THE FIFTY YEARS' DIGEST (1901-1950)

(Civil, Criminal & Revenue)

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BY

D. V. CHITALEY & N. RAMARATNAM

Part X

LAND TENURE TO MADRAS CITY CIVIL COURT ACT (7 of 1892)

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Cols.

ABBREVIATIONS.

REPORTS.

A.I.R. 1914 All., Bom., etc. .. All India Reporter, Allahabad, Bombay, etc., sections of the respective years.
A.M.L.J. .. Ajmer-Merwara Law Journal
Agra H.C.R. .. Agra High Court Reports.
All. or I.L.R. All. .. Indian Law Reports, Allahabad Series.
All. L. Jour. .. Allahabad Law Journal.
All.W.N. .. Allahabad Weekly Notes.
All. W.R. .. Allahabad Weekly Reporter.
I.L.R. Assam. .. Indian Law Reports, Assam Series.
B.R. .. Bihar Reports.
Beng. L.R. .. Bengal Law Reports.
B.L.J.R. or Bihar L.J.R. .. Bihar Law Journal Reports.
Bom. or I.L.R. Bom. .. Indian Law Reports, Bombay Series.
Bom.H.C.R. .. Bombay High Court Reports.
Bom.L.R. .. Bombay Law Reporter.
Bom.P.J. .. Bombay Printed Judgments.
Bur.L.Jour. .. Burma Law Journal.
Bur. L. R. .. Burma Law Reports.
Bur. L. Tim. .. Burma Law Times.
Cal. or I.L.R. Cal. .. Indian Law Reports, Calcutta Series.
Cal. L. Jour. .. Calcutta Law Journal.
Cal. L. R. .. Calcutta Law Reports.
Cal. W. N. .. Calcutta Weekly Notes.
Cal. W.N. (D.R.) .. Calcutta Weekly Notes (Dacca Reports).
C.P.L.R. .. Central Provinces Law Reports.
Cr. App. Rep. .. Cohen's Criminal Appeal Reports.
Cr. or Cri. L. Jour. .. Criminal Law Journal.
I.L.R. Cut. .. Indian Law Reports, Cuttack Series.
Cut.L.T. .. Cuttack Law Times.
E.P. .. East Punjab.
I.L.R. E.P. or East Pun. .. Indian Law Reports, East Punjab Series.
F.C.R. .. Federal Court Reports.
F.L.J. .. Federal Law Journal.
I.L.R. Hyd. .. Indian Law Reports, Hyderabad Series.
Ind. App. .. Law Reports, Indian Appeals.
Ind. Cas. .. Indian Cases.
I.L.R. or Rul. .. Indian Rulings or Ruling.
I.T.R. .. Income Tax Reports.
J & K .. Jammu & Kashmir.
J. & K.L.R. .. Jammu & Kashmir Law Reports.
J.L.R. or Jaipur L.R. .. Jaipur Law Reports.
I.L.R. Kar. .. Indian Law Reports, Karachi Series.
K.B. .. (Law Reports) King's Bench Division.
(L.J.) K.B. .. Law Journal Reports, King's Bench.
K.L.T. or Ker. L.T. .. Kerala Law Times.
I.L.R. Lah. .. Indian Law Reports, Lahore Series.
Lah. L. Jour. .. Lahore Law Journal.
Lah. L.T. .. Lahore Law Times.
L.R.A. .. Law Reporter, Allahabad.
Low. Bur. Rul. .. Lower Burma Rulings.
Luck. or I.L.R. Luck. .. Indian Law Reports, Lucknow Series.
Madh. B. or M.B. .. Madhya Bharat.
I.L.R. Madh. B. .. Indian Law Reports, Madhya Bharat Series.
Madh. B.L.J. .. Madhya Bharat Law Journal.
Madh. B.L.R. .. Madhya Bharat Law Reporter.
Mad. or I.L.R. Mad. .. Indian Law Reports, Madras Series.
Mad. H.C.R. .. Madras High Court Reports.
Mad. L. Jour. .. Madras Law Journal.
Mad. L. Tim. .. Madras Law Times.
Mad. L. W. .. Madras Law Weekly.
Mad. W. N. .. Madras Weekly Notes.
M. L. R. or Marwar L. R. .. Marwar Law Reporter.
Moo. Ind. App. .. Moore's Indian Appeals.
Moo. P. C. C. .. Moore's Privy Council Cases.
Mys. .. Mysore.
I. L. R. Mys. .. Indian Law Reports, Mysore Series.
Mys. H. C. R. .. Mysore High Court Reports.
Mys. L. J. .. Mysore Law Journal.
I. L. R. Nag. .. Indian Law Reports, Nagpur Series.
Nag. L. Jour. .. Nagpur Law Journal
Nag. L. R. .. Nagpur Law Reports.
N. W. P. H. C. R. .. North-West Provinces High Court Reports.
Oudh Cas. .. Oudh Cases.
Oudh L. Jour. .. Oudh Law Journal.
Oudh L. R. .. Oudh Law Reports.
Oudh S. C. .. Oudh Select Cases.

Oudh W.N. .. Oudh Weekly Notes.
Pak. Cas. .. Pakistan Cases.
Pak. L. R., Lahore .. Pakistan Law Reports, Lahore.
Pat. or I. L. R. Pat. .. Indian Law Reports, Patna Series.
Pat. L. Jour. .. Patna Law Journal.
Pat. L. Tim. .. Patna Law Times.
Pat. L. W. .. Patna Law Weekly.
Pat. W.N. .. Patna Weekly Notes.
I.L.R. Patiala .. Indian Law Reports, Patiala Series.
Pepsu L. R. .. Pepsu Law Reports.
I. L. R. Punj. .. Indian Law Reports, Punjab Series.
Pun. L. R. .. Punjab Law Reporter.
Pun. Re. .. Punjab Records.
Pun. W.R. .. Punjab Weekly Reporter.
I. L. R. Raj. .. Indian Law Reports, Rajasthan Series.
R.L.W. or Raj. L. W. .. The Rajasthan Law Weekly.
Rang. or I.L.R. Rang. .. Indian Law Reports, Rangoon series.
Rang. L. R. .. Rangoon Law Reports.
Rat. Or Rat. Un. Cr. C. .. Ratanlal's Unreported Criminal Cases.
R.D. .. Revenue Decisions.
Sau. .. Saurashtra.
Sau. L. R. .. Saurashtra Law Reporter.
Sind L. R. .. Sind Law Reporter.
S. C. J. .. Supreme Court Journal.
S. C. R. .. Supreme Court Reports.
Suth. W. R. .. Sutherland's Weekly Reporter.
I.L.R. Trav. Co. or T. C. .. Indian Law Reports, Travancore-Cochin Series.
T. C. L. R. or Trav. Co. L. R. .. Travancore-Cochin, Law Reports.
T. L. J. or Trav. L. J. .. Travancore Law Journal.
U. P. L. R. .. United Provinces Law Reports.
Upp. Bur. Rul. .. Upper Burma Rulings.
Vind. Pra. or V. P. .. Vindhya Pradesh.
Weir .. Weir's Criminal Rulings.

Other Abbreviations.

A.C.	..	Appellate Jurisdiction, Civil.
A. Cr.	..	Appellate Jurisdiction, Criminal.
App.	..	Appendix or Appeal.
Appr.	..	Approved.
Art.	..	Article.
B. R.	..	Board of Revenue.
C. A.	..	Court of Appeal.
Civ.	..	Civil.
Cl.	..	Clause.
Cons.	..	Considered.
Cr.	..	Criminal.
Diss.	..	Dissented.
Dist.	..	Distinguished.
D. B.	..	Division Bench.
Expl.	..	Explained.
F. A.	..	First Appeal.
F. B.	..	Full Bench.
F. C.	..	Federal Court.
Foll.	..	Followed.
Illus.	..	Illustrations.
Jour.	..	Journal.
L. P.	..	Letters Patent.
N.	..	Note.
No.	..	Number.
O.	..	Order.
O. C.	..	Original Jurisdiction, Civil.
O. Cr.	..	Original Jurisdiction. Criminal.
Over.	..	Overruled.
P.	..	Page.
Pr.	..	Para.
Pt.	..	Point.
P. C.	..	Privy Council.
Pre.	..	Preamble.
R.	..	Rule.
Ref.	..	Referred or Reference.
Rel. on	..	Relied on.
Rev.	..	Revenue.
S.	..	Section.
S. A.	..	Second Appeal.
S. B.	..	Special Bench.
S. C.	..	Supreme Court.
S. N.	..	Short Notes of cases.
V.	..	Volume Number.

THE FIFTY YEARS' DIGEST

1901—1950

(Civil, Criminal & Revenue)

VOLUME X

LAND TENURES

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See Local Revenue Acts.

——**Land Tenures**—
See also Grants.

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85. Zamindari
86. Zurispeshgi lease
87. Miscellaneous.

1. Acquisition by Government.

——Acquisition by Government.

See also, Land Acquisition Act, Ss. 23, 30,

—Land-lord is entitled to no compensation on account of the acquisition of the malik mukbuza land as he is not interested as land-lord therein, his commission being merely payment for the trouble of collecting the land revenue. A.I.R. 1939 Nag. 121=1939 N.L.J. 140 =I.L.R. (1941) Nag. 345=181 Ind. Cas. 915.

——Acquisition by Government.

Prima facie, the zamindar has the whole of the interest; it is for the tenure-holders to show what part of the interest the **zamindar** has diverted himself of in their favour. A.I.R. 1933 Cal. 21=36 C.W.N. 866=140 Ind. Cas. 385.

——Acquisition by Government.

In the province of Agra, **kankar** is the property of Govt. and when land is acquired under Land Acquisition Act, the **zamindar** is not entitled to any compensation for **kankar.** (1931) A.L.J. 660= A.I.R. 1931 All. 394=53 A. 658=133 Ind. Cas. 611.

——Acquisition by Government.

The **gountia's** actual assessment to revenue is based on two factors and none other, namely, the quantity of raiyati lands and the quantity of bhogra lands. The gountia's payment varies inversely with the former and directly with the latter,

Held, that the Government is entitled to a share of the compensation paid for **bhogra** land under S. 14 of the Land Acquisition Act.

Held, also that once the land is acquired it rests in Government free from all encumbrances and entirely loses its **bhogra** character. Incidents of tenure of **gountia** traced. 11 P.L.T. 374=A.I.R. 1931 Pat. 131.

——Acquisition by Government—Compensation —Apportionment of—Communal lands.

Where, as in Southern Nigeria, lands are held by communities, their usufructuary rights are not affected by British occupation. The head-chief is no doubt authorised to convey a fee-simple but that is only in his capacity as a representative of all the interests affected—not because he is the owner himself. Where such lands are acquired by the Government, the head-chief is not entitled to be compensated otherwise than in his representative capacity. It is the members of the community who are in usufructuary occupation or in enjoyment of the usufruct that are entitled to compensation. A.I.R. 1921 P.C. 212 (P.C.)

2. Adimayavana.

——Adimayavana allowance—Grant in perpetuity —Evidence.

Held that the exhibits in the case coupled with the fact that the allowance has been enjoyed for more than three quarters of a century and has been received during all the time out of the land specified in the documents with the acquiescence of the successive **stanis** justified the conclusion that there was a valid grant of the allowance in perpetuity as a reward for services rendered, and that it was charged on the lands specified in the documents. 30 M. 203.

——Adimayavana tenure—Ejectment suit.

An Adimayavana tenure in Malabar is a permanent tenure and when lands are granted in that tenure for past services, they are not resumable. **Quaere.**— Whether they can be resumed if granted for future services, on the non-performance of such services, involving the necessity for having the tenants discharged by others. 27 M. 202.

3. Agraharam.

——Agraharam—Jodi—**Liability for.**

Agraharamdars are jointly and severally liable to the **zamindar** for **Jodi** due on the entire **agraharam** in the absence of any contract to which the **zamindar** is a party, apportioning the **jodi** on the various suti divisions of the **agraharam** made by the **agraharmdars inter se.** 33 M.L.W. 284=A.I.R. 1931 Mad. 51=129 Ind. Cas. 828.

4. Anubhavam tenure.

——Anubhavam tenure—Alienation—Forfeiture— Question of custom.

The question whether an **anubhavam** tenure has been forfeited by alienation, in view of conflict of decisions on the point, is possibly a question of custom rather than of law. A.I.R. 1935 Mad. 682= (1935) M.W.N. 866=42 M.L.W. 596=158 Ind. Cas. 228.

——Anubhavam **tenure—Rule negativing such tenure where amount is fixed—Application of.**

In applying the rule which negatives the existence of an **anubhavam** tenure when the amount to be taken by the grantee is fixed, the correct procedure is to see whether the substance of the transaction is that the grantee is entitled only to a definite quantity or the grantor is entitled only to a definite quantity, the grantee taking all the rest. The mere fact that from the terms of the documents, it is possible to work out arithmetically what the grantee will get is not sufficient to negative the existence of an **anubhavam** tenure. A.I.R. 1935 Mad. 682=(1935) M.W.N. 866=42 M.L.W. 596=158 Ind. Cas. 228.

——Anubhavam—Denial of title—Forfeiture.

The tenant holding lands on **Anubhavam** tenure does not forfeit them except by denial of title made directly to the land-lord. 29 Ind. Cas. 427 (Mad.)

5. Assessment.

——**Assessment—Suti lease—Regulation 1 of 1808.**

Village Chincholi was leased by Government in 1831, and the defendants khots were the successors-in-title of the lessee; plaintiff claimed to be the successor-in-title of a person who was in possession of the land in suit prior to the above-mentioned lease; plaintiff's title was traced to 1867: a considerable portion of the land was utilised for building purposes up to 1915; only the fixed annual payment was charged but in 1915-16 enhanced assessment was levied; plaintiff claimed that lands were suti and subject only to fixed annual payment and that the defendants were entitled to nothing more than the fixed payment.

Held, that the plaintiff was a sutidar of the lands in suit to which Regulation 1 of 1808 applied; that the lands in suit were subject to a perpetual fixed grain rental commuted into money payment and continued to be invariable until there had been a decennial valuation changing the commutation rate by Government that the tenure did not come to an end by reason of the change in the use of the lands, and that the rates fixed by the survey assessment did not amount to the decennial valuation contemplated in S. 41, Regn. 1 of 1808, and that the assessment in excess of the fixed annual payment levied invariably from the year 1867 could not be recovered by defendants. 118 Ind. Cas. 244=30 Bom. L.R. 992=A.I.R. 1928 Bom. 457.

——**Assessment—Right of Government.**

The Government has right to levy assessment on all land within its jurisdiction unless it can be proved either by statute or by agreement, express or implied, that a particular portion of land is exempt from assessment. 115 Ind. Cas. 49=52 Mad. 25=29 M.L.W. 185=1928 M.W.N. 581=A.I.R. 1928 Mad. 1176=56 M.L.J. 24.

6. Bhag.

——**Bhag—Succession.**

In Broach District, daughters and sisters of a **bhagdar** are excluded from inheriting **bhag** lands. The onus of proof rests on the party which denies the existence of this custom in any village in the Broach Collectorate. A.I.R. 1932 Bom. 434=34 Bom. L.R. 385.

7. Birt tenure.

——**Birt tenure (Oudh).**

A decree granting birt rights under the provisions of Circular No. 2 of 1861 is necessarily a grant of under-proprietary rights whether under-proprietary rights are or are not specially mentioned, and if a Settlement Officer forming his own opinion as to what the Circular meant proceeded to give title as birtias to persons under the provisions of that Circular that title can only be held to be title as the under-proprietor. 115 Ind Cas. 291=A.I.R. 1929 Oudh 358.

——**Birt tenure (Oudh).**

In the province of Oudh large proprietors let out lands on favourable terms on security of tenure. These grants of land are called **Birt Bankati** and various kinds of **birts** exist, the incidents of each of which differ from those of others.

In the present case, the defendant held the village Kundarwa under a **birt** grant created so long ago as 1802. The **Pattah** under which the **birt**-holders obtained the village declared that the land of the village was granted to get it cultivated and populated, for the purpose of clearing the jungle, making the land fit for cultivation, and bringing **raiyat,** which carried with it the duty of sinking wells, etc. It declared that "the **birt**-holder was to enjoy it for five or six years." A comparatively small but gradually ascending rent was fixed for next 4 years. After that he was to pay the revenue to the Sarkar prevalent in the **Taluka** and take the **daswant** prevalent in the **Taluka**. In 1871 the Extra Assistant Commissioner declared the **birt**-holder as an under-proprietor and made a decree upholding in express terms his "possession and occupation as an under-proprietor under the provisions of Circular 11 of 1862 in respect of the village Kundarwa,"

Held, the respondents **birt**-holders, as declared, in the village of Kundarwa held under-proprietary rights. 63 Ind. Cas. 694=26 C.W.N. 249=43 All. 355=48 I.A. 267=24 O.C. 123=1921 M.W.N. 359=8 O.L.J. 294=A.I.R. 1922 P.C. 41 (P.C.).

——**Birt tenure—Status of Birtidar.**

A Talukdar cannot put up to sale the rights of intermediate holders called **Birtdars** in execution of a rent decree obtained against sub-settlement holders. The rights of **birtdars** are altogether different from those of sub-settlement holders. No decree, therefore, can be passed against the **birtdars** for arrears of rent due by the sub-settlement holders. The amount payable by the under-proprietor to the superior land-lord though calculated on the basis of land revenue is not land revenue but rent. The mere entry in the revenue papers as occupancy holders does not convert their title of **birtdars** to that of occupancy tenants. 14 Ind. Cas. 117 (Oudh).

——**Birt tenure—Heritable and transferable rights.**

Persons holding under Birt tenures Oudh, i.e., tenures "known as the Bai Birt created by the Talukdar or proprietor for money paid," have a heritable and transferable rights as against the Talukdar in the villages in respect of which the birt has been created. 17 M.L.J. 400=9 Bom. L.R. 851=11 C.W.N. 913=6 C.L.J. 693=4 A.L.J. 737=29 A. 708=2 M.L.T. 402=34 I.A. 142 (P.C.)

8. Brahmottar.

——**Brahmottar.**

In Chota Nagpur Province, especially in the Manbhum District, the tenures known as **talabi brahmottars** among others take rank among the hereditary tenures at a fixed rent not liable to enhancement, these tenures escheating to the Crown and not to the **zamindars**. A.I.R. 1932 Pat. 157=11 Pat. 569=138 Ind. Cas. 419.

9. Cantonment tenure.

See also Cantonments.

——**Cantonment—Land in — Presumption in respect of.**

In the beginning of the 19th century one Lieutenant Young having built a house to quarter his regiment also appropriated a piece of land adjoining the same, situated within Cantonment limits and subject to Cantonment rules until 1874. When it was made over by the Military authorities to the Civil authorities sixty years had not elapsed since the acquisition of the land by the defendant:—

Held that the suit was not barred by limitation. A party who builds a house in Cantonments must be taken to have derived his title to occupy the land from the Military authorities and their power to make a grant of it can only be co-extensive with their own tenure of the property and no assignment by them

can subsist beyond the period the land might remain subject to Cantonment regulations. 7 A.L.J. 1194= 8 Ind. Cas. 1096 (2)=33 A. 229.

10. Chakdari tenure.

——**Chakdari tenure.**

A "chakdar kasurkhawar" is an inferior proprietor of the land held by him in a zamindari and is not a mere occupancy tenant. The 'Chakdari' tenure occurs in the Multan and other adjoining districts of the South Punjabe. 34 P.R. 1868; **Doie's Settlement Manual,** paras. 165 to 171 and **Multan District Gazetteer,** Ref. 11 Lah. 287=12 L. L. J. 119=31 P.L.R. 592= A.I.R. 1930 Lah. 740.

——**Chakdari tenure—Merger of.**

Where the defendant had certain chakdari land, but when he acquired superior proprietary rights in the mahal, the Revenue Court ordered the chakdari land to be classed as khalsa land, on the ground that the under proprietary right merged in the superior proprietary rights,

Held, that this order by a Revenue Court cannot deprive the defendant of his under-proprietary rights and no question of merger can arise unless and until the under-proprietor acquires full proprietary rights in the mahal. 98 Ind. Cas. 677=2 Luck. 274=3 O.W.N. 900=8 L.R.A. Rev. 42=A.I.R. 1927 Oudh 18.

11. Chakran lands.

——**Chakran lands (Bengal).**

The fact that some wages are paid to the tenant in addition, would not change the chakran character of the holding. 103 Ind. Cas. 542=31 C.W.N. 552= A.I.R. 1927 Cal. 561.

——**Chakran lands—Public and private.**

There is no distinction between the rights acquired in respect of chakran lands which are of a private nature and those auquired in respect of chowkidari chakran lands which are of a public nature. 98 Ind. Cas. 862= 44 C. L. J. 271=A.I.R. 1927 Cal. 46.

——**Chakran lands—Resumption by Government.**

The rights created by the Paiks who held the chakran tenure come to an end on the resumption of the land by Government and consequently the evidence as to the rate of rent paid by the tenant to the choukidar, chakran tenure-holder, is of no help to the tenant for proving that he is a tenant at fixed rent and that the rent is not liable to be enhanced. 91 Ind. Cas. 734= A.I.R. 1926 Cal. 661.

——**Chakran lands—Authority to transfer.**

The provision in a pattah by which the chowkidari chakran lands were granted to the effect that in case of the transfer of land, the incidental costs thereof shall be paid by the occupier without objection cannot by itself be construed as giving an express authority to make a transfer as contemplated by the provisions of the second paragraph of Cl. (1) of S. 11 of the Registration Act, VIII of 1819. 87 Ind. Cas. 529=41 C.L.J. 295=A.I.R. 1925 Cal. 807.

——**Chakran lands—Enhancement of rent.**

The putnidar's interest in resumed **chaukidari chakran** lands which were comprised in his **putni,** is derived from the **putni** itself and from nothing else. The **zamindar** cannot therefore claim to vary the **putni** by enhancing the rent in respect of lands which were included in the original demise even assuming that the profits of these lands were not taken into account in fixing the rent. 67 Ind. Cas. 440=36 C. L. J. 145=26 C.W.N. 943=A.I.R. 1922 Cal. 473.

——**Chakran lands—Patni Mahal—Suit for possession—Specific performance of contract.**

An action for possession of **Chakran** lands in **Patni** cannot be one for specific performance of a contract. If there is no scope for action for specific performance there is no possible ground, for a Zamindar to keep the **Patnidars** out of possession or to ask to do them anything except to pay the Collectorate assessment. 18 Ind. Cas. 239 (Cal.)

12. Communal ownership.

——Communal ownership — Incidents of—Effect of British occupation is not to destroy private rights — Public Lands Ordinance of 1903 of Southern Nigeria.

A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners and the general terms of cession are **prima facie** to be construed accordingly. The introduction of the system of Crown grants, which was made subsequently, must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. Questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provisions in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community the Head Chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled for apportionment as the native council of the district, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place and he is to be dealt with as representing, not only his own, but the other interest affected.

The title of the land occupied by a native community is **prima facie** based, not on such individual ownership as English Law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. There is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benign Kings conquered Lagos or when the Cession to the British Crown took place in 1861. A.I.R. 1921 P.C. 212.

13. Dholi tenure.

See also, Custom (Punjab).

——**Dholi and Bhonda—Definitions.**

Dholi tenure is a rent-free land granted for the benefit of a temple, mosque or shrine or to a person for religious purposes and the grantee in such cases has to carry out certain specified duties. Bhonda land is granted on similar tenure but for secular services. 41 P.L.R. 672.

——**Dholi tenure—Nature of.**

Dholi tenure is a form of tenure known in the Punjab only for the benefit of the temple. On a grant in dholi, the proprietors continue to be proprietors of the land and the dholidar in right of the temple and his successors become tenants in perpetuity. Ordinarily such a tenure would not confer the right of taking mines and minerals on the tenant which, if intended to

be given has to be given expressly. A.I.R. 1937 Lah. 805=40 P.L.R. 110=I.L.R. (1938) Lah. 447=175 Ind. Cas. 92.

——Dholi tenure.

The **dholi** tenure is a peculiar kind of tenure to be found in the south-eastern districts of the Punjab. It is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. In the revenue records the proprietary body are recorded as the owners of the property and the grantee is recorded as a tenant in the column of cultivation. So long as the purpose for which the grant is made, is carried out, it cannot be resumed, but should the holder fail to carry out the duties of his office the proprietors can eject him and put in some one else under a like tenure. Tenure of this kind cannot be alienated by sale or mortgage, and any alienation of that character, if made by the **dholidar**, would be absolutely void. There is, therefore, no reason why the defendant should not be able to impeach the alienation, more especially because the office of **dholidar** is similar to that of a trustee, and it is open for one trustee to impeach the validity of an alienation made by his predecessor. 65 Ind. Cas. 252=2 Lah. 313=25 P.L.R. 1922=A.I.R. 1922 Lah. 126.

14. Digwari tenure.

——Digwari tenure.

A digwari cannot either transfer the lands comprised in the digwari grant to another so as to create an interest in them by permanent lease, nor can he himself acquire any interest in the uncultivated land, such as jungle or waste land which is comprised within the Mouza. 59 Ind. Cas. 899 (Pat.).

——Digwari tenure—Incidents of—Digwari of Ghat Burrah—Position of—Suit for declaration of right—Jurisdiction of Civil Court.

There is a general usage on the death of the **Digwar** holding office to appoint his heir in his place as the successor to his office. The heir's claim, and the tenure of office are dependant on the approval of Government. The position of a **Digwar of Ghat Burrah** is that of an officer remunerated by the enjoyment of land. The Civil Court has no jurisdiction to reinstate a Digwar who has been dismissed by the Executive Government, as unfit for the discharge of his duties. But the position is different when the Commissioner decides against a claimant not in the exercise of his discretion but upon an erroneous view of the relative title of his opponent. In such case the Civil Courts can give a declaratory decree under S. 42 of the Sp. Rel. Act, to enable plaintiff to approach the Government with his claims and seek their decision on the question of the appointment of a successor to the office of **Digwar**. 43 Cal. 743=22 C.L.J. 419=20 C.W.N. 446=32 Ind. Cas. 437.

——Digwari tenure—Birbun—Nature.

A Digwari tenure in Birbun is similar to a Ghatwali tenure. Though not governed by ordinary rules of inheritance, the tenures are hereditary, but are subject to Government's approval of the heir. 18 C.W.N. 1036 =23 Ind. Cas. 849.

——Digwari tenure—Incidents of—Digwar, if entitled to minerals—Zemindari property—Rights of Government.

Digwari tenure which was granted originally in consideration of the performance of military service, to which police duties were attached is hereditary and inalienable. The digwar is appointed by the Government and is liable to be dismissed by the Government for misconduct. On dismissal, the next male heir, if fit for the office, is appointed.

The Zemindar of a permanently settled estate is entitled to the minerals underneath the lands held on **digwari** tenure in the absence of a separate settlement by Government with the **digwar** or of evidence that mineral rights had vested in the **digwar** before the permanent settlement or of a grant of such rights by the Zemindar since the settlement. To a suit by the Zemindar for a declaration of his rights to the minerals as against the **digwar** the Government is not a necessary party as it never claimed the minerals in the Zemindari. 39 Cal. 696=39 I.A. 133=16 C.W.N. 482=(1912) M.W.N. 425=11 M.L.T. 337=9 A.L.J. 462=15 C.L.J. 461=14 Bom. L.R. 445=23 M.L.J. 26=15 Ind. Cas. 219 (P.C.).

[On appeal from 34 Cal. 753=12 C. W. N. 193= 5 C. L.J. 583.]

——Digwar of Ghat Tasra in Jheria—Police duties—Government control — Rights of the Zemindar—Right in sub-soil—Mokurari lease of under-ground rights granted by Digwar—Suit by Zemindar questioning—Government necessary party.

The Digwar of Tasra and Rabaraband in Jheria has been holding, under a tenure which is ancient and hereditary, subject to the payment to the Zemindar of a fixed rent only and on condition of the performance of certain police of public services for the due discharge of which the holder has been responsible to the Government which alone exercised the power of appointment to and dismissal from office. His position is analogous to that of the Ghatwals of Birdhum; the under-ground rights including mining rights belong to the Digwar; the right to receive the fixed rent alone being reserved to the Zemindar. Where therefore the Zemindar instituted a suit against the Digwar with the object of establishing his exclusive right to the sub-soil and minerals, Government has an interest in maintaining intact the mouzahs set apart for remuneration of the Digwar, and it has all along assumed itself to possess the right to do so. 12 C.W.N. 193=5 C.L.J. 583=34 Cal. 753.

15. Evidence.

——Evidence—Patta.

The facts that the patta has all along stood in the name of the plaintiff and his predecessors-in-title and they it was that were paying kist due to Govt, constitute **prima facie** evidence of the title to the land being in the plaintiff, more especially in the absence of any claim of original title in the defendants. A.I.R. 1943 Mad. 756=1943 M.W.N. 246=213 Ind. Cas. 204.

——Evidence — Patta — Construction — Land demised stated to be three bighas measuring by guess—Lessee, if entitled to 26 and a half bighas on the strength of this patta.

Where the patta gives the area of the land demised as measuring by guess three bighas, the lessee is not entitled on the strength of this patta to 26 and a half bighas of the land on the ground that such area is comprised within the boundaries of his patta. 61 C. 886= A.I.R. 1935 Cal. 28=154 Ind. Cas. 71.

——Evidence—Pattas—Home farm-land, when established.

Where it was proved by evidence that the zemindar was letting the suit land on lease from 1877 and the tenants were given sagupadi pattas which are not generally given to tenants who claim occupancy rights and although the zemindar had not been turning them

out of the land altogether, he was dealing with the tenants as he liked.

Held, that the inference that the land had always been home farm-land of the zemindar was warranted by the evidence. A.I.R. 1935 Mad. 789=161 Ind. Cas. 757.

16. Fazendari tenure.

——**Fazendari tenure.**

The word **Fazendari** used in an agreement between a land-lord and tenant even though indicating the nature of the rent, does not necessarily decide the nature of the tenure which depends upon the agreement between the parties. 16 Bom. L.R. 720=27 Ind. Cas. 523.

——**Fazendari—Meaning of.**

The word **Fazendari** is used with reference to tenants holding under a private land-holder to indicate sometimes an indefeasible right to hold the property on payment of a small quit or ground-rent and sometimes any kind of tenure agreed upon, between the parties. 16 Bom. L.R. 723 (Note)=27 Ind. Cas 512.

——**Fazendari tenure—Sub-letting—Nature of.**

Fazendari tenures are perpetual, subject only to the payment of nominal rents to Government; and the holder thereunder might sub-let on any condition he pleases and the tenant does not necessarily take a permanent tenure unless specifically stipulated. 39 Bom. 316=16 Bom. L.R. 252=23 Ind. Cas. 880.

17. Free-hold tenure.

——**"Free-hold tenure" — Meaning of—Incidents or attributes of "free-hold."**

The term "free-hold" when used in a conveyance in India means an estate in land which is not liable to terminate after a fixed period of time and in which the owner has an estate as nearly as possible equivalent to absolute property. The liability to pay land revenue cannot affect the question as to whether the land is or is not free-hold. A free-hold land does not mean land held free from payment of revenue, though it is true that certain lands are free from assessment. Heritability and transferability are two of the most important attributes of free-hold land. 52 Bom. L.R. 636=I.L.R. 1950 Bom. 568.

18. Ganti tenure.

——**Ganti tenure — Tenure created by previous settlement holder.**

The temporary settlement holder of a mahal created a ganti interest in favour of certain persons. Subsequently the mahal was sold for arrears of revenue and purchased by plaintiff, whereupon the Settlement Officer settled the rent for the mahal on the basis of the rent payable by the **gantidars**, and plaintiff executed a kabuliyat stipulating to respect the recorded right of under tenure-holders and other persons; **Held**, that the plaintiff was bound to recognise the **ganti** tenure and could not question its existence. 24 C.W.N. 53=31 C.L.J. 78= 54 Ind. Cas. 719.

19. Gaontia rioti lands.

——Gaontia rioti lands—**Status of—Whether stronger than occupancy-tenant.**

Gaonti rioti fields constitute an agricultural holding analogous to an occupancy tenancy and the position of an occupier of such fields is not stronger than that of an occupancy-tenant. A. I. R. 1943 Nag. 217=1943 N.L.J. 283=I.L.R. (1943) Nag. 595=208 Ind. Cas. 159.

——**Gaontia rioti lands**—Zabti bhogra—**Assessment of—If can be challenged in civil suit.**

Once the assessment is made and left unchallenged, it becomes binding upon the co-sharers' **gaontias.** When no steps are taken to contest the assessment made at the time of the settlement, it cannot be challenged in a civil suit and a partition among the co-sharer **gaontias** does not put an end to the liability for **zabti bhogra**. A.I.R. 1939 Pat. 497=6 B. R. 218=185 Ind. Cas. 602.

20. Ghatwali tenure.

See also Beng. Ghatwali Land Regulation.

Synopsis.

a. Accretion
b. Alienability
c. Ascertaining surplus rents and profits
d. Bankura
e. Defective appointment
f. Dismissal of Ghatwal
g. Distinction between Kharagpur and Birbhum tenure
h. Execution
i Fitness of Ghatwali
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k. Ghatwal's interest
l. Handwa Ghatwals
m. Heritability
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o. Kakwara Ghatwali tenure
p. Manbaum
q. Occupancy rights
r. Shikami ghatwali
s. Status of particular Ghatwal
t. Tabedari
u. Tenures governed by Ben. Ghatwali Land Regulation
v. Transfer of.

20 (a) Accretion.

——**Ghatwali tenure—Accretion.**

The produce of an impartible estate does not necessarily belong to and form an accretion to the original property, and there is no distinction between realized rent and unrealized rent. In the absence of any intention on the part of the late ghatwal to treat the produce of the estate as an accretion to the ghatwali estate, the unrealized rents are liable in execution to attachment and sale. 97 Ind. Cas. 343=7 P.L.T. 626= A.I.R. 1926 Pat. 518.

20 (b) Alienability.

——**Ghatwali tenure—Alienability.**

Ghatwali tenures may be alienable by custom. But if the Government releases or abolishes the services in some effective and lawful manner the incident of inalienability will pass away. In Kharagdhi, Ghatwali tenures are alienable by custom. 80 Ind. Cas. 544=3 Pat. 915=6 P.L.T. 191=A.I.R. 1925 Pat. 210.

——**Ghatwali tenure — Alienability — Ghatwali tenures are inalienable and indivisible —** Actual appointment of next heir is not necessary— Nature and termination of the tenure — Law regarding ghatwali tenures in general considered— Hundwa estates are ghatwali in nature.

A Ghatwali tenure is inalienable and indivisible and cannot be sold in execution of a decree against the person of the incumbent of the office of ghatwal for the time being. Neither by the terms of the grant nor

by the general law applying to such ghatwali tenures is an actual appointment of the next heir to be ghatwali in the rooms of his predecessor requisite, nor is actual performance of the stipulated ghatwali services from time to time necessary. Readiness and willingness to perform them when required may be inferred where there is no proof of refusal to perform and where performance within a reasonable time, if required, is not shown to have become impossible. Law relating to ghatwali tenures in general considered.

Hundwa tenure is a Government tenure. It is a perpetual and hereditary tenure, being a service tenure and ghatwali in nature.

To terminate the ghatwali character of the lands, it seems that it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender, and re-grant of the lands on new terms, or at any rate, of a release of the right to appoint the ghatwal and call for the performance of the services.

Where a tenure is created, as distinct from a personal employment the tenure-holder has such an interest in the rendering of the services as entitles him to such benefit of the tenure as accrues from his readiness and willingness to perform his obligation. The service is not a mere burden on the land. It constitutes a personal right which cannot be terminated on the ground merely of waiver by grantor or desuetude. 79 Ind. Cas. 825=28 C.W.N. 351=3 Pat, 183=5 P.L.T. 171=51 I.A. 37=34 M.L.T. 27=A.I.R. 1924 P.C. 5 (P.C.).

20 (c) Ascertaining surplus rents and profits.

——Ghatwali tenure—Ascertaining surplus rents and profits—Responsibility of preparing budget and determining surplus, whether lies with revenue authorities or Civil Court.

While determining the procedure in ascertaining and realisng the surplus rents and profits of a **ghatwali,** the distinction should be clearly borne in mind between the methods of administering an estate of which the profits were under attachment in execution of a decree of a Sub-Divisional Officer or inferior Court and the procedure in similar proceedings when the executing Court is a Subordinate Judge. The procedure followed in referring the budget to the Commissioner for settlement and final sanction is an appropriate procedure in the former class of cases. In the latter class of cases, it is for the Receiver to make an estimate of collections and expenditure which he is to submit for the approval of the Court and it is the duty of the Court to pass final orders settling the budget. In collecting and disbursing the income, the Receiver must be acting under the directions of the Court and not of the executive authorities.

Where, therefore, a Subordinate Judge rejects an objection of a decree-holder to certain items in a budget of receipts and expenditure for a **ghatwali** estate,without giving a finding on merits, on the ground that the responsibility of the preparation of the budget and the determination of the surplus available for attachment lay with the revenue authorities and not the Civil Court, such an order is erroneous. 5 B.R. 344=A.I.R. 1939 Pat. 242=180 Ind. Cas. 8.

20 (d) Bankura.

——Ghatwali tenure — Bankura — Succession—Rules as to.

The ordinary Hindu and Muhammadan rules of inheritance are not applicable to the **Ghatwali** tenure in Bankura, but it is held upon the condition of the approval of the heir, by Government. 9 C. 187 P. C. Rel. on. 24 Ind. Cas. 527 (Cal.).

20 (e) Defective appointment.

——Ghatwali tenure—Defective appointment.

If a person enters into a Ghatwali Jaghir, not having obtained the appointment which is required to make him the lawful holder of it, his possession is without title at all, and until by prescription or otherwise he acquires a right which he is capable of alienating the lack of a sanad of appointment is really the proof of the defect of his title, not of the completeness of it. 79 Ind. Cas. 825=28 C.W.N. 351=3 Pat. 183=5 P.L.T. 171=51 I.A. 37=34 M.L.T. 27=A. I. R. 1924 P.C. 5 (P. C.).

20 (f) Dismissal of ghatwal.

——Ghatwali tenure — Dismissal of ghatwal—Power to dismiss—For-feiture of tenure—Finality of order.

A Magistrate has jurisdiction to dismiss a **ghatwal** and in construing grants of this description, it should be presumed in the absence of evidence to the contrary that the officers of Govt. were acting within their authority.

Where a **ghatwal** has been rightly dismissed for misconduct, such dismissal involves as a necessary consequence the forfeiture of his tenure and the order must be treated as final and cannot be questioned in the Civil Court. 54 C.L.J. 325=A.I.R. 1932 Cal. 77=135 Ind. Cas. 275.

20 (g) Distinction between Kharagpur and Birbhum tenure.

——Ghatwali tenure—Distinction between Kharagpur and Birbhum tenure.

The ghatwali tenure in Taluka Dumri is in no way comparable to the Birbhum ghatwali tenures, and Reg. XXIX of 1814 does not apply to it, but in its origin it is rather of the nature of the Kharagpur ghatwalis. One of the main distinctions between these two classes is that the former are inalienable except with the consent of Government by whom the settlements were made and to whom the revenue is paid direct, whereas the latter are alienable subject to the consent of the land-lord to whom the rent or revenue is paid. The incidents that are proved to attach to the tenure are:—(1) that it is impartible and permanent, (2) that it descends by lineal primogeniture, and (3) that it is alienable at least with the consent of the Zemindar. 74 Ind. Cas. 668=4 P.L.T. 473=1923 P.H.C.C. 161=2 Pat. 685=A.I.R. 1923 Pat. 453.

20 (h) Execution.

——Ghatwali tenure—Execution—Appointment of Receiver.

The rents and profits other than surplus being earmarked for the payment of chowkidars, sardars and Government dues, an order may be made that the surplus be placed at the disposal of the creditors, for there can be no question that the creditors are entitled to that surplus in execution of their decrees, and that for this purpose a Receiver may be appointed. 76 Ind. Cas. 8=1923 P. H. C. C. 372=5 P.L.T. 34=3 Pat. 339=A.I.R. 1924 Pat. 269.

——Ghatwali tenure—Execution—Sale.

The only restriction attaching to the saleability in execution of a Ghatwali or Police tenure is the right of Government to prevent the sale on the ground that the Jahirdar or Ghatwal is liable to Government to render Police and public duties. 64 Ind. Cas. 522=2 P.L.T. 742.

——**Ghatwali tenure — Execution of decree —** Surplus profits realised by Ghatwal if can be attached.

A Ghatwali tenure by itself cannot be attached in execution though the surplus rents and profits realised by the Ghatwal may be attached as his personal property. 4 W.R. 5, 10 C.W.R. 260 Rel.

A receiver may be appointed in execution of a decree against the Ghatwal so that he might receive the rents and profits and apply it to the decree. 39 Cal. 1010=16 C.W.N. 802=14 Ind. Cas. 227.

20 (i) Fitness of Ghatwali.

——**Ghatwali tenure—Fitness of ghatwali—Ghatwal** property dismissed, cannot be re-instated by Court.

Per Manohar Lall, J.—The decision of fitness for the post of a ghatwal must ordinarily rest with the executive authorities subject to this important reservation that if the executive has simply made a pretence of dealing with the question of the fitness of the ghatwal who claims to be recognized as the next ghatwal and declares him unfit in an arbitrary manner or in a manner which the law would not recognize, then the Civil Courts are free to interfere.

Per Chatterji, J.—The Courts cannot do anything beyond giving a mere declaration. They cannot force the executive authorities to remove the one and appoint the other instead. A mere declaration, therefore, would be infructuous. Such declaration the Court should not grant.

The Court cannot re-instate a person in the land who has been properly dismissed from the office. 4 B.R. 633=A.I.R. 1938 Pat. 245=19 P.L.T. 519=17 Pat. 398=175 Ind. Cas. 854.

20 (j) Forfeiture.

——Ghatwali **tenure—Forfeiture.**

A hereditary ghatwali tenure, when can be forfeited by the Govt., explained. A.I.R. 1938 Pat. 245=17 Pat. 398=4 B.R. 633=19 P.L.T. 519=175 Ind. Cas. 854.

——**Ghatwali tenure—Forfeiture.**

Government has the power of appointing ghatwals and removing them. Upon removal for neglect of duty or mis-conduct the lands are forfeited to the Government. Birbhum Ghatwali tenures though hereditary are liable to be forfeited on the dismissal of the holder thereof. 84 Ind. Cas. 405=3 Pat. 673=A.I.R. 1924 Pat. 616.

—— **Ghatwali tenure — Forfeiture — Ghatwal dismissed—No male heir—Forfeiture.**

Where a Ghatwal is dismissed and has no male member of the family to succeed, the tenure is forfeited; and if a stranger should permanently be appointed to his place, no subsequently born son of the dismissed Ghatwal can claim it on the ground that the tenure is hereditary.

Government cannot disapprove of the heir of a Ghatwal or withhold sanction on any ground it likes and apart from the question of his fitness. 1 W.R. 321 and 5 Cal. 740 Dist. 18 C.W.N. 1036=23 Ind. Cas. 849.

20 (k) Ghatwal's interest.

——**Ghatwali tenure—Ghatwal's interest—Nature of.**

A ghatwal's interest may not necessarily be that of a subordinate tenure-holder. The fact that a land is within the ambit of one's zemindari does not necessarily show that the holder of the land is subordinate to the zemindari. His rights may be co-ordinate with him. A.I.R. 1935 Pat. 33=13 Pat. 517=1 B.R. 570=156 Ind. Cas. 136.

20 (l) Handwa Ghatwals.

——**Ghatwali tenure**—Handwa ghatwals — Status of before Permanent Settlement—Ghatwali coming into hands of successor—Surplus property accruing during life-time of predecessor—Whether can be followed for realizing rent for which he was liable—Such assets in hands of successor, if can be attached in execution of decree.

The status held by the Handwa ghatwals before the Permanent Settlement was that of talukdars who were declared to be the proprietors of the soil by Regulation VIII of 1793, but by reason of the fact that they did not take steps to have their taluqs separated from the Kharagpur zemindari either under the provisions of the aforesaid Regulation or the Regulation of 1801, their status was converted into one of dependent taluqdars. Their failure to apply for separation merely deprived them of the right to separation, other rights remaining unaffected and that they were declared to be the proprietors of the soil by S. 5, Permanent Settlement Regulation.

The position of the proprietor of the Kharagpur estate is that of a superior land-lord or one who is entitled to realise a certain rent from the Handwa ghatwals, but the holders of the Handwa properties have all the rights which usually go with the proprietorship of the soil.

Any surplus proceeds of the property which accrued due during the life-time of the predecessor and have now come into the successor's hands can be followed for the purpose of realising the rent for which he was liable in his life-time and the decree can be realised from the successor so far as she is in possession of those amounts. In every case, therefore, of this kind, it is a question of fact whether the succeeding ghatwal has come into possession of an asset of the deceased; and, if so, whether those assets are sufficient to pay off the rent that was due during the life-time of his predecessor. 1 B.R. 77=A.I.R. 1935 Pat. 306=14 Pat. 70=157 Ind. Cas. 433.

—— **Ghatwali tenure — Handwa — Istimrari** Mokkurari tenure—Permanent settlement — Alienation by holder—Heirs of holder—Rights of.

The Handwa and Chandwa estates were crown Ghatwalis holding the lands as military tenure directly under the British crown. The sanad issued to the holder by the British Government made the tenure one held directly under the Government, and resumable at the death of the life tenant. The sanction of the Government is necessary to validate the succession on the death of each holder. The permanent settlement of 1796 might destroy a military tenure by a new contract with the holder of the tenure but it does not affect the position of the tenure holder with whom the new settlement was not made.

The mere fact that the Ghatwali service had not been demanded or rendered does not show that the services could not be demanded by the Government. Where a Ghatwal had been for generations without rendering military services and the **defacto** holder of the Ghatwal mortgaged it, it is not open to his heirs to impugn the mortgage on the ground that it is inalienable. (1918) P.H.C.C. 305=47 Ind. Cas. 179.

20 (m) Heritability.

——**Ghatwali tenure—Heritability.**

Zemindar ghatwali tenures are heritable and descend from generation to generation. But the rule of inalienability may be qualified by local custom. (Nature and incidents of such tenure explained). A.I.R. 1935 Pat. 306=1 B. R. 77=14 Pat. 70=157 Ind. Cas. 433.

——Ghatwali tenure —Heritablity—Permanancy—Resumption—Dismissal.

A ghatwali tenure which has descended from father to son is a hereditary one even in the absence of words of inheritance. **Held**, also, that the tenure in the case was hereditary. 6 W.R. 199. On appeal 14 M.I.A. 247, Ref. to, and foll. Where lands are held subject to the payment of quit-rent and the performance of ghatwali services, and they were included in the permanent settlement in the **mal** lands of the zemindari and assessed only to the extent of the quit-rent paid to the zemindar, the inference to be drawn is that the tenure was a permanent one. The zemindar cannot at his option, dispense with the services and take the lands back. 13 M.I.A. 438 ref. to. The dismissal of a deputy appointed by Government itself cannot amount to the dismissal of the principal, and the dismissal of the son when acting as deputy for his father cannot disqualify his claim to inherit the tenure on his father's death as the son of his father. 9 C.W.N. 663.

20 (n) Incidents of.

——Ghatwali tenure—Incidents of—Incumbent unfit for office—Forfeiture—Legality—Duty of Government.

Per **Manohar Lall, J.**—A hereditary ghatwali tenure cannot be taken away from a family, because the incumbent at any time misconducts himself or proves unfit to discharge his duties, so long as there is some other member of the family fit for the post, and in the case of a minor so long as some suitable arrangement can be made for the performance of the necessary duties until the minor, comes of age. As soon as the ghatwal is dismissed for misconduct the result is not that the whole tenure is forfeited and, therefore, Govt. have a right to appoint any one whom they like. The case of the ghatwal cannot be treated as the case of a mere jagirdar who has "a jagir assigned for support and remuneration."

In a case where there is an express repudiation by the entire family to accept relation of ghatwali or where the ruling power may think that the incumbent who is being removed has left no heir who is capable of rendering even the vicarious services involved as a part of the obligations of the holder of the tenure, the ruling power in such a case would be justified in holding that these circumstances are themselves a ground for forfeiture in the persons of the entire family.

Per **Chatterji, J.**—Under S. 5, of the Bengal Regulation of 1814, notwithstanding the hereditary character of the **ghatwali** tenure, the Govt., in case of breach of the condition to payment, is at liberty to forfeit the tenure and to take it away from the family of the defaulting **ghatwal**. When, his tenure is forfeited, the Govt. has a right to make a new grant to any person whom it may consider fit. Ordinarily, the Govt. should consider and respect the hereditary claim of the next heir of the dismissed **ghatwal** but he cannot force such claim upon the Govt. A.I.R. 1938 Pat. 245=4 B.R. 633=19 P.L.T. 519=17 Pat. 398=175 Ind. Cas. 854.

——Ghatwali tenure—Incident of—Non-payment of rent—Effect.

A Govt. ghatwali tenure is not liable to be sold in execution of a decree for rent, though deliberate and persistent default on the part of the ghatwal to pay rent may constitute misconduct in relation to his office, for which he is liable to dismissal by Govt. 10 B.R. 234=A.I.R. 1943 P.C. 185=(1943) 2 M.L.J. 463=56 M.L.W. 741=1944 O.W.N. 11=48 C.W.N. 275=I.L.R. (1944) Kar. (P.C.) 15 Sup.=209 Ind. Cas. 553 (P.C.).

——Ghatwali tenure—Incidents of Government ghatwali—Estate of Handwa held to be Government ghatwali—Taluq included in zemindari of another, whether by itself shows that Government ghatwali has ceased to be so.

The incidents of a Govt. ghatwali are that it is hereditary, indivisible and inalienable but the rule as to inalienability may be relaxed by the Govt. in certain cases and the tenure may be alienated by the special permission of the Government. A Govt. ghatwal, while he enjoys certain special privileges, also suffers from this disability that he can, at any time, be dismissed by the Govt. for misconduct. If the ghatwal holds the ghatwali tenure subject to the payment of a fixed and established annual sum and to the performance of certain duties for the maintance of the public peace, he will be liable to be dismissed by the Govt. on failure to discharge either of these obligations:

Held, that the Handwa estate was, in its origin, and has continued to be a Govt. ghatwali estate possessing all the incidents of a Govt. ghatwali. It is true that the ghatwali services have now lost their importance and the Govt. have practically ceased to be interested in them but there was, however, no proof in the record of this case that the Govt. have ever done anything to terminate the ghatwali character of the land.

Unless the inclusion of the tenure and assessment of the zemindari lands can be shown to have amounted to a release by the Govt. of the ghatwali service or to a grant to a third party of the right to receive them and of the right to appoint a ghatwal, the tenure must remain as it originally was, a Govt. tenure. It cannot be said that the Govt. ghatwal whose taluq is included in the zemindari of another person cannot continue to be a Govt. ghatwal. A.I.R. 1935 Pat. 306 14 Pat. 70=1 B.R. 77=157 Ind. Cas. 433.

——Ghatwali tenure—Incidents of.

Prima facie, the incidents of a ghatwali tenure or holding would relate to such matters as, for example, its permanancy, fixity of rent, heritability, and liability to attachment and sale in execution of decrees, and the acquisition of a right of occupancy, not by the ghatwal but by a raiyat under him in ghatwal land may also be an incident contemplated by that section or by the analogous provision contained in 181 of the Ben. Ten. Act. 13 P.L.T. 781=A.I.R. 1933 Pat. 52=142 Ind. Cas. 673 (2).

——Ghatwali tenure—Incidents of.

Ghatwals are the proprietors of the land and there is nothing in the Bengal (Birbhum) Ghatwali Land Regulation (XXIX of 1814) to take away their rights, the exercise of which came to be restricted, having regard to the local requirements and customs of the Santal village. A.I.R. 1930 Pat. 533.

——Ghatwali tenure—Incidents of.

The mouzahs held by ghatwals or digwars may be within the zemindari of the Raja in the geographical limits of whose zemindari they are situate or the ghatwals or digwars may hold directly of the sovereign power as co-ordinate with rather than subordinate to the Raja. But it is always a question of fact whether they are or are not sub-ordinate; and the burden is upon the zemindar to prove that they are part of his zemindari. 13 M.I.A. 438 (P.C.), **Rel. on.** 94 Ind. Cas. 974=53 Cal. 533=53 I.A. 100=30 C.W.N. 745=24 A.L.J. 761=A.I.R. 1926 P.C. 41 (P.C.).

——Ghatwali tenure—Incidents of.

Ghatwali tenure is hereditary. 94 Ind. Cas. 974=53 Cal. 533=53 I.A. 100=30 C.W.N. 745=24 A.L.J. 761 =A.I.R. 1926 P.C. 41 (P.C.).

——**Ghatwali tenure—Incidents of—Succession.**

Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the Zemindar approved as competent, and it is the right of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed Ghatwals. The member appointed however, does not hold on behalf of the family, and the other members of the family have no rights in the land while it is in his hands as Ghatwali.

Where the Zeminder on being released from the performance of Ghatwali duties gave the pattah to four Ghatwals members of a family, granting the lands (which were till then subject to the Ghatwali tenure) in perpetuity on an annual fixed juma, **held**, that the members of the family other than the four grantees took no beneficiary interest in the lands granted. 46 Cal. 362=24 M.L-T. 407=28 C.L.J 508=9 L.W. 60=21 Bom. L.R. 569=45 I.A. 251=48 Ind. Cas. 527 (P.C.).

20 (o) Kakwara Ghatwali tenure.

——**Ghatwali Tenure—Kakwara Ghatwali tenure, if Govt. or** zemindari ghatwali—**Sale in execution of decree obtained by zemindar for arrears of rent and cess—Failure of** ghatwals **in previous litigation to set up defence that tenure was Govt. tenure—Whether** res judicata—**Inference from.**

On granting a **sanad** in 1717 to the then **ghatwals** of Kakwara, by Captain James Browne, their tenure became a Govt. **ghatwali** tenure.

Per **Chatterji** and **Shearer, JJ.**; **Manohar Lall, J.** (**Contra.**)—At present the Kakwara **ghatwali tenure** is not a Govt. **ghatwali**. Under the **zemindar** of Kharagpur in Bihar, it is a **zemindari ghatwali**. In execution of a decree for arrears of rent and cess obtained by the **zemindar**, the tenure is liable to be sold.

Per **Manohar Lall, J.**—The failure of the defendants in the earlier litigations which were the subject of appeals to the High Court and to their Lordships of the Judicial Committee, to set up a defence that Kakwara was a Govt. **ghatwali** when the distinction between the status of a Govt. **ghatwal** and that of a **zemindari ghatwal** was not fully comprehended, does not preclude them in subsequent litigation from now contending that Kakwara is such a **ghatwali**. No inference can be drawn from the failure of the **ghatwals** in the previous litigation to assert rights of the existence of which they may not have been aware. A.I.R. 1945 Pat. 339=24 Pat. 33=12 B.R. 177=222 Ind. Cas. 65.

20 (p) Manbaum.

——**Ghatwali—Manbaum—Nature of tenure.**

In the District of Manbaum, the **Ghatwal** tenure is not heritable. The **Ghatwal's** appointment depends upon the will and pleasure of the Government. 2 Pat. L.W. 143=2 Pat. L.J. 506=41 Ind. Cas. 114.

20 (q) Occupancy rights.

——**Ghatwali tenure—Occupancy rights.**

Occupancy rights cannot be acquired in **ghatwali** lands. 33 Cal. 630 and 1 C.L.J. 138, **Foll.** 90 Ind. Cas. 489=A.I.R. 1926 Pat. 64.

——**Ghatwali tenure—Occupancy rights.**

The incidents of a ghatwali tenure widely differ in the different parts of the country in the case of all service tenures, they generally differ and before coming to a conclusion as to whether occupancy rights have accrued in respect of ghatwali lands by reason of a custom or usage to that effect, such custom or usage must be pleaded and evidence led as incidents of a ghatwali tenure are inconsistent with a right of occupancy rights in land subject to such ghatwali tenure. On principle, the lands given to the ghatwali should be returned to the land-lord free from any incumbrance or rights in favour of any other person. 84 Ind. Cas. 383 =6 P. L. T. 534=1924 P. H. C. C. 304=A. I. R. 1925 Pat. 306.

——**Ghatwali tenure—Occupancy rights—No occupancy rights in ghatwali lands.** See: 33 C. 306= 10 C.W.N. 297=3 C.L. J. 112.

20 (r) Shikami ghatwali.

——**Ghatwali tenure**—Shikami ghatwali, **incidents of—Lease, if enures beyond his life—Burden of service.**

A shikami ghatwali cannot take upon itself a higher right than that of the ghatwali itself.

By their nature, ghatwalis are inalienable and the shikami ghatwalis are likewise inalienable.

A lease granted by a shikami ghatwal of Morrow cannot enure beyond his lifetime, and consequently his heir can resume it.

Per **Muhammad Noor, J.**—The burden of service is upon the entire tenure. Shikami means belly and shikami tenure is a tenure which has been carved out from the head tenure by sub-infeudation. This carving out does not relieve the shikami tenure of the liability of the service which attaches to the tenure as a whole. Therefore, if inalienability is attached as a necessary incident to a ghatwali tenure, it is attached to the shikami tenure as well. 13 P.L.T. 224=A.I.R. 1933 Pat. 117=139 Ind. Cas. 858.

——**Ghatwali tenure—Shikami Ghatwali.**

Shikami Ghatwali tenure under the Ghatwal of Rohini is not saleable. It makes no difference that the sub-infeudation was also khorposh. A.I.R. 1928 P. C. 177; 8 Cal. 388, **Foll.** 116 Ind. Cas. 41=8 Pat. 116=10 P.L.T. 143=A.I.R. 1929 Pat. 198.

20 (s) Status of particular ghatwal.

——**Ghatwali tenure—Status of particular** ghatwal

The status of a particular ghatwal is to be determined upon a construction of the particular grant from which they derived their title and cannot be decided merely upon the analogy of other ghatwali estate. A.I.R. 1935 Pat. 306=14 Pat. 70=1 B.R. 77=157 Ind. Cas. 433.

20 (t) Tabedari.

——**Ghatwali tenure** — Tabedari — **If ghatwali — Incidents.**

The tabedari tenures are a form of inferior ghatwali tenures. The holder has an absolute power of alienation and that absolute power of alienation forms an integral portion of the ghatwal's right and interest in the ghatwali. Ghatwali tenure is ordinarily hereditary, the estate descending to such male member of the family as the zemindar approves as competent to perform the duties, and the member appointed does not hold on behalf of the family, and the other members have no rights in the land while it is in his hands as ghatwal. The nature of the tenure is not altered by the fact that the services are no longer performed by the holder. 19 P.L.T. 246=4 B.R. 388=A.I.R. 1938 Pat. 375=174 Ind. Cas. 168.

20 (u) Tenures governed by Bengal Ghatwali Land Regulation.

——Ghatwali tenure—**Tenures governed by Bengal Ghatwali Land Regulation (XXIX of 1814).**

A person may be a mourashi mokarraridar and also a ghatwal. The distinction between a ghatwali within

the Regulation and ghatwali which is outside the Regulation is that in the former case there is no tenure between the zamindar and the ghatwal who holds direct from the Government, while in the latter the tenure exists. In the former case, while the lands of the ghatwali are still deemed to be within the zamindari, the zamindar no longer pays the Government revenue for them and has, therefore, no claim to the under ground rights; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on this part of the zamindari. If the Government does not claim the mineral rights there is no one to whom they can belong but the ghatwal. But in the latter case the zamindar still pays the Government revenue on these lands and if the ghatwal claims the minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. 90 Ind. Cas. 513 =4 Pat. 799=A.I.R. 1926 Pat. 103.

20 (v) Transfer of.

——Ghatwali—Transfer of—Transferable right granted after auction sale of.

As the Ghatwal judgment-debtor had no transferable right on the date when the execution sale took place, the plaintiff purchaser in execution had taken nothing by the purchase. The subsequent enfranchisement from service does not give a title to plaintiff. 28 C.L.J. 283=48 Ind. Cas. 335.

21. Gordon settlement.

——Gordon settlement—Property held under—Nature of—Liability thereunder.

Under the Gordon settlement, each successive male holder is practically a holder of an estate of inheritance in tail male, without any service and must maintain the last holder's widow. 18 Bom. L.R. 450=31 Ind. Cas. 291.

22. Gountia tenure.

——Gountia tenure.

Incidents of Gountia tenure in Sambalpur District (Patna) traced. 11 Pat. L.T. 374=A.I.R. 1931 Pat. 131.

23. Gramanatham.

——Gramanatham — See Land tenures—Mirasi-tenures—Gramanatham.

24. Guzara lands.

——Guzara land.

Land held as guzara is land held rent-free. 83 Ind. Cas. 382=79 Ind. Cas. 1051=27 O.C. 273=A.I.R. 1924 Oudh 390.

25. Headmanship.

——Headmanship — Incidents of — Headman system—Nature of.

Village headmanship is a tenancy to which an office is attached or vice versa and in which not only the headman but the raiyats are also interested. A headman may surrender his own interest but he cannot surrender the interest of his successors nor can he terminate the tenancy and deprive the raiyats of their customary right to have a headman.

Per Macpherson, J.—Subject to the basic fact that the headmanship system is the indigenous system of village tenancy, the case of each village falls to be decided on its own facts. The 'village headman' as defined in the Chota Nagpur Ten. Act and especially the aboriginal village headman suffers severely from the confusion caused by inadvertent (and sometimes the interested) extension of a name such as pradhan to non-aboriginal or even mere non-agricultural holders of a lease with no permanent right to renewal, and again by the similar extension in popular parlance of the name 'thikadar' with its basic implication of temporary tenancy to persons who have a permanent right in their tenancy subject only to periodical reassessment which generally involves enhancement of rent. In accordance with custom, that is to say, the system, the village is entitled to have a pradhan, the preferential right in a vacancy appertaining to the members of the village family.

As to the headmanship itself, it is generally difficult or impossible to describe it in ordinary legal terms. Indeed, attempts in that regard to Chota Nagpur institutions have been attended with so much peril that the Legislature, in desperation described the Mundari khunt-kattidari tenancy as "neither a tenure nor a holding." But whether the headmanship is an office with a tenancy annexed or is a tenancy with an office conjoined or whatever it is, it is always exceedingly inexpedient to attempt to interpret it in terms of ideas alien to the environment, the only safe course being to get the facts clear and in close detail for an estate first and then for the particular village. A.I.R. 1937 Pat. 202=2 B.R. 457=17 P.L.T. 445=15 Pat. 488=162 Ind. Cas. 582.

26. Hundwa tenure.

——Hundwa tenure.

Hundwa tenure is a Government tenure. It is perpetual and hereditary. It is a service tenure and ghatwali in nature. 79 Ind. Cas. 825=28 C.W.N. 351=3 Pat. 183=5 P.L.T. 171=51 I.A. 37=34 M.L.T. 27=A.I.R. 1924 P.C. 5 (P.C.).

27. Inam. See: Grants—Inam.

28. Istimrari Mukarrari.

——Istimrari Mukarrari.

The phrase "Istimrari Mukarrari" in a Patta in District Hazaribag does not per se convey an estate of inheritance. But the Court is competent to see whether the other terms of the instrument, the circumstances under which it was made or the subsequent conduct of the parties show that the intention was to make the grant hereditary. 84 Ind. Cas. 586=4 Pat. 139=6 P.L.T. 12=1924 P.H.C.C. 313=A.I.R. 1925 Pat. 216.

——Istimrari Mukarrari.

In Chota Nagpur the terms istimrari mukarrari lease means a lease for life. 78 Ind. Cas. 511=3 Pat. 534=1924 P.H.C.C. 158=A.I.R. 1924 Pat. 572.

29. Jagir—See also Grant—Jaghir.

——'Jaigir'—Grant of land—Presumption—Landlord's right of resumption.

"Jaigir" etymologically means "Jai" a place "gir" holding and implies a tenure created by Mahomedan Government in favour of its servants whereby public revenue was assigned in lieu of services. It may be an assignment of revenue alone or it may comprise land also. But the mere use of the word "Jaigir" in the absence of other evidence does not connote that Jaigirdar

was granted the land which constituted the Jaigir. The land-lord is unquestionably entitled to resume the grant either because he bas dispensed with the servries or because the grantee is not inclined to continue performance of the services. But the land-lord can resume nothing more than what he granted. If he fails to prove that what he granted was the land itself he could only be entitled to resume the quit rent, in other words, he will be entitled to the full assessment of the rent. Every case should be decided on its own merits and there can be no presumption of law or reasonable inference that the grant is of land from the mere fact that the grantor was the landlord and the grantee a tenant of his estate and that the grant as described was a jaigir. I.L.R. (1949) Cut. 186=A.I.R. 1949 Orissa 31.

——Jaghir—Jagodih tenure.

Maintenance grants in Ramgarh and Chota Nagpur, like jaghirs, are resumable on failure of the lineal male descendants of the grantee.

The holders of the Jagodih tenure have the status of dependant talukdars holding under the Ramgarh Raj and are to be considered as lease holders only within S. 7 of Regulation VIII of 1793. The tenure is a jagir tenure held under the Ramgarh Estate and is resumable on failure of the lineal male descendants of the grantee and it is not a **shamilat** or **shikmi** tenure in the sense in which those terms are used by the Revenue Officer in the Record of Rights published in 1914. 94 Ind. Cas. 1007=A.I.R. 1926 Pat. 369.

——Jagir—New settlement.

Where the jaghir was specifically mentioned as a service tenure involving the performance of police and other duties and a new settlement with the Taluqdar showed that the rent was increased from Rs. 735 to Rs. 1,000 four villages were taken out of the Pargana and set apart for the maintenance of the widows of the previous holder, and a new patta was granted to him be the Maharaja and a new Parvana was issued to him at the zamindar's instance for possession of the jaghir.

Held, in the face of these facts it is idle to contend that the settlement with the Taluqdar was a continuance of the old tenure. Had the Taluqdar succeeded to the jaghir by right of inheritance the maintenance of the Ranis, the widows, would have exclusively devolved on him and the superior land-lord would have had no concern with it or the right to take away any part of the property to provide for their maintenance. The Maharaja's interference on behalf of the widows is explainable only on one hypothesis, viz., that he was making a new arrangement by virtue of a right recognized by the authorities.

Resumption in connection with these service tenures does not mean that on failure of the direct male line it "escheats" to the zamindar and becomes what is called his Sir or Khas property; the jaghir retains its character, but the zamindar becomes entitled to make a new settlement with the knowledge and sanction of the authorities. 82 Ind. Cas. 879=28 C. W. N. 145=33 M.L.T. 408=1923 M.W.N. 702=A.I.R. 1923 P.C. 217 (P. C.).

——Jagir—Hereditary tenure.

If descent from one to another heir, that is from father to son, is proved by long uninterrupted usage, the inference would be that the grant was one of inheritancee, because the descent from father to son is the strongest possible evidence of hereditary character. 18 C.L.J. 277=18 C.W.N. 297=21 Ind. Cas. 481.

——Jagir—Police tenure in Pachete Raj—Incidents of.

Police jagirs in Pachete Zamindari are hereditary though the Government could dismiss the heir and appoint a stranger if it so chose. The appointee in such a case takes by vismajor and not under the last holder. If the jagir is sold in execution, the heir of the jagirdar gets nothing. 3 Pat. L.W. 149=2Pat. L. J. 725=(1919) P.H.C.C. 425=42. Ind. Cas. 399.

30. Jote tenure.

——Jote tenure—Transferability of a portion by contract:—See: 6 C.W.N. 624.

31. Kabil Lagan.

——Kabil lagan.

The term kabil lagan describes a tenancy liable to pay rent but for which it is not actually paid. 18 C.L.J. 166 =18 C.W.N. 913=21Ind. Cas. 415.

32. Karam Kozhu tenure.

——Karam kozhu tenure.

Land held on karam kozhu tenure whether in North or South Malabar is not liable to forfeiture by alienation. 86 Ind. Cas. 294=A.I.R. 1925 Mad. 914.

33. Kasavargam Tenure.

——Kasavargam tenure—Kasavargamdar doing Gurukkal service—If amounts to holding under temple.

Mere doing of Gurukkal service by a kasavaragamdar, in the absence of proof of title in the temple, will not raise a presumption that the kasavargamdar was holding under the temple though it was the only person whom he was serving. 13 Ind. Cas, 660 (Mad.).

——Kasavargam—Incidents of.

The following incidents of the Kasavargam tenancy are recognised by usage in the Tanjore District. (1) the Manaikat or site is the property of the Mirasdars; the kasavargamdar has no proprietary interest in it, but he is the owner of the building on it. (2) The kasavargamdar holds the Manaikat free of rent, or for a nominal rent on condition that he performs services as an artisan or otherwise for the mirasidars. (3) The kasavargamdar cannot transfer the Manaikat to another but on his death, it passes to his heirs. (4) The Mirasidar can eject the kasavargamdar forthwith if the latter refuses the customary services. (5) The kasavargamdar ejected must be compensated by the Mirasdar for any house erected on the land during the tenancy. 22 M.L.J. 1=10 M.L.T. 341=12 Ind. Cas. 414.

34. Kasbati Tenure.

——Kasbati—Leasehold interest—Pattas—Bombay Acts VI of 1862 and 1868—Cession of territory—Effect of.

The predecessor in title of the defendant had been kasbati of a village in Pargana Viramgan at the time of the cession of the Distract to the British Government of Bombay. The Government had granted pattas from time to succeeding kasbatis regulating the terms and conditions of the tenancy. The defendant claimed that he had a proprietary interest in the village. **Held,** that whatever rights the kasbatis might have had under the native Government, only a leasehold interest had been conferred on them by the British Government and that they had therefore no proprietary right. Bom. Act, VI of 1862 does not apply to kasbatis nor does Bombay Act VI of 1888 confer on a kasbati holding greater rights than those under the patta. 39 Bom. 625=42 I.A. 229=19 C. W. N. 1087=13 A. L. J. 953=(1915) M.W.N. 563=29 M.L.J. 242=18 M.L.T. 179=2 L.W. 731=17 Bom. L. R. 730=23 C. L. J. 1=30 Ind. Cas, 303 (P. C.).

[Reversing on appeal 13 Bom. L. R. 609=11 Ind. Cas. 948.]

35. Kattuguthagai.

——Kattuguthagai—Nature of.

The kattuguthagai tenure may be granted for diverse purposes and not merely for military services.

Kattuguthagai is in essence a lease or grant of land at a favourable rent and is not limited to an interest limited to revenue. There is nothing in the term itself from which one is entitled to infer that what was handed over was only the melvaram. 55 M.L.W. 356=A.I.R. 1942 P.C. 21=1942 M.W.N. 509=8 B.R. 685=I.L.R. (1942) Kar. (P.C.) 49 Sup. =(1942) 2 M.L.J. 367=I.L.R. (1942) Mad. 893=69 I. A. 22=209 Ind. Cas. 1 (P.C.).

36. Kavimeras.

——Kavimeras—Karvetnagar zamindari — Right of payment out of melavaram—Collections, nature of.

The right to recover kavimeras from persons in possession of the different portions of the former karvetnagar zamindari is a right to receive a small fraction of the zamindar's melavaram in each village in the zamindari. The liability is not a personal one but is by virtue tenure. So long as any person is in possession of the village out of whose income the mera is payable, he is subject to the liability which is not one arising out of his having wrongly made a collection of what he was not entitled to collect but one arising from the fact that out of the collection which he is entitled to make as a zamindar, he is bound to make the disbursement and appropriate only the balance. In that sense and to that extent it is a personal liability and it is not one resting on a covenant but is in the nature of charge. A.I.R. 1938 Mad. 47=1937 M.W.N. 899=176 Ind. Cas. 247=46 M.L.W. 358.

37. Kayamgeni.

——Kayamgeni tenure (South Kanera)—Burden of proof—Uniform payment of rent—Evidentiary value—Finding of permanancy—Second appeal—Interference.

When a person has once become a tenant under a land-lord, he could not, by merely denying the rights of the land-lord, convert his possession, permissive as it was originally, into adverse possession, against the land-lord.

When a tenant of lands in India, in a suit by his land-lord to eject him from them, sets up a defence that he has a right of permanent tenancy in the land, the onus of proving that he has such right is upon the tenant. This principle is applicable to South Kanara as to other parts of India.

Possession for a long period and payment of a uniform rate of rent might not by themselves, be enough to prove that the defendants are kayamgeni tenants and not liable to be ejected. But when the lower Courts have come to a finding upon these as well as other facts that a tenure is a kayamgeni tenure, the High Court cannot interfere in second appeal. (1930) M.W.N. 874=35 M.L.W. 400= A.I.R. 1931 Mad. 577=133 Ind. Cas. 369.

38. Khaekar tenure.

——Khaekar tenure—Rights of khaekars— Hissedar not in actual possession of khaekar land recorded in his name as khudkasht—If acquires title in it.

The pucca khaekars are, in all respects, equal to proprietors with the exception that they cannot sell their holding, and pay small sums called malikana, in addition to the quota of revenue due from the land recorded in their names. The proprietors or hissedars have no power to interfere with these khaekars or their land, waste or cultivated, and on the death of a khaekar without direct heirs, the lapsed holding reverts to the whole community of khaekars and not to the hissedar.

If a hissedar brings fallow land under plough and actually cultivates it himself, he will be entitled to retain possession of the same, but he can acquire no title in khaekar land which is not in his actual possession and is merely recorded in his name as khudkasht.

The right of the Govt. to assumes lakheraj lands A.I.R. 1939 All. 751=(1939) A. L. J. 1053=1939 R. D. 579=1939 A.W.R. 733=185 Ind. Cas. 521.

——Khaekar tenure—Existence of gharpradhan, if essential for pacca Khackari—Village Khururi in Kumaun, held pacca Khaikari village.

In pacca khaikari village, there is usually a ghar-pradhan, but it does not follow there from that if there is no ghar padhan in a village, the village is necessarily a kachacha khaikari village.

Held, that though there is no such ghar-padhan in Mouza Khururi, in village Kumaun, it is a pacca Khaikari village.

[History, origin and incidents of khaikari tenure traced.] A.I.R. 1938 All. 136=(1938) A.L.J. 4= 1938 R.D. 153=1938 A.W.R. 48=174 Ind. Cas. 470.

——Khaikari tenure.

History of Khaikari tenure, its origin and its incidents and rights traced. 119 Ind. Cas. 514= 1929 A.L.J. 309=10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.

——Khaikari tenure—Right of reversioners.

A share of pucca khaikari tenure and its appurtenances belonging to a tenant in full heritable right can be inherited by his reversionary heirs even when not joint in cultivation either with him or the limited owner. 119 Ind. Cas. 514=1929 A.L.J. 309 =10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.

39. Khoti land.

——Khoti land.

A purchaser of Khoti Khasgi lands from one of the co-sharers Khots, would be liable to pay Faida unless he was able to show that by virtue of some custom or agreement amongst the Khots the Faida was not payable. 68 Ind. Cas. 335=24 Bom. L.R. 358=46 Bom. 819=A.I.R. 1922 Bom. 235.

——Khoti land—Transfer of—Without Khot's consent—Effect.

A Khoti tenancy cannot be transferred without the permission of the Khot who is entitled, on such a transfer, to re-enter without any liability to reimburse the transferee for the money he has spent for the transfer. 20 Bom. L.R. 681=46 Ind. Cas. 688.

——Khoti tenure—Khots have a right to cultivate land left dry in a river adjoining their land.

Where the Khots of a village claimed a right to occupy and cultivate land left dry in the river-bed as far as the middle of the bed opposite their villages: **Held,** that they were entitled to this right and that S. 37 of the Land Revenue Code was not a bar to such a right. **Held,** further, that the soil of land covered with water may, together with the water and the right of fishing therein, be specially

appropriated to a third person, whether he has land or not on the border thereof or adjacent thereto. 31 B. 456=9 Bom. L.R. 719.

40. Khudkhast and Sir lands.

——Khudkhast and Sir lands.

Bakasht conveys the same meaning as khudkhast—It might imply raiyati lands temporarily come into possession of land-lord and under his cultivation.

The term 'bakasht' invented by the Revenue Officers to meet a certain contingency conveys to all intents and purposes the same meaning as khudkhast which is admittedly the same as sir or zerait. It might, however, imply raiyati lands that had temporarily come into the possession of the land-lord and were temporarily under cultivation. 97 Ind. Cas. 217=5 Pat. 735=53 I.A. 176=7 P.L.T. 483=31 C.W.N. 341=A.I.R. 1926 P.C. 60 (P.C.).

——Khudkhast—Purchase of sir rights.

Sir rights, though they can only be held by a proprietor, are something beyond and apart from the mere proprietary right. The right of a sir holder is a right to exclusive possession coupled with the fact that no person cultivating under him can acquire occupancy rights.

In a joint undivided village each proprietor may have his own separate sir although the proprietary rights in the whole village are joint.

The acquisition of sir rights by purchase is not allowed. Where the entire sir has been sold and the purchaser obtained actual cultivatory possession, the land is treated as his khudkhast and not as his sir.

The purchaser of the rights of three out of four joint holders of sir rights can be ejected by the fourth owner if he takes possession of that owner's portion. In such a case, a person jointly interested in the sir khata does not lose his sir rights. 80 Ind. Cas. 899=A.I.R. 1925 All. 93.

41. Khuntkatiar tenure holders.

——Khuntkatiar tenure holders—Status of—Chota Nagpur Tenancy Act.

Although there is no provision in the Chota Nagpur Tenancy Act giving any permanent rights to khuntkatidar tenure-holders, it cannot be said that in every case when the khuntkatidars are entered in the khewat as tenure-holders it must be held as a matter of law that they are merely temporary tenure-holders. 223 Ind. Cas. 615=12 B.R. 446=1946 P.W.N. 262=27 P.L.T. 259=A.I.R. 1946 Pat. 313.

42. Kumaki lands.

——Kumaki lands.

In the case of lands in South Canara it is usual for pattadars to occupy lands adjoining their patta lands for the purpose of convenient enjoyment of their holdings under patta or for purpose of cultivation, etc. The Government generally grants such land known as kumki land on darkhast to the pattadars. When the land is kumki granted on darkhast, any right previously granted by the wargdor in favour of a tenant as regards the kumki land comes to an end, and even if there is a mortgage right on the land created by the wargdor it comes to an end as soon as the grant is made by the Government to the wargdor or any other person. 35 M.L.J. 120, Foll. 88 Ind. Cas. 924=A.I.R. 1925 Mad. 1226.

——Kumaki land—South Kanara—Warg—Grant to wargdar—Effect of.

Where a wargdar mortgaged usufructuarily certain warg land and the adjoining kumaki land and subsequently the Government assigned the kumaki land on Dharghast to the mortgagor the lands so assigned belong to the mortgagor absolutely and do not enure to the benefit of the mortgagee. 8 M.L.W. 100=35 M.L.J. 120=49 Ind. Cas. 147.

——Kumaki land—South Kanara—Transfer of.

Kumaki lands are waste land adjoining warg lands, and a kumaki privilege is the right which the ryot holding the warg land has to collect the leaves for manure and to pasture his cattle as an assistance to the cultivation of the warg land. 28 M. 257 Ref. These kumaki privileges are extinguishable by Government, which may assign the land over which they are exercised to persons other than the holder. 12 M. 422; 28 M. 527, Ref. 15 Ind. Cas. 278 (Mad.).

43. Lakheraj tenure.

——Lakheraj tenure—Right of Government to assess to revenue—Limitation.

The right of the Govt. to assess lakheraj lands to revenue becomes barred by the lapse of sixty years A.I.R. 1935 Cal. 368=60 C.L.J. 477=62 C. 346=159 Ind. Cas. 98.

——Lakheraj tenure—Suit for resumption—Burden of proof.

In a suit to assess or resume a lakheraj tenure on the allegation that it came into existence since 1790, the burden is on the plaintiff to prove that the land was assessed to revenue, it is not enough for him to show that the lands fell within the geographical limits of his revenue-paying estate. A.I.R. 1932 Cal. 446=36 C.W.N. 215=59 C. 629=138 Ind. Cas. 157.

44. Manibaam (Madras).

——Manibaam — Madras Manibaam lands — Enfranchisement—Issue of inam title—Non-mention of cess—Whether relieves grantee of liability to pay it.

In a case where manibaam lands were enfranchised and inam title issued declaring that the quit rent imposed is to be paid to Govt., the non-mention of the cess in the inam title does not relieve the grantee from the liability to pay the cess even granting that previous to the enfranchisement, such liability existed. A.I.R. 1935 Mad. 718=(1935) M.W.N. 897=42 M.L.W. 583=160 Ind. Cas. 680.

45. Mulguzars.

——Mulguzars—Central Provinces—Whether de facto and de jure proprietors of land.

Obiter, per Niyogi, J.—The mulguzors are **de facto** and **de jure** proprietors of the mahal the land revenue of which they have agreed to pay by accepting the settlement, and the subordinate tenures like the absolute occupancy and the occupancy are carved out of his primary proprietary right. The definitions of the terms "land-lord" and "tenant" contained in the Ten. Act leave no manner of doubt that the origin of their relationship to each other is contract. It is true that the conditions of the contract are not left to be fixed by the parties themselves but they are regulated by statute. That, however, does not affect their fundamental relation being contractual. The limitations put by the Act upon the rights of the malguzars cannot be interpreted as negativing the right itself. Consequently the imposition by law of certain restrictions on the exercise of malguzari rights cannot be interpreted as

involving the denial or annihilation of those rights. As the result of the proprietary award of 1864, the status which formed the basis of relation between the malguzars and ryots was replaced by contract, and the custom which regulated their relation by statute.

Obiter, per **Bose, J.**—(Creation of malguzari system in Central Provinces and its history traced.) A.I.R. (1940) Nag. 49=I.L.R. (1940) Nag. 348=1940 N. L. J. 121=186 Ind. Cas. 731 (F.B.).

46. Mirasi tenure.

——Mirasi tenure—Nature of.

Per **Wassoodew, J.**—The term "mirasdar" is usually applied to denote heritability and also permanency of occupation. It is undoubtedly qualified by the obligation assumed by the tenant to remain in possession so long as he pays the inamdar or the land-lord the customary rent or the rent agreed upon between them. So long as he does that, he can enjoy the land from generation to generation. A.I.R. 1942 Bom. 268=44 Bom. L. R. 534=I.L.R. (1942) Bom. 595=203 Ind. Cas. 238.

——Mirasi inam village.

Where, in a mirasi village, new tenants are introduced into uncultivated land, the melvaramdars alone are the land-lords of the village. Even if some payment described as thunduvaram is due to the mirasidars, this payment cannot be regarded as indicative of the character of the mirasidars as land-lords. It must be regarded as the customary payment due to the mirasidars on account of their preferential right in the village. The right to the thunduvaram can only be regarded as the present remnant of a customary right the origin of which is lost in obscurity and cannot be accurately analysed from the point of view of modern legal notions.

Where, in such a case, the tenants have been in possession for over a century without executing muchilikas, they cannot be regarded as ejectable at the option of the mirasidars or of anybody. A.I.R. 1934 Mad. 275 =154 Ind. Cas. 294.

——Mirasi tenure—Hereditary right—Onus of proof.

The nature and extent of mirasdars rights in Miras village vary from place to place in the Madras presidency and the onus is on the mirasdars to prove that any specified incident attaches to miras rights in any particular district. 'Miras' right to cultivable land does not mean absolute ownership; it is only a preferential right. The right of cultivable waste is again a matter for proof. So in the absence of any reliable evidence, apart from opinions expressed by some of the witnesses, no assumption can be made that, because the plaintiff is styled Ekabhogam mirasdar, and has hitherto been the sole pattadhar in a village close to the Chingleput border, he must have such rights and privileges. 32 M.L.W. 945=60 M.L.J. 137=A.I.R. 1931 Mad. 135=132 Ind. Cas. 117.

——Mirasi tenure.

Where the son and successor of a Vatandar was aware of a permanent lease made by his father and for over twenty years received the rent under the permanent lease from the lessee,

Held, the lessee could not be evicted at least during the life-time of the vatandar who had so continued the permanent tenancy. 117 Ind. Cas. 438=31 Bom. L.R. 218=A.I.R. 1929 Bom. 174.

——Mirasi tenure—Incidents of.

The special incidents of mirasi tenures are somewhat varied in different villages. Sometimes the mirasidars have got some special rights over waste lands. Some portion of the village land is joint for all the mirasidars and is known as samudayam. Sometimes they are subject to a payment of kist to Government only if they cultivate and they have got the option to cultivate or not if they like. Where the land not held by the original mirasidars is leased out by Government to new tenants or non-mirasidars, the original mirasidars and their descendants have a right to get some special fee from the new tenants called swatanthrams. The mirasidars themselves are regarded as occupancy tenants and their under-tenants known as payakaris have in general no occupancy rights. The share paid by the payakaris is called thunduvaram. The mirasi right is held in shares, pangus, sometimes specified lands being allotted to each pangu and sometimes the pangus not being defined with reference to the lands. Where one Mirasidar is the sole tenant of all the lands of the village he is then known as ekabhogam Mirasidar. The muchilikas executed by the tenants in favour of the mirasidars where they indicate absolute rights of the mirasidar are described as swanubhogam muchilikas. 40 Mad. 410 (F.B.), **Ref.** 119 Ind. Cas. 577=29 M.L.W. 760=1929 M.W.N. 239=A.I.R. 1929 Mad. 529.

——Mirasi tenure—Suit for partition.

Samudayam tenure is a holding in common by the village community known as the mirasidars.

Karaiyeedu tenure consists in a system of shifting severalty of ownership the village lands being redistributed among the mirasidars at intervals. A suit brought for the partition of the village lands and for change to individual ownership lies whether the tenure of the village is Samudayam tenure or the Karaiyeedu tenure. 78 Ind. Cas. 37=20 M.L.W. 122=A.I.R. 1924 Mad. 741.

——Mirasi tenure—Grant of proprietary rights.

Plaintiffs were mirasidars under-defendants under Miraspatras of 1859 and 1864 which recited that the grantee would bring the land under cultivation. The quit rent was fixed as the assessment which would be imposed at the survey less the sum of Rs. 50. Beyond this no right was reserved to the Inamdars. The deed contained expressly that the Inamdars "have no right or claim whatsoever to the said lands," and allowed the grantee the right to recover any sort of tax or cess —Kulbab Kulkanu—from those who held under him. On the introduction of the Survey Settlement building fine was levied on the mirasidar under rules made under Ss. 65 and 48 of the Land Revenue Code. Plaintiff sued for declaration that he was not liable to pay the fine.

Held, the deed did in fact give the plaintiff rights which might be described as those of a sub-inamdar and they were entitled to a declaration that they were not liable to pay building fine to the inamdar and to an injunction restraining the Inamdar from collecting such fines through the collector. 76 Ind. Cas. 897= 24 Bom. L.R. 1040=A.I.R. 1923 Bom. 79.

——Mirasi tenure—Gramanatham Lands —Suit for recovery of possession by land-holder—Plaintiffs being one of the co-owners whether a bar—Gramanatham land whether communal property.

In a suit by the land-holder to recover possession of some Gramanatham land which was occupied by the defendant sometime in 1936, the defences were (1) that the plaintiff being one of the co-owners of the inam village in which the suit property was situated was not entitled to institute the suit in ejectment; (2) that plaintiff was not owner of the land and that it was communal property and he had therefore no title to eject; and (3) that

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the plaintiff had no possession within 12 years prior to date of institution of suit,

Held: (1) Apart from the fact that the plaintiff was recognised as the land-holder under the Madras Estates Land Act, he was entitled to institute a suit in ejectment against a trespasser.

(2) Gramanatham is not communal property in the sense in which village thrashing floor or burning grounds or other property is communal, that is property reserved for the use of the community. Further, this particular property in an inam village not being a communal poromboke plaintiff would be entitled to sue for recovery of possession. (1939) M.W.N 207, relied on.

(3) The present suit having been filed within 12 years from 1936 when the defendant admittedly trespassed into the property the suit was not barred. 62 M.L.W. 204=1949 M.W.N. 139=A.I.R. 1949 Mad. 814=(1949) 1 M.L.J. 290.

——Mirasi rights—Gramanatham — Proprietary rights in—Proof of.

To establish proprietary right to property registered as natham, there must be evidence that the same was dedicated or set apart for the purposes alleged. 115 Ind. Cas. 241=29 M.L.W. 229=56 M.L.J. 38.

——Mirasi—Gramanatham—Rights of Government and of Mirasdars—Grant of house site by Government—Mirasdar's suit for recovery—Recognition of mirasi rights by the State.

Per Wallis, C. J.—There is no general presumption of Mirasdar's ownership of Nattam in the absence of evidence of user, but where user is shown the presumption of ownership readily arises. Before the advent of British rule and especially under the Munammadan rule occupied Nattam was not generally recognised by Government as the private property of the Mirasdars and their ownership has not been established subsequently either by Government recognition or by judicial decisions. Per Wallis, C, J. and Ayling, J.—The preferential right of a mirasdar to cultivate waste does not entitle him to eject persons who have got Nattam from Government but entitles him to the sites if necessary. Per Ayling, J.—The rule is inapplicable in cases in which Mirasdars have prior to the grant by Government already acquired a title to the particular site either by previous grant or prescription. Though all the incidents of a Mirasi tenure may have a common origin in the status of the Mirasdar, none of them necessarily involves the other. Each requires to be separately established and recognition by the State whether express, or implied, is an indispensable condition for the enforcement of each. Per Kumaraswami Sastri, J.—In Mirasi villages the rights of Government over waste including Nattam and Cheri are subject to the rights of the Mirasdars. The nature and extent of such rights are not uniform throughout the Presidency but vary, and the onus is on the Mirasdars to prove that any specified incidents atttach to Mirasi rights in any particular district there being no presumption that Gramanatham is the exclusive property of the Mirasdars. The rights of Mirasdars over waste are not extinguished by the mere fact the Government grants pattas to strangers. 40 Mad. 410=32 M.L.J. (Sup.) 1=40 Ind. Cas. 909 (F.B.)

——Mirasi—Rights of Mirasdar—Irrigation—Government tank.

Where a part of the source of irrigation for a ryotwari village is a Government tank, Mirasdars who have from time immemorial cultivated their wet lands with the tank water, have a preferential right to irrigate from the tank, over the assignees of waste land from the Government. 51 Ind. Cas. 734 (Mad.)

——Mirasi—Chingleput District — Subordinate proprietors—Swatantram—Ullkudi.

In a mirasi tenure, produce of land is divided into (1) Melvaram or the Royal share, (2) Thunduvaram or Landlord's, share and (3) Kudiwaram or the occupant's share. The history of the Mirasi tenure in the Chingelput District discussed.

A Payakar whom a Mirasidar introduces for cultivation purposes, if he permanently settles in the village and his descendants enjoy the lands as tenants for about 100 years, becomes an Ullkudi Payakar with permanent rights of occupancy and acquires in a sense Kudivaram rights.

Swatantrams include Thunduvaram and mean a certain portion of the gross produce raised by Ullkudi tenants and due to the Mirasidar.

The presumption in the case of an Inamdar is that at the time of the grant of the inam, he is not the owner of the Kudivaram right. (20 Ind. Cas. 374 and 8 Ind. Cas. 365 Dis.)

But in the case of a Mirasidar in Chingleput District to whom an inam was granted long ago it cannot be said that there is a presumption against his owning the Kudivaram right.

A Mirasidar owning the Kudivaram right in the lands in the village is called an Ekabhogam Mirasidar. 1 M.L.W. 41=26 M.L.J. 169=23 Ind. Cas. 113.

47. Mokhasa.

——Mokhasa.

Mokhasa is a well-known tenure in Northern Sircars. It implies a tenure subject to service. 1930 M.W.N. 945.

——Mokhasa—Definition of.

Mokhasa is a well known tenure in the Northern Circars and is a tenure subject to service and consists of a village or land assigned to an individual either rent free or at a low quit rent on condition of service. 26 M. 403.

48. Mortgage.

——Mortgage—Not adhlaphi tenure.

One half of a certain area of land was sold and the vendee was to sink a well but not at his own expense, it being specifically agreed that the vendor would pay half of the total expenditure incurred on the sinking of the well and the preparation of the ground for cultivation. The vendee was to be in possession of half of the land not sold, and, out of the produce thereof, recover half of the expenditure which was payable by the vendor and the vendee was to keep strict accounts of the expenses and income.

Held, that the transaction was a lekhamukhi mortgage and an adhlaphi tenure was not created. 101 Ind. Cas. 549=9 L.L.J. 63=28 P.L.R. 123=A.I.R. 1927 Lah. 828.

——Mortgage—Biswi mortgage.

Where land held by tenant is mortgaged by the proprietor to the tenant in consideration of money paid by the latter, it is not unusual for the tenant to appropriate a portion of the rent, for which he was originally liable, towards interest due on his loan and to pay the balance, known as paramsana, to the mortgagor. Biswi is the name usually given in Eastern Oudh to mortgages of this kind. The extinction of the right of redemption of this kind does not destroy the right of the mortgagor or his successors to claim the paramsana as rent for the paramsana does not fall within the rights to which the mortgagee is entitled. 67 Ind. Cas. 808=9 O. L. J. 141=A.I.R. 1922 Oudh 75.

49. Mukkaddami tenure.

——Mukkaddami tenure.

In the absence of any special evidence to the contrary, the fact of a person holding land under what is known as a 'mukkaddami' tenure does not imply that the mukkaddam has any heritable or transferable right in the holding. 1900 A.W.N. 197=23 A. 67.

50. Mukarrari lease.

——Mukarrari lease—Arrears of rent—Sale of tenure.

The land-lord has the right to sell the mukarrari tenure for arrears of rent. Such a right exists even if not expressly given in the kabuliyat. A.I.R. 1941 Pat. 566=8 B.R. 507=199 Ind. Cas. 169.

——Mukarrari lease—Record of rights showing another person as holding under zemindar — Suit for declaration of incorrectness of Record of Rights—Parties.

Where, according to the original mukarrari granted to the plaintiff's transferor, no right or interest was reserved by the zemindar except that to receive the rent reserved, and a subsequently prepared Record of Rights showed certain other persons as holding under the zemindar:

Held, that the Record of Rights was incorrect and a suit for declaration that the Record of Right was incorrect would not be bad for non-joinder of the villagers as parties to the suit. A.I.R. 1933 Pat. 259=144 Ind. Cas. 753.

——Mukarrari lease.

Though there is no presumption that a permanent lease should, at the same time, be mukarrari, the express mention of the word "mukarrari" is not necessary to create a permanent lease at a fixed rent. 58 C. 1046=A.I.R. 1932 Cal. 73=36 C.W.N. 178=134 Ind. Cas. 1130.

51. Mulgeni tenure.

——Mulgeni tenure—Sub-tenancy—Right of land-lord to recover rent.

A land-lord has the right to recover the rent on his lands direct from the permanent sub-tenants of the original mulgeni tenant. 22 Bom. L. R. 118=55 Ind. Cas. 540.

——Mulgeni — Death of tenant — Escheat to Government or to mulgar.

The rights of a mulgenidar do not escheat to the Government on his dying without issue but revert back to the mulgar from whom the mulgeni was acquired. A mulgeni is of the same character as a permanent lease. 30 A. 489; 17 C. 826; 1 C. 391 Dist. 42 Mad. 327=36 M.L.J. 207=(1919) M.W.N. 366=26 M.L.T. 270=49 Ind. Cas. 695.

——Mulgeni lease—Trees—Right of lessee to cut.

A mulgeni tenant in South Canara cannot cut trees existing at the date of the grant. A lessee can remove trees planted by him after the commencement of the lease, and trees and plants of spontaneous growth, provided he restores the land in **status quo ante** at the end of his lease. 29 M.L.J. 314=18 M.L.T. 218=(1915) M.W.N. 226=31 Ind. Cas. 12.

——Mulgeni—Registration.

The T. P. Act does not apply to mulgeni leases. When the defendant has been asserting for 40 years that he has mulgeni rights to the land, the inference is that the defendant had such rights though there is no registered lease. (1915) M. W. N. 271=28 Ind. Cas. 599.

——Mulgeni—Incidents of—South Canara.

The Mulgeni tenure is permanent, inheritable and also alienable in some cases by the conditions of the Mulgeni chit, but in all cases perpetual, though subject to forfeiture in some cases. The lessor has a reversion or a possibility of a reverter and a right to an annual rent but cannot determine the tenancy with notice nor will it be terminated by efflux of time. 5 M.L.T. 37=4 Ind. Cas. 1091.

——Mulgeni or Chalgeni tenure—Presumption.

In South Canara, there is no presumption that a tenancy is either chalgeni or mulgeni. Proof of immemorial possession at a uniform rent will raise a presumption in favour of mulgeni in which the onus will be on the land-lord to prove that the tenure was only chalgeni. 30 M. 528.

——Mulgeni tenure — Increase in Government assessment—Liability to pay — Mulgar liable to pay.

In the case of Mulgeni tenures in South Canara, if the Mulgenidar pays the increase of revenue, he is entitled to recover it back from the Mulgar (under S. 35 of the Revenue Recovery Act), in the absence of any provision in the Mulgeni Chit about the liability to pay the increase in Government assessment, the Mulgar being the "land-holder" within the meaning of the Revenue Recovery Act, even though it may be that both the Mulgar and the Mulgenidar will have to bear the burden in equitable proportion but for S. 35 of the Madras Revenue Recovery Act. 20 M.L.J. 640=8 M.L.T. 173=7 Ind. Cas. 321=1910 M.W.N. 333=34 Mad. 231 (F.B.).

——Mulgeni tenure—Increase in assessment—Liability to pay—Interest on arrears of rent payable in kind.

Under the terms of a Mulgeni lease executed on the 25th September 1869, the Mulgenidar (tenant) agreed to pay the mulgar (lessor) rent of five and a quarter khandies of rice every year, and the latter to pay the Government assessment of Rs. 6-14-6. It was also agreed that the rent settled should not be reduced or enhanced. At the revised survery settlement the assessment was increased to Rs. 16-12-0. The mulgar then having sued the tenant for the arrears of rent for six years preceding the suit, with interest, the tenant claimed refund of the increased assessment which he paid and for which the mulgar was liable:—

Held, (1) that the amount of assessment of Rs. 6-14-6 mentioned in the lease as being payable by the mulgar, must be deemed to refer to the assessment as it then existed irrespective of the question of its reduction or enhancement thereafter; that therefore, the mulgar remained liable to pay the enhanced assessment; (2) that as the rent was payable in kind, the arrears of rent were not such a debt as was contemplated by the interest Act, 1839 which required that

it must be a debt or sum certain at the time when the promise was made to bring it within the operation of the Act, and there was no debt certain at that time because the market value of rice then need not have necessarily been the same as the market value at the time of the breach of the contract; (3) that neither was interest recoverable under S. 73 of the Indian Contract Act 1872, as damages for breach of contract to pay rent, since a suit to recover the money value of the rent in kind was a suit to recover unliquidated damages which were measured by the market value of the goods delivered under the contract on the day they ought to have been, but were not delivered, and interest could not run upon unliquidated damages. 12 Bom. L.R. 831=8 Ind. Cas. 411.

52. Mul-raiyati tenure.

——**Mul-raiyati tenure — Sonthal Pergannas —** When transferable—Whole or portion—Mustagir, rights of.

The rights of a mul-raiyat, who is a village headman or settlement holder in the Sonthal pergannas, are in their entirety transferable, saleable and attachable. The privilege which a mul-raiyat possesses of transfering his tenure must be exercised in respect of the whole tenure at the same time in other words, if he chooses to transfer his tenure, he must alienate the whole of his rights in the village including his right of managing the village and collecting the rent as also his right to the land in his possession. He cannot split up the tenure so as to part with a portion and retain the remainder. A sale of a portion of the tenure confers no title on the purchaser. The right of a mustagir is not absolutely restricted to the collection of rent from ordinary raiyats. The rights of a mul-raiyat and of a mustagir explained. 2 C. L. J. 77=32 C. 1014.

53. Nadgi tenure.

——**Nadgi tenure—Neglect by tenant.**

If a nadgi tenure-holder neglects to cultivate the land allows the hut to go into disrepair, carries away some of the building materials himself, and allows the rest to be stolen by others, he is liable to be evicted from his holding at the instance of the land-lord.

No definite rule can be laid down that the over-lord in nadgi tenure has to bear the expense of all improvements. 86 Ind. Cas. 24=27 Bom. L.R. 82= A.I.R. 1925 Bom. 178.

54. Nankar.

——**Nankar—Grant—Presumption.**

A right to nankar is as a rule, to be considered an under-proprietary right of a heritable and transferable nature though a person in receipt of such allowance cannot necessarily be considered to be the under-proprietor of lands of which he may be in possession. This will depend upon the circumstances of each case.

Where a nankar has not been decreed by a Settlement Court or where a person is not shown to have been in enjoyment thereof since the time when he lost his zemindari right and where it is shown that he has been granted those rights at a subsequent time it should be open to the zemindar to show that at the time when such grant was made it did not carry with it an estate of inheritance or transferability but was merely a grant of a personal character, limited to the life or lives of the person or persons to whom it has been granted. If, however, this is not proved by the land-lord and the mere fact that a nankar has been granted to the persons who were old proprietors is established then the presumption would be, unless shown to the contrary, that the grant was in lieu of old proprietary right of a heritable and transferable character. This would especially be the case where the person to whom the grant was made happened to be a former proprietor of the village and where the entry of the rights was to be found in the under-proprietary register. 115 Ind. Cas. 109=A.I.R. 1929 Oudh 348.

——**Nankar.**

A "Nankar villlage" means a village held by a proprietor in Mahomedan times in lieu of bread money or remuneration for services. 114 Ind. Cas. 194=A.I.R. 1928 Pat. 294.

55. Natham.

See: Land tenures—Mirasi tenures—Gramanatham.

56. Noabad.

——**Noabad lands of Chittagong—**Except 360 permanent settlements of Noabad lands between 1865 and 1867, Noabad lands were all along settled temporarily—(Conditions of temporary settlement indicated). A.I.R. 1942 Cal. 371=I.L.R. (1942) 2 Cal. 35=46 C.W.N. 347=201 Ind. Cas. 279.

——**Noabad Taluq—If permanently settled.**

A Noabad-Taluq in Chittagong may or may not be a permanently settled one. 22 C.W.N. 1025=46 Ind. Cas. 927.

——**Noabad Mahal—Nature of.**

A Noabad Taluk is a tenure, the land being Khas Mahal land of Government. 20 C.W.N. 636=32 Ind. Cas. 752.

——**Noabad Mahal—Nature of right.**

A Noabad Mahal implies a herditary and transferable title in perpetuity subject to rent for all lands under cultivation. 18 C.W.N. 531=24 Ind. Cas. 65.

——**Noabad Mahal — Temporary Settlement — Resettlement—Area, if must be same.**

A temporary settlement-holder, especially an intermediate holder for 10 years, is not entitled to a settlement of the same area at the same rate, though he may have a preferential right to the fersh settlement the Government makes at the expiry of the old settlement. 13 C.W.N. 235=9 C.L.J. 265=4 Ind. Cas. 49.

——**Noabad Mahal—Collector, power of—Government obligation of.**

In a Noabad taluk, the Collector cannot, in subsequent years, during the pendency of a completed settlement interfere with the arrangement of the Settlement Officer.

The Government is not bound to include any lands in a Noabad talukdar's tenure according to the boundaries or dags of any former survey. 9 C.L.J. 265 =13 C.W.N. 235=4 Ind. Cas. 49.

——**Noabad Mahal in Chittagong District—Incidents.**

Where the question was whether a certain mahal, known as Mahal Noabad Taraf Joy Narain Ghosal in the District of Chittagong was a part of the permanently settled 'taraf' of the proprietor or consisted merely of ordinary 'noabad' lands temporarily settled and liable to periodical re-settlement and annexed to the proprietor's taraf for convenience only:—**Held,** — That the special history of the tenure from 1763 when it was created showed that the mahal was neither the one nor the other. The mere fact that a mahal is 'noabad' mahal does not necessarily attach to it the incidents of ordinary 'noabad' properties of later creation. All 'noabad' mahals of Chittagong have this in common that the proprietors have to pay rent or

revenue to Government. But the incidents of different noabad mahals vary very greatly. The incidents of the present mahal determined, and held mainly upon the basis of a kabuliyat executed by the proprietors in favour of the Government in 1852, that the revenue was fixed in perpetuity on the hasila area only. 11 C.W.N. 928.

57. Non-transferable holding.

——Non-transferable holding—Surrender—Kabs possession.

A non-transferable occupancy holding was sold in execution of a money decree on the raiyat's refusal to leave possession; the transferee and the raiyat divided the holding between them. The transferee executed a conveyance for the portion retained by the raiyat who executed a deed of collusive surrender of the whole field in favour of the land-lord while remaining in possession. The land-lord's suit for khas possession failed as the surrender being unreal and did not terminate the tenancy. 20 C.W.N. 610=33 Ind. Cas. 611.

——Non-transferable holding—Talukdar, if can convert into transferable holding—Execution.

Held, that the tenure created under a compromise decree was not an under-proprietory tenure and could not be sold in execution. A Talukdar cannot convert a non-transferable tenure into a transferable one without the consent of the tenure holder. 12 O. C. 267=3 Ind. Cas. 868.

58. Occupancy right.

See also: **Land tenures—Ryotwari—Occupancy rights.**

——Occupancy rights—Assam Land and Revenue Regulation (1 of 1886)S. 71—Possession of pasuidar under trespasser — Co-sharers — Surrender by some.

The continuous possession for twelve years which is the subject of S. 6 of the Act VIII of 1869 must be possession under one and the same right. This right might have been in its inception joint with other person and by the death of co-sharers ultimately becomes a sole right without its continuous nature being affected.

Where there was a surrender by the co-sharers and a confirmatory patta was granted in favour of one of them:

Held, that the right was continuous for the purpose of S. 6. A.I.R. 1933 Cal. 590=37 C.W.N. 1009=60 Cal. 1287=144 Ind. Cas. 808.

59. Opinion of settlement officers.

——Opinion of settlement officers—Value of.

It is now well-settled that opinions of officers expressed in Settlement Reports regarding the nature of a tenure, although entitled to weight, cannot form the basis of a judicial decision. A.I.R. 1948 Pat. 448.

60. Paikan land.

——Paikan land—Transfer without consent of temple authorities—Validity.

A transfer of the paikan land (i. e.) land held by Paiks of the temple on condition of rendering services to the deity, is not absolutely void. The temple authorities may consent to or acquiesce in the transfer. They may accept services from a non-paik transferee or if he is not capable of rendering services they may accept rent in cash from him. There is nothing to prevent the temple authorities from adopting these courses. A transfer without their consent and acquiescence which seeks to separate the obligations of the land from its enjoyment would certainly be voidable at the instance of the temple authorities.

Where the paikan land was attached and sold under the orders of the Court in execution proceedings without any objection being raised by the temple authorities and the auction-sale was not challenged within the period allowed by law, the title of the auction-purchaser cannot be disputed by the temple authorities by reason of the efflux of time, even if the auction sale was originally void. A. I. R. 1950 Assam 1.

61. Patni.

——Patni—'Adha' and 'urdha'.

The words "adha and urdha" in the document conveyed the under-ground rights to the lessees including the right to work mines and extract coals. 1921 P.H.C.C. 49=A.I.R. 1921 Pat. 379.

——Patni — Darpatni interest, unless legally terminated continues.

A darpatni interest is an interest recognised by law and cannot be held to have come to an end until and unless it has been legally terminated. A.I.R. 1944 Pat. 41=23 Pat. 31=10 B.R. 525=212 Ind. Cas. 504 (F.B.).

——Patni—Intermediate tenure.

A Zemindar can create an intermediate mirasi tenure between himself and a patnidar and such mirasidar can recover rent from the patnidar. 67 Ind. Cas. 105=34 C. L. J. 77.

——Patni—Intermediate tenure.

There is nothing opposed to law or custom to prevent a Zemindar to create an intermediate tenure between the patnidar and the darpatnidar and a suit for rent by such an intermediate tenure-holder will lie. 66. Ind. Cas. 200=34 C.L.J. 76.

——Patni tenure—Patni and darpatni—Durpatnidar and Zemindar.

A Durpatnidar, to whom Khut rent assessed on the proportion of land revenue payable to Government on that portion of the estate, should be paid by tenants holding Chakran lands under the Zemindar, is not a land-lord of the tenants by payment of **khut** rent; the Zemindar and not durpatnidar has the right to settle tenants during the Chakran tenancy but not after it is resumed by zemindar. The durpatnidar is entitled to khas possession as well as mesne profits. 22 C. L. J. 290=31 Ind. Cas. 249.

——Patni tenure—Right of co-sharer—Suit to recover rent—Other co-sharers if necessary parties.

Where the plaintiffs sued for a declaration that the defendants had no mirash right in the plaintiffs' patni lands, that the plaintiffs were entitled to get the said lands assessed to rent and for recovery of fair and equitable rent and it appeared that while some of the lands exclusively belonged to the plaintiffs as regards certain others they had merely the undivided interest as co-sharer.

Held, that the suit could be divided only as regards the plaintiffs' exclusive lands, and that it could not be proceeded with in the absence of the other co-sharers as regards the other lands. 34 C.W.N. 379=A.I.R. 1930 Cal. 693.

——Patni—Right to minerals.

In the absence of express words mukarrari leases and other grants do not carry with them the rights to

to the minerals and a patni lease stands on the same footing as a mukarrari lease so far as the right to the minerals is concerned. 5 P. L. J. 563, **Foll.**; 16 C.L.J. 7, **Not Foll.**; A.I.R. 1925 P.C. 42 and A.I.R. 1917 P.C. 163, **Expl.**; A.I.R. 1925 Cal. 962 and A.I.R. 1927 Cal. 956, **Dist. from.**

History and incidents of patni tenure discussed—the word 'talukdar' explained. 112 Ind. Cas. 659=8 Pat. 190=9 P.L.T. 593=A.I.R. 1928 Pat. 482.

——Patni—River-beds included in patni **tenure becoming culturable land—Such land resumed by Government and assessed—**Zemindars **accepting settlement of land—Rent settled, whether adds to** patnidar's **liability.**

Where the beds of the rivers included in the original **patni** become culturable land and after such land is resumed by the Govt., the zemindar takes settlement of such land from the Govt. the rent settled in respect of that land in the resumption proceedings cannot add to the liabilities of the patnidars who are entitled to hold according to the original patni lease, while the representatives of the original zemindars continue to own the land. Hence the patnidars are entitled to a declaration that the rents assessed should be treated as Samil jamas with tenure rent as long as the representatives of the original lessors retain the superior interest.

Where the zemindar refuses to take settlement of the land and the patnidar pays the rents assessed in the resumption proceedings direct to the Govt., the patnidar is entitled to claim abatement to the extent to which it can be shown that he is paying twice over for the same land. But in the absence of any evidence as to the terms of the grant, or that the rate of rent was in any way affected by the consideration that there might be re-formation in the beds of existing rivers, it cannot be held that the patnidars are paying rent twice over for any part of the lands held by them. A..I.R. 1941 Cal. 242=199 Ind. Cas. 618.

——Patni—Sale of—Suit for khas **possession—Onus.**

Plaintiffs purchased a putni in execution of a decree for arrears of rent. Within 12 years of this purchase they sued for possession of the lands,

Held, that it was for the plaintiffs to show that the zemindar was in possession of these lands before the creation of the putni and that the possession of the defendants commenced after the putni came into existence or that such possession was not adverse.

The decision of the Judicial Committee in 39 Mad. 617 (P. C.) does not lay down any principle contrary to that laid down in 19 C.W.N. 18. 61 Ind. Cas. 469=25 C.W.N. 106=A.I.R. 1921 Cal. 754.

——Patni—Transferee's rights—Completion.

The transferee's rights are perfected by transfer by the patnidar and are not contingent on payment of the fee and security under S. 6 (1) of the Patni Regulations, (15 C. 345 12 C. 622 F, 20 W. R. 380, con). The transferee may therefore claim the compensation money on acquisition by Government even though he has not registered his name in the books of the Zemindar. 16 C.L.J. 301=18 C.W.N. 103=17 Ind. Cas. 171.

——Patni—Zemindar's **power to create intermediate tenure.**

A Zemindar can create a tenure intermediate between his zemindary interest and a patni provided he does not thereby prejudice the position of the first tenant. 60 C. 1092=A.I.R. 1933 Cal. 543=144 Ind. Cas. 92.

62. Permanent tenancy.

See also: T. P. Act (1882), Ss. 105 to 108.

——Permanent tenancy—Onus—Party appealing to Civil Court on ground that action of Revenue Board subjecting land to additional assessment was ultra vires**—Burden of proof is on him.**

The party appealing to the Civil Court has to establish that the Court has jurisdiction and that the Board of Revenue have acted **ultra vires** in subjecting the land included in the Permanent Settlement to an additional assessment. A.I.R. 1937 Cal. 574=176 Ind. Cas. 341.

——Permanent tenancy.

The mere fact that tenure holders are called jagirdars does not show that they have a permanent interest but tends the other way. A.I.R. 1933 Cal. 21=36 C.W.N. 866=140 Ind. Cas. 385.

——Permanent tenancy—Miadi sarbarakar**—Tenure, if permanent and heritable.**

A **miadi sarbarakar** in Orissa has only a temporary tenure and for the period of settlement only. His tenure is neither permanent nor heritable and he cannot claim re-appointment as a matter of right. A.I.R. 1933 Pat. 74=11 Pat. 757=14 P.L.T. 743=141 Ind. Cas. 340.

——Permanent tenancy—Lessee can transfer interest in lease with consent of lessor—Such a transfer cannot create custom **or vary the terms of lease.**

During the period of the lease, the lessee has security of tenure and may, with the consent of the lessor, alienate his interest but his interest and that of his transferees is nonetheless temporary and for the period of the lease only and no amount of transference by contract, succession or inheritance during the period of the lease can create a "custom" to vary the terms of the lease and override the stipulation for a fixed period. A.I.R. 1933 Pat. 74=11 Pat. 757=14 P.L.T. 743=141 Ind. Cas. 340.

——Permanent tenancy—Suit for declaration of title—Onus of proof that lands were included in settled estate.

Where the plaintiffs sue for declaration of title to land alleging that the lands were dry lands at the time of the Permanent Settlement and were assessed as included within their permanent settled estates, the onus of proving that the lands were included within the estate and assessed at the time of the Permanent Settlement is on the plaintiffs. As it is a question of fact and not of law, it is to be proved in order to enable the plaintiffs to succeed in the suit. A.I.R. 1931 Cal. 239=34 C.W.N. 1113=133 Ind. Cas. 573.

——Permanent tenancy—Succession — Custom — Onus.

The rule of succession to a permanent tenure, heritable in its character, is, in the absence of a statute, terms of a grant, if any, or valid and binding custom to the cantrary, the same as is applicable to other properties left by a deceased tenant. If a special custom excluding collaterals from inheritance as regards a permanent tenure is pleaded, the party pleading such a custom must have the onus laid on it to prove by satisfactory evidence that such collaterals, though heirs under the personal law of the deceased tenant in respect of all other assets left by him, were excluded from inheritance as regards his rights in the permanent tenure. 119 Ind. Cas. 514=1929 A.L.J. 309=10 L.R.A. Rev. 138=A.I.R. 1929 All. 223.

——Permanent tenancy—Proof of.

The Court has to find whether the tenants' predecessors possessed occupancy rights at the incep-

tion of the relation of the parties, and not whether there was a subsequent change in those relations. When the origin of the tenancy is not known, evidence of the acts and conduct of the parties consitutes the best and the only evidence to prove the nature of the tenancy. The Court is entitled to infer from the continuance of land in the same hands at a low and unvarying rent, permanent rights of occupancy. 79 Ind. Cas. 619=1924 M. W. N. 487=A. I. R. 1924 Mad. 833=47 M.L. J. 598.

——Permanent tenancy—Long possession—Presumption.

Where plaintiff is in undisturbed possession of a tenure which was in existence for 75 years, from his purchase in 1879 till the partition proceedings. **Held,** that the tenure was parmanent. But it does not follow that the tenure is not liable for enhancement of rent. 37 Cal. 662=15 C.W.N. 45=7 Ind. Cas. 881.

——Permanent tenancy — Evidence — Characteristics.

Long possession at uniform rent, erection of expensive buildings without interferences, transfers by sale, gift, mortgage in succession, execution of receipts for rent, in which it is described as permanent, are indications to show the permanent nature of the tenancy. (28 C. 738 F. 3 C. 696, 16 C. 223, 21 A. 496, Dist.) In the case of a permanent tenancy at fixed rate no enhancement can be allowed. Permanent tenants cannot also be restrained from building or rebuilding their houses in the absence of a contract to the contrary. 197 P.W.R. 1912=209 P.L.R. 1912=121 P.R. 1912=17 Ind. Cas. 208.

63. Poramboke lands.

See also: Land tenures—Ryotwari—Tree patta.

——Poramboke lands—Tree patta.

Where land has been registered as tope poramboke, prima facie the paramount title is with Government. Tree pattas not being issued to owners of the land on which the trees stand, the holder of tree patta in respect of land registered as tope poramboke is not owner thereof. 79 Ind. Cas. 881=A.I.R. 1925 Mad. 143.

——Poramboke—In inam village — Burden of proof.

In an inam village belonging to the plaintiff, all lands within the ambit of the village prima facie belong to the plaintiff and it is for the defendant to raise the plea that the suit lands are communal poramboke lands and therefore do not belong to the plaintiff and to allege and prove the facts necessary to substantiate the contention. 81 Ind. Cas. 1021=20 M. L. W. 185=A.I.R. 1925 Mad. 139.

64. Pradhan.

See also: (1) Chota Nagpur Ten. Act, 1908.
(2) Land Tenures—Headmanship.

——Pradhani tenure—Ingredients of—Hat-Injunction restraining the holding of Hat.

Where certain persons holding a pradhani tenure in respect of the entire village hold a hat in a few plots belonging to them, it does not amount to such use of land as can be held to withdraw an unreasonably large area from cultivation, as would justify the granting of an injunction, at the instance of the proprietor of the village, restraining those persons from holding the hat on these plots. A hat is a useful institution which is run for the benefit of all the villagers, and unless a proper case favouring an injunction is satisfactorily made out no injunction ought to issue. 62 C.L.J. 123=166 Ind. Cas. 878.

——Pradhan—Whether statutory tenure.

Prodhani tenures are not statutory tenures, and the incidents of any particular tenure must largely be the creature of custom or of contract. 62 C.L.J. 123=166 Ind. Cas. 878.

——Pradhan.

Tenants inducted by Pradhan cannot acquire rights by adverse possession against the land-lord. To define the status of a Pradhan in the Santhal Parganas is a somewhat difficult matter. He is not a tenure-holder in the ordinarily accepted sense, but he has all the attributes of a tenure-holder and possibly he has greater rights. The Pradhan although not a tenure-holder as defined in the Bengal Tenancy Act at the present day combines both the attributes of Jeth raiyat or head raiyat of a village and ijaradar or true tenure-holder 1921 P.H.C.C. 8=A.I.R. 1921 Pat. 67.

65. Rafa-tanki tenure.

——Rafa-tanki tenure.

The nature of the Rafa-tankidari interest is a question for determination in each case and they cannot be classed as a whole either as tenures or as raiyati holdings.

The status of Rafa-tankidars in the particular case was that of tenure-holders and the tenants under them were occupancy raiyats.

In 1838 during the resumption proceedings by the British Government a compromise was entered into between some of the Tankidars and the Government to the effect that on condition of their agreeing to pay rent at a certain fixed rate no enquiry would be made as to the liability of their interests to be resumed. The rates so fixed were known as Rafa-tanki, or compromise quit rents, and the holders of these lands came to be known as Rafa-tankidars. In many cases Rafa-tankidars belonged to the raiyati class, but this in itself is not sufficient to show that their interests were necessarily those of raiyats rather than tenure-holders. 105 Ind. Cas. 633=6 Pat. 698=9 P.L.T. 72=A.I.R. 1927 Pat. 209 (F.B.).

——Rafa—Tanikdars — Occupancy rights—Khurdah.

In the Khurdah Estate, and in zemindaries which at one time formed part of that Estate, Rafa-Tankidars are occupancy Rayats and not tenure holders. 5 Pat. L.J. 373=57 Ind. Cas. 225.

66. Rent-free.

——Rent-free—Revenue free and rent free lands—Distinction—Importance of, on question of onus.

The claim of a revenue-free title is obviously different from a claim that the lands are held rent-free. The latter proceeds on the assumption that the lands are included within the regularly assessed estate of the land-lord but the tenants are still entitled to hold them without payment of rent to the zamindar. If the lands are claimed to be revenue-free, that is, lakheraj in the strict sense of the word, it will be for the plaintiffs to show before they can succeed in their suits that the lands are comprised within their estate. On the other hand, if the defence is only a plea of rent-free title, the onus of proof will lie on the defendants, who will have

to prove when and how they or their predecessors relieved themselves of the obligation to pay rent. A.I.R. 1942 Cal. 309=74 C.L.J. 574=46 C.W.N. 309 =200 Ind. Cas. 749.

——Rent-free.

Muafi or rent-free tenure may be analogous to that of tenancy but it is governed by different provisions of law. A.I.R. 1942 Oudh 25=1941 O.W.N. 1101=1941 R.D. 851=1941 A.W.R. 879=17 Luck. 215=196 Ind. Cas. 673.

——Rent-free—"Belagan," whether means rent-free holding.

Without deciding that "belagan" means generally in the District of Jharia all that the Court (in Letters Patent Appeal) held was that it could not take a different view from the Courts below having regard to the materials on the record, i. e., the word "belagan" as used in this district did not necessarily mean rent- free but that it meant a holding which is not paying rent, and such may be a rent-free holding or it may be a holding for which rent may later be assessed. A.I.R. 1941 Pat. 488=7 B.R. 750=194 Ind. Cas. 300.

——Rent-free.

Land-lord mortgaging land with possession cannot create right in tenant to hold the land rent-free. This can only be done by the mortgagee in possession but even that would not be binding against the mortgagor unless the settlement was made bona fide in the ordinary course of management. 5 B.R. 342=A.I.R. 1939 Pat. 258=180 Ind. Cas. 105.

——Rent-free—Long possession without payment of rent—Presumption.

Long possession without payment of rent may justify, in particular circumstances, an inference of a rent-free tenure. The onus is always on the side of the tenant to establish by satisfactory evidence that the tenure he holds is rent-free, when the land-lord has shown that the land is within the revenue paying estate. A.I.R. 1937 Cal. 755= 65 C.L.J. 474=172 Ind. Cas. 987.

——Rent-free tenure—Creation if.

A rent-free tenure is created when the proprietor of a land creates rights by which one person can hold it free of rent while the other is liable for the revenue and where such rights are created, the law as to rent-free grants applies. The law as to resumption as to rent-free tenures overrules, in view of Government interests contracts otherwise valid. In considering their effect considerations other than those applying to ordinary transactions must be taken into consideation. 1 O.L.J. 325=25 Ind. Cas. 594.

——Rent-free tenure—Long possession without payment rent.

From the evidence of long and uninterrupted possession without paying rent, the Court may presume the land to be granted rent-free, though possibly not revenue-free. There can be a rent-free grant of a permanently settled land and such a grant is binding on the grantor's heirs and successors.

In strictness 'Lakhiraj' indicates a freedom from liability to pay revenue but is often used loosely to indicate exemption from liability to pay rent. 18 C.L.J. 166=18 C.W.N. 913=21 Ind. Cas. 415.

67. Resumption and forfeiture.

See also: 1. Land Tenures—
(a) Ghatwali tenure—Forfeiture
(b) Service tenure
2. Grants
3. Inams

——Resumption and forfeiture — Saranjam — Grant of royal share of revenue—Resumption of grant.

When a grant of the royal share of the revenue takes place and the grant is resumed by the Government afterwards, the Government do not acquire the mirasi or the occupancy right which is a heritable and transferable right in holdings of which the saranjamdar has become the khatedar during the continuance of the grant, either by surrender or forfeiture. 89 Ind. Cas. 539=49 Bom. 126=26 Bom. L.R. 1173=A.I.R. 1925 Bom. 197.

——Resumption and forfeiture.

Resumability of a tenure is different from its forfeiture on account of dismissal of its holder. 84 Ind. Cas. 405=3 Pat. 673=A.I.R. 1924 Pat. 616.

——Resumption and forfeiture— "Santhathi Brahmaswam" and "Adimayavana."

No custom in favour of a right of re-entry of land-lord who has granted lands on the tenures known as Santhathi Brahmaswam and Adimayavana is established. 65 Ind. Cas. 942=45 Mad. 394=15 M.L.W. 650=1922 M.W.N. 192=31 M.L.T. 1=A.I.R. 1922 Mad. 274=43 M.L.J. 1 (F.B.).

68. Ryotwari.

Synopsis.

a. Alienable and heritable
b. Evidence
c. Irrigation rights
d. Nature of holding
e. Occupancy right
f. Pattadar's rights
g. Permanent tenancy
h. Remission of assessment
i. Resumption and regrant
j. Right to vary assessment
k. Tree patta
l. Unassessed waste lands.

68 (a). Alienable and heritable.

——Ryotwari—Alienable and heritable.

The estate of a ryotwari proprietor is heritable and alienable. He has a sufficient estate to support a grant of an easement and he would be a capable grantor as understood in English Law, for the application of the doctrine of lost grant. (1936) M.W.N. 426=44 M.L.W. 139=A.I.R. 1936 Mad. 682=71 M.L.J. 187= 59 M. 979=164 Ind. Cas. 764.

68 (b). Evidence.

——Ryotwari—Evidence.

Where cerain land does not appear to have been assessed and there is no name given in col. 16 of the Survey and Settlement Register prepared under the Madras Surveys and Boundaries Act under the heading "Name of enjoyer," these facts, by themselves, do not prove that the land is not ryoti. A.I.R. 1939 Mad. 716=49 M.L.W. 238=(1939) M.W.N. 230.

68 (c). Irrigation rights.

——Ryotwari—Irrigation rights.

The right of the holder of wet land on ryotwari areas under Govt., whether it be based on contract or whether it be proprietary in its nature, is a right to the accustomed quantity of water and is subject to the right of the Govt. to control the supply and even to change the source provided there is no diminution of facilities. A ryot cannot prescribe for a right to take water from a particular source without regard to Govt. control and no declaration to this effect can be given unless the circumstances warrant the assumption that the Govt. has expressly divested itself of the control of sources of water supply.

A lost grant cannot be presumed as against the Govt. unless there is evidence of 60 years' user and never when the evidence shows positively that no such grant had been made less than 50 years' before the suit. (1936) M.W.N. 358=A.I.R. 1936 Mad. 692=162 Ind. Cas. 97.

——Ryotwari—Irrigation rights.

Under the general law prevailing in the Madras Presidency, the ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He has no right to insist that his supply shall come from any particular source or any other souree than that recognised by Govt.or that it shall come by any particular channel, nor can he prescribe against the Govt. for such right by user otherwise for any length of time. It is open to Govt. to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. (Relationship between the Govt. and the wet ryot and the wet ryots **inter se** indicated). The wet ryot has a right as against other wet ryots and even subject to Govt.'s right to give him an equally efficient supply, as against Govt. to the protection of law for that supply, once it has passed into the channel ear-marked for his supply. One ryot cannot prescribe against another. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorisation of Govt. Nor is it an easement by which he is conveying property of his own over a servient tenement. It is an incident of ryotwari tenure. If the customary supply and manner of supplying according to this contractual or proprietary right has been interfered with, not by Govt. but by private parties such interference, **prima facie** is an invasion of a right and will give rise to a civil cause of action.

The doctrine of percolating water flowing under ground in undefined channels as settled by English decisions should not be applied to the water carried in the sandy bed of an Indian river in the dry months between monsoons. Necessary modifications must be made in the English Law of flowing water to make it applicable to the tropical countries.

(Right of wet ryots **inter se** discussed.)

When the whole of water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise amount of the particular damage caused by that diminution. Under such circumstances, the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage.

Per **Pandalai, J.**—Though there is no ownership to percolating water till it reaches a defined channel not even of the owner of soil under which it percolates and though there is, therefore, no infringement of any right of property by appropriating such percolating water yet it is possible for an owner to be guilty of a breach of contract, if, by appropriating under-ground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain. A.I.R. 1931 Mad. 284=33 M.L.W. 631=61 M.L.J. 563=54 M. 793=133 Ind. Cas. 507.

——Ryotwari—Irrigation rights.

Mirasdars who own wet lands from time immemorial have a preferential right to the supply of water from a Government tank in a village to the assignees of waste lands from Government who have since brought them under cultivation. 51 Ind. Cas. 734 (Mad.).

——Ryotwari—Irrigation rights.

A plaintiff, whose land is prevented from getting water by a dam erected by Government, can sue in a Civil Court to protect his right. (1914) M.W.N. 788=26 Ind. Cas. 18.

68 (d). Nature of holding.

——Ryotwari—Nature of holding.

There is absolutely no relation or analogy between the nature of Kumri lands in South Canara and ryotwari holdings. 80 Ind. Cas. 835=26 Bom. L.R. 639=20 M.L.W. 49=51 I.A. 257=1924 M.W.N. 572=35 M.L.T. 128=47 Mad. 572=29 C.W.N. 365=A.I.R. 1924 P.C. 150=47 M.L.J. 35 (P.C.)

68 (e). Occupancy right.

——Ryotwari — Occupancy right — Presumption against—Vernacular descriptions of tenure—Contract executed by predecessors of tenants negativing claim of occupancy—Onus.

There is no special rule as to burden of proof applicable to Tanjore temples on account either of their location or their management by the Collector up to 1860, or on account of anything except the agreements between the Collector and the ryots about 1830. 34 M.L.J. 234 Expl. The fact that land-holders had a tendency to get inserted in pattas and muchalikas terms negativing the existence of occupancy rights is not itself sufficient to justify a Court in refusing to consider on the merits and with reference to the burden of proof such terms in pattas and muchilikas of a date prior to the decision in 6 M.H.C.R. 164. There is a presumption against occupancy rights in a tenant of a ryotwari pattadar. Vernacular descriptions of tenures in Madras Presidency are elastic and their definitions derived from Wilson's Glossary, or other works of reference must be accepted with caution as corresponding at most to their normal meanings and subject in each particular case to revision in the light of its circumstances. (1920) M.W.N. 163=10 L.W. 525=53 Ind. Cas. 308.

[Also (1920) M.W.N. 532=12 L.W. 191.]

——Ryotwari — Occupancy right — Pattadar—Long enjoyment and low and un-varying rent—Transfer of holdings by tenant—Effect of.

In the case of lands held under the ryotwari settlements the presumption is that the ryotwari pattadar is the owner of the land and the burden is on his tenants claiming a permanent right of occupancy to prove it. Mere length of enjoyment in the capacity of tenants or parukudies irrespective of their circumstances does not raise a presumption of occupancy right. The inference as to occupancy right depends on a consideration of the whole circumstances of the case and among

these circumstances are the continuance of the lands in the same hands at low and unvarying rents and the recognition by the land-lord of the tenant's rights to transfer the holding.

The history of the ryotwari settlement considered. 36 M. L. J. 463=9 L. W. 453=26 M.L.T. 311=52 Ind. Cas. 247.

——Ryotwari—Occupancy right.

The right of an occupancy right as over-riding the proprietor's right to cultivate his own lands is of a special character and as such it is one which the party seeking to derogate is bound to establish.

When the defendants have been accepting leases from the plaintiff in respect of the suit lands and when the crops were attached, they failed to bring a suit to establish their right when their claim petition was rejected, the defendants have failed to make out their occupancy right. (1915) M.W.N. 277=28 Ind. Cas. 916.

68 (f). Pattadar's rights.

——Ryotwari—Pattadar—Rights of.

The rights of a pattadar holding land upon ryotwari tenure under the Government are not the same as those of an occupancy tenant under a land-holder of an estate. So it cannot be maintained that the occupant of land under the former tenure can by means of such occupation acquire by prescription a title under the latter tenure. 41 Ind. Cas. 167 (Mad.)

——Ryotwari—Pattadar—Tenants under—Claim of permanent occupancy—Onus.

If in a case of ryotwari land the under-tenants, under a Government pattadar, claim a permanent right of occupancy in the land the burden of proving their right is on the tenants. A permanent tenancy may owe its origin to a custom, contract or title. Where the under-tenants of a pattadar had been in possession from time immemorial digging wells and making expensive improvements and selling the wells with or without the lands and enjoying the properties hereditarily. **Held,** that they had proved a permanent right of occupancy. 43 Mad. 567=47 I.A. 76=18 A.L.J. 707=22 Bom. L.R. 578=(1920) M.W.N. 61=27 M.L.T. 102=11 L.W. 399=38=M.L.J. 476=56 Ind. Cas. 117 (P.C.)

[On appeal from 24 M.L.J. 571=13 M.L.T. 450=(1913) M.W.N. 434=20 Ind. Cas. 374.]

——Ryotwari tenure—Pattadar's rights—Government's rights to put an end to the tenure.

A ryotwari holder is entitled to hold the lands so long as he paid the revenue properly leviable from him; and in default he can be ousted only on legal process taken under Madras Act II of 1864. The Government after having once granted the lands to one person cannot subsequently take them away from him otherwise than by process taken under Madras Act II of 1864 and grant a fresh patta to another. 19 M. 156; 31 I. A. 207 foll. 15 M. L. J. 416=28 M. 505.

68 (g). Permanent tenancy.

——Ryotwari — Permanent tenancy — Onus of proof.

The onus of proving a permanent tenancy under a ryotwari Pattadar is on the tenant setting up such right. Where the ryot is a temple the trustees of which could not create a permanent lease of the temple lands, the presumption against the acquisition of occupancy rights by the raiyats is greater. Mere description by the tenants as kudikanaidars, Ulavadaikani mirasdars in the village could not confer occupancy rights on them. Nor does the fact that the tenants have made transfers of the holdings without objection or demur by the trustees confer a permanent occupancy right by estoppel. 23 M.L.T. 161=34 M.L.J. 234=7 M.L.W. 380=44 Ind. Cas. 894.

68 (h). Remission of assessment.

——Ryotwari—Remission of assessment on land used for cattle shed—Land not excluded from patta—Effect.

Where plaintiffs petitioned Government to allow them to use a portion of their own land as a cattle shed and a farm house free from rent and the Government allowed the remission but in the next pattah the portion of the land in question was included though the assessment thereof was deducted from the total amount of rent, **Held,** that the plaintiffs did not give up their interest in the land and place it at the disposal of the Government absolutely. 26 Ind. Cas. 961 (Mad.)

——Ryotwari tenure—Remission of assessment.

Where at the request of the ryots certain land occupied by them was exempted from assessment and classified as gramanatham, the ownership or title of the ryots is extinguished and it is not open to them, notwithstanding such classification, to retain the land. Where land is classified as poramboke nattam and is annexed to the village site, the land is at the disposal of Government and the latter may grant it to **bona fide** applicants for house-site. 13 M.L.J. 269.

68 (i). Resumption and regrant.

——Ryotwari—Resumption and re-grant of inam declared illegal—Refund of land revenue—Claim for—Maintainability—Patta—Effect of.

The Government resumed a devadayam inam and granted a ryotwari patta to a certain person in respect of it. The plaintiff derived his title from this person. The resumption by the Government was ultimately held to be illegal by a competent Civil Court. The plaintiff sued the Government for the recovery of the assessment which he had paid.

Held, that as the plaintiff had paid the revenue with knowledge that Government's right of resumption was in litigation there was no question of mistake,

Held, further that the issue of a patta not only did not convey the land in question from Government to the plaintiffs predecessor-in-interest but did not even create a contract in respect of the land between them and that the plaintiff was not entitled to refund of land-revenue paid. 23 M.L.J. 746 and 26 Mad. 268, Foll.; A.I.R. 1922 P.C. 403, Dist. 87 Ind. Cas. 644=1925 M.W.N. 481=A.I.R. 1925 Mad. 859=48 M.L.J. 440.

68 (j). Right to vary assessment.

——Ryotwati tenure—Right to vary assessment.

The proprietorship of the ryotwari holder in his holding is subject to the prerogative which the Crown has, according to the common law of India, of imposing, by an executive act, assessment on land and varying it from time to time. The rigtt of the Government to assess land to land revenue and to vary it is not a right created or conferred by any statute, but the Crown possesses the prerogative of exacting from a subject holding arable land its share of the produce or the equivalent of such

produce. 91 Ind. Cas. 82=48 Mad. 586=22 M.L.W. 762=1925 M.W.N. 815=A. I. R. 1925 Mad. 1134=49 M.L. J. 79.

68 (k). Tree patta.

Ryotwari—Tree patta—Land patta—Cancellation of tree patta—Effect of—Right of pattadar of land to trees.

Plaintiff held a patta of trees on suit land for 20 years and defendant held patta for land. The former patta was cancelled and defendant interfered with plaintiff's enjoyment of trees. In plaintiff's suit for recovery of trees it was held that the cancellation of the tree patta did not vest ownership of them in the defendant and plaintiff had a preferential claim. 36 Mad. 148=10 M.L.T. 488=(1911) 2 M.W.N. 532=22 M.L. J. 201=13 Ind. Cas. 37.

68 (l). Unassessed waste lands.

——Ryotwari tenure—Unassessed waste lands—Rights of Government—Penal assessment—Effect of.

Unassessed waste lands in Government ryotwari tracts are at the disposal of the Government till a patta is granted. When once patta is granted, the right of the Government is confined to the recovery of the revenue due in respect of it. The peneal or Sivajama assessment imposed by the Government on trespassers amounts to a condoning of the act of trespass, but does not amount to a recognition of any right, nor any undertaking on the part of the Government to permit the occupation for the future. 91 Ind. Cas. 503, Ref. to. 124 Ind. Cas. 607 (Mad.).

69. Saranjam tenure.

——Saranjam tenure—Nature and incidents of—Saranjam Rules—Effect and scope of—Adverse possession by stranger—Value of—Resumption by Government—Effect on nature of land.

It is clear that the whole structure of saranjam tenure is founded in the sovereign right, which can only be changed by conquest or treaty. So founded, jagirs and saranjams, with the feudal incidents connected with them, are granted or withheld at the will and pleasure of the sovereign power, and if granted, the fixity of tenure is always subject to interruption and revocation by resumption, whether temporary or absolute in character. No incident normally applicable to private rights between subject and subject can fetter or disturb the sovereign will. Thus adverse possession by a private person for however long a duration, is nugatory before a paramount resumption or a re-grant. The rules framed by the Government are only rules of convenience and cannot exhaust the general power or prevent the Government from making a decision or determination referential to a particular saranjam without altering the rules with regard to all of them. A saranjam tenure cannot be destroyed by adverse possession. When Government resume the grant by levying the full assessment payable, the land ceases to be saranjam land and becomes khalsa land. 49 Bom. L.R. 270=A.I.R. 1947 Bom. 340 (F.B.)

70. Sarabarakari.

——Sarabarakari — Classification of sarabarakari into maurasi and miadi—Protection of rights of proprietors among others.

The distinction between "maurasi sarabarakari" and "miadi sarabarakari" consisted only in this that the former had a permanent and heritable interest while the latter had a temporary tenure during the continuance of the lease, Sarabarakars who were found to be in possession of the tenures from generation to generation before 1803 were classified as the "maurasi sarabarakars" while those who could not prove the existence of such a tenure but who had nevertheless been found to be in long possession of the tenure and were in possession at the time of the settlement were recorded as "miadi sarabarakars". Therefore, the status of "miadi sarabarakars" under the first Provincial Settlement of 1837 was of a temporary nature during the continuance of the lease. The period of the first settlement was extended by 30 years and continued up to 1897 when a fresh settlement began. The classification of sarabarakars into "maurasi" and "miadi" (which means for a fixed term) must be construed to have been made with a view to protect the rights of proprietors among others. Government reserved to themselves rights in regard to public revenue only. 15 P.L.T. 639=A.I.R. 1934 Pat. 632=1 B.R. 88 (2)=152 Ind. Cas. 759.

——Sarabarakari — Miadi sarabarakars—Permanent and heritable right.

Miadi sarabarakars cannot claim any permanent and heritable right by being treated as sub-proprietors. If they have come to be noted as "sub-proprietors" in the Survey and Settlement Records, this fact will not alter share status as conferred on them by the document of their title, viz., their kabuliyat. 15 P.L.T. 639=A.I.R. 1934 Pat. 632=1 B.R. 88 (2)=152 Ind. Cas. 759.

——Sarabarakari—Incidents of—Khurda—Orissa.

Sarabarkars in Khurda are mere office holders, though in practice their position was hereditary. They have no heritable or transferable right in their office or in the Sarabarkari Jagir lands. They are liable to dismissal for mis-conduct and upon dismissal lose all rights in the Jagir lands. 46 Cal. 378=36 M. L. J. 18=25 M.L.T. 73=29 C.L.J. 175=9 M.L.W. 269=23 C.W.N. 343=21 Bom. L.R. 580=54 I.A. 246=48 Ind. Cas. 391 (P.C.).

[On appeal from 18 C.W.N. 74=22 Ind. Cas. 359].

71. Saunjhi tenure.

——Saunjhi tenure—Removal of saunjhidar—Jullundur City (Punjab).

The principle that a saunjhidar in a village can be removed only by the proprietary body does not apply to the case to a saunjhi or saunjhidar of Jullundur City within Municipal limits. A.I.R. 1940 Lah. 356=192 Ind. Cas. 429.

——Saunjhi tenure.

Under saunjhi tenure the saunjhidar is entitled to retain possession without paying any rent so long as he gives his services as purohit to the grantor. 109 Ind. Cas. 653=A.I.R. 1929 Lah. 77.

72. Savaram.

——Savaram—Nature of.

Per **Sundara Aiyar, J.**—Savaram does not necessarily import absence of kudivaram in the cultivating ryot. It was compensation granted to the Zamindar or Revenue Officer by the Mahomedan Government. In some cases land exempt from payment of rent was granted. But if it was unavailable, the revenue of a portion of the lands for the assessment of which he was responsible was granted. Per **Sadasiva Aiyar, J.**—In consequence of certain lands being savaram the Courts may (but not must) presume that both Melvaram and Kudivaram belong to the Zamindar. 36 Mad. 168 =23 M.L. J. 624=(1912) M.W.N 1193=12 M. L. T. 561=17 Ind. Cas. 353.

73. Service tenure.

See also: Grants—Inam—Service inams.

Synopsis.

a. Alienability
b. Chaudry and kanungo
c. Chaukidari Chakran lands
d. Denial of title—Ejectment
e. Description "kasra chakran"
f. Dharmilla inam
g. Digwar—See: Land tenures—Digwari tenure
h. Ejectment
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l. Khairat Kusbrit tenure
m. Muafi kidmati lands
n. Mullagiri lands
o. Personal service
p. Purakkudi service
q. Resumption
r. Right to hold adversely.

73 (a). Alienability.

——**Service tenure — Alienability — Cessation of service.**

If the service cannot be enforced, the service tenure looses its character as a service tenure under the common law fetter of inalienability is removed and the land can consequently be alienated. 18 C.L.J. 277=18 C.W.N. 297=21 Ind. Cas. 481.

——**Service tenure—Alienability—Resumption.**

A right of forfeiture on alienation or inalienability cannot be inferred from the existence of a right of escheat in the land-lord on failure of the grantee's heirs. The custom must be proved by evidence. Resumability does not follow from alienability; the right of resumption and re-entry on alienation must be expressly given. 38 M.L.J. 275=27 M.L.T. 111=55 Ind. Cas. 380.

——**Service tenure—Alienability—Palayam of Kannivadi.**

Where the Palayam of Kannivadi was originally held in military and police service tenure and the two services were abolished in 1801 and 1816 by Lord Clive's Proclamation and by the Government of Madras respectively the tenure ceased to be a service tenure and consequently became alienable. 60 Ind. Cas. 953=20 A.L.J. 393=26 C.W.N. 106=48 I.A. 100=44 Mad. 575=34 C.L.J. 6=14 M.L.W. 49=1921 M.W.N. 352=A.I.R. 1922 P.C. 154=40 M.L.J. 537 (P.C.).

——**Service tenure—Alienability—Palayam.**

Lands held on service tenure are inalienable beyond the life-time of the holder. If an estate is freed from its connection with its public office and the services are abolished, it is subject to the same incidents of ownership and devolution as ordinary property. Where lands held on service tenures have been alienated, the subsequent enfranchisement of the lands from service will not validate the alienation so as to give an absolute interest to the alienee. 34 M.L.J. 17 and 24 Bom. 556, Rel.

An unsettled palayam held originally on condition of rendering military and police services, ceases to be inalienable on the abolition of such services by the British Government in spite of the omission of the Government to issue sanad under Regulation 25 of 1802 finally settling the peishcush payable by the holder of the estate. 1 I.A. 283 and 1 I.A. 268 Rel. 41 Mad. 749=34 M.L.J. 563=24 M.L.T. 1=8 L.W. 382=47 Ind. Cas. 733.

[Affirmed on appeal by the Privy Council: 40 M.L.J. 537.]

73 (b). Chaudry and Kanungo.

——**Service tenure — Chaudry and Kanungo tenure — Incidents — Permanent or precarious — Rule of succession—Rights of holder and of sons and junior members. See Hindu Law—Succession.** I.L.R. (1949) Cut. 811.

73 (c). Chaukidari Chakran lands.

——**Service tenure—Chaukidari Chakran lands —Resumption by Government.**

Where chaukidari chakran lands situate in a Zemindari and included in the malguzari lands are resumed by Government the title of the Zemindar is not affected; but Tannadhari lands are Lakhiraj (rent-free) and resumption by Government puts an end to tittle of Zemindar. 44 Cal. 841=21 C.W.N. 609=32 M.L.J. 565=15 A.L.J. 390= 25 C.L.J. 499=19 Bom. L.R. 462=(1917) M.W.N. 459=6 L.W. 101=2 Pat. L.W. 1=22 M.L.T. 489=44 I.A. 117=40 Ind. Cas. 981 (P.C.)

——**Service tenure—Chaukidari chakran lands —Origin of tenure — Resumption — Rights of Zemindar or Government.**

The nature of a grant of Chaukidari is not altered though some of the appointments of chaukidars are made with the approval of Government officers. Under Bengal Regulation 1 of 1793 S. (4) and VIII of 1793, S. 41 the option of resumption was reserved in the lands appropriated by Zemindar with Government's permission for remunerating chaukidars for services though such lands were not considered in the assessment of revenue being included in the mahal and annexed to malguzari lands. 42 Cal. 710=42 I.A. 30=19 C.W.N. 65=2 M.L.W. 11=17 M.L.T. 1=21 C.L.J. 31=17 Bom. L.R. 32=28 M.L.J. 457=26 Ind. Cas. 676 (P.C.)

——**Service tenure—Chaukidar jagir for chaukidari work, grant of—Resumption.**

Where a jagir is a chaukidar jagir granted to the village chaukidar in his capacity of chaukidar for services which are in their nature essentially public services and not private to the zemindar, the office is of a public nature and is not liable to resumption at the instance of the zemindar. Even if the zemindar had been accustomed to demand certain private services from chaukidar, he would not be entitled to resume the chaukidari land merely because those private services were no longer rendered so long as the holder of the land was the chaukidar of the village. It may be true that when the chaukidar receives pay from the chaukidari fund, the jagir becomes liable to resumption, but that resumption can only be made in accordance with the provisions of Part 2 of Act VI of 1870, and a suit for resumption of the chaukidari land on the ground that the chaukidar receives his remuneration in another way would not be cognizable in the Civil Courts. A.I.R. 1938 Pat. 507=17 Pat. 315=5 B.R. 93=4 C.L.T. 30=20 P.L.T, 93=178 Ind. Cas. 372.

73 (d). Denial of title—Ejectment.

——Service tenure—Denial of title.

If a service tenant renounces his character as a service tenant and denies the title of the land-lord to resume the land, the lease to him determines and no notice is necessary to eject him. 103 Ind. Cas. 542=31 C.W.N. 552=A.I.R. 1927 Cal. 561.

73 (e). Description "Karsa chakran."

——Service tenure—Description "karsa chakran"—Meaning of.

Where the nature of the interest in land is described by the words "karsa chakran," it does not mean that it is a holding burdened with service but it means that the lands constituted a service tenure, the character of the lands being agricultural land. A.I.R. 1936 Cal. 49=39 C.W.N. 581=61 C.L.J. 143=161 Ind. Cas. 187.

73 (f). Dharmilla inam.

——Service tenure—Dharmilla Inam—Resumption.

An Inam granted by a zamindar to a servant for performing personal services is resumable when the services are dispensed with. So long as the servants do not commit any default in payment of rent and are willing to render the services stipulated for, they cannot be ejected. 14 M.L.T. 562=(1914) M.W.N. 179=21 Ind. Cas. 833.

73 (g). Digwar.

——Service tenure—Digwar.

See Land tenures—Digwari tenure.

73 (h). Ejectment.

——Service tenure—Ejectment—Refusal to perform service—Ejectment.

Certain person was recorded in the current Record of Rights as occupancy tenant. paying quit rent. Apart from the evidence showing that this entry was wrong, it was shown in the remark column that the person was holding service-tenure. The land-lord accepted the quit rent and instituted a suit for ejectment on refusal of the tenant to perform the services for which the tenure was created:

Held, the presumption about the correctness of the entry that the person was occupancy-tenant was rebutted by other inconsistent entry in the remark column. The tenant, therefore, was holding service tenure and on his ceasing to perform service, the land-lord was entitled to eject him and the acceptance of quit rent mentioned in the Record of Rights, did not deprive him of his right to do so. A.I.R. 1940 Pat. 587=7 B. R. 141=22 P.L.T. 216=6 C.L.T. 41=191 Ind. Cas. 89.

——Service tenure—Ejectment—Tenant refusing service—Liability to ejectment without quit notice.

Where the holder of a service-tenure refuses to perform the services on the ground that no service can be demanded from him, such tenant is liable to be ejected without a notice to quit. A.I.R. 1939 Pat. 362=5 B.R. 861=183 Ind. Cas. 80.

——Service tenures—Ejectment—Services no longer required—Tenants, if liable to be ejected—Assessment of rent.

Where the grant is subject to the burden of a service, the tenants are not liable to be ejected merely because the alleged service is no longer being rendered. If a grantor releases the services, or a portion of the services, upon which lands are held, the tenant may hold the land free of services; but the land-lord cannot put an end to the tenure and resume the land.

Where, in such a case, the service being the repairing of a bundh, the land-lord has made the performance of the service impossible by converting the land into agricultural lands, he cannot turn round and claim that the land be assessed with rent. 2 B.R. 6=A.I.R. 1935 Pat. 504=15 Pat. 46=17 P.L.T. 191=158 Ind. Cas. 621 (2).

——Service tenure—Ejectment—Liability to ejectment.

Per Odgers and Napier, JJ.—Where the holder of a service inam is found to be entitled to Kudivaram, tenants are bound to prove that they are not tenants from year to year, otherwise they are liable to be ejected on proper notice to quit. Case-law reviewed. A service tenure is not incompatible with a permanent right of occupancy as such a right does not amount to an alienation. 84 Ind. Cas. 799=19 M.L.W. 513=34 M.L.T. 175=1924 M.W.N. 466=A.I.R. 1924 Mad. 626=46 M.L.J. 515.

——Service tenure—Ejectment—Notice—Service, refusal to perform.

The tenant of a service tenure, who refuses to perform his service, is liable to be ejected even without a notice to quit. It is an incident of a service tenure that the holder thereof is liable to ejectment upon refusal to perform service; as this incident would be materially affected, and practically destroyed, if the provision of S. 155 of Bengal Tenancy Act relating to relief against forfeiture were made applicable, service tenures must be held to be excepted from the operation of S. 155 by virtue of S. 181 of the Act. When a case has been remanded by an Appellate Court, in an appeal against the decision given after the remand, fresh points which might and ought to have been urged before the remand, cannot be allowed to be taken. 2 C. L. J. 403. See also 13 M.L.J. 209.

73 (i). Grantor if can put an end to.

——Service tenure—Grantor if can put an end to.

A grant subject to a burden of service of patwari cannot be but an end to by the grantor whether the services of the holder of the grant are required or not. 13 B.L.R. 124 Rel. 19 C.L.J. 241=20 Ind. Cas. 69.

73 (j). Indicia.

——Service tenure—Indicia.

A tenant's ancestor was an occupancy raiyat; he did not hold a service-tenure but an occupancy holding the rent of which was settled at Rs. 53-2-6 annually.

He was appointed jeth-raiyat and on condition of rendering such services, he was permitted to deduct Rs. 12 from the amount of rent payable. This was not described in the Record of Rights as an incident of the tenure but as the mode in which the rent payable had been fixed. There was nothing in the entry from which it could be deduced that this holding was a jeth-raiyati jagir; the holding had been partitioned;

Held, that the occupancy-holding was not of the nature of service tenure, and the settlement of the original holding was not a grant of land burdened with services. As the zemindar had dispensed with the services of the jeth-raiyat, he was entitled to recover the rent of the sub-divided holding at the rate which was shown as payable in the Record of Rights and the tenants were no longer entitled to claim remission which they enjoyed on condition of rendering service as jeth-raiyat to the land-lord. A.I.R. 1939 Pat. 520=18 Pat. 502=6 B.R. 34=20 P.L.T. 659=184 Ind. Cas. 308 (S.B.)

——Service tenure—Indicia.

Where the lands were granted to the defendants on conditions alleged by the plaintiff, namely, that out of their produce, they were to supply rations to the plaintiff's amlas whenever they visited the villages and any surplus was to be utilised by them:

Held, that a jagir like this was unusual but the principle of service-tenures was to be applied to this kind of tenure and the plaintiff need not prove the conditions when the record of rights itself gives sufficient indication of the status of the tenants and that refusal to perform the obligations by the tenant would entail the penalty of ejectment without notice.

Held, also that no fixed quantity of grain was deliverable by the defendants and it cannot be a raiyati holding. A.I.R. 1934 Pat. 319=15 P.L.T. 391 =150 Ind. Cas. 112.

——Service tenure—Indicia.

A clear distinction must be drawn between the grant of an estate burdened with certain duties and the grant of an office, the performance of whose duties, are remunerated by the use of certain lands; and a further distinction must also be drawn between a grant for services of a public nature and one for services, private or personal to the grantor. The former class grants in each instance are liable to resumption by the grantor, while the latter class are not so liable. 13 M.I.A. 438 and 22 C. 938, ref. to. 5 C.L.J. 583=12 C.W.N. 193=34 Cal. 753.

73 (k). Inference of permanent heritable character.

——Service tenure—Inference of permanent heritable character.

The holder of a service tenure had not produced any sanad nor had she proved otherwise that the grant was a grant of an estate burdened with certain services but merely contended relying upon the circumstances, that the land had been allowed to devolve from father to son and that the tenure was created from many years ago and lastly that the zemindar did not avail himself of the services but allowed her to hold on:

Held, that there was no justification in law for the inference that the grant was of a permanent heritable character. A.I.R. 1939 Pat. 362=5 B. R. 861=183 Ind. Cas. 80.

73 (l). Khairat Kusbrit tenure.

——Service tenures—(Bihar and Orissa) Khairat kusbrit tenure—Nature and incidents—Resumability on extinction of male line—Custom in Ramgarh Raj.

Khairat kusbrit is a tenure given on condition of the receiver maintaining the worship at a particular temple and is resumable if the condition is not properly fulfilled. According to the custom in the Ramagarh Estate, such tenure is resumable when the direct male line of the grantee becomes extinct. A.I.R. 1931 Pat. 224=12 P.L.T. 891=131 Ind. Cas. 788.

73 (m). Muafi Khidmati lands.

——Service tenure—Muafi khidmati lands, nature of—Difference between muafi khidmati and muafi khairati lands.

Muafi khidmati lands are lands held in lieu of services, and persons holding such lands are usually village servants or malguzar's servants. Muafi khairati lands, on the other hand, may be lands held free in lieu of service on condition of service by persons who are not tenants, or they may be lands held by persons who are tenants, but by favour of the mulguzar hold the lands rent-free or at a low rent. The difference between land given on condition of service and land given to a tenant, which is to be held rent-free as long as the tenant performed certain services is, that if the tenant ceases to perform service in the latter cases, the land-lord is entitled to recover the assessed rent though he cannot eject the tenant. A.I.R. 1933 Nag. 313=146 Ind. Cas. 404.

73 (n). Mullagiri land.

——Service tenures — Mullagiri land—Female, if can inherit mullagiri lands.

The duties of a Mulla are of a religious and not a secular nature and a female is incapable of performing the duties. Consequently, a female is not entitled to inherit what are called mullankl or mullagiri lands, that is, lands assigned for the remuneration of a village. A.I.R. 1935 Bom. 245=8 R. B. 22=37 Bom. L.R. 257=156 Ind. Cas. 656.

73 (o). Personal service.

——Service tenures—Personal service.

Where there is no duty or service of a persona nature imposed upon the grantee of the tenure and he is merely required to appoint Police patrols and to pay for them, the tenure is not a service tenure and not ghatwali in its nature. Mere compulsion to pay rent or revenue imposed upon the grantee does not make the tenure a service tenure. 80 Ind. Cas. 544=3 Pat. 915=6 P.L.T. 191=A.I.R. 1925 Pat. 210.

73 (p). Purakkudi service.

——Service tenure—Purakkudi service—Incidents of—Notice to quit—T. P. Act, S. 111.

In the case of purakkudi service it is the refusal or neglect to perform such service that determines the tenancy and the tenants render themselves liable to be evicted without notice to quit. S. 111, T. P. Act, has no application to the tenancy. 28 Ind. Cas. 915 (Mad.).

73 (q). Resumption.

——Service tenures—Resumption.

There seems to be a distinction between a case where there is a right to service of a public character, such as Chaukidari chakran, and one where the service is to a private person. In the former case, the zamindar himself is not or may not always be entitled to resume possession, whereas in the latter case, he can do so either when the service is

not required or when the grantee has refused to perform the service. 58 C. 1359=35 C.W.N. 823= A.I.R. 1932 Cal. 221=135 Ind. Cas. 296.

——Service tenure—Resumption and re-grant—Rival claimant—Adverse possession by.

The grant of a title deed at the enfranchisement of a service inam (unlike the case of personal inam) confers a new title. The title cannot be questioned by persons unconnected either with the office or with the family of the grantee. The title conferred by enfranchisement is not necessarily confined to grants to persons either holding the office at the time of enfranchisement or those claiming the right to do so, though ordinarily as the land follows the office, the title would be conferred on the office-holder at the time of enfranchisement. It would be open to an outsider claiming an enfranchised service inam to show either that it was not an inam at all liable to resumption or that he had by prescription acquired a title to the property, good, not only as against the service holder, but also against the Government, so that the Government's power of disposition was lost. This would involve adverse possession for sixty years. 44 Mad. 643 (P. C.), interpreted and followed; 30 M.L.T. 334, Overruled. 91 Ind. Cas. 130= 1925 M.W.N. 218=48 Mad. 570=A.I.R. 1925 Mad. 780=48 M.L.J. 470.

——Service tenure—Resumption.

Resumption is permissible only when the assets include the estate at the Permanent Settlement and the grant is for service in lieu of wages or is burdened with service which the grantee is unable to perform. The attendance on ceremonial and indefinite occasions is not a condition of the holding and non-performance does not result in forfeiture. 2 M.L.W. 483=(1915)M.W.N. 346=29 Ind. Cas.365.

[Affirmed by the Privy Council on appeal: 42 Mad. 589=50 Ind. Cas. 631.]

——Service Tenure—Resumption—Grant subject to burden of service or in lieu of wages—Test.

Held, by their Lordships that the following circumstances in the case namely, (1) that no office by any particular designation, but an obligation of a feudal character was imposed on the grantee; (2) the payment of a uniform rent for a period of 120 years; (3) the absence of any interference by the zemindar with the devolution of the property from heir to heir, and (4) an absence of even an attempt at resumption during all the time, determined the character of the grant as one subject merely to the burden of service, and not as one merely in lieu of wages. Where lands are held under a grant subject to the burden of service, so long as the holders of those grants are willing and able to perform the services, the zemindar has no right to put an end to the tenure whether the services are required or not. I. A. Sup., Vol. 181 at 185 ref. to. 3 A. L. J. 55=3 C.L.J. 1=10 C.W.N. 161=16 M.L.J. 1=8 Bom. L.R. 1=1 M.L.T. 3=29 M. 52=33 I. A. 46 (P. C.).

Affirming 26 M. 403.

——Service tenure—Resumption—Digwars of Rarigurh—Dismissal by Government and resettlement with them as Saknitalukdars—Default, proof of.

The Digwari service in this case corresponded elosely with what in other cases have been termed Ghatwali. There is nothing in the use of the term Digwar to raise any presumption in favour of the contention that the holders of land by a service so named hold as personal servant of the Rajah, If anything, the presumption would seem to be the other way. The power of Government, although generally exercised through the Rajah, was always recognised as supreme with respect to the supervision over the Digwars in regard to the discharge by them of their police duties. The Rajah of Rarigurh never possessed or exercised a right to dismiss the Digwars and to resume the Digwari grants, save in cases of default; and by the terms under which persons held Digwari grants, no such power was given or reserved to the Rajah. The dismissal by Government of the Digwars and the substitution for them of a new system of rural police supposed to be of superior quality did not entitle Rajah to resume the lands for default. The subsequent settlement of the lands by Government, purporting to act under Act VIII of 1878 with the dismissed Digwars treating them as sakni talukdars, and imposing on them assessments for road and police purposes of an amount far beyond the burden which previously rested on the holding in the shape of supplying patrols, amounted to a continuance in the form imposed by statute of their public duties. There was no default. 12 C.W.N. 178.

73 (r). Right to hold adversely.

——Service tenure—Right to hold adversely—Onus.

Where a tenure is held to be a service tenure, the onus to prove that the holder of the same had the right to hold the tenure in his own right adversely to the zemindar is on the holder. A.I.R. 1939 Pat. 362=5 B.R. 861=183 Ind. Cas. 80.

74. Sub-soil rights.

——Sub-soil rights.

See also: (1) Grants—Mines and Minerals.
(2) Mines and Minerals.

A grant of tenure does not include mineral rights. A.I.R. 1935 Pat. 149=2 B.R. 585=163 Ind. Cas.169.

——Sub-soil rights—Right to minerals — Construction of words—Ochre and stone—Adverse possession of stone, whether implies adverse possession of ochre.

With regard to right to minerals, patni tenures are generally on the same footing as other permanent heritable and transferable tenures created by a zemindar, and the sub-soil rights will only pass under a patni, as in the case of the other tenures referred to, when granted in express terms.

The words 'chaya hrad' (shades and lakes) daro bast hukuk (with all rights) are not sufficient to pass sub-soil rights to the grantee.

The stone and the ochre must be regarded as separate portions of the sub-soil, of which there may be separate ownership and separate possession.

There can be separate ownership of different strata of the sub-soil, at all events where minerals are involved.

Adverse possession of ochre cannot be presumed from adverse possession of the superincumbent stratum of stone and gravel. A.I.R. 1931 P.C. 162= 35 C.W.N. 870=(1931) A.L.J. 566=34 M.L.W. 1= 54 C.L.J. 137=33 Bom. L.R. 1273=58 I. A. 228=59 Cal. 80=132 Ind. Cas. 610=61 M.L.J. 632 (P.C.)

——Sub-soil rights—Zemindari—Adverse possession of sub-soil—Conduct of parties.

Though long possession of land situated within zemindari may be good evidence of title to surface rights, the question as to sub-soil rights stands upon a different footing. If a claimant to sub-soil rights holds under the zemindar, or by a grant emanating from him, even though his power may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights.

In considering whether the holders of an estate which fromed part of a parent estate are entitled to sub-soil rights as against the owners of the latter, the conduct of the parties, if approximately, contemporaneous with the severance of the estates, might be of some evidentiary value, but conduct after the lapse of a long period when no one has any certain idea of what the real rights are, is not of much value.

Long possession and enjoyment of surface rights in villages forming part of a zemindari is not evidence of adverse possession of the sub-soil. A.I.R. 1931 P. C. 89=53 C.L.J. 333=35 C.W.N. 521=(1931) M.W.N. 435=33 M.L.W. 707=33 Bom. L.R. 885=61 M.L.J. 9=58 C. 1187=58 I. A. 125=131 Ind. Cas. 753 (P. C.).

——Sub-soil rights—Zemindari.

As between zemindar and jagirdar, the zemindar must be regarded as the owner of the minerals.

The remission of land revenue in respect of villages forming part of a zemindari, whether authorised, by the Govt. or not, cannot affect the proprietary rights of the zemindar in these villages or his right as against tenure holders under him to claim the ownership of the minerals in them. A.I.R. 1931 P.C. 30=58 I.A. 9=60 M.L.J. 253=53 C.L. J. 11=35 C.W.N. 233=33 M.L.W. 277=10 Pat. 296=12 P.L.T. 375=131 Ind. Cas. 325 (P.C.).

75. Tabedari tenure.

See: Land tenures—Ghatwali tenure.

76. Talukdari.

——Talukdari wanta in Gujarat—Nature of—Rights of talukdars.

A talukdari wanta in Gujarat is neither an alienated nor an unalienated holding. It is a peculiar estate which continues to be the property of its holder under the British Rule as it was in pre-British dynasties from ancient times. A talukdar is neither an inamdar nor an occupant of his lands. His wanta is a free-hold and not a lease hold. What was paid formerly as tribute and peshkush as a political levy is now converted into a fixed amount in lump as a revenue payment, but his proprietary right over all the lands comprised in the wanta was affirmed at the commencement of the British Rule and has not since been taken away by any legal process. A.I.R. 1941 Bom. 161=I.L.R. (1941) Bom. 226=43 Bom. L.R. 167=195 Ind. Cas. 640.

——Talukdari.

Ordinarily lands given as Jivai or maintenance to a cadet in the family are part of the Talukdari estate and liable to payment of Jama. 99 Ind. Cas. 293=28 Bom. L.R, 1213=A.I.R. 1926 Bom. 590.

——Talukdari — Properties purchased from income.

The mere fact that the absolute owner of a certain talukdari as well as non-talukdari properties mixed together the incomes of both the properties and purchased further properties does not impress the subsequently purchased properties with the character and status of talukdari property and it is only the ordinary rule of succession that would apply to it. 88 Ind. Cas. 255=47 All. 186=22 A.L.J. 1079=A.I.R 1925 All. 155.

77. Tanki tenure.

——Tanki tenure—Origin and incidents of.

The word "Revenue" as defined in Act VII of 1868 (B.C.) includes every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof and the word "properietor" includes any tenant by whom any estate or tenure is held directly under the Government. Upon the disappearance of the Zemindars who held the tenures (tanki tenures) directly from the Government under successive temporary settlements and upon their refusal to take fresh settlements at the time of a re-settlement the tankidars came into direct relations with the Government and became proprietors of the tenures which were henceforth held by them under the Government within the meaning of S. 1 of Act VII of 1868 (B.C.) and the sum annually payable by them in respect of the tenures would be rightly described as revenue, within the meaning of the same provision of the law: and the Collector has ample authority to bring such tenures to sale under the provisions of Act VII of 1868 (B.C.). If the tankidars in a body are the tenure holders, liable for the payment of the Government revenue, each of them **prima facie** has to contribute a portion of the sum payable. The payment of such sum by any tankidar is payment by him in his character as a member of the body of the tankidars; merely because he cultivates the land in his occupation he cannot be regarded as a cultivating raiyat under the entire body of tankidars which includes himself as a member. The tankidars cannot, therefore, be regarded as occupancy raiyats protected from eviction under S. 14 of Act VII of 1868 (B.C.). It cannot be affirmed as a matter of law that upon defualt of payment by a tankidar, the entire village is liable to be brought to sale so as to destory the rights of all the tenure-holders. The question depends upon the circumstances whether the settlement originally was under Cls. 3, 4 and 5 or under Cls. 7 and 8 of S. 10 of Regulation VII of 1882. The fundamental distinction between the two kinds of settlement is that in the case of a settlement made with a Sudder Malguzar who represented all the persons interested in the property, his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement; and in the case of a settlement under Cls. 7 and 8, there is a settlement with a selected person as Sudder Malguzar, and his default does not make the entire tenure liable to sale unless there is a specified provision to the contrary in the settlement. A settlement can be made under Cls. 7 and 8 only in the case of cultivating proprietors who hold their tenure liable to sale in puteedari or bhyacharee or similar form. 7 C.L J. 460.

78. Tenancy.

——Tenancy — Nature — Bengal Tenancy Act (VIII of 1885).

A tenancy is not a cultivation of a tenure created for purposes other than agriculture. The annual payment of rent is not conclusive proof of the tenancy being annual. 32 C.L.J. 6=58 Ind. Cas. 835.

——Tenancy—Principle of construction.

Where the lessee was to hold land either in khas or by letting it out to tenants and the tenancy was a temporary one, he was a tenure holder and not a raiyat. The conduct of parties may be looked into when the grant is ambiguous and not otherwise. Though the tenancy is described as a jote strangers may show that its real character is that of a tenure. 14 C.L.J. 38=15 C.W.N. 902=10 Ind. Cas. 431.

79. Thanadari lands.

——Thanadari lands—Rights of holder.

The holders of thanadari land stand in a certain position to the contiguous zamindar. If the lands are resumed, they are to be settled with the zamindar; and it may be that they may even be described as settled with the zamindar in a certain sense, and that there is a sort of superiority in the zamindar which might entitle him to the surface of the land in case of escheat, but whether this would give him a claim to the minerals is a question. The view that thanadari lands, though made resumable, were not always resumed is a difficult one to support. 6 M.I.A. 101 (P.C.); 10 M.I.A. 16 and 44 Cal. 841 (P.C.), Ref. 94 Ind. Cas. 974=53 Cal. 533=53 I.A. 100=30 C.W.N. 745=24 A.L.J. 761=A.I.R. 1926 P.C. 41 (P.C.).

——Thanadari lands.

While both Lakhiraj and Thanadari lands were excluded from the operation of the Permanent Settlement, Lakhiraj lands were neither assessed nor settled with the zamindar while Thanadari lands were settled with the zamindar but excluded from the operation of the Permanent Settlement in the sense that the resumption and re-assessment thereof was reserved by the Government. 10 M.I.A. 16 (P.C.) and 42 Cal. 710 (P.C.), **Rel. on.**

Resumption in connexion with Thanadari lands properly so called was concluded within a short time after the Permanent Settlement and the zamindars were not allowed to enjoy the produce of such lands or allowances granted in respect of them to the detriment of the public revenue for any considerable length of time afterwards.

A person who claims under a settlement from the Collector on the lands having been resumed is entitled to prove despite all this that the resumption took place on the footing that the lands were Thanadari or that the proceedings relating to the resumption were such as were sanctioned by the Regulations or were in accordance therewith and he can show by other evidence as well that the lands were Thanadari lands. 57 Ind. Cas. 678=44 C.L.J. 7=A.I.R. 1926 Cal. 1185.

80. Transferability.

——Transferability—(Manbhum) —Khorposhadar —Suit on ground of inalienability of tenures—Burden of proof on plaintiff.

As regards the jagirs and tenures in the estate of Pachet in Manbhum, the tenures not being service tenures after the Govt. Notification in 1881, it is for the plaintiff, who sues for recovery of possession of land on the ground of its being inalienable, to establish that the defendant vendors were khorposhdars and not share-holders in the tenure. A.I.R. 1934 Pat. 524=150 Ind. Cas, 784.

——Transferability.

Where a man is proved to have hereditary rights and there is nothing to show that they are non-transferable they must be presumed to be transferable. 115 Ind. Cas. 291=A.I.R. 1929 Oudh. 358.

——Transferability—Raiyati holding in Santhal Parganas.

A raiyati jote in the Santhal Parganas cannot be sold by the regular Courts in execution of a decree except where transferability is recorded in Record-of-Rights. A.I.R. 1928 Pat. 105, **Rel. on.** 116 Ind. Cas. 41=8 Pat. 116=10 P.L.T. 143=A.I.R. 1929 Pat. 198.

——Transferability—Kharposh mukarrari.

As the khatian jamabandi is not confined to raiyati lands, the entry in this khatian jamabandi of kharposh mukarrari lands does not show that they are rayati lands, and if according to the rules of the settlement department, in force, under-tenancies are not to be recorded, it must be taken that the tenants entered against the sub-numbers are raiyats and consquently the kharposhdar is a tenure-holder and his interest is transferable. 105 Ind. Cas. 42=9 P.L.T. 283=A.I.R. 1928 Pat. 105.

——Transferability—Tenure held by villagers as a body—Khatedar—Right of alienation.

At the time of the first Settlement in Berar it was not uncommon for villagers residing in the villages in their province to apply for and obtain from Government fields on the full survey assessment to be used as grazing grounds the village cattle. As the fields were let on assessment it was necessary to have a khatedar or person responsible for that assessment and therefore such fields were entered in the name of a particular villager though they were in reality the property of the villagers as a body. They collected among themselves the annual assessment and paid it to the khatedar who in turn paid it to Government. Under such circumstances an alienation by the khatedar is void, provided that the alienee knew the want of title in the trasferor. A.I.R. 1923 Nag. 214.

——Transferability—Karamkari and Adimayavana tenures.

The inference of **prima facie** inalienability from the right of reversion in the land-lord is not a necessary or valid inference at all. A permanent right of cultivation does not imply inalienability. No inference of inalienability by custom arises in the case of Karamkari and Adimayavana tenures. The method of inferring the existence of new incidents for a tenure as the supposed logical result of its known incident seems to be quite an unsafe method to adopt. To find out if any particular right is a Customary incident of a tenure, the only safe method is to take evidence of the custom, in the absence of authoritative rulings or statements about it. 15 M. L. W. 164=55 Ind. Cas. 380=A.I.R. 1922 Mad. 290=38 M.L.J. 275.

81. Ubari tenure.

——Ubari tenure.

The Ubari tenure is something of the nature of special grant from Government and is subject to resumption by Government under certain conditions. 69 Ind. Cas. 971=20 A.L.J. 945=45 All. 169=A.I.R. 1923 All 58.

82. Vanta tenure.

——Vanta tenure.

Vanta tenure is prescription of remote antiquity without any deeds or grants. 69 Ind. Cas. 102=24 Bom. L.R. 709=A.I.R. 1922 Bom. 342.

83. Waste land.

——Waste land—Possession and assessment, as evidence of title.

The fact that a certain piece of land has not been assessed to revenue is no proof that it has not been

cultivated. Nor does the failure to assess take away the plaintiff's possessory right if by actual possession he has acquired such a right. The Revenue Rules permit any person to enter into possession for the purpose of cultivation, of any Government waste land, but provided that if he does so, he shall be liable to be assessed to revenue and to be evicted by the Government. It is for the Government through its officers, to assess to revenue and not for the cultivator to see that he is so assessed. The fact that one of the contestants has been assessed to revenue and the other has not, is no doubt a relevant fact, and there may be cases in which it will suffice to turn the scale, but it is not in itself conclusive nor is assessment a recognition by the Government of a trespasser's possession. Hence, the fact that the plaintiff was not assessed for the land in dispute and the further fact, that defendant ultimately was so assessed, do not by themselves establish plaintiff's want of title. 84 Ind. Cas. 961 = 2 Rang. 488 = A.I.R. 1925 Rang. 87.

84. Water rights.

See **Land Tenures — Ryotwari—Irrigation rights.**

85. Zamindari.

——Zamindari—Alienability.

The Dhalbhum Raj in Bengal is an ordinary zemindary and is alienable. 82 Ind. Cas. 886 = 40 C.L. J. 331 = A.I.R. 1925 Cal. 116.

——Zamindari — Bhandara District—It is for zamindars to show that they are not ordinary British subjects.

Zamindars in Bhandara District (C.P.) are ordinary British subjects and are subject to the ordinary laws of the land. The burden lies on them to establish that they are not. A.I.R. 1944 Nag. 201 = I.L.R. (1944) Nag. 180.

——Zamindari—Bhandara District in C. P.— Zamindars not included in class of feudatories are ordinary British subjects and are amenable to revenue laws of land.

Zamindars in Bhandara District (C. P.) and such of the zamindars as were not recognized and classed as feudatories were made amenable to the liability to pay land revenue whatever their previous rights may have been, and as oridinary British subjects, they are amenable to the revenue laws of the land. A person who has lost all rights to sovereign status, even if he ever possessed it, and is reduced to the status, of an ordinary subject, cannot demand the right to wield the attributes of sovereignty and deal directly with the paramount power and not be amenable to its revenue laws. They can be assessed to land revenue, and are bound to pay it if and when it is claimed from them, subject to the revenue laws. A.I.R. 1944 Nag. 201 = I.L.R. (1944) Nag. 180.

——Zamindari—Claim against Zemindar to lands —Onus.

In the case of any claim against the Zemindar to lands which were included in his Zemindari at the Permanent Settlement the burden of proof is upon the claimant. 1 B.R. 77 = A.I.R. 1935 Pat. 306 = 14 Pat. 70 = 157 Ind. Cas. 433.

——Zamindari—Forests—Rights.

Zamindar owns absolute estate in forests in zemindary. 79 Ind. Cas. 845 = 20 M.L.W. 478 = 1924 M.W.N. 440 = A.I.R. 1924 Mad. 828.

——Zamindari—Kampta zemindar in Central Provinces—Status of.

Kampta zemindar was always a subject of the Nagpur Raja, in fact nothing more than a glorified patel. He obtained titular status of zemindar in 1843 on presentation of a nazar of half a lakh of rupees. Kampta was never an independent chieftaincy. (History of the zemindari traced). A.I.R. 1944 Nag. 201 = I.L.R. (1944) Nag. 180.

——Zamindari—Claim to lands in—Onus.

Since the Permanent Settlement, zemindars have at least a **prima facie** title to all lands included in zemindari, for which they pay revenue and in the case of any claim against it the burden of proof is upon the claimant. 33 M.L.W. 707 = A.I.R. 1931 P.C. 89 = 53 C.L. J. 333 = 35 C.W.N. 521 = (1931) M.W.N. 435 = 33 Bom. L.R. 885 = 61 M.L. J. 9 = 58 C. 1187 = 58 I. A. 125 = 131 Ind. Cas. 753 (P.C.).

——Zamindari—Lands in—Presumption.

There is a general presumption that the land in a zamindari is the property of the zamindar, and held under him. A.I.R. 1931 P.C. 30 = 60 M.L. J. 253 = 53 C.L. J. 11 = 35 C.W.N. 233 = 33 M.L.W. 217 = 10 Pat. 296 = 12 P.L.T. 375 = 58 I.A. 9 = 131 Ind. Cas. 325 (P.C.).

——Zamindari — Mokhasa — Enfranchisement — Effect of.

Where a mokhasa was held from before the Permanent Settlement partly for Police services, which were due to State, and partly for personal services due to the zamindar and on payment of kattubadi to him, and the Government enfranchised the undivided half of the mokhasa area which was held for Police services:

Held, that the enfranchisement did not reduce the claim of the zamindar to one half of the kattubadi due to him. A.I.R. 1934 Mad. 46 = 39 M.L.W. 65 = 147 Ind. Cas. 756.

——Zamindari—Primogeniture—Presumption.

There can be no presumption that the estate because it is admittedly a zamindari is governed by the rules of primogeniture. 118 Ind. Cas. 871 = A.I.R. 1930 Nag. 35.

——Zamindari—Rights of Zamindar.

The Zemindar is entitled to all lands within the Zemindari limits and chowkidari chakran lands included in malguzari lands though originally excluded in calculating assessment belong to the Zemindar on resumption. 44 Cal. 841 = 21 C.W.N. 609 = 32 M.L. J. 565 = 15 A.L. J. 390 = 25 C.L. J. 499 = 19 Bom. L.R. 462 = (1917) M.W.N. 459 = 6 L.W. 101 = 2 Pat. L.W. 1 = 22 M.L.T. 489 = 44 I.A. 117 = 40 Ind. Cas. 981 (P.C.).

——Zemindari—Right of Zemindar.

A Zemindar has a right to the full enjoyment of lands within the ambit of the Zemindari. If the Government claims to resume service lands (i. e.) chowkidari chakran lands in the Zemindari the onus of proving express reservation lies on Government. 43 Cal. 1104 = 20 M.L.T. 235 = 20 C.W.N. 1245 = (1916) 2 M.W.N. 175 = 4 L.W. 251 = 14 A.L. J. 1009 = 18 Bom. L.R. 838 = 24 C.L. J, 296 = 31 M.L. J. 745 = 43 I. A. 172 = 37 Ind. Cas. 223 (P.C.).

——Zamindari—Sind.

Though there may have been originally nothing proprietary in the character of some Zemindars in Sind, yet the position was one which readily developed into a proprietary form. 1 S.D. 2281, Foll.; 2 S.D. 320, Not foll.; 7 S.L.R. 169, Ref.

A jaghirdar is merely one who holds an assignment of the Government revenue of certain lands. The landowner in Sind is called the zamindar. The ordinary tenure in Sind is that of a zamindar or land-holder who exercises wholly or in part the privileges of the land-holder and the extent of such privileges varies according to custom from that of an absolute proprietorship of the land, subject to the payment to Government of whatever may be the customary Government share of the produce, down to that of an ill-defined and often disputed claim to levy a **lapo** or rent on all cultivated land. 79 Ind. Cas. 819=16 S.L.R. 87=A.I.R. 1921 Sind 109.

——Zamindari—"Takoli" if land revenue.

The word "takoli" has no exact meaning and its significance varies according to the connotation in which it is used. In the case of feudatories who are not British subjects, it may possibly, and probably, does, connote a "tribute" leviable by the paramount power. But in the case of non-feudatories it is nothing more than a portion of the land revenue.

The Provincial Legislature has, therefore, power to make laws regarding it. (subject to S. 299 Govt. fo India Act, 1935). A.I.R. 1944 Nag. 201=I.L.R. (1944) Nag. 180.

——Zamindari — Tank — Presumption as to ownership.

Where there is nothing to show that a tank situated in a zamindari was in existence at the time the village was granted to the inamdar or the zamindar, there is no presumptin that the tank belongs to the inamdar or zamindar. A.I.R. 1936 Mad. 490=163 Ind. Cas. 855.

——Zamindari—Water-cess—Enfranchised inam —Kulavettu, if recoverable by zamindar.

Where there is evidence to show that the irrigation tanks and the supply channels have been maintained by the zamindar in proper condition and that the defendant's lands are irrigated by one of the tanks to kept in good repair, kulavettu is a legal cess and is recoverable in a suit by the zamindar against the holder of an enfranchised inam. A. I. R. 1935 Mad. 718=1935 M.W.N. 897=42 M.L.W. 583=160 Ind. Cas. 680.

86. Zurispeshgi lease.

——Zurispeshgi lease—Occupancy rights in.

A Zurispeshgi lease is a transaction between debtor and creditor and not a transaction between lessor and lessee. Therefore the Zurispeshgidar is not entitled to claim occupancy right although there was letting of the land in the sense that the Zurispeshgidar was by the terms of the Zurispeshgi lease required to cultivate the lands and to pay yearly and nominal rent. 78 Ind. Cas. 588=3 Pat. 465=A.I.R. 1924 Pat. 580.

87. Miscellaneous.

——Miscellaneous—Bajeaftidars.

Bajeaftidars are persons whose lands were resumed by the Government under the various regulations and were assessed to revenue, and whatever their position may have been under the regulations, the custom of the country has recognised them as tenants where they hold an area of 75 or less acres, and persons holding under them are recognised by the custom of the country only as mere tenants-at-will, the only exception being that some of the bajeaftidars were given the same status of tenure holders as a matter of compromise in the settlement which took place between 1890 to 1900. 101 Ind. Cas. 119=8 P. L. T. 578= A.I.R. 1927 Pat. 225.

——Miscellaneous—Belagan—Behar.

Settlement Officers in Behar use the terms 'Belagan' to indicate a rent-free tenure. The term means 'not paying agricultural rent' and does not imply anything as to liability to pay rent. 18 C.L.J. 166=18 C.W.N. 913=21 Ind. Cas. 415.

——Miscellaneous—Bobabaing land.

There is no reason why persons should not own bobabaing land in a village; it is conceivable that bobabaing land might often exist in an area which was not originally appropriated to dwelling places, but was subesquently so appropriated. 89 Ind. Cas. 303=3 Rang. 147=A.I.R. 1925 Rang. 263.

——Miscellaneous—Co-sharers—"Hissedar."

A bissedar means a co-sharer, that is to say, a person who owns a share in the mahal. A 'mahal' is ordinarily divided into 'annas' and 'pies' share or into 'bighas' and 'bishwas' share. It comprises a certain specified area. A person who owns a fractional share in the 16 annas or a fractional share in the 20 biswas necessarily owns a share in the joint Khalsa land as a co-sharer. But there may be proprietors, who have proprietary interests in the mahal and yet do not own a fractional share of the 16 annas or of the 20 biswas, as the case may be.

But where the entire 16 annas comprised in the mahal was exhausted by one group of co-sharers, the other groups, though proprietors, could not be called co-sharers, that is, persons who owned specified shares in the 16 annas. 82 Ind. Cas. 196=A. I. R. 1925 All. 135.

——Miscellaneous—Forcible dispossession.

Forcible dispossession of an estate does not affect the tenant's rights who subsequently enters. 2 M.L.W. 483=(1915) M.W.N. 346=29 Ind. Cas. 365.

[Affirmed on appeal: 42 Mad. 589=50 Ind. Cas. 631 (P.C.)]

——Miscellaneous — Grant by Zemindar having no Kudivaram rights—Effect—Rights of inamdar to eject a tenant.

A grant by a Zemindar having no kudiwaram rights cannot operate as grant of an inam.

An Inamdar, to establish his rights to eject tenant, must show that he had the kudiwaram right which can be proved only by showing that he let in the tenants at the beginning of their occupation. 12 M.L.T. 313=17 Ind. Cas. 246.

——Miscellaneous—"Jote."

Jote is a general term with respect to a holding and it is not necessarily equivalent to a "Raiyati jote." A.I.R. 1922 P.C. 241; 21 C.W.N. 188 and 8 C.W.N. 117, Foll. 115 Ind. Cas. 81=48 C.L.J. 97=32 C.W.N. 587=56 Cal. 173=A.I.R. 1928 Cal. 880.

——Miscellaneous—Muafi khairati.

The entry Muafi Khairati simply means that the land is held rent-free or at a low rent by the favour of or under an agreement with the malguzar. Such an entry does not stand in the way of the land-lord recovering the arrears of rent assessed on the holding so recorded. 11 C.P.L.R. 129 and 15 C.P.L.R. 9, Ref. 89 Ind. Cas. 741=A.I.R. 1925 Nag. 452.

——Miscellaneous—Manhunda rent.

Manhunda rent is a fixed amount independent of the total outturn of crops grown. 85 Ind. Cas. 172= 4 Pat. 190=3 Pat. L.R. 22=6 P.L.T. 4=1929 P.H.C. C. 355=A.I.R. 1925 Pat. 299.

——Miscellaneous—Marfatdari receipt.

Marfatdari receipts cannot convey Raiyati title to a Marfatdar. 84 Ind. Cas. 586=4 Pat. 139=6 P.L.T. 12=1924 P.H.C.C. 313=A.I.R. 1925 Pat. 216.

——**Miscellaneous — Oudh — Under proprietary rights—Distinction from proprietary rights.**

Under-proprietary rights are distinct from proprietary rights. They do not form part and parcel of talukdari right. An under proprietor has complete ownership over his land subject only to the payment in certain cases of rent or malikana to the superior proprietor and his estate is alienable and transferable; but he cannot, and unlike the proprietor, engage directly with the Government for land revenue but must pay his assessment to the proprietor. 17 Ind. Cas. 334 (Oudh).

——**Miscellaneous—Pattadar — Relinquishment—Sale by mortgagee from Pattadar.**

A decree obtained by a mortgagee from the pattadar subsequent to the relinquishment by the pattadar and grant of the patta to a third person does not affect the rights of such third person who claims under a title granted by the Government even though the mortgagee has purchased the land himself and obtained a patta. 12 M.L.T. 261=(1912) M. W. N. 880=17 Ind. Cas. 253.

——**Miscellaneous**—Shamilat **land.**

The rights of a proprietor in the shamilat of a village are not a mere accessory to the land separately held by him and a sale of the latter does not **ipso facto** convey any rights in the former to the purchaser, and a clause in the wajib-ul-arz providing that shares in the shamilat are proportional to the khewat lands held by each proprietor cannot confer any rights in the common land on the purchaser not conveyed by his deed of sale. 1 P.R. 1894; 113 P.R. 1901; 65 P.R. 1889; 42 P.R. 1897, Foll.; 96 P.R. 1919; 8 P.L.R. 1907 and 9 P.L.R. 1907, Dist. 78 Ind. Cas. 368=A.I.R. 1925 Lah. 105.

——**Miscellaneous — Unauthorised settlement—Parti land.**

The holder of a settlement made by an unauthorised Zemindar, can neither derive title therefrom nor resist the rightful owners who are in possession according to Survey Record of Rights. Possession of **parti** land, follows title. 1 Pat. L.T. 184=57 Ind. Cas. 323.

Larceny

See **Penal Code, S. 377.**

Lathi

See **(1) Criminal P. C., S. 144.**
(2) Penal Code, Ss. 299 to 304.

Lavangi Crackers,

See **Explosives Act.**

Law and Equity.

See **(1) Equity.**
(2) Practice.

Lawful custody, meaning of

See **Penal Code, Ss. 147, 224.**

Law Reports

See **(1) Law Reports Act (2) Precedents.**

Law Reports Act (XVIII of 1875)—Effect or force of unauthorised rights:—

See 12 Bom, L. R. 491=34 Bom. 462.

Law Reports Act (XVIII of 1875.)

——**Applicability.—Privy Council Rulings.**

The Indian Law Reports Act has no application to a decision of the Privy Council, and therefore the Courts are at liberty to refer to an unauthorized report of the decision of the Privy Council and, if they are satisfied that it is a correct report, they are bound to follow it. 91 Ind. Cas. 597=48 Mad. 846=1926 M. W. N. 213 = A.I.R. 1926 Mad. 20=49 M.L.J. 498.

——Law Report decision—Purpose for which admissible.

A report of cases may be used as precedent for the decision of a case. But when effect is asked to be given to that very order, a copy of the order duly certified must be produced; a report of the order cannot be looked at for the purpose. (1900) 5 C.W.N. 307=28 C. 171. See also 5 C.W.N. 326=28 C. 289. See also 12 Bom. L. R. 491.

——**Ss. 3 and 4—Judgment of Division Bench, though not reported, is binding on single Judge.**

All that the Law Reports Act does is to ensure that Judges who have no access to the decisions themselves shall be provided with accurate copies of them. The act is little more than an addendum to S. 78, Evi. Act, which provides for the manner in which public documents may be proved. If an officially certified copy of a judgment of the High Court were to be produced in a lower Court, the lower Court would be bound to treat it in the same way as it would an officially reported judgment. A lower Court is bound by an unpublished ruling of its own High Court but not by an obiter dicta.

Hence a single Judge of the High Court is bound by the decision of the Division Bench, even though the decision is not reported. It is the decision and not the opinion of the Court nor the report of it that makes the precedent. Hence an unreported case may be cited as an authority if the actual decision can be shown from the original sources. It is the decision which establishes the precedent and the report but serves as evidence of it. A.I.R. 1944 Nag. 44=1944 N.L.J. 1=I.L.R. (1944) Nag. 342=213 Ind. Cas. 241 (F.B.)

——S. 3—Private publication.

Under S. 3, it would be open to a Court before whom a decision from an unauthorised report is cited to make up its mind as to whether it shall hear that case cited, or shall receive or treat that decision as an authority binding on it. In exercising its discretion on any particular occasion, the Court should give due weight to the practice prevailing in the Courts with reference to any particular report, a decision from which is sought to be cited. A subordinate Court is not, however, entitled to compare the soundness or otherwise of the views, on a question of law contained in a decision reported in an unauthorized series of the High Court to which he is subordinate with those of other High Court. (1930) M.W.N. 955= A.I.R. 1931 Mad. 71=130 Ind. Cas. 190.

——S. 3—Private publication.

A decision published in a private publication not authorized by any Local Government is not absolutely binding. 98 Ind. Cas. 708=4 Rang. 146 =5 Bur. L.J. 90=27 Cr.L.J. 1396= A.I.R. 1926 Rang. 164 (F.B.)

——S. 3—Subordinate Courts.

Per Dalal, J.—A Subordinate Court is bound to follow a decision of a Bench of its High Court, and in doing so it would be exercising jurisdiction rightly and not irregularly. 37 All. 359 (P. C.) and A.I.R. 1923 All. 392 (F.B.), Rel. on. 98 Ind. Cas. 376=48 All. 432=24 A.L.J. 430=A.I.R. 1926 All. 346.

——S. 3—Unofficial report.

A view expressed in a judgment of a High Court which has not been officially published even without reasons, is entitled to respect, and any examination of it ought to start with the assumption that it is correct and has good reasons behind it. But it is not to be followed blindly, like one that is officially published, though good reasons must be found for not following it. 93 Ind. Cas. 850=8 N.L.J. 153= A.I.R. 1925 Nag. 414.

——S. 3—Unreported cases, authority of.

S. 3 of the Indian Law Reports Act was framed to constitute a monopoly for the authorised law reports, if the judges so desire. But it does not prevent the court from looking at the unreported judgment of the judges of the same court. 5 C.W.N. 326=28 C. 289.

Leading Questions.

See Evidence Act, Ss. 141—143.

League of nations.

See (1) Constitutional Law.
(2) International Law.

Lease.

See (1) Co-sharer.
(2) Deed—Construction.
(3) Land-lord and Tenant.
(4) T. P. Act, Ss. 105 to 117.

LEASE.

Synopsis.

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2. Agricultural lease
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25. Sub-soil rights
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28. Validity
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1. Adverse possession.

——Lease—Adverse possession.

The lessor offered to lease his land to the lessee for building a house on an annual rent with a condition, that so long as rent was paid, the lessor would have no right to get the house vacated. No lease was executed by the lessor but the lessee executed a registered kabuliyat. The lessee remained in possession for over 12 years;

Held, that the lessee acquired a title which the agreement, if accompanied by a registered lease, would have conferred upon him. A.I.R. 1943 All. 212 =(1943) A. L. J. 66=1943 A.W.R. 28.

2. Agricultural lease.

——Agricultural lease—Mortgage by tenant.

Where a lessee of agricultural lands is to enjoy the land without transferring it to any body and he mortgages it subsequently, the Court will give him time to pay off the mortgage, particularly where the owner has refrained from objecting to a previous mortgage by the lessee. 94 Ind. Cas. 1054=50 Bom. 450=28 Bom. L. R. 527=A.I.R. 1926 Bom. 304.

——Agricultural — Non-delivery of portion of demised land—Claim for damages—Cause of action—Limitation.

A contract between the lessor and the lessee is broken completely as soon as the lessor declines or is unable to place the lessee in possession of the demised property and the cause of action for the plaintiff's suit arises on the date of such breach whether the suit is construed as one for breach of a covenant to give possession or of one for quiet enjoyment and the failure of the lessor to give possession goes to the very root of the contract and is so fundamental as to entitle the lessee to treat the breach as final and bring an action forthwith for the whole of his prospective damages. 40 Mad. 910=19 M.L.T. 318= 3 L. W. 443=(1916) 1 M.W.N. 342=30 M.L.J. 515= 5 Ind. Cas. 254.

——Agricultural—If governed by T. P. Act.

Agricultural leases are not governed by the provisions of the Transfer of Property Act. 5 M.L.T. 222=4 Ind. Cas. 1124.

3. Assignment.

Assignment—Option to the lessee to purchase the land leased, whether enures to the assignee.

On an assignment of the lease, the option of the lessee to purchase the leased property enures to the assignee. 42 Bom. 103=19 Bom. L. R. 813=42 Ind. Cas. 882.

——Assignment—Suit for rent after—Kattakonam—Right to set off.

After the execution of a lease deed, the lessee gave a certain sum as Kattakonam to the lessor. The interest due from the lessor was to be deducted from the rent due every year and the principal of the Kattakonam was repayable when the lease from year to year terminated. After the lease, the lessor assigned his reversion to a third party. The lessor then filed a suit for rent. **Held**, (1) that the lessee could not set off the Kattakonam against plaintiff's claim; (2) that the tenant could proceed for his Kattakonam against either the assignor or the assignee; and (3) that the right to enforce the Kattakonam did not accrue due, on the date of the assignment but on the termination of the tenancy unless a special contract to the contrary exists. 17 Ind. Cas. 623 (Mad.).

4. Building by lessee.

——Building by lessee.

The contract between the parties stipulated that the price to be paid by the lessor for the building erected by the lessee on the lease land should be according to the market-value of the building at the time the land-lord resumed possession. The lessor was not entitled to resume possession until the value was paid. The building constructed was a cinema hall;

Held, that (1) the proper method in valuing the building was to find out the cost of reproducing the building and then to allow for depreciation and cost of repairs in the absence of a stipulation to the contrary. No special value could be placed upon the building by reason of its being a cinema hall;

(2) if the lessee had refused a reasonable offer of the lessor for the building, at the expiration of the lease, the lessee must be considered to be a trespasser and therefore, liable for mesne profits;

(3) if the amount offered was ridiculously inadequate, the lessee could not be treated as a trespasser, liable to mesne profits and his occupation must be deemed to have continued on the basis of the rent fixed by the contract between the parties. In such a case, if the Court allowed the lessor rent for occupation on the basis fixed by the contract between the parties and ordered him to pay a certain sum fixed by it as the value of the building to the lessee within the fixed time, the Court was not entitled to direct that. the sum should carry interest in the event of default in payment as ordered. 54 M.L.W. 508=1941 M.W.N. 238=(1941) 2 M.L.J. 711=A.I.R. 1942 Mad. 156.

——Building by lessee and carrying on business —Lessor if acquires good will of business on termination of lease.

Ordinarily, a hotel connotes the business carried on by a person, though sometimes the terms is also used with regard to premises, but it is only owing to their association with the original business carried on in them. Hence where the lessee of a certain site built a hotel on it and carried on business under a particular name, and the lessor, on the termination of the tenancy got back the site, with the structures constructed thereon, under the terms of the lease.

Held, that the lessor did not get the goodwill of the business and was not entitled to carry on a hotel at the site under the old name. 32 P.L.R. 542=A.I.R. 1931 Lah. 650=133 Ind. Cas. 891.

5. Construction.

Synopsis.

a. Abwab
b. Ambiguous terms
c. Assignment or sub-lease
d. Bemiadi patta
e. Clause against objection to dispossession
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w. Security
x. Tenancy
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a-a. Words
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5 (a). Abwab.

——Construction—Abwab or rent.

Whether any particular item is an abwab or not must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed is really part of the rent agreed to be paid under the lease. 21 C.W.N. 108=36 Ind. Cas. 404.

——Construction—Abwab—Consideration.

If a definite sum is specified in a lease or is agreed and is the lawful consideration for the use and occupation of the land, i. e., part of the rent although not described as such, the land-lord can recover the same. In a Kabuliyat before the B. T. Act, there was a term for delivery of 10 seers of chilli besides the money rent; **Held** that the chilli was part of the consideration of the lease and not abwab. 12 Ind. Cas. 37 (Cal.).

5 (b). Ambiguous terms.

——Construction—Ambiguous terms.

Where the terms of the lease are ambiguous and the original purpose of the tenancy is not clear, it will be open to the Court to refer to the conduct of the parties and other extraneous circumstances in order to determine the nature and the purpose of the tenancy. 15 C.W.N 896, **Rel. on.** 121 Ind. Cas. 360=10 P.L.T. 359=A.I.R. 1929 Pat. 376.

5 (c). Assignment or sub-lease.

——Construction—Assignment or sub-lease.

On a question as to a transaction amounting to an assignment or to an under-lease, the proper test is to see whether the lessee under the head-lease has parted with his whole interest or with a lesser interest than he himself possessed. If he has, then the instrument of transfer, by whatever name it may be called, is in reality an assignment. A lease of the entire interest of the lessee subject to a power to surrender, operates as an assignment and not as an under-lease. 1 Pat. L. T. 84 =55 Ind. Cas. 113.

5 (d). Bemiadi Patta.

——Construction—Bemiadi patta.

Where a certain woman gave a 'Bemiadi patta' of a jagir the terms of which were that the lessee, his heirs and successors should hold possession of the property and have rights in the minerals and that the lessor shall have the rights to use the trees thereon as she may require, and the rent shall be payable to her and after the death to her daughter yearly, **Held,** that the Bemiadi Patta was a lease without a term, if not for any definite period, and the mere mention of the heirs, minerals, etc., did not make the lease a permanent one and that it was only a lease from year to year. 2 Pat. L.J. 180=1 Pat. L.W. 447=(1918) Pat. H.C.C. 1 =39 Ind. Cas. 658.

5 (e). Clause against objection to dispossession.

——Construction—Clause against objection to dispossession.

A executed a deed of lease in favour of **B** which contained terms to the following effect: "I shall not be competent to raise any objection on the ground of drought, inundation, etc., and possession and dispossession of any kind," "I shall not claim any dags, etc., which may have been included in the lease but which are owned and possessed by anybody else." **B** being unable to take possession of the land instituted a suit for a declaration of title and recovery of possession with a prayer in the alternative for refund of the premium. It was contended that because of the given conditions **B** was not entitled to a refund.

Held, that the stipulations did not in any way take away from the lessee the ordinary rights that he had of being put in possession and in default thereof claiming a rescission of the contract. 57 Cal. 114= A.I.R. 1930 Cal. 385=125 Ind. Cas. 607.

5 (f). Consent decree.

——Construction—Consent decree empowering land-lord to eject tenant on refusal to cultivate—Right to sue for rent.

A land-lord and tenant agreed under a consent decree that if the tenant refused to cultivate the land and to deliver to the land-lord his share of the produce the land-lord could eject the tenant. **Held,** that the clause relating to the ejectment was in the nature of a clause for re-entry and had not the effect of depriving the land-lord of his ordinary right to sue for the arrears of rent due by the tenant. 44 Ind. Cas. 925 (Cal.).

5 (g). Grove.

——Construction—Grove—Planting of — Condition not rendered impossible—Transfer of.

A land was granted to defendant for the purpose of planting a grove and it was provided that the transferee might plant trees on the land and cut them at his pleasure, that if any revenue was assessed on the land the defendant was to pay it. If he wished to sell it the plaintiff was to have a right of pre-emption. **Held,** that the document created an interest in the land in favour of the defendant and that the right granted could not be revoked at the will of the grantor. No time having been fixed for planting a grove, the condition could not be said to have been broken until the defendant rendered the performance of the condition impossible. 13 A.L. J. 376=28 Ind. Cas. 680.

5 (h). Improvements.

—— Construction — Improvements, right to remove.

A provision in a lease-deed enabling the tenant if he is unwilling to take the lease again to remove the improvements made by him does not cover the right of renewal on the same terms but only the right of removal of fixtures and other improvements. 13 C.L. J. 262= 9 Ind. Cas. 923.

5 (i). Joint lessees.

——Contruction—Joint lessees.

A lease specified certain shares in favour of several lessees but the various lessees were treated as one person and the consideration was one sum due from the lessees as a body. The lease was joint and indivisible. **Held,** that none of the joint lessees can sue for possession of his proportionate share. One joint lessee can sue for possession of the whole where the other lessees act in collusion with the lessor. 57 P.R. 1911=49 P.L.R. 1912=242 P.W.R. 1911=12 Ind. Cas. 850.

5 (j). "Lease for season."

——Construction—Lease for 'Season'—Hill station—Period.

In the absence of evidence to the contrary, a lease of a house at Mussoorie for the 'season' continues to the end of the year. 13 A.L. J. 647=29 Ind. Cas. 437.

5 (k). Lease of melwaram rights.

——Construction — Lease of melvaram rights—Liability for village officers' remuneration.

The plaintiff zamindar executed a cowlenama (lease) of certain villages in defendant's favour. It was, in effect, of the right to collect melvaram from the tenants of the villages. The Raja was liable to pay out of the gross yield nine per cent. to the village officers as their remuneration (maniba swatantrams). The defendant-lessee made these payments direct to the village officers. The Government having afterwards fixed salaries in cash for the village officers, the nine per cent. became no longer payable to them by the Raja. The Raja accordingly claimed to recover from the defendant lessee the nine per cent. of the gross produce, contending that the defendant had hitherto been paying the same over to the village officers as an agent of the Raja and that when the obligation of the Raja to make these payments ceased, the defendant-lessee was thereafter receiving the nine per cent. for the Raja's use:

Held, upholding the contentions of the plaintiff, that the nine per cent. was not transferred to the defendant subject to the burden of paying the remuneration that the payment was really made by the defendant **ad hoc** as an agent of the zamindar who was therefore entitled to recover them as soon as the liability to pay ceased. 104 Ind. Cas. 337=46 C.L.J. 231=39 M.L.T. 258=1927 M.W.N. 713=29 Bom. L.R. 1400=A. I. R. 1927 P. C. 206=53 M.L.J. 289 (P.C.).

——Construction—Lease of melwaram rights—Liability for village officers' remuneration.

A Zamindar who was entitled to receive from the cultivating ryots, as his melwaram, 48 per cent. of the produce, 9 per cent. of which was to be paid by him to village officers as pay, executed a cowle to farmers in respect of the said melwaram right under which the cowledars undertook to make the payment to the village officers themselves. Thereafter the payment to village officers was abolished by Statute and the Zemindar thereupon sued the cowledars for the amount which they would have had to pay to the Village Officers, on the ground that the cowledars were only agents of the Zemindar and that they had to account to the Zemindar for the said amount.

Held: Per **Schawabe, C. J.** and **Trotter J., Kumaraswami Sastri, J.,** diss. — The plaintiff was not entitled to recover the amount and the only remedy of the Raja was under S. 27 (4) of the Madras Proprietary Estates Village Service Act of 1894 by an application to the Collector for increase of rent. 70 Ind. Cas. 469=15 M.L.W. 556=30 M.L.T. 317=46 Mad. 177=A.I.R. 1922 Mad. 263=43 M. L. J. 158 (F.B.).

5 (l). Lease or agreement to lease.

——Construction—Lease or agreement to lease.

Whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document. Where the contract operates as an actual demise it must be deemed to be a lease. 74 Ind. Cas. 480=10 O.L.J. 109=A.I.R. 1923 Oudh 237.

——Construction—Lease or agreement to lease.

The paramount intention of parties deducible from the instrument determines the question as to whether there is a present demise or only an agreement to demise. **Held** on the construction of an amalnamah, neither stamped nor registered and executed in anticipation of a proper Mourai Mokrari lease, there was a present demise. 13 C. L. J. 300=15 C.W.N. 536= 8 Ind. Cas. 44.

5 (m). Lease or contract for service.

——Construction—Lease or contract for service.

A Kabuliyat by a burgadar created a settlement of a land for a term with a provision for giving up the

land without notice on the expiration of the term. **Held**, that the contract was not a mere contract for service but created a tenancy. 53 Ind. Cas. 541 (Cal.)

5 (n). Lease or usufructuary mortgage.

——Construction—Lease or usufructuary mortgage.

Under the terms of the deed it was agreed that the Ijaradar should remain in possession of the Ijara property, and out of the fixed annual rent, he should pay Government revenue and road-cess into the Government Treasury every year, should deduct and appropriate to himself certain sum every year in lieu of interest on the Zuripeshgi money and should pay the remaining sum every year as haq ajiri to the owner.

Held, that the haq ajiri payment was not rent, that the deed was a usufructury mortgage and that the person in possession held as mortgagee and not as a tenant. The haq ajiri was due from him as mortgagee under an arrangement with the mortgagor and was not due from him as tenant, and further that the haq ajiri not being rent, no interest was payable on it, as there was no stipulation in the deed for payment of interest thereon. 1 P.L.W. 795, Rel. 90 Ind. Cas. 785=7 P.L.T. 158=1925 P.H.C.C. 317=A.I.R. 1926 Pat. 77.

5 (o). Lessee or under-proprietor.

——Construction—Lessee or under-proprietor.

Where the wording of the patta does more than suggest that the holder is an under-proprietor and not a tenant, and there is evidence that the holder managed the cultivated and uncultivated lands, exercised rights of escheat, allowed tenants to settle in the village, to plant trees, to sink wells, and this the holder or his predecessor has done as far back as the memory of man can go, at least from a period prior to annexation, the inevitable conclusion is that the holder is an under-proprietor and not tenant or thekadar. A.I.R. 1930 P.C. 248(P.C.)=34C.W.N.1111=7 O.W.N. 931=59 M.L.J. 880=128 Ind. Cas. 272=33 L.W. 85.

——Construction—Lessee or under-proprietor.

A document was christened with the name of a 'perpetual lease.' After reciting the area of the lands which were the subject-matter of the deed, the document prescribed a jama of Rs. 102—2—0 annually payable by the lessor, and then proceeded as follows:—"I do hereby agree and reduce to writing that the said 'lessee' having his possession over it shall annually pay the pay of the Patwari and Chaukidar, i.e., the entire amount of Rs. 102—2—0 shall be paid to the Government, and he shall remain in possession and enjoyment of the same generation after generation (naslan bad naslan, batnan and batnan) and shall exercise all sorts of proprietary powers." It was found that the donee and his sons used to pay rent to the donor and her transferee.

Held, the name "perpetual lease" is not inconsistent with a grant of heritable and transferable right in the property which is the subject-matter of the deed in question. The defendants are not proprietors of the lands in suit, but they are under-proprietors, i. e., they possess heritable and transferable interest in those lands. 66 Ind. Cas. 110=9 O.L.J. 104=A.I.R. 1922 Oudh 42.

5 (p). Liability to rates and taxes.

——Construction—Liability to rates and taxes.

A condition in a kabuliyat providing for the payment by the lessee of any tax or cess covers the road and the Health Board cess but does not include income-tax on royalty. A.I.R. 1922 Pat. 75.

——Construction—Liability to rates and taxes.

Where by the terms of a lease, the lessee covenanted to pay water tax and the lessor covenanted that he would during the said lease pay all rates and taxes, payable in respect of the said premises except the rates covenanted to be paid by the lessee, the lessor is clearly bound to pay property tax based on an increased assessment made after the lease. 32 Bom. L.R. 1660 and 32 Bom. L.R. 1668=A.I.R. 1931 Bom. 118.

——Construction — Liability for — Municipal taxes—Covenant by lessee to pay taxes on buildings and by lessor to pay quit-rent.

A lessee undertook to pay all the municipal taxes payable for buildings erected on the land demised and the lessor agreed to pay only quit-rent. Subsequent to the lease the Municipality began to levy separate assessment on the buildings and the lands. **Held**, that on the construction of the lease, the lessee was bound to pay all taxes leviable under Ss. 129, 145, 148 of the City of Madras Municipal Act. The liability was not affected by any arrangement on the lands and buildings standing thereon. (1918) M.W.N. 130=7 M.L.W. 140=43 Ind. Cas. 634.

——Construction—Liability to rates and taxes—Agreement to pay Government dues—Remission—Right to benefit.

Under a Paini lease, the annual rent was fixed at a certain sum out of which Rs. 1,080—8—7 was to be paid by the tenant on account of Government dues payable by the land-lord and the balance was to be paid to the land-lord as Malikana. The lease provided that if any new imposts be levied by Government in the future the tenant would be liable for the same but there was no provision for the case of any remission. Except for the Malikana, the land-lord was to have no right and interest whatever. Subsequently the Government demand was reduced. **Held**, that the land-lor was entitled to the benefit of this sum, that is, he may realise it from the tenant in addition to the Malikana. 33 C. 140. 32. C. 169, Dist. 14 C.L.J. 589, Ref. 15 Ind. Cas. 301 (Cal.)

——Construction—Liability to pay—Cess.

An agreement to pay 'road and public work' cesses at half an anna per rupee as is levied at present will bind the tenant to pay enhanced cesses in case of revaluation. 13 C.L.J. 412=9 Ind. Cas. 704.

5 (q). Nim-howla lease.

——Construction — Nim-howla lease—Stipulation against voluntary alienation—Execution sale—Stranger purchaser—Land-lord if can sue original tenants for rent and obtain decree.

At a sale in execution the plaintiff purchased the right, title and interest of the tenants in a nim-howla tenure. Notwithstanding that the purchase by plaintiff was duly notified to the land-lord, the latter sued the tenants for rent and obtained a decree. The plaintiff sued for a declaration that this decree was not binding on him and that the tenure in his hands was not liable to sale in execution. The lease which created the nim-howla provided: 'Let it be known that if you transfer the nim-howla tenure, you will transfer it to me for proper price, and will not transfer it to any other person. If you transfer it to any other person such transfer will be invalid.' Held, that there being no covenant against involuntary alienations and no covenant for re-entry, the plaintiff acquired a good title by his purchase and consequently the land-lord could not

sue the original tenants to obtain a decree whereby he could proceed against the tenure in the hands of the plaintiff. 18 C.W.N. 1138=26 Ind. Cas. 23.

5 (r). Occupancy rights.

——Construction — Occupancy rights — Claim to.

A lease from 1914 to 1923 Sambat demised for the year 1914, 25 highas of land and nine mahua trees and from 1915 to 1923 the entire mouza including the cultivated and uncultivated lands. It was stipulated that the lessee should cultivate the village, keep the tenants contented, settle himself and cause the tanants to settle therein. It was further covenanted that in the event of the rent being paid till term of the lease, after the expiry of the term, the settlement would be made at a proper increased rent for a certain term with the same lessee and no other. Several times the lease was renewed and contained a clause disclaiming raiyati rights. In the Record-of-Rights, the lessee was entered as bemiadi thekadar.

Held, that it was not correct to say that the lease was a cultivating lease in respect of 25 bighas. It was a single lease for the whole village. Although there was the covenant for renewal, the lease did not contemplate permanency of tenure. The lessee was only a tenure-holder holding under a lease and acquired no occupancy rights so long as the lease continued. 115 Ind. Cas. 554=A.I.R. 1929 Pat. 68.

——Construction—Occupancy right.

A stipulation by a ryot that he will not touch the land without obtaining a fresh cowle amounts merely to a covenant not to cultivate and is not inconsistent with occupancy right. 9 M.L.T. 213=9 Ind. Cas. 566.

5 (s). Permanent or temporary.

——Construction—Permanent or temporary.

When the lessee is to construct a building on the land leased, and to remain in the house for ten years at a small rent, the lease is one for ten years and not in perpetuity. 7 M.L.T. 106=5 Ind. Cas. 813.

5 (t). Principles for construction.

——Construction—Principles.

Every lease must depend on its particular language and terms. 98 Ind. Cas. 92=A.I.R. 1927 All. 78.

——Construction—Principles.

The construction of one lease is of very little help in construing another. 11 Pat. L.T. 695=A.I.R. 1931 Pat. 25.

——Construction—Principles.

The circumstances existing at the date of the lease should be looked at, for the purpose of construing the words in the lease. 24 C.L.J. 21=34 Ind. Cas. 72.

——Construction — Principles—Penal clause in lease deed.

The penal clause in a lease must be construed strictly without favouring either side. 39 Mad. 1049=32 Ind. Cas. 512.

——Construction — Principles — Plain and unambiguous words.

Where the true effect of the language used in a lease is perfectly clear, no reference is possible to the conduct of the parties and no amount of acting by the parties can alter or qualify words which are plain and unambiguous. 19 C.W.N. 1311=26 Ind. Cas. 466.

5 (u). Remission of rent.

——Construction — Remission of rent on account of Mondoli — Mondol's services dispensed with—Rent of holding.

Defendant executed a kabuliat to the plaintiff in 1865 providing that 'the rent, at the rate of 5 as. a Bigha, has been settled at Rs. 2,534; on the prayer of the tenant and in consideration of his services a mondol as sum of Rs. 811 is remitted and the tenant admits a rent of Rs. 1,623 and agrees to pay the same year by year in accordance with certain instalments.' Plaintiff in 1909 removed the defendant from his position as Mondol and sued him for rent at the higher amount. In certain Eqrars executed by the defendant the rent actually fixed was declared to be the smaller amount and when the rent receipts were granted, the rent payable as the Jama was stated at the lower figure, and when on one occasion an attempt was made to state the Jama at the higher figure and below this the remission, the tenant objected and the attempt was abandoned. Held, that the kabuliat meant that the lesser sum agreed to be paid was the rent of the holding and that the remission granted was not contingent upon or held, in abeyance as payment for services but represented a permanent and irrevocable abatement. 8 Ind. Cas. 18 (Cal.)

——Construction — Remission for excess or failure of rains.

Where the terms of a lease-deed provide that rent would be remitted in case of excess or failure of rain, remission would be granted to the lessee only in abnormal seasons and not in normal seasons. 7 M.L.T. 39=5 Ind. Cas. 510.

5 (v). Right of tenant to settlement.

——Construction — Right of tenant to settlement.

When the land-lord had,under a kabuliat, granted a lease of certain lands to the defendant, and the defendant had taken possession, he must recognise the defendant as his tenent. 50 Ind. Cas. 314 (Cal.).

5 (w). Security.

——Construction — Security — Stipulation to furnish in a fortnight—Waiver.

Under a lease the lessees were to give security within 15 days. The security bond was executed after the expiry of the 15th day and then the lessors made over possession to the lessees. Held, that the surety was liable to perform the obligation he entered into, under the document as the time clause was solely for the benefit of the lessors. 18 A.L. J. 105=2 U.P.L.R. (All.) 53=55 Ind. Cas. 230.

5 (x). Tenancy.

——Construction—Tenancy—Character of.

In order to determine the character of the tenancy, the Court has to look to the intrinsic evidence afforded by the documents themselves creating the tenancy and if the terms are vague or ambiguous, the Court is entitled also to look to the surrounding circumstances and the conduct of the parties.

Where a large portion of the area covered by the tenancy was tank, and in the documents there was no specific mention of the fact that the tenancy was being created for the purpose of agriculture, or horticulture but, on the other hand, the documents in question spoke of conditions to the effect that the rent would be increased proportionately as the lands became cultivable and also that the tenant would be liable to damages if the productive power of the lands be diminished in consequence of negligence on the part of the tenant and where, further more, it had been found the lands were paddy lands and that there were mango trees on the banks the fruits of which the tenant enjoyed.

Held, the lease was governed by the Tenancy Act. 79 Ind. Cas. 648=A.I.R. 1925 Cal. 181.

5 (y). Tenure.

——Construction—Tenure—Not raiyati interest.

One K executed in favour of B a kabuliyat by which a Sarasari jama was sougt to be created in respect of 275 bighas of land. Out of these 275 bighas 160 bighas were cultivated land for which a rental of Rs. 74 was fixed. The remaining 115 bighas were waste land for which no rent was assessed and it was provided in the document that the rent would be assessed therefor when the land would be brought under cultivation. It went on to state that if any market, hat, etc., were established on the land, the land-lord would be entitled to make settlements about them separately, and if any portion of the land was acquired for public purposes the land-lord would get the price therefor. It further provided that the tenant would enjoy the fruits of the trees on the land paying Falkar and would be liable to pay further compensation if he did damage to the trees, etc. It further stated that if the entire rent for any particular year was not paid in time, the land-lord would be entitled to make a fresh settlement oe the jama. It stated also that the tenancy that was created was to be heritable.

Held, that the interest created was that of a tenure-holder and not that of a raiyat and the tenure was transferable. 100 Ind. Cas. 302=44 C. L. J. 434=A.I.R. 1927 Cal. 220.

5 (z). Toll.

——Construction—Toll—Payment of—Shop.

The defendant took a lease of certain property for keeping a shop. The terms were that the lessee should pay a certain amount of rent and must also pay toll over the stipulated rent as part of the rent in respect of goods that should be sold in the shop or on boat or on road on certain terms. Held, defendant was liable to pay toll not only for goods sold in his shop but also for those taken from his shop and carried by boat or on road to some other near place and sold there. 45 Ind. Cas. 875 (Cal.)

5 (a-a). Words.

——Construction—Words—"Land required for culverts, embankments on roads"—Words if exhaustive or illustrative.

Words like 'culverts, embankment, roads' appearing in a Patni Kabuliat are merely illustrative of the purposes and not exhaustive. 18 C.W.N. 860=22 Ind. Cas. 966.

——Construction—Words—'Phal Phul' — Meaning of.

The expression 'phal phul' (fruits and flowers) of trees leased would in the natural meaning of the words include the natural products of the trees only and prima facie in the absence of other circumstances the cutivation of shellac on them would not be included. 24 C.L.J. 21=34 Ind. Cas. 72.

——Construction—Words—"Raiyat."

The word "raiyat" used in a lease does not necessarily mean an agricultural tenant. It is often used in the mofussil of Bengal in its wider sense of meaning a tenant in general. The lessee of a piece of homestead land is ordinarily a tenant and not raiyat. 90 Ind. Cas. 104=42 C. L. J. 78=A.I.R. 1926 Cal. 215.

——Construction—Words—Satta.

The generic meaning of the word "satta" is mercantile traffic or exchange for money. The Satta is merely a commercial agreement regulating the conditions under which a tenant agrees to grow certain crops; but it is, in no sense, a demise of the land.

Where in a suit for declaration that the defendants are occupancy tenants, and not tenants, at fixed rates, a kabuliyat executed by defendant's predecessor in 1875 is produced by the plaintiff as showing the origin of the tenancy, and where this kabuliyat does not refer to any previous tenancy or purport to be a renewal of a previous lease in the absence of evidence to the contrary, the kabuliyat must be read as creating the tenancy. 2 P.L.T. 605=A.I.R. 1921 Pat. 412.

5 (b-b). Miscellaneous.

——Construction—Miscellaneous.

A particular piece of land was leased out "without any interest except to get produce, cultivate the land and pay the rent, without changing the features of the land or having recourse to any illegal act or in any way interfering with the land." The land comprised paddy land and land merely producing thatching grass.

Held, that so far as the other piece of land for producing thatching grass was concerned, it must be considered that growing grass on that piece was a form of cultivation. A.I.R. 1930 Pat. 297=126 Ind. Cas. 289.

6. Contracts of leases.

——Contracts of leases—Incidents.

Contracts of leases are, in their very nature founded upon executory consideration inasmuch as the payment of rent on the part of the lessee is to be made in future at the stipulated points of time. 77 Ind. Cas. 695=25 O.C. 282=A.I.R. 1923 Oudh 45.

7. Covenants.

——Covenant against alienation — Breach of —Re-entry.

Cases of unauthorized alienation are generally covered by an express condition in the lease giving a right of re-entry on breach of that condition. 98 Ind. Cas. 794=50 Bom. 306=28 Bom. L.R. 750=A.I.R. 1926 Bom. 410.

——Covenant—Breach of—Re-entry—Right of on breach of covenant.

Where there is a covenant against alienation by the tenant but no right of re-entry reserved in the land-

lord, the lease is not forfeited by breach of the covenant and the remedy of the land-lord is by the limited ways of injunction against an apprehended breach or by recovery of damages for the breach already committed. 24 C.L.J. 40=21 C.W.N. 117=34 Ind. Cas. 833.

——Covenant—Breach of—Provision to give up land on notice—Remedy of lessor.

Where the lessee was bound by the terms of the lease, to give up a portion of land required by the lessor for which proportionate remission in rent should be allowed and the lessor gave notice to the lessee to give up almost all the lands in question and on refusal, sued for possession. Held, that the proper remedy to ask for would be specific performance and not relief in ejectment. 6 S.L.R. 265=19 Ind. Cas. 908.

——Covenant—Construction of—Restriction on alienation.

A 'person' in a covenant against assignment includes a corporation and a limited company is capable of being 'a respectable and responsible person' within such covenant. 'Unreasonable' means without fair, solid and substantial cause, justfiying refusal of the lessor's consent to the alienation. 24 C.W.N. 1007=60 Ind. Cas. 105=A.I.R. 1921 Cal. 99=48 Cal. 176=60 Ind. Cas. 105.

——Covenant—Re-entry—Binding nature of covenant for.

A kabuliyat provided as follows: "I have remained in possession by taking lease in the benami of S and paying Rs..... as the annual rent; if the Sarkar requires it I shall give up the building and the trees which I may grow on taking the proper market price. On this understanding I sign this mukarrari lease. If there is any necessity for huzoorali to resume possession I shall relinquish it and get back consideration money." Held, on a construction of the lease, that the lease was not a permanent one but was one on a fixed rent with a covenant for entry. Held also that the covenant as to re-entry ran with the land and was binding on the parties and their successors. 52 C.L.J. 486=A.I.R. 1931 Cal. 160=130 Ind. Cas. 564.

——Covenant for re-entry whether personal or runs with the land—Taluka patta.

The interest created by a Taluka patta constitutes prima facie a permanent tenure, where there was nothing to the contrary either in the surrounding circumstances or in the instrument. When the taluka patta was silent as to heritability and transferability but during the period of sixty years the tenancy had devolved from father to son and had formed the subject of many transfers and the rent fixed had never varied, the lease was held to be permanent. Though there was a covenant in the lease that if the grantor had personal necessity the grantee would be bound to relinquish the land, the covenant was a personal one and ceased to be operative on the death of the grantor. The covenant must be construed strictly against the grantor and most beneficially in favour of the grantee. The question whether a covenant in a lease is personal one or runs with the land depends upon the true intention of the grantor and the grantee to be ascertained from the construction of the terms of the grant. 21 C.W.N, 903=28 C.L.J, 18=41 Ind. Cas. 530,

8. Creation of lease.

——Creation of lease—Agreement as to meaning of lease does not create new lease.

An agreement as to the meaning of a lease would not by itself be the creation of a new lease. There was a dispute between the parties as to their respective rights under the lease. A compromise petition fixing the rate of rent and prohibiting the lessee from constructing pucca roofs without the lessor's permission, was filed. Held, that the compromise petition did nothing more than express an agreement that the lease would be interpreted in a particular way and did not create a new lease. A.I.R. 1941 Cal. 536=197 Ind. Cas. 360.

9. Ejectment.

——Ejectment—Unregistered written lease—Lessee not let into possession—Suit by him in ejectment against person in possession not claiming through lessor, if maintainable.

In the case of a written unregistered lease of agricultural land, the lessee to whom possession has not been delivered by the lessor is not entitled to maintain an action in ejectment against a person in possession and not claiming under the lessor. In such a case, the lessee having specifically pleaded that there was written unregistered lease in his favour cannot be allowed to set up the case of an oral lease though he could have, even apart from the unregistered lease, relied on his tenancy right, if he had been let into possession. The transaction relied on by the lessee may be regarded either as an agreement to lease or a lease which is not completed by delivery of possession. In such circumstances, he cannot alone maintain a suit though different considerations might have arisen if his lessor was a party to the suit. 7 B.R. 399=20 Pat. 346=A.I.R. 1941 Pat. 577=22 P.L.T. 971=192 Ind. Cas. 451.

——Ejectment—Verbal agreement for permanent lease—No document—Time for suit for specific performance expiring— Permanent structures built—Suit by lessor for ejectment—Lessee, if can rely on equitable estoppel or get compensation for structures built.

Where there was a verbal agreement for a permanent lease for the specific performance of which the lessee might have instituted a suit but the time for such a suit has expired with the result that the lessee has lost the remedy which was open to him and the lessee has built permanent structures on the land, in a suit by the lessor for the ejectment of the lessee, the lessee cannot rely upon an equitable estoppel. If, however, the lease was for the benefit of the lessor, the lessee is entitled to compensation for the permanent structures erected by him. A.I.R. 1938 Pat. 435=4 B.R. 829=19 P.L.T. 791=177 Ind. Cas. 522.

10. Forfeiture.

——Forfeiture—When penal.

Where a clause in the lease ran as follows: "After the expiry of the term I shall give up the land and I shall remove from possession and it will be open the to land-lord without notice to settle the land with any one he likes," and there was absolutely no evidence worthy of credit to prove that the tenant was compelled to submit to the terms appearing in the kabuliyat or that any undue influence was exercised or could be exercised by

the land-lord in connexion with it, and the tenant himself did not even speak of any compulsion or undue influence.

Held, that in these circumstances the clause was not penal. 107 Ind. Cas. 538=9 P.L.T. 184.

——Forfeiture — Clause of nullity — Relief against.

A Mukarrari lease granted before the enactment of the T. P. Act provided that in default of three instalments of rent the lease should be null and void.

(i) Held, the distinction between a condition of forfeiture and a clause of nullity was one of doubtful soundness even in English Law.

(ii) At any rate, it is not countenanced by S. 114 of the T. P. Act.

(iii) So that distinction ought not to be observed even in cases not governed by the Act.

(iv) The Court can afford relief in both cases. 69 Ind. Cas. 886=1 Pat. 363=4 Pat. L.T. 292= A.I.R. 1922 Pat. 528.

11. Holding over.

——Holding over—Consent—Effect.

If the tenant continues to hold after the lease for one year by consent of both the parties a tacit contract for renewal of the agreement is implied. 3 M.L.W. 189=19 M.L.T. 128=(1916) M.W.N. 192 =32 Ind. Cas. 709.

12. Kabuliat.

——Kabuliat—Evidence—Admissibility.

A registered kabuliat amounts to a valid contract and is admissible in evidence as against the person executing it, if it shows that his possession began under the lease. 27 A. 136 Dist. 5 Ind. Cas. 350 (All.)

——Kabuliyat to Government — Tenant's liability.

A person taking settlement from Government and agreeing to recognise the rights of immediate holders recorded in settlement papers is bound to do so though the rights are wrongly recorded. 11 C.L.J. 68=5 Ind. Cas. 301.

13. Mining lease.

——Mining lease—Liability of lessee to pay road cess.

Where the mining lease provided that the lessee "will pay all Govt. and other cesses, taxes and impositions" during the continuance of the lease, the lessee is bound to pay road cess upon the royalties received by the lessor. A.I.R. 1946 Pat. 143=24 Pat. 551.

——Mining lease—Nature of.

Mining lease is not a mere sale of land or minerals but also partakes of the character of a lease. A.I.R. 1946 Pat. 143=24 Pat. 551.

——Mining lease.

——Interest payable on all arrears of minimum royalty—Interest, held recoverable only on minimum royalty and not on excess. A.I.R. 1943 Pat. 327=22 Pat. 220=10 B.R. 259=210 Ind. Cas. 426.

——Mining lease—Sub-lease of mines—Sub-lessee to pay royalties—Sub-lessee mortgaging his interest—Mortgagee putting prospective purchaser of mortgagee interest in possession—Purchaser agreeing to pay royalties during his possession —Sale not completed and mortgagee not assigning his interest—Agreement by purchaser directly with lessor that he would pay royalties during his period of possession—Lessor, can sue him for royalties on this agreement even though he was not his tenant. A.I.R. 1939 Pat. 421=20 P.L.T. 124=5 B.R. 1012=183 Ind. Cas. 873.

——Mining lease—Notice to quit—Lessee continuing—Suit for damages—Rights of lessor and lessee.

Where a person working a colliery under a legal title receives notice to quit but continues to work it and the lessor institutes a suit for damages, the lessor is entitled to the price of the coal removed but the lessee is entitled to deduction in regard to severing of the coal and bringing it to the pit's mouths. A.I.R. 1936 Cal. 727=64 C.L.J. 308=41 C.W.N. 203=170 Ind. Cas. 690.

——Mininglease — Reservation of Crown— 'Shale', what is.

A question as to whether a particular substance is covered by the specific words of the reservation made by the Crown, is an issue of fact to be decided according to the particular circumstances of the case, the duty of the Court being to determine what the words meant in the vernacular of the mining world, the commercial world and land-owners at the relevant time.

Shale is a chalky or clayey substance, generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers as the result of pressure it assumes a rocky character, but even so, it is still triable and without the hardness which characterises stone or slate.

Held, that shale was not covered by the reservation made by the Crown, the specific words of which were: "Mines and Minerals of what kind or nature soever, Quarrys and Delfs of Plagg, Slate or Stone .....as now are or at any time heretofore have been invested." A.I.R. 1938 P.C. 238=176 Ind. Cas. 979 (P.C.).

——Mining lease — Wrongful removal of minerals—Right to damages—Failure to pay compensation to surface owner—Right to damages, if affected.

Where a person has a mining lease, he can claim damages for wrongful removal of minerals during the period of the lease, even if he has not paid compensation to the surface-owner. Default to pay the same will not entitle the surface-owner to remove the minerals to which the lessee alone is entitled after grant of the lease to him. The measure of damages is the value of the minerals in situ where the removal is not wilful and with knowledge. I.L.R. (1936) Nag. 115=A.I.R. 1937 Nag. 74=170 Ind. Cas. 554.

——Mining lease granted by four shebaits of an idol—Construction of the lease—One of the four shebaits suing for his share in the idol's interest—Suit, not maintainable.

The material portions of a lease-deed granted by the shebaits of an idol in favour of the predecessor-in title of a company, ran as follows:

"Mouza Monoharbahal in Pergana Sergarh within Police Station and Sub-Registry Asansol, Chowki Raniganj and District Burdwan is the rent-free debuttar property of your family deity Sri Sri Iswar Gopinath Jiu Thakur. You have

parichariki right in the said property as shebait. On my making a proposal to take a settlement of the interests of your family deity in the said mouza for raising coal by excavating a coal mine under the ground of the said mouza, you grant unto me a settlement, on the following terms and conditions, of the whole interest that your family deity has in the said mouza for the benefit of the said family deity and for increasing the income of the said debuttar estate. I take the settlement on the terms following, and agree: (1) That I shall raise coal from the ground underneath the said mouza according to the boundaries given below and shall pay a commission of 1 pice per maund of steam coal, $1\frac{1}{2}$ pice per maund of soft and hard coke, two annas per ton of dust coke, and $1\frac{1}{2}$ pice per maund of rubble coal to the extent of the interest of your said family deity ..... (4) ..... The minimum royalty will be paid in four equal instalments to yourselves or your authorised officers on taking receipts. I shall not be entitled to plead payment of commission without receipt, and if I do so, it will not be entertained. If the money be not paid accordring to the Kist aforesaid, I shall be liable to pay interest at 1 per cent. per month."

The plaintiff, describing himself as servitor and shebait to the idol sought to recover a certain amount in respect of his alleged onefourth share, as one of the four shebaits of the deity, of the entire royalties on the coal raised in the mine leased:

" Held, (1) that one of the shebaits could not sue for his share in the idol's interest, as the terms of the lease did not afford any warrant for splitting up the property of the family deity;

(2) that the lease disclosed a joint demise or contract and that none of the four lessors, with or without the consent of his co-lessors could sue for an aliquot part of the whole and that if the suit is not for the whole of the interest, it was not maintainable, that the royalty was payable on raisings which represented the interest of the family deity and that the words "to the extent of the interest of your said family deity" in the deed were equivalent to the words "on that amount which represents the interest of the family deity."

(3) that the stipulated royalty is payable only on coal raisings which correspond with the extent of the interest of the respondents' family deity in the mouza viz., eight annas. 11 O.W.N. 225=A.I.R. 1934P.C. 58=39 M.L.W. 291=88 C.W.N.325=(1934) A.L.J. 295=36 Bom. L.R. 390=66 M. L. J. 899=(1934) M.W.N. 300=18 R. D. 112=61 C. 313=59 C.L.J. 257=3 A. W. R. 193=61 I. A. 35=147 Ind. Cas. 884 (P. C.).

14. Mokarrari.

——Mokarrari.

A mourasi mokarrari kabuliyat provided: "You have been pleased to grant me in accordance with my prayer a Permanent Settlement at a jama of 10 maps of sanja paddy, measured with a Rajhati pai of full measure (the price where of is Rs. 50) and 10 pons of straw (the price where of is Rs. 2), the total price being Rs. 52 per annum. Accordingly I give in writing this kabuliyat that I shall deliver the said sanja paddy and straw without variation every year. If I make any default in delivering the sanja paddy, then I shall deliver bari (addition) of two salis of paddy for every map every year."

Held, the parties' intention was that only paddy and straw should be paid as rent. It would be inconsistent with their intention to hold that a fixed sum was agreed upon as that would be wholly inadequate value of the paddy at the date of the suit, and, therefore, in default of payment of the paddy and straw mentioned in the kabuliyat the land-lord was entitled to their market value at the date on which they should have been paid and not merely to the sum mentioned in the kabuliyat. 91 Ind. Cas. 935=43 C.L.J. 171.

——Mokarrari.

The words "Istimrari Mokarrari" do not necessarily mean "permanent and heritable" but the nature of the grant is to be determined from the circumstances. 90 Ind. Cas. 781=30 C.W.N. 807=A.I.R. 1926 Cal. 322.

——Mokarrari—Istimrary—Heritability.

Where a lease is described as Istimrari it is in the absence of specific clauses referring to succession and transfer good only for the life time of the lessee and is no defence to a notice of ejectment against the successors of the lessee. 2 U.P. L.R. (B.R.) 13=56 Ind. Cas. 656.

——Mokarrari—Istimrari Mourasi Mokarrari—Meaning of.

The words Istimrari Mourasi Mokarrari in a lease always mean permanent and heritable interest and not merely permanent for the life of the grantee, even when no other words indicating a heritable interest are used in the docnment. 41 Ind. Cas. 875 (Cal.).

——Mokarrari.

In Chota Nagpur the term Istimrari mokarrari lease means a lease for life. 78 Ind. Cas. 511=3 Pat. 534 =1924 P.H.C.C. 158=A.I.R. 1924 Pat. 572.

——Mokarrari.

A covenant, in a Mourasi Mokarrari lease providing for a payment of a fourth of the purchase money. If the land is sold is not illegal but the land-lord must prove what exactly is the amount of the purchase-money. 63 Ind. Cas. 337 (Cal.).

——Mokarrari—Mokarrari Mourasi—Rent partly in money and partly in kind—Liability of tenant.

A mukarari lease provided that the rent was payable partly in kind and partly in cash and if the former was delivered the tenant should pay a certain sum to be fixed by the parties as its value. **Held**, that the parties intended to fix the value of the rent in kind and on default of payment in specie and that the tenant was liable only to pay the sum fixed. Per **Banerjee, J.** The words 'jamma abadharit' meant more than a provisional settlement of rents for the incidental purpose of scertaining a stamp duty. 47 Cal. 139=30 C.L.J. 37=53 Ind. Cas. 103.

——Mokarrari—Rent—Fixity of—Mokarrari

Words creating or importing the existence of a permenent tenure at a fixed rent may admit of the construction that the rent is a rent fixed in perpetuity though no such term as 'mokarrari' is expressly used. 20 Ind. Cas. 235 (Cal.)

——Mokarrari — Mourashi Mokarrari Jamai Jami.

The words 'Mourashi Mokarrari Jamai Jami' though not inconsistent with the position of a tenure holder are more apt to describe the position of a raiyat. 50 Ind. Cas. 641 (Cal.)

——**Mokarrari—Incidents — Minerals — Grantees right to.**

A Mokarrari lease is a permanent heritable and transferable tenure but the grantee is not entitled to subjacent minerals unless expressely conveyed 'Mai Hak Hakuk' (with all rights) is not sufficient to convey the minerals. 45 Cal. 87=44 I.A. 246=22 M.L.T. 358= 15 A.L.J. 351=33 M.L.J. 687=3 Pat. L.W. 169=26 C.L.J. 584=(1917) M.W.N. 232=22 C.W.N. 201=7 M.L.W. 90=20 Bom. L.R. 64=42 Ind. Cas; 51 (P.C.).

——**Mokarrari—Rent payable to grantor for life—Absolute after grantor's death.**

If the terms of a deed indicate that the grantor intended to create a perpetual Mokarrari Lease the lessee to pay the rent to the grantor during the latter's life-time and after his death the lessee to get the absolute interest, **Held**, that the entire ownership was divided into two portions the grantee becoming the tenant while the interest of the land-lord continued in the grantor and there was no present disposition of property. 16 C.L J. 111=14 Ind. Cas. 56.

15. Origin.

——**Origin—Presumption of legal origin.**

Where the lease has existed unchallenged and the rent uncharged for over 70 years in spite of attempts at enhancement, the Court should presume a legal origin of the lease. 90 Ind. Cas. 781=30 C.W.N. 807 =A.I.R. 1926 Cal. 322.

16. Period of lease.

——**Period of lease.**

On the termination of lease, the land-lord and the tenants contracted that though the term of the original kabuliyat had expired and the rent and the land had diminished still in other respects the terms of the kabuliyat were to remain intact and thenceforward the tenants were to hold lands and the rent "bemeadi," i.e., without term by succession. The actual words used were "warishen krame" and "bemeadi."

Held, that the words indicated that the jama was not permanent and that the tenancy was a tenancy-at-will to be extinguished by the land-lord after one year's notice. A.I.R. 1928 Cal. 392, **Dist.**; 1918 P.H.C.C. 11, **Ref.** A.I.R. 1930 Cal. 94=57 Cal. 775=126 Ind. Cas. 550.

——**Period of lease—Lease for indefinite period.**

If a lease be made to a man for an indefinite period, it enures, generally speaking, as far as his lifetime, and passes no interest to his heirs unless there are words showing an intention to grant a hereditary interest. A.I.R. 1930 Mad. 434=125 Ind. Cas. 242.

——**Period of lease—Option to renew not exercised.**

A lease provided that "on the expiration of the term written in this patta you will take a new settlement." The tenant, however, did not exercise his option of taking a new settlement when the term expired nor did he exercise that option within a reasonable time.

Held, that the tenant was not entitled to resist the suit for ejectment by land-lord. 119 Ind. Cas. 144=33 C.W.N. 365=A.I.R. 1929 Cal. 407.

——**Period of lease—Option to lessee.**

A lease for a particular period, after which an option is given to the lessee to continue in possession on payment of rent enures for lessee's benefit, and the principle of reciprocity or mutuality cannot be invoked. After the expiry of the lease, the lessee can continue in possession as long as he pays the rent, that is, it enures during the lifetime of the lessee. 114 Ind. Cas. 374= 30 Bom. L.R. 1596=A.I.R. 1929 Bom. 66.

——**Period of lease—Lease "for hamesha."**

The operation of a perpetual lease cannot be limited to the lifetime of the lessees. Where there is absolutely no reservation of any right of re-entry in favour of the lessor, in a lease for ever (hamesha karita) even in the absence of words indicating that a heritable estate was intended to be created in favour of the lessees, the words "hamesha karita" (for ever) cannot be interpreted to mean "Tumche jeewman paveto" (for your lifetime). 110 Ind. Cas. 487=A.I.R. 1929 Nag. 23.

——**Period of lease—'Hamesha'—'Dawami'.**

No interest after the life of the lessee or grantee is created by the use of 'Hamesh' or 'Dawami' in a lease or grant. Circumstances must be considered. 2 O.L.J. 746=33 Ind. Cas. 264.

——**Period of lease.**

Where an ijara lease pertaining to a small plot of land provided "the mortgagee being in possession of the mortgaged property may cultivate or get cultivated the land with due care and diligence and the mortgagee will not allow any one to take possession of the land which is in my possession for a long time... and thereafter shall bring the mortgaged property under my own sir possession."

Held, that the term of the lease taken together and read with the circumstances of the lease amounted to an express prohibition to settle the land with the tenant so as to confer a title extending beyond the term of the lease itself. 103 Ind. Cas. 627=8 P.L.T. 775=A.I.R. 1927 Pat. 401.

——**Period of lease—Grant for indefinite period.**

The general rule of construction is that if a grant is made to a man for an indefinite period, it enures, generally speaking, at least for the lifetime of the grantee unless there were some words showing the intention that a heritable grant was made.

The terms of the lease were as follows: "You having applied to get settlement of land for the purpose of constructing your basha, I hereby fix annul rent for the said land and settle the same with you; you shall enjoy and possess the said land by constructing your basha and residing therein, regularly paying the rent. To this effect I execute this pattah."

Held, that the tenancy under the lease is not a tenancy at-will or a yearly tenancy. A.I.R. 1926 Cal. 558, **Diss.** The lease would enure for the lifetime of the lessee. 99 Ind. Cas. 200=31 C.W.N. 46=A.I.R. 1927 Cal. 179.

——**Period of lease.**

Whether a lease for an indefinite term enures for the life of the grantee depends upon the terms of the document. Where annual rent is payable in the absence of anything to show the contrary it indicates that the tenancy is a yearly one. 94 Ind. Cas. 684=53 Cal. 95 =A.I.R. 1926 Cal. 558.

——**Period of lease—Lease for indefinite period.**

If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life time, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. 3 Cal. 210 (P.C.), **Foll.** 89 Ind. Cas. 298= A.I.R. 1926 Cal. 379.

——**Period of lease—Lease of bagat land.**

Where the kabuliyat showed that the lease was for a plece of bagat land and it contained no indication that the tenant was to be treated as a raiyat or that the purpose of the tenancy was agricultural or horticultural,

and the limitation as to the rights of the tenant indicated in the kabuliyat showed clearly that the lease was neither intended to be an agricultural lease nor a horticultural lease.

Held, that the tenant was bound by the contract he made, that is, to give up possession of the land after the expiry of the prescribed period. 90 Ind. Cas. 114= A.I.R. 1926 Cal. 354.

——Period of lease.

A lessee cannot be evicted in the course of any agricultural year, because allowing him to retain possession at the beginning of a year amounts to the grant of a lease for that one year. 93 Ind. Cas. 633=A.I.R. 1926 Nag. 335.

——Period of lease—Lease determinable at will.

Where in a lease there is an express term that the lessee shall vacate the land in case he fails to pay the rent or whenever the lessor requires him to do so, the lease is not a lease for term exceeding one year though a longer period (e.g., 30 years) is mentioned in the lease and the lessee is liable to ejectment. 75 Ind. Cas. 603=A.I.R. 1923 All. 382.

17. Permanency and heritability.

——Permanency and heritability.

The absence of the words "from generation to generation" or "you or your descendants" is an important circumstance to be taken into consideration in the construction of the lease claimed to be a "mulgeni" lease.

The clauses in a lease for an indefinite period that "the lessor shall not demand additional rent higher than Rs. 96" or that "the lessee alone shall have the right to make improvements to the exclusion of the lessor," cannot by themselves be taken to mean that the lease is a perpetual one. A.I.R. 1930 Mad. 434=' 125 Ind. Cas. 242.

——Permanency and heritability.

In the construction of a lease for an indefinite period clauses which throw the cost of improvements on the lessee indicate some measure of continuity but not necessarily perpetuity. 43 Cal. 382, **Foll.** A.I.R. 1930 Mad. 434=125 Ind. Cas. 242.

——Permanency and heritability.

Perpetual lease from a person beyond his power cannot be construed as an ordinary lease from year to year entitling the lessee to possession. A.I.R. 1928 All. 617, **Diss. from.** 119 Ind. Cas. 436=10 L.R.A.Rev. 293=A.I.R. 1929 All. 387.

——Permanency and heritability.

The ordinary rule is that the interest in a lease is heritable. 112 Ind. Cas. 651.

——Permanency and heritability.

A perpetual lessee of a structure on a piece of land as distinguished from the permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. 100 Ind. Cas. 834=A.I.R. 1927 Lah. 225.

——Permanency and heritability—"Aulad."

The use of the word "aulad" in a lease extends the lease from being a life lease to a lease enjoyable by the aulad, but the meaning given to aulad should not be extended to mean collaterals. 12 Cal. 117 (P. C.) and 31 Cal. 561, **Dist.** 93 Ind. Cas. 927=3 O.W.N. 213=13 O.L.J. 565=A.I.R. 1926 Oudh 260.

——Permanency and heritability—Possession not necessary for permanent lease.

Delivery of possession is not necessary for the completion of a permanent lease under the Transfer of Property Act, and hence a lessee who never got possession of the land can maintain an action for trespass or for injunction and damages. 91 Ind. Cas. 169=5 Pat. 80=7 P.L.T. 188=1925 P.H.C.C. 254= A.I.R. 1926 Pat. 130.

——Permanency and heritability—"Perpetual"—Meaning of.

The mere use of the word "perpetual" in a lease does not transfer heritable interest.

Where in the lease the description of the document was given as perpetual lease given for perpetual cultivation but there were no words indicating future generations, and where it was not stated that those tenants and their successors-in.interest should not be liable to ejectment,

Held, that the lease did not enure for the benefit of the future generations. 89 Ind. Cas. 221=12 O.L.J. 638=2 O.W.N. 539=A.I.R. 1926 Oudh. 72.

——Permanency and heritability.

Where a lease conferred all rights of cultivation and enjoyment to the lessee and provided for the determination of the tenancy only in the case of non-payment of rent,

Held, that reading the document as a whole the intention of the parties seems to have been to create a permanent lease in favour of the lessees which could be put an end to only in one circumstance, **viz.,** the non-payment of rent by them. 85 Ind. Cas. 964= A.I.R. 1925 Mad. 919.

——Permanency and heritability — Elements necessary to constitute permanent tenancy explained.

In a suit for ejectment of the defendants from their homestead situated within Municipal limits the facts found were that the tenancy was 44 or 45 years old, that its origin was not unknown, that the rent was paid uniformly at the rate of Rs. 5-10-0 per year, that there was one case of succession to the defendants from their father and that defendants' father built a house with mud walls and tiled roof, over which there were thatched chalas, and also constructed a pucca staircase and a pucca gateway and the defendants constructed a pucca privy.

Held, on those facts, that there were no substantial pucca buildings on the land and the inference of permanency was not justifiable from these facts. 85 Ind. Cas. 103=52 Cal. 43=29 C.W.N. 138=A.I.R. 1925 Cal. 309.

——Permanency and heritability — Lease for indefinite term—Bemaiyadi lease—Meaning.

The material clauses of a lease were:—

(1) The purpose of the lease was to enable the lessee to erect Gola house and to purchase and sell all sorts of commodities therein, or in other words to open his business therein;

(2) The lease was not limited for any definite period but that it was a bemaiyadi lease or a lease without any term;

(3) That the lessee shall not have the power to construct any pucca building without the express and written permission of the lessor and if that stipulation be violated and pucca building be raised by the lessee without such permission of the lessor, he, the lessee, shall be liable to be evicted; and,

(4) In case the lessee went to erect pucca building and to have a pucca well or Indara he shall have to do so according to the advice of the lessor.

Held, that the erection of pucca buildings for the business as well as well as for the purpose of residence was in the contemplation of the parties with the

condition that permission for erecting pucca structures will have to be taken from the lessor, and that under these circumstances the inference is not unreasonable, that the lease in question was meant to be of a permanent character and not from year to year.

A Bemaiyadi lease or a lease without any term may in the circumstances of a particular case be shown not to confer any permanent grant. 77 Ind. Cas. 32=2 Pat. 452=4 P.L.T. 414=1 Pat.L.R. 190= A.I.R. 1924 Pat. 88.

——Permanency and heritability.

'Mireshorotto Janmaiya.'

The material portion of the lease was thus: "With the trees you have no concern. Now all the trees you will plant there (will be) in your control; (if) on the land trees and buildings you prepare (**lit.** make ready) and (if) afterwards you sell (these) then to my estate you will pay a fourth, without a fourth and without information (to me) you will not be able to sell. Preserving the four boundaries of the land causing to come into being Mireshorotto constructing houses continue to make residence,"

Held, that the lease was permanent and heritable and that by the use of the words Mireshorotto Janmaiya it was intended that the tenancy should be heritable and to be enjoyed by the grantee from generation to generation. 27 C.W.N. 1037=A.I.R. 1923 Cal. 705.

——Permanency and heritability—Tenancy at fixed rent.

The use of the words "Putra poutradi Krame" indicate that it is intended to be a perpetual lease.

In the body of the document there was in one place an undertaking by the tenant to pay the 'Nirdaritjama,' fixed rent, and in another portion the tenant undertook to pay in addition to the 'Dharyajama' fixed rent, certain other sums namely, road cesses and public works cess as assessed and any tax or additional amount that may be assessed or settled by the Government in future in respect of lands of the tenancy. The deed further provided that "when the aforesaid village is measured and Jamabandi prepared, I shall be present before the Amin when required and shall cause the measurement and bring enhancement of rent into effect.

Held, on construction, that this tenancy was intended to be a lease at a fixed rent. The restrictive clauses "the tenant undertakes not to excavate any ditch or tank, prepare bricks, construct pucca buildings and cut down trees, etc., without taking a written order expressing consent from the land-lord do not modify the nature of the tenancy. 76 Ind. Cas. 586=38 C.L.J. 350=A.I.R. 1923 Cal. 505.

——Permanency and heritability—Lease to lessee putra poutradi santati.

Where a lease was granted to the lessee his sons, grand sons and descendants, held that the house would be deemed to have been let absolutely for the period and that on lessee's death before the expiry of the period, it would descend to his heir alienable and never resumable, unless in a particular case, some custom were proved which would exclude the ordinary law; for instance, if it were found that these words applied to a devise of an estate which by custom descended only in the male line, then they could not be held to convey an absolute estate of inheritance. There is no difference whether such words be found in a will or lease. 67 Ind. Cas. 230= 24 Bom. L.R. 300=46 Bom. 816=A.I.R. 1922 Bom. 45.

——Permanency and heritability—'Putra Poutradhi'—Perpetual lease.

The expression 'putra poutradhi kramay' in a lease deed indicates a permanent lease. 20 C.W.N. 182=29 Ind. Cas. 502.

——Permanency and heritability — Perpetual lease.

The material parts of the lease provided, "From the years 1311 to 1313 B. S., you shall pay jama at the said rate in respect of 550 bighas of land over and above that. You shall abide by such rules as may be enforced in respect of the remaining 264 bighas, 17 cottas of land, the jama whereof remains remitted after the same has been surveyed or brought under cultivation by the Sarkar. More over if in the meantime survey of cultivation be made at any time by the Sarkar then you shall pay without any notice and objections jama of Hasil (culturable) and Santpati (culturable sometimes and patit at others) land in accordance therewith from the said year. You go on enjoying the property with great felicity down to your sons, sons' sons and so on in succession and keeping intact the limits and boundaries on excavating and filling up and making homesteads and gardens and on being vested with right of sale and gift."

Held, that rights are conferred of a permanent and heritable character, but that the lease does not fix maximum rent payable in perpetuity. A. I. R. 1923 Cal. 354.

——Permanency and heritability—Lease by shebait.

A lease of land was granted in 1824 under a rent note which provided for a payment of a yearly rent and that if the rent was not paid, the lessee should be at liberty to remove the structure which he might have made on the property. The lessor never raised any objection when the lessee sub-let the property, on various occasions, viz., 1872, 1883 and 1900,

Held, the lease was a permanent lease which could only be terminated if the rent was not paid. The disability of a shebait to make the permanent grant is not absolute. Under special circumstances it must be presumed that the grant would be valid beyond life of the grantor if a long time has elapsed after the grant. 66 Ind. Cas. 162=26 C.W.N. 473= 20 A.L.J. 371=35 C.L.J. 421=24 Bom. L.R. 584= 1922 M.W.N. 319=30 M.L.T. 268=46 Bom. 481= 49 I.A. 54=A.I.R. 1922 P.C. 163=42 M.L.J. 501 (P.C.).

——Permanency and heritability — Khayam Saswatham Patta—Incidents of.

The incidents of 'Kayam Saswatham Patta' and the test to determine its character are those laid down by the Privy Council in 12 C, 117 P. C. The use of such terms as 'generation to generation' will signify the grant of a permanent tenure and their absencce would generally import only a life interest. The pattas, surrounding circumstances, and the conduct of the parties may be considered in this connection. Where to the knowledge of the lessor and acquiesced in by him there have been transfers effected by the lessees and Court auctions, the presumption might arise that the grant was permanent and heritable. In every lease there is an implied condition that the lessee shall do nothing to prejudice the lessor's title. 35 M.L.J. 129=8 M.L.W. 109=46 Ind. Cas. 62. Also 35 M.L.J. 647=48 Ind. Cas. 301.

——Permanency and heritability—Proof.

A lease is not permanent because no time is prescribed and the lessee has been in occupation for 60 years on a low rent. 33 Ind. Cas. 57 (Mad.).

——Permanency and heritability—Lease by shebait.

The grantee of a permanent lease from a shebait holds the land during the subsistence of the grantor's interest. 13 Ind. Cas. 686 (Cal.)

——Permanency and heritability—Sub-lease.

If a lease is valid and the terms of the lease allow the continuance of the tenancy the interest created by a sub-lease is heritable. 57 Ind. Cas. 580 (Cal.).

——Permanency and heritability — Prepetual lease.

An apparently perpetual lease containing no specific condition about succession is not heritable. 2 U.P.L-R. (B.R.) 3=57 Ind. Cas. 316.

——Permanency and heritability—Fixed rent—Reverter to waram.

A lease provided for a permanent rate of rent for ever and coupled with words of inheritance that the property shall descend to the heirs of the lessee. **Held,** that the lease was not only for a fixed period but conveyed an absolute estate and that it was not open to the lessor or his assignee to revert to waram. (1919) M.W.N. 253=26 M.L.T. 262=52 Ind Cas. 239.

——Permanency and heritability—Kayam and Saswatham patta—Renewal of prior lease deeds—Permanent tenancy.

The word 'Kayam' and 'saswatham' were used in a lease to describe the nature of the tenure and the deed was in renewal of previous lease the tenancy under which was held to be permanent in a prior suit. **Held,** that the intention was to confer a permanent tenure on the lessees. 9 M.L.W. 164=35 M.L. J. 647=24 M.L.T. 469=(1918) M.W.N. 846=48 Ind. Cas. 301. Also 35 M.L. J. 129=46 Ind. Cas. 62.

——Permanency and heritability—Provision for lessor taking possession in a certain event—Effect.

A provision in Dowl Kabuliat, that, in the event of the land-lord and the tenant not being able to arrive at a new rate of rent after the expiration of the temporary term covered by the kabuliat, the land-lord would be entitled to take possession of the land, was held to be absolutely inconsistent with a plea of permanent interest in the land by the tenant. 45 Ind. Cas. 651 (Cal.)

——Permanency and heritability—Indefinite term—Absence of words indicating permanency or heritability—Renewal, right to.

A Kabuliyat recited that lands were settled for five years at a certain rent. After five years the lessee was to take a fresh settlement under a fresh kabuliat. In case of failure to do so the lessee was to hold and enjoy possession of the land on payment of an excess rent of one anna per rupee every five years. The lessee was not to make a gift, sale or mortgage of the tenure to anybody. **Held,** that the tenancy after the expiry of five years was for an indefinite period; but as there were no words of inheritance in the lease nor any circumstances, such as long possession, or the fact of succession to heirs or a series of transfers, the tenure could not be presumed to be a heritable or a permanent one. 41 Ind. Cas. 227 (Cal.)

——Permanency and heritability—Fixed rent for thirty years.

Where a lease was granted for thirty years at a fixed rent which was to be increased at the end of the term if the revenue was increased and there was no mention whatever of hereditary rights the tenure was heritable possibly only for the unexpired period of thirty years. 4 O.L.J. 191=40 Ind. Cas. 116.

——Permanency and heritability—Circular No. 16 of 1874—Ejectment—By notice.

Leases granted under Circular No. 16 of 1874 are heritable leases, and a tenant holding under such a lease cannot be ejected by notice. 3 O.L.J. 218=34 Ind. Cas. 760.

——Permanency and heritability — 'Sthayee Karsha Kabuliyat'—'Kayemi', meaning of.

The description of a Kabuliyat as 'Sthayee Karsha Kabuliyat' does not necessarily imply that the grantee was intended to have a permanent heritable interest.

The use of the term 'Kayemi' in a Kabuliyat imports no fixity of rent but only permanence of occupation of the land. 19 C.W.N. 1129=27 C.L.J. 579=29 Ind. Cas. 461.

——Permanency and heritability—Long possession—Presumption.

Though a land was let out for building purposes and the lessee was allowed to remain in possession of the land on payment of rent for long period, this would not in itself be sufficient to support the conclusion that the lease was permanent at its inception. 16 C.W.N. 564=14 Ind. Cas. 152.

18. Purpose of.

——Purpose of—House let for school—Leasehold vesting in Government—Lease if determined.

By a lease the lessors let a house to one K for a school. The lease recited that the lessors were agreeable according to lessee's proposal to keep the house on lease as long as the lessee liked, for a monthly rental of Rs. 140 and that the lessee would not be entitled to give up the house before he prepared a house of his own for the school, and that the lessors would not be entitled to take hold of the house unless the lessee gave up the same of his own accord. Subsequently the school was removed to another site and the leasehold land was thereafter used as a hostel for students. The school was taken over by the Government and the lease property was transferred by statute to the Governor of of Bengal in Council. The question of the amount of compensation to be paid to the lessors thus arose.

Held, that the fact that the physical site of the College buildings was upon the adjoining land and that the lease property was being used for the purposes of the College other than the actual teaching in a class room would not be such a cessation of the use of the land for purposes of the College as to entitle the lessors to exercise the right to determine the lease, and that the value of the right existing in the lessors was properly established by capitalising the monthly rent. 118 Ind. Cas. 271=1929 A.L.J. 411=33 C.W.N. 669=1929 M.W.N. 415=30 M.L.W. 831=A.I.R. 1929 P.C. 113=57 M.L.J. 493 (P.C.).

——Purpose of.

A tank can be leased for agricultural purposes; for instance, for irrigating adjacent lands or watering the cattle used for cultivation. 88 Ind. Cas. 534=A.I.R. 1926 Cal. 239.

——**Purpose of—Horticultural lease.**

Where the lessee is allowed, according to the lease, to enjoy the fruits of the trees on the land and is also allowed to plant and grow more fruit trees, and to enjoy the fruit thereof, but is not allowed to cut down or sell the trees, without the lessor's permission, the tenancy is for horticultural purposes. 17 C.L.J. 411, Dist. 96 Ind. Cas. 89 (Cal.).

——**Purpose of.**

A lease to a company provided inter alia: "You shall keep it as long as you please. You should always keep this land in your possession for the use of your ginning factory. I will not ask it back."

Held, that it was an agreement with a particular company, the original lessees, that they should hold the land as long as they liked. A perpetual lease is determined by the death of the lessee. (4 Bom. 424, **Ref.**). And on the same principle where the company to whom the land is given for a specified purpose is defunct, the lease comes to an end. The lease is not a perpetual one in the sense that the lessees could do what they liked with the land and any diversion of use of the land from the purpose for which the lease was apparently granted would give the lessor a right of re-entry and therefore in the present case the lease came to an end when the land was no longer used for ginning factory. 73 Ind. Cas. 24=6 N.L.J. 170=A.I.R. 1923 Nag. 243.

——**Purpose of—Lease for purposes of cultivation and building tenants' houses.**

Where the lease of a certain land was for purposes of cultivation and building tenants' houses at a certain amount of anual rent and where an appreciable portion of the land was occupied by non-agricultural tenants **held** it was a mixed lease, containing both agricultural and non-agricultural land held under a lump rent. 1 O.L.J. 124=24 Ind. Cas. 788.

19. Registration.

——**Registration—Invalidity—Proof of lease.**

Even if the registration of a lease deed be invalid, the tenancy can be proved otherwise without proving the written lease which may be inadmissible for want of registration. 41 Cal. 347, **Foll.**

The tenancy can also be proved by the doctrine of part performance. 105 Ind. Cas. 172=8 P.L.T. 829=A.I.R. 1928 Pat. 89.

——**Registration—Necessity.**

A lease which need not be registered under T. P. Act does not depend for validity on the lessor's signature. The lessor's assent togetherwith delivery of possession is sufficient. 30 M. 322 doubted and dist. 7 M.L.T. 116=5 Ind. Cas. 826.

——**Registration—Want of—Proof of tenancy.**

When the lease granted to a tenant is inadmissible for want of registration or otherwise, he may prove his tenancy aliunde. 14 C.W.N. 141=2 Ind. Cas. 202.

20. Renewal.

——**Renewal—Covenant for—Construction.**

A lease for a term of years contained a renewal clause which entitled the lessee after the expiry of the original term to a renewal of the lease for a further period or to a new lease on certain terms. The lessee mortgaged his interest in the property and empowered the mortgagee to sub-let the property during the term of the mortgage as the mortgagor himself might have done and also to do all acts by using the name of the mortgagor without reference to him.

Held, that the mortgagee was not an assignee of the term for the renewal of the lease and that as there was no privity of contract between him and the lessor, he was not entitled to demand a renewal of the lease. 91 Ind. Cas. 501=A.I.R. 1927 Cal. 100.

——**Renewal—Covenant for—Rights under.**

Under a lease with a clause for renewal the lessee cannot claim to ask for a condition of renewal in the renewed lease. The utmost right that he has under the renewal clause is the right for a lease for an additional term of the original lease, after the expiry of the original lease. When the lessor does not disturb the possession of the lessee for another term, the lessee has no ground of complaint. After the expiry of the original lease the lessee becomes a tenant from year to year with a right to renewal for another term of the original lease and the lessor can eject him upon proper notice of ejectment. 95 Ind. Cas. 831=53 Cal. 590=A.I.R. 1926 Cal. 1065.

——**Renewal—Covenant for—Nature of.**

Covenant for renewal does not run with the land. 111 Ind. Cas. 404=51 Mad. 885=55 I. A. 423=26 A.L.J. 1229=30 Bom. L. R. 1578=48 C.L.J. 431=33 C.W.N. 33=28 M. L. W. 803=1928 M.W.N. 754=A.I.R. 1928 P.C. 258=55 M.L.J. 646 (P.C.).

——**Renewal — Covenant for — Not penal.**

An ejectment suit was compromised. The provisions of compromise were that up to 11 years the defendants were to hold the premises on a rent of Rs. 400 per year and that if the defendants wanted to occupy the premises after the expiry of 11 years, without taking a fresh settlement, they would have to pay rent at Rs. 100 per month.

Held, that what the parties intended was that, if the defendants wanted to occupy the premises after the expiry of 11 years, they could either take a fresh settlement or remain in occupation without a fresh settlement on a rent of Rs. 100 per month which the parties at that time thought would be a fair rent after the lapse of 11 years and that the terms were not penal and therefore they were enforceable. 92 Ind. Cas. 617 =7 P. L. T. 299=1925 P. H. C. C. 353=A. I. R. 1926 Pat. 122.

——**Renewal—Of part.**

A lease of land contained the clause for renewal in the following terms: "That the said F (i.e., the lessee) his heirs, executors, administrators or assigns fulfilling the covenants and agreements hereinbefore contained and on his part to be performed and yielding and paying at the end and expiration of the aforesaid term of 99 years unto the said United Company, (i.e., the lessor) their successors or assigns, the full and just sum of 100 pagodas current money of Fort St. George, then this lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be judged reasonable." During the term of lease the lessees transferred their interest in a portion of the property. On expiry of the lease term, they sued for a declaration that they were entitled to renewal for 99 years of the term granted by the said lease as regards the whole of the property demised by the said lease or, alternatively, as regards the part retained by them and specific performance of the covenant for renewal.

Held, that the claim for renewal of the whole was untenable, the lessees having lost interest in a portion of the property and that the covenant was plainly applicable to the premises as a whole and that as the convenant was to renew the lease as a whole, it could not avail the lessees for a renewal of a portion. 8 L. J.C.P. 59, **Dist.** [102 Ind. Cas. 246=50 Mad. 595 =25 M.L.W. 525=1927 M.W.N. 318=38 M.L.T. 233 =A.I.R. 1927 Mad. 513=52 M. L. J. 443 reversed].

111 Ind. Cas. 404=51 Mad. 885=55 I.A. 423=26 A.L.J. 1229=30 Bom. L.R. 1578=48 C.L.J. 431=33 C.W.N. 33=28 M.L.W. 808=1928 M.W.N. 754=A.I.R. 1928 P. C. 258=55 M.L.J. 646 (P.C.).

——Renewal—Specific performance allowed.

Per **Trotter, C. J. and Venkatasubba Rao, J. (Krishnan, J. differing)**—A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal is a contract which is capable of specific performance. Such a contract is not void or uncertainty. 102 Ind. Cas. 246=50 Mad. 595=25 M. L. W. 525=1927 M.W.N. 318=38 M. L. T. 233=A. I. R. 1927 Mad. 513=52 M.L.J. 443.

[Reversed on appeal by the Privy Council].

——Renewal.

In paragraph 1 of the Patta it was provided that the lease was for a term of seven years from 1322 to 1328 Fs. Then paragraph 5 ran as follows: "The period of Thikka under this Patta will expire in 1328 (twenty-eight) Fs. 1, the executant, have agreed that I shall execute a fresh Patta for seven years from 1329 (twenty-nine) to 1335 (thirty-five) Fs. with respect to all the Mouzas and the lands leased out on the above amount of Jama and on the condition of this deed and that possession of the Thekadar will continue up to 1335 Fs., etc."

Held, there was a clear agreement between the parties that after the expiration of the first period of seven years the lessee was to continue in possession for a term of another seven years on the same condition as before and therefore the period of the Theka was to extend up to the year 1335 Fs. The lessee being in possession, he could, if he liked, enforce specific performance of the agreement to execute a fresh Patta. 24 C W.N. 463, **Foll.** 84 Ind. Cas. 536=1 Pat. L.R. 69 =1923 P.H.C.C. 23=A.I.R. 1923 Pat. 236.

——Renewal—Specific performance not allowed.

Where the head lessee in head lease does not bind himself to take out a lease at the end of 99 years' period fixed in the head lease, but has agreed that if and when the lease is renewed he and his heirs and assigns would pass on the benefit of that renewal to their lessee that is not sufficient to give to the sub lessees the right to the renewal of the lease in perpetuity. 90 Ind. Cas. 189=26 Bom. L. R. 1019= A.I.R. 1925 Bom. 64.

——Renewal—Specific performance.

Where in the contract for renewal of the lease some method is stipulated for ascertaining the rent the contract with regard to the rent is not incomplete; but where it is stated that the lessor would be at liberty to enhance the rent without any objection on the part of the lessee and no limit is imposed upon the lessor's claim; nor is any method stated as to how the rent is to be fixed, the contract with regard to rent is too vague and incomplete to be specifically enforced, as the covenant for renewal is vitiated by uncertainty with regard to the rent that the plaintiff would be liable to pay which is a material part of a contract for lease. 69 Ind. Cas. 600=A.I.R. 1924 Cal. 346.

——Renewal—Covenant for—Lease by Government.

The grantee under a settlement by Government executued a kabuliat containing a clause 'if I agree to the enhanced rent to be fixed at the time of the next settlement, Government shall have power to settle the lands with me or if I do not agree, then with others'. **Held,** that the clause in the lease was a covenant for renewal on the same terms as the old lease except as to the amount of rent. 27 C.L.J. 447=45 Ind. Cas. 983.

——Renewal—Covenant for.

A lease granted by Government contained the following clause: 'If you (the lessee) agree to pay the enhanced rent fixed at the time of resettlement in future, the Government will have the right to settle with you.' **Held,** that the clause embodied a covenant for renewal subject to any higher rent which might be fixed at the settlement. 46 Cal. 160=27 C.L.J. 443= 45 Ind. Cas. 939.

——Renewal—Covenant for—Terms of—Silence as to—Presumption.

In the absence of specification of the terms of renewal the renewed lease would be for the same period and on the same terms as the original lease in respect of the essential conditions except the covenant for renewal itself. Silence in the condition as to the terms for which a settlement was to be made does not render a covenant for renewal unenforceable. 33 Ind. Cas. 450 (Cal.).

——Renewal—Covenant for.

A lease recited prior settlements on the expiration of the last of which the lease was renewed at an enhanced rent and also provided that after the expiry of the term the lessor would have power to resettle at an enhanced rent. **Held,** the clause was a covenant for renewal. 16 C.L.J. 217=17 Ind. Cas. 180.

——Renewal—Covenant for — Vagueness—Enforceability.

A covenant in a lease for a renewal of the settlement after the expiry of the present term without specifying the terms or the period of years, and the amount of rent is vague and not enforceable. 13 C.W.N. 593= 4 Ind. Cas. 535.

21. Rent and revenue.

——Rent and revenue—Abatement of rent.

Where the patnidar filed series of rent suits against the darpatnidars holding lands under him, and the darpatnidars defended the suits claiming abatements of rent on various grounds, and also filed cross suits, alleging that they have been deprived by the patnidar of certain lands included in their darpatni leases and claiming on this account an entire suspension of rent or in the alternative an abatement in respect thereof.

Held, on construction of documents, that abatements under various heads, including the claim to the disputed lands, which were included in the darpatnis, should be allowed. 33 C.W.N. 772= A.I.R. 1930 P.C. 198 (P.C.)=32 Bom. L.R. 1157= 52 C.L.J. 132=59 M.L.J. 208=32 M.L.W. 311= 126 Ind. Cas. 81.

——Rent and revenue—Abatement of rent.

In a lease the tenants agreed not to claim abatement of rent on account of flood, dispossession or other grounds of like nature but did not mention 'diluvion.' **Held,** that it was still within their rights to claim abatement on the ground of diluvion. A forced construction should not be put to justify that the tenants were bound to pay. 22 C.L.J. 569=33 Ind. Cas. 349.

——Rent and revenue — Apportionment of— Putni rent — Putnidar becoming proprietor before the end of year.

In the case of Putni lands rent does not accrue from day to day but is payable in accordance with

the contract. The only statute in this country dealing with apportionment is S. 36, T. P. Act, but that does not apply to agricultural lands and consequently has no application. Therefore, although a putnidar becomes proprietor before the end of the year, he is bound to pay the whole year's rent unless there is any contract to the contrary. 83 Ind. Cas. 144=28 C.W.N. 1039=A.I.R. 1924 Cal. 1069.

——Rent and revenue.

Where a lessee who has covenanted to pay rent, assigns his lease subsequently and there is a default in paying rent, there is a separate cause of action against the original lessees and the assignee. The original lessees are liable on their covenant, that is, by privity of contract, and the assignee is liable by privity of estate, that is by virtue of the relationship which exists between him and the land-lord. It is true that as between the assignee and the original lessees, the assignee is primarily liable. But on the other hand, it is settled that, in law, the lessee is not a mere guarantor for the assignee. There is no inconsistency whatever between the liability of the original lessees on their covenant, and the liability of the assignee arising by reason of privity of estate, though the several liabilities are in respect of the same subject-matter. The causes of action being distinct, the judgment obtained against the assignee for due rent is no bar to the claim against the original lessees when the judgment remains unsatisfied. A.I.R. 1938 Bom. 360=I.L.R. (1938) Bom. 471=40 Bom. L. R. 497=177 Ind. Cas. 479.

——Rent and revenue—Enhanced assessment—Liability for.

An agreement was made in 1882 whereby a tenant took building site from land-lord on a fixed rent of Rs. 19 which as agreed between them was not to be enhanced. In 1915 the Government increased the assessment on the land from annas 15, pies 3 to Rs. 59 and odd. The tenant contended that in spite of this increment, land-lord should pay the assessment as he had been admittedly paying so long.

Held, that though deed was silent on the point, it was inequitable that the land-lord should bear the burden and that the tenant was bound to pay the difference between the actual rent he paid and the assessment. 86 Ind. Cas. 96=27 Bom. L.R. 95 =A.I.R. 1925 Bom. 168.

——Rent and revenue—Enhanced rent—Provision for.

Where a lease provides for the payment of increased rent on the measurement of the land leased, such increased rent can only be claimed from the time the land is measured, and not from any anterior date. 60 Ind. Cas. 743 (Cal.).

——Rent and revenue.

Where a kabuliyat provided: When you would measure the lands we shall pay rent, without any objection, for lands found out by your measurement, in accordance with the prevailing rate of tenants holding similar class of lands,

Held, that it means that if the land-lord insists upon having a measurement he may do so and then when he does so the whole thing is to be re-assessed on the basis of the prevailing rate for lands of the same plots; in other words, the document is a contract by which the tenant goes on for the present at a fixed jama for a fixed land but there is a right in the land-lord to alter that position and to claim prevailing rate for the actual amount of land in the tenant's possession. 105 Ind. Cas. 605=46 C.L.J. 250=A.I.R. 1927 Cal. 924.

——Rent and revenue—Heritable tenure does not mean fixity of rent.

The document purporting to be a lease provided: "You will enjoy from generation to generation keeping intact the boundaries as before. The profit and loss are yours. You will on no account be entitled to claim a reduction of rent. When required by me you will submit to Jarip Jamabandi .... If any new imposition be made by the Government you will pay it besides the Jama of this Potta."

Held, that the lease was not one for fixed rent. The mere fact that the tenure is heritable and a sum is mentioned as the rent does not show that the rent is fixed. 76 Ind. Cas. 324=A.I.R. 1923 Cal. 351.

——Rent and revenue—Permanent assessment.

The predecessors-in-interest of plaintiffs were granted in 1790 the talukdari patta of certain land. The taluk was settled with them permanently and the revenue was to be assessed on the cultivated land which would be ascertained by measurement from time to time. The rate to be paid was an increasing rate up to 8 annas per bigha after which it would remain fixed in perpetuity 1-6th of the area cultivated would be free of rent. The mohal was subsequently surveyed from time to time in 1834, 1850-1, 1877-8, 1888-9, 1914 and additional areas were assessed up till 1914 at the rate of 8 annas a bigha, the full amount mentioned in the sanad of 1790, that is, for about or over a 100 years. Then in 1914, the rate was increased to 12 annas.

Held, that by the patta of 1790 the land within the boundaries specified by the plaintiff was permanently settled with the plaintiff and that the revenue was to be assessed from time to time according to the terms of the patta by measuring the lands under cultivation and was to be assessed at an increasing rate up to the maximum of annas 8 per bigha only and the land was not therefore assessable at 12 annas per bigha. 69 Ind. Cas. 188 =35 C.L.J. 445.

——Rent and revenue—Persons in occupation.

The lessee is entitled to demand rent from the persons who are in occupation of the portion of the demised property, if the lessor is so entitled. 17 R.D. 306=A.I.R. 1933 All. 632=146 Ind. Cas. 584.

——Rent and revenue—Remission of rent not allowed.

Where the extent did not form an item of consideration at all in fixing the rent of the lands, in other words, the lands were merely leased as villages and the rent had nothing to do with the actual extent and admittedly, no measurements were taken at the time the lands were leased nor at any time thereafter. Held, the lessee cannot claim more than the area first taken possession of by him under the lease nor remission of rent. 69 Ind. Cas. 517=17 M.L.W. 94=1923 M.W.N. 189 =A.I.R. 1923 Mad. 459.

——Rent and revenue—Rent in kind mokarrari lease.

The material passages in the kabuliyat were as follows: "After setting a quantity of 1 bishi 5 aris of paddy the price of which is Rs. 50 as annual gula rent (paddy rent), and Rs. 25 as selami, I

execute this mourashi mokarrari kabuliyat to the following effect: I shall pay the rent that is, deliver the gula paddy according to the kists noted below year after year, x x x. There shall not be any variations as regards the jama and area settled at any time. If I fail to deliver the gula paddy according to the kists, I shall be dealt with according to law x x x. I shall deliver the said paddy measuring it out with a five seer dou after drying and winnowing it and making it fit for being stored in a gola." The schedule which was appended to the kabuliyat contains the following. "Instalment of rent 1 bishi, 5 aris of paddy in the month of Magh,"

Held, that the primary intention of the parties was that the rent should be paid in kind, and not in cash, and in the event of failure to deliver it, the land-lord would be entitled to damages by recourse to the Court, which would ordinarily be the market price of the paddy. 113 Ind. Cas. 37 = 55 Cal. 808 = A.I.R. 1928 Cal. 737.

——Rent and revenue—Rent in kind or in cash.

In each case the question, whether rent stipulated for is in kind or cash, depends upon the particular terms of the particular kabuliyat and no hard-and-fast rule can be laid down.

Where a kabuliyat provided: "I do execute this patta that in lieu of the price of Rs. 39 per year as described above with respect to the land you would be liable to deliver within the month of Magh every year at my house 78 aris of paddy. If you do not deliver then I shall be entitled to realize the same with interest and damages at the rate of 4 annas per rupee,"

Held, that the rent provided for was in cash at R. 39 per year and not in kind. 98 Ind. Cas. 977 = A.I.R. 1927 Cal. 243.

——Rent and revenue—Rent in kind.

Where rent is fixed in a lease deed in kind, but at the end of the lease, the price of the grain to be given is also approximately given.

Held, that the rent payable is a rent-in-kind, and that the consequence of non-delivery as covenanted is that the lessee is liable for the market value of the crops on the date of the delivery. 66 Ind. Cas. 780 = 3 Pat. L.T. 456 = A.I.R. 1922 Pat. 4.

——Rent and revenue—Rent is debt.

As soon as a lease is granted rent becomes due and is a debt which is payable to the personal heir of the lessor if the lessor dies before due date for its payment. The question as to who is entitled to rent depends upon the intention of the term in the lease reserving the rent. 22 N.L.R. 13 = 94 Ind. Cas. 741 = A.I.R. 1926 Nag. 314.

——Rent and revenue—Rent payable by lessee, whether accrues from day to day.

Rent payable by a lessee accrues due from day to day, though actual payment is to be made on the expiry of a year. It is inequitable and not warranted by law that the person who is on the scene when rent falls due is entitled to appropriate for the entire period for which it is paid, even though the right to receive rent for part of that period was not vested in him. A.I.R. 1934 All. 453 = 18 R. D. 351 = 149 Ind. Cas. 323.

——Rent and revenue.

Where a so-called lease is inadmissible in evidence, compensation for use and occupation can be granted in a suit for rent based on the so-called lease. 31 All. 276, Foll. 92 Ind. Cas. 553 = A.I.R. 1926 Nag. 238.

——Rent and revenue—Revenue Court—Plea not open.

In a suit filed in a rent Court by the lessor against the lessee for the balance of lease money, it was pleaded in defence that the lessor had improperly deprived the lessee of some portion of the leased land,

Held, that such a plea cannot be admitted in a rent Court. 71 Ind. Cas. 400 = A.I.R. 1923 All. 367.

——Rent and revenue—Stipulation for rent in kind or money value—Lond-lord if can recover market value.

Where a tenant executed a kabuliyat promising to pay rent Rs. 4 in cash and 91 aris of paddy and on his failure to pay the said rent and share of paddy the land-lord would be competent to realise the said rent and Rs. 36 as price of the paddy.

Held, that on the tenant making default in paying the land-lord's share of the paddy the latter was not entitled to recover the market value of the paddy at the time but only the fixed amount of Rs. 36. The question whether a land-lord is entitled to anything more than the value of the paddy stipulated to be paid, on default of payment by the tenant, is one depending on the construction of the kabuliyat in each case. 15 C.W.N. 249, Ref. 24 C.W.N. 85 = 54 Ind. Cas. 914.

——Rent and revenue.

Where the sub-lessee undertook to pay the fixed rent to his land-lord and also undertook to discharge the rent due from his lessor to the superior land-lord he must pay the rent actaully due to the superior land-lord though such rent is enhanced subsequently. 9 Ind. Cas. 223 (Cal.)

22. Rent suit.

——Rent suit—Scope of enquiry.

Where, in a suit for rent, the lessee claims certain amount as damages alleging them to have accrued by reason of the high-handed and illegal acts of the lessor, but does not pay any court-fee on this amount, he is not entitled to any relief in the suit. Further, the nature of the enquiry essential to determine the correctness or otherwise of this claim would be quite foreign to the scope of a rent suit. A Court is, therefore, justified in refraining from entering into such a question in a rent suit. A.I.R. 1941 Pat. 106 = 21 P.L.T. 821 = 7 B. R. 490 = 192 Ind. Cas. 776.

——Rent suit—Sustainability.

Certain premises taken on lease by defendant so long as he would remain in town—Premises vacated without cause before expiry of term—Defendant still in town—Plaintiff land-lord protesting—Suit for rent for part of unexpired period of lease is maintainable, A.I.R. 1938 Lah. 454 = 40 P.L.R. 750 = 180 Ind. Cas. 652.

23. Rights and obligations.

——Rights and obligations.

The rights of the parties to a contract of lease can be abrogated by settlement proceedings. A.I.R. 1945 Cal. 129 = 78 C.L.J. 328.

——Rights and obligations.

Where a lease has been disposed of contrary to the terms contained in it, and that disposition is

void or has been avoided by a landlord, there is no room for the application of the doctrine of 'fidei commissium' even in the case of a sale or other disposition for value, much less where the disposition is a gift. Since the choice in such a case of avoiding the disposition is with the lessor and not with the lessee or his executor, it cannot be said that the lessee or his executor must bring an action to get the disposition declared void. A.I.R. 1939 P.C. 138=50 M.L.W. 87=41 P.L.R. 717=182 Ind. Cas. 770 (P.C.)

——Rights and obligations.

Were the lessee was given a preferential right to take a lease for the ensuing year if he was prepared to pay as much as any other bona fide applicant where prepared to give, that is the lessee had, so to speak, a right of pre-emption and if the offer made by the other was bona fide and valid, he, the lessee, was not entitled to take a lease at a lower figure, although he would be entitled to take it if he were prepared to offer the same figure; the right which so accrues to the lessee is called the rights of first refusal. 1935 O.W.N. 1211=A.I.R. 1936 Oudh 56=11 Luck. 567=159 Ind. Cas. 121.

24. Sale of tenancy interest.

——Sale of tenancy interest — Position of purchaser.

When a tenancy interest is sold in execution of a decree against the lessee, a tenancy is created in the name of the purchaser in the terms of the original demise and the covenants therein will be binding on him. 90 Ind. Cas. 832 (Cal.)

25. Sub-soil rights.

——Sub-soil rights—Adverse possession.

In considering whether a person has acquired title to minerals by adverse possession, it is nothing to the purpose to prove that the person in possession had not worked any one pit for 12 years continuously, if for 12 years he had carried on operations in various parts of the mineral field. On the other hand, the fact that one pit in a mineral field is discontinued and another opened in a different part of the field and that bores are sunk in likely places is excellent proof of possession of the whole area. A.I.R. 1931 P.C. 186=60 M.L.J. 183=33 M.L.W. 162=35 O.W.N. 265=53 C.L.J. 81=(1931) M.W.N. 121=33 Bom. L.R. 425=58 I.A. 29=12 P.L.T. 251=15 R.D. 194=10 Pat. 407=53 C.L.J. 487=130 Ind. Cas. 315 (P.C.)

——Sub-soil rights—Title.

Since the permanent settlement, zemindars have, at least, a prima facie title to all lands for which they pay revenue.

Though long possession of land situated within zemindari may be good evidence of title to surface rights,the question as to sub-soil rights stands upon a different footing. If a claimant to sub-soil rights holds under the zemindar, or by a grant emanating from him, even though his power may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights. A.I.R. 1931 P.C. 89=53 C.L.J. 333=35 C.W.N. 521=(1931) M.W.N. 435=33 M.L.W. 707=33 Bom. L.R. 885=61 M.L.J. 9=58 C. 1187=58 I.A. 125=131 Ind. Cas. 753 (P.C.)

——Sub-soil rights.

As between zemindar and jahagirdar, the zamindar must be regarded as the owner of the minerals. The remission of land revenue in respect of villages forming part of zamindari, whether authorised by the Government or not, cannot affect the proprietary rights of the zamindar in these villages or his-rights as against tenure-holders under his to claim the ownership of of minerals in them. A.I.R. 1931 P.C. 30=60 M.L.J. 253=53 C.L.J. 11=35 C.W.N. 233=33 M.L.W. 277=10 Pat. 296=12 P.L.T. 375=58 I.A. 9=131 Ind. Cas 325 (P.C.).

——Sub-soil rights—Evidence of title to—Duty of lessor—Onus.

A contract for grant of mining lease in certain mouzas provided that if the lessees did not take the lease within a certain period "except for want of the lessor's title in the said mouzas" the deposit would be forfeited to the lessor. The settlement record showed the lessor as zamindar of the mouzas and also that one of them was settled as a brahmottar and the other as a debuttar with tenure holders. Further demand was made by the lessees for production of the deeds of brahmottar and debuttar grants for the purpose of satisfying themselves that underground rights had been reserved to the zamindar and also for execution of an indemnity bond. The lessor replied that no deeds could be traced and that he was not prepared to execute an indemnity bond. The lessees thereupon refused to complete the lease and sued for their deposit.

Held, that the exception clause in the contract referred to title to the underground and not title to the mouzas but it did not increase the obligation as to the title lying on the lessor under general law which included no duty to produce satisfactory evidence of title to the underground before the completion of the lease.

That the onus was on the lessees to show that the lease offered to them was not a secure lease. Moreover the title of the zamindar had not been shown to be such as prevented him from giving the lessees a secure and valid lease. A.I.R. 1930 Cal. 561= 34 C.W.N. 347=57 Cal. 1189=128 Ind. Cas. 321.

——Sub-soil rights—Express grant necessary.

A patni grant does not carry with it the rights to the minerals unless there are express words to that effect. Where the patta provided: "you shall be in possession of all the zamindary rights and interest as prevailing from before in the lands included in the said mauza from before."

Held, there was nothing to show that sub-soil rights were granted. 112 Ind. Cas. 659=9 P.L.T. 593=8 Pat. 190=A.I.R 1928 Pat. 482.

——Sub-soil rights—Grant of—Construction.

Obiter: The question whether a putni tenure transfers all the rights of the Zamindari, including the right to the minerals, is still open. 45 Cal. 87, Expl. and Dist.; 16 C.L.J. 7 has not been overruled by Privy Council decisions. 86 Ind. Cas. 289=29 C.W.N. 725=27 Bom. L.R. 753=23 A.L.J. 712 =6 P.L.T. 42=21 M.L.W. 289=4 Pat. 244=52 I. A. 109=A.I.R. 1925 P.C. 42=48 M.L.J. 328 (P.C.).

——Sub-soil rights—Minerals—Adverse possession.

Leases purporting to grant sub-soil-rights will not give a title by adverse possession for which actual working must be established. (1920) Pat. H. C. C. 146=5 Pat. L. J. 273=56 Ind. Cas. 184.

26. Transferability.

——**Transferability.**

Privity of estate between the lessor and the lessee's assignee can hardly be said to arise except where the interest of the lessee has been transferred in whole to an assignee. A.I.R. 1939 Pat. 522=6 B.R. 200=185 Ind. Cas. 557.

——**Transferability — Construction — Lessor not** bound by lessee's transfer unless security accepted—Lessee has no right of transfer and cannot call upon lessor to accept security.

A lessor stipulated that any transfer by the lessee would not bind him and lessee would be liable for the rent in spite of the transfer and added further that "notwithstanding (the aforesaid provision) if on account of the intricacies of the law any tansfer made by you becomes in any way binding on me (the lessor), then you and your heirs shall remain bound to pay the fixed amount of rent so long as the transferee will not furnish security in proper quantities of immovable properties to be fixed by me for the due payment of the fixed rent and this shall in no way be varied."

Held, that the passage does not mean that whenever the lessees choose to transfer the lease-hold interest, the lessor would be bound to fix the security for the due payment of the rent which the transferee would be required to give and the original lessees would be exonerated from their personal liability to pay the rent. 122 Ind. Cas. 1=33 C.W.N. 865=31 M.L.W. 118=A.I.R. 1930 P.C. 13 (P.C.)

——**Transferability.**

The executants of a kabuliyat had purchased certain jamas in 1822, 1833 and other years. The land lords accepted rent in respect of these jamas from the purchaser all the while. As a consequence of the application for mutation of names in 1842, a kabuliyat was executed which was limited to a term of eight years. It was contended that effort at mutation shows that the jamas were transferable.

Held, that the facts were not sufficient to infer that jamas were transferable. 32 Cal. 41 (P.C.) and 32 Cal. 51 (P. C), **Dist.** A.I.R. 1930 Cal. 94=57 Cal. 775=126 Ind. Cas. 550.

——**Transferability.**

A purchaser, from a permanent lessee who had covenanted not to alienate, if recognized by the lessor is not bound by the convenant against alienation. 116 Ind. Cas. 153=49 C.L.J. 89=A.I.R. 1929 Cal. 228.

——**Transferability—Under-proprietary rights.**

The taluqdar, having the superior proprietary rights, executed in favour of **K** and **D** a lease of a village which granted them the whole village from year to year and generation after generation (nas-lan bad naslan). **K** and **D** applied to the Settlement Court for a decree that they were entitled to under-proprietary rights and produced the lease before the Settlement Officer who ordered that "their claim was dismissed but that they had secured their end." They were never recorded as under-proprietors nor did they exercise their rights as such until the transfer in dispute was made.

Held, that no under-proprietary rights, **i. e.,** to say hereditary and transferable rights in the village were granted to **K** and **D.** The order of the Settlement Officer could only mean that such rights were refused to them. They had therefore no rights of transfer in the village. 14 I.A. 7 and A.I.R. 1927 Oudh 74, Dist. 113 Ind. Cas. 799=A.I.R. 1929 Oudh 327.

——**Transferability—Law governing.**

Where the lease was executed in the year 1875, long before the present Agra Tenancy Act (1901) was passed, and there was no prohibition against transfers of an interest by a thekadar,

Held, assuming that the interest was transferable prior to 1901, it can be made non-transferable by an express enactment. The law governing the transfer must be that which was in force on the date when the transfer in dispute took place. 95 Ind. Cas. 1048=48 All. 385=24 A.L.J. 489=A.I.R. 1926 All. 432.

——**Transferability—Lease governed by T.P. Act.**

Where the lease, read as a whole, shows that the lessor put the lessee in the same position as he himself occupied, except in a few minor matters, and the primary object of the lease is not agriculture,

Held, the lease must be treated as not an agricultural lease, so as to be exempted from the operation of S. 108 of the Transfer of Property Act and to be governed by the Agra Tenancy Act, and the rights under it are transferable. 95 Ind. Cas. 1048=48 All. 385=24 A.L.J. 489=A.I.R. 1926 All. 432.

——**Transferability—Clause against.**

If a lease creating a permanent tenancy at a fixed rate of rent contains a restriction on the transferability of the tenancy, the restriction is inoperative if there is no re-entry clause in the event of the breach of the covenant. 91 Ind. Cas 649=53 Cal. 270=A.I.R. 1926 Cal. 533.

——**Transferability—Clause against.**

Where a lease lays down that the grantee would enjoy the land by reclamation and cultivation from generation to generation and that the jama would be paid into the office of the land-lord from year to year,

Held, that the rent is fixed in perpetuity. The words "Thicca mokra" in the deed would only strengthen the view and a clause in deed preventing the alienation of the tenancy without the consent of the land-lord would not be a conclusive indication that the rent was not intended to be a permanent one. Such a convenent is inoperative if there is no clause for re-entry. 72 Ind. Cas. 1047=A.I.R. 1924 Cal. 361.

——**Transferability—Clause of re-purchase does not affect transferability of lease.**

A lessor contracting for a right of re-purchase of lessee's rights does not in any way derogate from the transferable quality of the rights under the lease. The decision of every case will depend on the conditions of the lease. 66 Ind. Cas. 106=9 O. L. J. 101=A.I.R. 1923 Oudh 47.

27. Under-proprietary tenure.

——**Under-proprietary tenure — If amounts to sale of tenure.**

A grant of under-proprietary rights by means of leases, giving heritable and transferable rights in lieu of a premium taken in advance, and an annual rent reserved thereby, cannot be treated as a sale of a proprietary or and under-proprietary tenure. 1 O.L.J. 463=17 O.C. 299=25 Ind. Cas. 855.

28. Validity.

——**Validity.**

Execution of lease by pardanashin lady—Onus to prove that she understood nature and effect of her act is on person setting up its validity—Plea challenging validity of lease not taken by representatives of lady

lessor in written statement—Lady enjoying benefit of lease without complaint for number of years before death—Such plea cannot be entertained before Privy Council. 1939 A.W.R. 101=5 B.R. 647=20 P.L.T. 407=43 C.W.N. 758=A.I.R. 1939 P. C. 159=(1939) M.W.N. 963=41 Bom. L.R. 1055=(1939) Kar. (P.C.) 249 Sup.=70 C.L.J 402=(1939) 2 M.L.J. 793=181 Ind. Cas. 341 (P.C.)

——Validity—Lease of plot owned by several co-sharers jointly—One of them leasing out without consent of others—Rights of statutory tenant.

Where an agricultural plot is owned by two or more co-sharers, a perpetual lease of the land cannot be granted by a co-sharer without the consent of the others. Much less is a co-sharer, who is in wrongful possession of the share of the other co-sharers competent to grant such a lease of the joint plots and such a lease is wholly void.

A person in wrongful possession of land has no right to let that land and cannot consequently create statutory rights by admitting others as tenants.

Where the land belonging to more than one co-sharer is let out by only one of them without the consent of the other co-sharers, the lessee not having been admitted to tenancy by all the co-sharers, does not acquire the rights of a statutory tenant and is not entitled to retain possession as such. A.I.R. 1938 All. 316=(1938) A.L.J. 333=I.L.R. (1938) All. 441=1938 R. D. 463=1938 A.W.R. 199=175 Ind. Cas. 902.

——Validity.

If the land-lord lets premises with the knowledge that they would be used as a brothel, then the lease is void on the ground of bublic policy, and though on the one hand he cannot under those circumstances recover the overdue rent on the other hand he can recover possession of the premises occupied by the defendants under a void lease. (1839) 5 Bing. (N. C.) 666, **Foll.** 87 Ind. Cas. 802=A.I.R. 1925 Sind 296.

——Validity—Lease to commence in future.

A lease to commence in future, is an **inter se termini** which is in an existing real right vested in the lessee which gives him an immediate right of entry. 77 Ind. Cas. 798=18 N.L.R. 85=A.I.R. 1922 Nag. 227.

——Validity—Agreement between co-sharers—Not a lease.

Plaintiff and defendants purchased certain shares in a certain village and entered into an agreement by which one of the defendants was to realise his share of profits from certain tenants, and the plaintiff and the remaining defendants were each to realise the rent from all the other tenants of the village and take all the profits for a period of six years in turn. Plaintiff contended in his suit that the agreement was not valid in law or binding on him and that it, being a lease, could only be made by a registered instrument,

Held, the agreement in question was binding. It could not amount to a lease as one of the essentials of a lease, that there should be a consideration to be rendered periodically or on specified occasions to the lessor, was wanting. 68 Ind. Cas. 333=25 O.C. 39=9 O.L.J. 184=A.I.R. 1922 Oudh 201.

——Validity—Oral lease.

Where a person is in possession under an oral agreement to lease, and the premises are then let to third party, he must be deemed to have notice of the prior lease. An oral lease is not invalid and where the lessee takes possession the effect is the same as if a document had been executed, provided the specific performance is asked for in the same Court between the parties and at the same time when the subsequent question comes to be determined. 63 Ind. Cas. 118=25 C.W.N. 220.

29. Void.

——Void—Payment under—Effect.

Payment of rent under a void contract of lease for a number of years does not make the contract legal and operative. 36 Cal. 604=9 C. L. J. 343=2 Ind. Cas. 828.

——Void—Tenancy at will.

A perpetual lessee though he cannot be so treated owing to the lease having been subsequently found to be invalid, may yet be treated as a tenant-at-will. 2 O.L.J. 276=30 Ind. Cas. 258.

30. Zuripeshgi.

——Zar-i-peshgi lease and usufructuary mortgage, difference between.

Every zar-i-peshgi lease is not to be regarded as a mortgage. The main difference between a zar-i-peshgi lease and an usufructury mortgage is that under an usufructuary mortgage, the mortgagee is authorised to retain possession until the mortgage-money is satisfied but in a zar-i-peshgi lease, the mortgagee is to retain possession for a definite period only. Where, therefore, a lease does not show any intention to create the relationship of debtor and creditor and no right of redemption is expressly or impliedly reserved to the lessor but the lessee is to quit the land without any payment on the part of the lessor at the expiry of the term of the lease, such a lease does not create an usufructuary mortgage. 1936 O.W.N. 399=1936 R.D. 168=A.I.R. 1937 Oudh 146=12 Luck. 161=162 Ind. Cas. 825.

——Zur-i-peshgi.

The mortgagor is entitled to set off the rent payable to him as against the zuripeshgi money at the time of redemption. 5 Cal. 333, Foll; 56 Ind. Cas. 743, Dist. 102 Ind. Cas. 421=8 P.L.T. 601=A.I.R. 1927 Pat. 285.

——Zuripeshgi—Independent documents.

The combination of two independent documents which contain no reference to each other cannot create Zuripeshgi lease. 78 Ind. Cas. 47=A.I.R. 1925 Oudh 270.

——Zuripeshgi—Lease or mortgage.

In a Zuripeshgi lease properly so-called there is an advance to the lessor in consideration of which the lessee is given possession of the land for a term during which he recoups himself for the sum advanced and interest out of the profits of the land of which he is put in possession. There is no question of redemption upon paying off an advance. The lease terminates at the expiration of the term and the lessor may re-enter as on the termination of any other lease.

Where, however, the interest created in the lessee continues after the expiration of the term until the advance, which is essentially a loan and not an advance of rent, is re-paid, the transaction has the essential characteristics of a mortgage. 68 Ind. Cas. 394=3 P.L.T. 797=2 Pat. 217=A.I.R. 1923 Pat. 122.

——Zur-i-peshgi—Rights of a lessee under.

Where the object of a zuripeshgi lease was to secure repayment of a debt and not to create the relationship of land-lord and tenant the lessee could not claim occupancy rights in the land. (1917) Pat. H.C.C. 271=41 Ind. Cas. 495.

31. Miscellaneous.

——Miscellaneous.

Where the lessee of a Corporation had assigned the lease and a default was made in payment of rent, the references to assignee as a lessee under the lease in notice served by the lessors on the assignee determining the lease and forfeiting it, in a resolution passed by the lessors sanctioning the filing of a suit against him, and in the plaint filed by the lessors against the assignee, are not strong enough to justify an inference that the lessors released their claim against the original lessees. A.I.R. 1938 Bom. 360=I.L.R. (1938) Bom. 471=40 Bom. L.R. 497=177 Ind. Cas 479.

——Miscellaneous—Private property attached during Mutiny of 1857 and leased out for bazar —Assurance that bazar would remain for ever— Misconduct of lessee or requirement of land for road to entail dispossession—Lessee entitled to remove material—Release of attached property to original proprietors—Proprietors, if derived title from Government and if bound by intermediate acts of Government,

During the Mutiny of 1857, in September, the Military Governor passed a General Order "attaching" the immovable property of all Muhammadan residents of Delhi. In accordance with this order, the land in question was "attached." In close proximity to this land, the British Military Camp had been established and after the suppression of the Mutiny, Govt. decided to construct a regular bazar in that locality, and for this purpose, it granted small plots of land on a nominal rent to intending builders. The terms of the grant were contained in a proclamation which was issued by the Superintendent of the Sadar Bazar, Delhi, on Sepetember, 29, 1858 (Ex. D. 1). Some of the terms were: "the Govt. has decided that pakka or kacha shops should be constructed in the abadi of Sadar Bazar, Camp, Delhi. It is likely that the abadi shall continue for ever. If per chance the Sadar is removed from there or a road is required to be constructed, the owner of the shop, which is included in the road, will not get the cost of the shop from the Govt. But owners of the shops shall be competent to remove their materials. If any shop-keeper is expelled from the Sadar Bazar on account of misconduct and he has some property in the Sadar, then such orders regarding the value of the said property will be passed by the Superintendent, Sadar Bazar, as he deems proper. Any person who wants to sell his shop to anybody else, will not be allowed to do so without giving information to the Govt." Some of the attached properties were subsequently released to the former proprietors who proved their innocence:

Held, that the grantees of the lease were permanent tenants:

Held, also that the attachment was nothing less than appropriation of such property by Govt. who was the de jure as well as the de facto owner at the time when, after the restoration of peace, as an act of grace it decided to "release" these properties to those who proved their innocence. The so called "releases" of properties confiscated under the "General Order" were in reality nothing but regrants, under which the former proprietors derived their title from Govt., taking only such rights as were held by the Govt., their assignor, at the time and, therefore, they were bound by all intermediate acts of the Govt., in respect of the property assigned. A.I.R. 1937 Lah. 370=39 P.L.R. 602= I.L.R. (1940) Lah. 363=176 Ind. Cas. 65.

——Miscellaneous.

Lease of undivided fraction in estate—Subsequent partition decree—Lessee not party to decree—Lessee in possession of whole share allotted under decree to lessor—Lessee cannot be ousted from share in remaining portion leased originally. 64 Ind. Cas. 448= 35 C.L. J. 166=A.I.R. 1921 Cal. 623.

Lease or Mortgage

See **Contract Act, Ss. 69 and 70.**

Lease or Mortgage.

See **Deed—Construction.**

Lease or sale.

See **Deed—Construction.**

Leave to Appeal.

See (1) **Civil P. C., O. 33 and O. 40, R. I.**
(2) **Govt. of India Act, 1935, S. 205.**
(3) **Judicial Committee Rules.**
(4) **Provincial Insolvency Act, S. 16.**

Legacy.

See (1) **Hindu Law—Will.**
(2) **Muhammadan Law—Will.**
(3) **Prob. and Admn. Act, Ss. 112—145.**
(4) **Succession Act, Ss. 129, 131, 133, 134, 138, 141, 142, 150, 152, 169, 172, 173, 175.**
(5) **Will.**

Legal Adviser.

See (1) **Criminal P. C., S. 340.**
(2) **Evidence Act, Ss. 126—129.**
(3) **Legal Practitioner.**
(4) **Legal Practitioners' Act.**

Legal and Equitable Estates.

See (1) **T. P. Act, 1882, Ss. 53-A, 54, 55, (4)**
(2) **Trusts Act.**

Legal Cruelty.

See (1) **Divorce Act.**
(2) **Hindu Law—Maintenance.**
(3) **Husband and Wife.**
(4) **Muhammadan Law—Divorce.**

Legal Disability.

See **Lim. Act, Ss. 6 to 8.**

Legal Fee.

See **Civil P. C., S. 35.**

Legality, Contract.

See **Contract Act, Ss. 23, 30.**

—Legal Maxims.

Expressio unius est exclusio alteris. See Cr. P. Code (V of 1898), S. 350-A. 1948 A.W.R. (H.C.) 174 =A.I.R. 1948 A. 411.

——"Omnia presumuntur rite esse solemniter esse acta donee probetur in contrarium". See Evidence Act, S. 68. I.L.R. (1947) Nag. 649=A.I.R. 1948 Nag. 155.

Legal Necessity.

See Hindu Law—Alienation.

Legal Practitioners.

See also: (1) **Bar Councils Act, 1926.**
(2) **C. P. Code, O. 3.**
(3) **Evidence Act, S. 126.**
(4) **Legal Practitioners' Act.**
(5) **Letters Patent (Bombay, Calcutta Madras). Cl. 10.**
(6) **Letters Patent (Allahabad, Lahore, Nagpur, Patna), Cl. 8.**

Legal Practitioner.

See also **C. P. C., O. 3.**

Synopsis.

1. **Abandonment of issues and pleas.**
2. **Admission**
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4. **Authority to act**
5. **Change of name**
6. **Compromise**
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19. **Relation with client**
20. **Rights and duties**
21. **Status**
22. **Withdrawal from case**
23. **Witness**
24. **Miscellaneous.**

1. Abandonment of issues and pleas.

——Vakil's general power, if includes power to abandon issue.

A Vakil's general power in the conduct of a suit includes the abandonment of an issue which, in his discretion, he thinks it inadvisable to press. A.I.R. 1935 Lah. 71=16 L. 328=37 P.L.R. 596=157 Ind. Cas. 806.

——A pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower Appellate Court cannot be challenged in second appeal. 109 Ind. Cas. 178= A.I.R. 1928 Mad. 900.

——Abandoning issue.

It is within a vakil's power to abandon an issue which in his discretion he thinks inadvisable to press. 25 Mad. 367 (P.C.), Foll. 109 Ind. Cas. 713= 10 L.L. J. 383.

——Abandonment of plea—Agreement to be bound by special oath—Validity.

One of the plaintiffs in a suit for recovery of money, died and her heirs were brought on record. On behalf of the original plaintiffs three pleaders were engaged. The substituted plaintiffs presented a second Vakalatnama on which only two pleaders made a formal endorsement of acceptance though it contained the name of the third also who was the senior pleader. **Held,** that as senior pleader of the three, the third was entrusted with the management of the case on behalf of all the plaintiffs. The two Vakalatnamas were similar in terms and authorised the pleaders to withdraw the suit or to give up the claim of the plaintiff, to cite and examine the witnesses or to refuse to examine the same and provided that all acts done by the pleaders for the benefit of their clients would be accepted by the parties. **Held,** that the powers were wide and comprehensive enough to include also the step taken by the pleader in placing one of the defendants on special oath and agreeing that his clients should be bound by the answers given by the witness. 24 C.W.N. 385=57 Ind. Cas. 149.

——Abandonment of plea—Issue of fact.

On a qestion of fact it is within the competence of the pleader or the parties to give up an issue. 25 M. 367, Foll. 43 Mad. 398=38 M L. J. 86=27 M.L.T. 142=11 L.W. 379=(1920) M.W.N. 272=55 Ind. Cas. 371.

——Abandonment of plea.

Where a pleader abandons a plea at one stage of the hearing of a cause it should not be entertained at later stages. 30 C.L. J. 48=53 Ind. Cas. 49.

——Legal Practitioner—Abandonment of plea—Binds client.

Parties are bound by what their counsel do, in the shape of admissions, consents, withdrawals, in conducting the cases in the exercise of their discretion, acting within the scope of their authority unless they have been induced or misled by some circumstances to make a statement under a mistake. 35 Ind. Cas. 205 (All.)

——Abandonment of plea — Authority — Client cannot re-open issues in appeal.

A pleader is entitled to withdraw a plea raised in the pleadings and the client cannot re-open to the issues based on such a plea in appeals. 3 O.L. J. 156=34 Ind. Cas. 390.

2. Admission.

——Admission — Erroneous admission — Withdrawal—Permissibility.

An erroneous admission made by a legal practitioner can be allowed by Court to be withdrawn. I.L.R. (1950) Nag. 445=1950 N.L. J. 343=A.I.R. 1951 Nag. 161.

——Wrong admission of law is not binding on client.

A wrong admission by a Plader on a pure question of law is not binding on his client. A.I.R. 1941 Lah. 347=43 P.L.R. 489=14 R.L. 241=197 Ind. Cas. 481.

——Admissions—Erroneous on point of law.

An erroneous admission on a point of law made by the pleader of a party prior to the filing of the suit is not binding on that party. 13 S.L.R. 128= 52 Ind. Cas. 878.

——Admission—Erroneous on point of law.

An erroneous admission by a pleader on a point of law is not binding on the party whom the pleader represents and does not preclude the party from claiming his legal rights in an Appellate Court. 27 C.L.J. 447=45 Ind. Cas. 983.

——Admissions—Erroneous on point of law.

A client is not bound by the erroneous admission of law made by his pleader. 8 S.L.R. 156=27 Ind. Cas, 357.

——Admissions—Erroneous point of law—If binding on client.

A pleader's erroneous admission on a point of law is not binding on the client. 23 M.L.J. 327=16 Ind. Cas. 746.

——Admissions—Mistaken—Review.

Quaere.—How far an admission by the counsel is binding on the party, and whether a mistaken admission on a point of law is a good ground for review. 6 N.L.R. 63=5 Ind. Cas. 426.

——Admission—Point of law—Judgment delivered on basis thereof—Whether binding on client.

While a mere concession on a point of law by counsel is not in itself binding either on counsel or his client and it is open to him to retract it or resile from it, there is nevertheless a well-established principle of law that a litigant cannot through his counsel adopt an inconsistent position. When, on the basis of a concession made, a judgment is delivered, the judgment is binding on the client so long as it stands. If he desires to change his front, he should take some steps either to have the judgment vacated or at least to notify the opposite party that he proposes to question the validity of the judgment and to resile from the concession on the point of law made. I.L.R. (1947) 1 Cal. 478=51 C.W.N. 309.

——Admission on question of law, if binding on client.

An admission on a question of law by a Pleader does not bind his client, and whatever his Pleader might have admitted before the trial Court, it is open to his Advocate in the High Court to urge the contrary view. 47 Bom. L.R. 114=A.I.R. 1945 Bom. 351=I.L.R. (1945) Bom. 390.

——Admission by Advocate on point of law is not binding on party but decision based on it is binding unless it is set aside.

It is true that an admission by an Advocate on a point of law is not binding upon a party, but if, on the basis of such an admission, a decree has been passed, the decree is binding upon the party unless it is set aside under the procedure prescribed by law. In other words, even though an admission may not be binding, a decision on the basis of that admission will bind the party. 5 B.R. 664=20 P.L.T. 685=A.I.R. 1939 Pat. 580=181 Ind. Cas. 721.

——On point of law.

A confession by a Pleader made in the lower Court that the compromise incorporated in a decree sought to be executed included certain matters not relating to the suit is not a confession on a pure question of fact but largely a confession of law by which the party is not bound in second appeal. 33 Bom. L.R. 463=A.I.R. 1931 Bom. 295=132 Ind. Cas. 434.

——On point of law, not binding.

An erroneous admission upon a point of law made by legal adviser does not bind his client. Whether this doctrine extends to a case where to re-open the topic which was closed might entail the remanding of the case to the lower Court for a further finding of facts is not very clear. 31 M.L.W. 516=1930 M.W.N. 129=A.I.R. 1930 Mad. 547.

——On point of law, not binding.

A party cannot be bound by any wrong admission of his pleader as to law, inasmuch as the parties must be presumed to know what is correct law. 92 Ind. Cas. 732=13 O.L.J. 138=A.I.R. 1926 Oudh 311.

——On point of law, not binding.

An erroneous admission by a counsel on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court. 27 C.L.J. 447; 18 W.R. 359 and 27 Cal. 156 (P.C.), Foll. 90 Ind. Cas. 98=42 C.L.J. 71=A.I.R. 1925 Cal. 1171.

——Minor client.

The interest of a minor cannot be affected by the admission on a law point by a pleader. 82 Ind. Cas. 1052=A.I.R. 1925 Nag. 207.

——On point of law, not binding.

Where the cross objections of the respondent arose from the decree of the first Court and they were included in the grounds of appeal from that decree but were not pressed in the lower Appellate Court owing to misapprehension by the counsel on a point of law.

Held, an erroneous admission by counsel on a point of law is of no effect and does not preclude a party from claiming his legal rights in the appellate Court. 81 Ind. Cas. 742=11 O.L.J. 436=A.I.R. 1925 Oudh 150.

——On a point of law, not binding.

An admission made by the counsel on a point of law cannot in any way bind client. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——Admission—Question of fact—Client when bound.

A pleader can bind his client by an admission upon a question of fact provided that such a question falls within the scope of the suit in which he has been retained. Where there is no question as to the liability of a transferee-defendant arising in a suit against the transferor-tenant, it is beyond the scope of the pleader's authority to bind his client by an admission of the validity of the transfer. 17 C.W.N. 156=15 Ind. Cas. 156.

——Of law or fact, binding.

Where the pleader of a party makes an admission, whether the admission is of law or an admission of fact, that party is bound thereby and it would be doing great injustice to a Subordinate Court of law to re-open a matter in appeal, which has been decided by that Court on the admission of a pleader of a party. 118 Ind. Cas. 166=A.I.R. 1929 All. 446.

——Legal Practitioner—Admission—On point of law, not binding but admission of fact binding.

Per Ananthakrishna Aiyar, J.—Though a party might not be bound by admissions made by his counsel on pure questions of law, yet on questions of fact, parties are bound by admissions made by their counsel, whether the admissions be made in the course of the trial in the first Court or in the course of the hearing of the appeal before the lower Appellate Court. 109 Ind. Cas. 178=A.I.R. 1928 Mad. 900.

——On point of law, not binding but admission of fact binding.

Admission of pleader on a point of law is not binding on the parties. But an admission of fact by the pleader is binding on his client. Whether the admission is one of law or fact will depend

upon the circumstances of every case. 87 Ind. Cas. 956=A.I.R. 1925 Oudh 665.

——Admission by Pleader, of fact—When not binding on client.

An admission of a fact by a Pleader is not binding on the client if it is made under misapprehension. A.I.R. 1937 Bom. 81=38 Bom. L.R. 1058=167 Ind. Cas. 208.

——Counsel's powers to make admission in or refer to arbitration or compromise suit.

A Counsel has authority to make admissions in Court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client. A Conusel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed, if his doing so is for his client's advantage or benefit even though he has no express authority from his client but a Counsel cannot, without express authority agree to compromise or refer to arbitration, matters unconnected with the subject-matters of the suit in which he is instructed. Where in the course of a suit a Counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not the subject matter of the suit, there is a presumption that the Counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. The Counsel has no power to make an admission in, or compromise or refer to arbitration, a suit is he is instructed not to do so, without express authority from his client. A.I.R. 1935All, 626=(1935) A. L. J. 953=1935 A.W.R. 772=158 Ind. Cas. 97.

——Authority to bind client by admissions of fact—Statement of liability in purshis signed by Pleader—Effect of.

In the ordinary course of his duties, a Pleader has authority to bind his client by admissions of fact provided such admissions are made during the actual progress of litigation. Where a purshis signed by a Pleader in the course of a suit contains a statement of liability, it is binding on the client as an acknowledgment of liability under S. 19, Lim. Act. 36 Bom. L.R. 334=A.I.R. 1934 Bom. 186=151 Ind.Cas. 376.

——Authority to admit facts.

A pleader has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the appellate stage. 3 Bom. L. R. 467, Foll.; 112 Ind.Cas. 110=52 Bom. 686=30 Bom. L.R. 646=29 Cr.L.J. 990=11 A.I.Cr.R. 243=A.I.R. 1928 Bom. 241.

——Binding nature of.

Parties are bound by admissions of counsel, unless he has been induced or misled by some circumstances to make a statement under a mistake. 70 Ind. Cas. 417=A.I.R. 1922 Bom. 233.

——Admission—Repudiation—Time of—Pleader and client.

A party desiring to repudiate his counsel's admission must do so at the earliest stage. A pleader may abandon issue which he thinks unnecessary. 20 O.C. 49=38 Ind. Cas. 800.

——Admission—Binds client.

Parties are bound by what their consel do in the shape of admissions, consents, withdrawals, in conducting the cases in the exercise of their discretion, acting within the scope of their authority unless they have been induced or misled by some circumstances to make a statement under a mistake. 35 Ind. Cas. 205 (All.)

——Admission—Effect of on—Party.

Where a pleader in the Lower Court makes an admission upon an issue regarding which evidence might be, but is not given, the party will be bound by the admission. 39 Bom. 352=17 Bom.L.R. 187=28 Ind. Cas. 485.

——Admissions—Question of fact—Binding on client.

An admission of fact by the pleader of a party is binding upon his client and the opposite party cannot be arbitrarily deprived of the benefits of such admission. 44 Ind. Cas. 18 (Cal.)

——Admission—Binds client.

An attorney's admission is evidence against his client unless shown to be otherwise. 20 C.W.N. 995=37 Ind. Cas. 71.

——Admission—How far binding on client.

Plaintiffs are bound by the statement made by their duly appointed pleader. 164 P.W.R. 1916=86 P.L.R. 1916=35 Ind. Cas. 870.

——Admissions—How far binding on client.

The counsel's admission, that his point was not urged in Lower Appellate Court, binds the client. 5 N.L.R. 47=2 Ind. Cas. 29.

3. Arbitration.

—Pleader authorised in power-of attorney to refer suit to arbitration—He need not obtain express authority from client before referring case to arbitration. 46 P.L.R. 108=A.I.R. 1944 Lah. 280=219 Ind. Cas. 70.

——Power to make reference to arbitration.

A reference to arbitration in a suit is a proceeding incidental to the suit and the Advocate of the parties have power to execute such references. A.I.R. (1944) Sind 51=I.L.R. (1943) Kar. 438=213 Ind. Cas. 364.

——Arbitration—Authority to refer.

The words used with reference to the power to be exercised by the pleader appointed by the vakalatnama were shalishan or solenama karibain.

Held, that the pleader was vested with sufficient authority to refer the matter to arbitration. 56 Cal. 21=A.I.R. 1929 Cal. 322.

——Authority to refer.

A pleader engaged to act or plead in a suit does not possess the power to refer it to arbitration without express authority from the client. Such authority cannot be inferred by the mere circumstance that the pleader, though not formally appointed by a vakalatnamah, was allowed to sign a jawabdawa. 114 Ind. Cas. 712=A. I. R. 1929 Lah. 171.

——Authority to refer.

In a suit for partition, on the motion of the counsel of the parties, a particular person was appointed as a special referee to go into accounts and a consent decree was passed fixing the shares of the parties. Thereupon one of the parties moved the Court to set aside the decree on the ground that the counsel consented to arbitration contrary to his instructions. The Court found that the counsel had limited authority and proceeded with the case.

Held, that if a client objected to important matters of account being referred to private arbitration and to a private referee, and if that was done by mistake of his counsel, the Court was not wrong in taking steps to see that the suit should proceed in the ordinary way. (1902) 1. A. C. 465, Foll. 106 Ind. Cas. 309=32 C.W.N. 44=A. I. R. 1928 Cal. 378.

——**Authority to refer.**

A party's agent binds the party by an agreement under S. 9 as much as a party himself. A vakalatnama gives sufficient authority to a pleader to agree to make a reference under S. 9 of Oaths Act. 79 Ind. Cas. 246=A.I.R. 1923 All. 65.

——**Authority to revoke.**

A pleader has no authority to revoke the apointment of arbitrators made by his cilents, without instructions from the client, and to appoint a new arbitrator in substitution. 65 Ind. Cas. 879=5 N.L.J. 229=18 N.L.R. 140=A.I.R. 1922 Nag. 39.

4. Authority to act.

——A vakalatnama is a power-of-attorney and a 'power-of-attorney' is an authority whereby one is set in the turns, stead or place of another to act for him. 19 N.L.J. 207=A.I.R. 1937 Nag. 65=I.L.R. (1937) Nag. 494=169 Ind. Cas. 117.

——**Vakalat—Vakil's name not entered in the body of—Mere clerical error.** See C.P. Code, O. 9, R. 9. (1946) 1 M.L.J. 274=A.I.R. 1946 Mad. 482.

——**Where a pleader is satisfied that a gumasta is authorized to deliver the vakalatnama signed by the party and accepts it, it is a sufficient authority for him to act on behalf of the party.** 114 Ind. Cas. 156=48 C.L.J. 357=A.I.R. 1929 Cal. 11.

——**Verbal appointment.**

An Advocate, unlike a pleader, can be verbally appointed to act on behalf of his client, and when so appointed, under R. 1 of O. 3 he can appear, plead and act. There is nothing to prevent an advocate, either in the High Court or in the subordinate Courts, to present an application on behalf of his client without any power of appointment or vakalatnama given to him in writing. There is nothing in the Legal Practitioners' Act also against this view. 9 All. 617, Foll. 92 Ind. Cas. 179=4 Pat. 766=7 P.L.T. 1362=A.I.R. 1926 Pat. 73.

——**Acceptance of Vakalatnama after filing in Court.**

A Vakalatnama once filed in Court may be subsequently accepted by a vakil or pleader whose name appears in the Vakalatnama. The Court has only to see whether the name of the pleader proposed to be appointed, appears in the Vakalatnama or not and if his name does appear, then the pleader is entitled to sign the Vakalatnama and appear and act in the case. 68 Ind. Cas. 659=3 P.L.T. 447=A.I.R. 1922 Pat. 504.

——**Authority to act—Defective vakalatnama.**

Where by oversight, the name of the pleader presenting an appeal was not mentioned in the vakalatnama, the pleader was not a properly appointed one, and there was no proper presentation of the appeal. 11 A.L.J. 458=19 Ind. Cas. 674.

——**Authority to act—Appearance without vakalatnama—Procedure.**

When an accused is represented by a pleader without vakalatnama in an appeal, the proper course is to adjourn the hearing of the appeal until it is produced and thus afford the accused an opportunity of being represented by a pleader. 21 Cr.L.T. 413=56 Ind. Cas. 61 (Cal.)

——**Authority to act—Presentation without—Invalid.**

The presentation of a memorandum of appeal by a Vakil without any authority in the shape of a vakalatnama is not a valid presentation. 55 Ind. Cas. 271 (Pat.)

——**Authority to act—Pleader appearing with party's knowledge and consent—Power of attorney not filed—Effect.**

Where a pleader appears with the party's knowledge, consent and authority the mere non-filing of a power-of-attorney would only be an irregularity and could not nullify the pleader's action or statement in Court. 6 Bur. L.T. 62=20 Ind. Cas. 189.

——**Authority to act—'No instructions'—'Appearance'—Meaning of.**

Instructions do not merely mean information. If a Barrister states in Court that he has no instructions he is not deemed to represent his client. But though a pleader cannot answer questions put to him by Court his authority does not end, being derived from vakalatnama. A mere presence of pleader is equal to appearance of client. The formula 'I have no instruction' does not necessarily mean that the pleader is not acquainted with the case, but it implies that he may be treated as absent. 3 S.L.R. 208=6 Ind. Cas. 851.

——**Authority to act—Extent of.**

The authority of a solicitor to represent his client does not necessarily come to an end on the passing of the judgment in the suit. 14 C.L.J. 445=12 Ind. Cas. 780.

——**Authority to act.**

A pleader cannot exceed the powers given to him by the contract between him and the client. 71 P.R. 1915=109 P.W.R. 1915=13 P.L.R. 1916=30 Ind. Cas. 517.

——**Implied authority to contract.**

A solicitor has no implied authority to make a contract on behalf of his client. A. I. R. 1946 P.C. 97=50 C.W.N. 603=224 Ind. Cas. 508=59 M.L.W. 370=12 B.R. 596=1946 Pesh. L.J.P.C. 97=48 Bom. L.R. 456=1946 A.L.J. 326=1946 M.W.N. 598=73 I.A. 98=(1946) 2 M.L.J. 259=48 Pun. L.R. 450=1946 A.W.R. (P.C.) 160=I.L.R. (1946) Kar. P.C. 94 (P.C.)

——**Agreement to pay without authority.**

While a suit was pending the pleader for the defendants stated that if the plaintiff presented probate or Letters of Administration or succession certificate the defendants would have no objection to pay him the amount in dispute with interest thereon for six months.

Held, that the pleader who made the statement had no general or special authority from the defendant which would entitle him to enter into a contract on their behalf to pay a time barred debt and therefore this statement was not a new contract within S. 25 (3) so as to give rise to a fresh cause of action, especially when there is nothing whatever to show that the record of the statement made by the pleader was signed by the pleader or by any other agent. 75 Ind. Cas. 309=21 A.L.J. 713=4 L.R.A. Civ. 473=A.I.R. 1924 All. 12.

——Conduct of case.

Obiter.—A Counsel must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts which are required for the proper management and conduct of the trial:

Held, that the vakalatnama authorised the Pleader to do all that he considered necessary for the conduct of the case. A.I.R. 1940 Oudh 314= 1940 O.W.N. 662=15 Luck. 686=1940 A.W.R. 316= 187 Ind. Cas. 889.

——Offer to be bound down by special oath of witness—Necessity of express authority.

Pleaders or agents should, in their own interests, be careful not to make offers to be bound down by special oath except in the presence of the party or on express written authority to that effect. A.I.R. 1938 Nag. 64=I.L.R. (1940) Nag. 310=172 Ind. Cas. 421.

——Special oath.

Application on behalf of defendants that if plaintiff takes special oath and makes statement, defendants would be bound by it—Application signed by some defendants and by Pleader appearing for all defendants with words "for defendants"—Pleader can be deemed to have signed on behalf of all defendants. A.I.R.=1939 Pat. 222=20 P.L.T. 131 =5 B.R. 827=182 Ind. Cas. 791.

——Offer to be bound by oath of other party.

A pleader acting for a party or parties to a suit cannot bring it to a close by offering to be bound by the oath of the opposite party in a particular form. But it is quite open to a Court to make an inference from the peculiar circumstances of a case that there was authority on the part of the pleader. Thus where the defendants have put up a common defence and one of the adult defendants was present in Court at the time the pleader made the offer and it appeared that that defendants had been put forward by the others to take all necessary steps in connection with the suit,

Held, that the parties were bound by the pleader's offer. 34 C.W.N. 310=A.I.R. 1930 Cal. 463.

——Agreement to be bound by the statement of certain witness.

No special power under the vakalatnama is necessary for a pleader to agree to be bound by the statement of a particular witness. 38 All. 131, Foll. 102 Ind. Cas. 38=49 All. 842=25 A.L.J. 729 =A.I.R. 1927 All, 584.

——Authority — Consent — Decree — Binding nature on client.

When the case was opened, the Counsel for defendant, in view of certain documents, mentioned to the attorney that the defendant should consent to a decree and he also consulted the person who was standing behind his back, but it appeared that the Counsel was under the impression that the person consulted was a relative of the party and not the party himself. The decree that was passed on the basis of the Counsel's representation was sought to be impugned on the ground that the Counsel did not have the requisite authority:

Held, that the party present having, in fact, been consulted, the agreement was binding on him.

Per Rankin, C.J.—If the party present in Court was not properly and adequately consulted then his duty was to refuse, when his Counsel was proposing to consent to a decree, to allow that to happen and if necessary, to give notice to the other side and the Court that he was withdrawing the authority, which the counsel had on his behalf. If any right is to accrue to the client from the fact of his being in Court, he must at least make his presence known to the Counsel in order that the Counsel may act accordingly and it cannot be supposed that because he keeps quiet and does not even instruct his Counsel as to who the client is or take any steps to inform the Counsel of his presence, the Counsel has got to carry on upon the footing that he has no authority to deal with the case as circumstances may require. 59 C. 31=54 C.L.J. 558=35 C.W.N. 674=A.I.R. 1932 Cal. 231=136 Ind. Cas. 535.

——Statement of pleader, value of—Contradiction by client, effect of.

When a pleader, who is authorised by his vaklatnama to appear for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not material sufficient to contradict his pleader. A.I.R. 1931 All. 415=136 Ind. Cas. 622.

——Criminal P.C., S. 493.

It is ordinarily undesirable that any counsel should be brought in to assist the public prosecutor at a very late stage even if acts entirely under the control of the public prosecutor, but there might arise special circumstances which would justify such a course.

The word 'act' in S. 493 does not mean some thing other than examining or cross-examining witnesses or addressing the Court. The word is not used in a technical sense in distinction from 'appear and plead' in the opening words of the section. 1930 M.W.N. 769.

——Power to file appeal.

Where in a printed form of the power-of-attorney the clause authorising an advocate to file an appeal has been struck off by the client, it does not mean that the said power has been taken away from him, if it otherwise existed. It only means that the power was not expressly given. 116 Ind. Cas. 184=A.I.R. 1930 Lah. 68.

—Ex parte decree—Application to set aside—No fresh Vakalatnama necessary.

Where an ex parte decree is passed against the defendant in the absence of his pleader, the latter need not file a fresh Vakalatnama in order to apply to set aside the ex parte decree. In seems to be taking an extremely narrow view of the rules with regard to Vakalatnamas to say that the effect of the old Vakalatnama had expired as soon as the ex parte decree had been passed and that it would be necessary before a pleader could be heard that he should obtain a fresh one. 69 Ind. Cas. 169=47 Bom. 11=24 Bom. L.R. 744=A.I.R. 1922 Bom. 207.

——Authorisation to prosecute execution case —Mukhtear, if can bind principal by agreement relinquishing his rights.

Where a mukhtarnama only authorises a person to prosecute the execution case on behalf of of his principal, he cannot bind the principal by any agreement relinquishing rights possessed by the principal. A.I.R. 1937 Oudh 270=1937 O.W.N. 127=166 Ind. Cas. 714.

——Authority to act — Vakalat to execute decree—What it implies.

A power given to a vakil to execute a decree includes a power to receive from the judgment-debtor, money out of Court and therefore an order of Court recording satisfaction of the decree to the extent of the amount so received by the vakil is legal. 15 M.L.T. 162=(1914) M.W.N. 220=22 Ind. Cas. 277.

——Right to release debt — Implied authority.

A solicitor has no implied authority as such to receive payment of a mortgage debt though he may be authorised to receive interest. He cannot enter into an agreement to release a portion of the mortgaged property from the lien. Nor can he, where he is authorised to receive payment receive a cheque instead of cash. 10 C. L. J. 150 =1 Ind. Cas. 214.

——Letter purporting to be instructed by client— Presumption — Evidence Act, S. 114, illus. (f).

Where, in a letter written by a pleader on behalf of his client, the exact amount due was not admitted but it was admitted that goods had been bought and not paid for in full and the letter ends with a definite promise to pay whatever may be found due before a certain date:

Held, that the letter constituted an acknowledgment of liability and a promise to pay before the date specified.

When a member of the Bar writes a letter purporting to be instructed by a client, it is to be presumed, until the contrary is proved, that the letter is written under instructions. A. I. R. 1933 Rang. 147=144 Ind. Cas. 996.

——Presumption of authority.

Where a consent decree is passed by a Court on confession of judgment by a party's pleader it must be assumed that the Court must have satisfied itself before the passing of the consent decree that the pleader confessing judgment had authority on behalf of the party to act in the manner in which he did. The person challenging the authority must prove to the contrary by positive evidence. 121 Ind. Cas. 283=A.I.R. 1929 Oudh 211.

5. Change of name.

——Change of name—High Court can order amendment only in certificate and roll of advocates but not in Bar Council papers — Different caste suggested by new name — Amendment does not decide right to assume different caste.

It is open to any person to change his name and after giving due notice of it in the Official Gazette assume a new name. In accordance with such a change, there can be no objection, in the case of an advocate, to a corresponding change in the name appearing in the certificate and in the roll of advocates. But the High Court cannot grant his prayer in so far as it relates to the enrolment papers filed with the Bar Council.

Where the new name suggests that he belongs to a caste other than that which is indicated by stood as deciding that he is entitled to describe the original name in the roll and certificate, the granting of the amendment should not be understood as deciding that he is entitled to describe himself as belonging to any particular caste. 61 L.W. 349=A.I.R. 1948 Mad. 525=1948 M.W.N 378=(1948) 1 M. L. J. 361.

6. Compromise.

See also: Civil P.C., O. 3. R. 4 and O. 23. R. 3.

——Authority to compromise given by vakalatnama—Duty to obtain client's consent to compromise.

When a vakalatnama authorises a pleader to effect a compromise he is authorised to enter into the compromise itself and if he enters into a compromise it cannot be said that it was bad because he had not obtained his client's consent to the compromise. 1950 A.L.J. 621= A.I.R. 1951 A. 459.

——Authority to compromise in the absence of express authorisation by the vakalatnama.

An express and explicit direction or power in the vakalatnama given to an advocate or a pleader to conduct and defend a suit, which must mean to contest it, cannot be deemed to include a direction or power to compromise it.

A vakalatnama provided: "I (fourth defendant) do hereby appoint and retain (the advocate) to appear for me in the above suit and to conduct and defend the same." This was followed by express directions for the advocate to conduct and defend proceedings in any application for execution, appear in all miscellaneous proceedings in the suit until all decrees or orders are satisfied or adjusted; to obtain the return of all documents, draw any moneys payable to the client; to accept service of notice of all appeals or petitions filed in any Court of Appeal, reference or revision. There was no reference made to a compromise of the suit.

Held, that in a vakalatnama conferring in detail, six separate distinct powers, the absence of a power or direction to compromise was not without significance. As the client had only empowered the advocate to appear for her and to conduct and defend the suit and she had not empowered him to settle it, he had no express authority to effect a compromise, but solely to contest the suit. In the circumstances no implied authority arose or could be deemed to have been conferred upon him to make a compromise binding upon his client. 1923 P. C. 13, foll; I.L.R. (1948) Mad. 647=61 L.W. 61=1948 M.W.N 100=A.I.R. 1949 Mad. 98=(1947) 2 M.L.J. 580.

——Authority to compromise.

An advocate has by virtue of his position as such ample power to settle a disputed point and a specific authority to compromise is not necessary for this purpose. I.L.R. (1947) All. 706= 1947 A.L.J. 406=1947 A.W.R. (H.C.) 307=A.I.R. 1947 A. 382.

——Authority to compromise — C. P. Code, O. 3, R. 4.

Counsel in India, whether Barristers, Advocates or Pleaders, have inherent powers both to compromise claims, and also to refer disputes in Court to arbitration without the authority or consent of the client, unless their powers in this behalf have been expressly countermanded, and this, whether the law requires a written authority to "act" or "plead" or not. I.L.R. (1946) Nag. 824=1947 N.L. J. 1=229 Ind. Cas. 402=A.I.R. 1947 Nag. 17 (F.B.).

——Power to compromise.

In India, an Advocate has the same implied authority to compromise as he has in England. But where he derives his authority from an express written contract such as a vakalatnama the case is different. If it appears from the terms of the vakalatnama that the client did not intend to authorise his Advocate to compromise, then there would be no implied authority and where, in the vakalatnama, there is no express authority to compormise, no authority could be implied.

A vakalatnama given by a party to his Advocate contained the following clause: "I execute this vakalatnama with consent agreeing to accept all the proceedings (conducted) by you therein as if done by me personally."

Held, that although the clause did not unequivocally authorise the Advocate to compromise yet, in construing the clause, it was not unreasonable to bear in mind that Advocate ordinarily had such an authority and to assume that the clause was intended to embody that authority, which, in the absence of a vakalatnama, would be implied. A.I.R. 1943 Mad. 672=(1943) 2 M.L.J. 168=1943 M.W.N. 544=56 L.W. 582=213 Ind. Cas. 218.

——Vakalatnama—Power to compromise.

Where a vakalatnama given to a pleader does not give any specific authority to negotiate with the defendants and settle the terms of the compromise, but merely to sign the compromise application to be presented in Court and if the consent of the party to such an application being presented to the Court had not been obtained, the compromise resulting in the decree is unauthorized. A.I.R. 1939 Bom. 490=41 Bom.L.R. 994=185 Ind. Cas. 669.

——Power to compromise—Power-of-attorney not mentioning that he had no power—Presumption—Compromise decree—Binding nature.

Where a pleader who was authorised by a party to suit to appear on her behalf enters into a compromise, and there is no statement on record that by his power-of-attorney, the pleader was not authorised to compromise, and a decree is passed on the basis of it, such decree, when not appealed against and in the absence of allegations of fraud, is final and binding on the party. The pleader must be assumed to have authority to compromise in the absence of anything to the contrary in his power-of-attorney. A. I. R. 1937 Lah. 91=38 P.L.R. 467=167 Ind. Cas. 264.

——The power to compromise may be validly exercised by an Advocate who has been authorised only to appear. The absence of a power-of-attorney in such circumstances would be no more than an irregularity, which would not affect the validity of the compromise, and the decree passed upon it. A.I.R. 1936 Lah. 199=17 L. 456=38 P.L.R. 961=161 Ind. Cas. 764.

——Compromise entered into by pleader on behalf of a party in a suit, when he has not been so authorised by the vakalatnama, is not binding on the party. A suit to set aside decree on such compromise is maintainable. A.I.R. 1934 Oudh 417=11 O.W.N. 1030=150 Ind. Cas. 838.

——Pleader's power to compromise—Construction of vakalatnama—'If expedient or necessary, you are to compromise,' effect of.

Where a vakalatnama executed in favour of a pleader provided: "avasyamanal (if necessary or expedient) you are to compromise the suit or raise contest therein:"

Held, that it was within the discretion of the Pleader to decide whether it was necessary or expedient to compromise the suit and the pleader had, therefore, authority to compromise without further reference to the client. 38 L. W. 341=A.I.R. 1933 Mad. 734=146 Ind. Cas. 219.

——Compromise—Authority—Nature and extent of.

The implied authority of counsel is not an appanage of office, a dignity added by the Courts to the status of barrister or advocate at law. It is implied in the interests of the client, to give the fullest beneficial effect to his employment of the advocate. Secondly, the implied authority can always be countermanded by the express directions of the client. No advocate has actual authority to settle a case against the express instructions of his client. If he considers such express instructions contrary to the interests of his client, his remedy is to return his brief. 123 Ind. Cas. 545=34 C.W.N. 453=1930 A.L.J. 489=32 Bom. L.R. 645=51 C. L. J. 309=A.I.R. 1930 P.C. 158=58 M.L.J. 551 (P.C.)

——Implied authority.

An Advocate of the High Court has, when briefed on behalf of a party in a subordinate Court the implied authority of his client to settle the suit. He must be treated as though briefed on the trial of the suit, though he may be engaged to press an interlocutory application. The power to compromise a suit is inherent in the position of an advocate in India. The considerations which have led to this implied power being established in the advocate of England, Scotland and Ireland, apply in equal measure to India. 123 Ind. Cas. 545=34 C.W.N. 453=1930 A.L.J. 489=32 Bom. L.R. 645=51 C.L.J. 309=A.I.R. 1930 P. C. 158=58 M.L.J. 551 (P.C.)

——Compromise — Consent of client — Duty to consult.

There is a duty upon Counsel to consult his client and take his instructions and when the performance of the duty is omitted for whatever reason, it would be contrary to principle to enforce a decree passed in such circumstances.

When a client is present in the Court he has a right to be consulted before the Counsel gives his consent to a decree and consent given by the Counsel without such consultation is without authority express or implied. A.I.R. 1927 Cal. 714, **Foll.** 34 C.W.N. 210=A.I.R. 1930 Cal. 477.

——Compromise—Barristers in Burma.

As in Burma barristers merely appear because they are advocates, and not because they are barristers, they must be judged by rules applicable to advocates.

To enter into a compromise an Advocate must "act" for his client and no Advocate can act for his client unless he possesses a power of attorney.

A barrister, in Burma, therefore filing only a notice of appearance and not a power-of-attorney from his client, cannot bind the client by a compromise entered into without his express consent unless the client subsequently ratifies it. 8 Rang. 290=A. I. R. 1930 Rang. 313.

——Compromise—Express authority — Necessity for.

For effecting a compromise on another's behalf neither a general power-of-attorney nor the ordinary powers of a pleader are sufficient, express authority

is absolutely necessary. 119 Ind. Cas. 430=A.I.R. 1929 Lah. 746.

——**Express authority not necessary.**

Where the applicant challenged the consent decree on the ground that his Counsel acted on misapprehension against instructions,

Held, on the facts proved that the agent of the appellant acquiesced in the settlement, though under protest, proposed by the Counsel, in good faith in the interest of his chief, that he accepted it, and that the decree was binding on him. Two propositions are well settled; first, that express authority is not needed for a Counsel to enter into a compromise within the scope of the suit; and secondly, that where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. 67 Ind. Cas. 96=3 Pat. L.T. 371=1 Pat. 489=A.I.R. 1922 Pat. 232.

——**Authority to compromise must be express.**

A pleader who does not hold and has not filed in the suit before the Court his client's general power-of-attorney authorizing him generally to compromise suits on behalf of his client, cannot be recognised by a Court as having any authority to compromise the suit unless he has filed in the suit his client's vakalatnama giving him authority to compromise the suit before the Court. 84 Ind. Cas. 721=33 M.L.T. 294=1923 M.W.N. 734=4 L.R.P.C. 138=A.I.R. 1923 P.C. 98=45 M.L.J. 453 (P.C.)

——**Instructions from mukhtear.**

Where the vakalatnama given to a pleader clearly authorised him to enter into a compromise on behalf of his client, and the pleader compromised the suit on the instructions not from the client himself but from a third person who was subsequently appointed as his mukhtar by the client:

Held, that the compromise was binding on the party. 108 Ind. Cas. 262=A.I.R. 1928 Lah. 642.

——**Dealings with clients—Power to compromise —Client** pardanashin **lady — Duty of Pleader in such cases.**

It is exceedingly uncommon for Pleaders to take the responsibility of entering into a compromise on the strength of the authority conferred by the vakalatnama, particularly in the case of illiterate and **pardanashin** ladies. In all such cases, Counsel should be asked if he had personally satisfied himself by reference to the lady herself that she was agreeable to the compromise or confession of judgment:

Held, on facts that the Counsel was guilty of extreme carelessness and actual dereliction of duty towards his client. A.I.R. 1939 Lah. 439=I.L.R. (1939) Lah. 433=41 P.L.R. 843=186 Ind. Cas. 77.

——**Compromise**—Pardanashin **lady.**

Though a clause authorizing a pleader to compromise is to be found in vakalatnamas that are ordinarily filed, it is exceedingly uncommon for pleaders to take the responsibility of entering into a compromise on the strength of the authority conferred by it, the more so in cases where illiterate pardanashin ladies are concerned. Those who assert that this was the position have got to discharge an exceedingly heavy burden indeed and the least that could be expected of them is that they should examine the pleader himself. 108 Ind. Cas. 44=A.I.R. 1928 Cal. 334.

——**Collateral matters.**

The authority of Counsel to compromise a suit **coram judice** in court is limited to matters involved in the suit and it does not extend to collateral matters. If a bargain is to be made so as to bind a client upon collateral matters then Counsel should take care to get express authority from his client.

In a partition suit where the only point of difference between the parties was as to whether a certain property was joint or debuttar and Counsel for the plaintiff and the defendant agreed to certain terms of settlement outside Court settling that the attorneys of the parties were to be appointed Commissioners of partition and Receivers of the joint estate and the debuttar property and a certain remuneration was fixed for them, and a decree was passed in terms of the compromise,

Held, that the question whether to appoint a Receiver of the debuttar property was a matter merely collateral to the suit and not within the scope of the general authority of the Counsel and therefore that part of the terms of compromise was, as a matter of law, outside the authority of the Counsel. The fact that it may be a severable part of the agreement was immaterial. 104 Ind. Cas. 387 =55 Cal. 113=31 C.W.N. 953=A.I.R. 1927 Cal. 714.

——Where a pleader derives his authority from the agent of a party having no authority to confess a judgment he cannot confess a judgment. 102 Ind. Cas. 470=1 L.C. 19=A.I.R. 1927 Oudh 222.

——A Counsel should not draft and sign a petition of compromise and an affidavit in a case, in which he was not engaged from before and in which he must know that other lawyers were engaged, without a vakalatnama from the party concerned. 102 Ind. Cas. 337=6 Pat. 217=8 P.L.T. 470=28 Cr.L. J. 529=8 A.I.Cr.R. 117=A.I.R. 1927 Pat. 199.

——A vakil has no general power to compromise a suit on behalf of his clients. 93 Ind. Cas. 302=1 Luck. 341=13 O.L. J. 482=3 O.W.N. 277=A.I.R. 1926 Oudh 315.

——A Counsel has no authority to compromise a case wihtout reference to his client. 88 Ind. Cas. 369=29 C.W.N. 597=41 C.L. J. 213=A.I.R. 1925 Cal. 866.

——An Advocate of the High Court in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as Counsel and such a compromise would be valid and binding upon the parties even though it had been effected contrary to the express instructions of the client, unless the prohibition had previously been communicated to the other side. But the apparent authority of Counsel is restricted to acts and admissions **coram judice** or **in Court**; such acts and admissions out of court do not bind the client unless in fact they are authorised by the client, or by his agent duly authorised by the client in that behalf. A compromise therefore effected by counsel out of the Court, and not assessed to by the client, is only binding upon the client if it is expressly authorised, or subsequently ratified by the client or by his agent authorised in that behalf. 88 Ind. Cas. 413=52 Cal. 386=29 C.W.N. 566= A.I.R. 1925 Cal. 696.

——**Compromise—Misapprehension.**

The consent given by Counsel or solicitor might be withdrawn by the client if the Counsel or solicitor gave it under a misapprehension, before that consent order had been drawn up and perfected. In India, no less than in England, the Courts are not deprived of their general authority

over justice between the parties by an unauthorised act of the Counsel. 91 Ind. Cas. 509=3 Rang. 261= A.I.R. 1925 Rang. 314.

——**Compromise—Without authority.**

A Consent order was allowed to stand where the defendant did not suffer any loss of right by such order though the defendant contended that his pleader who consented to the order being passed by the Court was not given any permission by him to consent to the order. 85 Ind. Cas. 408=20 M.L.W. 900=A. I. R. 1925 Mad. 278.

——**Client absent.**

The authority of Counsel at the trial of an action extends, when it is not expressly limited, to the action and all matters incidental to it; the consent of the client is not needed for a matter which is within the ordinary authority of Counsel, and therefore if a compromise is entered into by Counsel in the absence of the client, the client is bound. 83 Ind. Cas. 611=51 Cal. 385=A.I.R. 1924 Cal. 651.

——It is doubtful if the Counsel can enter into a compromise so as to make his client's fortune dependant upon the determination of the pleader for the opposite party. 83 Ind. Cas. 380=5 L.R. P.C. 145=26 Bom. L.R. 772=35 M.L.T. 136=1924 M.W.N. 646=20 M L.W. 571=A.I.R. 1924 P.C. 200=47 M.L. J. 136 (P.C.).

——It has been well established that a Vakil appointed under a usual power of attorney it not endowed with power or authority to compromise the suit, he is thus retained to argue. Where the Vakil never saw his client, a pardanashin lady, never spoke to her in reference to the compromise, nor had any communication with her touching it and yet purported to compromise the suit.

Held, that the vakil failed in his duty towards his client. 71 Ind. Cas. 632=17 M.L.W. 481=27 C.W.N. 629=25 Bom. L.R. 548=37 C.L. J. 501=1923 M.W.N. 392=32 M.L.T. 137=A.I.R. 1923 P.C. 13 (P.C.)

——**Authority of counsel to compromise.**

Where no limitation is imposed on Counsel's authority, he may bind his client by agreeing to a compromise but, if Counsel is only empowered to compromise on certain terms, he is thereby impliedly prohibited from settling on other terms, and if notwithstanding that prohibition, he does effect a settlement on such other terms, then that settlement does not bind his client. 85 Ind. Cas. 504=25 Bom. L. R. 1137=A.I.R. 1921 Bom. 414.

——**Construction of Vakalatnama.**

The question whether a party is bound by a compromise filed by his pleader must depend in each case on the terms of vakalatnama. Where by the vakalatnama the plaintiffs agreed that they would be bound by all acts of their pleader in the course of their suit, and they further expressly specified amongst the acts which the said pleader might perform on their behalf the presentation to the Court of petitions relinquishing the claim, compromising the suit or withdrawing from the suit,

Held, that the plaintiffs were bound by the pleader's act in presenting a petition of compromise to the Court and expressing on their behalf agreement to its terms. 60 Ind. Cas. 912=19 A.L. J. 63.

——**Compromise by—Authority—General vakalatnama.**

A Vakalatnama in general terms is wholly insufficient to authorise a vakil either to compromise the suit or to refer it to arbitration. The position of a pleader is that of an agent to the client and his power is created entirely by the vakalatnama. 45 Ind. Cas. 321 (Pat.).

——**Certifying fact of.**

Where a compromise effected by the parties is merely conveyed to the Court by pleaders on both sides, the question if the vakalatnama did or did not empower the pleader to compromise does not arise. 60 Ind. Cas. 22=12 M.L.W. 562.

——**Compromise by—Authority to withdraw suit.**

Power to withdraw a suit must be given specifically and cannot be implied from general words authorising a compromise. 38 M.L. J. 322=27 M.L.T. 99= 11 L.W. 225=(1920) M.W.N. 270=55 Ind. Cas. 267.

——**Compromise by—Extent of authority.**

The authority of a pleader to compromise a suit on behalf of his client, does not extend to his effecting a compromise in respect of matters outside the scope of the suit. (1919) P.H.C.C. 465=53 Ind. Cas. 20.

——**Compromise by—Excess of pleader's authority—Binding nature of—Actings of parties.**

A compromise signed by a pleader on behalf of his client which has been acted upon and adopted cannot afterwards be objected to on the ground that the pleader had no instructions to enter into the compromise. 53 Ind. Cas. 143 (Cal.)

——Compromise by—Consent of client.

An authority given to a vakil to compromise a suit, if necessary, does not necessarily give him authority, to negotiate the terms of the compromise without reference to his client. Such authority must be strictly construed. 41 Mad. 233=22 M.L.T. 149=41 Ind. Cas. 429.

——**Compromise by—Authority—Ratification by client—Effect of.**

Where a pleader has effected a compromise without specific authority and it has been ratified by the client it is binding on the latter. 9 S.L.R. 218= 34 Ind. Cas. 928.

——**Compromise by—Authority—Sind Courts Civil Circulars.**

A pleader has ordinarily no powers of compromise and Form 4 of the Sind Courts Civil Circulars does not permit such a power to be given in the vakalatnama. 8 S.L.R. 91=25 Ind.Cas. 935.

——**Compromise by—General vakalat—If sufficient.**

A vakil who has a general vakalat authorising him to compromise does not require a special power in order to effect a compromise. 12 M.L.T. 348=23 M.L.J. 381=17 Ind.Cas. 391.

——**Compromise by—Extent of authority.**

Where a vakil entered into a compromise with the opposite party and without settling the matters in dispute, left the parties to fight out their rights in a fresh litigation and also surrendered the suit property to the adverse party, Held, that the vakil acted improperly and the compromise was invalid. (1912) M.W.N. 158=13 Ind. Cas. 595.

——Compromise—Setting aside.

On principle, there does not seem to be any reason for interfering with a compromise consented to by a pleader duly authorized in this behalf, unless fraud or collusion is imputed to the pleader. 92 Ind. Cas. 179=4 Pat. 766=7 P.L.T. 362=A.I.R. 1926 Pat. 73.

——Before an order passed on the consent of the Pleader, though under a mistake of fact, can be set aside serious and substantial injustice to the party concerned must be established. 77 Ind. Cas. 355=18 M.L W. 437=26 Bom.L.R. 189=33 M.L.T. 376=5 L.R.P.C. 30=40 C.L.J. 272=A.I.R. 1923 P.C. 184=46 M.L J. 160=47 M.L.J. 164 (P.C.).

——Compromise by.

If a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court to cancel all that has been done and to revive the suit. 34 Bom. 502=12 Bom. L.R. 378=6 Ind. Cas. 527.

——Compromise by—Authority.

A decree based on compromise entered into by the defendant's pleader who has no authority to enter into a compromise, should be set aside by the Court on the application of the defendant. 34 Bom. 408=12 Bom. L.R. 223=5 Ind. Cas. 968.

7. Costs.

See also: (1) Civil P.C., S. 35.
(2) Note 10.

——Attorney—Costs of—Proper order.

The proper order for attorneys to be obtained from Court as regards their costs is not a charging order but an order declaring their lien. A.I.R. 1942 Bom. 102=44 Bom. L.R. 178=200 Ind. Cas. 85.

——Attorney—Costs—Attorney employed by trustees—Liability of trust estate.

Where an attorney is employed and retained by the trustees, they became personally liable to pay to the attorney. The trust estate is not liable. The attorney can get at the trust estate only through the trustee's right of re-imbursement. In a suitable case the attorney can be subrogated to that right, but that depends on the question of account between the trustee and the trust estate. 54 C.W.N. 764.

——Attorney—Costs—Taxation — Jurisdiction of Court—Costs of Attorney of trustees paid out of trust money—Application by beneficiary for delivery of bill of costs and its taxation or inspection—Power of Court to make order.

The plaintiff who was a sole beneficiary filed a suit against the trustees for their removal from office, accounts, etc. The suit was settled. The plaintiff withdrew it paying her costs, the defendants trustees to get their costs taxed as between attorney and client. After the disposal of the suit, the attorney for the defendants submitted his bill of costs which was paid by the defendants out of the trust money. The plaintiff contended that as the payment to the attorney had been made out of the trust fund, which was her property, she was entitled as a matter of right to the delivery of the bill of costs and to have it taxed and in any event to have inspection and applied to the Court for orders to that effect.

Held, that the Court had no jurisdiction to make the order asked for. In this country there is no statute as the Solicitors Acts in England and there are no Rules in the Original Side Rules of the Calcutta High Court providing for orders being made as in the Solicitors Acts. 54 C.W.N. 764.

——Taxation—English Law—Applicability in Bombay.

The law and practice in England relating to Solicitors and to taxation of bills of costs applies in Bombay Presidency, except where that law or practice is inconsistent with the rules or practice of the High Court. 37 Bom. L.R. 39=A.I.R. 1935 Bom. 150=59 B. 443=155 Ind. Cas. 945.

——Solicitor and client—Attorney practising on Original Side of High Court can ask High Court to direct that personal property recovered under judgment obtained by his exertions stand security for costs of recovery—High Court's power to make such order is discretionary—Fund in Court—Solicitor's lien, if absolute charge thereon—Order directing payment to parties out of fund.

Attorneys practising before the old Supreme Court and on the original side of the present High Court had and have subject to the rules, the rights enjoyed at common law by solicitors, attorneys, and proctors in England prior to the Judicature Act, 1873, under which the three classes of practitioners were abolished, and all became solicitors of the Supreme Court of Judicature. Among these rights is the right of an attorney to ask the High Court to direct that personal property, recovered under a judgment obtained by his exertions, stand security for the costs of recovery. The power of the High Court to make an order enforcing the lien is, however, discretionary. An attorney's position is even stronger with regard to a fund in Court. When there is a fund in Court, the solicitor's lien, independently of the statute, and without any declaration thereunder, is an absolute charge thereon, and has priority over any other assignment or charging order obtained with or without actual notice.

An order for payment to the parties out of a fund in Court never formally reserves the attorney's lien, and, therefore, the order cannot be said to override the lien or show that attorney has waived it. A.I.R. 1942 Cal. 76=I.L.R. (1941) 2 Cal. 289=199 Ind. Cas. 220.

—The attorney need never allow his services to be retained without obtaining a lump sum down or security for his costs. But he is not entitled to embarrass and impede the litigants by retaining the papers entrusted to him when he himself has declined to act further. (1936) 164 Ind. Cas. 138=62 Cal. 464=39 C.W.N. 688.

—Attorney practising on Original Side of High Court can ask High Court to direct that personal property recovered under judgment obtained by his exertions stand security for costs of recovery—High Court's power to make such order is discretionary. A.I.R. 1942 Cal. 76=I.L.R. (1941) 2 Cal. 289=199 Ind. Cas. 220.

——Party represented by firm of attorneys—Some partners of firm dying or retiring and new firm formed by remaining members with others—No fresh warrant filed.

Where a party is represented by a firm of attorneys and a warrant in their favour is filed and subsequently, on the death or retirement of some of

the partners of the firm, the surviving partners form a new firm with some others, it cannot be said that the partners remaining on the record are discharged. Even though no fresh warrant is filed by the firm, the old firm, in the person of the remaining partners, is entitled to allocatur. A.I.R. 1941 Cal. 662=I.L.R. (1941) 2 Cal. 205=197 Ind. Cas. 445.

——Costs—Solicitor himself a party.

A solicitor who is himself a party in a suit is entitled to the same costs as if he had employed a solicitor except for items of personal appearance for which he cannot get his costs. 27 C.L.J. 78=45 Ind. Cas. 738.

——Costs—Partnership suit—Assets in the hands of Receiver.

Where there are assets of partnership in the hands of a receiver appointed in a partnership suit the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership. 11 Bom. L. R. 1062=4 Ind. Cas. 135=34 B. 484.

——Attorney change of—Attorney employed by testator continued by executor—Change of attorney by executor—Costs incurred by testator—Liability of executor to pay.

An executor desiring to change an attorney who had been employed by the testator and continued in such employment by him must pay not only the costs incurred since such empolyment by him, but the past costs incurred in the life-time of the testator. (1902) 6 C.W.N. 306.

——Costs—Suit on behalf of non-existing party—Personal liability of solicitors for costs—Procedure—Rights and liabilities.

A solicitor purporting to act for a non-existent party is personally liable for costs.

Per Rangnekar, J.—The proper procedure for recovering costs from a solicitor who purports to act on behalf of a non-existing plaintiff or who defends a suit on behalf of a non-existing defendant is by an application in the suit itself.

Rights and liabilities of solicitors examined. A.I.R. 1933 Bom. 317=35 Bom. L.R. 554=58 B. 1 =145 Ind. Cas. 641.

——Costs—Attorneys—Personal liability—Unnecessary printing.

The Court ordered the cost occasioned by unnecessary printing of certain matter in the printed paper book of appeal, at the instance of the defendant's attorneys to be paid by the defendant's attorneys personally and not their clients. Similarly with regards to the costs of a Judge'e order obtained for the amendment of the memorandum of the appeal by the addition at the instance of the plaintiff's attorneys, of a very unnecessary paragraph asking for relief in respect of a certain matter. 42 Bom. 327=20 Bom. L.R. 905=47 Ind. Cas. 762.

——Costs—Attorney—Infant client—No personal decree.

Where an attorney appointed by a next friend of an infant, is able to show that he has no reasonable chance of recovering his costs from the next friend he can institute a suit against the infant through a guardian ad litem to get a charge declared upon the property when it is recovered in the suit for which he was engaged, when it is found that the suit was properly instituted and was for the benefit of the infant. 43 Cal. 676=20 C.W.N. 537 =33 Ind. Cas. 708.

—A Pleader may be held personally liable for costs of the proceedings taken by him in appropriate cases, where the costs occasioned to his client are the direct result of the initiation and prosecution of the proceedings by him. 14 R.O. 486=A.I.R. 1942 Oudh 279=1942 A.W.R. 65=1942 O.W.N. 68 =199 Ind. Cas. 385.

——Liability to costs.

Per Full Bench.—The High Court has no power to order a legal practitioner to pay personally the costs of an application or suit except in cases to which S. 35 can be made applicable. 1930 A.L.J. 402=A.I.R. 1930 All. 225 (F.B.).

——Settlement of untaxed bills, when liable to be re-opened.

As between attorney and client, the existence of fiduciary relationship alone, or the fact that certain bills of costs were not taxed but were settled out of court by execution of a deed will not justify a court in re-opening accounts settled on which the bond is based, unless sufficient grounds of suspicion exist or the bills are prima facie shown to be extortionate.

Under the practice obtaining in the Original side of the High Court, taxation of bills of solicitors is deemed to be optional with the client and bills of costs are not infrequently adjusted without taxation. The case of Monoehur Doss v. Ramanath I.L.R. 3 C. 474 was decided on the special circumstances of that case and does not lay down any general rule of law. 12 C.W.N. 1102=2 Ind. Cas. 553=36 Cal. 493.

Solicitor—Costs—Recovery.

Solicitors can recover costs due to them by a client in different suits by one summons. It is not necessary to take separate summons for costs due in each suit. 32 B. 1=9 Bom.L.R. 508.

——Suit for recovery of fees paid or payable—Barrister enrolled as advocate in India.

An English or Irish Barrister practising as an Advocate in this country cannot sue or be sued for the recovery of fees payable or paid to him in respect of professional services. 32 L.J.G.P. 137; 14 Cox. C.C. 460, N.W.P. H.C. 1871, p. 83; 3.M. 139, followed. 1903 A.W.N. 104=25 A. 509.

8. Fees.

See also (1) Bar Councils Act S. 16.
(2) Legal Practitioners' Act, S. 27.
(3) Legal Practitioners' (Fees) Act, 1926.

——Change of Advocate—No misconduct on part of Advocate engaged—Client wishing to change him must pay first his full fees.

In the absence of misconduct on the part of the Advocate, the client is not entitled to the sanction of the Court for a change of the Advocate without making a satisfactory arrangement to pay the Advocate, who has had charge of the case hitherto.

The client proposed to abandon the Advocate engaged by him when the case was ready for hearing. Although he pleaded poverty as a ground, he was able to get sufficient means to instruct another Advocate and to purchase necessary papers:

Held, that in the circumstances, the Advocate on the record should be paid his full fees before the

change of vakalat was sanctioned. 58 L. W. 34= (1945) 1 M.L.J. 56=1945 M. W. N. 155=A.I.R. 1945 Mad. 190.

——**Rules relating to fees of legal practitioners (Madras)—Rules 34, 31—Execution in respect of costs—Fee allowable.**

Where a plaintiff is granted two reliefs by the decree, possession and costs, the Counsel's fee payable on an application to execute the decree in respect of costs is one-fourth of the fee permissible on the amount awarded as costs, (1944) 2 M.L.J. 337= 57 L.W. 593=1944 M.W.N. 744=A.I.R. 1945 Mad. 88.

——There was no agreement between the pleader and his client with regard to the amount of fees. The pleader was to submit a bill upon the conclusion of his employment in the case and was to be paid only such charges as the client considered reasonable:

Held, that the suit by the pleader for the recovery of his fees was governed by Art. 56 and not Art. 120, Lim. Act. A.I.R. 1942 Cal. 444=75 C.L.J. 7=201 Ind. Cas. 650.

—A legal practitioner is entitled to full fees agreed upon for the full conduct of the case, even when the case comes to an end abruptly. 1942 N.L.J. 225.

——**Plaintiff's settlement with two defendants and appeal with regard to third—Fees of latter's Pleader should be calculated on the whole subject-matter.**

Where the subject-matter of the suit is the actual value of the property in the hands of the defendants to which the plaintiff would have been entitled had the suit succeeded, the fact that the plaintiff settles with two defendants and appeals with regard to the third is not material for the valuation of Pleader's fees which is to be calculated on the valuation of the whole subject-matter. A.I.R. 1939 Bom. 299=41 Bom. L.R. 413=183 Ind. Cas. 655.

——**Parties to reference agreeing to pay fees to legal adviser of arbitrator—Legal adviser, if can sue.**

Where an Advocate acts as a legal adviser to an arbitrator and the parties agree in the award to pay certain amount to him as his fees, the Advocate cannot sue for the amount on the principle of trust, agency, estoppel or privity of contract. A.I.R. 1939 Sind 125=I.L.R. (1939) Kar. 422=182 Ind. Cas. 226.

——**Nature of—Contract of service—Right to fix fees.**

Where the relationship of Advocate and client subsists; an Advocate is always obliged to see that in addition to his fair and just remuneration he does not use the privilege and responsible position for the purpose of putting money into his own pocket. But short of actual proved misconduct, such as would occur if a person took advantage of some one who is incapable of entering into business relationships, it is entirely open for a professional man on first hearing the nature of the complaints made to him by his client to fix for his service any fee at which he may choose to value it. The client can accept the contract, or, if he thinks the fee is exhorbitant, can go elsewhere. It is true that circumstances might arise in which the consideration for the service rendered would be so glaring that there might be presumptive evidence of an intended fraud; but in a case where a person who is said by an independent witness to be normal, goes to an Advocate's office and enters into an agreement with him for remuneration in order to do business, part of which is the taking of criminal proceedings aginst some one who had defamed him, it is no part of the Advocate's duty to examine the defamatory matter but, assume it to be and use the truth of it as a ground for taking special care not to enter into any contract with his prospective client without taking independent advice. When a contract for service has been concluded, a relationship is called into being which imposes special obligations, but at the outset, both client and Advocate can bargain for services in such methods as they may deem proper. A.I.R. 1937 Rang. 299=172 Ind. Cas. 257.

——**Clear written contract regarding fees, etc. —Necessity of—Duty of Advocates to keep complete and accurate accounts.**

When an Advocate enters into a contract with his client it is appropriate that in order to avoid any future misunderstanding as to the amount of the fees to be charged for various works, there should be a clear written contract between the parties and the amount charged should be clearly mentioned and agreed to by the client. Receiving a large sum on account, without settling the exact fees charged for various works to be done, may, in certain cases, be unfair to the client and may cause an adverse reflection on the Counsel concerned. Advocates keep clerks and maintain offices, and do the work of both Counsel and Solicitors. It is, therefore, their duty to keep complete and accurate accounts, which should be available to their clients who entrust them with money. A.I.R. 1936 All. 359=(1936) A.L.J. 300= 1936 A.W.R. 339=162 Ind. Cas. 622 (S.B.).

——**Barrister practising as Advocate in Allahabad High Court—Whether can sue his client for fees—Letters Patent, Allahabad, cl. 7—Allahabad High Court Rules, Chap. XV. r. (1).**

A Barrister of England as a Barrister has no right to practise in the High Court or in any Court subordinate to the High Court. But a Barrister who has been enrolled as an Advocate of the High Court of Allahabad is under no disability to sue his client for professional services done by acting and pleading for him. 55 A. 570= (1933) A.L.J. 451=A.I.R. 1933 All. 417=143 Ind. Cas. 727 (F.B.).

[Overruling 25 All. 509].

Fees—Counsel's right to—Suit part-heard—Withdrawal of brief. See Calcutta High Court Rules and Orders (O. S.), Chap. 35, R. 34. 84 C.L.J. 9.

——**Duty of Counsel—Excessive fees.**

It is as much the duty of a counsel to protect his client from the liability to pay excessive fees as to protect him from an adverse decree. 88 Ind. Cas. 212=46 All. 553=22 A.L.J. 446=A.I.R. 1924 All. 652.

——**Fees—Promissory note for.**

There may be cases in which the fee due to a Vakil may be otherwise adjusted though no actual money has passed. Such an adjustment, however, should be something more than a mere agreement to pay. For instance when a promissory note, especially a negotiable instrument is given, it may be equivalent to payment. In such a case a certificate may not be really dishonest even if no

fee was received and it may be too strong an expression to describe such a certificate as a false certificate. 122 Ind. Cas. 799=30 M.L.W. 977= A.I.R. 1930 Mad. 413=57 M.L.J. 780.

—It is a well recognized rule of law that an attorney is not entitled to any donation irrespective of his just and legitimate costs, during the subsistence of the relationship with his clients. A.I.R. 1930 Rang. 243=129 Ind. Cas. 526.

The pleaders' fees to be allowed to a party is what is actually paid or what might reasonably have been paid, whichever is less. 111 Ind. Cas. 148=A.I.R. 1928 Nag. 283.

——Solicitor in Bombay—Services in mofussil.

There is no reason why a solicitor practising in Bombay and performing professional services for a client regarding business in the moffusil should not be entitled to send a bill to his client for such professional services, and, if the client declines to pay, why he should not be entitled to come to the Court and ask for a common order to get the bills taxed by tbe Taxing Master. 94 Ind. Cas. 149=28 Bom.L.R. 384=A.I.R. 1926 Bom. 272.

——Miscellaneous proceedings.

Where an appeal is expressly from an order passed in miscellaneous proceedings and it is withdrawn on an objection that the order was not final one and that consequently it was not appealable, it is in the discretion of the Court to fix the fees of Counsel as in miscellaneous proceedings. 94 Ind. Cas. 627=8 L.L.J. 99=27 P.L.R. 238= A.I.R. 1926 Lah. 320.

——Quantum meruit.

In the absence of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed or for any reason the engagement of his services by his client is put an end to, then the pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a 'quantum meruit' 12 Bom. 557, Ref.

The Court in assessing the 'quantum meruit' might be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where circumstances of the case would render it unjust to do so. 90 Ind. Cas. 604=27 Bom.L.R. 1156= A.I.R. 1925 Bom. 513.

——Solicitor and client—Special fee paid but not allowed on taxation.

Where special fees were paid to Counsel as arranged by the defendant attorney with the Counsel on the express oral instructions of the client who was informed by the defendant that they would not be allowed on taxation and in spite of such information the plaintiff client instructed the defendant to pay the fees to Counsel,

Held, that plaintiff should not be allowed to recover the amount of those fees from the attorney. But the attorney should make an application to the Judge for an order under R. 32 of Chap. 36 for an allowance of fees to Counsel, higher or other than the fees set out in the table embodied in that rule,

Held further, in that view the special circumstances of the case the Court should exercise the jurisdiction vested in it by Chap. 36, R. 32.

When an attorney proposes or is asked by his client to mark on the brief or to pay fees to Counsel which cannot be allowed on taxation by the Taxing Officer he should, in every case, before marking or paying such fees make it clear to his client that such fees will not be allowed on taxation and he should obtain a letter signed by his client authorising or ratifying the payment of such fees; and if, and when such fees are disallowed on taxation the attorney must adopt the procedure laid down by the rules.

An attorney is an Officer of Court and it is an improper proceeding on his part to contest in a Court of Law the amount of a bill of costs which has been taxed by the Taxing Officer. 84 Ind. Cas. 817=51 Cal. 829=28 C.W.N. 597 = A.I.R. 1924 Cal. 753.

——Solicitor and client—Special fee paid but not allowed on taxation.

The defendant was the plaintiff's solicitor. He claimed a right to retain out a fund in his hands payable to plaintiff, a certain sum of money he had paid as fee to certain eminent Counsel he had engaged for the client. The fee was a heavy one but the client had been told by the defendant that if he wished to retain those eminent Counsel, he would have to pay a fee which would not be allowed on taxation. The plaintiff consented but no written authority was signed by him. At the time of taxation, the whole of the item in question was disallowed; no reference or review was applied for from the decision of the Master.

Held, that the order of the Master was final, that the defendant cannot, several years afterwards, apply to Court to increase the sums allotted, that he can retain only such monies of his clients as, in accordance with the rule of Court, he is entitled to claim against them and that therefore he cannot retain monies which, though he might have spent, was disallowed by the Taxing Officer. The position of a solicitor who is on Officer of Court is different from that of an ordinary agent. 77 Ind. Cas. 1022=27 C.W.N. 537=A.I.R. 1923 Cal. 603.

——Basis of calculation.

Pleader's fees in a suit for profits among co-sharers need not be restricted to the sum claimed, but it may be assessed on the sum actually awarded. 88 Ind. Cas. 134=12 O.L.J. 272=28 O. C. 217 =A.I.R. 1925 Oudh 432.

——Basis of calculation.

In suits falling under Court-fees Act, S. 7 (iv)(d) the valuation for Court-fees and jurisdiction is the same, i.e., the value at which the relief is valued in plaint, which also is the basis for calculating pleader's fees.
69 Ind. Cas. 577=A.I.R. 1924 Lah. 364.

——Basis of calculation—Suit in ejectment.

In a suit to eject the defendant, plaintiff's tenant, from her house the claim for purposes of Court-fee was valued at Rs. 1,080 (the amount of rent for one year) and for purposes of jurisdiction it was valued at Rs. 15,000, the value of the house. The suit being decreed in the trial Court the defendant appealed to the High Court, valuing her claim at Rs. 1,080 both for Court-fee purposes and for pleader's fees but failed in appeal. A question having arisen how the pleader's fees should be assessed,

Held, the pleader's fees should be arressed on the value of the house. 64 Ind. Cas. 1000=46 Bom. 396=23 Bom. L.R. 1183=A.I.R. 1922 Bom. 171.

——Fees, basis of—Bombay Regulation II of 1827, S. 52—Actual value or Court-fee value.

On a question raised as to whether the basis for the calculation of Pleader's fees under S. 52, Regulation II of 1827 should be the actual value of the property or the valuation of the claim for Court fee purposes,

Held, that the words of the Regulation point to the actual value as the basis of the remuneration, while the Court fee value in suits of this class may bear no relation to the actual value. (1904) 7 Bom. L. R, 131=29 Bom. 229.

——Actual fee to be marked.

The actual fees, which it has been arranged to pay to Counsel, must be marked on the Counsel's brief, and no manipulation thereof can be permitted for the purpose of taxation or otherwise. 84 Ind. Cas. 817=51 Cal. 829=28 C.W.N. 597=A.I.R. 1924 Cal. 753.

——For services as Commissioner — Impropriety.

Where a pleader commissioner sued on a mortgage executed in lieu of fees by defendant for whom he was acting as Commissioner,

Held, it is quite incredible that the duties of a Commissioner should be thought consistent with approaching an individual party and getting him to pay sums of money in discharge of an untaxed bill of costs upon the footing that unless this is done the report will not be filed. No such bargain so procured can stand. It is an improper advantage obtained by an officer of Court by abuse of his position as such officer. It is not the case that the Commissioner is the servant of the party at whose instance the Court makes the appointment. The work done is not work done for that party. It is work done for the Court and the right to sue a party at whose instance the Court appoints a Commissioner is not the right to sue a party for whom the Commissioner has worked. It is necessary that there should be no doubt cast on the broad rule that a Commissioner appointed by a Court must keep himself clear of any ambiguous conduct towards any party in the matter of his fees. 75 Ind. Cas. 443=27 C.W.N. 430=37 C.L. J. 406=A.I.R. 1923 Cal. 436.

——Filing of vakalatnama before date of hearing by one pleader and the conducting of appeal by another does not disentitle the party to full fees. 70 Ind. Cas. 99=25 O.C. 279=A.I.R. 1923 Oudh 55.

——The mofussil practice in probate cases is to calculate pleader's fee ad valorem. 69 Ind. Cas. 954=1922 M.W.N. 626=16 M.L.W. 455=32 M.L.T. 20=A.I.R. 1923 Mad. 131.

——Probate Proceedings — Appeal — Assessment of pleader's fees.

Pleader's fees in appeals in probate proceedings should according to a long standing practice of the High Court, be assessed at Rs. 30. 2 Ind. Cas. 283=10 Bom. L.R. 1197=33 B. 256.

——S. 47, C. P. C.— Civil rules of practice, R. 32.

In an appeal against an order under the old Section 244, read with the old Section 212, a pleader's fee should under R. 32 of the rules of practice, be alllowed only at the rate of 1½ per cent. 1 L. W. 298=24 Ind. Cas. 283.

——Fees—Land acquisition case.

If the claim against a Land Aquisition award is exhorbitant, and absurdly extravagant, the Counsel's fees for the Secretary of State should be allowed 'ad valorem' on the amount in appeal. 107 P.R. 1912=34 P.L.R. 1913=17 Ind. Cas. 901.

——Return of brief—Return of fees.

Where an advocate accepted a brief containing instruections to appear for a client but in consequence of other work returned the brief to his attorney and claimed to have earned the consultation fee marked on the brief, **Held,** he should have returned the whole fee as the consultation was only with a view to attending at the trial. 44 Cal. 741=26 C.L.J. 605=42 Ind. Cas. 63.

——Transfer of brief — Failure of pleader to appear on account of illness—Pleader engaging another to conduct the case—Refund of fees.

It is doubtful whether a client is entitled legally to claim refund of fees, because his pleader being absent on account of illness, sent a substitute in accordance with the power of attorney and the client refused to engage him. In case of neglect client is entitled to refund. 20 P.W.R. 1916=33 Ind. Cas. 993.

——Transfer of brief — Client's consent and will—Return of fees.

A Barrister though physically unable to attend court cannot transfer his client's case to another practitioner without his client's consent or against his will. The Barrister should be ordered to return a part of the fees. 3 Bur. L.T. 131=8 Ind. Cas. 958.

——Purchase of subject-matter of suit—Pre-emption—Payment of money—Right to embursement.

Where a pleader paid the pre-emption money out of his own pocket for his minor client and claimed the pre-empted property on the ground of its sale to him by the minor's next friend, he is entitled only to a decree for money against the client under S. 65 of the Contract Act. A pleader who agrees to conduct a case for his client without remuneration is not afterwards entiiled to claim it from the clients representatives. 12 P.L.R. 1916=108=P.W.R.. 1915=30 Ind. Cas. 513.

——Fees—Certificate of fees—When should be filed.

A fee certificate is filed within time, if it is put in, before the date on which the appeal was actually heard though it is after the date fixed for first hearing. 11 Ind. Cas. 3 (All.)

——Fees—Calculation of—Act XII of 1866, S. 17—Regulation II of 1827. S. 56.

In Sind, the calculation of the Pleader's fees is to be made in accordance with the rules issued under S. 17 of Act XII of 1866 and not according to S. 56 of Regulation II of 1827. In suits where injunction is claimed for reparation or prevention of wrong, the pleader's fees are to depend on the amount decreed where damages are claimed and decreed, and on the amount of the valuation in the plaint when damages are not so claimed and when the Court has accepted the plaint without compel-

ing the plaintiff to put a value on the damages as it ought to the Court has no right to assess damages when not claimed for purpose of calculation of pleader's fees. 29 Bom. 229 not applied. 3 S.L.R. 97=3 Ind. Cas. 901.

——Fees.

See (1902) 7 C.W.N. 300.

——Fees not paid—Duty of vakils.

In the Madras High Court Vakils being allowed to act as well as plead on the Original Side, they are very much in the same position as solicitors in England. It is well settled in England that attorneys or solicitors are not entitled to refuse to go on with an action for want of funds unless they have given their clients sufficient notice of their intention to enable him to make other arrangements.

A Vakil is not entitled to refuse to take a necessary step in the case, because his own fees have not been paid, and at the same time refuse his consent to the transfer of the case to another Vakil. 69 Ind. Cas. 695=44 Mad. 978=14 M.L.W. 154=1921 M.W.N. 562=A.I.R. 1921 Mad. 320=41 M.L.J. 213.

——Fees—Advocate instructed by vakil on original side of the High Court—Fees whether recoverable as part of costs.

On the original side of the High Court a party cannot recover from his adversary as part of the costs of the suit the fee paid to the advocate who appeared on the instructions of a vakil. 30 M.L.J. 120=33 Ind. Cas. 906.

——Solicitor—Retainer disputed by client—Suit—Solicitor's Act (1843) 6 and 7, Vict. C. 731, S. 43.

Where an attorney's retainer is disputed, the payment due to him may be enforced by an action only and amount must be ascertained by the Taxing master before a suit is filed. 33 Bom. 667=11 Bom. L.R. 83=1 Ind. Cas. 201.

——Taxation—Attorney and client—Petition for removal of guardian—Practice—Counsel's fees—Duty of Taxing officer.

It is the duty of the Taxing Officers as representing the court to intervene on taxation for the protection of clients in the matter of excessive or unusual charges, whether the client appears or does not appear on the notice given to him to attend the taxation and whether he takes express objection or does not to such payment. As a general rule clients should not be chargeable for excessive and extravagant fees paid by attorney to Counsel, unless upon their written authority given expressly for the payment of such fees; the usual warrant of attorney signed by a client does not authorise the attorney to pay excessive or unusual fees to counsel, and attorneys paying such fees except upon the written authority or consent of their clients run the gravest risk of having those payments disallowed as against their clients on taxation. Under no circumstances, will excessive or extravagent fees be allowed as against estates in the hands of the court or which are representated by guardians, trustees or executors and managed by them for the benefit of infants or other beneficiaries. (1906) 33 C. 827.

——Principles of taxation—Practice—Vakil's fee.

The principle and rule of taxation ought, as far as possible, to be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the court, and this end can best be secured by adopting the actual value as the basis of the taxation. In view of this conclusion, it will in future be right for the real as well as the court fee value to be stated on every plaint and memorandum of appeal, and in case of dispute, for an issue to be raised as to the real value. The vakil's fee should be taxed upon the real value of the subject matter and not on the court fee value. 7 Bom. L.R. 131=29 B. 229.

——Fee proportioned to result—Unprofessional conduct—Disciplinary jurisdiction.

It is highly reprehensible for an advocate to stipulate for or receive remuneration proportioned to the result of the suit by away of share or percentage or otherwise. An advocate in or out of the Presidency Town so doing will render himself liable to the disciplinary jurisdiction of the High Court. (1901) 3 Bom. L.R. 102. (F.B.)

—Application for leave to appeal to Privy Council—Whether Counsel can claim Lien.

A Counsel who files an application for leave to appeal to the Privy Council in a certain case, is not entitled to claim a lien for the outstanding fees on the amount which the appellant had deposited as security, this amount not having been the subject matter of the appeal, nor the fruit of the action. (1932) A.L.J. 764=A.I.R. 1933 All. 3=142 Ind. Cas. 241.

9. Intervention of Solicitor.

——Intervention of solicitor—Council — Professional etiquette.

Looking to usage and etiquette of the profession, counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor. No statutory rule of law prevents a litigant from instructing counsel directly or to prevent counsel so instructed from appearing on behalf of a litigant, but eminent Judges emphasized the importance of strict adherence to the long established professional usage in this respect. In the Calcutta High Court departure from this practice is allowed only in the case of appeals from the mofussil. A real and not merely a formal compliance with requirements of professional usage is necessary in this respect, which is expedient in the interest of suitors and for the satisfactory administration of justice. Consequently communications should pass between counsel attorney and not between counsel and the lay client without the intervention of the attorney. 31 C.L.J. 313=57 Ind. Cas. 22.

——Intervention of solicitor—Counsel—Professional etiquette.

The usuage obtaining on the Original Side, of the Calcutta High Court that counsel should take their instructions only from attorneys though founded upon no rule of law, is a most beneficial one and must be maintained. 44 Cal. 741=26 C. L. J. 605=42 Ind. Cas. 63.

10. Lien.

See also 1. Contract Act, S. 171
2. Note 7
3. A. I. R. 1933 All. 3 under Note 8.

——Solicitor and client—Solicitor's lien.

Collusive compromise before judgment entered into by client to deprive the solicitor of his costs—Court will lend its assistance to protect solicitor's lien for his

unpaid costs—Court however, would not interfere with **bona fide** compromise to preserve the solicitor's lien—Circumstances under which Court will infer collusion indicated. I.L.R. (1943) 2 Cal. 172=47 C.W.N. 394 =A.I.R. 1945 Cal. 57=218 Ind. Cas. 173.

——Solicitor's lien for costs—Rule of Common Law—Moneys in hands of solicitor earmarked for specific purpose—Solicitor's lien cannot prevail.

The Common Law rule which governs what is known as the Solicitor's particular lien is founded on the principle that the Solicitor is entitled to have his costs out of the property obtained for his client by the solicitor's exertions. That rule, when the property is part of a fund which has come into the Solicitor's hands for a particular purpose, does not apply. In cases where the moneys in a Solicitor's hands have been earmarked for a specific purpose, the Solicitor's lien for costs cannot intervene to defeat it.

The plaintiff instituted a suit on August 17, 1939, for recovery of a sum of Rs. 3,694—11—0 on a signed adjustment of account and on August 18, 1939, applied for attachment before judgment of a decree which the defendant had obtained against one X. On that date, the Court made an **interim** order on the application restraining the defendant from withdrawing the sum of Rs. 3,694—11—0 out of the amount that may be realised in execution of the defendant's decree against X. Then, on August 31, 1939, the Court made an order by which the plaintiff's application for attachment before judgment was adjourned and the interim injunction against the defendant was discharged on the defendant's undertaking to deposit with his Attorney Rs. 3,700 if money was realised by execution of or otherwise on account of the decree obtained by the defendant against X. The money was to be held by the Attorney until further orders on the plaintiff's application for attachment before judgment. Subsequently, the defendant realised a sum of Rs. 1,500 from X in respect of the decree against X. This amount came into the hands of the defendant's Attorney. The plaintiff, having obtained decree in the suit against the defendant, applied in execution to recover the amount in the hands of the defendant's Attorney. The Attorney claimed a lien over that amount for his costs of the suit in which the decree against X was obtained by the defendants.

Held, that the purpose for depositing the money with the Attorney was that he should hold it as security for the plaintiff's claim, should the latter be successful in his suit against the defendant. The Attorney therefore, assumed the character of a stakeholder and his possession was impressed with a trust. His lien for costs, therefore, could not prevail. A.I.R. 1944 Cal. 189=I. L. R. (1944) 1 Cal. 445=214 Ind. Cas. 154.

——Costs—Attorney asserting his lien against client on whose behalf he is applying for payment of fund in Court, propriety.

It is improper for an Attorney to assert his lien against the client on whose behalf he is making an application for order for payment of fund in Court. A. I. R. 1942 Cal. 76=I. L. R. (1941) 2 Cal. 289=199 Ind. Cas. 220.

——Attorney—Set off.

In the matter of allowing set off with costs, the Court has power to exercise its discretion in favour of the party claiming it, notwithstanding the Attorney's lien and is not fettered where the Attorney claims lien for his costs on the amount awarded to his client under a decree in independent and separate proceedings. The Attorney's lien should only be allowed to prevail and intercept the set-off provided he established that the set-off would not be fair and just as between the parties or if some fraud or imposition had been practised upon the Solicitor by collusion. Primarily, the Solicitor must look to his client for his costs. There is no reason why because he has not taken the precaution to take proper advances from his client, he should compel a party to pay his costs who has to recover from the other party more than he has to pay him. A.I.R. 1942 Bom. 102=44 Bom. L. R. 178=200 Ind. Cas. 85.

——Attorney — Discretion of Court to allow to set-off costs due by parties to one another with or without prejudice to Attorney's lien—Lien, if protected after set-off is allowed.

The right of an Attorney in respect of his lien is really in essence a claim to the equitable interference of the Court for his protection. The Attorney's lien is really an equity claimed on his behalf. Such a lien is subject to all the equities between the Attorney's client and any other party or parties interested in the property over which the lien is claimed. A party's right to set-off costs payable to him by the other party against the sum found due from him to the other party on the taking of accounts in the same suit, is not affected by the Solicitor's lien. The Court has a discretion to allow a set-off of judgments for damages, that is, debt, or costs against each other either with or without prejudice to a Solicitor's lien on either of those judgments. The Courts have complete discretion to allow a set off, whether in the same action or in different actions, and it extends to the setting off of costs against costs and also in proper case to the setting off of debt or damages against costs and vice versa. The discretion has to be exercised judicially, having regard to the facts and circumstances of each case, and not upon any pre-conceived view that to allow, the Attorney's lien to prevail must in every case, the contrary to natural justice. The circumstances considered by the Court are matters relating to the Atrorney whose lien is sought to be affected irrespective of his client, because as between the parties themselves, there can hardly be a ground for resisting a set-off The Attorney's lien is, however, not protected after the set-off has already been allowed. 41 Bom. L.R. 1091=A.I R. 1939 Bom. 518=I.L.R. (1939) Bom. 692=186 Ind. Cas. 351.

Where an order has been passed against the defendant for costs, and the costs have been taxed and a particular amount of costs has beon paid into Court, the defendant is not entitled to claim set off against the plaintiff in answer to the plaintiff's attorney's claim to exercise his right of lien. (1936) 63 C. 746= 40 C.W.N. 458.

——Costs—Set-off—Cross-claims between parties to the same suit—Whether set-off can be allowed irrespective of Solicitor's lien—Attorney's lien—Discretion.

In the case of cross claims between parties to the same suit, they can be allowed to be set-off one against the other, without regard to the Solicitor's lien for costs. In India the question whether an Attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit, is a matter of discretion. 34 Bom. L R. 1429=A.I.R. 1932 Bom. 619=141 Ind. Cas. 406.

——Solicitor's lien—Direction for costs on setting aside of adjudication—Set off against debt due to petitioning creditor—If permitted.

Costs ordered to be paid by a petitioning creditor to a debtor when an adjudication in bankruptcy is set

aside cannot be set off to the prejudice of the solicitor's lien against the debts due to the petitioning creditor. 32 Bom. L.R. 1076=A.I.R. 1930 Bom. 516.

——Firm of Solicitors dissolved—If amounts to discharge of Solicitors by themselves—Lien over fund in Court.

The dissolution of a firm of Solicitors amounts to a discharge of the Solicitors by themselves but it does not entail loss of their lien over a fund in Court recovered by their exertions before dissolution. A.I.R. 1942 Cal. 76=I. L. R. (1941) 2 Cal. 289=199 Ind. Cas. 220.

——Solicitor's lien over property obtained by his exertions—Insolvency of client—Effect.

A Solicitor has, at Common Law and apart from any order of the Court or statute, a lien over property recovered or preserved or the proceeds of any judgment obtained for the client by his exertions. Subject to any statute to the contrary, the Courts in India will follow the Common Law of England in this respect. So far as this type of lien is concerned, it does not matter whether the Solicitor has got actual possession of the property over which he proposes to exercise his lien or not.

The insolvency of the client makes no difference to the Common Law right of the Solicitors to be reimbursed for their costs out of the property obtained by their exertions. The right is based on the principle that it is not just that the client should get the benefit of the Solicitor's labour without paying for it. The lien, therefore prevails notwithstanding the bankruptcy of the client. A.I.R. 1940 Cal. 179=I.L.R. (1935) 1 Cal. 212=43 C.W.N. 290=188 Ind. Cas. 66.

——Solicitor's lien—Solicitor appoinment by next friend of minor—Solicitor's client, who is—Next friend superseded by new one—Solicitor appointed by former, if bound to hand over documents to next friend.

A client of a Solicitor appointed by a next friend of a minor is the next friend and not the minor; it is to the next friend, and not to the minor, that a Solicitor looks for his costs, and the next friend is liable to pay those costs. It may be that in a proper case the Solicitor ultimately can get the costs out of the minor's estate, but the next friend is the person directly liable to the Solicitor. But a Solicitor's lien is a lien against his client, and as against third parties he has no higher right than the client possesses. Where a next friend who has appointed a Solicitor is superseded by a new next friend, the old next friend is bound to hand over the documents relating to the suit to the new next friend and as the solicitor appointed by the old next friend is not in a better position than that of his client, the Solicitor is bound to hand over the documents to the new next friend. A.I.R. 1938 Bom. 418=I.L.R. (1938) Bom. 749=40 Bom. L. R. 694=177 Ind. Cas. 727.

——Solicitor's costs—Solicitor's lien over property recovered—Compromise between parties to deprive Solicitor of his costs—Court's power of interference—"Collusive", meaning of.

A Solicitor has, apart from any order of the Court or any statute, a lien over any property recovered or preserved and over the proceeds of any judgment, that is to say, of any decree which is obtained for his client by the Solicitor's exertions. That lien is known as a particular lien. It relates only to the costs incurred in recovering the property or obtaining a judgment for payment of money. The right of the Solicitor is really, in essence, a claim to the equitable interference of the Court for the Solicitor's protection. At the same time, however, the Solicitor's lien may, in some circumstances, be affected by a compromise between the parties, and as a general rule, the Court will not, for the purpose of maintaining the Solicitor's lien, interfere in a compromise which is a **bona fide** compromise. But if the motive or the object or the intention of the parties to the compromise is that the Solicitor shall be deprived of his lien, then the Court will interfere for the protection of the Solicitor, and in such an event, the Solicitor may apply for payment of the costs by either of the parties to the scheme. "Collusion" will be there if the agreement between the parties is made with the knowledge that the result will inevitably be to deprive the Solicitor of his costs which he has earned. There is certainly "collusion" if the parties enter into an agreement knowing and intending that the outcome will be that the Solicitor is deprived of his lien. 61 C. 1005=38 C.W.N. 1031=A.I.R. 1935 Cal. 168=154 Ind. Cas. 781.

——Solicitor's costs—Solicitor's lien, law applicable—If altered by O. 21, Civil P. C.

It is incorrect to say that O. 21, Civil P. C., has altered the law regarding Solicitor's lien. The Civil P. C. does not contain exhaustive general principles of law applicable to the question of Attorney's lien; the question of the Solicitor's lien in India is still governed by the relevant principles of English Law. 61 C. 1005=38 C.W.N. 1031=A.I.R. 1935 Cal. 168=154 Ind. Cas. 781.

——A Solicitor's lien is a right exercisable against the client and gives the Solicitor no higher rights, against third persons than the client himself possesses. Thus, notwithstanding the lien, the Solicitor can be compelled to produce the papers in his possession if his client would have been bound to produce them. (1935) 62 C. 1037=39 C.W.N. 917=37 Cr.L.J. 825=163 Ind. Cas 224.

——Attorney—Lien on documents for costs—Position in India—Attorney repudiating contract—Calcutta High Court Rules (Original Side), Chap. 11, R. 66.

In the matter of protection of Attorneys as regards their lien over documents in India, it is the same as those of Solicitors in England. The position is as follows, that when an Attorney or Solicitor is on contract for service to a litigant, the status of the Attorney or Solicitor with regard to his lien on documents, depends upon how the contract between him and his client is terminated. If it is terminated unjustifiably by the client, then the Attorney has the absolute right to maintain his lien and say "I stand by my rights in law; I will not give up your papers until my legitimate costs already incurred are paid." If, on the other hand, the Attorney or Solicitor puts an end to the contract himself, he is not so entitled. He retains his lien, but the lien is postponed. It comes into effective operation only after the case is ended and after the other Attorney has completed his work. There is no lien in favour of an Attorney who is discharged by the client for misconduct.

No order for change of Attorney is made unless provision is made for the payment of the costs of the Attorney, subject of course, to this, that no such provision will be made, where the Attorney has, by his own conduct or misconduct discharged himself. But where there is no question of misconduct on the part of the Attorney; but by his conduct he puts an end to the contract between himself and his clients, though for good reasons, but the repudiation comes from him, he only retains the modified lien, the position being that his priority of lien is sacrificed to the second attorney, and to that extent, impaired,

The Attorney need never allow his services to be retained without obtaining a lump sum down or security for his costs. But he is not entitled to embarrass and impede the litigants by retaining the papers entrusted to him when he himself has declined to act further. (1935) 62 C. 464=39 C. W. N. 688=164 Ind. Cas. 138.

——Attorney in India—Retaining lien and common law lien—Balance of account between Attorney and client—Whether Attorney has a general lien over client's deeds and papers—Contract Act, S. 171—Whether takes away retaining lien.

The rights of an Attorney in India are the same as the rights of a Solicitor in England, except in so far as the latter have been diminished or increased by statute. A Solicitor is entitled to three kinds of lien to protect his right to recover his costs from his client namely (1) a passive or retaining lien; (2) a common law lien on property recovered or preserved by his efforts; (3) a statutory lien enforceable by a charging order. With regard to statutory lien, it is a creation of the Solicitor's Act, 1860, (23 and 24 Vic. C. 127). Indian statute law contains no similar provision. Common law lien is admittedly a particular lien and not a general lien and it is, therefore, not available for the general balance of account between the Attorney and his client, but extends only to the costs of recovering or preserving the property in suit.

Section 171, Contract Act, has not the effect of depriving Attorneys of the passive or retaining lien which they possessed prior to the passing of the Contract Act. Attorneys are entitled to a passive or retaining lien.

A Solicitor has no greater rights over money which is the fruit of his exertions when he obtains possession of it, than he has when it is still in the stage of being in deposit in Court. 60 C. 1442=A.I.R. 1934 Cal. 341 =149 Ind. Cas. 331.

——Costs—Attorney's lien—Non-payment of costs —Documents and papers — Whether can be retained.

It is the primary right of every litigant to employ any Attorney he likes and to change him for another Attorney in the course of the same proceeding if he so wishes, provided that he does not thereby cause delay or injustice to any other party or inconvenience to the Court. If he has not paid costs to the Attorney whom he wishes to discharge, that would affect his right to obtain papers and documents on which the Attorney might claim a lien for his unpaid costs and it is not open to an Attorney to say that his client shall continue to employ him in the suit or proceeding until all the costs due to him are paid. The Attorney, however, has a lien on the papers and documents of the client in the case and non-payment of Attorney's costs only affects the right of the litigant to obtain such papers and documents. 35 Bom. L.B. 298=A.I.R. 1933 Bom. 182=144 Ind. Cas. 628.

——General lien, nature of.

Solicitor has a general lien upon deeds and papers in his hands for all costs however arising. But he has no such general right of lien against money which he recovers for his client. Whether he gets them or does not his lien or right to be paid out of those funds is to be confined to the costs incurred in respect of those funds, subject, of course, only to this; that he has the ordinary rights of set-off which one creditor has against another. 60 C. 1442=A.I.R. 1934 Cal. 341= 149 Ind. Cas. 331.

——Costs—Lien of Solicitor—Solicitor discharging himself and client discharging Solicitor—Difference—Duties of Solicitors—Change of Solicitor, when sanctioned.

A Solicitor has a lien upon the funds, money or property recovered for his client, but this lien is, unlike a lien on documents and papers, not a general lien, but restricted to costs incurred in the recovery of the funds, money or property. He has, however, a general lien upon all his client's papers and documents for payment of all taxable costs, charges and expenses incurred by him on behalf of his client, and the lien entitles him to refuse production of the papers and document's to his client except on certain conditions.

If a Solicitor discharges himself, the client or his new Solicitor is entitled to an order; not merely for inspection or production of the papers and documents in the former Solicitor's possession, but also for delivery thereof on an undertaking to hold them on the other hand, the client discharges the Solicitor, without prejudice to the former Solicitor's lien and subject to the re-delivery thereof after the hearing of the suit, and if necessary, subject also to an undertaking to prosecute the suit in an active manner. If, the Solicitor, is under no obligation to deliver, nor even to produce or allow inspection of the documents and papers in his possession for the client's benefit until all his taxed costs are paid.

When a Solicitor takes up a case and undertakes to conduct it, he is bound, whether his client is rich or poor, to proceed with due diligence and honesty to prosecute or to defend the claim, even if he is not put in funds, for it is open to him when he takes up the case to assure himself whether his client is a person of substance.

The Solicitor can however, protect himself if he doubts the credit and honesty of his client by insisting on a sufficient advance at the outset to cover all probable cost.

It is rule of the Court not to sanction a change of Solicitors when the former Solicitor has not discharged himself, so long as his costs remain unpaid. A.I.R. 1932 Bom 363=34 Bom. L.R. 703=138 Ind. Cas. 257.

——Lien for costs—Compromise—Lien, whether subsists—Fraud and collusion—Notice.

Ordinarily the Court will not interfere for the purpose of preserving the Solicitor's lien after a **bona fide** compromise between the parties has been arrived at though the result of such compromise may be to deprive the Solicitor of his costs. The Solicitor's lien never precludes a fair and honest arrangement between the parties.

But if the compromise has been arrived at with the intention of depriving a Solicitor of his lien, costs may be ordered to be paid by the opposite party. In such cases, the existence of fraud and, collusion between the parties should be manifest and must be clearly established; and it may even be inferred from the facts.

If a valid compromise is made, and after the compromise, the Solicitor gives notice that he has a lien for costs, it is at the defendant's peril if in face of that notice he pays over the money which has been agreed to be paid to the plaintiff by way of compromise.

A **bona fide** compromise entered into before verdict or judgment, and even after notice of the Solicitor's claim for costs, is good, and will not be set aside or affected at the instance of the Solicitor unless collu-

sion or fraudulent conspiracy exists between the parties. 34 Bom. L. R. 721=A.I.R. 1932 Bom. 352=140 Ind. Cas. 809.

——English Solicitors' Act, 1860.

Where an Advocate put in a claim to the Official Assignee for certain moneys due to him by an insolvent for work done for the insolvent in a probate litigation in respect of a will of which the insolvent was the executor and the legatee, and he claimed it from the estate of the testator:

Held, (i) that the insolvency Court was not competent to make an order against the estate of the testator inasmuch as the only estate which was vested in the Official Assignee was the estate of the insolvent;

(ii) that the Advocate was not entitled to a lien for costs like that which is sanctioned by the English Solicitors' Act, 1860 in favour of a Solicitor upon property recovered by his exertions for a client.

The only possible ground for supporting a claim to such a lien in favour of an Advocate, is the express agreement to that effect. A.I.R. 1932 Mad. 256=(1932) M.W.N. 8=62 M.L.J. 185=35 M.L.W. 166=55 M. 455=137 Ind. Cas. 571.

——Common law lien over fruits of litigation.

A Solicitor has under the common law, what is known as particular lien which does not depend on actual possession of the property as distinguished from possessory lien by reason of certain property like title-deeds being in his hands.

This lien is not liable to be defeated on the ground that the assignee of the decree or the attaching creditor of the Solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of the Solicitor's lien.

When the client treats the engagement as subsisting and instructs the Attorney to tax his bill of costs, the business cannot be said to be terminated. 60 M.L.J. 133=A.I.R. 1931 Mad. 183=33 M.L.W. 430=131 Ind. Cas. 158.

——Lien—Priority over costs to be paid.

Where the petitioning creditor's petition is dismissed with costs to be paid to the debtor, no set-off is permissible to the petitioning creditor against the money ordered to be paid at least to the extent of the lien for costs of the attorneys of the debtor. 32 Bom. L.R. 1076=A.I.R. 1930 Bom. 516.

——Priority over mortgagee's lien.

A solicitor's lien on the property of his client cannot have priority over the lien of a mortgagee who has advanced money to pay off prior incumbrances on the property. 108 Ind. Cas. 705=52 Bom. 336=30 Bom. L.R. 153=A.I.R. 1928 Bom. 108.

——Priority over attachment.

The solicitor's lien independently of the charging order has priority over any attachment by a judgment creditor so long as the moneys attached remain within the jurisdiction of the Court, that is to say, they are not realised and paid off to the judgment-creditor. 49 L.J.C.P. 524, **Foll.** 88 Ind. Cas. 81=49 Bom. 505=27 Bom. L.R. 556=A.I.R. 1925 Bom. 351.

——Nature and extent of.

In India a solicitor has a common law lien for costs over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions. This lien is a particular lien; it is not, therefore, available for the general balance of account between the solicitor and the client, but extends only to the costs of recovering or preserving the property in question, including the costs of protecting the solicitor's right to such costs, and of establishing the lien. The lien does not attach to real property, but, with this exception, it applies to property of every description—including costs ordered to be paid to the client, **Shaw** v. **Neale**, (1858) 6 H.L.C. 581: 10 Bom. 248 and A.I.R. 1925 Bom. 351, **Foll.** 108 Ind. Cas. 705=52 Bom. 336=30 Bom. L.R. 153=A.I.R. 1928 Bom. 108.

——Common fund.

The attorney's right to a lien for his costs is ancillary to the right he has of recovering his costs against his client. Where the attorney is unable to show that he cannot get payment from his client where others besides the client are interested in the fund, the Court would not exercise its discretion in favour of the attorney against the other parties so interested. 94 Ind. Cas. 153=28 Bom. L. R. 386=A.I.R. 1926 Bom. 289.

——General and particular.

Obiter:— In addition to the particular or active lien which an attorney has upon moneys which have been recovered in a suit, the attorney has a general or passive or relatining lien upon all movables, deeds, documents, and so forth that come into his hands unless they come for a specific purpose which would be inconsistent with the right of retainer. 66 Ind. Cas. 209=48 Cal. 817=25 C.W.N. 800=A.I.R. 1921 Cal. 67.

——Enforcement of costs—Direct order to pay—Jurisdiction of Court.

The Court has jurisdiction to enforce, in a proper case the solicitor's lien by making a direct order for payment to the solicitor by the opposite party of such costs. 2 C.W.N. 508, Foll. Where the original client was dead and his legal representatives were not people of substance and were unable to pay, it is a proper case for the Court to exercise discretion and pass an order for payment of such costs to the solicitor by the opposite party. 46 Cal. 1070=54 Ind. Cas. 691.

——Lien—Judgment obtained by client.

Solicitor's lien on the judgment passed in favour of his client should be given effect to, like other liens, if the judgment is in the solicitor's possession, The lien should be subject to other equities if any. 43 Cal. 932=21 C.W.N. 106=38 Ind. Cas. 30.

——Extent of movable and immovable property recovered in the suit.

An attorney has a lien for his costs over the properties movable or immovable, recovered in the suit of his client but he cannot get a personal decree against an infant client. 43 Cal. 676=20 C.W.N. 537=33 Ind. Cas. 708.

——Money in cash deposit.

Where a Barrister does not obtain a decree in favour of his client there are no fruits on which he can claim a lien. When he allows money of the client deposited in Court to be taken away he cannot subsequently claim a lien on the amount. 8 L.B.R. 70=29 Ind. Cas. 870.

——Right to—Tort.

The right of a solicitor claiming a lien will largely depend on the circumstances under which he has ceased to act for his client. Whether the solicitor has discharged himself or whether he has been discharged by his client is the test. In other words, whether the solicitor has ceased to act for his client owing to an unjustifiable action of his

own or whether he has ceased owing to the action of his client. In an administrative action the obligation of the solictor to give inspection of and to produce documents that are in his possession and over which he has a lien is confined to those cases in which they are essential to determine those questions arising in the normal administration proceedings when the estate is being actually admidistered. 35 Bom. 352=13 Bom.L.R. 670=12 Ind. Cas. 3.

——Lien—Moneys spent in other causes.

A pleader in India like a solicitor in England cannot retain moneys realized by him on behalf of his client in one cause for his dues in other causes conducted by him. 33 Mad. 255=7 M.L.T. 229=20 M.L.J. 326=4 Ind. Cas. 398.

——When modified—Change of Solicitors.

If a change of solicitors in the course of an action takes place the former solictior's lien is not taken away but modified according as his discharge is by himself or by his client; in the former case he is entitled to have an undertaking from the new solicitor that he should hold the papers without prejudice to his lien and to return them intact to him after the action is over, in the latter case he cannot be compelled to hand over or produce the papers so long as his costs are unpaid. 20 C.W.N. 437=23 C.L.J. 326=33 Ind. Cas. 73.

——Notice of.

Where a party attaches a decree, which directs payment of costs to the plaintiff, he has notice by that very fact that the plaintiff's solicitors may be entitled to an attorney's lien on that fund for the amount of their costs. The mere fact of there being a fund in Court is sufficient to give notice to the third party of the possibility of a solicitor being entitled to a lien for his costs. So long as the Court has control over the funds, the lien is not liable to be defeated by a third party, such as the assignee of a decree or an attaching creditor of the solicitor's client, even though the third party had no express notice of the lien. 105 Ind. Cas. 383=29 Bom.L.R. 1196=51 Bom. 855=A. I. R. 1927 Bom. 542.

——Solicitors's lien—High Court—Summary Jurisdiction—Discretion.

There exists a summary jurisdiction in the High Court to enforce the solicitor's lien, but the exercise of that jurisdiction is discretionary. Although the High Court possesses a summary jurisdicition to enforce the solicitor's lien upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties or would compel the court to go into complicated questions of fact especially when charges of fraud or collusion are made, or when a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction. (1905) 7 Bom.L.R. 547.

——Lien—Compromise of suit by parties—High Court—Summary Jurisdiction—Motion by the solicitor for his costs—Solicitor's right to oppose client's motion—Practice—Procedure—Solicitor's costs — Collusion — Conspiracy—Negotiable security—Conditional payment:

The High Court of Bombay has a summary jurisdiction over its suitors for the purpose of enforcing a solicitor's lien for costs and in enforcing it the court must be guided by the principles of English Law. Hence, a solicitor engaged by a party to a suit has a right to come in and say that before any order is passed on the basis of a compromise arrived at privately between the parties effect should be given to his lien. Whether the solicitor moves the court by an application of his own or appears to oppose a motion of the party against whom the lien for costs is alleged to arise, in either case he calls in aid the equitable interference of the court under its summary jurisdiction. Where the compromise arrived at between the parties to a suit is collusive fraudulent and made with a view to deprive a solicitor of his costs, the court will order the award of costs, to the solicitor. (1904) 6 Bom. L.R. 879=30 B. 27.

——Lien—Contract Act S. 217.

A Vakil who disburses out-fees at the request of his client and takes a pro-note for them which not being filed in court becomes void is entitled to recover such out-fees independent of the void promissory note and entitled under S. 217 of the Contract Act to retain the same out of the sums recived by him to the credit of his client in the suit in which he has disbursed the out-fee.

Quaere:—Whether a vakil will be entitled in the absence of express authority from the client to retain out of money received by him in one suit fees or out-fees due or disbursed by him in another suit. (1903) 14 M.L.J. 274=27 M. 512.

——Scottish Law does not apply in England, nor does it apply in India. 105 Ind. Cas. 385=51 Bom. 855=29 Bom.L.R. 1196=A.I.R. 1927 Bom, 542.

11. Misconduct.

See also: Legal Practitioners' Act, 1879 Ss. 12,13.

—Misconduct—Pleader purchasing at sale in proceedings instituted by himself to execute decree of client—If guilty of misconduct. See Legal Practitioners Act, Madras Rules. R. 17. (1946) 1 M.L.J. 218=A.I.R. 1946 Mad. 245 (F. B.)

——Auction sale in execution of decree—Decree-holder not bidding—Decree-holder's pleader buying property in clerk's name—Property transferred to pleader's wife's name—Pleader is not guilty of professional misconduct.

Rule 17 of the rules framed by the Madras High Court under the Legal Practitioners' Act prohibits a practitioner from purchasing from his client or from any other person any interest in a decree passed by the Court in which he practises, but there is no rule prohibiting a legal practitioner from bidding at an auction held in pursuance of a decree obtained by his client. A Pleader of a party to a suit is not debarred by O. 21, R. 73, Civil P.C., from purchasing peoperty sold in execution of the decree. Consequently, where a pleader buys the property in the name of his clerk in execution of a decree passed in favour of his client and has it transferred to his wife, but with the knowledge that his client does not wish to bid for it, the pleader cannot be held guilty of professional misconduct. A.I.R. 1946 Mad. 245=(1946) 1 Mad. L.J. 218=59 Mad. L. W. 161=(1946) Mad. W.N. 203 (F.B.)

——Pleader drafting plaint for plaintiff gratuitously as friend—No confidential information imparted by plaintiff—Pleader subsequently accepting brief for defendant and appearing for him is not guilty of professional misconduct.

In a suit for redemption of a mortgage, a pleader drew up a draft plaint at the plaintiff's request gratuitously and as a friend. For this purpose the only document he was shown was the mortgage deed. No confidential information was imparted to him by the plaintiff. The plaint was filed by the plaintiff himself. The pleader subsequently accepted brief for defendant and appeared for him:

Held, that as no confidential information was imparted to the pleader by the plaintiff there was no breach of confidence on the part of the pleader in appearing for the defendant at a later stage and he was not guilty of professional miscondact. A.I.R. 1946 Lah. 329=48 Pun. L.R. 485=226 Ind. Cas. 479 (F.B.)

——Improper conduct—Double dealing—Court refusing him leave to appear in case.

Where a legal practitioner received confidential information from a party before he was engaged and it further appeared that he had omitted to warn the party that he had been approached by the other side and eventually he accepted a brief for the latter, held that the conduct of the practitioner was improper though it did not amount to professional misconduct and that the trial Court was justified in refusing him permission to appear in the case. 8 Rang. 446=128 Ind. Cas. 354=1930 Cr. C. 1233=A.I.R. 1930 Rang. 355.

——Practice—Objection to admissibility of unstamped document.

According to the rules laid down by the General Council of the English Bar, it is considered to be unprofessional conduct for Counsel to raise objections to the admissibility of a document on the ground that it is not stamped, but there is no such objection to Counsel raising an objection to the validity of a document which is, by law, rendered invalid owing to the absence of stamps. A.I.R. 1937 Cal. 765=I.L.R. (1937) Cal. 257.

——Legal practitioner appointed managing trustee of estate—His own interests considered in preference to and to the detriment of beneficiaries—Professional misconduct—Tests.

The fact that a legal practitioner, who is appointed as the managing trustee of an estate, in using the funds of the estate, was in fact, lending trust money to himself and thereby committed a serious breach of trust, in itself is not necessarily sufficient to constitute professional misconduct. But held, that in the circumstances in the case, when the legal practitioner as managing trustee altered the terms of a mortgage agreeing that the beneficiaries for whom he was trustee, should be paid only $5\frac{1}{2}$ per centum interest, when the mortgagor was liable under the mortgage which was transferred to pay $6\frac{1}{2}$ per-centum, and another alteration in the terms of the mortgage by which the mortgagor was given the right to pay off at any time without any prior notice to the mortgagee the whole of the principal sum or any part thereof not being less than £. 100 was effected in order to facilitate dubious transactions, led to the conclusion that he was considering the interests of himself in preference to and to the detriment of the interests of the beneficiaries of the estate for whom he was trustee.

If it is shown that a Solicitor, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to say that he is guilty of professional misconduct.

The importance of the high Standard of duty which is required from a Solicitor to his client, being maintained without any diminution when a Solicitor is dealing with clients who happen to be native or half-castes, who may be ignorant and semi or wholly illiterate people emphasized. 44 M.L.W. 315=A.I.R. 1936 P.C. 224=163 Ind. Cas. 434 (P.C.)

——Tests in considering if Advocate should be struck off the roll of Advocates—Disciplinary jurisdiction of Court—Conviction for criminal offence—Effect.

The test that the Court has to apply in considering whether an Advocate should be struck off the rolls of Advocates is whether the proved misconduct of the Advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. The two conditions should be taken disjunctively and the test applied in that way so that on the fulfilment of any one of the conditions the test would be regarded as satisfied. This test would prove a sound working rule in the majority of cases and would be applicable to all branches of the profession: the first condition being a standard applicable to all and as regards the second condition, the circumstances to be taken into consideration differing according to the duties attaching to the particular profession. The test speaks of 'striking off the roll' which is equivalent to removal. But as regards suspension or reprimand the test would apply equally well, the form of the action taken being dependent on the nature and gravity of the misconduct found and also on other circumstances.

The disciplinary jurisdiction vested in Court should not be employed merely in aid of the Criminal Law of the land and merely to supplement, as it were by way of a further punishment, a punishment which the Advocate has received under that law for the misconduct of which he is guilty.

While conviction for a criminal offence is prima facie evidence of misconduct, all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction. The Court must take into consideration the facts on which the conviction is based.

Held, that the general tenor of the speeches made by the Advocate in question was inoffensive and was such as one would expect to find in speeches made in connection with question affecting a labour union and no further action was called for. 40 C.W.N. 366=63 C.867=A.I.R. 1936 Cal. 158=37 C.L.J. 534=162 Ind. Cas. 170 (S.B.).

——Permission granted to engage in bussiness for the time being—Conviction for lottery.

A Pleader, a young man of thirty, was permitted to engage in business and to abandon for the

time being his profession as a lower-grade Pleader. While he was under this voluntary suspension, he started with other persons the idea of entering into a syndicate and it embarked upon a scheme which the Court decided was nothing more nor less than a common lottery. He was convicted of taking part in that lottery. On the question whether a person of good character who has suffered one such conviction should be necessarily debarred from practising as a lower grade Pleader should he see fit and choose to do so:

Held, that the Pleader behaved not only wrongly but very foolishly in acting as he did, but considering his age, it was not necessary in connection with such an offence committed by a man of his age to take the step which might have serious consequences for him and his name should not be struck off the register. A.I.R. 1936 Rang. 382=37 Cr.L.J. 1118=164 Ind. Cas. 350.

——Vakil carrying on partnership business—Court not informed—Untrue statement made by Vakil—Misconduct—Punishment.

Where a Vakil, in contravention of the rules of the High Court, entered into a partnership business and not only did not inform the High Court of the matter but made an untrue statement in respect of it:

Held, that the Court could not take a lenient view of the conduct of the Vakil, (The Vakil suspended for six months.)

Per Iqbal Ahmad, J.—The charges of professional misconduct against an Advocate must be proved by clear and convincing evidence and should not be inferred from mere groumds for suspicion, however reasonable those grounds may appear to be. A.I.R. 1935 All. 1023=1935 A.W.R. 1229=37 Cr. L. J. 117=(1936) A.L.J. 379=159 Ind. Cas. 561 (S.B.)

——Reckless charge of fraud, without any evidence.

In a written statement signed by the Advocate for the defendants, a charge of fraud was recklessly made against the plaintiff without any evidence in support of it. This fact was well-known to the defendants and the Advocate who was unable to say anything except that he was acting on his client's instructions:

Held, that the conduct of the Advocate was most improper and deserved strong condemnation. 42 M.L.W. 412=(1935) M.W.N. 340=A.I.R. 1935 Mad. 578=69 M.L.J. 250=36 Cr. L.J. 1342=158 Ind. Cas. 302.

—Test to see whether an Advocate's name should be struck off the roll.

The test that the court has to apply in considering whether an Advocate should be struck off the roll of Advocates is whether the proved misconduct of the Advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. A.I.R. 1935 Rang. 458=37 Cr. L.J. 200=159 Ind. Cas. 1036.

——Manifesto issued in connection with Bar Council Election—Professional misconduct.

It is a well-recognized rule of etiquette in the legal profession that no attempt should be made to advertise oneself directly or indirectly. Such a course of action tends to lower the dignity of the honourable profession and is undoubtedly akin to touting.

The High Court can deal with such cases only where the act is not merely a breach of professional etiquette, but amounts to professional misconduct involving moral turpitude. The issuing of the manifestoes by Advocates as part of election campaign in connection with Bar Council Election does not amount to any professional misconduct but only to breach of a professional etiquette. These matters are for the Bar Council to consider and it is their function to stop such practices. A.I.R. 1934 All. 1067=1 A.W.R. 780=153 Ind. Cas. 667.

——Misconduct—Advertising.

A pleader's sending a circular post-card merely giving the address and the name and description of himself would amount to an advertisement on his part and therefore to improper conduct and if in addition he falsely stated that he had been authorized to examine the accounts of waqf properties and to issue certificates by the District Court rather aggravates the case than the reverse. Even if auditing is not strictly legal work, yet this very fact of advertising his readiness to take up that work, combined with his misleading statement that he is a High Court Pleader and seeing that this work is connected with the Courts and has to be supervised by the Courts would result in his getting an improper advantage in legal work over his fellow pleader, who did not descend to such devices. It was improper conduct on the part of the District pleader to issue such post-cards and to canvass for this particular work in the way that he did, and accordingly he has committed an offence under S. 26. 31 Bom. L.R. 625=53 Bom. 640=A.I.R. 1929 Bom. 335.

——Misconduct — If confined to professional activity.

The conduct of the legal practitioner which subjects him to the disciplinary jurisdiction of the Court need not necessarily be connected with his professional activities. He is equally amenable to the jurisdiction of the Court if the acts of which objection is taken have been done outside his professional duties. A.I.R. 1934 Lah. 251=35 Cr.L. J. 1010=15 L. 354=36 P.L.R. 510=149 Ind. Cas. 764 (S.B.).

——Speech inciting breaking of laws and defying dispersal order—If a ground for disciplinary action.

A speech calling upon the audience to break those laws which the All India Congress Committee orders to be broken, is a clear incitement to break laws which another body might decide should be broken and is inconsistent with the duty of a legal practitioner to asist in the administration of the laws. Such a speech, as well as a speech exhorting the audience to resist an order for dispersal will attract the disciplinary jurisdiction of the High Court. A.I.R. 1934 Lah. 251=35 Cr.L. J. 1010=15 L. 354=36 P.L.R. 510=149 Ind. Cas. 764 (S.B.).

——Passing resolution sympathising with satyagraha movement, and congratulating persons convicted for breach of laws is misbehaviour which renders liable to suspension, under S. 16, Sind Courts Act, 1866. A.I.R. 1931 Sind 33=25 S.L.R. 131=131 Ind. Cas. 187.

——Misconduct — Promoting enmity between classes.

The moral turpitude is always involved in the commission of an act, which comes within S. 153-A

of I.P.C. 65 Ind. Cas. 560=20 A. L. J. 200=23 Cr.L. J. 128=44 All. 352=A.I.R. 1922 All. 140 (F.B.),

——Misconduct and moral turpitude.

Misconduct is not necessarily the same thing as moral turpitude and when disciplinary action is taken, the motive of the informer is immaterial. A.I.R. 1934 Lah. 251=35 Cr.L.J. 1010=15 L. 354=36 P.L.R. 510=149 Ind. Cas. 764. (S.B.).

——Principle to be applied.

The principles to be applied in deciding whether the conduct of a legal practitioner amounts to misconduct are (1) that the mere holding of certain views and even expression of such views in language, however emphatic or strong is no ground for taking disciplinary action against a legal practitioner; (2) that mere conviction for an offence is not sufficient but the Court must look into the nature of the act on which the conviction is based to decide whether the legal practitioner is an unfit person to remain in the profession; (3) that a legal practitioner is a part of the machinery provided for the maintenance of order and the enforcement of the law of the land; it is, therefore, inconsistent with his duties as a legal practitioner to incite other either to boycott the Court or to break the law which it is the duty of the Courts to administer. Those who live by the law cannot preach the breaking of the law; (4) that organised breach of the peace or incitement to acts tending to subvert order is a reasonable cause to suspend or remove a legal practitioner and (5) that acts involving moral turpitude or which imply general infamy make a legal practitioner unfiit to remain on the rolls of the Court. A.I.R. 1034 Lah. 251=35 Cr.L. J. 1010=15 L. 354=36 P.L.R. 510=149 Ind. Cas. 764 (S.B.)

——Advocate receiving money from client to file appeal—Appeal not filed being barred by time—Application of money not satisfactarily explained—Client withholding correct information from Court—Action against Advocate.

An Advocate was engaged to file an appeal and he received money from the client for filing the same, but as copy of the judgment had not been received on that date, he asked the client to see him again. The Advocate admitted that he received the copy some weeks later and found that the limitation for filing appeal had already expired and he returned the copy to the client. But the money was not returned, and on being asked to explain why he did not return the money, he could not give any satisfactory explanation. It appeared that the conduct of the client was also not consistent with what he should normally have done and that he withheld the correct information about the matter from the Court:

Held: that although, having admitted the receipt of the money, it was for the Advocate to account for its application, the Court cannot be uninfiluenced by the conduct of the client when deciding whether a reasonable cause has been established to remove or suspend the Advocate from practice and that it would be unsafe to take any action on the bare statement of the client. A.I.R. 1933 Lah. 575=34 Cr.L. J. 954=145 Ind. Cas. 278 (S.B.).

——A Pleader drew out from the Court the money of his client, and paid the cheque to his own credit in his own Bank. The money was not entered in the client's account, and the Pleader was unable to refund those moneys when called upon.

Held, that the Pleader was guilty of misbehaviour, and action under S. 16 Sind Courts Act could be taken against him. A.I.R. 1933 Sind 65=143 Ind. Cas. 631.

——Confidential position—Securing advantage over client—Trust—Trusts Act (II of 1882) S. 88.

A certain property to which a widow was really entitled as heir was in the possession and was standing in the name of her husband's brother. A person who desired to purchase the property from the widow's husband's brother consulted his Pleader, who though he was aware that the widow had title, never informed his client about this. A few months afterwards, the Pleader himself got a permanent lease from the widow and instituted a suit for possession against the brother and his former client. There was nothing to show that the Pleader had encouraged his client to make the purchase or that the client ever negotiated with the widow:

Held, that the Pleader could not be considered to have used his confidential position to secure an advantage over his client.

Held, further, that the requirements of S. 88, Trusts Act, for constituting the Pleader trustee for the defendants were also not fulfilled as no advantage was obtained by him over his clients by using his confidential position. A.I.R. 1931 Cal. 144=52 C.L.J. 492=130 Ind. Cas. 897.

——Misconduct—Misappropriation.

Where a legal practitioner was proceeded against for professional misconduct for having appropriated the client's money and it appeared that after the proceeding was commenced as against him before the Bar Council the vakil paid the amount to the party,

Held, that such a device should deceive nobody and that far from being an act to be placed to the credit of the Vakil it was the very reverse of it. 1930 M.W.N. 216 (F.B.).

——Misconduct—Money specifically paid by client towards stamp fees—Legal practitioner appropriating same or part of it towards his fees—Propriety.

Where money is put into the hands of a legal practitioner by a client for a specific purpose it can be applied only for that specific purpose. Thus money paid for stamp fees cannot be appropriated towards fees due to the vakil.

Where an Advocate having received sufficient sum for paying additional stamp duty failed and neglected to pay the same to the Board of Revenue in time and thereby caused a penalty of Rs. 200 to be imposed and levied on her,

Held, that the Advocate was guilty of professional misconduct and that he should be struck off the rolls for a period of three years. 1930 M.W.N. 216 (F.B.)

——Misconduct—Retaining client's money.

Retaining monies payable to client is a serious type of professional misconduct. 32 M.L.W. 435=A.I.R. 1930 Mad. 927. (F.B.)

——A pleader retained his client's money with him and did not pay it in spite of repeated demands for a very long period. His explanation was that he had been asked by some relations of his client to keep the money in order that it might be utilized in the purchase of stones for the construction of a temple. This explanation was found by the District Judge to be untrue. It was further found that for the whole of the year while proceedings under the Legal Practioners Act were hanging over his head he took out no sanad and, therefore, suspended himself as it were from pleading in the Court where his practice lay.

Held, that a lenient view of his case be taken because he evinced some sense of propriety by not attempting to take out a sanad and because the conduct was not necessarily dishonest though it may have been improper but that he should be severely censured. 106 Ind. Cas. 97=39 M.L.T. 483=26 M.L.W. 652=9 A.I.Cr.R. 168 =28 Cr.L.J. 1009=A.I. R. 1928 Mad. 18=53 M.L.J. 669 (F.B.).

——Misconduct—Error of judgment.

—Where circumstances are sufficient to justify the insertion in an affidavit of a paragraph in a qualified manner and it is inserted by the solicitor in an unqualified manner, it is merely an error of judgment on the part of the solicitor to omit an express statement of the limitation to which the deponent's assertion is necessarily subject, and no moral blame should be imputed to the solicitor for the omission. 116 Ind. Cas. 387=1929 A.L.J. 53=29 M.L.W. 111=A.I.R. 1929 P.C. 33 (P.C.).

——Misconduct—Defamation,

—Defamatory statements made by an advocate outside his duty as advocate and with no reference to the subject before the Court are irrelevant and are necessarily made in badfaith. A counsel might therefore be proceeded against in an action for defamation.

While examining a witness the counsel of a company asked the witness whether his client company was not the biggest in the town. The witness said "Yes", and the pleader on the opposite side remarked "and it is also the most dishonest in the town."

Held, that the remark was defamatory of the company, had no reference to the subject before the Court and was irrelevant. The counsel therefore could not plead privilege and was liable in damages. 115 Ind. Cas. 458=1929 A.L.J. 303=51 All. 509=A.I.R, 1929 All. 214.

——Misconduct—Exhorbitant fees.

—Where a barrister owing to his inability to attend a case, requested another barrister to attend and promised him a portion of his fees, but the latter, alleging the case itself had been transferred to him, obtained from the client who was illiterate, a large amount of fees, quite out of all proportion to the importance of the case and the work done by him, he was held guilty of professional misconduct. 110 Ind. Cas. 321=5 O.W.N. 805=29 P.L.R. 522=29 Cr.L.J. 689=28 M.L.W. 958=10 A.I.Cr.R. 511= 1928 M.W.N. 831=A.I.R. 1928 P.C. 264=55 M.L.J. 296 (P.C.).

——Miseonduct—Tampering witness.

—An advocate laying himself open to the suspicion of tampering with witnesses in an enquiry before the Coroner, amounts to professional misconduct, though he was not actually professionally engaged in the case. 104 Ind. Cas. 659=29 Bom. L.R. 1062= A.I.R. 1927 Bom. 517.

——Misconduct—Instigation for false evidence.

—Where a pleader defending an accused person was prosecuted for instigating witnesses to give false evidence, while that proceeding is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence, has been appreciated by the Court,

Held, that the prosecution is inadvisable. If such a prosecution is to be started it ought to be started after the principal proceeding in relation to which the offence is said to have been committed, has terminated. 71 Ind. Cas. 523=24 Bom. L.R. 1153=24 Cr.L.J. 171=A.I.R. 1923 Bom. 105.

——Misconduct—Signing dishonest statements without knowledge.

—If a legal practitioner puts his signature to a document he will be bound by all the implications arising from it just as much as if he had written every word of it with his own hand. Practitioners must realise that if they associate themselves with statements which they know are dishonest and untruthful for the purpose of misleading the Court they must on proof of misconduct bear personal respbnsibility and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the bar, or that they did not read the document or consider it at all. 98 Ind. Cas. 493= 48 All. 542=27 Cr.L.J. 1373=A.I.R. 1927 All. 45 (F.B.).

——Misconduct—Breach of duty.

—An attorney was entrusted by one set of clients with Rs. 20,000 to advance on a mortgage of two properties. He deliberately omitted to register the mortgage made in their favour. The result was that that mortgage became useless. The clients afterwards got a mortgage of one of the properties but they were left without any security on the other, though for some time they were led to believe by the solicitor that they had got a valid security on that property. Further, as regards another set of clients: the solicitor allowed them to advance Rs. 22,000 on the mortgage of this very property without telling them that there was already this other mortgage in favour of the first set of clients which had not been registered, but which, at that date, might still have been registered. The solicitor endeavoured to suppress from his first set of clients any knowledge of this second document.

Held, that he was guilty of professional misconduct. 104 Ind. Cas. 681=29 Bom. L. R. 1066= A.I.R. 1927 Bom. 537.

——Complicity in wrongful act by client.

A sum of Rs. 3,250 was obtained by the attorneys from the Sheriff upon the representation that the money was due to the land-lords, a charitable trust, for the rent of the premises and that if it were received from the Sheriff it would be paid in full to the land-lords. The money was due for a godown rented by his client for 10 months at Rs. 325 per month, to keep furniture attached before judgment on behalf of his client. The attorney paid the money to his client for payment, but subsequently upon instructions from his client wrote to the landlords denying liability for rent but that he was sending Rs. 474 as a matter of grace.

Held, that the attorney should have insisted on the client paying the money to the trust or refunding it to the Sheriff, and ought not to have made himself a party to the course adopted by his client by addressing the letter to the trust. As an officer of the Court, he owed a duty to the Court as well as to his client. Though his conduct did not involve any moral turpitude there was a breach of duty which the attorney owed to the Court. It was competent to and proper for the Incorporated Law Society to bring the matter to the attention of the Court when the matter was brought to the notice of the Society. 90 Ind. Cas. 468=29 C.W.N, 1047=A.I.R. 1925 Cal. 964 (S.B.).

——Misconduct—Improper complaint.

To lodge on behalf of a client an obviously improper and groundless criminal complaint against a person is serious misconduct on the part of a practitioner. If it was due to deliberate dishonesty, the practitioner should be removed from the roll of legal practitioners. But even otherwise, if it had its origin in carelessness, incompetence and a lack of sense of responsibility, then too, the conduct of the practitioner is open to severe censure. It is the bounden duty of the practitioner before presenting a complaint to make due enquiries of the clients and to act with such care and prudence that his good faith could never successfully be questioned. He ought not to regard his function as that a mere machine and his only duty to transmit to the Court any half truths and insinuations which his clients desired him to record. 86 Ind. Cas. 408=47 All. 377=23 A.L.J. 125=26 Cr.L.J. 776=6 L.R.A. Civ. 244=A.I.R. 1925 All. 247 (F.B.).

——Misconduct—Insulting questions to witness.

—In drafting pleadings, counsel should avoid personal ill-will and reckless charges of fraud and criminality. Even when questions as to credit are material, the counssl should satisfy himself, before putting questions, that there is some reasonable ground for believing in the charges he makes against a witness.

A counsel drafted a written statement containing defamatory allegations against a Mukhtar knowing fully well that the allegations had no foundation in fact. Subsequently in the cross-examination of that Mukhtar the counsel asked him if he had not a notice served on him under Cr. P. Code, S. 476. The Counsel had no ground for making the allegation.

Held, that he was guilty of professional misconduct. 88 Ind. Cas. 179=47 All. 729=23 A.L.J. 469=6 L.R.A. Civ. 403=23 Cr.L.J. 1091=A.I.R. 1925 All. 641 (F.B.).

——Misconduct — Removal and suspension—Imputation of bad character not necessary.

A conviction under S. 17, sub-s. (1) of the Criminal Law Amendment Act (XIV of 1908) constitutes a reasonable cause within the meaning of Cl. 8, Letters Patent, Lahore, for the removal or suspension from practice of an advocate or vakil. Strictly speaking proceedings under Cl. 8 are neither civil suits nor criminal prosecutions. The High Court exercise a special jurisdiction under Cl. 8. The propriety in law or in fact of the conviction cannot be questioned in the proceedings taken by the Court in the exercise of its diciplinary jurisdiction. 22 All. 49 (P. C.) Ref. Advocate or Vakil may be struck off the rolls for an offence which has no relation whatsover to his character as a legal practitioner but the mere circumstance that he has been convicted of an offence does not make it imperative on the Court to remove or suspend him from practice. It is not necessary that the Act of a legal practitioner which is relied upon for striking his name off the roll should have subjected him to anything like a general infamy or imputation of bad character. 76 Ind. Cas. 385=4 Lah. 271=25 Cr.L.J. 161=6 L.L.J. 491=A.I.R. 1924 Lah. 123 (S. B.)

——Misconduct—Unpreparedness to argue.

A pleader who has looked into the papers of a case for drafting grounds of appeal, is not guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of the presentation of the appeal papers. 84 Ind. Cas. 1051 =20 M.L.W. 623=1924 M.W.N. 893=48 Mad. 385 =26 Cr.L.J. 411=A.I.R. 1924 Mad. 895=47 M.L.J. 661.

——Reckless and false allegations against Magistrate—Cr.P.C., S. 526.

——Advocate making reckless and false allegations against Magistrate in application under S. 526, Criminal P.C., without verifying them is unfit to enjoy the privileges conferred upon him by law and must be visited with punishment. A.I.R. 1944 Sind 155= I.L.R. (1944) Kar. 133=46 Cr. L.J. 223=217 Ind. Cas. 182.

——Misconduct—Charge against Judge.

It is the duty of Counsel towards their clients to use their own judgment and experience and discretion and as a result, whatever be their instructions, to exclude all topics and observations of which the case does not properly admit. They should be careful to express anything in a form which will not be unduly insulting or opprobrious to the officer, who has to receive the notice.

Where a notice by a pleader contained the following extracts: "You should not have asked my client to attend the Court at 11 a. m., when he was not going to be examined at that time. He was not bound in law to wait indefinitely till you chose to call him for examination. A witness's time is as much valuable, if not more, than the time of the Court .... Obviously enough, your order was not only arbitrary and high handed, but also spiteful and malicious .... From what is stated above, you will clearly see the enormity of your own acts."

Held, that there was a clear excess of the privilege of the Bar, amounting to improper conduct. 113 Ind. Cas. 519=30 Bom.L.R. 934=A.I.R. 1928 Bom. 338.

—No practitioner can possibly suggest that because an application that a case should be transferred to the District Judge, had been judicially rejected, there is the slightest ground in decency or honour, for suggesting that any suspicion has there by been aroused against the impartiality of the Magistrate. Members of the legal profession are under no duty to their clients to make grave and scandalous charges either against Judges or the opposite parties on the mere wish of their clients. They are agents, not of the man who pays them but are acting in the administration of justice and in matters of making applications to Court they are bound to exercise an independent judgment, and to conduct themselves with a sense of personal responsibility. If they fail to act with reasonable care and caution, they are unfit to enjoy the privileges conferred upon them by law, and serious breaches must be visited with punishment. 81 Ind. Cas. 177=46 All. 121=21 A.L.J. 893=4 L.R.A. Civ. 615=25 Cr.L.J. 689=A. I. R. 1924 All. 253 (F.B.)

——Misconduct — Contempt — Jurisdiction of Subordinate Courts.

Per Full Bench:—No power to punish for contempt of an inferior Court now exists independently of the Indian Penal Code and the Contempt of Courts Act and no disciplinary power over legal practitioners or power to punish for contempt outside the provisions of the Indian Penal Code is vested in the Subordinate Courts. 1930 A.L.J. 402= A.I.R. 1930 All. 225 (F. B.).

——Contempt of Court—Appeal.

Legal practitioner punished by Bench of High Court for contempt of Court for certain remarks made by him as party to suit and later on suspended from practising for six months under Legal Practitioners' Act—Application by him for leave to appeal to Privy Council:

Held, that leave might be granted under S. 109 (c) Civil P. C. or under cl. 30. Letters Patent (All) that he should furnish security as in appeals in ordinary cases. (1933) A.L.J. 273=55 A. 246=A.I.R. 1933 All. 225=145 Ind. Cas. 853.

——Misconduct—Rules applicable.

Charges of professional misconduct must be clearly established and should not be inferred from mere ground for suspicion however reasonable, or what may be mere error of judgment or indiscretion. A.I.R. 1930 P.C. 144 Foll. 31 P.L.R. 913=129 Ind.Cas. 301=A.I.R. 1930 Lah. 947.

12. Negligence.

See also: Lim. Act, S. 5

While considering what is 'sufficient cause' within the meaning of S. 5 Lim. Act, the good faith with which a person must be shown to have acted will appropriately be taken to mean that variety which pre-supposes due care and attention rather than mere 'honesty.' The mistake of a Pleader made in good faith may afford sufficient cause for admitting an appeal after time, but the mistake must have been made in spite of the exercise of due care and attention. When a litigant gives carte blanche to his lawyer to act as he thinks fit without further consulting him he must take full responsibility for the act of the lawyer; and he cannot claim to have acted in good faith in filing the appeal unless the lawyer so acted. If the lawyer acted with complete carelessness, he cannot be said to have acted in good faith that is, with due care and attention. The fact that the Court in which the appeal was wrongly filed did not notice the mistake is immaterial. A.I.R. 1940 Rang. 14=1939 Rang. L.R. 639=186 Ind. Cas. 715.

—Negligence on the part of the Councel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application in good faith, though in a wrong Court within the meaning of S. 14, Lim. Act. 1938 O.W.N. 360=A.I.R. 1938 Oudh 112=173 Ind. Cas. 956.

—An advocate is bound to exercise reasonable skill and prudence in the exercise of his profession but is not expected to be infallible.

Where an Advocate drafted the terms of a compromise decree believing that his client's right to recover mesne profits by subsequent proceedings was not barred thereby and advised his client accordingly, but it was subsequently decided that upon, a true construction of the compromise decree, the client was not entitled to claim mesne profits and the client sued the Advocate for negligence:

Held, that the Advocate could not be made liable unless the Court was of opinion that the construction put by the Advocate was not such a construction as could reasonably be put by an Advocate exercising reasonable skill and care. 9 R. 575=A.I.R. 1932 Rang. 1=135 Ind. Cas. 648.

——Standard of care.

The standard of care to be exacted from practitioners in the Colony is pre-eminently a matter for the Judges of the local Court. Privy Council will not interfere in this matter with the order of that Court. 116 Ind. Cas. 387=1929 A.I.J. 53=29 M.L.W. 111=A.I.R. 1929 P.C. 33 (P.C.).

——Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. 96 Ind. Cas. 685=49 Mad. 523=1929 M.W.N. 412=24 M.L.W. 100=A.I.R. 1926 Mad. 568=50 M.L.J. 399. (S.B.).

——Carelessness of clerk.

Where an appeal was filed without the order appealed against being stamped and the same was returned and filed again with proper stamp but out of limitation,

Held, a Counsel when filing an appeal ought to see that all the documents which require stamp are properly stamped. He cannot shelter himself behind his clerk, and if his clerk has been guilty of any carelessness he is responsible for that. 71 Ind. Cas. 736=A.I.R 1924 Lah. 401.

——Negligence—Pleader's responsibility for fraud committed by his clerk—Remedy of client.

A pleader is responsible for any fraud perpetuated by his clerks on his clients. The principles of agency are not applicable without reservation, to the relation between a client and his pleader. The conduct of a pleader who is guilty of fraud or such gross negligence as would, in law, amount to fraud, cannot bind his client and the Court has power to restore an appeal dismissed for such conduct on the part of the appellant's pleader. The Court may in its discretion leave the appellant to his remedy against the pleader by an action for damages. (1912) M.W.N. 332=11 M.L.T. 280=22 M.L.J. 284=14 Ind. Cas. 823.

Where it was the duty of the retained pleader to conduct all cases brought to him by the officers of the plaintiff, unless it was shown that there was any special duty cast on the pleader to remind officers of plaintiff that the decrees would be barred, he was not liable for damages for negligence when those officers had the same knowledge or means of knowledge that the decrees would be time barred. 71 Ind. Cas. 916=5 P.L.T. 355=2 Pat.L.R. (Civ.) 205=A.I.R. 1923 Pat. 259.

——Alleged negligence of solicitor due to ignorance of statute — Local circumstances, knowledge of, necessary—Interference by Privy Council.

The question of negligence with regard to the performance of solicitor's duty must, to some extent, be affected by local conditions and local circumstances as to which their Lordships of the Privy Council might not be perfectly informed. The question as to whether a solicitor is negligent or not in omitting to give effect to a statutory provision cannot be disentangled from the consideration of whether the statute which is involved is one which is of constant and common occurrence in practice, or whether it is one unfamiliar and remote. With those circumstances their Lordships declared their inability to deal. A.I.R. 1921 P.C. 231 (P.C.).

——Where a pleader allows the essential points in a case to be overlooked the decree cannot be vacated for fraud though the pleader may be liable for misconduct. 59 Ind. Cas. 752 (Cal.).

——Negligence—Dismissal of appeal—Liability to client.

Per Richards, C.J.:—If it is shown that an advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal but his client lost his right of appeal as a result of his negligence to file the appeal or application in time he will be liable to the client. 37 All. 267=13 A.L.J. 286=28 Ind. Cas. 265.

13. Power and duty of Court.

——Retention or re-admission—Question as to—Hardship and pity are no considerations—Unsuitable persons cannot be admitted or retained as matter of grace or charity—Court's duty is to safeguard larger interests of legal profession and litigants.

The question of retention on or re-admission to the roll of Advocates cannot be decided on considerations of individual hardship or on appeal to one's sense of pity. The High Court in the exercise of its disciplinary jurisdiction has to safeguard the larger interests of the legal profession and the litigant public and unsuitable persons cannot be admitted or retained as a matter of grace or charity. The Court's effort should be to try and keep the profession of law free from influences that may degrade or corrupt it and on the other hand to protect the litigant public against persons whose character is proved to be such that it would be unsafe to allow them to occupy the position of privilege commanded by Advocates of the High Court. A.I.R. 1946 Lah. 338=226 Ind. Cas. 470 =49 Pun. L.R. 62 (F.B.)

——Mortgage between Solicitor and client—Duty of Court in such matters.

Transactions of mortgage between a Solicitor and client to secure the payment of money advanced at the time are not ordinarily subjected by the Courts to the same jealous scrutiny as, for instance a gift from a client to a Solicitor, or purchases or sales at under-value between a Solicitor and client. If the money was sorely needed and was paid, the mortgagor had its benefit, the rate of interest was reasonable, and the terms neither excessive nor onerous, there is no reason why the transaction should not stand as a valid mortgage between the parties. 52 L.W. 777=A. I. R. 1940 P.C. 204=7 B.R. 218=(1941) M.W.N. 1=I.L.R. (1940) Kar. (P.C.) 419 Sup.=1941 O.W.N. 513=1940 A.W.R. 158=67 I.A. 431=(1941) A.L.J. 316=43 Bom. L.R. 465=73 C.L.J. 121=191 Ind. Cas. 94 (P.C.)

——Defence asserting that Pleader for opposite party may be required as witness—Court, if can restrain Pleader from appearing in case—Duty of Pleader.

For the proper control of the legal profession, it is essential that the Courts should have authority to refuse to permit a particular Pleader to appear on behalf of a particular person in a particular case when it would be gross misconduct on the part of the Pleader so to appear. But the mere facts that the defence asserts that the Pleader for the prosecution will be required as a witness for the defence, and that the Magistrate himself thinks that he will be a material witness for the defence, are not sufficient grounds for restraining the Pleader from appearing in the case for the prosecution. A Pleader who is conducting a case, is, nevertheless, a competent witness therein, and there is no harm in his giving evidence in a case in which he is appearing but it is desirable that a pleader should not appear in a case if he knows or has reason to believe that he will be an important witness in the case, and no self-respecting Pleader should conduct a case under such circumstances; if he accepts the brief not knowing or having reason to believe that he will be such a witness, but discovers subsequently that he is a witness on a material question of fact, he should retire from the case. A.I.R. 1939 Rang. 342=1939 Rang. L.R. 224=40 Cr.L.J. 936=184 Ind. Cas. 182.

——Review—Inherent power.

Although there is no express provision for a review of an order made under the Legal Practitioners Act, there is inherent power in the High Court to restore a Pleader whose name has been struck off the rolls. A.I.R. 1935 All. 321=4 A.W.R. 1404=156 Ind. Cas. 243 (F.B.)

In criminal proceedings, the Court should not accept the certificates given by Pleaders as to the solvency or fitness of sureties proposed by their clients as sufficient without further enquiry. A.I.R. 1934 Sind. 142= 35 Cr.L.J. 1455=151 Ind. Cas. 747.

——Harassing tactics of Counsel—Remarks as to conduct of Counsel in ex-parte order—Whether can be expunged—Method of provoking Magistrate into some unguarded expression and then applying for transfer condemned.

The High Court is jealous to protect Counsel who appear before the Subordinate Courts from undue interference in the legitimate exercise of their duties to their clients, but it is also jealous to protect the Courts from harassing tactics on the part of Counsel. Therefore, the High Court will not be prepared to expunge any remarks made as to the conduct of Counsel even from an ex-parte order of the Subordinate Court unless the High Court is fully satisfied that the remarks were not deserved.

Where the Counsel resorts to attempting to provoke the Magistrate trying the case into some unguarded expression and then applying for a transfer, the method adopted will be neither in the interest of his client nor in the interest of justice. A.I.R. 1933 All. 949=35 Cr.L.J. 548=147 Ind. Cas. 1164.

——Mistake of counsel.

Where the Counsel of the plaintiff committed a blunder which was apparent on the very face of the record,

Held, that plaintiff should not be deprived of a decree if as a matter of fact the place of the plaintiff were sustainable and the suit should be decided according to the pleas as put forward psior to the blunder by the Counsel. 91 Ind. Cas. 442 (Lah.).

——Presence at hearing.

When a vakil represents his client the right of audience is, for the time being, vested in him. For the purpose of continuing the hearing or commencing the hearing, he is the appellant. It he is absent there is default. Even if the client is corporeally present in the eyes of the law, he is not present in such a sense as to prevent the absence of the vakil from being a default. If a Judge is anxious to assist a party in distress he can give him a little time to obtain the assistance of a new vakil, or adjourn the case, and make him pay costs or something of that sort, but for a default of this kind, subject to the penalty usually inflicted the client should not be deprived of the right of having his appeal heard. 80 Ind. Cas. 950=5 L. R. A. Civ. 615=A.I.R. 1925 All. 58.

——Suit on a bond executed by client to attorney—Bond held voidable—Power of court to grant compensation for work done in the same court.

In a suit by an attorney on a promissory note executed by his client in his favour the court found that the note, was given at present for work done and that the client had no independent advice when he gave the note. **Held,** that, although the suit was on a promissory note, yet having regard to the fact that the attorney had worked for his client, and that there was a prayer for general relief in the plaint, the attorney was entitled to his remuneration in the present suit, which was to be ascertained upon a reference to the Registrar. 6 C.W.N. 816=29 C. 595.

14. Power-of-attorney Agent.

——Agent — Whether entitled to all rights of legal practitioner—Whether has right of audience—Principal intending to conduct proceedings himself—Agent, if entitled to notice.

Power-of-attorney agent cannot be accorded all the rights and privilege which are enjoyed by members of the legal profession. For, such an agent, unlike legal practitioners, need possess no qualifications whatsover as regards education and character and is not bound by any rules of professional conduct or etiquette and is not subject to the disciplinary control of the High Court or of any one. The power of attorney agent, therefore, cannot carry on business as a Solicitor or attorney, drafting, engrossing and filing plaints. Judge's summons' affidavits and generally issuing legal process and charge fees to the principal. For, to carry on such business is to practise.

Such an agent with a power-of-attorney to appear and conduct judicial proceedings but having not been so authorised by the High Court, has no right of audience on behalf of the principal either on the Original or Appellate Side of the High Court. He is not, therefore, entitled to notice if his principal wants to appear and conduct the proceedings himself or appoint an Advocate to appear for him, as his power-of-attorney authorising him to plead is of no force. A.I.R. 1937 Mad. 937=(1937) M. W. N. 1060=(1937) 2 M.L.J. 552=46 L.W. 734=I.L.R. (1938) Mad. 12=172 Ind. Cas. 489 (F.B.).

——Agent with power of attorney to conduct proceedings—Powers of.

There is no warrant whatever for putting a power-of-attorney given to a recognised agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though probably the latter may also be described as a power-of-attorney. Such a power-of-attorney or appointment as it is called is confined only to Pleaders, that is, those who have a right to plead in Courts. A.I.R. 1937 Mad. 937=(1937) M.W.N. 1060=(1937) 2 M.L.J. 552=46 L.W. 734=I.L.R. (1938) Mad. 12=172 Ind. Cas. 489 (F.B.)

——Authority of agent—Construction—Power to prosecute appeal.

Where the power-of attorney provides that' whatever shall be done by agent shall be acceptable to the executant rthereof the holder of the power can engage a plead e for prosecuting an appeal in the lower Appellate Court. A.I.R. 1936 Lah. 583 (583-584) 9 R.L. 234=165 Ind. Cas. 274.

Retainer of an attorney ordinarily comes to an end when the suit is ended. Attorney would require fresh authority to act for his clients in execution proceenings. They have no authority to accept a notice in execution. 34 Bom. L.R. 615=A.I.R. 1932 Bom. 337=138 Ind. Cas. 820.

15. Proceedings against.

——Proceedings against.

Allegations against legal practitioner amounting to criminal charge—Proper procedure is to prosecute him Criminally before proceeding under Legal Practitioners' Act. A.I.R. 1938 Cal. 783=I.L.R. (1938) 2 Cal. 138 =40 Cr.L.J. 87=178 Ind. Cas. 456.

——Allegation making him liable to criminal prosecution—Procedure.

Where the allegation against a legal practitioner amounts to a charge of criminal prosecution, the correct procudure to be followed is that proceedings under the Legal Practitioners' Act should not be taken but that, if it was thought necessary to take action, it should be by way of criminal prosecution. A.I.R. 1934 Cal. 272=38 C.W.N. 87=149 Ind. Cas. 874 (1).

——While it is not incompetent for the High Court to deal under Art., 8. Letters Patent with charges of a criminal nature against a practitioner, unless and until these have been investigated by a Criminal Court, it is eminently fitting that in such cases, the criminal prosecution should precede any disciplinary decision. A.I.R. 1931 P.C. 112=35 C.W.N. 640=(1931) A.L.J. 450=53 C L J. 405=(1931) M.W.N. 603=33 Bom.L.R. 945=53 A 183=34 L.W. 59=61 M.L J. 130=58 I. A. 152=132 Ind. Cas. 608 (P.C.).

——Conviction of legal practitioner—Case sent to Bar Council for enquiry into his conduct—Duty of Bar Council—Whether it can justify action of legal practitioner—Disciplinary action.

Where a legal practitioner has been convicted of a criminal offence and his case is sent for an enquiry by a Tribunal of the Bar Council into his conduct with a view to seeing whether he has done anything which seems to indicate the necessity of taking disciplinary action against him, the Tirbunal should merely record the fact that he had been convicted of an offence and ask him to show cause why no disciplinary action should be taken against him. The Tribunal cannot go further and justify the action of the legal practitioner. A.I.R. 1938 Rang. 394=1938 Rang L.R. 125=178 Ind. Cas. 592.

——Criminal proceedings against Counsel finally concluded—Presumption as to their correctness—Subsequent enquiry for disciplinary action—Question to be determined.

When criminal proceeedings are taken against a Pleader or an Advocate and finally concluded, they must be taken to have been rightly decided and the question to be determined in a subsequent enquiry as to whether the Advocate or Pleader ought to have disciplinary action taken against him is whether, upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings, his offence has been one implying a defect of character which unfits him to be a Pleader or Advocate. Such a defect of character normally involves moral turpitude. A.I.R. 1938 Rang. 394=1938 Rang. L.R. 125=178 Ind. Cas. 592.

——Disciplinary action—Conviction for sedition—Legality—Whether can be challenged.

Where a legal practitioner has been convicted for sedition, he cannot, in an inquiry under the disciplinary jurisdiction of the High Court, contend that his conviction was not justified on the facts found. The High Court must assume, for the purposes of the enquiry that the speeches made by him contained the expressions mentioned in the judgment in the case against him. A.I.R. 1934 Lah. 251=35 Cr.L.J. 1010=15 L. 354=962 P.L.R, 510=149 Ind. Cas. 764 (S.B.)

——Conviction of Advocate conclusive.

In the enquiry in respect of the removal of the name of an Advocate from the rolls, the conviction of the Advocate by the competent Magistrate must be accepted as proper, and cannot be re-opened. 65 Ind. Cas. 560 =44 All. 352=20 A.L.J. 200=23 Cr.L.J. 128=A.I.R. 1922 All. 140 (F.B.)

——Findings on questions of fact recorded by Bar Tribunal—When accepted by High Court.

The question whether a particular Advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently, the High Court ordinarily accepts findings on questions of fact recorded by the Bar Tribunal provided the findings are not perverse. A.I.R. 1940 All. 1= (1939) A.L.J. 957=1939 A.W.R. 828=41 Cr.L.J. 211= I.L.R. (1940) All. 60=185 Ind. Cas. 611 (S.B.).

——Proceedings against Advocate as to why his name should not be struck off the rolls—Proceedings, whether second trial.

Where proceedings are taken against a legal practitioner as to why his name should not be struck off from the roll of Advocates the proceedings are not in the nature of a second trial or a new punishment. But the question is, whether, after the conduct of the man, it is proper that he should continue a member of a profession which should stand free from all suspicion. A.I.R. 1935 Rang. 458=37 Cr.L.J. 200=159 Ind. Cas. 1036.

——Enquiry should not be started without grave consideration.

It is right and proper that all judicial officers, high or low, should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should, in proper cases, institute inquiries under the Legal Practitioners' Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all, of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well-founded. Permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill-considered proceedings are taken. (1931) A.L.J. 678=A.I.R. 1931 All. 580=33 Cr.L.J. 260=136 Ind. Cas. 287 (S.B.)

——Reference to Special Bench.

Reference to a Special Bench in the matter of a legal practitioner's professional conduct is a step which should not be taken lightly unless the Court is satisfied that the question is of such a serious nature that it is in the interest of the profession as a whole and of litigants in general that a full enquiry should be made into it by a Special Bench for that purpose. Where an attorney failed in his duty to disclose documents come to his knowledge subsequent to the filing of an affidavit of documents,

Held, that the matter was not so serious as to justify further investigation by a Special Bench. 61 Ind. Cas. 908=25 C.W.N. 99=A.I.R. 1921 Cal. 267.

——Court should not treat anything in the conduct of the case by the practitioner against whom proceedings are taken as indicating a lack of confidence in his own defence on the merits. 84 Ind. Cas. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).

——Where the Advocate-General has not moved the Court at the instance of the representative body of the profession the rule should be served upon the body also in order that they may have an opportunity of representing to the Court the point of view of the profession. 84 Ind. Cas. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).

——In proceedings which affect an officer of the Court personally it is necessary that the rule should be brought on for hearing as quickly as possible. 84 Ind. Cas. 353=26 Bom. L.R. 887=A.I.R. 1925 Bom. 1 (F.B.).

——Misconduct—Proceedings by Advocate-General—Right of private party to be heard.

It must depend upon the discretion of the Court having regard to the circumstances of the case to decide whether a private party may be heard or not after proceedings have been taken by the Advocate-General against a legal practitioner for professional misconduct. 84 Ind. Cas. 353=26 Bom. L.R. 887= A.I.R. 1925 Bom. 1 (F.B.).

——Privilege—Full Bench.

The question whether a Counsel has exceeded the licence given him for conducting the case can only be dealt with by the Full Bench. 9 Ind. Cas. 509 (Cal.)

——Suit for accounts against Counsel.

Even if there be no general agency between Counsel and client, a suit for accounts is maintainable against Counsel in respect of the suits in which he was engaged by the client. 33 P.L.R. 1074=A.I.R. 1933 Lah. 60=140 Ind. Cas. 564 (1).

16. Professional Communications.

See **Evidence Act, S. 126.**

17. Purchase in execution proceedings.

——Purchase in execution proceedings — Sale not invalid.

Although a pleader purchasing property at an auction sale in execution of a decree in which he was professionally engaged on behalf of the decree-holders infringes certain rules of conduct, the sale does not thereby become invalid. 117 Ind. Cas. 471=6 O.W.N. 226=4 Luck. 635=A.I.R. 1929 Oudh 235.

——Concealment of name—Sale invalid.

There is no more certain way of taking advantage than the way of concealment, and if an attorney or agent can show he is entitled to purchase, yet if instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment and the advantage he has acquired by concealing the name of the real purchaser must be given up Even where the Trusts Act does not apply the above principles hold good. 81 Ind. Cas. 752= 33 M.L.T. 472=1924 M.W.N. 155=19 M.L.W. 349=22 A.L.J. 177=51 I.A. 24=2 Pat. L.R. 96= 51 Cal. 299=26 Bom. L.R. 575=5 L.R.P.C. 110=29 C.W.N. 491=A.I.R. 1924 P.C. 34=46 M.L.J. 532 (P.C.).

18. Re-instatement.

——Re-instatement—Considerations—Moral fitness — Burden of proof — Legal practitioner found guilty or cheating his client.

When an applicant seeks admission to the Bar and the Court is called upon to determine his moral fitness for the position to which he aspires, he is entitled to the benefit of the presumption that he is morally fitted for such position and but little evidence may be required in support of his application,

When he has been so admitted and it is charged that he is unfit to continue to exercise the power vested in him as a pleader, the Court should guard his every right and see to it that he is not deprived of an opportunity to follow his chosen profession excepting upon clear proof of more than trivial abuses of the confidence that has been reposed in him. But when after full and fair trial he stands convicted of such wrong doing as demonstrates his unfitness to act as a pleader—an officer in courts of justice—and his licence as such has been revoked, if he petitions for re-instatement the onus is on him to establish by satisfactory evidence, that he has undergone such moral change as to render him a fit person to enjoy the trust and confidence once forfeited. A court should be slow to disbar but it should be even slower to re-instate. It should endeavour to make certain that it does not again put in the hand of an unworthy petitioner that almost unlimited opportunity to inflict wrongs upon society possessed by a practising practitioner. It becomes the duty of the Court upon a petition for re-instatement of one who has been disbarred to seek such information as it may lawfully receive touching upon the moral fitness of the petitioner to be admitted to practise his profession as a pleader. A legal practitioner, who is, after a fair trial, found guilty of an offence of cheating his client, which was not the result of momentary lapse but was a deliberate act calculatedly executed is absolutely unfitted for the profession of law and should never be allowed to return to the profession whatever his promises as to the future and whatever be the number of recommendations bearing upon their face evidence of the worthiness of such a petitioner. A.I.R. 1949 E.P. 344=51 Cr.L. J. 140 (F.B.).

——Re-instatement—Considerations — Advocate removed for misbehaviour involving moral turpitude.

There is no absolute bar to the re-admission of an Advocate removed for misbehaviour involving moral turpitude. The punishment is not perpetual but the only set of circumstances in which such a person can be re-admitted is when if at all, he can satisfy the Court that as the result of the punishment he has undergone since his exclusion, he has got so chastened by remorse and hardship that the temptations to which he gave way once, when he committed acts justifying his exclusion, are such that he, by virtue of his reformed character, will now be able to resist. The onus of proving that his character has been so reformed is on the applicant and he must discharge that by evidence. The nature and the gravity of the offence originally committed by him has to be considered, as also the effect that the punishment for the offence and hardship during the period of exclusion are likely to have had on his character. Evidence usually in the form of affidavit should be furnished by the petitioner for re-admission which tends to show that during the period of exclusion he has led a blameless life and has earned the esteem and regard of his neighbours. This evidence is evidence of a purely negative character and ordinarily would not be sufficient. He must prove affirmatively and satisfy the conscience of the Court dealing with the petition for reinstatement that he has in fact acquired that sense of duty, honour and integrity which he once lost, and that therefore it would be safe to re-admit him without degrading the profession of law and without danger to the litigant public. The question of retention on or re-admission to the roll of advocates cannot be decided on considerations of individual hardship or on appeal to one's sense of duty. I.L.R. (1947) Lah. 150=49 P.L.R. 62=226 Ind. Cas. 470=A.I.R. 1946 Lah. 338 (F.B.).

——Re-instatement—Mukhtear disbarred on finding of criminal breach of trust in respect of client's money.

The relationship between a lawyer and his client is one that demands the utmost good faith on the part of the lawyer. The ignorance of clients, their inability to be present on every occasion when money is paid or received on their behalf, and the general reputation of members of the profession all require that a person who derogates from the high standard demanded of a legal practitioner must not be permitted to be in a position where he can harm the interest of his clients, and the reputation of the profession to which he belongs, and at the same time, the reputation of the Court for the administration of justice. Where a Mukhtar whose name was struck off the Roll in 1937 on a finding that he had committed criminal breach of trust in respect of a sum of money entrusted to him by his client, applied in 1945 to be re-instated attaching to his petition a number of certificates granted to him by persons who testified to his good conduct since the original proceedings were taken against him.

Held, that the moral lapse which occurred in 1937 was such as to indicate that the petitioner was not a person who should be placed in a position of trust where the possibility must always arise of another lapse. 226 Ind. Cas. 388=1946 P.W.N. 299=12 B. R. 742=47 Cr.L. J. 932=A.I.R. 1946 Pat. 357 (F.B.).

——Moral turpitude is no absolute bar to re-instatement—Applicant can satisfy Court that he has got so chastened by remorse and hardship that he can resist temptations to which he gave way once—Onus to prove reformed character is on applicant—Nature of evidence required indicated.

There is no absolute bar to the re-admission of an Advocate removed for misbehaviour involving moral turpitude. The punishment is not perpetual but the only set of circumstances in which such a person can be readmitted is when, if at all, he can satisfy the Court that as the result of the punishment he has undergone since his exclusion, he has got so chastened by remorse and hardship that the temptations to which he gave way once, when he committed acts justifying his exclusion, are such that he, by virtue of his reformed character, will not be able to resist, the onus of proving that his character has been so reformed is on the applicant and he must discharge that by evidence. What type and amount of evidence is required will naturally depend on the facts of each case, but it certainly cannot be a mere assertion by the applicant himself coupled with an assurance to behave in future. This nature and the gravity of the offence originally committed by him has to be considered, as also the effect that the punishment for the offence and hardship during the period of exclusion are likely to have had on his character. Evidence usually in the form of affidavit, should be furnished by the petitioner for re-admission which tends to show that during the period of exclusion he has led a blameless life and has earned the esteem and regard of his neighbours. He could show in a variety of ways that in him has awakened a higher sense of honour and duty since he originally committed the offence justifying his removal. This he must prove affirmatively and satisfy the conscience of the Court dealing with the petition for re-instatement that he has in fact acquired that sense of duty, honour and integrity which he once lost, and that therefore it would be safe to readmit him, without

degrading the profession of law and without danger to the litigant public. A.I.R. 1946 Lah. 338=226 Ind. Cas. 470=49 Pun. L.R. 62 (F.B.).

——Name struck off from roll for misappropriation—When can be re-admitted.

Before the Court can re-admit an Advocate who has been struck off the rolls for misappropriation, the Court must be fully satisfied that he has fully regained his character and is fitted for re-admission into the ranks of an honourable profession. Mere opinion is not sufficient. The Court requires solid facts and cogent reasons, not merely the opinions expressed by gentlemen who had given him certificates. Re-admission does not depend on the fact that he has been suspended or struck off the rolls for several years. He can only be re-admitted if he can show that he has become worthy to act as an Advocate. In deciding such matters, the Court has a duty to the public and where an Advocate has been guilty of misappropriation, it must be shown that there is no likelihood of such an offence being committed again.

(After considering all the facts, the Court thought it fit not to re-admit the Advocate) A.I.R. 1939 Mad. 917=50 L. W. 566= (1939) M.W.N. 1037= (1939) 2 M.L.J. 630= I.L.R. (1940) Mad. 84=41 Cr.L.J. 185=185 Ind. Cas. 417 (S.B.)

——Re-instatement—Considerations— Advising on law for reward after being struck off—Strong ground for refusing re-instatement.

The success or otherwise of an application for re-instatement must depend upon the character, reputation, behaviour and other matters regarding the applicant after he has been dirplaced from his membership as pleader from the roll. It is no ground to support an application of that sort to state that the applicant has advised friends and clients in legal affairs. If after ceasing to be qualified as a professional gentleman in legal matters, an individual nevertheless, to the utmost extent possible continues to act for reward in legal matters and advises in such matters that would be very strong ground to refuse his application for re-instatement. I.L.R. (1948) Mad. 449=A.I.R. 1948 Mad. 62=1947 M.W.N. 521=60 L.W. 560=(1947) 2 M.L.J. 250 (F.B.)

——Re-instatement — Evidence on which the Court will act upon — Practice — Certificate as to character and integrity — Statements as to opinions of deponents in affidavits—Value to be attached.

In applications for restoration to the roll of advocates, it is not the practice of the High Courts to act upon more certificates of character and integrity of the applicant subsequent to the removal of his name from the rolls. The contents of such certificates have to be placed in the form of affidavits. In such cases, the Court would not pay attention to statements as to opinions but only to statements of facts regarding the applicant's conduct, behaviour and trustworthiness.

Upon a review of the circumstances of the case, including the statements in the several affidavits by people who had employed the applicant or engaged his services since his name was removed from the rolls, it was held that the applicant had atoned for his past misconduct, had re-instated himself as an honest and upright member of society, had shown that he was now a person who deserved the confidence of his fellow citizens and had regained the character which was formerly his but which he lost by reason of his misdeeds and that therefore he could be readmitted to the roll of advocates. 1947 M.W.N. 475=60 L. W. 508=A.I.R. 1948 Mad. 137=(1947) 2 M.L.J. 213 (F.B.)

——Relationship between lawyer and his client demands utmost good faith on part of lawyer—Mukhtar committing criminal breach of trust respecting client's money—Mukhtar struck off Roll—Application for enrolment—Mukhtear's subsequent good conduct testified by number of persons —Petitioner held should not be enrolled as possibility must always arise of another lapse.

The relationship between a lawyer and his client is one that demands the utmost good faith on the part of the lawyer. The ignorance of clients, their inability to be present on every occasion when money is paid or received on their behalf, and the general reputation of members of the profession, all require that a person who derogates from the high standard demanded of a legal practitioner must not be permitted to be in a position where he can harm the interest of his clients, and the reputation of the profession to which he belongs, and, at the same time, the reputation of the Court for the administration of justice, Lawyers are officers of the Court, and their misconduct cannot but affect that trust which litigants are entitled to place in the conduct of legal proceedings.

Where, therefore, a Mukhtar applied to be enrolled as such, his name having been struck off the roll on a finding that he had committed criminal breach of trust in respect of a sum entrusted to him by a client, and a number of persons testified to his good conduct since the original proceedings were taken against him:

Held, that although the reputation of the petitioner was somewhat better than it was at the time of the original proceedings taken against him, the moral lapse which had occurred then was such as to indicate that the petitioner was not a person who should be placed in a position of trust where the possibility must always arise of another lapse. A.I.R. 1946 Pat. 357=12 B.R. 742=226 Ind. Cas. 388=47 Cr. L. J. 932 (F.B.)

——Re-instatement—Principles.

The High Court has power to entertain a petition for the re-instatement of an advocate struck off the rolls. When a question of re-instatement arises what the Court has to see is whether the applicant, since he was disbarred, has honestly endeavoured to rehabilitate his character so that if restored to Bar he will be upright and honest and he can be expected to conduct himself as an officer of the Court and co-operate in the administration of law and maintenance of order. 51 Mys. H.C.R. 42=24 Mys. L J. 83.

——Pleader—Dismissal for professional misconduct—Re-instatement, ground for.

Where a Pleader who was removed from practice on the ground of professional misconduct, after some years applies for re-admission saying 'he tenders his unconditional apologies, proclaims his unqualified repentance and promises a clean and unspotted career in future if given an opportunity,' neither the interests of justice, nor the public interests, nor the interests of the profession demand that clemency should be withheld from him.

46 Bom. L. R. 703=A.I.R. 1945 Bom. 39=I. L. R. (1944) Bom. 713=219 Ind. Cas. 459=46 Cr.L J. 625.

——Bribery or attempted bribery by Advocate—Advocate disbarred for such offence—Re-instatement after four years—Propriety of.

An Advocate found guilty of an offence like bribery or attempted bribery is guilty of grossest professional misconduct and can, in no circumstances, suffer so light a penalty as suspension for four years. It is an offence which can necessarily only be purged after strenuous efforts and after a long period during which he has tried his best to reinstate himself in society. The door is not, however, inevitably and permanently shut to persons who are disbarred: they may, after the lapse of a suitable period of time, provided their conduct has been uniformly satisfactory, ultimately reach re-instatement. But re-instatement is not a matter of course and it is not something which can be hoped for within a brief period of four years. A.I.R. 1939 Rang. 142=1939 Rang. L.R. 213=180 Ind. Cas. 902 (2) (S.B.)

——Misconduct and suspension—Re-instatement—Inherent Power of Court to re-instate—Principles.

The High Court has power to re-instate a legal practitioner dismissed for misconduct. But he will not be reinstated as a matter of course after a certain length of time if his conduct during that time is not called in question. The nature of the offence or misconduct for which he was disbarred, the length of time which he has elapsed since his dismissal, the extent to which he has been tried in other walks of life, the opportunities he had of acting honestly in the face of temptations and the opinions of respectable persons who have had personal experience of his honesty are the important determining factors. Where the circumstances in which a legal practitioner deviate from the path of recitude are not of a recurring nature or do not suggest a deep-rooted criminal tendency. a few years of unblemished life may justify the belief that he has turned a new leaf. Where, however, the offence or misconduct proved against him was of such gravity as to indicate an inherent defect of character and moral depravity, very cogent proof ought to be forthcoming to satisfy the Court that he has completely reformed himself.

Held, on facts, no case was made out that Mukhtear who was convicted of criminal breach of trust should be re-instated A.I.R. 1937 All. 50=(1936) A.L.J. 1396=1936 A.W R. 1160=38 Cr L.J. 296=I.L.R. (1937) All. 411=166 Ind. Cas. 818 (F.B.)

——Exclusion from practice—Re-instating of—Jurisdiction—Tests.

The High Court has the power to re-instate a Pleader even though the Court, for professional misconduct, had struck him off the roll.

The guiding principle in re-instating is to see whether the sentence of exclusion has had the salutary effect of awakening in the delinquent, a higher sense of honour and duty, and whether, during the period between his expulsion and the date of the application for re-instatement, the applicant's conduct has been such as to satisfy the Court that he might be safely entrusted with the affairs of clients and re-admitted to an honourable profession without that profession suffering degradation. What the Court has to see is whether the applicant has, since he was expelled, honestly endeavoured to rehabilitate his character so that if restored to the bar, he will be upright and honest in his dealings:

Held, that the applicant had, for an adequate period, acted in such a manner as will permit the Court to exercise its discretion of allowing him a chance of redeeming his character. 38 Bom. L.R. 1161=A. I. R. 1937 Bom. 48=I.L.R. (1937) Bom. 99=166 Ind. Cas. 628.

——Advocate offending against criminal law struck off the rolls—Whether can be re-instated.

When an Advocate is struck off the rolls of Advocates for having offended against criminal law he cannot be re-instated as an Advocate except in very exceptional circumstances. A. I. R. 1936 Rang. 368=14 R. 390=37 Cr.L J. 905=164 Ind. Cas. 236 (1) (S B.)

——Misconduct—Re-admission to profession.

The High Court is under a manifest duty to give a legal practitioner, who has been removed from the roll of legal practitioners in consequence of a serious offence in the course of his professional duties but who realises the gravity of his offence and having made up his mind for the future to lead a straightforward and honourable life is able to satisfy the High Court that for the past seven years since his removal from the roll of legal practitioners, it has been his genuine and earnest endeavour to rehabilitate his character, another opportunity of practising the law, by cancelling the order standing in the way of his practising. 82 Ind. Cas. 282=25 Cr.L. J. 1274=A.I.R. 1925 Pat. 250.

——On a question when and how, a legal practitioner who has been debarred, should be restored to his former position, the test to be applied is whether the sentence of exclusion. however right, has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether, in the interval, his conduct had been so irreproachable that, not withstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. An application to strike off the rolls or re-admit to them ought not to be looked at with respect to the punishment of the individual himself. The Court has a duty to perform to the suitors and to the profession of the law, and is bound to see that the persons admitted to it are persons on whose integrity and honour, reliance may be placed, persons whose conduct has been such as to inspire confidence in their character. 79 Ind. Cas. 564=16 S.L.R. 11=A.I.R. 1921 Sind 91 (F.B.).

——Power of High Court to restore a pleader.

Although there is no express provision for a review of an order made under the Legal Practitioners' Act, there is inherent power in the High Court to restore a Pleader whose name has been struck off the rolls. 4 A.W.R. 1404=A.I.R. 1935 All. 321=156 Ind. Cas. 243 (F.B.)

——Dismissal for professional misconduct—Re-admission—Procedure.

Where a Pleader who was removed from practice and whose sanad was cancelled on the ground of professional misconduct, is allowed to resume practice, the proper procedure is to permit him to take out a new sanad bearing the date on which it is taken out. 46 Bom. L.R. 703=I.L.R. (1944) Bom. 713=219 Ind. Cas. 459=41 Cr.L. J. 625=A.I.R. 1945 Bom. 39.

19. Relation with client.

See also: **Civil P. C., (1) O. 9, R 9 Sufficient Cause. (2) O. 9, R. 13—Sufficient Cause.**

——No general agency.

There is no such thing as general agency between a pleader and his client. In every suit the contract of agency becomes complete when the vakalat is executed, and it ends with termination of the suit,

99 Ind. Cas. 456=50 Mad. 249=24 M.L.W. 818=1927 M.W.N. 32=38 M.L.T. 26=A.I.R. 1927 Mad. 157=51 M.L. J. 804.

——No general agency.

There is no such thing as a standing relation of a legal practitioner to a man. A man is a pleader for another only when that other has occasion to employ him as such. That employment may be either to conduct a suit or to advise him about some matter in which legal advice is required, but there is no such general relationship as that of solicitor and client of a standing and permanent character upon all occasions and for all purposes. 84 Ind. Cas. 276=35 M.L.T. 84=1924 M.W.N. 517=A.I.R. 1924 Mad. 840=47 M.L. J. 483.

——Solicitor's managing clerk and client.

The relationship existing between a client and solicitor's managing clerk who is in charge of the client's case and who introduces the client is a fiduciary relationship. (1902) 4 Bom. L.R. 469. 26 B. 689.

——Solicitor's clerk and client—Bounty by client—Independent advice to client—Absence of—Validity of gift.

A bounty by client to a solicitor's clerk cannot be enforced in the absence of proof that the client had independent advice. (1902) 4 Bom. L.R. 469=26 B. 689.

20. Rights and Duties.

See also: **Legal practitioners' Act, S. 4. T. P. Act, S. 136.**

——Attorney—Rights of—Law in India and England—Constitution of India, Art. 225.

The rights of attorneys in India are the same as the rights of Solicitors in England under the Common Law except in so far as the latter have been modified by statute. This was the law before the establishment of the Indian Republic and the law as it existed before 26th January, 1950, has under Art. 225 of the Constitution been maintained and continues. 54 C.W.N. 764.

——Rights and duties of Attorneys—Law of.

The rights and duties of attorneys are governed by the English common law. 105 Ind. Cas. 383=51 Bom. 855=29 Bom. L.R. 1196=A.I.R. 1927 Bom. 542.

——Counsel—Duty of—Leaving examination of witness to Court and submitting to tendency of Court—Propriety of.

It is the duty of counsel appearing for parties to take the trouble to see that the record is properly completed. It is neither proper nor desirable for counsel to neglect the duty of asking necessary questions of witnesses in examination, and to leave it to the judge to do so, feeling that the tendency of the Judge lies in a particular direction. Counsel should not submit to that tendency. Counsel has no doubt a duty to the Judge, but he has also a duty himself and a duty to his client, and it is entirely unbefitting the dignity of the Bar for any Counsel to permit himself to be made a sort of pliable instrument in the hands of the Judge. It is not for Counsel merely to watch which way the wind blows and then to trim his sail according to that wind. He must do his duty to his client even when he feels that the Judge is for the time being against him. 51 Bom. L.R. 523=A.I.R. 1949 Bom. 346=I.L.R. 1950 Bom. 110.

——Counsel accepting vakalat, though no fee was paid—Not present in Court though notice of hearing was sent to him—Propriety.

Apart from the duty which a counsel owes to his client, he owes an obligation to the Court also. Where a counsel has accepted a vakalat though no fee was paid to him and has filed it in Court and notice of hearing is sent to him, but he leaves the station without making any arrangements for representation to be made to the Court with the result that no body appears on the date of hearing and the case is dismissed, the conduct of the counsel is open to criticism. 22 Luck. 101=A.I.R. 1948 Oudh 144=1947 A.W.R. (C. C.) 272=1947 O.A. (C.C.) 272=1947 O.W.N. 537.

——Rights of, while conducting criminal case.

A counsel must be free and unhampered in the conduct of the defence of a case, especially in a murder case, and if he considers that a particular plea is available he is entitled to raise it. The question whether the plea is tenable or not is for the Court to decide. A.I R. 1946 Nag. 321=226 Ind. Cas. 377=47 Cr. L. J. 918=1946 N. L. J. 656=I.L.R. (1946) Nag. 946.

——Pleader engaged on behalf of person for certain cases with separate vakalat for each case—Whether prevented from appearing against such person in another case.

Where a Pleader does not hold a general retainer on behalf of a certain person but has merely been engaged in certain cases and in each case, he is given a separate vakalat, there is nothing to prevent him from appearing on behalf of another person against the former in another case. A.I.R. 1943 Mad. 493=(1943) 1 M.L J. 487=56 L.W. 344=44 Cr.L.J. 735=I.L.R. (1944) Mad. 71=1943 M.W.N. 512=208 Ind. Cas. 147 (S.B.).

——Advocate and Pleaders—Duties towards clients—Advocate appearing for one party in dispute should not be allowed to appear on behalf of other party and against original client in subsequent litigation arising between them out of same dispute.

Though the methods of appointment of Advocates and higher or lower grade Pleaders are different and the discipline by which they are controlled arises from different sources, their duties as representing their clients ars similar and the principles applying in one class of legal advisers ought to be applied in the case of another.

An Advocate or Pleader who has appeared on beha of one party in a suit ought not to allow himself to be placed in the position in which there might be some suspicion, whether well or ill founded, that his knowledge of his client's case would be used by him on a subsequent occasion in appearing for another party and against his original client. Therefore, a legal practitioner who has acted for one party in a dispute should not be allowed to act for the other party in subsequent litigation between them relating to or arising out of that dispute. A.I.R. 1939 Rang. 183=1939 Rang. L.R. 514=182 Ind. Cas. 77 (S. B.)

——Counsel brifed by one party at one stage of the case, cannot appear against interest of client—Assurance not enough.

As a matter of practice, a Counsel should not be allowed to appear against the interests of a person who has briefed him at one or other stage of the case. It is absolutely necessary for taking opinion that the party should lay all his cards before the Counsel concerned, and it is only after he has thoroughly gone into the facts of the case that a lawyer can be in a position to advise his client. In the circumstances, it would be unfair to allow the Counsel to appear against the same person later on, and an assurance on the part of that indivi-

dual would also be of no avail in the matter. A.I.R. 1935 Pesh. 65=158 Ind. Cas. 591.

——Rights and duties—Accepting briefs—Breach of confidence.

A counsel ought not to accept a brief in any case in which he would be embarrassed in the discharge of his duty by reason of the confidence reposed in him by the other party in a previous though unconnected case, and if his embarrassment is self-evident and his action an obvious scandal, it can be brought before the general Council of the bar. A.I R. 1930 Mad. 626.

——Breach of confidence.

A, a Barrister, allowed a client S to see him and to give his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate and without warning him that the other side had approached him to represent them in the matter and that he had not yet declined their offer. Subsequently A was engaged by the other side.

Held, that there could be no doubt that S reposed confidence in A by discussing the case in a way he did.

Held, further, that the conduct of A could not be regarded as professional misconduct but the case came within the ambit "Counsel ought not to accept a brief against a party even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party" and the Court is justified in holding that it would not be fair to S to allow A to appear for the other side. 8 Rang. 446=A.I.R. 1930 Rang. 355.

——Changing sides.

P, a legal practitioner, acting for his client S, a vendor, sued to set aside an award made in respect of a dispute about conveyance and under instructions from S alleged that the agreement by vendee M to finance S which formed consideration for conveyance being left unperformed by vendee the award which in effect confirmed agreement which was the basis of conveyance was illegal and the conveyance was invalid. Subsequently S sued to set aside conveyance on grounds of undue influence, misrepresentation and inadequacy of or failure of consideration. In that suit P appeared on behalf of M and denied allegations of S and affirmed the validity of conveyance,

Held, that P's changing sides was bound to embitter litigation and be prejudicial to S and that there was a probability of mischeif and consequently P ought not to appear for M. A.I.R. 1917 P.C. 30, Foll. 8 Rang. 44=A.I.R. 1930 Rang. 185.

——Where it is sought to restrain a Vakil from appearing for the opposite side, it must be shown that the party who desires to prevent the vakil from appearing should have offered the engagement in the first instance and the Vakil should have refused the engagement on insufficient or improper grounds. The mere fact that instructions were obtained in other proceedings which arose out of a right claimed in the proceedings under consideration, gives only a preferential right to the party to engage the Vakil and if he is prepared to engage him, the Vakil has a duty to appear for him and not to appear on the other side. 110 Ind. Cas. 544=A.I.R. 1928 Mad. 592.

——Legal practitioner should create confidence that information from client will never be utilized against him.

Pleaders would do well to avoid any conduct on their part which is reasonably capable of being misunderstood. If a pleader advises or acts for a client he should not appear against him in any subsequent proceeding if he feels that he might in such proceeding even unconsciously use the information gained from his former client against him. Clients should have the fullest confidence in their legal advisers and should not be deterred or hampered in disclosing the strength and weekness of their cases by the fear that their instructions might at some future time be used against them by their legal advisers. 92 Ind. Cas. 300=48 Mad. 676=22 M.L.W. 606=A.I.R. 1925 Mad. 1201=49 M.L.J. 366.

——It is an elementary principle of professional ethics that it is not proper for a legal adviser to use knowledge obtained in one case to the detriment of his client in another case. Where there is a danger of that occurring in any case it can only be avoided by not allowing the Pleader to accept the later engagement or to act the reunder. 62 Ind. Cas. 712=13 M.L.W. 541=1921 M W.N. 646=A.I.R. 1921 Mad. 666=41 M.L.J. 60.

——Appearance at trial both as counsel and party.

An Advocate, who is accused with others of a criminal offence, cannot appear at the trial as Counsel for his co-accused. Counsel cannot appear in the same matter both as Counsel and party. There is no objection to an Advocate who is accused of a criminal offence or is a party in a Civil Court conducting his own defence or his own case. He is fully entitled to do so. But he cannot be in Court in the same matter in the two capacities. A.I.R. 1941 Mad. 808=(1941) 2 M.L.J. 156=54 L.W. 133=1941 M.W.N. 683=43 Cr.L.J. 43=I.L.R. (1941) Mad. 1019=196 Ind. Cas. 624.

——Duty of Counsel to give correct statement of facts.

When Counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice. A.I.R. 1940 F.C. 25=6 B.R. 498=21 P.L.T. 405=(1940) 1 M.L.J. 28 Sup.=T.L.R. (1940) Kar. (F.C.) 52 Sup.=(1940) M.W.N. 685=52 M.L.W. 122=44 C.W.N. (F.C.) 29=72 C.L.J. 142=(1940) F.C.R. 75=187 Ind. Cas. 453 (F.C.)

——Duty in making statements.

Counsel should realize their responsibility when they make statements of fact on behalf of their clients and should not commit their clients to any position on which they are not sufficiently informed; but if once a statement is made in all solemnity, especially when it goes to the root of the case, it cannot be ignored lightly. A.I.R. 1937 Lah. 437=174 Ind. Cas. 722.

——Rights and duties—Taking instructions.

Legal Practitioners must make some effort to acquaint themselves with the necessary information for carrying on their business and advising their clients properly. They should not allow their clients to go to Court for trial without the available materials and the relevant documents. It is heart breaking to see how lawyers practitioners go blindly along a beaten path without giving themselves the trouble to understand what their clients really want and without availing themselves of the machinery which the Legislature has provided with such scrupulous care. 64 Ind. Cas. 878=44 All. 176=19 A.L.J. 971=A.I.R. 1922 All. 254.

——**Rights and duties—Thorough study.**

A part of the duty of a legal practitioner s to thoroughly familiarise himself with all the ins and outs of his client's case and to study it from every aspect. 62 Ind. Cas. 712=13 M.L.W. 541=1921 M.W.N. 646=A.I.R. 1921 Mad. 666=41 M.L.J. 60.

——**Counsel must prepare case before coming to Court—Documents on record—Pleader should not take Court's time in finding out passages from documents—Duty of clients towards Counsel.**

It is incumbent on Counsel to prepare their cases before they come to Court and it is not proper that a prolonged period, of the Court's time should be taken up by Counsel endeavouring to find out a passage in a vernacular document which is on the record. It is the duty of clients to supply certified copies of all necessary documents to their Counsel in order that Counsel may be aware of the necessary passages in the documents before the case is heard in Court. It is not possible for Counsel to supply the place of evidence by his argument. A.I.R. 1939 All. 303=(1939) A.L.J. 118 =1939 R.D. 115=1939 A.W.R. 176=I.L.R. (1939) All. 447=181 Ind. Cas. 745.

——A Pleader defending a person has to do more than go through the record. He has to go through all the prosecution evidence, find out what defence may best be set up and what means there exist for putting up that defence. 39 Cr.L.J. 576=A.I.R. 1938 Rang. 198=175 Ind. Cas. 350.

——**Duty of Advocate—Conduct of case—Proper arrangements.**

Obiter Per **Sharpe, J.**—It is ordinarily the duty of an Advocate to be present, or to make suitable arrangements for the conduct of the case, and the Courts are not to be inconvenienced by the postponement of cases until the proper Advocate is available. A.I.R. 1939 Rang. 1=1939 Rang. L.R. 108=180 Ind. Cas. 565.

——**Counsel being engaged in another case when case called—Necessity of making proper arrangements.**

The mere fact that a Counsel happens to be engaged in one Court is no excuse that the Judges in other Courts, where he has cases, should wait for him until he can find time to attend to them. The mere fact that a Counsel is engaged in some other Court should not justify the postponement of his other cases as they come up for hearing.* Counsel should be present as their cases are called, and if they are unavoidably absent, they should make proper arrangements. (1935) 158 Ind. Cas. 609.

——Where a Counsel is briefed for a case and the case appears on the daily board for hearing for the next day, he should make up his mind if he will be able to attend whenever the case is called on, and if he will not be able to do so, he should return his brief. If two Counsels are engaged, they ought to arrange between themselves that one or other of them at any rate will be in a position to attend if the case is called on. A.I.R. 1932 Bom. 634=34 Bom. L.R. 1425 =141 Ind. Cas. 402.

——**Authority of Counsel—Conduct of case.**

A Counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witness and do such other acts which are required for the proper management and conduct of the trial. A. I. R. 1939 Oudh 257=1939 O. W. N. 825=1939 A.W.R. 160=1939 R.D. 542=14 Luck. 723=183. Ind Cas. 821.

——**Pleadings—Drafting of.**

Judges have many and various cases to deal with and it is the duty of the Advocates and Pleaders to assist them from the inception of a suit by a proper presentation of their cases.

Advocates and Pleaders have a duty to their clients to give the due attention to their cases from the start and not merely when the hearing stage is reached, as so many practitioners apparently think. The drafting of the pleadings is as important, and may frequently be as difficult, as the presentation of the case in Court. Good pleadings take time, and it is the Pleader's duty to take time over, and to give careful thought to the pleadings which bear his name. A.I.R. 1939 Rang. 189=1939 Rang. L.R. 1=183 Ind. Cas. 49.

——Although it is not proper to apply the rules of pleadings in **Mofussil** cases strictly, it does not follow that the **Mofussil** or any other kind of Pleaders are thereby absolved from obeying the provisions of schedule to the Civil P. C. A.I.R. 1936 Nag. 177= 165 Ind. Cas. 29.

——Every practitioner, when pleading, should have particular regard to O. 6, R. 2. 58 C. 418=A. I. R. 1931 Cal. 458=134 Ind. Cas. 538.

——**Counsel's duty towards client and Court—Whether can make serious allegation in written statement against party on advice of client—Pleadings.**

Per **Allsop, J.**—On the one hand, Counsel must look to the interest of his client and not be deterred by fear or favour from making any allegations which, in those interest, it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded. A.I.R. 1935 All. 425=(1935) A L. J. 759=1935 A.W.R. 285= 155 Ind. Cas. 1043 (S.B.).

——**Statements in the affidavit of his clients drafted and filed by him on instructions—Responsibility in respect of—Extent and nature of.**

It is well settled that although a legal practitioner has his duty towards his client, he has other duties and responsibilities as well and that he should not on the instructions of his client make a charge of fraud against another in an affidavit without satisying himself that there are reasonable grounds for the allegation. But he has not got to satisfy himself that the statements made by his client were aboslutely true. All that is incumbent on him is to satisfy himself that there are reasonable grounds for believing them. I.L.R. (1947) M. 1=228 Ind. Cas. 324=48 Cr.L.J. 198=59 L.W. 401 =1946 M.W.N. 548=A. I. R. 1946 Mad. 538=(1946) 2 M.L.J. 79 (F.B.).

——**Making reckless charge of fraud—Duty to satisfy that there are grounds.**

Although an Advocate has his duty towards his client to perform, he has other duties and responsibilities as well. He has no right whatever even on the instructions of his client recklessly to make charges of fraud. His responsibility to the Court, and to the Bar whose traditions it is his duty to maintain, make it incumbent upon him to satisfy himself that there are reasonable grounds for making such charges. A.I.R. 1935

Mad. 578=(1935) M.W.N. 340=69 M.L.J. 250=42 M.L.W. 412=36 Cr.L.J. 1342=158 Ind. Cas. 302.

——Cross examination of witness.

The Counsel should have full freedom to cross-examine a witness and nothing should be done which would hamper his cross examination. If a Counsel is continually pressed by a succession of 'next' 'next' of the Judge that distrub the flow of his ideas and interferes with effectiveness of his cross-examination; if he is not permitted to cross-examination freely, then the effectiveness of the cross-examination in marred. A.I.R. 1944 Nag. 320=1944 N.L.J. 396.

——Right to put questions in cross-examination to discredit witness—Evidence Act (I of 1872), ss. 146, 148.

Considering the provisions of Ss. 146 and 148, Evi. Act, and also bearing in mind the fact that unlike in England, the privilege of a Counsel in India is qualified, there can be no question that a Counsel or Advocate, provided he has instructions, has a large amount of discretion in the matter of putting questions in cross-examination. In the interests of his client, in the interest of justice, and in order to discredit the witness he is cross-examining, the Advocate is entitled to put questions within the limits his good sense might dictate or indicate. A.I.R. 1938 Cal. 766=42 C.W.N. 1113=178 Ind. Cas. 253 (S.B.).

——Rights and duties—Discretion in questions.

While counsel have their privileges they have also their rosponsibilities and ought never to abuse their position or their privileges and therefore though an advocate may act from a sense of duty towards his client and in entire good faith, he must exercise his own discretion before he puts the question to the witness. 104 Ind. Cas. 717=55 Cal. 85=46 C.L.J. 227=28 Cr. L. J. 877=A.I.R. 1927 Cal. 823.

——Complaint—Drafting of—Duty of Advocate.

A distinction must be drawn between the complainant and his Advocate, for, it may well be that the complainant had knowledge which his advocate did not possess. Moreover, it is obvious that an Advocate cannot be expected to constitute himself a Judge either of the law or facts of his client's case. He is his client's adviser and must act according to his instructions, provided always those instructions do not require that he should be guilty of an offence or of misconduct or that he should institute in a Court criminal proceedings which, to his own certain knowledge, are false. Moreover, it is his bounden duty to put into the complaint the material facts upon which the complaint is based and not wilfully, by acts of omission, to deceive the Court. A. I. R. 1937 Sind 193=38 Cr. L.J. 1002=170 Ind. Cas. 891.

——Solicitor acting for client—Duty of disclosing personal interest.

It is most desirable that a Solicitor, acting for a client in any transaction, should not have a personal interest in that transaction without making full disclosure of the nature and extent of that interest to the client. A.I.R. 1936 P.C. 224=44 M.L.W. 315=163 Ind. Cas. 434 (P.C.)

——Counsel is expected to be free from any personal, as distinguished from professional, interest in litigation. 34 P.L.R. 445=A.I.R. 1932 Lah. 584=142 Ind. Cas. 689.

——Pleader having interest in case—If can plead.

It is undesirable that a member of the Bar should plead in a case concerning which he has a personal interest. 39 C.W.N. 274=(1936) 164 Ind. Cas. 897.

A legal practitioner cannot validly object to the order of the Court to produce a document at least, for the inspection of the Court—before the Court decided whether the objection to its production was or was not valid. 37 Cr. L. J. 113=A.I.R. 1936 All. 212=(1935) A.L.J. 1176=58 A. 364=159 Ind. Cas. 524.

——It is neither proper nor professional that Counsel should go alone before a Judge or Judges in their private room and impart to them a matter inimical to the other side. It is also improper or undesirable that on having received the information, the Judges in question should give advice as to what course should be taken when they had only heard one side of the question. (Duty of Counsel and the Judge pointed out.) A.I.R. 1936 Cal. 47=62 C. 289=162 Ind. Cas. 100.

——Selection of documents—Duty of Solicitor.

Solicitor must select documents necessary for case. In cases of doubt, the solicitor should take the advice of Counsel on this point. Ejaz Ali v. Special Manager. A.I.R. 1935 P.C. 53=68 M.L.J. 397=61 C.L.J. 102=1935 A.L.J. 744 (P.C.).

——Premature threat from Bench — Pleader's duty—Compromise.

It is the duty of members of the Bar, if their clients are threatened prematurely from the Bench not to adopt an attitude which may be described as pusillanimous, but protest then and there that they resent such observations; and after consulting with their Attorney instructing them, it may become necessary for them to apply for a transfer of the case to the list of another Judge.

Where soon after the premature threatening of his clients by the Bench, the Pleader consented to settle the case:

Held, that the Counsel was intimidated and was not free to consider the whole aspect of the settlement from an unbiased point of view, and that the Court had an inherent power to set aside this settlement. 60 C.L.J. 179=39 C.W.N. 61=36 Cr. L. J. 698=A.I.R. 1935 Cal. 231=62 C. 223=155 Ind. Cas. 297.

——Issues.

It is the duty of the Court to frame issues which arise out of the pleadings, but it is also the duty of Counsel to get the proper issues framed. A.I.R. 1935 Lah. 251=16 L. 782=158 Ind. Cas. 465.

——Client—Statement of intention of executant, by his Pleader, if binding on client.

The question whether the parties intended that the mortgage deed should or should not be enforced in the case of default of either party is purely a question of fact and not a question of law. Hence a Pleader's statement regarding such intention of the executant is binding on his client. A.I.R. 1935 Lah. 71=16 L. 328=37 P.L.R. 596=157 Ind. Cas. 806.

——Duty to Court in conduct of cases—Imputing motives to presiding officer—Asking irrelevant and scandalous questions.

The duty of an Advocate is to assist in the administration of justice and not to obstruct or to

impede it, and in the performance of his professional duties, he is expected, not to be influenced by personal motives, desire of revenge or by resentment. It is improper for him to adopt an insulting attitude towards the presiding officer of the Court or to impute motives to him. It is illegal for him lo ask irrelevant and scandalous questions and he incurs grave personal responsibility if he does so. A.I.R. 1937 Lah. 300=38 Cr. L.J. 611=168 Ind. Cas 773.

——Responsibility towards Court.

The duty of a member of the legal profession is to realize his responsibilities, not merely to his clients, but to the Court before whom he practises. A.I.R. 1935 Pat. 249=16 P.L.T. 231=36 Cr. L. J. 1023=1 B.R. 660=156 Ind. Cas. 889 (S.B.)

——Rights and duties—Assistance to Court.

It is the duty of a pleader whether briefed for the accused or for the Crown, as an officer of the Court, when he sees an error being committed, to draw the Magistrate's or the Judge's attention to it. It is the duty of a pleader, according to the high traditions of the English Bar, to assist the Court in the attainment of justice. 95 Ind. Cas. 753=20 S.L.R. 261=27 Cr. L.J. 833=A.I.R. 1926 Sind 244.

——Obiter.—A pleader has duties and obligations to his client in respect of the suit or matter which is entrusted to him and is pending in Court. There is a further and equally important duty and obligation upon him, viz., to co-operate with the Court in the orderly and pure administration of justice. 82 Ind. Cas. 712=2 Rang. 265=25 Cr. L. J. 1352= A.I.R. 1924 Rang. 320.

——Duty to disclose facts to Court.

A legal practitioner cannot suppress the truth in Court as to his own doings. A.I.R. 1933 Lah. 797= 34 P.L.R. 963=146 Ind. Cas. 474 (2).

——Solicitor and client—Duty of—Non-disclosure of material facts, if makes him liable for damages.

When a party holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts which his constituent is entitled to know in connection with the transaction he cannot be heard to maintain that the disclosure would not have altered the decision to proceed with the transaction because the constituent's action would be solely determined by some other factor, such as the valuation by another party of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant. A. I. R. 1934 P. C. 176=(1934) A.L.J. 613=40 M.L.W. 206=4 A.W.R. 638=151 Ind. Cas. 972 (P.C.).

——Advocate—Rights of—Non-litigious work—Special authority of Counsel.

The rights of an Advocate (Original Side) are the same as those of a Barrister. Counsel in conducting litigation has many powers, duties, privileges and obligations extending beyond the mere duty of acting as an Advocate. Amongst other things, he has power to refer the matter in dispute to arbitration, or to compromise it. Those powers and obligations are derived from his retainer as Counsel and not from any contractual appointment as an agent. On the other hand, in non-litigious work. Counsel has no such special authority. His authority in that class of work is merely that of an agent, and depends on the particular terms of his employment.

The special authority of Counsel in relation to litigation is confined to litigation in the ordinary course and does not extend to matters pending before private tribunals. 36 Bom. L. R. 18=A.I.R. 1934 Bom. 101=58 B. 447=149 Ind. Cas. 1235.

——The public are entitled to receive dis-interested, sincere and honest treatment and advice from the Advocates to whom they repair for counsel and succour in their time of need; and the Court has always insisted that members of the legal profession "should stand free from all suspicion." 12 R. 110=A.I.R. 1934 Rang. 33=149 Ind. Cas. 856.

——Merely because a legal practitioner is a member of a society, he is not prevented by any rule of professional etiquette from accepting instructions from the society of which he is a member, though it is improper for a member of the Bar who is a director of a company or a society to appear for remuneration for that company or society in its legal business. A.I.R. 1933 Mad. 682=38 L.W. 401=65 M.L.J. 367=(1933) M.W.N. 977=56 M. 970=145 Ind. Cas. 438.

——Duties of Advocates.

The position of an Advocate is a privileged and responsible one and the public have a right to look upon the Bar as consisting of persons in whom they may have the utmost confidence. 34 Cr.L.J. 1131=A.I.R. 1933 Pat. 571=14 P.L.T. 709=12 Pat. 843=145 Ind. Cas. 1017 (S.B.).

——There is always a limit beyond which Counsel should not go in attacking the opposite party or his witnesses.

A Counsel has a very valuable privilege; in that he is not liable in other than exceptional circumstances to civil or criminal proceedings on account of anything which he may say in Court on behalf of his clients. But that privilege imposes a corresponding responsibility and a Counsel has to be very careful not to make any attack upon parties or witnesses engaged in the case, which goes beyond what is fairly necessary for the presentation of his own client's case. 34 Bom.L.R. 443=A.I.R. 1932 Bom. 199=138 Ind. Cas. 543.

——Agreement—Mistake by Pleader — Wrong exercise of judgment by Counsel.

If a Counsel gives his consent to a decree on a misunderstanding, that may be good reason for the Court refusing to enforce the agreement. Where, however, the Counsel himself does not complain of having acted on a misunderstanding, the Court cannot presume that he had acted on a misunderstanding. If the client is negligent in giving instructions and if the Counsel's exercise of judgment is not very sound, the agreement arrived at cannot be impeached on those grounds. A.I.R. 1932 Cal. 231=59 C. 31=35 C.W.N. 674=54 C.L.J. 558=136 Ind. Cas. 535.

——Counsel's privilege does not extend to stating his instructions when these instructions involve an attack on dignity of Court. 33 Cr.L.J. 675=33 P.L.R. 785=A.I.R. 1932 Lah. 502=138 Ind. Cas. 878 (F.B.).

——Aspersion of fraud in judgment.

Where a serious aspersion of fraud is cast against a legal practitioner in the judgment of

the Court, he should take steps to get that aspersion expunged if he could do so. 36 L.W. 781=1933 M.W.N. 54=140 Ind. Cas. 600=A.I.R. 1933 Mad. 96=63 M.L.J. 945.

——Collecting evidence for client, propriety of.

In the Punjab, the Counsel has the duties, both of Solicitor and of Advocate, and he does not exceed his duties in collecting evidence on behalf of his client or even in furnishing him information which was in his own personal knowledge and not in the knowledge of his client at all. A.I.R. 1931 Lah. 246=32 P.L.R. 772=134 Ind. Cas. 515.

A Pleader, having filed a written statement, handed over the envelope containing its copy to the Pleaders in the Bar room, who wanted to read it out of curiosity and interest on the point of law involved therein.

Held, that as the proceedings formed part of the judicial record, he was privileged in handing over the same to the Pleaders inside the Bar room. A.I.R. 1931 Lah. 246=32 P.L.R. 772=134 Ind. Cas. 515.

——In a case of murder, the Advocate for defence should be very careful in advising accused to dispense with his defence witnesses especially if these witnesses were present at the time of occurrence. A. I. R. 1931 Rang. 163=32 Cr.L.J. 1067=133 Ind. Cas. 488.

——Solicitor and client—Implied retainer—Permissibility. See Calcutta High Court Rules and Orders, (O.S.) Chap. 36, Rr. 2 and 3. 84 C.L.J. 9.

——When a litigant comes to engage a Counsel very often he is uneducated, if not illiterate, and in many cases, he is not familiar with the practice and procedure of Courts. On the other had, Counsel are in a position to realize fully the importance and value of written contracts and are, therefore, expected to keep written records of the terms of their engagement. This is particularly important in their own interest lest there should be any misunderstanding or dispute unnecessarily arousing suspicion. 1936 R. D. 890=A.I.R. 1936 All. 359=(1936) A.L.J. 300=1936 A.W.R. 339=162 Ind. Cas. 622 (S.B.).

——Money paid to attorney for special purpose—Duty of attorney.

Money paid to the Attorney by his client unless paid to him expressly for costs, i. e., for the purpose of being used is trust money, should never be used by him even though he can pay it back within a reasonable time or immediatety. In such a case, it is the duty of Attorney to distinguish it from other moneys and for this purpose, enter the amounts properly in his own books into a ledger account of the client, to put the money into a separate account in the bank and never to touch the money. I.L.R. (1943) 1 Cal. 81.

——Rights and duties—Account of client's money.

It is the duty of every Advocate who receives money on behalf of his client to conduct litigation with, to keep an account of how that money has been applied. 1930 M.W.N. 216.

——Rights and duties—Advice from Court.

It is not right for a Counsel to take advice from the Court as to the kind or amount of evidence which has to be produced in support of his client's case, and even if a Court goes out of the way and gratuitously gives such advice, which itself would be an extremely improper act on its part, Counsel ought not to be guided by such advice, but must exercise his own independent judgment in deciding as to how to proceed in the conduct of his case. 116 Ind. Cas. 555=A.I.R. 1930 Lah. 401.

——Rights and duties—Affidavits.

According to the well recognized practice which prevails wherever members of the English Bar practise, the counsel should never file an affidavit in a case in which he is appearing professionally. 107 Ind. Cas. 108=29 Cr. L. J. 220=9 A.I.Cr.R. 514=A.I.R. 1928 Lah. 276.

——A legal practitioner who chooses to file an affidavit in support of a petition of appeal or revision must swear to the facts as they occur and take scrupulous care not to conceal or distort them or confound them with his own impressions hastily formed at the time. From the slip of notes found attached to the record of the appeal or the refusal of the Judge to wait for the records before proceeding with the hearing or from his own failure to make an impression on the Judge the practitioner has no right to assume that the Court had made up its mind or pre-judged the case.

The members of the legal profession are responsible for the fair and honest conduct of a case and they cannot be allowed to make personal attacks or reckless and unfounded charges of impropriety or inattention against a tribunal when the real ground is that the Advocate concerned has failed to make an impression by his arguments on the Court concerned and lost his case in spite of every effort. 81 Ind. Cas. 937=5 L.R.A. Civ. 389=25 Cr.L. J. 1113=A.I. R. 1924 All. 565.

——Rights and duties—Application for sanad—Rule 16, Nagpur Judicial Commissioner's Court.

The R. 16 framed by the Judicial Commissioner against a legal practitioner carrying on money-lending business speaks of the state of things obtaining at the date of the application for admission as a pleader and is not made applicable to the pleaders enrolled prior to that date, as it casts on the applicant for enrolment the duty of stating the fact of his carrying on any trade or other business in his application. 107 Ind. Cas. 903=A.I.R. 1928 Nag. 273.

——Rights and duties—Arguments.

So long as he is not guilty of unnecessary repetition or of irrelevant arguments a Counsel is entitled to present his client's case as he thinks best and it is no ground for a Judge to decline to hear him or to cut short his argument merely because he is expected by the superior Courts to turn out a certain amount of work within a fixed time. 107 Ind. Cas. 763=29 Cr.L.J. 279=A.I.R. 1928 Lah. 319.

——Counsel in a Letters Patent appeal are not confined to the arguments addressed to the single Judge. 89 Ind. Cas. 958=A.I.R. 1926 Lah. 113.

——Rights and duties—Brief for another Counsel.

If a Counsel holds a brief for another Counsel, it is his duty to inform the reader that he does so. 110 Ind. Cas. 772=26 A.L.J. 1393=A.I.R. 1928 All. 718.

——Rights and duties—Counsel of accused.

Entire devotion to the interests of the client, warm zeal in the maintenance and defence of his rights and the exercise of his utmost learning and ability, these are the points which can only satisfy the truly conscientious advocate. Every man accused of an offence has a constitutional right to a trial according to law and the duty of his counsel requires him to scan with legal

knowledge the forms of the proceeding against the accused. Counsel assigned for the defence of an accused charged with the offence of murder cannot decline the office, nor can he abate a jot of his duty to the accused and to the Court, because of the querulous attitude taken by another Counsel who is asked to associate himself with the Counsel assigned to the accused. 115 Ind. Cas. 561=48 C.L.J. 307=33 C.W.N. 136=30 Cr.L.J. 494=A.I.R. 1929 Cal. 1.

——**Rights and duties—Death of party.**

A practitioner who appears for several respondents, one of whom dies before the hearing of the appeal, owes a clear duty to the Court to bring to its notice if he is aware of the fact that one of the respondents for whom he has entered appearance is dead and no longer represented by him. 114 Ind. Cas. 601=57 All. 267=1929 M.W.N. 220=56 I.A. 80=33 C.W.N. 318=29 M.L.W. 423=1929 A.L.J. 85=49 C.L.J. 141=A.I.R. 1929 P.C. 58=56 M.L.J. 304 (P.C.)

——**Rights and duties—Discovery of documents.**

It is the duty of an attorney to be extremely careful in ascertaining from his client who has to make an affidavit of this nature, exactly what materials and documents are in his possession. It is further his duty, the moment he finds that there are other documents which have not been disclosed at the very earliest moment to bring these documents to the notice of his opponent and give him an opportunity of inspecting them. 61 Ind. Cas. 908=25 C.W.N. 99=A.I.R. 1921 Cal. 267.

——**Rights and duties—Examination of documents.**

During the progress of the hearing of a suit, a counsel has the privilege of examining such documentary evidence as he may have summoned from a witness or a party, before tendering it in evidence. 83 Ind. Cas. 782=46 All. 575=22 A.L.J. 521=5 L.R.A. Civ. 785=A.I.R. 1924 All. 625.

——**Rights and duties—Pardanashin lady.**

Where a pleader acting for a pardanashin lady never sees her, never speaks to her in reference to proceedings nor has he any communication with her upon the points raised in the suit, then he is deemed to have failed in his duty towards her. Conduct of a pleader who does not even take trouble to satisfy himself that he is really engaged on behalf of the pardanashin lady and his vakalatnama is really on her behalf and not on behalf of certain enemies of hers who wanted to ruin her deserves severe condemnation. 112 Ind. Cas. 522=5 O.W.N. 847=A.I.R. 1928 Oudh 449.

——**Rights and duties—Personal opinion—Expression of.**

Per **Mookerjee, J.**—It is not the duty of the pleader to approach the trial Judge and to apprise him that in his opinion the man, whose fate has been entrusted to his care, has no defence to make.

His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

A man's rights are to be determined by the Court not by his attorney or Counsel. 81 Ind. Cas. 353=25 Cr.L.J. 817=28 C.W.N. 170=38 C.L.J. 411=A.I.R. 1924 Cal. 257 (F.B.).

——**Rights and duties—Refusing brief.**

The lawyers in their profession have got to do their duty and they cannot refuse to take up a party's case even if the other party is also a lawyer when all the conditions are fulfilled, viz., the tender of a proper fee, the willingness to give complete instructions and the case of the character that the pleader is accustomed to take, and when no allowable, reasonable and honest excuse exists. 117 Ind. Cas. 104=1929 A.L.J. 1047=A.I.R. 1930 All. 309.

——A lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties, on grounds of partisanship for a party to the litigation. A.I.R. 1914 Oudh 372, Foll. 88 Ind. Cas. 1048=2 O.W.N. 682=26 Cr.L.J. 1272=A.I.R. 1925 Oudh 672.

——A lawyer has no right to reject a brief when offered to him on payment of fee agreed upon between the parties on grounds of partisanship for a party to the litigation. 80 Ind. Cas. 826=11 O.L.J. 337=27 O.C. 401=A.I.R. 1924 Oudh 372.

——**Rights and duties—Resumption of practice.**

Where a legal practitioner has been in Government service but has been subsequently discharged and he applies for permission to resume practice, it is incumbent on him to make a full and complete disclosure of the circumstances that led to his discharge. 38 C. 309, **Foll.** 62 Ind. Cas. 831=37 C.L.J. 391=27 C.W.N. 528=22 Cr.L.J. 591.

——**Duty of—Acquisition of subject-matter of suit—Duty to reconvey—Equity.**

While the relation of pleader and client continues, the pleader cannot as against his client **acquire** absolutely a beneficial interest in or title to the subject matter of the litigation antagonistic to that of his client; if the pleader gains a pecuniary advantage, he must hold it for the benefit of his client, subject to reimbursement for expenses incurred. 22 C.W.N. 491=27 C. L.J. 388=44 Ind Cas. 13.

——**Selection of Junior.**

The practice of one counsel already engaged in the case selecting the other counsel who should be briefed with him is contrary to the traditions and to the best interests of the profession and ought to be discouraged. 44 Cal. 741=26 C.L.J. 605=42 Ind. Cas. 63.

——**Transfer of brief—Pleader appearing for another—High Court rules.**

Where a pleader appears for another who is unable at the moment to attend court he ought to let the court know that he is so appearing. 20 C.W.N. 283=17 Cr.L.J. 1916=33 Ind. Cas. 831.

——**Duty of—Pleader—Trustee—Rights.**

A pleader trustee should not appropriate the first assets realised as his fee without the consent of beneficiaries. 6 S.L.R. 183=19 Ind. Cas. 443.

——**Duty of—Paper book—Contract between Pleader and Hight Court.**

An undertaking by a pleader to prepare an office book is a contract between the Pleader and the High Court which the Court expects him to fulfil and can be enforced in the same way as the contracts by attorneys are enforced. 19 C.L.J. 432=25 Ind. Cas. 510.

——**Duty of—Clients with conflicting interest.**

By the custom of the mofussil, a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding. The pleader in the mofussil is not merely an advocate. He is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors. For legal advice, for the prosecution of legal proceedings in all their stages, the client depends on the pleader. This dependence makes the position of the pleader peculiarly onerous and binds him to give exclusive attention to the

interests of the client throughout any proceeding in which he is engaged. In winding up proceedings, a single pleader must not represent two different creditors whose interests are known to conflict. A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings. 36 Bom. 606=14 Bom. L.R. 700=13 Cr.L.J. 913=16 Ind. Cas. 788.

——Duty of—Before Land Acquisition Officer.

Legal practitioners attending before Acquisition Officer should not refer to the consequences if the case be taken to Court; they are to assist the officer in arriving at a valuation by putting before him all the materials and information at their disposal. 34 Bom. 481=11 Bom. L.R. 1176=4 Ind. Cas. 278.

——Duty of.

A counsel, like a judge, should not be subject to fear for the consequences of anything which he might say in the course of his duty. Instructed or not, it is the pleader's duty to make a suggestion, if he thinks it might advance the interests of his client and in this he is not limited to the record in the case. 3 S.L.R. 177=10 Cr.L.J. 514=4 Ind. Cas. 176.

——Duty of.

Pleaders are a privileged class enrolled for rendering asistance to courts in the administration of justice. 33 Bom. 252=10 Bom. L.R. 1169=2 Ind. Cas. 264.

——Duty of—Discovery of document.

It is the duty of an attorney to be extremely careful in ascertaining from his client, who has to make an affidavit of documents, exactly what materials and documents are in his possession. The moment he finds there are other documents which have not been disclosed, he is bound to bring those documents to the notice of his opponent and give him an opportunity of inspecting them. **Held,** that the conduct of the attorney in not disclosing documents subsequently when they came to his knowledge, was wrong, but was not such as to justify disciplinary proceedings. 25 C.W.N. 99=61 Ind. Cas. 908=A.I.R. 1921 Cal. 267.

——Evidence calling of—Responsibility of Advocate.

If an advocate takes the responsibility of not calling evidence, whatever his reasons for so doing may be, the case cannot be re-opened in order to admit such evidence after it has been decided. 4 Bur. L.T. 161=11 Ind. Cas. 779.

——Duty of—Supplying forms with signature by the client.

Legal practitioners should discourage the practice of their clients supplying them with blank forms of execution and other kinds with their signatures. 1 Ind. Cas. 667 (Mad.).

——Unable to appear—Duty of.

If there is a chance of neither of the two counsel briefed in a case being able to attend when the case is called on, one of them must return his brief in good time. In case of dispute it is the duty of the junior to return the brief or to make arrangements for some other counsel to attend till he can come in. (1908) 33 B. 475=10 Bom. L.R. 1172=3 Ind. Cas. 992.

——Duties of.

It would be too strict to hold that it is the duty of counsel, at their peril, to restrain judges within the Cursus curie, and to insist on their abstaining from experiments which to some may prove too alluring to admit of adherence to legal **media concludendi.** (1907) 6 C.L.J. 5=11 C.W.N. 721=71 M.L.J. 347=4 A.L.J. 461=31 B. 381=9 Bom. L.R. 671=34 I.A. 115=2 M.L.T. 435 (P.C.).

——Right of audience—In transfer applications from mofussil to High Court — Extra-ordinary Original Jurisdiction.

Vakils have not as a matter of practice, the right to appear in transfer applications from the file of a mofussil court to its file on the extra-ordinary original side. (1910) 37 C. 853=8 Ind. Cas. 724.

——Right of audience—Insolvency appeals in the High Court.

A Vakil has the right of audience before an Appellate Bench of the High Court in appeals from the Insolvency Court. (1908) 18 M.L.J. 565.

——Statements made in professional capacity—Privilege—Nature, scope and limits of protection. See Torts—Defamation—Privilege. I.L.R. (1945) All. 702=A.I.R. 1946 A. 213.

——Care and diligence should be exercised in choosing clerk.

There is a duty cast upon members of a monopolist profession to exercise care and due diligence in the persons whom they employ, and if they choose to employ a person known by them to de irresponsible, without taking adequate steps to keep a close personal check upon his actions, then they are themselves at fault and will become liable to be called to account. A.I.R. 1938 Nag. 370=179 Ind. Cas. 471.

21. Status.

——If subordinate officer of Court.

A lawyer is no doubt subordinate to the Courts in so far as he is subject to the disciplinary authority of the Courts but, all the same, he cannot be characterised as a subordinate officer of the Court. To call a responsible person like a lawyer a subordinate officer of the Court and thus degrade him to the level of other ministerial officers working in the Court is an entirely erroneous conception of the position he occupies. [The word "subordinate" was ordered to be expunged from the judgment of the Magistrate]. 44 P.L.R. 511=A.I.R. 1943 Lah. 14=44 Cr.L.J. 181 =I.L.R. (1943) Lah. 791=204 Ind. Cas. 299.

Quaere.—Whether since the passing of the Bar Councils Act, the status of a Barrister of England is identical with that of an ordinary Advocate of India. (1932) A. L. J. 764=A. I. R. 1933 All. 3=142 Ind. Cas. 241.

——Status.

The status of an advocate of the Calcutta High Court does not differ from that of a barrister in England. 88 Ind. Cas. 413=29 C. W. N. 566=52 Cal. 386=A.I.R. 1925 Cal. 696.

——Legal Remembrancer (Patna)—Position of.

In the province of Bihar, the position of Legal Remembrancer is governed by certain rules which have been published by the Government. He is the Chief Law Officer of the Government and it is his duty to superintend and advise on the conduct of all litigation, criminal and civil, to which Govt. may be a party or with which Govt. is in any way concerned. He is also **ex-officio** public prosecutor in all cases coming before the High Court of Patna or before a y other Court in the province. Further, as Chief Law Officer of the Govt. it is his duty in criminal matters to instruct Govt. Advocate when necessary in relation to cases coming before High Court. The definition of his duties given in Govt.

Rules is wide enough to empower him in a case of contempt of Court to move on behalf of Govt. or the Governor and to instruct the Advocate-General to carry on proceedings for contempt in the High Court. A.I.R. 1941 Pat. 185=7 B. R. 261=42 Cr. L. J. 225=20 Pat. 306=21 P.L.T. 980=191 Ind. Cas. 834.

——Government pleader.

Court should treat the Vakil for Government with the same stringency as, but with no greater stringency than, any of pleaders appearing for other litigants. 79 Ind. Cas. 745=51 Cal. 70=40 C.L.J. 163 =A.I.R. 1924 Cal. 774.

——Mukhtear—Status and position of.

A **Mukhtear** is an attorney, whether appointed specially or generally or certificated as a legal practitioner. A **Mukhtearnamah** is a document which empowers him to act for the person by or on whose behalf the document is executed and includes a power-of attorney in favour of a person other than a certified **Mukhtear.** 108 P.W.R. 1912=202 P.L.R. 1912=15 Ind. Cas. 122.

22. Withdrawal from case.

——Withdrawal from case—Grounds—Notice—What amounts to.

A Solicitor may withdraw on good grounds which include misconduct of an offensive character or such misbehaviour on the part of the client as makes it impossible for a selfrespecting solicitor to continue to act for him. It is incumbent upon the Attorney to give reasonable notice to the client of his intention to withdraw from the case. That the Attorney would apply to be discharged from the case which application comes on for hearing before the Court the next day does not mean giving reasonable notice to the client. 20 C.W.N. 443=23 C.L.J. 473=33 Ind. Cas. 78.

——Withdrawal from case—Implied—Non-payment of out-of-pocket expenses.

The rufusal of Attorney to go on acting unless his out-of-pocket expenses are paid by the client, amounts to a discharge of Attorney by himself and he, thence forward, cannot claim to retain the papers when they are wanted for continuing the litigation. 20 C.W.N. 437=23 C.L.J. 326=33 Ind. Cas. 73.

——Withdrawal from case—Implied—Non-payment of necessary funds.

An Attorney discharges himself by refusing to proceed with a suit because the client does not put him in funds. The contract of the Attorney is an entire contract to carry on the litigation to its termination subject to his being paid. 40 Cal. 386=17 C.W.N. 278 =18 Ind. Cas. 315.

23. Witness.

——Witness.

Person appearing as Counsel in case should not give evidence as witness in same case—If he wants to give evidence, he must retire from case as Counsel. A.I.R. 1942 Mad. 691=(1942) 2 M.L.J. 479=44 Cr.L.J. 114=55 L.W. 845=203 Ind. Cas. 585 (S.B.).

——Advocate for accused cited as prosecution witness, whether must withdraw from case—Trial Court coming to conclusion that trial would be embarrassed by his appearance—Whether can require him to withdraw.

An accused person is entitled to select the Advocate whom he desires to appear for him, and the prosecution cannot fetter that choice merely by serving a **subpoena** on the Advocate to appear as a witness. On the other hand, the Court is bound to see that the due administration of justice is not, in any way, embarrassed. If therefore, a Court comes to the conclusion that a trial will be embarrassed by the appearance of an Advocate who has been called as a witness by the other side, and, if, notwithstanding the Court's expression of its opinion, the Advocate refuses to withdraw, in such a case, the Court has inherent jurisdiction to require the Advocate to withdraw. A.I.R. 1939 Bom. 150=41 Bom. L. R. 282=40 Cr.L.J. 568 (1)=181 Ind. Cas. 769.

——Witness.

Counsel cited as witness by Police in criminal case—He is not disqualified from taking brief from accused though it would not be in accordance with professional etiquette. 48 L.W. 276=(1938) 2 M.L.J. 446=.A.I.R. 1938 Mad. 878=(1938) M.W.N. 976=40 Cr.L.J. 92=178 Ind. Cas. 532.

——It is against the etiquette of the bar that a Counsel should give evidence in the case in which he is engaged as Counsel, and no self-respecting Counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. 91 Ind. Cas. 65=27 Cr.L.J. 33=1925 M.W.N. 702=A.I.R. 1925 Mad. 1153=49 M.L.J 95.

——Counsel, if can give evidence.

A Counsel is not incompetent to give evidence, whether the facts to which he testifies occurred before or after his retainer. As a general practice, it is undesirable that when a matter to which Counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting. A.I.R. 1938 Lah. 204=40 P.L.R 558=178 Ind. Cas. 235.

——A Vakil, who at the time of the negotiations, is acting on behalf of one of the parties and conducting litigation for him, cannot, by reason of S. 126, Evi. Act, give evidence as to communications made to him, without the express consent of his client. 1935 A.W.R. 1486=A.I.R. 1936 A 157=160 Ind.Cas. 76.

——Witness.

It is improper for a counsel who is intending to appear as a witness for a party to conduct the case on his behalf. 117 Ind. Cas. 66=A.I.R. 1930 Lah. 361.

——Vakil should not appear in a case in which he is likely to be an important witness. Woodroffe J., in 40 Cal. 898, Foll. 101 Ind.Cas. 289=8 P.L.T. 510=5 Pat. 777=A.I.R. 1927 Pat. 61.

——It is not desirable that members of the legal profession should appear in cases in which they may have to give evidence or in which they may be personally interested. 81 Ind. Cas. 59=18 S.L.R. 30=25 Cr.L.J. 571=A.I.R. 1925 Sind 99.

——A pleader merely called to give evidence as to what had occurred in a previous suit in which he was engaged as a pleader, cannot be allowed special fees. 64 Ind.Cas. 78=46 Bom. 89=23 Bom.L.R. 898=A.I.R. 1922 Bom. 116.

——Rule as to exclusion from Court—Applicability to Counsel.

The rule as to the exclusion of the witnesses from Court until they have been examined is not without exceptions. It does not extend to the parties themselves in Civil cases so long as they conduct themselves properly, or to their solicitors

whose assistance is necessary for the proper conduct of the case. The same rule applies in Criminal Cases. There are even stronger reasons for not applying the rule to the Counsel for the parties who have to conduct the case. 62 Ind. Cas. 828=44 Mad. 916=13 M.L.W. 702=1921 M.W.N. 440=22 Cr.L.J. 588=A.I.R. 1921 Mad. 424=41 M.L.J. 158.

——Witness—Counsel likely to be witness in a cause—Acceptance of brief.

If counsel knows or has reason to believe he will be an important witness in the case he ought not to accept a retainer therein. If he finds he is likely to be a witness during the course of the trial he ought not to continue to appear unless his retiring would jeopardise the client's interest. If counsel knows that his own professional conduct is likely to come in question in the cause he must not accept a retainer or if he accepts it without such knowledge, he must return it. There is nothing inherently unprofessional in counsel giving evidence, in a case where he appears, as to facts that happened before or after the retainer but counsel must not testify for or against his client, on matters which are not merely formal. A counsel appearing in a case ought to give his deposition if he can thereby throw light on the case. 40 Cal. 898=18 C.W.N. 185=23 Ind. Cas. 25.

——Witness — Appearance in case where his evidence is likely to be material.

Though it is desirable that counsel should not appear in a case in which evidence is likely to be material, there is no rigid rule preventing the court from examining the pleader at any stage of the suit when such a thing is necessary for the ends of justice. 17 M.L.T. 382=29 Ind. Cas. 135.

——Witness—Counsel giving evidence on behalf of their clients—Court—Practice.

The court will not allow counsel conducting cases to give evidence on behalf of their clients in respect of matters with which they are acquainted before they were retained. (1907) 9 Bom. L. R. 1044.

24. Miscellaneous.

——Contempt of Court—Threatening notice to counsel to withdraw allegations made in written statement of his client.

Person addressing threatening notice to Counsel demanding withdrawal of certain allegations of fact made in written statement of his client, held guilty of contempt of Court. A.I.R. 1940 Nag. 110=I.L.R. (1940) Nag. 69=1939 N.L.J. 461=41 Cr. L.J. 709=189 Ind. Cas. 58.

——Objection to trial in criminal proceeding—Waiver.

No serious defect in the mode of conducting a trial can be justified or cured by the consent of the advocate of the accused. 7 O.W.N. 972=128 Ind. Cas. 209.

——Different parties on the same side.

When parties are different they are not bound to engage the same pleader though all the parties may be arrayed on the same side. 85 Ind. Cas. 509=12 O.L.J. 1=28 O.C. 8=A.I.R. 1925 Oudh 337.

——Co-plaintiffs.

Co-plaintiffs cannot sever at the trial but must appear by the same solicitors and Counsel. 77 Ind. Cas. 83=24 Bom. L.R. 1111=47 Bom. 349=A.I.R. 1923 Bom. 177.

——Private pleader—Appearance by—Prospective orders by Magistrate.

A District Magistrate has no authority to direct other Magistrates subordinate to him by the issue of general prospective orders as to the general exercise of their judicial discretion of allowing a person to practise as a private pleader in their Courts. 16 M.L.W. 879=1922 M.W.N. 809=31 M.L.T. 458=A.I.R. 1923 Mad. 183.

——Private Vakil—High Court Circular.

Where a High Court circular stated as a general rule that no person, not qualified as legal practitioner, should be permitted to act in any proceeding except to prevent a miscarriage of justice, a general order by a magistrate that private vakils shall appear in his court goes beyond the terms of the circular. But he will be acting in consonance with its terms if he states that he is not prepared to make any general exception in favour of any particular individual. (1902) 12 M.L.J. 354.

——Agreement not to practise for a certain time—Breach—Injunction.

Where two branches of the legal profession (Barrister and Solicitor) are amalgamated in a particular place, a person who carries on both branches and is a legal practitioner in that place may enter into an agreement not to practise for a reasonable time. In case of breach of such an agreement without justification or excuse an injunction will be granted. 17 C.W.N. 215=19 Ind. Cas. 822 (P.C.)

——Judge — Competency of to try case, in which he was counsel for one of the parties.

Judges voluntarily decline to hear cases with which they were connected as Counsel before their elevation to the Bench. This practice is but an evolution of the elementary maxim that no man should be a Judge in his own suit and preside in a case in which he is not wholly disinterested and impartial. But this principle does not apply when objection is taken to Judge trying a cause on the ground that he had, before his appointment, acted as Counsel in other matters for one of the parties. It is no objection to a Judge trying a case that before his appointment he was counsel in other matters for one of the parties. The fact that a Judge was prior to elevation to the Bench engaged in the particular cause in no disqualification, though according to long usage a Judge would refuse to adjudicate upon a case if he had been engaged as Counsel therein. 39 C.L.J. 313=57 Ind. Cas. 22.

——Capacity to be an arbitrator.

A pleader is not incompetent to be an arbitrator simply because on some occasions he was engaged by one of the parties as his pleader. 39 Ind. Cas. 767 (Cal.)

——Professional practice.

When a suit for rent is in contemplation by the lessor, and one of the tenants (who were joint) approaches the plaintiff's pleader for the purposes of seeing whether he could settle the action he must be implied to have authority to act on behalf of all the defts. 44 Cal. 130=20 C.W.N. 1217=25 C.L.J. 42=34 Ind. Cas. 571.

——Attorney—Practice—Articled clerk—Assistant in a firm not competent to take.

Only an attorney who carries on business on his own account or as a member of a firm of solicitors and who does not occupy a subordinate position as

an assistant to another firm can take an articled clerk. 13 C.W.N. 402=1 Ind. Cas. 286.

——Practice—Rivision—Pleader uncertified.

An uncertified pleader who is prohibited by a circular of a Dt. Magistrate from practising in Criminal Courts cannot file a revision to the High Court against the order but he can apply for revision of a particular case in which he was illegally refused permission to appear under this circular. 19 M.L.J. 566=11 Cr. L.J. 69=4 Ind. Cas. 876.

——Report—Registrar — Exceptions — Notice of motion—Belchamber's Rules 615, 617—Mistake.

A party who objects to a report of the Registrar must not only file objections, but must also give notice of a motion to vary or discharge the report within 14 days of the filing of the report. The 'mistake' referred to in Rule 617 of Belchamber's Rules which will justify a discharge or a variation of the report even after the time fixed by Rule 615 is one incident to or connected with or which has resulted in making the report, not one which is quite beside, and independent of, the report. A solicitor's mistake though bona fide in not following the correct procedure, is not a mistake within Rule 617. (1901) 5 C.W.N. 337= 28 C. 272.

——Remuneration of Solicitor—Executor.

See: 7 Bom. L. R. 854=9 C. W. N. 769=15 M.L.J. 271=3 A.L.J. 68=29 B. 530=32 I.A. 142 (P.C.).

——Examiners — Board of — Pleadership and Mukhtearship — Application not considered— Candidate once considered unfit—How far that decision conclusive for all time.

A decision by the Board of Examiners that a candidate was unfit to apply is not conclusive evidence of unfitness for all time, and the Board is bound to consider a fresh application on its own merits. (1901) 28 C. 479.

——Legal Practitioners' Act (I of 1846)—S. 7 —'Regular suit'—Probate proceedings.

Probate proceedings are not 'regular suits' within S. 7 of the Act I of 1846. 33 Bom. 256=10 Bom.L.R. 1197=2 Ind. Cas. 283.

[Ed. Note: This Act has been repealed by Act XLVIII of 1952].

Legal Practitioners' Act (XVIII of 1879)

See also: Bombay Pleaders' Act 1920.

——Enquiry under—Judgment and evidence in civil suit filed by a party against the Pleader —Admissibility.

The judgment and evidence given in a civil suit filed by a party against the Pleader is admissible as evidence in an enquiry against the Pleader under the Legal Practitioners' Act, but the judgment and evidence are not conclusive proof in the enquiry. A.I.R. 1935 All. 1023=1935 A.W.R. 1229=37 Cr. L. J. 117=(1936) A.L.J. 379 =159 Ind. Cas. 561 (S.B.).

——Enquiry—Court, duty of.

The duty of Court, in holding an enquiry under the Act is not to allow irrelevent matter to be introduced or to admit inadmissible evidence. 1 Pat. L. T. 372=57 Ind. Cas. 460.

——As amended by XV of 1926—Inherent powers.

——Per Full Bench.—Inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861 and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners' Act and the Indian Bar Councils Act now exist in the Allahabad High Court in respect of their professional or other misconduct. 1930 A.L.J. 402=A.I.R. 1930 All. 225 (F.B.).

——Interpretation and scope.

Per Full Bench.—The Act does not merely consolidate previous enactments but the whole law on the subject and it does not merely consolidate pre-existing law but also amends it which taken with the consolidation of the same implies both addition to and derogation from the pre-existing law. It is a complete Code in itself as regards the subject it deals with. 1930 A.L.J. 402=A.I.R. 1930 All. 225 (F.B.).

——Nature of proceedings.

Proceedings under the Legal Practitioners' Act are quasi-criminal and where the facts had already formed the subject of criminal trial which has resulted in an acquittal the principle of "Autrefois acquit" must apply. 88 Ind. Cas. 279=26 Cr.L. J. 1111=2 Rang. 491=A.I.R. 1925 Rang. 110.

——Practice.

A question relating to the rival claims of different sections of the Legal Practitioners of the High Court cannot be settled by a single Judge or a Division Bench of the Court. 25 C. L. J. 401=21 C.W.N. 654=18 Cr. L. J. 793=41 Ind. Cas. 313.

——Munsif giving certificate—If Dt. Judge can refuse to renew.

Where a Munsif before whom a pleader is practising gives a certificate of character, the Dt. Judge cannot refuse to renew his certificate on the ground that he has formed an unfavourable opinion as to the pleader's character in a case cited by him. 13 C.W.N. 415=1 Ind. Cas. 334.

——Authority of Munsif to direct a pleader to dismiss his clerk.

A Munsif has no authority in law to direct any pleader to dismiss any of his clerks; he has no inherent power to refuse to recognise as a pleader's clerk a person who is not a bona fide clerk; if any body acts unprofessionally or in any way not warranted by law, he can take proceedings under the Legal Practitioners' Act or under any other Act that may be applicable. (1905) 10 C.W.N. 49.

——S. 3—Person, when can be declared tout.

Before a person can be declared to be a tout it must be found for a fact that he has acted in a manner which will bring him within the definition as laid down in S. 3, Legal Practitioners' Act. A.I.R. 1938 Mad. 634=47 M.L.W. 578=(1938) M.W.N. 426=(1938) 2 M.L.J. 100= I.L.R. (1938) Mad. 988=177 Ind. Cas. 456.

——S. 3—Order declaring person to be tout when it is not proved that he is so illegal.

J gave a petition to the District Magistrate that she had come to arrange a transfer of a case from one Court to another and F took money from her promising that he would engage a pleader and that instead of doing that F ran away with the money. The District Magistrate endorsed the petition to

a Subordinate Magistrate for enquiry and report. The Subordinate Magistrate asked the Secretary of the Bar Association about the antecedents of F. The Secretary informed that the Executive Committee of the Bar Association had passed a resolution that F was an undesirable man and did not possess good antecedents. The Subordinate Magistrate held that it was not proved that F was a tout though it might be that he committed an act of cheating. F was present at the inquiry. The District Magistrate stating that he did not agree with this finding declared F to be a tout.

Held, that the proceedings against F were illegal throughout. There had been no allegation that F was a tout. The Subordinate Magistrate did not report name of F as having been proved as a tout and District Magistrate could not declare him a tout. The resolution of the Bar Association was not that F was a tout but only that he had bad antecedents and the resolution was not passed at a specially convened meeting so as to be evidence under Expl. to S. 36 (1) of the general repute of F. The District Magistrate should have heard F which he did not do. Lastly, there was no evidence that F was a tout as defined in S. 3. 31 P.L.R. 212 =A.I.R. 1930 Lah. 405.

——It is a reasonable and legitimate inference of fact that if a man attends Court every day, looks after the cases of clients, even pays to pleaders and realizes costs and engages pleaders and also realizes their fees, he is not rendering gratuitous service such as a casual friend or acquaintance may do. 115 Ind. Cas. 602=56 Cal. 800=A.I.R. 1929 Cal. 196.

——It must be shown that a legal practitioner has either paid the tout for his services in bringing work to him, or that the tout has proposed to the legal practitioner, or to some person interested in the legal business to procure the employment of the legal practitioner on condition that the legal practitioner, or some such person, will pay him something as a reward for bringing him a client. 102 Ind.Cas. 340=8 P.L.T. 587=28 Cr.L.J. 532=8 A.I.Cr. R. 207=6 Pat. 567=A.I.R. 1927 Pat. 282.

——Looking after other people's cases and writing petitions for them cannot by themselves make a person a tout within the meaning of S. 3 of the Legal Practitioners' Act. It must be proved that he procured the employment in any legal business of any legal practitioner in consideration of any remuneration moving from such practitioner before he can be declared a tout. 62 Ind. Cas. 829= 22 Cr.L.J. 589 (Cal.).

——S. 4—Applicability—Advocate enrolled by Bombay High Court under Bar Councils Act—Rights to practise in Courts subordinate to Patna High Court.

S. 4 of the Legal Practitioners' Act does not apply to and cannot operate as a bar to an Advocate of a High Court, enrolled under the Bar Councils Act practising in Courts subordinate to the Patna High Court. S. 4 of the Legal Practitioners' Act has to be ignored in cases of persons enrolled as Advocates of the Bombay High Court and claiming to be entitled to practise in Courts subordinate to the High Court at Patna by virtue of their enrolment as Advocates by the High Court. 25 Pat. 468=12 B.R. 560=225 Ind. Cas. 147=1946 P.W.N. 243=A.I.R. 1946 Pat. 369=27 P.L.T. 313 (S.B.).

——Ss. 4 and 38—Bar Councils Act, S. 14 (1)—Advocate enrolled under Bar Councils Act—Whether can practise in subordinate Court of any High Court.

There is no law for the time being in force which prohibits the Advocates enrolled by any High Court under Bar Councils Act, practising in the Subordinate Courts of another High Court, which they are entitled to by virtue of S. 14 (1), Bar Councils Act. Section 4, Legal Practitioners' Act does not apply to Advocates enrolled under Bar Councils Act. 58 M.L.W. 52=(1945) 1 M.L.J. 106=I.L.R. (1945) Mad. 464=1945 M.W.N. 101= A.I.R. 1945 Mad. 144 (F.B.).

——If competent witness.

See **witness**. 10 Bom. L. R. 1172=33 B. 475.

——S. 4—Insolvency Courts.

Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras. 85 Ind. Cas. 1025=48 Mad. 331=A.I.R. 1925 Mad. 385=48 M.L.J. 36 (F.B.).

——S. 4—Object.

Section 4 of the Act is not intended to override the special provisions relating to insolvency in the Presidency Towns. 85 Ind. Cas. 1025=48 Mad. 331= A.I.R. 1925 Mad. 385=48 M.L.J. 36 (F.B.).

——S. 4—Provision—Audience, right of—'Under this section'—Letters Patent (Mad. 1866) Cl. 44.

The words "under this section" in the provision to S. 4 applies to the whole section. The proviso is not a variation by the legislature of the rule giving to Vakils the right of audience under Letters Patent, Cl. 44. 31 M. L. J. 698=(1916) 2 M. W. N. 529=37 Ind. Cas. 699.

——Ss. 4, 8—Right of audience—Public officers.

No general rule of law exists entitling persons to be represented by pleaders before public officers. The claim must be referred to some statutory provision; otherwise representation by pleader is entirely within the judicial discretion of the Magistrate or Court. 4 S.L.R. 49=7 Ind. Cas. 606.

——S. 5—Liability of client for fees.

Per **C. C. Ghose, J.**—Where an attorney has employed a Counsel under the authority given to him by the party in the retainer filed in the Court he is bound to pay the fees paid to the Counsel on taxation. It is only when the client has instructed the attorney not to brief a particular counsel that the client would be under no obligation to pay fees paid to that particular counsel. 52 C.L.J. 197=A.I.R. 1950 Cal. 651 (F.B.).

——S. 6—Mukhtear.

In Bombay Presidency "Mukhtear" is a person who can with the permission of the Court represent an accused in any proceeding within the meaning of S. 4 (1) (r), C.P. Code, and so a general order of a District Magistrate against employment of Mukhtears in criminal cases in his district is improper. 107 Ind. Cas. 56= 29 Bom. L.R. 1587=29 Cr.L.J. 226=9 A.I.Cr.R. 403 =113 Ind. Cas. 402=A.I.R. 1928 Bom. 33.

——S. 6—Women cannot be admitted and enrolled as pleaders—'Person' in section is a male.

Under the rules made by the High Court under S. 6 of the Legal Practitioners' Act, women cannot be admitted and enrolled as pleaders. Proceedings relating to the admission of pleaders are administrative and not judicial. From the perusal of the sections it appears that the 'person' referred to is male and not female as the pronoun 'he' is invariably used.

64 Ind. Cas. 636=1 Pat. 104=3 Pat. L. T. 69=1922 P.H.C.C. 97=A.I.R. 1922 Pat. 269 (F.B.).

——S. 6—Females as pleaders—Cal. High Court Rules, R. 18.

The whole Act contemplates admission of males only for legal profession. From the history of immemorial time, either in Hindu, Budhist or Mah. Rules, females were never allowed to be enrolled as pleaders; the Act removed the disabilities of men only. Females cannot be allowed to practise as pleaders under this Act, though masculine gender includes females in the Universities Act. 44 Cal. 290=24 C. L. J. 382=21 C.W.N. 74=35 Ind. Cas. 925 (S.B.).

——S. 6—High Court Rules—R. 15—Board of Examiners—If can delegate their powers.

The Board of Examiners cannot delegate their duty of considering the fitness of a candidate for the pleadership examination to the secretary or to any single member. 18 Ind. Cas. 459 (Cal.).

——S. 6—Rules under, R. 11 and S. 32—Pleader applying late for renewal of sanad and before renewal appearing before Magistrate.

Under R. 11, an application by a Pleader for renewal of his **sanad** was required to be made, not later than November 15. If the application for renewal was made by that date, the practice was to allow the Pleader to appear in cases pending the issue to him of the **sanad**. A Pleader did not apply for the renewal of his **sanad** for the year 1943 until December 31, 1942 and on January 15, 1943, before the **sanad** had been renewed, he filed a memorandum of appearance in a case before a Magistrate. The certificate was afterwards issued and was dated January 1, 1943 in accordance with the usual practice.

Held, that as the Pleader had not complied with R. 11, he had no right to appear in a case until his **sanad** had actually been renewed and that in appearing on January 15, 1943 in the case before the Magistrate, he rendered himself liable to punishment under S. 32. But as he was a Pleader of 27 years' standing and his previous conduct had given no cause for complaint and an apology had been made on his behalf, no fine should be inflicted and he should only be censured for his conduct. A.I.R. 1944 Mad. 244=57 M. L. W. 87 (1)=1944 M. W. N. 128=(1944) 1 M.L.J. 123=45 Cr. L. J. 671=I.L.R. (1944) Mad. 633=214 Ind. Cas. 4 (F.B.).

——Ss. 6 and 7—Rules under—R. 13 of Madras High Court and its Circular Order of 1916—Notice.

A Pleader was charged with professional misconduct in that he accepted a position on the board of directors of a trading company on a monthly allowance of Rs. 300 without obtaining the permission of the High Court as required by R. 13 of the rules framed by the High Court under Ss. 6 and 7, Legal Practitioners' Act and the circular order issued by the High Court in 1916. The company was, however, unable to carry on the business as the Provincial Govt. refused the necessary permission:

Held, that inasmuch as the company never carried on business and as the Pleader received no remuneration from the company, his breach of the rule was of a technical nature, which called for no action. A.I.R. 1943 Mad. 665=56 M.L.W. 491=(1943) 2 M.L.J. 273=1943 M.W.N. 587=45 Cr.L.J. 117=I.L.R. (1944) Mad. 161=209 Ind. Cas. 247 (S.B.).

——Rules under, R. 14—"Pending final decision on charge of professional misconduct"—Scope.

The words 'pending a final decision on a charge of professional misconduct' in R. 14 are not wide enough to cover a case in which the enquiry has not yet begun. It must refer only to a final decision by the High Court upon materials already enquired into and adjudicated upon by some subordinate judicial authority, and it must apply only to a case in which **prima facie,** there is reason to believe the Pleader concerned to be guilty of professional misconduct. A.I.R. 1937 Mad. 672=(1937) M.W.N. 460=46 M.L.W. 599=39 Cr.L. J. 83=172 Ind. Cas. 136.

——Rules under—Whether apply to Advocates—Oudh Civil Rules, R. 287 (iv)—Scope of.

The rules framed under S. 6, Legal Practitioners' Act, can apply only to Pleaders and Mukhtears. Rule 287 of the Oudh Civil Rules does not apply to an Advocate who is subject to the provisions of the Bar Councils Act. The words "who, having been admitted as a Pleader" in Sub. R. (iv) of R. 287, cannot mean that if a person has been admitted as a Pleader once, he must always continue to be subject to those rules even though he might cease to be a Pleader, but the implication of the rule is that having been admitted as a Pleader, the person also continues to be such. 1935 O.W.N. 1029=A.I.R. 1936 Oudh 18=11 Luck. 477=158 Ind. Cas. 278.

——S. 6 (a)—Proper and 'to be' in S. 6 (a), meaning of.

The word 'proper' in S. 6, Cl. (a), Legal Practitioners' Act, implies that apart from educational and other qualifications that may be insisted on, there may be other conditions laid down in order to entitle a person to be admitted as a Pleader and the word 'to be' denotes that his continuance as a Pleader may be made dependent on such conditions. A Pleader, in conducting the litigation for which his services are requisitioned, has to do some administrative work arising out of the litigation in the offices of the Court and appears as Advocate in the Court as well; in other words, he combines in his own person the two duties which are performed in England by Attorney and Barristers. And it is only in the fitness of things that the Court should be in a position to control his activities in such a way as would ensure the proper discharge of his duties as Pleader. A.I.R. 1936 Cal. 205=40 C.W.N. 377=63 C.L J. 127=63 C. 855=37 Cr.L.J. 590=162 Ind. Cas. 517 (S.B.)

——S. 6—Rules framed under — Professional misconduct.

A transaction by which a pleader advances money to his client on interest is a void transaction under Cl. 8 of para. 267 of the Oudh Civil Digest framed under S. 6 of the Legal Practitioners' Act, though the transaction may not be void, under S. 23 of the Contract Act; the action though not absolutely forbidden by law is opposed to public policy being a violation of the rule which imposes in the public interest, certain restriction upon dealings between pleader and their clients and therefore the transaction is void. 3 O.L. J. 140=19 O.C. 60=34 Ind. Cas. 360.

——Ss. 6 and 7—Reinstatement—Application for—Considerations. See Legal Practitioner—Reinstatement.

——S. 7—Renewal of certificate—Right to practise pending receipt of certificate—Power of District Court to forbid.

District Judges have no power to forbid legal practitioners to practise pending the receipt from the High Court of their renewed certificates. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed from the High Court. (1931)

M.W.N. 392=60 M.L.J. 588=33 L.W. 561=54 M. 574=A.I.R. 1931 Mad. 688=133 Ind. Cas. 522.

——**Ss. 7, 12, 14—Pleader—Renewal of certificate, right to—Character certificate from presiding officer, if necessary—Rule 25 of High Court Rules,** ultra vires.

Rule 25 of the rules of the High Court made under the Legal Practitioners' Act, laying down that with his application for the renewal of his certificate a pleader should file a certificate of character from the presiding officer of the Court in which he practises, is inconsistent with Ss. 12 to 14 of the Legal Practitioners' Act unless the expression 'certificate of character' is construed as meaning nothing more than a certificate that the presiding officer of the Court is not aware of any misconduct of the pleader justifying action under those sections. **Held**—That the District Judge had no authority to refuse to renew the certificate of a pleader practising in the Munsif's Court merely because he had formed an unfavourable opinion of his character in the course of the trial of a case in which the pleader was a party, when the pleader produced with his application for renewal a certificate from the Munsif to the effect that he knew nothing against the pleader's character. (1909) 13 C.W.N. 415=1 Ind. Cas. 334.

——**S. 7—Scheduled Districts Act, Ss. 3, 5, 6—Kumaon Rules, 27th July 1894, Rules 2 and 11—Jurisdiction of the High Court as regards enrolment of Vakils in the province of Kumaon and Garhwal.**

For the purposes of the Legal Practitioners' Act, 1879, the Commissioner of Kumaon is the High Court for the province of Kumaon and Garhwal. A Vakil, therefore, whose name is enrolled in the High Court of Judicature for the North-Western provinces is not, by virtue of such enrolment, entitled to practise in the Courts of Kumaon and Garhwal nor has the High Court of judicature for the North-western Provinces any jurisdiction to reverse an order of the Commissioner of Kumaon refusing to enrol a Vakil on the roll of legal practitioners entitled to practise in the courts of Kumaon and Garhwal. (1902) A.W.N. 86=24 A. 348 (F.B.).

——**S. 9—Muktear—Authority to practise in criminal case—Special permission in each case necessary.**

See Cr. P. C. S. 4 (r). 1908 A.W.N. 11=5 A.L.J. 40=30 A. 66 (F.B.).

——**Ss. 10 and 32—Appearance in Courts without pleader's licence—Proper procedure—O. III, R. 1, C. P. C.**

A Barrister should not complain to the Deputy Commissioner about the appearance of a certain person in courts without a pleader's certificate without asking for any specific relief, what should be done would be to petition to the Judge (Dist.) asking the man to be punished under S. 32 of the Legal Pract. Acts and the Judge should then proceed to find out whether the person complained about is practising in contravention of S. 10 of the Act or whether his appearances are covered by O. 3, R. 1 C. P. C. 8 Bur. L. T. 280=8 L.B.R. 531=33 Ind. Cas. 669.

——**S. 12.**

See also: Legal Practitioners' Act, S. 13—Conviction.

Synopsis.

1. Conviction implying defect of character
2. Correctness of conviction
3. Criminal complaint
4. "Criminal offence"—Meaning of
5. Jurisdiction and discretion of High Court
6. Jurisdiction of Subordinate Court
7. Offence not committed in professinal capacity
8. Re-admission.

1. Conviction implying defect of character.

——**S. 12—'Defect of character', significance of.**

The expression 'defect of character' as used in S. 12, includes not only moral turpitude but also such defect in the character of the Pleader which renders him unfit to be a member of the honourable profession to which he belongs. A.I.R. 1933 Cal. 731=60 C. 1453=38 C.W.N. 278=145 Ind. Cas. 316.

——**S. 12—Pleader, while joking handing over** pamphlets prejudicial under R. 38 (5) of the Defence of India Rules.

A Pleader, in a light-hearted manner, without any ulterior motive of influencing the Presidents of the District Union Boards, handed over to them two pamphlets containing matter of prejudicial nature within R. 38, Sub. R. (5) of the Defence of India Rules. No further copies of these pamphlets were found on search on the Pleader's person or at his house:

Held, that the conviction of the Pleader under R. 38 Sub-R. (5) did not imply defect of character which rendered him unfit to be a Pleader. A.I.R. 1943 Cal. 371=44 Cr.L.J. 743=208 Ind. Cas. 208.

——**S 12—Conviction under R. 56, Defence of India Rules—Action under S. 12, when can be taken.**

In order to take action against a legal practitioner under S. 12, Legal Practitioners' Act, it is necessary for the Court to come to the conclusion that the finding on the basis of which he has been convicted implies a defect of character, which unfits him to be a Pleader. [Taking out a peaceful and orderly procession in contravention of an order promulgated under R. 56 of the Defence of India Rules, **held** did not imply defect of character.] A. I. R. 1943 Cal. 370=44 Cr.L.J. 707=208 Ind. Cas. 4.

——**S. 12.**

——Pleader uttering anti-war slogan—Convicted under Defence of India Rules—Disciplinary action not necessary. (1942) 46 C.W.N. 405=75 C.L.J. 428.

——**S. 12—Conviction under S. 121, Penal Code—Whether unfits him to be a Pleader.**

A Pleader who has been convicted under S. 121, Penal Code, of waging war against the King has a defect of character and this unfits him to be in the roll of Pleaders. A.I.R. 1936 Mad. 318=43 M.L.W. 426=(1936) M.W.N. 238=70 M.L.J. 498=37 Cr.L.J. 571=59 M. 732=162 Ind. Cas. 414 (F.B.)

——**S. 12—Legal practitioner convicted—Principles in considering whether disciplinary action should be taken—Making of speech inciting people to break law—Suspension.**

In order to see whether disciplinary action should be taken against a Pleader who has been convicted of an offence, the Court should not merely accept the fact that he has been convicted but must consider the material upon which he was convicted.

It is inconsistent with his duties as a legal practitioner to incite others either to boycott the Courts or to break the law which it is the duty of the Courts to administer,

The making of a speech by a legal practitioner which incites, others to break the law, or an organised breach of the peace by him or incitement to acts tending to subvert order, such as asking people not to pay land revenue to Govt. or asking them to unite and refuse to recognize the authority of the Govt. servants, is a reasonable cause for suspending or removing him. I. L. R. (1941) Lah. 736=A.I.R. 1942 Lah. 85=43 Cr.L.J. 568=44 P.L.R. 471=199 Ind. Cas. 535 (S. B.)

——S. 12—Pleader convicted under S. 17 (1), Criminal Law Amendment Act and under Ss. 124-A, 153-A and 178, Penal Code—No faith in Courts of Justice—Defect of character.

A pleader was not only convicted under S. 17 (1) and (2), Criminal Law Amendment Act but was convicted for having committed offences under Ss. 124-A, and 153-A. Penal Code, and was once found guilty of an offence under S. 178, Penal Code:

Held, that these convictions entailed severe action as they undoubtedly implied defect of character in a legal practitioner.

Held, also, that where, in addition to the above facts, the attitude of the Pleader taken by him in proceedings against him under S. 12, Legal Practitioners' Act, before Courts of Justice and conduct showed that he had no faith in justice administered by Courts in this country, the conduct must be taken to be highly reprehensible, and must, accordingly, be dealt with very severely. A.I.R. 1935 Cal. 742=37 Cr.L.J. 153=159 Ind. Cas. 664.

——S. 12 — Pleader promoting meeting of unlawful association—Conviction under S. 17 (2), Criminal Law Amendment Act—Whether sufficient for taking action.

Where a Pleader assists and promotes a meeting of an unlawful association for which he is ultimately convicted under S. 17, Cl. (2), Criminal Law Amendment Act, his action is nothing short of an open and defiant violation of law. Such open and defiant violation of the law by a member of the legal profession is such a defect of character as will unfit him to be a Pleader and by such conduct, he makes himself liable to action under S. 12, Legal Practitioners' Act. 59 C.L.J. 410=A.I.R. 1934 Cal. 808=152 Ind. Cas. 943.

——S. 12—Pleader prosecuted thrice and convicted twice for semi-political offences—Whether action under the Act may be taken—Distinction between various kinds of law-breaking—Whether may be drawn—General principles of procedure in such cases.

In proceedings under S. 12, Legal Practitioners' Act, the question to be considered is whether the facts proved constitute an offence implying a defect of character which unfits the Pleader or Mukhtear, from practising as such.

The principle upon which the High Court should proceed is, that where a Pleader wilfully breaks the law upon one or two isolated occasions, it may not be necessary for the Court to take any action under S. 12, Legal Practitioners' Act. Where, on the other hand, the Pleader has wilfully and habitually broken the law, then the Court may quite reasonably come to the conclusion that his acts imply such a defect of character as to render him unfit for practice as a Pleader, and in such a case, the Court may dismiss him from practice. Where the acts of the Pleader fall midway between the two extremes, then the Court may think it sufficient to warn the Pleader, by inflicting upon him a period of suspension or otherwise, that if he persists in breaking or defying the law, such conduct will inevitably lead the Court to the conclusion that he is totally unfit to practise in the Courts.

Where a Pleader had been prosecuted three times and convicted twice for semi-political offences, and he was, in fact, suspended from practice owing to his inability to obtain a licence for a period a litle over six months:

Held, that he had been punished sufficiently and that he should be warned that if he persisted in these courses, the Court would eventually have to consider the question of dismissing him from practice. 35 Cr.L.J. 592=A. I. R. 1934 Cal. 242=38 C.W.N. 276=148 Ind. Cas. 57.

——S. 12—Pleader of 60 years, having unblemished character convicted for embezzlement of money.

Where a Pleader convicted under S. 409, Penal Code, for embezzlement was 60 years old having an unblemished character till then:

Held, that though the circumstances made the case all the more distressing, still the Courts had a duty to the public and to the profession itself, and that that duty could only be exercised by striking his name off the register of Pleaders. A.I.R. 1938 Rang. 288=176 Ind. Cas. 752.

——S. 12—Conviction for criminal breach of trust.

Advocate convicted for offence of criminal breach of trust and attempt to cheat—**Held**, his name should be struck off from the roll of Advocates. A.I.R. 1935 Rang. 458=37 Cr.L.J. 200=159 Ind. Cas. 1036.

——S. 12—Conviction for criminal breach of trust—Circumstances of mitigation—Less severe punishment awarded.

A legal practitioner was convicted of criminal breach of trust and abetment thereof, in respect of certain moneys of a client. It was found that he was to a certain extent the victim of his senior. He paid the amount of defalcation after his conviction. High Court in consideration of the fact that he was victim of circumstances and had expressed his repentance and promised to lead honourable life suspended the practitioner for one year. 1929 Cr.C. 515=33 C.W.N. 829=A.I.R. 1929 Cal. 771.

——S. 12—Temporary misappropriation.

Conviction for criminal breach of trust which was found to have been temporary and not an attempt at permanent misappropriation is a temporary aberration on the part of the pleader who was convicted and therefore, an order of suspension for six months was held sufficient to meet the requirements of the case. 81 Ind. Cas. 949=25 Cr.L.J. 1125=A.I.R. 1925 Cal. 238.

——S. 12—Pleaders convicted under Ss. 145, 151, Penal Code and Ordinance VI of 1930, S. 3.

Where two Pleaders were convicted of offences under Ss. 145 and 151, Penal Code, and also under S. 3 of Ordinance VI of 1930:

Held, that regard being had to the nature of the offences for which they were convicted, which involved serious defect of character and to the fact that there was no expression of regret for their past behaviour, they should be dealt with under S. 12, Legal Practitioners' Act. A. I. R. 1933 Cal. 731=60 C. 1453=38 C.W.N. 278=145 Ind. Cas. 316.

——S. 12—Criminal offence—Penal Code—S. 144 and S. 150.

If a mukhtear is convicted under Ss. 144 and 150, I.P.C., the High Court must, if any action is to be taken against him, initiate proceedings against him under S. 12

of the Act. 11 C.L.J. 164=11 Cr.L.J. 214=5 Ind. Cas. 727.

——S. 12—Conviction under S. 506, Penal Code—Release by Local Government under Notification dated March 5, 1931—Suspension, if proper.

Where a Mukhtear was convicted under S. 506 of the Penal Code for threatening a person with the consequence that his tenants would stop rendering of unpaid labour or 'Begar' and payment of rent, and pending an appeal preferred by him, he was released in accordance with Government of India Notification dated March 5, 1931, granting amnesty to prisoners whose offences did not involve violence or incitement to violence, and disciplinary proceedings were subsequently instituted against him:

Held, that the release by the Local Govt. amounted to an expression of opinion on their part, that he was convicted of an offence which did not imply violence or incitement to violence, and that the threat, although it came within the definition of crimina lintimidation, did not imply any violence either to person or to property, and hence proceedings regarding him as to why he should not be suspended should be dropped. A.I.R. 1932 All. 232=(1932) A.L.J. 116=33 Cr.L.J. 830=139 Ind. Cas. 787.

——S. 12—Intimidating and assaulting women—Conviction for assaulting woman—No reason for suspension.

A pleader was convicted under Penal Code for intimidating and assaulting a woman in a most reprehensible manner. It was the first occasion on which disciplinary action was called against him.

Held, that the conviction was not by itself sufficient to show defect of character which unfits him to be a pleader within the meaning of S. 12.

Held further, that though the words "any other reasonable cause" in S. 13 seem to be wide enough to include the case, still the conduct was not such as to justify suspending him from practice. 1929 Cr.C. 608=A.I.R. 1929 Rang. 352.

——Ss. 12, 13—Conviction of Pleader for breach of Salt Law—Misconduct—Suspension from practice.

Where a Pleader was convicted with a number of other people for an offence under the Salt Act which he committed by way of political demonstration and was sentenced to rigorous imprisonment, their Lordships held that offences of this nature could be dealt with under the Legal Practitioners' Act, and suspended the Pleader from practice for a period of six months. A.I.R. 1931 Pat. 208=12 P.L.T. 161=132 Ind. Cas. 359 (F.B.).

——S. 12—Gambling.

The conviction of a pleader under the Gambling Act can hardly be looked upon by itself as sufficient reason for disciplinary action. 1929 Cr.C. 608=A.I.R. 1929 Rang. 352.

——Ss. 12, 13 and 14—Pleader keeping a common gambling house—Suspension from practice.

The conviction of a pleader under S. 6 of the Towns Nuisance act for using his office as a common gambling house implies a defect in character which unfits him to be a pleader within S. 12 of the Legal Practitioners' Act. Having regard to the novelty of the case the High Court suspended the pleader from practice for a period of six months only. In a proceeding under S. 12 of the Legal Practitioners' Act the whole of the procedure prescribed with regard to charges under Ss. 13 and 14 need not be followed The Court should not re-try the case which ended in a conviction of the pleader. The only question to be considered is whether the offence of which the pleader has been convicted implies a defect of character unfitting him to be a pleader. 42 Mad. 111=35 M.L.J. 65=25 M.L.T. 71 =(1918) M.W.N. 847=8 L. W. 621=19 Cr. L. J. 1001 =48 Ind. Cas. 341 (S.B.).

2. Correctness of conviction.

——S. 12—Correctness of conviction.

In proceedings against a Pleader under S. 12 in respect of a conviction, he is not entitled to question the correctness of his conviction. A. I. R. 1936 Mad. 318=(1936) M.W.N. 238=70 M L. J. 408=37 Cr.L. J. 571=43 L. W. 426=59 M. 732=162 Ind. Cas. 414 (F.B.).

——S. 12—Effect of conviction.

Conviction of a legal practitioner is sufficient without any further enquiry to justify the High Court in taking proceedings under S. 12. It is not permissible to go behind the conviction and the pleader cannot be allowed to have indirect appeals against the judgment of conviction. 1929 Cr. C. 515=33 C. W. N. 829=A.I.R. 1929 Cal. 771.

——S. 12—Correctness of conviction.

That having regard to the character of the offence an order under S. 12 of the Legal Practitioners' Act could properly be passed against them. That in such a proceeding it was not open to them to go behind their conviction by the criminal court and invite the court to examine the facts with a view to showing that the conviction was erroneous. 26 I.A. 242: S. 22 A-49; 3 C.W.N. 736, followed. But the court in such a case will look into all the facts as found to determine the position of the persons concerned. (1910) 14 C.W.N. 1073=12 C.L. J. 553=7 Ind. Cas. 622.

3. Criminal complaint.

——S. 12—Criminal complaint.

If a complaint is made against a legal practitioner that he has committed an offence, it is a matter which should be tried before a Criminal Court and not by proceedings under the Legal Practitioners' Act. If he is convicted by the former then disciplinary action can be taken. Under S. 40 a pleader should not be suspended without an opportunity being afforded to defend himself. 76 Ind. Cas. 825=2 Bur. L. J. 213=25 Cr.L. J. 265.

4. "Criminal offence"—Meaning of.

——S. 12—'Criminal offence', meaning of—Being bound over, effect of.

The words "criminal offence" used in S. 12, Legal Practitioners' Act, mean an offence punishable under the Penal Code as well as any act or omission made punishable by any law for the time being in force which is indictable and punishable criminally by Courts of Justice.

But, in order to apply the provisions of S 12, conviction for "criminal offences" within the meaning of the expression used in S. 12, is not enough. The Court has to inquire into the nature of the crime in order to decide whether the offence was of such a nature as to imply defect of character which would render the lawyer concerned unfit to be a member of the legal profession.

A Pleader bound down under S. 107, Criminal Procedure Code, to keep peace and sent to jail for refusing to give security, cannot be said to be convicted of any criminal offence within the meaning of S. 12.

A Pleader convicted under S. 3, Police Incitement to Disaffection Act, and sentenced thereunder and a Pleader convicted under S. 17, Criminal law (Amendment) Act and sentenced thereunder are Pleaders convicted of "criminal offences" within the meaning of S. 12, but the conviction is not in itself sufficient to show a defect of character. A.I.R. 1931 Pat. 369=12 P.L.T. 773=32 Cr.L. J. 1256=11 Pat. 365=134 Ind. Cas. 945 (F.B.).

5. Jurisdiction and discretion of High Court.

——S. 12—Conviction of Pleader for criminal offence—Misconduct.

The conviction of a Pleader or Barrister is evidence of misconduct and the High Court has jurisdiction to take disciplinary action against him. 36 Bom. L.R. 1136=A.I.R. 1935 Bom. 1 (3)=59 B. 57=154 Ind. Cas. 546 (F.B.).

——S. 12—Discretion.

The use of word "may" in S. 12 after the words "the High Court" shows that the discretion of the High Court in each particular case is absolute. 1929 Cr. C. 515=33 C.W.N. 829=A.I.R. 1929 Cal. 771.

6. Jurisdiction of Subordinate Court.

——Ss. 12, 13 (f) 14—Subordinate Court, Jurisdiction of—High Court, powers of.

When a mukhtear has been convicted of any criminal offence implying a defect of character, it is the High Court alone which can take proceedings under S. 12 of the Legal Practitisners' Act. A Subordinate Court has no jurisdiction to initiate proceedings in such a case. (1910) 5 Ind. Cas. 727=11 C.L. J. 164=11 Cr.L. J. 214.

7. Offence not committed in professional capacity.

——S. 12—Jurisdiction of High Court take disciplinary action.

The High Court has jurisdiction to take disciplinary action against a Pleader though the criminal offence was not one committed in his professional capacity. A.I.R. 1036 Mad. 318=43 L.W. 426=(1936) M.W.N. 238=70 M.L.J. 498=37 Cr.L.J. 571=59 M. 732=162 Ind. Cas. 414 (F.B.).

——S. 12—Offence not committed in professional capacity.

The fact that the Advocates concerned had been convicted of a criminal offence was evidence of the misconduct within meaning of S. 10 (1) of Bar Councils Act XXXVIII of 1926 and the misconduct, though not committed in their professional capacity, entitled the Court to take disciplinary action against them. Where, in the exercise of their statutory discretion, the Judges proceed to consider whether in the circumstances the misconduct so proved called for any disciplinary action, whether in the nature of reprimand, suspension or removal from practice and decide that it does not, this action in their exercising their discretion is not such as can be considered by Privy Council. 1935 A.W.R. 1029=1935 O.W.N. 964=1 B.R. 828=(1935) M.W.N. 913=A.I.R. 1935 P.C. 168=42 L.W. 480=69 M.L. J. 481=37 Bom. L.R. 722=39 C.W.N. 1281=(1935) A.L. J. 1092=59 B. 676=62 I.A. 235=157 Ind. Cas. 428(P.C.).

——S. 12—Misconduct—Contempt of Court.

Pleader committing contempt of Court in his capacity as suitor is punishable in his professional capacity for misconduct. (1933) A.L. J. 251=A.I.R. 1933 All. 224 (225)=55 A. 148=145 Ind. Cas. 847.

——S. 12—Criminal offence—Striking off the roll.

The Court should not hesitate to strike off the roll a practitioner found guilty of a serious offence though it is not in relation to his profession. The test is, whether he is fit to continue to be an officer of the Court. 14 C.W.N. 1073=11 Cr.L. J. 503=12 C.L. J. 553=7 Ind. Cas. 622.

8. Re-admission.

——S. 12—Conviction for criminal offence, whether permanent bar—When can be re-admitted.

When persons are struck off the roll, it is always said that the door is not irrevocably shut behind them, and that after years of industry, straightforwardness of life, and conduct which shows repentance and the determination to amend, they may ultimately find their way back to the honourable profession which they once disgraced. That lenity of outlook results from the consideration that it is impossible to shut out from a man of education, who has once borne a good character, the hope that he may rise again. But it does not mean that persons who have been properly removed from the roll should come again and again with repeated applications within months, or even within a few short years, after the event. A.I.R. 1940 Rang. 32=41 Cr.L. J. 272=186 Ind. Cas. 268.

——S. 12—Finality of order of disbarment.

Though the name of a legal Practitioner may have been removed from the rolls by the High Court by reason of professional misconduct or criminal conviction, the Court may re-admit him, if satisfied that during the interval which has elapsed since the order of removal was made, he carried an unimpeachable character and may be allowed to return to the practice of an honourable profession. An order of disbarment of a legal practitioner is not necessarily final or conclusive for all time. 38 Cal. 309=12 C.L.J. 625=15 C.W.N. 357=12 Cr.L. J. 22=8 Ind. Cas. 1108.

——S. 12—Mukhtear — Criminal conviction — Misconduct — Removal — Restoration — High Court, power of.

It is open to a Court, when a legal practitioner has been dismissed for criminal conviction or misconduct of any description in the widest sense of the term, to re-admit him after the lapse of time, if he satisfies the Court that he has in the interval conducted himself honourably and that no objection remains as to his character or capacity. The authorities on the subject reviewed. Where a mukhtear who was dismissed upon conviction for a criminal offence of a grave character implying moral turpitude and was also directed to be prosecuted for perjury, applied after the lapse of several years to be reinstated, and it was found on enquiry that he had not made a full disclosure of his previous history, the High Court refused to make the order for re-admission. (1910) 12 C.L.J. 625=15 C.W.N. 357=38 Cal. 309=12 Cr. L, J. 22=8 Ind. Cas. 1108.

——S. 13

See also: "Legal practitioner."

Synopsis.

1. Acting on instructions from unauthorised persons.
2. Agreement for payment on success.
3. Altering document.
4. Appeal.
5. Appearing for opposite side.
6. Business.

7. Client's money.
8. Charges and threats to court.
9. Conviction.
10. Criminal offence.
11. Duties of Legal Practitioner.
12. False certificates.
13. False statements, contradictions and suppressions.
14. Fees and Non-payment.
15. Gratification for employment.
16. Identification.
17. Improper advice.
18. Jurisdiction and Procedure.
19. Misconduct prior to enrolment.
20. Mistakes and Negligence.
21. Nature of proceedings.
22. Non-acceptance of brief.
23. Non-attendance.
24. Politics.
25. Privilege.
26. Proof of charge.
27. "Reasonable cause"—Cl. (f).
28. Renewal of Sanad.
29. Suborning evidence.
30. Unprofessional conduct.

1. Acting on instructions from unauthorised persons.

——S. 13—Acting without authority—Acceptance of vakalat unauthorised person.

The rule relating to the acceptance of vakalatnamas and Mukhtearnamas must be scrupulously and punctiliously observed. Where a Mukhtear not influenced by any dishonest or corrupt motive accepted a Mukhtearnama from an unauthorised person known by him to be such, his conduct calls for something more than censure. The Mukhtear was suspended from practising for a period of three months. 19 Cr.L.J. 227=43 Ind. Cas. 819 (Cal.).

——Ss. 13 (a), 14—Acting without instructions—Instructions to practitioners directly from clients or their duly authorised agent.

Instructions must be received by legal practitioners directly from clients or their duly authorised agents. Gross negligence tantamount to misconduct is attributable to a mukhtear who receives and acts on a mukhtearnama from an unauthorised person without proper inquiry. 2 Pat. L.J. 36=18 Cr.L.J. 140=37 Ind. Cas. 492.

——S. 13 (a)—Acting without instructions—General rules and orders of Calcutta High Court rule 45 (e)—Receiving instructions from unauthorised persons—Bona fide mistake.

On the instructions of the clerk of a pleader who has left the Court to practise in another Court, another pleader signed the vakalatnama for the plaintiff, and withdrew the money for plaintiff, deposited by the judgment-debtor in Court, and handed it over to the clerk bona fide believing that the clerk had taken out his "card" for the year while in fact he had not. The pleader was held to be guilty of contravening the provisions of S. 13 (a) of Legal Practitioners' Act and of rule 45 (e) of general rules and orders of High Court and deserved severe censure for his act. 36 Ind. Cas. 442 (Cal.).

——S. 13 (a)—Acting without instructions.

A pleader receiving instructions from an unauthorised person, who is neither the recognised agent, guardian, servant relative or authorised to give instruction on behalf of the party is guilty of misconduct, under S. 13. 20 C.W.N. 1016=17 Cr. L.J. 229=34 Ind. Cas. 645 (F.B.).

——S. 13 (a)—Acting without instructions.

S. 13 (a) prohibits pleaders from acting on instructions from persons who are not their clients or agents or near relative but not from acting without instructions when they are entrusted with the whole of the Court business. 1 Ind. Cas. 667 (Mad.).

2. Agreement for payment on success.

——S. 13—Agreement with client to take certain percentage of proceeds of suit as remuneration only if it is successful.

An agreement entered into by an Advocate with his client, to take certain percentage of the proceeds of the suit as remuneration for his services only if the suit is successful, amounts to professional misconduct. A.I.R. 1939 Mad. 772=(1939) M.W.N. 766=(1939) 2 M.L.J. 320=50 L.W. 234=41 Cr.L.J. 83=I.L.R. (1940) Mad. 17=184 Ind. Cas. 606 (S.B.).

——S. 13—Allowing clerk to enter into contracts for sharing in proceeds of litigation.

Where an Advocate allowed his clerk to enter into agreements with his clients to finance the litigation about property which they launched against others, the clerk was to be compensated for his labour and expenses by being given a share in the property in dispute if the cases be ultimately decided in favour of his clients, and in pursuance of this, the Advocate appeared for those clients without receiving any fees in advance:

Held, that his conduct in allowing his clerk to enter into such a transaction called for severe censure, but his conduct in advising him in the matter and then appearing for the litigants without receiving the usual fees in advance amounted to professional misconduct and such conduct constituted a reasonable cause for the suspension of his licence to practise as an Advocate. A.I.R. 1932 Lah. 584=34 P.L.R. 445=142 Ind. Cas. 689.

——S. 13 (b)—Agreement for payment on success.

To agree with a client for inam or present over and above his fees in the case of a success, is disgraceful for an advocate. His conduct accounts to gross misconduct in his profession if he attempts to extract more supplemental fee at the last moment from his client, on whose failure to pay he absents himself from the case. The failure of a barrister in exacting money as supplemental fee does not absolve him from his original obligation to his client and the court. 14 Bom.L.R. 691=13 Cr.L.J. 916=16 Ind.Cas. 780 (F.B.).

——Ss. 13, 14, 15—Agreement for payment on success.

Agreement to pay a pleader in event of success if not actually illegal, is at least highly objectionable. 8 A.L.J. 151=12 Cr. L. J. 12=9 Ind. Cas. 130.

——S. 13—Champertous agreement by way of—Relation of pleader and client.

It is highly improper and grossly unprofessional conduct on the part of an advocate or of a vakil to enter into an agreement with a client to furnish him with funds for a litigation in consideration of his assigning over a part of the property in litigation if recovered to such Advocate or Vakil.

When a Vakil takes an active interest in a case during its pendency in the lower court and there is an understanding that he will be engaged as Vakil when the case comes up to the High Court it cannot be said no relationship of pleader and client existed between himself and the client before the actual execution and acceptance of the Vakalatnama. (1901) 4 C.L.J. 262 (F.B.)

——S. 13—Professional misconduct—Champertous agreement with client.

It is professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or professional remuneration a share of the property fund or other matter in litigation for his services as advocate in such litigation upon the successful issue thereof. Semble:—The same principle is applicable to the case of a pleader. Per Hill, J.—Any arrangement between counsel and client which brings the the personal interests of the former into conflict with his duty as an advocate is unprofessional. (1900) 4 C. L. J. 259 (F.B.)

3. Altering document.

——S. 13—Mukhtear — Breach of professional rules—Alteration of document — Accusation of respectable men of perjury — Punishment — Duties of mukhtear.

Where a mukhtear was found to have acted as a mukhtear on behalf of the defendant in a case without filing as mukhtearnamah, and had made alterations in a receipt and a cash book with a view to deceiving the Court and came to the Court with a case which was manifestly untrue and accused respectable persons of perjury and of having set up a false case against him:

Held, that such a man was no longer fit to remain a member of the profession.

Dictum.—'A mukhtear's profession is a laborious one. It is of great public utility. From mukhtears great qualities are expected and heavy responsibilities are placed upon their shoulders and, however humble their relative position in the legal hierarchy may be, their reputation should be as jealously guarded by the Courts as those of Pleaders or Vakils or Barristers.' 13 P.L.T. 552= A.I.R. 1932 Pat. 289=33 Cr. L. J. 874=140 Ind. Cas. 107 (S.B.)

——Ss. 13 (b) and 14 — Altering documents—Insertion of name in Vakalatnamah.

A Mukhtear added to the names in a Vakalatnamah, his own name, also altered certain words in the Vakalatnamah at the request of the individual who had executed the Vakalatnamah, without any improper motive as he could not file a criminal appeal unless the Vakalatnamah, contained his name. Held, as the mukhtear was not actuated by any improper motive which would constitute grossly improper conduct, no order under S. 14 of the Act should be passed. The apology of the mukhtear expressing regret might be accepted. 17 C.W.N. 823=13 Cr. L.J. 846=42 Ind. Cas. 718.

——Ss. 13 (b) and 14—Altering document—Court record.

Where a property to be sold in execution of a decree was, owing to the carelessness of the pleader for the decree-holder and his clerk, mis-described in the application for execution, the pleader was held to have acted without due care and sense of responsibility and thus was guilty of grave impropriety in the performance of his duty. In the case he was suspended from his practice for 3 months. Held, (ordering the pleader's suspension for three months) that to tamper with the Court's records is a serious matter and the pleader acted without due care and caution and without sense of responsibility in allowing it to be done by his clerk. 20 C.W.N. 1069=18 Cr. L. J. 42=36 Ind. Cas. 874.

——S. 13 (b)—Altering document—Substitution of names in summons.

Where a solicitor acting for a plff. who had been refused a warrant for the detention of the deft. by a Civil Court started a criminal process on the same subject-matter, and, by means of allegations to which the Civil Court attached no credit, obtained his warrant form a different Court, almost as a matter of course, his conduct does not necessarily involve any punishable contempt of the Civil Court. The law does not restrict a litigant to a single form of remedy and he may pursue all the legal remedies appropriate to his grievance. Where a solicitor substituted the name of two witnesses in a summons on the ground that the persons originally summoned were totally ignorant of the facts of the case. Held, that the solicitor was not guilty of forgery, as there was no intent to defraud and at the most he committed an irregularity for which some pecuniary penalty on his part was an adequate punishment. The Privy Council set aside the order striking off the name of the solicitor and restored his name to the Roll. 16 C.W.N. 386=9 A.L.J. 676=15 C.L.J. 639=14 Bom.L.R. 471=23 M.L.J. 194=12 M.L.T. 106= (1912) M.W.N. 683=13 Cr. L. J. 440=15 Ind. Cas. 72 (P.C.).

4. Appeal.

——S. 13—Appeal to Privy Council—Considerations—Practice of Allahabad High Court.

When an order striking off the name of a Pleader from the roll of Pleaders on the ground of misconduct, has been made, the practice of the Allahabad High Court has been to treat the order as falling under S. 109 (c), Civil P. C. although the Calcutta and Patna High Courts have taken a different view. The certificate of leave to appeal is not to be as a matter of course, but can be granted where the case is otherwise a fit one for appeal to His Majesty in Council.

Where, in an appeal from an order striking off the name of a Pleader from the roll of Pleaders, the point in dispute was naturally not measurable by money and it was of great private importance to the applicant and there were some points of law raised in the case:

Held, that the case could be certified under S. 109 (c) as a fit one for appeal to the Privy Council. A.I.R. 1937 All. 167=(1936) A.L.J. 1272=38 Cr.L.J. 410=1936 A.W.R. 1007=167 Ind. Cas. 666.

——S. 13—Appeal.

An order of High Court refusing to enrol a person as legal practitioner comes under its disciplinary or administrative powers and no leave to appeal to His Majesty can be granted. 4 Pat. L.J. 423, Foll. 70 Ind. Cas. 172=1 Pat. 590=4 P.L.T. 229=A. I. R. 1922 Pat. 603.

5. Appearing for opposite side.

——S. 13 — Misconduct — Change of sides by lawyer.

Change of sides as such by a lawyer is not forbidden by law. Change of sides is forbidden if

there are confidential communications by one side which may be made use of when the lawyer represents the opposite party. It is forbidden if the lawyer obtains his own discharge and acts for the opposite party. It is also forbidden if the lawyer accepts a retainer from the opposite party without first offering his services to his original client. A lawyer is, therefore, not guilty of professional misconduct in accepting a brief for the opposite party if he has no confidential communication of his original client in his possession at that time and the matters in which he had been retained had come to an end and the original client had refused to avail himself further of his services. I.L.R. (1946) Lah. 173=226 Ind. Cas. 70=47 Cr. L.J. 818=A. I. R. 1946 Lah. 301 (F.B.)

——S. 13—Misconduct—Changing sides—Pleader drafting plaint for plaintiff gratuitously as friend appearing for defendant at later stage.

A pleader who acted gratuitously as a friend in drawing up a draft at the request of the plaintiff who filed the plaint himself, and to whom no confidential information was imparted, is not guilty of professional misconduct in appearing for the defendant at a later stage. 226 Ind. Cas. 479=48 P.L.R. 485=A.I.R. 1946 Lah. 329 (F.B.)

——S. 13 and Letters Patent, Cl. 8 (Lah.)—Change of sides by counsel—When forbidden.

Change of sides as such by counsel is not forbidden by law. Change of sides is forbidden if there are confidential communications by one side which may be made use of when the lawyer represents the opposite party. It is forbidden if the lawyer obtains his own discharge and acts for the opposite party. It is also forbidden if the lawyer accepts a retainer from the opposite party without first offering his services to his original client.

In the present case, it was held that there were no confidential communications in possession of the counsel which had not already become public property when he accepted the brief for the opposite party. Further, the counsel did not obtain his own discharge. The proceedings in which he was engaged by the party had terminated and the party had refused to avail himself of the services of the counsel. In the circumstances, the counsel was not guilty of professional misconduct in accepting the brief of the opposite party. A. I. R. 1946 Lah. 301 = I.L.R. (1946) Lah. 173=226 Ind. Cas. 70=47 Cr.I.J. 818 (F B.).

——S. 13—Decree for accounts obtained by son against mother—Decree obtained by mother against son for maintenance—Pleader **L** acting for mother in her suit—**L** then acting for son in execution of his decree against mother—Misconduct.

A son sued his mother for an account of the management of his estate during his minority, and obtained a money-decree against her. The mother subsequently sued the son for the recovery of maintenance due to her and for future maintenance. The suit was decreed. A Pleader **L** acted for the mother in the suit against the son and was, in fact, her legal adviser; he subsequently agreed to act for the son, and filed an application in execution proceedings arising out of the decree obtained by the son against the mother. The question having arose as to whether this amounted to professional misconduct:

Held, that L was not guilty of professional misconduct in filing the petition in execution of the son's decree. The son's suit had nothing to do with the mother's suit. It would have shown a spirit more in keeping with the tradition of the profession if L had not acted for the son, but there was nothing professionally wrong in so doing. A.I.R. 1938 Mad. 276=47 L W. 192=(1938) M.W.N. 220=I.L.R. (1938) Mad. 399=174 Ind. Cas. 44 (S.B.).

——S. 13—Held, though Pleader did not act to the standard of propriety expected, yet no disciplinary action was justified.

The position of the members of the legal profession is very high but, at the same time, delicate. They must take scrupulous care that nothing is done by them which leaves room for any accusation being made against them;

Held, that though the Pleader did not act up to that standard of propriety which is expected from a member of the legal profession who must enjoy the complete confidence of the litigant public and of the Court, and he mixed himself up in transactions which were not straightforward, and technically his appearing in the land registration case against his client, was improper, it was clear at the same time that he did not act without the knowledge, consent or at least acquiescence of the client. Under the circumstances, no disciplinary action would be justified. A.I.R. 1928 Pat. 28=4 B.R. 192=39 Cr. L. J. 222=172 Ind. Cas. 849 (S.B.).

——S. 13—Engagement of Counsel—When prevented from appearing for opposite party—Definite retainer with fee, necessity of.

A great deal has to take place before Counsel can be said to be engaged by a party to a suit so that it would be unprofessional for him to appear on the other side. In order to prevent Counsel appearing for the other party, he must have a definite retainer with a fee paid or he must have had such confidential information from one of the parties as would make it improper for him to appear for the other party. A.I.R. 1932 All. 536=(1932) A.L.J. 755=33 Cr.L.J. 867=140 Ind. Cas. 62.

——S. 13 (b)—Misconduct—Confidential communication by party before engaging practitioner—Practitioner subsequently accepting brief from other side—Propriety.

A legal practitioner allowed a party to see him and to give his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate and without also informing him that the other side had approached him to represent them in the matter and that he had not declined their offer. Subsequently the legal practitioner was engaged by the other side. **Held,** that the conduct of the practitioner could not be regarded as professional misconduct, but the case came within the ambit of the rule that "Counsel ought not to accept a brief against a party even though the party refuses to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party" and that the Court was justified in holding that he should not appear in the case. 8 Rang. 446=128 Ind. Cas. 354=1930 Cr. C. 1233=A.I.R. 1930 Rang. 355.

——S. 13—Working for opposite parties.

Pleader drafting complaint for complainant in one case and acting for accused in a different case instituted by same complainant—No offence is committed. 109 Ind. Cas. 228=8 Lah. 671=29 P.L.R. 126=29 Cr. L. J. 500=A.I.R. 1928 Lah. 65.

——S. 13—Working for both sides, amounts to misconduct.

A legal practitioner cannot represent conflicting interests or undertake the discharge of inconsistent duties. When he has once been retained and received

the confidence of a client, he cannot accept a retainer from or enter the service of those whose interests are adverse to his client in the same controversy or in a matter so closely allied thereto as to be in effect a part thereof. The rule is rigid and is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights or the interests which he should alone represent. Fidelity is required from all who hold fiduciary relations; they must not lightly enter upon such relationships, but if they do, they will not be permitted to be disloyal and of all species of disloyalty, desertion and adherence to the enemy or to the opposite party in a suit is recognised as the worst. 72 Ind. Cas. 22=37 C.L.J. 48=24 Cr. L. J. 294=A.I R. 1923 Cal. 106.

——S. 13 (b)—Appearing for opposite side.

In order to bring a pleader within the purview of S. 13 of the Act it is not necessary that there should be an intentional disobedience of the rules or that there must be some act involving a moral stigma or proof of actual injury to the litigant. A pleader who acts for both the parties in the suit at one stage or other is guility of gross negligence amounting to professional misconduct. 3 Pat. L. J. 390=19 Cr. L. J. 636=45 Ind. Cas. 684.

——S. 13—Appearance for opposite side—Professional etiquette.

It is improper on the part of a legal practitioner, who has acted for one party in a dispute, to act for the other party in subsequent litigation between them relating to or arising out of that dispute. It is a matter which concerns the honour of the profession. Such conduct is open to misconception and is likely to raise suspicion in the mind of the original client and to embitter the subsequent litigation. 21 C.W.N. 1137=(1917) M.W.N. 636=7 L.W. 133=42 Ind. Cas. 236 (P.C.).

——S. 13—Appearance for opposite party.

A **mukhtear** is not guilty of professional misconduct, where in the absence of any instructions from the first client he appears for the opposite party in a subsequent connected proceeding. 13 A.L.J. 475=16 Cr. L. J. 593=30 Ind. Cas. 145 (F.B.).

——S. 13—Appearing for opposite side—Appearing for complainants — Proceedings relating to immovable property.

A mukhtear appeard in assault proceedings for certain accused. The complainant in the assault proceedings instituted proceedings under S. 145 of the Cr.P. Code and the mukhtear appeared for him. The defendants did not offer to engage him. **Held**, on the facts of the case, that the mukhtear was not guilty of any professional misconduct. Pleaders should make it a point as far as possible to appear for the party who first employed them. 13 A.L. J. 475=16 Cr.L.J. 593=30 Ind. Cas. 145 (F.B.)

——S. 13 (b)—Appearing for opposite side.

A professional gentleman should, as far as possible, stick to the side who first employed him. It might be a very good practice, when gentleman were offered instructions by the opposite side in any connected case, that they should at least in the first place inform their first clients. 16 Cr.L.J. 420=28 Ind. Cas. 996 (All.)

——S. 13—Appearance for opposite side—Pleader retained by one party—When entitled to appear for opposite side.

When a client engages another pleader the presumption arises that the services of the original pleader are not required and that he is free to appear for the opposite side. 16 M.L.T. 349=(1914) M.W.N. 785=25 Ind. Cas. 712.

——S. 13—Appearing for opposite side—Power of Court to prohibit.

Where a pleader who had appeared in criminal proceedings appeared for the opposite party in a subsequent civil suit, the Court was justified in prohibiting his appearance, as the civil suit was connected with the previous criminal proceedings.

No rule is necessary to enable a subordinate Court subject to correction by the High Court to refuse, audience to a pleader where, by his appearance, he is guilty of professional misconduct. 38 Mad. 650=25 M.L. J. 567=21 Ind. Cas. 629.

——S. 13 (b)—Appearing for opposite side.

A legal practitioner, who has appeared for a party in a case cannot act for the opposite party in a later stage of the same proceedings or in subsequent litigation, unless he has been discharged, without misconduct, or he has completed the business he was engaged to perform, and has no secrets to carry with him that can be used to his former client's prejudice. (1910) I.U.B.R. 50=12 Cr.L.J. 57=8 Ind. Cas. 1174.

——S. 13 — Unprofessional conduct — Attorney appearing for plaintiff and defendant.

An attorney whom in the name of a firm of which he was the sole partner appeared on behalf of the plaintiff also appeared in his own personal capacity for the defendants:—**Held**, that he was guilty of contempt of court and of improper behaviour, and must be suspended. (1908) 3 C.L.J. 165.

——S. 13—Pleader appearing for one party in a civil suit for land appearing for the opposite party in criminal proceedings in respect of the same land—Propriety of.

The mere fact that in a civil suit a pleader has been employed by a party in relation to a particular piece of land should not alone make it misbehaviour to appear against him in criminal proceedings connected with the same land. (1902) 4 Bom. L.R. 67=26 B. 423 (F.B.)

——S. 13—Professional misconduct of—Information obtained as the solicitor of one party could be utilized under certain circumstances while acting for another.

Though those things which an attorney learns from his client or in consequence of his employment by his client or in consequence of his employment by his client, he is forbidden to disclose and any betrayal of his confidence would be visited by the court as gross misconduct, yet if he learns matters relating to his client under such circumstances that if questioned about them in a court of justice he could not refuse to answer them he is not within the court's jurisdiction. 16 L.T. N.S. 715, foll. A solicitor is not guilty of misconduct because, having changed sides, he uses for his new client information acquired from his old client if it was open to him to obtain such information from public sources. 9 Bom. L.R. 38.

——S. 13—Information obtained when appearing for one person—Use of against him when appearing for his adversary—Propriety of—Test.

Those things which a pleader learns from his client, or in consequence of his employment by his client, he is forbidden to disclose and any betrayal of his confidence would be visited by the court as gross misconduct. But if he learns matters relating to his client under such circumstances that if questioned about them in a court

of justice he could not refuse to answer them, he is not within the disciplinary jurisdiction of the court. (1902) 4 Bom. L.R. 67=26 B. 423 (F.B.).

6. Business.

——S. 13 (f)—Engagement in trade or business—Power of Court to control activities of Pleader—R. 951 (Calcutta High Court).

Though Cl. (f), S. 13 of the Act need not be read ejusdem generis with the other clauses of the section and cases of moral turpitude unconnected with the discharge by the legal practitioner of his professional duty may come within the expression 'any other reasonable cause,' yet, in the absence of definite rules to that effect, engagement in trade or business or other occupation, however derogatory to the dignity of the profession or detrimental to the discharge of the duties of a legal practitioner, would hardly come within the expression. Rules restricting the liberties of Pleaders in this respect are dictated by public policy and are, in one form or another, in force in some of the other provinces as well. The new R. 951 of the Calcutta High Court was framed with the object of softening the rigour of such rules as were in existence before, and it professes not to preclude Pleaders and Mukhtears, while practising as such, from holding, any appointment or engaging themselves in any occupation, trade or business, unless such appointment, occupation, trade or business should appear to be derogatory to a practising member of the legal profession or is likely to interfere with the due discharge of his professional duties. The provision in the rule as regards previous notice to the Court is a provision evidently made for the benefit of the practitioner himself so that he may not be in a state of uncertainty as to what the consequences of his proposed action may be. The Rule was entirely within the competence of the High Court to make. In re A.I.R. 1936 Cal. 205=40 C.W.N. 377=63 C.L.J. 127=37 Cr.L.J. 590=63 C. 855=162 Ind. Cas. 517 (S.B.).

——S. 13—Investments of his savings by Advocate, when constitute engagement in money-lending business.

What does or does not constitute money-lending business must depend on the facts and circumstances of each case and is not capable of an exact definition. The question is a mixed question of fact and law and the answer to the question must depend on the facts found in each particular case. An element of continuity and habit is essential to constitute the exercise of a profession or business.

Investments of his savings by an Advocate do not necessarily amount to engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless, if investments by way of loan are made as a matter of regular business and for gain, there can be no escape from the conclusion that such investments constitute engagement in money-lending business. A.I.R. 1940 All. 1=(1939) A.L.J. 957=41 Cr.L.J. 211=1939 A.W.R. 828=I.L.R. (1940) All. 60 =185 Ind. Cas. 611 (S.B.).

——S. 13—Advocate joining as partner in firm.

The carrying on of a trade or business is ordinarily inconsistent with the practice of the profession of an advocate. The conduct of an Advocate in joining as a partner in a firm constitutes professional misconduct:

Held, that as the Advocate concerned gave an undertaking to suspend his practice and not to do any work of an Advocate while he was engaged in the aforesaid trade or business, it was not necessary to impose any penalty on him for the offence and that the requirements of the case would be met by the Court expressing their disapproval of his conduct. 11 Luck. 477=1935 O.W.N. 1029=A.I.R. 1936 Oudh 18=158 Ind. Cas. 278.

——S. 13 (f)—Pleader doing business of insurance agent also—Pleader, if guilty of professional misconduct.

Where a person enters the profession of the law as Pleader, he must make up his mind to conduct the business of the Pleader and nothing else.

Where a Pleader was running two businesses at the same time, that of a Pleader and that of an insurance agent nominally through his brother:

Held, that such a practice was, in the highest degree, injurious to the interest of the profession and to the interest of the public and that the Pleader had been guilty of professional misconduct. A.I.R. 1936 Pat. 1=16 P.L.T. 781=2 B.R. 159=37 Cr. L. J. 230 (2)=15 Pat. 175=160 Ind. Cas. 23 (S.B.)

——S. 13—Misconduct—Entry into trade.

The carrying on of a family business by a Vakil which has been in existence for a long time, does not amount to entering into any trade, or business within the second paragraph of Rule 26 Part 11 of the Allahabad High Court Rules. Before a Vakil embarks on any commercial transactions he should give notice to and obtain the permission of the High Court. 17 A.L.J. 1147=1 U.P.L.R. (H.C.) 139=52 Ind. Cas. 638.

——Ss. 13 (f) and 14—Madras High Court Rules, R. 27.

A Pleader entered into series of money lending transactions in his own name and his minor son. The transactions in the son's name where found to be only a screen or shield. The transactions were all of an usurious nature. Held, (1) that the pleader violated R. 27 of the High Court Rules under the Act and was guilty of professional misconduct. (2) that the High Court could deal with the pleader under the Act. 21 M.L.J. 559=9 M.L.T. 55=(1911) 1 M. W. N. 111=11 Cr. L. J. 697=8 Ind. Cas. 677 (F.B.)

——S. 13—Agency business—Using principal's money for agent's own business without authority.

A Vakil acting as an agent for sale of immovable property will be acting improperly in using the purchase money for his own purposes without authority from his principles. In the particular case before their Lordships, they deemed it sufficient to censure the vakil for the abuse of his position as agent, having regard to the fact that the vakil was not acting as vakil in the agency and also to the fact that there was no dishonest intention on his part. (1910) 20 M.L.J. 494=7 M.L.T. 427=6 Ind. Cas. 310=11 Cr.L.J. 307.

7. Client's money.

——S. 13—Client's money.

A legal practitioner convicted of embezzling money of client must be removed from rolls altogether. A.I.R. 1941 Lah. 384=I.L.R. (1941) Lah. 731=43 Cr.L. J. 63=196 Ind. Cas. 730 (F.B.).

[Overruling A.I.R. 1936 Lah. 717=38 Cr.L. J. 54=165 Ind. Cas. 601.

——Ss. 13 (b), 14—Pleader retaining client's money as loan.

Lawyers should not, except in very special circumstances, accept loans from their clients. Where a lawyer has withdrawn money for a client and has been permitted to retain it, a document evidencing that transaction should, in every case, be drawn up. It is essential in cases, where the relationship of lawyer and client has been changed to one of debtor and creditor, that the clearest evidence of such a change should be obtainable. If the relationship of Pleader and client is changed into one of debtor and creditor, then no question of misconduct can arise. Failure by the debtor to pay the money on demand does not amount to professional misconduct. A.I.R. 1939 Pat. 343=5 B.R. 795=40 Cr.L. J. 687=18 Pat. 580=20 P.L.T. 607=182 Ind. Cas. 645 (S.B.).

——S. 13—Lady engaging Pleader for two suits, one against her and other filed by her—Fees settled were paid in one year. Both suits then referred to arbitration—Lady paying her Pleader certain amount, half for payment to arbitrator as his fees and rest towards his fees—Year of payment of fees not expired—Pleader appropriating whole amount towards his fees:

Held, that the Pleader wrongfully retained for himself the amount which had been handed to him for payment to the arbitrator and that his conduct in doing so was grossly improper in the discharge of of his professional duty. Even if no criminal offence was committed by him in appropriating whole amount towards his own fees, his conduct was gravely improper on the part of a Counsel and called for disciplinary action. A.I.R. 1938 Lah. 248 =175 Ind. Cas. 29.

——S. 13—Unauthorised retention of client's money—Payments on pressure by cheque—Cheque dishonoured—Cancellation of licence to practise—Sind Courts Act (XII of 1866) S. 16.

Where a legal practitioner retained a considerable sum of his client's money which, when demanded by the client, he gave out that he would pay after obtaining Court's sanction, but in fact it was not necessary to obtain sanction, and when further pressed, he paid part of it, and gave a cheque for the balance on a bank and the cheque was dishonoured:

Held, that the legal practitioner dishonestly retained in his possession the money of his client:

Held, also that, the fact, that the legal practitioner had previously been guilty of malversation of client's money, aggravated the circumstances of the case and it was proper that his licence to practise should be cancelled. A.I.R. 1933 Sind 45=142 Ind. Cas 593.

——S. 13—Client's money.

A legal practitioner received money from the Court on behalf of his client and retained it in his own hands without any authority from the client so to retain it. Subsequently he chose to treat it as loan and gave security which he felt himself at liberty to withdraw at his own will and pleasure:

Held, that this was a grave offence which amounted to professional misconduct for no practitioner is entitled to hold his client's money in his hands and to use it himself for his own private purposes without the consent of his client. 32 M.L.W. 435= A.I.R. 1930 Mad. 927 (F.B.).

——S. 13—Retention of money payable to his client by a pleader for a very long time and refusal to remit the same to that client amounts to misconduct on the part of the pleader. 111 Ind. Cas. 880=5 O.W.N. 880=29 Cr.L.J. 960=11 A.I.Cr.R. 301=A.I.R. 1928 Oudh 464.

——S. 13—Appropriation of client's money amounts to misconduct.

In one case the Vakil was retained by two persons, one a gosha lady and the other an old man. They were the plaintiffs in a suit in which there stood to their credit in Court a sum of Rs. 1,218. The Vakil drew that money out of Court, but did not pay it over to the clients.

In another case, the Vakil appeared on behalf of the defendant in a mortgage suit, the defence was that, owing to the refusal of the plaintiffs to take his money at a time when, defendant was willing to pay it, plaintiffs had inflated the claim by claiming interest throughout a long period when they could have had the money but would not take it. In those circumstances, the client's instructions to the Vakil were to admit that Rs. 760 and odd was due, and he handed that sum to him with instructions to deposit it in Court. The Vakil did not deposit in Court, nor did he disclaim liability formally for the balance of the plaintiffs, claim and after several adjournments he confessed judgment for the whole amount due.

Held, that in both cases the Vakil was guilty of professional misconduct. 88 Ind. Cas. 360=26 Cr.L. J. 1128=22 M.L.W. 152=1925 M.W.N. 321=A.I.R. 1925 Mad. 797 (F.B.)

——S. 13 (b)—Misappropriation.

Misappropriation of the client's money entrusted to a pleader for a specified purpose amounts to professional misconduct. 30 P.W.R. 1917 Cr.=18 Cr.L. J. 903=42 Ind. Cas. 135.

——S. 13 (b)—Misappropriation.

Where a pleader received in his private capacity certain shares from a lady client with instructions to sell them and realise the proceeds on her behalf but appropriated the proceeds, without her consent, to his fees as a pleader, the pleader is guilty of conversion and misconduct. 14 Bom. L. R. 499=13 Cr.L. J. 513=15 Ind. Cas. 785.

——S. 13 (b)—Misappropriation—Conversion of client's money to one's use.

A vakil acting as an agent for the sale of a house and using the sale proceeds for his own use without the consent of the principal, is guilty of unprofessional conduct. (1910) M.W.N. 159=7 M.L.T. 427=20 M.L. J. 494=11 Cr.L. J. 307=6 Ind. Cas. 310.

——S. 13 (b)—Misappropriation.

Retention of client's money without any colour of right is professional misconduct as also to receive money in furtherance of contract of indemnity of bail to deny having received any money or to claim to retain it as fee is a criminal dishonesty, for which the proper punishment is cancellation of sanad. 3 S.L.R. 88=10 Cr.L. J. 412=3 Ind. Cas. 897.

——S. 13—Pleader appropriating client's money—Grossly improper conduct in the discharge of professional duties.

A party in a suit gave his pleader a power-of-attorney to draw out a sum of money which he had recovered in that suit. The pleader drew the money out of Court, appropriated it to his own purpose and, when asked failed to hand it over to his client. **Held**, that the pleader had acted in a grossly improper manner in the discharge of his professional duties. (1903) 31 C. 44=7 C.W.N. 373.

8. Charges and threats to Court.

——S. 13 (f)—Malicious and defamatory allegations by Pleader against Judge.

A Pleader wrote a letter to the Governor wilfully and maliciously making untrue statements reflecting on a District Munsif. In the letter, the Pleader described himself as "the leader of the Bar" and accused the District Munsif of being a sympathiser with the satyagraha movement and that he had, on a certain date, granted an application of an Advocate for an adjournment made on the ground that he wanted to go to a certain place to see a friend offering satyagraha. He further stated that there were "several instances when motions for adjournment on strongest conceivable grounds, e.g., death-bed illness; official duty, etc., were refused by the same District Munsif". It was contended that the Pleader's offence was more in the nature of contempt of Court than professional misconduct:

Held, that since the Pleader, in his professional capacity, had made a malicious and defamatory attack on a Judge, he was guilty of professional misconduct constituting "reasonable cause" within S. 13 (f), Legal Practitioners' Act. A.I.R. 1942 Mad. 630=1942 M.W.N. 481 (2)=55 M.L.W. 502=(1942) 2 M.L.J. 234=44 Cr.L.J. 17=203 Ind. Cas. 182 (S.B.)

——S. 13—Notice served on Subordinate Judge, signed by Pleader—Notice containing malicious and defamatory matter—Pleader, if liable under S. 13.

Rule was issued against a Pleader to show cause why he should not be dismissed or suspended under S. 13, Legal Practitioners' Act, on the ground of grossly improper conduct in the discharge of his professional duty by giving notice under S. 80, Civil P. C., upon a Subordinate Judge, which contained highly objectionable words. It was signed by the Pleader and it purported to be given on behalf on his client. At more than one place in the notice the Subordinate Judge was charged with having misused his powers and also with having wantonly, with intent to harm and disgrace his client, ordered an attachment before judgment. The Pleader, in showing cause, tried to to explain his conduct by saying that he had signed the notice without having read the contents thereof:

Held, that the Pleader's explanation that he signed this document without reading it could not be accepted. The Pleader had been guilty of grossly improper conduct in the discharge of his professional duty and had, therefore, brought himself clearly within the purview of S. 13, Legal Practitioners' Act. 61 C. 522=A.I.R. 1934 Cal. 723=152 Ind. Cas. 58.

——S. 13 (b)—Pleader defending accused in whose case Pleader is interested—Obstruction of the course of justice—Covert attacks on Magistrate for unfairness and partiality—Conduct of Pleader "unseemly, contumacious and impertinent"—Punishment.

U, a Pleader who had been granted a timber-licence in respect of a certain area, had employed another person as his agent for carrying on work under the licence. The latter was charged with offence in connection with the selling of timber in areas and in a manner not permitted by the licence. U appeared for the defence in the case and it appeared from the records that he allowed himself to be 'swayed too much by his own feelings' in the Court of the trial, and conducted the case for the defence in a manner that made manifest his intention improperly to obstruct the courts of justice. The record was replete with frivolous objections and open and covert attacks upon the presiding Magistrate for alleged unfairness and partiality. When called upon to answer the charge of improper conduct, the Pleader urged that he was provoked to commit the improprieties of which he was guilty by the trying Magistrate who was prejudiced against him from the outset because he had consented to appear for the accused in a case in which he was himself "deeply involved":

Held, that the defence was unsustainable and that the Pleader was guilty of grossly improper conduct in the discharge of his professional duties.

Held, also that the conduct of the Pleader was 'unseemly, contumacious and impertinent' and having regard to his grossly improper conduct, he should be suspended from practice for two years.

For the due administration of justice, it is essential that order and decorum in the conduct of judicial proceedings should be maintained. A.I.R. 1933 Rang. 34=34 Cr.L.J. 466=142 Ind. Cas. 828.

——S. 13—Charges and threats to Court.

Making charges against Judicial Officer which the pleader has no prospect of substantiating amounts to misconduct. 110 Ind. Cas. 815=1928 M.W.N. 317=28 M.L.W. 202=51 Mad. 798=10 A. I. Cr. R. 473=1 M.Cr.C. 279=29 Cr.L.J. 783=A.I.R. 1928 Mad. 918=55 M.L.J. 170 (F.B.).

——S. 13—Threat to Magistrate by a pleader is misconduct—Conditional apology is not of any value.

Letter by a pleader which contains vulgar abuse of the Magistrate, and a demand for an apology, apparently followed by a threat of further proceedings is highly improper. Instructions from a client are no excuse whatever for a Pleader exceeding what is his duty towards the Courts. It is presumed that a pleader knows what his responsibilities are in addressing Magistrates and Judges. A conditional apology by the Pleader for such a letter is valueless. 72 Ind. Cas. 353=25 Bom. L.R. 264=24 Cr.L.J. 353=A.I.R. 1923 Bom. 234.

——S. 13—Statements gratuitously and unnecessarily made in open Court which contained imputations against the fairness and impartiality of the Court without any foundation amount to professional misconduct. Pleaders have a duty not only towards their clients but also towards the Court of which they are pleaders, and it is part of their duty to co-operate with the Court in the orderly and pure administration of justice. 71 Ind. Cas. 673=27 C.W.N. 88=24 Cr.L.J. 209=A.I.R. 1922 Cal. 550.

——S. 13—Misconduct—Imputation of prejudice to presiding Judge.

A letter written by a legal practitioner imputing racial antipathy to a Judge and charging him with having allowed such feelings to influence him in passing unfavourable orders to the practitioner constitutes misconduct. A belated apology in the High Court was held to be insufficient and the pleader was suspended from practice for 3 months. 67 Ind. Cas. 504=23 Cr.L.J. 408 (Lah.).

——S. 13 (f)—Contempt of Court—Abusive letter to Judge—Misconduct.

A **Mukhtear** who addressed certain letters to a Magistrate in connection with a copy for which he had applied, and the contents of the letters were grossly insulting, the **Mukhtear** could be proceeded against under S. 13 (f) of the Act. 42 All. 86=17 A.L.J. 1050=20 Cr.L.J. 718=1 U.P.L.R. (H.C.) 134=52 Ind. Cas. 798.

——S. 13—Contempt of Court — Misconduct — Libellous attack on Judge.

A pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a pleader. The co-operation of a pleader and a Judge would be impossible if the pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the pleader is posing in public as the chastiser of the Judge. Such conduct is not only a breach of the pleader's duty to the Court but must also result in an actual obstruction to the administration of justice. A letter published by a Pleader, alleging that a certain Judge is indolent and takes credit for cases not tried but compromised even if written in good faith and even if it does not constitute the offence of libel, amount to misbehaviour under S. 16 of the Sind Courts Misbehaviour Act. 11 S.L.R. 81=19 C.L.J. 322 =44 Ind. Cas. 338 (F.B.).

——S. 13—Contempt of Court—Letter to Judicial officer.

A legal practitioner who writes a letter to a Judicial officer asking him in a particular manner is guilty of grossly improper conduct within S. 13 (f) of the Legal Practitioners' Act. 3 P.W.R. 1918 Cr.=19 Cr. L.J. 267=161 P.L.R. 1917=44 Ind. Cas. 123.

——Ss. 13 and 14—Contempt of Court—Disciplinary powers.

The words "such misconduct as aforesaid" in S. 14 are not restricted to fradulent or grossly improper conduct in the discharge of his professional duty but include all cases of misconduct whether included in Cl. (b) or in one or more of the other clauses of S. 13. A Subordinate Court can inquire into the matter falling within any of the clauses of S. 13 when the pleader or **Mukhtear** whose conduct is called in question, practises in such Court. Under S. 13 the inquiry need not be conducted by the High Court, but may be by a Subordinate Court under the discretion of the High Court. The charges must be framed with great care and precision, so that the practitioner may know what he is to oppose; his conduct which shows disrespect of the Court or which obstructs or interferes with the due administration of justice, committed in the actual presence of the Court or in places where the Court is deemed present such as places set apart for its use and for the use of its officers, jurors, witnesses, amounts to contempt. A **Mukhtear** practising in a Court exchanged some hot words with the Accountant of the Court in his office, in the course of which he abused the Accountant, which was heard by the Judge holding his Court in an adjoining room. The misconduct amounted to a contempt for which a warning was deemed sufficient. 44 Cal. 639=24 C.L.J. 190=20 C. W. N. 1284=18 Cr. L. J. 420=38 Ind. Cas. 980.

——S. 13 (b) and (f)—Contempt of Court—Letter to Commissioner to report in client's favour—Addressing disrespectful letter—Private capacity—Misconduct.

A pleader addressing a letter to a Commissioner appointed to investigate a case to report in his client's favour he is guilty of professional misconduct under S. 13, Cl. (b) of the Act. A pleader addressed to the Commissioner of the District a most disrespectful letter and circulated it free among his subordinates. **Held,** he is guilty of misconduct under Cl. (f) of S. 13 of the Act, though the matter is one of a private nature between the pleader and that officer. S. 13 (f) of the Act is not confined to the misconduct of a pleader as such but also covers his misconduct as a party to a suit. 18 P.R. 1915=12 P.W.R. (Cr.) 1915=16 Cr.L.J. 338=28 Ind. Cas. 722.

——Ss. 13 (f) and 14—Contempt of Court—Improper suggestion.

A Vakil is guilty of professional misconduct meriting more than a mere warning for suggesting that he is in a position to influence a Judge in his favour by indirect and improper means. 26 M.L.J. 429=23 Ind. Cas. 789.

——S. 13 (b)—Contempt of Court.

A pleader is not guilty of professional misconduct, if on being pressed by the Judge what the real facts were, he said "Possibly the gunner was doing all that is attributed to the accused" (a case of indecent assault on a woman.) 3 S.L.R. 177=10 Cr.L.J. 514=4 Ind. Cas. 176.

——S. 13—Imputation against Magistrate in petitions.

It is improper on the part of legal practitioners to impute improper motives and corruption to a judicial officer in petitions addressed to him in connection with proceedings pending before him as such officer. (1905) 29 M. 100=3 Cr.L.J. 376.

9. Conviction.

See also S. 12 supra.

——S. 13—Pleader—Conviction for defaming Sub-Inspector—Suspension from practice if warranted—Reprimand—Sufficiency.

Where a pleader defamed a Sub-Inspector and was prosecuted and convicted in respect of it though certainly it was wrong of him to defame the Sub-Inspector in the way he did, his action did not involve such a degree of moral turpitude as to warrant the Court in imposing the severe penalty of suspension from practice and a reprimand would be sufficient in the circumstances. I.L.R. (1946) Mad. 459=225 Ind. Cas. 101=47 Cr.L.J. 686=59 L.W. 63=1946 M.W.N. 104=A.I.R. 1946 Mad. 247=(1946) 1 M.L.J. 95 (F.B.)

——S. 13 (f)—Pleader convicted for criminal breach of trust.

Conviction of a Pleader for criminal breach of trust renders him unfit to be a member of the legal profession and his name must be struck off the register of Pleaders under S. 13 (f), Legal Practitioners' Act. A.I.R. 1940 Rang. 242=42 Cr.L.J. 110=191 Ind. Cas. 122.

——S. 13 (f)—Conviction for receiving stolen property.

A man who is convicted of so serious an offence as of receiving stolen property, even though the property be not of very great value, is not fit to be a Pleader. A.I.R. 1938 Rang. 160=39 Cr.L.J. 541 (1)=175 Ind. Cas. 126.

——S. 13 (b) (f)—Conviction under Burma Village Act for not removing stack of hay—Defect in character—Conviction under S. 228, Penal Code—Improper behaviour before Magistrate—Action sought to be taken under S. 13—Duty of Court to consider the setting in which Pleader acted.

Where a Pleader is convicted under the the Burma Village Act for not removing a stack of hay from his compound in spite of a resolution under the Act, the conviction does not disclose a defect of character which unfits him to be a Pleader and the Court will not take any disciplinary action under S. 13, Legal Practitioners' Act in respect of that charge.

But where his conduct in snatching certain papers and in making improper expressions before a Magistrate are made the subject of criminal charges against him under S. 228, I.P.C., and he is convicted therefor, in proceedings under S. 13, Legal Practitioners' Act, in considering his acts and words, it is right and sensible that the Court should consider the setting in which he acted as he did and the Court should act having regard to the setting in which the incident occurred:

Held, that justice and mercy would alike be satisfied by ordering the Pleader to be suspended from practice for three months. A.I.R. 1936 Rang. 175=37 Cr.L.J. 623=162 Ind. Cas. 534.

——S. 13—Taking part in activities of Association declared unlawful—Such conduct, if involves moral turpitude.

The Advocate-General presented three petitions to the High Court asking that three Barristers on the roll of the Court may be suspended and removed from practice or otherwise dealt with as the High Court thinks fit in exercise of the disciplinary jurisdiction vested in the Court. There were also two reports made to the High Court by District Judges under S. 26 of the Bom. Pleaders' Act for the purpose of action being taken by the Court under S. 26 of the Act. The ground was that all three Barristers were convicted by Presidency Magistrates under S. 17 (1) and (2) of the Criminal Law Amending Act (XXIII of 1932), in that they had been members and assisted and managed the operations of the Bom. Provincial Congress Committee Emergency Council, an association declared unlawful by the Govt. of Bombay, and they were sentenced to imprisonment and fine:

Held, that the mere fact that they were members of an unlawful association or assisted the operations or managed the affairs thereof did not render them unfit for the exercise of the profession.

Held, also that such conduct did not necessarily involve moral turpitude, or any attack upon the system of which the High Court forms part, or embarrass in any way the administration of justice by the Courts of the Presidency. 59 B. 57=A.I.R. 1935 Bom. 1=36 Bom. L.R. 1136=154 Ind. Cas. 546 (F.B.)

——S. 13 (f)—Unprofessional conduct.

Per **Monair, J.C.**—A conviction of a Pleader of an offence, trivial in itself, may not imply a defect in character which unfits him to be a Pleader. A.I.R. 1931 Nag. 33=27 N.L.R. 29=14 N.L.J. 1=32 Cr.L.J. 604=130 Ind. Cas. 826 (S.B.)

——Where a Pleader has been convicted of an offence, the High Court can **suo motu** take action for either suspension or dismissal of Pleader or can act upon the report submitted to it by the subordinate Courts. A.I.R. 1931 Pat. 369=12 P.L.T. 773=32 Cr.L.J. 1256 =11 Pat. 365=134 Ind. Cas. 945 (F.B.)

——S. 13 (f)—Proceedings under—Conviction of legal practitioner under Penal Code—Petitioner, if entitled to go behind his conviction.

Where a legal practitioner has been convicted, it is not open to him, in appearing to show cause why disciplinary proceedings should not be taken against him, to go behind the conviction in order to show that he had committed no offence at law. If, however, the convicting judgment does not show what the conduct of the legal practitioner was that led to his conviction, he is entitled to the benefit of any doubt. 15 N.L.J. 90=34 Cr.L.J. 224 (1)=A.I.R. 1933 Nag. 383 (2)=141 Ind. Cas. 570 (1).

——S. 13 (b)—Merits of conviction.

Under the Legal Practitioners' Act, the High Court will not go into the merits of the conviction but will ordinarily accept the findings of Criminal Courts as final. 5 Bur. L.T. 191=13 Cr.L.J. 875=17 Ind. Cas. 811.

10. Criminal offence.

See also Note 4 under S. 14.

——Ss. 13 (b) and 14—Criminal offence—Grave criminal charges against pleader—Reasonable cause.

Proceedings under the Act being summary proceedings, a pleader should not be proceeded there under for what are in reality grave criminal charges. Though the phrase "any other reasonable cause" in Cl. (f) of S. 13 is interpreted not **as ejusdem generis** with the proceeding ones, and a Court can investigate cases of moral turpitude unconnected with the discharge of professional duty, the case of a pleader's conduct in the capacity of a suitor is different. 43 C.L.J. 237, Foll. 1 Pat. L.T. 571=5 Pat. L.J. 601=21 Cr.L.J. 726=58 Ind. Cas. 150.

——Ss. 13 and 14—Criminal offence—Mukhtear suspected of taking money from client for bribing Court—Offence.

There is no reason why a different standard of proof of guilt should be required in a case under the Legal Practitioners' Act from that which is necessary in any other legal proceedings, viz., that the offence has been committed beyond any reasonable doubt. To remove a person from his profession for what amounts to a criminal charge upon mere suspicion cannot possibly be justified, the suggestion to adopt a less stringent mode of proof would be an entirely novel departure and unjustifiable on any known principles of law. 1 Pat. L.T. 372=21 Cr.L.J. 636=57 Ind. Cas. 460 (F.B.)

——S. 13 (f)—Criminal Offence—Pleader suspected of—Evidence insufficient for—Criminal prosecution—Disciplinary proceedings.

A Dt. **Judge,** being of opinion that the evidence available in respect of certain charges against a pleader, was of such a character that a criminal prosecution was not likely to succeed, directed the institution of proceedings against him under S. 13 (f) of the Legal Practitioners' Act. **Held,** that summary investigation under the Legal Practitioners' Act of what in reality is grave criminal charge may, in particular instances, be to the prejudice of the pleader. The rule deducible from the cases is that an attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanour involving want of integrity even though the judgment may be arrested or reversed for error and also without previous conviction if he is guilty of gross misconduct in his profession or of acts which though not done in his professional capacity, gravely affect the character as an attorney, but if in the latter case if the acts charged are indictable and are fairly denied, the Court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer on oath to a charge for which he may be indicted. 31 C.L.J. 471=24 C.W.N. 755= 57 Ind. Cas. 931.

11. Duties of legal practitioner.

——S. 13—Members of the legal profession are expected to act in an honest and upright manner. Any deviation from these elementary principles must be severely dealt with. 1944 O.W.N. 122=1944 A.W.R. 84=A.I.R. 1944 Oudh 236=46 Cr.L.J. 108= 216 Ind. Cas. 63.

——S. 13 — Professional misconduct — Advocate should not on instructions of his client make charge of fraud without satisfying himself that there are reasonable grounds for the allegation.

Although an advocate has his duty towards his client, he has other duties and responsibilities as well. He should not on the instructions of his client, make a charge of fraud without satisfying himself that there are reasonable grounds for the allegation. A.I.R 1946 Mad. 538 (1946) 2 M.L.J. 79=59 M.L.W. 401=1946 M.W.N. 518=I.L.R. (1947) Mad. 1=228 Ind. Cas. 324=48 Cr.L.J. 198 (F.B.).

——S. 13—Reckless allegations in pleadings—Duty to satisfy himself that client has material to base charge.

When Pleaders are asked by their clients to write in a pleading or petition accusations of dishonesty, criminality, etc., against anybody, or instructed to ask questions of that nature, the lawyers are not to blindly follow the instruction. They must satisfy themselves that, apart from the relevancy of those accusations or questions, there are materials on which those accusations can be made or questions asked, and that the accusations and suggestions are not recklessly made. If they do not do so, they are guilty of professional misconduct.

When a pleading contains allegations of fraud or collusion or other similar charges, the duty of the Pleader ends when he has satisfied himself that his client was not making a reckless irresponsible statement and that he has some material on which he bases his charge. It is not necessary that the Pleaders themselves should have inquired into the truth of the charge.

It is enough if they believed that there were grounds for making the charge. 15 P.L.T. 560=A.I.R. (1934) Pat. 598=1 B.R. 18=36 Cr.L.J. 1=14 Pat. 10=152 Ind. Cas. 313 (S.B.).

——S. 13—Lending of money by Pleader or Advocate to his client.

In India, a Pleader, like the Advocate combines the functions of the Solicitor and the Barrister in England. He does the Solicitor's part of work and he pleads in Court. As he fulfills both roles he must be subject to the disabilities of both. There would be nothing improper for a solicitor to advance moneys to his client for purposes of litigation but it would be improper for a Barrister briefed by a Solicitor to do so and the higher standard must be applied. By financing his client's litigation, the Pleader acquires a personal interest in the litigation; in fact, an actual interest in the subject-matter of the suit. This is surely not in keeping with the standard of conduct which his profession demands of him. Hence, it is improper for a Pleader or on Advocate to lend money to his client at any time for the purposes of an action in which he is engaged.

[In the case as the Pleader had acted in good faith in financing his client's litigation, it was held that no action was called for.] A.I.R. 1942 Mad. 553=(1942) 2 M.L.J. 196=43 Cr.L.J. 798=1942 M.W.N. 483=55 L.W. 481=I.L.R. (1943) Mad. 30=202 Ind. Cas. 184 (S.B.).

——S. 13—Rules framed by Madras High Court, R. 16—Failure to keep accounts.

Even if a Vakil has not much work, he is bound to keep accounts for whatever work he may have and failure to keep accounts amounts to professional misconduct. I.L.R. (1941) Mad. 286=(1940) 2 M.L.J. 1031=52 L.W. 947=(1940) M.W.N. 1267=A.I.R. 1941=Mad. 63=42 Cr.L. 346=192 Ind. Cas. 604 (F.B.).

——S. 13—Acceptance of vakalat for withdrawing amount deposited in Court—Caution and duty of Advocate.

It is extremely desirable and necessary that Advocates, when having to withdraw money or to accept serious responsibility of the kind from and on behalf of clients should, even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the vakalatnama and furthermore, they should not accept a vakalatnama unless they have satisfied themselves of the **bona fides** of the person who offers it to them. 18 P.L.T. 407=A.I.R. 1937 Pat. 433=38 Cr.L.J. 926=3 B.R. 745=16 Pat. 488=170 Ind. Cas. 339 (S.B.).

——S. 13 (f), (b)—Asking for adjournment to delay course of justice—Duty towards Court.

A legal practitioner who asks for adjournments on different occasions merely to delay the course of justice with deliberate intention is guilty of grossly improper conduct, and renders himself liable to punishment.

Per, **Beasely, C. J.**—It is not the duty of a legal practitioner to follow blindly every instruction his client gives him. That is an entire misapprehension of the duty of a legal practitioner. He has not only got a duty towards his client but he has got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. To attempt to obtain adjournments by misrepresentations and to put forward a purpose which the legal practitioner knows will never be carried out is to attempt to gain and to gain an advantage by a trick and a very dishonest one too. 60 M.L.J. 393=33 L.W. 425=(1931) M.W.N. 321=32 Cr.L.J. 657=54 M. 520=A.I.R. 1931 Mad. 422=131 Ind. Cas. 145 (F.B.).

——S. 13—Duties of legal practitioner.

A pleader by virtue of his position is an officer of the Court and it is his duty to protect all minor officials of the Court from any temptation to depart from their duty, (to take a document from record to pleader's house for inspection by his client). Any such conduct on the part of any legal practitioner must be strongly deprecated. 115 Ind. Cas. 673=10 P.L.T. 715=A.I.R. 1929 Pat. 338 (S.B.)

——S. 13—Questioning witnesses of other side.

Advocates and Pleaders retained in a case ought to be extremely careful in approaching and questioning persons who to their knowledge have been approached and cited by the other side for the purpose of giving evidence, so as to give no room for any suspicion that they are attempting to tamper with the evidence or with the witnesses. 1929 M. W.N. 384 (F. B.)

——S. 13—Applications for transfer—Statements of clients should be tested by pleader.

Although it is perfectly true in one sense that a legal adviser must accept statements of fact from his client yet in applications for transfer statements imputing prejudice or unfairness or corruption to Magistrates should not be made unless the statements of the client as tested by the adviser are found sustainable, unless they are found to be corroborated and unless the adviser has taken some steps not necessarily to pledge himself for his client's veracity but such as to give him, as a reasonable man, ground for belief that the statements at any rate are such as should be properly investigated. The duty of the legal profession is a very serious one both with regard to applications of this kind and also in respect of pleadings.

An application for transfer drafted by mukhtear contained a statement which would have been considered as a statement that there was such a relationship

between the Magistrate and the person who was mentioned as having visited him, as to make it undesirable that the Magistrate should sit and try a case in which the interests of that person were adversely affected. The statement was found to be totally unfounded and untrue.

Held, that the mukhtear was guilty of professional misconduct. 116 Ind. Cas. 762=8 Pat. 575=10 P.L.T. 711=A.I.R. 1929 Pat. 151 (F.B.)

——S. 13—Warning is not sufficient punishment for defying law—Duties of a Vakil discussed.

Where it is perfectly clear that a Vakil had deliberately taken the law into his own hands and defied the orders of constituted authority, and where he expressed no regret for his past conduct and has given no assurance as to his conduct in the future:

Held, warning would not be sufficient punishment. Advocates and Pleaders are a privileged classed enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order to enable High Court to exercise its jurisdiction that any offence should have been committed, nor is it necessary that what the pleader had done should subject him to anything like general infamy or imputation of bad character. 72 Ind. Cas. 875=1923 P.H C.C. 42=1 Pat. L.R. Cr. 36=A. I. R. 1923 Pat. 186 (S. B.).

——S. 13—Defective appreciation of duty.

A legal adviser engaged by a client in respect of a compromise of certain disputes with others is bound to warn his client when he is acting in ignorance of the nature of what he is doing while the legal adviser is in a position to inform him or if the client is acting under a mistake as to his right which the legal adviser is in a position to correct. The legal adviser does not properly appreciate his duty if he thinks or acts upon the belief that he is not bound to warn his client under such circumstances unless he is specially asked by the client upon the subject; but this defective appreciation of duty on the part of the legal adviser does not amount to such professional misconduct as to entail upon him punishment. A legal adviser who allows his client to execute an agreement which he thinks to be invalid in law and himself attests the same is not guilty of any professional misconduct especially when it has been held by the court that the agreement is not invalid. A legal adviser who knows that his client is solely entitled to a certain inheritance is not guilty of any professional misconduct if he allows his client to enter into an agreement by which his client parts with a portion of his rights in the inheritance to others when the client is fully aware of the nature of his rights and enters into the agreement under no mistake but with a full knowledge of his rights and of the nature of the transaction and there is nothing to show that the legal adviser had any knowledge or means of knowledge which his client did not possess. (1905) 15 M.L.J. 432=7 Bom. L.R. 894=10 C. W. N. 57=33 C. 151=1 M.L.T. 17=2 A.L J. 800=2 C.L.J. 421=32 I.A. 217 (P.C.).

12. False certificates.

——S. 13—Giving of certificate in support of special leave to appeal to Privy Council in forma pauperis.

The giving of certificates under R. 8, Judicial Committee Rules, 1925, by a Counsel in support of petitions by condemned prisoners for special leave to appeal in **forma pauperis** in circumstances which do not warrant the granting of such certificates, shows an utter disregard of the solemn and serious responsibilities of Counsel who is called upon to certify and the Counsel so certifying is guilty of gross professional misconduct. A.I.R. 1943 Lah. 210=44 Cr.L.J. 714=I.L.R. (1943) Lah. 409=208 Ind. Cas. 27 (F.B.).

——S. 13—Application by condemned prisoner for leave to appeal to Privy Council in **forma pauperis**—Certificate granted by Pleader on improper grounds certifying that the case was fit for appeal, only to obtain temporary respite for client—Pleader, held guilty of serious professional misconduct.

[Grounds on which Privy Council entertains appeals in criminal matters indicated.] I.L.R. (1944) Lah. 151 =46 Cr.L.J. 302=A.I.R. 1944 Lah. 159=213 Ind. Cas. 201 (S.B.).

——S. 13—False fee certificate filed.

A Pleader filed a fee certificate stating that he had received from his client Rs. 20. This was false:

Held, that the offence was not a light one but as it took place before the judgment in S, a Pleader Vellore, In re, [197 Ind. Cas. 658=I.L.R. (1941) Mad. 940= 43 Cr. L.J. 233=A.I.R. (Vol. 28) 1941 Mad. 905 (S.B.)] suspension for one month be ordered. A.I.R. 1944 Mad. 268 269=57 L.W. 174=(1944) 1 M.L. J. 233= 1944 M.W.N. 196=45 Cr.L J. 690=I.L.R. (1944) Mad. 550=213 Ind. Cas. 161 (S.B.).

——S. 13—Pleader filing fee-certificate without having received fee amounts.

It is certainly a very serious matter for a Pleader or an Advocate to file a false certificate with regard to fees. For a Pleader or an Advocate to file a fee certificate without having received the fee is most improper and the Court would take strong disciplinary action in any case coming to its notice. 54 L.W. 481=1941 M.W.N. 936=(1941) 2 M.L.J. 663=A.I.R. 1941 Mad. 905=43 Cr.L. J. 233=I.L.R. (1941)Mad. 940=197 Ind. Cas. 658 (S.B.).

——S. 13—Pleader taking promissory note from client for fees and filing certificate that he had received them in cash.

In fact, it would amount to professional mis conduct if a legal practitioner, whether an Advocate or a Pleader, filed a certificate stating that he had received the amount of his fee when he had merely received from his client a written promise to pay. Of course, if he disclosed in his certificate that what he had received was a promissory note and not cash, there would be nothing improper. It would be then for the Court to decide whether the fee should be allowed on taxation. But where he accepts a promissory note in lieu of fees and files a certificate that he has received his fees in cash under the **bona fide** belief that he was acting properly (when such a view has been taken by the High Court), his conduct does not amount to professional misconduct. A.I.R. 1943 Mad. 493=(1943) 1 M. L. J. 487=56 L.W. 344=44 Cr. L.J. 735=1943 M.W.N. 512=I.L.R. (1944) Mad. 71=208 Ind. Cas. 147 (S.B.).

——S. 13—Fee certificate — Legal Practitioners' (Fees) Act (XXI of 1926) — Fee not actually paid entered in certificate—Promissory note taken— Bar Councils Act (XXXVIII of 1926), S. 12—Rules under, R. 9—Honest mistake in interpreting rule—

Held, charge of misconduct could not be sustained.

Where a legal practitioner, acting for the defendants in a case, made no attempt to conceal the fact that he had received only a portion of his fee in cash, and that for the balance of his fee he had obtained a promissory note which he produced in the trial Court and neither the plaintiff nor his Counsel suggested, at the time of the taxation of costs, that the defendants could not be allowed the fee which though promised, had not yet been paid by them, nor did the plaintiff urge, in his appeal to the High Court, that the Advocate was not justified in entering in his certificate the fee which he was to recover on the promissory note nor was there any personal advantage to be gained by deceiving the Court and he was found guilty of professional misconduct for filing a fee certificate which was not in accordance with the High Court Rules:

Held, that the circumstances of the case point to the conclusion that the entry in the certificate, upon which the charge of misconduct is founded, was due to the belief that as the new law enacted by the Legal Practitioners' (Fees) Act of 1926 had imposed upon his clients the obligation of paying the fee due on the promissory note they should have the corresponding right to recover it from the defeated party which they could do only if it was stated in the certificate and allowed on taxation. This belief was honestly entertained by him, and was apparently shared by many other persons and hence the charge of misconduct could not be sustained against him. 2 B.R. 582=1936 A.W.R. 558=A.I.R. 1936 P.C. 176=40 C.W.N. 933=17 P.L.T. 429=38 P.L.R. 684=38 Bom. L. R. 731=(1936) M. W. N. 725=19 N. L. J. 163=1936 O.W.N. 577=58 A. 307=63 C. L. J. 521=71 M.L. J. 631=162 Ind. Cas. 445 (P.C.).

——S. 13—Allahabad High Court General Rules, Chap. XXI, R. 1—Fee-certificate—Legal practitioner materially altering form of certificate—Certificate mentioning fees as having been paid by means of promissory note—Disciplinary Jurisdiction of High Court—Action under, propriety of.

Where an Advocate was charged with having certified that he received his fees by means of a promissory note, which was not in accordance with R. 1, Chap. XXI, Allahabad High Court General Rules, with the knowledge that no fee which had not been paid in cash before the conclusion of the hearing of the case in which the fee certificate was being filed could be certified as having been paid to him:

Held, that the fact that he had materially departed from the form of the fee certificate prescribed by the Court was a matter which could not be overlooked, that the alteration in the fee certificate clearly indicated a dishonest intention on the part of the Advocate and also showed that he never misinterpreted the clear words of the rule, and that in the circumstances, it must be held that he deliberately filed a fee certificate which was not in accordance with the High Court Rules in order that a fee not actually paid to him might be taxed; and consequently, he should be convicted of serious professional misconduct. 35 Cr.L. J. 421=A. I. R. 1934 All. 109=(1934) A. L. J. 333=3 A.W.R. 586=147 Ind. Cas. 608 (S.B.).

——Ss. 13 (f), 6—Rule 6 under S.—Certificate by legal practitioner containing false statement.

Where a certificate under R. 6 of rules framed under S. 6, Legal Practitioners' Act, containing false statements or misleading statements is intentionally given by a legal practitioner, the case falls under S. 13 (f). A. I. R. 1936 Cal. 372=38 Cr. L. J. 215=166 Ind. Cas. 426.

13. False statements, contradictions and suppressions.

——S. 13—Judicial officer making disparaging remarks against lawyer witness—Whether ground for action.

When a responsible judicial officer makes a statement of a disparaging character against a witness who is a member of the legal profession, it may be a sufficient ground for instituting an enquiry in the course of which the alleged falsity of the statement made by the witness should be established, but the mere opinion of a Judge or Magistrate regarding the reliability of a witness does not constitute any material **per se** for taking action. I.L.R. (1947) Lah. 687=48 Cr.L. J. 737=231 Ind. Cas. 215=A.I.R. 1947 Lah. 262 (F.B.).

——S. 13 (f)—Pleader knowingly making false statement in pleading drafted by him—Suspension.

It is a very serious matter for a legal practitioner knowingly to make a false statement in a pleading drafted by him.

Where a Pleader, in spite of knowing that a promissory note had been merely endorsed for collection, inserted in the plaint a statement that the instrument had been endorsed to the plaintiff for good consideration:

Held, that the Pleader be suspended from practice for a period of three months and not merely for one month. A.I.R. 1944 Mad. 268=57 L. W. 174=(1944) 1 M.L. J. 233=1944 M.W.N. 196=213 Ind. Cas. 161=45 Cr.L. J. 690=I.L.R. 1944 Mad. 550.

——S. 13—Misrepresentations made by Counsel in open Court—Facts within knowledge of Court and Court not misled.

Where the misrepresentations which were alleged to have been made by a Pleader were made in open Court in respect of documents before the Court and the facts were all within the knowledge of the Court and it was not misled by such representations, no charge of professional misconduct can be made against the Pleader. 44 Cr. L. J. 114=A. I. R. 1942 Mad. 691=(1942) 2 M.L. J. 479=55 L.W. 845=203 Ind. Cas. 585 (S.B.).

——S. 13 (b)—Giving false information to client by Pleader—Professional misconduct.

A Pleader was charged by the Sub-Divisional Magistrate for having falsely told a Marwari that the Sub-Divisional Officer had ordered that "the goods be sent to the person they belonged to", in respect of some tins of ghee which a certain Municipality had impounded as being adulterated, and which had been kept in the custody of the said Marwari by the Municipality, and the Marwari had sent the ghee back to the person to whom it belonged relying on the said false statement of the Pleader:

Held, that the Pleader concerned was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, as contemplated by S. 13 (b), Legal Practitioners' Act. A. I. R. 1935 Cal. 547=39 C.W.N. 283=36 Cr.L. J. 1271=157 Ind. Cas. 998.

——S. 13—Legal practitioner making two contradicting statements one before police and other as witness in Court—He is guilty of grossest misconduct. 121 Ind. Cas. 297=1929 Cr.C. 441=31 P. L. R. 224=31 Cr.L. J. 242=A.I.R. 1929 Lah. 803.

——**S. 13—Adjournment asked for in good faith—Absence of sufficient grounds for transfer—Pleader responsible for application is not necessarily guilty of misconduct.**

Although every application for adjournment for the purpose of a transfer indirectly implies that there is a belief in the mind of the accused person that he would not have a fair trial, an application for adjournment under S. 526 does not always amount to an allegation of partiality made by the accused's Vakil against the trying Magistrate. If an application is made in good faith, the mere fact that it turns out subsequently that there are not sufficient grounds for transfer would not lead to a necessary inference that there was misconduct on the part of the practitioners who were responsible for such an application. 110 Ind. Cas. 686=29 Cr.L. J. 750=26 A.L. J. 1250=A.I.R. 1928 All. 396 (S.B.).

——**S. 13**—Bail refused by Dt. Judge– Pleader applying again for bail to Dt. Magistrate without informing him of previous application to Dt. Judge—Pleader is guilty of misconduct.

(The pleader had a good record and was therefore only reprimanded). 69 Ind. Cas. 442=23 Cr.L. J. 714 =A.I.R. 1923 Lah. 211.

——**S. 13—Telling a lie is misconduct.**

The fact that a man is going to be injured professionally if he does speak the truth is no valid excuse for telling a lie: but, it is an attitude which is not uncommon and which is not of the most serious character. It is very different from the case of a professional man telling a lie fraudulently in the sense of wishing to assist his client in deceiving the Court or even wishing to assist his client in a claim that he is making against another. In this case, the conduct of the pleader was disapproved but no action taken. 73 Ind. Cas. 329=17 M. L. W. 358=24 Cr.L. J. 585= A.I.R. 1923=Mad. 485 (F.B.).

——**S. 13 (f)—False statements—False identification.**

A Legal Practitioner is guilty of professional misconduct if he identifies a person not known to him. 2 U.P.L.R. (All.) 211=57 Ind. Cas. 818 (F.B.).

——**Ss. 13 (a) and (b) and 14—False statement—Petition without instructions.**

A Vakil engaged to defend in the Court of Sessions certain persons accused of murder prepared and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions. In fact it was a petition which originated with him without instructions from his clients, and which contained allegations which were made recklessly and without reasonable grounds of belief. **Held,** that the Vakil was guilty of professional misconduct and under S. 8 Letters Patent the Vakil was suspended from practising his profession. 42 All. 450=2 U.P.L.R. (All.) 130=21 Cr.L. J. 469=18 A.L. J. 419=56 Ind. Cas. 501.

——**S. 13 (b)—False statements—Reply to Dt. Judge.**

A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with for making them under the disciplinary jurisdiction. It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected. **Held,** overruling the contention that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him. 36 Bom. 606=14 Bom. L.R. 700=13 Cr.L. J. 913 =16 Ind. Cas. 788.

——**S. 13 and Cl. (a) to (f)—False statements—False suit.**

A pleader is guilty of misconduct under S. 13, Cl. (f), if he files a false suit, and can be dismissed or suspended. The words "any other reasonable cause" in S. 13. Cl. (f) are not to be construed **ejusdem generis** with causes enumerated in Cls. (**a** to **e**). They include personal misconduct distinguished from professional one. 6 L. B. R. 33=4 Bur. L. T. 275=12 Cr L. J. 574=12 Ind. Cas. 838.

——**S. 13 (b)—False statement.**

Where a pleader in order to recover fees due to him from his client for work done, made certain statements which if true, would expose him to criminal prosecution. **Held,** that the conduct of the pleader though improper was not such as to call for action being taken, under the Act. 15 C. L. J. 224= 13 Cr.L. J. 208=14 Ind. Cas. 208.

——**S. 13 (b)—False statements — Attesting a will after testator's death—Extenuating circumstances.**

Where a Mukhtear was pressed by person to put a signature to a will as an attesting witness, and he signed it because he believed the signature of the testator as genuine and confessed everything; the Court though holding that the Mukhtear was liable under S. 13 of the Act, was lenient in his case in view of fact that he was a Vakil of 25 years standing, bore a good character and was repentent. 14 C.L J. 606=13 Cr.L.J. 61=13 Ind. Cas. 397.

——**Ss. 13 and 14—False statements.**

Entering deliberately into a false defence, with intent to defraud others, is a ground of action under Ss. 13 and 14. 12 Cr.L.J. 67=9 Ind. Cas. 362 (Cal.).

——**S 13 (f)—False statement—Professional misconduct.**

Where a pleader retained in his service a suspected tout without dismissing him even after notice from the Bar Council not to retain him in his service and thereafter gave a false statement that he had dispensed with the services of that tout and stuck to that statement deliberately in a subsequent enquiry, **Held,** he was guilty of professional misconduct under S. 13 (f). 49 P.W.R. 1914 (Cr.)=16 Cr.L.J. 108=214 P.L.R. 1915= 27 Ind. Cas. 156 (F.B.).

——**S. 13 (b)—False statement — Petition with unfounded allegations.**

Where a pleader filed a petition in a criminal case containing unfounded allegations against the presiding Judge. **Held,** that he was guilty of professional misconduct. 8 M.L.T 375=21 M.L.J. 76=(1911) 1 M.W.N. 359=11 Cr.L. J. 684=8 Ind. Cas. 574 (F.B.).

——**S. 13 (b)—False statement—Plea of** alibi.

Where a pleader set up **alibi** in a case of defamation against him and the Court found against the plea; the High Court opined that they were not called upon to make any order under the Leg. Practs' Act. 20 M.L J. 498=11 Cr.L.J. 452=7 Ind. Cas 356.

——**S. 13 (b) — False statement—False notice—Professional msiconduct.**

A Vakil who sends a notice containing facts false to his knowledge is guilty of professional misconduct, though he purports to act under instructions from his client. 6 M L.T. 329=11 Cr.L.J. 165=4 Ind. Cas. 1072.

14. Fees and non-payment.

——**S. 13—Pleader honestly claiming lien over papers for fees.**

There can be no professional misconduct when an Advocate puts forward a claim **bona fide**. Hence,

where a Pleader claims a lien over the records and papers for his fees under the honest belief that he is entitled to do so, he is not guilty of any professional misconduct. A.I.R. 1943 Mad. 493=(1943) 1 M.L.J. 487=56 L.W. 314=44 Cr.L.J. 735=1943 M.W.N. 512 =I.L.R. (1944) Mad. 71=208 Ind. Cas. 147 (S.B.).

——S. 13—Fees and non-payment.

Exhorbitant fees claimed by pleader do not amount in themselves to misconduct unless there is clear evidence to prove fraudulent conduct on part of pleader. 123 Ind. Cas. 184=1930 A.L.J. 539=34 C.W.N. 534= 1930 M.W.N. 300=31 M.L.W. 627=7 O.W.N. 517=51 C.L.J. 418=31 Cr.L.J. 489=A.I.R. 1930 P.C. 144= 58 M.L.J. 635 (P.C.).

——S. 13—Pleader's duty when client putting off settlement of fees.

When the client is, for some reason or other, putting off the settlement and payment of fee, a legal practitioner would be well advised if he served a registered notice upon him in good time intimating to him that if the client did not settle and pay his fee he would repudiate all his responsibility as a pleader. A.I.R. 1930 Lah. 947=31 P.L.R. 913=129 Ind. Cas. 301.

——S. 13—Signing of Vakalat—Failure to pay fee —No duty to defend case.

Where a pleader signs a vakalatnama on the distinct understanding that a sum paid to him is really in the nature of a part payment, and that the client will settle the proper fee afterwards, and if the client fails to do so, it follows that mere acceptance of vakalatnama cannot cast upon the pleader the duty of defending the case. 31 P. L. R. 913=129 Ind. Cas. 301=A.I.R. 1930 Lah. 947.

——S. 13—No remuneration paid to pleader— Pleader is not absolved from his obligation to the client unless instructions are expressly repudiated to the knowledge of the client.

The absence of the necessary remuneration does not absolve the legal adviser from his obligations to his client unless the matter is brought specifically to the notice of the client. This must be borne in mind by practitioners, particularly those who have the very responsible duty of appearing for very poor clients and especially in criminal cases. It is not right that a legal adviser should come after a lapse of time and should say it is true that he accepted instructions from his clients but those instructions were conditional upon his receiving his remuneration. If the client does not produce the necessary remuneration it is the duty of the legal adviser to go back to the client and then and there repudiate the instructions. 115 Ind. Cas. 676= 10 P.L.T. 723=A.I.R. 1929 Pat. 337 (S.B.)

15. Gratification for employment.

——S. 13 (c) and (d)—Gratification for employment.

Munshiana (clerk's fee) is not included in the fee paid or payable to a pleader for his services within S. 13 (c). Paying wholly or in part, Munshiana to a person who introduces a client to a pleader, is not objectionable under S. 13 (d) unless it is done in pursuance of any previous arrangement between that person and the pleader for procuring clients for the pleader. **(Obiter)** the Munshiana system is very similar to that in force in England where a counsel's clerk is paid by his employer as well as the employer's clients. **(By the Divisional Bench).** A pleader, who himself pays a sum of money to a procurer of clients or allows him to take his clerk's Munshiana in whole or in part as a gratification for having procured him a client is liable to be dealt with under S. 13 (c). 69 P.L.R. 1910=27 P.R. 1910 Cr.= 22 P.W.R. 1910 Cr.=11 Cr.L.J. 396=6 Ind. Cas. 736 (F.B.)

——S. 13 (c)—Gratification for employment.

The words "out of any fee paid or payable to him" qualify only 'consents to the retention of' and not 'tenders' or 'gives'. 22 P. W. R. Cr. 1910=11 Cr.L.J. 306=60 P.L.R. 1910=27 P.R. (Cr.) 1910=6 Ind. Cas. 736 (F.B.)

——S. 13 (c)—Gratification for employment.

To sustain a charge under S. 13 (c), the gratification which is paid to the tout must be out of any fee paid or payable to a pleader but does not include a payment made out of the **Munshiana** of a pleader's clerk. 31 P. W. R. (Cr.) 1909=11 Cr.L.J. 148=4 Ind. Cas. 1022.

16. Identification.

——S. 13—A mukhtear practising the professional business of identification must be removed from the roll of mukhtears. In re A.I.R. 1937 Pat. 138=17 P.L.T. 951=38 Cr.L.J. 411=3 B.R. 310=16 Pat. 121=167 Ind. Cas. 668 (S.B.)

——S. 13—Judgment debtor filing satisfaction petition with forged signature alleged to be of decree-holder's son, acknowledging satisfaction—Mukhtear endorsing identification of decree-holder on being told by judgment-debtor that person brought by him was decree-holder—Decree-holder alleged to be illiterate—Judgment-debtor known to mukhtear for 15 year—sMukhtear not making investigation nor taking precaution of obtaining thumb impression of alleged decree-holder but acting merely on judgment debtor's assurance that he would obtain such thumb-impression—Mukhtear not acting for his or judgment-debtor's benefit—Mukhtear's act, held, grossly careless and negligent—Serious notice of his conduct without imposing punishment of suspension, held sufficient in the circumstances. A.I.R. 1941 Pat. 179 =7 B.R. 61=42 Cr.L.J. 473=22 P.L.T. 679=193 Ind. Cas. 861 (S.B.)

——S. 13—False identification is serious evil— Conscious misconduct not proved, still offender is liable to suspension.

An applicant for obtaining copies had some reason for concealing his true identity. He therefore had himself taken by a friend to a mukhtear and the friend announced him as the person in whose name he intended to be identified. The mukhtear, who knew the man by sight but did not know his name, nor anything about his identity, rashly accepted the statement of the friend and signed the identification paper. The mukhtear himself was an aged man and no complaint had hitherto been made against him,

Held that though the Mukhtear was not consciously guilty of misconduct still he was guilty for making a false identification and was liable to suspension for one month. A.I.R. 1930 Pat. 495 (F.B.).

——S. 13—Identification must be genuine—Merely clerk's telling practitioner that he identified the person does not entitle practitioner to pose as identifier.

A practice of identifying people is fraught with the gravest risk to the practitioner. It is not enough for a person who comes forward as an identifier to rely merely upon the fact that he has been told by his clerk that he (the clerk) identified the person. This does not entitle the practitioner to pose as an identifier. The identification must be a genuine identification as it involves not only an offence on the part of the legal practitioner against the duties of his profession but also an offence

against the State and public funds. 115 Ind. Cas. 679=10 P.L.T. 641=A.I.R. 1929 Pat. 339 (S.B.)

17. Improper advice.

——S. 13 (f)—Improper advice—Guardian directed to furnish security—Pleader advising payment of moneys from minor's estate to the sureties as consideration.

A pleader directed his client who was appointed guardian of a minor to two other persons who consented to become sureties under an agreement by which a portion of the income of the minor's estate was to go to them as consideration for the suretyship. The agreement between the guardian and the sureties was not detrimental to the interest of the minors. The pleader in advising the guardian to enter into the agreement with the sureties did not believe to be other than a proper transaction and beneficial to the minor. **Held**, there was no cause for proceeding against the pleader under S. 13 (b) or (f) of the Leg. Practs' Act. 38 M.L.J. 58=11 L.W. 38=27 M.L.T. 107=(1920) M.W.N. 125=21 Cr.L.J. 19=54 Ind. Cas. 163.

——S. 13 (b)—Improper advice Ulterior motives.

In this case a **Vakil** of the High Court was suspended from practice for 2 years by the High Court under Cl. (10) of the Letters Patent (Madras) for professional misconduct arising from the following acts he did; **viz.**, (1) giving improper advice and getting a nominal sale for a low value, (2) pleading a false defence, (3) giving false evidence and suborning perjury. 18 Cr.L.J. 449=39 Ind. Cas. 289 (Mad.).

——S. 13 (b)—Improper advice—Ulterior motive.

A pleader, who, in order to secure his own fee, is an active party to placing his client in the hands of an unscrupulous money lender, without warning his client of the extortionate nature of the bargain he was entering into, is guilty of grave professional misconduct, of a kind which if permitted, would tend to corrupt and demoralise the legal profession. A high standard of rectitude, diligence, duty, and zeal is required, of pleaders in the interests of the bar. The inquiry into a pleader's conduct, being **quasi** judicial the Court must have strict proof of the pleader's misbehaviour. 11 Bom.L.R. 1150=10 Cr.L.J. 526=4 Ind. Cas. 266.

18. Jurisdiction and procedure.

See also Note 1 under S. 14.

——Ss. 13 and 14—Misconduct alleged—Enquiry should be conducted by presiding officer in whose Court alleged misconduct occurred but the High Court has power to direct enquiry in other Court. A.I.R. 1944 Nag. 273 =1944 N.L.J. 244=I.L.R. (1945) Nag. 346=218 Ind. Cas. 239=46 Cr.L.Jour. 433.

——S. 13—Appointment of tribunal to make enquiry—Approval of tribunal, if can be given ex post facto.

The Legal Practitioners' Act in S. 13 contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand, the inquiry cannot be lawful. The suggestion that approval of a tribunal may be given **ex post facto** is repugnant to the spirit of the Act and the wording of S. 13. 51 L.W. 197=(1940) 1 M.L.J. 259=(1940) M.W.N. 161=41 Cr.L.J. 419=I.L.R. (1940) Mad. 433=A.I.R. 1940 Mad. 370=187 Ind. Cas. 144 (S.B.).

——S. 13—Acquiescence.

If the tribunal which conducted the inquiry under S. 13, was not validly constituted, acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain. A.I.R. 1940 Mad. 370=51 L.W. 197=(1940) 1 M.L.J. 259=(1940) M.W.N. 161=41 Cr.L.J. 419=I.L.R. (1940) Mad. 433=187 Ind. Cas. 144 (S.B.).

——S. 13—High Court directing District Judge to enquire into charge of professional misconduct—District Judge has no power under S. 3-A, Madras Civil Courts Act (III of 1873), to direct Additional District Judge to make enquiry without reference to High Court. 51 L.W. 197=(1940) 1 M.L.J. 259=(1940) M.W.N. 161=41 Cr.L.J. 419=A.I.R. 1940 Mad. 370=I.L.R. (1940) Mad. 433=187 Ind. Cas. 144 (S.B.).

——S. 13—Misconduct in connection with instructions of client—Court before whom such misconduct takes place, if can take action—Trust—Breach of—Client deprived of valuable rights—Conduct must be severely dealt with.

If the Pleader who practises in a Court commits an offence of professional misconduct in connection with any instructions which he has received from his client generally or in connection with a particular case, then it is within the jurisdiction of any Court before whom the Pleader is practising, if brought to its notice that the Pleader has committed any professional misconduct, to take action against him and those proceedings will be entirely with in jurisdiction.

It is regrettable that legal practitioners who are entrusted by poor and ordinary litigants in the mufassal do not hesitate on occasions in committing serious breaches of trust in utter violation of the confidence imposed by their clients in the hope that the usually illiterate clients will find it difficult and inexpedient to convince a Court of the moral delinquency of the legal practitioner—the result very often has been that for failure to carry out the trust, the litigant has been deprived of his valuable rights and he has no remedy whatsoever, except to embark on doubtful and expensive litigation with dubious chance of success against a lawyer. It is incumbent on the High Court to protect the unfortunate litigants whose trusts have been betrayed by practitioners and if it is established that the lawyer, instead of discharging his duties faithfully like persons of trust and honour, has betrayed that trust, such conduct must be severely dealt with. A.I.R. 1938 Pat. 17=18 P.L.T. 961=39 Cr.L.J. 203=4 B.R. 184=17 Pat. 96=172 Ind. Cas. 877 (S.B.).

——Ss. 13, 14—District Judge hearing that Pleader was using his private car as a public conveyance proceeding to hold inquiry under S. 14—Propriety of — Proper procedure — Pleader relinquishing interest in car.

Where a District Judge is informed by a person avowedly at enmity with a legal practitioner, that the latter was using his private motor car as a public conveyance, he should report the matter to the High Court in order that the High Court may take such steps as it deems fit under S. 13, Legal Practitioners' Act, or otherwise. He has no jurisdiction to hold an inquiry into the matter under S. 14, Legal Practitioners' Act, without having previously referred the matter to the High Court.

If a Pleader uses his private car as a public conveyance for passengers, in so acting, he is not conforming to the rules by which the conduct of Pleaders is regulated:

Held, that in view of the fact that the Pleader had relinquished whatever interest he had in the car, no disciplinary action was necessary. A.I.R. 1936 Rang. 189=37 Cr.L.J. 617=162 Ind. Cas. 485.

——S. 13—High Court is competent to take action under S. 13, Cl. (f) after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court; the enquiry may well be made by a Subordinate Court under the direction of the High Court. The only essential is, as pointed out by the full Bench in **In the matter of Ganapathi Sastri,** 19 M.L.J. 504 that notice must be given to the legal practitioner concerned to show cause against suspension or dismissal and the notice must formulate the charges; with great particularity and precision so as to enable the practitioner to know the charges he is called upon to meet. The final termination rests with the High Court and with the High Court alone, as was pointed out by the learned Judges in **Russick Lal Nag**, 44 Cal. 639; and even if the alleged misconduct had been brought to the notice of the High Court, without the intervention of the Subordinate Court the High Court is competent and ought in a proper case to take necessary action. 71 Ind. Cas. 673=27 C.W.N. 88=24 Cr.L.J. 209=A.I.R. 1922 Cal. 550.

——S. 13—Misconduct before Subordinate Judge—District Judge can take action—Charge must be precise—Final order is for the High Court.

The District Judge has jurisdiction to deal with the alleged misconduct of a pleader, even if it does not take place in his Court if he is practising in his Court. Section 13 does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. Section 14 does not specify the nature of the materials upon which the court concerned may take action. It is plain however that if proceedings are instituted, there must be an enquiry supported by legal evidence. What is essential however is that the charge must be formulated with precision so as to enable the legal proctitioner concerned to meet the allegations against him. The ultimate order if any, can be passed by High Court and High Court alone, on the materials supplied by the Subordinate Court. 67 Ind. Cas. 985=49 Cal. 850=35 C.L.J. 520=A.I.R. 1922 Cal. 484 (S.B.).

——Ss. 13 (b) and 14—Inquiry into misconduct—Who should conduct.

A charge of professional misconduct of a pleader can be inquired into only by the presiding officer of the Court in which the pleader practises. 32 M.L.J. 402=(1917) M.W.N. 303=6 L.W. 364=18 Cr.L.J. 785=41 Ind. Cas. 305.

——Ss. 13 (f) and 14—Inquiry into misconduct—Charge—Subordinate Courts.

S. 14 of the Legal Practitioners' Act includes a charge under clause (f) of S. 13 (as amended by Act XI of 1896), and Subordinate Courts have jurisdiction to take proceedings under clause (f) 39 Mad. 1045 (F.B.) Foll, 27 C. 1023, Diss. The fact that the pleader concerned had become a Vakil of the new High Court at Lahore since the action was taken under S. 14 of the Act by a Lower Court could not affect the jurisdiction of that Court. 152 P.R. 1919=2 Lah. L.J. 51=21 Cr.L.J. 198=54 Ind. Cas. 982.

——Ss. 13, Cls. (b), (f) and 14—Inquiry into misconduct—Subordinate courts -Receipt of money from accused for bribing police.

Subordinate courts can take proceedings against a legal practitioner in respect of an act coming under Cl. (f) to S. 13, where proceedings are commenced under Cl. (f) to S. 13, but if it is found that the act comes under Cl. (f) to S. 13, the High Court may avail itself even if the subordinate court in such case would have no jurisdiction to make the enquiry it did. In this case the High Court dismissed a mukhtear for having received a sum of money from one of the persons against whom a case is pending for the purpose of bribing the police acting as a go-between. 21 C.W.N. 516=18 Cr.L.J. 465=39 Ind. Cas. 305.

——Ss. 13 (f) and 14—Inquiry into misconduct—Subordinate Courts.

S. 13(f) is not confined to cases of misconduct **ejusdem generis** as those in other clauses. The subordinate Courts can take proceedings under S. 14. 39 Mad. 1045=18 M.L.T. 549=(1915) M.W.N. 1050=17 Cr. L. J. 38=32 Ind. Cas. 326.

——Ss. 13 and 14—Inquiry into misconduct—Charge—Report to High Court.

Where any of the charges mentioned in S. 13 of the Act is brought to the notice of any Court within whose local limits a pleader is ordinarily practising, the presiding officer can proceed against the pleader under S. 14 and report to the High Court for suspending or dismissing such pleader in case the charge is made out. Before issuing notice to the pleader the Court is bound to hold a preliminary enquiry in order to satisfy itself that the charge is **prima facie** true. Such notice if issued on a vague report is liable to be set aside by the High Court. 31 P.W.R. (Cr.) 1909=11 Cr.L.J. 148=4 Ind. Cas. 1022.

——Ss 13, Cl. (f), 14—Jurisdiction—Inquiry by Court subordinate to the High Court into conduct of pleader practising before it.

Held, that the words "any such misconduct as aforesaid" as used in S. 14, of the Legal Practitioners' Act, 1879, relate to all the cases set out in S. 13 of the Act. The authority therefore to inquire into a matter falling within the purview of S. 13, clause (f) of the Act is not confined to the High Court, but may be exercised by a Subordinate Court before which the pleader or mukhtear whose conduct is called in question may be practising. (1906) A.W.N. 268=3 A.L.J. 811=29 A. 61.

——Ss. 13, 14—Reference—Jurisdiction—Constitution of Bench—Division Court, if empowered to hear references under S. 14.

According to a long and undeviating course of practice in the High Court the constitution of a Bench for hearing civil appeals and references from a particular group has been treated as conferring on that Bench a jurisdiction to hear references under S. 14 of the Legal Practitioners' Act coming from districts within that group. Such practice gives the Division Bench sufficient authority to deal with such references without any special order allocating references under S. 14, Legal Practitioners' Act, to the Bench. 5 Ind. Cas. 406=37 C. 173=14 C.W.N. 275.

——S. 13—A Court is quite competent to order an enquiry into the facts and circumstances of a case whether it came under Cl. (b) or whether it came under Cl. (f) of S. 13 of the Act. 27 Cal. 1023, **Not foll**; 75 Ind. Cas. 728=1923 P.H.C.C. 329=25 Cr.L.J. 40=5 Pat. L.T. 350=A.I.R. 1924 Pat. 131.

——S. 13—Proceedings not to be dropped on agreement between parties.

Court having reason to believe that practitioner may have been guilty of professional misconduct—It cannot allow proceedings to be dropped on agreement between complainant and practitioner or on wish of complainant. A.I.R. 1940 Mad. 370=51 L.W. 197=(1940) 1 M.L.J. 259=(1940) M.W.N. 161=41 Cr L.J. 419=I.L.R. (1940) Mad. 439=187 Ind. Cas. 144 (S.B.)

——S. 13—Jurisdiction not vindictive.

The jurisdiction which the Court exercises under S. 13 is not a vindictive jurisdiction at all. Its main object in such a case is not to allow a man to practise in Courts, when he himself is counselling disobedience to the law and order enforced by Courts. When a man who has offended in that way comes before the Court and honestly expresses his regret and his intention to assist the administration of justice in future, there is no reason why he should not be given an opportunity of showing that his intentions are as he expresses them. 81 Ind. Cas. 57=18 M.L.W. 717=1924 M.W.N. 18=33 M.L.T. 100=25 Cr.L.J. 569=A.I.R. 1924 Mad. 160=45 M.L.J. 718 (F.B.).

——S. 13—Inquiry into—Misconduct—Procedure.

If a Court thinks that there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, it should decide the merits and reserve such question for further consideration after the disposal of the suit. 40 All. 147=16 A.L.J. 64=19 Cr.L.J. 865=44 Ind. Cas. 28.

——S. 13—Enquiry on formulated charges.

Enquiry should proceed on formulated charges—Evidence should be carefully taken and judged according to the ordinary standards of proof. 123 Ind. Cas. 184 =1930 A.L.J. 539=34 C.W.N. 534=1930 M.W.N. 300 =31 M.L.W. 627=7 O.W.N 517=51 C.L.J. 418=31 Cr.L.J. 489=A.I.R. 1930 P.C. 144=58 M.L.J. 635 (P.C.)

——S. 13 (b)—Inquiry into misconduct—Cheating client— Admission of charges — Formality in drawing up the charges.

The Chief Court found that the appellant who acted for the plff. as pleader in a pre-emption suit, had taken advantage of that position of trust in order to cheat his client out of the subject-matter of the suit and obtain it for himself, and made an order removing the appellant permanently from the register of pleaders entitled to practise. On a petition asking for a review of that order appellant's counsel withdrew all the grounds alleged in the petition as grounds for review and admitted that the facts were as they were found in the order under review. The Court reviewed its former decision and made a second order reducing the penalty to suspension from practice for three years. **Held,** that the charges were not perhaps very formally drawn up but the substance of what was imputed to the appellant was perfectly well understood by all parties, that the order on review went as far in the direction of mercy as it properly could go. 14 C.W.N. 521=11 C.L.J. 438=(1910) M.W.N. 107=7 M.L.T. 412=12 Bom.L.R. 425=20 M.L.J. 447=11 Cr.L.J. 303=10 P.W.R. (1915) Cr.=6 Ind. Cas. 269 (P.C.).

——S. 13—It is duty of applicant to substantiate his allegations and submit himself to cross-examination.

The proceedings under S. 13, Legal Practitioners' Act (XVIII of 1879), are of a quasi criminal nature, and in the event of the charge of the professional misconduct being established, the consequences to the legal practitioner concerned are very serious indeed. Such being the case it is the duty of the applicant who is more or less in the position of a complainant to go into the witness box and substantiate his allegation before producing any other witnesses, and what is more important, to submit himself to cross-examination. A.I.R. 1930 Lah. 987.

——S. 13—Evidence in another case incorporated in enquiry—Legality.

"When evidence has been given in one case upon the issues raised in that case nothing can be more dangerous than to take that evidence and apply it to another case in which other issues arise." Where in a proceeding against a legal practitioner for having tampered with the witnesses on the other side the Magistrate in holding the enquiry merely took the depositions already given in the other case and used them as against the pleader.

Held, that the procedure adopted in the inquiry was wholly illegal. 1929 M.W.N. 384 (F.B.).

——S. 13—Inquiry into charges of professional misconduct—Opportunity to cross-examine—Witnesses—Evidence — Legal evidence—Hearing of arguments by Advocate—Practice—High Court—Disciplinary jurisdiction.

In an enquiry into the alleged professional misconduct of a pleader, the court examined two witnesses and also the pleader, on the understanding that the pleader was not then a person on his defence. The pleader was given no opportunity of cross-examining the witnesses, and was not allowed to address the court upon the evidence. The Judge then expressed an opinion, adverse to the pleader, that he had deliberately made a false statement in court:—Held, by Jenkins, C. J., that having regard to the nature of evidence and the defects in procedure it would not be safe to accept the opinion of the court. Held, by Beaman, J., that there was no good evidence upon which the charge could be sustained, since it was doubtful whether reading and criticising depositions or other matter, which, if objected to, could not be received in evidence, makes those depositions or that matter evidence until the objection or objections are expressly waived —Per Jenkins, C.J.—It is clear that a judge in the great majority of cases cannot do full justice to a case without hearing the arguments which the advocates desire to adress. (1907) 9 Bom. L.R. 866.

——S. 13—Proceeding under—Several charges drawn up—Some of them proved by reliable evidence—Cumulative effect of finding on each charge—Whether can be considered to determine punishment.

Although in a proceeding against a member of the legal profession under the Legal Practitioners' Act different charges have been drawn up, there is only one issue which is whether or not he has been guilty of conduct justifying action under the Act, and the so-called charges spilt up into various sub-heads merely give notice to him of the case that he is called upon to meet. It is true that these sub-heads of charges are independent items and if one more of them are based on inconclusive evidence action on these sub-heads is not justified because two inconclusive pieces of evidence do not make the case against him any better. At the same time when more than one such sub-head is established by reliable evidence then the cumulative effect of the findings on each sub-head can properly be taken into consideration in determining what action should be taken against him. I L R. (1947) Lah. 687=48 Cr L J. 737=231 Ind. Cas. 215=A.I.R. 1947 Lah. 262 (F.B.).

19. Misconduct prior to enrolment.

——S. 13—Criminal offence—Enrolment—Concealment of conviction—Effect.

A pleader intentionally concealing his conviction in his application for admission is liable to be

dismissed. 11 Bur. L.T. 304=15 Cr.L J. 587=25 Ind. Cas. 339.

——S. 13, Cl.(f)—False personation by a person enrolled as mukhtear—Suspension of.

False personation by a person who is afterwards enrolled as a mukhtear is a ground for his suspension under S. 13, Cl.(f) of the Legal Practitioners' Act, XVIII of 1879, as amended by Act XI of 1896. (1902) 6 C.W.N. 556=28 C. 890 (F.B.).

——S. 13—Misconduct prior to enrolment—Applicability of section to.

Held by the Full Bench (Ghose J., dissenting).—S. 13 of the Legal Practitioners' Act XVIII of 1879 as amended by Act XI of 1896 applies to misconduct antecedent to enrolment. (1902) 6 C.W.N. 556=28 C. 890 (F.B.).

20. Mistakes and negligence.

——S. 13—If a pleader acts bona fide in accepting a vakalatnama but makes a serious mistake, there is no need for the Court to take up the matter again after a long time has elapsed. The rules, which have been drawn up by the Judges of the High Court, should be strictly observed by pleaders in accepting vakalatnama. 65 Ind. Cas. 417 =23 Cr.L J. 65=A.I.R. 1922 Cal. 178.

——Ss. 13 (b) and 14—Error of law.

Error of law is no professional misconduct. 43 Cal. 685=20 C.W.N. 278=23 Cr.L.J. 237=17 Cr.L.J. 65=32 Ind. Cas. 657.

——S. 13—Misconduct—Indiscretion or error of judgment—If amounts to—Counsel for appellant failing to pay deficient Court-fee believing appellant's case to be weak and allowing appeal to be dismissed.

It is settled rule of law that charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion. Where a counsel for appellant fails to pay deficient Court-fees in time honestly believing his client's case to be weak and in order to save him his money and allows the appeal to be dismissed and returns to his client the draft sent to him without even cashing it, his conduct may amount to certain indiscretion or laxity on his part, but it is not a fit case for any disciplinary action being taken against him. 51 Cr.L.J. 862=A.I.R. 1950 Pepsu. 2.

——S. 13—Duty to make inquiries to see that mukhtearnama is in order and is genuine—Failure to make enquiries amounts to negligence.

It is very important that mukhtears should make inquiries to see that their mukhtearnamas authorising them to withdraw client's money are in order and genuine even in circumstances where prima facie, there are no facts to arouse their suspicion. The fact that there was nothing to arouse his suspicion does not absolve him from this duty in cases of this kind to make a thorough inquiry and that notwithstanding any possible disadvantage to himself. Even if he has been honest throughout, if he has not taken this precaution which the Court has laid down in the public interest, his conduct will amount to negligence. A.I.R. 1937 Pat. 137=17 P.L.T. 948=38 Cr.L.J. 441=3 B.R. 309=16 Pat. 123=167 Ind. Cas. 656 (S.B.).

——S. 13—Carelessness—Affidavit for withdrawal of money—Pleader swearing he had made enquiries—Money found to have been withdrawn—Duties of Pleader in such cases.

A Pleader of about 25 years' standing and commanding considerable practice applied for withdrawal of a certain sum of money in Court deposit and swore in his affidavit that he made such enquiry as was open to him to make and had consulted the accounts of his client. It was found that the money had already been withdrawn:

Held, although it is expected that when the Court requires the assistance of the Pleader for the purpose of enabling it to satisfy itself that the money is due and had not been withdrawn, the Court certainly expects a greater degree of care on the part of the Pleader, it could not be held that the conduct on the part of the Pleader amounted to such misconduct as would justify the Court in proceeding to take action under the Legal Practitioners' Act against him, and that the proceedings taken against him should serve as a warning to him. A.I.R. 1936 Cal. 658=38 Cr.L.J. 197=166 Ind. Cas. 371.

——S. 13—A pleader withdrawing money from Court at the instance of his client's relation who was surety for the guardianship of the client and paying the money to the relation on the strength of two previous withdrawals and payments to the relation is negligent of his duty to the Court and also his client but not guilty of grossly improper misconduct in the discharge of the professional duty within the meaning of S. 13 of the Legal Practitioners' Act. 77 Ind. Cas. 181=25 Cr. L.J. 325=A.I.R. 1925 Cal. 146.

——S. 13 (a)—Negligence — General Rules and Orders of Calcutta High Court, R. 45 (e).

A pleader engaged jointly with another on behalf of plff. in a suit instead of signing the Vakalatnama at the time of the suit, signed it after the other pleader had left that Court for another Court, and on the instructions of that other's clerk received from Court a sum of money deposited by the judgment debtor to be paid to the plff. decree-holder and paid it over to the clerk, who did not pay it to the plff. It transpired that the clerk had not taken out his "card" for the year and was not thus entitled to act as pleader's clerk when the money was withdrawn, but that the pleader **bona fide** believed that he had such authority and had taken out his "card". **Held**, that the pleader contravened the provisions of S. 13 (a) of the Legal Practs.' Act and of R. 45 (e) of the General rules and Orders of the Calcutta High Court and, therefore, deserved severe censure for his conduct. 96 Ind. Cas. 442 (Cal.).

——S. 13 (a)—Negligence—R. 45 Ch. XI Calcutta High Court Civil Rules and Orders.

The duty of a pleader who accepts a vakalatnama is to note on it, the date and the name of the person from whom it is received, and he must be satisfied that the person brought to him was either the party himself or his recognised agent or some friend or relative. 20 C.W.N. 283=17 Cr.L.J. 191=33 Ind. Cas. 831.

——S. 13 (b)—Negligence — Reckless signing of Vakalatnama.

Every practitioner is bound to see before accepting a Vakalatnama that he has not already been engaged on the other side. To recklessly sign a vakalatnama very nearly amounts to misconduct. 14 Cr.L.J. 44=18 Ind. Cas. 268 (All.)

——Act. S. 13 (b)—Negligence—Cheating of client by clerk.

Negligent management of his office and permitting his clerks to cheat the clients and mislead them as to the progress of the case, and to inform the client that a case had been dismissed on the merits when in fact it was dismissed owning to the Pleader's neglect, is misconduct on the part of the pleader for which he might be suspended from practice. 35 Mad. 543=39 I. A. 191=16 C.W.N. 1081=23 M.L.J. 114=13 Cr.L.J. 680 =12 M.L.T. 396=14 Bom. L.R. 1079=16 C.L.J. 634= (1912) M.W.N. 963=16 Ind. Cas. 328 (P.C.)

[On appeal from 22 M.L.J. 276=(1912) M.W.N. 348=11 M.L.T. 296=13 Cr.L.J. 421=14 Ind. Cas. 965.]

21. Nature of proceedings.

See also: Note 3 under S. 14.

——S. 13—Nature of proceedings.

Proceedings under the Legal Practitioners' Act are **quasi**-criminal proceedings. If the person against whom the proceedings are directed is found guilty of the charges which are framed under the Act, he is liable to punishment. Some of the provisions of the Legal Practitioners' Act are, in a sense, penal. Further-more, in the proceedings under the Act, the contest is not between the legal practitioner and the person who has laid information against him, but between the legal practitioner and the Govt. Advocate as representing the Crown. It is also to be observed that whilst in a civil suit a successful defendant may recover his costs against an unsuccessful plaintiff, a successful defendant in a proceeding under the Legal Practitioners' Act, cannot recover costs from the Govt. Advocate or from the person upon whose information the proceedings under the Act have been started. A.I.R. 1939 All. 168=(1938) A.L.J. 1219=1939 A.W.R. 861 =I.L.R. (1939) All. 224=180 Ind. Cas. 563.

——S. 13—Though the proceedings under S. 13, Legal Practitioners' Act, cannot be described as a prosecution they are something very akin to a prosecution. (1937) A.L.J. 528=1937 A.W.R. 451=A.I.R. 1937 All. 506=170 Ind. Cas. 615.

——S. 13—Proceedings under Legal Practitioners' Act whether ground for action for malicious prosecution.

A man's professional reputation is as valuable as a trader's financial reputation. If the presentation of a bankruptcy petition necessarily involves injury to the trader's credit, the presentation of a petition in proceedings under the Legal Practitioners' Act against a Mukhtear must similarly involve damage to his professional reputation. Once such proceedings are instituted, his good name and reputation must suffer and that being so, these proceedings do come within that class of civil proceedings which cause actual damage the moment they are launched and therefore, give rise to an action for malicious prosecution if such proceedings are instituted maliciously and without reasonable and probable cause and, if they end in favour of the person proceeded against. (1937) A.L.J. 528=1937 A.W.R. 451=A.I.R. 1937 All. 506=170 Ind. Cas. 615.

——S. 13—Disciplinary proceedings under the act are neither criminal nor civil and the Court has inherent power to apply such rules of procedure as may ensure a fair trial of the matter requiring adjudication. What is essential is that the party should have proper notice and reasonable opportunity to be heard. 12 P. L. T. 773=A.I.R. 1931 Pat. 369=32 Cr.L.J. 1256=11 Pat. 365=134 Ind. Cas. 945 (F.B.).

——S. 13—Under the Legal Practitioners' Act, there is no question of any indictment or trial for the same offence under any other law and there is no question of punishing Pleaders over again for those offences; the question always is whether the acts committed by the Pleaders concerned bring them within the disciplinary jurisdiction of the Court of which they are officers under the Legal Practitioners' Act. A.I.R. 1931 Pat. 369=12 P.L.T. 773=32 Cr.L.J. 1256=17 Pat. 365=134 Ind. Cas. 945 (F.B.).

22. Non-acceptance of brief.

——S. 13—Non-acceptance of brief.

Mere fact that opposite party happens to be member of the same profession is not a circumstance which entitles a member of the Bar to refuse to undertake the case against him.

It is very important then men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to act for anybody who fulfils certain conditions. Therefore if a client comes to them with proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind, which they are accustomed to do and they refuse, such refusal amounts to professional misconduct and should be punished as such. 115 Ind. Cas. 641=30 Cr.L.J. 522 =1929 A.L.J. 616=10 L.R.A. Cr. 95=A.I.R. 1930 All. 262.

——S. 13—Refusal to take up case merely with intention of not appearing against professional brother is professional misconduct.

A lawyer must, as a general rule, take up a case for any member of the public if (1) a fair and proper fee is tendered to him; (2) adequate instructions are given; and (3) the case is of a class which the lawyer is accustomed to do. No doubt he can legitimately decline to take up the case if, for instance, he has an out-station engagement, or is engaged in some social function, such as a marriage or is incapacitated by ill-health or any reason which a sensible man would recognize adequate. But to refuse to take up a case simply and solely on the ground that the Advocate will not appear against a brother practitioner, or to put forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is, in each case, professional misconduct and should be dealt with as such. The reason for the rule is that if lawyers as a body refuse to act against lawyers, they would become a class standing above the law and justice would be denied to the public. 51 All. 892=A. I. R. 1929 All. 367.

——Ss. 13, 14—Refusal of brief for political reason —Right to refuse—Reasons for refusal, if must be stated —Right to move High Court to quash proceedings when called upon to show cause.

A pleader is not bound to accept a brief offered to him nor to state his reasons for refusing to accept it. A pleader having refused a brief offered to him was subjected to stringent examination to disclose his reasons, and on its appearing that his reasons were political, proceedings were started against him under the Legal Practitioners' Act, and he was called upon to show cause why he should not be reported to the High Court for unprofessional conduct. Without waiting to show cause, the pleader at once moved the High Court to quash the proceedings. **Held** —That he was entitled to do so and that there was no rule of procedure to justify the examination to which he was subjected. (1908) 12 C.W.N. 381=35 C. 317.

23. Non-attendance.

——S. 13 (f)—Non-attendance on day of hartal—Absence of evidence to show intention to boycott Court.

Where, owing to a hartal in the town, the majority of Pleaders remained absent from the Court but it was not shown that they were engaged in any cases fixed on that day, or that they intended to boycott the Court:

Held, that such an intention cannot be affirmatively presumed from their absence and no individual Pleader could be held liable for misconduct under S. 13 (f), Legal Practitioners' Act. 35 C.W.N. 344=A.I.R. 1931 Cal. 616=33 Cr.L.J. 2=134 Ind. Cas. 1044.

——S. 13 (b) and (f)—Boycott of Court on particular day—Misconduct—Consent of client, effect of.

Absenting from Courts on a particular day in pursuance of a concerted movement on the part of the Pleaders to boycott the Courts, amounts to professional misconduct under S. 13 (b) and (f) of the Legal Practitioners' Act and the consent of client does not make any difference. 35 C.W.N. 223=32 Cr.L.J. 980=A.I.R. 1931 Cal. 706=132 Ind. Cas. 90.

——S. 13—Boycott of a Court and throwing up a brief without obtaining client's consent amount to misconduct.

Where in pursuance of a resolution of the local Bar Association to boycott a Magistrate's Court, a pleader refrained from appearing in Court without first obtaining his client's consent and left his client undefended as a result of which the client was detained in jail for about a month more,

Held, that the pleader was guilty of unprofessional conduct and that an arrangement arrived at with his client for a consent subsequent to the pleader's failure to appear and defend did not affect his liability. 82 Ind. Cas. 712=2 Rang. 265=25 Cr.L.J. 1352=A.I.R. 1924 Rang. 320.

——S. 13—Observing hartal through fear of the public wrath.

Per **Sanderson, C.J.**—Failure to attend Court for unreal fear of being put to great inconvenience and humiliation by the irritated public, who were observing hartal or bowing down to the popular will rather than doing the pleader's duty to his client and to the Court, amounts to acquiescence in though not actual sympathy with the boycott-of-Court movement and consequently it amounts to grossly improper conduct.

Per **Woodroffe, J.**—Mere lack of courage or unwillingness to face a real or supposed danger arising from the indignant public opinion and the fear of injury physical or otherwise arising therefrom would not amount to unprofessional conduct but to have sympathy with the cause of hurtal would. (Evidence sufficient to constitute joining the boycott-of-Court movement discussed).

Per **Woodroffe, J.**—A pleader being an officer of Court and thus bound to submit to its authority cannot join in an action to boycott the Court or a particular Judge because of any grievance real or alleged whether touching the Court or of political or other character. 71 Ind. Cas. 81=49 Cal. 732=26 C.W.N. 589=35 C.L.J. 356=24 Cr.L.J. 33=A.I.R. 1922 Cal. 515 (S.B.)

——S. 13—Throwing away interests of unimportant client in favour of important client is deserving of censure.

A pleader **N** had two cases to attend on the same day. In one he was an assistant to a senior but in the other he was solely responsible though **B** a relation pleader of his was also engaged on nominal fees to take notes of evidence. On the previous night **N** took detailed instructions from his client who was being prosecuted for bribery in the latter case. His relation **B** was also present but the client remained under the impression that **N** would conduct the cross-examination next day. On the next day, however, **N** presented himself in the former case, the client concerned wherein was important and did not attend the bribery case though requested. The former case was being conducted by his senior who was amply provided with assistance independently of **N**. It was not absolutely necessary for him to be present there. The bribery case was weak, it was then conducted by another pleader and the accused was convicted,

Held, that **N** threw away the interests of an unimportant client in favour of the interests of an important client and in so doing committed an offence deserving of the most serious censure. 116 Ind. Cas. 764=10 P.L.T. 664=A.I.R. 1929 Pat. 153 (F.B.).

——S. 13—Non-attendance.

Aga Haidar, J.—It may sometimes happen that a Counsel may find himself in a position of unforeseen difficulty when with all the best intentions in the world it may become impossible for him to appear on behalf of his client in a case and he may be left no alternative except to hand over his brief to another Counsel so that his client's interest may not suffer But in a murder case when a Counsel has reason to believe that he would not be available at the time when the case would be called on for hearing because he has other engagements elsewhere, it is his duty to communicate with the person who had engaged him and to return the fee to him. If it is not possible for him to do so and the pressure of overriding circumstances is beyond his control, then he should try his very best and spend the whole of the fee that he has received in briefing a Counsel who would do full justice to his client's case for the remuneration. 3 Bur. L.T. 131, **Ref.**

Per **Fforde, J.**—It is not practicable or indeed desirable to lay down rigid rules of conduct for the Bar. The independence and sense of responsibility of the legal profession should be encouraged rather than the reverse. But when a practitioner has undertaken the duty of appearing to defend a man for his life, he should give exclusive attention to that case, and nothing should be deemed to exonerate him from that obligation except physical inability to attend at the hearing. 108 Ind. Cas. 257=29 Cr.L.J. 362=10 A.I.Cr.R. 42=A.I.R. 1928 Lah. 448.

——S. 13—Refusing to appear in Court is not the proper course for pleaders when ill-treated by any Court.

Where some pleaders refused to appear in a certain Court in pursuance of a resolution of the Bar Association to boycott that Court as a protest against its ill-treatment of pleaders and proceedings under S. 14 of the Legal Practitioners' Act were drawn up against several pleaders for failure to appear in Court in matters which had been entrusted to them by their clients.

Held, the pleaders deliberately abstained from attending the Court and took part in a concerted movement to boycott the Court, a course of conduct which was not justified. The pleaders had duties and obligations to their clients in respect of suits and matters entrusted to them which were pending in the said Court. There was a further and equally important duty and obligation upon them, **viz.**, to co-operate with the Court in the orderly and pure administration of justice. By the course which they adopted the pleaders violated and neglected their duties and obligations in both these respects if the pleaders thought they had a just cause of complaint, they had two courses open to

them: to make a representation to the District Judge or to the High Court. 69 Ind. Cas. 209=26 C.W.N. 580=35 C.L.J. 403=A.I.R. 1923 Cal. 212.

——S. 13—Per **Curiam.**—When a pleader accepts a Vakalatnama in the ordinary form, he must attend Court on every occasion to protect the interest of the client concerned. Any limitations on this obligation by special agreement must be proved and the onus lies on the pleader. Non-payment is no justification for refusal to attend. 71 Ind Cas. 81=49 Cal. 732=26 C.W.N. 589=35 C.L.J. 356=24 Cr.L.J. 33=A.I.R. 1922 Cal. 515 (S.B.).

——S.13(b)—Abandonment of case—Wilful neglect of pleader to appear—Plea of non-payment of fees.

A pleader is guilty of misconduct if after receipt of full fees he wilfully neglects to appear and conduct a case. Per **Sundara Iyer, J**:—Wilful neglect to appear after receipt of full fees is worse than gross negligence and amounts to a fradulent conduct. A plea of non-payment of fees as excuse for non-appearance is useless in the absence of an agreement that it must be paid previously. Per **Sankaran Nair, J**:—In the absence of such an agreement or at least notice to the party in time, a Vakil must appear and conduct the case though the fee or a portion thereof remains unpaid. 37 Mad. 238=23 M.L.J. 447=12 M.L.T. 615=(1912) M.W.N. 1029=13 Cr.L.J. 800=17 Ind. Cas. 544.

——S. 13—Abondonment of case—Acceptance of fees for whole case—Failure to appear.

In the absence of a special contract to the contrary, the fees accepted by an Advocate must be taken to be for the whole case. Where a case requires more hearings than anticipated and the advocate refuses to appear unless a further fee is paid to him, he is guilty of professional misconduct. A writing to evidence the term of the engagement between the advocate and the client is always desirable. 8 L.B.R. 294=15 Cr.L.J. 707=30 Ind. Cas. 995.

——Ss. 13 (b) and 14—Abandonment of case.

A pleader acts improperly in abandoning his client's case while in the midst of the client's examination in-chief. After once taking up his client's case he ought to have seen that it was terminated. 14 Cr.L.J. 379=20 Ind. Cas. 139 (Cal.)

24. Politics.

See also Note 23.

——S. 13 — Applicability — Pleader distributing pamphlets calling upon public officers to resign.

The Legal Practitioners' Act applies to a Pleader registered as a Legal Practitioner under R. 9 of the rules framed under the Act, although he has not taken the necessary steps to have the sanad renewed for the year in which his conduct was called in question and the Court has power to deal with him under S. 13.

The Pleader was convicted under the Defence of India Rules for distributing pamphlets to public officers during the grave disturbances which took place in India in August 1942, calling upon them to resign their posts and to take an active part in the movement which resulted in the disturbances:

Held, that the conduct of the Pleader was such that the Court could not allow him to continue to be a member of the legal profession and that his name should be struck off the register of Pleaders. A.I.R. 1943 Mad. 616=56 L.W. 401 (2)=(1943) 2 M.L.J. 126=1943 M.W.N. 516=I.L.R. (1944) Mad. 17=45 Cr.L.J. 534=212 Ind. Cas. 103 (S.B.)

——S. 13 (f)—Political opinions of members of legal profession when actionable—Conviction of member under Defence of India Rules for sending letters to officials to induce them to leave their posts—Whether misconduct.

The Court is not concerned with political opinions of the members of the legal profession unless the expression of them involves the committing of an offence, or constitutes conduct improper on the part of a legal practitioner, who is a part of the machinery for the administration of justice.

A legal practitioner who is convicted under the Defence of India Rules for having sent letters to responsible officials, with the object of inducing them to leave their posts is guilty of misconduct of a nature as to justify disciplinary action under S. 13, Legal Practitioners' Act. A.I.R. 1943 Mad. 475=(1943) 1 M.L.J. 396=56 L.W. 320=1944 M.W.N. 459=44 Cr.L.J. 748=I.L.R. (1944) Mad. 8=208 Ind. Cas. 222 (S.B.).

——S. 13 — Misconduct not involving moral turpitude.

In cases of professional misconduct, it may sometimes be necessary that the Court should impose a penalty which is intended to be punitive, and to serve as a warning to other Advocates. But in the case of misconduct which is not professional, the element of punishment should not enter into the consideration of the Court. It is not part of the High Court's duty to impose penalties for misconduct, unconnected with the exercise of the profession.

In cases of misconduct involving moral turpitude, the Court has to see whether the Advocate has shown himself to be unworthy of the confidence of the Court, or unfit to be entrusted with the business of his client, or a person with whom his professional brethern cannot be expected to associate. But cases involving moral turpitude are not the only ones in which the Court may be called upon to take disciplinary action. The Court has a right to expect of a high standard of loyalty to the Court and co-operation from the Advocates on its roll. Cases may arise in which it is proved that an Advocate has been engaged in revolutionary activities designed to destroy the system of which the Court forms part, or activities likely to hamper or embarrass the administration of justice by the High Court or any of the Courts subordinate thereto. Courts of law can only function under a stable Govt., and the destruction of Govt. by revolutionary and unconstitutional means must, of necessity, involve the destruction of the Courts, or the grave impairing of their effciency. The High Court will not tolerate upon its rolls an Advocate who is endeavouring to destroy or undermine the authority of the Courts. Anyone who elects to engage in activities of that nature must do so without the authority and prestige attached to the position of an Advocate. 36 Bom. L.R. 1136=A.I.R. 1935 Bom. 1 =59 B. 57=154 Ind. Cas. 546 (F.B.).

——S. 13 (f)—Pleader—Infraction of forest law to protest against policy of Government—Conviction—Power to take disciplinary action.

Where a Pleader, with the object of protesting against the forest policy of the Govt. of Berar and of drawing attention to public grievances, and partly to assist the civil disobedience movement, committed an offence under the Forest Law by cutting and removing without permit some branches of forest trees and was convicted and sentenced to pay a fine, and an application was made on behalf of the Govt. to the High Court for taking action against him under the Legal Practitioners' Act;

Held, (i) that the conduct of the Pleader fell within S. 13 (f) of the Legal Practitioners' Act and the High Court had power to take disciplinary action;

(ii) that the fact that the Pleader had already been punished by the Criminal Court was no bar to such action being taken by the High Court;

(iii) that under such circumstances, it was not proper to allow the Pleader to practise until he had changed his views.

Per **Niyogi, A. J.C.**—The action taken under S. 13 (f), Legal Practitioners' Act, is not punitive but disciplinary. The object in a case of this nature should be to prevent repetition of such acts as are found incompatible with the obligations which the profession of law imposes on those who voluntarily served by administering a warning to the gentlemen whose case, in particular has been brought to the notice of this Court and there is no necessity to suspend such gentlemen from practising. A.I.R. 1931 Nag. 33=27 N.L.R. 29=14 N.L. J. 1=32 Cr.L. J. 604=136 Ind. Cas. 826 (S.B.).

Pleaders who become members of the Civil Disobedience Movement and commit illegal acts in furtherance of that movement by taking the law into their own hands and defying constituted authority, render themselves liable to disciplinary action under S. 13 (f), Legal Practitioners' Act. A.I.R. 1931 Pat. 369=12 P.L T. 773=32 Cr.L. J. 1256=11 Pat. 365=134 Ind. Cas. 945 (F.B.).

——S. 13—The conduct of a pleader should not be inconsisent with the position he holds in the administration of justice.

A legal practitioner, as any other person has a right to entertain political opinions which may or may not be acceptable to the authorities. But having obtained licence to practise in Courts, if he acts inconsistently with the position which he has obtained by virtue of the licence granted to him, he abuses it and brings himself within the four corners of the Legal Practitioners' Act. A.I.R. 1922 Cal. 515 and A.I.R. 1922 P.C. 351, Foll.

The action of legal practitioners counselling the public not to attend Court and thereby interfering with the administration of justice amounts to misconduct within the provisions of S. 13. 114 Ind. Cas. 96=30 Cr.L. J. 232=12 A.I.Cr.R. 214=A.I.R. 1928 Cal. 853.

——S. 13—Advising non-payment of taxes or boycott of Courts justifies refusal to issue sanad.

Courts should not consider what the political opinions of any body are, whether they are members of the legal or any other profession. But while the Courts will always uphold the liberty of the subject in thought or speech, an applicant who comes to ask for the issue or renewal of a **sanad,** is applying to be treated as a part of the machinery, for the maintenance of law and order in the body politic and to take an active part in administering, for the other subjects of the Crown, the benefits that may be supposed to result from the upkeep of law and order. It is intolerable and illogical that a man should seek to be put in that position, while at the same time he is saying that law and order should be disobeyed, and taxes are not to be paid and that all public offices are to be abandoned, in order to paralyse the very life of the body politic, apart altogether from any other views he may entertain, as to the desirability of the person or the particular members of the Government he attacks, or the particular character of the transactions carried on, in these Courts. A Court would not without stultifying itself,' issue a certificate to a man, who, in the same breath that he is asking for it, cuts himself off and announces his intention to do his best to cut off others, from the life of the state. 75 Ind. Cas. 977=18 M.L.W. 689=1923 M.W.N. 768=33 M.L.T. 98=25 Cr. L.J. 65=A.I.R. 1924 Mad. 129=45 M. L. J. 684 (F.B.).

——**S. 13**—The jurisdiction of the High Court to take action against legal practitioners is not confined to acts in professional capacity but may extend to other activities, for example, organised resistance to payment of tax which entails grave danger to the public peace. 69 Ind. Cas. 367=18 M.L.W. 59=1923 M.W.N. 528=4 L.R.P.C. 36=1 Pat.L.R.Cr. 42=31 M.L.T, 192=49 I.A. 319=49 Cal. 845=27 C.W.N. 343=37 C. L. J. 136=25 Bom.L.R. 131=18 N.L.R. 176=A.I.R. 1922 P.C. 351=44 M.L.J. 32 (P.C.).

——S. 13 (b)—Politics—Passive rosistance—Civil disobedience to laws.

As a protest against the passing of the Rowlatt Act, certain barristers and pleaders practising joined the movement called the Satyagraha Sabha and signed a pledge whereby they undertook to refuse civilly to obey such laws as a committee to be hereafter appointed may think fit. **Held,** that the barristers and pleaders had, by signing the pledge, rendered themselves amenable to the disciplinary jurisdiction of the High Court, but that under the circumstances a warning was enough. Per **Macleod, C. J.**—Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administaration of justice, but also for giving professional advice, for which they are entitled to be paid, by those members of the public who require their services. It is not necessary for the High Court to exercise its jurisdiction that any offence should have been committed, nor is it necessary that what the pleaders have done should have subjected them to anything like general infamy or imputation of character. 44 Bom. 418=22 Bom. L. R. 13=21 Cr. L. J. 151=54 Ind. Cas. 679.

——S. 13 (b)—Politics — Organising seditious meeting—Reasonable cause—Meaning.

White, C. J., and Benson, J.—(Miller and Sankaran Nair, J). not expressing any opinion: The words other reasonable cause, in S. 13 (f) are not limited in scope to matters of the nature of those mentioned in Cls. (a) to (e) of the section. Two pleaders were charged under the Legal Practitioners' Act, with having organised a meeting at which two persons spoke and were convicted for sedition. Therefore the act of two pleaders who had only made certain arrangements for that meeting in which seditious speeches were made and signed a seditious leaflet for a procession in honour of B.C. Pal, whom the leaflet was intended to glorify does not constitute 'reasonable cause' within S. 13 for the suspension or dismissal of the pleaders. 19 M.L.J. 504=6 M. L. T. 253=11 Cr. L.J. 274=3 Ind. Cas. 344 (F.B.).

25. Privilege.

——S. 13 Cl. (b) and (f)—Privilege—Refusal to disclose—Communication.

A pleader has general authority to act in the interests of his client in the manner he thinks best, and cannot be charged with misconduct if he drafts a petition without consulting his client and asks or advises him to present the same in Court, where the facts on which the petition is based took place within his own cognizance and were such as to endanger the interests of his client. A pleader cannot be

charged for misconduct for refusing to disclose to the Court a professional communication made to him by his client. 14 Cr. L. J. 438=20 Ind. Cas. 598 (Oudh).

26. Proof of charge.

——Ss. 13 (b), 14—Strict proof of professional misconduct, necessity of.

Charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable or what may be mere error of judgment or indiscretion. Proving facts and circumstances giving rise to grave suspicion is not sufficient to establish a charge of fraudulent or grossly improper conduct in the discharge of professional duty. A.I.R. 1939 Pat. 343=40 Cr. L. J. 687=5 B. R. 795=20 P.L.T. 607=18 Pat. 580=182 Ind. Cas. 645 (S.B.).

——S. 13—Using client's money for one's own purposes—Fraud, if should be proved—Intention, if material—Subsequent agreement to restore money.

Where a legal practitioner is accused by his client of fraudulently and dishonestly using the money, it is not necessary that fraud or any other criminal offence should be proved. It is sufficient if it is shown that the legal practitioner has intentionally used his client's money for his own purposes without his client's permission; and it is quite unnecessary to consider whether he did so with any intention of defrauding his client. He may have every intention of restoring the money to his client later on but he is nevertheless guilty of professional misconduct in converting the money to his own use even temporarily.

When once an act of professionl misconduct has been committed, any subsequent agreement by the legal practitioner to restore the money and his client to receive it back does not make the act anytheless one of professional misconduct though the subsequent restoration of the money may have some bearing on the question of punishment. When a case of professional misconduct has been brought to the notice of the Courts, then the charge cannot be permitted to be "squared". 46 L. W. 48=(1937) M.W.N. 721=(1937) 2 M. L. J. 160=A.I.R. 1937 Mad. 696=38 Cr. L. J. 1000=I.L.R. (1938) Mad. 104=171 Ind. Cas. 93 (F.B.).

——S. 13—Held, pleader was not guilty of improper conduct.

Held, after considering the evidence that the pleader had not been proved to have been guilty of any improper conduct. Emperor v. Harbans Lal. A.I.R. 1936 Lah. 1013=163 Ind. Cas. 975.

——S. 13—Proof of legal practitioner's deliquency not free from doubt—Benefit of doubt.

A lawyer should not be convicted for professional misconduct unless the proof of his delinquency is free from doubt. When Court thinks that it might not be safe to act upon the assumption that it has been proved that the lawyer was a party to the scheme of suborning a witness, he should be given the benefit of the doubt and no disciplinary action will be taken against him. 36 Cr L.J. 1099=A.I.R. 1936 Rang. 180=13 Rang. 506=157 Ind. Cas. 48.

——S. 13—Proof of charge.

Charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable, or what may be mere error of judgment or indiscretion. An appropriate guide may be found in S. 13 under which a pleader or mukhtear may be suspended or dismissed who is guilty "of a fraudulent or grossly improper conduct in the discharge of his professional duty." 123 Ind. Cas. 184=1930 A.L.J. 539=34 C.W.N. 534=1930 M.W.N. 300=31 M.L.W. 627=7 O.W.N. 517=51 C. L. J. 418=31 Cr.L J. 489=A.I.R. 1930 P.C. 144=58 M. L. J. 635 (P. C.).

——S. 13—Where the gravemen of the charge is that the notice was prejudicial to the interests of the client, on whose behalf it was sent by his pleader it must be shown first that the pleader knew the rights of parties and that his client did not know them, or did not intelligently or deliberately realise them and, secondly, that the notice was in fact prejudicial to the interests of his client. 123 Ind. Cas. 184=1930 A.L.J. 539=34 C.W.N. 534=1930 M.W.N. 300=31 M L.W. 627=7 O. W. N. 517=51 C.L.J. 418=31 Cr.L.J. 489=A.I.R. 1930 P. C. 144=58 M.L.J. 635 (P.C.).

——S. 13—Charges of professional misconduct must be clearly established and should not be inferred from mere ground for suspicion however reasonable, or what may be mere error of judgment or indiscretion. A.I.R. 1930 P.C. 144, **Foll.** 31 P.L.R. 913=A.I.R. 1930 Lah. 947.

——Ss. 13 and 14—Inquiry into misconduct—Proof of guilt—Standard of.

The standard of proof of guilt under Legal Practitioners' Act is not different from other legal proceedings and should be such as to leave no reasonable doubt in the mind of the Court that the offence has been committed. 1 Pat. L. T. 372=21 Cr.L.J. 636=57 Ind. Cas. 460.

27. "Reasonable cause"—Cl. (f).

See also: Notes 6, 8 to 13, 17, 23, 24.

——S. 13 (f) "Reasonable cause"—Meaning—Offence not committed in professional capacity.

The words "any other reasonable cause" in S. 13 (b), Legal Practitioners' Act, are not confined to misconduct of which a practitioner is guilty in his professional capacity but embrace all causes which may afford reasonable grounds for his suspension or dismissal. 29 C. 890 (F.B.), foll. 51 Cr.L.J. 368=A.I.R. 1950 Dacca 3=2 D.R. 141.

——S. 13 (f)—Professional misconduct committed in personal capacity.

It cannot be said that a legal practitioner can never be punished for professional misconduct committed by him in his personal capacity, however gross the offence may be. 43 Bom.L.R. 250=A.I.R. 1941 Bom. 228=42 Cr.L.J. 723=I.L.R. (1941) Bom. 548=195 Ind. Cas. 359.

Section 13(f), Legal Practitioners' Act, is not confined to acts done in a professional capacity. A.I.R. 1931 Nag. 33=27 N.L.R. 29=14 N.L.J. 1=32 Cr.L.J. 604=130 Ind. Cas. 826 (S. B.)

——Ss. 13 Cl. (f) and 12—"Reasonable cause,"—Ejusdem generis, principle of — Suspension or dismissal, considerations leading to.

The legislature did not intend, to couple Cl. (f) of S. 13 with the preceding clauses, i. e., clause (f) is not limited by the principle of **ejusdem generis.** Therefore, the words, "any other reasonable cause" are not confined to misconduct in his professional capacity but, embrace all causes which, in the opinion of the High Court may afford reasonable ground for his suspension or dismissal; and a conviction for sedition constitutes "reasonable cause" within Cl. (f). Though a legal practitioner has been convicted by a Criminal Court of competent jurisdiction, a discretion remains under S. 12 in the High Court to decide whether or not the convicted

practitioner should be suspended or dismissed. 6 N.L.R. 129=11 Cr.L J. 615=8 Ind. Cas. 282.

——S. 13 Cl. (f)—Misconduct other than professional misconduct—Applicability of section to.

By the Full Bench (**Ghose, J. dissentiente**)—The words 'any other reasonable cause' in clause (f) S. 13, of the Legal Practitioners' Act, XVII of 1879, as amended by Act XI of 1896, include cases of misconduct other than professional misconduct. (1902) 6 C.W.N. 556=28 C. 890 (F.B.).

——S. 13, Cl. (f) –Pleader –Slander of officer of court—Defendant—Professional misconduct.

The Legal Practitioners' Act is aimed against the misconduct of legal practitioners in relation to their professional duties and not in relation to other matters. The words 'reasonable cause' in S. 13, should, therefore, be read **ejusdem generis** as referring to professional misconduct. An allegation made by a pleader as a defendant in a suit and not as a pleader that the plaintiffs had bribed some officer of the record-room to tamper with certain documents produced at the instance of the plaintiff did not amount to professional misconduct. (1900) 5 C.W.N. 48.

——Ss. 13, Cl. (f), 14 –Petition containing disrespectful language presented by co-plaintiff who was also a pleader in the court—Act committed by a suitor.

A and **B**, the latter a pleader, were co-plaintiffs in a suit. The District Judge, doubting the **bona fides** of the claim, took evidence from the plaintiffs and others and passed proceedings, giving in detail the reasons for his doubts. **A** and **B**, then filed a petition objecting to their having been **prima facie** condemned. Certain passages in this petition were disrespectful. **Held**, that the pleader was not liable under the Legal Practitioners' Act, so long as it was possible to take notice of his behaviour as one committed by a suitor. The act of the petitioner was not sufficient **per se** to disqualify him from continuing to be a pleader. (1900) 24 M. 17.

——S. 13 (f)—"Any other reasonable cause".

"Any other reasonable cause" in S. 13 (f), Legal Practitioners' Act, need not necessarily be one **ejusdem generis** as the preceding. A. v. Emperor. A.I.R. 1937 Rang. 345=38 Cr.L. J. 1087=171 Ind. Cas. 503.

——S. 13 r. (f)—Pleader making demonstration in Court. Thereby interfering with Court's work.

It is the duty of a legal practitioner to assist the court. If he appears in the court and makes a demonstration which has the effect of interfering with the work of the court and the administration of justice he does something which a member of a legal profession certainly ought not to do. The court has power under S. 13 (f) to suspend or dismisss him for such conduct. (1943) 1 M.L. J. 8=1943 M.W.N. 14 (1)=56 L.W. 14=A.I.R. 1943 Mad. 130=44 Cr. L. J. 409 =I. L. R. (1943) Mad. 459=205 Ind. Cas. 400 (S. B.).

——S. 13 (f)—"Any other reasonable cause" in S. 13 (f), meaning and interpretation of—Rights and duties—Resolution prohibiting one member of Bar from acting against another—Interference with administration of justice.

Legal practitioners have their duties towards the Courts and are expected to co-operate with them to the orderly and pure administration of justice. They cannot be permitted to act, or to combine with others against such authority and in a manner calculated to impede or interfere with the administration of justice.

It is a fun amental right possessed by every legal practitioner that he may be allowed freely to exercise his profession and to appear in any case in which he may choose to appear without interference of any kind except where such interference is based upon some valid and legal grounds.

The words "any other reasonable cause" in Sub-S. (f) to S. 13, Legal Practitioners' Act, are not confined to acts done in a professional capacity by a legal practitioner, and are not restricted to reasonable cause of the same class or description referred to in the preceding sub-sections.

Where the members of a Bar Association passed a resolution that no member thereof except the Govt. Pleader should accept a brief in a criminal case against any other member, and subsequently when a certain member **B** accepted the brief on behalf of the prosecution in a Crown case against another member another resolution was passed that no member of the Association should act as junior, senior or colleague to **B** or receive any brief from him by way of transfer or otherwise and copies of this resolution were sent to all Bar Associations in the District.

Held, that the former resolution was flagrant and unwarranted interference with the rights of legal practitioners, that the latter resolution was calculated to have the effect of interference with the administration of justice, and that the action of the authors of the resolution amounted to 'reasonable cause' within the meaning of S. 13 (f), Legal Practitioners' Act. 54 C.L.J. 530=A.I.R. 1932 Cal. 370=36 C.W.N. 294=33 Cr.L. J. 466=59 C. 709=137 Ind. Cas. 434.

——Ss. 13 (f) 14—Reasonable cause—Meaning of—Criticism of administration.

The phrase 'for any reasonable cause' in the residuary Cl. (f) of S. 13 is not to be understood in an **ejusdem generis** sense but it covers cases other than those of professional misconduct in the ordinary sense, but which unfit a pleader for the practice of his profession, for instance, conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of court. 26 M. 448; 44 C. 639; 29 A. 95 P.C. 39 M. 1045, Dist. The remedy provided by S. 14 is not indended to apply to cases in which a pleader as an ordinary member of the public criticises the administration of justice though such criticisms may on enquiry be found not to be wholly justified. S. 13 cannot be properly utilised in punishing a pleader for making comments on matters of public interest in the newspapers merely because such comments exceed the limits of in fairness. Per **Krishnan, J.**—The Legal Practitioners' Act, 1879, deals with the pleader only in his professional, and not in his private capacity. Though misconduct other than professional may fall under Cl. (f) S. 13 its impropriety must be such as would render the continuance of the pleader in practice undesirable or unfit him from being a member of the profession. 38 M.L. J. 230=11 L.W. 122=(1920) M.W.N. 105=21 Cr.L. J. 246=55 Ind. Cas. 198 (F.B.).

——S. 13 Cl. (f)—Reasonable cause—Becoming director of a bogus Co.

Pleaders becoming directors of a bogus life insurance business are guilty of unprofessional conduct under S. 13 Cl. (f). "Any other reasonable cause" must not be construed in a limited way on the principle of ejusdem generis (**Miller, J.**). Dishonesty in the discharge of duties other than professional good also come under 'reasonable cause' in S. 13 Cl. (f). 34 Mad. 29=(1910) M.W.N. 163=8 M.L.T. 22=20 M.L.J. 500=11 Cr.L.J. 310=6 Ind. Cas. 313.

——S. 13, Cl. (f)—Other reasonable cause meaning and scope of—Ejusdem generis—Association with fraudulent companies.

S. 13, (f) of the Legal Practitioners' Act is not confined to professional misconduct only, but includes any dishonest or dishonourable conduct whether or not in the discharge of professional duty. The association of pleaders as presidents or directors in so called provident companies which have no substantial basis to work upon but are a fraud on the public, is a reasonable cause within the meaning of S. 13, Cl. (f). 20 M.L.J. 500=34 M. 29=8 M.L.T. 22=6 Ind. Cas. 313.

——S. 13, Cl. (f)—Other sufficient cause—Notice—Requisites of notice—Per Chief Justice and Benson, J.

The phrase "other reasonable cause" in cl. (f) of S. 13, Legal Practitioners' Act, is not restricted to matters ejusdem generis. An order under S. 13 of the Legal Practitioners' Act, can only be made after notice to the pleader concerned to show cause against suspension or dismissal; and the notice must formulate the charges with great particularity and precision so as to enable the pleader to know the charges he is called upon to meet. (1909) 19 M.L.J. 504=6 M.L.T. 253=3 Ind. Cas. 344 (F.B.).

——S. 13, cl. (f)—"Other reasonable cause."

A pleader who writes an anonymous letter to an officer conducting an inquiry into a charge of bribery against a public officer, with a view to prejudice the officer making the injury is liable to be suspended under cl. (f) to S. 13 of the Legal Practitioners' Act, his act amounting to some "other reasonable cause" within the meaning of the clause. 27, C. 1023, foll. (1902) 13 M.L.J. 65=26 M. 448.

28. Renewal of sanad.

——S. 13—Readmission—Most important question is whether Advocate's character precludes him from remaining on roll of Advocates—That Advocate belongs to respectable family is no ground for leniency—Undertaking not to misbehave in future is weak piece of evidence to show that he has become fit.

Where an Advocate who has been removed from the roll of Advocates as a result of his criminal conviction applies for re-admission, by far, the most important question in such matter, is not whether he has or has not been punished sufficiently, but whether his character as shown by the facts leading upto his conviction is such that he should not be allowed to remain on the roll of Advocates of the Court. It is not by way of punishment that the Court in such cases exercise their discretion. That the Advocate belongs to a respectable family affords no ground for leniency, for, in such proceedings the Court is not assessing the amount of punishment. That is the peculiar function of the criminal Courts. Nor is the Court assessing the burden of punishment on those who may have the misfortune to be intimately connected with an Advocate who has been found guilty of offences involving moral turpitude to the extent disclosed. The undertaking not to misbehave in future is no more than a weak, because it is an interested piece of evidence to show that a person who was found unfit once has become fit again. A.I.R. 1946 Lah. 338=226 Ind. Cas. 470=49 Pun. L.R. 62 (F.B.).

——S. 13—Misappropriation of client's money by Advocate—Names struck off roll—Reinstatement.

Where an Advocate misappropriates a considerable sum of his clients, the act of the professional misconduct committed by him is a very grave one and it is not possible to allow him to continue practising in an honourable profession. But that does not mean that the Court is precluded from reinstating him where adequate punishment has been imposed and he has shown that he has rehabilitated himself in such a manner that he is fitted to be admitted into his profession again. A.I.R. 1939 Mad. 906=(1939) M.W.N. 1038=(1939) 2 M.L.J. 632=I.L.R. (1940) Mad. 81=50 L.W. 548=41 Cr.L.J. 163=185 Ind. Cas. 257 (S.B.).

——S. 13—Renewal of sanad.

Applications for the renewal certificates by Pleaders who, by illegal acts committed by them in connection with the civil disobedience movement which led to their prosecution and conviction and to preventive action under S. 107, Criminal P.C., have brought themselves under the disciplinary jurisdiction of the Court vested under S. 13 (f), must be treated as if it was an application for admission, where the Court has to see whether they are proper persons to be officers of the Court and to be trusted with the interest of suitors. And where the Court calls upon such persons to give an undertaking for future behaviour, refusal to do so should be deemed to aggravate the situation. A.I.R. 1931 Pat. 369=12 P.L.T. 773=32 Cr.L.J. 1256=11 Pat. 365=134 Ind. Cas. 945 (F.B.).

——S. 13—Renewal of sanad.

Where a pleader was committed to prison for default in complying with an order under S. 107, Cr. P. Code, and the pleader later disclaimed and disavowed any intention of either disobeying the order or in any way paralysing the administration of justice:

Held, the sanads of the pleaders may be renewed. Where the pleader before he renewed his sanad took up occupation on the press and mainly without remuneration held such conduct can be overlooked. 92 Ind. Cas. 214=1924 M.W.N. 5=27 Cr.L.J. 230=A.I.R. 1924 Mad. 479 (F.B.).

——S. 13—The High Court has power to reinstate a legal practitioner who had been dismissed for misconduct of any description. Before the Court should exercise such powers it should be clearly convinced not by mere protestations of repentance or regret but by actual facts that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of an honourable profession. The proper course is for the petitioner to apply to a Bench presided over by the Chief Justice and ask for a rule in the matter. 71 Ind. Cas. 122=1 Pat. 684=24 Cr.L.J. 74=4 P.L.T. 303=A.I.R. 1922 Pat. 604.

——S. 13 (b)—Criminal offence—Removal for misconduct—Reinstatement.

Where a legal practitioner, found guilty of a serious offence committed several years ago, and removed from the rolls applied for reinstatement: **Held**, that the test to be applied to cases of this description was whether the sentence of exclusion had the effect to awakening in the delinquent a higher sense of honour and duty and whether in the interval his conduct has been so irreproachable that notwithstanding the delinquency in early life he may be safely entrusted with the

affairs of clients and admitted to an honourable profession without degradation to the profession. 16 C.W.N. 237=14 C.L.J. 113=12 Cr.L.J. 461=11 Ind. Cas. 997.

29. Suborning evidence.

——S. 13—Tutoring of witness inside or outside Court.

It is a professional misconduct on the part of a legal practitioner to tutor a witness inside or outside Court and when the tutoring takes place in Court and in spite of warnings the professional misconduct is all the greater. (1943) 2 M.L.J. 621=A.I.R. 1942 Mad. 701=55 L.W. 799 (1)=1942 M.W.N. 758 (2)=44 Cr. L. J. 195=I.L.R. (1943) Mad. 81=204 Ind. Cas. 93 (S.B.).

——S. 13—Pleader bribing witnesses likely to be called by opposite party, for swearing false affidavits.

A Pleader joined with another person in obtaining false affidavits from witnesses, who were about to be called by the opposite side, in connection with an election petition saying that they knew nothing about the matter. He paid bribe to each of them for swearing such affidavits. Whilst the hearing was in progress, the Pleader also tried to tamper with other witnesses and offered them bribes:

Held, that the conduct of the Pleader on the two occasions could not be put down to a mere momentary lapse, but was part of a systematic endeavour to interfere with the course of justice. His name, therefore, should be struck off the register of Pleaders. A.I.R. 1938 Rang. 294=177 Ind. Cas. 731.

——S. 13—Suborning of witnesses—Seriousness of offence.

Subornation of witnesses is as serious an offence as could well be committed, because it fouls the course of justice, and makes the due administration of law impossible. Persons having resort to such an iniquitous practice as the subornation of witnesses will be severely punished. 36 Cr.L.J. 1099=13 R. 506=A.I.R. 1936 Rang. 180=157 Ind. Cas. 48.

——S. 13 (b)—Intimidation—Witness.

A Pleader intimidating a witness to prevent him from giving evidence is guilty of professional misconduct. 19 Cr.L.J. 803=46 Ind. Cas. 819 (F.B.).

——Ss. 13, Cl. (f), 14—Misconduct—Witness—Payment for true evidence—Payment to keep back unfavourable evidence.

For a pleader to pay or offer to pay a witness for giving true evidence in favour of his client or to suggest such payment to his client is professional misconduct, though it may not amount to a criminal offence. Advice to a client to pay a witness for keeping back unfavourable evidence is grossly improper and punishable as serious professional misconduct. **Semble:** That a false letter to a client to expedite remittance would amount to misconduct. (1900) 5 C.W.N. 45.

30. Unprofessional conduct.

See also: (1) **Notes 1 to 3, 5 to 17, 20, 22 to 24 and 29.**

(2) **Note 7 under S. 14.**

——S. 13 (b)—Pleader giving evidence for party without cancelling vakalat—If misconduct.

Where a pleader even after knowing that he would have to give evidence on behalf of his client continues to act as his pleader in a case and gives evidence without first cancelling the vakalat and even thereafter continues to act in an active capacity as his counsel, his conduct is improper and in no circumstances can it be considered that it was anything other than deserving of condemnation. The pleader should have cancelled his vakalat and ceased his professional connection with the case immediately he became aware that his evidence was essential and that he would have to be a witness at the trial. **Obiter** in (1942) 2 M. L. J. 479 (F. B.), approved.

As there is no authority or rule which prohibits such conduct there is a doubt whether it can be said to be professional misconduct within the purview of S. 13 (b) of the Legal Practitioners' Act and the doubt has to be exercised in favour of the pleader. I. L. R. (1948) Mad. 829=61 L.W. 162=1948 M. W. N. 165=A. I. R. 1948 Mad. 273=49 Cr. L. J. 467=(1948) 1 M.L.J. 170 (F.B.).

——S. 13—Pleader who obtains client's signature on blank sheets of paper and then prepared plaint on it is guilty of professional misconduct.

A Pleader who obtains his client's signature on blank sheets of paper and then prepares the plaint on it is guilty of professional misconduct. But the fact that there is a considerable spacing between the signature of the plaint is, in itself, not sufficient to show that the signatures were obtained before preparing the plaint. In such a case, the suspicion is no doubt strong but it is not sufficient to hold the Pleader guilty. 58 M.L.W. 56=1945 M.W.N. 106 (2)=(1945) 1 M.L.J. 174=A.I.R. 1945 Mad. 132=I.L.R. (1945) Mad. 317=46 Cr.L.J. 556=219 Ind. Cas. 275 (F.B.).

——S. 13—Addressing of letter to Magistrate's clerk asking him to deal with application filed urgently.

It is improper for an Advocate to address a letter to a clerk in a Magistrate's office asking that an application filed by him should be dealt with urgently and amounts to professional misconduct. The proper course for him if there is any delay, is to bring the matter to the notice of the Magistrate himself. K, Advocate, Madura In re A.I.R. 1941 Mad. 230=53 L.W. 62=(1941) 1 M.L.J. 128=1941 M.W.N. 56=42 Cr.L.J. 602=I.L.R. (1941) Mad. 354=194 Ind. Cas. 587 (S.B.).

——S. 13—Misconduct, meaning of—Negligence, if professional misconduct.

"Professional misconduct" means conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency. Mere negligence, even of a serious character, will not suffice.

Held, on facts, that the Counsel, though undoubtedly guilty of negligence, had not been guilty of conduct which would be regarded as 'disgraceful or dishonourable' by solicitors of good repute and competency. A.I.R. 1940 All. 289=(1940) A. L. J. 306=41 Cr.L.J. 620=I.L.R. 1940 All. 386=1940 A.W.R. 260=188 Ind. Cas. 527 (S.B.).

——S. 13—Mere negligence, if amounts to misconduct—Bar Councils Act (XXXVIII of 1926), Ss. 10, 12 (4)—Finding of Tribunal not clear as to question of moral delinquency—Case should be sent back to Tribunal.

Per **Costello, J.**—It is true that mere negligence unaccompanied by any moral delinquency on the part of a legal practitioner in the exercise of his profession does not amount to professional misconduct. But where it is not at all certain that it could be said with strict accuracy that there is really a finding that there was no moral delinquency by the Tribunal

constituted by the Bar Council, the case should be referred back to the Bar Council, under S. 12 (4), Bar Councils Act.

If a professional man does not tell the truth in connection with a matter which he has undertaken to carry through on behalf of a client, that is a conduct which might easily be said to involve moral delinquency. It is not in the best interest of the legal profession as a whole or of any member of it (other than the person accused) that there should be any lax or loose standard of professional conduct.

Per **Lort-Williams, J.**—Mere negligence, however gross, connot amount to misconduct, professional or otherwise. Per **Henderson, J.**—Negligence accompanied by the suppression of truth or by deliberate misrepresentation would be misconduct. A.I.R. 1935 Cal. 484=62 C. 158=36 Cr.L.J. 1130=157 Ind. Cas. 374 (S.B.).

——S. 13—Negligence—Employing unregistered clerk.

Mere negligence on the part of a legal practitioner does not found a petition for professional misconduct. There must be moral delinquency in addition to negligence. There is nothing unprofessional in a Pleader employing an unregistered clerk. The law allows a Pleader to have two registered clerks, but does not insist that any clerk should be registered. A.I.R. 1938 Mad. 965=(1938) M.W.N. 961=(1938) 2 M.L.J. 661=48 M. L. W. 653=40 Cr. L. J. 160 (1)=178 Ind. Cas. 917 (S.B.).

——S. 13 (b) is not intended to punish Pleader who has been guilty merely of failure to make careful arrangements in any particular case.

The words of S. 13 (b), Legal Practitioners' Act, are as strong words as could well be imagined, and they plainly import in all cases moral turpitude to the Pleader whose conduct is impugned. Although of course, a Pleader who is habitually guilty of carelessness or laxity is no good example to his profession and will, in the end, find his laziness result in pecuniary loss to himself, the section is not intended to punish a Pleader who has been guilty merely of failure to make careful arrangements in any particular case.

A pleader who was engaged in a criminal case by an accused to defend him filed his power and asked for a long adjournment as he desired to go out. He was, in conformity with his application, granted a comparatively long adjournment but when that date arrived, he failed to put in an appearance at the Magistrate's Court. In the meantime, he had asked another Pleader of some standing to accept the case for him but when such Pleader appeared and saw the accused, he was told by the accused not to conduct the case:

Held, that there was not the least ground for suggesting that the conduct of the Pleader in the circumstances was either fraudulent or grossly improper though it showed a laxity which deserved no encouragement. A.I.R. 1939 Rang. 262=183 Ind. Cas. 580.

——S. 13—Practice of knowingly filing under-stamped appeals on last day of limitation hoping that Court would be persuaded to accept deficiency later.

The practice of filing of the memorandum of the appeal on the last day of limitation knowing full well that it was under-stamped and hoping that the Court would be presuaded to accept the deficiency later is certainly not in accordance with the High traditions of the legal profession. The High Court will not tolerate practices of this nature:

Held, that the charges against the Advocate had not been substantiated and that the arrangement between him and his client was as stated by the Advocate. 48 L.W. 702=(1938) M.W.N. 1169=I.L.R.(1939) Mad. 1=(1939) 1 M.L.J. 564=A.I.R. 1939 Mad. 1=179 Ind. Cas. 204 (S.B.).

——S. 13—Justifying conduct by production of forged document punishment.

If a Pleader is found guilty of endeavouring to appear on behalf of a person by whom he had never been instructed and seeks to justify his conduct by the production of a forged document, it would not be a matter for suspension for a month or a year; he would be totally unfitted to exercise the responsible duties of a Pleader and would have to be struck off the rolls of Pleaders forthwith.

Held, on facts that the charge of deliberate forgery which was preferred had not been made out, and no action, therefore, need to be taken in the matter. Tun Shin, In the matter of A.I.R. 1939 Rang. 312=183 Ind. Cas. 756.

——S. 13—Suggestion by Pleader to bribe official, amounts to grave misconduct—Fact that proceedings were instituted as result of grudge makes no difference in gravity of offence and is no excuse. A.I.R. 1938 Mad. 264=47 L.W. 156=(1938) M.W.N. 219=(1938) 1 M.L.J. 410=39 Cr.L.J. 398=I.L.R. (1938) Mad. 457=173 Ind. Cas. 1008 (F.B.).

——S. 13 (f)—Offence under S. 377, Penal Code—Such offence committed by person when only 17 years of age—If can be a Pleader—Such Pleader not disclosing fact while applying for admission as Pleader.

Although generally an offence under S. 377, I. P. C. committed by a pleader or Advocate could not be condoned, the fact that the offence was committed by a person when he was only seventeen years of age ought not to debar a person, who is making an honest attempt to reform, from ever seeking respectable society or from being a member of an honourable profession. But such a person commits a serious offence of deceiving the authorities when he does not disclose the fact of his conviction in his application for being admitted as a Pleader although asked at the time whether there were any facts which ought to be brought to the notice of the High Court and the High Court is entitled to take him to task for it.

Persons who apply for entrance into the ranks of the legal profession should fully and frankly disclose all the circumstances of their past career with the knowledge that the Court will take into consideration every matter which ought properly to be dealt with by it. A.I.R. 1938 Rang. 159=39 Cr.L.J. 540=175 Ind. Cas. 124.

——S. 13—Pleader, one of trustees of pagoda—He finding co-trustee depriving trust of money—He not reporting to Police but undertaking responsibility for defalcations by co-trustee—Whether incurs any criminal responsibility—Disciplinary action.

A Pleader was an honorary treasurer of a certain pagoda. He failed to give information to the Police when he found that a co-trustee of his had deprived the trust of money but rather preferred to deal with his co-trustee mercifully and make himself morally responsible for the defalcation and undertake responsibility for the defalcation which had arisen.

Held, that the Pleader did not incur any criminal responsibility. Even if he might be negligent in his duties, he was not guilty of any kind of misconduct

which would justify disciplinary action being taken against him. A.I.R. 1938 Rang. 158=39 Cr.L.J. 543=175 Ind. Cas. 156.

——**S. 13—Madras High Court Rules, R. 16—Purchase of decree from client and executing it for larger amount than due.**

If a Pleader purchases a decree from his client in contravention of R. 16 of the rules framed by the Madras High Court under the Legal Practitioners' Act, he commits professional misconduct and the offence grows more in seriousness when he dishonestly suppresses the payments made in reduction of the decree and practise frauds on the Court and then executes the decree fraudulently for the larger amount than is actually due. A.I.R. 1938 Mad. 276=47 L.W. 192=(1938) M.W.N. 220=I.L.R. (1938) Mad. 399=174 Ind. Cas. 44 (S.B.).

——**S. 13 (f) — Calcutta High Court Rules, S. 978 (2), (3)—Registered clerk, meaning of—Mukhtear maintaining unregistered clerk for work outside Court—Rule, if contravened—Mukhtear, if liable.**

The expression 'recognized clerk' means a clerk employed by a Pleader or mukhtear and permitted as such, to have access to the Courts in which his employer is authorized to practise and to the officers attached thereto. Under S. 978 (2), (3), Calcutta High Court Rules, the statement made on the application undertaking not to employ an unregistered clerk means that he undertakes not to employ an unregistered clerk to do the business of a registered clerk, that is to say, that he undertakes not to employ any clerk who will require for the performance of his work access to the Court or to the ministerial officers.

Consequently, where a mukhtear, after statement under S. 978 (2) (3), maintains an unregistered clerk who works in the Court compound but does not actually enter any of the Courts, the mukhtear does not contravene any rule and cannot be brought under the provisions of S. 13 (f), Legal Practitioners' Act. 41 C.W.N. 929=A.I.R. 1937 Cal. 408=170 Ind. Cas. 251.

——**S. 13—X**, a Senior Advocate not used to withdrawing money of client in deposit in Court—Fact known to **G**, a Junior Advocate—Clerk of **X** approaching **G** with Vakalatnama on behalf of Client of **X** to withdraw money—**G**, accepting vakalatnama without consulting **X**, believing in clerk.

Held, that in the particular circumstances of the case, the admitted fact that Mr. **X** was unwilling to perform the kind of duty mentioned and the circumstances that the Advocate was approached by a person who was up to that time at least a clerk in the employ of Mr. **X** and trusted by him, deprived **G's** mind of all cause for suspicion and that there was not the slightest imputation on the professional honour of **G.** 18 P.L.T. 407=A.I.R. 1937 Pat. 433=38 Cr.L.J. 926=16 Pat. 488=3 B.R. 745=170 Ind. Cas. 339 (S.B.).

——**S. 13—Court misled by petition to grant larger costs—Advocate found entitled to draw all but insignificant sum—Explanation given only in enquiry by Bar Council.**

An Advocate was charged with professional misconduct for having obtained an award of taxed costs plus Rs. 2,550 special costs in a suit; he procured payment to himself of taxed costs plus Rs. 4,500 as costs of the said suit. It was shown that he was, except for a small difference, entitled to the amount which he actually drew. But his explanation that he was entitled to other fees which had not been taxed was not suggested by him until he was called to account before the Bar Council Tribunal:

Held, that had the Advocate got his bills properly taxed in the first instance, this inquiry would never have been necessary. He had only himself to blame, and his conduct throughout had not been the scrupulously careful conduct which the public has a right to expect of Advocates of the High Court.

[The Advocates was exonerated.] A.I.R. 1937 Rang. 263=38 Cr.L.J. 952=170 Ind. Cas. 689.

——**S. 13—Pleader attempting to influence Judge before whom he is arguing through relative of Judge.**

Where a Pleader tried to influence the Judge before whom he was arguing his case, through a relative of the Judge:

Held, that the act was highly reprehensible and that it was in the interest of the legal profession, that serious notice should be taken of it;

Held, however, that in view of his youth, the vitiated atmosphere prevailing and the wrong angle of vision taken with respect to this sort of thing, along with the circumstance that he expressed his penitence at once and made no attempt to deny what he had done, he should be treated more leniently than his act merited.

[The Pleader was severely censured and warned and ordered to bear the costs of the proceedings.] A.I.R. 1936 Lah. 732=164 Ind. Cas. 384 (D. B.).

——**S. 13—Relation of Pleader implicated in criminal proceedings—Pleader seeing Government handwriting expert connected with investigation — Pleader proved not influencing officer.**

The conduct of a Pleader, who goes to the house (not the office) of a Police Officer who was the Govt. handwriting expert officially investigating into the question of handwriting of a disputed document in a criminal case, and begins a conversation regarding the person involved in the case, is highly irregular. Although there may be no intention of the Pleader to influence or bribe the officer, still his conduct must be disapproved apart from the question whether the person involved in the case happens to be his client, friend or realation. [Pleader was suspended from practice for six months]. 2 B.R. 418=17 P.L.T. 348=37 Cr.L.J. 625=A.I.R. 1936 Pat. 423=162 Ind. Cas. 216 (S. B.)

——**S. 13 (b)—Mukhtear exacting money to gratify Court Sub-Inspector to facilitate release of client whose release on bail had been ordered.**

Where a mukhtear exacts money for purposes of gratifying the Court Sub-Inspector to facilitate release of the client who has been already ordered to be released on bail, the practice is illegal and receiving such amount and adhering to the same, amounts to professional misconduct. [The mukhtear was suspended from practice for two years.] 17 P.L.T. 263=A.I.R. 1936 Pat. 337=3 B.R. 731=38 Cr.L.J. 916=170 Ind. Cas. 458 (S. B.)

——**S. 13 (f)—Pleader holding out promise to party in that if he be appointed arbitrator, he would not decide dispute unacceptable to him—Pleader acting contrary—Misconduct.**

A party in a civil suit was given a promise by a practising Pleader **K** that if he would appoint **K** as an arbitrator, the latter would get his dispute compromised, but he failed to get it compromised, he would refuse to act as arbitrator, and that in any case he would not give a decision that would be unacceptable

to the party. In spite of this promise, he made the recommendation that a large sum of money, which was in dispute, should be handed over to the opposite party. Thus he settled only one portion of the dispute between the parties before coming to any final decision as to the merits of the dispute between them and he thereby caused grave prejudice to one of the parties whose interests he had promised to protect.

Held, that K had acted with gross dishonesty under cloak of his position as a legal practitioner, and under S. 13 (f), Legal Practitioners' Act, he was liable to be dismissed. A.I.R. 1936 Pesh. 113=37 Cr.L.J. 741=162 Ind. Cas. 576.

——S. 13—Advocate attempting to bribe Judge to obtain judgment in his client's favour.

An Advocate who stoops to such nefarious tactics as attempting to bribe the Judiciary in order to obtain judgment in his client's favour is guilty of the grossest professional misconduct, for, by such means, if successful, justice is, both dishonoured and betrayed. A.I.R. 1935 Rang. 178=36 Cr. L. J. 961=13 R. 518=156 Ind. Cas. 582 (S.B.).

——S. 13—Pleader appearing in Court in state of drunkenness—Unable to conduct cases—Insulting the Court.

Where, in a criminal case, a lower grade Pleader for the accused appeared in a drunken condition and was unable to conduct the case, on another occasion, in spite of warning, he appeared in a similar condition in the Court of the District Judge and insulted the Court; on a third occasion being in the similar condition, he assaulted a Bench Clerk, and it appeared that he had taken to drink after his wife went mad and died:

Held, that the Pleader was no longer fit to be allowed to hold himself out as a person who could be entrusted with the responsible duties that needs be performed by a member of the legal profession and that his name be struck off the list of lower grade Pleaders. 12 R. 180=A.I.R. 1934 Rang. 156=150 Ind. Cas. 236.

——S. 13—Bar Councils Act (XXXVIII of 1926), S. 10 (1).

The test that the Court has to apply in considering whether an Advocate should be struck off the roll of Advocates is whether the proved misconduct of the Advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. 12 R. 110=A.I.R. 1934 Rang. 33=149 Ind. Cas. 856 (S. B.)

——S. 13—Mortgage with clients for providing for fees in case—Excessive interest—Pressure on clients.

An Advocate entered into a mortgage with a certain person, the purpose of the mortgage bond being **inter alia** the provision of fees to the Advocate. The interest was excessive and there was some pressure on the part of the Advocate to make him mortgage a large area:

Held, that under the circumstances and having regard to the method adopted by the Advocate in defending himself, he should be found to be guilty of professional misconduct. 34 Cr.L.J. 1131=A.I.R. 1933 Pat. 571=14 P.L.T. 709=12 Pat. 843=145 Ind. Cas. 1017 (S. B.)

——S. 13—Advocate wrongly retaining copies of judgment—Motive.

Where it was alleged that an Advocate wrongly retained the copies of certain judgments without handing them over to the parties as he was bound to do, and even after their asking him for the copies, he did the give them and it appeared to the Court that tno Advocate did, in fact, retain the copies:

Held, that whatever the motive of the Advocate might have been in withholding them, having regard to the fact that there was no valid excuse for retaining the judgments, the only conclusion the Court could come to as regards this matter was that the Advocate was guilty of professional misconduct. 34 Cr.L.J. 1131=A.I.R. 1933 Pat. 571=14 P.L.T. 709=12 Pat. 843=145 Ind. Cas. 1017 (S.B.)

——S. 13—Appearing in criminal case without Vakalatnama—Misconduct.

The filing of a Vakalatnama or Mukhtearnama in criminal proceedings is an arbitrary rule. There is no moral sanction behind it. It is a rule which was made for the better administration of justice and it is a rule which an officer of the Court must comply with but a disobedience of that rule in the particular case cannot be held to amount to professional misconduct, though no rule can be laid down that appearance without a **Vakalatnama** or other non-compliance with the rules cannot amount to professional misconduct. 34 Cr.L.J. 1131=A.I.R. 1933 Pat. 571=14 P.L.T. 709=12 Pat. 843=145 Ind. Cas. 1017 (S. B.).

——S. 13—Mukhtear—Advice to client on successful termination of case, to present gratification to Magistrate—Misconduct.

Where, after a case had terminated successfully, the mukhtear advised his client to present some gratification to the Magistrate who decided the case:

Held, that such conduct on the part of a mukhtear or any legal practitioner was disgraceful and though perhaps not so bad as a direct approach to the Judicial Officer with gifts before the trial of the case, as an example of misconduct, it was positively deplorable, and the mukhtear was liable to be suspended from practice. Cases relating to legal practitioners should be disposed of without delay. 33 Cr.L.J. 871=13 P.L.T. 574=A.I.R. 1932 Pat. 356=140 Ind. Cas. 10 (S.B.)

——S. 13—General infamy or imputation of bad character is not necessary for disciplinary action. 12 P.L.T. 725=A.I.R. 1932 Pat. 185 (F. B.)

——S. 13—Unprofessional conduct.

Where, in a criminal trial, the legal practitioner appearing for the accused suggests without reasonable grounds that the prosecution story is all a concoction, the legal practitioner is guilty of the grossest professional misconduct. 9 Pat. 31=10 P.L.T. 703=A.I.R. 1930 Pat. 195.

——S. 13—Letters Patent (Calcutta), Cl. 10—Pleader accepting vakalat and papers but not filing the appeal—Nor trying to get extension of time—Pleader's action amounts to grave professional misconduct.

P came to Calcutta being desirous of presenting a second appeal. The Vakil was at that time absent from Calcutta and P approached his clerk. Before P left Calcutta, the Vakil who had returned had himself prepared the memorandum of appeal and P had signed and handed over a vakalatnama. P made certain payment before he left Calcutta in respect of the appeal, but he had not paid the whole of the sum. No specific agreement exempting the Vakil from liability in case of non-payment was entered into. The Vakil subsequently left for the muffasil, relying upon instructions given by him to his clerk to file the appeal when the balance of the sum due had been paid by P. The Vakil took no further trouble in the matter. On his return to Calcutta he made enquiries of his clerk and was in-

formed by his clerk that the appeal had been filed although as a matter of fact it was not filed. Shortly afterwards he left Calcutta again having given his clerk instructions to arrange for some one to argue the appeal if it came up for hearing. The Vakil knew nothing of the clerk's deception until he returned on the second occasion to Calcutta. At this time, the negligence, trickery and lies of his clerk were made fully known to him. The Vakil agreed to move an application under S. 5, Lim. Act, and a draft memorandum of appeal and a draft affidavit of the clerk were prepared. But they were not actually filed. All other papers in the case were subsequently returned to **P.**

Held, that the Vakil had accepted **P's** vakalatnama and had promised to file the appeal. It was not an ordinary case of negligence. It was in itself grave professional misconduct and a complete disregard of the client's interest. 114 Ind. Cas. 490=A.I.R. 1928 Cal. 820 (F.B.).

——S. 13—Fraudulent acts of clerk—Pleader is not necessarily guilty of professional misconduct.

It cannot be too constantly or too emphatically stated that if a Vakil leaves his money business to be conducted by his clerk, he is responsible for what the clerk does for purposes of civil liability. At the same time, if a Vakil is deceived by his clerk, or if his clerk does acts in fraud of him, then of course, it would not be right to hold that the Vakil himself is guilty of professional misconduct. 114 Ind. Cas. 137=30 Cr.L.J. 256=12 A.I.Cr.R. 131=A.I.R. 1928 Cal. 817 (F.B.)

——S. 13—A legal practitioner who purchases property **benami** in the name of another person, and not only appears as a pleader in the legal proceedings regarding the property but also takes his fee as pleader in the Courts, while he is really the **de facto** plaintiff commits an offence against propriety and is guilty of grossly improper conduct, as a legal practitioner. 81 Ind. Cas. 975=25 Cr.L.J. 1151=A.I.R. 1925 Oudh 130.

——S. 13— A pleader standing surety to a man arrested under S. 420, Penal Code and convicted under the section and keeping in his possession on behalf this accused properties held later on to have been involved in the offence is not guilty of professional misconduct. 88 Ind. Cas. 279=2 Rang. 491=26 Cr.L.J. 1111=A.I.R. 1925 Rang. 110.

——S. 13—Denying allegiance to British Courts and expressing want of truth in British justice creates liability to disciplinary action—Legal practitioner accepting professorship without permission creates liability to disciplinary action.

A pleader, who acts as a professor in a College without the permission of the High Court, contravenes the rules framed by the High Court to regulate the conduct of legal practitioners and renders himself liable to disciplinary action.

A pleader, who proclaimed before a Criminal Court when he was tried for an offence under S. 188, I.P.C. that he owed no allegiance to British Courts and had no faith in British justice renders himself liable to disciplinary action. 77 Ind. Cas. 986=38 C.L.J. 353=25 Cr.L.J. 522=A.I.R. 1924 Cal. 329.

——S. 13—Acting as arbitrator—Personal interest.

Where a pleader who had been engaged by the plaintiff, withdrew on behalf of defendant, money, which he knew was payable to the plaintiff, and took a conspicuous part as arbitrator in a matter in which he was seriously and personally concerned; he was guilty of professional misconduct. 1 Pat. L.W. 483=(1917) Pat. 217=2 Pat. L.J. 259=18 Cr.L.J. 808=41 Ind. Cas. 828.

——S. 13 (b)—Professional misconduct — High Court Rules Chapter XV, Rule 25.

A pleader acting for a decree-holder and purchasing the property sold in execution of his client's decree is guilty of professional misconduct, equally so if he purchases the property for other persons. Where in execution of his client's decree, a pleader made a purchase on behalf of his father, **Held,** he was guilty of misconduct. 13 Cr.L.J. 795=17 Ind. Cas. 539 (All.).

——Ss. 13, 14—Unprofessional conduct—Suspicion—Mukhtear—Renewal of licence.

The renewal of the licence of a legal practitioner cannot be refused on the mere suspicion that he was implicated in and privy to the sending of anonymous petitions making serious allegations against a Sub-Divisional Officer and other Government officers. (1908) 12 C.W.N. 919.

——S. 13—Pleader under pecuniary liability to a client attempting to make a composition with the client favourable to himself.

Held, that a legal practitioner, who, believing himself to be under a pecuniary liability to his client, endeavours to get the client to accept a less amount than that for which he is liable, cannot be held guilty of "grossly improper conduct in the discharge of his professional duty" within the meaning of S 13 of the Legal Practitioners' Act 1879. 1908 A.W.N. 70=5 A.L.J. 126 (F.B.)

——S. 13—Aggravating circumstances—Prevarication during enquiry for technical offence.

A legal practitioner who had committed a technical offence gave some very shuffling and evasive evidence before the District Judge who called upon him to show cause and his explanation was, to say the least of it, very disingenuous: instead of making a frank admission that he had committed a technical offence and asking for a lenient view to be taken of it, he told some unnecessary lies, shuffled in a very discreditable manner, thereby gravely aggravating what might otherwise have been considered an offence of no great magnitude,

Held, that serious notice must be taken of this conduct. The pleader was reprimanded and suspended for two years. 11 Pat. L.T. 665=A.I.R. 1930 Pat. 493 (S. B.)

——S. 14.

Synopsis.

1. Enquiry into charge—Jurisdiction and procedure.
2. Interim suspension
3. Nature of proceedings
4. Procedure when allegations amount to criminal offence
5. Reference to High Court
6. Renewal of certificate pending Criminal proceedings
7. Unprofessional conduct
8. Miscellaneous.

1. Enquiry into charge—Jurisdiction and procedure.

See also: **Note 18 under S. 13.**

——S. 14—Misconduct in course of professional duty in Sub-ordinate Court—Such Court can frame charge and inquire into misconduct.

If in the course of a proceeding, a Subordinate Court had reason to think that a Pleader had committed misconduct in the course of his professional duty, the presiding officer of the Court can, under S. 14, Legal Practitioners' Act, institute proceedings against

him and inquire into the alleged misconduct. Venkatachariar, In re A.I.R. 1942 Mad. 691=44 Cr.L.J. 114=(1942) 2 M.L.J. 479=55 L.W. 845=203 Ind. Cas. 585 (S.B.).

——S. 14—Words "charged in such Court," meaning of.

It is only where, in the course of proceedings before it, a Subordinate Court has reason to suppose that a Pleader has been guilty of misconduct that the Subordinate Court is at liberty without reference to the High Court to inquire whether the Pleader has been guilty of misconduct or not. The words "charged in such Court" in S. 14 must refer to a charge of improper conduct in the course of proceedings in such Court. A.I.R. 1937 Rang. 345=38 Cr. L. J. 1087=171 Ind. Cas. 503.

——S. 14—Pleader inducing prosecution witnesses not to tell the truth—High Court, whether should hold inquiry.

Where a Pleader induces the prosecution witnesses not to tell the truth in the case, he behaves in a very improper manner, and his conduct might well justify his suspension or dismissal. It is obviously, therefore a case in which an inquiry should be made. But it is not necessary for the High Court to hold the inquiry itself. A.I.R. 1937 Rang. 345=38 Cr.L.J. 1087=171 Ind. Cas. 503.

——S. 14—Misconduct taking place during Police inquiry and before institution of proceedings—Court, held cannot start proceedings without orders from High Court.

Where the alleged misconduct of a Pleader takes place during the Police inquiry and before the proceedings are instituted before the Magistrate, the misconduct not having been committed in his Court, the Magistrate cannot start proceedings against the Pleader upon a complaint by the Court Prosecuting Officer without orders of the High Court. Nor can it be said that the misconduct was committed in relation to the case, the case not having yet been instituted. A. I. R. 1937 Rang. 345=38 Cr.L.J. 1087=38 Cr.L J. 1087=171 Ind. Cas. 503.

——S. 14—Court can take cognizance of Pleader's action only before it—Pleader getting nephew of client to sign as client had a swollen hand—Disciplinary action.

A Court ought to take cognizance under S. 14, Legal Practitioners' Act, only of the action of the Pleader in the case that took place in that Court. He cannot take cognizance of his action in a case proceeding in another Court.

A Pleader allowed the nephew of his client to sign certain applications as the client had a swollen hand, instead of applying to the Court and getting the documents executed, as the Court might direct:

Held, that the action was thoughtless and improper but he did not act with any indirect motive or with any intention to commit a breach of his professional duty. He ought to have known what his duty was and in acting as he did, he committed a breach of his professional duty but he did not deliberately do anything which he thought was unprofessional. In such cases, the Court has to pass a suitable order taking into account the setting in which the action of the Pleader is found. The conduct of the Pleader did not show that there is such a defect in his moral character as disentitles him to perform the honourable and onerous duties which fall to his lot as a Pleader, and in the circumstances, it was not necessary that the Court should take disciplinary action against him. A. I. R. 1936 Rang. 177=14 R. 152=37 Cr.L. J. 721=162 Ind. Cas. 887.

——S. 14—Person competent to take proceedings against Pleader.

Under S. 14, Legal Practitioners' Act, the only person who is entitled to take proceedings against a Pleader under that section is the presiding officer of the Court or Office in which proceedings are pending in the course of which the Pleader is alleged to have been guilty of misconduct. A.I.R. 1936 Rang. 158=13 R. 737=37 Cr.L.J 510 (2)=161 Ind. Cas. 958 (D.B.).

[Overrules A.I.R. 1921 L.B. 67=72 Ind. Cas. 521.]

——S. 14—Enquiry into charge.

The provisions of S. 14 indicate that ordinarily an "enquiry" mentioned in S. 14 should be made by the presiding officer of the Court where the misconduct has been alleged to be committed. 110 Ind. Cas. 686=26 A. L. J. 1250=29 Cr. L. J. 750=A. I. R. 1928 All. 396 (S.B.).

——S. 14—The enquiry contemplated by S. 14 must be made by the presiding officer of the Court in which the misconduct was alleged and not by the presiding officer of a superior Court. 71 Ind. Cas. 703=4 P.L.T. 97=1923 P.H.C.C. 45=24 Cr.L.J. 239=1 Pat. L.R. Cr. 41=A.I.R. 1923 Pat. 185 (S.B.).

——S. 14—Jurisdiction of Dt. Magistrate to institute proceedings—Offence committed before another Court—Personal knowledge.

Under S. 14 of the Legal Practitioners' Act the proceedings could be instituted only by the Deputy Magistrate in whose Court the alleged misconduct or offence took place. I.P.L.J. 576, Foll. The Dt. Magistrate acted improperly in relying upon his own recollections of facts when they differed from those of other witnesses and it was undesirable for him to sit as a Judge to determine the matters in respect of which he might have been called upon to report or examined as a witness. 1 Pat. L. T. 379=(1920) P. H. C. C. 225=21 Cr.L.J. 613=57 Ind. Cas. 277.

——S. 14—Section 14 does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. A.I.R. 1922 Cal. 484, **Foll.** 92 Ind. Cas. 896=1926 M.W.N. 466=27 Cr.L.J. 384=A.I.R. 1926 Mad. 1044.

——S. 14—"Such Court" in S. 14 means the Court in which the pleader practises and not necessarily the Court in which the pleader commits the offence charged against him. 72 Ind. Cas. 521=11 L.B.R. 111=A.I.R. 1921 L.B. 67.

——S. 14—Professional misconduct—Transfer of the case to the Court to which the presiding officer was transferred bad—Jurisdiction to issue warrant or summons on failure of pleader to appear—Use of bad language to Court by a pleader suitor—No professional misconduct.

A charge under S. 14 of the Legal Practitioners' Act must be dealt with by the presiding officer of the Court wherein the charge is made, and there is no provision of law authorizing the transfer of the case to the file of the Court to which the officer who presided over the Court in which the charge was originally made had been transferred subsequently. It is not competent to a subordinate Court charging a pleader with professional misconduct under S. 14 of the Legal Practitioners' Act to issue either a summons or a warrant against the pleader, if he fails to appear in answer to a charge under the section. The penalty for non-appearance in answer to the charge is that a report may be made without the pleader being heard in his own defence. The use of language by a pleader, such as that the magistrate had acted "maliciously, vexatiously, and with a vindictive spirit" in a written statement attached to a warrant

issued against himself, though improper to the last degree does not amount to "fraudulent or grossly improper conduct in the discharge of his professional duty," the same being used only in the pleader's capacity as suitor and not as a pleader. (1907) 18 M.L.J. 184=3 M.L.T. 237.

——S. 14—Mukhtears practising in Civil and Criminal Courts—Charge of misconduct with reference to matters pending in the Civil Court—Power of Sub-divisional Magistrate to frame charge—Jurisdiction.

A Subordinate court is authorized to proceed under S. 14 of the Legal Practitioners' Act only in matters coming within Cle. (a) and (b) of S. 15 of the Act. Where a Sub-Divisional Magistrate framed charges not under S. 14 of the Legal Practitioners' Act against certain mukhtears who were authorized by their certificates to practise in both Civil and Criminal Courts, with reference to conduct relating to suits pending before the Court of the Munsiff. **Held**—That the Sub-Divisional Magistrate had acted illegally and without jurisdiction. (1906) 10 C.W.N. 1059=4 C.L.J. 229.

——S. 14—Procedure—Nature—The procedure of S. 14 must be strictly followed.

The proceedings must be separate and distinct and cannot be made part of criminal proceedings. The report of the High Court must be accompanied by the opinion of the officer making the report. 15 C.W.N. 764=12 Cr.L.J. 40=9 Ind. Cas. 247.

——S. 14—Recording evidence.

Where the evidence was not received and recorded as required by S. 14 upon the date on which the enquiry was held it is a substantial defect in procedure. 54 Cal. 721=31 C.W.N. 554=A.I.R. 1927 Cal. 536.

——S. 14—Offence under S. 13 (b)—Failure to formulate charge—Pleader not prejudiced—Proceedings, if legal.

Where a Pleader alleged to be guilty of professional misconduct was given full particulars of the complaint made against him and was given every opportunity to meet that complaint and at no stage in the proceedings did he complain that he had been taken by surprise but no precise charges had been formulated against him:

Held, that it would have been better if precise charges had been formaluted; but as the failure to formulate such charges had not prejudiced the Pleader, such failure to formulate charges was not fatal to the proceedings. A.I.R. 1939 Pat. 343=5 B.R. 795=40 Cr.L.J. 687=20 P.L.T. 607=18 Pat. 580=182 Ind. Cas. 645 (S.B.)

——S. 14—Charge against Pleader—When can be framed.

Where the point for inquiry under S. 14 was whether a Pleader has signed and filed a petition or satisfaction in a mortgage execution case and he denied the same:

Held, that no charge under S. 14 could be framed against him unless it was established beyond reasonable doubt that he had actually signed the petition. 59 C.L.J. 419=A.I.R. 1934 Cal. 794=152 Ind. Cas. 43 (1).

——Ss. 14 and 36—Proceedings under—C. P. C. (1908), S. 16—Applicability of.

Summoning, enforcing attendance of witness and production of documents would be made as prescribed by C.P.C., S. 16 in an enquiry by the Dt. Judge under the Legal Pract.s' Act. 23 C.W.N. 560=50 Ind.Cas. 806.

——S. 14—Transfer of proceedings.

Section does not contemplate either a preliminary enquiry or a transfer of enquiry. 92 Ind. Cas. 896=1926 M.W.N. 466=27 Cr.L.J. 384=A.I.R. 1926 Mad. 1044.

——S. 14—Procedure.

Additional District Magistrate should follow the procedure laid down in S. 14 (c) with reference to a report by a District Magistrate and forward the report through the Sessions Judge. 71 Ind. Cas. 673=27 C.W.N. 88=24 Cr.L.J. 209=A.I.R. 1922 Cal. 550

2. Interim suspension.

——Ss. 14, para. (5) and 40—Interim suspension—Power of District Judge to suspend pleader pending enquiry before him.

Under para. (5) of S. 14 read with S. 40 of the Legal Practitioners' Act, a District Judge has only power to suspend a pleader after he has recorded a finding against the pleader and is submitting a report to the High Court for its orders. It is only at that stage that it can be said that the matter is pending the investigation and orders of the High Court. A pleader cannot be suspended pending the enquiry before the District Judge. 10 C. 256, 13 C. L. J. 457, 14 R. 735 and 1937 Mad. 672, foll. I.L.R. (1949) A. 874 =A.I.R. 1949 All. 642.

——S. 14 (5)—District Judge cannot suspend legal practitioner until he records finding thereon.

District Judge cannot, under S. 14, suspend any Pleader from practice until he has recorded his finding that he ought to be suspended or dismissed. The suspension of a Pleader from practice pending an investigation which has not yet been begun is, in fact, to impose upon him a punishment, before there is even a **prima facie** case of his guilt and it cannot possibly have been the intention of the Legislature that any such injustice should be committed. A.I.R. 1937 Mad. 672=46 L.W. 509=(1937) M. W. N. 460 =39 Cr. L. J. 83=172 Ind. Cas. 136.

——Ss. 14 (5), 13, 40—S. 40, if governs S. 14—Pleader, when can be suspended—Professional misconduct before Honorary Magistrate—Report to District Magistrate through Sub-Divisional Magistrate—Sub-Divisional Magistrate passing orders of suspension under order of District Magistrate pending investigation—Validity.

Section 14, Legal Practitioners' Act is governed by S. 40, and under S. 40 of the Act, no Pleader may be suspended from practice unless he has been allowed an opportunity of defending himself before the authority suspending him. Furthermore, the fifth clause of S. 14 gives authority to suspend a Pleader only after the preliminary inquiry in the Court in which the misconduct took place, and pending the investigation before the High Court under S. 13. Consequently where, at the time when the order of the District Magistrate was passed, no charge had been framed against the Pleader and no notice had been framed against the Pleader and no notice had been served upon him, as required by the first and second clauses of S. 14, the order of the District Magistrate suspending him from practice pending investigation on the report of an Honorary Magistrate through the Sub-Divisional Magistrate is one made without jurisdiction.

A Lower Grade Pleader was charged with professional misconduct before the Honorary Magistrate, who reported the matter to the District Magistrate through the Sub-Divisional Magistrate. District Magistrate ordered suspension, pending investigation, On this order, the Sub-Divisional Magistrate ordered suspension:

Held, that the only Court which could suspend the applicant from practice in connection with this partiy cular misconduct was the Court of the Honorar-Magistrate; for, S. 14 refers to an investigation into the

misconduct of the Pleader undertaken by the Court before which the misconduct took place, and under the fifth clause of that section, that Court only has authority to suspend the Pleader with the sanction of the District Magistrate. Hence the order served by the Sub-Divisional Magistrate upon the applicant, suspending him from practice, was clearly **ultra vires.** A.I.R. 1936 Pang. 249=14 R. 735=163 Ind. Cas. 586.

——S. 14—Power of suspension—Report—Investigation—Meaning.

Investigation in para. 5 of S. 14 means investigation in the High Court. It is only after a report to the High Court under para. 4 that power is given to suspend under para. 5. 15 C.W.N. 269=13 C.L. J. 457 =12 Cr.L. J. 33=9 Ind. Cas. 225.

3. Nature of proceedings.

See also Note 21 under S. 13.

——S. 14—Nature of proceedings.

A proceeding under the Act is not a civil proceeding and the provisions of the C. P. Code are wholly inapplicable to a case of misconduct by pleader. Nor can enquiry into the conduct of a pleader be treated as a criminal proceeding, though being penal in its nature it resembles in many respects a criminal case. 93 Ind. Cas. 700=27 P L.R. 225=27 Cr.L. J.=476=A.I.R. 1926 Lah. 199.

——S. 14—Per Woodroffe, J.—Proceedings under this section are quasi-criminal proceedings and the pleader may be examined on oath.

Per Mookerjee, J.—The proceedings are neither civil nor criminal in their nature. They are special proceedings resulting from the inherent power of the Court over its officers and are regulated by S. 14. 71 Ind. Cas. 81=49 Cal. 732=26 C. W. N. 589=35 C.L. J. 356=24 Cr.L. J. 33=A. I. R. 1922 Cal. 515 (S.B.).

——S. 14—Proceedings under—Nature of—C.P.C. S. 141—Transfer of enquiry.

Where proceedings were instituted under the Legal Pract.s' Act before the Dt. Munsif and an application was made to transfer the same to another Court.

Held, that the procedure under the Legal Pract.s' Act is neither Criminal nor Civil, but purely designed for the purpose of discipline. Such disciplinary proceedings under S. 14 are not proceedings of a Court of Civil Jurisdiction and S. 141, C.P.C. cannot apply to them. The enquiry under S. 14 of the Legal Pract.s' Act, cannot be delegated to another officer who is not the presiding officer of the Court in which the malpractices complained of, were committed. 1 Pat. L.T. 576=18 Cr.L. J. 132=(1917) P.H.C.C. 60 =37 Ind. Cas. 484.

4. Procedure when allegations amount to criminal offence.

See also: Note 10 under S. 13.

——S. 14—Charge amounting to serious crime—Prosecution should be launched and on conviction, proceedings under Act should be taken.

Where the charge brought against a legal practitioner amounts to an allegation of the commission of a serious crime, the proper procedure to follow is to launch a prosecution for that crime, and if a conviction is obtained, to institute proceedings under the Legal Practitioners' Act. A.I.R. 1943 Pat. 52= 9 B.R. 193=44 Cr.L. J. 323=24 P.L.T. 79=205 Ind. Cas. 106 (S.B.).

——S. 14—Aiding criminal offence.

Allegations amounting to aiding or conspiring to commit criminal offence—Proceeding under S. 14 should not be taken but a criminal prosecution may be started. A.I R. 1926 Cal. 502, **Foll.** 54 Cal. 721 =31 C.W.N. 554=A.I.R. 1927 Cal. 536.

——S. 14—Causing evidence to disappear.

Where a sanction was given for the prosecution of a party under S. 471, I.P.C., and the party instructed his pleader to withdraw all documents from the case and the pleader withdrew the same:

Held, that the conduct of the pleader amounted to a charge of aiding and abetting or conspiring to commit a criminal offence, **viz.,** causing evidence to disappear with the intention of screening the offender, an offence punishable under S. 201, and that the correct procedure to be followed is that proceedings under the Legal Practitioners' Act should not be taken, but that if it is thought necessary to take action it should be by way of a criminal prosecution. 94 Ind. Cas. 893=30 C. W. N. 186=27 Cr L. J. 701= A.I.R. 1926 Cal. 502.

5. Reference to High Court.

——S. 14 (b)—Reference against legal practitioner charging him with criminal offence—Competency—Absence of prior trial and conviction in criminal Court.

A reference under S. 14 (b) of the Legal Practitioners' Act against a legal practitioner formulating charges amounting to a criminal offence, is competent, although there has been no previous criminal trial and conviction in respect thereof. 51 Cr.L J. 368= A.I.R. 1950 Dacca 3=2 D.R. 141.

——S. 14—District Judge finding charge not established—Case should not be submitted to the High Court.

Where the District Judge does not find that the charge of professional misconduct has been established the case should not be submitted to the High Court. A. I. R. 1940 Rang. 190=41 Cr.L. J. 899=190 Ind. Cas. 320.

——S. 14 — Enquiry under — Presiding Officer coming to conclusion that proceedings should be dropped—District Judge disagreeing — District Judge reporting case to High Court without drawing up fresh proceedings—Such reference is ultra vires—**Proper procedure.**

Where the presiding officer of the Court draws up a charge against a Pleader under S 14, Legal Practitioners' Act, and after due enquiry, comes to the conclusion that the proceedings against the Pleader should be dropped and submits his report to the District Judge, if he disagrees with the report of the presiding Judge, is at liberty to draw up fresh proceedings against the Pleader and then, after giving notice to the Pleader, he should record himself all evidence in support of the charge or to refute the charge and then after adjudicating thereon he should report to the High Court if in his view the conduct of the Pleader deserves a punishment to be meted out by the High Court. But the District Judge has no jurisdiction to forward the proceedings which were never initiated by him nor can he act on the evidence which was never recorded by him. The result of these irregularities is that the reference must be discharged as being **ultra vires.** But it is open to the High Court to draw up fresh proceedings before it and then, after giving notice to the Pleader and hearing his defence, if any, to dispose of the matter.

[Duty of the Judge incharge of Records and the Pleaders pointed out.] A.I.R. 1938 Pat. 385=17 Pat. 261=4 B.R. 787=176 Ind. Cas. 896 (S.B.).

——S. 14—Recommending officer, whether should suggest punishment.

Section 14 does not anywhere say that the presiding officer must pass a sentence upon the legal practitioner before he recommends the case to the High Court for orders. Infliction of punishment on the legal practitioner is within the exclusive jurisdiction of the High Court, and it is not necessary for the recommending officer to suggest as to what punishment should be awarded. 54 C.L.J. 530=33 Cr.L.J. 466=59 C. 709=A.I.R. 1932 Cal. 370=36 C.W.N. 294 =137 Ind. Cas. 434.

——S. 14—Formalities not observed—Reference is not valid.

For a proper reference to the High Court the formalities required by S. 14 ought to be fulfilled and in the absence of those formalities being strictly complied with the reference is no valid reference.

A report made by a Magistrate subordinate to the Magistrate of the District was not made also through the Sessions Judges and hence no opinion of the Sessions Judge was before the High Court. The reference was held to be invalid. 118 Ind.Cas. 712=1929 A.L.J. 1042=30 Cr.L.J. 966=1929 Cr.C. 242=A.I.R. 1929 All. 655.

——S. 14:—The High Court would exercise its disciplinary jurisdiction even though the reference under S. 14 with regard to the alleged misconduct of a pleader is not made by the trial Court in whose Court the occurrence has taken place but by the appellate Court which has no power to refer it. It would be necessary however that the High Court should make an enquiry. What the nature of that enquiry ought to be is clearly a matter for the discretion of the Court. 71 Ind.Cas. 209=4 P.L.T. 235=1 Pat. L.R. Cr. 57=24 Cr.L.J. 81=1 Pat. 689 =A.I.R. 1922 Pat. 608 (F.B.).

——S. 14—Mukhtear practising without licence —Misconduct—Whether report to High Court lies.

A report to High Court under S. 14 of the Act recommending the dismissal of a mukhtear having no licence to practise in a Revenue office for gross misconduct, does not lie as the misconduct was committed in the capacity not of a mukhtear but as a private individual and came to light in a proceeding wherein he was not a party but only a witness. 19 C.L.J. 110=15 Cr.L.J. 378=23 Ind. Cas. 746.

——S. 14—Reference—Costs of.

A Dt. Judge has no power to award costs in a matter referred by him to the High Court, under the Legal Practitioners' Act. 1 L.W. 937=26 Ind. Cas. 125.

——S. 14—Reference —Practice—Division Bench.

According to the long and undeviated practice of the Calcutta High Court, matters for reference are heard by a Bench specially constituted for hearing Civil appeals and the like from particular districts, though there is no express rule for alloting references under S. 14 of the Act to any particular Bench. 37 Cal. 173=14 C.W.N. 275=5 Ind. Cas. 406.

——S. 14—Finding that allegations were false and were result of animosity, cannot be challenged in reference to High Court under S. 14.

A finding that the allegations by a Pleader against a Judicial Officer were false and were the result of animosity being a finding of fact cannot be challenged in a reference to the High Court under S. 14, Legal Practitioners' Act. A.I.R. 1942 Mad. 630=1942 M.W.N. 481 (2)=55 L.W. 502= (1942) 2 M.L.J. 234=44 Cr.L.J. 17=203 Ind.Cas. 182 (S.B.).

——S. 14—High Court, if can order defering renewal of sanad.

It is incompetent for the High Court, until a case is ready to be actually set down for hearing by a Bench, to pass any order deferring renewal of the sanad of the person against whom complaint is made. (1937) M.W.N. 460=A.I.R. 1937 Mad. 672= 46 L.W. 599=39 Cr.L.J. 83=172 Ind. Cas. 136.

6. Renewal of certificate pending criminal proceedings.

——S. 14—Criminal proceedings pending—Renewal of pleader's certificate.

Where a prosecution is ordered against a legal practitioner instead of proceeding according to S. 14, the Judge ought not to wait until the result of the Criminal proceedings are known before renewing the pleader's certificate. 38 All. 182=14 A.L.J. 82=17 Cr.L.J. 152=33 Ind. Cas. 632.

——S. 14—Rules of Court of 4th April 1884, Rule 452—Mukhtear—Refusal of District Judge to renew certificate—Semble.

That the fact that criminal proceedings in connection with an offence under S. 193 of the Indian Penal Code are pending against a mukhtear is not a sufficient reason within the meaning of Rule 452 of the Rules of Court of the 4th April 1894 for refusing to renew his certificate, unless the District Judge also takes action under S. 14 of the Legal Practitioners' Act, 1879. 1901 A.W.N. 60.

7. Unprofessional conduct.

See also: Note 30 under S. 13.

——S. 14—Negligence, if misconduct.

Negligence does not amount to professional misconduct. Hence allowing a suit to be dismissed in default by negligence is not a professional misconduct. (1944) 2 M.L.J. 317=57 L.W. 567=1944 M.W.N. 686 (2)=A.I.R. 1945 Mad. 55=46 Cr.L.J. 254=217 Ind. Cas. 231 (S.B.).

——S. 14—Pleader expressing carelessly is not guilty of professional misconduct.

Where a Pleader expressed himself carelessly in his deposition before the Judge, it cannot be said that he was guilty of unprofessional conduct, though he was guilty of some degree of carelessness in expressing himself. A.I.R. 1943 Pat. 62= 9 B.R. 182=44 Cr.L.J. 343=24 P.L.T. 81=205 Ind. Cas. 64 (S.B.).

——S. 14—Perjury by member of legal profession—Severe punishment.

Perjury by members of the legal profession, apart from the question that it is a criminal offence, is a very serious matter from the point of view of the profession. Apart from the fact that it harms

the profession, it sets a very bad example to the general public and is a great block in the administration of justice. Therefore, if and when cases of prejury by members of the legal profession are discovered, the member concerned deserves the most severe punishment which the High Court can give in the exercise of its disciplinary jurisdiction on the legal profession. A.I.R. 1935 Pat. 249=16 P.L.T. 231=36 Cr.L.J. 1028=1 B.R. 660=156 Ind. Cas. 889 (S.B.).

——Ss. 14, 12, 13—Legal practitioner becoming surety for accused persons—Propriety of—Court refusing to accept a person as surety—Mukhtear standing surety and entering into contract of indemnity with that person—Forfeiture of bail bond—Attempt at concealment of true facts—Misconduct.

There is nothing against a legal practitioner becoming a surety for accused persons. But where a mukhtear enters into an agreement with a person whose security the Court has refused to accept, to the effect that the amount deposited by that person with the mukhtear would indemnify the latter if he suffered any loss on account of the bail bond being forfeited, and the bail bond is forfeited and the mukhtear tries to conceal the above facts from the Court, the contract of indemnity is a public mischief, is highly unprofessional and is unquestionably illegal, being against public policy as it hampers the administration of justice. The further attempt at concealment of the agreement at the early stage of the proceedings is a serious aggravation of the crime. 16 P.L.T. 223=1 B.R. 450=36 Cr.L.J. 730=A.I.R. 1935 Pat. 195=14 Pat. 442=155 Ind. Cas. 430 (S.B.).

——S. 14—Professional etiquette—High Court—Duty of—Mukhtear making representations to Court-knowing them to be false.

It is no part of the etiquette of members of the legal profession to tell lies in Court or to give perjured evidence on behalf of their clients.

It is the duty of the High Court not only to protect the members of the public against disreputable members of the profession but it is also their duty to protect the profession itself against the loss of reputation brought upon it by the conduct of such members.

Where a mukhtear informed the Court that his client was ill at another place, that he, the mukhtear, had seen him there and asked for permission to appear on behalf of the accused as the accused was unable to appear personally and it was proved by independent witnesses that the accused was seen in the company of the mukhtear on the same day and in the same place and the mukhtear made no attempt at denying the truth of their statements:

Held, that the mukhtear was guilty of professional misconduct and it was the duty of the High Court to relieve the profession from the existence of a thoroughly unworthy member and that he should be removed from the rolls. 35 Cr.L.J. 453=A.I.R. 1934 Pat. 142=15 P.L.T. 63=147 Ind. Cas. 687 (F.B.).

——S. 14—Applicability—Pleaders acting in proceedings in Revenue Office—Casting imputations on integrity of Officer of Court—Irritation or disappointment.

Section 14, Legal Practitioners' Act, is material even when any Pleader is acting in his professional capacity on behalf of his client in a proceeding in a revenue office and if he is guilty of any grossly unprofessional or improper conduct while so acting, he brings himself within the disciplinary jurisdiction of the High Court.

No amount of irritation or disappointment would be any justification for any legal practitioner casting imputations upon the honesty and integrity of one of the officers of the Court before which he was appearing. If such an observation is made actually when the proceedings before an officer are taking place, the Pleader may be dealt with on the footing that it is a gross contempt of Court. A.I.R. 1933 Cal. 344=56 C.L.J. 595=143 Ind. Cas. 359.

——S. 14—Pleader representing one party but later on accepting instructions of the other side—Conduct, if deserving of censure.

Proper professional conduct is not a mere matter of compliance with technical rules. It is one of which every one who aspires to be called a gentleman should have an instinctive appreciation.

Where the Pleader has already taken instructions from one party and received his confidence in the matter of the genuineness of a Small Cause Court suit and notwithstanding that confidence, he accepts the instructions of the other side in a title suit referring to the same subject-matter, his conduct deserves the severest censure. 15 P.L.T. 305 =A.I.R. 1934 Pat. 352=150 Ind. Cas. 16 (S.B.).

——S. 14—Standing counsel.

Pleader exclusively retained by a client accepting brief against that client in another suit by opponent, is guilty of professional misconduct.

Held, he acts in violation not only of the principles which govern the conduct of a legal adviser, but of the ordinary principles of good faith as between man and man Such a course would not have been justified even if the retainer had been first determined. His conduct was "grossly improper conduct in the discharge of his professional duty" within the meaning of the Act. 122 Ind. Cas. 4=1930 A.L.J. 134=1930 Cr C. 205=7 O.W.N. 264=34 C.W.N. 432=31 M.L.W. 298=32 Bom L.R. 556=31 Cr.L.J. 337=51 C.L.J. 447=A.I.R. 1930 P.C. 60=58 M.L.J. 483 (P.C.).

——S. 14—Amending petition already filed.

A certain mukhtear instituted certain proceedings under S. 144 of the Cr. P. Code. After the petition had been filed in Court the mukhtear discovered that he had made a mistake on his description of the dag in his petition, viz., in giving the number. Instead of presenting to the Court a further petition for amendment of the first petition he proceeded to effect an alteration in the petition which had been filed in Court,

Held, that the mukhtear did act in a foolish and reprehensible manner, but that save and except this act of foolishness he did nothing else and did not deserve to be permanently debarred from practice. 87 Ind. Cas. 843=26 Cr.L.J. 1019=A.I.R. 1926 Cal. 223.

——S. 14—Retention of client's papers for non-payment of fees.

Refusing to part with clients papers on the ground that a part of the fees has not been paid does not amount to professional misconduct on the part of a legal practitioner. 69 M.L.J. 802=A.I.R. 1936 Mad. 48=8 R.M. 607 (1)—(1936) M.W.N. 73 =37 Cr.L.J. 279=43 L.W. 326=160 Ind. Cas. 123.

——S. 14.

To tamper with public records in Courts is a very serious matter, and cannot be overlooked. When it is done by a Pleader who has peculiar facilities afforded to him by reason of his position for handling such records, his conduct cannot be easily excused. Such misconduct deserves suspension from practice. The fact that the Pleader concerned happens to be a young and inexperienced man makes no difference. [Pleader suspended for one year.] 2 B.R. 400=17 P.L.T. 266=37 Cr.L.J. 560 =A.I.R. 1936 Pat. 418=162 Ind. Cas. 13 (F.B.)

——S. 14—Removal of record and substitution of another in its place without consent.

The removal from the Court by a mukhtear of a complaint which charged the peshkar with complicity in a certain offence in order to substitute therefor, without the consent of the complainant, another petition which omitted the charge against the peshkar amounts to gross misconduct. The certificate of the mukhtear was cancelled and he was debarred from practice. (1917) P.H.C.C. 265= 19 Cr.L.J. 61=43 Ind. Cas. 93.

8. Miscellaneous.

——S. 14—Professional misconduct—Finding of Criminal Court, finality of.

In proceeding under the Legal Practitioners' Act, the finding by the Criminal Court that the legal practitioner concerned was not guilty of misappropriation must be accepted as binding. (1944) 2 M.L.J. 317=57 L.W. 567=1944 M.W.N. 686 (2)= A.I.R. 1945 Mad. 55=46 Cr.L.J. 254=217 Ind. Cas. 231 (S.B.).

——Ss. 14, 15—Costs—Power of High Court to award costs.

The Subordinate Court has no power to award costs while dismissing a petition against a Pleader charging him with professional misconduct. The High Court however, can, if it deems it just, e.g., when the complaint is found to be vexatious, itself pass an order for the payment of costs when it takes up the case under S. 15, Legal Practitioners' Act. A.I.R. 1943 Mad. 250=56 L.W. 57=1943 1 M.L.J. 121=1943 M.W.N. 132=44 Cr.L.J. 476= I.L.R. (1943) Mad. 385=206 Ind. Cas. 327 (S.B.).

——S. 14—Review.

The power of review conferred upon High Court under S. 12 (6), Bar Councils Act cannot be extended to an order passed under S. 14 of the Legal Practitioners' Act. A.I.R. 1934 Oudh 140=11 O.W.N. 368=35 Cr.L.J. 678=148 Ind. Cas. 299 (F.B.).

——S. 14—Order of suspension, when can be made.

As regards a Pleader who holds a licence to practise as such, no order of suspension or dismissal can be made except by the Court itself and except as a result of a judicial proceeding contemplated and provided for by the Act itself. A.I.R. 1936 Cal. 205=40 C.W.N. 377=37 Cr.L.J. 590=63 C.L.J. 127=63 C. 855=162 Ind. Cas. 517 (S.B.).

——S. 14—Pleader, suspension of—No application to restore certificate—Subsequent conviction—Non-appearance to notice—Removal from rolls.

Where a Pleader who was suspended by the High Court after his conviction under the Salt Act, did not apply for the restoration of his certificate at the expiry of the period of suspension, and was again convicted under S. 17, Criminal Law Amendment Act, and made no appearance to a notice under S. 14, Legal Practitioners' Act, his name was ordered to be removed from the rolls. A.I.R. 1932 Pat. 300=34 Cr.L.J. 8 (2)=140 Ind. Cas. 295 (1) (S. B.)

——S. 14—Inquiry—Sanction against witness—No revision:—See C. P. C., S. 115. 1908 A.W.N. 273=5 A.L.J. 749=31 A. 38.

——S. 15—Applicability.

Section 15, Legal Practitioners' Act, applies in most cases to proceedings in which an adjudication has already been made by a subordinate judicial officer and the High Court is of opinion after calling for the record and studying the papers that that adjudication is **prima facie** wrong. A.I.R. 1937 Mad. 672=(1937) M.W.N. 460=46 L.W. 599=39 Cr.L.J. 83=172 Ind. Cas. 136.

——S. 15.

Subordinate Court has no power to award costs while dismissing a petition against a Pleader charging him with professional misconduct. The High Court can, if it deems just, e. g., when complaint is found to be vexatious itself pass an order for the payment of costs, when it takes up the case. A.I.R. 1943 Mad. 250=56 L.W. 57=(1943) 1 M. L. J. 121=1943 M.W.N. 132= 44 Cr L J. 476=I.L.R. (1943) Mad. 385=206 Ind. Cas. 327 (S.B.).

——S. 27—Scope of.

S. 27 of the Act has no reference to the fees payable by a party to his own pleader, advocate or vakil because that is regulated by private agreement. 15 C.L.J. 660 =17 C.W.N. 45=13 Ind. Cas. 43.

——S. 27—Rules under, (C. P. Rr. 6 and 8—Execution proceedings—Original Pleader re-engaged—Pleader's fee for execution.

A case in which a decree has been assigned and the Pleader who had been engaged in the suit itself is re-engaged by the assignee in execution proceedings, falls within R. 6 of the Rules laid down in respect of fees of Legal Practitioners under S. 27 of the Legal Practitioners' Act, 1879, which appear in Civil Circular No. 11-4 of the Civil Circulars of the Judicial Commissioner of Central Provinces and no fresh Pleader's fee can be allowed in execution in such a case. A.I.R. 1933 Nag. 360=144 Ind. Cas. 379.

——S. 27—Rules under, (Madras) Rr. 31, 37 (b)—Suit for declaration and injunction of right to fishery—Mode of valuation—Value not shown to be less than Rs. 1,000—Pleader's fee.

In a suit for declaration followed by injunction, the plaintiff should value only the injunction. Where the subject-matter of such a suit is fishery, which is generally incapable of valuation or even where it could be valued and its value is not shown to be less than Rs. 1,000, a Pleader's fee of Rs. 50 can be awarded. Under R. 37 of the Madras Legal Practitioners' Fee Rules what the Court has to see is whether the subject-matter in respect of which relief is claimed is capable of valuation. A.I.R. 1931 Mad. 640=131 Ind. Cas. 16.

——S. 27—Pleader's fees.

The proper sum as pleader's fee is what is actually paid or what might reasonably have been paid, whichever is less. The rules under the Legal Practitioners' Act are a good general guide to the sum that might reasonably have been paid, but no more. There are several factors to be considered in fixing the Pleader's fee, in addition to the valuation of the suit, and even that must be its real value, not the arbitrary or artificial valuation which is often sufficient for all other purposes. 107 Ind. Cas. 662=A.I.R. 1928 Nag. 175.

——S. 27—Engagement of more than one vakil—Rights to fees.

When a client engages more than one pleader he is presumed to expect the full services of the gentlemen to whom he has given the **vakalat.** If more than one pleader is retained by the same **vakalat** all of them cannot share the single fee allowed against the losing party. 38 Ind. Cas. 210 (Mad.)

——Ss. 27 and 28—Right to retain costs for fees.

An advocate cannot retain anything of what he has received from the other party as costs awarded, etc., on the ground that he was retained for a sum lesser than what he would have been entitled to under the taxation rules. S. 27 authorised the Court to regulate fees payable by a party in respect of the fees of his adversary's advocate and assumes the propriety of advocates charging a daily fee after the first day. 33 Ind. Cas. 107 (L. B.)

——Ss. 27 and 28—Fees—Suit for remuneration for work done.

The Act does not impose any limitation upon the fees recoverable by practitioners from their clients. S. 27 refers to fees to be paid to the adversary's pleader, where the fees are not settled beforehand and the suit is one for remuneration for work done, the Court in assessing the amount performs the functions of the taxing officer in England and when it assesses the remuneration at a certain amount having regard to the circumstances, an Appellate Court should be very slow to interfere with its discretion. 29 Ind. Cas. 763 (Mad).

——S. 27—Basis of calculation — Court fee or value of subject-matter.

The Vakil's fee should be taxed upon the real value of the subject-matter and not on the Court fee value. It will be right if both the values be stated in the plaint. (1904) 7 Bom. L.R. 131=29 B. 229.

——S. 27—In suit for declaration—Rule 31 of the Rules under the Legal Practitioners' Act.

A suit for declaration of right in respect of immovable property is not one in which "the subject matter of the claim does not admit of valuation" within the meaning of Art. 35 of the rules framed under the Legal Practitioners' Act, but is one which falls under Rule 31. Rule 31 is not confined to cases in which court fees are payable **ad valorem**. (1903) 13 M. L. J. 358=26 M. 654 (F. B.).

——Ss. 27 to 30—Pleader's fee—Amount allowed on taxation—Suit or recovery of fee.

S. 28 of the Legal Practitioners' Act, only deals with cases where there is an agreement and it is provided that the agreement should not be valid unless it is made in writing and filed in court. Where there is no agreement it does not bar a suit for recovery of fee not exceeding the amount allowed on taxation. 21 P.L.R. 1909=1 P. R. 1909=1 Ind. Cas. 393.

——Ss. 27, 28—Out fees disbursed by Vakil—Pronote by client for such out fees—Pronote not filed in court—Validity of pronote—Right of Vakil to claim recovery—Lien upon sums received from court.

A promissory note taken by a vakil from his client for an amount not advanced by way of loan but disbursed by the vakil at the request of the client for out fees in the suit in which he is retained as vakil is within the meaning of S. 29 of the Legal Practitioners' Act, an "agreement respecting the amount of payment for charges incurred or disbursements made" by the vakil in respect of the suit in which he is retained as vakil and if not filed in court is void under that section. The section is general and is not restricted in its operation to agreements which provide for the payment of a larger amount than the disbursements or for payment of pleader's fee in excess of what may be allowed under the rules framed under S. 27 of the Legal Practitioners' Act. 12 A. 169 and 25 C. 805 dissented from. Although such agreement may be invalid the pleader is not disentitled in the absence of any agreement, to claim the repayment of out fees advanced by him or reasonable remmneration in respect of his professional services. The Legal Practitioners' Act does not enact that no claim by a pleader for professional services rendered or for recovery of out fees advanced shall be sustainable unless an agreement in writing for the same has been entered into with the client, and filed in court, but only that an agreement, if any, entered into in respect of the same shall be void and unenforceable unless the same has been reduced to writing and filed in court. (1903) 14 M.L. J. 274=27 M. 512.

——S. 28.

Synopsis.

1. **Applicability and scope of section**
2. **Agreement invalid**
3. **Agreement not filed in court**
4. **Oral agreement**
5. **Right of suit**
6. **Right to set off fees against money borrowed**
7. **Repeal of section—Effect of.**

1. Applicability and scope of section.

——S. 28—Pleader suing for sum due for professional work since 1926—Held, S. 28 did not apply.

Where all that was said in the plaint was that the appointment of the plaintiff as a Pleader dated from the year 1903 and since that date, his fees were allowed at a certain scale which was settled between him and the defendant's officer:

Held, that S. 28, Legal Practitioners' Act, did not apply as the plaintiff did not found his claim upon any agreement between Pleader and client arrived at prior to 1926, which would bring the case within the mischief of S. 28 of the Act. 41 C.W.N. 703=A.I.R. 1937 Cal. 359=I.L.R. (1937) 2 Cal. 259=169 Ind. Cas. 930.

——S. 28—Applicability.

A practitioner admittted as a pleader of the first grade in the Oudh J. Cs'. Court by reason of his being a Vakil of the High Court of Judicature at Allahabad, under para. 267 (5) of the Oudh Civil Digest, does not cease to be a Vakil of the Allahabad High Court and therefore the provisions of S. 28 requiring agreements for fees to be in writing do not apply to him by reason of S. 38 of the Legal Practitioners' Act. 89 Ind. Cas. 187=2 O.W.N. 289=12 O.L.J. 558=29 O.C. 75=A.I.R. 1925 Oudh 412.

——S. 28—Scope and Effect—Right to recover fee not conditional on agreement satisfying terms of the section.

Section 28 gives the Court a control over agreements between pleaders and their clients with respect to fees and costs and is not intended to make the right of the pleader to recover his fees, etc., conditional upon the agreement fulfilling the requirements of the section. A sanction for this view is to be found in S. 29 which enables the Court to order an agree-

ment otherwise in order "to be cancelled if the agreement is not proved to be fair and reasonable, and the costs, fees, charges, and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made." 53 Mad. 309=30 M.L.W. 876=A.I.R. 1930 Mad. 132=57 M.L.J. 756.

——The provisions of S. 28 are very wide and comprehensive and they include services rendered in respect of business done by pleaders, Mukhtears or Revenue-agents even in connexion with cases not pending in Court. All agreements between a legal practitioner and his client, whether in connexion with cases pending in Court or cases not pending in Court, fall within the mischief of the section. 6 Bur. L.T. 18 and 20 C.L.J. 445, Foll. 101 Ind. Cas. 559=8 P.L.T. 175=6 Pat. 614=A.I.R. 1927 Pat. 178.

——S. 28—Suit to recover remuneration on adjustment of accounts is barred by S. 23.

The plaintiff, a pleader, acted as the legal adviser of the father of the defendant as also of his paternal grandmother. It was agreed between the parties that the plaintiff would receive his legal fees, if so desired, or some remuneration per day. An account was taken of the sums due to him for his services, and after deduction of the amounts paid and of the amount relinquished, on amicable settlement, it was found on the 11th April, 1914, that a sum of Rs. 5,000 was due to him. On the 10th April, 1917, the plaintiff instituted the present suit to recover the sum thus found due to him on adjustment of accounts.

Held, that the suit was barred under S. 28 of the Legal Practitioners' Act. 73 Ind. Cas. 10=27 C.W.N. 769=A.I.R. 1923 Cal. 677.

——S. 28—Quantum meruit.

Where a pleader takes up a brief without any agreement as to the amount of fees or the manner of his payment, he is entitled to recover on an implied promise a reasonable remuneration. A suit to recover such sum is not affected by S. 28. In the absence of any agreement, a pleader is entitled to **quantum meruit** which has to be determined according of the circumstances of the case. 21 C.L.J. 618=29 Ind. Cas. 453.

——S. 28—Written contract not produced claim on basis of S. 70, Contract Act.

A contract between a pleader and his client, to be enforceable must satisfy S. 28 of the Legal Practitioners' Act. But no written contract need be produced where a pleader works on the expectation of being paid in the ordinary course. His claim can be based on S. 70 of the Contract Act. 20 C.L.J. 424=20 Ind. Cas. 47.

——Ss. 28, 29 and 30—Scope of.

Ss. 28 to 30 do not debar a pleader from recovering from his client the fee actually allowed to him by the Court on taxation but they provide that the pleader cannot recover the actual payment of remuneration agreed to be paid unless he complies with the provisions of the sections. P.R. 1909=8 P.W.R. 1909=21 P.L.R. 1909=1 Ind. Cas. 393.

2. Agreement invalid.

——S. 28—Agreement invalid — Agreement for fees invalid — Pleader can sue under Contract Act, S. 70.

Section 28 provides for cases in which the parties agree that there ought to be a special fee irrespective of the amount of work which the conduct of the suit may eventually be found to entail. This may be more or less than the "party and party" fee fixed under S. 27. If there is an agreement which is invalid under S. 28, or no agreement at all, the pleader can sue under S. 70 of the Contract Act, and he can get whatever is a fair and just remuneration for the services he has actually rendered. In neither case whether on the valid agreement or under S. 70 of the Contract Act, does the "party and party" fees come into question at all except as one piece of evidence to help in deciding what the proper remuneration would be, where there is an agreement which is invalid under S. 28, the terms of that agreement can be considered in evidence, for what they may be worth, for the decision of the issue of the proper remuneration. 27 Mad. 512, Foll. 59 Ind. Cas. 172=17 N.L.R. 8=A.I.R. 1921 Nag. 122.

——S. 28—Agreement of fees void ab initio.

Where an agreement is manifestly void from its inception as contravening the provisions of S. 28 and as such an agreement can be described to be one "discovered to be void" within the meaning of S. 65, Contract Act, as explained by Privy Council in A.I.R. 1923 P. C. 189 the client is bound to make compensation to the Vakil for the advantage which he has received under the contract. 53 Mad. 309=30 M.L.W. 876=A.I.R. 1930 Mad. 132=57 M.L.J. 756.

——S. 28—Agreement to pay fees —Lien on client's money for fees, if exists.

If an agreement for payment of fees by a client is contrary to the provisions of S. 28 of the Legal practitioners' Act a pleader has no lien on monies of the client. Kamini Debi v. Khettra Mohan. 15 C.W.N. 681=15 C.L.J. 690=11 Ind. Cas. 382.

——S. 28—Requisites of a valid agreement.

An agreement made under S. 28 of the Act must be in writing signed by the client and submitted in a Court within the prescribed period and an agreement in contravention of this section is of no avail to a pleader either as a plff. or as a deft. 9 M. 375; 14 M. 63; 17 M 306; 27 M. 512; 12 A. 169; 25 A. 764; 4 A.L.J. 535; Diss. 15 C.L.J. 660=17 C.W.N. 45=13 Ind. Cas. 43.

3. Agreement not filed in Court.

——S. 28—Agreement not filed in Court.

Where an agreement between a legal practitioner and his client in respect of fees or remuneration is reduced to writing but is all the same clothed imperfectly in legal forms, in that it was not filed in Court, the equitable doctrine of part performance can be called in aid to supply the defects of forms. But if the agreement is not reduced to writing the doctrine cannot be of any help. 123 Ind. Cas. 408=11 P.L.T. 398=A.I.R. 1930 Pat. 61.

——S. 28—Promissory note for out-fees—Right of pleader to recover the amount.

A promissory note executed to a pleader by his client in respect of out-fees disbursed by him is invalid if not filed in Court under S. 28. The pleader can obtain a decree for his sums actually spent by him on the original cause of action. Such a promissory note, even though invalid, for not being filed in Court may still operate as an acknowledgment of liability and the dismissal of a suit on the note does not bar a fresh suit on the original cause of action but interest at the rate specified on the note cannot be allowed.

27 M. 512; 14 M. 63; 16 M. 278, F. 27 M. L. J. 728=1 L.W. 1070=27 Ind. Cas. 116.

——**S. 28—Failure to file agreement.**

Even an illegal agreement if not actually filed under S. 28 cannot be acted on and if the pleader acted **bona fide** and in good faith no action ought to be taken on it. 8 A.L. J. 151=12 Cr.L. J. 12=9 Ind. Cas. 130.

4. Oral agreement.

——**S. 28—Oral agreement of fees.**

A suit by a pleader for fees based upon an alleged oral agreement cannot succeed because it is not a valid agreement as it is a special agreement and any special agreement is to be in writing under the provisions of S. 28. 67 Ind. Cas. 874=26 C.W.N. 709=A.I.R. 1922 Cal. 567.

——**S. 28—Oral agreement.**

An oral agreement between a pleader and his client for payment of fees and litigation expenses is invalid and unenforceable. 20 C.L. J. 445=26 Ind. Cas. 960.

——**S. 28—Oral agreement.**

S. 28 of the Act forbids verbal agreement for fees by pleaders. (1912) M.W.N. 524=14 Ind. Cas. 279.

——**S. 28—Oral agreement to pay full legal fee.**

A Suit for damages for breach of contract based on an oral promise "to pay full legal fees and to engage the plaintiff as a pleader on behalf of the defendant" is barred by S. 28, of the Legal Practitioners' Act. (1906) A.W.N. 235=3 A.L.J. 579=28 A. 764 (F.B.)

5. Right of suit.

——**S. 28—Suit by Mukhtear for fees.**

Suit by a **Mukhtear,** for recovery of money due on account of fees for his services is maintainable. 18 A.L.J. 373=2 U.P.L.R. (All.) 86=58 Ind. Cas. 182.

6. Right to set off fees against money borrowed.

——**S. 28—Pleader—Agreement to allow legal fees to be set off against money advanced to a pleader by a client.**

A client advanced certain money to a pleader who subsequently appeared for the lender in various cases. On suit by the lender to recover his loan the pleader set up an agreement entitling him to set off against the money borrowed his fees for professional services. **Held, (dubitante)** and following the decision mentioned below, that the pleader was entitled to a set off in the shape of reasonable remuneration for services actually rendered although there was no such agreement as required by the Legal Practitioners' Act, S. 28. (1907) A.W.N. 230=4 A.L.J. 535=29 A. 649.

7. Repeal of Section—Effect of.

——**S. 28—Effect of repeal.**

The repeal of Ss. 28 to 31 of the Legal Practitioners' Act by Act XXI of 1926 does not affect the rights of the parties to an agreement entered into before its operation. 101 Ind. Cas. 559=8 P.L.T. 175=6 Pat. 614=A.I.R. 1927 Pat. 178.

——**S. 32.**

Pleader applying late for renewal of his sanad then the prescribed time, and appearing in a case before Magistrate before its renewal Pleader, held, guilty under S. 32, but being a Pleader of 27 years' standing, previous conduct being good, and he having apologised, censure of conduct alone, held, sufficient, 57 L.W. 87 (1) 1944 M.W N. 128=(1944) 1 M.L J. 123=45 Cr.L.J. 671=I.L.R. (1944) Mad. 633=A.I.R. 1944 Mad. 244=214 Ind. Cas. 4 (F.B.)

——**S. 32—"Illegally practises as a pleader"—Semble.**

That the expression "practises in any court" as used in S. 32 of the Legal Practitioners' Act, 1879, does not mean "habitually acts, as a pleader or mukhtear," but signifies the doing of acts, or, it may be, a single act, in a professional capacity as of right, which could not be done as of right by a non-professional man. 1904 A.W.N. 56=26 A. 380.

——**S. 32—Rule framed by High Court—Mukhtears, how far entitled to practise in civil court—Special leave—Violation with courts permission, consequence of.**

Special leave must be obtained from the court in each case by a mukhtear who is desirous of offering any legal argument on examining any witness before a civil court. Such leave should be given only in exceptional cases and for sufficient reasons. A practice allowing mukhtears to act as above generally and as a matter of course is in violation of the rule made by the Calcutta High Court, which should be strictly observed. Where, however, certain mukhtears had been acting in violation of the rules made by the High Court but they had either the express or the implied permission of the court to do so:—**Held,** that no proceeding under the Legal Practitioners' Act, should be taken against them. (1904) 8 C.W.N. 401.

——S. 36.

Synopsis.

1. Inquiry must be only by officers mentioned in Sub. S. (1)
2. Inquiry—Procedure
3. Resolution of Bar Association—Explanation
4. Opportunity to show cause—Sub. S. (2)
5. Inquiry and report by Subordinate Court—Sub. S. (2-A)
6. Revision
7. Miscellaneous.

1. Inquiry must be only by officers mentioned Sub. S. (1).

——**S. 36—Recording of evidence.**

The Judge and officers mentioned in the section cannot delegate the task of recording the evidence to a subordinate officer. 84 Ind. Cas. 462=5 Lah. 443=26 Cr.L J. 318=A.I.R. 1925 Lah. 225.

——**S. 36—Order under, by District Magistrate on evidence recorded by Subordinate Magistrate illegal.**

An order under S. 32 declaring a person to be tout is not valid if made by a District Magistrate on evidence recorded by a subordinate Magistrate, as the order can only be made by the officer mentioned in the section on evidence recorded by himself. 60 Ind. Cas. 321=22 Cr.L.J. 209=24 C.W.N. 1074.

——**S. 36—Tout—Declaration—Inquiry.**

An order under S. 36 of the Legal Practitioners' Act declaring a person to be a tout can be made only by one of the authorities specified in that section and upon

evidence taken by such authority himself. 24 C.W.N. 1074=60 Ind. Cas. 321.

——S. 36.

The duties to be undertaken under the section cannot be delegated by any of the officers mentioned therein to their subordinates. 59 Ind Cas. 322=22 Cr.L.J. 66=1919 P.H.C.C. 273.

——S. 36—Declaration of tout—Enquiry—Notice—Procedure.

An order declaring a person to be a tout under S. 36 of the Legal Practitioners' Act, is bad if it is made otherwise than on enquiry made by the officer himself and after notice. Where a sub-divisional officer called on a person to show cause why he should not be declared a tout and he showed cause and the sub-divisional officer after recording evidence on both sides submitted the proceedings with his report to the District Magistrate and the latter after perusing them passed on order declaring the person to be a tout, the order was set aside. 6 C.W.N. 283 foll. (1908) 12 C.W.N. 842.

——S. 36—Delegation of authority by officer empowered to make enquiry.

The officer empowered to make a list of touts under S. 36 of the Legal Practitioners' Act cannot delegate the task of making the enquiry or taking evidence to an officer subordinate to himself, and the evidence must be evidence adduced before the officer himself. (1901) 6 C.W.N. 289.

——S. 36—Tout-Declaration—Dt. Munsiff.

A Dt. Munsiff has no power to declare a man tout under S. 36 of the Legal Practitioners' Act. He can enquire into the matter and report to the Dt. Court. A perron cannot be prohibited from entering court on the ground that he is a tout unless the presiding officer takes steps to have the person declared a tout on due inquiry. Per **Sadasiva Iyer**:—Such an order is not a judicial order and cannot be revised by the High Court. It is a purely departmental affair. 12 M.L.T. 411=(1913) M.W.N. 370=16 Ind. Cas. 895.

——S. 36—Tout declaring a person to be—District Judge to take evidence himself—Power to direct Munsif to take it—Opportunity to show cause—Procedure when Munsif suspects a person to be a tout.

S. 36 of the Legal Practitioners' Act, is of a final nature and its provisions must be strictly and precisely complied with. It is only the Judges and other officers specially mentioned in S. 36 of the Legal Practitioners' Act, who can frame and publish a list of touts and they can only frame and publish such a list when it has been proved to their satisfaction by evidence taken and heard by themselves that the person whom they propose to include in the list habitually acts as a tout. A District Judge has no power to delegate to the Munsif the special statutory powers conferred upon him by that section. When a Munsif has reason to suspect that any person is acting as a tout he should inform the District Judge of his suspicions giving him the names of witnesses and leaving it to him to take and hear evidence. (1907) 12 C.W.N. 843.

2. Inquiry—Procedure.

——S. 36—Proceedings under—Petition for taking proceedings under, is not necessary—Opportunity for hearing party, if given, is sufficient compliance with section—Enquiry need not be carried on in manner prescribed by Cr.P. Code.

Where a petition filed in the District Court to have a person included in the list of touts did not give sufficient particulars as to why his name should be included:

Held, that under S. 36 of the Legal Practitioners' Act it is not necessary that there should be a petition at all, it does not contemplate the case of a party making definite allegations against an alleged tout. There is a sufficient compliance with the section if the alleged tout is called upon to show cause why his name should not be included in the list, provided an opportunity was given to him to rebut the evidence tendered and otherwise to place his case before the Court. S. 36 of the Legal Practitioners' Act creates a special jurisdiction, but does not define the details of the mode in which that jurisdiction is to be exercised. The course to be adopted should be such as would do substantial justice to the parties brought before the Court. An enquiry under S. 36 cannot be conducted in the manner prescribed in Cr.P. Code regarding enquires altogether of a different nature. 69 Ind. Cas. 433=16 M.L.W. 795=23 Cr.L.J. 705=A.I.R. 1923 Mad. 188=44 M.L.J. 437.

——S. 36—Procedure.

Inserting a person's name in the list of touts should proceed in accordance with the provisions of the Act. It should not be done in the absence of legal evidence that such person habitually acted as tout. 116 Ind. Cas. 173=49 C.L.J. 118.

——S. 36—Sufficient enquiry, what is.

The insertion of names of persons in the list of touts should be made after conducting a proper enquiry under S. 36 of the Legal Practitioners' Act. Where all that was done was the holding of a parade before the judicial officer in the presence of members of the legal profession,

Held, that there was no proper enquiry. 116 Ind. Cas. 173=49 C.L.J. 118.

——S. 36—Tout—Declaration—Procedure.

Notice to show cause why a person should not be declared a tout must be given to him and evidence should be taken in his presence to show that he is a tout. (1917) P.H.C.C. 186=5 Pat. L.W. 229=19 Cr.L.J. 36=42 Ind. Cas. 996 (F.B.)

——S. 36—Enquiry under—Evidence of repute—Admissibility.

Per **Teja Singh, J.**—S. 36 of the Legal Practitioners' Act clearly lays down that a man could be declared a tout if he had that reputation and evidence of reputation is admissible in an inquiry under this section. 49 P.L.R. 212=A.I.R. 1947 Lah. 313 (F. B.).

——S. 36—Tout—Declaration—General repute—Meaning of.

A person sought to be proclaimed as a tout under S. 36 of the Act can be proved to be such by evidence of general repute including hearsay evidence which may be tested by cross-examination. The exhibition of the copy list referred to in S. 36, Cl. (3) of the Act is necessary to constitute a man a proclaimed tout. The principle applicable in cases under S. 110 of Cr.P.Code, apply to cases under S. 36. 40 All. 153=16 A.L.J. 76=19 Cr.L.J. 269=44 Ind. Cas. 125.

——S. 36—Tout—Declaration—Evidence.

To declare a person a tout it is necessary to have some evidence of the facts required by S. 3 of the Leg. Pract. Act as amended by Act XI of 1896. A stray admission by a person that he is a tout without understanding its full legal significance, is not enough to declare him a tout. 28 Ind.Cas. 918 (Mad).

——S. 36—Tout—Evidence.

There must be legal evidence to prove that a person is a tout. The mere report of the Bar Association is not enough. 12 M.L.T. 259=(1912) M.W.N. 959=17 Ind. Cas. 251.

——S. 36—Tout—Declaration—Grounds.

Proof by general repute or otherwise is necessary before a person can be declared a tout under the section. 112 P.L.R. 1912=12 P.W.R. (Cr.) 1912=13 Cr.L.J. 467=15 Ind.Cas. 307.

——S. 36—Tout—Enquiry by Magistrate—Delegation—Evidence—Opportunity to cross-examine.

An enquiry under S. 36 of the Legal Practitioners' Act must be made by the Dt. Magistrate himself and cannot be delegated to any subordinate officer. 12 C.W.N. 842, Foll. The decision of a Court determining that a person is a tout must be based on substantial legal evidence. The person against whom the evidence is directed must have an opportunity of cross-examining the witnesses. 13 Cr.L.J. 510=15 Ind. Cas. 654 (Cal.)

——S. 36—Tout—Declaration—Evidence.

A person cannot be declared a habitual tout when evidence of his being a tout is vague and general, and there is the testimony of apparently respectable witness to the contrary. 26 P.W.R. 1909 (Cr.)=11 Cr. L. J. 147=4 Ind. Cas. 1021.

——Ss. 36 and 3—Tout—Evidence.

The evidence of an ordinary witness that a barrister pays a person commission an any case brought to him, while the barrister himself denies the fact, does not sufficiently prove that the person is a habitual tout. 27 P.W.R. (Cr.) 1909=11 Cr.L.J. 148=4 Ind. Cas. 1022.

——S. 36—Tout—Inquiry—Different persons—One inquiry—If proper.

The enquiry under this S. 36 need not be confined to the case of one person alone. To include cases of persons who frequent different courts as touts in one enquiry would be unreasonable but persons frequenting the same court may be so included. 11 C.L.J. 513=11 Cr.L.J. 320=6 Ind. Cas. 327.

3. Resolution of Bar Association—Explanation.

——S. 36—Notice of meeting, if should specify particular charges.

For a meeting being specially convened within S. 36, Legal Practitioners' Act, it is not necessary to state in the notice of the meeting the particular nature of the charges made against the tout. A.I.R. 1943 Pesh. 54=44 Cr.L.J. 582=207 Ind. Cas. 135.

——S. 36, Expl.—Meeting of Bar Association must be specially convened to declare a man as tout.

The words 'any person' appearing first in the Explanation to S. 36, Legal Practitioners' Act mean 'any named person' or 'any specified person' and the meeting of the Bar Association must be specially convened for the purpose of declaring any person or persons whose name or names are before the meeting when it is convened, to be or not to be a tout. A.I.R. 1937 Sind 4=38 Cr.L.J. 316=30 S.L.R. 340=166 Ind. Cas. 643.

——S. 36—Interpretation—"Specially convened."

The Collector of a certain place wrote to the Secretary of the Bar Association of that place inviting the Association to take steps "to consider the tout evil." After receiving this letter a meeting of the Association was held and the members then present appointed a sub-committee to investigate the prevalence of touting in the place, and to submit to the Association a list of persons whom the sub-committee considered to be acting as touts. That sub-committee presented to the executive committee of the Bar Association a list of persons whom it considered to be touts, and the executive committee thereupon issued a notice to all "resident members" of the Bar Association, i. e., members of the Association resident, summoning an extraordinary meeting of the Association "to consider the tout evil." At that meeting the list of names prepared by the sub-committee of the Association was read out.

Held, that it was a meeting "specially convened for the purpose" of preparing a list of touts under S. 36 (1). 118 Ind. Cas. 524=26 A.L.J. 790=9 L.R.A.Cr. 113=10 A.I.Cr.R. 193=A.I.R. 1928 All. 334.

——S. 36—Bar Association's resolution — Touts—Defaulting members, if can vote—Enquiry by District Judge—Costs.

A District Bar Association, declared certain persons by the unanimous vote, to be touts. Thereupon an inquiry was started by the District Judge under S. 36 (1), Legal Practitioners' Act, and it was found that there was no evidence to show that the persons were touts. He had also invited the Bar Association to assist him. Some members of the Association were examined as witnesses and all that they stated was that they were unable to say whether in view of the considerations placed before them as witnesses they still adhered to the resolution. District Judge ordered the Association to pay to the person the costs of the inquiry:

Held, (ii) that the contention, that some of the members of the Association were defaulters and could not vote, was without force. It was entirely a matter for the Bar Association to decide whether the defaulting members have or have ceased to be its members. It was purely a domestic matter with which the contending party had no concern. The resolution did not become invalid on this ground;

(iii) that the Association was not a party to the proceedings and hence the order as to costs was illegal;

(iv) that there was no provision in law under which the persons affected by the resolution were entitled to be heard to show cause why the resolution should not be passed. A.I.R. 1936 Lah. 382=38 Cr.L.J. 19=39 P.L.R. 62=165 Ind. Cas. 963.

——S. 36 (1), (as amended by Act XV of 1926)—Resolution of Bar Association—Admissibility—Meeting convened for declaring certain persons as touts—Resolution declaring another as tout—Validity.

The resolution of the Bar Association referred to in Explanation to S. 36, Legal Practitioners' Act, if duly passed, is sufficient, in the absence of other cogent evidence, for the inclusion of a name in a list of touts framed under the section.

It is not necessary that the members of the Bar present at the meeting should consider the evidence for themselves. It is sufficient if the members present find reason to believe that the report of a committee formed to enquire into the matter had been prepared with impartiality and due care, and the members support the resolution because of the report.

Where the meeting is convened for declaring certain persons as touts and a resolution is passed declaring

another person to be a tout, the resolution is not valid evidence that that person was a tout. Yeshwant Rao Shantaram v. Secretary, High Court Bar Association. A. I. R. 1932 Nag. 141=28 N. L. R. 159=33 Cr.L.J. 940 (2)=189 Ind. Cas. 900.

——S. 36—Tout—Resolution of Bar Association based on repute — Admissibility—Evidentiary value—Revision—Powers of High Court.

If a resolution of a Bar Association declaring a person to be a tout is based on general repute, the Court may attach less weight to it but such a resolution is not legally inadmissible evidence and can be taken into consideration by the Court.

The High Court, in the exercise of its powers of superintendence, can revise an order passed by a Subordinate Officer if the order is against natural justice. A. I. R. 1931 All. 711=54 A. 230=(1932) A.L.J. 176=33 Cr.L.J. 282=136 Ind, Cas. 374.

——S. 36—Amendment Act (XV of 1926)—Declaration of touts — Proof of general repute — Resolution of Bar Association, evidentiary value of.

After the amendment of the Legal Practitioners' Act by Act XV of 1926, while a Court can still proceed under S. 36 of the Legal Practitioners' Act, and examine witnesses as to the general repute of the suspected tout, it can also avoid the calling of witnesses and accept a resolution of the Bar Association satisfying the requirements of Act XV of 1926 as sufficient evidence to prove that he is a tout by general repute. A.I.R. 1931 All. 315=130 Ind. Cas. 629.

——S. 36—Resolutions of Bar Associations—Evidentiary value.

A resolution passed by a Bar Association declaring certain persons to be touts is merely evidence upon the value of which the judicial officer to whom it is sent must form his own opinion. 118 Ind. Cas. 524=26 A.L.J. 790=9 L.R.A. Cr. 113=10 A.I.Cr.R. 193=A.I.R. 1928 All. 334.

——S. 36 (1)—Declaration of tout—Report of Bar Association—Omission to serve notice on all members—Validity of report.

The proceedings under S. 36, Legal Practitioners' Act, are of a quasi-criminal nature.

Under S. 36 (1) in order to enable a Court to admit in evidence the resolution of the Bar Association, it is necessary to establish that it was passed at a meeting specially convened for the purpose of passing the resolution in question; this implies that the meeting should have been properly convened and that the object of the proposed meeting should have be properly notified to all the members of the Association.

A meeting of an Association such as the Bar Association to be valid must be legally and properly convened, that is to say, after proper notice to all its members who are able to attend and a notice, to be proper, must be given in a reasonable manner and at a reasonable time before the meeting takes place. It is the right of every member to express his views on every matter that is discussed at a meeting of the Association and, therefore, in a proceeding under S. 36, Legal Practitioners' Act, it is the right of the suspected touts to claim that the meeting at which they were condemned should have been properly convened after a valid notice to all the members of the Association. A.I.R. 1931 Lah. 57=32 Cr.L.J. 672=12 L. 385=131 Ind. Cas. 238.

——S. 36—"Majority of members present"—Resolution passed by majority of votes but not by majority of members present—Validity.

The expression, "majority of members present" in the Explanation to S. 36 of the Legal Practitioners' Act is not the same thing as majority of members voting. Where the only evidence on which a person was declared a tout was a resolution of the Bar Association and it appeared that at the meeting of the Association 64 were present but only 26 voted in favour of the resolution, 14 votes being against it and the rest being neutral:

Held, that there was no legal evidence on which the person could be declared a tout. 1930 A.L.J. 977 =A.I.R. 1930 All. 752.

——S. 36.

The law does not require that all the members should be present at the meeting but requires that a meeting of the association should be convened for the purpose of considering whether a certain person is a tout; and if by a majority of the members present at such a meeting a resolution is passed, it is sufficient. 115 Ind. Cas. 602=56 Cal. 800=A.I.R. 1929 Cal. 196.

——S. 36.

A resolution or report of a Sub-Committee of only seven members, out of an association of about 22 members, declaring certain persons to be touts, is not a resolution by a majority of the members and hence it connot be used as evidence of general repute under the Explanation to sub-S. (1) of S. 36. 102 Ind. Cas. 340=8 P.L.T. 587=28 Cr.L.J. 532=8 A.I.Cr.R. 207=6 Pat. 567=A.I.R. 1927 Pat. 282.

——S. 36—Interpretation—"Members".

Whether a resolution passed by a meeting of a Bar Association declaring certain persons to be touts was or was not regularly passed must be determined by reference to the explanation to S. 36, sub-S. (1) and not by reference to any rules framed by an Association. The Act only requires that "members" shall vote and that the resolution shall be passed by a simple majority irrespective of the rules of the particular Bar Association. When forwarding the resolution the Secretary of the Bar Association ought to state the total number of members belonging to the Association, the number of those who attended the meeting and the figures of the votes for and against the resolution. 118 Ind. Cas. 524=26 A.L.J. 790=9 L.R.A.Cr. 113=10 A.I.Cr.R. 193=A.I.R. 1928 All. 334.

4. Opportunity to show cause—Sub-S.(2).

——S. 36—Opportunity reasonable.

Notice to show cause was served on person on 18th December just a few days before X-mas holidays began. On the re-opening of the Court he applied on 2nd January for the issue of summons to a number of witnesses including seven Vakils. The Judge instead of issuing summons and allowing him to take the risk if they were not served in time declined to issue the summons and directed him to produce affidavits from the Vakils. As no affidavits were filed the Judge on the resolution of the Bar Association declared him to be a tout on 3rd January:

Held, that sufficient opportunity was not given to him to satisfy the Court that he was not a tout. 1930 Cr.C. 1018=A.I.R. 1930 All. 796.

——S. 36—Opportunity to show cause.

As S. 36 is somewhat exceptional and of a drastic nature, a great deal of care and caution is necessary before action is taken against anybody and full opportunity should be given to the aggrieved party to meet the case for the prosecution. 92 Ind. Cas. 749 =27 Cr.L. J. 333=A.I.R. 1926 Lah. 227.

—— S 36—Tout — Opportunity to show cause must be given—Duties under section cannot be delegated.

Before directing inclusion of a person's name in the list of touts it is necessary under S. 36 of the Act to give the person an opportunity of showing cause against the inclusion. 59 Ind. Cas. 322=22 Cr.L.J. 66.

5. Inquiry and report by Subordinate Court —Sub-S.(2-A).

——S. 36—Delegation of inquiry.

If the enquiry is entrusted to a Subordinate Court, it is the Subordinate Court which must be satisfied that the person is proved to be a tout. If that authority is not satisfied and does not send up his name, the superior authority which itself made no enquires cannot include the name of a person who has not been so recommended. 1930 A. L. J 961=A. I. R. 1930 All. 641.

——S. 36—Delegation of enquiry.

Under S. 36 (2) the District Judge has the power to differ from or accept the report of a Subordinate Court as regards the question referred, namely whether certain persons should be declared touts or not. Where the District Judge refuses to accept the report, the High Court will not interfere in revision unless the Order is manifestly wrong. 31 P.L.R. 1003= A.I.R. 1931 Lah. 98.

——S. 36—Touts—Report by Subordinate Judge—Objection before District Judge—Dismissal of objection—Legality.

A Subordinate Judge made a report against certain persons whom he considered to be touts. The petitioner who was one of them, applied to the District Judge against his name being included in the list of touts and the District Judge, treating that application as an appeal against the order of the Subordinate Judge dismissed it:

Held, that the order passed by the District Judge on the so-called appeal of the petitioner dismissing his objections to the report of the Subordinate Judge could not be regarded as taking the place of the formal orders which he had to pass before it could be said that a man was rightly included in the list of touts under the orders of a competent authority and could not be upheld. 32 Cr. L. J. 730=A.I.R. 1931 Lah. 156=32 P.L.R. 9=131 Ind. Cas. 370.

——S. 36—Report—Powers of District Judge—Interference by High Court.

Under S. 36, Cl. 2, Legal Practitioners' Act, the District Judge has power to differ from or accept the report placed before him by the Subordinate Judge and the High Court will not interfere with the decision of the District Judge, when the question is only one of weighing evidence. A. I. R. (1931) Lah. 98=31 P.L.R. 1003=32 Cr. L. J. 1129=134 Ind. Cas. 98.

——S. 36 (2-A)—Tout—Submission of report to District Judge—Notice by District Judge to show cause, whether necessary.

Where an inquiry in regard to persons alleged to to be touts has been held by a Subordinate Court and a report has been submitted to the authority which had ordered the inquiry, it is not the duty of such authority to issue notice to the persons reported against to show cause, but it is the duty of such persons to enter appearance before the said authority and intimate to him that they desire to be heard. A I.R. 1931 Lah. 543=32 Cr L. J. 966=33 P.L.R. 591=13 L. 323=132 Ind. Cas. 346.

——S. 36—Declaration of touts—Report of Subordinate Court—Duty of District Magistrate to hear accused persons.

While it is not necessary under the Legal Practitioners' Act that a notice should be issued to a person or persons whom the Subordinate Magistrate recommends to be declared touts, the District Magistrate must satisfy himself that the person against whom action has been taken is aware of the report submitted against him and should also give such a person a reasonable time and opportunity for appearing and stating his objections to the report if he so desires, unless the District Magistrate is satisfied that he does not wish to appear.

Where an order under S. 36 (2), Legal Practitioners' Act, is passed by the District Magistrate without giving the applicant an opportunity of appearing before him and being heard, there is sufficient ground for revision. A.I.R. 1931 Nag. 187=14 N.L.J. 122=27 N.L.R. 398=33 Cr. L. J. 146=135 Ind. Cas. 411.

6. Revision.

——S. 36—Nature of jurisdiction — Order of District Judge declaring person to be tout—Revision—Government of India Act, S. 224 (2).

Under S. 36 of the Legal Practitioners' Act the authorities empowered to draw up a list of touts are not **persona designata** but are given such power as the presiding officers of their Courts. This jurisdiction dealing with touts is given to these officers in their capacity as presiding officers over the Courts concerned. The Courts, when exercising their jurisdiction under this section, are exercising a peculiar jurisdiction which is created by that section. It is neither a civil jurisdiction nor a criminal jurisdiction, it is a disciplinary or administrative jurisdiction.

An order of a District Judge declaring a person to be a tout is therefore an administrative order and not a judgment and the High Court has under its general power of superintendence a right to interfere in revision on the administrative side with such an order in a proper case, such right not being affected by S. 224 (2) of the Government of India Act. The High Court has, however, no power to interfere with it except on its administrative side. 49 P.L.R. 212= A.I.R. 1947 Lah. 313 (F.B.).

——S. 36—Order of District Judge under, if "judgment" within meaning of S. 224 (2), Government of India Act, 1935—Whether open to revision by High Court.

An order passed under S. 36, Legal Practitioners' Act by the District Judge amounts to a judgment as contemplated by sub-S. (2) of S. 224, Govt. of India Act, 1935, and is not, therefore, open to revision under S. 115 Civil P.C any more than under the Criminal P.C. and since sub-S. (2) of S. 224, Govt. of the India Act, bars the interference of the High Court on the administrative side, it follows that the High Court has

no power to question the decision of the District Judge under S. 36.

The intention of the Act is that an order passed under S. 36 declaring certain persons to be touts shall not be subject to revision. A.I.R. 1941 Lah. 1=42 P.L.R. 609=42 Cr. L. J. 289=I.L.R. (1941) Lah. 133=192 Ind. Cas. 363.

——S. 36—Person declared tout—High Court, if can revise order under S. 115, Civil P.C. Govt. of India Act, 1935, S. 224(2), if bar to such revision—Revision under S. 439, Criminal P.C.

The High Court can, under S. 115, Civil P. C., revise an order passed by a District Judge under S. 36, Legal Practitioners' Act, declaring a person to be a tout. Section 224 (2), Govt. of India Act, is not a bar to such a revision. To such a case, S. 439, Criminal P.C. does not apply and there would be no revision under the Criminal P. C. The revisional jurisdiction under S. 115, Civil P.C. is necessarily of an exceptional character and cannot be invoked except in furtherance of justice. A.I.R. 1938 Mad. 634=47 L.W. 578=(1938) M.W.N. 426=(1938) 2 M.L.J. 100=I.L.R. (1938) Mad. 988=177 Ind. Cas. 456.

——S. 36—C. P. Courts Act (I of 1917), S. 21—Proceedings for declaration of touts—Revision—Nature of revisional of jurisdiction.

The Judicial Commissioner's Court of Nagpur has jurisdiction to revise an order of a Subordinate Court made in a proceeding under S. 36, Legal Practitioners' Act under the general power of superintendence and control conferred on it by S. 21, C. P. Courts Act, and the exercise of this power is a judicial matter. 28 N.L.R. 4=A.I.R. 1932 Nag. 50=33 Cr. L. J. 408=137 Ind. Cas. 66.

——S. 36—Order under—Revision by High Court—Govt. of India Act, S. 107—Powers of general superintendence—Tout—Evidence of general repute—Resolution of Bar Association—Admissibility.

The High Court, in the exercise of power of its general superintendence over all Courts subject to its appellate jurisdiction, can under S. 107 of the Govt. of India Act, revise orders made by such subordinate Courts under S. 36, Legal Practitioners' Act.

The powers under S. 36 are not conferred on individual officers by name as persona designata but upon officers presiding in the Courts which are mentioned therein.

An order declaring a person to be tout is one which seriously affects his character and living and hence it is all the more incumbent upon the District Judge, before whom an application to declare a person as tout is made, to satisfy himself that the conditions laid down by S. 36 (2-A) for the admissibility of a resolution of the Bar Association, are duly fulfilled and satisfied. 34 Bom L.R. 1281=A.I.R. 1932 Bom. 596=34 Cr. L. J. 47=56 B. 577=140 Ind. Cas. 553.

——S. 36—Revision.

High Court can entertain in exercise of general powers of superintendence an application in revision from an order of District Magistrate including the name of a person in a list of touts under S. 36, Legal Practitioners' Act. 1930 A.L.J. 961=A.I.R. 1930 All. 641.

——S. 36—Revision.

High Court can revise order passed under S. 36 in furtherance of justice by virtue of Government of India Act, S. 107. 31 P.L.R. 542=A.I.R. 1930 Lah. 889.

——S. 36—High Court can revise order under S. 36—Decision of District Judge against the weight of evidence is no ground for interference.

The High Court in the exercise of its discretion can send for the record of an enquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. High Court would not interfere in the exercise of its powers of superintendence; where the sole ground upon which interference was asked for was that the decision of the Dt. Judge was against the weight of the evidence. The intention of the Legislature was not to allow anything of the nature of an appeal against the decision of a competent Court under S. 36 of Act No. 18 of 1879. High Court cannot consider whether the circumstantial evidence relied upon by a Dt. Judge, and set forth in his order, was or was not evidence from which High Court would have drawn the same inference. 74 Ind. Cas. 11=79 Ind. Cas. 693=45 All. 676=21 A.L.J. 671=4 L.R.A. Civ. 317=A.I.R. 1924 All. 69.

——S. 36—Order under—Revision.

The High Court cannot in its revisional jurisdiction, interfere under S. 115 with an order under S. 36, Legal Practs.' Act. The enquiry under the Leg. Practs.' Act is in the nature of the departmental inquiry and it may be conducted in such a way that the officer inquiring, acts with substantial justice and gives the person, against whom proceedings are being taken an opportunity to defend himself. 13 S.L.R. 212=21 Cr.L.J. 449=56 Ind. Cas. 433.

——S. 36—Revision.

Proceedings under S. 36 are neither governed by the Civil or the Criminal Procedure Codes and cannot be revised under the Civil or Criminal jurisdiction. But the High Courts have held that they have jurisdiction to interfere under S. 15 of the High Courts Act. 18 P. R. (Cr.) 1914=51 P.W.R. (Cr.) 1914=266 P.L.R. 1914=15 Cr.L.J. 601=25 Ind. Cas. 513.

——S. 36 — Tout — Declaration — Revisional Jurisdiction—Evidence—Personal knowledge of Judge.

An order declaring a person to be a tout should be well scrutinized by the Chief Court in the exercise of its revisional jurisdiction. The Dt. Judge is bound to examine witnesses named by him and to summon them for the purpose, after the evidence against the person has been produced. Otherwise the Chief Court on revision would set aside the order. The Dt. Judge ought not to impart his own personal knowledge into a case, unless he informs the person of the nature and source of his information and allows himself to be cross-examined thereupon. If a number of respectable pleaders in a particular District are found to be of opinion that a person is a tout, the District Judge is justified in holding that the person charged, is a tout.

120 P.L.R. 1909=29 P.W.R. (Cr.) 1909=10 Cr.L.J. 447=3 Ind. Cas. 982.

——S. 36—Order under—Appeal—Revision.

The Legal Practitioners' Act confers no power on the High Court to interfere by way of appeal or revision with the order of a Dt. Judge under S. 36 of the Act nor is any right conferred by S. 439 of the Criminal Procedure Code or S. 622 of the C.P.C. But it can interfere under S. 15 of the High Courts' Act. (Per Karamat Hussain, J.)—Power is conferred by S. 15 only on the whole Court and not upon a bench and a single Judge cannot even admit a revision from an order under S. 36 of L. P. Act. (Per Aikman, J.)—R. 20 of the High Court rules not being applicable to touts it is not necessary for a bench of 3 judges to revise an order under S. 36 of L. P. Act. The Court has delegated its powers to a bench or even a single Judge as under R. 1 (XIII) and R. 4. 31 All. 59=6 A.L.J. 22=9 Cr.L.J. 59=1 Ind. Cas. 143.

——S. 36—Tout—Declaration of person as—Revisional powers of Chief Court—Evidence—Personal knowledge of Judge.

An order declaring a person to be a tout is one which very seriously affects the character and prospects of the person against whom it is passed. It is therefore competent to the Chief Court in the exercise of its revisional jurisdiction to scrutinize such orders with the object of satisfying itself that there has been a compliance with the provisions of the law and that the person affected has been given full opportunity of meeting the charge brought against him. The District Judge is bound to examine witnesses named by him and to summon them for the purpose after the evidence against the person has been produced. Where the District Judge declined to do so, the Chief Court on revision set aside the order and directed him to summon the witnesses named by the person declared as a tout and record the evidence and pass orders on the whole evidence on the record. The District Judge ought not to impart his own personal knowledge in a case unless he informs the person of the nature and source of his information and allows himself to be cross-examined thereupon—a process which is faught with grave inconvenience. Where statements by certain pleaders made on a previous occasion were read to them by the District Judge and the persons against whom proceedings where held were allowed opportunity to cross-examine them:

Held, that the irregularity in the procedure adopted by the District Judge was not a sufficient ground for interference by the Chief Court on revision. If a number of respectable pleaders in a particular district are found to be of opinion that a person is a tout, that fact is sufficient to justify the District Judge in holding that the person charged is by general repute a tout. The law was framed as it is with the distinct object of evading the difficulty of compelling to give the specific grounds upon which their opinions were based, and in cross-examination the witness cannot be compelled regarding specific instances, though no doubt it is open to the person charged to show that a particular witness has an animus against him or that for other reasons his testimony should not be accepted without demur. 120 P.L.R. 1909=3 Ind. Cas. 982.

——S. 36—Order declaring certain persons as touts—Revision—High Courts power of superintendence.

A District Judge called upon certain persons to show cause why they should not be declared as touts, and after hearing them declared them touts and ordered them to be excluded from the precincts of Civil, Criminal and Revenue Courts. They applied in revision to the High Courts. Held, Per Karamat Hussian, J.—Rule 4 of the High Court Rules does not empower a Bench of two Judges to dispose of cases under S. 36, Legal Practitioners' Act, in revision, in as much as that power, under S. 15 of the Charter Act, vests in the whole court. A single Judge of High Court has no power to admit a revision from an order passed by a District Judge under S. 36, Legal Practitioners Act. Per Aikman, J.—The Legal Practitioners' Act confers on the High Court no right of inference by way of appeal or revision against an order passed under S. 36, nor is any right of interference conferred by the Code of Civil or Criminal Procedure. The High Court can interfere with such an order under the general power of superintendence conferred on it by Ss. 14, 24 and 25, Vic. Chap. 104, although that power is very limited. It cannot interfere to correct an error of fact or error of law. I.A. 101; 9 A. 104 ref. to Rule 20 of the Rules of court did not apply to this case as it was not a charge against a Legal Practitioner, nor was it a disciplinary case within the meaning of the rule and, consequently, it was not necessary that it should be tried by three Judges. The court had an inherent power to delegate to one or more its members the power to deal with applications asking the court to exercise its power of superintendence and it was not necessary that such applications shauld be disposed of by the whole court. That the court had delegated the power to a Division Bench was clear from Rules 1, (xiii) and 4. (1908) 6 A.L.J. 22=9 Cr.L.J. 59=1 Ind. Cas. 143=1908 A.W.N. 279=31 A. 59.

——S. 36—Tout—Procedure—Misjoinder—Multifariousness—High Court, powers of—Revision, nature of jurisdiction in.

It cannot be affirmed as an inflexible rule of law that an enquiry under S. 36 of the Legal Practitioners' Act cannot comprehend within its scope the case of more than one person alleged to be a tout. An enquiry under S. 36 of the Legal Practitioners' Act is neither a suit under the Civil Procedure Code, nor a prosecution under the Criminal Procedure Code. The objection of misjoinder or multifariousness does not, therefore, apply, unless it is proved that the petitioner has been prejudiced by the procedure adopted at the enquiry. An objection on the ground of misjoinder may be waived, and if not taken in the original court, will not be entertained on appeal or revision, unless the merits of the case or the jurisdiction of the court have been affected. The revisional jurisdiction under which the High Court can interfere with an order under S. 36 of the Legal Practitioners' Act is of a very special nature, and cannot be invoked except in furtherence of justice. 11 C.L.J. 513=6 Ind. Cas. 327.

7. Miscellaneous.

——S. 36—Non-attendance of touts.

Section 36 does not authorize the District Magistrate to compel the attendance of an alleged

tout in the proceedings or to receive orders in the case and therefore he cannot be charged under S. 174, Penal Code, if he fails to attend the Court. 111 Ind. Cas. 672=6 Rang. 529=29 Cr.L.J. 912=A.I.R. 1928 Rang. 296.

——S. 36—Jurisdiction—Order declaring tout.

The list in which the petitioner's name as a tout had been published was applicable to Courts other than that in which the 4th Presidency Magistrate presided and those Courts were not subordinate to his Court.

Held, the order of the 4th Presidency Magistrate was bad as having been made without jurisdiction since the power is limited by S. 36 to his Court and the Courts subordinate thereto. 75 Ind. Cas. 722=25 Cr.L.J. 34=A.I.R. 1923 Cal. 484.

——S. 36—Tout, definition of.

Under the Legal Practitioners' Act, a tout is a person who procures the employment of legal practitioners in any legal business in consideration of any remuneration. A person who is merely seen in Court often times will not come within this definition. 15 C.W.N. 1000=11 Ind. Cas. 432.

——S. 36—Jurisdiction of District Judge to prohibit touts from entering Court—Affidavits, action on—Civil Procedure Code, Ss. 194, 125, 647.

The District or Sessions Judge has jurisdiction under S. 36 of the Legal Practitioners' Act, to prohibit persons declared as touts from appearing within the precincts of his own court and of the courts subordinate to him. It is competent to a District Judge to act upon affidavits in an application under the Legal Practitioners' Act, to declare certain persons as touts. Such a procedure is warranted by Ss. 194, 195 and 647, C.P.C. —(1882). (1903) 13 M.L.J. 272=26 M. 596.

——S 36—Tout—Declaration—And exclusion from Court.

A District Judge directed that a list of certain named persons be framed declaring them to be touts and thereby he excluded them from the precincts of the District and Subordinate Courts of the district except when they themselves are parties to the action being heard or are witnesses in suits. **Held**, that the order should be set aside, as it cannot be brought within the ambit of S. 36 (3), (4) of the Legal Practitioners' Act, 1879, until they are extended to the Bombay Presidency. (1903) 5 Bom. L.R. 728.

——Ss. 40 and 14 (5)—Interim suspension—Power of District Judge. **See**: Legal Practitioners' Act. Ss. 14 Para. (5) and 40. A.I.R. 1049 All. 642.

——S. 40—Section 14, Legal Practitioners' Act, is governed by S. 40 of the same Act. A.I.R. 1936 Rang. 249=14 R. 735=163 Ind. Cas. 586.

——S. 40—Notice to show cause.

The provisions of S. 40 apply to interim orders of suspension passed under S. 14, para. 5; before an interim order of suspension is passed the pleader must be asked to show cause under S. 40 and a report must be sent to the High Court under S. 14 (4). 15 C.W.N. 269=13 C.L.J. 457=12 Cr.L.J. 33=9 Ind. Cas. 225.

——S. 40—Suspension from practice without opportunity to defend.

A District Judge framed two charges against a pleader under S. 14 of the Legal Practitioners' Act. On the day they were framed, he suspended him. With regard to the first, no opportunity was given to the pleader to defend himself before making the order. As regards the second the Judge had before the date of the order remarked on a judgment on the pleader's conduct in consequence of which the pleader had written a letter and filed an affidavit by way of explanation. **Held**, that the order was bad, as the pleader had been given no opportunity to defend himself; that the observation in the judgment is not such an opportunity, and that S. 40 of the Legal Practitioners' Act governs all proceedings instituted under the Act. (1900) 24 M. 83.

——S. 41—Improper certificate by Advocate for petition for leave in forma pauperis—Disciplinary action—Proper orders.

Where, in a proceeding for disciplinary action against an Advocate for giving improper certificate in a petition for special leave in **forma pauperis** it was found that the Registrar's letter was not circulated by the Secretary of the Bar:

Held, that the Advocate should not be suspended, direction to pay costs of the Advocate General being sufficient. 47 Cr.L.J. 77=A.I.R. 1945 Pesh. 33=221 Ind. Cas. 98.

——S 41—Removal of name from roll—Power of Oudh Chief Court to rescind the order—Confirmation by Local Government, necessity of.

Where the name of an Advocate was removed from the list of Advocates of the Oudh Judicial commissioner's Court in 1910 and he prayed in 1933 that the order should be rescinded and his name be restored to the roll of Advocates of the Oudh Chief Court:

Held, that when the Judicial Commissioner's Court had, under S 41 of the Legal Practitioners' Act, the power to remove an Advocate from practice subject to confirmation by the Local Govt. it must be deemed to have possessed a like power to rescind such orders and that this power possessed by the late Court of the Judicial Commissioner of Oudh must be deemed to be vested in the Oudh Chief Court and the power of rescission could be exercised only with the sanction of the Local Govt. which had been obtained on the order passed by the Judicial Commissioner's Court.

Held, also that the Advocate's having indulged in foul abuse of several Govt. Officers was most unworthy of him, but in view of the fact that he tendered an apology and a period of nearly fifteen years since the order removing his name had passed, and he appeared to have been chastened by adversity and seemed to have regained his sanity, he must be deemed to have been sufficiently punished, and this was a fit case in which the order might be rescinded and the Advocate reinstated subject to confirmation by the Local Govt. 11 O.W.N. 368=35 Cr.L.J. 678=A.I.R. 1934 Oudh 140=148 Ind. Cas. 299 (S.B.)

——Sch. 2—Interpretation.

The expression 'High Court' in the entry in the Schedule referes to High Courts not established by Royal Charter and only to pleaders authorised to practise in Courts subordinate to the High Courts and therefore, Art. 30 of the Stamp Act clearly applies to the advocates of the late J. Cs'. Court, Upper Burma. 74 Ind. Cas. 913=1 Rang. 142=A.I.R. 1924 Rang. 1 (F.B.)

——(Madras Rules) R. 17—Purchase by legal practitioner at sale in execution of decree of client—If "misconduct"—C.P. Code, O. 21, R. 73—"Or other person"—Meaning of.

R. 17 of the Rules framed by the High Court under the Legal Practitioners' Act only prohibits a practitioner from purchasing from his client or from any other person any interest in a decree passed by the Court in which he practises, but there is no rule prohibiting a practitioner from bidding at an auction held in execution proceedings instituted by him on behalf of his client. The words "or other person" in R. 73 of O. 21, C.P. Code, does not include a legal practitioner who has no duty to perform in connection with the sale. [Desirability of a rule prohibiting a practitioner from bidding either in his own name or in the name of another at a Court sale held in execution of a decree obtained by his client pointed out.] I.L.R. (1947) Mad. 541=225 Ind. Cas. 295=47 Cr.L.J 708=1946 M.W.N 203=59 L.W. 161=A.I.R. 1946 Mad. 245=(1946) 1 M.L.J. 218 (F.B.)

Legal Practitioners' (Fees) Act (XXI of 1926).

See also: Legal Practitioner.

——Legal Practitioner—Certificate of fees.

While it is a salutary rule that only the fee actually received by a practitioner should be mentioned by him in his certificate for the purpose of the taxation of costs between party and party, vis-a-vis his own client, he has recently been placed in an advantageous position. The Legal Practitioners' (Fees) Act, XXI of 1926, not only allows a legal practitioner to settle, by a private agreement with his client, the terms of his engagement and the fee to be paid to him for his professional services, but also authorises him to enforce that agreement by legal proceedings taken for the recovery of the fee due to him. There can, therefore, be no doubt that the Indian Law does not now require a legal practitioner to receive the whole of his fee before the hearing of the case, but permits him to make an agreement for the payment in future of the whole or part of his fee. The statute while conferring upon a legal practitioner the right to recover the fee promised by his client, does not authorise the latter to realise it from his defeated adversary. The right of a successful party to recover the fee from the opposite party depends upon the rule framed by the High Court which contemplates that only the fee actually paid before the hearing can be allowed as costs on taxation. 1936 A.W.R. 558=2 B.R. 582=A.I.R. 1936 P.C. 176=40 C.W.N. 933=17 P.L.T. 429=38 P.L.R. 684=38 Bom. L.R 731=19 N.L.J. 163=(1936) M.W.N. 725=1936 O.W.N. 577=58 A. 307=63 C.L.J. 521=71 M.L.J. 631=162 Ind. Cas. 445 (P.C.).

——Applicability to criminal proceedings.

Per **King, J.**—The language of the Legal Practitioners' (Fees) Act, 1926, is wide enough to apply to criminal proceedings also. (1933) A.L.J. 451=A.I.R. 1933 All. 417=55 A. 570=143 Ind. Cas. 727 (F.B.)

——Barrister enrolled as Advocate—Right to sue client.

A Barrister, who has been enrolled as an Advocate of he High Court, is under no disability to sue his client for professional services done by acting and pleading for him. (1933) A.L.J. 451=A.I.R. 1933 All. 417=55 A. 570=143 Ind. Cas. 727 (F.B.).

——S. 2—'Legal practitioner', whether includes Advocate.

Under S. 2 (a), Legal Practitioners' (Fees) Act, 1926, a 'Legal Practitioner' means a legal practitioner as defined in S. 3, Legal Practitioners' Act, 1879, and the definition given by that S. 3 includes an Advocate of any High Court. A.I.R. 1931 Rang. 104=132 Ind. Cas. 719.

——Ss. 3, 4—Discharge of pleaders during pendency of case—Remuneration, calculation of—Discretion—Several pleaders—Each, whether entitled to full fee.

Under the Legal Practitioners' Act as amended in 1926, a legal practitioner is entitled to recover his fee settled between himself and his client. When he is not able to prove such a settlement, he is entitled to the fee which is payable to a successful party under the rules.

When there are several Vakils retained by a client in the same vakalatnama, each of the Vakils is entitled to claim from his client the full fee stipulated for by him and not merely a share in the single fee allowed as against the losing party.

Whether the vakalatnama has been signed or not, the Advocates concerned are entitled to their remuneration for the work done by them on the principle of **quantum meruit.**

Whether the Court is not assessing fees as in a terminated litigation but is assessing the remuneration for the work done and for the loss that the learned Advocates themselves would suffer on account of the cessation of their services by their client, the compensation is within the discretion of the Court to be assessed upon the circumstances of the case and need not necessarily be upon the scale of fees fixed by the rules to be charged against a losing party. A.I.R. 1931 Pat. 137=13 P.L.T 200=131 Ind. Cas. 542.

——Ss. 3 and 4—No settlement of fee—Fee payable.

Where it is found as a fact that no fee had been settled as the amount payable by a client to his counsel, the fee payable would be as on legal scale because there is no agreement having the force of a contract. A.I.R. 1950 All 443.

——S. 4—Fee not settled—Right to taxable fee.

The meaning of S. 4 of the Legal Practitioners' (Fees) Act, clearly is that every legal practitioner, in the absence of a definite contract, is entitled to the full legal taxable fee. If a litigant is not desirous of paying the full legal fee it is his duty to settle the fee with the legal practitioner before engaging him. It cannot be said that if more than one practitioner is engaged all must share the taxable fee. 1949 A.W.R. 385.

——S. 4.

Pleaders engaged—No specific agreements as to the amount of their fees—Each Pleader is entitled to the full fee assessed. 20 P.L.T. 352=(1939) 18 Pat 213=5 C.L.T. 34.

——S. 4—Client agreeing to munshiana and Pleader's fees—Suit by Pleader.

One of the terms of the engagement of a Pleader was that he would be paid Rs. 70 for himself and Rs. 7 as his munshi's remuneration;

Held, that the Pleader was entitled to sue for the munshiana. A.I.R. 1938 Lah. 306=40 P.L.R. 12(1) =176 Ind. Cas. 751.

——S. 4—Absence of agreement, remuneration.

In the absence of an agreement between a legal practitioner and his client, the former is entitled to fee computed in accordance with the law for the time being in force and not to a reasonable remuneration. A.I.R. 1937 Nag. 32=I.L.R. (1937) Nag. 412=167 Ind. Cas. 505 (1).

——S. 4—Private agreement as to fees—Enforceability.

Under the Legal Practitioners' (Fees) Act, 1926, a legal practitioner can not only by private agreement settle with a client the terms and fee but also sue for his fee due under that agreement. It is only where no such fee has been settled that his fee must be computed in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner. Such a private agreement can be impugned like any other contract and in case the agreement is avoided, the fee would have to be computed according to the rules for the time being in force. A.I.R. 1931 Rang. 104=132 Ind. Cas. 719.

——S. 4—Rangoon, taxation rules.

Rules 13, 31 (proviso), 54 are governed by R. 3. An Advocate is not precluded from suing for his fees. If it is alleged that the Advocate gave bad advice which constituted negligence in his duties and partial failure of consideration, as the part of the consideration which is said to have failed is not ascertainable in money without collateral enquiry, such defence cannot be put up in the suit and the defendant's remedy is by separate suit. A.I.R. 1930 Rang. 243.

Legal Practitioners Fees Rules.

——R. 33—Junior's fee—Conditions necessary for allowing—Junior counsel passing away after framing of issues—Fee whether allowable to another junior counsel coming in thereafter.

The fee payable to a junior counsel in a case under R. 33 of the Legal Practitioners Fees Rules must be to the junior who was on record at least on the date of settlement of the issues.

Where in a case two counsel appeared, a senior and a junior, but the junior died after the framing of the issues and another junior counsel was sub-stituted in his place, no fee would be allowable for the junior counsel under R. 33 of the Legal Practitioners Fees Rules. The Court cannot give effect to the spirit of the rule overlooking its clear language.

It is a matter for the Rule Committee to make suitable amendment to the rule to cover cases of this description 61 L.W. 389 (2)=A.I.R. 1948 Mad. 352=1948 M.W.N. 380=(1948) 1 M.L.J. 344.

——R. 33—Scope—Senior engaged for arguments along with junior in appeal—Fees allowable—Senior if should have been on record even from the filing of appeal to be entitled to his fees.

R. 33 of the Legal practitioners Fees Rules does not intend, and could not have intended that a senior would be entitled to his fee only if he was on record from the date of the settlement of issue in a suit or from the date fixed for the appearance of the respondent in the appeal. The rule is expressly made applicable only to the case of juniors and it would be against reason and common sense alike to apply it to seniors.

The phrasing of R. 33 does not show that the senior should be first in the field and that the junior must be engaged by him to assist him. The rule will equally apply to a case of a junior who is first in the field and engages a senior at a later stage.

Hence in an appeal admitting of the appearance of both a senior and a junior practitioner and the payment of fees to both, the senior practitioner need not have been on record in the appeal from the date fixed for the appearance of the respondent in the appeal to be entitled to claim his fees. Even if he is engaged at the time of the arguments, he would be entitled to his fees. 63 L.W. 783=1950 M.W.N. 621=(1950) 2 M.L.J. 284=A.I.R. 1951 Mad. 256.

Legal Representative.

See Civil P. C., Ss. 2 (11) and 50, O. 21, R. 22, O. 22, R. 3, and O. 30, R. 4.

——Nature and extent of liability—Death of defendant in a suit for accounts.

Where the defendant in a suit for accounts dies, his legal representative would be liable only to the extent of the assets in his hands. 1949 A.M.L.J. 63=A.I.R. 1949 Ajmer 63 (2).

——Suit in good faith against person appearing to be proper legal representative—Decree, if binding on deceased's estate.

If a plaintiff in good faith sues a person who appears to him to be the proper legal representative of the deceased, and there is no fraud or collusion in the proceeding, then a decree so obtained is binding on the deceased's estate whoever may be the actual legal representative; the essential question to be considered in such cases is, whether the estate of the deceased person was sufficiently represented by the legal representative who had been brought on the record. 54 C.M.N. 667=A.I.R. 1951 Cal. 228.

Legal Representatives' suits Act, (XII of 1855).

——Applicability.

The Act relates only to suits brought against the heirs of a deceased person for a wrong committed by the latter within the year preceding his death. (1908) 10 Bom. L.R. 297=32 Bom. 348.

——Suit for damages by manager of Hindu family - Effect of death.

The Act does not apply during the pendency of a suit for damages for malicious prosecution by the manager of a joint Hindu family where he dies, since the Act relates to the maintainability of the suit and not to the continuation of it and since the surviving members are not his representatives. 31 Ind. Cas. 4 (Mad.).

——S. 1—Damages for malicious Prosecution—Right to sue for damages for malicious prosecution does not survive to a legal representative of the person wronged.

Section 89 of the Probate and Administration Act and Act XII of 1855 are designed to protect suits

for wrongs done to the property of a deceased person but do not extend that protection to compensation for personal injury the right to which dies with the death of the person injured. The right to sue for legal expenses or other losses caused to a person due to a malicious prosecution instituted against him is a personal right and it does not survive to the legal representative of such person. 98 Ind. Cas. 590=48 All. 630=24 A.L. J. 796=A.I.R. 1926 All. 610.

——S. 1—'Representative' meaning of—Right of suit—Nature of right—Limitation Act, S. 8 and Art. 21.

The word 'representative' means and includes all or any of the persons for whose benefit a suit under the Act can be maintained. In the absence of an executor or administrator, or in case he is unwilling to sue, the suit may be instituted by, and in the name of, the representative of the deceased person. The right of the beneficiaries to compensation is a right distinct in each, i e., they are entitled to relief separately in respect of the same cause of action which is enforceable at the suit of all or any one of them suing for himself and the rest. Suits under the Act, are governed by Art. 21 of the Limitation Act, and where one of the persons entitled to sue is a major, time will run as against all. The beneficiaries of a deceased person entitled to sue under the Act, are neither joint creditors nor joint claimants within the meaning of S 8 of the Limitation Act, and, consequently, the benefit conferred by S. 8 of the Limitation Act cannot accrue to them. (1905) 15 M.L. J. 363=28 M. 479.

Legatee.

See: (1) **Succession Act**
(2) **Wills**

Legislative Council Rules Of Procedure.

See: **Constitutional Law—Legislature.**

——Subordinate legislature—If can legislate with extra-territorial effect.

Assuming that a subordinate Legislature cannot validly make laws imposing punishments on non-subjects for offences committed by them outside the territorial limits of its jurisdiction, there can be no doubt that Parliament can, if it so chooses, authorise even a subordinate Legislature to legislate with extra-territorial effect. A.I.R. 1946 F. C. 27=47 Cr.L. J. 800=1946 F L J. 64=225 Ind. Cas. 520=1946 F.C.R. 94=(1946) 2 M.L J. 23=1946 M W N. 541=48 Bom L.R. 740=1946 A.W.R. (F.C.) 7=81 C.L. J. 263 (F.C.).

——Method of making legislative amendments by correction slips intended to be stuck into unamended copies is deprecated. A.I.R. 1946 Bom. 117=47 Bom. L.R. 898.

The liberty of the subject is in existence in so far as it is sanctioned and controlled by law. The Legislature has full power to enact measures which would encroach upon the liberties of the subject. By proper enactments in that behalf. The Legislature can deprive a subject of his liberty of person or his rights of property and various other liberties which are his priceless treasures. The realm of law is supreme; **salus populi est suprema lex.** All individual liberty must give way to consideration of national safety. Even though the liberty of the subject has got to be jealously preserved, Legislature is supreme, and if Legislature enacts certain provisions which have the effect of curtailing the liberties of the subject, the subject has to submit to such encroachments. A.I.R. 1946 Bom. 65=47 Bom. L.R. 681=227 Ind. Cas. 303=47 Cr.L. J. 1048=1 L.R 1946 Bom. 309

Legislature.

See also: (1) **Constitutional Law**
(2) **Interpretation of Statutes**
(3) **Govt. of India Act.**

Legislature—Powers of.

See—**Interpretation of Statutes.**

Legitimacy.

See also—**Hindu Law.**
Mahomedan Law.
Evidence Act, Ss. 112, 114.

——Acknowledgment—Mahomedan Law.

See Mahomedan law. 9 Cal. W.N. 352.

——Hindu heir not bound to take.

See Hindu Law—Widow. 13 C.W.N. 1190=3 Ind. Cas. 859.

——Presumption of—Ceremony of marriage gone through—Treatment by relations, etc.

Where a man and a woman who were proved to have been recognised by all persons concerned as man and wife, were so described in important documents and their daughters were respectably married as would be natural in the case of legitimate children. **Held**, that on these facts, following upon a ceremony of marriage which undoubtedly took place, though its validity was attacked, afforded an extremely strong presumption in favour of the validity of the marriage and legitimacy of its offspring. The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied. 38 Cal. 700=15 C.W.N. 790=10 M.L.T. 53=(1911) 2 M W N. 91=13 Bom. L R. 534=14 C.L. J. 72=21 M.L. J. 933=11 Ind. Cas. 502. (P.C.).

——Presumption of—From long cohabitation.

Where the mother of a child was a prostitute before coming to live with the father, the presumption of legitimacy arising from long cohabitation is not of much weight. 22 All 345=27 I.A. 105=12 Bom. L.R. 447=8 M.L.T. 59=14 C.W N. 690=7 A.L. J. 579=11 C.L. J. 649=(1910) M.W.N. 312=20 M.L. J. 579=13 O. C. 170=6 Ind. Cas. 674 (P.C.).

——Proof of—Entry in legal proceedings.

A memorandum of appeal substituting a person as the son of the deceased party is no proof of the legitimacy of the person. 21 Ind. Cas. 274 (Oudh).

——Proof of cohabitation and acknowledgment—Presumption.

Where there is a **prima facie** evidence of cohabitation as man and wife and a course of treatment of the lady as wife and the children as legitimate, the presumption as to legitimacy is raised and can be repelled only by strong, distinct and satisfactory evidence to the contrary. 15 C.L. J. 621=13 Ind. Cas. 678.

[On Appeal See 45 Cal. 878=45 I.A. 73=47 Ind. Cas. 513 (P.C.)]

——**Proof of**—Jagir **Estate.**

In cases of succession to landed property of a large value or a **Jagir** more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible dispute. 42 P.W.R. 1918=44 Ind. Cas. 57.

——**Proof of—Presumption—Entry in** Khewat.

An entry in **a Khewat** founded on **a** mutation proceeding showing the plff. to be the reputed son of a certain person is relevant in proving their legitimacy though, the defts. were not parties to such proceeding. 1 O.L.J. 89=23 **Ind. Cas.** 972.

Leprosy.

See **Hindu Law—Succession.**

Lessor and Lessee.

See (1) **C. P. Tenancy Act, Ss. 106—117.**
(2) **Land-lord and Tenant.**
(3) **Lease.**

Letters of Administration.

See (1) **Prob. and Admn. Act, (5 of 1881)**
(2) **Succession Act, (39 of 1925)**

Letters Patent.

——**Letters Patent—(Allahabad), (1866)—Power to frame rules.**

The basis of the power of High Court to frame rules is the power of High Court to do all things that may be necessary to do in order to carry out the provisions of the Letters Patent and the C. P. Code. That being the case and it being only a subordinate body in the matter of framing of rules it has no power to so frame rules as to override either the provisions of the C. P. Code, or the Letters Patent. 1930 A.L.J. 1126 =A.I.R. 1930 All. 558.

——**Cl. 7.**

A Barrister of England as a Barrister has no right to practise in the High Court or in any Court subordinate to the High Court But a Barrister who has been enrolled as an Advocate of the High Court of Allahabad is under no disability to sue his client for professional services done by acting and pleading for him. (1933) A L.J. 451=A.I.R. 1933 All. 417=55 A. 570=143 Ind. Cas. 727 (F.B.).

——**Cls. 7 and 8—Jurisdiction of High Court to deal with Barrister—Advocates of Court—Rules 180, 181, 197.**

Barrister-Advocates of the Allahabad High Court, (i.e., those who are members of the English bar and are admitted as Advocates of the High Court) are subject to the disciplinary jurisdiction of the said High Court; and a Bench of three Judges can, according to Rule 2 of the Rules of Court, hear and decide a charge against an Advocate. Rule 197 of the Rules of Court which provides that the Chief Justice and the Judges present for the time being in Allahabad may suspend or remove any Advocate provides for cases in which the Chief Justice and Judges may, for good cause, and without charge or trial, suspend or remove from the Roll of the Court any Advocate of the Court, and does not apply to cases where there is a charge and trial. An Advocate convicted under a criminal offence might properly be suspended or removed from practice under R. 197, without further charge or trial. A contempt of court committed by an Advocate of the court in a matter concerning himself personally in his professional character, in the attempt to vindicate his professional conduct in a publication for which he was solely responsible, such that it may be dealt with by the High Court in a summary manner by fine or imprisonment or both, is a reasonable cause within the meaning of S 8 of the Letters Patent. 29 A. 95=4 A.L.J. 34= 5 C.L.J. 130=9 Bom. L R. 9=11 C.W.N. 273=17 M.L.J. 74=34 I.A. 41 (P.C.).

——**Cls. 8, 27—Jurisdiction to deal with Advocates.**

The jurisdiction to deal with Advocates still vests in the High Court under Cl. 8, Letters Patent, and the High Court, in exercising that jurisdiction, is performing a function directed by the Letters Patent, and its Benches are, therefore, governed by the rule as to the opinion of the majority mentioned in that clause. There is nothing in the Bar Councils Act, or in any rules made thereunder which is inconsistent with the provision that the opinion of the majority of the judges hearing the case should prevail. Indeed the fact that the Act is silent and so are the rules would suggest that the provisions of the Letters Patent have necessarily been retained. (Remedy of aggrieved Advocate pointed out). 1935 A.W R. 1245=A.I.R. 1935 All. 1037=37 Cr.L.J. 139 (2)=(1936) A.L.J. 383=58 A. 406=159 Ind. Cas. 653.

——**Cl. 8—Jurisdiction under.**

The mere fact that the words in Cl. 8 are "especially empowered to remove or suspend from practice on reasonable cause" would not necessarily show that the High Court is not exercising any jurisdiction when it exercises such power. (1934) A.L.J. 722=56 A. 702 =A.I.R. 1934 All. 898=4 A. W. R. 1129=150 Ind. Cas. 699.

——**Cl. 8—Enquiry into conduct of legal practitioner—Procedure.**

While it is not incompetent for the High Court to deal under Art. 8, with charges of a criminal nature against a practitioner unless and until these have been investigated by a Criminal Court, it is eminently fitting that in such cases, the criminal prosecution should precede any disciplinary decision.

Art. 8 prescribes no special procedure for dealing with complaints against the conduct of **Vakils** practising before the Court, and merely empowers the Court "to remove or suspend from practice on reasonable cause" Advocates, **Vakils** or Attorneys-at-law of the Court. The procedure to be followed in such cases is thus left to the discretion of the Court, but it is manifest that where grave charges are involved, care should be taken to see, not only that justice is done but also that justice should seem to be done. An appropriate guide in dealing with such cases is to be found in the disciplinary provisions of the Legal Practitioners' Act, 1879.

It is undesirable that an investigation under Art. 8, into the conduct of a legal practitioner should proceed before the same Judges as have heard the case out of which the charges arose. Such charges should be enquired into by a Tribunal which has had no previous association with the matters in issue. A.I.R. 1931 P.C. 112=(1931) A.L.J. 450=35 C. W. N. 640=53 C.L.J.

405=(1931) M.W N. 603=33 Bom.L.R. 945=53 A. 183 =34 L W. 59=61 M.L. J. 130=58 I.A. 152=132 Ind. Cas. 608 (P.C.).

——Cl. 8—Misconduct of pleader—Notice issued by High Court on 13th June, 1928—Bar Councils Act coming into force on 1st June—Notice is ultra vires.

A notice was issued on 13th June, 1928, by High Court against a pleader calling upon him to show cause why he should not be dealt with under the Legal Practitioners' Act for professional misconduct. Objection was taken by the pleader in view of the Bar Councils Act which had come into force on 1st June, 1928.

Held, that the provisions of the Letters Patent, in so far as they may conflict with the provisions of the Act, were abrogated by S. 19 (2) and therefore it was necessary for the case to be either referred to the Bar Council or at any rate for the Bar Council to be consulted. The Court was not properly seised of the case and that the notice issued to show cause was, as framed, **ultra vires** and a nullity. 112 Ind. Cas. 214 =51 All. 76=26 A.L.J. 1039=29 Cr.L.J. 998=A.I.R. 1928 All. 439 (F.B.).

——Cl. 8—Vakil—Professional misconduct.

A **Vakil**, engaged to defend in the Court of Sessions, certain persons accused of murder, prepared and put before the Sessions Judge a statement which purported to be a petition issuing from his clients and drafted on their instructions. In fact it was a petition which originated with him without instructions from his clients and which contained allegations which were made recklessly and without reasonable ground of belief. **Held**, that the **Vakil** was guilty of professional misconduct and under S 8, Letters Patent, the **Vakil** was suspended from practising his profession. 42 All. 450=18 All. L J. 419=2 U. P. L. R. (All.) 130=21 Cr.L.J. 469=56 Ind. Cas. 501.

——Cl. 8.

Acts which scandalize the Court as libels on its integrity or the integrity of its judges, officers and proceedings are all instances of such misconduct.

Hence when an Advocate published, in a paper published by him articles throwing discredit upon the Judges of the Court in various ways, and his defence **inter alia** was that he had done so in his capacity of Editor and not in his capacity of Advocate of the Court: **Held**, that he was guilty of professional misconduct and the High Court had power to deal with him under S. 8 of the Letters Patent and Rule 2 of the Rules of the Court. 1906 A. W. N. 226= 3 A.L.J. 592.

——Cl. 8—Scope.

See C. P. C, O. 44, r. 1 and O. 33, r. 3. (1901) A.W.N. 213=24 A. 172.

——Cl. 10—Appeal—Procedure.

Procedure in Letters Patent appeal like the procedure in any other civil appeal is governed by the Code. But a Bench hearing Letters Patent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code. A.I.R. 1931 All. 244=(1931) A.L.J. 187=53 A. 535=132 Ind. Cas. 24 (F.B.).

——Cl. 10—Appeal to single Judge against order passed on review by appellate Court—Dismissal —Appeal under Letters Patent filed though leave was refused—Maintainability.

Where an appeal against an order passed on review by the lower appellate Court is dismissed by a single Judge of the High Court and leave to appeal is refused, it is not open to the party to file an appeal under Cl. 10 of the Letters Patent. 1950 A.L.J. 348 =A.I.R. 1950 A. 534=1950 A.W.R. 551.

——Cl. 10—Appeal under—Competency—Dismissal by single Judge of appeal against judgment passed in appeal by the lower appellate Court.

An appeal under Cl. 10 of the Letters Patent (All.) will not lie against the dismissal by a single Judge of an appeal against a judgment passed in appeal by the lower appellate Court and when the single Judge had refused leave to appeal under the Letters Patent. 1950 A. W. R. 38 (1)=A. I. R. 1950 A. 226=1950 A.L. J. 74.

——Cl. 10—Appeal from order in execution—Dismissal—Appeal.

Under S. 10 of the Letters Patent (Allahabad), no appeal lies from the order of a single Judge of the High Court dismissing an appeal from an order of the executing Court on an application under O. 21. R. 90 to set aside an execution sale. 14 A. 226, F. 39 All. 191 =15 A.L. J. 46=39 Ind. Cas. 460.

——Cl. 10—Appeal under—Plea of jurisdiction not pressed before single judge—If open.

A plea of want of jurisdiction can be raised in a Letters Patent appeal even though it has not been pressed before the Single Judge. (1935) A L J 635= 1935 A.W.R. 585=A.I.R. 1935 All. 760=57 A. 916= 156 Ind. Cas. 281.

——Cl. 10—Appeal under—Plea of jurisdiction—If open for the first time.

A point involving a question of jurisdiction can be taken up in the Letters Patent appeal even for the first time. 54 A. 573=A.I.R. 1932 All 273=(1932) A.L.J. 365=16 R.D. 293=138 Ind. Cas. 583 (2) (F B.).

——Cl. 10—Appeal—Review of Judgment—If open.

No application lies for review of a judgment passed in a Letters Patent appeal. A.I.R. 1931 All. 244=(1931) A.L.J. 187=53 A. 535=132 Ind. Cas. 24 (F.B.).

——Cl. 10—Appeal—Review of judgment.

An application for a review of judgment is allowable where the decree was given in an appeal under Cl. 10 of the Letters Patent. 16 A.L.J. 964=48 Ind. Cas. 476.

——Cl. 10—Appeal—Revision.

No appeal under 10 of the Letters Patent of the court will lie from an order of a single judge of the court disposing of an application under S. 622 of the C.P. Code, 1882. 14 A 226, 15 A. 373, 22 B. 891 and 22 M. 100, foll. 1905 A.W.N. 218=28 A. 133.

——Cl. 10—Court-fee.

Under S. 10 of Letters Patent (Allahabad) no Court-fee can be levied on an appeal from the judgment of a single Judge of the High Court. 63 Ind. Cas. 318=44 All. 13=19 A.L.J. 677=A.I.R. 1922 All. 164.

——Cl. 10—Cross-objection.

The provision of the Code of Civil Procedure as to cross objections do not apply to appeals under the Letters Patent. 21 All. 207, **Foll.** 70 Ind. Cas. 488= A.I.R 1922 All. 55.

——Cl. 10 — Judgment — Interlocutory orders during pendency of suit—Appealability.

Under the Letters Patent (All.), Cl. 10, an appeal lies only against a judgment passed by a learned single Judge and a judgment within the meaning of this clause means an adjudication which conclusively determines the rights of the parties. Appeals are not allowed to be filed against mere interlocutory orders during the pendency of a case. 1950 A.L.J. 845=1950 Comp. C. 238=A.I.R. 1950 All. 309.

——Cl. 10—Judgment—Order dismissing application for impleading applicants as legal representatives of deceased party to an appeal—Appealability—Test.

An order dismissing an application for impleading certain applicants as legal representatives of a deceased party to an appeal is a "judgment" within the meaning of Cl. 10 of the Letters patent of the Allahabad High Court as it would determine the appeal itself and is therefore appealable. I.L.R. (1950) A. 120=1949 A.L.J. 191=A.I.R. 1949 A. 604=1949 A.W.R. 303.

——Cl. 10—Judgment — Single Judge refusing stay of execution pending appeal—If Judgment.

No appeal lies against the order of a Single Judge refusing an application for stay of execution of a decree pending the disposal of an appeal since such an order is not a "judgment" within the meaning of Cl. 10. (1940) A.L.J. 16=A.I.R. 1940 All. 242=I.L.R. (1940) All. 121=1940 A.W.R. 29=188 Ind. Cas. 797.

——Cl. 10—Judgment—Order passed by Single Judge in second appeal refusing to set aside abatement of appeal—Whether judgment.

The word "jurisdiction" in the Letters Patent covers the exercise of all the powers of the Court in a particular jurisdiction in which the case comes before it. The Letters Patent do not contemplate that a case which comes before the Court in one kind of jurisdiction can be supplimented by the exercise by the Court of any other kind of jurisdiction. When a second appeal comes before a Judge of the High Court, if it is within his jurisdiction, the jurisdiction which he exercises is jurisdiction of second appeal. That jurisdiction covers all the orders which he may make in the course of the second appeal from its commencement to its termination. Therefore an order passed by a Single Judge in second appeal refusing to set aside abatement of appeal is an order passed in the exercise of second appellate jurisdiction. Such an order does not amount to a "judgment" within the meaning of Cl. 10, and therefore no appeal lies. And further, if the order amounts to a "judgment" then the permission of the Single Judge would be necessary for an appeal to lie. A.I.R. 1939 All. 185=(1938) A.L.J. 1107=1938 A.W.R. 74=I.L.R. (1939) All. 19=180 Ind. Cas. 558.

——Cl. 10—Judgment, meaning of.

The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. A distinction exists between a decree and a judgment as contemplated in Civil P.C., in which the judgment contains the reasons and the decree embodies the final order which governs the rights of the parties.

In a first apppeal pending before the High Court, one of the parties died and two sets of claimants filed applications to be brought on the record as his legal representatives. The Court came to the conclusion that the contesting respondent should be considered as the legal representative of the deceased and accordingly dismissed the application of the present appellants. An appeal was preferred against this order:

Held, that the word 'judgment' in the Letters Patent could not be extended to such cases. So far as the two rival claimants were concerned, the question as to who was the legal representative of the deceased had not been finally adjudicated upon and could be re-agitated as between them. It was, therefore, not a final adjudication of the rights of the parties by the Court at all. All that was necessary was to bring on the record some person who was found to be the legal representative of the deceased so that the case may be proceeded with and the rights of the opposite party finally determined. Consequently, no Letter Patent appeal lay from the order. 1936 A.W.R. 1164=(1936) A.L.J. 1381= A.I.R. 1937 All. 192=I.L.R. (1937) All. 381=168 Ind. Cas. 178.

——Cl. 10—Judgment—Order transferring case was not judgment within Cl. 10.

An order transferring the case was an order passed in the exercise of the discretion vested in the Judge and cannot be regarded as a judgment within the meaning of Cl. 10 as it did not amount to any decision as to the rights of the parties at all.

The Judge had perfect jurisdiction even independently of S. 24, Civil P.C. to transfer a suit from one Court to another Court under S. 107 (b), Govt. of India Act and an order passed under that section is non-appealable. A.I.R. 1935 All. 750=(1935) A.L.J. 968=1935 A.W.R. 922=156 Ind. Cas. 43.

——Cl. 10—Judgment—Single Judge refusing to extend time under S. 5, Limitation Act.

The order of the Single Judge dismissing an application under S. 5 Lim. Act, and refusing to extend time is not a judgment within the meaning of Cl. 10, and accordingly, no appeal lies from that order. A.I.R. 1935 All. 620=1935 A.W.R. 743=(1935) A.L.J. 681= 57 A. 983=157 Ind. Cas. 347 (F.B.)

——Cl. 10.

"Judgment" should not be read as meaning only "decree" and not as a final "order." (1933) A.L.J. 127=A.I.R. 1933 All. 262=55 All. 326=142 Ind. Cas. 331 (F.B.)

——Cl. 10—'Judgment'—Adjudication must be final.

The test is not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not a judgment within the meaning of the Letters Patent. 35 Mad. 1; 17 All. 442, **Foll.** 70 Ind. Cas. 805=20 A.L.J. 801=45 All. 66= A.I.R. 1923 All. 44.

——Cl. 10—Judgment — Meaning—Cr. P. Code, S. 195—High Court—Meaning.

Order of sanction for prosecution under S. 195, Cr P.C. is not a judgment within Cl. 10, Letters Patent; it is not appealable, when passed by a Judge of High Court, who when siting alone to do his part of his work, is the High Court itself and not subordinate to any Bench of the High Court. 39 All. 147=14 A.L.J. 1230 =17 Cr.L. J. 537=36 Ind. Cas. 585.

——Cl. 10—Leave to appeal.

Leave to appeal is necessary if the judgment appealed against is delivered after the amendment to the section which makes such leave necessary. 110 Ind. Cas. 719= 50 All. 865=26 A.L.J. 1317=A.I.R. 1928 All. 708.

——Cl. 10—Leave under.

Principles governing grant of leave to appeal under Letters Patent stated. A.I.R. 1941 All. 9=(1940) A.L.J. 762=1940 A.W.R. 539=193 Ind. Cas. 498.

——Cl. 10—Malicious prosecution.

In a suit for damages for malicious prosecution the question whether the defendant had reasonable and probable cause for instituting criminal proceedings against the plaintiff is a pure question of fact. And where the lower Courts, after judicially considering the evidence, find that the absence of such cause was not proved by the plaintiff the High Court cannot disturb the finding nor is it a fit case to be certified for an appeal under the Letters Patent. 117 Ind. Cas. 619= A. I. R. 1929 All. 429.

——Cl. 10—Order of Single Judge passed in appeal.

Unless there is any specific provision to the contrary in the Civil P C., it cannot affect any special law or special jurisdiction or power which is conferred on the High Court. The Letters Patent undoubtedly confers such special jurisdiction and power. The provisions of the Letters Patent are saved by virtue of S. 4, Civil P.C., unless there is specific provision to the contrary. S. 104 (2), Civil P.C., does not contain any express provision which would suggest that the provisions of the Letters Patent have been abrogated. Consequently, under Cl. 10, Letters Patent an appeal lies from the order of a Single Judge passed in appeal. A.I.R. 1937 All. 165=(1936) A.L.J. 1326=1936 A.W.R. 1155= I.L.R. (1937) All. 386=167 Ind. Cas. 653.

——Cl. 10—Order returning memorandum of appeal for presentation in proper Court—C P.C. (1882), S. 588—Appeal—If lies.

No appeal lies under S. 10 of the Letters Patent from an order of a Judge of the High Court directing a memorandam of appeal for presentation to the proper Court under S. 588 of the C.P.C, 1882. 1 Ind. Cas. 137 (All.)

——Cl. 10—Order on review application.

An appeal does not lie against an order rejecting an application for review of judgement even under S. 10 of the Letters Patent. 84 Ind. Cas. 585=21 A.L.J. 341= 45 All. 535=4 L.R.A. Civ. 218=A.I.R. 1923 All. 356.

——Cl. 10—Remand—Order of remand by appellate Court—High Court upholding the order—No appeal lies.

An auction-purchaser brought an objection under O. 21, R. 90, on the ground that no mention was made in sale proclamation of an existing encumbrance. His application was dismissed and he brougt a suit and the Trial Court dismissed it but the appellate Court held that the plaintiff had a right to sue on the ground of fraud, misrepresentation or material irregularity in the sale, and remanded the case. On appeal High Court upheld the order of remand.

Held, no Letters Patent Appeal was competent. 39 All. 191, **Foll.** 4 L.R.A. Civ. 227=A.I.R. 1923 All. 396.

——Cl. 10—Remand by Single Judge.

An appeal lies under Cl. 10 against an order o remand passed by a Single Judge of the High Court under O. 41, R. 23, Civil P.C.

The word "judgment" in Cl. 10 or Cl. 15, Letters Patent of the Bombay, Madras and Calcutta High Courts, should not be read as meaning only a "decree" and not also a final "order." (1933) A.L.J. 127=55 A. 326=A.I.R. 1933 All. 262=142 Ind. Cas. 331 (F.B.)

——Cl. 10—Remand by single Judge.

Appeal lies from an order made by a single Judge of High Court remanding an appeal to the lower Appellate Court for re-hearing. A.I.R. 1925 P.C. 155, **Dist.** 96 Ind. Cas. 666=48 All. 684=24 A.L.J. 892=A.I.R. 1926 All. 669.

——Cl. 10—Scope.

No Letters Patent appeal lies from an order passed in the exercise of criminal jurisdiction of a Single Judge of the High Court. (1934) A.L.J. 946=A.I.R. 1935 All. 55=36 Cr.L.J. 554=4 A.W.R. 1406=154 Ind. Cas. 638.

——Cl. 10—Scope—Application under S. 491 Criminal P.C. to High Court, dismissed—Appeal, if maintainable.

A minor was the child of A and B. A dispute arose between the father A and mother B as to the custody of the minor. An application was made before the High Court under S. 491, Criminal P.C. by B against A praying that the minor should be brought before the Court and delivered to B. This application was dismissed by a Single Judge of the High Court. B preferred an appeal under Cl. 10.

Held, that the appeal was not maintainable, inasmuch as the the power exercised under S. 491, Criminal P. C., is to be exercised on the criminal side of the jurisdiction of the Court and Cl. 10 expressly debars an appeal from an order passed "in the exercise of criminal jurisdiction."

Held, also, that the proceedings being in the nature of an appeal purporting to have been filed under Cl. 10 costs might be awarded. A.I.R. 1934 All. 606=(1934) A.L.J. 684=3 A.W.R. 297=56 A. 899=150 Ind. Cas. 740.

——Cl. 10—U. P. Tenancy Act, Ss. 180, 175—Appeal—Jurisdiction:—See U. P. Tenancy Act, S. 180. (1904) A.W.N. 48=1 A.L.J. 105=26 A. 375.

——Cl. 11—'Civil Courts.'

The term "Civil Courts" used in the Letters Patent, Cl. 11, does not cover a tribunal created under a particular statute for a particular purpose, e. g., a Court created under the U.P. Municipalities Act. 87 Ind. Cas. 51=47 All. 513=23 A.L.J. 385= 6 L.R.A. Civ. 191=A.I.R. 1925 All. 380 (F.B.).

——Cl. 11—Right of appeal—No appeal lies unless right to appeal is expressly conferred by statute.

The constitution of the High Court as a Court of appeal is quite a different thing from saying that it has jurisdiction to hear appeals from every decree or order passed by a Subordinate Court. If there is no law or regulation which allows an appeal to it, the High Court cannot assume an appellate jurisdiction. The power of revision and superintendence, however, is much wider. 92 Ind. Cas. 282=48 All. 104=23 A.L.J. 965=A.I.R. 1926 All. 113.

——Cl. 12—Application for appointment of mother as guardian and to order father to produce child in Court.

It cannot be laid down as a general rule that the High Court should, in all cases, take action under Cl. 12, although the applicant has an alternative remedy under the Guardians and Wards Act, by an application to the District Judge. There may be cases in which complicated questions of fact have to be ascertained and such cases might be more suitably dealt with in the Court of the District Judge where witnesses could be examined and corss-examined. But where no important matters of fact have to be ascertained, the High Court can entertain an application under Cl. 12. (1934) A.L.J. 399=A.I.R. 1934 A.722=3 A.W.R. 787 =150 Ind. Cas. 149.

——Cl. 12—Joint Hindu family—Jurisdiction under the Act is not generally exercised in the case of a Hindu joint family.

The jurisdiction of the Court of Chancery with regard to the persons and estates of infants, which descended to the Supreme Court of Calcutta and so to the High Court at Calcutta and so to the Allahabad High Court by virtue of Cl. (12), Letters Patent exists. But the High Court is reluctant to exercise the same in the case of a joint Hindu family as it is sanctioning a wholly new practice. 112 Ind. Cas. 873=50 All. 709=26 A.L.J. 595=A.I.R. 1928 All. 709.

——Cl. 16—Constitution of High Court—Appointment of sixth Judge—Legality.

The appointment of a sixth Judge to a High Court created by Letters Patent is legal. 36 All. 168=12 A.L.J. 231=15 Cr.L.J. 200=22 Ind. Cas. 984.

——Cl. 22—"Court"—Village panchayat—High Court cannot transfer criminal proceedings pending before village panchayat.

A village panchayat constituted under the Local Act VI of 1920 is not a "Criminal" Court within the meaning of Chapter II of the amended Cr. P. Code; therefore, S. 526 would have no application. So also S. 22 of the Letters Patent (Allahabad)does not apply and the High Court has no jurisdiction to direct the transfer of a case from a panchayat constituted under the Local Act.

Per Kanhaiya Lal, J.—A village panchayat is a Court for the purpose of S. 22 of the Letters Patent, and in the absence of any limitation imposed by any Act, the High Court has power under that section to transfer any criminal proceeding pending before a village panchayat to another village panchayat empowered to take cognizance thereof. 83 Ind. Cas. 350=46 All. 167=21 A.L.J. 925=25 Cr.L.J. 1390=A.I.R. 1924 All. 265.

——Cl. 26—Jurisdiction to declare marriage null and void.

The jurisdiction in matrimonial matters conferred on Allahabad High Court by Art. 26 is to be exercised in accordance with the provisions of the Divorce Act 1869 and in accordance with that Act alone. So far as the suit for declaring a marriage null and void is based on the grounds that the petitioner was an idiot at the time of his marriage and that the consent of the petitioner was obtained by force or fraud, the jurisdiction of the High Court exists, because of the provisions of S. 19, Divorce Act, 1869. This Act does not empower the High Court to declare a marrigage null and void on the ground that the ceremonies necessary for a marriage enjoined by the Church have not been performed. The reason is that S. 4, Divorce Act does not allow the High Court to exercise its matrimonial jurisdiction otherwise than under the rules laid down in the Act and the Act nowhere confers on the High Court a jurisdiction to hear a case for a declaration that a certain marriage is void because of non-observance of the essentials of the Church. A suit based on the ground of non-observance of essential ceremonies must, therefore, be instituted in an ordinary Court of original civil jurisdiction namely, in the Court of a Munsif or a Subordinate Judge, according to the pecuniary and territorial jurisdiction of such Court. It is no doubt open to the High Court when such a suit is instituted in the Court of a Munsif or a Subordiate Judge, to transfer it to itself and to try it under its extraordinary original civil jurisdiction. But no such suit is permitted by the law to be instituted directly in the High Court. A.I.R. 1934 All. 273 =3 A.W.R. 70=(1934) A.L.J. 1129=56 A. 428=153 Ind. Cas. 733.

——Cl. 27—Applicability.

Appeal to High Court under Civil P. C.—Cl. 27, Letters Patent (All.) will not be applicable but S. 98, Civil P.C. applies. A.I.R. 1932 All. 195= (1931) A.L.J. 1157=137 Ind. Cas. 58.

——Cl. 27—Custom—If point of law.

A custom is a law and the existence of a law binding the parties is a point of law and not a point of fact. Hence upon a difference between the two Judges on a point of custom the case can be referred to the third Judge under Cl.27. A.I.R. 1938 All. 321 =(1938) A.L.J. 400=1938 R.D. 505=1938 A.W.R. 251=I.L.R. (1938) All. 396=175 Ind. Cas. 665.

——Cl. 27.

Opinion of majority of Bench dealing with any particular case should prevail. A.I.R. 1935 All. 1037=1935 A.W.R. 1215=37 Cr.L.J=139 (2)= (1936) A.L.J. 383=58 A. 406=159 Ind. Cas. 653.

——Cl. 27—Judges of Divsion Bench disagreeing—Procedure to be followed.

Where two Judges comprising a Division Bench hearing a first appeal have disagreed either in law or in fact, the procedure to be followed is that laid down in Cl. 27 and not that laid down in S. 98, Civil P. C.

Cl. 27 governs the procedure in case of disagreement in first appeals as well as Letters Patent appeals. A.I.R. 1938 All. 641=(1938) A.L.J. 1027=1938 A.W.R. 712=I.L.R. (1938) All. 972=178 Ind. Cas. 683 (F.B.)

——Cl. 27—Effect of two Judges hearing an appeal from single Judge, being divided in opinion.

S. 575, C. P. C., (1882) does not in respect of appeals under S. 10 of the Letters Patent override S. 27 of the Letters Patent, and consequently, when two judges of the bench hearing a Letters Patent appeal differ, the opinion of the senior Judge prevails. 1903 A.W.N. 162=26 A.10.

——Cl. 27.

Under Cl. 27, when all the Judges have expressed their opinions, the point has to be decided according to the opinion of the majority of the Judges who have heard the case, including those who first heard it. (1933) A.L.J. 1127=A.I.R. 1933 All. 861=56 A. 39=146 Ind. Cas. 84 (S.B.)

——Cl. 27—Scope.

The mere fact that the matter involved is one of some difficulty for decision is no ground for referring a second appeal to a Bench of two Judges. A.I.R. 1931 All. 207=(1931) A.L.J. 267=129 Ind. Cas. 717.

——Cl. 30 — Order under O. 39, Civil P. C., if final.

The test to decide whether an order is final within the meaning of Cl.30 is to see whether the rights of the parties have been finally and once for all decided by it. If the effect of the order is not to adjudicate finally the rights of the parties, the order cannot be characterized as final. In one sense every order passed by a Court is final so far as that Court is concerned, but the finality of the order contemplated by Cl. 30 is in relation to the rights of the parties and not with reference to the Court passing the same. In other words, if the effect of the order is to bar a party from seeking redress with respect to the alleged infringement of his right by a proceeding according to law, the order is final, otherwise it is not.

An order under O. 39, Civil P. C., granting or refusing a temporary injunction which does not bar a party from having resort to procedure prescribed by law is not a final order within the meaning of Cl. 30. (1941) A.L.J. 508=A.I.R. 1941 All. 367=1941 A.W.R. (H. C.) 258=1941 R. D. 769=I.L.R. (1941) All. 666=197 Ind. Cas. 289.

——Cls. 30, 8—Granting leave to appeal to Privy Council.

When special power has been conferred upon the High Court under S. 10, Bar Councils Act to get an enquiry made into the alleged misconduct of an Advocate and on receipt of the finding, to fix a date for the hearing of the case and to hear the parties concerned and then pass such final orders in the case as it thinks fit and make an order as to the payment of the cost of the enquiry and of the hearing in the High Court, and if necessary, later on to review its order, the High Court in such a proceeding is acting judicially and not merely in an administrative capacity. In such a judicial proceeding, the High Court is exercising "jurisdiction" within the meaning of Cl. 30. Such a jurisdiction is not an appellate jurisdiction, nor it is a criminal jurisdiction. As it is the High Court only which passes final orders in the case on the receipt of the finding, it must be held to be exercising original jurisdiction and not any appellate jurisdiction. The order passed in such a proceeding is an order passed in the exercise of original jurisdiction of the High Court conferred upon it by the Bar Councils Act, modifying to some extent the power conferred upon it by the Letters Patent.

The High Court has, therefore, jurisdiction to grant leave to appeal to the Privy Council if the High Court is satisfied that the case is a fit and proper one.

In the case of an Advocate, the High Court found that not only was the filing of fee certificate contrary to the rule framed by the High Court but that he acted in bad faith in filing it. The point raised in appeal was that there was some contradiction in the two sub-sections of the Rule at the time when the Advocate had got his form of certificate printed, which contradictions had been lately removed by amendment, that there was latitude allowed to him inasmuch as it was provided that the certificate shall be "so far as is possible" in the form prescribed and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee:

Held, that this was a case which should be certified as a fit one for appeal to the Privy Council under S. 109 (c), Civil P.C. or at any rate, under Cl. 30, Letters Patent. A.I.R. 1934 All. 898=(1934) A.L.J. 722=4 A.W.R. 1129=56 A. 702=150 Ind. Cas. 699.

——Cl. 30.

A legal practitioner punished by Bench of High Court for contempt of Court for certain remarks made by him as party to suit and later on suspended from practising for six months under Legal Practitioners' Act—Application by him for leave to appeal to Privy Council:

Held, that leave might be granted under Cl. 30, Letters Patent (Allahabad): that he should furnish security as in appeals in ordinary cases. (1933) A.L.J. 273=A.I.R. 1933 All. 225=55 A. 246=145 Ind. Cas. 853.

——(Bhopal).

——Cl. 7—Cls. 7, 8/1—Interpretation.

In spite of the fact that S. 3, Bhopal Civil P.C. has excluded from its purview all special enactments providing otherwise: Cl. 7 of the Letters Patent (Bhopal) is governed by the provisions of the Code owing to the fact that a saving clause has been added to it for this very purpose. Clause 8/1 of the Letters Patent is general and without any saving clause. Therefore, its provisions would prevail even in the case of their being directly opposed to the orders of the Bhopal Civil P.C., in virtue of S. 3 of the said Code. 188 Ind. Cas. 33 (F.B.).

——Cls. 7, 8/1—Order of Single Judge passed on Original Side on objection under O. 21, R. 58 Letters Patent Bhopal Civil P. C. is governed by Cl. 7 and not by Cl. 8/1 of and is not appealable under Letters Patent. 188 Ind. Cas. 33 (F.B.).

——Cl. 7, 8/1—A decision under O. 21, R. 58 is a 'judgment' within meaning of Cl. 7, Letters Patent (Bhopal). 188 Ind. Cas. 33 (F.B.).

——Cl. 7, 8/1—Order of Single Judge passed on Original Side on objection under O. 21, R. 58, Civil P.C. (Bhopal) is governed by Cl. 7 and not by Cl. 8/1 and is not appealable under Letters Patent. 188 Ind. Cas. 33 (F.B.)

——Cl. 8/1.

What is actually meant by Cl. 8/1 is that in all cases not falling within the purview of Cl. 7, an appeal from the judgment of a Single Judge would lie to the High Court. 188 Ind. Cas. 33 (F.B.).

——(Bombay) (1865).

——Amendment of.

The Letters Patent may be varied by legislation or by further Letters Patent issued by His Majesty but in general it is not open for the Letters Patent to be varied by mere resolutions, either of the Local Government or of the Government of India. 104 Ind. Cas. 685=51 Bom. 749=29 Bom.L.R. 1071=A.I.R. 1927 Bom. 521.

——Cl. 8—Power of Court to appoint special commissioner—Vesting of property in the special commissioner—Procedure.

The Court has no power or jurisdiction whatever—inherent or conferred—first to appoint a Special Commissioner for sale of immovable property; secondly, to vest immovable property in a special commissioner, to execute a conveyance of such property. 10 Bom. L.R. 1176.

——Cl. 10—Advocates and Pleaders—Passive resistance—Signing of pledge to civilly disobey laws—Unprofessional conduct.

As a protest against the passing of the Rowlatt Act, certain barristers and pleaders practising joined a movement called the Satyagraha Sabha and signed a pledge whereby they undertook "to refuse civilly to obey such laws as a committee to be hereafter appointed may think fit. Held, that the barristers and pleaders had, by signing the pledge, rendered themselves amenable to the diciplinary jurisdiction of the High Court, but that under the circumstances a warning was enough. Per Macleod, C. J.—Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. It is not necessary in order for the High Court to exercise its jurisdiction that any offence should have been committed, nor is it necessary that what the pleaders have done should have subjected them to any thing like general infamy or imputation of bad character. 22 Bom. L. R. 13=54 Ind. Cas. 679.

——Cl. 10—Criticism on pending trial.

While certain persons where, on their trial a resolution moved by the second and supported by the third opponent was passed under the presidentship of first opponent, a District Pleader congratulating them upon their sacrifice,

Held, the opponents acted improperly in being parties to a resolution of this character. Anything done or said which may amount to criticism of proceedings pending in a Court of Justice is calculated to hinder the even and impartial administration of justice. Pleaders have privileges, but they have responsibilities also, and a pleader who acts so as to hinder and embarrass the administration of justice is guilty of "improper conduct" within the meaning of those words as used in S. 26, Bombay Pleaders' Act and such conduct furnishes "reasonable cause" for the exercise of disciplinary jurisdiction under S. 25. 76 Ind. Cas. 78=24 Bom.L.R. 1049=47 Bom. 117=A.I.R. 1922 Bom. 361.

——Cl. 10—Misbehaviour — Disciplinary jurisdiction of High Court:—See Bombay Regulations II of 1827, S. 56.

10 Bom. L. R. 1169=33 Bom. 252.

——Cls. 10, 39—Order suspending a pleader from practice—Leave to appeal—Privy Council—No power to High Court for grantin leave.

No appeal lies by right of grant against an order of the High Court under Cl. 10 of the Letters Patent as it is not in the nature of a final judgment, decree or order under Cl. 39; and, therefore, the High Court has no power to grant leave to appeal. The aggrieved party must proceed by way of petition to His Majesty the King for leave to appeal. 10 Bom.L.R. 21=32 B. 106.

——Cl. 10—"Reasonable cause," meaning of

"Reasonable cause" within the meaning of Cl. 10, means the same as professional or other misconduct under S. 10, Bar Councils Act. There must be something which can fairly be described as misconduct; otherwise there can be no reasonable cause for taking disciplinary action. But "misconduct" itself is a sufficiently wide expression; it is not necessary, for instance, that it should involve moral turpitude. Any conduct which in any way renders a man unfit for the exercise of his profession or is "likely to hamper or embarrass the administration of justice by the High Court or any of the Courts subordinate thereto" may be considered to be misconduct calling for disciplinary action. 43 Bom. L. R. 250=A.I.R. 1941 Bom. 228=42 Cr. L. J. 723=I.L.R. (1941) Bom. 548=195 Ind. Cas. 359.

——Cl. 10—Suspension of sanad—Insolvency.

High Court in its disciplinary jurisdiction has full power to suspend the sanad of a pleader, if he has been adjudicated an insolvent, until he obtains a discharge, if in the circumstances of the case, it considers that the insolvency coupled with the surrounding circumstances supplies a reasonable cause for such a suspension. It is largely a matter of discretion. The Chief Justice receiving an application of this kind can well be satisfied from the circumstances that are put forward that there is no objection to grant an insolvent pleader permission to continue to practise, and in doing so he would be acting on behalf of the Court, but if he considers that the case is one where there is reason

to doubt the advisability of granting such permission, he can ask the Government Pleader to bring it before the Court in its disciplinary jurisdiction. 114 Ind. Cas. 259=52 Bom. 559=30 Bom. L.R. 1011 =A.I.R. 1928 Bom. 385.

——Cls. 11 and 36—Power of judge on Original side of High Court to stay—Proceedings in mofussil.

The jurisdiction of the High Court and of the Judges composing the Court is determined by the Charter Act, by the Letters Patent and by the rules framed by the Court under S. 13 of the Act. Under Cls. 11 and 36 of the Letters Patent (Bombay) and R. 62 of the Original Side Rules, the local jurisdiction of a Judge of the High Court on the Original Side is limited to the Town and Island of Bombay. S. 15 of the Charter Act gives to the High Court powers of superintendence over all Courts subject to its appellate jurisdiction. R. 1 of the Appellate Side Rules (Bombay) provides that with certain exceptions, the civil jurisdiction on the Appellate Side shall be exercised by a Division Court of two Judges. It is not competent to a single Judge of the High Court, exercising the ordinary civil jurisdiction of the Court, to stay the hearing of the suit pending for a trial in a Subordinate Judge's Court, in the mofussil unless authorised to do so, by the rule. (Per Macleod, J.)—A single Judge sitting on the Original Side of the High Court, is competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the mofussil, and so in effect stay the proceedings. 39 Bom. 604=17 Bom. L.R. 655=30 Ind. Cas. 560.

——Cl. 12.

Alternative in last portion of—If applies to suits for land or other cases. See Letters Patent (Bombay), Cl. 12.—Suit for Land. A.I.R. 1950 F.C. 83=1950 S.C.J. 51 (F.C.).

——Cl. 12—Carrying on business—Suit against partners.

Partners who are liable to plaintiff as co-partners would be none the less liable even though the the estate of their deceased co-partners may be liable together with them. The defendants will be carrying on business within the jurisdiction within the meaning of the section, even though there may be associated with them in the array of parties a partner who was not a member of the firm at the time of the agreement which was the basis of the suit. Held, also, that leave given by the Prothonotary adding the executor of the deceased partner was wrong. 8 Bom.L.R. 56=30 B. 364.

——Cl. 12—Cause of action—Contract by correspondence by post—Place of posting of offer—If part of cause of action—Parties residing within different jurisdiction—Rule.

Where a contract is made by offer and acceptance sent through the post between parties residing in different places, the posting of the offer is no part of the cause of action for a suit on the contract. The true principle is that even though an offer may have emanated from a place within jurisdiction, it cannot be said to have been made until that offer has been received by the party to whom it has been made. If the party to whom the offer is thus communicated resides or carries on business outside jurisdiction, the offer cannot be said to have been made within jurisdiction, and it cannot be said in such a case that any part of the cause of action arises within jurisdiction. I.L.R. (1947) All. 44=I.L.R. (1940) Mad. 195; A.I.R. 1945 Lah. 270, foll. 52 Bom.L.R. 643=A.I.R. 1951 Bom. 249.

——Cl. 12—"Cause of action"—Meaning—Suit to recover debt by assignee—Assignment—If part of cause of action.

"Cause of action" means every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. In an action by an assignee of a debt the assignment itself is a part of the cause of action for a suit by him; a part of the cause of action therefore arises at the place of assignment. 48 Bom. L.R. 636=229 Ind. Cas. 391=A.I.R. 1947 Bom. 72.

——Cl. 12—Cause of action—Place of payment of debt—Objection for leave given.

The expression 'cause of action' means the bundle of facts which it is necessary for the plaintiff to prove before he can succeed in his suit. It does not include irrelevant or immaterial facts, but embraces material facts, without which the plaintiff must fail. If any of these material facts have taken place within the jurisdiction of the court, then leave can be given under Cl. 12 of the Letters Patent. But if no such material facts have taken place within the jurisdiction of the court and leave is given, then it is open to the defendant to contend at the hearing that the court has no jurisdiction. When no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payments where the creditor is. Where the plaintiff and defendant carried on business of commission agent, the former at Bombay, and the latter at Phulgon, and the former gave instructions to the latter to enter into certain transactions on his behalf on the strength of which the latter did so, the facts that the defendant rendered accounts to plaintiff at Bombay and sent money to plaintiff were material parts of a cause of action which arose in Bombay. 6 Bom. L.R. 1038=30 B. 167.

——Cl. 12—Construction—Despatch of Secretary of State and Report of Commissioners for amalgamation of Supreme Court accompanying Letters Patent 1862 and 1865 are inadmissible for construing Cl. 12 (Per Full Bench, Fawcett and Mirza, JJ., contra).

104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.).

——Cl. 12—Equity jurisdiction.

Per Fawcett, J.—The equity jurisdiction of the High Court must be confined within the four corners of Cl. 12 as it at present stands. 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.).

——Cl. 12—Foreign trust—Defalcations by trustee—Suit for accounts and recovery of moneys against trustee—Jurisdiction of High Court. See C. P. Code, S. 92. 51 Bom. L.R. 471=A.I.R. 1949 Bom. 351.

——Cl. 12—Jurisdiction—Administration suit.

An administration suit is not a suit for land within the meaning of Cl. 12. The High Court, therefore, has jurisdiction to try an administration suit though part of the estate of the deceased consisting of land is outside its Ordinary Original Civil Jurisdiction. But the Court cannot decide as to who is entitled to property outside its Ordinary Original Civil Jurisdiction. 65 Ind. Cas. 160=46 Bom. 772=23 Bom. L. R. 1326=A.I.R. 1922 Bom. 443.

——Cl. 12—Jurisdiction—Administration suit.

In an administration suit the High Court can determine the question whether certain immovable property situated outside the territorial limits of its jurisdiction belonged to the deceased at the time of his death in absence of leave under Cl. 12. 79 Ind. Cas. 780=48 Bom. 331=26 Bom. L.R. 163=A.I.R. 1924 Bom. 313.

——Cl. 12—Jurisdiction of High Court to hear suit cognizable by Small Cause Court.

Under the Letters Patent, Cl. 12 and Pres. Sm. C. C. Act, S. 22 the High Court can entertain a suit wherein the damages claimed exceeds Rs. 100, subject to the determination of the question of costs in accordance with S. 22, Pres. Sm. C. C. Act and such jurisdiction is not taken away by S. 15 of the C. P. Code, 1882. 34 Bom. 13=11 Bom. L.R. 273=3 Ind. Cas. 837.

——Cl. 12—Jurisdiction—Malicious prosecution.

In continuance of a prosecution of the plaintiff by the defendant in Rajkote, extradition proceedings were taken at the instance of Government against the plaintiff in Bombay. In that trial the magistrate held that the offence charged bore no foundation, and that the plaintiff should be acquitted and should not be extradited from the British territory. The plaintiff thereupon filed a suit on the Original Side of the High Court to recover damages for malicious prosecution from the defendant. **Held,** that the material part of the cause of action accrued in Bombay and that the High Court had jurisdiction to entertain the suit. 29 B. 368=7 Bom. L.R. 20.

——Cl. 12—Jurisdiction—Matrimonial Suit—Dissolution of marriage—Marriage solemnised according to Zoroastrian rites—Conversion of wife to Islam—Husband refusing to become Mahomedan—Marriage if dissolved—Suit by wife for declaration that marriage stood dissolved—Maintainability—Law to be applied—Mohomedan Law—Application of.

The plaintiff and defendant, who were originally Zoroastrians were married according to Zoroastrian rites in Iran. They subsequently became domiciled in British India and the plaintiff (wife) later became a convert to the Mahomedan religion. She called upon her husband to embrace Islam but he refused. She then filed a suit on the Original Side of the High Court of Bombay for declaration that her marriage with the defendant stood dissolved and was at an end.

Held, (i) that the High Court on its Original Side had jurisdiction to entertain and try the suit, in view of the wide and extensive jurisdiction conferred on it by Cl. 12 of the Letters Patent;

(ii) that the law applicable was not the Muslim personal law, but that the case should be decided according to justice and right;

(iii) that it would not be in accordance with justice and right that, on the conversion of one of the parties to the marriage to Islam, it should be held that the marriage stood dissolved;

(iv) that there was no warrant for holding that a marriage solemnised according to one personal law could be dissolved according to another personal law simply because one of the parties had changed his or her religion. I.L.R. (1948) Bom. 223=48 Bom. L.R. 864=A.I.R. 1947 Bom. 272.

——Cl. 12—Jurisdiction—Matriomonial suit—Suit for jewish marriage.

Jews—Suit for dissolution of marriage—Parties, held domiciled in Bombay—Bombay High Court, had jurisdiction. A.I.R. 1944 Bom. 15=45 Bom. L.R. 921=I.L.R. (1944) Bom. 411=211 Ind. Cas. 51.

——Cl. 12—Jurisdiction—Matrimonial suit.

Clause 12 of the Letters Patent gives the High Court jurisdiction to entertain a suit arising out of matrimonial disputes between Jews, and in deciding it the Jewish Law must be applied "with such adapations to the circumstances of the case as justice may require". 94 Ind. Cas. 59=50 Bom. 369=28 Bom. L.R. 328=A.I.R. 1926 Bom. 169.

——Cl. 12—Jurisdiction—Mortgage executed in Bombay.

A suit to enforce a mortgage is not a suit for land within Cl. 12, but a suit **in personam** to recover a debt.

Where the mortgage is on property situate outside British India, and mortgagor defendants reside outside British India, but the mortgage is executed in Bombay, a part of the cause of action arises within the jurisdiction of Bombay, and the mortgagee can bring a suit in Bombay to enforce the mortgage, and since under O. 34, R. 1, Civil P. C., all persons interested in the equity of redemption are necessary parties, and must be joined in a suit to enforce a mortgage, the Bombay Court has jurisdiction to try the suit against person residing outside British India in whose favour a charge has been created by the mortgagor. A.I.R. 1936 Bom. 313=38 Bom. L.R. 535=60 Bom. 778=164 Ind. Cas. 581.

——Cl. 12—Jurisdiction—Equitable mortgage in Bombay by persons in Bombay of property in Baroda.

The Bombay High Court can enforce an equitable mortgage of property situate in a Native State (Baroda State) effected in Bombay by persons residing in Bombay, although the laws of the Native State may not recognise the mortgage. The High Court can also pass an order for the sale of the property on the mortgagor's failure to pay the mortgage amount within the time provided in the decree. A.I.R. 1932 Bom. 642=57 Bom. 234=34 Bom. L.R. 1384=142 Ind. Cas. 130.

——Cl. 12—Jurisdiction—Mortgage suit.

According to provisions laid down in Cl. 12, and C. P. Code, O. 34, R. 1 the Bombay High Court has jurisdiction to try suit between the mortgagor and prior and puisne mortgagees even though the property is situate outside Bombay. The suit remains a suit for recovery of debts in certain order, the land being liable to sale in default of payment. 31 Bom. L.R. 1002=A.I.R. 1929 Bom. 468.

——Cl. 12—Jurisdiction—Mortgage suit.

In Bombay a suit by a mortgagee of land to enforce his mortgage by sale can be maintained in the High Court under S. 12, Letters Patent even when the mortgaged land is situate wholly outside the limit of the ordinary original civil jurisdiction of the High Court if the cause of action has arisen wholly within the said limits. 50 Bom. 1; A.I.R. 1926 Bom. 1; 91 Ind. Cas. 847 (F.B.), **Held, overruled**; A.I.R. 1927 Bom. 278 (F.B.), **Foll.**; 120 Ind. Cas. 279=11 L.L.J. 306=A.I.R. 1929 Lah. 449.

——Cl. 12—Jurisdiction—Mortgage suit.

A suit to enforce mortgage by mortgagee of land situate outside the ordinary original civil jurisdiction of the High Court is maintainable in High Court as it is not a suit for land. A.I.R. 1927 Bom. 278 (F.B.), **Foll.** 104 Ind. Cas. 115=51 Bom. 711=29 Bom. L.R. 659=A.I.R. 1927 Bom. 663.

——Cl. 12—Jurisdiction—Mortgage suit.

A suit by mortgagee of land to enforce his mortgage can be maintained under Cl. 12 of the Letters Patent if defendant resides within the local limits of the ordinary original civil jurisdiction of the High Court at the commencement of the suit. 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.)

——Cl. 12—Jurisdiction—Mortgage suit.

A suit by mortgagee to enforce his mortgage by sale can be maintained under Cl. 12 even if the mortgaged property is situate wholly outside the limits of the Oridinary Original Civil Jurisdiction of the High Court, and the defendant does not at the commencement of the suit dwell or carry on business or personally work for gain within such limits, but the cause of action has arisen wholly or in case the leave of the Court shall have been first obtained, in part within the said limits. 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.).

——Cl. 12—Jurisdiction—Mortgage suit.

Suit to enforce mortgage—Mortgaged land situate wholly outside—Defendant dwelling, etc., within limits of oridinary jurisdiction of High Court when suit commenced—Suit can be maintained under Cl. 12. 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.)

——Cl. 12—Jurisdiction—Mortgage suit.

High Court has no jurisdiction to grant a declaration, as to who out of two competing mortgagees is a prior one when the property mortgaged is situated beyond the jurisdiction of the Court (in this case in Cutch), though the mortgage transactions were entered into in Bombay. 14 Bom. 353, **Considered**; 29 Bom. 249, **Foll.** 88 Ind. Cas. 92=27 Bom. L.R. 570=A.I.R. 1925 Bom. 333.

——Cl. 12—Jurisdiction—Mortgage suit.

Suit by a mortgagee against property outside the jurisdiction and against the mortgagors living outside its jurisdiction can be tried by the Bombay High Court in its ordinary original civil jurisdiction. 80 Ind. Cas. 1007=26 Bom. L.R. 539=A.I.R. 1924 Bom. 419.

——Cl. 12—Jurisdiction—Mortgage suit.

Suits by mortgagees to enforce their rights under their mortgages are not suits for land within the meaning of Cl. 12 of the Letters Patent, and such a suit is one to realise and dispose of his and his debtor's interest in the land. The object of the suit is not to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land, but to obtain repayment of debt owing to the plaintiff and for that purpose to realise the security which has been vested in him. 14 Bom. 353; 22 Bom. 701, Foll. The personal jurisdiction of the Bombay High Court is exercised under Cl. 12 of the Letters Patent not only in cases where the defendants or some of them reside permanently within the jurisdiction but where, according to the provision of the Letters Patent, they have been lawfully caused to appear upon summons where the cause of action or part of it has arisen in Bombay. 80 Ind. Cas. 442=26 Bom. L.R. 535.

——Cl. 12—Jurisdiction—Suits filed in High Court before 1948 amendment—Jurisdiction to try—If taken away.

The jurisdiction of the High Court under Cl. 12 of the Letters Patent is to receive, try and determine suits of the particular description therein mentioned. The words receive, try and determine are to be read conjunctively and not disjunctively. Once the suit is entertained or received by the Court, the Court has jurisdiction to, and must try and determine the same in spite of whatever happens subsequently unless such jurisdiction is taken away either by express words or by necessary implication. The Bombay High Court Letters Patent Amendment Act (XLI of 1948), has not the effect of taking away the jurisdiction of the High Court to try and determine the suits which had already been validly received or entertained by it prior to the enactment of the Act (XLI of 1948). This enactment has no retrospective operation. 51 Bom. L.R. 122=A.I.R. 1949 Bom. 182.

——Cl. 12—Jurisdiction—Suit for accounts against commission agent.

Defendants used to send rates and quotations from Calcutta to the plaintiff in Bombay, and the plaintiff sent orders by letter or telegram to the defendants in Calcutta and the orders were accepted by letter or telegram by the defendants from Calcutta. Defendants entered into transactions with third parties in Calcutta, in pursuance of such orders and instructions, and then sent advice notes to the plaintiff with confirmation slips attached thereto. At times, goods were also consigned from Calcutta, by the defendants to the plaintiff in Bombay. Defendants made up statements of account in Calcutta and sent them to the plaintiff in Bombay. The plaintiff instituted a suit for accounts against the defendants at Bombay:

Held, that no part of the cause of action arose in Bombay and the Bombay High Court had no jurisdiction to try the suit.

A cause of action has no relation whatever to the defence set up by the defendants. It refers entirely to the grounds set forth in the plaint.

Leave granted under Cl. 12 is confined to the cause of action or causes of action set forth in the plaint.

Leave granted under Cl. 12, Letters Patent (Bombay) is not conclusive when the jurisdiction is in issue.

S. 21, Civil P.C., does not apply to the Chartered High Courts in the exercise of their original jurisdiction. It does not also apply to a case where the objection is not one to the place of suing, but one which goes to the root of the whole suit, such as an objection to the jurisdiction of the Court, which can be taken at any stage of the proceedings, even at the hearing of the suit and on appeal.

If there is no jurisdiction over the subject-matter of the suit, acquiescence of the parties or either of them cannot create it. 33 Bom. L.R. 1364=A.I.R. 1932 Bom. 42=135 Ind. Cas. 170.

——Cl. 12—Jurisdiction—Pleas as to or leave—Waiver.

Where plea of jurisdiction or of leave under Cl. 12 is not raised by the defendants at their earliest opportunity, i.e., in the orginal written statement, they are deemed to have waived the objection. 31 Bom. L.R. 1002=A.I.R. 1929 Bom. 468.

——Cl. 12—Jurisdiction—Specific performance of contract to sell land out of original jurisdiction.

The defendant contracted to sell to the plaintiff a plot of land situated outside the original jurisdiction of the Bombay High Court. The defendant resided in Bombay. The plaintiff brought a suit on the Original Side of the Bombay High Court to get specific performance of the agreement to sell the land. The prayer in the plaint was that the defendant may be ordered specifically to perform the said agreement, and upon his making out a marketable title to the said land to execute a conveyance thereof in favour of the plaintiff. **Held**, that without regard to the ultimate end or purpose of the suit, it was immediately a suit to enforce the specific performance of a contract, and as such was within the jurisdiction of the High Court, which had all the powers of a court of equity in England for enforcing its decree **in personam.** 7 Bom. L.R. 319.

——Cl. 12—Jurisdiction—Temporary residence.

Where a person is temporarily resident within the jurisdiction of the court and he has no permanent residence elsewhere, he must be taken to 'dwell' within the jurisdiction of that court and a suit against him is cognizable by that court. 2 Bom. L.R. 291=25 B. 176.

——Cl. 12—Leave—Amendment of plaint—Fresh leave.

The obtaining of leave under Cl. 12 is the foundation of the jurisdiction, and such leave must be obtained before the institution of the suit and cannot be granted afterwards. If an amendment which would alter the cause of action is made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action. The cause of action alleged to exist in the six persons against the defendent for their alleged employment as brokers by him is clearly different from the alleged cause of action claimed to exist in the individual. The cause of action which is a right to sue vested in six persons alleged to be doing business together, is not the same as the right which exists in one individual. Consequently, when a plaint is amended so as to substitute latter cause of action for the first, fresh leave under Cl. 12 is necessary. A.I.R. 1939 Bom. 345=41 Bom. L.R. 536=184 Ind. Cas. 520.

——Cl. 12—Leave—Necessity — Cause of action partly outside jurisdiction.

In a case in which the cause of action has arisen in part only within the local limits of the original jurisdiction of the High Court, it is a condition precedent to the maintenance of the suit that the leave of the Court should have been first obtained under Cl. 12. The condition is further one which it is not competent for a Court to ignore or for the parties to waive. 34 Bom. L.R. 236=A.I.R. 1932 Bom. 291=56 B. 324=137 Ind. Cas. 381.

[Overrules A.I.R. 1929 Bom. 468=122 Ind. Cas. 133]

——Cl. 12—Leave to sue—Partnership dissolution.

A firm **T** in Calcutta consisting of eleven partners carrying on business in Karachi in partnership with another firm of Bombay and also carrying on business in Bombay in partnership with twelfth member—Suit for accounts and dissolution of firm **T** by trustees of Bombay firm which did business in partnership with **T** firm at Karachi—Bombay High Court can entertain it —Firm **T**, held carried on business in Bombay though in partnership with twelfth member. 39 Bom. L.R. 648 =A.I.R. 1937 Bom. 387=I.L.R. (1937) Bom. 811=171 Ind. Cas. 416.

——Cl. 12—Leave—Suit on bill of exchange.

In order to give rise to the liability as against the acceptor, the payee or endorsee must prove that a negotiable instrument drawn on the drawee in favour of the payee was presented to the drawee and accepted by him as indicated by his signature on the bill. Each one of these steps has to be established by the plaintiffs. They have, therefore, to establish that the bills of exchange sued upon were drawn by the drawer on a person who is named as the drawee, in favour of the plaintiffs-payee. This is necessary because only a drawee can accept a bill of exchange. Therefore, the fact that the bills of exchange were drawn on drawee is a material fact which has to be proved by the plaintiffs to establish their claim. When that fact has taken place in Bombay, with leave under Cl. 12, the Bombay High Court has jurisdiction. The starting point for the liability is the drawing of the bills of exchange on the drawee and the concluding point is when he accepts the liability by putting his signature on the bills as acceptor. A.I.R. 1942 Bom. 15=43 Bom. L.R. 916=I.L.R. (1942) Bom. 101=198 Ind. Cas. 288.

——Cl. 12—Leave.

Hundis in form of pro-notes signed outside Bombay by firm and then sent to its clerk in Bombay—Clerk delivering them to payees in Bombay and payees endorsing them in favour of plaintiff in Bombay—Cause of action, held arose in Bombay. A.I.R. 1939 Bom. 461=I.L.R. (1939) Bom. 631=41 Bom. L.R. 959 =186 Ind. Cas. 657.

——Cl. 12—Leave—Suit on Hundi—Hundi not payable in Bombay.

The Bombay High Court has no jurisdiction to entertain the suit, on **Hundis** which were not made payable in Bombay and the fact that the consideration for the **Hundis** was the balance of accounts, due by the deft. to the plaintiff, in respect of transactions effected in Bombay is no part of the cause of action. 40 Bom. 473=18 Bom. L.R. 57=32 Ind. Cas. 918.

——Cl. 12—Leave to sue—Promissory note executed outside Bombay making money payable at Bombay, Poona or wherever demanded—Parties residing in Poona—Demand made for payment of amount in Bombay.

Under Cl. 12 of the Letters Patent (Bombay High Court) the Judge has a discretion to grant or refuse

leave. But normally and ordinarily if a material part of the cause of action arises within jurisdiction, the Judge should grant leave under Cl. 12 unless there are some judicial grounds why the ordinary practice should not be given effect to. In a suit on a promissory note the fact that the moneys are payable within jurisdiction is a material part of the cause of action.

A promissory note passed at Poona where the parties resided provided that the money advanced was payable either in Bombay, Poona or elsewhere or wherever demanded. Demand for payment at Bombay was made prior to suit.

Held, that a material part of the cause of action for suit arose in Bombay, and the High Court had jurisdiction to entertain the suit, and unless there was some strong judicial reason, the Court ought not to refuse a party the right to come to the High Court and have his suit tried by the High Court. 40 Bom. L.R. 252; 18 Bom. L.R. 57, foll. 52 Bom. L. R. 61=A.I.R. 1950 Bom. 259.

——Cl. 12—Leave to sue.

Money due on promissory note payable on demand, payable either at Poona, Bombay or elsewhere—Demand made in Bombay—Leave to bring suit, can be granted. A.I R. 1938 Bom. 278=40 Bom. L.R. 252=176 Ind. Cas. 760.

——Cl. 12—Leave to sue — Third party proceedings—Inference of grant of leave.

Merely because a notice is ordered to be served by registered post it cannot be assumed that leave is given under Cl. 12 of the Letters Patent. It is extremely necessary before it can be assumed that leave has been granted under Cl. 12 of the Letters Patent, that it must be proved that an application was made to the Judge under Cl. 12 of the Letters Patent, and if the judge makes the order it should appear clearly on the face of it that he was giving leave under Cl. 12 of the Letters Patent.

Per **Macleod, C. J.**—When a defendant asks the Court to issue a third party notice in a case in which leave has to be obtained under Cl. 12 of the Letters Patent, then an application should be made to the Judge for such leave to be endorsed on the notice in the same way as it is endorsed in a plaint. 59 Ind. Cas. 28=45 Bom. 24=A.I.R. 1921 Bom. 195.

——Cl. 12—Leave—Third party proceedings.

No leave can be inferred from the fact that leave was obtained to issue the third party notice. It is necessary to obtain leave of the Court under Cl. 12 of the Letters Patent, for a third party notice, where part of the cause of action is outside the ordinary original jurisdiction of the High Court and the party lives out of such jurisdiction. Third party proceedings fall within the words "suits of every description" in Cl. 12 of the Letters Patent. A successful deft. against the third party is entitled to his costs of the suit as between the solicitor and client and to his costs of the third party proceedings as between party and party. 21 Bom.L.R. 808=59 Ind. Cas. 12.

——Cl. 12—Leave of Court, absence of Jurisdiction.

The absence of leave under Cl. 12 of the Letters Patent goes to the root of the jurisdiction of the Court and the Court trying issues, in the absence of such leave, is not competent to try it within the meaning of S. 44 of the Evidence Act. 37 Bom. 563 =15 Bom.L.R. 672=20 Ind. Cas. 530.

——Cls. 12 and 14—Leave of Court—Joinder of causes of action—Notice under Cl. 14, application for, when to be made.

The plff. in his plaint joined three causes of action, two of which had arisen partly within the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Bombay and the third, wholly outside the local limits. Plff. when presenting the plaint obtained leave of the Court as to the first two causes of action, under Cl. 12 and also made an application under Cl. 14 for issue of notice calling upon the defts. to show cause why he should not be permitted to join together in one suit the several causes of action shown in the plaint. The defts. objected (1) that no application under Cl. 14 can be made in a case in which leave had to be obtained under Cl. 12 in respect of other cause of action and that the application should have been made before the plaint was filed. Held, that as soon as leave had been obtained, the Court got original jurisdiction in respect of the first two causes of action. The Court could then call on the defts. to show cause why the third cause of action should not be joined in the suit and there is nothing in Cl. 14 to show that this must have been done before the filing of the plaint. 34 Bom. 564=12 Bom.L.R. 988=8 Ind. Cas. 648.

——Cl. 12—Leave to sue—Grant of—Power to revoke leave granted—Matters to be considered.

Under Cl. 12 of the Letters Patent, leave to sue is not granted as of right, and, if granted is not granted irrevocably. It is not correct to hold that the Court cannot revoke the leave once granted under Cl. 12. Where only some small part of the cause of action has arisen within the Court's jurisdiction, the Court is entitled and bound, to take into consideration the balance of convenience of both parties. 48 Bom.L.R. 636=229 Ind. Cas 391 =A.I.R. 1947 Bom. 72.

——Cl. 12—Leave to sue.

Leave is necessary and a preliminary condition of jurisdiction. Where the defendant was already dead before leave was obtained under Cl. 12, fresh leave should be obtained in respect of his sons when they are sought to be joined. Leave obtained against a dead person is against no person at all. 31 Bom.L.R. 1002=A.I.R. 1929 Bom. 468.

——Cl. 12—Leave to sue.

Where the suit as originally instituted was not merely against a wrong person, but against no person at all, and the plaint was amended by substituting the name of his son:

Held, the case was not one of substitution at all. It was a new suit against a new defendant and leave under Cl. 12 was necessary. 85 Ind. Cas. 464 =25 Bom. L.R. 7=A.I.R. 1924 Bom. 109.

——Cl. 12—Leave to sue—Partition suit.

The Court has power to grant leave in a partition suit where part of the property is outside British India. The Court should exercise its discretion in not granting leave if it will tend to defer the final decision of the points at issue between the parties. 77 Ind. Cas. 934=46 Bom. 249=23 Bom. L.R. 1049=A.I.R. 1921 Bom. 328.

——Cl. 12—Leave to sue—When refused.

The plaintiff, an Indian merchant, bought bullion through the defendants in London. The bullion was shipped and was lost on the sinking of the ship. The defendants had insured the gold for its value and upwards, with the result that plaintiff was repaid his entire cost of the purchase of the gold plus a certain additional sum. Plaintiff contended that the defendants ought to have insured not for, say, five or six per cent. above the value of the gold as they in fact did, but for ten per cent. above that value. Accordingly, he claimed the difference between this five per cent. and ten per cent. His clain was based solely on an alleged custom of the bullion market in London.

Held, that substantial part of the cause of action did not accrue in Bombay. At any rate, the case was one of those exceptional cases where leave under Cl. 12 ought not to be given. 100 Ind. Cas. 946=29 Bom.L.R. 131=A.I.R. 1927 Bom. 660.

——Cl. 12—Leave to sue—When essential.

Under Cl. 12 leave is only required when the cause of action has arisen in part within the local limits of the ordinary original civil jurisdiction. 91 Ind. Cas. 847=50 Bom. 1=27 Bom.L.R. 1281=A.I.R. 1926 Bom. 1 (F.B.).

——Cl. 12—"Suit for land"—Meaning of—Suit for accounts by principal against agent alleging acts of misconduct by agent — Prayer for declaration that lands outside jurisdiction in defendant's name were acquired as plaintiff's agent and with funds of plaintiff—Jurisdiction of High Court to entertain.

A "suit for land" within the meaning of Cl. 12 of the Letters Patent means a suit substantially relating to land, i. e., a suit which directly involves a question of title or right to land. It is not enough that the question should arise merely incidentally; it must arise directly for the determination of the Court. The primary object of the suit has to be ascertained. If the primary object is something unconnected with foreign land, then the suit is not a suit for land, even though incidentally the Court might have to try questions of title to foreign land. But if the claim in the suit be based on any contract, trust or fraud or any circumstance giving rise to privity between the parties, the suit would not be a suit for land. Cl. 12 of the Letters Patent confers upon the High Court an equity jurisdiction similar to the one exercised by the English Courts of Chancery in connection with rights to property situated abroad; if the primary object or leading purpose of the suit does not involve a question of title or right to land, the fact that further questions incidentally arise relating to title to land would not necessarily make the suit a suit for land, and the Court may even give a declaration as to title to land situate outside the local limits of its jurisdiction, if it becomes necessary for the purpose of effectuating the main purpose of the suit, provided such main purpose does not directly involve a question of title or right to land.

Where in a suit for accounts by a principal against his agent, relating, inter alia, to certain lands situate outside the limits of the ordinary original jurisdiction of the High Court which the plaintiff claims to be of his ownership, having been acquired by the defendant as plaintiff's agent and with his (plaintiff's) funds, the plaintiff seeks a declaration that the lands belonged to and were the property of the belaintiff and that the defendants had no beneficial interest in them and asks for an order against the defendant to execute all such documents, and deeds and do such acts as may be necessary for transferring those lands to the name of the plaintiff, it must be held that the main object and leading purpose of the suit is to charge the agent with various acts of misconduct, the question of land being impossible of severance from the other questions pertaining to the agency of the defendant. There is definitely an equity between the plaintiff and the defendant, an equity arising out of the contract of agency, and the suit is therefore not a "suit for land" falling under Cl. 12, but is one which the High Court has jurisdiction to entertain and try. I.L.R. (1948) Bom. 693=50 Bom.L.R. 49=A.I.R. 1948 Bom. 272.

——Cl. 12 — Suit for land — Meaning of — Alternative in last portion of the clause—If applies to suits for land or other cases.

The defendants who are a firm of merchants carrying on business in Bombay, were the secretaries and treasurers of the plaintiff Company, and as such, were in sole management of the spinning and weaving mill owned by the Company at a place called Jalgaon in the province of Bombay but situated outside the original civil jurisdiction of the High Court of Bombay. After the termination of the agency the Company brought the suit for various reliefs founded, in general, on alleged wrongful action by the defendants in breach of their fiduciary obligation in the course of their employment. In addition to the prayer a general account of the defendants' management of the Company's affairs and business during the whole period of the agency and certain other connected prayers, the company asked for two reliefs concerning certain lands at Jalgaon which were alleged to have been acquired by defendants on behalf of the company and out of the moneys or other property belonging to the Company but in the name of the defendants. The reliefs were: (a) That it may be declared that the lands in Jalgaon (particularised in the plaint) belong to and are the property of the plaintiff Company and that the defendants have no beneficial interest therein; and (b) that the defendants may be ordered to execute all such documents and deeds and do such acts as may be necessary for transferring the said lands to the name of the plaintiff Company. With reference to these prayers it was contended that the High Court has no jurisdiction to try the suit on its Original Side as the lands claimed by the plaintiffs were outside the original civil jurisdiction of the High Court.

Held, Kania, C. J.—The fact that the plaintiffs have asked for a declaration of title to lands in Jalgaon does not oust the jurisdiction of the High Court to consider whether the lands were acquired by the defendants in breach of trust and, if so, whether they should not be compelled to transfer the lands to the plaintiffs. The Court has certainly jurisdiction to determine the propriety of the defendants' actions as agents in dealing with the property and money of the plaintiffs. That seems to be the main purpose of the suit. The Court is also competent to investigate and ascertain if the defendants had utilised the plaintiffs' money in the purchase of the immovable property at

Jalgaon. If the Court holds that the property was purchased by the use of such funds as claimed by the plaintiffs, having regard to the fact that they are in possession of them, the Court has jurisdiction to order the defendants to execute a conveyance of those lands, in favour of the plaintiffs. Therefore the plaintiffs' prayer for a declaration of title to the land at Jalgaon is no ground for holding that the Original Side of the Bombay High Court is not competent to try the suit.

Patanjali Sastri.—The only "relief" which the plaintiffs will in law be entitled to on proof of the facts alleged by them is the execution of the necessary instruments formally transferring the lands in Jalgaon to the name of the plaintiff company and it is also the only necessary and sufficient relief for the plaintiffs to obtain. That being the gist of the plaintiffs' claim in regard to the lands at Jalgaon the suit is not a "suit for land" within the meaning of clause 12 of the Letters Patent. The plaintiffs do not claim possession or control of those lands, being already in possession and enjoyment thereof. Nor do they ask for an adjudication of title to those lands. By their very demand for its transfer they concede that the legal title is vested in the defendants who have purchased the properties and got them entered in the Government records in their own names. All that the plaintiffs seek on this part of their case is the fulfilment of the personal obligation which, it is claimed, the law casts upon the defendants to hold the properties for the benefit of the plaintiffs and to execute the necessary instruments conveying to them the legal title in those properties, an obligation arising out of the fiduciary relation between the parties and the circumstances relating to the acquisition of properties as alleged in the plaint. The position is thus analogous to that in a suit for specific performance where the plaintiff conceding the defendant's title claims a conveyance of it in accordance with the contract. As the defendants reside and carry on business in Bombay and are thus amenable to the jurisdiction of the High Court that Court can act in personam and compel the defendants to fulfil their fiduciary obligation though such fulfilment has reference to lands situate outside the jurisdiction.

Mahajan, J.—The object of the suit so far as Jalgaon lands are concerned is to establish title to them. Prayer (b) is consequential to the declaration asked for in prayer (a). Plaintiffs have based their claim of ownership to the Jalgaon lands on alternative grounds. Taking the plaint as it stands there can be no manner of doubt that a clear controversy is raised about title to the land situate in Jalgaon, the plaintiffs claiming that the lands are owned by them and they are ostensibly held by the defendants as their benamidars, the purchase having been made with the funds supplied by them. The defendants on the other hand contend that the lands were purchased by them with their own money for their own benefit. On these pleadings the plaintiffs have asked for a declaration to the effect that they be declared to be the owners of these lands. The issues raised in the pleadings very clearly indicate the nature of the controversy. Even a question of adverse possession has been raised about the lands. In this situation it is difficult to hold that the suit is not a "suit for land" within the meaning of clause 12 of the Letters Patent.

Mukherjea, J.—Prayer (a) is wholly inappropriate to a suit for enforcing a personal obligation against the defendants and if this prayer is retained, the suit, to that extent, would be a "suit for land" within the meaning of clause 12 of the Letters Patent and as the properties concerned are outside the jurisdiction of the High Court of Bombay, it would not be competent to try the suit. As the plaint stands, prayer (b) can only be read as accessory to prayer (a) and if the execution of the document is necessary only for the purpose of perfecting the plaintiffs' title of which a declaration is sought for in prayer (a) the Court must also be held incompetent to try the suit so far as prayer (b) is concerned.

Case-law in regard to the construction and meaning of the words "suit for land" in clause 12 of the Letters Patent exhaustively discussed.

Kania, C. J.—The last alternative in clause 12 of the Letters Patent, which refers to the residence of the defendant or his carrying on business within the limits of the Court's original jurisdiction is an alternative having reference only to the words "all other cases" and applies to all other cases other than suits for land only.

Mahajan, J.—The last part of clause 12 of the Letters Patent does not confer jurisdiction on the High Court on the ground of residence of the defendants in suits for land. This clause is governed by the expression "in all other cases" occurring in its earlier part.

Mukherjea, J.—The last alternative in clause 12 of the Letters Patent which refers to the residence of the defendant or his carrying on business within the limits of the Court's jurisdiction is a provision applicable to all cases other than suits for land. 1949 F.C.R. 849=A.I.R. 1950 F.C. 83=(1950) S.C.J. 51 (F.C.).

——Cl. 12—Suit for land.

Sale by mother acting as guardian of minor son—Suit for setting aside sale in original side of High Court when property is outside its jurisdiction—Subsequent suit for possession:

Held, that the claim for possession could not have been instituted on the original side of the High Court as the suit would necessarily have been a suit "for land" within Cl. 12, Letters Patent (Bombay). 35 Bom. L. R. 630=57 B. 456=A.I.R. 1933 Bom. 398=148 Ind. Cas. 116.

——Cl. 12—'Suit for land.'

Per **Marten, C. J.**—The words 'suit for land' refer to suits to obtain or recover land, or alternatively to suits which substantially involved the recovery of land or its equivalent. The preposition 'for' in the expression 'suit for land' would seem to indicate that the title to or possession of, immovable property must be the primary object of the action but the primary object of a suit to enforce mortgage by sale is money.

Fawcett, J.—A suit to be one "for land" should substantially relate to land and this should primarily be judged by considering what is the nature of the relief sought by the plaintiff. A suit for land grammatically means a suit for possession of the land and also covers suits for title to or compensation for wrong or trespass to land which are properly local "actions".

Per **Mirza, J.**—A suit for land means a suit which is substantially for land, that is, for the purpose of acquiring title to or control over land. It includes any suit in which a decree is asked for operating directly upon the land. A suit which prays for any relief with reference to any specific immovable property is a suit for land.

Per **Blackwell, J**—A suit for land means a suit to obtain or recover land and does not include a suit "substantially" for land where a question of title to the land may be involved.

Per **Patkar, J.**—The words "suit for land" mean a suit in which the substantial question is the right to land. 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498 =A.I.R. 1927 Bom. 278 (F.B.).

——Cl. 12—Suit for land—Mortgage suit.

A suit by a mortgagee of land to enforce his mortgage by sale is not a suit for land within the meaning of Cl. 12 of the Letters Patent. 50 Bom. 1; A.I.R. 1926 Bom. 1; 91 Ind. Cas. 847 (F. B.), **Overruled**; 14 Bom. 353, **Appr.** 104 Ind. Cas. 8=51 Bom. 516=29 Bom. L.R. 498=A.I.R. 1927 Bom. 278 (F.B.).

——Cl. 12—Suit for land—Mortgage suit.

A suit based on a mortgage of land outside the local limits of the original jurisdiction of the High Court, claiming the usual mortgage decree for sale of the property in default of payment, is a suit for land within the meaning of the clause. Where the whole of the property is outside the jurisdiction, and the defendants also reside outside the jurisdiction, the High Cout on its original side cannot entertain such a suit against a defendant who resides outside the jurisdiction. 14 Bom. 353, **Overruled.** 91 Ind. Cas. 847= 50 Bom. 1=27 Bom. L. R. 1281=A.I.R. 1926 Bom. 1 (F.B.).

[Overruled in 51 Bom. 516=A. I. R. 1927 Bom. 278 (F.B.).]

——Cl. 12—'Suit for land'.

'Suit for land' does not mean only suits for recovery of land. The words include a suit which, having regard to the real object of the suits is substantially a suit for land and is in effect and reality a suit to establish title to the land and for the recovery of possession thereof. 37 Bom. 494=14 Bom. L. R. 846=17 Ind. Cas. 198.

——Cl. 12—Suit for land—Suit for declaring charge for maintenance.

Where in a suit for maintenance the plaintiff prays for a decree charging her maintenance on a specified immovable property, the suit is a suit for land within the meaning of Cl. 12, 9 Cal. 535, **Dist.**; 6 Bom. L.R. 958 and 14 Bom. L.R. 701, **Foll.** 81 Ind. Cas. 776=25 Bom. L.R. 1172=A.I.R. 1924 Bom. 141.

——Cl. 12—"Suit for land"—Suit for declaring charge—Suit to declare a charge is suit for land but land being outside jurisdiction Court must have jurisdiction in personam.

Under Cl. 12 of the Letters Patent the Bombay High Court has jurisdiction **in personam** with respect to lands situated outside its original jurisdiction. A suit by a vendor to declare a charge upon such lands for the unpaid purchase-money against the vendee residing or carrying on business in Bombay is therefore maintainable in the Bombay High Court in its original jurisdiction.

A Suit to declare a charge on property in Bombay is a suit for land so as to give the Bombay High Court jurisdiction over the suit which otherwise it would not have. Where the land is situated outside the original limits of its jurisdiction the words "suit for land" must be read as being subject to the qualification or proviso that the High Court has jurisdiction **in personam** similar to that exercised by a Court of Equity in England and by the Mofussil Courts under C.P.C., S. 16 proviso. 80 Ind. Cas. 1049=26 Bom. L.R. 541=48 Bom. 625=A.I.R. 1924 Bom. 412.

——Cl. 12—Suit for land—Leave of the court—Cause of action—Court of Equity in England—Jurisdiction over lands situated abroad—Title to land.

Under S. 12 of the Letters Patent, leave is only required when the cause of action shall have arisen in part within the local limits of the oridinary original jurisdiction of the High Court; in no other case is there any power or need to give leave. A court of equity in England only assumes jurisdiction in relation to land abroad, when, as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case does the court of equity entertain a suit, even, if the defendant was within the limits of its jurisdiction, where the purpose is to obtain a declaration of title to foreign land. Though it is a general principle that the title to land should ordinarily be determined by the court within the limits of whose jurisdiction it lies, it no doubt is open to the legislature to disregard that principle. But the courts certainly would not lean towards a construction involving that result where the words of the legislature are fairly capable of a meaning in conformity with the general principle. The phrase,—suit for land—in S. 12 of the Letters Patent is by no means limited to a suit for the recovery of land; the expression is not to be read with a technical limitation, which never had been associated with it. The plaintiffs brought a suit on the Original Side of the High Court of Bombay for a declaration that they were entitled to exclusive possession and enjoyment of a Talas situate beyond the local limits of the court's jurisdiction, and that the defendants, who resided within its jurisdiction had no right in or to the same; they also sought an injunction to give effect to that declaration; and then they prayed for a declaration that they were owners of a piece of land:—**Held**, that the prayers were directly concerned with the land and were so framed as to constitute the suit one for land within the meaning of S. 12 of the Letters Patent; since the leading purpose of the suit was to establish a title to possession of land situate outside the local limits of the jurisdiction of the court and to secure that possession from molestation, and the claim was based not on any contract, trust or fraud or any circumstance giving rise to privity between the parties, but was brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiff; and that therefore, the court had no jurisdiction to entertain the suit. 6 Bom. L.R. 958=29 B. 249.

——Cl. 12 — Miscellaneous — Arbitration Act — Applicability.

Reading S. 2, Aribitration Act with Cl. 12, Letters Patent (Bom.) it may be said generally that the Arbitration Act applies to arbitrations which are connected either as to the subject matter or as to the parties within a Presidency town. 36 Bom. L. R. 47= A.I.R. 1934 Bom. 79=58 B. 369=150 Ind. Cas. 478.

——Cl. 12—Miscellaneous—Plaint, presentation of.

Under the rules and practice of the Bombay High Court, the proper officer to receive the plaint is the Prothonotary, or somebody in his office to whom the duty is delegated by him. The plaint, even where leave is required, is presented when it is handed over by the plaintiff or his agent to the proper officer in the Prothonotary's Office. If leave is required, the plaint must be submitted to the Chamber Judge and leave obtained from him under Cl. 12, Letters Patent. When that leave is obtained, the officer in the Prothonotary's office must see that the plaint is in order and admit it under O. 4, R 2, Civil P.C, and he cannot admit the plaint until the leave of the Judge has been obtained. But, the obtaining of the leave of the Judge and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Lim. Act. 36 Bom. L.R. 84=A.I.R. 1934 Bom. 91 =148 Ind. Cas. 1038.

——Cl. 13—'Subject to its superintendence'—Court of Resident at Aden—Jurisdiction of High Court to transfer case from Resident's file to its own.

The court of the Resident at Aden is 'subject to the superintendence' of the High Court of Bombay within the meaning of the words in S. 13 of the Letters Patent and consequently the High Court has power to transfer a case on the file of the Residents Court to its own file. (1905) 3 A.L.J. 53=3 C.L.J. 5=10 C.W.N. 185=8 Bom. L.R. 4=16 M.L.J. 73=1 M.L.T. 1=30 B. 246=33 I.A. 38 (P.C.)=5 Bom. L.R. 562=27 B. 575.

——Cl. 13—Transfer of suit—High Court—Small Cause Court.

Under proper circumstances the High Court of Bombay has power to transfer to itself a suit pending in the Small Cause Court of Bombay. This power can be exercised by a single judge sitting alone on the original side of the High Court. 7 Bom. L.R. 143.

——Cl. 14—Construction.

The natural interpretation of Cl. 14 would be that the words "such causes of action not being for land or other immovable property" are intended merely to qualify the words "several causes of action" that appear just before them. That is to say, in considering Cl. 14 any cause of action which is one for land or other immovable property must be excluded. The word "several" in the expression "several causes of action" of course means "separate." A.I.R. 1927 Bom. 278 (F.B.), **Cons.** Two or more causes of action arising within the jurisdiction of the High Court can be joined together by the plaintiff, without any leave of the Court. Cl. 14 should be construed as far as possible consistently with the provisions of Rr. 3 and 4 of O. 2. 117 Ind. Cas. 424=53 Bom. 251=31 Bom. L.R. 7 =A.I.R. 1929 Bom. 100.

——Cl. 14—Essentials.

To bring a case within the four corners of Cl. 14 it is not necessary that there must be at least one cause of action which the defendant admits has arisen within the original jurisdiction of High Court. 16 Cal. 98, **Rel. on.** 117 Ind. Cas. 424=53 Bom. 251=31 Bom. L.R. 7=A.I.R. 1929 Bom. 100.

——Cl. 14—Plea of jurisdiction.

Although a defendant can set up a plea of want of jurisdiction in respect of a cause of action allowed under Cl. 14. to be joined in the suit with a cause of action which is within jurisdiction, still the mere fact that defendant may succeed in any such plea does not deprive the High Court of jurisdiction to pass an order under Cl. 14. 117 Ind Cas. 424=53 Bom. 251=31 Bom. L.R. 7=A.I.R. 1929 Bom. 100.

——Cl. 14—Scope.

Cl. 14 by its terms necessarily contemplates cases where the other causes of action are not within the original jurisdiction of High Court, and there is nothing in the clause to limit such causes of action to those arising within the extraordinary orginal civil jurisdiction of the Bombay High Court that is mentioned in in Cl. 13, that is to say, a cause of action which has arisen within the limits of the Bombay Presidency proper, or within the jurisdiction of some Court outside that Presidency, but subject to its superintendence. 33 Bom. 564, **Appr**; 22 Cal. 222 (P. C.), **Expl.** and **Dist.** 117 Ind. Cas. 424=53 Bom. 251=31 Bom. L.R. 7=A.I.R. 1929 Bom. 100.

——Cl. 14—"Suit for land"—Trespass action.

The cause of action for trespass on immovable property is not a cause of action for land or other immovable property within the meaning of Cl. 14, if no question of title apparently arises. 117 Ind. Cas. 424 =53 Bom. 251=31 Bom.L.R. 7=A.I.R. 1929 Bom. 100.

——Cl. 15.

Synopsis.

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1. Amendment.

——Cl. 15—Amendment.

Amendment of 1928 applies to judgments of one Judge delivered after 1st February, 1929—Declaration by Judge that case is fit for appeal is necessary. 32 Bom. L.R. 185=A.I.R. 1930 Bom. 224.

——Cl. 15—Amendment.

Up to 1st February 1929, leave was necessary under the Letters Patent of 1927 and thereafter it is also necessary under the new Letters Patent of 1928 for an appeal from judgment of a single Judge of the High Court in appeal. 118 Ind. Cas. 798=31 Bom. L.R. 473 =A.I.R. 1929 Bom. 241.

——Cl. 15—Amendment — Amendment (1928) to Cl. (15) is retrospective.

An alteration in Cl. 15 of the Letters Patent of the Bombay High Court effected by a notification in the Bombay Government Gazette of 2nd February 1928,

to the effect that no appeal from the judgment of one Judge of the Bombay High Court lies to a Division Bench, if it is made in the exercise of second appellate jurisdiction, except in any case where such single Judge declares that it is a fit one for appeal, has retrospective effect. 114 Ind. Cas. 241=52 Bom. 753=30 Bom.L.R. 942=A.I.R. 1928 Bom. 371.

——Cl. 15—Amendment.

The alteration in Cl. 15 of the Letters Patent of the Bombay High Court does not entirely abolish a former right of appeal; it merely restricts it in a reasonable manner. 114 Ind. Cas. 241=52 Bom. 753=30 Bom. L.R. 942=A.I.R. 1928 Bom. 371.

2. Arbitration.

——Cl. 15—Arbitration — Dismissal of petition for revocation.

The decision of an arbitrator to admit evidence on a question not referred to him is appealable to the High Court for leave to revoke the submission to the arbitrator on the ground of want jurisdiction and when a Judge dismisses a petition for revocation, it is a decision on a question of right and practically enlarged the scope of the submission and deprived the party of his right to have the matter decided by a Court of Law and hence an appeal lies under Cl. 15 of the Letters Patent. 34 Bom. 1=11 Bom. L.R. 1=1 Ind. Cas. 14.

——Cl. 15—Arbitration—Order extending time for making award and dismissing petition to set aside award.

The Court has power under the Arbitration Act, 1899, to extend the time for making an award even after the award, has been made. But, before exercising this power, under R. 373, Bombay High Court (Original Side) Rules, the Court should require a substantive application to be made and should serve notice of that application on the other side.

An order which extends the time for making an award and then dismisses the petition to set aside the award is appealable under Cl. 15. 32 Bom. L.R. 1650=A.I.R. 1931 Bom. 125=55 B. 452=129 Ind. Cas. 886.

3. Appeal - Scope of.

——Cl. 15—Appeal—Scope of—New point.

A point which has not been taken in any of the Courts below cannot be allowed to be argued for the first time in a Letters Patent appeal. I.L.R. 1946 Bom. 794=48 Bom. L.R. 225=A.I.R. 1946=Bom. 365.

——Cl. 15—Appeal—Scope of—New point.

New point on a question of fact (a plea of limitation,) should not be allowed to be considered in a Letters Patent Appeal. A.I.R. 1943 Bom. 12=44 Bom. L.R. 819=I.L.R. (1943) Bom. 104=204 Ind. Cas. 402.

——Cl. 15—Appeal—Scope of—New points.

In an appeal under the Letters Patent, the appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred. A.I.R. 1940 Bom. 49=41 Bom. L.R. 1305=186 Ind. Cas. 726.

——Cl. 15—Appeal—Scope of—New points.

In an appeal under the Letters Patent (Bom.), the appellant is not entitled to be heard on points which had not been raised before the Judge from whose judgment the appeal has been preferred. 38 Bom. L.R. 221=60 B. 516=A.I.R. 1936 Bom. 227=163 Ind. Cas. 305.

——Cl. 15—Appeal—Scope of—New point.

An appellant is not entitled in an appeal under Letters Patent to be heard on points which had not been raised before the Judge from whose judgment he has preferred the appeal. 36 Bom. L.R. 1052=A.I.R. 1934 Bom. 466=152 Ind. Cas. 1031.

——Cl. 15—Appeal—Scope of.

In a Letters Patent appeal, the appeal Court is not restricted to consider the point on which the Judges in the Court of appeal have differed. The whole decree lies open before the Judges hearing the Letters Patent appeal. 87 Ind. Cas. 199=48 Bom. 691=26 Bom. L.R. 349=A.I.R. 1925 Bom. 118.

4. Certificate.

——Cl. 15—Certificate—Principles to be followed.

Leave to appeal will not be granted under Cl. 15, Letters Patent, unless it is alleged that any point in dispute is such that in the exercise of the judicial discretion of the Court, it may be certified as being of great public or private importance or involving questions of public importance or which may be important precedents governing numerous other cases. A.I.R. 1932 Bom. 218=34 Bom. L. R. 398=138 Ind. Cas. 454.

——Cl. 15—Certificate.

No appeal lies under Cl. 15 of the Letters Patent in absence of a certificate of the Judge who has disposed of the second appeal that the case is a fit one for appeal whether such Judge be temporary or officiating. A.I.R. 1926 Rang. 1 (F.B.), **Foll.** 32 Bom. L.R. 624=A.I.R. 1930 Bom. 366.

——Cl. 15—Certificate—Oral application—Competency.

An application to the single Judge, who has disposed of a second appeal, for a declaration that the case is a fit one for appeal to a Division Bench can be made straightaway orally by the pleader, who thinks that his client should appeal, and that no written application is necessary in such a case. The pleaders should be encouraged to make such an oral application at the time, instead of later, when a written application will be necessary and arrangements will have to be made for a special sitting to hear the application by the Judge, who will probably then have forgotten the facts of the case. Such speed is necessary because the certificate that the case is a fit one for appeal can only be granted by the Judge who passed the judgment against which it is proposed to appeal. A.I.R. 1926 Rang. 1 (F.B.), **Foll.** 114 Ind. Cas. 241=52 Bom. 753=30 Bom. L.R. 942=A.I.R. 1928 Bom. 371.

——Cl. 15—Certificate—Refusal of—Appeal.

No appeal lies from the order of the single Judge refusing to make the declaration that the judgment is fit to be appealed against. The order making and refusing to make the declaration that the case is a fit one for appeal is in effect a part of the judgment on merits from which no appeal is provided by Cl. 15 of the Letters Patent. 32 Bom. L.R. 185=A.I.R. 1930 Bom. 224.

5. Commission.

—Cl. 15—Commission—Refused to issue.

An order refusing a commission is not one affecting the merits of the question between the parties by determining some right, it is purely an interlocutory order relating to procedure and not a judgment within Cl. 15. A.I.R. 1934 Bom. 168=36 Bom. L.R. 272=152 Ind. Cas. 264.

——Cl. 15—Commission—Refusal to issue.

'Judgment' means a decision affecting the merits of questions between parties by determining some right or liability. 'Judgment' does not include a formal order or order merely regulating the procedure. Order directing issue of Commission for examination of witnesses is not a 'Judgment' and hence no appeal lies from such order. Order of refusal of an application by plff. for a Commission to examine a witness resulting in dismissal of suit amounts to 'Judgment'. 11 Bom. L.R. 241=2 Ind. Cas. 157.

6. Committal for contempt.

——Cl. 15—Committal for contempt by single Judge of High Court—Appeal.

An order of a single Judge of the High Court committing a party to prison or ordering him to pay a fine, for contempt of Court, viz., disobedience of an order of the Court, is a "Judgment" within the meaning of Cl. 15 of the Letters Patent, and an appeal therefore lies from such order. It is a final order. A.I.R. 1948 Bom. 103=49 Bom. L.R. 709 (F.B.).

——Cl. 15—Committal for contempt—Comments on pending trial.

Comments upon a pending trial by persons, some of whom are parties to the suit and some of whom are not, is contempt of a criminal nature and an order passed on a notice of motion for an order for committal of one of the parties for contempt in such a case is an order made in the exercise of criminal Jurisdiction and is not appealable under Cl. 15. 35 Bom. L.R. 9=A.I.R. 1933 Bom. 108=(1933) Bom. 283=57 B. 286=143 Ind. Cas. 691.

7. Delay in filing appeal.

——Cl. 15—Delay in filing appeal — Order, excusing—Not Judgment.

An order excusing delay in the filing of an appeal does not prevent the rights of the parties from being adjudicated upon in the appeal. It is merely a procedural step restoring the appeal to a condition in which the rights of the parties could be decided finally by the Court. Hence such an order is not 'Judgment' within the meaning of Cl. 15, and is not appealable. A.I.R. 1940 Bom. 196=42 Bom. L.R. 377=I.L.R. (1940) Bom. 361=189 Ind. Cas. 79.

——Cl. 15—Delay in filing appeal—Order of Division Court refusing to excuse delay in applying for leave to appeal to Privy Council is 'Judgment.'

An order passed by a Division Court rejecting an application to excuse the delay in presenting an application for leave to appeal to His Majesty-in-Council beyond the period of limitation is a "Judgment" and is appealable as such under Cl. 15, Letters Patent. 80 Ind. Cas. 862=48 Bom. 442=26 Bom. L.R. 395=A.I.R. 1924 Bom. 399 (F.B.).

——Cl. 15—Delay in presentation of appeal—Refusal to excuse.

An order of a single Judge of the High Court refusing to excuse the delay in presentation of the appeal is in effect an order dismissing the appeal and is a 'judgment' within Cl. 15 of the Letters Patent (Bombay). 42 Bom. 260=20 Bom. L.R. 172=44 Ind. Cas. 913.

8. Judgment — What is.

——Cl. 15—"Judgment" — What is — Appeal—Test.

In order that an order made by a single Judge of the High Court sitting on the original side should be a "Judgment" within the meaning of Cl. 15 of the Letters Patent, it must affect the merits of the question between the parties by determining some right or liability. If a Judge misapprehends the extent of his jurisdiction and makes an order, the order would be subject to appeal, provided that order concludes the rights of parties. But if the order is merely procedural in character or interlocutory, without finally determining the rights of parties it does not amount to a "judgment" within the meaning of Cl. 15. A.I.R. 1949 Bom. 125=50 Bom. L.R. 711.

——Cl. 15 — Judgment — What is — Writ of certiorari.

An order passed by a Single Judge issuing a **writ of certiorari** to an Assistant Judge in respect of an application under S. 15, Bombay Municipal, Boroughs Act, heard by him as a **persona designata** is a judgment within the contemplation of Cl. 15.

An appeal lies under Cl. 15, against such an order which is passed, not under revisional jurisdiction, but under the original jurisdiction exerciseable not over the Subordinate Court but over other tribunals also. 46 Bom. L.R. 675=A.I.R. 1945 Bom. 7=I.L.R. (1944) Bom. 683.

——Cl. 15—'Judgment'—What is.

A finding on an issue, which does not merely regulate the procedure in the suit but goes further so as to decide some right affecting the merits of the question between the parties, amounts to a judgment from which an appeal lies under Cl. 15. 32 Bom. 602; 11 Bom. L.R. 241, Foll. 32 Bom. L.R. 285=A.I.R. 1930 Bom. 262.

——Cl. 15—'Judgment'—What is.

The term "judgment" in the Letters Patent of the High Court means in civil cases a 'decree' and not a judgment in the ordinary sense. 87 Ind. Cas. 313=6 L.R.P.C. 117=41 C.L.J. 628=1925 M.W.N. 474=22 M.L.W. 246=30 C.W.N. 459=23 A.L.J. 555=27 Bom. L.R. 872=2 O.W.N. 535=A.I.R. 1925 P.C. 155=49 M.L.J. 25 (P.C.).

See also 1933 A.L.J. 127=55 All. 326=A.I.R. 1933 All. 262=142 Ind. Cas. 331 (F.B.)

——Cl. 15—Judgment—What is—Order requiring security from a woman—Order of a single Judge sitting on the original side directing.

An appeal was against an order by a Judge sitting on the original side of the court requiring security from a

woman under S. 380 of the Code of Civil Procedure 1882. Such an order is a judgment within the meaning of Cl. 15 of Letters Patent. 10 Bom. L.R. 337.

——Cl. 15—Judgment—What is—Order, to take accounts.

An order deciding a question of right of a Judge sitting on the original side (i. e.) appointing a commissioner to take accounts is appealable. 33 Bom. 216=10 Bom. L.R. 488=2 Ind. Cas. 294.

9. Judgment—What is not.

——Cl. 15—"Judgment"—What is not—Order allowing amendment of plaint—Appeal.

An order allowing an amendment of a plaint is not "judgment" within the meaning of Cl. 15 of the Letters Patent, and no appeal lies from such an order under Cl. 15. 48 Bom. L.R. 252, foll. I.L.R. (1951) Bom. 145=A.I.R. 1950 Bom. 343=52 Bom. L.R. 381.

——Cl. 15—"Judgment"—What is not—Suit in ejectment on ground of breach of conditions of lease—Order allowing amendments of plaint including further breaches after suit—If appealable.

An order granting leave to a plaintiff in an ejectment suit to amend the plaint by inserting further breaches of conditions in the lease after suit as a ground of ejectment is not a "Judgment" within the meaning of Cl. 15 of the Letters Patent because it is not an order which affects the merits of the case; nor does it determine any right or liability. Hence such an order is not appealable. I.L.R. (1946) Bom. 756=227 Ind. Cas. 411=48 Bom. L.R. 252=A.I.R. 1946 Bom. 361.

——Cl. 15—"Judgment"—What is not—Order dismissing suit for non-prosecution and non-appearance of plaintiff—Appeal.

An order dismissing a suit for default of appearance of the plaintiff and for non-prosecution, under O. 9, R. 8, C P. Code, after the counsel for the plaintiff has withdrawn his appearance on refusal of an adjournment is not a "judgment" within the meaning of Cl. 15 of the Letters Patent and no appeal lies from such an order. The only remedy of the plaintiff in such a case is an application under O. 9, R. 9, C. P. Code. A.I.R. 1950 Bom. 355=52 Bom. L.R. 375.

——Cl. 15 — Judgment—What is not — Order refusing to commit person for breach of undertaking given to Court.

An order of the Court refusing to commit a man for breach of an undertaking given to the Court and embodied in the order of the Court cannot be said to be a judgment within the meaning of Cl. 15 since it does not affect the merits of any question between the parties and consequently, such an order is not appealable. A.I.R. 1936 Bom. 314=38 Bom. L.R. 571=60 B. 894=164 Ind. Cas. 335.

——Cl. 15—Judgment—What is not.

Where the plaint was amended and name of an individual substituted for the name of the firm, the order was held to be one for regulating procedure and hence not appealable under Cl. 15 of the Letters Patent. 38 Bom. L.R. 529.

——Cl. 15—Judgment—What is not.

An order refusing to declare a person as a lunatic on an application under S. 39, Lunacy Act is not a judgment within Cl. 15 and is not appealable. 35 Bom. L.R. 38=A.I.R. 1933 Bom. 112=57 B. 371=144 Ind. Cas. 100.

——Cl. 15—Judgment—What is not.

A decision under S. 10, Civil P. C., either to allow or to refuse a stay is one that really determines the right of the plaintiff to sue and is a judgment. 35 Bom. L.R. 15=A.I.R. 1933 Bom. 85=57 B. 364=143 Ind. Cas. 806.

——Cl. 15 — Judgment—What is not—Order extending time for sale of property.

An order fixing the date for the sale of partnership assets in a partnership action or extending the time for sale is not a judgment within the meaning of Cl. 15 and is not appealable. 34 Bom. L.R. 12=A.I.R. 1932 Bom. 134=56 B. 237=137 Ind. Cas. 456.

——Cl. 15—Judgment—What is not—Order refusing directions to third parties—Appeal.

An order refusing direction under Rr. 130 and 131 of the High Court Rules is not a judgment and not appealable. 22 Bom. L.R. 1169=A.I.R. 1921 Bom. 320.

——Cl. 15—"Judgment"—What is not—Order refusing to restrain deft. from prosecuting suit in a foreign Court.

An order refusing to restrain the deft. by an injunction from prosecuting his suit in a foreign Court is not a "Judgment" within Cl. 15 of the Letters Patent and no appeal lies from such an order. 21 Bom. L.R. 955=53 Ind. Cas. 395.

——Cl. 15—Judgment—What is not.

Order refusing to try and dispose of issues before first hearing of suit is not a Judgment and no appeal lies from such an order. 11 Bom. L.R. 245=2 Ind. Cas. 150.

——Cl. 15—Judgment—What is not.

An order by which directions under Rr. 130 and 131 of the High Court Rules are refused is not a "judgment" within Cl. 15 and no appeal lies against such order. 8 Beng. L.R. 433, Foll. 59 Ind. Cas. 533=45 Bom. 428=A.I.R. 1921 Bom. 320.

——Cl. 15—'Judgment'—What is not—C. P. C., S. 135—Order under.

An order under S. 135 of the Civil Procedure Code, discovery is not a 'judgment' within the meaning of Cl. 15 of the Letters Patent, and hence no appeal lies from such an order. 4 Bom. L.R. 342.

——Cl. 15—"Judgment"—What is not.

A suit should not be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed can never amount to a judgment and no appeal lies from such a decision. 92 Ind. Cas. 552=27 Bom. L.R. 1496=A.I.R. 1926 Bom. 136.

10. Leave to sue as pauper.

——Cl. 15—Leave to sue as pauper—Grant of.

An order giving leave to sue as a pauper determines no right as against the defendant in the suit and is not appealable under Cl. 15, Letters Patent (Bom.). A.I.R. 1943 Bom. 318=45 Bom.L.R. 602=I.L.R. (1943) Bom. 547=212 Ind. Cas. 637.

——Cl. 15—Leave to sue as pauper—Refusal—Order refusing leave to sue in forma pauperis.

An order of a Judge in Chambers refusing leave to sue in forma pauperis is a 'judgment' within the meaning of Cl. 15 and is appealable under the said clause. 32 Bom.L.R. 1647=A.I.R. 1931 Bom. 166=130 Ind. Cas. 24.

11. Leave to withdraw suit.

——Cl. 15—Leave to withdraw suit with liberty—Appeal.

An order made by a single Judge of the High Court on the Original Side, giving leave to the plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action, under O. 23, R. 1, C.P. Code, is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is appealable under Cl. 15. The rights of the defendant are affected by such an order, and an order which deprives the defendant of a valuable right is clearly a "judgment.". 22 Bom. L.R. 1012, foll. A.I.R. 1950 Bom. 378=52 Bom. L.R. 386.

——Cl. 15—Leave to withdraw suit—Appeal.

A pronouncement giving plff. liberty of withdrawing his suit made after recording evidence and hearing argument is a judgment within the meaning of Cl. 15. 45 Bom. 377=A.I.R. 1921 Bom. 267=22 Bom.L.R. 1012=58 Ind. Cas. 1004.

12. Sanction to prosecute.

——Cl. 15—Sanction to prosecute—Refusal of.

It is doubtful whether an order refusing to garnt a sanction to prosecute under S. 195, Cr.P.C., is a judgment within the meaning of Cl. 15. 68 Ind. Cas. 33=24 Bom. L.R. 817=23 Cr.L.J. 497=47 Bom. 270=A.I.R. 1922 Bom. 455.

13. Summary suit.

——Cl. 15—Summary suit—Leave to defend.

An order in a summary suit granting leave to defend on condition that the defendant deposited a certain amount in Court within a certain date is a judgment within the meaning of Cl. 15 and is appealable. 56 B. 268=34 Bom.L.R. 252=A.I.R. 1932 Bom. 163=137 Ind. Cas. 397.

——Cl. 15 — Summary suit—Order allowing transfer of to short causes—No appeal lies.

An order amending the title of a plaint by omitting the word "summary" from the same, and transferring the case to the short cause list, from the list of summary suit does not in any way affect the merits of the questions at issue between the parties by determining some right or liability. It is only an order regulating the procedure according to which the suit is to be tried. It is not therefore a judgment and no appeal lies. 86 Ind. Cas. 100=27 Bom.L.R. 99=A.I.R. 1925 Bom. 159.

14. Unrestricted inspection of documents.

——Cl. 15—Unrestricted inspection of document—Appeal.

No appeal lies against the order of Judge for unrestricted and full inspection of documents in the hands of receiver in the suit. 11 Bom. L.R. 248=2 Ind. Cas. 167.

15. Miscellaneous.

——Cl. 15—Miscellaneous.

Appeal provided by Cl. 15 is special jurisdiction within meaning of S. 4, Civil P.C. and is not affected by S. 104—Civil P.C. A.I.R. 1940 Bom. 216=42 Bom.L.R. 428=I.L.R. (1940) Bom. 426=189 Ind. Cas. 656.

——Cl. 15—Miscellaneous.

A right of appeal from one tribunal to another tribunal which is differently constituted stands on a different footing from the right to appeal from the judgment of a tribunal where only one Judge consititutes the tribunal to the same tribunal where two or more Judges constitute the same tribunal. The former creates not merely a remedial but a substantive right; the latter seems merely to regulate the procedure of the same tribunal. 114 Ind. Cas. 241=52 Bom. 753=30 Bom. L.R. 942=A.I.R. 1928 Bom. 371.

——Cl. 15—Miscellaneous—Reference to a third Judge—Concurrence in the decree but not in the reasons thereof—Appeal.

Where the Judge to whom an appeal is referred under the provisions of S. 575, C.P.C.(=S. 98 New Code) agrees with one of the differing Judges as to the result of the appeal, but the agreement does not proceed on the indentical lines of reasoning, there is no further appeal to the High Court against such decision under Cl. 15 of the Letters Patent. 6 Bom.L.R. 230.

——Cl. 15 — Miscellaneous—How far Cl. 15 controlled by S. 588, C.P.C.—S. 104 and O. 43, New Code.

S. 588 of the Civil Procedure Code, (1882) does not take away the right of appeal given by Cl. 15 of the Letters Patent. 4 Bom. L.R. 342.

——Cl. 17—Power to appoint guardian of minor co-parcener and sanction sale.

The power which the Bombay High Court exercises on its Original Side over minors is the power derived from the prerogative of the Crown as parens patrioe to protect subjects of the Crown who cannot protect themselves; and if that be the nature of the Court's jurisdiction, it is clear that it can only be limited as to subjects within the jurisdiction of the Court by the interest of the person to be protected. No doubt, an order which is likely to be infructuous would normally not be for the benefit of a minor; but if the Court thinks that it is for the benefit of the minor, it has jurisdiction to make such an order. The jurisdiction

of the Court to sanction a contract for the benefit of a minor extends, at any rate, to a minor resident within the Presidency of Bombay. Consequently, the Bombay High Court can appoint a guardian of a minor entitled to an undivided interest in coparcenary property and to sanction the sale of such property. But in such a case, no order dealing with property in which, the minor is interested can be passed behind the back of the minor. The minors should be made respondents to the petition, and should be represented by a guardian ad litem. Normally the guardian ad litem should be an officer of the Court because it would be difficult in most cases to find an independent member of the family to consider the interest of the minor. The guardian ad litem must satisfy himself as to the interest of the minor. He may, of course, require further evidence as to the alleged necessity, for the sale, and he may require further evidence as to the price being a good one and he will also have to consider how the proceeds of sale are to be dealt with. If he requires any funds to enable him to look into the matter properly, the parties seeking the order must provide those funds. The object of asking for orders of this sort is to enable the joint family to get a better price for its property, and they cannot complain, if they have to pay for the privilege. A.I.R. 1941 Bom. 397=43 Bom. L. R. 926=I.L.R. (1942) Bom. 39=197 Ind. Cas. 678 (S.B.)

——Cl. 19—Jurisdiction.

Per Marten, C. J.—Generally speaking the High Court has succeeded to the jurisdiction conferred upon its predecessor, the Supreme Court, by the Supreme Court Charter, 1823.

Though under Cl. 19 of the Letters Patent of 1865, the law and equity to be applied in each case coming before the High Court in the exercise of its Ordinary Original Civil Jurisdiction is the law or equity which would have been applied if the Letters Patent had not been issued, yet Cls. 11 and 12 govern the local limits of the Court's jurisdiction. In other words, the Court must first acquire jurisdiction under Cls. 11 and 12 before applying the law or equity applicable under Cl. 19. 104 Ind. Cas. 8=51 Bom. 516=29 Bom.L.R. 498=A.I.R. 1927 Bom. 278 (F. B.).

——Cl. 20 — Jurisdiction to appoint Special Commissioner—Vesting of property in the Special Commissioner—Procedure.

The Court has no power or jurisdiction whatever —inherent or conferred—first to appoint a Special Commissioner for sale of immovable property; secondly, to vest immovable property in a Special Commissioner, and, lastly, to empower any such Speical Commissioner to execute a conveyance of such property. 10 Bom.L.R. 1176.

——Cl. 26—Powers of High Court.

The power of the High Court to review a case is restricted to the point or points of law certified by the Advocate-General as involving an error and if the High Court comes to the conclusion that there has been no error with regard to the point or points of law mentioned in the certificate of Advocate-General, the High Court would have no power to go into any other question or to review the case generally even to the extent of altering the sentence. A.I.R. 1944 Bom. 274=46 Cr.L.J. 277=I.L.R. (1945). Bom. 52=46 Bom. L.R. 566=217 Ind. Cas. 255 (F.B.)

——Cl. 26—Powers of Court to review the whole case—Certificate of Advocate-General.

On the question whether the High Court can review the whole case and decide whether a confession of the accused was properly admitted by the learned trial judge when there was no certificate of the Advocate-General, under clause 25 of the amended Letters Patent, 1865, that it was wrongly admitted. Held, by Davar J. (Russel Ag. C.J., Chandavarkar and Batty, JJ. did not express their opinion) that in the absence of any reservation of the point by the trying judge as provided by Cl. 25 of the amended Letters Patent or of any certificate from the Advocate-General the court was precluded from reopening the question which was decided by the learned judge presiding at the trial. The words "review the case" in Cl. 26 must be read with the words that follow, viz., "or such part of it as may be necessary and finally determine such point or points of law." Under Cl. 26 the court is at liberty to review the case or part of the case for the purpose of determining the point or points of law, that are either reserved for our opinion or are certified by the Advocate-General to be wrongly decided. Beaman, J.—Where the Advocate-General has certified that a particular piece or pieces of evidence have been wrongly admitted, the Court of Reference constituted under Cl. 26 of the Charter has first to determine whether or not the certificate is well-founded, and if it decides that it is, then to deal with what remains of the evidence, after strking out what has thus been adjudged not to be evidence. If the party applying for the Advocate General's certificate has objected to another piece of evidence as wrongly admitted but the Advocate-General has refused to certify that in his opinion it was done so, then there are two opinions, his and that of the trying judge, in favour of the admissibility of the evidence and is and was indended to be enough. If the party did not object, and did not ask for a certificate in respect of evidence which is thus challenged for the first time after the trial, at the hearing before the Court of Reference, the objection comes too late. 32 Bom. 111=6 Cr.L.J. 164=9 Bom. L.R. 789 (F.B.)

——Cl. 26—Interference by High Court with verdict of jury.

The Language of Cl. 26, shows that the High Court must first be satisfied that there has been an error in the decision of a point or points of law or that there is a point of law requiring further consideration before any question can arise of interference with the verdict of the jury. In order to justify interference, the point of law in question must obviously be a substantial and important one; and it must appear that there has been some error by which the accused has been prejudiced and the fair trial of the case affected. A.I.R. 1943 Bom. 150=45 Bom. L.R. 281=44 Cr.L.J. 534=206 Ind. Cas. 592 (F.B.).

——Cl. 26—Conviction, when set aside.

It is not essential, whenever there has been some error of law, to set aside the conviction, but undoubtedly, the High Court must set aside the conviction, if it thinks that the error of law has prejudiced the accused. If it thinks that the error of law has not prejudiced the accused, then the conviction can stand. A.I.R. 1942 Bom. 71=44

Bom. L.R. 27=43 Cr.L.J. 529=I.L.R. (1942) Bom. 384=199 Ind. Cas. 202 (F.B.).

——Cl. 29—Jurisdiction of Bombay High Court to transfer criminal case from Aden Resident's Court.

The Bombay High Court has power to transfer to its own file a criminal case from the file of the Resident's Court at Aden. 7 Bom. L.R. 104=29 Bom. 575.

——Cl. 29—Village Magistrate's proceedings—Jurisdiction to quash.

Bombay High Court has no power to quash proceedings before Village Patil under Cr. P. C. but it has such power under the Letters Patent. 10 Bom. L.R. 630, Rel. 21 Bom. L.R. 274=20 Cr.L.J. 315=50 Ind. Cas. 491.

——Cl. 35—Restitution of conjugal rights—Bombay High Court has jurisdiction to entertain suit for restitution of conjugal rights by Christian lady against her Parsi husband.

While enacting the Divorce Act the intention of the Legislature was to enact it in such a way as to remove the limitation contained in Cl. 35, Letters Patent. The Divorce Act intended it to be sufficient for one party to profess the Christian religion and did not require that both parties should do so. The Bombay High Court, has, therefore, jurisdiction to entertain a suit for restitution of conjugal rights instituted by a lady, who is a Russian and a Christian, against her husband who is a Parsi. 38 Bom. 125; 20 Ind. Cas. 492, **Overruled.** 32 Bom. L.R. 1046=A.I.R. 1930 Bom. 385 (F.B.).

——Cl. 36—Decision of Single Judge, whether binding on other Single Judge.

Ordinarily, Single Judge of the High Court should follow the decision of another Single Judge of the same High Court as a Court of co-ordinate jurisdiction, leaving it to the Court of Appeal to say whether or not that decision is wrong. 46 Bom. L.R. 818=A.I.R. 1945 Bom. 110.

——Cl. 36—Difference of opinions—Appeal from a single Judge's decision—Bench hearing it differing—Opinion of senior prevails.

The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the Civil Courts of the mofussil subject to the High Court would be the the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on Cl. 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Further the Code only deals with appeals from certain Courts and does not deal with appeals within the High Court from the decision of one Judge of the Court to another. Therefore when a Bench of two judges is hearing an appeal from the decision of a single Judge of the same High Court whether on the original side or the appellate, and they differ in opinion, the opinion of the senior Judge would prevail. 26 All. 10; A.I.R. 1921 P.C. 6, Ref. 76 Ind. Cas. 317=A.I.R. 1923 Bom. 218.

——Cl. 36—Difference of opinion—Second appeal.

On a difference of opinion between an appeal from the mofussil the procedure is governed by S. 98, C. P. Code and not by Cl. 36 of the Letters Patent. 43 Bom. 433 and 492=21 Bom. L.R. 157=50 Ind. Cas. 715 (F.B.).

——Cl. 36—Difference between judges—Execution—Delivery—Obstruction.

See 3 Bom. L.R. 58=25 B. 478.

——Cl. 36—Scope.

Cl. 36 of the Letters Patent of Bombay is not controlled by S. 98 of the C. P. Code. 60 Ind. Cas. 822=45 Bom. 718=48 I.A. 181=19 A.L.J. 409=23 Bom. L.R. 623=33 C.L.J. 488=25 C.W.N. 605=14 M.L.W. 7=1921 M.W.N. 408=A.I.R. 1921 P.C. 6 =40 M.L.J. 519 (P.C.).

——Cl. 37 does not empower High Court to make rules with respect to Subordinate Courts.

Cl. 37 of the Letters Patent does not empower the High Court to make rules and orders for the purpose of regulating proceedings in civil cases in the Courts subordinate to it. For the purpose the High Court must resort to S. 122 of the Civil P.C. or S. 224 (1) (b), Government of India Act, 1935. A.I.R. 1946 Bom. 174=47 Bom. L.R. 808=I.L.R. (1945) Bom. 819=224 Ind. Cas. 210.

——Cl. 39—Application of legal representative to be brought on record—Merely interlocutory—Whether appeal lies to Privy Council.

An order of the High Court rejecting the application of a legal representative to be brought on record not being final, but interlocutory, no appeal from the order lies to the Privy Council. 38 Bom. 421=16 Bom. L.R. 195=23 Ind. Cas. 373.

——Cl. 39—"Final Judgment"—Finality of judgment—Order in Civil extraordinary application—No final disposal of rights—Order is not a final order or a final judgment.

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty-in-Council was really passed on the Civil extraordinary application, but it did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning S. 109 (a) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent. 79 Ind. Cas. 210=A.I.R. 1923 Bom. 39.

——Cl. 39—"Final Judgment"—Reference under Income-tax Act.

The decision of the High Court on a reference from the Chief Revenue Authority under S. 51 of the Indian Income-tax Act (VII of 1918) is a judgment within the meaning of Cl. 39 of the Letters Patent. 64 Ind.Cas. 931=23 Bom. L.R. 1102 =A.I.R. 1921 Bom. 128.

——Cl. 39—Final judgment or order.

An award made in a Land Acquisition case by the High Court is not a decree. Nor is it a final judgment or order within the meaning of S. 39 of the Letters Patent. 37 Bom. 506=14 Bom. L.R. 1194=17 Ind. Cas. 952.

[See on Appeal 20 Ind. Cas. 76 B. (P.C.)]

——Cl. 39—Land Acquisition case—Leave to appeal to Privy Council.

Where there is no appeal in a Land Acquisition case, Cl. 39 of the Letters Patent does not make the order of the High Court appealable. 17 C.W.N. 421=20 Ind. Cas. 763 (P.C.)

(On appeal from 37 Bom. 506=14 Bom. L. R. 1194=17 Ind. Cas. 952.)

——Cl. 39—Scope.

Cl. 39 first refers to a final judgment, decree or order made on appeal, i e., made on appeal on the Original Side or under the Civil P.C., or appeals from the mofussil and the latter part of Cl. 39 refers to a final judgment, decree or order of the High Court in the exercise of its orginal jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the High Court under Cl. 15. 33 Bom. L.R. 1476=55 B. 785=A.I.R. 1932 Bom. 90=136 Ind. Cas. 183.

——Cl. 39—Scope.

High Court decree in pursuance of directions from Privy Counsel—Decree cannot be said to have been passed on appeal to the High Court—No leave to appeal to Privy Counsel can be granted either under Cl. 39 or S. 109, Civil P.C. 33 Bom. L.R. 1476=55 B. 785=A.I.R. 1932 Bom. 90=136 Ind. Cas. 183.

——Cl. 39—Scope.

Under S. 111, Civil P.C., no appeal lies to His Majesty in Council from decree or order of one Judge of a High Court passed in exercise of appellate or revisional jurisdiction. To this extent S. 111 overrides Cl. 39, Letters Patent. A.I.R. 1931 Bom. 503=32 Bom. L.R. 1106=134 Ind. Cas. 1164.

——(Calcutta.)

Per Sen, J.—It is true that the Letters Patent is not an Act, but it is granted by the Sovereign by virtue of an Act passed by the Parliament and it should be construed in the same way as an Act. 44 Cr.L.J. 673=A.I.R. 1943 Cal. 285=207 Ind. Cas. 481 (S.B.)

——Cl. 10—Attorney, procedure for striking attorney's name off the file.

There is no special procedure for disciplinary action of the Court. The English Procedure cannot be adopted in its entirety. Proceedings should be initiated by a rule, motion or notice calling upon the attorney to answer the matter in the affidavits of the applicant; service should be personal, and ordinarily a day should be given for the notice to be returned. Disciplinary action rests on the principle that the Court deems a person unfit to act as an attorney and not by way of punishment. A case of suspicion is not enough to justify disciplinary action. 41 Cal. 113=14 Cr.L.J. 305=19 Ind. Cas. 993.

——Cl. 10—Misconduct of pleader.

Pleader accepting client's vakalatnama and papers but not filing the appeal—No specific agreement exempting him from liability in case of non-payment of fees—Pleader also not subsequently trying to file an application to get extension of time—Pleader's action amounts to not ordinary negligence but to grave professional misconduct. 114 Ind. Cas. 490=A.I.R. 1928 Cal. 820 (F.B.).

——Cl. 10—Clearest evidence of misconduct is necessary under the section.

It is not every reprehensible conduct that necessarily amounts to that professional misconduct which entails the serious result of being struck off the roll of solicitors or suspended, or otherwise dealt with by the Court, and in respect of applications under S. 10 of the Letters Patent the Court cannot be too much careful in scrutinizing the materials upon which the jurisdiction of the Court is invoked. At all times it is a serious matter, and the machinery of the Court ought not to be set in motion, except upon the clearest evidence of professional misconduct. 91 Ind. Cas. 142=52 Cal. 795=A.I.R. 1925 Cal. 1084.

——Cl. 10—'Any reasonable cause'—Removal of advocates, etc.—Misconduct other than professional misconduct.

Under Cl. 10 of the Calcutta Letters Patent an Advocate, Vakil or Attorney can be removed for any misconduct not connected with his professional business. 6 C.W.N. 556=29 C. 890 (F.B.)

——Cl. 10—Pleadership Examination—Jurisdiction of Court over Board of Examiners.

See 28 C. 479.

——Cl. 11—If controls Cl. 34.

Cl. 11 cannot be interpreted to control Cl. 34. A.I.R. 1944 Cal. 433=I.L.R. (1943) 2 Cal. 554.

——Cl. 11—Suit in Small Cause Court on pro-note—Suit by defendant on a running account in the High Court—Pro-note not an item in running account—Stay of small cause suit.

Where a certain person institute a suit on a pro-note in the Small Cause Court and the defendant therein afterwards filed a suit for accounts in the High Court as against the plaintiff in the small Cause Court and applied to the High Court for a stay of proceedings in the Small Cause Court:

Held, that though not as a matter of right, but still as a matter of convenience a stay may be granted, on the applicant furnishing security in respect of the total amount of the indebtedness irrespective of the question whether the suit for the accounts is vexatious or not, it being competent to the court to deal with such suit where the pro-note sued upon prima facie does not appear to be an item in the running account. 30 Q. 627.

——Cl. 11—Jurisdiction of High Court—Temporary injunction against party litigating in another province—It can be granted.

Where two different suits are pending between the same parties in Calcutta and in Madras and some of the issues are common to both the suits, the Calcutta High Court in its original side has inherent power to grant a temporary injunction apart from the provisions of C.P. Code restraining the party before it from proceeding with his suit in Madras. But the Court will not exercise such power unless it is satisfied that the Madras suit is vexatious and an oppressive multiplication of actions, the burden of proving which is on the party applying for the injunction. 24 C.W.N. 735 and 49 C.W.N. 172, foll. 53 C.W.N. 398=84 C.L.J. 18.

——Cl. 11—Jurisdiction—Temporary injunction restraining defendant from proceeding with suit in another Court.

In a case to which S. 10, C. P. Code, does not apply, the Calcutta High Court has inherent powers to issue a temporary injunction apart from the provisions of C.P. Code, restraining the defendant in the suit before it from proceeding with a suit previously instituted by him in another Court, and the exercise of this power is not limited to persons residing within its jurisdiction. The Court will not exercise such inherent power on the ground of convenience alone. It must be satisfied that the other suit is vexatious and an oppressive multiplication of actions and that the plaintiff in that suit could not obtain any advantage, by proceeding with that suit that he would not obtain in this Court. A further matter which must always be relevant when a temporary injunction is asked for is whether the party who seeks that injunction has come to the Court at the earliest opportunity to seek his remedy. I.L.R. (1945) 2 Cal. 298=A.I.R. 1949 Cal. 357.

——(Cal.) Cl. 12.

Synopsis.

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1. Applicability.

——Cl. 12 — Applicability — Suit for money instituted with leave of Court—Decree based on agreement adjusting claim creating charge on property outside jurisdiction and empowering its sale in execution—Validity.

In a suit for money instituted in the High Court in its ordinary original jurisdiction after obtaining leave under Cl. 12 of the Letters Patent, a decree was passed on the basis of an agreement adjusting the claim in the suit by which a charge was created upon immovable property situated outside the limits of the Court's territorial jurisdiction and the decree-holder was empowered to enforce the charge in execution without recourse to a fresh suit.

Held, that the agreement in suit was a lawful agreement as it related to the suit and the decree passed pursuant to it was not a nullity but was valid and capable of execution. An agreement of compromise can validly include matters which are not the subject-matter of a suit and so long as the agreement relates to the suit, the Court has authority, or jurisdiction under O. 23, R. 3, C.P. Code, to pass a decree in accordance with its terms. I.L.R. (1946) 1 Cal. 559=50 C.W.N. 447=A.I.R. 1946 Cal. 559.

——Cl. 12—Applicability—Suit for partition of Hindu joint family properties filed after obtaining leave of Court—Minor sons of defendant subsequently added as parties—Fresh leave, if necessary.

Where a suit for partition of the properties of a joint Hindu Mitakshara family has been instituted after obtaining leave of the Court under Cl. 12 of the Letters Patent, fresh leave under that clause need not be obtained if the minor sons of one of the defendants are subsequently added as parties to the suit. The minor sons are already, dormantly as it were, parties to the suit being represented in the suit by the karta of their family. In a partition suit among the members of a Mitakshara family there can be no change of cause of action when a person already represented by his karta is brought on the record. I.L.R. (1947) 2 Cal. 73.

——Cl. 12—Applicability.

Secretary of State is not body corporate—Suit by Govt. servant for wrongful dismissal—Plaintiff's entire service in district outside Calcutta High Court's jurisdiction—High Court has no jurisdiction to entertain suit. A.I.R. 1941 Cal. 553=197 Ind. Cas. 331.

——Cl. 12—Applicability.

S. 92, Civil P.C., must be taken as overriding Cl. 12 of Letters Patent (Calcutta). The High Court has no jurisdiction to try a suit under S. 92,

Civil P. C., when no part of subject-matter of the trust is whithin its jurisdiction. A.I.R. 1932 Cal. 444=59 C. 357=137 Ind. Cas. 808.

——Cl. 12—Applicability.

A suit for judicial separation was brought by the wife against her husband. The parties were members of the Jewish community and professed the Jewish religion. The wife took out summons for an order on the husband to pay to the wife a certain sum on account of and towards the costs of the suit.

Held, that neither Cl. 35, Letters Patent (Calcutta) nor the Divorce Act applied to the case, but the suit came within the ordinary original civil jurisdiction of the High Court under Cl. 12, Letters Patent, and the procedure as regards payment of costs was that laid down by C. P. Code, of which S. 35 did not give the Court power to direct the order prayed for. 34 C.W.N. 319= A.I.R. 1930 Cal. 558.

——Cl. 12—Applicability.

Although the legislature had power in 1908 to override the Letters Patent the legislature has not by introducing S. 21, C. P. Code, overridden the provisions of Cl. 12. 120 Ind. Cas. 577=49 C.L.J. 212=56 Cal. 940=A. I. R. 1929 Cal. 358.

2. Application for grant or revocation of grant.

——Cl. 12—Application for grant or revocation of leave already granted—Principles applicable—Doctrine of forum conveniens—Cause of action founded on assignment of claim. (Copy from 41—45 Q.D.) I.L.R. (1945) 2 Cal. 333=A.I.R. 1949 Cal. 195.

3. Carrying on business.

——Cl. 12—Carrying on business—Meaning.

Where a suit for damages for alleged breach of contract entered into beyond the local limits of the High Court's Ordinary Original Civil Jurisdiction, plaintiff contended that the suit was maintainable within such jurisdiction as the deft. was carrying on business within the local limits of the said jurisdiction of the Court by virtue of an agreement of managing agency between him and a certain company which had its office in the Town of Calcutta.

Held, that the plaintiff's contention failed and the suit was not maintainable. The mere facts that he granted certain rights to a firm in Calcutta does not mean he carried on his business there. 24 C.W.N. 582=31 C.L.J. 327=57 Ind. Cas. 211.

——Cl. 12—Carrying on business.

A contract was signed by the manager of the deft.'s business in Calcutta, the deft. himself was resident of Singapore. The deft. can be sued in his firm's name for damages for breach of the contract in the Original Side of the High Court. 10 Ind. Cas. 895 (Cal.)

4. Cause of action.

——Cl. 12 — Cause of action—Leave under—When can be granted.

Usually, it is not right to grant leave in a case where the part of the cause of action on which the jurisdiction depends, is a matter with which the defendants have had nothing to do. Such a hard and fast rule cannot be laid down but generally speaking, when people take an assignment of a promissory note, they should be prepared to enforce their claim either in the Court within whose jurisdiction the makers reside or in a jurisdiction where a part of the cause of action with which the makers are directly concerned has arisen.

Consequently, where the only cause of action which arises within the jurisdiction is the assignment of the promissory note in suit, leave under Cl. 12 should not be granted; the balance of convenience demands that the litigation should be conducted either in the Court within whose jurisdiction the defendants reside or in the Court within whose jurisdiction the document sued upon was executed. A.I.R. 1936 Cal. 219=40 C.W.N. 164= 63 C. 526=162 Ind. Cas. 287.

——Cl. 12—Cause of action.

Pro-note assigned in favour of plaintiff—Defendant having no notice—Plaintiff has cause of action—Leave under Cl. 12 can be granted—Held, on facts, that the case was not fit for grant of leave. A.I.R. 1936 Cal. 349=40 C.W.N. 161=63 C. 435=63 C.L.J. 199=163 Ind. Cas. 167.

——Cl. 12—Cause of action—Assignment in Calcutta but debt contracted outside jurisdiction of Original Side of High Court.

In a suit by an assignee, the assignment is a part of the cause of action, and upon that cause of action, leave under Cl. 12 is invariably granted. For practical purposes, it is impossible before the hearing of the suit to decide whether an assignment is or is not bona fide. The Court will not be justified, on a mere suspicion that the assignor might not have acted in the ordinary way of business, in depriving the plaintiff of the right to bring a suit in the place where the assignment was made. 37 C.W.N. 1139=A.I.R. 1934 Cal. 175=148 Ind. Cas. 442.

——Cl. 12—Cause of action—Holder of negotiable instrument—Discrimination on basis of hardship and humanity between plaintiffs and defendants, if exists-Private individual, holder of instrument, if can be treated on different footing from commercial man.

With regard to holders or assignee of a negotiable instrument under Cl. 12, there is no discrimination between plaintiffs and defendants who are interested in negotiable instruments, on the ground of hardship or humanity or even on the ground of legitimate collusion to assign; nor can a private individual who is a holder of a bill of exchage or a pro-note be treated on a different footing in law to a commercial man through whose hands instruments of negotiability are daily passing. 63 C. 908=40 C.W.N. 717=164 Ind. Cas. 904.

——Cl. 12—Cause of action arising wholly outside jurisdiction—Secy. of State—Suit against.

The Secy. of State for India in Council does not dwell or carry on business, or personally work for gain within the local jurisdiction of the High Court at Calcutta. Where the cause of action for a suit arises wholly out of the ordinary original civil jurisdiction of the Calcutta High Court, the Court has no jurisdiction to entertain the suit against the Secy. of State for India in Council. 14 C. 256, Foll. 40 Cal. 308=21 Ind. Cas. 1.

On appeal from 16 C.W.N. 747=15 Ind. Cas. 955.

——Cl. 12—Cause of action—Consideration illusory.

A promise to forbear from suing on an award for the amount awarded during a certain time in consideration of payment of a portion of the sum awarded is not supported by consideration and a plea that a suit is premature on that ground is not good; a suit based solely upon a cause of action alleged to have arisen out of such a transaction will not lie under Cl. 12 of the Letters Patent in the Original Side of the High Court. 31 C. 274=8 C.W.N. 207.

——Cl. 12—Cause of action—Suit for damages—Breach of agreement.

An agreement by a defendant that he will jointly and in participation with the plaintiff "look after and manage" certain appeals filed by the plaintiff in the High Court, and will bear a moiety of the costs, to be incurred therefor, does not necessarily give jurisdiction to the Original Side of the High Court to entertain a suit to recover damages for breach of such agreement. Where the agreements were executed where the parties resided and the property affected by them was in the mofussil, the High Court has no jurisdiction to entertain a suit based on such agreements, unless they contemplated something which necessarily had to be performed within the jurisdiction, e. g., the instructions must necessarily be given or the costs incurred must necessarily be paid within the jurisdiction. 1 C. L. J. 219.

5. Concurrent jurisdiction of High Court.

——Cl. 12—Concurrent jurisdictions of High Courts in India—Jurisdiction of—To restrain trial of suit—Injunction—Foreign Court.

The jurisdiction of the High Court is what was formerly possessed by the Supreme Court at Calcutta and continued to it by the Indian High Courts Act, 1861. (24 and 25 Vict. C. 104) Viz. over Bengal, Behar and Orissa; and for the purpose of restraining suits, any court outside such jurisdiction is to be considered a foreign court.

A court can restrain a person from proceeding with a suit in a foreign Court, only when the person sought to be restrained is within its jurisdiction and not otherwise, so that in the event of an injunction being granted against him and disobeyed by him, he would be subject to the process of that court and for contempt. 13 C.W.N. 346=1 Ind. Cas. 927=36 C. 233.

6. Construction.

——Cl. 12—Construction.

The construction of Cl. 12 upon which all the High Courts are are agreed is that as regards suits for land the High Court can take cognizance if the land is situate wholly within the local limits or where the land is situate in part only within such limits if leave has been first obtained; and that as regards suits other than those for land the High Court has jurisdiction if the cause of action has arisen in part only within the limits if the leave of the Court shall have been first obtained or if the defendant dwells or carries on business or personally works for gain within these limits. 120 Ind. Cas. 577=49 C.L.J. 212=56 Cal. 940=A.I.R. 1929 Cal. 358.

7. Contract—Breach.

——Cl. 12—Contract—Breach—Cause of action—Forum.

X and Y. respectively carrying on business in Cawnpore and Calcutta agreed to accept for accommodation of Z.'s firm in Cawnpore a hundi drawn on X and Y in Calcutta by one A in Delhi in favour of B, also in Delhi and in the case of payment by acceptors of the amount of the said hundi to debit the same to the accommodation party Z.'s firm. The acceptors sued the accommodation party to recover the amount of the said hundi which was duly accepted and the amount of which paid to B in Calcutta.

Held, that the plffs.' cause of action would not be complete unless they proved the fact that they had accepted the hundi in Calcutta in accordance with their undertaking to the drawers of the hundi and paid the bill into Calcutta on due date, in accordance with their acceptance. As part of cause of action arose within the local limits of the ordinary original jurisdiction of the High Court the said Court had jurisdiction to hear the case. 47 Cal. 583=59 Ind. Cas. 539.

8. Damages for conversion of land.

——Cl. 12—Damages for conversion of land.

In a suit for damages for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the tort-feasor, who resides in Calcutta, can be properly maintained in Calcutta High Court. 13 B.L.R. 91, Dist. 116 Ind. Cas. 727=32 C.W.N. 208=A.I.R. 1928 Cal. 887.

9. "Dwells or resides".

——Cl. 12—Dwells or resides.

Question whether a person resides at a place at a certain time is one of fact—Defendant having permanent residence in Calcutta at all material times—Residence at Calcutta house whenever he liked—Held, he dwelt or resided there within the jurisdiction of the Court at time of commencement of suit. 40 C.W.N. 65=164 Ind. Cas. 907.

——Cl. 12—'Dwelling or carrying on business.'

The dwelling or carrying on business must be of all the defendants. The expression is used not as indicating an individual defendant in a suit, but the party defendants to the suit, which may be one person or several. 13 B.L.R. 91, Foll. 104 Ind. Cas. 721=54 Cal. 655=A.I.R. 1927 Cal. 768.

10. Grant of leave.

——Cl. 12—Grant of leave—Discretion.

If a suit is properly framed, so as to embrace land partly within and partly without the local limits, it is, in all cases, a question of the discretion of the Court and if the Court exercises the discretion in favour of entertaining the suit, the jurisdiction cannot be questioned. The Court's discretion to grant leave under Cl. 12 is not necessarily ousted by the fact that some of the defendants are interested only in lands outside the jurisdiction. A.I.R. 1933 Cal. 295=60 C. 54=144 Ind. Cas. 792.

——Cl. 12—Grant of leave—Contention by defendant that no part of cause of action arose within jurisdiction—Proper procedure.

Where the defendant contends that no part of the cause of action arose within the jurisdiction of the Court and that leave under Cl. 12 of the Letters Patent ought not to have been granted, it is questionable whether in such a case an application for revocation of the leave granted is really the proper course. The proper procedure in such circumstances is to settle an issue, namely, whether the plaint discloses a cause of action which the Court has jurisdiction to try, and to try it as a preliminary issue in the suit. 50 C.W.N. 624.

——Cl. 12—Grant of leave — Propriety challenged—Proper course.

It is well settled that where leave has been granted under Cl. 12 of the Letters Patent and the propriety of the grant is challenged, the proper course is for the defendant to apply at the earliest opportunity for revocation of the grant. He cannot be permitted in the course of execution proceedings to claim that the decree was without jurisdiction on this ground. 224 Ind. Cas. 381=50 C. W. N. 548=A.I.R. 1947 Cal. 364=82 C. L.J. 131.

——Cl. 12—Grant of leave—Objection—Waiver—Conduct.

Where by inadvertence, leave under Cl. 12 of the Letters Patent declared by the Registrar was not endorsed in the plaint held that it could not be endorsed subsequently, as at the date on which the plaint was presented for admission. Leave declared by the Registrar is not a proper leave. An objection as to want of such leave might be waived and would be considered to have been waived if the defendant had taken any steps in furtherance of the suit to its trial. 17 C.W.N. 512=18 Ind.Cas. 898.

——Cl. 12—Grant of leave.

The Calcutta High Court cannot under Cl. 12 grant leave to enforce a cause of action regarding properties partly within and partly without the ordinary original civil jurisdiction and so a decree affecting properties without those limits is void. A mortgagee of property situate in mofussil by mortgaging his mortgagee interest together with a property in Calcutta can sue his mortgagor in the original side of the Calcutta High Court where a suit between himself and mortgagee, i. e., sub-mortgagee can be properly brought. 31 C.L.J. 272 =24 C.W.N. 633=56 Ind. Cas. 532.

——Cl. 12—Grant of leave—Grant by Registrar—Objection—When to be raised.

The objection that the leave was granted by the Registrar or a Master is one which can be waived by the defendant by taking any step in the proceedings before applying to have the action dismissed. 7 C.L.J. 441=12 C.W.N. 705=35 C. 394.

——Cl. 12—Grant of leave—Delegation to Master or Registrar "ultra vires".

The granting of leave under Cl. 12 of the Charter being a judicial act cannot be delegated to a ministerial officer and Rule 515-A of the Rules and Orders of the Calcutta High Court, in so far as they authorize the Registrar or Master to grant such leave is ultra vires. 11 C.W.N. 649=5 C.L.J. 405=34 C. 619 (F.B.).

See also: 11 C.W.N. 663.

11. High Court—Original jurisdiction.

——Cl. 12—High Court—Original jurisdiction—Effect of amendment of S. 144, Bengal Tenant Act by Amendment Act IV of 1928.

Jurisdiction of the High Court on original Side under Cl. 12 is not taken away by the amendment of S. 144, Bengal Ten. Act by the Bengal Ten. Amendment Act IV of 1928, which is a provincial. Act. 49 C.W.N. 552=A.I.R. 1945 Cal. 425=I.L.R. (1946) 1 Cal. 21.

——Cl. 12—High Court—Original jurisdiction.

S. 20, Civil P.C., has no application to cases brought on the Original Side of the Calcutta High Court. The jurisdiction of the Original Side of the High Court is not given to it by S. 21, Civil P.C., but by Cl. 12. To ascertain whether the Court has jurisdiction, evidence has to be given as to whether the requirements of that Cl. 12 have been satisfied. When that evidence is given, the Court may decide whether it has jurisdiction or not. If the High Court has jurisdiction to entertain the suit, there is no need to invoke the aid of S. 21 of Civil P.C. If the Court has no jurisdiction to entertain this suit, then the judge in the Court of first instance, has no jurisdiction to hear the case and the High Court sitting as an Appellate Court has no jurisdiction to entertain the appeal. That being so, the High Court has no jurisdiction to consider the matter and has no jurisdiction to apply S. 21, Civil P.C. If the High Court finds that the Court has no jurisdiction under the Letters Patent, S. 21, Civil P.C., cannot give it jurisdiction. 40 C.W.N. 65=164 Ind. Cas. 907.

——Cl. 12—High Court—Original Side—Limited territorial jurisdiction—Fictitious entry in mortgage—Not effective to give jurisdiction—Decree of High Court—Nullity.

The High Court in its original side, is a court of limited territorial jurisdiction. Consequently, it has no jurisdiction to try a suit on a mortgage if the parties thereto included a fictitious item of property situate in the city of Calcutta, merely with a view to give jurisdiction to the Registrar of Calcutta and the properties really intended to be mortgaged were situate wholly outside the limits of the original jurisdiction of the High Court. Where in a suit on such a mortgage, the Court allowed the description of the property to be amended so as to substitute an actually existing property within its jurisdiction for the fictitious item and then passed a decree. Held, that the decision that the High Court had jurisdiction, being erroneous could not extend its limited territorial jurisdiction and neither the direction to amend nor the decree could bind strangers who had acquired title in the property before the date of the amendment nor render the registration valid. Quaere.—Whether such amendment was within the scope of the suit which was not one for rectification. 41 Cal. 972=41 I.A. 910=1 L.W. 1050=27 M.L.J. 80=(1914) M.W.N. 462=16 M.L.T. 6=18 C.W.N. 817=19 C.L.J. 484=16 Bom. L.R. 400=12 A.L.J. 774=23 Ind. Cas. 637 (P.C.).

——Cl. 12—High Court on its original side to set aside decree of mofussil Court on the ground of fraud.

The High Court has jurisdiction under Cl. 12 of the Letters Patent. and Ss. 11 and 17, C.P.C., to entertain a suit to set aside a decree of a mofussil Court on the ground of fraud. The suit being one by a legatee under a will for the administration of her share in the estate, and for declaration that certain leases given by the executors to themselves could not stand as against her, is not a suit for land. 7 C.W.N. 353=30 C. 369.

12. Immovable property.

——Cl. 12—Immovable property — Mortgage decree.

A mortgage decree and an assignment of it are immovable properties. I.L.R. (1945) 2 Cal. 526=A. I. R. 1949 Cal. 549.

13. Injunction.

——Cl. 12—Injunction.

A suit for injunction with the object of preventing the defendant from taking movable property belonging to plaintiff and lying on land outside the jurisdiction of the Court is not suit for land outside the jurisdiction and the relief can be granted. A.I.R. 1942 Cal. 382=46 C.W.N. 522=201 Ind. Cas. 525.

——Cl. 12—Injunction when part only of the preperty is situate within jurisdiction.

The High Court may entertain an action in respect of immovable property, provided that a portion of such property is within the jurisdiction. Where, although but a portion of the estate regarding which certain declarations and injunctions are sought in an action are within its jurisdiction, the High Court has power to grant the same declarations and injunction as regards the whole estate. 12 C.W.N. 1065=I Ind. Cas. 514=36 Cal. 28.

14. Jurisdiction before 1908 C P Code.

——Cl. 12—Jurisdiction before 1908.

The jurisdiction of the High Court as is stood in 1908 when the Civil Procedure Code was republished depended upon S. 9, High Courts Act of 1861. It was to have such power and authority as Her Majesty may by Letters Patent grant and direct. 120 Ind. Cas 577=49 C.L.J. 212=56 Cal. 940=A.I.R. 1929 Cal. 358.

15. Jurisdiction to pass decree in personam.

——Cl. 12—Jurisdiction to pass a decree in personam regarding property outside its jurisdiction.

Both in India and in England the High Courts, for the purpose of doing equity, possess jurisdiction to pass decrees **in personam** which may affect immovable property situate beyond the jurisdiction of the Court. But while this jurisdiction in equity is to be exercised at the discretion of the Court, the Court will act in compliance with limitations upon its discretion which have long been established. Moreover, the Court will not pass a decree **in personam** which indirectly affects foreign land unless the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction. It will not pass a decree that will operate in the Courts **loci situs** merely as a **brutum fulmen** (law which is not respected or obeyed.) 104 Ind. Cas. 721=54 Cal. 655=A.I.R. 1927 Cal. 768.

——Cl. 12—Jurisdiction to pass decree regarding property outside jurisdiction.

The suit was for the construction of a will and declaration of the rights of parties under it and for a declaration of the plaintiff's immediate and absolute right to some movables, and immovables not situate within the jurisdiction of the court. Probate had been granted by the court to the executrix who was the chief defendant in the case. **Held,** that the suit was one for land within the meaning of S. 12 of the Letters Patent and was not cognizable by the High Court. **Held also,** that the test was not whether the courts of equity exercise jurisdiction in similar cases, but whether it comes within the terms of the section. 29 C. 315.

16. Leave to sue.

——Cl. 12—Leave to sue.

Decree against company having office at Calcutta obtained in Lahore—Petition in Calcutta for winding up of company on basis of decree—Suit for declaration that decree is nullity—Cause of action partly arises at Calcutta and leave can be granted under Cl. 12. A.I.R. 1943 Cal. 172=I.L.R. (1942) 1 Cal. 562=207 Ind. Cas. 581.

——Cl. 12—Leave to sue.

Where leave to sue under Cl. 12 is craved, particulars of the grounds upon which the application is made must be set out with sufficent clearness in the plaint, to enable the Court or its officer to ascertain whether leave is necessary or not, and the Attorney must ask for such leave when he presents his plaint for admission. 58 C. 418=A.I.R. 1931 Cal. 458=134 Ind. Cas. 538.

——Cl. 12—Leave—Effect.

Where leave to sue has been granted under Cl. 12 though persons living outside jurisdiction are made parties, until the leave is revoked, the suit will lie. A.I.R. 1937 Cal. 172=171 Ind. Cas. 652.

——Cl. 12—Leave to sue—Discretion in granting wrongly exercised.

The proper course for the defendant to take in a case where he maintains that the discretion of the Court in granting leave under Cl. 12 has been wrongly exercised is not to abstain from making any application to remove the suit from the file and wait until the hearing to make his submission. On the contrary, in many cases, the defendant should bring this aspect of aspect of the matter to the notice of the Court at the first possible moment, and his failure to do so. if it any way prejudices the position of the plaintiff, is a matter which may prevent success of his application. This applies only, where the Court has admittedly the discretion to grant leave.

But where the omission of the defendants to make an interlocutory application has not, in any way prejudiced the position of the plaintiff. and the case is one in which, if the Judge had applied his mind to the point, he would have refused the leave, the Court can allow the application, though made at the hearing of the suit. 40 C. W. N. 161=63 C. 435=63 C. L. J. 199= A.I.R. 1936 Cal. 349=163 Ind. Cas. 167.

17. Mortgage suit.

——Cl. 12 — Mortgage suit—Part of property within jurisdiction Termination of mortgagor's interest in that property prior to suit—Validity of decree—Collateral proceedings.

A mortgage was created in respect of a leasehold interest of the mortgagor in a property in Calcutta within the ordinary original civil jurisdiction of the High Court, besides other properties in the mofussil. An application was made by the mortgagee under Cl. 12 of the Letters Patent for leave to sue on the mortgage, which was duly accorded. An **ex parte** decree was then passed in the suit against the mortgagor. Before the institution of the suit the leasehold interest of the mortgagor in the Calcutta property expired by effluxion of time and thereafter they became monthly tenants of that property, which interest was determined by notice to quit. It was contended that, since the mortgagor's interest in the Calcutta property had terminated before the mortgage suit was instituted, at that time there was no mortgaged land situated within the Court's territorial limits and therefore, it had no jurisdiction to entertain the suit and consequently, the decree passed was a nullity, Overruling that contention;

Held, that the mortgagee's right to sue in the Court arose because the **hypotheca** included inlying land and the suit was a suit for land in respect of which the Court had jurisdiction to give leave to sue, to entertain the suit and to pass a decree. The mortgagee wat not concerned with nor was a party nor agreed to the termination of the mortgagor's interest in the inlying land. While such termination would prevent him from obtaining relief in the suit in regard to that land, nevertheless his inability to succeed in tha respect by reason of such termination did not change the nature of the suit which was a a suit for land and which was within the competence of the Court to entertain. The factor which enabled a Court to assume jurisdiction in a mortgage suit was the instance that the **hypotheca** was in respect of, or included, land in its territory. When there was no question regarding the genuineness of the inclusion of inlying land in a mortgage and it **bona fide** formed part of the **hypotheca**, subsequent termination of the mortgagor's interest in that land did not destroy the mortgagee's right to sue on the mortgage in the Court of the inlying land and did not take away that Court's jurisdiction to give leave to sue and to entertain the mortgagee's suit.

Per **Ormond, J.**—The question whether the Court had jurisdiction must be treated as having been raised and decided, rightly or wrongly, in the suit.

There was no inherent want of jurisdiction to entertain the suit and pass the decree, and the decree could not be re-opened collaterally in a fresh suit seeking to bring in evidence new facts not then before the Court. I.L.R. (1946) 2 Cal. 63.

——Cl. 12—Mortgage suit.

Part of mortgage property outside jurisdiction of Court—No leave obtained under Cl. 12—Decree is nullity—Executing Court must refuse to execute it. A.I.R. 1942 Cal. 496=I.L.R. (1942) 1 Cal. 149= 202 Ind. Cas. 193.

——Cl. 12—Mortgage of property outside jurisdiction—Suit, if can be maintained in High Court.

The High Court has no jurisdiction to entertain a suit on mortgage if the only property included in the mortgage is outside the original jurisdiction of the High Court; but if, in the mortgage, are included properties one of which is situated within the orignal jurisdiction of the High Court, leave under Cl. 12 might be granted. Where the High Court, when granting the leave, rightly or wrongly held that an item of property which was a admittedly situated within the original jurisdiction, was intended to be included in the deed of assignment which also created a further charge, it is not open in a suit under O. 21, R. 103, Civil P. C., based on that decree to contend that the decree was without jurisdiction on that ground, for it is open to the Court to determine as to whether it has jurisdiction or not to entertain a suit or proceeding, and if there is a judicial determination, the judicial determination assuming jurisdiction cannot be collaterally attacked. That must be held to bind the other party. Further, it is no concern of the third party to raise the contention as to real intention of the parties to the mortgage transaction and thereby to impeach the validity of the mortgage deed. 64 C L. J. 115=A.I.R. 1937 Cal. 88=41 C.W.N. 396=169 Ind. Cas. 913.

——Cl. 12—Mortgage suit on Original Side.

Under Cl. 12, in the case of a suit for land of which a part is within its jurisdiction, the High Court acquires jurisdiction over the entire suit provided that its leave is first obtained. When once it acquires jurisdiction to determine the suit, the decree that it passes is in no way different from a decree passed by the **mofussil** Court. An order for sale passed on the Original Side in a mortgage suit in respect of properties partly within and partly outside the original jurisdiction of the High Court attracts the operation of the rule of **lispendens** even as to properties outside jurisdiction. The fact that the decree was based on consent does not make any difference. A.I.R. 1931 Cal. 763=58 C. 598=134 Ind. Cas. 561.

——Cl. 12—Mortgage.

The practice of the Calcutta High Court for more than half a century has been to regard suits for the enforcement of equitable mortgage of property situate outside the jurisdiction as suits for land. 120 Ind. Cas. 720=49 C L. J 235=A.I.R. 1929 Cal. 373.

——Cl. 12—Mortgage.

Mortgagee's interest is an interest in land. 117 Ind. Cas. 854=33 C.W.N. 44=56 Cal. 224=A.I.R. 1929 Cal. 227.

18. Objection to Jurisdiction.

——Cl. 12 — Objection to Jurisdiction — Not raised effect of.

Resident of Calcutta lending money in Calcutta by cheque drawn on lenders account with Imperial Bank of India to non-resident foreigner—Suit by lender in Calcutta High Court (Original side) — Writ issued and defendant entering appearance without protest—High Court, held had jurisdiction. A.I.R. 1941 Cal. 291=I.L.R. (1942) 1 Cal. 253=199 Ind. Cas. 519.

——Cl. 12—Objection to Jurisdiction—Waiver.

A deft. cannot be held to have waived his objection to jurisdiction when the plaint alleged the cause of action to have risen wholly wtihin the original civil jurisdiction, if it afterwards turns out that a portion was beyond jurisdiction and no leave was obtained. 44 Cal. 10=38 Ind. Cas. 571.

——Cl. 12—Objection to Jurisdiction.

No leave obtained as to property out of jurisdiction —Objection as to jurisdiction can be taken for first time at appellate stage—High Court has no jurisdiction as to such property. 120 Ind Cas. 577=56 Cal. 940=49 C.L. J. 212=A.I.R. 1929 Cal. 358.

19. Originating summons.

——Cl. 12—Originating summons taken out by executors of will who are also residuary legatees —Questions formulated arising in course of administration—One of such questions relating to division of residuary estate.

It is no doubt well recognised that a proceeding by way of an originating summons is a suit. But an originating summons taken out by the executors of a will formulating for determination by the Court questions arising in course of administration of the testator's estate, is not a "suit for land" within the meaning of Cl. 12 of the Letters Patent, although one of such questions is whether the residuary estate should be divided. In view of the fact that the plaintiffs have not been impleaded in the suit as residuary legatees but are parties thereto only in their capacities as executors, it is impossible to read this question as a prayer by the residuary legatees for division of the residuary estate. Having regard to the frame of the suit this question must be read purely as a question arising amongst the executors in course of administration of the estate and the suit is therefore nothing more than a pure administration suit which is not a suit for land. I.L.R. (1947) 1 Cal. 184.

——Cl. 12—Originating summons—Jurisdiction.

Ch. XIII of Rules and Orders of the Original Side (Cal.) must be read subject to the provisions of Cl 12, Letters Patent and it follows that the Court has no jurisdiction to entertain an originating summons unless it would have jurisdiction to make an administration decree with regard to the estate in respect of which relief by originating summons is sought. I.L.R. (1940) 1 Cal. 102=A.I.R. 1940 Cal. 354=189 Ind. Cas. 238.

——Cl. 12—Originating summons.

The expression "suit for land and other immovable property" in Cl. 12 means suits in which having regard to the issue raised in the pleadings the decree or order will effect directly the proprietary or possessory title to land or other immovable property.

Where the substantial objects for which the originating summons is taken out are claims **inter alia** that plaintiff is entitled to whole of residuary estate of the testator and that certain dedications of properties made debutter under a will is void and construction of a will is sought merely in furtherance thereof, the proceeding is "a suit for land," for if the Court determines these issues the orders made thereon will necessarily affect title to immovable property situate outside jurisdiction. 122 Ind. Cas. 197=56 Cal. 979=A.I.R. 1930 Cal. 258.

——Cl. 12—Originating summons—If suit.

A proceeding which is commenced by taking out an originating summons supported by an affidavit is a suit within the meaning of that term in Cl. 12. The term "suit" in Cl. 12 is not to be construed in a restricted sense. An originating summons is therefore to be deemed a suit. If the law were otherwise, a ready method would lie at hand for evading the limits set to the jurisdiction of the Court under Cl. 12. 122 Ind. Cas. 197=56 Cal. 979=A.I.R. 1930 Cal. 258.

20. Plaint—Amendment.

——Cl. 12—Plaint—Amendment introducing new cause of action—Leave to amend cannot be granted under Cl. 12.

Cl. 12 makes it clear that the Court's leave shall previously be obtained before it has jurisdiction to

receive a suit for which leave is required. The grant of leave is a condition precedent to the Court having jurisdiction to receive a suit. The grant of leave relates solely to the cause of action set forth in the plaint at the time it was obtained, and is not available to confer jurisdiction in respect of a different cause of action which was not considered at the time. After a suit is filed no leave can be granted in respect of a new cause of action which is sought to be introduced subsequently by amending the plaint. The plaintiff relying on the new cause of actian must bring a fresh suit after obtaining leave under Cl. 12. A.I.R. 1946 Cal. 23 =225 Ind. Cas. 52=I.L.R. (1944)=2 Cal. 101.

21. Prayer for leave—Necessity.

——Cl. 12—Prayer for leave—Necessity.

Where, in a plaint, the plaintiff alleges that he institutes the suit with leave under Cl. 12, there should, strictly speaking, be a prayer that such leave be granted. A.I.R. 1938 Cal. 271=I.L.R. (1938) 1 Cal. 354=42 C.W.N. 371=177 Ind. Cas. 876.

——Cl. 12—Revocation of leave—Material considerations—Suit on negotiable instrument.

In considering the question as to whether leave granted under Cl. 12 of the Letters Patent ought to be revoked or not, the question of convenience is a material factor. But this does not mean that if on nice calculations the balance of convenience is on the side of the defendant asking for revocation it would be sufficient. The convenience of the parties ought not to be weighed in the delicate scale of the chemists. The nature of the suit must also to be taken into consideration; the question of comparative expenses to the parties also would be a material factor. Where a suit is based on a negotiable instrument the considerations which would generally be of weight would be material but it would only be a question of degree. I.L.R. (1948) 1 Cal. 122.

——Cl. 12—Revocation of leave.

Leave granted under Cl. 12 for the institution of the suit can be revoked when the facts are brought before the Court. A.I.R. 1941 Cal. 553=197 Ind. Cas. 331.

——Cl. 12—Revocation of leave—Application for.

An application to revoke the leave which had been gra ted for the institution of the suit under Cl. 12, Letters Patent and for stay of the suit relied upon an agreement between the parties in Gujerati to the effect that the parties had agreed to settle their disputes at Rajkot or Bantva. It was alleged that Rajkot or Bantva would be convenient forum as according to agreement the accounts between the parties were maintained there. English translation of the agreement, however, was not produced by the applicant in accordance with the provisions or R. 25, Chap. IV, Calcutta High Court (Original Side) Rules. The result was that both the parties placed before the Court their own conflicting translations:

Held, that before it could be decided whether the clause in question did contain agreement barring the jurisdiction of the High Court, the Court had to decide question of difficulty as regards translation of the document and the construction of the same afterwards. Consequently, in view of the state of things, the application to revoke leave and for stay of suit could not be allowed. I.L.R. (1940) 1 Cal. 497=44 C.W.N. 460=A.I.R. 1941 Cal. 236=195 Ind. Cas. 257.

——Cl. 12—Revocation—Application to revoke leave granted under Cl. 12.

Questions of difficulty and importance should not be dealt with by an application to revoke the leave under Cl. 12 and to stay the suit so as to take the plaint off the file. Normally the proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a substantive part of the defence. I.L.R. (1940) 1 Cal. 497=44 C.W.N. 460=A.I.R. 1941 Cal. 236=195 Ind. Cas. 257.

——Cl. 12—Revocation of leave—Application for.

In an interlocutory application for revocation of leave to sue granted under Cl. 12, matters of difficulty and importance which require a meticulous consideration of facts and law and which are best determined upon the evidence of witnesses who have been subjected to cross-examination should be decided at the trial of the suit and not in the application.

Where a firm register kept in accordance with the terms of the Partnership Act shows that the principal place of business of the firm is Calcutta and a person brings a suit for dissolution of partnership in Calcutta High Court relying upon the entry in the firm register, the High Court has jurisdiction to try the suit and leave to sue in the Calcutta High Court under Cl. 12, cannot be revoked on the ground that jurisdiction of that Court is being attracted by adoption of a device. A.I.R. 1940 Cal. 134=I.L.R. (1939) 2 Cal. 199=187 Ind. Cas. 356.

——Cl. 12—Revocation of leave—Application for.

Questions of difficulty and importance should not be dealt with by an application to revoke leave under Cl 12 and to take the plaint off the file. Such questions may be considered as preliminary issues after the case has proceeded to written statement. The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a part of the defence and except in the clearest cases, this procedure should be followed. If there is any serious point of limitation, it is better that it should be considered on the facts than dealt with ex facie of the plaint A.I.R. 1932 Cal. 146=35 C.W.N. 930=59 C. 150=135 Ind. Cas. 873.

——Cl. 12—Revocation of leave—Application for—Questions of fact difficult to determine upon affidavit evidence—If can be dealt with.

Questions which involve consideration of facts which are far too difficult to determine upon affidavit evidence, should not be dealt with on an application to revoke leave under Cl. 12 of the Letters Patent. 50 C.W.N. 624.

——Cl. 12—Revocation of leave—Main grounds for.

Where leave to sue has been granted under Cl. 12, the defendant can apply for revocation of the leave on the ground of want of jurisdiction. He is not obliged to wait until the trial and to take the point by way of defence in his written statement. The application to revoke should, however, be based on something better than a mere criticism of the clarity of the pleadings. In granting leave or revoking it, the Judge should go by the cause of action alleged.

Where, in the case of contracts, part of the cause of action arises within the jurisdiction of the Court the defendant cannot ask for revocation unless he shows that Cl. 12 has no application at all.

It cannot be said that the Judge, in granting leave, should not consider matters of evidence outside the plaint.

If a pleading is not quite in order, the reasonable thing for the Judge to do would be to order particulars to be given or to order an amendment of the plaint. He should not order the plaint to be taken off the file or withdraw the leave granted under Cl. 12. A.I.R. 1931 Cal. 659=58 C. 539=134 Ind. Cas. 65.

——Cl. 12—Revocation of leave—Proper time to apply for.

Where the defendant feels aggrieved at the manner in which the Court has exercised the discretion which it admittedly has, he should apply at the earliest moment and not allow what is prima facie a perfectly bona fide suit to proceed through the normal stages of litigation up to the stage of being ready for hearing and appearing in the Warning List before he makes his application. Where the application for revocation is made at the stage when the suit appears in the Prospective and Warning List, it cannot be granted. A.I.R. 1936 Cal. 230=40 C.W.N. 165=162 Ind. Cas. 234.

22. Suit for administration of trust.

——Cl. 12—Suit for administration of trusts.

The rules of English law do not bar the High Court's jurisdiction to entertain suits for administration of trusts. 62 C. 1062=39 C.W.N. 1154.

——Cl. 12—"Suit for" administration of trust.

If a suit is brought for the administration of a trust which inter alia relates to immovable property situate outside the jurisdiction of the High Court, and the only relief sought is that the trustee should be ordered duly to carry out the trust, the suit is not a suit for land. But if the relief claimed is not confined to an order for the enforcement of the trust, and the applicant claims, e. g., a declaration of his right to the possession of trust properties situate outside the jurisdiction, then the suit would be a suit for land, and the Court would have no jurisdiction to entertain it. 104 Ind. Cas. 721=54 Cal. 655=A.I.R. 1927 Cal. 768.

23. Suit for declaration of dissolution of marriage.

——Cl. 12—Suit for declaration of dissolution of marriage—Parties marrying as Hindus one of them subsequently embracing Islam. [See: Fill up from Q. D. 1941—45. I.L.R. (1945) 2 Cal. 405= A.I.R. 1949 Cal. 436.

24. Suit for land.

——Cl. 12—Suit for land—Suit for specific performance of contract for sale of land—Equitable jurisdiction of Court to pass decree operating in personam.

A claim by a purchaser against a vendor for specific performance of a contract for the sale of land is not a suit for land within Cl. 12 of the Letters Patent. The Calcutta High Court has jurisdiction to entertain such suit when the land is situated outside the territorial limits, provided the suit is otherwise maintainable.

Both the Indian and the English Courts can pass a decree which operates in personam upon the individual requiring him to do, or to abstain from doing, some specified act, provided the party is within its jurisdiction so that the Court can enforce its decree. This jurisdiction is exercised when the Court is of opinion that, in all good conscience, the defaulting party should be compelled to do, or to refrain from doing, the specified act. There is no difference in principle between the equitable jurisdiction of the Indian and of the English Courts in this respect. I.L.R. (1947) 2 Cal. 113.

——Cl. 12.

Suit for land—Suit for specific performance of agreement for sale of land outside Calcutta—Jurisdiction of High Court. Copy Q.D. 41—45. I.L.R. (1945) 1 Cal. 47=A.I.R. 1949 Cal. 128.

——Cl. 12—"Suit for land"—Specific performance and damages.

A suit for specific performance of an agreement made in Calcutta to sell a tea estate in Assam and for damages, the agreed price under which had also to be paid in Calcutta, is not a suit for land within the meaning of Cl. 12 of the Letters Patent and the High Court has jurisdiction to entertain the suit, having regard to the fact that the agreement which it was sought to enforce was made in Calcutta. 70 Ind. Cas. 92=49 Cal. 670=27 C.W.N. 65=A.I.R. 1922 Cal. 443.

——Cl. 12—"Suit for land"—Specific performance.

A suit for specific performance of an agreement to mortgage lands outside the jurisdiction, even if the title is accepted, is a suit for land within the meaning of Cl. 12 of the Charter. 66 Ind. Cas. 484=48 Cal. 882=A.I.R. 1922 Cal. 328.

——Cl. 12—Suit for land—Suit by purchaser for specific performance of agreement to sell land outside jurisdiction of High Court.

A suit by a purchaser for specific performance of an agreement to sell land outside the jurisdiction of the Calcutta High Court is "a suit for land" within the meaning of Cl. 12, and consequently, the Calcutta High Court has no jurisdiction to entertain it. A.I.R. 1937 Cal. 593=I.L.R. (1937) 2 Cal. 644=176 Ind. Cas. 304.

——Cl. 12—Suit for land.

After person's death intestate, his brother taking possession of immovable property situate outside territorial jurisdiction of Original Side and obtaining letters of administration—Suit by son of deceased for possession, accounts and administration by or under decision of Court—Suit, held one for land and Original Side had no jurisdiction. A.I.R. 1938 Cal. 271=I.L.R. (1938) 1 Cal. 354=42 C.W.N. 371 =177 Ind. Cas. 876.

——Cl. 12—Suit for land—Suit not involving proprietary title, whether one for land.

For the purposes of Cl. 12, an originating summons is a 'suit.'

If the Court has no jurisdiction having regard to the subject-matter of the suit and the failure of the plaintiff to obtain the necessary leave of the Court, no consent, express or implied, on the part of the defendants can cure the defect.

A suit to have it established that under a deed on the death of the tenant for life the title to the immovable property no longer remained in the Official Trustee in trust for the sons but reverted to the estate of the settlor and that the property accordingly had become available to satisfy the claims of their creditors, is a suit for land though the plaintiff did not claim a proprietary title in himself. A.I.R. 1931 Cal. 651=58 C. 768=134 Ind. Cas. 436.

——Cl. 12—"Suit for land."

A suit by trustees under a composition deed regarding certain properties within the original jurisdiction of Calcutta High Court does not cease to be a suit for land merely because the properties have been entirely swept away by prior encumbrancers. 120 Ind Cas. 577=56 Cal. 940=49 C.L.J. 212 =A.I.R. 1929 Cal. 358.

——Cl. 12—Suit for land.

A suit for declaring a person as secured creditor of land is a suit for land and if the land in question is outside the local limits of the ordinary original jurisdiction of the High Court, the High Court in the exercise of its ordinary original jurisdiction cannot try the suit. 117 Ind. Cas. 854=33 C.W.N. 44=56 Cal. 224=A.I.R. 1929 Cal. 227.

——Cl. 12—"Suit for land"—Share in sale proceeds of house.

The term "suits for land or other immovable property" is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property, but means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property.

Where the claim is to a share of the proceeds resulting from the sale of an ancestral dwelling house outside the High Court's jurisdiction, the suit is not "a suit for land or other immovable property" within Cl. 12. 104 Ind. Cas. 721=54 Cal. 655=A.I.R. 1927 Cal. 768.

——Cl. 12—Suit for land—Test.

The test whether a suit is a suit for land or other immovable property is not formal test but regard is to be had to substance of the suit. A suit for damages in respect of injury to land is a suit for land within the meaning of Cl. 12 of the Letters Patent and so if the land is outside the original jurisdiction of High Court the High Court cannot try it. 42 Cal. 942=31 Ind. Cas. 581.

——Cl. 12—"Suit for land"—Trespass—Wrongful breaking through mine and carrying away coal—Covenant to keep barrier between lessor and lessee—Cause of action—Suit for damages for erection of buttreses.

The venue of a suit on a covenant by reason of a privity of estate is local. A, an under-lessee covenanted to leave a certain barrier as provided in the under-lease. Subsequently, A assigned his rights or granted an under-lease to B, who granted an under-lease to C. The representative of the original lessor sued C for damages for breach of the covenant and for damages which would be caused to plff. erecting masonry buttresses to protect his mine.

Held, that there was no privity of estate between C and the plff. that C was not personally liable on the covenant and that the plaint did not disclose any cause of action against C. That the claim for damages for erecting masonry buttresses was a claim for land within Cl. 12. A suit to recover damages for breaking through plff.'s mine or land and carrying away coal is a suit for land or immovable property within Cl. 12 and is founded on the ordinary case of a trespass quare clausum fregit and necessitates the decision of the question of title as to the coal. 39 Cal. 739=17 Ind. Cas. 500.

——Cl. 12—Suit for land—Suit by lessee for land and for profits during his absence—Land situate outside.

A suit is not maintainable in the High Court by a lessee for possession of land, for declaration of the validity of the lease and for profits which accrued during his absence on conviction in a Criminal Court, when the properties, the subject of the lease are outside the jurisdiction of the High Court. 36 Cal. 59=1 Ind. Cas. 472.

——Cl. 13—Appeal—Refusal to revoke order of transfer under—If appealable. See Letters Patent (Calcutta), Cls. 15 and 13. A.I.R. 1948 Cal. 171.

——Cl. 13—Appeal.

The judgment of a Judge on the Original Side transferring probate proceedings to the High Court under Cl. (13) is not appealable. 100 Ind. Cas. 797=54 Cal. 126=31 C.W.N. 254=A.I.R. 1927 Cal. 281.

——Cl. 13—Appeal.

An order of a Single Judge transferring a suit from the Small Cause Court to the High Court for trial is not a judgment within Cl 15, and hence no appeal lies from the order. 60 Ind. Cas. 963=47 Cal. 1104.

——Cl. 13—Ground for transfer—Balance of convenience—Matter for consideration—Threat of personal violence to litigant at particular place—If relevant.

Balance of convenience is neither the convenience of the plaintiff alone nor of the defendant alone but the balance of convenience of both. In determining the balance of convenience for the trial of a suit the Court has to take into consideration: (1) the convenience or inconvenience of the plaintiff and the right of the plaintiff to choose his own forum; (2) the convenience or inconvenience of the defendant; (3) the convenience or inconvenience of the witnesses required for a proper trial of the suit; (4) the convenience or inconvenience of a particular place of trial having regard to the nature of the evidence on the main points involved in the suit and also having regard to the doctrine of "forum convenience"; and (5) the nature of issues in the suit.

Personal violence to a litigant at a particular Court at a particular place or threat of such violence is also a relevant consideration in exercising the powers of the High Court under Cl. 13 of the Letters Patent. 85 C.L.J. 22=54 C.W.N. 189.

——Cl. 13—Grounds for transfer.

The plaintiff is the arbiter litis. He has the right to chose any forum the law allows him. But this right is subject to control under Cl. 13 of the Letters Patent. If the Court feels that for purposes of justice a suit should be transferred, the Court must do it.

In order to justify a transfer on the ground of balance of convenience, it is as a rule necessary that something more should exist than a mere balance of convenience in favour of proceedings in the High Court. The Court must be satisfied that either the expense or the difficulties of trial in the mofussil Court would be so great that injustice would be done.

Apart from balance of convenience there is another principle which is to be borne in mind. If the Court, taking all the facts into consideration, comes to the conclusion that the plaintiff in commencing an action in a particular Court has not done so on account of any legitimate advantage which a trial in that Court will give him but for purposes entirely foreign to that legitimate purpose then apart from any question as to expense or inconvenience not only has the Court jurisdiction but it is its duty to transfer the proceedings. 53 C. W.N. 261.

——Cl. 13—Petition for transfer from mofussil Court to High Court.

Where an application is filed on behalf of the plaintiff that he be furnished with particulars of various statements made in a petition asking for the transfer of a suit filed in a Mofussil Court to the High Court under Cl. 13 under the inherent jurisdiction of the Court, the High Court is entitled to interfere and direct particulars if the Court considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit:

Held, that when the application for transfer is heard, the defendants would be strictly held to the rule that it is not permissible to import new matter in an affidavit in reply; in other words, any relevant statement which could have been incorporated in the petition or furnished by way of particulars will be treated as new matter within the meaning of the rule and no attention will be paid to it if it finds a place in the affidavit in reply. 40 C.W.N. 913=165 Ind. Cas. 24.

——Cl. 13—"Purposes of justice"—Meaning of—Personal feeling of litigant—If relevant consideration.

The words "purposes of justice" in Cl. 13 of the Letters Patent are advisedly general and wide so as not to fetter the discretion of the High Court in any way. What are the "purposes of justice" and when "the said High Court shall think proper to do so" are questions better left to be decided on the merits and facts of each case. To define justice in this context as "a principle which regulates the distribution of things valued by mean" may not be as complete a definition as that statement would imply. Justice like the true diamond has myriad facets and nothing is so misleading as to see one facet for describing its totality. Manifestations of justice are as manifold as its concept and attempts to objectify its standards have never succeeded.

Personal feeling or private emotion or individual temperament as such of a litigant is not a proper consideration under Cl. 13 of the Letters Patent. It is only when there is a public sentiment in the locality in which the Court is situate against a litigant then the resultant "feeling" of that litigant produced by such public sentiment may be a ground for transfer. That is because such public sentiment in the locality creates an atmosphere of prejudice which may engulf not merely the Court trying the cause but may prevent witness and fail to secure fearless testimony and so embarrass trial and stifle justice. Then it will be one of the "purposes of justice" to remove such a suit from that Court under Cl. 13 of the Letters Patent. While the importance of securing the confidence of litigants in the fairness and impartiality of the Tribunal cannot be over-emphasised it has none the less to be stressed that the laws of the land have set up Courts of competent powers and jurisdictions which the mere temperamental prejudice or the private sentment of an individual litigant cannot be permitted to supplant. 53 C.W.N. 770, Expl. 85 C.L.J. 22=54 C.W.N. 189.

——Cl. 13—"Purpose of justice"—Meaning—Transfer of suit—Grounds for—Discretion of Court.

Cl. 13 of the Letters Patent confers a very wide discretion on the High Court in the matter of removal of suits. As the discretion given is so large, it is necessary that it should be carefully and judiciously used. The clause empowers the High Court to remove a suit whenever it thinks proper so to do in the interests of justice. The expression "in the interests of justice" means, to promote or advance the cause of justice. Justice is a principle which regulates the distribution of things, valued by men—awarding them to some, denying them to others. It is at the same time a principle whereby each man's worth is appraised. Justice gives to "every one that which is his". It is not a free gift from the Court. The subject of a civilised country is entitled as a matter of right to get it "freely without sale, fully, without any denial, and speedily without delay". The Court only appraises it. In doing so the Court must act and appear to act without partiality and without prejudice.

If the Court on a "consideration of all the facts comes to the conclusion that the applicant for transfer of a suit feels that he is not likely to have a fair trial in the Court from which he seeks the transfer it is the duty of the Court to make the order. In coming to a conlusion on this point, the question for consideration is what is the effect likely to be produced in the mind of the party and not in the mind of the judge. It is the feeling of the party that has to be ascertained, and it necessarily depends on the individual concerned, his temperament and failing, his interst and cirumstances. Far more than the convenience of parties and witnesses, more than anything that may happen at the trial, is the importance of securing the confidence of parties in the fairness and impartiality of the tribunal, which is next only to the importance of securing a fair and impartial tribunal. 53 C.W N. 770=84 C.L J. 313.

——Cl. 13—"Purposes of Justice" — Balance of convenience must be considered.

The question of a transfer of a suit from a Sub-Judge's Court to High Court "for purposes of justice" within the meaning of Cl. 13, Letters Patent, is to be determined by reference to the circumstances of each case, and the balance of convenience, having regard to those circumstances, is one of the matters for consideration. 105 Ind. Cas. 184=51 Cal. 607=A.I.R. 1927 Cal. 791.

——Cl. 13—'Suit'—Meaning of.

Proceedings for the grant of probate which are contested come within the meaning of the word "Suit" within Cl. (13). 100 Ind. Cas. 797=54 Cal. 126=31 C.W.N. 254=A.I.R. 1927 Cal. 281.

——Cl. 15.

Synopsis.

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1. Amendment.

——Cl. 15—Amendment, applicability of.

The date of presentation of the second appeal to the High Court is not the date which determines the applicability of the amended Cl. 15, requiring permission of the deciding Judge, for further appeal, but the date of institution of the suit is, in each case, the determing factor. 113 Ind. Cas. 49=43 C.L.J. 150=56 Cal. 512=32 C.W.N. 1130=A.I.R. 1928 Cal. 640 (F.B.).

——Cl. 15—Amendment—Effect.

A second appeal came up for hearing before two Judges of the High Court on 9th February, 1928. The Judges differed in their opinion and the case was disposed of under S. 98 (2) instead of being referred to in pursuance of the proviso to 98, C.P. Code. The amendment to Cl. 15, Letters Patent, came into force on 14th January, 1928. Application for certificate under the amended clause was refused. An appeal having been preferred against this order:

Held, that certificate is a condition attached by the amending Letters Patent only to the case of a judgment of a single Judge and the right of appeal given in the case of a difference of opinion where the Judges are equally divided is dealt with in the amended Letters Patent by being deleted altogether. No appeal therefore lay from the refusal to grant such a certificate. 114 Ind. Cas. 403=56 Cal. 507=32 C.W.N. 1153=A.I.R. 1928 Cal. 819 (F.B.).

——Cl. 15—Amendment—Appeal—Judgment.

Semble:—An order of a Judge on the Original Side allowing or refusing an amendment except on terms is not a judgment within Cl. 15 of the Letters Patent. 45 Cal. 305=22 C.W.N. 611=47 Ind. Cas. 129.

2. Appeal.

——Cl. 15—Appeal—Difference of opinion in Divisional Bench.

Where appeal was heard by a Divisional Bench and there was a difference of opinion, the Senior Judge holding that the appeal should be dismissed while the other was in favour of allowing the appeal in part, and they held that as there was a difference of opinion and there was no majority varying or reversing the decree appealed from, the appeal should be dismissed;

Held, that against this decision an appeal under Cl. 15 of the Letters Patent was clearly competent. 78 Ind. Cas. 679=51 Cal. 669=28 C.W.N. 637=A.I.R. 1924 Cal. 855 (F.B.).

——Cl. 15—Appeal—Insolvency proceedings.

An appeal lies from an order by the High Court refusing to set aside an order for the examination of witness passed by the Registrar in insolvency under S. 36 (1). 66 Ind. Cas. 715=48 Cal. 1089=25 C.W.N. 750=A.I.R. 1921 Cal. 58.

——Cls. 15, 36—Appeal—Dissentient judgment—Further appeal.

An appeal lies under Cl. 15 of the Letters Patent from a Dissentient judgment that has prevailed in an appeal under the same section. 17 C.W.N. 308 =17 C.L.J. 206=18 Ind. Cas. 253.

——Cl. 15—Appeal—Orders under Companies Act.

An order depriving a creditor, who has a claim which he has long ago put in the form of a proof of debt against a company, and which the liquidators are willing to admit, of the benefit of the company's winding-up proceedings, is an order which deprives him, of a substantial and important right, and it cannot be held that such an order is not appealable by reason that it is not a judgment under Cl. 15 of the Letters Patent. 103 Ind. Cas. 659=31 C.W.N. 894=A.I.R. 1927 Cal. 689.

——Cl. 15—Appeal—New point.

Question affecting jurisdiction of lower Appellate Court can be raised for first time in Letters Patent appeal. A.I.R. 1940 Cal. 528=71 C.L.J. 553 =44 C.W.N. 387=191 Ind.Cas. 39.

——Cl. 15—Appeal—Prob. and Admn. Act, S. 86—Difference of opinion.

Where the Judges of a Division Bench hearing an appeal in a probate case, have disagreed and a decree has been drawn up in accordance with S. 98 of the C. P. Code, an appeal lies under Cl. 15. 22 C.L.J. 298=31 Ind. Cas. 319.

——Cl. 15—Appeal—Scope.

In an appeal under Cl. 15, the Court is not required to confine itself to facts and circumstances as disclosed by the judgment appealed against under Letters Patent but is entitled to look into the judgment of the lower Appellate Court. 34 C.W.N. 97=A.I.R. 1930 Cal. 321.

——Cl. 15—Appeal—Scope.

A Bench constituted to hear an appeal under S. 15, Cl. (3) of the Letters Patent is not competent to consider the question as to whether the decision of the Division Bench upon a matter upon which both the Judges were agreed is or is not right. 87 Ind. Cas. 653=29 C.W.N. 398=52 Cal. 546=A.I.R. 1925 Cal. 598 (F.B.).

——Cl. 15—Appeal under—Whole case open.

Where in an appeal heard by a Bench of two or more Judges transactions, seperate, and independent, were involved, and the Judges of the Division Bench were agreed as to one or more of them, effect should be given to their view so far as they agreed. Though they disagreed as to the others, the whole case should not be dismissed. 31 C.L.J. 447=57 Ind. Cas. 226.

3. Applicability.

——Cl. 15—Applicability of C.P. Code.

The Civil P.C. and the rules made under it apply to an appeal from a Judge of the High Court. A.I.R. 1935 Cal. 35=39 C.W.N. 155=154 Ind. Cas. 1056.

——Cl. 15—Applicability—Contempt—Witness—Abuse, assault and intimidation of—Interference with administration of justice—Order of committal by single Judge of High Court—If made in exercise of criminal jurisdiction—Appeal—Competency.

A distinction has to be drawn between contempts of a criminal nature and contempts of a civil nature. Generally contempts which tend to bring the administration of justice into scorn or which tend to interfere with the due course of justice are criminal in their nature, while contempts in disregarding orders or judgment of a Civil Court or in not doing something ordered to be done in a case are civil and not criminal in their nature. A Judge dealing with a contempt which is criminal in nature is exercising criminal jurisdiction and a sentence passed in respect of a criminal contempt is a sentence passed in the exercise of the Judge's criminal jurisdiction.

Where a party to a suit abused and assaulted a witness for the opposite party in order to intimidate him and prevent him from giving evidence, and a Single Judge sitting on the Original Side of the High Court, trying the suit committed him for contempt the contempt was of a criminal nature and the judgment committing the party for contempt was passed in the exercise of criminal jurisdiction, and consequently no appeal lay from that judgment under Cl. 15 of the Letters Patent. I. L. R. (1948) 2 Cal. 231=49 Cr.L.J. 379=A.I.R. 1948 Cal. 214.

4. Arbitration Act.

——Cl. 15—Arbitration Act, Ss. 11 (2) and 15—Order refusing to set aside award if appealable.

An order refusing to set aside an award is a judgment within Cl. 15 of the Letters Patent and is therefore appealable. There is no right of appeal against such on order under S. 104 (f), C.P.C. which has no application to the filing of an award under S. 11, Cl. (2) of the Arbitration Act. 45 Cal. 502=46 Ind. Cas. 687.

——Cl. 15—Arbitration Act — (IX of 1899) S. 19—Order refusing to stay proceedings.

An Order refusing to stay proceedings under S. 19 of the Arbitration Act for having incurred the forfeiture of the benefit under the section to applicant for taking part in the proceedings is a judgment and hence appealable under Cl. 15 of the Letters Patent. But a deft. can claim an order before filing a statement to stay proceedings in a suit in which he has referred the matters in dispute to arbitration but no steps in that direction have been taken. 47 Cal. 611=24 C.W.N. 612=58 Ind. Cas. 755.

5. Insolvency jurisdiction of High Court.

——Cl. 15—Insolvency Jurisdiction of High Court—Order for costs—Contempt proceedings.

The High Court, in exercising the insolvency jurisdiction, exercises it as a part of its ordinary jurisdiction with which it is vested by law. The order in insolvency jurisdiction by the High Court is a judgment of the High Court, and a suit based upon such judgment is maintainable. Though the practice is to proceed in contempt in respect of an unsatisfied order for costs, there is nothing to prevent a suit. 33 C. 560=9 C.W.N. 952.

6. Judgment—Meaning.

——Cl. 15—Judgment—Meaning.

"Judgment" in Cl. 15 should not be read as meaning only "decree" and not as a final "order". (1933) A.L.J. 127=A.I.R. 1933 All. 262=55 A. 326 =142 Ind. Cas. 331 (F.B.).

——Cl. 15—Judgment—Meaning.

The term 'Judgment,' in Cl. 15 of the Letters Patent means "decrees or order"; consequently, an order of dismissal of an appeal without investigation of the merits, may be judgment whether an order dismissing an appeal presented out of time is a judgment. 28 C.L.J. 20=47 Ind. Cas. 677.

——Cl. 15—Judgment—Meaning—Appeal—What questions open.

The term 'Judgment' in Cl. 15 means the sentence of law pronounced by the Court. An appeal under Cl. 15 is deemed to be preferred against the decree and all the points necessary to be investigated for the determination of the question of the correctness of the decree, are open for consideration, though the Court as a Court of appeal will be slow to take, on questions of fact, a view contrary to the concurrent opinion of the trial Judge and the Judges, of the division Bench. 22 C. L. J. 452=20 C.W.N. 210= 32 Ind. Cas. 468.

——Cl. 15—Judgment—Meaning.

Per Mukerjee, J.—'Judgment' in Cl. 15 of the Letters Patent, signifies what is now termed 'decree' or 'order'. 22 C.L.J. 525=31 Ind. Cas. 965.

7. Judgment—What is.

——Cl. 15 — 'Judgment' — What is—Order for winding up.

An order for winding up is a 'judgment' within Cl. 15 of the Letters Patent and it can only be questioned by an appeal initiated or brought before the appropriate Court in the manner prescribed for an appeal and a summons to set it aside cannot be deemed or treated as an appeal. I.L.R. (1948) 2 Cal. 503=52 C.W.N. 534=A.I.R. 1949 Cal. 69=1949 Comp. C. 61.

——Cl. 15—Judgment—What is—Order refusing to appoint Receiver.

As an order refusing an application for the appointment of a Receiver based on a provision in the indenture of hypothecation that on a breach of any one of the covenants contained therein the plaintiff's assignor would be entitled to have a Receiver appointed the order has determined a right which is one of the matters in the controversy itself, and so is a judgment within the meaning of Cl. 15. A.I.R. 1935 Cal. 35=39 C.W.N. 155 =154 Ind. Cas. 1056.

——Cl. 15—'Judgment'—What is — Refusal to discharge receiver.

Order refusing to discharge receiver appointed in suit for partition on basis of intestacy subsequent to grant of probate to executor, is a judgment and so appealable under Letters Patent. 52 C.L.J. 66=A.I.R. 1930 Cal. 803.

——Cl. 15—Judgment—What is—Orders under S. 9 and S. 61, Insurance Act, are judgments.

An order under S. 9, Insurance Act directing the refund of the deposits under S. 7 finally determines the right of the insurer to get refund and the liability of the Reserve Bank of India to refund the deposit under S. 7. It is, therefore, a 'judgment' within the meaning of Cl. 15.

An order under S. 61, Cls. (1) and (2), Insurance Act, reducing the amount of the insurance contracts finally determines the rights of the policy-holders under policy contracts and the liability of the insurance company; under these contracts. These orders, therefore are "judgments" within the meaning of Cl. 15. A.I.R. 1942 Cal. 578= I.L.R. (1942) 2 Cal. 85=46 C.W.N. 441=204 Ind. Cas. 175.

——Cl. 15—Judgment—What is.

A judgment of the High Court in a case under the Land Acquisition Act, is a 'judgment' within the meaning of Cl. 15, and is appealable. 40 C.W.N. 1143=AI.R. 1936 Cal. 688=64 C.L.J. 503=I.L.R. (1937) 1 Cal. 699=168 Ind. Cas. 352.

——Cl. 15—Judgment—What is.

An order refusing to stay a suit to which the provisions of S. 10, Civil P.C., apply is a judgment within Cl. 15 and is appealable. A.I.R. 1935 Cal. 1=61 C. 670=38 C.W.N. 818=154 Ind. Cas. 645.

——Cl. 15—Judgment—What is—Order granting leave to suitor to a change of Attorney without providing for payment of his costs.

Where, by an order, leave is granted to a suitor to a change of Attorney without providing for the Attorney's costs, the Attorney not having discharged himself, the order is appealable under Cl. 15, as the rights of the Attorney are determined by the order. A.I.R. 1934 Cal. 58=60 C. 1273=37 C.W.N. 998=147 Ind. Cas. 1064.

——Cl. 15—Judgment—What is.

Quaere.—Whether an order in the claim case is a judgment' within the meaning of the Letters Patent. A.I.R. 1933 Cal. 715=37 C.W.N. 641=60 C. 914=147 Ind. Cas. 359.

——Cl. 15—'Judgment', what is.

The right of the appeal to the High Court depends upon Cl. 15 and whether or not the decision of the learned Judge appealed from is a judgment, depends upon whether or not so far as he is concerned he finally decided the rights of the parties as regards the question on which the appeal is based. 57 Cal. 736=A.I.R. 1930 Cal. 623.

——Cl. 15—Judgment—What is.

Where the order was that upon security for a certain amount being given within a certain time, the defendants should have leave to defend, but that in default of the defendants giving security within the time aforesaid, a decree was to be drawn up.

Held, that it was a judgment within Cl. 15. 96 Ind. Cas. 839=30 C.W.N. 298=A.I.R. 1926 Cal. 668.

——Cl. 15—Judgment—What is.

An order dismissing a suit for want of prosecution under R. 36, Chapter X of the High Court Original Side Rules is a "judgment" within the meaning of Cl. 15 of the Letters Patent and is appealable. 81 Ind. Cas. 1048=51 Cal. 905=28 C.W.N. 916=A.I.R. 1924 Cal. 1025.

——Cl. 15—Judgment—What is.

A decision which sets aside an abatement is a "judgment" within the meaning of Cl. 15 of the Letters Patent, and is therefore appealable. 67 Ind. Cas. 917=49 Cal. 62=A.I.R. 1922 Cal. 335.

——Cl. 15—Judgment—What is—Order rejecting application for judgment on admissions.

An order rejecting an application for judgment on admissions is a judgment within Cl. 15 of the Letters Patent and is appealable. 23 C.W.N. 1017=54 Ind. Cas. 836.

——Cl. 15—Judgment—What is—Sanction—Cr. P. Code, S. 195.

An order of a Judge of the High Court remanding a case to the Small Cause Judge who refused to grant a sanction under S. 195, Cr. P. Code, to make a further investigation and pass orders thereon, is a "Judgment" within the meaning of Cl. 15 of the Letters Patent and as such is appealable. 44 Cal. 816=21 C.W.N. 209=25 C.L.J. 193=18 Cr. L.J. 497=39 Ind. Cas. 465.

——Cl. 15—Judgment—What is.

A decision that a suit being open to the objection of multifariousness cannot be entertained as framed is a judgment within the meaning of Cl. 15. (Per Mookerjee, J.)—The true test to be applied in the solution of the question of the competence of an appeal under the Letters Patent from an adjudication is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made. Whatever the form of adjudication may be if it puts an end to the suit, so far as the trial Court is concerned the adjudication is a judgment within the meaning of Cl. 15. 45 Cal. 111=21 C.W.N. 794=27 C.L.J. 158=41 Ind. Cas. 944.

——Cl. 15—Judgment—What is.

To decide whether an adjudication is a judgment within Cl. 15 of the Letters Patent the test is not what the form of the adjudication is but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form and whatever the nature of the application on which it is made is to put an end to the suit or proceeding, so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with is to put an end to the suit or proceeding, the adjudication is a judgment. A remand order nullifying the benefit of the decree is a judgment. The expression some right or liability in the Judgment of Couch, C. J. in 17 W.R. 364 is not restricted to the right in controversy in the suit itself. 21 C.W.N. 921=29 C.L.J. 225=41 Ind. Cas. 250.

——Cl. 15—Judgment—What is.

Order refusing application for relief under Bengal Money-lenders' Act amounts to judgment within Cl. 15. A.I.R. 1943 Cal. 169=46 C.W.N. 605=206 Ind. Cas. 196.

——Cl. 15—'Judgment'—What is—'Criminal trial'—Order refusing to discharge a convicted prisoner from custody.

An order passed by a Judge sitting in the exercise of original criminal jurisdiction of the High Court, on an application under S. 491 of the Criminal Procedure Code, refusing to discharge a convicted prisoner from custody is a judgment within Cl. 15 of the Calcutta Letters Patent, and not being an order made in a criminal trial, is appealable under that clause. 6 C.W.N. 254=29 Cal. 286 (F.B.).

——Cl. 15—Judgment—What is—Stay of issue probate—Order refusing.

An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a 'judgment' within the meaning of Cl. 15 and is appealable. 5 C.W.N. 781.

——Cl. 15—Judgment—What is not—Refusal to revoke order of transfer of suit under Cl. 13.

An order refusing to revoke an order of transfer of a suit under Cl. 13 of the Letters Patent is not a 'Judgment' within the meaning of Cl. 15 and hence not appealable. A.I.R. 1948 Cal. 171.

8. Judgment—What is not.

——Cl. 15—Judgment—What is not.

The opinion of a judge taken under Ch. XXVI, R. 50 of the High Court Rules (O.S.) by way of a special report in a pending case is not a judgment and no appeal lies under Cl. 15 against it. 40 C.W.N. 1264=I.L.R. (1937) 1 Cal. 149.

——Cl. 15—Judgment—What is not.

The judgment given upon a case stated by the Commissioner of Income-tax under S. 66 (2) of the Income-tax Act, 1922 is merely advisory, made by the Court in the exercise of its consultative jurisdiction, and is not a judgment within the meaning of Cl. 15 of the Letters Patent. 87 Ind. Cas. 653=29 C.W.N. 398=52 Cal. 546=A.I.R. 1925 Cal. 598 (F.B.).

——Cl. 15—Judgment—What is not.

No appeal lies against an order directing that the Registrar might be at liberty to sell the mortgaged properties without reserve. When a step is taken in carrying out the directions contained in the final decree to bring the properties to a speedy sale, nothing in the nature of the rights of the parties is determined. A. I. R. 1933 Cal. 504=60 C. 506=145 Ind. Cas. 318.

——Cl. 15—Judgment—What is not—Order admitting appeal filed after limitation.

The mere circumstance that an order puts in peril the finality of a decision given in a person's favour does not of itself make that order a judgment within the meaning of Cl. 15, Letters Patent. A decision under S. 5, Limitation Act, admitting an appeal after the period of limitation prescribed merely declares that an appeal is entertainable. It is not a "judgment" and no appeal lies against it under Cl. 15. 114 Ind. Cas. 88=32 C.W.N. 935=56 Cal. 135=A.I.R. 1929 Cal. 214 (F.B.).

——Cl. 15—Judgment—What is not.

An order under S. 195, Companies Act, made by a Court directing the directors of a company to appear before the Court for examination as to their dealings in respect of the affairs of a company is not a judgment within the meaning of Cl. 15, Letters Patent (Calcutta) and therefore is not appealable. 109 Ind. Cas. 764=55 Cal. 262=A.I.R. 1928 Cal. 295.

——Cl. 15—Judgment—What is not.

Order giving unconditional leave to defend on a summons under Chap. 13-A of the Original Side Rules is not a judgment within the meaning of Cl. 15 of the Letters Patent. For deciding whether an order is a judgment or not, each case must be decided on its own facts and the nature of the order. 96 Ind. Cas. 182=53 Cal. 776=30 C.W.N. 706=A.I.R. 1926 Cal. 842.

——Cl. 15—Judgment—What is not.

An order setting aside ex parte decree and the execution proceedings consequent thereon, on the ground that summons was not duly served, is not a "judgment" within Cl. 15 and is not, therefore, appealable. 91 Ind. Cas. 965=30 C. W. N. 104=A.I.R. 1926 Cal. 327.

——Cl. 15—Judgment—What is not—Suit on behalf of a lunatic—Application to take plaint off the file—Dismissal—Order of, is not a "judgment."

Where in a suit instituted on behalf of a lunatic defendant applied for plaint being taken off the file or for an inquiry whether it was properly instituted and whether it was for the benefit of the lunatic and the trial Judge dismissed the application on the ground that on evidence before him that can be given upon a mere interlocutory application, he was not prepared to hold that the suit was mala fide or entirely unsubstantial so that there would be an abuse of the process of Court and the defendant appealed under Cl. 15 of the Letters Patent,

Held, that the order dismissing the application was not a judgment within the meaning of Cl. 15, Letters Patent, as it does not determine right or of the liability affecting the merits of the controversy between the parties. 69 Ind. Cas. 915=26 C.W.N. 242=A.I.R. 1922 Cal. 172.

——Cl. 15—Judgment—What is not—Order refusing to issue commission to examine witnesses.

No appeal lies from an order refusing to issue Commission for the examination of witnesses, as the order is not a "Judgment". 31 C.L.J. 162=55 Ind. Cas. 766.

——Cl. 15—Judgment—What is not—Order refusing leave to file written statement—Appeal.

An order of a single Judge of the original side of the High Court refusing leave to file a written statement after the expiry of the time allowed is not a judgment and therefore not open to appeal under Cl. 15 of the Letters Patent. 45 Cal. 818=49 Ind. Cas. 120.

——Cl. 15—Judgment—What is not.

Order refusing application for reveiew is not a judgment and no appeal lies. 9 O.W.N. 502.

——Cl. 15—Judgment—What is not.

Order refusing to enlarge time for preferring an appeal is not a judgment and no appeal lies. 10 C.W.N. 986=3 C.L.J. 545=33 Cal. 1323.

9. Leave—If can be granted ex parte.

——Cl. 15—Leave—If can be given ex parte.

Leave to appeal under Cl. 15 can be granted ex-parte. A.I.R. 1942 Cal. 606=75 C.L.J. 419=I.L.R. (1942) 1 Cal. 403=46 C.W.N. 131=203 Ind. Cas. 580.

10. Orders in revision.

——Cl. 15—Orders in revision.

The orders which are made non-appealable are all orders made in the exercise of revisional jurisdiction and an appeal cannot be maintained to test whether an order which purports to have been made in the exercise of revisional jurisdiction was or was not made without jurisdiction. 9 Cal. 482 (P.C.), Dist. 64 Ind. Cas. 689=34 C.L.J. 489=A.I.R. 1921 Cal. 217.

——Cl. 15—Orders in revision.

No appeal lies against an order of a single Judge of the High Court on its Original Side, refusing an application under S. 115, C.P. Code for revision of a decree of the Calcutta Small Cause Court. 22 C.L.J. 40=30 Ind. Cas. 862.

——Cl. 15—Orders in revision.

An order discharging a rule issued under S. 115, C P. Code is not appealable under Cl. 15 of Letters Patent. 22 C.L.J. 113=30 Ind.Cas. 906.

——Cl. 15—Orders in revision.

There is no appeal against an order discharging a rule under S. 115 of the C.P.C. 22 C.L.J. 22=33 Ind. Cas. 247.

——Cl. 15—Orders in revision.

The order of the single Judge of the High Court interfering with the judgment of a Presy. Sm. Cause Court under S. 115, C. P. Code is a judgment within S. 15 of Letters Patent and is appealable. 41 Cal. 323=23 Ind. Cas. 977.

11. Order of remand.

——Cl. 15—Order of remand.

A decision of a single Judge of the High Court reversing in appeal an order of a Dt. Judge and remanding the case for rehearing is a judgment within Cl. 15. 27 C.L.J. 418=22 C.W.N. 627=44 Ind. Cas. 763.

——Cl. 15—Order of remand.

An order of remand for certain issues of fact only by a single Judge of the High Court is no judgment and hence not appealable. 2 Ind. Cas. 636 (Cal.)

——Cl. 15—Order of remand.

A judgment of a judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and the decree of the lower court is a judgment within the meaning of S. 15 of the Charter Act. 13 C.W.N. 105=4 Ind. Cas. 329.

12. Order under C. P. Code, O. 37

——Cl. 15—Order under C. P. Code, O. 37—Appealability.

An order O. 37, C. P. C. against a deft. to furnish security before he can defend the suit, is not appealable if it is that of a single Judge of High Court Original Side, under Cl. 15 of Letters Patent. 42 Cal. 735=22 C.L.J. 41=31 Ind. Cas. 238.

13. Restoration.

——Cl. 15—Restoration—Order making.

No appeal lies from an order made under O. 9, R. 9 restoring a suit, the order not being a judgment under Cl. 15 of the Letters Patent. 69 Ind. Cas. 820=49 Cal. 616=A.I.R. 1922 Cal. 407.

——Cl. 15—Restoration—Rejection of application for.

An order of a Judge of the High Court in its original jurisdiction rejecting an application under C.P.C., O. 9, R. 9 for restoring a suit dismissed for default is a judgment within Cl. 15 and is appealable. 43 Cal. 857=20 C.W.N. 594=23 C.L.J. 443=34 Ind. Cas. 634.

14. Review.

——Cl. 15—Review of judgment of Division Bench—Refusal by a Judge—Appeal.

An application for review of a judgment of a Division Bench of the High Court being rejected by a Judge the other having ceased to be a Judge, no appeal lies under the Letters Patent aginst the order. 25 C.L.J. 360=21 C.W.N. 852=41 Ind. Cas. 183.

15. Scope.

——Cl. 15—Scope—Single Judge of High Court hearing second appeal if can entertain application for extension of time for filing Letters Patent appeal.

A High Court Judge who hears a second appeal sitting singly, has no jurisdiction to entertain an application under S. 5, Lim. Act for the extension of the period of limitation for filing Letters Patent appeals. That is a matter for the Division Bench that may be consituted by the Chief Justice for the purpose of hearing Letters Patent appeals, and if there is no such Bench then constituted, it would be for the Chief Justice to constitute a Division Bench to deal with the application for extension of time. A.I.R. 1942 Cal. 606=I.L.R. (1942) 1 Cal. 403=75 C.L.J. 419=46 C.W.N. 131=203 Ind. Cas. 580.

——Cl. 15—Scope — Order refusing leave to appeal.

Whether an order refusing leave to appeal from a judgment passed in a second appeal be a judgment or not, it cannot be appealed against. A.I.R. 1931 Cal. 571=53 C. 342=134 Ind. Cas. 574 (2).

——Cl. 16—Civil Courts — Debt Settlement Boards are not Civil Courts.

Obiter.—Debt Settlement Boards are certainly not Revenue or Criminal Courts. They are tribunals which have been created by a special statute for a special purpose and are not Civil Courts within the meaning of Cl. 16. Further, they do not try suits of a civil nature and are not governed either by the provisions of the Civil P. C., or by the terms of the Bengal, Agra and Assam Civil Courts Act. They cannot, therefore, be described as Civil Courts. A.I.R. 1940 Cal. 286=41 Cr.L.J. 662=44 C.W.N. 530=I.L.R. (1940) 2 Cal. 14=188 Ind. Cas. 686.

——Cl. 16—Civil Courts—Officer under Agricultural Debtors' Act—If Civil Court:

A special Appellate Officer appointed under S. 40, Beng. Agri. Debtors' Act is not a Civil Court within the meaning of Cl. 16, Letters Patent, which does not cover Courts set up by a special statute for a special purpose. The fact that the special officer happens to be a Munsif makes no difference. A.I.R. 1938 Cal. 688=42 C.W.N. 892=178 Ind. Cas. 172.

——Cl. 16—Civil Courts.

Civil Courts contemplated by Cl. 16 do not cover Courts which are created by special statute for a special purpose. An actual relationship between Courts and the High Court must be established. A special Appellate Officer appointed under S. 40, Beng. Agri. Debtors' Act is not a Civil Court subordinate to the High Court within the meaning of S. 115, Civil P.C. A.I.R. 1938 Cal. 448=42 C.W.N. 507=68 C.L.J. 407=176 Ind. Cas. 616.

——Cl. 17.

Court will not appoint a stranger as mere custodian of minor instead of as guardian. A.I.R. 1944 Cal. 433=I.L.R. (1943) 2 Cal. 554.

——Cl. 17.

Court can take into consideration opinion of child below 16 years while appointing guardian for it. A.I.R. 1944 Cal. 433=I.L.R. (1943) 2 Cal. 554.

——Cl. 17.

Agreement by parents to give their child to third person to be brought up by later as his own is void. I.L.R. (1943) 2 Cal. 554=A.I.R. 1944 Cal. 433.

——Cl. 17.

Soon after birth, care and custody of female child given to third person—For 14 years child brought up, maintained and educated by such third person at her own expense—Father should not be allowed to assert his natural rights, on the ground of welfare of child. I.L.R. (1943) 2 Cal. 554=A.I.R. 1944 Cal. 433.

——Cl. 17.

Boy brought up by father for first eight years—Custody and education of boy given over to third person—Father still paying for maintenance and education of child:

Held, that father could be appointed guardian. A.I.R. 1944 Cal. 433=I.L.R. (1943) 2 Cal. 554.

——Cl. 17 — Jurisdiction — Appointment of guardian of person and estate of minor.

Calcutta High Court can appoint guardian of the persons and estates of minors residing within the whole of Bengal Division of the Presidency provided they are British subjects. A.I.R. 1944 Cal. 433 =I.L.R. (1943) 2 Cal. 554.

——Cl. 17—Jurisdiction.

The Original Side of the Calcutta High Court has no jurisdiction to direct an inquistion or appoint a guardian of person or property in the case of an Indian not resident in Calcutta. 58 C. 919=35 C.W.N. 1045=A.I.R. 1932 Cal. 91=133 Ind. Cas. 188.

——Cl. 17—Jurisdiction—Original Side of High Court has jurisdiction to appoint guardian of person and property of minor.

There is no restriction in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the town or to European British subjects and even if any such limitation exists, it does not apply where person who is outside the limits of ordinary orginal jurisdiction or who is not a European British subject desires to avail himself of the jurisdiction of the Court and there is no opposition thereto. 57 Cal. 533=A.I.R. 1930 Cal. 598.

——Cl. 17—Law to be administered by the Calcutta High Court in exercise of its ordinary original civil jurisdiction stated.

The Law that is to be administered by the Calcutta High Court in the exercise of its ordinary original civil jurisdictiion is to (a) receive, try and determine suits of every description as provided in Cl. 12, Letters Patent (1865), and (b) apply the same law or equity to each case which would have been applied by the Supreme Court of

Calcutta, namely, rules of English law and rules of Equity of the High Court of Chancery in Great Britain subject to Indian Legislative enactment; but (c) in suits against an inhabitant of Calcutta in matters of inheritance and succession to lands, rents and goods and in matters of contract and dealing between party and party, apply, when both parties are subject to the same personal law or custom having the force of law, that personal law or custom and when the parties are subject to different personal law or custom, the law or custom to which the defendant is subject. A.I.R. 1946 Cal. 90=48 C.W.N. 513=I.L.R. (1944) 2 Cal. 201.

——Cl. 17—High Court of Calcutta—Ordinary original jurisdiction—Parties Jews subject to Jewish law—Contract alleged to be invalid according to personal law—High Court must ascertain what the personal law is—Jewish law.

The Calcutta High Court in exercise of its ordinary orginal civil jurisdiction could not, before the Government of India Act, 1915, administer any personal law other than the personal laws of the Mohammadans and the Hindus in certain specified matters. But since 1915 that High Court in exercise of its ordinary original civil jurisdiction has been empowered to apply all personal laws, i.e., of all communities but only in certain specified matters and in no other matter.

Where both parties to the suit are Jews and subject to Jewish law and the suit is filed in the ordinary original civil jurisdiction, if the defendant claims that the contract in suit is invalid by reason of the provisions of the personal law of the parties it is incumbent on the Calcutta High Court after 1915 to ascertain what that personal law is and what effect that law has on the facts of the case in general and on the contract in suit in particular. A.I.R. 1946 Cal. 90=48 C.W.N. 513=I.L.R. (1944) 2 Cal. 201.

——Cl. 17—Law to be administered.

Appointment of guardian of minor under Cl.17—High Court should follow principles adopted by Court of Chancery in England—Guardians and Wards Act, how far applicable stated. A.I.R. 1944 Cal. 433=I.L.R. (1943) 2 Cal. 554.

——Cl. 19—Decision according to justice and right—Duty of High Court.

Under Cl. 19 of the Letters Patent read with Cl. 14 of the Charter, the High Court on its original side must decide causes according to justice and right, when no specific law is applicable. I.L.R. (1948) 2 Cal. 119=52 C.W.N. 142.

——Cls. 22, 23, 24—Vakil's right of audience.

13 C.W.N. 605=10 Cr.L.J. 553=4 Ind. Cas. 297 (S.B).

——Cl. 24.

Cls. 24, 29 Applications under Chap. XXXVII, R. 2, Crown Side Rules, for the exercise of the Extraordinary Jurisdiction conferred by Cls. 24 and 29 cannot be entertained on the Orginal Side of the High Court. 35 C.W.N. 1086=A.I.R. 1932 Cal. 394=137 Ind. Cas. 674.

——Cls. 24, 29—Crown Side Rules, Chap. XXXVII, R. 2—Jurisdiction of Original Side over Europeans.

The petitioners complained to the High Court against certain Police Officers of British India in respect of certain acts done by them in the French territory of Chandernagore. The petitioners did not obtain the certificate of the Political Agent or Local Govt. or sanction under S. 197, Criminal P.C.:

Held, (i) that neither the Extradition Act nor the British Foreign Jurisdiction Act had any application to the case;

(ii) that neither Cl. 24 nor Cl. 29 had any application to the case and the High Court, in its appellate side, had no jurisdiction to entertain the application;

(iii) that so far as the Indian subjects complained against were concerned, they could not be proceeded against without the certificate of the Political Agent, or the sanction of the Govt;

(iv) that as regards the Europeans who were resident within the ordinary original jurisdiction if any application lay at all, it must be made on the Original Side. 33 Cr.L.J. 322=A. I. R. 1932 Cal. 229=35 C.W.N. 1082=136 Ind. Cas. 598.

——Cl. 24.

Cl. 24 is the only clause of the Letters Patent which gives extraordinary original criminal jurisdiction to the Calcutta High Court. A.I.R. 1932 Cal. 123=35 C.W.N. 1088=33 Cr.L.J. 219=135 Ind. Cas. 880.

——Cl. 25.

The words in Cl. 41 "By any Court which has exercised original jurisdiction" have reference only to words in Cl. 25 "Courts constituted by one or more Judges of the High Court." A. I R. 1935 Cal. 477=39 C.W.N. 235=62 C. 389=36 Cr.L.J. 1211=157 Ind. Cas. 653.

——Cls. 25 and 26—Cases stated for opinion of Full Bench—Right to begin.

If in a Sessions trial the Judge convicts the accused but reserves the question of admissibility of the evidence for the opinion of the Full Bench, the Counsel for the accused should begin and have a right of reply before the Full Bench. Under Cls. 25 and 26 of the Letters Patent the Full Bench is not competent to order a retrial but should finally decide the matter on review. The Full Bench is not competent to investigate, independently of the evidence erroneously admitted, whether there was sufficient evidence to justify the verdict of the Jury. As it was doubtful whether a reasonable Jury would have found the accused guilty on the residue of the evidence, the conviction must be set aside. 47 Cal. 671=24 C.W.N. 501=31 C.L.J. 402=58 Ind. Cas. 929 (F. B.)

——Cls. 25 and 26—Certificate—Whole case open.

When points of law have been reserved or certified by the Advocate-General under the clauses and the High Court on review holds on the point of law in favour of the accused, it can consider the whole case on the evidence and pass such sentence as it thinks to be just. 44 Cal. 477=24 C.L.J. 400 =21 C.W.N. 33=18 Cr.L.J. 385=38 Ind. Cas. 945 (F. B.)

——Cl. 25—Procedure.

The initial step is for the trial Judge to reserve a point of law or for the Advocate-General to grant a certificate. The successive stages of the process which follows inevitably may be enumerated:—

(i) The Court reviews the entire case or such part of it as may be necessary.

(ii) The Court finally determines the point or points of law reserved or certified.

(iii) The Court thereupon alters the sentence passed by the Trial Court.

(iv) The Court passes such judgment and sentence as shall seem right to the Court.

The term "thereupon" must be construed with reference to the context; and it may, with good reason, be interpreted as equivalent to "upon final determination of the point of law reserved or certified in favour of the prisoner." It is not necessary that the contention of the prisoner should succeed in its entirety; if the opinion of the trial Judge on the point reserved or certified, which forms an ingredient of the reasons for conviction and sentence, is not supported, the conviction cannot be sustained, and it then becomes open to the Court to alter the sentences passed by the trial Judge. 81 Ind. Cas. 353=28 C.W.N. 170=38 C.L.J. 411=25 Cr.L.J. 817=A.I.R. 1924 Cal. 257 (F.B.)

——Cl. 25 and 26—Right of appeal—Extent.

The right of appeal or revision in the case of trials on the Sessions Side of a High Court is limited, to the two clauses. 44 Cal. 723=21 C.W.N. 167=18 Cr.L.J. 311=38 Ind. Cas. 423.

——Cl. 26.

Original Criminal trial by High Court—Advocate-General carefully considering the matter and declining to grant certificate—No rule can be issued calling upon him to show cause why he should not issue a certificate. 63=Cal. 838.

——Cl. 26—Certificate of Advocate-General—Statement of trial Judge—Weight due to.

A certificate under S. 26 of the Letters Patent should reflect the judgment of the Advocate-General and must be granted in the interests of justice after a careful consideration of all the available materials. It must be in conformity and not in conflict with the statement of the Judge who presided at the trial. Once the Advocate-General grants a certificate the Court has to deal with the case. The statement of the trial Judge as to what took place before him is conclusive. 19 C.W.N. 653 =21 C.L.J. 377=16 Cr.L.J. 561=30 Ind. Cas. 113 (F. B.)

——Cl. 26—Joint trial.

Where a Judge in his discretion under S. 239, Cr. P. C. desires to try a number of accused jointly it is not a matter for interference on a certificate of the Advocate-General under Cl. 26 of the Letters Patent. A defective summing up to the jury unless it causes a failure of justice is no ground for reversing a conviction. 76 Ind. Cas. 966=25 Cr.L.J. 294=38 C.L.J. 309 (F.B).

——Cl. 26—Powers under S. 537, Cr. P. Code.

Per **Rankin, J.**—S. 537, Cr. P. Code is applicable under Cl 26 of the Letters Patent. 93 Ind. Cas. 33=53 Cal. 350=43 C.L.J. 310=30 C.W.N. 276=27 Cr.L.J. 385=A.I.R. 1926 Cal. 470 (F. B.).

——Cl. 26—Procedure—Advocate-General must hear both sides—Allegation by parties must be verified.

Per **Mookerjee and Richardson, JJ.**—It is clear on the language of Cl 26, that the Letters Patent requires that the certificate should reflect the judgment of the Advocate-General and is presumably granted in the interest of justice after careful consideration of all available materials. If that judgment is founded on incomplete materials or inaccurate allegations, its weight is obviously diminished in a corresponding degree. In a case where the error ascribed to the Judge depends on the evidence adduced at the trial, it is plainly desirable that the notes of the evidence, as recorded by the Judge, should be laid before the Advocate-General when he was asked to grant the certificate. The requisite materials can always be obtained on application to the Judge. The Advocate-General must hear not merely Counsel for the prisoner, but also Counsel for the Crown before he grants the certificate. The allegations embodied in the petition to the Advocate-General should be verified by Counsel present at the trial or by other responsible person. 81 Ind Cas. 353=28 C.W.N 170=38 C.L.J. 411=25 Cr.L.J. 817=A.I.R. 1924 Cal. 257 (F.B.).

——Cl. 26—Verdict of jury.

Per **Rankin, C. J.**—The verdict of the jury cannot be allowed to stand unless the High Court in review under Cl. 26 be of opinion that the same verdict would have been arrived at, had they been correctly and sufficiently directed. It is not open to direct retrial in such a case. 47 Cal. 671 (F. B.), **Rel. on.**

Per **C. C. Ghose, J.**—The word "thereupon" means that the determination of the point or points of law reserved or certified must be in favour of the prisoner before the Court can interfere with the conviction and sentence. If it be found that the opinion of the trial judge on the point or points reserved or certified cannot be supported it is not open to the High Court to direct a retrial. No doubt the High Court has power under Cl. 26 to examine evidence and determine for itself whether after the exclusion of the evidence or matter which may be considered inadmissible, the residue and the record are sufficient to justify the conviction. The Court

will not substitute its own finding for the verdict of the jury. It must consider whether the evidence on record improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury and whether it was reasonably certain that the jury would, not might, have acted on the unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. S. 537, Cr. P. Code, has no application to a case under Cl. 26. 44 Cal. 477 (F.B.), **Appr.** A.I.R. 1926 Cal. 470 (F.B.), **Not appr.**

Per **Jack J.**—The Court can, on review, examine evidence for itself and determine without reference to the probable verdict of the jury, whether, excluding inadmissible evidence, the residue is sufficiently justifiable for the conclusion. If the Court is convinced on the evidence that the accused is guilty, he should not be acquitted merely on account of a defective charge. The unanimous verdict of the jurors should not be set aside on the mere speculation that certain allegations might have influenced them to some extent when it is clear that the verdict is entirely justifiable by the evidence. S. 167, Evidence Act, is imperative and applies even to the decision of the High Court when exercising its powers under Cl. 26. 119 Ind Cas. 103 = 50 C.L. J. 106 = 33 C.W.N. 1121 = 30 Cr L. J. 993 = 1929 Cr.C. 228 = A.I.R. 1929 Cal. 617 (S.B.).

——Cl. 28—Scope.

Cl. 28 is limited to such officers and Courts as were subject to reference or revision by the High Court at the time of the grant. The Secretary to the Local Government of Bengal acting under Bengal Act I of 1923 in the Goondas Act even on the assumption of his being a Criminal Court does not come under Cl. 28. 83 Ind Cas. 500 = 51 Cal. 460 = 26 Cr.L.J. 20 = A.I.R. 1924 Cal. 698.

——Cl. 29.

Applications under Chap. XXXVII, R. 2, Crown Side Rules for the exercise of the Extraordinary Jurisdiction conferred by Cls. 24 and 29 cannot be entertained on the Original Side of the High Court. A.I.R. 1932 Cal. 394 = 35 C.W.N. 1086 = 137 Ind. Cas. 674.

——Cl. 29.

The petitioner complained to High Court against certain Police Officers of British India in respect of certain acts done by them in the French territory of Chandernagore. The petitioners did not obtain the certificate of Political Agent or local Govt. or sanction under S. 197, Criminal P. C.

Held, neither Cl. 24 nor Cl. 29, had any application to the case. A.I.R. 1932 Cal. 229 = 35 C.W.N. 1082 = 33 Cr.L.J. 322 = 136 Ind. Cas. 598.

——Cl. 29.

Cl. 29 deals really with transfer of cases and an application upon a complaint to the High Court to take proceedings against certain persons some of whom are not Indians and some are either Indians or else residing within the original jurisdiction of the High Court does not lie to the High Court under Cl. 29. 35 C.W.N. 1088 = A.I.R. 1932 Cal. 123 = 33 Cr.L.J. 219 = 135 Ind. Cas. 880.

——Cl. 29—Proceedings under S. 145, Cr. P. C.—Transfer—Jurisdiction of High Court.

Per **Taylor, J.**—The High Court of Calcutta has jurisdictoin under Cl. 29 of the Letters Patent to transfer a proceeding under S. 145, Cr. P. C. 28 C. 709 = 5 C.W.N. 749.

——Cl. 30—Law applicable—Criminal prosecution for damages—Statement in course of judicial proceeding by party thereto—No absolute privilege applies—Same rule applies even under Letters Patent.

If a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein on oath or otherwise, his liability must be determined by reference to the provisions of S. 499, I. P. C. Under the Letters Patent the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; the Court cannot engraft thereupon exceptions derived from the Common Law of England or based on grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in S. 499, I. P. C.

If a party to a judicial proceeding is sued in a Civil Court for damages for defamation in respect of a statement made therein on oath or otherwise, his liability, in the absence of statutory rules applicable to the subject, must be determined with reference to principles of justice, equity and good conscience. There is a large preponderance of judicial opinion in favour of the view that the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the Common Law of England. A small minority favours the view that the principles of justice, equity and good conscience should be identical with the rules embodied in the Indian Penal Code. (**Case-law fully discussed.**) 59 Ind. Cas. 143 = 48 Cal. 388 = 22 Cr.L.J. 31 = A.I.R. 1921 Cal. 1 (S.B.).

——Cl. 30—Offence under Penal Code — High Court must apply Penal Code only.

Cl. 30 of the Letters Patent which is now in force makes the argument entirely untenable that the High Court is not to administer criminal law as contained in the Indian Penal Code but is to engraft thereon the rules of the Common Law of England. It is indisputable that all persons brought before the High Court for trial in the exercise of its original criminal jurisdiction or in the exercise of its jurisdiction as a Court of Criminal Appeal, Reference or Revision, if charged with an offence under the Indian Penal Code, shall be liable to punishment under that Code and not otherwise. 59 Ind. Cas. 143 = 48 Cal. 388 = 22 Cr.L.J. 31 = A.I.R. 1921 Cal. 1 (S.B.).

——Cl. 32—Admiralty Jurisdiction—Extent of.

The admiralty jurisdiction of the Calcutta High Court rests on Cl. 32 of the Letters Patent of 1865 which continues Cl 31 of the Letters Patent of 1862. The effect of these clauses is to vest in the High Court such civil and maritime jurisdiction as might be exercised by the supreme Court as a Court of Admiralty, or by any Judge of that Court as Commissary of the Vice-Admiralty Court. The Admiralty Jurisdiction of the Supreme Court is defined by Cl. 26 of the Charter of 1774. It conferred upon the Supreme Court a jurisdiction of Admiralty "as the same is used and exercised in that part of Great Britain called England". A.I.R. 1937 Cal. 122=171 Ind. Cas. 513.

——Cl. 32—Admiralty Jurisdiction—High Court—Law applicable.

The Admiralty jurisdiction of the High Court, rests on Cl. 32 of the Letters Patent of 1865 which continues Cl. 31 of the Letters Patent in 1862. The effect of these clauses is to vest in the High Court such Civil and Maritime jurisdiction as might be exercised by the Supreme Court under Charter of 1774, Cl. 26. Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessities by any previous enactments such jurisdiction now rests on Ss. 2 and 35 of the Colonial Courts of Admiralty Act of 1890, which vests in the High Court the powers described in S. 5 of the Admiralty Act 1861. To oust the jurisdiction so conferred on the High Court under S. 5, it is not enough that the owners of the ship should be in fact domiciled in Br. India; this domicile has to be proved to the satisfaction of the Court. The Court when it made the order for arrest had **prima facie** jurisdiction to do so, and as the exception to its jurisdiction had not been established the order cannot be treated as **coram non judice or a nullity.** 42 Cal. 85=28 Ind. Cas. 463.

——Cl. 34—Calcutta High Court—Testamentary jurisdiction over Assam.

The Calcutta High Court has testamentary and intestate jurisdiction over Assam.

If a person dies in Assam, leaving properties in Assam, Bengal and the United Provinces, exceeding Rs. 10,000 in each case, an application for probate having effect throughout British India may be made to the Calcutta High Court as the Court having jurisdiction in Assam. In such a case, the Assam rate and not the Bengal rate should be adopted in assessing the **ad volorem** Court-fees. I.L.R. (1946) 1 Cal. 77=49 C.W.N. 695.

——Cl. 34—Grant of probate—Jurisdiction of High Court—Property outside local limits of its ordinary original civil jurisdiction—Succession Act, Ss. 2 (bb) and 300.

The High Court has jurisdiction to grant probate of a will, although the property which is the subject-matter of the will is situated outside the local limits of its oridinary original civil jurisdiction and the testator lived and died outside the local limits of the said jurisdiction. Under Cl. 34 of the Letters Patent, the High Court's jurisdiction in testamentary matter is co-extensive with the limits of the province. This jurisdiction cannot be said to interfere with those provisions of the Succession Act which confer jurisdiction on District Judges to grant probates. The exercise by the High Court of its testamentary jurisdiction beyond the local limits of its ordinary original civil jurisdiction is not exclusive of, but concurrent with the jurisdiction of the District Judge. S. 300 (1), Succession Act, does not require that any portion of the property should be within the limits of the oridinary original civil jurisdiction of the High Court. Further, the definition of "District Judge" given in S. 2 (bb) of the Act includes a Judge of the High Court on the Original Side. A.I.R. 1950 Cal. 377=54 C.W.N. 225.

——Cl. 34.

Cl. 34 is not controlled by Cl. 11. I.L.R. (1943) 2 Cal. 554=A.I.R. 1944 Cal. 433.

—— Cl. 34—Jurisdiction under Succession Act.

Court exercising jurisdiction under S. 302 acts in pursuance of testamentary and intestate jurisdiction with which it is vested under Cl. 34. Letters Patent and not of its oridinary original jurisdiction. The Court is moreover not competent on an application under S. 302 to determine any disputed questions of title, the jurisdiction of the Court under that section being confined to the issue of direction to the executor relating to management of estate. 12 Bom. 638, **Rel. on.** 122 Ind. Cas. 197=56 Cal. 979=A.I.R. 1930 Cal. 258.

——Cl. 35—Scope.

Suit for judicial separation—Parties professing Jewish religion—Wife praying for order on her husband to pay her costs.

Held, that neither Cl. 35, Letters Patent (Calcutta) nor the Divorce Act applied to the case, but the suit came within the ordinary original civil jurisdiction of the High Court under Cl. 12, Letters Patent, and the procedure as regards payment of costs was that laid down by C. P. Code, of which S. 35 did not give the Court power to direct the order prayed for. 34 C.W.N. 319=A.I.R. 1930 Cal. 558.

——Cl. 36—Applicability—Assam High Court—Difference of opinion between the two Judges of that Court—Procedure—C. P. Code, S. 98.

Cl. 36 of the Letters Patent of the Calcutta High Court, which has been made applicable, with necessary modifications, by the Assam High Court Order, 1948, presupposes that the High Court consists of more than two judges. The necessary modification in the application of that clause would mean that so long as the Assam High Court consists of two Judges only that clause is, for all practical purposes, inoperative. Where, therefore, there is a difference of opinion between the two Judges who constitute that Court while hearing an appeal under S. 96, C. P. Code, the decree of the Court from which the appeal has been preferred must be confirmed. I.L.R. (1950) Assam 100=A.I.R. 1950 Assam 80.

——Cl. 36—Costs—Difference of opinion—Original Side appeal.

As regards the costs of an original side appeal, the Judges having differed, S. 98, C. P. C. is not applicable but Cl. 36 of the Letters Patent applies and the opinion of the Chief justice prevails. 24 C.W.N. 352=58 Ind. Cas. 421.

——Cl. 36—Difference of opinion in Bench.

In appeal from subordinate Courts a difference of opinion between two Judges forming a Division Bench is regulated by the provisions of S. 98, C. P. Code, and not by Letters patent, Cl. 36. 91 Ind. Cas. 897=52 Cal. 1018=A.I.R. 1926 Cal. 121.

——Cl. 36—Difference of opinion—Criminal revision—Govt. of India Act, S. 107.

If case is outside S. 435, Cr. P. Code, S. 439 cannot apply to it and in such a case, either S. 36 of the Letters Patent applies or there is no law regulating the procedure. In the latter case the Court should act in accordance with the principle underlying S. 36 of the Letters Patent. 24 C.W.N. 97=31 C.L.J. 183=21 Cr.L.J. 25=54 Ind. Cas. 169.

——Cl. 36—Difference of opinion—Costs.

Where there is a difference of opinion on the question of costs, the opinion of the Senior Judge prevails under Cl. 36 of the Letters Patent. 18 C.W.N. 106=17 C.L.J. 75=16 Ind. Cas. 922.

——Cl. 36—Judges differing—Reference of case under Cl. 36.

Per Buckland, J.—On the question of the admission of the appeal, there are three courses open to the Judges constituting a Division Bench of two Judges: either to concur in rejecting it, or to concur in admitting it or to differ. If they differ, it is possible for the one to give way to the other. But that is a matter purely between the Judges themselves and it is not a practice in the technical sense so as to impose a rule upon the Bench. If one of the Judges will not give way to the other and they deliver dissentient judgments, the case must be referred under Cl. 36 of the Letters Patent to a third Judge to decide whether the appeal should be admitted. 61 C. 365=A.I.R. 1934 Cal. 633=152 Ind. Cas. 597.

——Cl. 36—Scope.

Per Suhrawardy, J. (Walmsley, J., contra).—To the extent to which S. 98, C.P. Code is inconsistent with Cl. 36 of the Letters Patent the former has by virtue of the power conferred on the Indian Legislature by Cl. 44 of the Letters Patent superseded or modified the latter. 88 Ind. Cas. 637=52 Cal. 894=41 C.L.J. 456=29 C.W.N. 755=A.I.R. 1925 Cal. 845 (F.B.)

——Cl. 37.

If the rules of the Civil P. C., are contrary to the rules of the High Court made under the Letters Patent, the latter must prevail.

The rules made under Cl. 37 prevail over O. 3 R. 4 (5), Civil P. C. 59 C. 370=A.I.R. 1932 Cal. 1=35 C.W.N. 1100=135 Ind. Cas. 789.

——Cl. 37.

The High Court has the power under the Letters Patent to make rules inconsistent, if that be necessary, with the rules to the schedule to the Civil P. C. But until it does so, the Orders and Rules of the Civil P. C. apply to the Original Side. Any 'practice' of the Original Side inconsistent with the Code which applies, is contrary to law. Where a rule of the Code, owing to the operation of the rules framed by the High Court, cannot be applied exactly, it must be applied as reasonably as possible; where it can be applied strictly it must be so applied. 58 C. 510=A.I.R. 1931 Cal. 688=133 Ind. Cas. 587.

——Cl. 39—Appeal to the Privy Council—Remand—Account taken under order of Privy Council by an Appellate Bench—Order, a final decree of a Division Court—'Division Court,' meaning of.

Where the Privy Council remanded a case to the High Court directing accounts to be taken on a certain footing, an order made by a Bench of two Judges sitting on the appellate side, upon taking accounts as directed, was a final decree of a Division Court from which an appeal did not lie to the High Court under S. 15 of the Letters Patent. An appeal, therefore, lay from it to the Privy Council under S. 39 of the Letters Patent, when the amount in dispute exceeded Rs. 10,000. The expression 'Division Court' does not apply only to a Division Court sitting on the Original Side. Semble:—The case did not fall within Ss. 595 and 596 of the Civil Procedure Code (1882). 9 C.W.N. 566=32 C. 963.

——Cl. 39—Decision of High Court in Criminal Appeal.

The words "in any matter not being of criminal jurisdiction" in Cl. 39, govern all the classes of judgments; decrees or orders which are thereinafter in that clause mentioned and the High Court has, therefore, no power to grant leave to appeal to the Privy Council against a decision of the High Court sitting in Criminal Appeal from a trial by a Court of Session. 58 C. 344=A.I.R. 1931 Cal. 526=32 Cr.L.J. 1183=134 Ind. Cas. 544.

——Cl. 39—Final judgment made on appeal—Leave to appeal to Privy Council—Order allowing a party to sue "in forma pauperis".

An order passed by the High Court under S. 622 C. P. Code (old) deciding that a certain party should be allowed to sue in forma pauperis is not a "final judgment made on appeal" within the meaning of S. 39 of the Letters Patent. 8 C.W.N. 296,

——S. 39—Order on appeal—Order under S. 15, Charter Act—Final order', meaning of.

An order passed under S. 15 of Charter Act also is one passed on an appeal for the purposes of S. 39 of the Letters Patent. (21 W. R. 203, F, 30 C. 679, Dist.) 'Final order' in S. 39, Letters Patent means an order finally deciding any matter directly at issue in the case in respect of the rights of the parties. 13 C.L.J. 90=15 C. W. N. 848=9 Ind. Cas. 183.

——Cl. 41—Appeal to Privy Council.

Whether appeal lies to Privy Council from order on certificate by the Advocate-General was not decided as the Privy Council dismissed the appeal on merits. 85 Ind. Cas. 47=29 C.W.N. 181=1925 M.W.N. 20=3 Pat. L.R.Cr. 1=6 L.R.P.C.Cr. 1=27 Bom. L.R. 148=6 Pat. L.T. 169=52 I.A. 40=52 Cal. 197=23 A.L.J. 314=41 C.L.J. 240=26 Cr.L.J. 431=20 P.L.R. 50=A.I.R. 1925 P.C. 1=48 M.L.J. 543 (P.C.)

——Cl. 41—Appeal to Privy Council.

In a criminal case the Court's only power to grant leave to appeal to the Privy Council is under Cl. 41. There is no help if any case does not come under its strict application. 82 Ind. Cas. 763=38 C.L.J. 406=25 Cr.L.J. 1371=A.I.R. 1924 Cal. 338.

——Cl. 41—Appeal to Privy Council—Leave—Order under S. 118, Cr.P. Code.

An order of the High Court affirming an order under S. 118, Cr.P.C. whereby the petitioner was bound down to be of good behaviour and to execute a bond with sureties is not appealable to the Privy Council under Cl. 41 of the Letters Patent. 18 C.L.J. 119=14 Cr.L.J. 598=21 Ind. Cas. 470.

——Cl. 41—Bail.

High Court has jurisdiction to grant bail, especially when the High Court has declared the case to be a fit one for appeal, or when the Privy Council has granted special leave. 72 Ind. Cas. 362=24 Cr.L.J. 362=50 Cal. 585=A.I.R. 1924 Cal. 64.

——Cl. 41—'By any Court,' meaning of.

The words 'by any Court' in Cl. 41, have reference only to the Original Criminal Jurisdiction of the High Court. Cl. 25 refers to 'criminal trials before Courts of Original Criminal Jurisdiction' which may be constituted by one or more Judges of the High Court, and it proceeds to state that it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the High Court. The words in Cl. 41 "by any Court which has exercised Original Jurisdiction" have reference only to the words in Cl. 25 'Courts constituted by one or more Judges of the High Court.' A.I.R. 1935 Cal. 477=39 C.W.N. 235=62 C. 389=36 Cr.L.J. 1211=157 Ind. Cas. 653.

——Cl. 41.

Quaere.—Whether an appeal lies to the Privy Council under Cl. 41 where the decision appealed from is upon a question reserved for the opinion of the Court by a Court of Original Criminal Jurisdiction or where the High Court declares the case fit one for appeal to Privy Council. A.I.R. 1939 Cal. 682=1.L.R. (1939) 1 Cal. 187=43 C.W.N. 133=41 Cr.L. J. 59=184 Ind, Cas. 614.

——Cl. 41—Contempt proceedings — If come within Original Criminal jurisdiction.

Contempt of Court proceedings do not come within words "Orginal Criminal jurisdiction" in Cl. 41—No leave to appeal to Privy Council can therefore be asked for. 63 C. 287=39 C.W.N. 823.

——Cl. 41—Contempt proceedings.

Per Derbyshire, C.J. and Costello, J.—Proceedings for contempt of Court do not come within the phrase "original criminal jurisdiction of the High Court" within the meaning of Cl. 41. Proceedings for contempt of Court are of a peculiar nature; though it may be that in certain aspects, they are quasi-criminal, they are not exercised as part of the original criminal jurisdiction of the High Court.

There is inherent right to take such proceedings in the Calcutta High Court by virtue of its position as a Superior Court of Record. The power of the High Court to exercise jurisdiction of a summary character in a case of contempt was conferred or affirmed by the Charter under which the Supreme Court was originally established; which power the Calcutta High Court has inherited. The power to punish for a contempt of Court is a power sui generis. It is not a power which is or can be exercised under the ordinary criminal jurisdiction of the Court. When the High Court, as a Court of Record, thinks it fit to exercise summary jurisdiction and under that jurisdiction, punishes for contempt of Court, it is not open to the person concerned to ask the High Court for leave to appeal to His Majesty-in-Council. A.I.R. 1935 Cal. 419=39 C.W.N. 770=36 Cr.L.J. 1053=61 C.L.J. 376=63 C. 217=156 Ind.Cas. 1055 (F.B.).

——Cl. 41—Conviction by Presidency Magistrate upheld by High Court — Petition for leave to appeal from the decision—Maintainability.

Where a Judge of the High Court confirms a conviction on revision from the order of conviction and sentence of the Presidency Magistrate, the order made by the judge is not made in the exercise of the original criminal jurisdiction, nor is it made in any Criminal case where any point or points of law had been reserved for the opinion of the High Court by any Court which had exercised original jurisdiction and hence a petition for leave to the Privy Council to appeal from the decision is not maintainable. A.I.R. 1935 Cal. 477=39 C.W.N. 235=62 C. 389=36 Cr.L.J. 1211=157 Ind. Cas. 653.

——Cl. 41—Criminal appeal—Difference between two Judges—Reference to the third Judge—Leave to appeal to Privy Council.

Under Cl. 41 of the Letters Patent no appeal lies to the Privy Council from the judgment of a Judge of a High Court on a reference to him on a difference of opinion between two other Judges of the same Court. 18 C.L.J. 121=14 Cr.L.J. 672=21 Ind. Cas. 912.

——(EAST PUNJAB), Cl. 10—Certificate of fitness of case for appeal—Who can grant.

Under Cl. 10, Letters Patent, the only person who can grant a certificate declaring that a case is a fit one for appeal is the Judge who passed the judgment and no other Judge. A.I.R. 1950 E.P. 288 = 52 P.L.R. 223.

——(LAHORE)—Original Criminal Jurisdiction.

According to the Letters Patent the Original Criminal Jurisdiction of the Lahore High Court is co-extensive with that of the Chief Court of the Punjab, which had no original criminal jurisdiction to try any person except the European British subjects. 115 Ind. Cas. 428 = 30 Cr. L.J. 460 = 12 A.I. Cr. R. 413 = A.I.R. 1929 Lah. 217.

——Original Criminal Jurisdiction.

Unless expressly prohibited by the Letters Patent to take cognizance of a certain offence the High Courts constituted after 1915 have the power to take cognizance of all offences which have been made cognizable by such Courts by the statutory laws in force in India. 115 Ind. Cas. 428 = 30 Cr.L.J. 460 = 12 A.I.Cr. R. 413 = A.I.R. 1929 Lah. 217.

——Cl. 8—Conviction of legal practitioner under S. 17 (1), Criminal Law Amendment Act, whether sufficient ground for suspension.

Where a legal practitioner has been convicted and he has neither moved the High Court nor appealed from the conviction, it is not open to him to ask the High Court to go into the merits of the conviction when called upon under Cl. 8 to show cause why his name should not be removed from the list of practitioners or attorneys of the Court.

In a proceeding under Cl. 8, the Court has to look to the character and position of the persons and judge of the acts committed by them upon the same principle as if the Court were considering whether or not a person is fit to become an Attorney, the principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court.

Being a member of an association which interferes with the maintenance of law and order, or is a danger to the public peace may well be considered to render a man an improper person to be a practitioner in a Court of Justice but it by no means follows that a man, who has committed an isolated act which assists the operations of an unlawful association, is necessarily such an improper person. Much would depend upon the nature of the act done and the particular operation assisted.

The mere fact that a lawyer assisted in the celebration of the Independence Day by a Congress Committee, in the absence of any evidence as to the nature of the acts done by him is no ground for punishing him under Cl. 8.

The fact that a legal practitioner had made a speech at a meeting organized by an unlawful association condemning the action of the Government in arresting a popular leader is not in itself sufficient to show that he is an improper person to be a legal practitioner.

Per **Jai Lal, J.**—Every conviction of a legal practitioner under S. 17 (1), Criminal Law Amendment Act does not necessarily attract the disciplinary jurisdiction of the High Court. 14 L. 532 = A.I.R. 1933 Lah. 577 = 143 Ind. Cas. 737 (S.B.).

——Cl. 8—Removal or suspension from practice.

A conviction under S. 17 (1) of the Criminal Law Amendment Act (14 of 1908) constitutes a reasonable cause within the meaning of Cl. 8, Letters Patent, (Lahore), for the removal orsuspension from practice of an Advocate or Vakil. Strictly speaking, proceedings under Cl. 8 are neither civil suits nor criminal prosecutions. The High Court exercises a special jurisdiction over legal practitioners in pursuance of the authority conferred upon it by the Letters Patent or an Act of the Legislature and has inherent power to apply such rules of procedure as may ensure a fair trial of the matter requiring adjudication. What is essential is that the parties concerned should have a proper notice and a reasonable opportunity to be heard. The propriety in law or in fact of the conviction cannot be questioned in the proceedings taken by the Court in the exercise of its disciplinary jurisdiction. Advocate or Vakil may be struck off the rolls for an offence which has no relation whatsoever to his character as a legal practitioner but the mere circumstance that he has been convicted of an offence does not make it imperative on the Court to remove or suspend him from practice. It is not necessary that the act of a legal practitioner which is relied upon for striking his name off the roll should have subjected him to anything like a general infamy or imputation of bad character. 44 Bom. 418 (F.B.); 49 Cal. 732 and 49 Cal. 845 (P.C.), Rel. 76 Ind. Cas. 385 = 4 Lah. 271 = 25 Cr.L.J. 161 = 6 L.L.J. 491 = A.I.R. 1924 Lah. 123 (S.B.).

——Cl. 8—Disciplinary action against advocate convicted of criminal offence—Legality of conviction——If can be challenged.

In proceedings under Cl. 8, Letters Patent, for disciplinary action against an Advocate who has been convicted of a criminal offence, the legality of the conviction cannot be challenged except perhaps on the ground of jurisdiction. If the conviction is by a Court of competent jurisdiction, it must be taken to be correct for the purposes of these proceedings, as obviously the High Court cannot sit in appeal in these proceedings on the merits of convictions for criminal offences. I.L.R. (1947) Lah. 150 = 49 P.L.R. 62 = 226 Ind. Cas. 470 = A.I.R. 1946 Lah. 338 (F.B.).

——Cls. 8 and 29—Order of High Court made under disciplinary powers—Expunging of remarks in judgment—Application to High Court for leave to appeal to Privy Council—If competent.

Orders made under Cl. 8 of the Letters Patent merely amount to the exercise of disciplinary powers by the High Court in respect of Advocates or vakils and do not fall within the purview of Cl. 29 of the Letters Patent. Consequently, an application to the High Court for leave to appeal to His Majesty in Council from its order made under its disciplinary powers or for getting certain remarks expunged from its judgment is not competent under Cl. 29 of the Letters Patent and S. 109-C, C.P. Code. I.L.R. (1947) Lah. 720 = A.I.R. 1949 Lah. 83 (F.B.).

——Cl. 8—Scope.

Under Cl. 8, no person whatsoever but an Advocate, *Vakil* or Attorney of High Court shall be allowed to act or plead for or on behalf of any suitor in the High Court. A.I.R. 1937 Lah. 318 = 174 Ind. Cas. 239.

——Cl. 8—High Court's discretion to take action, whether can be fettered by the Local Government.

The Local Government have no *locus standi* in any way to fetter the discretion of the High Court to take or not to take any action under Cl. 8 or under the Legal Practitioners' Act, against any legal practitioner; the matter is one which is entirely within the discretion of the High Court and consequently, as the Local Government, is not competent to claim that action should be taken against any particular legal practitioner, it follows from this that it has no right or power either to abandon any proceedings or to condone the conduct of the legal practitioners so far as it comes within the purview of the disciplinary jurisdiction of the High Court so as to bind it in any way. 15 L. 354 = A.I.R. 1934 Lah. 251 = 35 Cr.L.J. 1010 = 36 P.L.R. 510 = 149 Ind. Cas. 764 (S.B.).

——Cl. 9—Transfer of proceeding in insolvency from the Lower Court to the High Court.

The word "suit" in Cl. 9 should be interpreted widely and the word "suit" in the Letters Patent does include a proceeding in the Insolvency Court. The Lahore High Court, under its extraordinary powers, has jurisdiction to transfer a proceeding in insolvency from the lower Court to the High Court for disposal. A.I.R. 1936 Lah. 608 = 38 P.L.R. 235 and 1013 = 17 L. 582 = 160 Ind. Cas. 972.

——Cl. 10.

Synopsis.

(1) Appeal.
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(1) Appeal.

——Cl. 10—Appeal.

A decree or order passed by Single Bench of Lahore High Court on second appeal from the appellate decree of Subordinate Court is under Cl. 10, Lahore Letters Patent, appealable to a Bench of two or more Judges of the High Court. A.I.R. 1942 Lah. 169 = 44 P.L.R. 318 = I.L.R. (1942) Lah. 592 = 201 Ind. Cas. 468 (F.B.).

——Cl. 10—Appeal.

Order of High Court holding application under S. 235, Companies Act by the Liquidator maintainable—Order is appealable under S. 202—Aggrieved party can appeal to Division Bench under Cl. 10, Letters Patent. A.I.R. 1938 Lah. 658 = 180 Ind. Cas. 254.

——Cl. 10—Appeal—Burden of proof.

Where the evidence has already been fully examined by a Judge of the High Court and is considered to be insufficient for the purpose of establishing the plaintiff's allegation, the onus lies heavily on the plaintiff in a Letters Patent appeal by him, against the decision to show that the conclusion arrived at by the Judge is legally erroneous. A.I.R. 1937 Lah. 644 = 39 P.L.R. 293 = 173 Ind. Cas. 165.

——Cl. 10—Appeal—Refusal to set aside—Dismissal "for default."

It is only in the exercise of his appellate power that a Judge of the High Court can exercise his jurisdiction under O. 42, Civil P.C., read with O. 41, R. 19 and whatever order he may pass, it does no doubt affect the original appeal. When a Judge dismisses an appeal "for default," he confirms the Judgment and decree of the lower Appellate Court and in refusing to set aside that order, he declines as it were to re-open the case or, in other words, to withdraw his order confirming the decree of the lower Appellate Court. The order of refusal is therefore, made in respect of the appeal and in the exercise of appellate jurisdiction. The certificate required by Cl. 10 is, accordingly, necessary before an appeal against the order can be presented to a Division Bench of the High Court. A.I.R. 1935 Lah. 815 = 156 Ind. Cas. 454.

——Cl. 10—Appeal—Refusal to re-admit appeal dismissed for default.

An appeal lies under Cl. 10 from the order of a Judge in chambers rejecting an application under O. 41, R. 19, C.P. Code, for the re-admission of an appeal dismissed in default. 89 Ind. Cas. 795 = A.I.R. 1925 Lah. 617.

——Cl. 10—Appeal—Refusal to set aside dismissal.

An appeal lies under Cl. 10 from an order made by a single Judge rejecting an application for an order to set aside a dismissal of an appeal. 3 Lah. 188 ; A.I.R. 1922 Lah. 380 and 43 Cal. 857, Foll. 71 Ind. Cas. 824 = A.I.R. 1924 Lah. 412.

——Cl. 10—Appeal—Dismissal of appeal.

A judgment dismissing an appeal against the appellant is not appealable. 77 Ind. Cas. 477 = A.I.R. 1923 Lah. 504.

(2) Certificate.

——Cl. 10—Certificate—Only the Judge who passes judgment has authority to make declaration that case is fit for appeal.

The grounds on which a review is competent are different from those on which a further appeal lies under Cl. 10 after the certificate has been granted by the Judge who had decided the case. Hence, when permission for appeal under Cl. 10 is refused, the petition cannot be treated as an application for review. A.I.R. 1935 Lah. 330 = 16 L. 602 = 37 P.L.R. 708 = 157 Ind. Cas. 23.

——Cls. 10 and 26—Certificate—Declaration of fitness of case for appeal to the Privy Council—Whether should be made by the Judge who passed the judgment.

Clause 10 requires the declaration of fitness of a case for appeal to the Privy Council to be made by the Judge who passed the judgment sought to be appealed against. Clause 26 does not empower any Judge of the High Court to make the declaration in the absence of the Judge who passed the judgment. 34 P.L.R. 469 = A.I.R. 1933 Lah. 534 = 143 Ind. Cas. 141 (1).

(3) Final order.

——Cl. 10—Final order, what is.

After the passing of the preliminary and final decrees in a mortgage suit against father, the son brought an objection against the sale of his share, instituted a suit and got an order of stay. His suit was dismissed and he filed an appeal and, on the day the appeal came for preliminary hearing, a stay order was again granted on 23rd July, 1921, *ex parte*. The decree-holder then applied for the discharge of the stay order, praying in the alternative that security for the amount of the decree and costs be taken. The application of the decree-holder was dismissed on 24th March, 1922, and he filed an L.P.A. against this order on 1st May, 1922. It was contended that the order of the 24th March, was not a final order within the meaning of Cl. 10, Letters Patent.

Held, if that objection is acceded to, it would follow that the appellants would be bound by an *ex parte* order without power to question that order, Justice would be done by treating this appeal admitted on 15th May as being one from the order of the 23rd July, 1921, and extending the time within which that appeal would have to be brought. Justice will be met by allowing the appeal on the terms that security be given by the respondent for the full decretal amount without

regard to the security of the property attached. 84 Ind. Cas. 24 = 5 L.L.J. 287 = A.I.R. 1923 Lah. 428.

(4) Finding of Fact.

——Cl. 10—Finding of fact.

An appeal under the Letters Patent is one preferred against the decree, and all the points necessary to be investigated for the determination of the correctness of the decree are open for consideration. But as a Court of appeal the High Court would of course be slow to take, upon a point of fact, a view contrary to the concurrent opinions of the trial Judge and of the Judges of the Division Bench. A.I.R. 1949 E.P. 349 = 51 P.L.R. 70.

——Cl. 10—Finding of fact.

In appeal under Cl. 10 of the Letters Patent the High Court can set aside the judgment of a single Judge who has interfered with an erroneous finding of fact in second appeal. 31 Punj. L.R. 381 = A.I.R. 1930 Lah. 144.

(5) Joint order by dissenting Judges.

——Cl. 10—Joint order by dissenting Judges.

Cl. 10 confers a right of appeal and that right is not extinguished simply because the Judges while considering the effect of their dissent on the result of appeal joined in making an order that the decree should be framed in a particular way.

There would hardly be any case in which the dissenting Judges would not be required to concur in an order disposing of the appeal in accordance with the opinion of the one Judge or the other. 93 Ind. Cas. 344 = 7 Lah. 179 = 27 P.L.R. 50 = 8 L.L.J. 13 = A.I.R. 1926 Lah. 65.

(6) Judgment.

——Cl. 10—Judgment in Cl. 10, if synonymous with decree.

The word "judgment" in Cl. 10 is not synonymous with decree. The clause contemplates orders other than judgment in a decree. Whether an order amounts to a "judgment" within the clause must be considered on the facts and circumstances of each case and the tests propounded. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

——Cls. 10, 29—Judgment.

The word "judgment" in Cl. 10 is not the same as the words "final judgment" in Cl. 29. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

——Cl. 10—Judgment—What is.

An order determining the forum in which the suit is to be tried, amounts to a judgment within Cl. 10 and hence, is appealable. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

——Cl. 10—Judgment, interlocutory.

The term 'judgment' in S. 10 of Letters Patent includes any interlocutory judgment which decides so far as the Court pronouncing such judgment is concerned whether finally or temporarily any question materially in issue between the parties and directly affecting the subject matter of the suit. 77 Ind. Cas. 327 = A.I.R. 1922 Lah. 185.

——(PUNJAB), Cls. 10, 29 and 30—"Judgment"—Interlocutory order—Stay of execution.

The term "Judgment" in the Letters Patent is a very wide one, having a not much narrower connotation than the definition given in the C. P. Code. 'Judgment' in S. 10 of the Letters Patent includes any interlocutory judgment which decides so far as the Court pronouncing such judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject-matter of the suit. An order on an application to stay execution pending appeal, comes within the definition of 'Judgment' and so is appealable. 12 P.W.R. 1920 = 79 P.L.R. 1920 = 55 Ind. Cas. 933.

——Cl. 10—"Judgment"—Reference under Income-tax Act.

The decision of a High Court upon a case stated and referred to it by the Chief Revenue Authority under the Income-tax Act is not a final "judgment" within the meaning of Cl. 10 of the Letters Patent of the Lahore High Court but is merely advisory and not final. 88 Ind. Cas. 570 = 6 Lah. 30 = 26 P.L.R. 144 = A.I.R. 1925 Lah. 336.

——Cl. 10—Judgment—Refused to transfer case.

An order refusing to transfer a suit is a judgment within the meaning of Cl. 10 and hence is appealable. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

[Overrules A.I.R. 1927 Lah. 540 = 102 Ind. Cas. 843].

——Cl. 10—"Judgment"—Refusal to transfer case.

An order refusing to transfer a case pending before a Subordinate Court is not a judgment within Cl. 10 of the Letters Patent as it does not put an end to the proceeding before that Court. 102 Ind. Cas. 843 = 3 Lah. 681 = 29 P.L.R. 16 = A.I.R. 1927 Lah. 540.

——Cl. 10—Judgment—What is—Order registering decree as that of Revenue Court under S. 100, Punjab Tenancy Act, 1887, if "Judgment."

An order registering a decree as that of a Revenue Court under S. 100, Punjab Tenancy Act, is a judgment within Cl. 10 and is, therefore, appealable. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

[Overruling A.I.R. 1936 Lah. 785 = 166 Ind. Cas. 292.]

——Cl. 10—"Judgment," What is.

An order passed in an appeal from preliminary decree restraining the trial Court from passing a final decree during the pendency of the appeal amounts to a "judgment" within the meaning of Cl. 10. 111 Ind. Cas. 274 = 29 P.L.R. 571 = 10 Lah. 132 A.I.R. 1928 Lah. 904.

——Cl. 10—Judgment.

Order directing the issue of notice to the respondents in Europe, which will have the effect of postponing the hearing of the appeal indefinitely, cannot be held to be a judgment. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit or appeal is not a judgment within the meaning of the Letters Patent. However, making the *ad interim* order staying execution absolute constitutes a judgment within the meaning of Cl. 10. 93 Ind. Cas. 351 = 8 L.L.J. 35 = 27 P.L.R. 109 = A.I.R. 1926 Lah. 174.

——Cl. 10—Judgment—What is—Determination of question whether suit can be brought 12 years after mutation is a judgment.

If the effect of an order, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. But it is impossible to lay down any definite rule, and the only thing which can be said is that in determining whether an order constitutes a judgment or not, the Court must consider the nature of the order and its effect upon the civil proceeding in which it was

made. Though a mere formal order or an order merely regulating the procedure cannot be viewed as a judgment, it cannot be held that the words "right" and "liability" were used in a narrow sense. The determination of the question whether the plaintiff is entitled to bring his suit after the lapse of twelve years from the date of the mutation is a determination of right, and the adjudication thereupon certainly affects the merits of the question between the parties. 67 Ind. Cas. 388 = 3 Lah. 188 = A.I.R. 1922 Lah. 380.

(7) Land acquisition cases.

——Cl. 10—Land acquisition cases—Judgment of single Judge confirming award of District Judge—Letters Patent appeal from, is not barred by S. 54.

The word "only" does not restrict the right of appeal but was intended to make it clear that the *forum* of appeal in Land Acquisition cases is always the High Court and not the District Court; and that it is immaterial whether the amount of compensation awarded by the Court of first instance does or does not exceed Rs. 5,000 and whether the Court of first instance is the Court of a District Judge or that of a Subordinate Judge or an Assistant Judge. It is beyond dispute that Cl. 10 of the Letters Patent gives in express terms a right of appeal and that right has not been impliedly taken away by S. 54 more especially when the section is merely an enabling section and was enacted in order to confer a right of appeal to His Majesty in Council. 69 Ind. Cas. 428 = 3 Lah. 420 = A.I.R. 1923 Lah. 275.

(8) Limitation.

——Cl. 10—Limitation—Forum and right of appeal given by Letters Patent—S. 12, Lim. Act, if applies.

An appeal from a judgment passed by the High Court in the exercise of its original civil jurisdiction whether ordinary or extraordinary, in which not only the forum of appeal, but also the right of appeal is given by the Letters Patent, is governed by Art. 151, Lim. Act which is subject to S. 12, Lim. Act. Hence in such a case, the appellant is entitled to exclude under S. 12 the "time-requisite" for obtaining a copy, whether such copy is filed or not. A.I.R. 1941 Lah. 257 = 43 P.L.R. 297 = I.L.R. (1941) Lah. 191 = 195 Ind. Cas. 452 (F.B.).

[Overrules A.I.R. 1921 Lah. 26 = 61 Ind. Cas. 327.]

——Cl. 10—Limitation.

Ignorance of law is no excuse for delay and therefore the fact that the appellant previously was under the impression that limitation was 90 days for a Letters Patent Appeal in Lahore is no excuse for not filing it within the 30 days period prescribed by the rules. 61 Ind. Cas. 327 = 2 Lah. 127 = 3 L.L.J. 415 = 74 P.L.R. 1921 = A.I.R. 1921 Lah. 26.

——Cl. 10—Limitation.

The period for an appeal under the Letters Patent is governed exclusively by the Rules made by the High Court, which provide *inter alia* that no copy of the decree, order, or judgment appealed from need accompany the memorandum of appeal. Ignorance of the rules or the fact that the period expired during the vacation is not an excuse for presenting appeal out of time. 60 Ind. Cas. 737 = 3 L.L.J. 361 = A.I.R. 1921 Lah. 237.

(9) New point.

——Cl. 10—New point.

A plea that the appeal may be taken to have been filed by the executive officer under S. 35 (1), Punjab Municipal Act which had never been advanced before cannot be permitted to be advanced for the first time at the stage of Letters Patent Appeal. A.I.R. 1943 Lah. 318 = 45 P.L.R. 365 = 211 Ind. Cas. 353.

——Cl. 10—New Point.

An objection that an application is barred by time is not purely one of law. It is a mixed question of fact and law and cannot be allowed to be raised for the first time in Letters Patent Appeal. A.I.R. 1943 Lah. 129 = 207 Ind. Cas. 561.

——Cl. 10—New point.

The plea that the subsequent mortgagee cannot claim the right of subrogation on the ground that the date on which he paid off the prior mortgagee, the prior mortgage was not subsisting as more than 12 years had elapsed from the date of the prior mortgage, depends on questions of fact and cannot be allowed to be raised for the first time in Letters Patent Appeal. A.I.R. 1943 Lah. 113 = 45 P.L.R. 143 = 209 Ind. Cas. 75.

——Cl. 10—New point.

The point that in deciding the question whether an alienation by a Hindu widow governed by custom was or was not for necessity, the amount of the income of the estate is irrelevant in the particular tribe to which the widow belonged, cannot be raised for the first time in Letters Patent Appeal. A.I.R. 1942 Lah. 200 = 44 P.L.R. 274 = I.L.R. (1943) Lah. 406 = 201 Ind. Cas. 511.

——Cl. 10—New point.

The point that there was a mistake apparent on the face of the record which was not noticed by oversight of all concerned and that it should be corrected, can be allowed to be raised for the first time in Letters Patent Appeal. A.I.R. 1940 Lah. 204 = 42 P.L.R. 7 = 188 Ind. Cas. 679.

——Cl. 10—New point.

Where the objection was not specifically raised before the Single Judge of the High Court, it cannot be allowed to be raised in Letters Patent Appeal under Cl. 10. A.I.R. 1936 Lah. 555 = 166 Ind. Cas. 603.

——Cl. 10—New point.

The question whether abstinence, to sue, when coupled with other circumstances would or would not amount to waiver is largely, if not wholly, a question of fact. Such a point, when not taken before the Single Judge, cannot be allowed to be raised in Letters Patent Appeal. A.I.R. 1936 Lah. 159 = 162 Ind. Cas. 673.

——Cl. 10—New point.

It is not open to a party to raise a new point in an appeal under the Letters Patent. A.I.R. 1933 Lah. 685 = 34 P.L.R. 853 = 145 Ind. Cas. 416 (1).

——Cl. 10—New point.

An appellant is not entitled in an appeal under the Letters Patent to be heard on a point which had not been raised before the Judge from whose judgment he prefers the appeal.

A plaintiff, therefore, who distinctly states in the plaint and admits before the single Judge that his suit is governed by the Punjab Limitation (Custom) Act cannot be allowed to contend in a Letters Patent Appeal that it is not so governed. 31 P.L.R. 282 = A.I.R. 1930 Lah. 632.

——Cl. 10—New point.

The point not raised before the Division Bench who heard the appeal cannot be taken in an appeal under Letters Patent. 120 Ind. Cas. 284 = 30 P.L.R. 433 = 11 L.L.J. 425 = A.I.R. 1929 Lah. 536.

——Cl. 10—New point.

A new plea that the suit is barred by Art. 144 cannot be permitted in appeal since its decision would involve a finding of fact whether the appellant's possession was adverse to the knowledge of the respondent. 80 Ind. Cas. 321 = 6 L.L.J. 151 = A.I.R. 1924 Lah. 468.

——Cl. 10—New point.

In an appeal under the Letters Patent an appellant is not entitled to be heard on a point which has not been raised before the Judge from whose judgment he is appealing. 79 Ind. Cas. 281 = A.I.R. 1923 Lah. 151.

——Cl. 10—New point.

It is not open to the parties to raise in appeal under the Letters Patent a contention which was not urged before the Court from the judgment of which the appeal is preferred. 2 Lah. L.J. 1 = 11 P.W.R. 1920 = 28 P.L.R. 1920 = 55 Ind. Cas. 983.

(10) Parties.

——Cl. 10—Parties.

An appeal cannot be proceeded with if necessary parties to the appeal are not impleaded. 89 Ind. Cas. 298 = 7 L.L.J. 182 = 26 P.L.R. 150 = A.I.R. 1925 Lah. 392.

(11) Question of law.

——Cl. 10—Question of law—Whether from facts proved permanent tenancy can be inferred is question of law.

The question whether on facts proved an inference of there being a permanent tenancy or not can be drawn is a question of law and not a question of fact and can, therefore, be reconsidered even in the Letters Patent Appeal. A.I.R. 1944 Lah. 9 = 45 P.L.R. 339 = 211 Ind. Cas. 366.

——Cl. 10—Question of law.

Per *Division Bench*.—A contention based on a point of law which cannot be concluded by any admission that may have been made before the Single Judge can be raised in Letters Patent Appeal. A.I.R. 1942 Lah. 42 = 43 P.L.R. 689 = 199 Ind. Cas. 677.

(12) Rejection of petition under S. 491, Cr.P. Code.

——Cl. 10—Rejection of petition under S. 491, Cr. P. Code—Appeal.

A Judge of the High Court disposing of a petition under S. 491, Cr.P. Code, exercises criminal jurisdiction, and as such no appeal is competent under Cl. 10 of the Letters Patent from his order rejecting the petition. I.L.R. (1945) Lah. 573.

(13) Revision.

——Cl. 10—Revision.

No appeal lies under Letters Patent against order passed in revision. 94 Ind. Cas. 521 = 6 Lah. 250 = A.I.R. 1925 Lah. 624.

(14) Scope of appeal.

——Cl. 10—Scope of appeal.

When the plea of subrogation was not specifically pleaded but all the necessary facts were clearly stated in the plaint and one of the issues framed was comprehensive to cover the plea and the parties were fully cognizant that the plaintiff claimed priority as subrogee and the arguments were addressed on the point in the first Court, and in all Courts, this was one of the main points considered and decided, it is too late for the appellant to object in appeal under the Letters Patent that this plea, not having been specifically taken in the plaint, should be disallowed. A.I.R. 1943 Lah. 113 = 45 P.L.R. 143 = 209 Ind. Cas. 75.

——Cl. 10—Scope of appeal.

The use of the word "wherever" in Cl. 10 is not intended to confine the scope of the appeal to the point or points on which there is a disagreement between the Judges.

When once the right of appeal is established, the appellant can raise, not only the points upon which the Judges have differed, but also those on which they have agreed. 93 Ind. Cas. 344 = 7 Lah. 179 = 27 P.L.R. 50 = 8 L.L.J. 13 = A.I.R. 1926 Lah. 65.

(15) Miscellaneous.

——Cl. 10—Miscellaneous.

A memorandum of appeal cannot be put in at any time in cases where an order appealed from does not require a certificate of the Judge who made the order. A.I.R. 1935 Lah. 328 = 37 P.L.R. 504 = 16 L. 448 = 156 Ind. Cas. 668 (F.B.).

——Cl. 10—Miscellaneous.

While hearing a Letters Patent Appeal from the decision of a Single Judge, it is open to the Bench to grant a stay when the Single Judge has not exercised any discretion in the matter and has not given any decision on the merits of the application. A.I.R. 1934 Lah. 361 = 150 Ind. Cas. 985 (1).

——Cl. 10—Miscellaneous.

Though an appeal may lie from an order made by a Single Judge in the exercise of his discretion, the fact that the making of the order was a matter of discretion may be a good ground for refusing to exercise the appellate jurisdiction. A.I.R. 1933 Lah. 881 = 14 L. 804 = 35 P.L.R. 98 = 144 Ind. Cas. 672.

——Cl. 10—Miscellaneous.

The order passed by a High Court transmitting an order in Council for execution is appealable 123 Ind. Cas. 277 = 31 P.L.R. 182 = 12 L.L.J. 93 = A.I.R. 1930 Lah. 674.

——Cl. 26—Applicability.

All cases of difference of opinion among the Judges composing the Division Bench are governed by Cl. 26, Letters Patent (Lahore) and not by S. 98, Civil P.C. since the addition of sub-section (3). A.I.R. 1934 Lah. 371 = 15 L. 425 = 35 P.L.R. 760 = 149 Ind. Cas. 575 (F.B.).

——Cl. 26—Applicability.

When the Judges of a Division Bench, of the High Court differ, even in the case of appeals from the *moffussil*, the case is governed by Cl. 26 and not by S. 98. A.I.R. 1933 Lah. 648 = 34 P.L.R. 584 = 142 Ind. Cas. 427.

——Cl. 26—Applicability.

Where an appeal is heard by a Bench composed of two Judges who differ in opinion the decision of the appeal is regulated by S. 98, C.P.C., if the appeal is from a Subordinate Court under the Civil Procedure Code or any local or special statute. In all other cases the decision is governed by Cl. 26 of the Letters Patent (Lahore). 93 Ind. Cas. 344 = 7 Lah. 179 = 27 P.L.R. 50 = 8 L.L.J. 13 = A.I.R. 1926 Lah. 65.

——Cl. 26—Referee Judge must return his finding on point of difference to Division Bench for pronouncing decision of appeal.

When a point is referred to a third Judge under Cl. 26 on a difference of opinion between the two Judges hearing the appeal, the jurisdiction for the decision, not only of the appeal as a whole, but also of the point of difference, remains with the referring Bench. All that Cl. 26 lays down is a method by which, in the case of a difference of opinion, the difficulty is to be resolved. Hence, it would be the duty of the referee Judge to express an opinion on the point or points of difference and to return the case with his opinion to the Division Bench seized of the case which must pronounce the final judgment, according to the method provided by Cl. 26. If, in the interval, a change has occurred in the constitution of the Division Bench in question, it would be necessary for the Chief Justice to constitute another Division Bench as the successor of the referring Bench. Consequently, the third or referee Judge should return his finding on the point of difference to the referring Bench for it to pronounce the decision of the appeal. In such a case, the decree is that of the original

Bench, and not of any other Bench. A.I.R. 1943 Lah. 84 = 45 P.L.R. 166 = I.L.R. (1943) Lah. 539 = 206 Ind. Cas. 247 (F.B.).

——Cl. 26—Scope.

Where the senior Judge does not press his opinion and instead of deciding the appeal the Division Bench sends it to the Chief Justice who orders the appeal to be heard by a Full Bench, no objection can be taken to the constitution of the Full Bench on the ground that under Cl. 26 the appeal should be decided according to the opinion of the Senior Judge. 61 Ind. Cas. 926 = 2 Lah. 133 = 3 L.L.J. 297 = 75 P.L.R. 1921 = A.I.R. 1921 Lah. 1 (F.B).

——Cls. 26 & 10—Scope.

Under Cl. 10, declaration of fitness of case for appeal to the Privy Council should be made by the Judge who passes the judgment. Cl. 26 does not empower any Judge of the High Court to make the declaration in the absence of Judge who passed the Judgment. 34 P.L.R. 469 = A.I.R. 1933 Lah. 534 = 143 Ind. Cas. 141 (1).

——Cl. 27—Rules under Cl. 27, if 'special law' within meaning of S. 29, Lim. Act—S. 12, Lim. Act—If applies.

The statutory rules framed by the High Court under Cl. 27, under the authority delegated to it by His Majesty who in turn, was acting under the powers conferred on him by Act of Parliament are a 'special law.' It follows, therefore, that by virtue of the provisions of S. 29, Lim. Act, S. 12 governs appeals under Cl. 10 from the judgments passed by the High Court in its appellate jurisdiction and therefore, the 'time requisite' in obtaining a copy of the judgment appealed from must be excluded. A.I.R. 1941 Lah. 257 = I.L.R. (1941) Lah. 191 = 43 P.L.R. 297 = 195 Ind. Cas. 452 (F.B.).

[**Overrules** A.I.R. 1921 Lah. 26 = 61 Ind. Cas. 327].

——Cl. 29—Cl. 29 of Lahore Letters Patent pemits appeal to His Majesty-in-Council from (1) any final judgment, decree or order of the High Court made on appeal and (2) any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the High Court or of any Division Bench of the Court. In either of these cases, however, condition must be satisfied that from such judgment, decree or order "an appeal does not lie under provisions in Cl. 10, Letters Patent." A.I.R. 1942 Lah. 169 = 44 P.L.R. 318 = I.L.R. (1942) Lah. 592 = 201 Ind. Cas. 468 (F.B.).

——Cl. 29—No appeal lies to His Majesty-in-Council under Cl. 29 of Letters Patent (Lahore) from a decree on order passed by Single Bench of Lahore High Court on second appeal. A.I.R. 1942 Lah. 169 = 44 P.L.R. 318 = I.L.R. (1942) Lah. 592 = 201 Ind. Cas. 468 (F.B.).

——Cl. 29—The word 'judgment' in Cl. 10 is not the same thing as words 'Final Judgment' in Cl. 29. A.I.R. 1942 Lah. 95 = 44 P.L.R. 140 = I.L.R. (1942) Lah. 491 = 200 Ind. Cas. 652 (F.B.).

——(MADRAS), Cl. 8—It is incorrect to say that Cl. 8 of Madras Charter, 1800, gave jurisdiction to the Supreme Court to issue the writ of *certiorari* to a Court of Company anywhere throughout the Province. Cl. 8 gives and defines an authority which is to be exercised over those who, by the later clauses, are made subject to it. The writ does not issue to correct purely executive acts. The object of writ is to secure by the exercise of authority of superior Court that the jurisdiction of inferior tribunal should be properly exercised. 56 M.L.W. 460 = A.I.R. 1943 P.C. 164 = 1943 M.W.N. 525 = 48 C.W.N. 18 = (1943) 2 M.L.J. 254 = 10 B.R. 278 = I.L.R. (1944) Mad. 457 = I.L.R. (1944) Kar. (P.C.) 119 (Sup.) = 70 I.A. 129 = 210 Ind. Cas. 239 (P.C.).

——Cls. 8, 21, 22 & 23—Scope of.

Per *Sundara Aiyar, J.*—Cl. 8 of the Letters Patent does not widen the jurisdiction given to the Court in Civil and Criminal matters by Cls. 21, 22 and 23. 36 Mad. 72 = 23 M.L.J. 393 = 13 M.L.T. 367 = (1912) M.W.N. 1012 = 13 Cr.L.J. 723 = 16 Ind. Cas. 755.

——Cl. 9—Appearance in insolvency cases.

Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to act and plead in the insolvency jurisdiction of the High Court. 113 Ind. Cas. 876 = 28 M.L.W. 545 = 52 Mad. 92 = 1928 M.W.N. 856 = A.I.R. 1928 Mad. 1182 = 55 M.L.J. 551 (F.B.).

——Cl. 9—Vakils have no right of audience in the Insolvency Court at the Presidency Town of Madras. 85 Ind. Cas. 1025 = 48 Mad. 331 = A.I.R. 1925 Mad. 385 = 48 M.L.J. 36 (F.B.).

——Cls. 9, 10—Vakil—Right of audience.

Vakils have a right of audience on the Original Side of the Madras High Court; Attorneys have not the right of audience on the Original Side of the Madras High Court. R. 533 of the Original Side Rules of the Madras High Court of 1902 is not *ultra vires* of the Letters Patent. 31 M.L.J. 698 = (1916) 2 M.W.N. 529 = 37 Ind. Cas. 699.

——Cl. 10—The power-of-attorney agent has no right of audience either on Appellate or Original Side of High Court. A.I.R. 1937 Mad. 937 = (1937) M.W.N. 1060 = 46 M.L.W. 734 = (1937) 2 M.L.J. 552 = I.L.R. (1938) Mad. 12 = 172 Ind. Cas. 489 (F.B.).

——Cl. 10—Bench of three Judges is competent to hear an enquiry into the conduct of an Advocate. It is not necessary that all the Judges of the High Court should sit to hear the matter. 61 M.L.J. 148 = 32 Cr.L.J. 1085 = 34 M.L.W. 19 = 54 M. 857 = A.I.R. 1932 Mad. 131 = 134 Ind. Cas. 33 (F.B.).

——Cls. 10 and 33—Disciplinary jurisdiction—Orders—Appeal.

Orders passed in proceedings in exercise of the disciplinary jurisdiction vested in the High Court under Cl. 10 are not appealable under Cl. 39 and no special leave to appeal to the Privy Council can be granted. 39 Mad. 128 = 29 M.L.J. 16 = 29 Ind. Cas. 879.

——Cl. 10—Misconduct.

Negligence by itself is not professional misconduct; into that offence there must enter the element of moral delinquency. 96 Ind. Cas. 685 = 49 Mad. 523 = 1926 M.W.N. 412 = 24 M.L.W. 100 = A.I.R. 1926 Mad. 568 = 50 M.L.J. 399 (F.B.).

——Cl. 10—Misconduct—Advocate convicted for perjury in England—Disbarment by Benchers of his Inn—Subsequent good conduct—Admission as Advocate in India—High Court is not bound by the decision of the Benchers—Propriety of conviction cannot be gone into. 76 Ind. Cas. 873 = 46 Mad. 903 = 18 M.L.W. 823 = 33 M.L.T. 110 = 25 Cr.L.J. 281 = A.I.R. 1924 Mad. 265 = 45 M.L.J. 639 (F.B.).

——Cl. 10—Reasonable cause—Professional misconduct.

Where a pleader filed a petition in a criminal case containing unfounded allegations against the presiding Judge. *Held*, that he was guilty of professional misconduct. 8 M.L.T. 375 = 21 M.L.J. 76 = (1911) 1 M.W.N. 359 = 11 Cr.L.J. 684 = 8 Ind. Cas. 574 (F.B.).

——Cl. 10—Vakil—False notice—Unprofessional conduct.

A vakil who sends a notice reciting facts which are false to the knowledge of the vakil is guilty of unprofessional conduct and he is not protected by the fact that it was "under instructions" from his client. 6 M.L.T. 329 = 11 Cr.L.J. 165 = 4 Ind. Cas. 1072.

——Cl. 10—Vakil—Professional misconduct—Perjury—Asserting absolute title in himself—Getting a conveyance benami.

Where a vakil taking advantage of the ignorance and needy position of his clients bought the equity of redemption for much less than its value and afterwards fraudulently executed a fresh mortgage deed in favour of the plaintiff s mortgagee in order to defraud his clients and to secure for himself the property in fraud of the understanding between himself and his clients which he sought to support in Court by giving false evidence and securing evidence of false witnesses, *Held*, he was guilty of professional misconduct and was debarred from practising for 2 years. 40 Mad. 69 = 18 Cr.L.J. 449 = 39 Ind. Cas. 289.

——Cl. 10—Vakil—Professional misconduct—Suggestion to influence a Judge in his favour.

A vakil is guilty of professional misconduct, meriting more than a mere warning, for suggesting that he is in a position to influence a Judge in his favour by indirect and improper means. 26 M.L.J. 429 = 23 Ind. Cas. 789.

——Cl. 10—Vakil—Suspension—Reasonable cause—Negligence—Duty to the Court and the client.

Where a vakil, though acquitted of personal fraud, permitted his clerks, guilty to his own knowledge of practising fraud and gross deception upon his client to continue in correspondence with him, there is "reasonable cause" to suspend the vakil from practice under Cl. 10 of the Letters Patent. It is the general function of the Bar and the solicitors that they must in the conduct of all suits entrusted to them co-operate with the Court in the orderly and pure administration of justice. 35 Mad. 543 = 39 All. 191 = 16 C.W.N. 1081 = 23 M.L.J. 114 = 13 Cr.L.J. 680 = 12 M.L.T. 396 = 14 Bom. L.R. 1079 = 16 C.L.J. 634 = (1912) M.W.N. 963 = 16 Ind. Cas. 328 (P.C.).

——Cl. 11—Original and ordinary original jurisdiction—Distinction between ordinary original and original civil jurisdiction of the High Court.

There is a distinction between the original jurisdiction of the High and the ordinary civil jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are original civil when matters come for the first time to the High Court, and they are appellate civil when they come in the form of appeals. The granting of probates or succession certificates will come within the original civil jurisdiction, but it would not come under ordinary original civil jurisdiction, which, by the Letters Patent, seems to be confined to suits and matters under Cls. 12 to 21, which refer to the exercise by the High Court of its ordinary original civil jurisdiction. 53 Mad. 237 = 59 M.L.J. 17 = 32 M.L.W. 4 = 126 Ind. Cas. 481 = A.I.R. 1930 Mad. 779.

——Cls. 11 and 12—Original jurisdiction.

The High Court in the exercise of its original jurisdiction is merely a local Court. 12 M.L.T. 229 = (1912) M.W.N. 974 = 23 M.L.J. 726 = 17 Ind. Cas. 342.

——Cl. 12.

Synopsis.

1. **Carrying on business.**
2. **Cause of action.**
3. **Dwell.**
4. **Effect of amendment.**
5. **Leave to sue.**
6. **Relative scope of Cls. 12 and 18.**
7. **Suit for land.**
8. **Miscellaneous.**

1. Carrying on business.

——Cl. 12—Carrying on business—Insurance Company having head office at Calcutta and branch office at Madras.

A company only carries on business where it enters into contracts relating to its business, not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business.

Where, therefore, an insurance company with its head office at Calcutta has its branch office in Madras but the contracts of insurance are made in Calcutta and not in Madras, it cannot be said that the company is carrying on business in Madras within the meaning of Cl. 12, Letters Patent. 52 M.L.W. 625 = (1940) M.W.N. 1078 = (1940) 2 M.L.J. 688 = A.I.R. 1941 Mad. 270 = I.L.R. (1941) Mad. 109 = 195 Ind. Cas. 201.

——Cl. 12—Carrying on business, etc.

The words "carry on business or personally work for gain" are inapplicable to the Secretary of State for India in Council. 14 Cal. 256, rel. on. 105 Ind. Cas. 576 = 50 Mad. 449 = 39 M.L.T. 304 = 26 M.L.W. 558 = A.I.R. 1927 Mad. 689 = 53 M.L.J. 355.

——Cl. 12—Carrying on business.

Whereas the words "carry on business" apply to a corporate body and to limited companies, and "personally work for gain" to an individual or individuals, the word "dwell" can only apply to an individual in a private sense and not to an entity. 105 Ind. Cas. 576 = 50 Mad. 449 = 39 M.L.T. 304 = 26 M.L.W. 558 = A.I.R. 1927 Mad. 689 = 53 M.L.J. 355.

——Cl. 12—Carrying on business through agent is within the clause.

"Carrying on business" includes carrying on business through an agent. 12 Ch. D. 522, foll. and 12 B. 507, diss.

Under Cl. 12 of the Letters Patent the power to try suits against persons is expressly conferred in the case of defendants dwelling or carrying on business or personally working for gain within the jurisdiction and it is impossible to construe 'defendant' to include foreigners in two out of three cases and not in the third, as all three occur in the same sentence. 'Defendant' therefore includes foreigners. 76 Ind. Cas. 752 = 18 M.L.W. 515 = 1923 M.W.N. 739 = 33 M.L.T. 19 = A.I.R. 1924 Mad. 158 = 45 M.L.J. 471.

2. Cause of action.

——Cl. 12—"Cause of action" meaning of—Jurisdiction of High Court—Contract, breach of.

The words "cause of action" in S. 12 mean all those things which are necessary to give a right of action; and in a suit for breach of contract the High Court has no jurisdiction where leave has not been given unless it is proved that the contract as well as the breach of it occurred within the local limits of the Court. 27 M. 494.

——Cl. 12—Cause of action—Posting of offer or despatch of offer by telegram.

The posting of an offer or the despatch by telegram of an offer from a particular place cannot be regarded as part of the cause of action. The offer is made at the place where it is received and if it is made by post or telegram, the place of despatch is not a material factor. Similarly, the notice of rejection must be taken to have been given in the place where the letter was received. The place of rejection is not material. A.I.R. 1940 Mad. 49 = 50 M.L.W. 597 = (1939) M.W.N. 171 = (1940) 1 M.L.J. 676 = I.L.R. (1940) Mad. 195 = 190 Ind. Cas. 154.

——Cl 12—Cause of action.

A suit, without leave under Cl. 12, to recover goods or price of goods confiscated by Collector of Customs,

after seizure thereof by the District Officer on the ground that they were smuggled into British India, does not lie on the original side, simply because the order of the Collector was made within its jurisdiction, where the goods were seized outside its limits. 105 Ind. Cas. 576 = 50 Mad. 449 = 39 M.L.T. 304 = 26 M.L.W. 558 = A.I.R. 1927 Mad. 689 = 53 M.L.J. 355.

——Cl. 12—Cause of action—International Law—Foreigner, action against—Personal action—Submission to jurisdiction—Probate—Costs.

One *V. A.* of Seringapatam in Mysore left a will by which he appointed the four defendants, executors and, *inter alia* provided that the moneys due on policies issued to him by two life insurance companies of Bombay and Calcutta should be collected and invested in Government promissory notes and that four-fifths of the same should go to his daughter, the plaintiff for life, and then to her children and the remaining one-fifth should go to his widow for life, and after her death to her children. Soon after the testator's death in 1862 the executors obtained probates in the High Court of Madras in respect of properties in the Madras Presidency in the District Court of Civil and Military Station, Bangalore, in respect of properties in the Province of Mysore. The Madras probate did not include the policy moneys. The 1st defendant, who was the son of the testator, was left by the other executors sole possession of the properties of the testator. He collected the policy moneys and instead of investing them in the Government securities, advanced the moneys on the securities of lands in Mysore. He was paying interest to the plaintiff regularly till 1897, when a dispute arose as to whether she should have the Government interest only or the actual interest under the mortgage. The 1st defendant at first denied her right to more than Government interest, but finally questioned the validity of the father's will and the right of the plaintiff thereunder. This action for administration was commenced against the executors, the 2nd and the 4th being residents of Madras, and the 1st and the 3rd of the Mysore Province. The 3rd defendant appeared but did not plead to the jurisdiction of the Court. The 1st defendant raised the point of jurisdiction in his written statement, not however, on the ground that he was a foreigner though even that contention he raised in an affidavit he filed early in the case. *Shephard, J.*, dismissed the suit as against defendants 1 and 3, on the ground that they did not reside, nor the cause of action arose within the jurisdiction; and as against the other two, on the ground that it would be useless to give a decree against them as they were not in possession of the properties. On appeal, *held*, that the action was rightly dismissed as against the 1st defendant, but that there should be a decree against the other three, the 3rd defendant, assuming he was a foreigner, having submitted to the jurisdiction of the Court. Per *Chief Justice*.—In any view of the plaintiff's cause of action, whether it was her right to the administration of the trust or the defendant's repudiation of the trust, or the investment of the money in improper securities. The whole cause of action did not arise in Madras. And the Court will have no jurisdiction unless the whole cause of action as defined in 8 Cal. 107, arose in Madras. *See* (1900) 2 Q.B. 43—*Obiter*.—On a proper construction of Art. 12 of the Letters Patent foreigners are not exempt from the jurisdiction of the High Court and the 1st defendant cannot, therefore, take the exception to the jurisdiction on the ground that he was a foreigner, especially as he had not taken it in his written statement or obtained an issue on the point. Per *Davies, J. Obiter*.—It is very doubtful whether (1900) 2 Q.B. 43 is applicable to any but actions on contract. In cases like this the trust follows the beneficiary and the place of performance is the place where the beneficiary resides. The whole cause of action, therefore, arose at Madras. But a personal action against a non-resident foreigner will not lie if he does not submit to the jurisdiction of the Court. The suit against the 1st defendant should, on this ground, be dismissed. In dismissing a suit for the administration of trusts on the ground of want of jurisdiction, the Court has power under S. 220, C.P.C. and Art. 21 of Letters Patent to direct the plaintiff's costs to be paid out of the estate. 11 M.L.J. 91.

——Cl. 12—Cause of action—Part of cause of action—Promissory note payable in Madras or Secunderabad—Payments of interest in Madras.

Where a promissory note was executed in plaintiff's favour at Vizianagaram, payable in Secunderabad or Madras, and payments of interest were made in Madras. *Held*, that part of the cause of action had arisen in Madras, and a suit could be filed in the High Court with leave to sue. 24 M. 259.

3. Dwell.

——Cl. 12—Dwelling within limits, meaning of.

The defendant who was a domiciled resident in Mysore left his house in charge of a servant, hired a house in Madras to which he brought his wife and children, and apprenticed himself to a vakil for a year in Madras. In a suit brought against him some months after, on the Original Side of the High Court, with leave under Cl. 12 of the Letters Patent. *Held*, that as the defendant had taken up his abode in Madras with the intention of dwelling there for several months and was living there at the time of the institution of the suit, the suit was cognizable by the High Court on the Original Side. 34 Mad. 257 = 38 I.A. 129 = 15 C.W.N. 741 = 8 A.L.J. 774 = 13 Bom. L.R. 520 = (1911) 2 M.W.N. 375 = 14 C.L.J. 64 = 21 M.L.J. 669 = 10 M.L.T. 263 = 11 Ind.Cas. 447 (P.C.).

——Cl. 12—"Dwell"—Jurisdiction over foreigner—Essentials—Parts of the cause of action—Executor—Jurisdiction of Court over executor—Estoppel—Will—Adverse title by executor—Presumption.

The mere presence of a foreigner within the local limits of a Court's jurisdiction at the time of the institution of the suit gives jurisdiction over the foreigner to the Court. (21 I.A. 171, explained). In India a suit is instituted on the mere filing of the plaint. The presence of a foreigner in order to confer jurisdiction need not be an abiding in the place involving permanency as opposed to a temporary stay or a mere temporary locality of existence; nor need it be that there should have been personal service or even issue of the writ of the foreigner while he is within the territory. The word 'dwell' in Cl. 12 of the Letters Patent does not import any permanency of residence. Where the defendant in the case shut up his house in Bangalore (foreign territory), took up a house within the Court's jurisdiction for his exclusive occupation and occupied it with his wife and child and entered at the same time into a contract of apprenticeship with a professional man in the new place in order to qualify himself to the Bar (the same involving an uninterrupted stay in Madras) and acted upon the contract for a period of six months. *Held*, that the defendant dwelt within the jurisdiction of the Court within the meaning of Cl. 12 of the Letters Patent. A breach of an undertaking to a Court to administer the estate is part of the cause of action within the meaning of Cl. 12 of the Letters Patent in a suit against the executor in respect of the administration. A Court from which an executor takes out probate or letters has jurisdiction over the executor in respect of the administration even though he be a foreigner. Where the Court has jurisdiction to make a grant of probate it has power to decide whether the will is a valid testamentary disposition. A proprietor of a foreign immovables or person interested in such, may be compelled by the King's Court if it has jurisdiction over him to dispose of his property

or his interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort provided there is nothing in the foreign law preventing him from doing what the Court directs. The presumption is that the legislature does not intend to exceed its jurisdiction ; the occasion for its application arises only when the words of the enactment leave room for doubt as to whether jurisdiction has been conferred. Per *White, C.J.*—When a cause of action arose wholly in Madras, the High Court would have jurisdiction under Cl. 12 of the Letters Patent to entertain a suit against a person in respect of that cause of action, notwithstanding he might be an absent foreigner. 1 M.L.T. 71 = 16 M.L.J. 238 = 29 M. 239. **Affirmed in** 8 A.L.J. 774 = 13 Bom.L.R. 520 =15 C.W.N. 541 (P.C.).]

4. Effect of amendment.

——Cl. 12—Effect of amendment.

The provisions of the amended Letters Patent cannot be read as conferring jurisdiction upon High Court in a case where one or more of the several defendants reside within its jurisdiction. The real question to be considered is the balance of convenience. Where major portion of the cause of action arises outside Madras, leave to sue in Madras should be refused. 72 Ind. Cas. 982 = 1922 M.W.N. 841 = A.I.R. 1923 Mad. 272.

——Cl. 12—Jurisdiction—Submission of accounts—at Madras—Defendant residing out of Madras.

If the defendant submits the accounts of his agency to the plaintiff in his shop at Madras, the High Court in its Original Side does not cease to have jurisdiction merely because the defendant resides in a place outside such jurisdiction. (1915) M.W.N. 519 = 29 Ind. Cas. 462.

5. Leave to sue.

——Cl. 12—Leave exhausted by filing suit.

Leave was given to sue in the High Court, but the suit was withdrawn under S. 373, C.P.C. A fresh suit was sought to be filed on the same cause of action and leave was applied for, but refused. *Held* (1) that the previous leave was exhausted by the filing of the suit, and the Court could grant or refuse leave as it deemed proper ; (2) that the order passed by the Court in the due exercise of its discretion should be up-held. 24 M. 293.

——Cl. 12—Leave to sue—Mortgaged properties partly within Madras and partly outside—It is immaterial whether or not mortgagors had good title to property alleged to be within the jurisdiction of the Court.

Where the plaintiff seeks to obtain leave to institute a suit against the defendant on a mortgage by the defendant of certain properties one of which is alleged to be within the original jurisdiction of the High Court, it makes no difference whatever, as to the jurisdiction of the Court whether or not the mortgagor had a good title to the property situated within the jurisdiction of the Court. 71 Ind. Cas. 390 = 14 M.L.W. 563 = A.I.R. 1921 Mad. 701 (F.B.).

——Cl. 12—Leave to sue granted—Motion to revoke—Written statement.

Where leave to sue was granted a motion to revoke that leave should be made at once, as a major portion of the cause of action had arisen in Madras, or the party should take an extension of time for filing his written statement on that ground. It is for the interest of the parties that the question whether leave is to be revoked or not should be decided at the outset before any costs are incurred. 8 M.L.T. 349 = (1910) M.W.N. 564 = 8 Ind. Cas. 299.

——Cl. 12—Leave to sue—Discretion, exercise of—Convenience.

The High Court should in granting leave to sue a non-resident foreigner exercise its jurisdiction with caution ; and the question of convenience of trial is not a matter to be excluded from the consideration of the Court in granting leave to sue. 17 M.L.J. 304 = 30 M. 438.

6. Relative scope of Cls. 12 & 18.

——Cls. 12 and 18—Relative scope.

Cl. 12, Letters Patent, does not affect the provisions of Cl. 18. 40 Mad. 810, rel. on. 112 Ind. Cas. 149 = 51 Mad. 540 = 28 M.L.W. 285 = A.I.R. 1928 Mad. 732 = 55 M.L.J. 171 (F.B.).

——Cls. 12 and 18—Relative scope.

S. 12 does not control S. 18. 40 Mad. 810 = 20 M.L.T. 311 = 4 M.L.W. 425 = 36 Ind. Cas. 524.

7. Suit for land.

——Cl. 12—Suit for land.

A suit to avoid an incumbrance on land, is a suit for land. 12 M.L.T. 229 = (1912) M.W.N. 974 = 23 M.L.J. 726 = 17 Ind. Cas. 342.

——Cl. 12—Suit for land—Administration suit.

An administration suit is not a suit for land. And where leave to sue has been granted High Court can decide question of title to land even where the land is wholly outside its jurisdiction.

But the High Court will not grant leave unless a substantial portion of the cause of action has arisen within the jurisdiction, and, if the leave has been wrongly granted, it is quite open to the defendants apply for that leave being revoked. 110 Ind. Cas. 276 = 28 M.L.W. 583 = A.I.R. 1928 Mad. 760 = 55 M.L.J. 266.

——Cl. 12—"Suit for land"—Specific performance action.

A suit by a purchaser of lands situate outside the presidency town for specific performance of a contract to sell, made in the presidency town by parties resident therein is not a suit for land within the meaning of Cl. 12 and so is cognizable by the High Court in its Ordinary Original Civil Jurisdiction. 118 Ind. Cas. 73 = 52 Mad. 809 = 30 M.L.W. 169 = A.I.R. 1929 Mad. 721 = 57 M.L.J. 190 (F.B.).

——Cl. 12—Suit for land—Suit for damages for cutting and carrying away trees.

A suit for damages for cutting and carrying away trees is a suit for land or other immovable property within the meaning of Cl. 12 of the Letters Patent. 30 M.L.J. 120 = 33 Ind. Cas. 906.

——Cl. 12—Suit for land—Claim for damages for trees cut—Test.

The suit is one for land under Cl. 12, where on the allegations in the plaint, title to land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit. A suit for the recovery of damages for trees cut and carried away from the plaintiff's casuarina plantation is a suit for land. 26 M.L.J. 567 = 15 M.L.T. 411 = 24 Ind. Cas. 895.

——Cl. 12—Suit for land—Originating summons regarding legacy outside city limits.

Legacy comprising lands situated outside limits of city of Madras—Question whether proceedings pursuant to originating summons constitute suit for land under Cl. 12, involves substantial question of law. (1940) M.W.N. 1223 = 52 M.L.W. 881 = A.I.R. 1941 Mad. 194 = (1941) 1 M.L.J. 186 = I.L.R. (1941) Mad. 226 = 195 Ind. Cas. 767.

——Cl. 12—Suit for land—Suit for account of management of trust is not "suit for land."

The expression "suit for land" must be construed as an action, the primary object of which is to establish claims regarding the title to property or possession of property and no suit can be described as a "suit for land" as the result of the decision in which the title to, or possession of, immovable property will not in any manner or measure be directly affected.

A suit for an account of the management of a trust is really, a suit for administration of a trust and not a "suit for land" and, therefore, is not excluded from the jurisdiction of the High Court, though the trust properties are in the moffussil. 90 Ind. Cas. 188 = 22 M.L.W. 160 = 1925 M.W.N. 395 = A.I.R. 1925 Mad. 1084 = 49 M.L.J. 311.

——Cl. 12—Suit for land—Suit for maintenance—Charge on specific immovable property.

Plaintiff sued for maintenance on the Original Side of the High Court and prayed that her maintenance may be made a charge on certain lands of the defendant. *Held*, that the suit was "for land" within Cl. 12 and the High Court could entertain the suit. A suit for maintenance in which the plaintiff only prays for a decree charging her maintenance on ancestral property, without specifying any particular portion of that property, may not be a suit for land, as no relief is claimed against any specific property but where the maintenance is sought to be made a charge on specified immovable property the plaintiff prays for a decree to operate directly on the immovable property and the suit is therefore one for land. 33 Mad. 131 = 6 M.L.T. 263 = 20 M.L.J. 103 = 3 Ind. Cas. 930.

——Cl. 12—Suit for land—Lands situate partly within and partly without—Leave to sue, discretionary.

Where land is situated partly within and partly without the local limits of the original civil jurisdiction of the High Court the granting of leave to sue under Cl. 12 is purely discretionary and the High Court will not in appeal, interfere. Per *Seshagiri Aiyar, J.*—A plaint presented on the granting of a provisional leave becomes invalid the moment the leave is withdrawn. 35 M. 1, foll. (1916) 1 M.W.N. 146 = 3 M.L.W. 107 = 32 Ind. Cas. 423.

——Cl. 12—Suit for land—Suit for movables within jurisdiction and for immovables outside—Leave to amend—Partial partition.

A suit praying for accounts for the administration of the estate by the Court and for possession of the plaintiff's share in a houses situate outside the original jurisdiction is a suit for land within the meaning of the clause; and the prayer for administration in view of the ascertainment of plaintiff's share cannot convert the suit into an administration suit. In a suit for partition of movables within the jurisdiction and of immovables without, brought without obtaining leave, the suit ought to be dismissed only in so far as it relates to land outside the jurisdiction; or leave to amend the plaint by omitting therefrom so much as related to land outside the jurisdiction ought to be given. In a suit for partition the fact that a portion of the common property lies outside the jurisdiction of the Court in which the suit was brought does not in itself bar the maintenance of the suit. 28 M. 216.

——Cl. 12—Suit for sale of mortgaged property.

A "suit for land" includes any suit in which a decree is asked for operating directly upon the land and therefore includes any suit brought to enforce a security upon land. "Suit for land or other immovable property" as used in Cl. 12 of the Letters Patent includes all suits mentioned in Cls. A to F in S. 16, C.P.C. (1882). Consequently the High Court has no jurisdiction to try a suit for realization of a debt by sale of lands situate outside the original jurisdiction of the High Court and in respect of which the title deeds have been deposited by the defendants with the plaintiff in respect of the debt. 27 M. 157.

8. Miscellaneous.

——Cl. 12—Miscellaneous—Jurisdiction of High Court Judge on Original Side—Issue of warrant against judgment debtor resident oustide original jurisdiction.

An order made by a Judge of the High Court sitting on the Original Side directing a warrant to issue against the person of a judgment-debtor and directing a special bailiff to execute the warrant against the judgment-debtor wherever he might be found in the Presidency is bad for want of jurisdiction. 26 M. 120.

——Cl. 13—Amendment of plaint—Amendment ousting the jurisdiction of the Trial Court cannot be allowed.

No Court will permit a plaint to be so amended as to oust its own jurisdiction to try the suit.

A suit was filed originally in the City Civil Court, Madras, and was transferred to the High Court in the exercise of its extraordinary original civil jurisdiction. Later, an application to amend the plaint was made, the effect of which was to convert the suit into one which the City Civil Court (the forum originally chosen by the plaintiff) would have no jurisdiction to try.

Held, that the amendment could not be allowed as the powers of the High Court under Cl. 13 are those of the City Civil Court itself. 108 Ind. Cas. 413 = 27 M.L.W. 609 = A.I.R. 1928 Mad. 400 = 54 M.L.J. 145.

——Cls. 13 and 15—Jurisdiction—Appellate order under Charter Act.

An order of a single Judge in the exercise of the power of superintendence under S. 15 of the Charter Act (S. 107 Government of India Act) and dealing with the decision of a Court subject to the appellate jurisdiction is one made in the exercise of the appellate jurisdiction of the Court within the meaning of Cl. 13 of the Letters Patent. (1913) M.W.N. 595 = 20 Ind. Cas. 633.

——Cl. 13—Powers of Vacation Judge—Suit to be filed in Court outside High Court's Ordinary Original Civil Jurisdiction—Closing of the Court—High Court cannot entertain suit.

There is no provision of law by which the High Court can in the first instance receive a plaint which ought to be filed in some inferior Court within the Presidency and pass orders pending the disposal of the suit and although the Court in which it was to be filed was closed owing to vacation, the Vacation Judge of the High Court cannot entertain such a suit except perhaps where the claim has arisen within the limits of the ordinary original civil jurisdiction of the High Court and where the High Court has concurrent jurisdiction along with other Courts of the Presidency Town. 113 Ind. Cas. 412 = 52 Mad. 52 = 28 M.L.W. 684 = A.I.R. 1929 Mad. 29 = 55 M.L.J. 690.

——Cl. 13—Procedure.

A suit was brought in an inferior Court but as the Court was closed owing to vacation, an application was made to the High Court for an order of injunction.

Held, that the procedure followed by the applicant was not correct. The proper procedure to be followed would be that the petition on the face of it should apply for a transfer of the suit in an inferior Court temporarily to the High Court, and the application should be made for injunction and another application for a re-transfer of the case to the original Court. 113 Ind. Cas. 412 = 52 Mad. 52 = 28 M.L.W. 684 = A.I.R. 1929 Mad. 29 = 55 M.L.J. 690.

——Cls. 13 and 20—Proceedings in District Court—Transfer of, to High Court.

The powers of the High Court in a case transferred from the District Court are confined to those exercisable

by a District Court, but for the transfer. 38 Mad. 807 = 41 I.A. 314 = 27 M.L.J. 30 = 18 C.W.N. 1089 = 1 M.L.W. 520 = (1914) M.W.N. 585 = 16 M.L.T. 165 = 20 C.L.J. 253 = 16 Bom. L.R. 625 = 12 A.L.J. 1155 = 24 Ind. Cas. 290 (P.C.).

——Cl. 13—Scope—High Court, power of, to withdraw suit from Subordinate Court, quash objectionable *interim* order passed by it and then send case back for trial to same Court—That power is given by S. 24, Civil P.C.

Cl. 13 does not give the High Court power to withdraw a suit from a Subordinate Court and quash an objectional *interim* order passed by such Court and then send the suit back to the original Court for trial. That power is conferred by S. 24, Civil P.C. (1945) 1 M.L.J. 14 = 58 M.L.W. 7 = 1945 M.W.N. 1 = I.L.R. (1945) Mad. 389 = A.I.R. 1945 Mad. 69 = 218 Ind. Cas. 267 (F.B.). [*Overrules* A.I.R. 1929 Mad. 29 = 113 Ind. Cas. 412.]

——Cl. 13—Scope.

Under Cl. 13, the High Court has power to withdraw a suit from a Subordinate Court and try and dispose of the action itself. 69 M.L.J. 776 = 42 M.L.W. 945 = (1935) M.W.N. 1329 = A.I.R. 1936 Mad. 55 = 160 Ind. Cas. 80 (F.B.).

——Cl. 13—Scope.

Where a suit is pending in a *moffussil* Court, which is closed for the summer recess, the High Court can transfer the case to itself under Cl. 13 of the Letters Patent and pass *interim* orders in the case but such an application for such transfer must be made on the Original Side of the High Court and in cases or suits which are not pending in a *moffussil* Court, the High Court has no power to make any order with regard to them. (1934) M.W.N. 157 = A.I.R. 1934 Mad. 314 = 66 M.L.J. 428 = 39 M.L.W. 493 = 57 M. 453 = 148 Ind. Cas. 849.

——Cl. 13—Transfer to High Court—Court-fee.

When a suit is transferred to High Court under Cl. 13, Court-fees payable are governed by the Court-fees Act and not by High Court Fees Rules. 60 M.L.J. 435 = 33 M.L.W. 318 = A.I.R. 1931 Mad. 457 = 132 Ind. Cas. 647.

——Cl. 13—Transfer of suit from Presidency Small Cause Court to High Court—To be made to Judge on the Original Side.

An application for the transfer of a suit from the Presidency Small Cause Court to the High Court is governed by S. 13 of the Letters Patent and must be made to a Judge sitting on the Original Side of the High Court. (1912) M.W.N. 150 = 11 M.L.T. 159 = 22 M.L.J. 187 = 13 Ind. Cas. 860.

——Cl. 15.

Synopsis.

(1) Amendment.
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(26) Scope of appeal.
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(1) Amendment.

——Cl. 15—Amendment—Effect—No retrospective effect.

The amended Letters Patent which came into force on 31st January, 1928, making the judgment of a single Judge of the High Court in a second appeal appealable only with the leave of the Judge does not apply retrospectively to second appeals pending at the time of the amendment. 115 Ind. Cas. 811 = 52 Mad. 361 = 29 M.L.W. 390 = 1929 M.W.N. 57 = A.I.R. 1929 Mad. 381 = 56 M.L.J. 369 (S.B.).

(2) Appeal.

——Cls. 15, 44—Appeal—Order passed in appeal under S. 39, Arbitration Act—No appeal, lies under Cl. 15

No second appeal lies under Cl. 15 of the Letters Patent from an order passed in appeal under S. 39, Arbitration Act, in view of S. 39 (2) of the Arbitration Act and Cl. 44 of the Letters Patent. (1945) 1 M.L.J. 54 = 58 M.L.W. 10 (1) = 1945 M.W.N. 164 (2) = I.L.R. (1945) Mad. 564 = A.I.R. 1945 Mad. 184.

——Cl. 15—Appeal—Order on claim petition by single Judge.

Neither S. 283 nor S. 591 of the C.P. Code, 1882, takes away the right of appeal conferred by Cl. 15 of the Letters Patent from an order of a single Judge of the High Court on a claim petition. 39 Mad. 1196 = 17 M.L.T. 208 = (1915) M.W.N. 211 = 28 Ind. Cas. 367.

——Cl. 15—Appeal—Order on claim petition.

Four persons lent money on mortgage, the deed, with the consent of all, being prepared in favour of one of them alone. It however specified the amount that each had advanced and provided that if the nominal mortgagee should receive any instalments from the mortgagors, they should be distributed among them according to the amount advanced by them. The nominal mortgagee died, leaving a will appointing executors, who had not, however, taken out probate. A judgment-creditor of the mortgagor attached the property. The three mortgagees filed a claim petition. *Held*: (1) An appeal lies from an order by a Judge sitting on the Original Side of the High Court, dismissing a claim preferred under Ss. 278 and 282 of the Code of Civil Procedure (1882) by the mortgagees of immovable property which has been attached in execution of a decree; (2) The applicant could put in the claim petition, for they had 'some interest' in the attached property within the meaning of S. 279 of the Code. If the nominal mortgagee was the agent of the applicants, they had a legal interest in the property attached, and if he was a trustee, they had a beneficial or equitable interest in it. A beneficial interest is as much an

interest within the meaning of S. 279 as a legal interest in the property attached. 11 M.L.J. 346 = 25 M. 555.

——Cl. 15—Appeal—Order refusing leave to file Letters Patent Appeal against judgment of single Judge in second appeal.

An order refusing leave to appeal under the Letters Patent against the judgment of a single Judge in second appeal is a part of the judgment in the second appeal itself, and against such an order there is no appeal under Cl. 15 of the Letters Patent. I.L.R. (1950) Mad. 747 = A.I.R. 1950 Mad. 216 = 62 M.L.W. 816 = 1949 M.W.N. 690 = (1949) 2 M.L.J. 641.

——Cl. 15—Appeal—Order setting aside order of abatement.

An appeal lies under Cl. 15 of the Letters Patent against an order of a single Judge of the High Court sitting on the Original Side setting aside the abatement of a suit, as such order is judgment under Cl. 15. 2 L.W. 948 = 31 Ind. Cas. 38.

——Cls. 15 and 44—Appeal against judgment of single Judge in second appeal—Necessity for certificate of fitness for appeal.

By Cl. 15 of the Letters Patent (Madras) it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It cannot be suggested that Cl. 44 in any way abrogates the effect of Cl. 15. 228 Ind. Cas. 640 = A.I.R. 1947 Mad. 5 (1) = 1946 M.W.N. 508 (1) = (1946) 2 M.L.J. 165.

(3) Certificate.

——Cl. 15—Certificate.

By Cl. 15 of the Letters Patent it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It is wrong to suggest that Cl. 44 somehow abrogates the effect of Cl. 15. (1946) 2 M.L.J. 165 = 1946 M.W.N. 508 = A.I.R. 1947 Mad. 5 (1).

——Cl. 15—Certificate—Refusal by Single Judge to grant certificate under S. 205, Government of India Act—Interference in appeal.

When a Single Judge of a High Court hearing a revision petition has refused to grant a certificate under S. 205, Government of India Act, the Letters Patent Bench cannot interfere with his order. The order of the Single Judge is the order of the High Court within S. 205. (1945) 1 M.L.J. 37 = 58 M.L.W. 87 (2) = 1945 M.W.N. 162 (1) = A.I.R. 1945 Mad. 156 = I.L.R. (1945) Mad. 623.

——Cl. 15—Certificate.

The Judge granting a certificate under Cl. 15, declaring the case a fit one for appeal, has no power to limit the ground of appeal. It is for the higher Appellate Court to say what are the questions it will allow to be raised. A.I.R. 1941 Mad. 481 = 1941 M.W.N. 456 = 53 M.L.W. 650 = (1941) 1 M.L.J. 800 = I.L.R. (1941) Mad. 775 = 196 Ind. Cas. 87 (F.B.).

(4) Committal for contempt.

——Cl. 15—Committal for contempt.

Appellant giving undertaking not to alienate property in suit—Alienation in breach—It is contempt—Order committing appellant to prison is appealable under Cl. 15. A.I.R. 1943 Mad. 541 = (1943) 1 M.L.J. 400 = 56 M.L.W. 316 = 1943 M.W.N. 462 = I.L.R. (1944) Mad. 197 = 210 Ind. Cas. 425.

(5) Court-fee.

——Cl. 15—Court-fee—Appeal from order of Judge of High Court—Fee payable is that payable under the Charter Act directly and not under S. 3 of the Court-fees Act.

S. 3 of the Court-fees Act must be controlled by S. 15 of the High Courts Charter Act. S. 15 of that Act which speaks of the settling fees to be allowed to Sheriffs, Attorneys and all clerks and officers of the Court, will not cover a case of Court-fee payable on a memorandum of appeal from an order of a Judge of a Chartered High Court because S. 3 of the Court-fees Act clearly points to the fee which is to be taken by the officer as a perquisite. The power under which Court-fees are levied on the Original Side of the High Court was derived from the general powers to issue general rules for regulating the practice of Courts. Such powers necessarily include imposition of fees and the collection of them, and the Court can collect the fees only through its proper officers. The fee leviable on an appeal is the fee payable for the time being to the officers of the High Court by virtue of the High Courts Charter Act directly. 70 Ind. Cas. 813 = 45 Mad. 849 = 1922 M.W.N. 511 = 16 M.L.W. 210 = A.I.R. 1922 Mad. 421 = 43 M.L.J. 436.

(6) Criminal jurisdiction.

——Cl. 15—Criminal jurisdiction.

No appeal lies to the High Court from the decision of a Judge of the High Court in the exercise of criminal jurisdiction. 71 Ind. Cas. 126 = 45 Mad. 928 = 16 M.L.W. 365 = 1922 M.W.N. 594 = 31 M.L.T. 287 = 24 Cr. L.J. 78 = A.I.R. 1922 Mad. 495 = 43 M.L.J. 375 (F.B.).

(7) Criminal trial.

——Cl. 15—Criminal trial—Appeal.

No appeal lies under Cl. 15 of the Letters Patent against an order passed by a single Judge of the High Court in the exercise of its Criminal Revisional Jurisdiction. 27 M. 510, *Foll.* 2 L.W. 363 = 16 Cr. L.J. 464 = 29 Ind. Cas. 96.

——Cl. 15—Criminal trial—Order for compensation under S. 250 of the Cr. P. Code.

An order for compensation under S. 250 of the Cr. P. Code is an order in a criminal trial and the Judgment of the single judge of the High Court in revision from that order is not open to appeal under Cl. 15 of the Letters Patent. 19 Cr. L.J. 208 = 43 Ind. Cas. 624.

——Cl. 15—Criminal trial—Order to grant trial.

An order of a High Court Judge to grant trial to an accused person is an order in a criminal trial. It is not a judgment within Cl. 15 and is therefore not appealable to a Division Bench. 19 M.L.J. 478 = 11 Cr. L.J. 279 = 4 Ind. Cas. 871.

——Cl. 15—Criminal trial—Order passed in revision under Cr. P. Code, S. 488—Appeal.

The order of a single Judge of High Court passed in revision in proceedings under S. 488, Cr. P. Code, is one passed in a "criminal trial" within Cl. 15 of the Letters Patent and no appeal lies therefrom. 39 Mad. 472 = 28 M.L.J. 483 = 17 M.L.T. 330 = 16 Cr. L.J. 326 = 28 Ind. Cas. 662.

——Cl. 15—Criminal trial—Revision—Order of a single Judge—Appeal, Cr. P. Code, S. 118.

No appeal lies against the order of a single Judge on a revision petition presented against the order of Magistrate acting under S. 118 of Cr. P. Code. Proceedings taken for binding over persons to keep the peace under Ch. VIII of Cr. P. Code are criminal trials within Cl. 15 of the Letters Patent. The portion of the Letters Patent commencing with S. 22 dealing with criminal jurisdiction gives the right of appeal against the order of a single Judge acting as a Court of Revision. 39 Mad. 539 = 28 M.L.J. 307 = (1915) M.W.N. 224 = 16 Cr. L.J. 303 = 28 Ind. Cas. 527.

——Cl. 15—"Criminal trial"—Judgment—Order passed in revision under S. 145, Cr. P.C.—Appeal.

The judgment of a single Judge of the High Court, passed on revision in proceedings under S. 145, Cr. P.C. is not one made in a "criminal trial" within the meaning of S. 15 of the Letters Patent; and consequently, appeals lie from such orders. 17 M.L.J. 158.

——Cl. 15—Criminal trials.

Appeal lies from order of Judge on original side extending time for prosecution under S. 195, Cl. 6. 9 C.W.N. 321 = 32 C. 379. Also Order of remand. 35 C. 1096.

——Cl. 15—Appeal lies from order refusing to issue commission to witness beyond 200 miles. 30 M. 143.

——Cl. 15—Appeal lies from order refusing to issue commission to examine witness. 14 M.L.J. 329 = 28 Mad. 28.

(8) Difference of opinion in Bench.

——Cl. 15—Difference of opinion in Bench.

In appeals governed by S. 96, when the two Judges of the High Court are divided in opinion, the judgment of that Judge who confirms the decree of the lower Court prevails. 86 Ind. Cas. 857 = 21 M.L.W. 721 = A.I.R. 1925 Mad. 1032.

(9) Finding of fact.

——Cl. 15—Finding of fact.

A finding that a person was insane during certain period cannot be challenged in Letters Patent Appeal. 55 M.L.W. 476 = A.I.R. 1942 Mad. 606 = 1942 M.W.N. 496 = (1942) 2 M.L.J. 206 = I.L.R. (1943) Mad. 107 = 202 Ind. Cas. 747.

(10) Interlocutory orders.

——Cl. 15—Interlocutory order.

An order on an interlocutory application in a second appeal granting stay of proceedings in the lower Court till disposal of the second appeal is a "judgment" within the contemplation of Cl. 15 of the Letters Patent (Madras) against which an appeal lies. 61 M.L.W. 70 = A.I.R. 1948 Mad. 371 = 1948 M.W.N. 66 = (1948) 1 M.L.J. 62.

——Cl. 15—"Interlocutory order"—Order refusing stay.

Where an application to the High Court for stay of execution could not have been made independently of and apart from the second appeal pending, it is the appellate jurisdiction of the High Court that is invoked, and the order of dismissal of application is made in exercise of that jurisdiction; over such an order Letters Patent Appeal under S. 15 does not lie. 53 Mad. 158 = 30 M.L.W. 976 = 1929 M.W.N. 878 = A.I.R. 1930 Mad. 427 = 57 M.L.J. 783.

——Cl. 15—Interlocutory order.

An order made by a single Judge refusing a stay of execution is not a judgment within the meaning of Cl. 15 and no appeal lies therefrom. 95 Ind. Cas. 808 = 14 M.L.W. 701.

——Cl. 15—Interlocutory order.

An order refusing to stay execution of a decree is not a judgment within the meaning of S. 15 of the Letters Patent and is, therefore, not appealable under that section. The fact that an order under S. 244 has been declared to amount to a decree for the purposes of the Code of Civil Procedure does not give it the force of a judgment under the Letters Patent. 24 M. 358.

——Cl. 15—Interlocutory order—Order to bring person on record as legal representative.

An order directing the respondent in an appeal to be brought on the record as the legal representative of the deceased original appellant is not a judgment within the meaning of Cl. 15, and is not appealable under the Letters Patent, for it is not a judgment which finally settles the rights of parties but has the effect of allowing litigation which is proceeding to further proceed to a final adjudication.

Such an order stands on a different footing from an order setting aside an abatement. 37 M.L.W. 460 = 64 M.L.J. 493 = (1933) M.W.N. 237 = A.I.R. 1933 Mad. 417 = 56 M. 689 = 142 Ind. Cas. 679.

——Cl. 15—Interlocutory order—Order adding party.

Order adding a party is not a "judgment" and therefore is not appealable. 1930 M.W.N. 971 = A.I.R. 1930 Mad. 987 = 60 M.L.J. 237.

——Cl. 15—Interlocutory order.

Where a civil revision petition is filed and interlocutory applications are made in the civil revision petition for reliefs, the High Court can only act in its exercise of revisional jurisdiction in dealing with these applications and orders passed on such applications in the exercise of that jurisdiction are not appealable under the Letters Patent. 107 Ind. Cas. 813 = 51 Mad. 165 = 1928 M.W.N. 30 = 27 M.L.W. 18 = A.I.R. 1928 Mad. 169 = 54 M.L.J. 323.

——Cl. 15—Interlocutory order—Order allowing evidence.

An order giving permission to a party to adduce in the first appeal Court evidence which that Court had refused time to the party to call is not a final judgment or order within Cl. 15. 105 Ind. Cas. 720 = A.I.R. 1927 Mad. 1021.

——Cl. 15—Interlocutory order.

Under Cl. 15 an order of a merely interlocutory nature passed by a single Judge on the Original Side is not appealable. 75 Ind. Cas. 901 = 18 M.L.W. 615 = 1923 M.W.N. 894 = A.I.R. 1924 Mad. 234 = 46 M.L.J. 71.

——Cl. 15—Interlocutory order.

An order on an independent proceeding auxiliary to the suit such as one for interim injunction or a Receiver's appointment is a judgment under S. 15 though it does not affect the merits of the suit and determine any rights. The word judgment in S. 15 covers a preliminary or interlocutory judgment as well as final ones but not an interlocutory order. This interpretation is uncontrolled by C.P. Code. An order declining to frame an issue asked for by a party is not appealable. To make an adjudication a judgment, its effect should be to put an end to the suit or proceeding in which the adjudication is given so far as the Court is concerned, its form being immaterial. If the adjudication is a mere step to obtain time, the adjudication is not a judgment. 35 Mad. 1 = (1910) M.W.N. 697 = 8 M.L.T. 453 = 21 M.L.J. 1 = 8 Ind. Cas. 340 (F.B.).

(11) Judgment.

——Cl. 15—'Judgment'.

Order dismissing application by decree-holder of insolvent for a sum of money in the hands of Official Assignee is a 'judgment' and is appealable. 25 M. 406 = 12 M.L.J. 282.

——Cl. 15—Judgment—Dismissal of case by single Judge.

Where a single Judge dismissed a case with costs in the exercise of his discretion, the order is not a judgment under Cl. 15 and no appeal lies. 8 M.L.T. 288 = (1910) M.W.N. 423 = 7 Ind. Cas. 695.

——Cl. 15—Judgment—Order refusing to extend time for paying costs.

Application for restoration of suit dismissed for default—Applicant ordered to deposit costs of suit

before certain date, on fulfilment of which the order of dismissal would stand as set aside—Application for extension of time for payment—Court's order refusing to extend time—Such order is judgment and is appealable. 1936 M.W.N. 915.

——S. 15—Judgment—Order as to costs.

An order awarding costs though discretionary is a judgment within S. 15 and is appealable. 22 Ind. Cas. 551 (Mad.).

——Cl. 15—Judgment—Order as to costs.

An order as to costs is not a "judgment" within the meaning of S. 15 of the Letters Patent, and is consequently not appealable. 17 M.L.J. 569.

——Cl. 15—Judgment—Order to furnish security for costs—Appeal.

An order, that plaintiff should furnish security for costs is a judgment within the meaning of S. 15 of the Letters Patent. 26 M. 502. *Also* 13 M.L.J. 362 = 27 M. 121.

——Cl. 15—Judgment—Taxation of costs.

An order as to costs passed by a Judge, sitting on original side, on a review of taxation by the taxing officer is a 'Judgment' and hence appealable. 42 Mad. 352 = 9 L.W. 322 = 36 M.L.J. 351 = 25 M.L.T. 292 = 50 Ind. Cas. 14 (F.B.).

——Cl. 15—Judgment—Order calling for finding.

In an appeal against a decree of the City Civil Judge in a suit for recovery of damages for breach of contract, a single Judge of the High Court directed the trial Court to take fresh evidence that may be adduced by the parties on the issue as regards the difference in the price of the goods on the date of the receipt and the date of delivery and send up its findings on the evidence so recorded. In an appeal against that order under Cl. 15 of the Letters Patent, on a preliminary objection as to the maintainability of the appeal.

Held, the order calling for a finding was not a "judgment" within the meaning of Cl. 15 of the Letters Patent and the appeal was incompetent. I.L.R. (1949) Mad. 319 = A.I.R. 1949 Mad. 169 = 1948 M.W.N. 536 = 61 M.L.W. 531 = (1948) 2 M.L.J. 191.

——Cl. 15—Judgment—Order calling for finding.

An order of a single Judge calling for a finding on an issue newly framed by him, or old, whether raised in the pleadings or not is not a judgment within Cl. 15, for no right or title can be said to be adjudicated upon by the mere framing of an issue and by directing that issue to be tried. 99 Ind. Cas. 585 = 25 M.L.W. 95 = 38 M.L.T. 206 = A.I.R. 1927 Mad. 317.

——Cl. 15—Judgment—Order granting review.

An order which not only grants a review but also amends the decree, is a judgment under Cl. 15 and is therefore appealable. 106 Ind. Cas. 172 = 1927 M.W.N. 411 = A.I.R. 1929 Mad. 261.

——Cl. 15—Judgment—Orders in ancillary proceedings—Independent proceeding ancillary to suit but not step towards judgment—Order is judgment.

An order in an independent proceeding which is ancillary to the suit, not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained, is a judgment within the meaning of Cl. 15 of the Letters Patent.

Where during the pendency of a suit by a Mahomedan widow to recover her share in the properties of her deceased husband in the hands of the other heirs an order was passed to the effect that the plaintiff should be paid a certain sum every month for her maintenance.

Held, that an order imposing an obligation of this nature in a pending suit is clearly more than a mere step towards final judgment or a mere interlocutory order necessary for proceeding with the suit and that it is a "judgment" within the meaning of Cl. 15. 86 Ind. Cas. 909 = 21 M.L.W. 308 = 1925 M.W.N. 109 = A.I.R. 1925 Mad. 443 = 48 M.L.J. 395.

——Cl. 15—Judgment—Orders in partnership suit.

In a suit for dissolution of partnership and accounts, when the suit came for trial, the Court without determining any of the matters in controversy in the suit passed the following order:—"The whole case is referred to the Official Referee to determine what share the plaintiff had in the business carried on by the deceased *H*, and having determined that to take a full account as in an ordinary partnership action and report to this Court."

Held, that the order is not an *interim* decree or even a judgment within the meaning of Cl. 15 of Letters Patent. 73 Ind. Cas. 903 = A.I.R. 1924 Mad. 406.

——Cl. 15—Judgment—Order on application for injunction.

An order on an application for an *interim* injunction is a judgment within the meaning of this Article, as its effect is to render the final judgment effective, if obtained. 95 Ind. Cas. 956 = 21 M.L.W. 310 = A.I.R. 1925 Mad. 586.

——Cl. 15—Judgment—Order on Official Referee's report.

An order referring back a report of the Official Referee for further consideration is not a final order determining the rights of the parties within the meaning of Cl. 15 as a Judge is not precluded from varying or discharging such report and that it cannot take effect until it has received his imprimatur. Therefore, no appeal lies from that order. 107 Ind. Cas. 639 = 51 Mad. 235 = 1928 M.W.N. 45 = 27 M.L.W. 172 = A.I.R. 1928 Mad. 470 = 54 M.L.J. 136.

——Cl. 15—Judgment—Order refusing amendment of plaint—Appeal.

An order refusing leave to amend is not a judgment. (1916) 1 M.W.N. 146 = 3 M.L.W. 107 = 32 Ind. Cas. 423.

——Cl. 15—Judgment—Order refusing inspection.

An order refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of a party is not a judgment within the meaning of Cl. 15. 100 Ind. Cas. 642 = 25 M.L.W. 483 = 1927 M.W.N. 162 = A.I.R. 1927 Mad. 409 = 52 M.L.J. 192.

——Cl. 15—Judgment—Refusal to transfer case.

An order refusing to transfer case is not appealable under Cl. 15. 106 Ind. Cas. 890 = 39 M.L.T. 605 = 1927 M.W.N. 804 = A.I.R. 1928 Mad. 232.

——Cl. 15—Judgment—Refused to transfer case.

An order refusing to transfer a suit from one Court to another cannot be said to put an end to any of the rights of the parties, as its effect is only to allow the proceeding to go on and so no appeal lies against it. 107 Ind. Cas. 806 = 51 Mad. 330 = 27 M.L.W. 164 = A.I.R. 1928 Mad. 209 = 54 M.L.J. 710.

——Cl. 15—Judgment—Order transferring suit.

An appeal lies from an order of the Judge sitting on the Original Side transferring a suit from the District Court to the High Court under Cl. 13 of the Letters Patent, the order being a judgment within the meaning of Cl. 15 of the Letters Patent. 73 Ind. Cas. 1054 = 1923 M.W.N. 681 = 47 Mad. 136 = A.I.R. 1924 Mad. 90 = 45 M.L.J. 153.

——C. 15—Judgment—Preliminary issue.

Where there is an issue directly to be tried and there is decision of a Judge upon matters in issue in the action between the parties, one cannot but call what he did, a

judgment. 68 Ind. Cas. 921 = 16 M.L.W. 608 = 31 M.L.T. 284 = A.I.R. 1923 Mad. 44 = 43 M.L.J. 480.

——Cl. 15—Judgment—Refusal to extend time for award.

An order refusing to enlarge the time for the submission of an award remitted to the umpire on an application under S. 13, Arbitration Act, is a judgment and is appealable. 109 Ind. Cas. 70 = 51 Mad. 103 = 1928 M.W.N. 107 = 27 M.L.W. 51 = A.I.R. 1928 Mad. 69 = 54 M.L.J. 49 (F.B.).

——Cl. 15—Judgment—Refusal to strike off pleadings.

An order by a Judge sitting on the Original Side of the High Court refusing to direct certain allegation in defendants' written statement to be struck out at the instance of the plaintiff as being unnecessary and scandalous is not a judgment. 91 Ind. Cas. 566 = 1925 M.W.N. 785 = 22 M.L.W. 868 = A.I.R. 1926 Mad. 64 = 49 M.L.J. 632.

——Cl. 15—Judgment—Stay of execution—Judgment is one that puts an end to proceedings before the Court—Appeal lies against stay of execution.

Per KRISHNAN, J.—The test seems to be not what is the form of the adjudication but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not a judgment within the meaning of the Letters Patent.

Per WALLER, J.—"All orders passed after contest *inter partes* are judgments."

An appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an appeal or second appeal in this Court. The fact of there being a declaration is no bar to this Court staying the execution of the decree. 79 Ind. Cas. 109 = 47 Mad. 316 = 19 M.L.W. 427 = 34 M.L.T. 32 = 1924 M.W.N. 167 = A.I.R. 1924 Mad. 597 = 46 M.L.J. 138.

——Cl. 15—Judgment—Stay order.

The word 'judgment' does not include an order granting stay of further proceedings on terms during the pendency of an appeal preferred from preliminary decree in a mortgage suit and an appeal against such order by judgment-debtor dissatisfied by the terms imposed is not maintainable. 117 Ind. Cas. 123 = 29 M.L.W. 510 = A.I.R. 1929 Mad. 197 = 56 M.L.J. 197.

——Cl. 15—Judgment—Stay order.

An order granting injunction staying execution proceedings passed by a single Judge of the High Court is a judgment and is appealable. 102 Ind. Cas 396 = 38 M.L.T. 364 = 1927 M.W.N. 259 = A.I.R. 1927 Mad. 592 = 52 M.L.J. 670.

——Cl. 15—Judgment—Stay order.

An order of a single Judge of the High Court staying execution of a decree of a moffussil Court is a "judgment" within the meaning of Cl. 15 and an appeal therefrom is maintainable under that clause. 100 Ind. Cas. 157 = 50 Mad. 380 = 25 M.L.W. 511 = 38 M.L.T. 51 = 1927 M.W.N. 248 = A.I.R. 1927 Mad. 398 = 52 M.L.J. 161.

——Cl. 15—Judgment—Stay order.

No appeal lies under Cl. 15 of the Letters Patent from an order of a single Judge of the High Court staying further trial of a suit. 18 M.L.T. 312 = 30 Ind. Cas. 942.

——Cl. 15—Judgment—Transposing parties.

A determination, call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or *in toto* is a judgment and is appealable; but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. Every order on a contested petition is not a judgment. The line dividing judgments from orders must be drawn somewhere short of this. An order passed on the Original Side of the High Court transferring certain persons from the position of the defendants to that of plaintiffs is not a decision the effect of which is to put an end to the suit or proceeding and therefore it is not a judgment within Cl. (15). 94 Ind. Cas. 456 = 49 Mad. 539 = 23 M.L.W. 592 = 1926 M.W.N. 366 = A.I.R. 1926 Mad. 554 = 50 M.L.J. 361.

——Cl. 15—Judgment—Refusal to extend time for furnishing security.

An order refusing to extend time for furnishing security ordered to be deposited for staying an administration suit and thus dismissing the application for stay is not a judgment. 105 Ind. Cas. 124 = 26 M.L.W. 333 = 39 M.L.T. 146 = 1927 M.W.N. 809 = A.I.R. 1928 Mad. 154 = 53 M.L.J. 494.

——Cl. 15—Judgment in revision.

An order of a single Judge of High Court interfering with the order of the lower Court in revision is a judgment, and is therefore, appealable. An order of a single Judge of the High Court rejecting a revision pettion on the ground that the objection therein taken to the jurisdiction of the lower Court was not substantiated amounts to a judgment and is appealable. An appellate Court has no jurisdiction in an appeal from an order under S. 195, Cr. P.C., to direct the lower Court to take fresh evidence. Ss. 568, 569, C.P.C., are not made applicable by S. 647, C.P.C., to proceedings before Civil Courts under S. 195, Cr.P.C. Proceedings under S. 195, Cr. P.C. are of a criminal rather than of a civil nature, notwithstanding that such proceedings before Judges of Civil Courts may be revisable under S. 622, C. P. Code. 30 M. 311 = 17 M.L.J. 123 = 2 M.L.T. 84.

——Cl. 15—Judgment.

An order directing a receiver in a suit to advance money to a guardian *ad litem* to conduct the defence on behalf of a defendant is not a judgment. 24 M. 511.

——Cl. 15—Judgment.

The fact that notice was sent or that the parties were heard or that costs were awarded cannot necessarily make the refusal a judgment. But where the Court is bound to decide one way or the other, any question of right or liability, the order, whatever that may be, is a judgment irrespective of the form or language in which it is expressed. 27 M. 432.

——Cl. 15—Judgment—Provincial Small Cause Courts Act, S. 25—Order under.

A single Judge of the High Court when disposing of an application under S. 25 of the Provincial Small Cause Courts Act (9 of 1887) exercises "Appellate jurisdiction" within the meaning of S. 13 of the High Courts Act and his order is a judgment even when the Judge merely declines to interfere in revision. It is immaterial whether before such refusal the records were called for and a notice issued to the other side. An appeal lies from such an order under S. 15 of the Letters Patent. In matters of discretion, the Court will not ordinarily

interfere in appeal though it has jurisdiction to do so. 39 Mad. 235 = 18 M.L.T. 46 = 29 M.L.J. 12 = 29 Ind. Cas. 846.

——Cl. 15—Judgment—Dismissal of revision petition under S. 25 of Act (9 of 1887)—"Dismissal" after notice—Appeal.

The "dismissal" of a revision petition under S. 25, of Act (9 of 1887), by a single Judge of the High Court is a mere refusal to interfere in the exercise of his discretion and is not a judgment within the meaning of S. 15 of the Letters Patent. Consequently there is no appeal in such a case. The fact that such refusal is after notice to the other side and after the records are called for does not make it a judgment. 27 M. 340.

——Cl. 15—Order of single Judge—Small Cause—Revision.

A Letters Patent Appeal will lie against an order of rejection by a single Judge of the High Court of a petition for revision of a Small Cause judgment. [The Letters Patent have now been amended so as to exclude an appeal in a case like this.] 1 M.L.W. 726 = 16 M.L.T. 253 = 27 M.L.J. 480 = (1914) M.W.N. 832 = 26 Ind. Cas. 57.

——Cl. 15—Order of High Court Judge on a revision petition under S. 25 of Act (9 of 1887)—Appeal.

Under Cl. 15 no appeal lies to a Bench of the High Court against the order of a single Judge deciding a revision petition under S. 25 of the Act (9 of 1817). 6 M.L.T. 345 = 3 Ind. Cas. 953.

(12) Land Acquisition Appeal.

——Cls. 15 and 36—Land Acquisition Appeal—Dissenting judgment—Appeal.

The decision of the High Court in an appeal under S. 54 of the Land Acquisition Act is not a judgment within Cl. 15 of the Letters Patent. 41 Mad. 943 = 8 M.L.W. 261 = 24 M.L.T. 155 = 35 M.L.J. 110 = (1918) M.W.N. 540 = 49 Ind. Cas. 27.

(13) Leave to appeal.

——Cl. 15—Leave to appeal—Second appeal—Decision of single Judge—Leave to appeal—Considerations—Leave whether can be restricted to some points.

No hard and fast rule can be laid down as regards the grounds on which leave to appeal should be granted by a Judge under Cl. 15 of the amended Letters Patent against his decision passed in second appeal. The mere fact that there was a question of fact involved in the second appeal or that the second appeal was allowed and the decision of the lower Appellate Court reversed or modified, or that the valuation of a second appeal was not insignificant, is not by itself conclusive for the grant of such leave to appeal. Leave to appeal however may be limited to certain points only in which case the appellant will be confined to such points. Where the decision in second appeal was based on the construction of a deed of adoption which contained certain peculiar provisions.

Held, that leave should be refused. Principles applicable to granting of leave to appeal elaborately discussed. 53 Mad. 405 = 1930 M.W.N. 65 = 31 M.L.W. 254 = 58 M.L.J. 388.

——Cl. 15—Leave to appeal—Refusal.

An order refusing leave to appeal against a judgment in second appeal is not appealable.

Even if an order refusing leave to appeal could be regarded as a judgment under the first part of Cl. 15, an order to a different effect by a Division Bench on appeal therefrom would not suffice to confer right of appeal against the second appellate decree, because, under the second part of Cl. 15, the second appellate decree will be appealable only on a certificate granted by the Judge who heard the second appeal. (1935) M.W.N. 1308 = 42 M.L.W. 941 = A.I.R. 1936 Mad. 134 = 59 M. 293 = 160 Ind. Cas. 1036.

——Cl. 15—Leave to appeal—Refusal.

The intention of the legislature as appearing from Cl. 15 is that a judgment passed by a single Judge in a second appeal after 1st February, 1929, is final and not appealable and that an appeal could be entertained against the said judgment only if the Judge who decided the second appeal granted leave to appeal. If leave to appeal is refused by such Judge no appeal lies from the order refusing leave to appeal. 121 Ind. Cas. 621 = 52 Mad. 952 = 30 M.L.W. 386 = A.I.R. 1930 Mad. 75 = 57 M.L.J. 398.

——Cl. 15—Leave to appeal as pauper—Order excusing delay in applying for leave to appeal as pauper.

An order refusing to set aside an order excusing delay in the presentation of an application for leave to appeal as a pauper and admitting the appeal is not a 'judgment' within Cl. 15 and no appeal lies therefore under the Letters Patent. (1936) M.W.N. 41 = 43 M.L.W. 310 = 70 M.L.J. 306 = 59 M. 656 = A.I.R. 1936 Mad. 387 = 161 Ind. Cas. 416.

(14) New point.

——Cl. 15—New point.

The question, as to the reasonableness and sufficiency of notice to quit given by a landlord to his tenant for a year, is a pure question of fact and not one of law; and so, if it is not specifically raised in the lower Courts it cannot be raised for the first time in a Letters Patent Appeal in the High Court. 118 Ind. Cas. 279 = 30 M.L.W. 583 = A.I.R. 1929 Mad. 617.

(15) Order refusing to bring on record assignee.

——Cl. 15—Order refusing to bring on the record assignee of plaintiff.

An appeal lies from an order refusing to order assignee of plaintiff to be brought on the record, as such order amounts to a judgment. 24 M. 252.

(16) Order refusing to grant bail.

——Cl. 15—Order refusing to grant bail—Order in criminal trial—Appeal.

An order refusing to grant bail before the actual commencement of the trial is not a judgment within the meaning of S. 15 of the Letters Patent, but is an order in a criminal trial within the meaning of that clause. 19 M.L.J. 478 = 4 Ind. Cas. 871.

(17) Order under S. 195, Cr. P. Code.

——Cl. 15—Order under S. 195, Cr. P. Code.

Whether an appeal lies under the clause against an order of the High Court under S. 195, Cr. P. Code is doubtful. 39 Mad. 768 = 18 Cr. L.J. 434 = 38 Ind. Cas. 994.

(18) Pauper petition.

——Cl. 15—Pauper petition—Grant of—Appeal.

Appeal lies from an order by a single Judge on the Original Side giving leave to sue *in forma pauperis*. Such order being a judgment, is within the meaning of Cl. 15 of the Letters Patent. 85 Ind. Cas. 201 = 48 Mad. 700 = 20 M.L.W. 845 = 35 M.L.T. 136 = A.I.R. 1925 Mad. 167 = 47 M.L.J. 932.

——Cl. 15—Pauper petition—Refusal of—Appeal.

Whether there may be a right of appeal against an order rejecting an application for leave to file a memorandum of objections *in forma pauperis* or not, the appellate Court should not interfere. The question is one of the exercise of discretion and when the determination complained of is merely the result of the exercise

of discretion on the part of the Judge in a matter, which was a proper subject for the exercise of that discretion the appellate Court would rightly decline to interfere. 3 M.H.C.R. 384, *Appl.* 94 Ind. Cas. 45 = 23 M.L.W. 511 = 1926 M.W.N. 255 = A.I.R. 1926 Mad. 656 = 50 M.L.J. 426.

(19) Refusal to revoke leave to sue.

——Cl. 15—Refusal to revoke leave to sue.

An order refusing to revoke an order giving leave to sue on the Original Side of the High Court is not a jdugment and thus no appeal lies therefrom. 105 Ind. Cas. 159 = 50 Mad. 770 = 26 M.L.W. 227 = 39 M.L.T. 339 = A.I.R. 1927 Mad. 846 = 53 M.L.J. 329.

(20) Refusal to receive security.

——Cl. 15—Refusal to receive security—Appeal.

An order refusing to receive security for costs directed to be furnished is, within the meaning of S. 15 of the Letters Patent, a judgment, and an appeal lies against such order. Where an order directing the appellant to furnish security for the costs of respondent did not specify a day within which to furnish the security and the Court afterwards refused to receive the security furnished, it was *held*, that the order was wrong and the appellants were directed to furnish security within a specified day. 12 M.L.J. 34 = 25 M. 654.

(21) Revenue Board.

——Cl. 15—Revenue Board.

The mere fact that the Civil Procedure Code is made applicable to proceedings under the Act including presumably the proceedings of the Board of Revenue cannot by itself convert the Board of Revenue into a Civil Court subordinate to the High Court unless for some other reason it is a Civil Court subordinate to the High Court, such as is referred to in S. 3, C.P. Code, which it is not. Unless it can be said that the Board of Revenue is subject to the superintendence of the High Court when acting under S. 205 it is impossible to hold that it is a Court subordinate to the High Court.

The Board of Revenue exercises judicial powers and is in that sense a Court as pointed out in 9 Cal. 295 but that does not make it necessarily an inferior Court subject to the High Court as the superior Court. In the absence of any provisions declaring the Board of Revenue to be subject to the appellate jurisdiction of the High Court it must be held that it is not so subject.

Cl. 16, Letters Patent, says that every Civil Court of the Presidency is subject to the appellate jurisdiction of the High Court. S. 15, Charter Act (Replaced by S. 107, Government of India Act) provides that every Court subject to the appellate jurisdiction of the High Court is subject to its power of superintendence. Reading these two provisions together every Civil Court of the Presidency is subject to the High Court's power of superintendence, in other words, is subordinate to that Court. 9 Cal. 295 (P.C.), *Foll.*

Revenue Courts, although so designated, on account of their more limited jurisdiction, are nevertheless, properly understood, Civil Courts.

The revenue officers having been by the very terms of the Act, constituted Courts, when hearing certain suits or applications, it is a necessary corollary, that the Board, governed as it is by the same rules of procedure, should also be deemed a Court, when dealing with the same matters at a later stage.

It is wrong to assume that the Courts mentioned in S. 107 of the Government of India Act (S. 15, Charter Act) as being subject to the High Court's appellate jurisdiction, are restricted to such Courts as were in existence, at the time of the passing of the Charter Act or the issue of the Letters Patent. 114 Ind. Cas. 161 = A.I.R. 1928 Mad. 1032 = 55 M.L.J. 798 (F.B.).

(22) Review.

——Cl. 15—Review—Order refusing to review judgment passed in second appeal.

Cl. 15, when properly construed, means that no judgment of a Judge of the High Court in the exercise of second appellate jurisdiction is appealable without leave. An order of High Court refusing to grant review from its judgment passed in second appeal is an order made in the exercise of such second appellate jurisdiction. Consequently, there is no appeal without leave from such an order. A.I.R. 1938 Mad. 399 = 47 M.L.W. 178 = (1938) M.W.N. 312 = (1938) 1 M.L.J. 402 = I.L.R. (1938) Mad. 633 = 177 Ind. Cas. 762.

——Cl. 15—Review of judgment passed in appeal under C.P. Code, S. 114—Practice.

The High Court is competent to entertain an application to review a judgment passed in a Letters Patent Appeal. S. 114, C.P.C. applies to judgment under the High Court's Letter Patent. 40 Mad. 651 = 19 M.L.T. 126 = (1916) 1 M.W.N. 135 = 3 L.W. 172 = 32 M.L.J. 144 = 32 Ind. Cas. 873.

(23) Revision and appeal.

——Cl. 15—Revision and appeal.

Whether it is doubtful whether the decision appealed from was in revision or second appeal but the party aggrieved had a right of second appeal, it must be construed as an appeal and a Letters Patent Appeal. would lie in an appropriate case. A.I.R. 1930 Mad. 489.

(24) Sanction for prosecution.

——Cl. 15—Sanction for prosecution.

A sanction for prosecution by a single Judge sitting on the Original Side is an order and not a judgment and no appeal lies. 71 Ind. Cas. 126 = 45 Mad. 928 = 16 M.L.W. 365 = 1922 M.W.N. 594 = 31 M.L.T. 287 = 24 Cr. L.J. 78 = A.I.R. 1922 Mad. 495 = 43 M.L.J. 375 (F.B.).

——Cl. 15—Sanction—Judgment—Criminal trial—Probability of conviction.

An order passed under S. 195, Cr. P.C. is not a sentence or order '*in a criminal trial*' and is therefore appealable under Cl. 15 of the Letters Patent. 12 M.L.J. 408.

(25) Scope.

——Cls. 15 and 39—Scope—Final judgment in appeal by the Judges of the High Court against judgment of the Original Side Judge of the High Court—Whether governed by Cl. 39 of the Letters Patent.

An appeal preferred to a Bench of Judges against a decision of a single Judge sitting on the Original Side of the High Court under the provisions of Cl. 15, Letters Patent, confers, not original, but appellate jurisdiction upon the Court to entertain an appeal; and when such an appeal has been entertained and heard, it is pursuant to the appellate jurisdiction conferred by Cl. 15. Though the appeal relates to a matter decided in the exercise of the ordinary original civil jurisdiction, the appeal itself is not in the exercise of that jurisdiction, but as mentioned in the exercise of appellate jurisdiction. That being the position such a judgment in respect of which an application for leave to appeal to the Judicial Committee of His Majesty's Council is made is not a final judgment, decree or order in the exercise of the Court's original jurisdiction, and hence it does not come within Cl. 39 of the Letters Patent. 61 M.L.W. 214 = A.I.R. 1948 Mad. 331 = 1948 M.W.N. 189 = (1948) 1 M.L.J. 230.

——Cl. 15—Scope.

——Cl. 15 is not controlled by Civil P.C., and hence an appeal against the judgment of a single Judge of

the High Court passed on appeal under O. 43, Civil P.C. lies under Cl. 15. 38 M.L.W. 96 = A.I.R. 1933 Mad. 570 = 65 M.L.J. 222 = 56 M. 915 = (1933) M.W.N. 850 = 145 Ind. Cas 449 (F.B.).

——**Cl. 15—Scope.**

Cl. 15 of the Letters Patent is not controlled by S. 105, C.P. Code. And it is open to a person though he does not appeal against the order of remand, to attack it in his appeal against the final decree. 118 Ind. Cas. 291 = 30 M.L.W. 787 = A.I.R. 1929 Mad. 349.

——**Cl. 15—Scope and nature.**

Per THIRUVENKATACHARIAR J.—Both S. 98, C.P. Code, and Cl. 36, Letters Patent, are mere rules of procedure, differing in that respect from Cl. 15, Letters Patent, which gives a right of appeal in certain cases from the decision of a single Judge or of a Division Bench. 116 Ind. Cas. 343 = 29 M.L.W. 823 = 52 Mad. 563 = A.I.R. 1929 Mad. 641 = 57 M.L.J. 264 (F.B.).

(26) Scope of appeal.

——**Cl. 15—Scope of appeal—Whole case if open.**

Where there is an appeal under Cl. 15 of the Letters Patent the whole case is open on the appeal and not merely the point upon which the Judges composing the Division Bench had differed. 32 Mad. 95 = 4 M.L.T. 110 = 18 M.L.J. 497 = 1 Ind. Cas. 977 (F.B.). *See too* 11 M.L.J. 10 (F.B.).

(27) Trial.

——**Cl. 15—Trial—If includes appeal.**

The word "*Trial*" includes an appeal under Cl. 15 of the Letters Patent. 22 M.L.J. 44 = 10 M.L.T. 502 = (1911) 2 M.W.N. 479 = 12 Cr. L.J. 565 = 12 Ind. Cas. 653.

——**Cl. 15—Miscellaneous—Order of single Judge directing prosecution under S. 478, Cr. P. Code—Appeal Cr. P. Code, Ss. 215 and 478.**

Even if an appeal lies under Cl. 15 of the Letters Patent from an order of commitment under S. 478 of the Cr. P.C. by a Judge of the High Court trying a Civil Suit in the Original Side, the order cannot under S. 215 of the same Code be set asidee exept on a poirt of law. 21 Cr.L.J. 28 = 10 M.L.W. 568 = 37 M.L.J. 652 = 54 Ind. Cas. 172.

——**Cls. 15, 18—Miscellaneous—Insolvency Act, S. 73.**

Where Judges of the High Court hearing an appeal from a Commissioner's order in Insolvency do not agree in their opinion, a further appeal lies according to S. 15, S. 18 confers the power given by S. 73 of the Insolvency Act but does not deny the right of further appeal. 34 Mad. 121 = 8 M.L.T. 101 = 6 Ind. Cas. 387.

——**Cl. 15.** *See* C.P.Code, S. 104. 13 M.L.J. 497.

——**Cl. 15—Application for postponement of.**

A suit was referred to a Judge in Chambers and a certificate was agreed to by the defendant which left certain matters undermined. The case was set down for hearing in order that a decree might be passed in terms of the certificate. The plaintiff applied for a postponement of the passing of the decree will the matters had been determined. *Held*, that the application should be granted. 24 M. 252.

——**Cl. 16—Revision—Revenue Court's decision.**

No revision lies under S. 115, C.P. Code, or S. 107 of the Government of India Act or Cl. 16 of the Madras Letters Patent against an order of the Revenue Divisional Officer acting under Act (3 of 1895) as such officer is not a Court subject to the superintendence of the High Court. Meaning of 'appellate jurisdiction' discussed. 66 Ind. Cas. 556 = 14 M.L.W. 548 = 1921 M.W.N. 767 = A.I.R. 1922 Mad. 337 = 41 M.L.J. 577.

——**Cl. 16—Court subordinate to High Court closed for vacation—Appeal, if can be received by High Court.**

The High Court has no jurisdiction to receive an appeal which should be filed in a Court subordinate to it, when that Court is closed for vacation. A.I.R. 1945 Mad. 423 = 58 M.L.W. 329 = (1945) 2 M.L.J. 131 = 1945 M.W.N. 418 = I.L.R. (1946) Mad. 261.

——**Cl. 17—Scope of the jurisdiction under—Power of High Court to appoint guardian in respect of the undivided property of minor members of a Hindu joint family and to sanction sale of such property.**

In the exercise of its inherent jurisdiction vested in it under the Letters Patent, which jurisdiction is preserved by S. 3 of the Guardian and Wards Act, the High Court has power to appoint a guardian in respect of the person and property of minors covering even their undivided interest.

The father and manager of a Hindu joint family who had besides five minor sons, two adult sons and his wife and an unmarried daughter who have rights of maintenance, applied under Cl. 17 of the Letters Patent for being appointed guardian of the ancestral joint family property belonging to the minor sons and for sanction of the sale of that property as being beneficial to the interest of the minor sons. On a question whether the High Court had jurisdiction to entertain such an application and power to pass the orders as prayed for.

Held, that the High Court would be justified in appointing the guardian both by virtue of the power conferred under Cl. 17 of the Letters Patent and of the practice in this High Court and according sanction to the proposed sale as, in the circumstances, it was highly advantageous and beneficial to the interests of the entire family including the minor coparceners, subject of course to proper safeguards being provided for the minors' share of the purchase money being invested in Government securities and deposited with the Registrar of the Court. A.I.R. 1949 Mad. 260 = (1948) 2 M.L.J. 47.

——**Cl. 17—Infants.**

In Cl. 32, there is no restriction either as to place or persons, as it provides in the most general terms, that the Supreme Court, in the matter of appointing guardians for infants, is authorised to follow the same order and course, as that "observed in that part of Great Britain called England." The High Court can have jurisdiction over an infant though not of British birth although residing outside the limits of the Presidency town. (1936) M.W.N. 1285 = 44 M.L.W. 904 = 71 M.L.J. 873 = A.I.R. 1937 Mad. 51 = I.L.R. (1937) Mad. 383 = 169 Ind. Cas. 189.

——**Cl. 17—Charter of 1800, Cl. 22 — Inhabitant of Madras can invoke jurisdiction for protection of parental rights.**

By Cl. 22 of Charter of 1800, jurisdiction is conferred upon the Supreme Court (Madras) over the inhabitants of Madras, irrespective of any question of race or birth. Where a person owns a valuable and spacious house at Madras, for which he pays the rates, keeps up an establishment there and resides in it during his visits to the city at frequent intervals, he would answer the description of "inhabitant of Madras." (1936) M.W.N. 1285 = 44 M.L.W. 904 = 71 M.L.J. 873 = A.I.R. 1937 Mad. 51 = I.L.R. (1937) Mad. 383 = 169 Ind. Cas. 189.

——**Cl. 17—Resident of Madras can invoke jurisdiction for protection of parental rights.**

Cl. 17 does not impose as a condition the residence of the infant for the exercise of the jurisdiction thereunder. A resident of Madras can, therefore, invoke the jurisdiction of the High Court of Madras for the protection of his right as a parent. The question as to where the children are residing is immaterial so long as they are

within the Presidency. (1936) M.W.N. 1285 = 44 M.L.W. 904 = 71 M.L.J. 873 = A.I.R. 1937 Mad. 51 = I.L.R. (1937) Mad. 383 = 169 Ind. Cas. 189.

——Cl. 18—Power of High Court to entertain insolvency petition of mofussil debtor.

Under Cl. 18 the High Court is not empowered to adjudicate a debtor, who is outside the limits of the Presidency Town, an insolvent, and pass *interim* orders even when the *mofussil* Courts which would ordinarily exercise the jurisdiction happen to be closed. The clause only means that, with regard to the original jurisdiction of the High Court, that is to be governed by the Presidency Towns Insolvency Act and that with regard to the appellate jurisdiction in respect of cases arising under the Provincial Insolvency Act, that is to be regulated by that Act. (1934) M.W.N. 157 = 66 M.L.J. 428 = A.I.R. 1934 Mad. 314 = 39 M.L.W. 493 = 57 M. 453 = 148 Ind. Cas. 849.

——Cl. 18—Scope.

Cl. 12, Latters Patent, does not affect the provisions of Cl. 18. 112 Ind. Cas. 149 = 51 Mad. 540 = 28 M.L.W. 285 = A.I.R. 1928 Mad. 732 = 55 M.L.J. 171 (F.B.).

——Cl. 21—Inherent powers.

The High Court has inherent powers apart from S. 151, Civil P. C. but can exercise them only on Original Side. A.I.R. 1944 Mad. 161 = 1943 M.W.N. 731 = 56 M.L.W. 698 = (1943) 2 M.L.J. 557 = 216 Ind. Cas. 44.

——Cl. 21—Scope.

Where the High Court deals as appellate or revisional authority with a case coming from a *mofussil* Court, it can only apply such law or equity and rule of good conscience as would be applied by the *mofussil* Court. Therefore, it can grant only an injunction in respect of such a case in accordance with the provision of O. 39. Consequently, the High Court has no power in such a case to grant an injunction staying the execution of a decree in a *mofussil* Court pending a revision petition. 37 M.L.W. 110 = (1933) M.W.N. 18 = 64 M.L.J. 112 = 56 M. 563 = A.I.R. 1933 Mad. 500 = 141 Ind. Cas. 607.

——Cl. 25—Scope.

Per *Mockett* and *Lakshmana Rao, JJ.*—The words of Cl. 25 give a most important and unfettered right of reservation of points of law at Sessions. A.I.R. 1936 Mad. 353 = (1936) M.W.N. 281 = 43 M.L.W. 548 = 70 M.L.J. 635 = 37 Cr.L.J. 637 = 162 Ind. Cas. 592 (2) (F.B.).

——Cl. 25—Scope.

The plea of *autrefois acquit* arose "in the trial" or "in the course of the trial" according to Cl. 25 or S. 434, Criminal P.C. and was taken at proper time and that the trial Judge was entitled to reserve the question if he thought fit as a point of law which had arisen in the trial. A.I.R. 1936 Mad. 353 = (1936) M.W.N. 281 = 43 M.L.W. 548 = 70 M.L.J. 635 = 37 Cr.L.J. 637 = 162 Ind. Cas. 592 (2) (F.B.).

——Cl. 25—In the trial, significance of.

For the purposes of Cl. 25, it is not necessary that the point referred should have been taken at the trial and decided by the Judge. The words "in the trial", in the Letters Patent and "on the trial" in the English Court of Crown Cases Act, on which are founded the provisions of Cl. 25 mean the same thing. A.I.R. 1936 Mad. 353 = (1936) M.W.N. 281 = 43 M.L.W. 548 = 70 M.L.J. 635 = 37 Cr.L.J. 637 = 162 Ind. Cas. 592 (2) (F.B.).

——Cls. 25 and 26—Criminal Law Amendment Act (14 of 1908), S. 6 (2)—Judgment under—Appeal.

The judgment of a speical Criminal Bench of the High Court constituted under S. 6 (*b*) of the Indian Criminal Law Amendment Act, 1908, is open to review on a certificate granted by the Advocate-General under Cl. 26 of the Letters Patent. The Court of review cannot go into matters not covered by the certificate of Advocate-General. 35 Mad. 397 = (1912) M.W.N. 549 = 12 M.L.T. 1 = 13 Cr.L.J. 352 = 14 Ind. Cas. 896 (F.B.).

——Cl. 26—Alleged inadmissible evidence allowed.

Per Full Bench (*Madhavan Nair* and *Curgenven, JJ.*, dissenting).—"Decision" in Cl. 26 does not cover a case where the Judge has not applied his mind to the matter and has not pronounced an opinion on it. Consequently where the Judge has allowed certain alleged inadmissible evidence and no objection is taken to it either at the time when the evidence is given or when such evidence is referred to by the Judge in his summing up to the jury, there is no decision on a point of law regarding the admissibility of such evidence and as such the granting of certificate by Advocate-General is incompetent.

Per *Madhavan Nair, J.*—On an inquiry following the grant of a certificate the High Court has jurisdiction to say that the Advocate-General's certificate is misconceived and should not have been granted on the ground that there is no decision on a point of law involved in the case and if it comes to that conclusion, the petition may straightaway be dismissed without any further consideration of the merits of the case. (1934) M.W.N. 1410 = A.I.R. 1935 Mad. 486 = 42 M.L.W. 53 = 58 M. 523 = 36 Cr.L.J. 1398 = 68 M.L.J. 1 (Sup.) = 158 Ind. Cas. 662 (F.B.).

——Cl. 26—Altering sentence.

The expression 'alter the sentence' in Cl. 26 of the Letters Patent includes setting it aside. The High Court can on review not merely reduce the sentence but has the power to set aside the conviction. 1930 M.W.N. 249 (F.B.).

——Cl. 26—"Decision."

Held, (*Eddy, J.* dissenting) that the word 'decision' in Cl. 26 includes every mental conclusion on which the judgment or charge is based and not merely matters actually stated at the Bar for the direct decision of the Court. It thus includes directions, misdirections or non-directions, to a jury. 1930 M.W.N. 249 (F.B.).

——Cl. 26—"Point of law."

The expression "point of law" in Cl. 26 of the Letters Patent means the same thing as matter of law in S. 418 of the Cr. P. Code. It includes such misdirection or non-direction as would permit an appeal against the verdict of a jury. And misdirection includes not only an error in laying down the law by which the jury are to be guided but also a defect in summing up the evidence or in not summing it up or in summing it up erroneously.

Per *Eddy, J.*, dissenting.—'A point of view' referred to in Cl. 26 means a point of law submitted to and decided by the trial Judge or any direction as to the law given by him in the course of his summing up to the jury. 1930 M.W.N. 249 (F.B.).

——Cls. 28, 29—Power of High Court to stay criminal proceedings taken in consequence of order under S. 476, Cr.P.C.—Stay of proceedings pending appeal on the civil side from original decree. *See* HIGH COURTS ACT, S. 15. 18 M.L.J. 466 = 31. M 510 = 4 M.L.T. 186. Also 3 Bom. L.R. 58 = 25 B. 478.

——Cl. 36—Per *Krishnan Pandalai, J.*—The correct procedure to be followed by the Judge to whom a case is referred under Cl. 36 of the Letters Patent of the Madras High Court is to send the case back for disposal to the referring Judges after pronouncing his opinion, though it may be possible in some cases for the referee Judge to decide the whole case in accord-

ance with the view of the majority. (1934) M.W.N. 135 = 39 M.L.W. 588 = A.I.R. 1934 Mad. 436 = 67 M.L.J. 721 = 57 Mad. 979 = 152 Ind. Cas. 75.

——Cl. 36—Full Bench decision doubted—Reference to arger Bench—Proper procedure.

Per *Beasley, C.J. and Reilly, J.*—When a question of law has been referred to a Full Bench and the Bench or the majority, of the Bench has given an answer, no Judge sitting alone and no Bench of two Judges is at liberty to disregard that answer or to treat it as not binding on them as if it was an opinion expressed *obiter* in disposing of an ordinary case and unnecessary for the disposal of that case, or to refer it to a larger Bench. The proper procedure is to refer the matter to the Chief Justice who may then consider whether the question should be referred to a larger Bench. A.I.R. 1932 Mad. 612 = (1932) M.W.N. 350 = 36 M.L.W. 292 = 63 M.L.J. 450 = 55 M. 883 = 140 Ind. Cas. 331 (F.B.).

——Cl. 36—Difference of opinions among Judges.

Per *Full Bench.*—Whether the appeal is under C.P. Code, or under the Letters Patent, the procedure to be adopted in either case by the High Court in case of an equal division of opinion between the Judges is to be governed by Cl. 36, Letters Patent, and not by S. 98, C.P. Code. 116 Ind. Cas. 343 = 52 Mad. 563 = 29 M.L.W. 823 = A.I.R. 1929 Mad. 641 = 57 M.L.J. 264 (F.B.).

——Cl. 36—Difference among Judges—In a Small Cause revision.

In case of difference among Judges forming the High Court Bench, S. 98, C.P. Code, does not apply but Cl. 36 of the Letters Patent applies and senior Judge's opinion prevails. 85 Ind. Cas. 1016 = A.I.R. 1925 Mad. 281 = 47 M.L.J. 876.

——Cl. 36—Difference of opinion—Revision—Procedure.

In cases of difference of opinion in revision cases, Cl. 36 and not S. 98, C.P.C. regulates the procedure. 18 M.L.T. 591 = 17 Cr.L.J. 42 = 32 Ind. Cas. 330.

——Cl. 36—Civil revision petition—Heard by two Judges—Difference of opinion—Latters Patent, Art. 36 applies and not S. 575 of Civil Procedure Code.

Where a civil revision petition is heard by two Judges and there is a difference of opinion between them, S. 575, C.P.C. (O.C.), applies and not Art. 36 of the Letters Patent. 25 M. 548.

——Cl. 36—Difference of opinion among Judges—Sanction, Cr. P. Code, S. 195 (6).

Where two Judges of the High Court differ in opinion as to whether a sanction given by the Lower Court should be revoked on an application under S. 195 (6) the provision in Cl. 36 of the Letters Patent applies and the opinion of the senior Judge prevails. 39 Mad. 750 = 11 M.L.T. 367 = (1912) M.W.N. 499 = 22 M.L.J. 419 = 13 Cr.L.J. 209 = 14 Ind. Cas. 305 (F.B.).

——Cl. 36—Scope.

Per *Thiruvenkatachariar, J.*—Both S. 98, C.P. Code and Cl. 36, Letters Patent, are mere rules of procedure, differing in that respect from Cl. 15, Letters Patent, which gives a right of appeal in certain cases from the decision of a single Judge or of a Division Bench. 116 Ind. Cas. 343 = 29 M.L.W. 823 = 52 Mad. 563 = A.I.R. 1929 Mad. 641 = 57 M.L.J. 264 (F.B.).

——Cl. 36—Applicability of amended clause pending cases.

The amended Cl. 36 applies to all pending cases. 119 Ind. Cas. 160 = 52 Mad. 584 = 29 M.L.W. 874 1929 M.W.N. 564 = A.I.R. 1929 Mad. 497 = 57 M.L.J. 22 (F.B.).

——Cl. 36—Senior Judge's decision to prevail—Appeal from Original Side of High Court.

In an Original Side appeal, when Judges are equally divided in opinion, the opinion of the senior Judge prevails. S. 575, C.P.C. (O.C.) has no application. 29 M. 1 at 24.

——S. 37—Rule 105 of Appellate Side Rules—If ultra vires.

R. 105 of the Appellate Side Rules of the High Court is authorised by S. 37 of the Letters Patent, and is therefore not *ultra vires*. R. 105 of the High Court Appellate Side does not contravene the provisions of the C.P.C. by limiting the right of appeal conferred by S. 100, C.P.Code or by varying the provisions of O. 41 as to the mode of disposing of appeals. 2 L.W. 999 = 18 M.L.T. 383 = 29 M.L.J. 784 = (1915) M.W.N. 817 = 31 Ind. Cas. 74.

——Cl. 39—Applicability.

Final judgment in appeal by the Judges of the High Court against judgment of the Original Side Judge of the High Court. *See* LETTERS PATENT (MAD.), CLS. 15 AND 39. (1948) 1 M.L.J. 230 = A.I.R. 1948 Mad. 331 = 61 M.L.W. 214.

——Cl. 39—Decree in testamentary matter.

A decree of the High Court in a testamentary matter is appealable to His Majesty in Council when the case is such that if it were an ordinary civil case it would be appealable under S. 109. 97 Ind. Cas. 836 = 49 Mad. 954 = 1926 M.W.N. 931 = A.I.R. 1926 Mad. 986 = 51 M.L.J. 299.

——Cl. 39—Deputy Collector sanctioning prosecution on Income-Tax Officer—High Court order refusing to quash proceedings, if appealable—Privy Council—Leave to appeal.

Where the High Court refuses to quash by its writ of *certiorari* the prosecution sanctioned by a Deputy Collector on Income-Tax Officer, leave to the appeal of the Privy Council should be given under Cl. 39 of the Letters Patent, since it appertains to criminal jurisdiction. Moreover Cl. 39 of the Letters Patent does not apply to the case of a writ of *certiorari*. 14 M.L.T. 421 = 25 M.L.J. 565 = 14 Cr.L.J. 656 = 21 Ind. Cas. 896.

——Cl. 39—Order in insolvency proceedings—Appeal lies to Privy Council against order under S. 8.

A judgment passed under S. 8 of the Presidency Towns Insolvency Act by the High Court in its appellate jurisdiction setting aside or annulling a prior order is appealable under Cl. 39 of the Letters Patent to the Privy Council.

In an insolvency matter (original or appellate) an application for leave to appeal lies under Cl. 39 of the Letters Patent, even if no such application lies under S. 109 of the C.P. Code. 91 Ind. Cas. 126 = 35 M.L.T. 57 = 22 M.L.W. 362 = A.I.R. 1925 Mad. 243.

——Cl. 39—Revisional jurisdiction of the High Court is a part of appellate jurisdiction under Cl. 39. 1934 M.W.N. 5 (F.B.).

——Cl. 39—Order in revision by single Judge—No appeal lies to the Privy Council from the decree or order of one Judge of a High Court.

By S. 44 of the Letters Patent, the Letters Patent are subject to imperial legislation. So S. 39 of the Letters Patent fails as against S. 111 of the C.P. Code. Hence, though since the amendment of the Letters Patent, the judgment of a Single Judge sitting in revision is not appealable to two Judges and therefore may be regarded as a final decree of a High Court from which a right of appeal to the Privy Council is given in all cases by S. 39 of the Letters Patent. S. 111 of the C. P. Code, prevails and no appeal lies to the Privy Council from the decree of a single Judge of a High Court. 75 Ind.

Cas. 604 = 46 Mad. 958 = 18 M.L.W. 655 = 1923 M.W.N. 719 = A.I.R. 1924 Mad. 399 = 46 M.L.J. 117.

——Cl. 39—Small Cause revision—Question raised in—Leave must be granted on substantial question of law.

Under Cl. 39 of the Letters Patent, leave to appeal to the Privy Council should be granted where the decision of the High Court involves a substantial question of law even in cases of revisions under S. 25 of the Provincial Small Cause Courts Act, if they necessitate the interpretation of the section of the statute which may be of great private importance. In this case the question was about the meaning of S. 12 of Madras Estates Land Act and the right in dispute was not exactly measurable in money. 66 Ind. Cas. 686 = 1922 M.W.N. 46 = 15 M.L.W. 140 = 30 M.L.T. 42 = A.I.R. 1922 Mad. 34 = 42 M.L.J. 78.

——Cl. 39—Suspension of Vakil from practice.

No leave to appeal to His Majesty in Council can be granted against an order suspending a Vakil from practice which is a disciplinary matter and not a judgment. 69 Ind. Cas. 290 = 16 M.L.W. 328 = 1922 M.W.N. 530 = 31 M.L.T. 173 = A.I.R. 1922 Mad. 440 = 43 M.L.J. 382 (F.B.).

——Cl. 41—Right of appeal to Privy Council depends on High Court declaring case as fit.

The right of appeal given by Cl. 41 is subject to the proviso that the High Court shall declare that the case is a fit one for appeal. The High Court, therefore, has the duty of satisfying itself, before declaring a case fit for appeal, that the case falls within the limits prescribed by the Privy Council for the entertainment of appeals in criminal matters. A.I.R. 1935 Mad. 793 = (1935) M.W.N. 5 = 68 M.L.J. 93 (Sup). = 42 M.L.W. 140 = 37 Cr.L.J. 64 = 159 Ind. Cas. 240 (S.B.).

——Cl. 44—If abrogates the effect of Cl. 15. *See* Letters Patent (Madras), Cls. 15 and 44. (1946) 2 M.L.J. 165 = A.I.R. 1947 Mad. 5 (1).

——Cl. 44—Appeal to Privy Council—No appeal lies to the Privy Council from the decree or order of one Judge of a High Court.

By S. 44 of the Letters Patent, the Letters Patent are subject to Imperial legislation. So S. 39 of the Letters Patent fails as against S. 111 of the C. P. Code. Hence, though since the amendment of the Letters Patent, the judgment of a single Judge sitting in revision is not appealable to two Judges and therefore may be regarded as a final decree of a High Court from which a right of appeal to the Privy Council is given in all cases by S. 39 of the Letters Patent. S. 111 of the C.P. Code, prevails and no appeal lies to the Privy Council from the decree of a single Judge of a High Court. 75 Ind. Cas. 604 = 46 Mad. 958 = 18 M.L.W. 655 = 1923 M.W.N. 719 = A.I.R. 1924 Mad. 399 = 46 M.L.J. 117.

——Cl. 44—Scope of.

The provisions of Cl. 44 do not enable Courts by implication to supplement the Letters Patent by importing into it all Acts *ejusdem generis* passed by the Governor-General in Council. The provision is only intended to empower the Governor-General in Council to legislate with a view to supplement the omission in the Letters Patent. 40 Mad. 651 = (1916) 1 M.W.N. 135 = 3 L.W. 172 = 19 M.L.T. 126 = 32 M.L.J. 144 = 32 Ind. Cas. 873.

——(Malta)—S. 33—Membership of Senate or Assembly.

Court of Appeal in Malta is finally to determine all questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly and an appeal does not lie to the Board of Privy Council. 124 Ind. Cas. 582 = A.I.R. 1930 P.C. 227 = 59 M.L.J. 416 = 33 M.L.W. 51 (P.C.).

——(Nagpur) Cl. 10—Applicability—Judgments delivered prior to constitution of High Court.

Cl. 10 deals with appeals against judgments of the Judges of the High Court or of one Judge of any Division Court and it has no application to judgments delivered previous to the constitution of the High Court. A.I.R. 1936 Nag. 118 = I.L.R. (1936) Nag. 58 = 164 Ind. Cas. 1072.

——Cl. 10—Applicability.

The right of appeal from a decree of a single Judge to the High Court is not governed by S. 96 or S. 100 or S. 104 of the Civil P.C. but by Cl. 10 of the Letters Patent. The Code makes no provision for an appeal within the High Court, that is to say, from a Single Judge of the High Court. 1940 N.L.J. 37 = A.I.R. 1940 Nag. 39 = I.L.R. (1940) Nag. 141 = 186 Ind. Cas. 129 (F.B.).

——(Nagpur) Cl. 10—"Judgment"—Meaning of—Order appointing a receiver—Appeal.

The word "Judgment" in Cl. 10 of the Letters Patent means "decree" in civil cases. The mere fact that a particular order is one from which an appeal lies as an appeal from an order under the C.P. Code, does not make that order a decree. An order appointing a receiver, although appealable as an order made by an original Court, would not render it a judgment. Such an order passed by a single Judge of the High Court during the pendency of an appeal is not appealable under Cl. 10 of the Letters Patent. I.L.R. (1947) Nag. 51 = 229 Ind. Cas. 222 = 1947 N.L.J. 51 = A.I.R. 1947 Nag. 159.

——(Nagpur) Cl. 10—Judgment—Meaning.

The word 'judgment' as used in Cl. 10 means in civil cases a decree. Order admitting legal representative on record is not a "judgment." A.I.R. 1946 Nag. 424 = I.L.R. (1946) Nag. 482 = 1946 N.L.J. 377.

——Cl. 10—'Judgment'—Meaning of.

A judgment in the Letters Patent must mean not a judgment as defined in the Civil P. C. but a judgment in its final definitive sense embodying a decree. Consequently, a decision by a Single Judge of the High Court in a matter concerning the admission of legal representatives on the record is not appealable under Letters Patent because it is not a decision of finality or one that goes to the root of proceedings. It has the effect of allowing the litigation which is proceeding to further proceed to a final adjudication. 1945 N.L.J. 128 = I.L.R. (1945) Nag. 286 = A.I.R. 1945 Nag. 156.

——Cl. 10—Judgment—Meaning—Order under O. 41, R. 5, Civil P. C.

The term "judgment" in the Letters Patent of the High Court means, in civil cases, a decree and not a judgment in the ordinary sense. An order granting stay of execution or refusing to vacate the stay order already passed under O. 41, r. 5, Civil P. C. is not a decree within the meaning of S. 2 (2) Civil P. C. It is merely an order and not a judgment within the meaning of Cl. 10. No Letters Patent appeal, therefore, lies against such order. A.I.R. 1943 Nag. 282 = 1943 N.L.J. 389 = I.L.R. (1943) Nag. 453 = 211 Ind. Cas. 237.

——Cl. 10—"Judgment"—Order dismissing appeal from order refusing to extend time for payment under O. 34, R. 2 (2), C. P. Code—Appeal.

An order of a Judge of the High Court dismissing an appeal filed against an order of the trial Court refusing to extend the time for payment of mortgage-money under O. 34, R. 2 (2) C. P. Code, is not a decree as defined in S. 2 (2) but is an order as defined in S. 2 (14), C. P. Code, and is, therefore, not a judgment within Cl. 10 of the Letters Patent. Consequently no Letters

Patent appeal lies against the order. I.L.R. (1947) Nag. 351 = A.I.R. 1948 Nag. 85 = 1947 N.L.J. 365.

——**Cl. 10—Judgment—Order refusing application for** leave to appeal in forma pauperis.

An order refusing an application for leave to appeal *in forma pauperis* is not a "judgment" within the meaning of Cl. 10 of the Letters Patent as it does not amount to a decree, and is therefore not appealable. 230 Ind. Cas. 449 = 1947 N.L.J. 26.

——**Cl. 10—'Judgment'—Order rejecting application to rehear second Appeal—Appealability.**

The term 'judgment' referred to in Cl. 10 of the Letters Patent for the Nagpur High Court means in civil cases a decree as defined in S. 2 (2), C. P. Code. An order rejecting an application under O. 41, R. 21, C. P. Code, read with O. 42 of that Code, to rehear a second appeal, does not come within the term "decree" and so it is not appealable under Cl. 10. I.L.R. (1948) Nag. 188 = A.I.R. 1949 Nag. 188 = 1948 N.L.J. 406.

——**Cl. 10—Land Acquisition Act, S. 54**

Appeal can be filed from the decision of a single Judge exercising powers in first appeal under S. 54, Land Acquisition Act. A.I.R. 1944 Nag. 284 = 1944 N.L.J. 267 = I.L.R. (1944) Nag. 780.

——**Cl. 10—Leave to appeal, if can be restricted to particular point of law.**

While granting leave to appeal under Cl. 10, it is competent for the Judge of the High Court to declare on what particular point of law he allows permission to appeal. A.I.R. 1943 Nag. 175 = 1943 N.L.J. 79 = I.L.R. (1943) Nag. 540 = 206 Ind. Cas. 602.

——**Cl. 10.** Leave to appeal should not be lightly given. Though it is doubtless very difficult to lay down a hard and fast rule, leave should not be granted where the matter in dispute is trifling, however interesting it may be. A.I.R. 1943 Nag. 23 = I.L.R. (1943) Nag. 67 = 1942 N.L.J. 506 = 203 Ind. Cas. 67.

——**Cls. 10, 27—Leave to appeal—Refusal—Judge—If can subsequently re-call his own order and declare case fit for appeal.**

R. 10 of the rules made by the Nagpur High Court, under the powers conferred by Cl. 27 read with sub-sec. (1) of S. 106 of the Government of India Act, precludes any possibility of an applicant approaching a Judge a second time when his application for a declaration under Cl. 10 that the case is a fit one for appeal has been refused. Hence when once a Judge has refused to declare that a case is fit one for appeal under Cl. 10, he cannot subsequently revise or review his own order and recall it and declare that the case is fit one for appeal under Cl. 10. A.I.R. 1940 Nag. 47 = 1939 N.L.J. 535 = I.L.R. (1940) Nag. 34 = 187 Ind. Cas. 253.

——**Cl. 10—Leave when necessary.**

Leave to file an appeal under the Letters Patent is necessary only for an appeal from a judgment passed by a single Judge in the exercise of his appellate powers in second appeal but not for those which are passed by him in the exercise of his original or first appellate jurisdiction. A.I.R. 1940 Nag. 39 = 1940 N.L.J. 37 = I.L.R. (1940) Nag. 141 = 186 Ind. Cas. 129 (F.B.).

——**Cl. 10—Leave when given.**

As a rule one does not, on motion hearing, refuse to admit a second appeal unless one is satisfied that there is no case to be made out by the appellant. If a Judge is so clearly satisfied as to even refuse to admit the appeal, he is not justified in granting leave to file a Letters Patent Appeal which leave is only given as a rule where there is a point of law of difficulty and importance about which the Judge entertains a doubt. A.I.R. 1939 Nag. 193 = I.L.R. (1941) Nag. 460 = 1939 N.L.J. 256 = 183 Ind. Cas. 341.

——**Cl. 10—Limitation for appeal.**

In a Letters Patent Appeal, the time requisite for obtaining certified copies can be deducted to computing the period for limitation. I.L.R. (1944) Nag. 714 = 1944 N.L.J. 455 = A.I.R. 1945 Nag. 52 = 219 Ind. Cas. 390.

——**Cl. 10—Limitation.**

In a Letters Patent Appeal, the appellant is not entitled to urge grounds that are concluded by the decision in second appeal except the one to which leave was confined. I.L.R. (1944) Nag. 743 = 1944 N.L.J. 337 = A.I.R. 1944 Nag. 370.

——**Cl. 10—Limitation for appeal.**

It is desirable to warn the legal profession 'that the Letters Patent appeals may well be held to be out of limit if not filed within 30 days in future.'

[In this case, however, the appeal was admitted even though out of time under the discretion to admit for good cause shown].

Quaere.—Whether in computing 30 days, the period during which the Court is closed should be excluded.

Where an award made pursuant to the provisions of the Workmen's Compensation Act comes to the High Court under S. 30, Workmen's Compensation Act, and the matter is disposed of by a Judge of the High Court, his decision does not amount to a judgment within the meaning of Cl. 10 and therefore, no Letters Patent Appeal lies against it. But the Judge who has to deal with either an appeal or a reference under the Workmen's Compensation Act, might well be justified in any case of difficulty or raising a point of importance, in referring the matter to a Bench. A.I.R. 1939 Nag. 122 = I.L.R. (1939) Nag. 124 = 1939 N.L.J. 63 = 182 Ind. Cas. 970.

——**Cl. 10—Order on reference under Municipalities Act.**

The answer of a single Judge of the High Court on a reference under S. 83 (2) C.P Municipalities Act, is merely an order of an advisory nature and no appeal lies from it under the Letters Patent. 1944 N.L.J. 499 = I.L.R. (1944) Nag. 827 = A.I.R. 1945 Nag. 75 = 220 Ind. Cas. 41.

——**Cl. 10—Order passed in second appeal—Appealability.**

Cl. 10 of the Letters Patent for the Nagpur High Court prohibits an appeal without special leave from the order of a single Judge of the High Court passed in the exercise of second appellate jurisdiction. The prohibition is on all orders passed in the exercise of that jurisdiction. whether or not they seek to uphold, revise or modify an order of a lower appellate court. I.L.R. (1948) Nag. 188 = 1948 N.L.J. 406 = A.I.R. 1949 Nag. 188.

——**Cl. 27**—Rule 10 of the rules made by Nagpur High Court under the powers conferred by Cl. 27 read with S. 106 (1) of the Government of India Act precludes any possibility of an applicant approaching a Judge second time when his application for a declaration under Cl. 10 that the case is a fit one for appeal has been refused. 1939 N.L.J. 535 = I.L.R. (1940) Nag. 34 = A.I.R. 1940 Nag. 47 = 187 Ind. Cas. 253.

——**Cls. 29 and 10—Decision of single Judge in second appeal—Leave to file Letters Patent Appeal refused—Application for leave to appeal to Privy Council—If lies.**

Under Cl. 29 of the Letters Patent an application for leave to appeal to His Majesty in Council from the decision of a single Judge in second appeal does not lie, as Cl. 29 is confined to cases in which no appeal lies to the High Court and as Cl. 10 confers the right of a Letters Patent Appeal from the decision of a

single Judge in second appeal. It is true that the right conferred by Cl. 10 could not be exercised in a particular case because leave was refused, but that is a very different thing from saying that no appeal lies under Cl. 10. Cl. 10 deals with the right of appeal in general but merely circumscribes the conditions under which it can be exercised. The right of the Judicial Committee to grant special leave is of course not affected. I.L.R. (1948) Nag. 425 = 1948 N.L.J. 304 = A.I.R. 1949 Nag. 96.

——Cl. 29—Final order.

Meaning of—Partition suit—Appeal to single Judge of High Court—Order by single Judge declaring and bringing legal representatives of deceased party on record—Letters Patent Appeal to Divisional Bench from such order—Order of Division Bench that single Judge's order was not 'judgment' within Cl. 10 and no appeal lay is not 'final order' contemplated by Cl. 29. A.I.R. 1946 Nag. 424 = I.L.R. (1946) Nag. 482 = 1946 N.L.J. 377.

——Cl. 29—" Judgment."

Appeal to single Judge of High Court—Order by single judge declaring and bringing legal representatives of deceased party on record.—Letters Patient — Appeal to Divisional Bench from such order—Order that sing e Judge's order was not 'judgment' within Cl. 10 and no appeal lay is not 'judgment' within Cl. 29. A.I.R. 1946 Nag. 424 = I.L.R. (1946) Nag. 482 = 1946 N.L.J. 377.

——Cls. 29, 30—Petition by First Grade Pleaders of Nagpur Judicial Commissioner's Court to be enrolled as Advocate of High Court without stamp duty.

The petitioners who were First Grade Pleaders of the Judicial Commissioner's Court applied to be enrolled either (*a*) as Advocates. of the High Court without any stamp duty being levied or (*b*) as Pleaders of the High Court without any stamp duty being levied, the second prayer being only sought "after necessary amendments to the Rules framed under the clauses" have been made. The Court rejected the petition on the ground, primarily, that it raised a question that was purely an administrative question. The petitioners applied for leave to appeal to the Privy Council;

Held, that the order was one disposing of a petition which raised no point capable of judicial determination, and the dismissal was not a "judgment, decree or order" within either Cl. 29 or Cl. 30. What was sought for was a judicial discretion to the Judges to make rules in a particular way. Leave to appeal could not, therefore, be granted. A.I.R. 1937 Nag. 318 = I.L.R. (1938) Nag. 186 = 172 Ind. Cas. 478.

——Cl. 30—Granting of permission under the clause to appeal against an interlocutory or preliminary order is entirely discretionary with the High Court and there is appeal as of right. I.L.R. (1946) Nag. 482 = 1946 N.L.J. 377 = A.I.R. 1946 Nag. 424.

——Cl. 39—An application for leave to appeal to the Privy Council from a sentence of death can only be entertained by Chartered High Court. A.I.R. 1933 Nag. 216 = 34 Cr.L.J. 934 (2) = 29 N.L.R. 340 = 145 Ind. Cas. 246.

——(Patna), Cl. 9—Order removing case from Sub-Judge's Court to High Court.

The mere non-recording of reasons in an order removing a case from the Subordinate Judge's Court to the High Court as required by Cl. 9 does not, in any way, affect the jurisdiction of the High Court nor does it make its decision illegal. It is only an irregularity which does not affect the jurisdiction. 14 P.L.T. 258 = A.I.R. 1933 Pat. 250 = 12 Pat. 727 = 149 Ind. Cas. 809.

——(Patna) Cls. 9, 10 and 26.

Original jurisdiction—Extent of—Succession Certificate—Jurisdiction to grant. *See* Succession Act, Ss. 371 and 372. 27 Pat. 18 = A.I.R. 1949 Pat. 318.

——Cl. 9—" Purposes of justice "—Meaning of—Questions of public importance and unusual difficulty involved—Sufficiency for transfer to High Court.

" Purposes of justice " for which the extraordinary original civil jurisdiction of the High Court is to be exercised, are served when the questions which arise in a suit are questions of public importance and unusual difficulty and when the interests of neither party will be seriously prejudiced if the suit is tried in the High Court instead of being tried locally in a Subordinate Court. 24 Cal. 183 *ref.* A.I.R. 1950 Pat. 179.

——Cl. 10—Appeals—Preliminary hearing—Practice—High Court Rules—Validity—Effect.

The High Court Rules which contemplate and authorize the procedure of preliminary hearing of Letters Patent appeals in the manner provided by O. 41, R. 11 C.P.C. having received the sanction of the Governor-General-in-Council and of the Local Government, have the force of law. Even if no procedure were provided either by the Code or by the rules of the Court or elsewhere, it would be the duty of the Court to deal with appeals under Cl. 10 of the Letters Patent in conformity with the practice aforesaid, as it is rule of justice, equity and good conscience. (1919) Pat. H.C.C. 146 = 4 Pat. L.J. 695 = 54 Ind. Cas. 230.

——Cl. 10—" Judgment "—Remand order.

Where a Judge of the High Court without setting aside the decision of the lower Appellate Court merely remands the case for the finding of an issue with directions to return that finding before finally disposing of the appeal, that is not a judgment within the meaning of the Letters Patent; but where the Judge sets aside the decision of the lower Appellate Court and orders a retrial by that Court, that decision amounts to a judgment within the Letters Patent and in such cases an appeal is permissible from the decision. 75 Ind. Cas. 946 = A.I.R. 1924 Pat. 336.

——Cl. 10—Judgment—Remand Order.

If a Judge sitting singly sets aside the judgment and decree of the lower Appellate Court and remands the case for re-hearing, the order of remand being a 'judgment' under Cl. 10 of the Letters Patent (Patna) is appealable. 65 Ind. Cas. 175 = 3 P.L.T. 343 = 1 Pat. 246 = A.I.R. 1922 Pat. 384.

——Cl. 10—Judgment—What is.

Order under S. 185, Companies Act, reversed—Order refusing restitution is judgment within Cl. 10. A.I.R 1944 Pat. 192 = 23 Pat. 24 = 10 B.R. 594 = 213 Ind. Cas. 340.

——Cl. 10—Judgment—What is not.

Single Judge refusing to recall under S. 151, his order passed after consideration of everything that could be said on both sides—Order is not "judgment" within Cl. 10 and not appealable under Letters Patent. 14 P.L.T. 1 = 12 Pat. 202 = A.I.R. 1933 Pat. 139 = 142 Ind. Cas. 455.

——Cl. 10—Finding of fact cannot be disturbed either in second appeal or Letters Patent appeal.

The finding of the lower Appellate Court on the question whether anything had been paid by the defendant as canal dues for the period in suit is a finding on a pure question of fact, and cannot be disturbed either by a single Judge in second appeal or by a Bench in Letters Patent Appeal. 7 B.R. 493 = 22 P.L.T. 219 = A.I.R. 1941 Pat. 253 = 20 Pat. 556 = 192 Ind. Cas. 851.

——Cl. 10—Finding of fact.

A question of fact cannot be raised in Letters Patent appeal. A.I.R. 1935 Pat. 56 = 16 P.L.T. 342 = 1 B.R. 347 = 154 Ind. Cas. 853.

——Cl. 10—Leave to appeal—Single Judge in second appeal refusing—High Court, if can hear appeal.

High Court can only hear an appeal from a judgment of a single Judge delivered in a second appeal in cases where such single Judge has granted leave to appeal. Where such leave has been refused, High Court has, by the very terms of the Letters Patent no right whatsoever to hear the appeal. The Letters Patent of the Patna High Court govern the jurisdiction of the Patna High Court and there is nothing in S. 9, High Courts' Act of 1861, which is inconsistent with the provisions of the Letters Patent. A.I.R. 1939 Pat. 425 = 20 P.L.T. 404 = 5 B.R. 943 = 183 Ind. Cas. 416.

——Cl. 10—"Leave to appeal"—When can be given.

"Leave to appeal" under the Letters Patent should not be given too lightly. A certificate should not be granted merely on the ground that a point of law arises in the case as might be the case in dealing with admissions of second appeal. The Judge from whose judgment appeal is sought, should certify the case as a fit one for appeal. In exercising the responsibility given to them by the Letters Patent to hear appeals singly, they should remember that it is only when a case presents some difficulty and in which the Judge really feels that the matter before him requires further consideration by a larger Court that "leave" should be granted. If a Judge decides the case with confidence that should be an indication that it is not a fit case for appeal, and if he accepts the responsibility which is cast upon him by the Letters Patent, his decision will be final. 15 P.L.T. 456 = A.I.R. 1934 Pat. 466 = 13 Pat. 587 = 151 Ind. Cas. 921.

——Cl. 10—Limitation.

Rule 2, Chap. 7 of the Patna High Court Rules, excludes the applicability of S. 12 of the Limitation Act to appeals under Cl. 10 of the Letters Patent. 59 Ind. Cas. 179 = A.I.R. 1921 Pat. 365 (F.B.).

——Cl. 10—Limitation—Time taken for getting copy of judgment—Cannot be deducted.

Under R. 2 of Ch. VII of the rules of the Patna High Court, a copy of the judgment of a single Judge is not required to be filed along with a Letters Patent Appeal and the time taken in obtaining such copies should not be deducted from the period of 30 days. (1920) Pat. H.C.C. 333 = A.I.R. 1921 Pat. 365.

——Cl. 10—Miscellaneous.

Per *Courtney-Terrell, C.J. and James, J.*—Where a Letters Patent appeal is filed on the contention that the suit was for defamation but it is clear from the pleadings that the suit is for wrongful dismissal and not for defamation, the appeal is not maintainable. 19 P.L.T. 186 = A.I.R. 1939 Pat. 190 = 5 B.R. 626 = 181 Ind. Cas. 585.

——Cl. 10—Order of single Judge staying criminal trials—Appeal.

An order of a Judge of the High Court sitting alone, staying a criminal trial, is not a judgment and is not appealable under Cl. 10 of the Letters Patent of the Patna High Court. The object of Cl. 10 was to prohibit appeals, (i) in respect of sentences and orders passed or made in the exercise of criminal jurisdiction and (ii) in respect of orders, made in the exercise of revisional jurisdiction in civil cases. (1919) Pat. H.C.C. 218 = 3 Pat. L.J. 509 = 5 Pat. L.W. 153 = 19 Cr.L.J. 1008 = 48 Ind. Cas. 348.

——Cl. 10—Scope.

The High Court cannot, in Letters Patent appeal entertain any point which the appellants were not competent to raise in second appeal. A.I.R. 1940 Pat. 322 = 19 Pat. 104 = 7 B.R. 52 = 190 Ind. Cas. 418.

——Cl. 11—If gives jurisdction to High Court to hear appeals from decision of single Judge of High Court.

Cl. 11, gives the High Court no jurisdiction whatever to hear an appeal from a single Judge of the Court. The right conferred by Cl. 11 is a right to hear appeals from the Civil Courts of the province and from all other Courts subject to the superintendence of the High Court. In short, this clause gives the High Court a right to hear appeals from what are commonly called the subordinate or lower Courts. 5 B.R. 943 = A.I.R. 1939 Pat. 425 = 20 P.L.T. 404 = 183 Ind. Cas. 416.

——Patna (1916). Cl. 11—Subordinate Courts.

The Letters Patent must be read subject to the special legislation in the form the Regulation V of 1893 which declares that the Courts other than the Sessions Court are not subordinate to the Patna High Court as their High Court. 108 Ind. Cas. 419 = 7 Pat. 337 = 9 P.L.T. 468 = 29 Cr.L.J. 427 = A.I.R. 1928 Pat. 241.

——Cl. 11—Decision of single Judge in revision.

No appeal lies to a Divisional Court under Cl. 10 from the decision of a Judge passed in the exercise of revisional jurisdiction.

The words "which has been called for by the said Court" are general in their application and refer both to the case in which the High Court has *suo motu* called for the records and the case where the records have been called for on the application of one of the parties. A.I.R. 1931 Pat. 292 = 12 P.L.T. 599 = 10 Pat. 428 = 133 Ind. Cas. 676.

——Cl. 19—Review.

Application for review does not lie against a decision of the High Court on Letters Patent appeal. A.I.R. 1931 Pat. 409 = 12 P.L.T. 652 = 134 Ind. Cas. 630.

——Cl. 27—Declaration of validity of marriage.

The jurisdiction of the High Court in matters matrimonial is only such jurisdiction as is comprised within the provisions of the Indian Divorce Act. A suit therefore for a declaration that marriage was a valid and lawful marriage does not lie. 72 Ind. Cas. 657 = 1923 P.H.C.C. 127 = 1 Pat. L.R. 129 = A.I.R. 1923 Pat. 301.

——Cl. 28—Applicability—Appeal—Hearing by Division Bench of two Judges—Difference on point of law—Procedure—C.P. Code, S. 98—Applicability. *See* CIVIL PROCEDURE CODE, S. 98. 27 Pat. 332.

——Cl. 28—Difference of opinion between two Judges in appeal from Subordinate Court.

The effect of the amendment of S. 98, Civil P.C. by adding sub-cl. (3) by Act XVIII of 1928, is to make Cl. 28 apply to appeals from the decisions of the *moffussil* Courts as well. The addition also excludes the Chartered High Courts from the operation of S. 8 where their Letters Patent provide for a difference of opinion between the Judges.

Per *Jwala Prasad, J.*—Cl. 28 permits such a reference to be heard by a single Judge and S. 108, Government of India Act, Cl. (2), read with the saving provision in Cl. 10 of Chap. II of the Rules of the High Court gives power to the Chief Justice to order such a reference to be heard by a single Judge. 11 Pat. 772 = A.I.R. 1933 Pat. 67 = 14 P.L.T. 374 = 141 Ind. Cas. 369.

——Cl. 28—Contempt proceedings.

Under Cl. 28 of the Letters Patent (Patna) Divisional Bench has power to issue a rule to show cause on its own motion against committal for contempt. A.I.R.

1941 Pat. 185 = 7 B.R. 261 = 42 Cr.L.J. 225 = 21 P.L.T. 980 = 20 Pat. 306 = 191 Ind. Cas. 834.

——Cl. 28—Contempt proceedings.

The rule for contempt proceedings need not be issued by the Court as an entire body and the whole of its judiciary need not be consulted. A single Judge or Division Bench has jurisdiction to issue the rule. 117 Ind. Cas. 180 = 30 Cr.L.J. 741 = A.I.R. 1929 Pat. 72 (F.B.).

——Cl. 28—Procedure in appeals.

Per *Das* and *Foster, JJ.*—There is no conflict between the Code and the Letters Patent. The special procedure indicated in the Letters Patent applies to Letters Patent appeals ; the procedure indicated in S. 98 of the Code applies to appeals from Subordinate Courts. 43 Bom. 433 *foll.* 87 Ind. Cas. 849 = 88 Ind. Cas. 141 = 4 Pat. 510 = 6 P.L.T. 634 = A.I.R. 1925 Pat. 625.

——Cl. 29—Appeal—Dismissal of appeal for failure to furnish printed papers—Privy Council—Appeal.

There is no appeal to the Privy Council from an order of the High Court dismissing an appeal or failure of the appellant to prepare and deliver a list of the papers to be inserted in the paper book in accordance with R. 8 of Ch. IX of the Patna High Court Rules, 1916. 5 Pat. L.J. 719 = 2 P.L.T. 112 = 60 Ind. Cas. 285 = 1926 P.H.C.C. 97 = A.I.R. 1921 Pat. 13.

——Cl. 29—Rules.

The High Court Rules of Patna were framed under Cl. 29 of the Letters Patent. Although the rules were not submitted to any Rule Committee they are quite legal. Ss. 122 and 123, C.P. Code do not include the High Court at Patna as it was not established when the C.P. Code of 1908 was enacted. 60 Ind. Cas. 285 = 5 Pat. L.J. 719 = 2 P.L.T. 112 = 1926 P.H.C.C. 97 = A.I.R. 1921 Pat. 13.

——Cl. 31—Administrative and disciplinary orders.

Right of appeal to Privy Council does not extend to administrative or disciplinary orders of High Court. It may always be necessary in performing administrative acts for the Court or the Judge or the person whose duty it is to carry out these acts to consider and come to a conclusion as to what his powers may be under a particular act of Council and the mere fact that such a consideration arises does not take the case out of the ordinary course. 70 Ind. Cas. 172 = A.I.R. 1922 Pat. 603 = 1 Pat. 590 = 4 P.L.T. 229.

——Cl. 31—Disciplinary action against pleader—Appeal to Privy Council—Leave.

There is no provision in the Legal Practitioners Act conferring a right of appeal to His Majesty in Council from an order passed by the High Court under S. 13 of that Act. Cls. 31 to 34 of the Letters Patent do not apply to orders passed in the exercise of administrative or disciplinary powers conferred on the Court by earlier clauses or statute. 4 P.L.J. 423 = 20 Cr.L.J. 679 = 52 Ind. Cas. 599.

——Cl. 31—Final judgment or order—Restitution order in summary proceeding is not final order.

A restitution order passed in a summary proceeding under S. 185, Companies Act, does not determine the rights of the parties finally and so is not a "final order or judgment" within the meaning of Cl. 31, Letters Patent (Patna). A.I.R. 1946 Pat. 141 = 24 Pat. 614 = 228 Ind. Cas. 205 = 12 B.R. 156.

——Cl. 31—Application under S. 66 (3), Income Tax Act, 1922, dismissed by High Court—Appeal to Privy Council does not lie. A.I.R. 1941 Pat. 225 = 22 P.L.T. 341 = 20 Pat. 561 = 7 B.R. 951 = 195 Ind. Cas. 589 (S.B.).

——Cl. 33—Construction.

The wording of Cl. 33, Letters Patent (Patna) is very precise and must be strictly construed. 15 P.L.T. 833 = A.I.R. 1935 Pat. 66 = 1 B.R. 469 = 36 Cr.L.J. 815 = 14 Pat. 318 = 155 Ind. Cas. 577.

——Cl. 33—Jurisdiction exercised by High Court in reference for confirmation of death sentence.

The jurisdiction excerised by the High Court in a reference for confirmation of death sentence is of an appellate character and can, in no sense, be said to be of an original nature.

Where, therefore, there is no right of appeal granted by the Letters Patent or under the Privy Council Act, those who desire to appeal must have recourse to the prerogative and approach His Majesty in Council direct for leave to present their case. In such cases, that is to say, where an appeal is presented for the exercise of the royal prerogative, either leave or a certificate from the tribunal which passed the appellate decision is not required as a preliminary step. They can proceed direct, without an intermediate application to the High Court, to His Majesty in Council and there obtain leave to present their case. 15 P.L.T. 833 = A.I.R. 1935 Pat. 66 = 1 B.R. 469 = 36 Cr.L.J. 815 = 14 Pat. 318 = 155 Ind. Cas. 577.

——Cl. 35—Vacation Judge—Jurisdiction to hear matters arising in Orissa.

Under Cl. 35, read with r. 5 in Chap. XXII of the Rules of the High Court, the Vacation Judge has no jurisdiction to hear at Patna matters arising in the Division of Orissa. 11 P.L.T. 862 = A.I.R. 1931 Pat. 61 = 130 Ind. Cas. 262.

——Cl. 35—Vacation Judge cannot hear revisional applications at Patna which should be heard in Orissa.

It is not open to a Vacation Judge, sitting at Patna, to hear a revisional application against the orders of the Subordinate Judge of Cuttack, granting time to the opposite party to move their Lordships of the Privy Council for review of a judgment as under Cl. 35, read with rule 5 in Chapter 22 of the Rules of the Patna High Court, he has no jurisdiction to hear such an application, which could be heard only in Orissa. 11 P.L.T. 862 = A.I.R. 1931 Pat. 26.

——Cl. 40—"Judgment"—Order directing trial of certain issue—Court hearing appeal after return of findings if entitled to disregard order of remand.

There is no appeal under the Letters Patent of the Patna High Court against an order of a single Judge directing the trial of a certain issue and a Judge before whom the case comes up for final hearing with the findings after remand can disregard the order of remand and dispose of the appeal on the original findings of the Appellate Court. (1917) Pat. H.C.C. 342 = 2 Pat. L.J. 663 = 2 P.L.W. 71 = 41 Ind. Cas. 337.

——Cl. 41—Cl. 41 is a clear and specific provision in the Letters Patent to the effect that an Ordinance passed by Governor-General in cases of emergency under S. 72, Government of India Act (Sch. IX) may curtail or limit the powers of the High Court under the Letters Patent. A.I.R. 1943 Pat. 24 = 23 P.L.T. 747 = 9 B.R. 146 = 44 Cr.L.J. 209 = 22 Pat. 160 = 204 Ind. Cas. 430 (F.B.).

——Cl. 45—Writ of *mandamus*—Patna High Court has no power to issue writ of *mandamus*.

Patna High Court does not possess any power either under S. 45 or Letters Patent to issue writ of *mandamus* similar to those possessed by the Calcutta High Court and the High Courts of Bombay and Madras. A.I.R. 1930 Pat. 538 = 11 P.L.T. 839 (F.B.).

——(Rangoon) 1922, Cl. 7—Advocates of Judicial Commissioner's Court.

Advocates of the late Judicial Commissioner's Court of Upper Burma should be enrolled in the Rangoon High Court according to their qualifications. The Legal Practitioners Act did not extend to Upper Burma and therefore, the Practitioners of the Judicial Commissioner's Court of Upper Burma do not come within the exception to Art. 30 of the Stamp Act, unless they are Vakils of an Indian High Court who have already paid that fee. 74 Ind. Cas. 13 = 1 Rang. 142 = A.I.R. 1924 Rang. 1 (F.B.).

——Cl. 8—Acts not in professional capacity.

When an officer committed what might have been adequately corrected by the ordinary punishment for an offence of that nature and the offence was not one which subjected the individual who committed it to anything like general infamy or any imputation of bad character so as to render his remaining in the Court as a practitioner improper : *Held*, it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally and which act *per se* did not render him improper to remain as a practitioner of the Court.

Although High Court has a very wide discretion in the exercise of its disciplinary powers, nevertheless, in a case where the acts charged were not committed in a professional capacity, and where they involve a criminal offence, it would not ordinarily be convenient for the High Court to exercise those powers until the charges have been investigated in a Criminal Court. 76 Ind. Cas. 827 = 2 Bur. L.J. 210 = 25 Cr.L.J. 267 = A.I.R. 1924 Rang. 113 (S.B.).

——Cl. 8—Appeal against suspension.

The provisions of the C.P. Code have no application whatever to orders made by virtue of Cl. 8 of Letters Patent and so where a High Court removes or suspends for reasonable cause advocates, pleaders or attorneys of the High Court, the High Court has no power to grant a certificate that the case is a fit one for appeal to His Majesty in Council. 8 Rang. 40 = A.I.R. 1930 Rang. 150 = 125 Ind. Cas. 260.

—Cl. 10—Jurisdiction.

M who had an office in Calcutta but whose head office was in Rangoon entered into an agreement to act as selling agent in Rangoon for *S* to sell dried prawns from Bengal on commission basis. *S* was merchant trading in Bengal and was to deliver prawns to *M* at his office in Calcutta. *M* at his Calcutta office was to make advances to *S* against the value of prawns so delivered. *M* by his Calcutta manager was to ship the prawns to Rangoon. *M* at Rangoon was to sell the prawns for *S* on commission and *M* was to pay *S* the proceeds of the sale of the prawns, less advances, commission and charges. *M* sued to recover a balance of advances made by him in Calcutta in excess of the value of prawns when sold, in Rangoon.

Held, that in the present case no payments by *S* to *M* were contemplated by the contract. *M* was to pay advances to *S* in Calcutta and was to pay *S* the balance of the sale proceeds also presumably in Calcutta. As the amounts were expressly made payable in the agreement they were certainly payable in Calcutta, the reasonable inference also would be that accounts were to be settled in Calcutta and if any amount should be found payable to *M* it should be payable to him in Calcutta just as amounts payable by him to *S* were payable in Calcutta. Calcutta Court had, therefore jurisdiction to try the suit. A.I.R. 1930 Rang. 216 = 127 Ind. Cas. 466.

——Cl. 10—Leave under Cl. 10.

As regards suits for land, the High Court can take cognizance, if the land is situate wholly within the local limits or, where the land is situate in part only within such limits, if leave has been first obtained ; and as regards suits, other than those for land, the High Court has jurisdiction, if the cause of action has arisen wholly within the limits or where the cause of action has arisen in part only within the limits, if leave of the Court should have been first obtained, or if the defendant dwells or carries on business or personally works for gain within those limits. It follows, therefore, that the High Court can pass a mortgage decree not only in respect of lands situated within its ordinary original civil jurisdiction but also in respect of lands situated outside its ordinary original civil jurisdiction when leave under Cl. 10, is obtained. A.I.R. 1938 Rang. 119 = 176 Ind. Cas. 811.

——Cl. 10—Leave, whether can be revoked.

Plaintiff applied for leave to file a suit under Cl. 10, Letters Patent (Rangoon) and R. 25, High Court, Rules (Original Side). No notice was required to be issued to defendants and none was issued. After a month, the defendants applied to set aside the leave :

Held, that R. 8 did not apply to *ex parte* orders of this nature and the Court had full power to revoke at any stage leave granted to a plaintiff to file a suit, should it be shown that the order granting leave ought not to have been passed. A.I.R. 1935 Rang. 367 = 13 R. 330 = 159 Ind. Cas. 142.

——Cl. 10—Suit for land—Mortgage suit.

A mortgage suit is a suit "for land" within the meaning of Cl. 10. A mortgage being a suit to realize an interest in immovable property, it cannot be placed in the same category as a suit in which the plaintiff merely seeks a money-decree. 12 R. 690 = A.I.R. 1934 Rang. 369 = 153 Ind. Cas. 375.

——Cl. 10—Suit for land—Suit for sale by mortgagee —Whether a 'suit for land'.

The term "suit for land or other immovable property" in Cl. 10 means : "suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property." It does not matter whether other issues are raised in the suit or whether some other issue raises the "main" or "substantial" question in the suit and the Court need not embark upon a consideration of the question whether "the primary or substantial object of a mortgage suit is the payment of the debt." 12 R. 370 = A.I.R. 1934 Rang. 250 = 151 Ind. Cas. 519 (F.B.).

——Cl. 10—Suit for land—Suit for money and for declaration that a property is mortgaged to plaintiff and for a decree in respect of it—Whether a suit for land.

The expression "suit for land or other immovable property," in Cl. 10, means suits in which, having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property.

Where the plaintiff prayed for a decree for a certain sum of money against defendants Nos. 1 to 5 and also for a declaration that a certain property was mortgaged to him and asked for a mortgage-decree in respect thereof, and defendant No. 9 challenged the right of defendants Nos. 1 to 5 to mortgage the property and claimed that the property belonged to him :

Held, that the suit directly involved the title to the land and was a suit 'for land' within the meaning of Cl. 10. A.I.R. 1934 Rang. 35 = 6 Rang. 344 = 149 Ind. Cas. 940.

——Cl. 10—Suit for trespass on immovable property— Dispute as to title—Jurisdiction of High Court—Tests.

By an agreement in writing between the plaintiff and the Secretary of State, the plaintiff purchased certain buildings and materials situated at *S* and undertook to remove them within a given period. Subsequently, the defendants became the owners by purchase

of the land at *S*. The plaintiff brought an action on the Original Side of the High Court claiming an injunction and damages for the wrongful and tortious act of the defendants in the fact that they had prevented him from carrying out his contract to remove the buildings and materials in his original agreement. The defence was that the buildings and materials in dispute or some of them were the property of the defendants and were not covered by the plaintiff's contract and he was not entitled to take them away :

Held, (1) that since the real dispute between the parties was with reference to the title to immovable property, the suit should have been instituted in the District Court which had jurisdiction over the property and not in the High Court. A.I.R. 1931 Rang. 109 = 134 Ind. Cas. 511.

——Cl. 11—Application for transfer.

It is desirable that the application for removal to the High Court of a suit under S. 11 should also be dealt with in the original jurisdiction of the Court. 76 Ind. Cas. 479 = 1 Rang. 226 = A.I.R. 1923 Rang. 185.

——Cl. 11—Transfer of Insolvency case in inferior Courts.

Original Side of the High Court is not competent to transfer insolvency proceedings from one Court to the other. The powers conferred by S. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the Original Side of the High Court a jurisdiction from which it is expressly excluded by the terms of the Act whether that section is read with S. 24, C.P. Code or Cl. (11) of the Letters Patent. 100 Ind. Cas. 265 = 4 Rang. 554 = A.I.R. 1927 Rang. 105.

——Cl. 12—The term "suits for land or other immovable property" in Cl. 12 of the Letters Patent means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property. 9 R. 13 = A.I.R. 1931 Rang. 109 = 134 Ind. Cas. 511.

——Cl. 12—Objection as to jurisdiction—Waiver.

Where in a suit, leave of the High Court, although necessary under Cl. 12, Letters Patent, is not obtained, the defendant must raise the objection as to the jurisdiction of the High Court at the first available opportunity. If he fails to do so, and at first submits to the High Court's jurisdiction, such submission constitutes waiver which cures the defect created by omission to apply for leave. 115 Ind. Cas, 898 = 6 Rang. 680 = A.I.R. 1929 Rang. 61.

——Cl. 13.

Synopsis.

(1) Appeal.
(2) Certificate.
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(11) Judgment—What is.
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(1) Appeal.

——Cl. 13—Appeal—New plea.

When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But the course ought not, in any case, to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea :

Held, that as the question whether the guardian had power to execute the security bond in question depended upon certain state of facts which the materials on record were insufficient to enable the Court to determine definitely one way or the other, the plaintiff could not be allowed to raise it and challenge his power for the first time in Letters Patent Appeal. A.I.R. 1938 Rang. 236 = 1938 Rang. L.R. 256 = 177 Ind. Cas. 573.

——Cl. 13—Appeal—Order deciding jurisdiction.

An order, passed by the Court on its Original Side, deciding that the Court has jurisdiction to entertain a suit, is appealable although appeal will not lie against a similar finding of a Court other than the High Court. 105 Ind. Cas. 472 = A.I.R. 1928 Rang. 20.

(2) Certificate.

——Cl. 13—Certificate—Effect.

When a "case" is certified to be fit for appeal to the Letters Patent, the word "case" includes an order for costs made or refused in that case which is obviously ancillary to the substantive order made in the case. A.I.R. 1941 Rang. 63 = 1940 Rang. L.R. 693 = 194 Ind. Cas. 306.

——Cl. 13—Certificate—Effect.

Certificate under Cl. 13 obtained upon representation that important point of law is involved—Appellate Court should not allow Counsel to abandon point of law and to reanvass matter on facts alone. A.I.R. 1938 Rang. 412 = 178 Ind. Cas. 772.

——Cl. 13—Certificate—Practice of Court in granting.

The practice of the Rangoon High Court is to grant certificates under Cl. 13, only in cases in which doubtful questions of law or procedure exist which deserve reconsideration, and this practice is sound in principle in view of the fact that questions of fact cannot constitute valid grounds even of a second appeal under the Code. A.I.R. 1939 Rang. 59 = 179 Ind. Cas. 946.

——Cl. 13—Certificate of fitness.

A certificate declaring that a case is a fit one for appeal can be granted only by the Judge who passed the judgment, because the intention of the Letters Patent is to confine the granting of a certificate to the Judge who actually heard the appeal and passed the judgment. 93 Ind. Cas. 124 = 3 Rang. 546 = 4 Bur. L.J. 185 = A.I.R. 1926 Rang. 1 (F.B.).

(3) Certiorari.

——Cl. 13—Certiorari.

A decision of a single Judge of the High Court or of any Division Court making absolute or discharging a rule *nisi* on a petition for the issue of a prerogative writ is a judgment within the meaning of Cl. 13. A.I.R. 1941 Rang. 199 = 195 Ind. Cas. 551.

——Cl. 13—Certiorari.

No appeal lies against an order making absolute a rule *nisi* for *certiorari* granted by a Judge on the

Original Side of the High Court, as such an order is not a judgment within the meaning of Cl. 13. 1941 Rang. L.R. 694 = A.I.R. 1941 Rang. 227 = 196 Ind. Cas. 470 (F.B.).

(4) Copy of judgment.

——Cl. 13—Copy of judgment.

Rule 5 of the Rangoon High Court Appellate Side Rules was intended to apply and does apply to appeals against judgments of the Original Side under Cl. 13 of the Letters Patent and therefore in the case of such appeals the memorandum of appeal must be accompanied by a certified copy of the judgment which is under appeal unless the Court dispenses with it. 98 Ind. Cas. 689 = 5 Bur. L.J. 75 = A.I.R. 1926 Rang. 143.

(5) Delay.

——Cl. 13—Delay.

A delay of 4 months was considered as not excusable. Where substantial justice was done to the parties, and the petitioners were attempting to take advantage of a technical defect to which they had once themselves agreed, declaration was refused. 79 Ind. Cas. 441 = 79 Ind. Cas. 744 = 2 Bur. L.J. 164 = A.I.R. 1924 Rang. 45.

(6) Finding of fact.

——Cl. 13—Finding of fact.

After two Courts have properly considered the evidence and come to a concurrent finding upon an issue of fact, it is not the function of the Court hearing a Letters Patent Appeal to try the issue upon the evidence over again. A.I.R. 1939 Rang. 59 = 179 Ind. Cas. 946.

(7) " Judgment "—Meaning.

——Cl. 13—" Judgment "—Meaning.

The word " judgment " in Cl. 13 means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. A.I.R. 1941 Rang. 69 = 1940 Rang. L.R. 702 = 194 Ind. Cas. 250.

——Cl. 13—" Judgment " meaning of.

The word " judgment " in Cl. 13 means a decree in suit by which the rights of the parties at issue in the suit are determined. A judgment may be a final judgment or it may be merely interlocutory. A final judgment is a decree in a suit by which all the matters at issue therein are decided ; and interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined. All other decisions are " orders " and not " judgments " under the Letters Patent, or appealable as such. The Original Side of a High Court is just as much the High Court as the Appellate Side, and rights of appeal are given, not by the Code, but by Cl. 13. 1937 Rang. L.R. 97 = A.I.R. 1937 Rang. 268 = 170 Ind. Cas. 822.

——Cl. 13—" Judgment " — Meaning —Tests as to whether an order is a " Judgment ".

Where, in a mortgage suit filed in the High Court with regard to immovable property situated outside the jurisdiction of the Court, on a preliminary objection as to absence of jurisdiction to try the suit, the Court held that it had and decided the suit on merits, and an appeal was preferred only against the preliminary order on the point of jurisdiction :

Held, that the order of the Court on the point of jurisdiction was not a judgment within the meaning of Cl. 13, as the order neither finally determined nor purported to determine the rights of the parties nor put an end to the suit, but merely determined that the Court had jurisdiction to try the suit.

Whether any particular order is a " judgment " within the meaning of Cl. 13, or not depends upon the effect of the order as made. 11 R. 19 = A.I.R. 1933 Rang. 15 = 142 Ind. Cas. 58.

(8) Judgment—Order on pauper petition.

——Cl. 13—Judgment—Order on pauper petition.

In the Letters Patent of the Rangoon High Court, the word " judgment " means and is a decree in a suit by which the rights of the parties at issue in the suit are determined.

The rejection of the petition for leave to sue as a pauper does not finally decide the matters in issue between the parties. On rejection of the petition, the plaint is not automatically rejected but the plaintiff can still file his plaint in the ordinary way, that is to say, with proper Court-fee attached ; all that he loses is the right to a certain procedure and this is not a final determination of the matters in issue between the parties. The right to sue as a pauper in certain circumstances is given not even in the Civil P.C. but in the Schedule attached to the Civil P.C., and a substantive right cannot be given in a Code which deals only with procedure. No appeal, therefore, lies from an order rejecting the petition to sue as a pauper. A.I.R. 1938 Rang. 58 = 1938 Rang. L.R. 68 = 174 Ind. Cas. 268.

——Cl. 13—Judgment—Order on pauper petition.

Order of Judge on Original Side of High Court refusing to allow person to sue as pauper is appealable as judgment—(Per *Heald, Ag. C. J.*)—But not where permission to sue as pauper is given. A.I.R. 1930 Rang. 259 = 126 Ind. Cas. 650.

——Cl. 13—Judgment—Order on pauper petition.

An order allowing a party to sue *in forma pauperis* is not a " judgment " within the meaning of Cl. 13. A.I.R. 1925 Mad. 167, *Dissented from* ; 26 Mad. 437 and 21 All. 133, *Appr.* 95 Ind. Cas. 523 = 4 Rang. 20 = 5 Bur. L.J. 6 = A.I.R. 1926 Rang. 110.

(9) Judgment—Order returning award.

——Cl. 13—" Judgment "—Order returning award.

Where the trial Court held that the arbitrators, by not giving notice to the parties before sending the award to the Court, acted with material irregularity and in breach of the statutory obligation imposed by S. 11 (2), Arbitration Act, and ordered the award to be sent back to the arbitrators to enable them to act according to law,

Held, that such an order was not a judgment within the meaning of Cl. 13 of the Letters Patent and no appeal lay on it. 45 Cal. 502 and A.I.R. 1925 Rang. 43, *Foll.* 114 Ind. Cas. 521 = 6 Rang. 25 = A.I.R. 1928 Rang. 110.

——Cl. 13—Judgment—Order remanding award.

Order of Court remanding the award for making a fresh award on the ground of arbitrator's misconduct, is a " judgment ". 76 Ind. Cas. 525 = 2 Bur. L.J. 193 = 1 Rang. 661 = A.I.R. 1924 Rang. 47.

(10) Judgment—Order directing trustee to fill up vacancy.

——Cl. 13—" Judgment "—Order directing continuing trustees to fill up vacancy—Order, if ' judgment ' within Cl. 13, or ' decree ' within S. 2, Civil P.C.

In a suit on the Original Side, a scheme was framed for appointing new trustees and settling a scheme of management. The new scheme provided for election of trustees and a clause set out the procedure to be followed when a vacancy occurred. Two vacancies occurred after the new trustees had been appointed and the respondent applied to the Court for an order directing the continuing trustees to call a meeting for the election of two new trustees in accordance with the

provisions of the scheme. This application was granted :

Held, that the order was not a judgment under Cl. 13 and no appeal lay from it. The order was an order directing the trustees to do what they were required by the scheme which was embodied in the final decree and was neither a judgment within Cl. 13 nor even a decree within the meaning of S. 2, Civil P.C. 1937 Rang. L.R. 97 = A.I.R. 1937 Rang. 268 = 170 Ind. Cas. 822.

(11) Judgment—What is.

——Cl. 13—Judgment — What is — Appointment of Receiver.

Where an appeal from an order is allowed by the C.P. Code, the Court will construe such an order as a judgment within the meaning of Cl. 13, and from an order appointing a Receiver under O. 40, R. 1, an appeal lies. 101 Ind. Cas. 791 = 5 Rang. 99 = A.I.R. 1927 Rang. 139.

——Cl. 13—Judgment—What is—Companies Act, 1913, S. 156—Order rejecting proxies and directing another meeting—Appealability.

Certain persons who had been appointed by the Court to assist the Chairman of a statutory meeting of creditors held under S. 153, Companies Act, filed a petition for directions as to the validity of certain proxies which had been used at the statutory meeting. An order was passed to the effect that the proxy forms should be rejected and that another meeting of the creditors must be held :

Held, (i) that the order was a judgment within Cl. 13, Letters Patent and appealable inasmuch as the effect of the order was finally to determine that the decision of the creditors who had voted as to the proposed scheme was not to be ascertained or recorded and that the poll taken at the meeting was inoperative ;

(ii) that the scrutineers appointed by Court as above-said had no right to decide themselves whether any proxy was good or bad, and had no *locus standi* to present a petition for the Court's directions as to the validity of the proxies. A.I.R. 1932 Rang. 96 = 10 R. 189 = 137 Ind. Cas. 444.

——Cl. 13—Judgment—What is—Order staying hearing.

An order under S. 10, Civil P.C. staying hearing of a suit is a judgment within the meaning of Cl. 13 of Letters Patent (Rang.) A.I.R. 1935 Rang. 73 = 12 R. 687 = 154 Ind. Cas. 774.

——Cl. 13—Judgment—What is—Order on application for review of order arising out of decree in second appeal, whether "judgment."

In a second appeal arising out of a suit for specific performance of a contract for sale of land, a single Judge of the High Court gave the plaintiff a decree and directed him to pay the money in Court within a certain date. Another Judge subsequently extended the time, but on an application for review of that order, he cancelled his own previous order and dismissed the suit on the ground that the plaintiff had not deposited the money in time :

Held, that the order dismissing the suit was a 'judgment' within the meaning of Cl. 13 and leave of the Judge was a condition precedent to the maintainability of an appeal therefrom. 9 R. 31 = A.I.R. 1931 Rang. 147 = 131 Ind. Cas. 729.

——Cl. 13—Judgment—What is—Refusal to add parties.

An order tantamount to refusing to join persons as parties finally adjudicates or concludes the matter so far as those persons are concerned and it is consequently a judgment within the meaning of Cl. 13 of the Letters Patent.

An order refusing to allow a person to be joined as defendant in a suit under S. 92, C.P. Code without the permission of Government Advocate is appealable. 103 Ind. Cas. 261 = 5 Rang. 263 = A.I.R. 1927 Rang. 180.

——Cl. 13—Judgment—What is—Refusal to amend plaint.

An order refusing leave to amend a plaint followed by dismissal of the suit is a "judgment" within Cl. 13 and is appealable. 101 Ind. Cas. 628 = 5 Rang. 115 = 6 Bur. L.J. 49 = A.I.R. 1927 Rang. 154.

——Cl. 13—Judgment—What is—Order in Insolvency.

Order of a Judge directing that the Official Receiver is entitled to a certain amount as commission as against heirs of the estate sold through the Receiver, is a judgment. 114 Ind. Cas. 673 = A.I.R. 1928 Rang. 301.

(12) Judgment—What is not.

——Cl. 13—Judgment—What is not—Order of transfer by High Court under S. 24, Civil P.C.

In the Letters Patent of the High Courts, the word 'judgment' means and is, a decree in a suit by which the rights of the parties at issue in the suit are determined. The term 'suit' in the Letters Patent includes suits instituted by a plaint or by an originating summons in the manner prescribed under the rules of the Court. A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined. All other decisions are orders, and are not 'judgments' under the Letters Patent, or appealable as such. Consequently, an order of the High Court under S. 24, Civil P.C. transferring a suit from a Subordinate Court to the High Court does not fall within Cl. 13. A.I.R. 1935 Rang. 267 = 13 R. 457 = 157 Ind. Cas. 1107 (S.B.).

[Overrules A.I.R. 1929 Rang. 41 = 114 Ind. Cas. 524 (F.B.)].

——Cl. 13—'Judgment'—What is not—Insolvency proceedings.

An order by Insolvency Court declining to adjudicate upon the claim that certain property in the hands of Official Assignee was in reality held by insolvent in trust and directing the claimant to enforce his claim by regular suit is not a judgment within Cl. 13 and is not, therefore, appealable. 111 Ind Cas. 836 = 6 Rang. 363 = A.I.R. 1928 Rang. 246.

——Cl. 13—Judgment—What is not—Conditional order granting leave to defend.

An order refusing absolutely an application for leave to defend is an order which finally disposes of the rights of the parties. But a conditional order granting leave to defend does not determine any of the rights of the parties and is not a judgment within the meaning of Cl. 13. It is only an order merely regulating the procedure in the suit and does not determine any right or liability as between the parties. 13 R. 239 = A.I.R. 1935 Rang. 245 = 157 Ind. Cas. 778.

——Cl. 13—Judgment—What is not—Conditional order directing setting aside of ex parte decree.

Where an order was passed directing the setting aside of an *ex parte* decree on condition that defendants would pay into Court within ten days a certain sum of money plus costs but before the expiry of the ten days, an appeal was filed against the order:

Held, that the order was not a judgment within Cl. 13, and that no appeal lay from it. A.I.R. 1934 Rang. 192 = 151 Ind. Cas. 402.

——Cl. 13—Judgment—What is not—Order dispensing with security for costs of suit continued by receiver in insolvency.

An order directing that the Receiver of an estate in insolvency should not be required to give security for the costs of a suit filed by the debtor before he became insolvent, and which the Receiver has elected to continue, under Or. 22, r. 8, Civil P.C., is an order relating to procedure, and it does not put an end to the suit, or in any way affect the merits of the suit, in whole or in part. Such an order is not, therefore, a "judgment" within Cl. 13 and is not appealable under the said clause. A.I.R. 1931 Rang. 286 = 9 R. 478 = 134 Ind. Cas. 750.

——Cl. 13—Judgment—What is not—Acceptance of security.

An order merely deciding as to the sufficiency of the security offered by the judgment-debtor where execution has been stayed by the appellate Court is not a judgment. 88 Ind. Cas. 740 = A.I.R. 1925 Rang. 225.

——Cl. 13—Judgment—What is not—Appointment of Commissioner in partnership suit.

A decision which affects the merits of the question between the parties by determining some right or liability may rightly be held to be a "judgment." An order which merely paves the way for the determination of the question between the parties cannot be considered to be a 'judgment' nor can a mere formal order regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication. Where in a suit for dissolution of partnership for accounts thereof being taken and for recovery of plaintiff's share therein a preliminary decree was passed by consent declaring partnership to be dissolved and ordering all proper accounts of the partnership being taken, and where a commissioner was appointed to take accounts and the commissioner applied to the Court for directions with reference to certain questions as regards the accounts and where the Court passed an order giving directions but not deciding on the merits of the suit or the rights and liabilities of the parties as regards the partnership, *held*, that the order was not a judgment within the meaning of Cl. 13. 84 Ind. Cas. 291 = 2 Rang. 469 = A.I.R. 1925 Rang. 43.

——Cl. 13—Judgment—What is not—Attachment before Judgment.

An order made under the provisions of O. 38, R. 5 is not a "judgment" within the meaning of Cl. 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit and therefore no appeal lies from that order. 90 Ind. Cas. 995 = 4 Bur. L.J. 108 = 3 Rang. 307 = A.I.R. 1925 Rang. 267.

——Cl. 13—Judgment—What is not—Decision on preliminary point.

The proper procedure, when a preliminary question of limitation is raised, is to hear that question and decide it as a preliminary point and if it is so decided, it cannot be said that the appellate Court which had not heard the appeal on its merits, either confirms or reverses the decree appealed from; and their decision cannot be a "judgment" within the meaning of Cl. 13. 77 Ind. Cas. 385 = 1 Rang. 584 = A.I.R. 1924 Rang. 148.

——Cl. 13—"Judgment"—What is not—Finding as to nature of document.

If the effect of an adjudication "is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding the adjudication is a judgment, otherwise not.

The finding that the parties intended to treat a document on which the suit was filed as an inland and not as a foreign instrument, which had the effect of allowing the suit to proceed, does not amount to a judgment within the meaning of Art. 13. 114 Ind. Cas. 524 = Rang. 703 = A.I.R. 1929 Rang. 41 (F.B.).

——Cl. 13—Judgment—What is not—Order that a person should be examined under S. 196, Companies Act.

An order directing that a person should be examined under S. 196, Companies Act, is not a judgment within Cl. 13, Letters Patent, and hence no appeal lies against the order. A.I.R. 1936 Rang. 166 = 14 R. 15 = 161 Ind. Cas. 749 (1).

——Cl. 13—Judgment—What is not—Rejection of claim.

Refusal of summary remedy given by O. 21, R. 58, C.P. Code, leaves open the right of bringing a regular suit and having the question in issue finally decided. It, consequently, cannot be a "judgment" within the meaning of Cl. 13, Letters Patent. 104 Ind. Cas. 330 = 5 Rang. 381 = 6 Bur. L.J. 162 = A.I.R. 1927 Rang. 287.

——Cl. 13—Judgment—What is not—Refusal to issue commission.

Refusal to issue a commission is a matter within the discretion of the Insolvency Judge and no appeal lies under Letters Patent (Rangoon) S. 13. 13 Mad. 143; 14 Mad. 88 and 28 Mad. 20, *dissented from*. 93 Ind. Cas. 211 = 4 Bur. L.J. 254 = 3 Rang. 605 = A.I.R. 1926 Rang. 64.

——Cl. 13—Judgment—What is not—Refusal to issue commission.

An order refusing to issue a commission, however serious the ultimate results to the party, is a purely interlocutory order and not a judgment terminating a suit or other proceedings or affecting the merits. 90 Ind. Cas. 967 = 4 Bur. L.J. 103 = 3 Rang. 293 = A.I.R. 1925 Rang. 290.

(13) Limitation.

——Cl. 13—Limitation.

The period of limitation for an appeal from a judgment of the Original Side under Cl. 13 of the Letters Patent is 20 days and from the date of the judgment, and in such appeals the memorandum of appeal must be accompanied by a certified copy of the judgment unless the Court dispenses with it, but need not be accompanied by a certified copy of the decree. 98 Ind. Cas. 417 = 4 Rang. 265 = 5 Bur. L.J. 187 = A.I.R. 1927 Rang. 20.

——Cl. 13—Limitation for Appeal.

The words "decree or order" as used in Art. 151 are wide enough to cover a "judgment" in the sense in which that word is used in Letters Patent, Cl. 13 and therefore the period of limitation for an appeal under Cl. 13 of the Letters Patent from a judgment of the High Court on its Original Side is 20 days from the date of the judgment. 98 Ind. Cas. 689 = 5 Bur. L.J. 75 = A.I.R. 1926 Rang. 143.

——Cl. 17—Interpretation—"Law"—Meaning.

The word "Law" as used in Cl. 17 of the Letters Patent, merely means the legal enactments of the Indian and Burmese Legislatures, the English Common Law and Equity, etc., which was applied by the late Chief Court of Lower Burma. It cannot of necessity be read as to include the published decisions of that Court, which decisions, until merged in an enactment, or used to modify or repeal any enactment, are not, strictly speaking, law. What the clause meant was that the institution of the High Court did not involve any change in the law to be administered by the Court on its Original Side, and that the enactments and the principles of law which would have been followed by the Chief Court should be followed by the High Court. 98 Ind. Cas. 526 = 4 Rang. 313 = A.I.R. 1927 Rang. 4 (F.B.).

——Cl. 17—Law—Applicable.

The Original Side of the Rangoon High Court will administer the Mahomedan Law in the matter of determining a gift by Mahomedan. 103 Ind. Cas. 189 = 5 Rang. 252 = A.I.R. 1927 Rang. 242.

——Cl. 28—Transfer of Criminal cases.

The High Court's power of revision are in express terms limited to those conferred by certain sections mentioned in S. 439, Cr. P. Code. S. 526 is not one of these. The Letters Patent does not confer any power of transfer over and above that conferred by S. 526 since Cl. 28 is qualified by Cl. 36. 77 Ind. Cas. 885 = 1 Rang. 632 = 2 Bur. L.J. 236 = 25 Cr.L.J. 485 = A.I.R. 1924 Rang. 100.

——Cl. 34—Difference of opinion between two Judges —Point, if can be referred to several Judges successively for separate decisions.

Per *Dunkley, J.*—Although under Cl. 34 the point on which the original Judges differed may be referred to more than one Judge for decision, the clause does not contemplate, that the point shall be referred to several Judges successively for their separate decisions, and there is nothing in Cl. 34 which permits of a case being first referred to a third Judge for his decision upon a particular point, and then when his decision still appears to leave the matter in doubt, it being referred to a fourth Judge. Moreover, it is plain from the provisions of Cl. 34 that the third Judge to whom the case is referred after the first two Judges have differed, has jurisdiction only to decide the point upon which those Judges have differed and he has no jurisdiction to deliver any opinion. The case should be placed before the original Bench for final decision. A.I.R. 1937 Rang. 324 = 170 Ind. Cas. 946.

——Cl. 34—Scope.

Cl. 34 of the Letters Patent does not in all cases override the provisions of S. 98 of the Code of Civil Procedure and where that section can properly apply it may be resorted to in spite of the provisions of Cl. 34 when it seems obviously right for the differing Judges to refer the point of law on which they differ. Cl. 34 of the Letters Patent applies only to those cases in which the appeals come before the Court by virtue of a right of appeal given by the Letters Patent. Where an appeal lies under the ordinary law of the land, the Letters Patent will not override the provisions of the Code, applicable to the appeal. 77 Ind. Cas. 385 = 1 Rang. 584 = A.I.R. 1924 Rang. 148.

——Cl. 35—High Court has power to regulate its procedure by Cl. 35, Letters Patent which necessarily includes the imposition and collection of fees. A.I.R. 1935 Rang. 460 = 13 R. 156 = 159 Ind. Cas. 1060.

——Cl. 35—Scope.

Cl. 35 of the Letters Patent as well as S. 122 of the C.P. Code and S. 108 of the Government of India Act (1915) merely give the High Court power to make rules and orders for the purpose of regulating proceedings in civil cases. 93 Ind. Cas. 124 = 3 Rang. 546 = 4 Bur. L.J. 185 = A.I.R. 1926 Rang. 1 (F.B.).

——Cl. 36—Transfer of Criminal Case.

The High Court's powers of revision are in express terms limited to those conferred by certain sections mentioned in S. 439. S. 526 is not one of these. The Letters Patent does not confer any power of transfer over and above that conferred by S. 526 since Cl. 28 is qualified by Cl. 36. 77 Ind. Cas. 885 = 1 Rang. 632 = 2 Bur. L.J. 236 = 25 Cr.L.J. 485 = A.I.R. 1924 Rang. 100.

——Cl. 37—"Final decree or order"—Decree of High Court under S. 91 (3) of Rangoon City Municipal Act is not appealable to Privy Council.

In the case of special and often technical enactments, if a person or a Court is specifically, designated to determine disputes arising out of the application of such enactments, the Court or person is not functioning in an ordinary, but in an extraordinary manner and parties to any litigation arising thereunder will not be permitted to appeal further than these specially appointed persons or tribunals.

A decree of the High Court under S. 91 (3) of the Rangoon City Municipal Act is not a final judgment, decree or order within the meaning of Art. 37 of the Letters Patent or S. 109 of the C.P. Code, and is not appealable to His Majesty in Council. 99 Ind. Cas. 994 = 4 Rang. 508 = 6 Bur. L.J. 1 = A.I.R. 1927 Rang. 88.

——Cl. 37—Order dismissing application to appeal in forma pauperis.

An order dismissing an application for granting of leave to appeal *in forma pauperis* is not a final judgment, decree or order of the High Court within Cl. 37 and hence no appeal lies to His Majesty in Council. 157 Ind. Cas. 39.

——Cl. 37—Order refusing leave to appeal in forma pauperis.

An order refusing to allow a party to appeal *in forma pauperis*, is not a final order within the meaning of Cl. 37 and certificate to appeal to the Privy Council from such an order cannot be granted. A.I.R. 1932 Rang. 192 = 10 R. 504 = 141 Ind. Cas. 277 (1).

——Cl. 37—Order remanding case for further consideration.

Though an order of remand, remanding a case for further consideration *prima facie*, does not purport finally to dispose of the rights of the parties, yet if the effect of the order is that the Court has finally determined the cardinal issue in the suit, and only subsidiary and subordinate issues remain to be decided, the remand order is a final order within Cl. 37 and appealable as such. 10 R. 499 = A.I.R. 1932 Rang. 189 = 141 Ind. Cas. 275.

——Cl. 39—Wrong admission of evidence—Course of trial not deflected—Whether ground for application under Cl. 39.

Leave to appeal is not granted except where some clear departure from the requirements of justice exists nor unless by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

The mere fact that some evidence has been wrongly admitted is not a ground on which an application under Cl. 39 can be granted when the course of the trial is in no way deflected. It is incumbent upon the applicant to make out, at any rate, a *prima facie* case that there has been a violation of the natural principles of justice, so demonstratively manifest as to convince the Court first, that the result arrived at was opposite to the result which they would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided.

In order to dispose of an application under Cl. 39, it is unnecessary to discuss in detail the facts disclosed by the evidence. It is sufficient that the Court should hold that there was ample evidence adduced at the trial to justify the finding of the jury that the applicant was guilty of the crime. A.I.R. 1935 Rang. 214 = 13 R. 141 = 36 Cr.L.J. 1232 = 157 Ind. Cas. 821.

——Cl. 39—Conviction in High Court Sessions.

Where the accused is convicted of murder and sentenced to death by the High Court Sessions, an application under Cl. 39 for a declaration that the case is a fit one for appeal to the Privy Council is competent. A.I.R. 1935 Rang. 214 = 13 R. 141 = 36 Cr.L.J. 1232 = 157 Ind. Cas. 821.

LIABILITY—For Torts.

See TORT.

——Of Agents.

See (1) CONTRACT ACT.
(2) PRINCIPAL AND AGENT.

——Of Guardian.

See GUARDIAN AND WARDS.

——Of Sons for Father's Property.

See HINDU LAW—DEBTS.

LIBEL AND SLANDER.

See (1) PENAL CODE. SS. 499, 500.
(2) TORT—DEFAMATION.

LIBERTY OF SUBJECT.

See CONSTUTIONAL LAW.

LICENSE.

See also EASEMENTS ACT, SS. 52-64.

——Occupation by co-sharer of plot in front of his house as sahan-darwaza**—Nature of.**

Where a co-sharer uses a plot in front of his house as his **sahan-darwaza** and his exclusive user is as co-sharer and not in any other capacity it cannot be said that he holds the land merely as a licensee. I.L.R. (1950) A. 507.

LIEN.

See (1) COMPANIES ACT, SCH. I, TABLE A, REGULATION 9.
(2) CONTRACT ACT, SS. 95-105, 168, 170, 171, 173 AND 221.
(3) LEGAL PRACTITIONER.
(4) T. P. ACT, SS. 55, 63, 65, 67-71 72-84, 86, 89, 91-92, 94, 95, 98-101.

LIFE ASSURANCE COMPANIES ACT (6 OF 1912). S. 2 (3)—"Court"

So far as the Punjab is concerned, "Court" in the Life Assurance Companies Act means the District Court only. 44 P.L.R. 1=A.I.R. 1942 Lah. 74=I.L.R. (1942) Lah. 800=199 Ind. Cas. 381.

——S. 2 (6)—"Policy of assurance upon human life", meaning of.

Where the policies issued by an insurance company provide for payment of a certain sum of money whether fixed or calculated in any other manner on the happening of the contingency stipulated for taking place during the lifetime of the member, and not providing for payment of anything to the legal representatives of the member in the event of his dying without the happening of such contingency, the contract between the members and the society. whether it be called a policy or a certificate of membership, is not an instrument on which the payment of money is assured on the happening of the contingency depending upon human life within the meaning of S. 2 (6). But were the policies provide for payment of some money, however small, to the legal representatives of a member, in the event of his dying without the happening of such contingency, they fall within the ambit of S. 2 (6). A.I.R. 1937 Sind 113=31 S.L.R. 416=169 Ind. Cas. 631.

——S. 2 (7)—Assignee, whether "policy-holder".

The words "for the time being" in S. 2 (7) clearly mean that a person must, at the date of the petition, be the legal holder of a policy. After a policy is assigned, the legal holder of the policy is the assignee and not original policy-holder. A.I.R. 1938 Bom. 182=40 Bom. L.R. 52=174 Ind. Cas. 593.

——Ss. 2 (7), (5), (6), 22—Where none of the members of the Provident Society applying for its winding-up under S. 22, Life Assurance Companies Act. read with the Companies Act are policy-holders under Cl. 7, S. 2 either read by itself or in the light of Cls. 5 and 6 of the Act, the Court has no jurisdiction to wind-up the Society under the Act. A.I.R. 1936 Sind 165=30 S. L.R. 92=164 Ind. Cas. 906.

——S. 6—Preferential creditor to fund.

The right of the policy-holders to rank as preferential creditors in respect of an assurance Fund must be founded on some act of the Legislature or recognized law of the land. Neither S. 6, Life Assurance Companies Act, nor any other Act gives such a right. A.I.R. 1938 Bom. 91=39 Bom. L. R. 1163 : 173 Ind. Cas. 727.

——S. 22—Application should be made to District Court.

The provisions of Life Assurance Companies Act as contained in S. 22 are kept intact and not affected by the provisions of the Companies Act. Consequently, the Court to which an application for winding-up an insurance company is to made, is the principal Civil Court of original jurisdiction in the District where the head office of the company is situate, **i.e.**, the District Court and such application must be made by the persons and subject to the qualifications mentioned in S. 22. A.I.R. 1942 Lah. 74=44 P.L.R.1=I.L.R. (1942) Lah. 800=199 Ind. Cas. 381.

——S. 22—Petition must be by ten policy-holders.

The right to wind-up a company is a statutory right and unless the petitioner can bring his case within the terms of S. 22, he is not entitled to maintain the petition.

The right given to policy-holders to present a petition is given to them because they are prospective or contingent creditors, and although in the case of a company which does not fall under the category of life assurance companies, the petition can be presented by a single prospective or contingent creditor, in the case of petition presented by policy-holders of a life assurance company, the petition must be by at least ten policy-holders. To hold otherwise would be to completely nullify the provisions of S. 22, because a policy holder is a contingent or prospective creditor, and if such a single policy-holder can present a petition, there is no sense in the Legislature enacting that a petition must be made by ten or more policy-holders. A.I.R. 1938 Bom. 182=40 Bom. L.R. 52=174 Ind. Cas. 593.

——Ss. 22, 2 (7)—Application by members for winding-up of Provident Society.

Where none of the members of the Provident Society applying for its winding-up under S. 22, Life Assurance Companies Act, read with the Companies Act., are policy-holders under Cl. 7, S. 2, either read by itself or in the light of Cls. 5 and 6 of the Act, the Court has no jurisdiction to wind-up the Society under the Act. To such a case, S. 22 has no application. A.I.R. 1936 Sind 165: 30 S.L R. 92: 164 Ind. Cas. 906.

——S. 34—It is wrong to contend that under S. 34, besides the company, only persons falling under any of the categories specified therein can be punished. A.I.R. 1940

Mad. 760: (1940) M.W.N. 384: 51 L.W. 534: 42 Cr. L. J. 39: 190 Ind. Cas. 896.

LIFE ESTATE.

See (1) HINDU LAW—WILLS.
(2) T.P. ACT, S. 14.

LIFE INSURANCE

See (1) INSURANCE.
(2) INSURANCE ACT, S. 45.
(3) LIFE ASSURANCE COMPANIES ACT.

LIFE INSURANCE COMPANIES ACT.

See (1) INSURANCE.
(2) INSURANCE ACT, 1938.

LIFE-INTEREST WITH REMAINDER OVER.

See T. P. ACT.

LIGHT AND AIR

See (1) EASEMENTS.
(2) EASEMENTS ACT.

LIGHT OBSTRUCTIONS.

See (1) EASEMENTS.
(2) EASEMENTS ACT.

LIMITATION.

Synopsis

1. Crown.
2. Determination of.
3. Exclusion of time.
4. Onus.
5. Plea.
6. Revision application.
7. Right of redemption.
8. Starting point.
9. Suspension.
10. Transposition of parties.
11. Miscellaneous.

1. Crown.

——Against Crown.

As regads limitation against the Crown, the legal presumption is that unless the Crown is specifically mentioned in a Statute, it is excluded from its operation. 86 Ind. Cas. 757 (Sind).

2. Determination of.

——Determination of—Basis for—Allegations in plaint and reliefs asked for and not on what reliefs should have been asked for.

The limitation applicable to a suit can only be ascertained on the allegations in the plaint and the reliefs prayed for, and not by speculating as to what relief the plaintiff should have prayed for. If the plaintiff prays for a relief to which he is not entitled, the Court may reject his claim, but the Court has no jurisdiction to find out what relief he should have claimed and then apply the provisions of the Limitation Act by reference to the relief which the plaintiff should have claimed but has not claimed A.I.R. 1950 Bom. 401=52 Bom.. L.R. 614.

——Determination of.

The questions of limitation cannot be decided inferentially. It is on the facts actually found and not merely upon those alleged in the plaint that limitation has to be computed. 118 Ind. Cas. 62=A.I.R. 1929 Nag. 124.

——When the law of limitation is to be applied the Court must look at the pleadings and not at the result of the suit. 98 Ind. Cas. 31=24 M.L.W. 475=1926 M.W.N. 767=A.I.R. 1926 Mad. 1190=51 M.L.J. 845.

3. Exclusion.

——Exclusion of time—Alternative remedies.

There is no provision of law according to which a plaintiff, who upon failling to obtain one remedy sues for an alternative one, is entitled to exclude the time taken up by the former proceedings. 100 Ind. Cas. 40=25 M.L.W. 11=A.I.R. 1927 Mad. 273.

——Period of notice under C.P. Code. S. 80.

In the case of a suit alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under S. 80 of the C.P. Code. 66 Ind. Cas. 287=34 C.L.J. 205=A.I.R. 1921 Cal. 661.

4. Onus.

——Onus.

It is wrong to place the onus on the defendants to prove that the suit was time barred; on the other hand it is the plaintiff that should be called upon to prove that the suit was within time. 1948 A.W.R. (Rev). 165=1948 R.D. 262.

5. Plea.

See also LIMITATION ACT, S. 3.

——Nature of plea.

A plea of limitation is not a mere technical plea. A party who can invoke the law of limitation in his favour is certainly justified in doing so and he ought not to be deprived of the advantages gained on the ground of the alleged technicality of the plea raised. 76 Ind. Cas. 119 =17 S.L.R. 263=A.I.R. 1924 Sind 47.

——Not a technical plea.

Where the right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not quite accurate to say that a plea, that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical is meant a plea which asserts rights which have no merits for their support. 57 Ind. Cas. 606=48 Cal. 110 =25 C.W.N. 289=13 M.L.W. 49=47 I.A. 255=18 A.L.J. 1095=22 Bom. L.R. 1370=3 P.W.R. 1921=28 M.L.T. 149=2 U.P.L.R. 124=A.I.R. 1921 P.C. 50=39 M.L.J. 195 (P.C.).

——Raising of plea—In second appeal.

Where the facts necessary to support a plea of limitation are either admitted or are apparent on the face of the record, Court will not be justified in refusing to entertain in the plea, even if raised for the first time in a second appeal. 114 Ind. Cas. 734=1929 A.L.J. 229=A.I.R. 1928 All. 689.

——General rule.

The general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact. Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on the evidence.

If limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed. 66 Ind. Cas. 287=34 C.L.J. 205=A. I. R. 1921 Cal. 661.

——It is necessary that limitation should be pleaded in all cases. But particularly this is so where the bar is alleged under some special law. 66 Ind. Cas. 287=34 C.L.J. 205=A. I. R. 1921 Cal. 661.

6. Revision application.

——Revision application.

Revision applications are not admitted beyond the time allowed for appeals except for special reasons. 7 O.W.N. 894=128 Ind. Cas. 739=A.I.R. 1930 Oudh. 496.

7. Right of redemption.

——Right of redemption.

The right to redeem can be exercised at any time before an order absolute for sale had been passed, and therefore the deposit is valid even though made long after the expiry of three years from the date of the decree. There is no period of limitation prescribed for such an application. 66 Ind. Cas. 944=9 O.L.J. 14=A.I.R. 1922 Oudh 33.

8. Starting point.

——Vendor's failure to keep up the express and implied covenants of title and quite enjoyment—Suit for damages by vendee—Limitation runs only from the date of actual physical disposition.

The right of a vendee to sue his vendor for damage on the ground that the vendor failed to keep up the express and implied covenants of title and quite enjoyment, arises only when there is actual physical dispossession of the vendee. The right would not be affected by limitation as long as the vendee remained in possession of the property and time will begin to run against him only from the date of actual dispossession, even though his right to remain in possession might have been lost by a decree against him. 62 L.W. 249=1949 M.W.N. 298=A.I.R. 1949 Mad. 652=(1949) M.L.J. 456.

——Suit for contribution—Execution of a pro-note.

Where a decree is passed against two judgment debtors, and one of them satisfies the decree by executing a pro-note in favour of the decree-holder that does not give him a right to contribute as against the other judgment-debtor. The limitation for a suit for contribution will run only from the date of satisfaction of the pro-note. 26 Mad. 322 and 14 M.L.J. 285, Foll. 99 Ind. Cas. 438=38 M.L.T. 106=A.I.R. 1927 Mad.1137.

——Starting point

Per **Mukerji J.**—The starting point of limitation does not always synchronise with the cause of action in many cases it does, but in others it dates from some specified events which again is either anterior or posterior to the accrual of the cause of action. The period prescribed by the Act are more or less arbitrary, and the fixing of the periods is founded on consideration of public policy. 89 Ind. Cas. 1000=29 C. W. N. 973=43 C.L.J. 155=A.I.R. 1926 Cal. 65.

——Starting point.

No limitation begins to run against an appellant until a decree is drawn up and signed. 89 Ind. Cas. 937 =A.I.R. 1926 Nag. 207.

——Omission of names in the decree—Amendment date.

Where a decree as passed omitted the same of appealing defendants but they did file an appeal and the appellate Court having made an enquiry, the trial Court added their names in the decree.

Held, that the right of the defendants to appeal from those decrees—if they had any right to appeal—arose when the decrees were amended by the addition of their names. 85 Ind. Cas. 627=A. I. R. 1925 All. 567.

——Where within six years of the denial of the plaintiff's title there is an adjudication by a Civil Court deciding against the defendant; a subsequent denial of the plaintiff's title is a fresh denial and not necessarily in continuation of the preceding one. Time must be calculated only from the later denial. 87 Ind. Cas. 647 =47 All. 416=23 A.L.J. 291=6 L.R.A. (Civ.) 237= A.I.R. 1925 All. 421.

——Plaintiff's share in mortgaged property wrongly entered in revenue papers, to plaintiff's knowledge—Limitation for declaratory suit to rectify error runs from entry—Assertion of plaintiff's title to larger share, by plaintiff's pleader in redemption suit by plaintiffs and defendants, does not necessarily imply a fresh denial of plaintiff's title by defendants giving rise to fresh cause of action. 86 Ind. Cas. 117=7 L.L.J. 35= A.I.R. 1925 Lah. 417.

——Instalment Bond—Option to sue for whole in case of default—Limitation runs from date of first default.

The bond amount was payable within six months and was to bear a certain rate of interest. This interest was to be paid month by month, and in the event of failure to pay in any month, compound interest was to accrue on the unpaid interest and the plaintiff was to have a right to file a suit at once, without waiting for the stipulated period of six months. Interest was never paid.

Held, that a suit not brought within three years of the date of the first default of payment of interest was barred by limitation notwithstanding that the plaintiff was entitled at his option not to sue on default in payment of interest but to wait till the expiry of the period of the bond. It is not open to the parties to an agreement to contract themselves out of the Law of Limitation by inserting in their agreement to alternative starting points for limitation A.I.R. 1923 All. 1 (F.B.), Foll. 85 Ind. Cas. 280=27 O.C. 318=A. I. R. 1925 Oudh 502.

——Rule in Madras.

In Madras Presidency where there is an option open to a person to call up the whole debt on default, or not as he chooses, if he does not exercise that option, it will not be held against him that his cause of action had arisen on the default itself. 84 Ind. Cas. 118=20 M.L.W. 430=1924 M.W.N. 828=A.I.R. 1925 Mad. 233.

——Instalment bond.

A suit on an instalment bond which enables the creditor to claim the entire amount on default of any one of the instalments is not time-barred in respect of the instalment, which fell due within the period of limitation, although the suit is filed after the expiry of the period of limitation from the date on which the

earliest instalment in respect of which default was made fell due. 90 Ind. Cas. 249=4 Pat. 829=1925 P.H.C.C. 215=A.I.R. 1925 Pat. 557.

——Per **Crump, J.**—It is only where it is necessary to consider the act plus the consequences as the cause of action, that the time runs from the consequences are injurious. S. 84 Ind. Cas. 736=25 Bom. L.R. 1333=A.I.R. 1924 Bom. 290.

——The true testto determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. 79 Ind. Cas. 520=39 C.L.J. 40=A.I.R. 1924 Cal. 600.

——For a suit under Art. 120 the starting point of limitation is the date of the first decree and not the date of the appellate decree confirming the same. 46 Cal. 670, Foll. 70 Ind. Cas. 45=16 M.L.W. 285=1922 M.W.N. 561=3 M.L.T. 169=A.I.R. 1923 Mad. 23.

——An entry in the Record-of-Rights-of-merely raises a presumption of correctness. and is not a starting point for the computation of the period of limitation. 63 Ind. Cas. 954=25 C.W.N. 1022=35 C. L. J. 19=A. I. R. 1922 Cal. 251.

——The limitation for an application for the determination of mesne profits is to be computed from the date of the final decree by which ihe award of mesne profits was confirmed. 36 All. 350 and 39 All. 641 Foll. 68 Ind. Cas. 896=25 O.C. 132=10 O.L J. 56=A.I.R. 1922 Oudh 197.

—Where a borrower executes first a mortgage bond and later on a charge deed and the deed contains a condition to repay the debt at any time before the redemption of the previous mortgage, the date of payment is fixed by the deed, and the limitation does not begin from the date of exceution of the bond. 65 Ind. Cas. 408=8 O.L.J. 660=A.I.R. 1922 Oudh 102.

——Fresh Cause of action—Starting point.

Where a debtor annulled the satisfaction of his debt on the ground of coercion and obtained a decree, the creditor gets a fresh cause of action and time begins to run from the date of the annulment. 9 Cal. 255 (P.C.); 12 M.I.A. 244, Foll. 59 Ind. Cas. 472=43 Mad. 845=12 L.W. 240=1920 M.W.N. 505=39 M.L.J. 312.

9. Suspension.

——Suspension.

It is not necessary nor would it be good law to invoke theory of suspension of limitation in any case in which suspension is not expressly provided for either in the Limitation Act or in some special statute. 10 P.L.T. 879=A.I.R. 1929 Pat. 694 (F.B.).

——Time—When extended.

The period of limitation is extended where there has been a suspension of the cause of action or where the cause of action accrued not on the date indicated in column 3 of the Schedule to the Limitation Act, but at a subsequent date, for no fault of the plaintiff. An original decree is not suspended by presentation of an appeal. nor is its operation interrupted where the decree on appeal is one of dismissal. 46 Cal. 670 (P.C.), Foll.

Time runs from the date on which the rights of the the party suing are finally settled, giving birth to his cause of action, and once its starts running it cannot be stopped by any act which does not being about any change in those rights. 85 Ind. Cas. 1007=A.I.R. 1925 Cal. 1216.

——Time granted at debtor's request.

A verbal promise on the part of the client to pay the attorney the latter's costs which have become overdue, when money is recovered in certain execution cases—a promise on the strength of which the attorney has not taken steps to enforce payment—is an answer to any objection based on limitation made by the client against an application by the attorney for an order for payment. 66 Ind. Cas. 209=48 Cal. 817=25 C.W.N. 800=A.I.R. 1921 Cal. 67.

10. Transposition of parties.

——Transposition of parties.

Where a paaty is transposed—No question of limitation arises. 99 Ind. Cas. 687=24 M.L.W. 826=A.I.R. 1927 Mad. 204=52 M.L.J. 33.

11. Miscellaneous.

——Remedy barred—Revivor by adding another less effective.

It would be **reductio ad absurdem** to hold that where a party has allowed a valuable right to be extinguished by the lapse of time he should be allowed to revive his right by claiming in his suit another relief which is still within time but is for other reasons ineffective. 129 Ind. Cas. 201=A.I.R. 1930 Lah. 993.

——Compromise.

No compromise or agreement can prevent the law of limitation from taking effect. 92 Ind. Cas. 732=13 O.L.J. 138=A.I.R. 1926 Oudh 311.

——Failure to bring suit for declaration of a bare chance—No prejudice can result.

It is not necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not do so.

A Hindu widow claimed certain properties as the heir of her predeceased natural born son. She willed away the income of the property before her death. Her title was disputed by another lady who claimed to be the adoptive mother of the deceased son. The validity of the adoption was challenged by the natural mother and the matter was before the Courts. The estate was being managed by the Court of Wards, and later, by Court Receivers.

Held, that under the circumstances of the case, the beneficiaries under the will were not bound to sue the testatrix's heir her death, for the payment of the legacies if and when he might be in possession of assets out of which the legacies might have been payable. 87 Ind. Cas. 324=52 I.A. 214=1925 M.W.N. 441=3 Pat. L.R. 208=29 C.W.N. 989=23 A.L.J. 261=6 L R. (P.C.) 82 =48 Mad. 312=27 Bom. L.R. 823=A. I. R. 1925 P.C. 105=48 M.L.J. 627 (P.C.).

——Assumption of title.

——The plea of limitation assumes that the title is in the plaintiff. 83 Ind. Cas. 205=3 Pat. 85=A.I.R. 1924 Pat. 402.

LIMITATION (OF SUITS) ACT (14 OF 1852)—(Repealed by Act 9 of 1871)

——S. 1, R. 12—Suit by reversioner—Time as to 'when the cause of action arises.'

Under Limitation Act of 1859, the limitation for a suit by a reversioner who succeeded to the property was 12 years from the time when the cause of action arises. 'In the case of a suit for possession by a reversionary heir after the death of the widow, who takes by inheritance from her husband and is dispossessed, the

period of limitation as against the reversioner, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had lived and brought the suit.' A. I. R. 1942 P.C. 54=(1942) A.L.J. 392=8 B.R. 874=(1942) 2 M. L. J. 249=46 C. W. N. 1008=23 P. L. T. 717=1942 O. W. N. 806=I. L. R. (1942) Kar. (P.C.) 111 (Sup.)= I.L.R. (1948) Mad. 1=69 I. A. 110=202 Ind. Cas. 1 (P.C.).

——S. 1, Cl. 12—Scope of—Widows barred—Reversioners barred.

Under Act (14 of 1859) if the widow is barred, the reversioners would also be bared and their rights are not revived by the Act of 1871. 22 M. L. T. 233= (1917) M. W. N. 679=6 L.W. 530=34 M.L.J. 319=42 Ind. Cas. 540.

——S. 1 (12) and (15)—Adverse possession—Possession of mortgagee under Bengal Regulation (15 of 1793) after mortgage money has been paid —Nature of.

The possession of a mortgagee under the Bengal Regulation (15 of 1793) does not become adverse simply because he remains in possession after the mortgage money has been paid out of the usufruct and the suit for redemption of a mortgage effected before the passing of the Limitation Act of 1859 is governed by 60 years rule. 33 A. 97, Foll. 34 All. 261=9 A.L.J. 131=13 Ind. Cas. 963.

——S. 1 (15)—Acknowledgment by manager or agent.

Per **Dar, J.**—The acknowledgment of a manager of a joint Hindu family or an agent was not a good acknowledgment under the Lim. Act of 1859 and was wholly ineffective to save time. A. I. R. 1943 All. 393 (1943) A.L.J. 548=1943 A. W. R. (H. C.) 291=I. L. R. (1944) All. 76=212 Ind. Cas. 238 (F.B.).

——S. 1 (15)—Words "in the mean time"—Meaning of.

Per **Full Bench.**—The words "in the mean time" in S. 1 (15), Limitation Act (14 of 1859), mean within 60 years from the date of the mortgage. An acknowledgment to be valid under Cl. (15) of S. 1, Lim. Act, has to be made within sixty years of the date of the mortgage and an acknowledgment made more than sixty years after the date of the mortgage, though made at a time when there was no period of limitation prescribed for redemption suits or when the mortgage was subsisting on account of period of grace granted by S. 18 of Act 14 of 1859, is not a valid acknowledgment within the meaning of Cl. (15) and cannot save time for redemption suits beyond the period of grace given by S. 18 of Act 14 of 1859.

The entries in the **khewat** of 1852 were merely to the effect that Lachman and others were in possession as mortgagees and that the mortgage-money was Rs. 274—4—0 in one case and Rs. 383 in the other. The entries were attested by the mortgagees or their representatives. It was contended that the entries amounted to acknowledgment that the mortgage was subsisting and the acknowledgment having been made at a time when there was no period of limitation prescribed for a suit for redemption, the acknowledgment was sufficient to extend the period of limitation even if made more than 60 years of the date of the mortgage:

Held, (1) (Per **Full Bench**).—That as the date of the mortgage was not established, the mortgagor had failed to show that the acknowledgement was made within 60 years of the mortgage and hence the acknowledgment was wholly ineffective to save limitation.

(2) (Per **Collister, Bajpai, Hamilton and Dar, JJ**).—That the entries could not be construed as acknowledgment by the mortgagees of the title of the mortgagor or that the mortgages were subsisting in law. 1943 A.W.R. 291=A.I.R. 1943 All. 393=(1943) A.L.J. 548=I.L.R. (1944) All. 76=212 Ind. Cas. 238 (F.B.).

[**Overrules:** (1) 1 A. 425; (2) 1894 A.W.N. 87; (3) 1 A. 117 (F.B.); (4) 5 Ind. Cas. 77 and (5) A.I.R. 1929 All. 209=115 Ind. Cas. 451.[

——S 1. Cl. 15 and 18—Mortgage—Redemption—Act IX of 1908, S. 29 and Art. 148—Acknowledgment of title after expiry of period prescribed for redemption—Effect of.

Plaintiff sued to redeem a mortgage of 1798. Under Cl. 15 of S. 1 of the Limitation Act of 1859 the mortgagor has sixty years to redeem unless there was an acknowledgment of the mortgagor's title in the meantime. The sixty years expired in 1858. There was an acknowledgment in 1861, **i.e.**, within two years of grace allowed by S. 18 of the Act to bring a suit.

Held, that the suit brought in 1911 was barred by limitation. The words "in the meantime" occurring in S. 1, Cl. 15 of the Act of 1859 refer to the sixty years mentioned in the first part of the clause and the right of the mortgagors to sue, having become barred in 1858, their right to the property was extinguished by S. 29 of the Act of 1871. The subsequent acknowledgment was ineffective to save limitation. 27 C. 1004 (P. C.); 5 M. 182, Foll. 33 M.L.J. 753=(1917) M.W.N. 864=22 M.L.T. 419=43 Ind. Cas. 50.

——S. 1 (15)—Anandravan—If person claiming under Karnavan—Limitation Act (9 of 1871), Sch. II, Art. 148.

An **Anandravan** cannot be said to be a person claiming under a **Karnavan** within the meaning of S. 1 (15) of Act 14 of 1859 or Art. 148 of Act 9 of 1871 and has no right to make an acknowledgment and save limitation and such an acknowledgment cannot be effective even if construed as one by a co-mortgagee. 17 B. 173; 19 M.L.J. 288; 1 Ind. Cas. 204, Foll. 26 Ind. Cas. 127 (Mad.).

——Ss. 1 (15), 8—Mortgage—Suit for redemption—Limitation.

The plaintiff instituted, on the 7th of June, 1899, a suit for redemption of an alleged usufructuary mortgage executed on the 14th of August, 1781, for a term of 70 years. **Held,** that the suit was barred by limitation under S. 1 (15) and S. 8 of Act No. XIV of 1859, as the limitation provided for by the Act was only 60 years from the date of the mortgage and not from the date of the cause of action as in the Act of 1877. 1906 A. W. N. 23=3 A. L. J. 113=28 A. 333.

——S. 17—Public property.

Property which by confiscation has become the property of the State and which the State is claiming as its own is public property. The rule of limitation in Oudh for suit for public property at the time Act XIV of 1859 was applied must have been the sixty year's rule prescribed by the Circular No. 104 of 1860 or else there was no rule of limitation at all. 61 Ind. Cas. 871=24 O.C. 77=8 O.L.J. 160=A.I.R. 1921 Oudh 88.

——S. 18—Suit before 1862.

By S. 18 of the Act of 1859 coupled with Act 11 of 1861, suits instituted before January 1862 were to be determined as if the Act had not been passed. 118 Ind. Cas. 566=458 C.L.J. 489=A.I.R. 1922 Cal. 149.

——S. 28—Adverse possession.

Regulation III of 1973 read with Regulation II of 1805, and Act XIV of 1859 have been always understood as meaning that adverse possession for the prescribed period not merely bars the remedy but gives title. (1854) 1 Boul. Rep. 70; 11 M.I.A. 345 (P.C.); (1869) 12 W.R. 12; 20 W.R. 104; 1 M.I.A. 446 (P.C.) and 3 Cal. 224, Foll. 118 Ind. Cas. 566=48 C.L.J. 489=A.I.R. 1929 Cal. 149.

LIMITATION ACT (11 of 1871) (REPEALED BY 15 of 1877)—Art. 129—Possession by setting aside adoption—Twelve years from the date of adoption of the adoptive father.

Article 129 of the Second Schedule of Act 9 of 1871 relates to all suits in which the plaintiff cannot succeed without displacing an apparent adoption by virtue of which the defendant is in possession. That article prescribed twelve years as the period of time within which a suit "to establish or set aside an adoption" might be brought, and that such period of twelve years should begin to run from the date of the adoption, or (at the option of the plaintiff) from date of the adoptive father's death. Act 9 of 1871 did not give to a reversioner, whose right to sue for possession accrued upon the death of Hindu widow any further time than the twelve years given by Art. 129 to any plaintiff. 92 Ind. Cas. 85=28 Bom. L.R. 173=30 C.W.N. 313=6 L.R. (P.C.) 169=52 I.A. 322=42 C.L.J. 563=48 Mad. 883=1926 M.W.N. 11=A.I.R. 1925 P.C. 249=49 M.L.J. 769 (P.C.).

——Art. 129—Adopted son not entitled to present possession—Title recognised within 12 years by adversaries—No suit need be brought.

In 1856, estate of a deceased Raja was confiscated by the Government. Afterwards it was relinquished by the Government in favour of the Raja's heirs in 1862. By the order of re-grant, the estate was to be enjoyed by the Raja's widows during their life-time, and after them, the Raja's daughter or failing her, the Raja's next heirs were to inherit the property. In 1863, the senior widow adopted a son to her deceased husband. In 1866, the validity of the adoption was questioned in a suit filed by the other widows. But the decree in the suit expressly refused to adjudicate on the validity of the adoption. The factum of adoption was not disputed by any body but only its validity. After the decree was passed in the suit the other widows recognised (within the period of 12 years from the adoption) the adopted soon as their son. The decree only decided that the adopted son had no present right to possession and entrusted the property to a receiver who was to be in possession during the life-time of the widows or during such period as the Court thought fit. The daughter of the Raja predeceased the last surviving widow. After the death of the last surviving widow, in 1912, the Receiver filed an inter-pleader suit. The sons of the adopted son were among the contesting defendants. It was contended that their right had become barred under the Limitation Act of 1871, Art. 129 as the adopted son had not sued to establish the adoption within 12 years from the date on which it had taken place.

Held, that the adopted son's right had not become barred, for the following reasons:—(1) Whithin twelve years from his adoption the same was recognished by those who had contested it. (2) The decree in the suit of 1866 refused to adjudicate upon the validity of the adoption and a suit by the adopted son in face of this decree would not have lain. (3) A suit filed by him for a declaration that under the terms of the grant he was entitled to succeed to the properties as adopted son on the death of all the widows and on the contingency of the daughter of the Raja predeceasing them would be dismissed on the ground that no Court would grant a declaration of a bare possibility which may or may not ripen. (4) The rival claimants in the inter-pleader suit being in the posttion of plaintiffs would themselves be debarred from challenging the adoption if the adopted son was debarred from supporting the adoption, as the former had not sued within the period fixed by the Act of 1871, to set aside the adoption.

Per **Spencer, Offg. C.J.**—The adopted son might have sued for a bare declaration but was not bound to do so. 93 Ind. Cas. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

LIMITATION ACT (15 OF 1877)—(REPEALED BY (9 OF 1908), S. 2—Right extinguised by law.

A right wich had become extinguished by the operation of law was not revived by Limitation Acts of 1877 and 1908. 107 Ind. Cas. 60=29 Bom. L.R. 1563=A.I.R. 1928 Bom. 28.

——S. 2—Title, acquisition of—Adoption not questioned for more than twelve years.

Giving full effect to the Jagathamba case (13 I.A. 84) and the other cases that follwed it. **Held,** that the immunity, such as is gained by the lapse of twelve years after the date of an apparent adoption does not amount to acquisition of title within the meaning of S. 2 of Act 15 of 1877. 8 Bom. L.R. 722=16 M.L.J. 440=28 A. 727=10 C.W.N. 1065=4 C.L.J. 405=3 A.C.J. 695=33 I.A. 156 (P.C.).

——S. 2, Cl. 8. (O.A.), S. 3, Art. 118)—Interpretation clause—(Plaintiff'—Effect of bar on immediate reversioner.

A, a widow, adopted **B**. Her daughter knew of his setting up title as adopted son. More than six years after their knowledge and within six years of his birth the son of one daughter sued to set aside the adoption. **Held,** that he was barred. The daughters, as immediate reversioners, represented the inheritance, and plaintiff, as a remote reversioner, was one claiming through or from them within the meaning of S. 3 of the Limitation Act. (1901) 24 M. 405. But **See** 16 M.L.J. 347.

——S. 19,—Redemption—Co-heir—Acknowledgment—Effect of.

Per **Full Bench**—An acknowledgment made by one of the heir of the mortgagee who have divided the mortgaged property among themselves without the consent of the mortgagor, is binding on him or his him so far as regards the property in his possession is concerned, though it may not be binding on the co-heirs of the mortgagee. The mortgagor can therefore claim to redeem that portion of the mortgaged property which is in the possession of the person making the acknowledgment on paying the whole amount of the mortgage money within the period of limitation from the date of the acknowledgment. 54 Bom. 625=32 Bom. L.R. 1096=128 Ind. Cas. 417=A.I.R. 1930 Bom. 466 (F.B.).

——S. 26—Applicability.

No specific mention of Crown—It is not applicable to Crown, 1 Bom. 7; 14 Bom. 23; 25 Mad. 457, Foll. 86 Ind. Cas. 757=21 S.L.R. 195=A.I.R. 1927 Sind 270.

——Art. 66—Personal covenant in mortgage.

When a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgaged properties, the claim is governed by Art. 66, and not Art. 132. 7 All. 509 (P.C), Foll. 95 Ind. Cas. 839=5 Pat. 585=53 I.A. 134=24 A.L.J. 615=28 Bom. L.R. 931=43 C.L.J. 545=24 M.L.W. 50=1926 M.W.N. 535=3 O.W.N. 591=7 P.L.T. 501=31 C.W.N. 25=A.I.R. 1926 P.C. 56=51 M.L.J. 82 (P.C.).

——Art. 118—Applicabliity.

The Act of 1877 applies only to declaratory suits in respect of adoptions and not to suits for possession of immovable property. 93 I.C. 705=48 Mad. 1=A.I.R. 1925 Mad. 497.

——Art. 179—Execution of mortgage-decree.

Under Art. 179, the period of three years runs from the date of the decree appealed against and not, from the date of the order to dismiss the appeal for want of prosecution. In a case a decree **nisi** for sale is made in a mortgage suit, the period of limitatation is three years from the date of the decree. It cannot be extended by six months, the period given by the decree for redemption. The decree is operative from its date and it is the length of time during which it is operative that the Limitation Act looks to. 74 Ind. Cas. 660=30 M.L.T. 95=1922 M.W.N. 338=24 Bom. L.R. 659=26 C.W.N. 858=49 Cal. 203=48 I.A. 335=A.I.R. 1922 P.C. 187 (P.C).

LIMITATION ACT (9 OF 1908)

See also LIMITANION.

Synopsis.

1. **Act is exhaustive Code.**
2. **Appeal.**
3. **Applicability.**
4. **Construction.**
5. **Effects on rights.**
6. **Laches.**
7. **Object of.**
8. **Miscellaneous.**

1. Act is exhaustive Code.

——Act is exhaustive Code.

The Limitation Act is an exhaustive Code in itself and effect must be given to its provisions unhampered by questions of expediency and the like. A.I.R. 1938 Nag. 534=1938 N.L.J. 336=I.L.R. (1940) Nag. 334=180 Ind. Cas. 903.

——Act is a complete Code—Provision saving bar of limitation must be contained or necessarily implied from the Act.

The Limitation Act, being the enactment of the Legislature which has dealt with all matters connected with the limitation of actions, applications, appeals and so on, is really in the nature of the Code. The essence of a Code is its completeness and therefore, on a proper interpretation and construction of the statute, no Court would be entitled to invoke any principle for the purpose of holding the claim as not barred by the law of limitation which is not contained or necessarily implied in any of the sections or articles of the Limitation Act. 111 Ind. Cas. 210=51 Mad. 549=29 M.L.W. 460=A.I.R. 1928 Mad. 509.

——Act is complete in itself.

The Court cannot introduce a new period of limitation on any ground of equity. The Limitation Act is complete in itself and any ground for extension of time must be sought for, within the four corners of the Act itself. 85 Ind. Cas. 272=20 M.L.W. 987=A.I.R. 1925 Mad. 334=48 M.L.J. 74.

——The Act is meant to be exhaustive. A.I.R. 1936 All. 383=(1936) A.L.J. 503=1936 R.D. 139=1936 A.W.R. 388=163 Ind. Cas. 244.

2. Appeal.

——Appeal.

Where parties' Counsel have been duly communicated the date fixed for delivery of judgment limitation for appeal will run from such date in spite of the fact that neither the parties nor the Counsel were present. 98 Ind. Cas. 942=A.I.R. 1927 Lah. 59.

3. Applicability.

(a) **General.**
(b) **Defence.**

3. (a) General.

——Applicability of Act in Shan States.

In the Shan States, the Limitation Act as such is not in force. A.I.R. 1937 Rang. 477=1937 Rang. 287=173 Ind. Cas. 160.

——Applicability—Laccadive Islands.

The law applicable to the Islands is to be found in Regulation 1 of 1912. The Limitation Act has not been applied to these Islands and therefore time for filing an appeal cannot be extended under S. 5 of the Lim. Act. 13 Mad. 353, .Appl. 93 Ind. Cas. 341=49 Mad. 419=23 M.L.W. 636=A.I.R. 1926 Mad. 657.

——Aden.

The Indian Limitation Act extends to the whole of British India of which Aden forms part and S. 16 of the Aden Civil and Criminal Justice Act (Act 2 of 1864) makes any Act or Acts in relation to civil procedure in force for the time being applicable to the Courts at Aden. 84 Ind. Cas. 796=25 Bom. L.R. 1333=A.I.R. 1924 Bom. 290.

—Applicability—Application by Receiver under S. 4, Provincial Insolvency Act. **See** Provincial Insolvency Act, S. 4. 52 Bom. L.R. 606=A.I R. 1950 Bom. 399.

——Law Applicable—Place where suit is brought.

The law of limitation is a law of procedure and has to be strictly construed. It may bar the remedy but does not extinguish the right. In considering whether a particular remedy is open to a party, the law applicable to the place where the suit is brought is applicable. The law of limitation prevailing in the place where the obligation arose has not to be considered. A.I.R. 1939 Bom. 522=I.L.R. (1939) Bom. 639=41 Bom. L.R. 1084=186 Ind. Cas. 393.

——Local law—Execution of decree passed by Baroda Court—Transfer to Br. Court.

In 1913, an application to execute the decree of 1909 was made in Baroda. It was within time according to the law of Baroda. In 1915, the decree was tranferred for execution to a British Court in Ahmedabad. **Held,** that the application was barred by time, because suits and applications are governed by the local law of the country in which the suit or the application is brought. 12 Bom. L.R. 844, Foll. 40 Bom. 504=18 Bom L.R. 481=36 Ind. Cas. 369.

——Retrospective effect.

A statute which takes away or impairs rights acquired under the existing law must not be construed to have a retrospective force, unless, by express words or necessary implication, it appears that such was the intention of the Legislature which passed it. It is true that ordinarily the enactments which regulate procedure take effect immediately on the principle that "no suitor has a vested interest in the procedure" and that an Act of limitation. being a law of procedure, will ordinarily govern all proceedings, to which its terms are applicable, from the moment of its enactment. But this rule must admit of the qualification that when the retrospective application of the statute of limitation would destroy vested rights, or inffict such hardship or injustice as could not have been within the comtemplation of the Legislature, then the statute is not any more than any other law to be construed retrospectively. A.I.R. 1939 Pat. 282=20 P.L.T. 139=18 Pat. 355=5 B.R. 902=183 Ind. Cas. 212.

——Retrospective effect—Reasons stated.

Per **Pandurang Row, J.**—The intention of the law of limitation being practically to put an end to existing rights after a certain lapse of time, the reason why a new rule of limitation is applied retrospectively is not because the law of limitation is a law of procedure but because the express intention of the law of limitation is to destroy or extinguish existing rights of action after a certain lapse of time. It is retrospective if it is clearly intended to be retrospective and not because it is merely a matter of procedure. A.I.R. 1938 Mad. 688=(1938) M.W.N. 682=(1938) 2 M.L.J. 44=48 L.W. 81=179 Ind. Cas. 16.

——Retrospective effect—Retrospective unless it confiscates vested right under old Act—If effect of new Act is only to curtail the period it should be given retrospective effect, e.g., suit by a minor under the old and new Acts.

Statutes of limitation cannot be considered as anything else than matters relating to procedure and ordinartily such statutes have their operation from the date fixed in the statute and govern all matters before the court after the commencement of the operation of the statute. There is however one exception and it is that where under the Act as amended the application could not be made the amendment will not apply retrospectively, for the principle is that the effect of an amendment is to regulate and not to confiscate of vested right.

A right to apply under C.P. Code. O. 34, R. 6, accrued to a minor in September, 1908. The mortgagee was under a disability of minority till 23rd September, 1923. Under the old Act the minor could make application within three years of the cessation of the disability. The new Act subsituted for this, three years from the date right to apply accrued. On the date of the coming into force of the new Limitation Act the minor had two years and nine month's time under the new Act within which to apply.

Held, that inasmuch as the effect of change was to cut the period within which to apply and not to take away the right, the new Act should be given retrospective operation. 122 Ind. Cas. 201=49 C.L.J. 362=33 C.W.N. 519=56 Cal. 1117=A.I.R 1930 Cal. 34.

——Right of limitation

No one has a vested right in a period of limitation. 110 Ind. Cas. 719=50 All. 865=26 A.L.J. 1317=A.I.R. 1928 All. 708.

——Law of.

The law of Limitation is a branch of the adjective law and governs all proceedings to which it is applicable from the date of its enactment. 1 Pat. L.J. 214 and 11 All. 408 (F.B.), **Foll.** 62 Ind. Cas. 100=2 P.L.T. 669.

——Applicability of—Pending Suit—Law applicable.

The provisions of the Lim. Act applicable to a suit are the provisions which exist on the date when the suit is instituted.

[Provisions of S. 20 as amended by Act. XVI of 1942, held operated to decide the question of limitation.] A.I.R 1946 Pat 60=24 Pat. 391.

——Law Applicable.

There can be no doubt that, in the ordinary way the law of limitation which geverns a suit is the law in force at the time of the institution of the suit and not that in force at the timeof the cause of action (1944) O.W.N. 242.

——New Act—Law applicable.

The Law of Limitation, being a branch of the adjectival law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statue which was in force at the time of the transaction or vesting of the cause of action on which the suit or remedy is based. A.I.R. 1939 Pat. 122=20 P.L.T. 38=5 B.R. 398=18 Pat. 1=180 Ind. Cas. 414.

——Limitation—Amendment of law of limitation—Cause of action before amendment—Law applicable.

It is certainly not the rule that when a statute introduces a shorter period of limitation, suits instituted after the amendment of the law in respect of causes of action accuring before such amendment are governed by the rule of limitation,which was in force on the date when cause of action accrued. On the contrary, the rule ordinarily applicable is the law which is in force at the time of the institution of the suit. The case is diffierent when there is an interval between the passing of the Act and its coming into force so that a party affected by the new period of limitation has a reasonable time during which he could avail himself of his remedy before the new period of limitation came into force. In such a case, the limitation is governed by the Amending Act and it is so even in cases where the cause of action has arisen before the Amending Act came into force. 18 P.L.T. 193=A.I.R. 1937 Pat. 311=3 B.R. 534=169 Ind. Cas. 78.

——Law applicable.

The law of limitation applicable to a suit or proceeding is the law in force at the date of the institutions of the suit or proceeding, unless there is a distinct provision to the contrary. 34 C.W.N. 733.

——Rules of limitation are **prima facie** rules of procedure, and unless there is something special in the rules which justifies a contrary inference, the rules applicable to application or appeal would be rules which are in force at the time when the appeal or the application is filed. A statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might have accrued before the Act

came into existence. 35 All. 227 (P.C.), **Foll.** 110 Ind. Cas. 719=50 All. 865=26 A.L.J. 1317=A.I.R. 1928 All. 708.

——Law applicable.

The law of limitation which prevails when a suit is brought, applies to that suit, unless it be shown that one or other of the parties have acquired vested rights under some earlier statute of limitation. 35 All. 227 (P. C.), Foll.

Plaintiff whose enjoyment of an easement as against the Crown began in 1865 cannot acquire a prescriptive right against the Crown in view of S. 15, Easements Act, and S. 26, Limitation Act, 1877, does not apply to such a case. 86 Ind. Cas. 757=21 S.L.R. 195= A.I.R. 1927 Sind 270.

——The law of limitation applicable to a suit of proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. 35 All. 227, (P.C.), Foll. 90 Ind. Cas. 274=48 All. 121=23 A.L.J. 977=6 L.R.A. Civ. 582=A.I.R. 1926 All. 93.

——Applicability of—Suit or proceeding—Law of Limitation applicable.

The Law of Limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. 29 Ind. Cas. 833. (Cal.).

——Applicability—Pending proceedings.

The law of limitation is a law relating to procedure and the law applicable to suits or proceedings is the law in force at its institution unless there is a distinct provision to the contrary. 21 Ind. Cas. 113 (Cal.).

——Applicability—Retrospective operation.

The law of limitation applicable to a suit is **prima facie** the law in force at the time of the institution of the suit, in the absence of circumstances indicating an intention of the part of the legislature to affect retrospectively existing causes of action. One such circumstance is that a new law ls brought into immediate operation without any opportunity afforded to litigants to enforce their rights under the old law. 35 A. 227 Foll. 18 C.L.J. 274=20 Ind. Cas. 821.

——Applicability of—Date of suit.

A suit is governed by the Limitation Law in force at the time of its institution and not by subsequent statute which comes into operation during the pendency of the suit. 19 C.L.J. 187=19 Ind. Cas. 968.

——Applicability—Law in force at the date of the suit or proceeding.

Unless there is a distinct provision to the contrary, the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding. 35 All. 227=40. I.A. 74=25 M.L.J. 131=13 M.L.T. 437=17 C.W.N. 605=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L.R. 489=19 Ind. Cas. 291 (P.C.).

——Applicability—Suits after 1877, but before acknowledgment under Act of 1859.

Where an acknowledgment was made when the Limitation Act 14 of 1859, was in force and the in suit was instituted when the Act of 1877, came into force: **Held,** that the law of limitation in force at the date of the institution of the suit of proceeding applied unless there was a distinct provision to the contrary. 7 B. 459, Foll. 32 All. 33=6 A.L.J. 931=6 M.L.T. 348=3 Ind. Cas. 725.

——Applicability of—Pending proceedings.

The law of limitation is a branch of the adjective law and governs all proceedings to which it is applicable from the date of its enactment. 20 C.W.N. 952= 2 P.L.W. 370=1 P.L.J. 214=34 Ind. Cas. 27.

——Applicability of Pending cases.

The new Act may be applied without hardship as the legislature has postponed its coming into operation, two years after passing it. The principle is not affected by cases of individual hardship. 34 Mad. 292=7 M.L.T. 115=20 M.L.J. 347=(1910) M.W.N. 516=5 Ind. Cas. 420.

——Applicability—Retrospective operation—Limits of.

Though laws affecting limitation might abridge or enlarge periods of limitation in cases of suits or causes of action which are alive at the date when the new enactment comes into force which under the old law would expire afterwards, the change cannot, unless there is clearly expressed an intention to the contrary either by apt words in the enactment or otherwise operate retrospectively so as to destroy rights of suits which were alive on the date. 39 Mad. 645=29 M.L.J. 1=18 M.L.T. 67=(1915) M.W.N. 547=2 L.W. 661 =30 Ind. Cas. 94.

——Applicability—Retrospective effect—Right barred prior to amendment is not revived—But right if not barred, amended law applies.

In the absence of anything to the contrary if a claim is within limitation according to the old Limitation Act on the date when the new Limitation Act comes into force and a proceeding is commenced after the coming into force of the new Act it is the new Act which would govern all decisions on the point of limitation. If, however, the right to sue or the right to apply had already been barred by the provisions of the old Act then in force, then unless there was something in the new Act which could be deemed to apply retrospectively to revive claims which had already become barred, the new Act could not be availed of for the purpose of saving limitation. A. I. R. 1946 All. 58=1945 A. W. R. (H.C.) 246=223 Ind. Cas. 175=I. L. R. (1945) All. 896.

——Ordinarily, the suit would be governed by the Lim. Act 9 of 1908, which is the law in force when the suit is instituted; but if the defendants are able to show that the right of action had become barred under the Act of 1859, then the title that they had acquired could not be defeated by the subsequent Lim. Act. A. I. R. 1942 P.C. 54=(1942) A.L.J. 392=8 B. R. 874=(1942) 2 M.L.J. 249=48 C. W. N. 1008=23 P. L. T. 717=1942 O.W.N. 806=(1942) Kar. (P.C.) 1111 (Sup.)=I.L.R. (1943) Mad. 1=69 I.A. 110=202 Ind. Cas. 1 (P.C.).

——In the absence of an express intention to the contrary, it is well-established that extension of the period of limitation of a suit by a new Act cannot revive a right of suit which had already been barred by the repealed Act. A.I.R. 1940 Cal. 115=70 C.L.J. 218=44 C.W.N. 38.

——New statute—Retrospective effect.

When, under the existing law, a right of suit has become barred and a person has consequently acquired

title, such right of suit cannot be revive and such itle cannot be extinguished by subsequent legislation. A.I.R. 1936 All. 858=1936 A. L. J. 1373=166 Ind. Cas.

——Applicability of — Barred rights—Not revived.

A right to sue barred under a repealed Limitation Act is not revived by the passing a new Act in the absence of a provision to that effect in the later enactment. 33 M.L.J. 753=(1917) M.W.N. 864=22 M.L.T. 419=43 Ind. Cas. 50.

——Applicability—Reversioner's suit for possession from heirs and representatives of adopted son —Suit within 12 years of death of widow—Right barred under Act of 1871 not revived by Act of 1877.

The right to sue to set aside an adoption, if barred under Art. 129, while the Limitation Act (1871) was in force, is not revived by the Act of 1877 or by that of 1908. 40 Mad. 846=6 L.W. 253=41 Ind. Cas. 546.

——Applicability of—Rights barred under old Act—Not revived by the passing of the new Act.

The intention of the law of limitation is, not to give a right where there is none, but to interpose a bar after a certain period to a suit to enforce an existing right. Nothing in the new Limitation Act can revive a right which has already become barred under the old Act. 33 All. 356=38 I.A. 87=15 C.W.N. 545 =8 A.L.J. 552=13 C.L.J. 575=13 Bom. L.R. 427=10 M.L.T. 25=(1911) 1 M.W.N. 432=21 M.L.J. 645=10 Ind Cas. 477. (P.C.).

——New Act—Retrospective effect.

Where, in an Act, amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given a retrospective effect. The Legislature have given all persons affected by the Amending Act a period of time to bring their suits, the causes of action of which accrued before the Amending Act came into force and which would otherwise be barred under the Amending Act. If suits are not brought within such period, then the amending statute must be held to bar them. A.I.R. 1939 Pat. 122=20 P.L.T. 38=5 B.R. 398=18 Pat.=180 Ind. Cas. 414.

——New Statute— Retrospective effect.

Where a new statute of limitation reduces the time previously allowed for commencement of the suit, but does not come into operation forthwith and allows a reasonable time for the enforcement of existing causes of action, the Court will not hesitate to hold that the statute may affect causes of action already accrued in the same manner as those accruing after its passage. A I.R. 1939 Pat. 282=20 P.L.T. 139=18 Pat. 355=5 B.R. 902=183 Ind. Cas. 212.

——Applicability of general provisions.

The general provisions of Limitation Act are founded mainly on equitable considerations which apply as much to the period of limitation prescribed by the special Act, as to period of limitation prescribed by the Limitation Act itself. 34 All. 496, Foll. 122 Ind. Cas. 810=10 P. L.T. 769=9 Pat. 172=A.I.R. 1930 Pat. 14.

——Quaere.

If the general provisions of the Limitation Act providing for extending the period of limitation apply only to the period prescribed in the schedule to that Act or also to the periods prescribed in special Acts like the Karachi Port Trust Act. 89 Ind. Cas. 376 (Sind)

——Applicability of—Application to Court.

The Limitation Act does not apply to applications to a Court to do what it cannot refuse, nor to applications for the exercise of functions of a purely ministerial character. 9 Bur. L. T. 148=8 L. B. R. 422=35 Ind. Cas. 950.

——Applicability—Action to be taken by Court.

The provisions of the Limitation Act do not apply to action which it is the duty of the Court to take up without any formal application by parties. 19 C.W.N. 473= 22 C.L.J. 66=28 Ind. Cas. 211.

——Applicability to all kinds of applications.

The Limitation Act does not pretend to provide for all kinds of application to Courts whatsoever. The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse; nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court. 15 C.W.N. 337=6 Ind. Cas. 537=12 C.L.J. 328=37 C. 796.

——Applicability of—Questions of private international law.

Obiter—Limitation is a law of procedure for some purposes, **e.g.**, when questions of private international law have to be decided and a Court has to settle the law of which state should be applied in case of conflict. 36 Mad. 108=21 M.L.J. 777=10 M.L.T. 75=(1911) 2 M.W.N. 565=11 Ind. Cas. 635.

——Applicability and scope—Proceeding before arbitration.

In the absence of a agreement to the contrary, the Limitation Act is applicable to a proceeding before arbitrators. A.I.R. 1943 All. 162=(1943) A.L.J. 69=I.L.R. (1943) All. 467=1943 A.W.R. H.C. 62=207 Ind. Cas. 571.

——Bihar and Orissa Municipal Act.

The Limitation. Act applies for recovery of dues under the Bihar and Orissa Municipal Act, since no special period of limitation is provided in the Act. 18 P.L.T. 252=A.I.R. 1937Pat. 360=3 B.R. 561=16 Pat. 302= 169 Ind Cas. 364.

——Special law—Tenancy.

If there is special law and a general law, the special must prevail over the general. This principle is applicable to matters of tenancy where the question of limitation is involved. A.I.R. 1936 Nag. 180=I. L. R.= (1936) Nag. 5=165 Ind. Cas. 122.

——Applicability to Advocate-General and Charitable trusts.

There is nothing in the Limitation Act which exempts the Advocate-General or any charity from the operation of the Act. (1905) 7 Bom. L. R. 772.

——Applicability to suits and proceedings under special or local laws.

The general provisions of the Indian Limitation Act 1877, are applicable to suits and proceedings under special or local laws except in so far as they affect or

alter the period of limitation prescribed by those laws, unless the special or local law is complete code in itself. 1902 A.W.N. 34.

3. (b) Defence.

——Applicability—Plea in defcnce.

It is open a defendant to resist a suit for possession by a plaintiff on the ground that the sale in favour of the plaintiff is voidable at his instance. The fact that the defendant's suit for cancellation of the sale is barred by time cannot debar him from raising the plea that the sale is voidable, for the simple reason that being in possession it was not necessary for him to bring the suit. It is now well settled that the Limitation Act only applies to suits or applications mentioned therein and does not debar a person from raising a plea in defence. The only case where a man loses not only the remedy but also the right by his failure to bring an action within time is the one which comes within the purview of S. 28 of the Limitation Act. 50 P.L.R. 167 =A.I.R. 1949 E.P. 29.

——Applicability to the case of defendant.

The Limitation Act is not applicable to the case of a defendant and the party in possession is not affected by it. It refers only to the remedy of the plaintiff and not even to his rights and even though the remedy may be barred, the right may still exists. 21 Luck. 194=1946 A L.W. (C.C.) 1=1946 O.A. (C.C.) 12= 1946 A.W.R. (C.C.) 12=1946 O. W. N. 1=A. I. R. 1946 Oudh 129.

——Application to defences.

The plea of limitation is not available against defences. (1932) A.L J. 595=A. I. R. 1932 All. 558= 138 Ind. Cas. 492.

——Defence.

There can be no limitation against a plea in defence. 113 Ind. Cas. 750=A.I.R. 1929 All. 77.

——The Limitation Act applies to the bringing of suits and not to defences. A.I.R. 1921 Bom. 257, Foll. 110 Ind. Cas. 571=A.I.R. 1928 Cal. 810.

——Even though the remedy of a suit may be barred the defence of the invalidity of transfer is not necessarily barred. 107 Ind. Cas. 897=A I.R. 1928 Nag. 262.

——Claim by way of defence.

Limitation cannot be pleaded against a claim made by way of defence. 92 Ind. Cas. 675=1 Luck. 92 =29 O.C. 118=13 O.L.J. 10=3 O. W. N.121=A.I.R. 1926 Oudh 228.

—Claim of defendant.

The statute does not apply to the claim of a defendant. 84 Ind. Cas. 168= 5 Lah. 375=A.I.R. 1925 Lah. 32.

—Defences—Not subject to.

There can be no limitation against a defence. 5 O. L. J. 768=49 Ind. Cas. 115.

—Defences—No bar of limitation.

There is no Limitation under the Act to bar defence of fraud to an action.

The time limit under the Act applies only to actions brought by the Plaintiff and not to rights set up in defence. 35 Ind. Cas. 610. (Cal.)

—Defences—Fraud.

There is no limitation under the Indian statute which will bar the defence of fraud to an action. The Limitation Act does hot bar defences. 31 M.L.J. 362= 20 C. W. N. 957=(1916) M.W.N 433=3 L.W. 528= 14 A.L.J. 1236=34 Ind. Cas. 37 (P.C.)

—Defence—Laches.

A defence of laches cannot prevail where a statutory period of limitation is prescribed. 41 Cal. 771=18 C.W.N. 631=26 Ind. Cas. 284.

4. Construction.

(a) **General**

(b) **Equitable considerations.**

4. (a) Construction—General Interpretation of the Act.

The Court Fees Act and Limitation Act are not in **pari materia**. 1941 N.L J. 205=A.I.R. 1941 Nag. 236 =I.L.R. (1941) Nag. 392=196 Ind. Cas. 556.

—Relation with C. P. Code—Both should be interpreted together.

Per **Das, J.** —Code of Civil Procedure and the Indian Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day. They are statutes in **pari materia** and are to be taken together as forming one system, and as interpreting and enforcing each other. 78 Ind. Cas. 200=3 Pat. 371= 5 P.L.T. 145=1924 P.H.C.C. 33= A.I.R. 1925 Pat. 1 (F.B.).

—Interpretation of the Act.

There is no place in law of limitation for general principle of suspension of limitation—Act must be strictly construed. A I R 1939 All 82: (1939) A L J 29=I.L.R. (1939) All. 207=1939 A. W. R 93=180 Ind. Cas. 927.

—Construction—Extension of scope of Act by implication—Permissibility.

It is an elementary principle of construction that the scope of the Limitation Act cannot be extended by implication, and a party's rights to go to Court cannot be taken away unless the Act expressly provides that his right is so barred. 50 Bom. L.R. 747=A.I.R. 1949 Bom. 104.

—Construction—Strict construction—Bar of limitation by analogy—Permissibility.

It is dangerous to assume that a suit is barred by limitation by virtue of any analogy. The law of a limitation deprives a party of his legal rights and has got therefore to be construed strictly according to its letter. No claim can be barred by analogy unless it is expressly barred by the statute. 1950 Comp. C. 15.

—Interpreation to be adopted—Necessity for law of limitation.

The provisions of the Limitation Act require to be very strictly interpreted. Limitation laws are very necessary, otherwise no person could remain certain that he would not be dragged before the Courts to answer for a debt allegedly incurred by some earlier ancestor of his. Persons who delay to enforce their claims in the Courts are guilty either of laches or must be held to delay to the uttermost extent for reasons of their own. It does not seem to me to be the duty of the Courts therefore, to attempt to interpret the law of limitation wherever possible in favour of the creditor. There must be no attempt to force the Limitation law to condone this suggested technical difficulty. 1946 A. M.L.J. 13.

—Interpretation.

Per **Abdur Rahman, J.**—If no other interpretation is possible, the words of the statute must be given effect to, however, unfortunate the result may be. But one must struggle against such interpreation as far as is possible and in doing so, he must, where the language is ambiguous, construe the words of the statute in favour of the plaintiff's right to proceed. Even if two interpretations are found to be equally possible, the Court must impute a reasonable intention to the Legislature and hold the suit not to be falling within shorter period of limitation. Limitation statute being a statute of repose, has to receive such interpretation as would effectuate the intention of the Legislature. Where therefore, two constructions are permissible without straining the language of the statute, the one which leads to undesirable or unexpected results or is liable to cause hardship must be avoided as not having been intended by the Legislature. A.I.R. 1945 Lah. 324=I.L.R. (1945) Lah. 523=47 P.L.R. 302 (F.B.).

—Interpreation of the Act.

Per **Stone, C. J.**—Limitation Act should be construed so as to save rather, than bar a proceeding. A.I.R. 1939 Nag. 150=I.L.R. (1939) Nag. 185=1939 N.L.J. 173=182 Ind. Cas. 662.

—Construction.

Statutes of limitation must be strictly construed and no man is to be deprived of rights which would, by law, belong to him unless the specific provisions of law, which are alleged to take away these rights can be shown to apply clearly and in precise terms to his case. A.I.R. 1938 Lah. 23=181 Ind. Cas. 728.

The provisions of Limitation Act should receive a fair and not too technical a construction. Its language ought not to be strained in favour of the judgment-debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder. A. I. R. 1938 Mad. 323=(1938) M. W. N. 191=(1938) 1 M. L. J. 135=47 L. W. 693=178 Ind. Cas. 749.

——Interpretation of the Act—Principles.

In construing Acts of Limitation, Courts must always remember that the object of the Legislature is to induce people to be active in the assertion of their rights, and to penalise those who sleep upon their rights; and if it is possible to avoid giving a statute of limitation a meaning wich has the effect of destroying a right to sue before that right has effectively arisen, the Court should do so. A.I.R. 1933 Bom. 439=35 Bom. L. R. 956=57 B. 593=147 Ind. Cas 919.

——Different periods of limitation—Duty of Court.

The Courts should have no hesitation in applying the Statue of Limitation whereit clearly applies, but where there are two possible views under this Statute one tending to deprive a person his just dues and the other entitling him to recover them, there is no reason way one should not lean in favour of the view which does not entail any hardships or lead to any unjust consequences A. I. R. 1931 pat. 285=12 P. L. T. 755=11 Pat. 112 =134 Ind Cas. 609.

——Construction—Favourable to plaintiff.

Courts in dealing with questions of limitation should, as far as possible, place upon the Act a construction favourable to plaintiffs. 1930 M. W. N. 930=32 M. L .W. 502= A. I. R. 1930 Mad. 991=59 M. L. J. 881.

——Limitation Act has to be strictly construed and unless a suit clearly falls with the ambit of the article sought to be applied the decision should be in favour of the continuation of the suit. 121 Ind. Cas. 379=30 P.L.R. 440=11 L. L. J. 431=A. I. R. 1929 Lah. 513.

——Words must not be construed to restrict rights unless so expressed — Provisions cannot be extended to cases not covered by the wording—Form of suit will determine what article should be applied.

Inasmuch as the Limitation Act is an Act which takes away or restricts rights to start legal proceedings it must receive such a construction as the language in its plain meaning imports. It cannot be interpreted so as to restrict rights unless it is clear that the Legislature intended that this should be done. It cannot also be forgotten that the provisions of the Limitation Act must not be extended to cases which are not strictly within the enactment or do not come within the strict meaning of the words used. The object of the Limitation Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in the Courts of law.

It therefore follows that whether a particular suit is of the nature contemplated by a particular article must depend upon the form in which the suit is brought and the relief claimed therein; for unless it comes within the wording of the first column of that article in the schedule, the limitation specified in the third column of that article cannot be made applicable to it. 98 Ind. Cas. 22=22 N. L. R. 147=9 N.L.J. 198=A.I.R. 1927 Nag. 10.

——Construction—Benevolent interpretation.

The Limitation Act operates as a bar to legally enforceable claims and it should therefore be construed as much as possible in favour of the person whose right is sought to be barred. 41 Mad. 18=33 M.L.J. 35=6 L. W. 192=41 Ind. Cas. 807.

——Construction—Strict interpretation.

The Limitation Act being one in which the rights are rendered ineffective if not abrogated, must be be read strictly. 9 Bur. L. T. 45=32 Ind. Cas. 536.

——Construction—Strict construction.

The Law of Limitation must be strictly interpreted and applied. No right or remedy is to be regarded as barred unless it is clearly shown to be shut out by the enactment. 11 N.L.R. 18=27 Ind. Cas. 935.

——Interpretation of the Act.

The Limitation Act. is the rule of procedure and must be interpreted strictly. A.I.R. 1938 Bom. 281=40 Bom. L.R. 377=I. L. R. (1938) Bom. 327=175 Ind. Cas. 528.

——Interpretation of the Act.

Provisions must be construed with reasonable strictness. A.I.R. 1935 Lah. 115.

——Construction—Two Articles applicable.

As between two Articles that are applicable to the case, the more specific Article will apply. 127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Construction—Two Articles applicable.

In giving effect to a statute of Limitation if two Articles limiting the period for bringing the suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally apart from other equitable considerations be preferred. 4 Pat. 448, Foll· 127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Two Aricles applicable—One general and one specific—Specific article to govern.

If there be two articles which may cover the case, the one however more general, and the other more particular or specific as a principle of construction, the more particular and specific article ought to be recorded as the one governing the case. 26 C. 72, foll. 4 Bom L.R. 72=26 B. 430.

——Determining article applicable—Form of relief does not determine character of suit.

It is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under which articles of the Limitation Act the suit falls. Though the relief claimed in the suit is possession of immovable property sued for is held by the contesting defendant under a sale or other transfer which is not void, but only voidable, and he cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer though no relief in those terms is prayed for, but the prayer is only for possession of the property. 13 Cal. 308 (P.C.) and 25 Bom. 337 (P.C.), Foll.; 44 Bom. 742 (F.B.), Appr. 118 Ind. Cas. 481=29 M.L.W. 169=1929 M. W. N. 124=A. I. R. 1929 Mad. 313=56 M.L.J. 332.

——Construction—Sections and Articles

The section in the Act govern and control the applications of the articles except where the language of a particular article clearly precludes the application of a section. 10 M. L. T. 418=(1911) 2 M. W. N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——Construction—Rules for—Schedule.

Courts are not at liberty to allow periods of suspension not provided for in the Act. It is equally inadmissable under the Act to say that time shall not begin to run from the time limited in the article except under some express provision of the Act. Per **Abdur Rahim and Seshagiri Iyer, J.J.**—It is a well-known rule for constuing the Indian Statute of Limitation that the first and the third columns of an article should be given the same meaning as in other columns. Per **Seshagiri Aiyar, J.**—Where both first and third colums of an article do not apply to a case the residuary article must be applied. Per **Srinivasa Iyengar, J.**—In construing the articles of the Limitation Act undue stress ought not to be laid on the first column of the article which describes the nature of the suits and it ought not to be held that all suits of that class must be governed by that article, though the starting point fixed in the third column cannot be applied to all or cannot be applied without working injustice. 40 Mad. 1040=33 M.L.J. 320=22 M.L.T. 236=(1917) M.W.N. 609=6 L.W. 464=43 Ind. Cas. 31 (F.B.).

——Constrction—Common law and statutory liability.

A statutory liability will be governed by the same articles of the Limitation Act as a Common Law liability if the words of the articles are capable of covering it. 6 L.W. 277=22 M.L.T. 146=33 M.L.J. 379=(1917) M.W.N. 710=42 Ind. Cas. 502.

——Construction—Principles.

Statues of limitation like all others ought to receive such construction as the language in its plain meaning imports. 36 Cal. 1003=36 I.A. 148=10 C.L.J. 284=6 A.L.J. 857=11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1=4 Ind. Cas. 449 (P.C.).

——Construction—How far affects substantive law.

The Limitation Act, being a law of procedure, should not be presumed to have effected any change in the rights of parties given by the substantive Hindu law. 10 Bom. L.R. 1029=Ind. Cas. 647=33 B. 88=1 **Also** 20 M.L.J 347.

——Statutes of limitation—Construction.

When the Legislature intends that a fresh period of limitation is to operate as against certain persons only, it says so in distinct terms. (1906) 11 C.W.N. 107=33 Cal. 1278.

——How to be construed—Curtailing rights.
See 5 C.W.N. 386.

——English principles.

There is no warrant for importing into the Limitation Act the provisions of a special English statute of limitation such as Ss. 3 and 4, Real Property Limitation Act, 1833. 116 Ind. Cas. 581=A.I.R. 1929 Sind 140.

4. (b) Construction—Equitable cosiderations.

——Interpretation.

The provisions of the Lim. Act must be construed strictly. Hardship is no consideration. A.I.R. 1944 Mad. 67=56 L.W. 658=(1943) 2 M.L.J. 510=1943 M.W.N. 728=I.L.R. (1944) Mad. 410=215 Ind. Cas. 318.

——Interpretation of the Act—Equitable considerations.

Equitable considerations are out of place when construing the Lim. Act. and the strict grammatical meaning of the words is the only safe guide. A.I.R. (1941) Mad. 449=53 L.W. 569=I.L.R. (1941) Mad. 599=(1941) 1 M.L.J. 644=1941 M.W.N. 408=199 Ind. Cas. 225 (F.B.)

——Interpretation of Act—Hardship, no ground for enlarging period.

Limitation Act ought to receive such a construction as the language in its plain meaning imports. A law of limitation and prescription may appear to operate harshly or unjustlyin particular cases, but where such law has been adopted by the State, it must, if unambiguous, be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds, enlarge the time allowed by the law, postpone it operation or introduce exceptions not recognised by it. A.I.R. 1941 P.C. 6=(1941) 1 M.L.J. 88=1941 O.W.N. 4=I.L.R.(1941) Bom. 202=72 C.L.J. 497=53 L.W. 212=1941 M.W.N. 321=67 I. A. 416=I.L.R. (1941) Kar. (P.C.) 11 (Supp.) =43 Bom. L.R. 346=45 C.W.N. 429=43 P.L.R. 138=7 B.R. 666=193 Ind. Cas, 225 (P.C.).

——Interpretation of the Act.

Equitable considerations are irrelevant in construing Act—No principle can be involved to add to or supplement the provisions of the Act. A.I.R. 1939 Bom. 1=40 Bom. L. R. 1134=I. L. R. (1939) Bom. 173=179 Ind. Cas. 178.

——Interpretation of the Act—No equitable considerations.

In construing the Act, equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. A.I.R. 1937 Cal. 581=41 C.W.N. 1151=67 C.L.J. 92=173 Ind. Cas. 584.

——Justice, equity and good conscience.

Justice, equity, and good conscience cannot be invoked to overrule the law of limitation. A.I.R. 1936 Rang. 305=164 Ind. Cas. 286.

——The fixation of periods of limitation must always be, to some extent, arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, and the strict grammatical meaning, of the words is the only safe guide. A.I R. 1932 P. C. 165=36 L. W. 7=36 C.W.N. 803=(1932) A.L.J. 643=34 Bom. L.R. 1065=33 P.L.R. 621=9 O.W.N. 681=(1932) M. W. N. 817=55 C.L J. 528=59 I. A. 283=63 M. L. J. 329=60 C. 1=137 Ind. Cas. 529 (P.C.).

——Equitable construction.

The statutes of limitation are in their nature strict and inflexible and are not susceptible of equitable construction. 11 P.L.T. 403=A. I. R. 1930 Pat. 455.

——No exceptions should be made on the ground of hardship.

In applying the Limitation Act to particular cases the Courts are not warranted in introducing savings or exceptions which are not found in the statute either because these may be within the reason of other exceptions which are to be found in the statute or because of considerations of mere hardship. 117 Ind. Cas. 543=56 Cal. 61=32 C. W. N. 971=A. I. R. 1928 Cal. 616 (S.B.).

——Principles and scope—General principles extraneous to the Act—Examined and explained—No equitable construction.

The cases which are said to have sanctioned the application of some general principle enuring to the benefit of the plaintiff and extraneous to the act itself, may broadly be classified into two groups, **viz.**, those in which the starting point of limitation fixed by the statute has been held to have arisen at a subsequent date and those in which it has been held that the operation of the statute has been suspended after time has begun to run. In the case of such of the articles of the Limitation Act in which the starting point of time synchronises with the cause of action, the test is to ascertain the time when the plaintiff could have maintained his action to a successful issue. In such a case, at the time when the cause of action arises there is no person capable of suing upon it, the statute does not run; similarly it is necessary that there shall be a person to be sued; and it is also necessary that the cause should be complete, that it is, all the facts must have happened which are material to be proved in order to entitle to the plaintiff to succeed. There are cases in which Courts of equity will interpose to prevent the bar of statutes of limitation as for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it at law. That the enactment is positive is not allowed to be used against conscience, and an equitable tribunal will supply and administer within its own jurisdiction a substitute for an original legal right of which a party has been fraudulently and unjustly deprived. Except perhaps in cases where injustice has been occasioned by a Court by its own acts or oversights there is no scope for the application of any principles of equity in the administering of the statutes of limitation. The Judicial Committee has not, however much the language used by their Lordships in some of the decisions may suggest the same, laid down any such principle as being of universal applicability and all the decisions of the Judicial Committee as well as most of the cases decided in this country are supportable on grounds which are in no sense founded on any general equitable principle extraneous to or unauthorised by the statute. In cases in which the question arises as to the starting point of time for the purposes of the limitation, these decisions are mostly reconcilable with a proper appreciation of what the cause of action means when the starting point is the cause of action or with a proper interpretation of the words used in the third column of the articles in other cases; and in cases where the question of suspension arises, if time has once begun to run, it never again ceases to run, but there may be satisfaction of a claim or the cancellation of a cause of action operating to suspend the rights of the plaintiff who may, on the removal of the satisfaction or cancellation, avail of a fresh cause of action which arises by reason thereof. The substitution of a new legal right on principles of equity is hardly permissible under the statute law as its stands and revival of an old cause of action once satisfied or cancelled is foreign to its conception. In applying the principles of limitation the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself. and apart from the provisions of the Act itself, there is no principle which can legitimately be invoked to add to or supplement its provisions. 89 Ind. Cas. 1000=29 C.W.N. 973=43 C.L.J. 155=A.I.R. 1926 Cal. 65.

——Construction—Strict interpretation.

Statute of limitation are in their nature strict and inflexible and are not capable of equitable extension. 47 Ind. Cas. 122 (Cal.).

——Equity.

There is no question of equity in cases governed by the Limitation Act. 118 Ind. Cas. 670=1929 A. L. J. 976=A.I R. 1929 All. 677.

——It is wrong to import considerations of equity in the application of the statute of limitation. 101 Ind. Cas. 62=31 C.W.N. 82=A.I.R. 1927 Cal. 117.

——The Limitation Act must be taken to be exhaustive as regards extension of the period of limitation, and no equitable principle can find a place there. 87 Ind. Cas. 17=12 O.L J. 66=2 O.W.N. 144=A.I.R. 1925 Oudh. 369.

5. Effects on rights.

——Nature of bar of limitation.

The rule is now well settled that lapse of limitation, apart from S. 28, bars only the remedy and does not extinguish the title of the claimant. 1930 A.L.J. 1416=A. I. R. 1930 All. 858.

——Though creditor's remedy may be barred his right is not.

It is well understood that though remedy which the creditor has, may be extinguished the debt may nevertheless subsist, and even after the period of limitation for a

suit for recovery of the debt has passed, the creditor has a right to receive the sum due to him from his debtor if the latter is disposed to pay him. It is further clear that a payment made to discharge a time-barred debt could not in law be recovered by the debtor. 78 Ind. Cas. 911=46 All. 384=22 A.L.J. 369=5 L.R.A. Civ. 306=A.I.R. 1924 All. 543.

——Limitation bars remedy but does not extinguish right.

Limitation bars the remedy but does not extinguish the right. The defendant, though unable to enforce his right by suit, can still rely upon it as a defence to an action brought against him. Limitation is not applicable to fix the period for which interest on the mortgage debt is payable by a mortgagor to a mortgagee in a redemption suit in which the mortgagee is necessarily a defendant. 147 P.R. 1890 (F.B.), Foll. 57 Ind. Cas. 348=8 P.L.R. 1921=A.I.R. 1921 Lah. 351.

6. Laches.

——Filing of suit on last day—Suit, if not in time.

If a suit is filed on the last date of limitation it is perfectly all right and no Court will be justified to say that it should have been filed "more punctually" and that it was therefore barred. 1948 A.W.R. (Rev.) 147=1945 R.D. 147.

——Laches—Applicability of doctrine.

The principle of laches or delay is based on the equitable doctrine of English Courts and cannot be allowed to prevail when the legal rights of a party to a proceeding come up before the Court for determination. It might be different if the party is asking for an equitable relief. Where he is asking for a legal relief and the only question is whether this is barred by the statute of limitation, there is no room for the application of any equitable defence such as laches or delay. A.I.R. 1940 Mad. 281=49 L.W. 768=(1939) M.W.N. 624=(1939) 2 M.L.J. 469=189 Ind. Cas. 185.

——Laches—Application of doctrine of.

The statutory period of limitation cannot be cut down by mere inaction. The delay must be such delay as to lead to the inference that the parties had abandoned the reference to arbitration and any thing short of this inference does not make any difference. A.I.R. 1933 Lah. 18=150 Ind. Cas. 674.

—Laches when bar to a legal remedy—Injunction—Mandatory—Projecting eaves on other's land—Pardah lady and minor plaintiffs.

Mere delay is on bar to a legal remedy unless it amounts to a waiver or abandonment of the right sought to be enforced or to acquiescence in the act complained of. 29 B. 245, foll. It is not the practice of the Courts in India or of the Privy Council to press either against an infant or a Hindu or Mahomedan female a presumption by acquiescence in a rival claim from the mere non-contestation for a limited time of an adverse title. This principle holds good as to waiver or abandonment. Mere laches unless it amounts to one of these three is not sufficient to disentitle a person to equitable relief. Where there is a vested right or interest in any party he cannot waive or abandon that right except by acts which are equivalent to an agreement or license. The defendants erected a house in 1900 and projected the eaves on plaintiff's land. Plaintiff's were one of them, a purdah woman and the others minors. The suit was brought in 1904: **Held**, that the plaintiffs were entitled to an injunction. 9 Bom. L.R. 1117.

——Laches and acquiescence—When bar to right to equitable relief.

Delay and acquiescence would not bar a defendant's right to equitable relief unless he knew he had the right or being a free agent at the time, deliberately determined not to enquire what his rights were or to do or act upon them. 17 M.L.J. 19=2 M.L.T. 4=30 M. 169 (F.B.).

——Laches—Bar to suit—Waiver—Abandonment—Acquiescence.

Laches means a neglect to do something which by law a man is obliged to do. To bar a remedy it must amount either to waiver, abandonment or acquiescence. To raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. (1905) 7 Bom. L.R. 200=29 Bom. 234.

——Equitable relief.

Persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. 72 Ind. Cas. 868=17 M.L.W. 216=1923 M.W.N. 1=46 Mad. 148=A.I.R. 1923 Mad. 284=44 M.L.J. 107.

7. Object of.

——Object of.

The object of limitation is to quiet long possession and to extinguish stale demands. Statutes of limitation are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proof arising from the ambiquity or the antiquity of transactions. A.I.R. 1943 Sind 33=I.L.R. (1942) Kar. 466=205 Ind. Cas. 304.

——Intention.

The intention of the law of limitation is not to give a right where there is not one but to interpose a bar after a certain period to a suit to enforce an existing right. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——Per **V. Rao, J.**—The intention of the Law of Limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. 21 Cal. 8 (P.C.) and, 33 All. 356 (P.C.), Foll. 72 Ind. Cas. 488=1923 M.W.N. 195=18 M.L.W. 35=A.I.R. 1923 Mad. 462=44 M.L.J. 303.

—Applicability of—Suits governed by.

The Limitation Act purely prescribes within what periods suits must be brought and does not create an obligation to sue, where none exsited. 39 Mad. 456=28 M.L.J. 571=29 Ind. Cas. 1.

—Object of—Not to confer right.

The intention of the law of limitation is not to give a right of suit where there is none but to impose a bar, after certain period, to a suit to enforce an existing right. 17 C.W.N. 5=16 C.L.J. 282=16. Ind. Cas. 742.

8. Miscellaneous.

—Substantive rights of parties.

The substantive rights of parties under a bond or a decree cannot be derived from, or sought for in the Limitation Act. A.I.R 1946 Cal. 500=50 C.W.N. 735=226 Ind. Cas. 343=81 C.L.J. 325 (F.B.).

——**Pleadings.**

The provisions of Sch. I, App. A., Civil P. C., requiring a party to specify the article or articles of the Lim. Act, under which the suit is, according to him, barred, is salutary and must be complied with as far as possible. The omission to mention the article may prevent the plaintiff at times from producing such oral or documentary evidence as he might have been capable of doing in answer to the objection raised by the defendant and in so far as the onus of proving limitation is on the plaintiff invariably, it may put him at a disadvantage, if some evidence is led on behalf of the defendant, after the case on the plaintiff's side is closed which he would be ordinarily unable to rebut. At all events, this device enables a party to conceal his hand up to the time of final arguments and to spring a surprise on his opponent in a large number of cases. A practice like this cannot but be deprecated and must be discouraged. A.I.R. 1942 Mad. 386=55 L.W. 90=1942 M.W.N. 129=(1942) 1 M L J. 274=206 Ind. Cas. 539.

——**Law in force before 1877.**

It is not correct to say that because the first Lim. Act was not introduced until 1877 there was no law of limitation in force in 1872. There was a law of limitation laid down in S. 14 of Regn. 3 of 1793 which provided a period of 12 years for the cause of action for any suit. A.I.R. 1940 All. 29=I.L.R. (1939) All. 990=(1939) A.L.J. 1127=1940 A.W.R. 21=187 Ind. Cas. 485.

——**Objections.**

Where in an execution case limitation was urged and was denied on the ground that on a particular date an affidavit had been filed to the effect that there were no encumbrances on the property but where there was then no written application to have the property sold and on the date fixed for dssposing of the matter, but on the back of the affidavit there was an endorsement of the Court directing that it should be filed,

Held, that it was filed some time later on the same date but that no oral application for sale could have been made then and that therefore the plea against limitation failed. 78 Ind. Cas. 631=22 A.L.J. 410=5 L.R.A. Civ. 318=A.I.R. 1924 All. 811.

—Period of limitation—Loose and strict sense.

The phrase "period of limitations" can be used in two senses (1) a strict and (2) a loose sense. In the strict sense it means such a period that a proceeding to which it is sought to be applied will be in time, if filed within the period, and beyond time, if filed after it. Sections 3, 5 and 7 to 25 of the Limitation Act, 1908, apply only to "periods of limitation" in the strict sense such as those prescribed by the schedules to that Act and not to periods of limitation in the loose sense such as that prescribed by S. 48 of the C. P. Code.

In the loose sense it means a secondary period which applies as a further check to an application or suit which is found not wanting when the primary or strict period of limitation is applied. Section 48, C. P. Code, 1908, for example prescribes a period of limitation in the loose sense. 70 Ind. Cas. 396=45 Mad. 785=16 M.L.W. 68=1922 M.W.N. 424=31 M.L.T. 140=A.I.R. 1922 Mad. 268=43 M.L.J. 168.

——**Nature and scope—If a mere adjective or substantive law.**

Per **Page, C. J.**—The law of limitation, in so far as it prescribes the period within which litigants are entitled to pursue in the Civil Courts the remedy in which the law provides for the redress of grievances is a part of the adjective law.

Per **Carr, J.**—The law of limitation is something more than mere adjective law and much more than merely rules of procedure. The effect of the law of limitation is to extinguish after the prescribed period a legal right. The law of contract gives the party a right of suit on a contract. But the law of limitation then adds that this right of suit shall cease to exist after a certain period. The result of the two laws together is to create a right of suit available for a certain time. It may be that after the time has elapsed the party has still a moral right to a relief. But it is no longer a legal one. Thus the law of limitation is just as much substantive law as is the law of contract. 8 Rang 380=127 Ind. Cas. 161=A.I.R. 1930 Rang. 228 (F.B.).

——Not a bare Ac of procedure. **See** 12 Bom. L.R. 881=8 Ind. Cas. 189. **Also** 21 M. L. J. 777.

——Limitation, a rule of procedure—**See** 20 M.L.J. 347=34 Mad. 292.

——**S. 2 (3)—Administration bond.**

An administration bond falls within the terms of the definition of bond given in S. 2 (3), Lim. Act. A.I.R. 1941 P.C. 6=1941 O.W.N 4=72 C.L J. 497=53 L.W. 212=43 Bom. L.R. 346=45 C.W.N. 429=43 P.L.R. 138=(1941) 1 M.L.J. 88=7 B.R. 660=I.L.R. (1941) Bom. 202=(1941) Kar. (P.C.) 11 Sup=67 I.A. 416=1941 M.W.N. 321=193 Ind. Cas. 225 (P.C.)

——**S. 2 (3)—Bond, what is.**

A contract to repay a loan of wheat, with interest in kind, is a bond. 86 Ind. Cas. 844=6 Lah. 276=26 P.L.R. 141=A.I.R. 1925 Lah. 415.

——**S. 2 (4)—'Defendant'—Tacking on of possession—Independent trespassers—Limitation Act (15 of 1877), S. 3.**

Where the Govt. after taking possession of reformed lands has released them to persons claiming to be entitled thereto as their own, those persons do not derive their liability to be sued from or through the Govt. and cannot tack on, the possession of the Govt. to their own. 44 Cal. 858=1 P.L.W. 593=32 M.L.J. 505=21 C.W.N. 642=15 A.L.J. 398=25 C.L.J. 487=19 Bom. L. R. 480=(1917) M.W.N. 482=6 L.W. 117=22 M.L.T. 310=44 I.A. 104=40 Ind. Cas. 337 (P.C.).

——**S. 2 (4)—Son in joint family.**

In the case of new born son in a Mitakshara family the person or persons through whom he derives this liability must be the other members of the family in whom the property which the son acquires by birth was previously vested. 66 Ind. Cas. 945=1 Pat. 506=3 P.L.T. 709=A.I.R. 1922 Pat. 450.

——**Ss. 2 (5) and 26**—Applicability—Right to take earth from land of another—If easement—Acquisition by prescription. **See** EASEMENTS ACT, S. 4. A.I.R. 1950 Pat. 202.

——**S. 2 (5)—Easement—Whether includes profit a prendre.**

What is known as profit in England is included in India in the term 'easement' in S. 2 of the Lim. Act of 1908. 16 P.L.T. 192=A.I.R. 1935 Pat. 188=1 B.R. 533=155 Ind. Cas. 966.

——**S. 2 (5)**—Although profits **a prendre** are regarded as easements in India this does not apply to profits **a prendre** in gross where there is an absence of servient

and dominant tenements. 1938 N. L. J. 306=A.I.R. 1938 Nag. 497=I.L.R. (1939) Nag. 81=181 Ind. Cas. 825.

——Ss. 2 (5) and 26—Easement rights—Indeterminate and fluctuating body if can acquire.

Under Ss. 2 (5) and 26, 20 years uninterrupted enjoyment confers the absolute right on a determinate person and not an indeterminate and fluctuating body like the **Sontals** and **Ghatwals**. 2 P.L.J. 323=2 P.L.W. 282=39 Ind. Cas. 868.

——Ss. 2 (7) 14—Good faith—Proceedings contrary to express provision of law.

Proceedings contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Lim. Act. A.I.R. 1940 Bom. 5=41 Bom. L.R. 1190=187 Ind. Cas. 85.

——Ss. 2 (7) and 14—Good faith—General Clauses Act (10 of 1897), S. 3 (20), C.P.C. (Act 5 of 1908), S. 80.

Where a suit for damages was brought by a person against a public Officer and it was dismissed for want of notice to the Officer and the plaintiff brought another suit after giving the required notice and claimed to exclude from the period of limitation the time taken by the first suit it was held that notice was imperative under S. 80 of the C. P. Code and that the plaintiff could not be taken to have acted in good faith within the meaning of S. 2 (7) of the Limitation Act or S. 3 (20) of the General Clauses of the Act. 5 S.L.R. 181=13= Ind. Cas. 260.

——Ss. 2 (7) and 5—Good faith—Sufficient cause—Wanton negligence of legal adviser.

'Good faith' implies what was done with due care and attention; wanton negligence on the part of a legal adviser is not a sufficient ground for extending the period of limitation under S. 5 of the Act. 3 P.L.J. 484=5 P.L.W. 136=46. Ind. Cas. 509.

——S. 2 (8)—"Plaintiff".

Under S. 2 (8), Lim. Act, the "plaintiff" includes any person from or through whom the plaintiff derives his right to sue. A.I.R. 1940 Cal. 228=190 Ind. Cas. 405.

——S. 2 (8)—"Plaintiff"—Watandar.

A succeeding watandar claims under his predecessor. So adverse possession against the previous holder operates equally as bar to a suit by the successor against the vendee of watan lands. 32 Bom. L.R. 1398=A.I.R. 1931 Bom. 24.

——S. 2 (8) and Art. 144—"Plaintiff"—Purchaser of tenant's right in homestead land under Ghatwal—Ejectment.

An ejectment suit against the purchaser of the right, title and interest of a tenant in homestead land under a **Ghatwal**, falls under Art. 144 of the Lim. Act. Time runs from the date when the possession of the defendant became adverse to the plaintiff. A **ghatwal** does not claim through his father and is not included in the word "plaintiff" in S. 2 of the Limitation Act. 40 Cal. 173=17 C.W.N. 137=16 C.L.J. 202=16 Ind. Cas. 365. Also 37 M. 38; 15 C.W.N. 572.

——S. 2 (8)—Purchaser from Government.

Where a purchaser of land from Government sued to recover possession within sixty years or more than 12 years from the commencement of adverse possession but within 12 years of the purchase.

Held, that the suit was barred. Art. 144 applied and there was only 12 years' limitation. Under S 2 (8) the period runs as against plaintiff's predecessor-in-title, **viz.**, the Government in this case, and it should be reckoned against plaintiff. 81 Ind. Cas. 675=28 C.W.N. 66=A.I.R. 1924 Cal. 394.

——S. 2 (8)—Cause of action—Transfer of title.

A cause of action cannot be prolonged by mere transfer of title. 4. W.R. (P.C.) 37, foll. Ind. Cas. 216 (Cal.)

——S. 2 (9), Schs 1, Art. 80—War bond.

A war bond is a promissory note for purposes of limitation and is governed by Art. 80. 64 M.L.J. 172: 37 L.W. 302=A.I.R. 1933 Mad. 376=142 Ind. Cas. 286.

——S. 2. (10)—'Suit'—How construed.

The definition of suit given in S. 2 (10) is subject to the rule that there is nothing repugnant in the subject or context. 2 Ind. Cas. 632 (All.).

——S. 3.

Synopsis.

1. **Applicability and Scope of section.**
2. **Burden of proof.**
3. **Defence.**
4. **Duty of court.**
5. **Effect on rights.**
6. **Execution cases.**
7. **Exemption from limitation.**
8. **Extension of time.**
9. **Institution of suit.**
10. **Pauper proceedings.**
11. **Period of limitation.**
12. **Plea.**
13. **Set-off**
14. **Waiver.**
15. **Miscellaneous.**

1. Applicability and Scope of section.

——S. 3—Applicability—Execution proceedings—Notice under O. 21, R. 22, C.P. Code, served on judgment-debtor—Latter, if precluded from raising issue of limitation at time of sale. **See** C.P. CODE, S. 11—EXECUTION PROCEEDINGS. 54 C.W.N. 900=A.I.R. 1950 Cal. 513.

——S. 3—Execution of award.

Section 3 of the Lim Act, applies to the application for execution of an award under Bom. Co-operative Society Act. A.I.R. 1938 Bom. 424=40 Bom. L.R. 889=177 Ind. Cas. 897.

——S. 3—Arbitration.

Although the Limitation Act does not in terms apply to arbitrations in mercantile references it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally proposed for the arbitrator's decision unless the parties have agreed to exclude that defence. Section 3 therefore applies to arbitration

proceedings. 115 Ind. Cas. 713=1929 A.L.J. 254=33 C.W.N. 485=29 M.L.W. 682=6 O.W.N. 473=49 C.L.J. 462=31 Bom. L.R. 741=56 I.A. 128=1929 M.W.N. 546=56 Cal. 1048=A.I.R. 1929 P.C. 103=56 M.L.J. 614 (P.C.).

——S. 3—Fraudulent transfer set aside—Application for mesne profits—Presidency Towns Insolvency Act, S. 7.

Held, that proceedings under S. 7 of the Presi-Towns Insol. Act were equivalent to a suit for the purposes of S. 3, Lim. Act and the Official Assignee could recover mesne profits only for a period of three years before the date of application. (1936) M.W.N. 609=71 M.L J. 289=A.I.R. 1936 Mad. 778=44 L.W. 280=59 M. 1020=164 Ind. Cas. 660 (F.B.).

——S. 3—Application for transfer.

Application under S. 39, C.P. Code, is governed by S. 3 (1), Limitation Act, and Court in considering such application must go into the question of limitation. 116 Ind. Cas. 113=29 M.L.W. 246=1929 M.W.N. 36=A.I.R. 1929 Mad. 199.

——S 3—Reference to Judge.

The Act does not apply to references to a Judge on an order by a Deputy Registrar of the Chief Court of Lower Burma, such reference neither being an appeal nor one of the applications set out in the third division of the schedule of the Act. 9 Bur. L.T. 226=38 Ind. Cas. 563.

——S. 3—Appeals from Revenue Courts.

The Act applies to appeals from Revenue Courts to the Dt. Judge. 17 O.C. 254=25. Ind. Cas. 703.

——S. 3—Scope—Suit for possession of land as raiyat.

Suit for possession of land as **raiyat** is not covered by S. 3, Lim. Act. 43 C.W.N. 1096=I.L.R. (1939) 2 Cal. 358=A.I.R. 1940 Cal. 113=187 Ind. Cas. 301.

——S. 3—Scope—Different claims in one suit.

Different claims in one suit—More than one period of limitation can be applied. 1941 M.W.N. 807=A.I.R. 1941 Mad. 786=(1949) 2 M.L.J. 244.

——S. 3—A combination of claims in one action can be split up into its component parts, each of which comes under its own rule of limitation. A.I.R. 1931 Lah. 309=130 Ind. Cas. 574.

——S. 3—Evading law of Limitation.

A party who should bring a suit for possession cannot be allowed to circumvent the law of limitation by bringing a suit for injunction. A.I.R. 1941 Pat. 181=19 Pat. 852=7 B.R. 739=22 P.L.T. 986=194 Ind. Cas. 243.

——S. 3—Articles cannot be evaded by phraseology of plaint.

Per **Sulaiman, C. J.**—The Lim. Act is in a sense, a purely arbitrary enactment and the various starting points for purposes of limitation laid down in cl. 3 of Sch. I are equally arbitrary. It is not absolutely necessary that there should be a consistency or a uniformity of any definite principle in fixing the various starting points. It is a mere matter of choice dependent on public policy; in some cases, the starting point is fixed as the date of the execution of the bond. In other cases the starting point is the date fixed for payment; in some other cases it is the date of the first default. Each article has, therefore, to be interpreted according to the particular language employed in that article and ordinarily irrespective of somewhat similar language employed in other articles.

In order to decide what article is applicable, the nature of the suit and the relief claimed are important. At the same time one has to see what is in substance the nature of the claim, and if the language of a statutory enactment is imperative, the evasion of that law cannot be tolerated simply because the phraseology of the plaint has been carefully selected. A.I.R. 1934 All. 661=(1934) A.L.J. 1035=3 A.W.R. 845=57 A 108=151 Ind. Cas. 585 (F.B.).

——S. 3—Evasion of limitation.

Where the suit, in substance, is a suit attacking the will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit. A.I.R. 1934 Lah. 913=155 Ind. Cas. 1104.

——S 3—Parties cannot by contract alter the statutory period of limitation. Nor can they alter the statutory starting point of limitation. A.I.R. 1934 All. 661=(1934) A.L J. 1035=3 A.W.R. 845=57 A. 108=151 Ind. Cas. 585 (F.B).

——S. 3—Amended plaint filed after limitation for suit—No new cause of action introduced—Question of limitation does not arise. A.I.R. 1939 Nag. 23=1939 N.L.J. 21=181 Ind. Cas. 106.

——S. 3—Where the objection of the defendant is that the decree is a nullity owing to the failure of the plaintiff to carry out the condition imposed by the decree, there is no limitation of time for raising a point of this nature. 1938 A.W.R. 415=A.I.R. 1938 All. 497=(1938) A.L.J. 673=177 Ind. Cas. 824.

2. Burden of proof.

——S 3—Suit within time—Burden of proof—Redemption suit—C. P. Code, O. 7, Rr. 1, 6 and 11.

It is clear from the provisions of S. 3 of the Limitation Act and O. 7, Rr. 1, 6 and 11, C. P. Code, that the burden rests in the first instance upon a plaintiff to show that his suit was not instituted after the period prescribed therefor by the first schedule and accordingly is not required to be dismissed under S. 3 of the Limitation Act. Accordingly in a suit for redemption where there is no evidence that the mortgage was for any fixed term, the plaintiff has to show that the mortgage was effected within 60 years of the date of suit. Mere proof by him that it was in existence within that period is not sufficient to shift to the defendant the burden of showing that the suit was not filed within time. 74 I.A. 285=I.L.R. (1947) Lah. 727=50 P.L.R. 21=29 P.L.T. 157=50 Bom. L. R. 539=1948 A.L.J. 20=1948 M.W.N. 34=61 L.W. 76=A.I.R. 1948 P. C. 36=52 C. W. N. 132=(1948) 1 M. L. J. 130 (P.C.).

——S.3—When an objection is taken that a suit is time barred, the onus is upon the plaintiff to prove that it is within time. A.I.R. 1940 Mad. 639=(1940) M. W. N. 446.

——S. 3—Execution applications—Dates of previous payments.

Where a plea of limitation is taken, burden is on the plaintiff or the applicant to show that his suit or his application is within the period prescribed by law. But each case is to be decided on its own circumstances. Where, in an execution application certain payments are

shown on certain dates and the judgment-debtor admits those payments but pleads limitation and does not deny the date of any specific payment the date of each payment need not be proved by the decree-holder in order to show that his application is not time-barred. A I.R. 1937 Sind 261 = 172 Ind. Cas. 221.

——S. 3—Grounds in plaint—If can be changed.

Per **Bajpai, J.**—If the plaint shows the grounds of exemption, the requirement of the Code is satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground. The test is that justice should not be allowed to be defeated simply because a party has not been able to prove the case which he attempted to prove, but has proved certain other facts which nevertheless entitle him to a decree, provided the aggrieved party is not taken by surprise. A.I.R. 1935 All. 946: (1935) A.L.J. 1029: 1935 A. W. R. 1155=58 A 261=159 Ind. Cas. 387 (F.B.).

——S. 3—When a defendant, in an action based on tort seeks to show that the suit is not maintainable by reason of the expiry of the statutory period of limitation, it is upon him to prove the necessary facts. 13 Pat. 752=A.I.R. 1934 Pat. 507=I.B.R. 5=16 P.L.T. 611 =151 Ind. Cas. 995.

——S. 3—Onus.

The plaintiff must prove from his own allegation that his suit is not barred by limitation. He cannot rely on deft's allegations. 6 P.R. 1912=218 P.L.R. 1911=204 P.W.R. 1911=12 Ind. Cas. 453.

3. Defence.

See also NOTE 3 (b) UNDER LIMITATION ACT (IX OF 1908), SUPRA.

——S. 3—It is a settled rule of law that limitation cannot be pleaded against a claim made by way of defence. 11 O.W.N. 1601=10 Luck. 481=A.I.R. 1935 Oudh 213=153 Ind. Cas. 307.

——S. 3—Defence.

The law of limitation does not prescribe any period which is to operate as a statutory bar to a defence. The articles of the Limitation Act apply to suits and applications and not to pleas by way of defence. 108 Ind. Cas. 149=25 A.L.J. 1086=A.I.R. 1928 All. 99.

——S. 3—There is no bar of limitation to a defence unless the suit for the relief involved in the defence falls within S. 26 or 28. 30 Mad. 444, Foll. 59 Ind. Cas. 118=45 Bom. 45=A.I.R. 1921 Bom. 257=22 Bom. L.R. 1082.

——S. 3—Defence—Applicability to.

A further advance was made by an usufructuary mortgagee on the security of the same property on condition that the second simple mortgage was to be paid off before redemption of usufructuary mortgage; **held**, since the suit on the simple mortgage was barred, the plaintiff can redeem the usufructuary mortgage without paying off the simple mortgage. 37 A. 634, Foll. 40 Ind. Cas. 404 (All.).

——S. 3—Defences—Applicability to.

A defence can be allowed though a suit to enforce. the claim is time-barred. 20 C. W. N. 957 (P. C.) Foll. (1917) M. W. N. 327=40 Ind. Cas. 820.

——S. 3 and Art. 44—Defences, applicability to.

A person, whose right to set aside an alienation is barred under Art. 44, cannot avoid it as deft. by denouncing it in a suit for possession brought by the alienee. 41 Mad. 102=33 M. L. J. 309=40 Ind. Cas. 664.

——S. 3—Defences—Applicability to.

Unless the mortgagee is compelled to bring a suit for money within S.3 he is entitled to set up every claim in defence to a suit for redemption that he has in law to support the debt which still remains due, although his right to sue under the bond be barred. 5. L. W. 593=40 Ind. Cas. 358.

——S. 3—Defences—Applicability to.

Sch. 1 provides limitation within which suit must be brought and neither it nor S. 28 applies to defences. 1 P.R. 1916=206 P.W.R. 1915=32 Ind. Cas. 485.

4. Duty of Court.

——S. 3—Duty and power of Court.

S. 3 of the Limitation Act is peremptory and lays a duty upon the Courts to act **suo motu** in all cases where the suit is instituted beyond the statutory period and the fact that parties may have thought differently or may not have noticed the point, does not make the slightest difference. The Act must be applied at **whatever** stage it is found applicable provided it is before a final order or decree is passed. I. L. R. (1947) Nag. 245=230 Ind. Cas.377=1947 N.L.J. 274=A.I.R. 1948 Nag. 41.

——S. 3—Powers of Board under Bengal Agri. Debtors' Act.

Under S. 3, Debt Settlement Board under Bengal Act 7 of 1936 must decide whether a judgment debt is barred by limitation. A. I. R. 1945 Cal. 399=49 C.W.N. 541=80 C.L.J. 157=221 Ind. Cas. 397.

——S. 3 and Civil Procedure Code, O. 8, R. 2—Apparent contradictions between.

Seemingly contradictory provisions of S. 3, Lim. Act and O. 8, R. 2, Civil P. C., are easily reconcilable. Section 3 makes the question of limitation a material question although not raised by the parties, but a Court is not bound to raise and decide a question of fact of its own motion. Hence where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the Court, the Court is bound under the provisions of S. 3 to raise the question **suo motu** and decide it.

But where the question of limitation raises issues of fact not arising from the plaint, the defendant is bound under O. 8, R. 2, to raise such question in his written statement; if he fails to do so thereafter, it is within the discretion of the Court to allow the question to be raised or not. A.I.R. 1940 Rang. 207=1940 Rang. L.R. 273=193 Ind. Cas. 61.

——S. 3—Cause of action before 1877.

The Lim. Act does not make any distinction as to whether the cause of action arose in a suit in regard to a document before or after 1877. The Act says clearly that every suit instituted after the period prescribed therefor shall be dismissed. A.I.R. 1940 All. 29=I.L.R. (1939) All. 990=(1939) A.L.J. 1127 =1940 A.W.R. 21=187 Ind. Cas. 485.

——Ss. 3, 5—S. 3, if peremptory—Applicability of rule to applications under O. 22, R. 9.

The Court has no general discretion outside the limits of the Lim. Act to dispense with its provisions or to relieve a suit from the operation of the Act on the ground of hardship or mistake. The provisions of S. 3. of the Act are peremptory and impose a duty upon

the Court to dismiss a suit or, an application as the case may be which is out of time unless the delay can be condoned under S. 5 of the Act or under any other provision of law for the time being in force. This rule applies equally to an application under O. 22, R. 9, Civil P.C. In all such cases, the burden lies heavily upon the person who claims relief under S. 5 of adducing distinct proof of the sufficient cause on which he relies. A.I.R. 1936 Sind 169=30 S.L.R. 242=165 Ind. Cas. 91.

——**S. 3**—Section 3 is peremptory and the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings. 1935 A.W.R. 615=1935 O.W.N. 527=(1935) M.W.N. 438=41 L.W. 629=(1935) A.L.J. 578=A.I.R. 1935 P.C. 85=39 C.W.N. 640=68 M.L.J. 665=61 C.L.J. 267=37 P.L.R. 395=37 Bom. L.R. 533=57 A. 242=1 B.R.479=62 I.A. 80=155 Ind. Cas. 205 (P.C.).

——S. 3—Discretion of Court.

There is authority to support the proposition that there is some sort of judicial discretion which would enable the Court to relieve the decree-holders from the operation of the Limitation Act in a case of hardship, particularly when it is alleged that the decree-holder was, in regard to the proceedings which he took by way of execution, in some way misled by some mistake in the form of the preliminary decree. It is impossible to hold that in a matter which is governed by the Act, an Act which, in some limited respects, gives the Court a statutory discretion there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. 1935 A.W.R. 615=1935 O.W.N. 527=(1935) M.W.N. 438=I.B.R. 479=41 L.W. 629=(1935) A.L.J. 578=61 C.L.J. 267=37 P.L.R. 395=37 Bom. L.R. 533=57 A. 242=A.I.R. 1935 P.C. 85=39 C.W.N. 640=68 M.L.J. 665=62 I. A. 80=155 Ind. Cas. 205 (P.C.).

——S. 3—Mandatory.

Courts are bound to apply the law of limitation in suits whether it is pleaded or not and to dismiss a suit which is apparently beyond time, Conversely they are bound, not to dismiss, as barred a suit which, on the face of it, is not barred. A.I.R. 1935 All. 946=58 A. 261=1935 A.L.J. 1029=1935 A.W.R. 1155=159 Ind. Cas. 387 (F.B.).

——S. 3—Decree of admission.

If a claim is barred, it is entirely barred and there can be no question of relief being given on the ground of admission made by the defendant in his evidence. 40 L.W. 538=(1934) M.W.N. 1250=A.I.R. 1934 Mad. 691=152 Ind. Cas. 266.

——S. 3—Suit filed after period of limitation—Limitation not set as defence.

By virtue of S. 3 a Court is bound to dismiss a suit if it has been filed after the period of limitation prescribed therefore by Sch. I of Act even if limitation has not been set up as a defence. The question of limitation, when it arises upon the facts before a Court must be heard and determined whether or not it is directly raised in the pleadings or in the grounds of appeal. (1933) A.L.J. 1283=A.I.R. 1934 All. 386=149 Ind. Cas. 651.

——S. 3—Court must see whether suit is not barred.

It is the duty of a Court under S. 3 to see that a suit is not barred by time. A general finding that a suit is not barred by limitation may become inconclusive if, on the finding of further facts, it is discovered that some other article is applicable which bars it. (1931) A.L.J. 858=A.I.R. 1932 All. 16=135 Ind. Cas. 558.

——S. 3—Duty of Court.

A Court is bound to see whether a plaintiff has brought this suit within the statutory period of limitation. 97 Ind. Cas. 635=A.I.R. 1927 Cal. 30.

——S. 3—Action by Court.

The Court has to act **suo motu**, if necessry, should it appear that a suit is barred by limitation. 93 Ind. Cas. 930=27 Bom. L.R. 1456=A.I.R. 1926 Bom. 54.

——S. 3—Construction—C.P. Code, S. 151 if affects.

C.P. Code, S. 151 does not override S. 3 of the Limitation Act. 57 Ind. Cas. 15 (Lah).

——S. 3—Duty of Court.

The question of limitation can by law be raised at any stage of the proceedings and it is always a court's duty, whether it is raised or not, to see whether the claim is barred. 40 Ind. Cas. 661. (Pat.).

——S. 3—Mandatory.

The provisions of S. 3 are mandatory where the bar appears on the face of the plaint, which does not involve questions of fact. 9 L.B.R. 71=11 Bur L.T. 73=39 Ind. Cas. 154.

——S. 3—Mandatory.

A suit or an application shall be dismissed though limitation has not been set up. The section is mandatory. 24 C.L.J. 467=21 C.W.N. 564=38 Ind. Cas. 17.

——S. 3—Plea of limitation—Effect of not raising.

Where question of limitation is not merely a question of law and is not raised by the deft. the court ought not to dismiss the suit on the ground of limitation 23. Ind. Cas. 360 (Cal.).

——S. 3—Plea of limitation—Duty of court.

Under S. 3, it is obligatory upon the Court to dismiss a time barred application although limitation is not set. as a defence. 22 C. L. J. 589=19 C. W. N. 970=29 Ind. Cas. 476.

——S. 3 (S. 4)—'Every suit'—Whole or part—Admission of claim as to part—Plea of limitation in second appeal relating to portion not admitted but decreed—Plea going to the root of the whole claim.

Where a decree has been based partly upon the admission of the defendant and partly otherwise, and the appeal is only as to this latter part and there is no appeal from the part of the decree passed upon admission, it is not open to the appellant to raise for the first time in second appeal a question of limitation if such question will also relate to the claim under the decree not appealed against. The obligation cast upon a court to dismiss a suit or an appeal under S. 4 of the Limitation Act is only in cases where it is in a position to dismiss the whole claim or suit. 5 C.L.R. 267; 9 C. 655, foll. (1904) 15 M. L. J. 402=28 M. 67.

——S. 3 (S. 4)—Issue as to limitation—Point not raised in the pleadings—Discretion of court to raise issues.

When the question of limitation is not raised in the pleadings. the judge is not bound to raise an issue about it, and it is left to his discretion to do so or not. 4 Bom. L.R. 543=6 C.W.N. 641=25 M. 367=29 I.A. 76 (P.C.).

——**S. 3 (S. 4)—Limitation, plea of, not taken by parties—Court's duty.**

A court is bound to take notice of a point of limitation even though no plea is raised by the parties. (1901) 12 M.L.J. 77=29 C. 167=4 Bom. L. R. 161=6 C.W.N. 266=25 P. R. 1902=29 Ind. Cas. 51 (P.C.).

——**S. 3 (S. 4)—Limitation—Dismissal of suit—No plea or issue.**

If upon the record it appears clearly that a suit is barred, the court can take cognisance of it and dismiss the suit, even though there was no such plea or issue. (1900) 5 C.W.N. 160=28 Cal. 86=(1903) 9 C.W.N. 58.

——**S. 3—Limitation Question as to—Raising—Point of time.**

An objection as to limitation can be taken at any stage of a suit or other proceeding including the appellate stage. S. 3 makes is mandatory on the Court to dismiss a suit which is barred even if it had not been pleaded in defence. 1949 R. D. 419.

——**S. 3—Action by Appellate Court.**

An appellate Court is not bound to take notice **suo motu** of the fact that an application made at the Trial Court was barred by limitation. 121 Ind. Cas. 552=A.I.R. 1929 All. 485.

——S. 3—Where the decision on the question of limitation depends on enquiry on facts and the plea has not been raised in the jawab-i-dawa or put in issue, the appellate Court cannot take up the question **suo motu** and dismiss the suit as time-barred. 115 Ind. Cas. 71=11 L.L.J. 91=30 P.L.R. 296=A.I.R. 1929 Lah. 432.

——**S.3—Plea of limitation—Non-raising of—Effect.**

A question of limitation arising upon the facts before a Court must be heard and determined though it is not directly raised in the pleading or in the appeal. S. 3 is not controlled by any rule of pleadings, **e. g.**, O. 41, R. 2. C. P. Code. Where the claim decreed is found to be barred by limitation in appeal the Appellate Court is not only competent, under O. 41, R. 33, C. P. Code, but must under S. 3 dismiss the suit. 8 N.L.R. 174=17 Ind. Cas. 638.

——**S. 3—Plea of limitation—Respondent precluded from raising—Duty of Court.**

If the respondent is precluded from raising the objection of limitation, the Court itself is bound to take cognizance of the question. 5 N.L.R. 50=2 Ind Cas. 229.

——**S. 3. (S. 4)—Duty of appellate Court—C.P.C., S. 542.**

Held, by the majority (**Rampini, Brett, Mitra, Mookerjee, Caspersz and Sharfuddin, JJ., Woodroffe. J. dissenting**)—The provisions of S. 4 of the Limitation Act are mandatory and ought to be given effect to even though the point of limitation is taken at a late stage of the case in the court of second appeal. Per **Woodroffe**, J:—S. 4 of the Limitation Act, 1877, is controlled by S. 542, C.P.C., 1882. The illustrations to S. 4, cannot affect the precise provisions of the other statutes. It is therefore in the discretion of the appellate court to allow or disallow a plea of limitation not set out in the grounds of appeal. Per **Mookerjee**, J:—S. 542, C.P.C. (1882) and S. 4 of the Limitation Act, are not controlled by each other. Their combined eeffct is this:—The appellant is not entitled without the leave of the court to urge or be heard in support of the ground of limitation, if that has not been set forth in his memorandum of appeal. The appellate court may grant the leave; whether it should do so depends upon the circumstances of each case. But the appellate court may, of its own motion, consider the question of limitation, though the plea has not been taken in the memorandum of appeal, and rest its decision on that ground, provided that the opposite party is given adequate opportunity to be heard on the point. In either case, however, the bar of limitation must be patent in the face of the proceeding. (1907) 11 C.W.N. 959=6 C.L.J. 237=34 C. 941 (F.B.).

——S. 3. (S. 4)—Whether an appellate court could reverse the decree on a point of limitation not set up. 8 C.W.N. 251=30 Cal. 761.

——S. 3—Provisions are mandatory—Limitation cannot be applied on equitable grounds. A.I.R. 1942 Pat. 335=8 B.R. 116=197=Ind. Cas. 217.

——S. 3—The Courts have no power, on consideration of hardship or equity, to invent new grounds of exemption from the bar of limitation not recognized by the statute. A.I.R. 1942 Mad. 487=I.L.R. (1942) Mad. 562=55 L. W. 264=(1942)=1 M.L.J. 472=202 Ind. Cas. 514.

——**S. 3—Hardship.**

There is no judicial discretion to relieve a party from the operation of the Lim. Act in a case of hardship or any authority in the Court to dispense with its provisions A.I.R. 1940 Rang. 276=1941 Rang. L.R. 1=192 Ind. Cas. 625 (F.B.).

——**S. 3—Enlargement of time.**

An application to set aside an **ex parte** decree is governed by the period of limitation prescribed by Art, 164. Section 3, Lim. Act, renders it imperative that an application presented after the period of limitation shall be dismissed. It is not open to the Courts to enlarge the period of limitation laid down by the statutory law. A.I.R. 1935 Pesh. 146.

——**S. 3—Presumption.**

Though it is the Court's duty to decide the point of limitation, even if it was not taken by the parties it must be assumed, until the contrary is shown, that the Court decided the question of limitation and if unfortunately it decided wrongly that does not affect its jurisdiction to make the order. 101 Ind. Cas. 694=8 P.L.T. 494=A.I.R. 1927 Pat. 261.

5. Effect on rights.

See also NOTE 5 UNDER LIMITATION ACT (IX OF 1908) SUPRA.

——**S. 3—Mortgage barred by limitation—It can still be used by mortgagee on defence to his right of possession.**

Even if a mortgage is barred by limitation, it is still available to the mortgagee as a shield to defend his possession: Limitation does not extinguish the liability but only bars the remedy. That the mortgage did not confer upon the mortgagee a right to possession is immaterial where the suit is one for partition calling for the adjustment of mutual rights and liabilities. A.I.R. 1943 Mad. 370=56 M. L. W. 44=1943 M.W.N. 96=(1943) 1 M.L.J. 100=209 Ind. Cas. 330.

——**S. 3—Debt remains but remedy is barred.**

The effect of S. 3, is to bring about the automatic dismissal of the suits, appeals and applications founded upon debts or causes of action which according to their

various periods of limitation, are time-barred. What the Lim. Act does not do is to extinguish the debt. The debt remains, but the remedy is destroyed. A.I.R. 1941 All. 278=1941 O.W.N. 548=I.L.R. (1941) All. 415=1941 A.W.R. 133=194 Ind. Cas. 839.

——S. 3—Time barred debt repaid after expiry of limitation—Debtor, if can recover it—Contract Act, Ss. 60 and 61.

Obiter.—If a time-barred debt is repaid after the period of limitation has expired, no action will lie for its recovery on the ground that it was barred at the date of the payment—the reason being that though the remedy at law was barred, the right in the debt still subsisted. This principle is also recognised in Ss. 60 and 61, Contract Act, which gives the right to a creditor to appropriate payments even towards time-barred debts when they are not specifically paid towards other debts. A.I.R. 1940 Lah. 166=42 P.L.R. 29=188 Ind. Cas. 833.

——S. 3—Act bars remedy only by way of suit—Right exists and can be enforced by other remedy.

The rule of limitation is a rule of proceedure, a branch of the adjective law, and does not either create or extinguish rights, except in the case of acquisition of title to immovable property by prescription under S. 28. Lim. Act. It is only the remedy by way of a suit that is barred, but the right itself continues to exist; and if there is some other remedy by which that right can be enforced the Lim. Act cannot come in the way. Thus, where the recovery of a debt is barred by lapse of time, the right to the debt is not extinguished, and if the debtor without being aware of the bar of time, pays up, he cannot sue the creditor to refund the money to him on the ground that his claim for recovery of the debt had become time-barred. A.I.R. 1939 Bom. 494=41 Bom. L. R. 1002=I. L. R. (1939) Bom. 685=185 Ind. Cas. 366.

——S. 3—Act refers only to remedy of plaintiff and not his rights.

Section 3, refers only to the remedy of the plaintiff and not to his rights and even though the remedy may be barred, the right may exist, but it does not refer at all to a defendant. The object of the Lim. Act is to prevent a party from putting forward stale or antiquated demands, and a ground of defence cannot become stale or barred by the law of limitation. All that the Act does it to take away the remedy of a plaintiff to enforce his rights by an action, and it is open to a defendant to put forward any defence though such defence as a claim made by him may be barred on the date it is put forward. A.I.R. 1935 Bom. 326=37 Bom. L. R. 471=59 B. 502=159 Ind. Cas. 213.

——S. 3—Under the Lim. Act, a debt is not destroyed, only the remedy to recover is barred. 36 Bom. L.R. 32=A.I.R. 1934 Bom. 97=150 Ind. Cas. 645.

——S. 3—Effect on rights.

The law of limitation as distinguished from the law of prescription merely bars the remedy of the plaintiff but does not extinguish his right. A barred debt can constitute a valid consideration for a fresh contract. Limitation affects only the claim of the plaintiff and has no application to a plea urged by the defendant. The defendant may therefore interpose a demand though barred as a defence to the suit. 96 Ind. Cas. 844=A.I.R. 1926 Lah. 633.

——S. 3—In the case of a personal action for a debt limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. Thus if the creditor has any form of lien upon property, he can exercise that lien notwithstanding that by the terms of the Limitation Act he could not bring a suit. 66 Ind. Cas. 203=48 Cal. 817=25 C.W.N. 300=A.I.R. 1931 Cal. 67.

6. Execution cases.

——S. 3—Execution cases.

Any Court having an application for execution made to it must **suo motu** determine the question of limitation. It has not only power but duty to determine such question. 1930 A.L.J. 1400=128 Ind. Cas. 607=A.I.R. 1930 All. 699.

——It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment debtor is not allowed to take the objection of limitation in a subsequent execution of the decree. But so long as an execution application is pending the judgment-debtor can show at any stage that the application is barred; and the Court will have no option but to dismiss the application under S. 3, Limitation Act. (1920) P.H.C.C. 109, Foll.; 9 Pat. 306=A.I R. 1930 Pat. 330.

——S. 3.—Executiug Court—Power of.

An Executing Court cannot extend the period of limitation by allowing the decre-holder to file a fresh application within a certain time. 75 P.L.R. 1909=113 P.W.R. 1909=4 Ind. Cas. 958.

7. Exemption from limitation.

——S. 3.—Exemption other than in Act, if can be claimed.

In view of the provisions of S. 3, it is not permissible to claim any exemption apart from what is contained in the Lim. Act. But where there was a cancellation of the cause of action for delivery of possession by a decree operating to suspend the rights of the auction-purchasers, they are entitled, on removal of the cancellation by the Appellate Court, to avail themselves of a fresh cause of action which arose by reason there of 1935 Cal. 333=62 Cal. 66=158 Ind. Cas. 191 (D.B.).

——Ss. 3 and 6—Exemption from limitation, grounds of.

Limitation being the results of statute law no exemption from it can be recognised apart from what the statute itself provides. 37 Mad. 186=13 M. L. T. 79 =(1913) M.W.N. 114=24 M. L. J. 96=18 Ind. Cas. 586.

——S. 3—Grounds for exemption from limitation must be specially pleaded. (1933) M. W. N. 352=38 M.L.W. 301=65 M.L.J. 271=A.I.R. 1938 Mad. 675=145 Ind. Cas. 933.

——S. 3—Intention.

It appears to be the intention of the Limitation Act that where an appellant has proceeded with due diligence, no right shall accrue to the respondent by reason merely of the lapse of the statutory period. 114 Ind. Cas. 88=32 C.W.N. 935=56 Cal. 136=A.I. R. 1929 Cal. 214 (F.B.).

——S. 3—Juristic person—Exemption from limitation.

(Per **Full Bench**).—"Juristic" person like other plaintiffs are subject to the law of limitation and enjoy no special privilege in this respect. The position of a juristic person is not that of a minor and it is doubtful whether a suit instituted on behalf of juristic person through a next friend is properly instituted. A.I.R. 1938 Lah. 369=40 P. L. R. 319=175 Ind, Cas. 945 (F.B.).

——**S. 3—Suit relating to mosque—Exemption from limitation.**

Per **Full Bench** (**Din Mohammad, J.,** dissenting.)—The personal law of the Muhammadans has been modified by the Punjab Laws Act, and the Lim. Act. Every suit is subject to the Lim. Act, and the Act applies without distinction to suits concerning both sacred and secular property; nor does it make any difference if the plaintiffs in such suits are divine or human. There being no provision in the Lim. Act exempting suits relating to **waqf** properties from its operation, the suit relating to a mosque must be held to be subject to the rules of limitation prescribed in the Lim. Act, and not to rules of Muhammadan Law. 40 P. L. R. 319= A.I.R. 1938 Lah. 369=175 Ind. Cas. 915 (F.B.).

——**S 3—Arts. 142 and 144—Exemption from limitation—Disqualified proprietor—Bengal Court of Wards Act, S. 6 (a).**

For purpose of limitation possession of the Court of Wards is possession of the ward. A disqualified proprietor under S. 6 (2) of the Bengal Court of Wards Act does not suffer under such a legal disability as to get an extended period of limitation under the Limitation Act. Consequently for a suit by him to set aside a sale of his property by the Court of Wards and to recover possession, time runs from the date when possession is given to the purchaser and not from the date when the Court of Wards gives up possession of the ward's Property. 46 Cal. 694= 36 M. L. J. 210=17 A. L. J. 202= 23 C. W. N. 531=29 C. L. J. 355= 25 M.L.T. 341=21 Bom. L. R. 611= 1 U. P. L. R. (P.C.) 16= (1919) M. W. N. 318=50 Ind. Cas. 202 (P.C.).

——**S. 3—Exemption from limitation—Court of Wards.**

Under the Limitation Act, no other disqualification than those of minority, insanity or idiocy can be admitted to save limitation. In spite of S. 35 of the Bengal Court of Wards Act of 1879, the right of suit is in the disqualified proprietor and no exemption can be made in his favour for the period of management by the Court of Wards. 19 C. W. N. 1193=28 Ind. Cas. 818.

8. Extension of time.

——S. 3—Counsel's negligence in finding application for leave to appeal to Privy Council in time--Party in position of Municipal Board—Hardship caused by Counsel's negligence :

Held, that Courts had no jurisdiction to relieve parties from the operation of the Lim. Act on the ground of hardship. A. I. R. 1944 Oudh 135-1944 O. W. N. 118=1944 A.W.R. 92=211 Ind. Cas. 499.

——S. 3—**Amended plaint—Amended plaint filed beyond time—Effect.**

When an amended plaint is filed at a time when the suit was barred by time, but a perusal of the two plaints shows that the amended plaint does no more than furnish particulars and introduces no new cause of action, no question of limitation arises. A.I.R. 1939 Nag. 23=1939 N.L.J. 21=181 Ind.Cas. 106.

——S. 3—If a person could extend the time for suing by alleging that he had mistaken the meaning of an instrument, a most serious inroad would be made into the law of limitation and that quieting of title which is the reason for and the policy behind the statutes of limitation would be gravely disturbed. A. I. R. 1938 Mad. 60=180 Ind. Cas. 462.

——**S. 3—Negligence of defendant—Exemption of time.**

The Court will not allow negligent plaintiffs to turn round and say that, inasmuch as the defendants have been late in coming to Court, although within the statutory period of limitation, extension of time should be allowed to them, namely, to the negligent plaintiffs, in order that they may prosecute their claim. 61 C. 22=A.I.R. 1934 Cal. 438=151 Ind. Cas. 432.

——**Ss. 3, 5, 29—Time for appeal fixed by Ordinance—If can be extended.**

In view of the terms of S. 29, Lim. Act, S. 5 thereof cannot be applied to extend the time for filing an appeal prescribed by the Bengal Emergency Powers Ordinance, and the High Court is prohibited by S. 3. from entertaining an appeal, filed after that period. 37 C. W. N. 201=A.I.R. 1933 Cal. 132=34 Cr. L J. 299=60 C. 618=142 Ind. Cas. 280.

——**S. 3—Extension—The maxim** lex non cogit ad impossiblia **cannot prevail against the express provision of S. 3.**

The principle that when the law creates a limitation, and the party is disabled from conforming to that limitation, without any default in him, and he has no remedy, law will ordinarily excuse him, is merely an application of the maxim "**lex non cogit ad impossibilia**" cannot prevail against the express provisions of S. 3 any more than principles of equity can prevail against the provisions of statutory law such as S. 49, Registration Act and Ss. 91 and 92, Evidence Act, especially when there is no hardship or impossibility. 115 Ind. Cas. 369 = 53 Bom. 12=30 Bom. L. R. 1463= A. I. R. 1929 Bom. 14.

——S. 3—Where the law expressly lays down the period within which the applicant is bound to make an application, the Court has no jurisdiction to extend that period. 73 Ind. Cas. 311=17 S. L. R. 255= A.I.R. 1923 Sind 14.

——**S. 3—Time granted at debtor's request.**

A verbal promise on the part of the client to pay the attorney the latter's costs which have become overdue, when money is recovered in certain execution cases—a promise on the strength of which the attorney has not taken steps to enforce payment—is an answer to any objection based on limitation made by the client against an application, by the attorney for an order for payment. 66 Ind. Cas. 209=48 Cal. 817=25 C.W.N. 800= A.I.R. 1921 Cal. 67.

——**S. 3—(S. 4) Art. 159**—Summary suit on negotiable instrument—Leave to defend—Limitation—Extension of time.—**See 5** C.W.N. 259.

9. Institution of suit

See also NOTE 10.

——**S. 3—"Suit" meaning of.**

The word "suit" ordinarily means, and apart from some context, must be taken to mean, a civil proceeding instituted by the presentation of a plaint.

An application by the liquidators in the compulsory winding of a company under S. 186 of the Companies Act for recovery of money from a contributory is not a suit within the meaning of S. 3, Lim. Act. Even if such a claim against such a Company could be held by virtue of the explanation to S. 3, Lim

Act, to be a "suit instituted", there is nothing in the explanation to justify a similar holding in regard to a claim by such a company.

The explanation to S. 3, Lim. Act, is not concerned with the question of what is a suit, or is to be considered a suit, within S. 3. It assumes the existence of a suit which has been instituted by the presentation of a a plaint, and is concerned only with the point of time at which that suit is, for the purpose of S. 3, to be treated as being instituted.

The latter portion of the explanation only means that in the case of a suit against a company which is being wound up by the Court, the institution of the suit is (for the purposes of s. 3) advanced also to an earlier date, **viz.,** the date when the claim was first sent to the Official Liquidator. It does not extend the meaning of the word 'suit' in that section so as to include mere applications in winding-up. (1933) M.W.N. 190=A.I.R. 1933 P.C. 63=(1933) A.L.J. 175=35 Bom. L.R. 319=37 L.W. 445=64 M.L.J. 403=37 C.W.N. 379=54 A. 1067=57 C.L.J. 166=60 I.A. 13=142 Ind. Cas. 7 (P.C.).

——S. 3, Expl.—Date of institution of suit—Amendment of plaint on account of circumstances happening after institution of suit.

Amendment of a plaint at a later stage on account of certain circumstances happening after the institution of the suit, cannot, by any stretch of imagination, be considered to mean the institution of a new suit, particularly when the parties are the same and the dispute is the same. A suit for a declaration without consequential relief filed within limitation cannot become time-barred on account of a later amendment of the plaint adding a consequential relief which could be granted to the plaintiff by reason of certain circumstances happening subsequent to the filing of the suit. A.I.R. 1950 Pepsu 21.

——S. 3—Suit against minor.

Order 32, R. 3, Civil P.C., as amended in the Central Provinces contemplates distinctly a suit brought against a certain defendant in which a dispute about minority is raised and in which the Court has to be satisfied about the fact of minority and then on being satisfied, it has to appoint a proper person to be the guardian. It does not mean that the suit is a nullity until that is done or that no suit can be taken to have been instituted until a guardian has been oppointed. The Lim. Act contemplates a suit brought against particular person; it does not matter whether that person is a major or a minor. The suit is not instituted against the guardian but against the minor himself and the minor does not become another person simply because he is subsequently described as a major. Consequently the suit, so far as the Lim. Act is concerned, is again, the proper person whether he is described as a major or a minor and, therefore, is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates, not to the institution of the suit, but to the right of the plaintiff to carry it on against the person who, in point of fact, is a minor. If no proper guardian is appointed, the suit of course, in the result becomes a nullity. But it is a nullity not because it is not instituted in time but because the procedure for continuing the suit against the minor and for obtaining a decree or order against him has not been carried into effect. A.I.R. 1941=Nag. 30=I.L.R. (1942) Nag. 322=1941 N.L.J. 115=193 Ind. Cas. 805.

——S. 3—Presentation of plaint with deficient Court-fee—Extension of time to make up deficiency—Effect.

Where a Court, whether rightly or otherwise, allows time under S. 149, Civil P.C., to pay court-fee even after the plaint is rejected, the order until it is set aside by a superior Court or in proper proceedings, remains a perfectly good order. It is not open to defendant to treat it as non-existent. The proper course is to apply either in review or revision to have it set aside and if this is not done, it remains in force and the suit cannot be dismissed as time barred. A.I.R. 1939 Cal 722=69 C.L.J. 379.

——S. 3—Presentation of plaint with deficient court-fee—Extension of time.

A plaint was presented on August 20, 1934, to the Judge personally at about 9 p.m. When the plaint was presented, it did not bear the requisite court-fee stamp, but it was accompanied by an application for an extension of time for the payment of the court-fee. The limitation for the suit expired on August 21, 1934. On 20th, the Judge made a note that the plaint had been presented to him and he transferred the suit for trial to the Subordinate Judge. The plaint ultimately reached the Court of the Subordinate Judge on August 22. Before the plaint reached this Court the plaintiffs had made up the deficiency in the court-fee stamp by paying the same in the Judge's Court where it was originally presented:

Held, that the plaint, under the circumstances, must be deemed to have been presented on August 20, and as court-fee was made good on 21st, the suit was within time. Even if it be assumed that the court-fee was made good on the 22nd or 23rd, it will not make any difference because the plaint having been presented on August 20, the Court was competent to extend the time for payment of the requisite cout-fee stamp under S. 149, Civil P.C., and the Court must be deemed to have granted time by accepting the court-fee on a subsequent date. A.I.R. 1937 Lah. 111=38 P.L.R. 445=167 Ind. Cas. 291.

——S. 3—Institution of suit—Deficiency in Court-fee made up within time allowed.

A plaint duly registered but insufficiently stamped was presented within time. The deficiency was subsequently discovered, time was allowed to make it good and it was made good within the time allowed. **Held**, that the suit was not barred by time. 29 A. 749, Foll. 3 Ind. Cas. 55 (All.).

——S. 3 (S. 4)—Plaint—Court fee on plaint discovered during progress of suit to be insufficient —Limitation—**See** COURT FEES ACT, S.28. (1907) A W.N. 253=4 A.L.J. 636=29 A. 749 (F.B.).

——S. 3—Plaint presented with insufficient court-fee—Deficiency made up within time allowed by court but after expiry of limitation—C P.C., S. 54 (b)—Court Fees Act, S. 28.

There can be no doubt that under S. 54 (b), C.P.C., (1882) read with S. 28 of the Court Fees Act, it is in the discretion of the court to fix a time within which the requisite court-fee is to be furnished and that if the stamp be made good within the time indicated, the date of the institution of the suit is to be reckoned from the date of presentation of the plaint. 19 C. 780, 27 C. 814, foll. (1903) 31 C. 75.

——S. 3 (S. 4)—Plaint presentation of, insufficiently stamped—Supply of deficiency at a later date—Date of institution—Civil Procedure Code, S. 54—Plaint rejection of, power of.

Where a plaint is presented on a paper insufficiently stamped, and the deficiency in stamp is made up at a subsequent date, the plaint, for the purposes of S. 4 of the Indian Limitation Act, 1877, is not to be taken as presented on the day on which the plaint is presented but on the day when the deficiency in stamp is supplied. The power of rejection of a plain under S. 54 of the Civil Procedure Code, 1882, does not arise merely because the plaint is written upon paper insufficiently stamped, but there must be the additional circumstance of a failure on the part of the plaintiff to supply the equrisite stamp paper within the period fixed. 27 Bom. 330=5 Bom. L.R. 198.

——S. 3—When a plaint is returned by a Court for want of jurisdiction and is represented to another Court, the suit is considered to be instituted on the date on which the plaint is presented to the latter Court and if by that time the period of limitation prescribed by the law in force (Punjab Act 3 of 1923 in this case) has expired the suit becomes time barred. 117 Ind. Cas. 900=A.I.R. 1929 Lah. 877.

——S. 3—Presentation of plaint.

Per **Blackwell, J.**—The moment a plaint is lodged it is presented to the Court within the meaning of S. 3. 103 Ind. Cas. 540=51 Bom. 848=29 Bom. L.R. 981=A.I.R. 1927 Bom. 480.

——S. 3—A suit must be deemed to hava been instituted on the date when the plaint was filed in Court and not on the date when it was ordered to be registered. Even if there is a defect in the verification the Court can allow an amendment at any stage ; such amendment would not make the suit open to objection on the ground of limitation. 66 Ind. Cas. 923=34 C.L.J. 465=A.I.R. 1921 Cal. 277.

——Ss. 3 and 5—Institution of suit.

Where a suit is readmitted after dismissal for default, it is deemed as filed on the date of the presentation of plaint and not the date of the readmission. 31 P.R. 1909=36 P.W.R. 1909=49 P.L.R. 1909=3 Ind. Cas. 484.

10. Pauper Proceedings.

——S. 3—The explanation to S. 3, Limitation Act is intended to show when limitation begins to run on a suit being instituted and not to affirm that an application for leave to sue as a pauper is tantamount to the filing a suit. 45 Bom. L.R. 1002=I.L.R. (1943) Bom. 721=A.I.R. 1944 Bom. 63=212 Ind. Cas. 608.

——S. 3, Expl.—Scope and effect—Pauper—Application for leave to sue as—Subsequent payment of Court-fee pending application—Effect—Date of institution of suit for limitation.

Where pending an application for leave to sue **in forma pauperis**, the plaintiffs-applicant pays the necessary Court-fee on the plaint, and it is numbered and registered as a suit, the date of the institution of the suit, for purposes of limitation is the date on which the application for leave is filed and not the date on which the Court-fee is subsequently paid. The explanation to S. 3, Limitation Act, is quite explicit. 27 Pat. 259=A.I.R. 1949 Pat. 465.

——S. 3, Explanation—Applicability of.

The provisions of the explanation S. 3 must be taken to have reference to a case in which an application to sue as pauper is granted, and it is not intended to apply to a case in which the application to sue as a pauper is rejected. A.I.R. 1939 Cal. 394=48 C.W.N. 686=I.L.R. (1939) 2 Cal. 68=69 C.L.J. 420=184 Ind. Cas. 345.

——S. 3, (S. 4)—Explanation—Per **Banerjee J.**—The explanation to S. 4 of the Limitation Act, 1877, applies only to a case where the application is granted. (1900) 28 C. 427.

——S. 3—Application not granted—Payment of court-fee—Date of institution of suit.

If the application **in forma pauperis** be not granted, the applicant may pay the court-fees on the plaint already presented and that the date of the institution of the suit will be the original date when the plaint was actually presented with the application. 41 C.W.N. 537=A.I.R. 1937 Cal. 246=55 C.L.J. 151=170 Ind. Cas. 758.

——S. 3—"Pauper," meaning of.

The word "pauper," in explanation to S. 3, means a "declared pauper" and not a person whose application to sue **in forma pauperis** is rejected. 17 L. 831=A.I.R. 1937 Lah. 151=39 P.L.R. 158=169 Ind. Cas. 368.

——S. 3—Pauper suit—When commences.

A pauper suit commences for the purpose of limitation on the day when the petition to sue **in forma pauperis** is presented to the Court under O. 23, R. 2 of C. P. Code, and not on the day when the application being granted it is numbered and registered under O. 23, R. 2.

The absence of signature and verification in the first instance does not prevent the petition as presented for being properly regarded as an application within the explanation to S. 3 of Limitation Act.

A who was dismissed by B on June 30, 1925, presented a petition for leave to sue **forma pauperis** for wrongful dismissal on June 28, 1928. There was an endorsement bearing the date June 30, 1928, by the Acting Prothonotary that it was to be interpreted and declared gratis. The petition itself was signed and solemnly declared on July 3, 1928. Leave to sue as a pauper was granted on July 24, 1928.

Held, that the application for leave to sue as a pauper was made when the petition was lodged in the Prothonotary Office on June, 28. The signature and verification were not essential in order to constitute an application for permission to sue and could properly be made subsequently. (1887) 4 B.H.C. (A.C.J.) 39 and 30 All. 95, **Foll.** 32 Bom. L.R. 1343=A.I.R. 1931 Bom. 47 (2).

——S. 3 (Ss. 4, 14)—Pauper application—Dismissal, effect of—Filing of suit within time granted by court after dismissal—C.P.C., S. 409

An application for leave to sue as a pauper was dismissed after the expiry of the period of limitation for the suit itself on the ground that the plaintiff was not a pauper and that he had concealed from the court material facts as to his property. The plaint was filed within one month of the dismissal date—the time allowed by the Court. **Held**, (1) that the suit was barred. 20 B. 508 foll. (2) that even supposing that S. 14 of the Limitation Act applied, there was no good faith on the part of the plaintiff in regard to the pauper proceedings. (1907) 9 Bom. L. R. 204.

11. Period of Limitation.

——**See also** NOTE 4 UNDER LIMITATION ACT (IX OF 1908), SUPRA.

——**S. 3—What determines.**

It is not the basis of a suit or the recitals of events given in the plaint that ordinarily determine the application of an article of the Limitation Act but it is the relief and the cause of action on which the suit is founded that determines the article of the Act applicable to the case. A.I.R. 1945 Lah. 164=47 P.L.R. 122=221 Ind. Cas. 524.

——**S. 3**—For the purpose of considering which article of the Limitation Act applies, Courts should have regard to the suit, not as framed but to the suit as it ought to have been framed. A.I.R. 1942 Oudh 33=1941 O.W.N. 1079=1941 A.W.R. 291=17 Luck. 1=196 Ind. Cas. 457.

——**S. 3**—In considering whether a particular remedy is barred, one looks, not at the relief claimed but at the cause of action, that is, at the necessary allegations which have to be made and found before the relief sought can be given. A.I.R. 1938 Nag. 335=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

——**S. 3—Test to decide which article applies.**

In order to decide which article of the Limitation Act applies, and whether the suit is barred or not, regard must be had to the nature of the suit and the relief claimed. It is the right of the plaintiff to frame his suit so as to bring it under any article of the Limitation Act, which is more favourable to him as giving a longer period than another. If he frames the suit wrongly, he take the consequences. But so long as the frame of the suit is consistent with the cause of action as alleged, the mere fact that he had made a claim which, on investigation is found to be unauthorized or which he was not entitled to make, cannot affect the question as to what article would apply. The question of limitation is to be decided with reference to the cause of action and to the frame of the suit when instituted and not with what is found at the end of the trial or the relief which is granted. 39 Bom. L.R. 224=A.I.R. 1937 Bom. 244=170 Ind. Cas. 172.

——**S. 3**—The article to apply in any proceeding is that article of the Act that relates to the from of remedy that the plaintiff seek. A.I.R. 1935 Mad. 709=42 L.W. 535=(1935) M.W.N. 1154=158 Ind. Cas. 121.

——**S. 3. Two articles wide enough to include same cause of action—Which article to be preferred.**

In giving effect to a statute of limitation, if two articles limiting the period for bringing a suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations, be preferred. A.I.R. 1934 Bom. 491=36 Bom. L.R. 1068=154 Ind. Cas. 680.

——**S. 3—Test to find out what article is applicable.**

The test of the proper article to be applied to a suit is to consider the facts alleged in the plaint and the remedy granted by the Court. It is not necessarily to be measured by the remedy which the plaintiff may have asked but which has been refused. A.I.R. 1933 Pat. 695=150 Ind. Cas. 242.

——**S. 3**—The language of Col. 3, Sch. I, should be so interpreted as to carry out the true intention of the Legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. A.I.R. 1935 Cal. 333=62 C. 66=158 Ind. Cas. 191.

——**S. 3**—When limitation is specifically provided for, the specifie provision must prevail and not the general provision in Limitation Act. A.I.R. 1935 Lah. 645=159 Ind. Cas. 1044 (1).

——**S. 3**—When a case falls within the provisions of a special article of the Limitation Act, there is no room for the application of the general article which is designed to meet cases for which no period of limitation is fixed by the Act. (1931) M.W.N. 8=A.I.R. 1931 Mad. 505=133 Ind. Cas. 193.

——**S. 3—Suspension of limitation.**

Apart from the provisions of the Limitation Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions and there can be no suspension of the period of limitation. A.I.R. 1933 Pat. 693=146 Ind. Cas. 856.

——**S. 3—Principles.**

While on the one hand, no "suspension" in the proper sense of a period of limitation which has begun to run is permissible except as provided in S. 14, etc., the Courts will place a liberal, or an accurate construction on the somewhat loosely expressed words in col. 3, Sch. I, which prescribes the starting point of the period of limitation, by not requiring parties to start legal proceedings in circumstances when it would be futile for them to do so. 60 M.L.J. 239=33 L.W.=154=A.I.R. 1931 Mad. 149=(1931) M.W.N. 18=54 M. 455=130 Ind. Cas. 738.

——**S. 3—Continuing or successive causes of action.**

The notion of continuing or successive causes of action is not entirely foreign to the Limitation Act. Where, therefore, a party has recurring or successiye causes of action, whether under the terms of contract or by operation of law, each cause of action will give a fresh start to the period of limitation and the mere fact that a party has not availed himself of the earlier cause of action, will not prevent him from availing himself of a later one. A.I.R. 1931 Pat. 285=12 P.L.T. 755=11 Pat. 112=134 Ind. Cas. 609.

——**S. 3—Period for suits.**

The period for suits is that prescribed by the 1st schedule and by Ss. 4 to 26. 40 All. 198, **Foll** 81 Ind. Cas. 484=11 O.L.J. 297=A.I.R. 1924 Oudh 385.

——**S. 3**—Mere laches is not a bar to a suit for rectification of deed on ground of mutual mistake if rights of third parties have not intervened. The date of notice of mistake is the date from which time runs. A.I.R. 1940 Bom. 321=I.L.R. (1940) Bom. 605=42 Bom. L.R. 605=192 Ind. Cas. 109.

——**S. 3—Appeal—Presentation valid and appeal within time.**

The Sub Magistrate delivered the judgment on August 25, 1928; two days were required for obtaining copy of the judgment and the appeal to the Sub-Divisonal Magistrate was presented on September 26, 1938, to the Second Clerk of that Court as the Head Clerk was absent on leave. The Sub-Divisional Magistrate passed an order dismissing the appeal on the ground that it was not filed within time allowed before the authority competent to receive it, that no reason for condoning the delay was given and that the appeal was time barred:

Held, that there was valid presentation of appeal. The appeal, therefore, was with in time. A.I.R. 1939 Mad. 669=49 L.W. 455=(1939) M.W.N. 319=40 Cr. L.J. 960=184 Ind. Cas. 353.

——S. 3—Memorandum of appeal filed on last day of limitation with insufficient court-fee—Deficit fee paid after limitation.

Where, on the last day of limitation, a memorandum of appeal was filed with a court-fee of eight annas though it was clear from the nature of the appeal and from what was stated in the memorandum itself that the proper court-fee payable was Rs. 15 and the deficit court-fee was paid by the appellant of his own accord some days latter :

Held, that the appeal must be deemed to have been presented only on the date when the full court-fee was paid and it was, therefore., barred by limitation. 44 L.W. 249=165 Ind. Cas. 57.

——S. 3—Right of plaintiff—Two causes of action

Where a person has two causes of action, one when a contract is broken and another arising when he pays money which defendant is legally bound to pay and he sues on the second, the suit is governed by Art. 61, though the suit for damages arising out of the first cause of action is barred. I.L.R. (1940) Nag. 437=20 N.L.J. 73=A.I.R. 1937 Nag. 152=169 Ind. Cas. 298.

——S. 3—Issue regarding limitation—How to be struck.

In striking an issue regarding limitation, the Court should first ascertain what article the parties consider to be applicable to the suit as framed. If the application of a particular article raises a question of fact, an issue should be strycit on those facts and if the facts are not in dispute, it may be possible to decide the question of purely legal arguments in the initial stages of the case without putting the parties to the expense of the trial. A. I. R. 1935 Lah. 982=17 L. 391=38 P.L.R. 883=160 Ind. Cas. 636 (2).

12. Plea.

——S. 3—Plea of adverse possession—If to be specifically raised. See ADVERSE POSSESSION—PLEA. I.L.R. (1947) Kar. 224=A. I. R. 1949 Sind 12.

——S. 3—Plaintiff uniting several causes of action against same defendant before Court competent to try suit as a whole—Question of limitation under S. 3, Limitation Act must be regarded with special reference to that Court's jurisdiction to try suit and not to jurisdiction of other Courts which might have been able to try those causes of action which split up, had they been brought before them. A. I. R. 1941 Mad. 786=(1941) 2 M.L.J. 244=1941 M. W. N. 807.

——S. 3—Execution application—Court competent to decide question of limitation.

Where the decree has been sent to another Court for execution, both, the Court to which the decree is sent and the Court which passed it have jurisdiction to determine the question whether the execution of the decree is time-barred or not. The question which of the two Courts is more suitable depends upon the question of convenience and priority. A. I. R. 1941 Rang. 56=1940 Rang. L. R. 725=193 Ind. Cas. 318.

——S. 3—Plea by surety for promisor—To what extent available.

Where a surety for a promisor denies liability on the ground of limitation, the plea of limitation can apply only to the debt and interest thereon, which it is alleged, had become barred by limitation at the time of the institution of the suit, and cannot apply to interest and charges which had not become barred or which have accrued subsequently. A. I. R. 1940 Cal. 401=I.L.R. (1940) 2 Cal. 362=44 C. W. N. 985=191 Ind. Cas. 608.

——S. 3—Basis for determination.

The question whether a suit is within time must be decided primarily on the basis of the plaintiff's own pleadings and not on the basis of the defence set up. A. I. R. 1933 Lah. 404=147 Ind. Cas. 57.

——S. 3—The question whether a particular claim is within limitation or not can be decided only after the plaint has been admitted. (1932) A. L. J. 489=A.I.R. 1932 All. 543=54 A. 525=138 Ind. Cas. 396.

——S. 3—Point of limitation can be taken in appeal.

Where the point of limitation is taken for the first time in the High Court that the plaintiff's claim was out of time, though the point had not been pleaded or taken in the Court below, the High Court is bound to take notice of it. A. I. R. 1940 Pat. 609=21 P. L. T. 442=6 B. R. 689=188 Ind. Cas. 411.

——S. 3—Plea at appellate stage.

It is true that the plea of limitation can be urged at any stage having regard to S. 3 but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it become difficult for the Court sitting in appeal to give effect to the defence contention and the Court is justified in rejecting it. A.I.R. 1936 Cal. 382=64 C. L.J. 513=166 Ind. Cas. 900.

——S. 3—Plaint showing point of limitation on its face—Point not argued—Defendants can raise it on appeal. A. I. R. 1934 Rang. 329=13 R. 43=154 Ind. Cas. 153.

——S. 3—Plea of limitation in Second Appeal.

The mere fact that the question of limitation was not raised in the Trial Court or in the first appellate Court or in the memorandum of appeal does not debar the Court of second appeal from going into the question if it arises on the pleadings and no question of fact has to be enquired into to dispose of the question. 35 C.W.N. 103=A.I.R. 1930 Cal. 703.

——S. 3—C. P. Code, S. 100.

No doubt, it is the duty of the Court in second appeal to entertain even for the first time the question of limitation ; but to remand a case on the ground that further investigation would disclose facts which would show that the plaint is time barred is wrong. 115 Ind. Cas. 606=32 C.W.N. 778=A.I.R. 1928 Cal. 870.

——S. 3—Plea of prescriptive right.

Plea of prescriptive right, i.e., positive limitation, cannot be taken at any stage. Plea of prescription belongs to the branch of substantive law of limitation which primarily strengthens title of a party and, therefore cannot be taken at any stage.

The plea of limitation which can be taken at any stage of the suit and even in second appeal relates to that part of the law of limitation which is negative in its operation. 109 Ind. Cas. 293=A.I.R. 1928 Nag. 203.

——S. 3—Where the determination of the question of limitation requires an investigation into facts, in order to see whether a particular payment was made in such

a manner has to extend time, the question should not be allowed to be raised in appeal for the first time. 94 Ind. Cas. 457=27 P.L.R. 432=A.I.R. 1926 Lah. 511.

——S. 3—Though point of limitation is not raised in the trial Court nor in the grounds of appeal, it can be raised for the first time at the hearing of appeal. 94 Ind. Cas. 251=27 Pat. L. R. 870=A.I.R. 1926 Lah. 451.

——S. 3—Second Appeal—Mixed question.

Under S. 3 the Court, in second appeal, cannot go into a question of limitation of its own accord and dismiss the suit as barred by limitation although it was not pleaded in defence when such a question is not a question purely of law but is one of mixed fact and law. 78 Ind. Cas. 960=A.I.R. 1925 Nag. 178.

——S. 3—Where the question as to limitation was raised in the written statement and an issue was framed, but it was not pressed in the trial Court:

Held, that the defendants-respondents were entitled to press that point on appeal. Section 3 of the Limitation Act and S. 184 of the Bengal Tenancy Act are clear upon the point. 89 Ind. Cas. 340=3 Pat. L. R. Civ. 132=7 P.L.T. 253=A.I.R. 1925 Pat. 549.

——S. 3—The plea of limitation can be taken at any stage of the case, and under S. 3 the Court of Appeal is bound to give effect to this plea when raised. But in order that this plea may be given effect to when raised in appeal it is necessary that the facts showing that the suit is barred should be apparent on the record. 67 Ind. Cas. 386=A.I.R. 1923 Cal. 283.

——S. 3—General rule.

The general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon questions of fact. Points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and on opportunity given them to meet it on the evidence.

If limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed. 66 Ind. Cas. 287=34 C.L.J. 205=A. I. R. 1921 Cal. 661.

——S. 3—A point of limitation can be taken in second appeal for the first time, if there are sufficient findings of fact on which it could be argued as a question of law. 63 Ind. Cas. 785 (Cal.).

——S. 3—Although the defendants have not raised a plea in their written statement that the debt for which the mortgagee was executed was time barred, they can raise the same in appeal for the first time. 61 Ind. Cas. 20=2 P.L.T. 318=6 P.L.J. 256=A.I.R. 1921 Pat. 99.

——S. 3—A question of limitation cannot be raised for the first time in appeal. It must be raised by the defendant, in his pleading according to C. P. Code, O. 8, R. 2. 60 Ind. Cas. 280=32 C.L.J. 236.

——S. 3—Plea of limitation—High Court's power to take up.

Where a question of limitation is raised by the written statement but no issue was framed thereon nor raised in the first appeal, **Held,** that the High Court can take the matter into consideration and dismiss the suit if it is barred. U. B. R. (1913) 164=20 Ind. Cas. 360.

——S. 3—Plea of—Limitation—Appeal.

The Court can take on a second appeal, notice of the question of limitation although it has not been taken up in the Courts below. 46 Cal. 455=22 C.W.N. 994=47 Ind. Cas. 25.

——S. 3—Plea of limitation—Appellate Court not bound to reinvestigate unless pressed.

A suit was dismissed on the merits, the Courts holding that it was not barred by limitation. The question of limitation was not reinvestigated on appeal as the defendant did not argue it. **Held,** that the Appellate Court was not called upon to determine the question of limitation, and was concerned only with the merits. 16 Ind. Cas. 418 (Cal.).

——S. 3—Plea of limitation—Appellate Court.

The abandonment of a point of limitation in a Lower Court does not relieve an Appellate Court of the duty of taking notice of the statute. But the plea of limitation in order to be effective must be properly put before the Court. 14 P.W.R. 1918=44 Ind. Cas. 890.

——S. 3—Plea of limitation—When to be taken.

A plea of limitation in the original court must be heard and decided if it is taken before issues are raised; and after the issues are fixed, the court can refuse to entertain the plea but when once the matter goes on appeal and the plea is not taken either in the original court or in the grounds of appeal but is raised in the course of arguments, the appellate court would be justified in refusing to entertain it. 84 P.R. 1911=255 P.W.R. 1911=13 Ind. Cas. 792.

——S. 3—Plea of limitation—Appellate Court—Duty of.

S. 3 of the Limitation Act does not lay upon an Appellate Court the duty of dismissing suits filed out of time in the original Court, unless its attention is drawn to it. 32. I. C. 785, Foll. 42 Ind. Cas. 536 (Mad.).

——S. 3—Plea of limitation—Point taken in Second appeal.

A plea of limitation cannot be taken for the first time in appeal, unless the point can be determined on pleadings and no evidence is necessary. A plea that the suit was barred under S. 7 as the plaintiff's elder brother could give a discharge was not allowed to be taken in second appeal as the point could not be determined without evidence as to whether he was a manager and did not collude with the defendant. 28 M.L.J. 115=28 Ind. Cas. 378.

——S. 3—Plea of limitation—Appeal—Court, when bound to enquire.

Where a plea of limitation was not taken in either of the courts below and the determination of the question involves a fresh investigation of facts, it could not be entertained on appeal. 4 Pat. L.J. 645=(1920) P.H.C.C. 91=52 Ind. Cas. 125.

——S. 3—Appellate Court—Power of, to take cognizance of.

An Appellate Court can take cognizance of the question of limitation for the first time when no further evidence is required for deciding it. 259 P.L.R. 1914=25 Ind. Cas. 354.

—— S. 3—Plea of limitation.

Where a point as to limitation was raised for the first time in application for review, the party was allowed

to raise it but was ordered to pay the costs of that application to the party. 109 Ind. Cas. 1=6 Rang. 302=55 I.A. 161=5 O.W.N. 479=30 Bom. L.R. 842=47 C.L.J. 510=26 A.L.J. 657=32 C.W. N. 845=28 M.L.W. 207=A.I.R 1928 P.C. 103=54 M.L.J. 696 (P.C.).

——S. 3—Plea of limitation —Raising of.

The question of limitation can be taken at any time in the course of proceedings. 1 Pat. L.J. 221=2 Pat. L.W. 374=36 Ind. Cas. 960.

——S. 3—Plea of limitation—When to be raised.

A plea of limitation can be raised at any stage of execution proceedings if facts are patent on the face of the record. 35 Ind. Cas. 337. (Pat.).

——S. 3—It is necessary that limitation should be pleaded in all cases. But particularly this is so where the bar is alleged under some special law. 66 Ind. Cas. 287=34 C.L.J. 205=A.I.R. 1921 Cal. 661.

13. Set-off.

——S. 3—Set-of—Limitation applicable.

Where a defendant pleads for a sum of money as set-off, which is in excess of the plaintiff's claim the time for computation is to be reckoned not from the date of the plaintiff's suit but from the date when defendant filed his written statement. 46 C.W.N. 882=A.I.R. 1942 Cal. 559=I.L.R. (1942) 2 Cal. 485=76 C.L.J. 396=203 Ind. Cas. 336.

——S. 3—A set-off to be pleaded must be within the period of limitation at the time the action of the plaintiff was brought. 5 B. R. 202=A.I.R. 1939 Pat. 142=179 Ind. Cas. 172.

——S. 3—A set-off should not be allowed where the claim is barred by limitation. A.I.R. 1936 Nag. 290=I.L.R. (1937) Nag. 481=170 Ind. Cas. 1004.

——S. 3—Set-off—Limitation applies.

So far as the position of a defendant asserting a right to set-off is concerned the limitation bar does apply to him. It applies to him as if he were bringing an independent suit of his own, the only difference being that where he is defending himself by way of set-off, if his claim was not barred at the time of the issue of plaint, he may prosecute a set-off even although the time may have elapsed before his filing, say, a written statement, claiming the set-off. But with that exception as to the **terminus ad quem** of the period of time, it is the law in India as well as in England that limitation applies to a set-off. 66 Ind. Cas. 209=48 Cal. 817=25 C.W.N. 800=A.I.R. 1921 Cal. 67.

14. Waiver.

——S. 3—Objections regarding limitation cannot be waived and even if they are waived, they can be taken up again by the parties waiving them or by the Courts themselves. A. I. R. 1940 Lah. 75=190 Ind. Cas. 379.

——S. 3—Per **Sharpe, J.**—It is impossible for parties by consent or agreement to extend or alter the period of limitation; parties cannot waive the statute. A. I. R. 1938 Rang. 328=178 Ind. Cas. 20.

——S. 3—Plea of—Omission to raise.

Where, in an appeal, after court-fee had been made good, notice was given to the respondents of the application for restoration of the appeal and the Court passed an order, after hearing the parties that the appeal be restored, and that a certain amount should be paid as the cost of respondents:

Held, that if the respondents had any objection to the restoration of the appeal on the ground that it was barred by limitation, it was obviously their right and their duty to put forward that plea as a ground for refusing the restoration of the appeal and that the parties were bound by the order restoring the appeal and it was not open to the respondents subsequently to plead that the appeal was barred by limitation. 1935 O.W.N. 68=A.I.R. 1935 Oudh 198=10 Luck. 606=153 Ind.Cas. 878.

——S. 3—Delay not amounting to estoppel or waiver, whether bars suit.

Mere delay cannot create an estoppel or waiver and is therefore, no ground for the dismissal of the suit where the plaintiff has got a cause of action and had instituted his suit within the time allowed to him under the Limitation Act. 58 C. 1359=35 C.W.N. 823=A.I.R. 1932 Cal. 221=135 Ind. Cas. 296.

——S. 3—Waiver—Effect.

Where the plea of limitation is waived though the suit is time barred, the decree following is a consent-decree and thus not appealable. 18 A.L.J. 625=(1920) M.W. N. 366=39 M.L.J. 68=28 M.L.T. 97=12 L.W. 260=44 C.W.N. 1055=2 U.P.L.R. (P.C.) 122=56 Ind. Cas. 539 (P.C.).

——S. 3—Waiver—Extension of time.

The period of limitation cannot be extended by express agreement between the parties nor can it be extended by an agreement which can be implied from circumstances such as those of the present case. It is the duty of the Court to give effect to a bar by limitation though the parties waive the plea. 3 Pat. L.J. 132=44 Ind. Cas. 570.

——S. 3—Waiver—Willingness to pay barred instalments in previous suit.

Where in a previous suit for the recovery of unpaid instalments to defendant was willing to pay barred instalments, he is not estopped from pleading limitation in respect of the same in a subsequent suit. 24 Ind. Cas. 507 (Mad.).

——S. 3—Waiver—Agreement to postpone suit—Invalidity of.

There is no estoppel against a statute. Parties cannot waive or contract themselves out of the Law of Limitation. An agreement by a person not to take advantage of a cause of action would not extend the period unless it amounts to an acknowledgment. 38 Mad. 374=(1913) M. W. N. 676=25 M. L. J. 264=21 Ind. Cas. 24.

——S. 3—Waiver—Contract against limitation—Invalid.

Parties are not at liberty to contract themselves out of the law of limitation, and the **Quilibet protest renunciare jure po se introducto** is restricted to legal provisions intended for the benefit of individuals and does not apply to rules of law based, as are statutes of limitation, on public policy and general considerations. 17 C.W.N. 518=18 Ind. Cas. 595.

15. Miscellaneous.

——S. 3—Wrong decision—Whether ultra vires—Proper remedy.

Whether a particular application is barred by limitation or not is a matter to be decided by the authority who is to act on that application. If that authority decides the question wrongly, the remedy is an appeal to the higher authority, and not a suit in the Civil Court. Where the Deputy Commissioner has decided that the cause of action for filing the application accrued when the villagers felt the necessity of having a headman, it is not for the Civil Court to say whether or not that interpretation is correct. No appeal lies to the Civil Court against the order of the Deputy Commissioner. An order passed on a barred application is not a nullity or **ultra vires.** 2 B. R. 457=17 P.L.T. 445=A.I.R. 1937 Pat. 202=15 Pat. 488=162 Ind. Cas. 582.

——S.3—Wrong decision—Award not in accord with law of limitation—Legality.

It cannot be laid down that all awards which have not been decided in accordance with terms of Limitation Act are invalid. (1931) M.W.N. 451=A.I.R. 1931 Mad. 619=34 L. W. 507=(1931) Mad. 762 (2)=133 Ind. Cas. 522 (2).

——S. 3—Proper Court.

A person wishing to appeal from a decree of the Consul-General at Kashgar must present his memorandum of appeal to the Court, that is, Consul-General, who is then charged with the duty of transmitting it to the High Court. The Consul-General it not to decide if the appeal is barred by time. The question of limitation can be taken only at the time of hearing of the appeal. A.I.R. 1933 Lah. 681=14 L. 656=34 P.L.R. 937=146 Ind. Cas. 45.

——S. 3—"Making application."—Filing notice of motion is making application (Obiter).

Where an "application" is to be made to the Court within the period of limitation prescribed by any Act, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court. 25 Q.B.D. 230 ; A.I.R. 1924 Bom. 36 ; 17 M.L.J. 215, Foll. 115 Ind. Cas. 83=55 Cal. 1341=A.I.R. 1929 Cal. 193.

——S. 3—Revision—Provincial Small Cause Courts Act, S. 25.

Revision lies from an order wrongly dismissing a suit as time barred. 115 Ind. Cas. 757=A.I.R. 1928 Lah. 274.

——S. 3—Construction—Question of limitation—If question of jurisdiction.

S. 3 of the Act does not say that the suits or applications filed after the period of limitation shall not be entertained but what it says is that such suits or applications shall be dismissed. A question of limitation is therefore not a question of jurisdiction. 46 Ind. Cas. 569 (Pat.).

——S. 3—Art. 164—Construction—Ex parte **decree—Application to set aside—Limitation.**

Art. 164 applies to an application to set aside an **ex parte** decree made after that Act came into force, the decree being passed before the Act came into force : S. 3 clearly lays a rule to that effect. 70 P. L. R. 1911=265 P.W.R. 1911=10 Ind. Cas. 823.

——S. 3—(Ss. 4, 14)—Regulation Collector under the Court of Wards not a courts—See COURT OF WARDS. 18 M.L.J. 581=31 Mad. 495.

——S. 4.

Synopsis.

1. **Applicability of section.**
2. **Court closed—Meaning of.**
3. **Court reopens—Meaning of.**
4. **Court must take judicial notice of holidays.**
5. **Plaint, appeal or application must be presented to proper Court.**
6. **Scope and Effect of section.**

1. **Applicability of section.**

(a) **General.**

(b) **Payment of money into Court.**

1 (a) Applicability of section—(General).

——S. 4—Applicability—Assignment of pronote on reopening day—Suit by assignee.

Where on the last day for a suit on a pro-note the Courts were closed and on the re-opening day the payee assigned the pro-note and the assignee filed suit on the very day :

Held, that on the date of the assignment, there was an interest that could be assigned. Section 4 applied to the case and the suit was maintainable. A.I.R. 1940 Mad. 908=52 L.W. 221=(1940) 2 M.L.J. 251=(1940) M.W.N. 777=194 Ind. Cas. 401.

——S. 4—Assignment of debt—After limitation but in Court vacation—Suit filed on re-opening—Maintainability.

When the period prescribed for a suit to recover a debt expires during the Court vacation and before re-opening the debt is assigned, the suit brought by the assignee on the re-opening day is within time. 15 Bom. L. R. 348=19 Ind. Cas. 820.

——S. 4—Applicability to deposit of costs.

Per **Agarwala**, J:—An "application" in S. 4, Limitation Act means an application to the Court to take some step which the Court is empowered to take only on being requested to do so, such as execute a decree, set aside an execution sale, etc. When making a deposit of costs, the appellant does not move the Court to do anything. Section 4, therefore, does not apply to deposit of costs. A. I. R. 1939 Pat. 667=20 P. L. T. 905=6 B.R. 159=19 Pat. 123=185 Ind.Cas. 353 (F.B.).

——S. 4—Applicability—Application under Oudh Courts Act.

The provisions of S. 4 are quite general and would apply to an application under S. 12 (2), Oudh Courts Act. A. I. R. 1938 Oudh 1861=938 O. W. N. 706=14 Luck. 138=177 Ind. Cas. 48.

——S. 4—Applicability—Application under Prov. Insol. Act.

By virtue of S. 29, Lim. Act, S. 4 of that Act applies to applications made under Prov. Insol. Act. A. I. R. 1938 Nag. 454=I. L. R. Nag. 377=178 Ind. Cas. 479.

——S. 4—Insolvency petition—Applicability.

Where three months from the date of transfer have expired during the vacation, an insolvency petition cannot be presented just after the vacation. 38 M. 794=42 L. W. 330=69 M. L. J. 283=(1935) M. W. N. 685=A. I. R. 1935 Mad. 857=158 Ind. Cas. 1 (F.B.) [Overruling A. I. R. 1934 Mad. 294=149 Ind. Cas. 339=58 Mad. 794].

——S. 4—Applicability—Prov. Insol. Act, S. 68.

Section 4 applies to application under S. 68, Prov. Insol. Act. A. I. R. 1931 Rang. 209=9 R. 150=134 Ind. Cas. 223.

——S. 4—Collector's Court.

Transfer of decree to Collector for execution—Limitation for application under O. 21, R. 89, Civil P. Code, expiring when Civil Court was closed—Application presented when Court re-opened:

Held, that the application was in time, even though the Collector's Court might have been open on the day when the limitation expired. A. I. R. 1938 Bom. 209=40 Bom. L. R. 152=175 Ind. Cas. 221.

——S. 4—Applicability—Sikh Gurdwaras Act (1925), S. 28.

Section 29 (2) (a), Limitation Act as amended in 1922, excludes the applicability of S. 4 only when a special or local law expressly excludes it. Sikh Gurdwaras Act, however, does not expressly excludes S. 4 and so its applicablity cannot be barred in the case where the Managing committee of a Gurdwara takes proceeding under S. 28, Gurdwara Act, and brings a suit for possession. A. I. R. 1930 Lah. 800.

——S. 4—Punjab Limitation (Custom) Act, Ss. 6 and 5.

The words "notwithstanding anything herein contained" do not repeal S. 5 in so far as the applicability of the provisions of Ss. 4to 25 to suits governed by S. 6 is concerned. They are intended to govern the period of limitation prescribed by the Act, and the object of section was to prescribe a maximum period of one year after the commencement of the Act for a suit which the period of limitation had commenced to run before the enforcement of the Act. 8 Lah. 711=9 L. L. J. 420=29 P. L. R. 148=A. I. R. 1927 Lah. 348.

——S. 4—Applies to applications to set aside sales on deposit.

After a sales was held in execution of a decree on 25th August, 1920, the Civil Court closed for the long vacation. When on 25th Octber, it re-opened an application was made to set aside the sale by applicant who also filed a tender offering the whole amount with compensation on the same day. The Judge signed the tender the next day on money being deposited:

Held, S. 4 applied and as the delay in payment was not due to any fault of the judgment-debtor the application was not time-barred. 67 Ind. Cas. 321=20 A. L. J. 543=A. I. R. 1922 All. 195.

——S. 4—Applicability — Private contracts between parties—Execution of decree.

S. 4 of the Limitation Act has no application to a case where a certain date has been fixed for payment by agreement of parties. A decree-holder agreed to set aside the sale, on the judgment-debtors's deposing the decretal amount within a fixed time. The Court being closed on the last day money was deposited the next day. The sale was not set aside. 1 Pat L. T. 227=56 Ind. Cas. 495.

——Ss. 4 and 31 (1)—"Prescribed" meaning of—General Clauses Act (11 of 1897), S. 10.

A suit, to which the two years period of grace provided for by S. 31 (1) was applicable, was instituted on 8th August, 1910, the 7th August being a Sunday Held, the suit was not barred by limitation. Although it such a case the limitation would not be saved under S. 4 of the Limitation Act, yet it would be so under the provisions of S. 10 of the General Clauses Act. 36 B. 268, not foll. 9 A.L.J. 439, Foll. 15 O. C. 373=15 Ind. Cas. 439.

——S. 4—Applicability—Period of grace under S. 31 (1)—Time, how reckoned—Sundays.

S. 4 is not applicable to the period of grace allowed by S. 31 (1) consequently when the last day of the two years fell on a Sunday the suit instituted on Monday i.e., the next day was held as time-barred. When an act providing a given number of days for doing a particular act says nothing about Sunday, the days are to be reckoned, as consecutive days including Sunday. Where, therefore, the last day fails on a Sunday, to do the act on Monday would be too late. 36 Bom. 268=13 Bom. L. R. 1153=12 Ind. Cas. 811.

——S. 4—Applicability—Suits under S. 77 of the Registration Act.

S. 4 of the Limitation Act, 1877 (corresponding to S. 4 of the Act of 1908) applies to suits under S. 77 of the Registration Act. If the last day for bringing a suit under S. 77, Registration Act was a holiday and the suit is brought on the next working day, the suit was not barred. The 30 days must be counted from the date when the order was communicated to the plaintiff. 16 C. W. N. 20=12 Ind. Cas. 33.

——S. 4—Applicable to suits under S. 77, Registration Act, to compel registration—**See** 1905 A.W.N. 175=2 A.L.J. 714=28 A. 48.

——S. 4 (S. 5)—Applicability—Not to orders S. 75 of the Registration Act, by the District Registrar—**See** REGISTRATION ACT, S. 75. 5 C.L.J. 188.

——S. 4—Applicability—Suit is barred.

Section 4 is applicable to the day on which the Court is closed only it such day is at the end of period of limitation and not otherwise.

Where the last day was the 9th September which was a holiday and the suit was filed in a wrong Court on the 10th and on return thereof the plaintiff represented the same in the proper Court:

Held, that S. 4 cannot operate to exclude the period between the 9th and 10th September, in computing the period of limitation. 69 Ind. Cas. 724=16 M.L.W. 911=31 M.L.T. 258=1923 M.W.N. 42=A.I.R. 1923 Mad. 114=43 M.L.J. 579.

——S. 4—Letters Patent appeals—S. 4 and other general provisions do not apply.

When the special or local law is not in itself a complete Code, the general provisions of the Limitation Act, e.g., Ss. 4, 5, 12 and so on, are ordinarily applicable to proceedings under it, inasmuch as such general provisions do not affect or alter the period prescribed by the special or local law, but only the manner in which that period is to be computed. Letters Patent being a complete Code the provisions of the Limitation Act do not apply to proceedings thereunder. 61 Ind.Cas. 327=2 Lah. 127=3 L.L.J. 415=74 P L.R. 1921=A.I.R. 1921 Lah. 26.

——Ss. 4—and 14 Applicability—Claim made within time—Reference by Decree Collector—Extension of time.

Where there were both a Regulation Collector and Decree Collector and claim was preferred to the Regulation Collector in respect of a debt before the recovery of it was barred by limitation, the claim is not liable to be dismissed as barred on the ground that the reference by the Decree Collector to the Civil Court was made after the expiry of the limitation period in consequence of the delay that happened in the disposal of the Regulation Collector. The reference by the Decree Collector to the court is not to be regarded as the institution of a suit by the claimant, and S. 4 of the Limitation Act has no application to it. The question that could properly be referred is whether the claim was legally enforcible when it was made to the Regulation Collector and not whether it was legally recoverable on some subsequent date arbitrarily fixed by the Regulation Collector. **Obiter**:—The case will be different if there was no Decree Collector at all, but there was only the Regulation Collector, when the suit will have to be filed before it is barred. A Regulation Collector is not a court "which from defect of jurisdiction was unable to entertain the claim" within the meaning of S. 14 of the Limitation Act, and S. 14 will not avail for the exclusion of the time taken before the Regulation Collector. (1907) 18 M.L.J. 581=31 M. 495=4 M.L.T. 321.

1 (b). Applicability of section—Payment of money into Court.

——S. 4—Deposit—Applicability—Amount to be deposited on a particular date—Vacation—Deposit on reopening day.

Where parties are prevented from doing a thing in Court on a particular day, not by any act of their own but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. Consequently, if the judgment-debtors are entitled to pay the money into Court on a certain date but they are prevented from doing it due to the vacation of the Court, they are within their rights if they make the deposition the re-opening of the Court. A.I.R. 1935 Lah. 369—158 Ind. Cas. 352.

——S. 4—Pre-emption decree—Last day for deposit falling on holiday — Deposit on re-opening day—Tender—Officers of Court too busy—Deposit on next day.

If a party fails to perform an act because the last day of the period allowed to it is a holiday and performs it on the next opening day of the Court, he must be deemed to have complied with his duty. This principle applies to deposit of money under a decree for pre-emption.

If there was a tender of the money on the due date but the money was not actually deposited because the officers of the Court were too busy to take it, the tender should be considered sufficient for the purpose of absolving to party concerned of any further responsibility in the matter. 33 P.L.R. 91=A.I.R. 1931 Lah. 388=134 Ind. Cas. 201.

——S. 4—Payment of money.

Where a decree is passed conditional on payment of money it is open to the party to deposit the money after the re-opening of the Court, if the Court was closed on the last date on which the money could be deposited. A.I.R. 1924 All. 218 (F.B.), Foll. 87 Ind. Cas. 620=6 L.R.A. (Civ.) 287=A.I.R. 1925 All. 687.

——S. 4—Deposit made on re-opening day the Court being closed on the day of deposit, is valid.

By an appellate decree, the plaintiff in two pre-emption cases was given one month from the 27th of September, 1921, within which to deposit certain money, if he desired to obtain the benefit of the decree in his favour. The Civil Courts closed for the vacation in that year on the 30th of September and re-opened on the 4th November. On that date the successful plaintiff made the deposit required by the decree:

Held, that the deposit tendered by Muhammad Jan the plaintiff on the 4th November, 1921, was in time under the terms of the decree. Although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused, not by any act of their own, but by some act of the Court itself, such as the fact of the Court being closed, they are entitled to do the act on the first opening day. 41 All. 47, Overruled. 78 Ind. Cas. 1014=22 A. L. J. 110=4 L.R.A. (Civ.) 88=46 All. 328=A.I.R. 1924 All. 218 (F.B.).

——S. 4—Pre-emption decree.

The plaintiff was given a decree on condition that he should pay a certain sum within a certain period. The Court was closed from the next day. The plaintiff tendered the money into Court on the next day on which the Court was open. In the meanwhile the period fixed by the decree had expired, **Held**, that the payment was within time. 67 Ind. Cas. 772=3 L. L. J. 310=A.I.R. 1921 Lah. 6 (F.B.).

——S. 4—The payment in satisfaction of a compromise decree can be made either directly to the decree-holder or into the Court. If the judgment-debtor chooses to pay the money into the Court and if on the day within which the payment has to be made, the Court is closed, the judgment-debtor can deposit the money in Court at the earliest possible opportunity afterwards, **viz.**, the date of the re-opening of the Court. There is a generally recognised principle of law, under which parties, who are prevented from doing a thing, not by any default of their own, but by the Court itself, are entitled to do it, at the first subsequent opportunity. 87 Ind. Cas. 560=1925 M. W. N. 566=21 M. L. W. 469=A. I. R. 1925 Mad. 743=48 M. L. J. 596.

——S. 4—Effect of S. 10, General Clauses Act.

The appellant sued the respondents for joint possession of a plot of land acquired by the defendants. On the 29th November, 1920 a decree of joint possession was passed in the plaintiff's favour subject to his paying one hundred rupees as contribution within six months from the date of the decree. The period of six months expired in the vacation when the Courts were closed, and the appellant deposited his money in Court on the day that the Court re-opened:

Held, that in view of S. 10, General Clauses Act, the payment was in time. 7 N.L.R. 176, Foll. 72 Ind. Cas. 388=19 N.L.R. 116=A. I. R. 1923 Nag. 246.

——S. 4—Where on the last day for payment of any sum of money under a decree which fixed a certain period thereof, the Court is closed, payment made on the re-opening day of the Court is valid. 60 Ind. Cas. 894=19 A. L. J. 49=A. I. R. 1921 All. 44.

2. Court closed—Meaning of.

——S. 4—Presiding officer on leave—Court whether closed'....

The mere absence of the presiding offier on leave is not tantamount to the Court being closed within the

meaning of S. 4 if the office of the Court was opened and documents could have been presented during the period.

The question whether the Court was closed owing to the absence of the presiding officer leave is purely a question of fact. A. I. R. 1933 Lah. 239=34 P. L. R 338=142 Ind. Cas. 307.

——S. 4—Whether Court is closed.

——Per **Blackwell, J.**—Whether a Court is or is not closed is in each case a question of fact and must depend upon the pratice which pervails in the particular Court. 103 Ind. Cas. 540=51 Bom. 848=29 Bom. L. R. 981=A. I. R. 1927 Bom. 480.

——S. 4—Court open during vacation for receiving plants, etc., is deemed to be open.

When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose. 5 Mad. 189 (F. B.), Foll.

As matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation become time-barred after the expiration of the period of limitation appropriate to such suits and plaintiffs cannot claim to exclude the whole of the Samll Cause Court's vacation. The words "other papers" are very wide and must include applications for re-trial of the suit. 70 Ind. Cas. 888=46 Mad. 938=17 M. L. W. 705=A.I.R. 1923 Mad. 435=44 M. L. J. 100.

——S. 4—Court closed — Meaning of — Officer absent in camp—Madras Civil Rules of Practice, R. 14—Applicability.

A court is not closed within S. 4, if the Officer authorised to receive plaints is absent from head-quarters and is in camp. R. 14 of the Madras Civil Rules of Practice does not apply to proceedings before a Revenue Court. 38 Mad. 295=29 Ind. Cas. 449 (F.B.).

——S. 4 (S. 5)—Plaint—Presentation on opening day of Court.

A plaint the period of limitation for filing which expires while the court is closed for vacation, presented on the opening day after the vacation, is to be treated as presented in time although the Prothonotary's office is working in the vacation for urgent work. (1907) 9 Bom. L. R. 1329.

——S. 4—Letters Patent appeal—Nagpur High Court.

The Nagpur High Court is open for receiving Letters Patent appeals during the long vacation. Section 4 cannot, therefore, be called in aid where time for such appeal expires during vacation and it is filed on the opening day of the High Court after vacation. A.I.R. 1941 Nag. 216=I.L.R. (1941) Nag. 563=1941 N.L.J 284=197 Ind. Cas. 415.

——S. 4—Original Side of High Court—Bombay.

According to prevailing practice in the Bombay High Court, suits on the Original Side can be filed in the summer vacation and therefore the Bombay High Court Original Side is not "closed" within S. 4 in the vacation. A.I.R. 1924 Bom. 144, Foll. 103 Ind. Cas. 540=51 Bom. 848=29 Bom. L. R. 981=A. I. R. 1927 Bom. 480.

——S. 4—Original Side of High Court is not closed during summer vacation—Whether Court is closed or not is a question of fact. 89 Ind. Cas. 529=25 Bom. L.R. 1296=A.I.R. 1924 Bom. 144.

3. Court re-opens—Meaning of.

——S. 4—Re-opening of Court but judicial work taken up on a later date—Application filed on that date—If within time where limitation expired during vacation.

The notification regarding the summer vacation of the High Court for the year 1942 prescribed that the Court would be closed from 28th April until the 4th July, both dates inclusive. The first day on which the Court was not closed but was open for receiving papers was 5th July, but the Judges actually sat for judicial work only from the 7th July. An application for which the prescribed period of limitation expired during the holidays was presented on 7th July instead of on 5th July.

Held, that the application was barred by limitation as having been presented out of time. 1948 M. W. N. 28=A. I. R. 1948 Mad. 521=61 L. W. 44=(1948) 1 M. L.J. 49.

——S. 4—Re-opening—Meaning of.

Office re-opening on April 3—Registrar sitting for first time after re-opening on April 5.

Held, application filed on 5th April was in time. A.I.R. 1937 Cal. 454=I.L.R. (1937) 2 Cal. 612=174 Ind. Cas. 1009.

4. Court must take Judicial notice of holidays.

——S. 4—Exemption not mentioned in plaint.

Limitation expiring during Court holidays—Presentation of plaint on re-opening day—Plaint not mentioning ground of exemption;

Held, that the omission of the ground will not entail dismissal of suit inasmuch as the Court is bound to take judicial notice of the holidays. A.I.R. 1937 Pesh. 41=39 P.L.R. 528=168 Ind. Cas. 384.

——S. 4—Holidays—Judicial notice of.

The Court is bound to take judicial notice of public holidays notified as such in the **Official Gazette** and a litigant is entitled to presume that the Court will take such notice thereof. 14 L. 240: A.I.R. 1933 Lah. 558 34 P.L.R. 540=149 Ind. Cas. 958.

5. Plaint, appeal or application must be presented to proper court.

—See also NOTE b (c).

——S. 4—Plaint presented in wrong Court returned for presentation to proper Court—No endorsement under Civil P. C., O. 7, R. 10—Pro-note basis of suit returned two days later.

Where a plaint is presented to the wrong Court, plaintiff is not entitled to any deduction on account of holidays, as what is necessary under S. 4, Lim. A ct, is that the plaint must have been presented to the proper Court.

Where, on a suit on a pro-note, being filed in the wrong Court, the Court returned the plaint for presentation to the proper Court but with no endorsement as required under O. 7, R. 10, Civil P. C., and the pro-note was returned a couple of days later and the plaint was presented to the proper Court on the day next after receipt of the pro-note.

Held, that the absence of any endorsement on the plaint as required by O. 7, R. 10, Civil P. C., was a mere irregularity and it could not be held that the proceedings were not terminated merely because the necessary endorsement was not made on the plaint. The time which was taken by the plaintiff, for obtaining the pro-note also could not be deducted. It was true that according to O. 7, R. 14 Civil P. C., any document on

which a suit was based had to be produced with the plaint, but in the present instance, if the pro-note was in Court and not in possession of the plaintiff, it was open to him to state the fact in the list of documents to be attached to the plaint. The suit was, therefore barred by time. A.I.R. 1937 Lah. 464=173 Ind. Cas. 740.

——S. 4—"Proper Court", meaning of.

Section 4, refers to "the proper Court" in which the application ought to be made, even if the jurisdiction given to such Court be for administrative convenience.

Whatever the meaning of the "proper Court" may be, a phrase which S. 4 does not employ, it is clear that the section can only refer to the Court in which the suit is actually instituted at the time when the section is being applied. It cannot refer to other Courts in which an unsuccessful attempt at institution was made. I.L.R. (1937) Nag. 217=A.I.R. 1937 Nag. 215=170 Ind. Cas. 798.

——S. 4—Scope of—Application not made to Proper court.

The provision in S. 4 means the proper Court in which the application ought to have been made and when it is impossible to say that the application was made to the proper Court on the day on which that Court re-opened, S. 4 will not apply. 1935 O.W.N. 527: 1935 A.W.R. 615: 62 I.A. 80: 1935 M.W.N. 438 41 L.W. 629: (1935) A.L.J. 578 A.I.R. 1935 P.C. 85 39 C,W.N. 640: 68 M.L.J. 665: 61 C.L J. 267: 37 P.L.R. 395: 37 Bom. L.R. 533: I.B.R. 479: 57 All. 242: 155 Ind. Cas. 205 (P.C.).

——S. 4—Proper Court—Meaning of.

Judge temporarily absent—Plaint received by Naib Sheriff having no authority to accept it—Plaint time-barred when placed before Judge though in time when fild:

Held, that the period during which the Court was closed had to be deducted in computing the period of limitation and the suit was therefore in time. A.I.R. 1934 Lah. 622 (1)=15 Lah 308=36 P.L.R. 466=152 Ind. Cas. 618.

——S. 4—(S. 5)—'The Court'.

'The court' in S. 5. of the Limitation Act, is the court to which the appeal lies direct and the High Court is not the proper court to entertain the application, when the matter comes before it by way of appeal from another order, which the party had preferred under an erroneous impression of the law. (1905) 7 Bom. L R. 664=30 B 56.

6. Scope and effect of section.

(a) General.
(b) Ss. 4 and 12.
(c) Ss. 4 and 14.
(d) Ss. 4 and 19 and 20.

——6 (a) Scope and Effect of section (General).

S. 4—Court closed on the last day of limitation—Right to take steps on the next working day.

Where on the last day of limitation for taking certain steps, the Court is closed then according to the provisions of S. 4 of the Limitation Act, those stepss could be taken on the next working day. A.I.R. 1950 A. 367=1950 A.W.R. 164.

——S. 4 and General Clauses Act, S. 10 if extend limitation or furnish data for computation of limitation.

Per Dave, J.—Section 4, Limitation Act, and S. 10, General Clauses Act, give expression to the general principle of law enunicated by the maxims **lex non cogit ad imposibilia**—the law does not compel a man to do that which he cannot possibly perform, and **actus curiae neminem gravaeit**—an act of the Court shall prejudice no man. These sections do not, in any way, extend the period of limitation, nor do they furnish any data for computation of time; they merely embody a rule of elementary justice that if the time allowed by statute to do an act or to take a proceeding expires on a day when the Court is closed, it may be done on the next siting of the Court. A.I.R 1942 All. 429=(1942) A.L.J. 592: I.L.R. (1943) All. 84: 1942 A.W.R. 368: 204 Ind. Cas. 1 (F.B.).

——S. 4, if extends period of limitation.

All that S. 4 provides is that the suit might be brought on the day when the Court re-opened if the Court happened to be closed when the period prescribed expired. The section does not extend limitation. A.I.R. 1938 Lah. 234=I.L.R. (1938) Lah. 193=40 P.L.R. 533=174 Ind. Cas. 277 (F.B.).

——S. 4—Scope.

Section 4, Limitation Act has nothing to do with computing the prescribed period but merely provided that if the prescribed period for a suit expires when the Court is closed, the suit may be instituted on the day when the Court re-opens, so that there is nothing in the section which alters the length of the prescribed period. A.I.R. 1940 Nag. 401=1940 N.L.J. 227=188 Ind. Cas. 585.

——S. 4—Suit triable both by Village Munsif and District Muusif—Limitation expiring during vacation of latter Court and suit filed on first opening day—Former Court open during latter's vacation.

The Court ought not to imply that a litigant should be deprived of his right to go to a normal Court subject to normal procedure because a Court of a very special nature, the village Court, happened to be open to him. To take away the right given by the Limitation Act requires some more substantial basis than implication.

Where, therefore, a suit which is triable by both the Village Munsif and the District Munsif and the limitation for which has expired during long vacation of District Munsif's Court, is instituted in that Court on the opening day of that Court, the suit is within limiiation under S. 4, Limitation Act. It is not barred by limitation merely because the Village Munsif's Court was open during vacation of the District Munsif's Court and the suit could have been instituted there, because, **prima facie** the plaintiff is entitled to sue in the Disirict Munsif's Court and there is no compulsion to go to the Village Munsif's Court. 51 Mad. L.W. 179= A.I.R. 1940 Mad. 945=I.L.R. (1940) Mad. 684=(1940) 1 M.L.J. 220=(1940) M.W.N. 152=194 Ind. Cas. 434.

——S. 4—Scope.

A promissory note was executed at **X** and was payable at **Y**. On the last day of limitation for the suit on the pro-note, the Court at **X** was open but the Court at **Y** was closed for vacation. The suit was filed in Court at **Y** on the day on which it re-opened :

Held, that the suit was within time. A. I. R. 1940 Cal. 443=I.L.R. (1940) 1 Cal. 323=44 C.W.N. 609= 191 Ind. Cas. 52.

——S. 4—Jurisdiction of Court when several causes of action are united—How determined.

Plaintiff unitting several causes of action against same defendant before Court competent to try suit as a whole —Questions of limitation under S. 3 and S. 4, Limitation Act. must be regarded with special referenee to that Court's jurisdiction and not to jurisdiction of other Courts which might have been able to try those causes

of action when split up had they been brought before them. A.I.R. 1941 Mad. 786=(1941) 2 M.L.J. 244=1941 Mad. 786=1941 M.W.N. 807.

——S. 4—Limitation expiring on holiday—Adjudication of debtor on reopening day—Proof of debt in insolvency.

Where the period of limitation for a suit to recover a debt of expires on a holiday and the judgment-debtor is adjudicated an insolvent on the next re-opening day, the debt can be proved in the insolvency. It is not necessary for the creditor to file a suit on the re-opening day for keeping the debt alive. 62 M.L.J. 256=35 L.W. 260=(1932) M.W.N. 216=A.I.R. 1932 Mad. 287=55 M. 630=136 Ind. Cas. 822 (F.B.).

——S. 4—Extension permissible on ground of minority.

Obiter—In order to ascertain the date of the expiration of the prescribed period, any extention permissible on the ground of minority would be included. A. I. R. 1943 Nag 284=I.L.R. (1943) Nag. 331=1943 N. L. J. 286=207 Ind. Cas. 338.

——Ss. 4, 6—Suit by ex-minor—Expiry of limitation on holiday.

If the period within which an ex-minor can institute a suit under the provisions of S. 6, expires on a day when the Court is closed, the suit can be filed on the re-opening day under S. 4. (1931) M.W.N. 1127=34 L.W. 650=61 M.L.J. 675=A.I.R. 1932 Mad. 139=55 M. 286 =135 Ind. Cas. 587.

——Ss. 4—"Prescribed" means that prescribed by first Schedule and as qualified by Ss. 5 to 25.

"The period of limitation prescribed" in S. 4 of the Act is equivalent to the period of limitation prescribed therefor by Sch. I, as mentioned in the general S. 3, to which S. 4 and most of the following sections of the Act are in the nature of provisos. But the period of limitation mentioned in S. 4 must be understood not only as prescribed in the schedule but also as qualified by Ss. 5 to 22.

An ex-minor brought a suit after three year- from the time of his having become major plus some days on which the Court was closed:

Held, that the siut was within time. 115 Ind. Cas. 509=A. I. R. 1928 Mad. 1255.

——S. 4—Meaning of "prescribed."

The proper construction of the word "prescribed" in S. 4 is 'prescribed by the Act' and not merely by the 1st Schedule. 81 Ind. Cas. 434=11 O.L.J. 297=A.I.R. 1924 Oudh 385.

——S. 4—What S. 4 says is that, if the time for presenting an application expires while Court is closed, the applicant may present it to the Court on the date when its opens again. The date of presentation goes back to the day when it ought to have been but could not be presented. A. I. R. 1928 Mad. 1255, Foll. 120 Ind. Cas. 377 (Mad.).

——S. 4—Principle.

Per **Crump, J.**—The principle underlying S. 4 is that **when** a party has to do something before a certain day and if upon that day or before that day he cannot do that thing by the reason of the act of the Court, them he is entitled to an extention of time over that period during which he is delayed by the Court's action. 103 Ind. Cas. 540=51 Bom. 843=20 Bom. L. R. 981=A.I.R. 1927 Bom. 480.

——S. 4—Operation of.

Although a party cannot extend a period allowed by law for doing an act in Court by his own act yet if the Court is closed on the last day of that period, he is entitled to do the act on the first opening day. 7 N.L.R. 176=12 Ind. Cas. 810.

——S 4—Plaint—Validity of, if depends upon validity under Court-fees Act.

The validity of plaint under S. 4 of the Limitation Act does not depend on its validity for the purposes of the Court-fees Act. 32 Mad. 305=6 M.L.T. 129=4 Ind. Cas. 503.

6 (b). Scope and effect—Ss. 4 and 12.

——Ss. 4 and 12—Extension under both sections cannot be combined.

Section 12 assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. Under S. 4, the right to present a suit or appeal or application on the day on which a Court re-opens is a special right which cannot extend the period of limitation prescribed in the Act. The section presupposes that that period has already expired. Therefore, under S. 4, the only privilege which is granted to the suitor or appellant, is that he may file his suit or appeal on that particular day and that particular day alone. If he delays in making his application for a copy until that day then he is applying for a copy when the period of limitation has already expired and the extension which is granted to him by the application of S. 4 cannot be combined with the extension which he seeks under S. 12. A.I.R. 1942 Mad. 604=55 L.W. 426=(1942) 2 M.L.J. 104=1942 M.W.N. 503=I.L.R. (1942) Mad. 868=203 Ind. Cas. 5.

——S. 4. Limitation expiring on Sunday—Application for copies on Monday—Filing of appeal on next day of getting copies—Appeal, held within time—One day's delay, held excusable. A.I.R. 1939 Bom. 46=40 Bom. L.R. 1211=179 Ind. Cas. 645.

——Ss. 4, 12—"The period of limitation prescribed" meaning of—Period prescribed should be subjected to correction under S. 12.

The words 'the period of limitation prescribed for any suit appeal or application, in S. 4, refers to the period prescribed by the Act having regard to the general application of the article appropriate to the particular class of suit, appeal or application subject to the corrections under S. 12 appropriate to the particular suit, appeal or application in question, and it contemplates the performance of an act which would otherwise have been performed at the end of that period being performed on the opening day of the term next following and not on any subsequent day. 15 P.L.T. 369=A.I.R. 1934 Pat. 367=13 Pat. 632=151 Ind. Cas. 380.

——S. 4—Application for copies.

Where the time for filing an appeal expires during vacation and the appellant applies for copies on the day the Court re-opens, an appeals filed on the day next after the issuing of the copies is within time. 19 All. 342 and 25 Bom. 584, Foll. 115 Ind Cas. 667=6 Rang. 743=A.I.R. 1929 Rang. 96.

——S. 4. Copying agent, who receives his salary from the Government, is not the agent of the litigant for the purpose of receiving application for grant of copies. If the period prescribed for the presentation of an appeal expires on a date on which the Court is closed, and if the appellant has not obtained copies of the decrees and judgment before closing the Court, and applies for such copies on the date of re-opening of the Court whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies, and if his appeal be

presented before the expiry of that time, it is not barred by limitation. 19 All. 342 Foll. 89 Ind. Cas. 437=A.I.R. 1926 Lah. 121.

——S. 4, (Ss. 5, 12)—Appeal—Expiration of time during holidays—Copies applied for on re-opening day—Deduction of time.

If the time for preferring an appeal expired during the holidays and the party not having got copies of judgment and decree before the closing of the court applied for copies on the re-opening day and preferred the appeal without further delay:—**Held**, that he was entitled to a deduction of the time taken up in obtaining copies as his right of appeal was not barred on the re-opening day and that his appeal was not barred. (1901) 3 Bom. L.R. 43=25 B. 584. **See also** (1901) 3 Bom. L.R. 244=25 B. 586.

6 (c). Scope and effect—Ss. 4 and 14.

——Ss. 4 and 14—Scope and effect.

Ss. 4 and 14 of the Limitation Act are not similar in their effect. Whereas under S. 14 of the Act the time spent can be excluded, S. 4 does not entitle a person to add the days on which the Court is closed to the statutory period. I.L.R. (1947) Nag. 494=A.I.R. 1948 Nag. 63=1947 N.L.J. 279.

——S. 4—Whether can be tacked on to S. 14.

S. 4 of the Limitation Act can be tacked on to the time excluded under S. 14 of that Act. What S. 4 provides is that where the period of limitation prescribed expires on a day when the Court is closed the application may be made on the day when the Court re-opens and "the Court" means the proper Court in which the application ought to have been made. I.L.R. (1947) Nag. 375=231 Ind. Cas. 134=A.I.R. 1948 Nag. 15=1947 N.L.J. 209.

——S. 4—Section 4 can be applied to a case in which extension of time has been claimed under S. 14 and a plaintiff is entitled to the benefit of S. 14 and S. 4 tacked together. 83 C.W.N. 221=A.I.R. 1929 Cal. 315.

——Ss. 4, 12 and 14—Scope and effect—Computation of limitation—Proper method.

Though S. 4 of the Limitation Act allows an appellant to file an appeal on the opening day of the Court though time has expired when the Court was closed, it does not operate so as to extend the prescribed period of limitation the proper method is to take what is primarily the prescribed period and then add to it the periods which are excluded by reason of S. 12 or S. 14 or such like. If these periods all taken together happen to expire on the date on which the Court is closed, the party can wait and file an appeal on the date when the Court re-opens. I. L. R. (1946) Lah. 107=230 Ind. Cas. 73=A.I.R. 1947 Lah. 168.

——Ss. 4 and 14—Distinction.

There is a marked distinction in form between Ss. 4 and 14. The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens so that there is nothing in the section which alters the length of the prescribed period; whereas in S. 14, and other sections of similar nature in the Act, the direction begins with the words: 'In computing the period of limitation prescribed for any application, certain periods shall be excluded. Therefore where there is ground for excluding certain period under S. 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period. A.I.R, 1938 All. 606=1938 A.W.R. 572=(1938) A.L.J. 1183=I.L.R. (1938) All. 861=178 Ind. Cas. 668.

——Ss. 4 and 14—Distinction between—Computation under S. 14—How to be made.

There is a marked distinction in form between Ss. 4 and 14. The language employed in S. 4 indicates that it has nothing to do with computing the prescribed period. Where there is ground for excluding certain periods under S. 14 in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily prescribed period. 1935 O. W. N. 527=(1935) M. W. N. 438=41 L. W. 629=(1935) A.L.J. 578=A. I. R. 1935 P. C. 85=39 C.W.N. 640=68 M. L. J. 665=61 C. L J. 267=I.B.R. 479=37 P.L.R. 395=37 Bom. L. R. 533=57 All. 242=62 I. A. 80=(1935) A.W.R. 615=155 Ind. Cas. 205 (P.C.).

——Ss. 4, 14, Sch. I, Art. 181—Application for execution of final mortgage decree—Time during Which preliminary decree was executed, if can be deducted.

It cannot be said, apart from any other objection that an application to obtain execution under a preliminary mortgage-decree is an application for the same relief as the application to the Court for a final mortgage-decree for the sale in the suit. Consequently, it is not permissible, on the basis of S. 14, Limitation. Act, in computing the period of limitation prescribed for an application for execution, to exclude the period during which the decree-holder was seeking execution under the preliminary decree. 1935 O. W. N. 527=(1935) M.W.N. 438=41 L. W. 629=(1935) A.L.J. 578=A.I.R. 1935 P.C. 85=39 C. W. N. 640=68 M. L. J. 665=61 C.L.J. 267=37 P.L.R. 395=57 All. 248=37 Bom. L.R. 533=1935 A.W.R. 615=I.B.R. 479=62 I.A. 80=155 Ind. Cas. 205 (P.C.).

——Ss. 4, 14—Limitation expiring during vacation—Plaint presented to wrong Court on opening day—Plaint returned for presentation to proper Court on and at once presented to such Court:

Held, that S. 14 allows one day to be excluded from the computation of limitation in this case, Section 4 merely allows the suit to be filed on the first day on which the Court re-opens. The suit was not instituted in the Court of Subordinate Judge, Second Class, on the day on which the Courts re-opened. Therefore S. 4 can have no application. If the appellant considered he had a right to insist on the Court of the Subordinate Judge, First Class, trying the case, he should have applied in revision against the order returning the plaint. I.L.R. (1937) Nag. 217=A.I.R. 1937 Nag. 215=170 Ind. Cas. 798.

——S. 4—Suit in wrong Court—Suit to be within time having to take help of S. 4, it being instituted in wrong Court—S. 14 will not apply to, when instituted in proper Court.

Where a suit, which, in order to be within limitation, had to take the advantage of a holiday under S. 4, was instituted in a wrong Court, S. 14 will not be applicable to bring it within time when subsequently instituted in proper Court. A.I.R. 1923 Mad. 114=116 P. L. R. 1920, Foll 116 Ind. Cas. 314=11 Lah. 12=A.I.R. 1929 Lah. 425.

——S. 4—Presenting application in wrong Court—Applicant cannot take advantage of both Ss. 4 and 14.

Provisions of S. 4 can be available only where the period prescribed expires when the Court is closed and the application is made to the proper Court on the day on which the Court re-opens; but if on the re-opening

day the applicant files his application in a wrong Court he cannot be entitled to take advantage of both the sections and to tack on the vacation in the period spent in prosecuting the application filed in the wrong Court. 36 Mad. 131=.A.I.R. 1921 Mad. 654=14 A.L.J. 310= A.I.R. 1923 Mad. 114, Foll.=118 Ind. Cas. 670= 1929 A.L.J. 976=A.I.R. 1929 All. 677.

——S. 4—Suit instituted in Court having no jurisdiction.

Where on the day the limitation period expires the Court having jurisdiction is closed and on the day of re-opening, the suit is instituted in a Court having no jurisdiction and the plaint is thereafter returned for presentation to the proper Court and is accordingly presented therein, the suit should be held to be barred; for the purposes of S. 4 account cannot be taken of the closing and re-opening of any other Court than that in which the suit was rightly instituted. 36 Mad. 131=36 Mad. 482 and 8 S.L.W. 256, Foll.

The period allowed by S. 14 cannot be tacked on to the period during which the proper Court was closed, when such latter period proceeds the period under S. 14. 63 Ind. Cas. 924=44 Mad. 817=13 M.L.W. 631=1921 M. W. N. 442=A. I. R. 1921 Mad. 654= 41 M.L.J. 84.

——Ss. 4 and 14—Wrong Court—Presentation in, on re-opening day—Subsequent presentation in proper Court—Deduction of time.

Plaintiff instituted a suit on the day after the last day of filing (the last day being a holiday) in a court within whose jurisdiction one only of the defendants resided. The court declined to grant leave under S. 20 (**b**) of the C. P. Code and returned the plaint for presentation to the proper court which was subsequently done. **Held**, that the plaint not having been presented to proper court on the day after the last day of limitation the suit was barred S. 4 of the Limitation Act as a particular statutory provision not for the purpose of computing the period of limitation but for allowing in certain circumstances the filling up the suits after the period had expired. This section avails only where there has been a presentation to the proper Court. S. 14 is a provision relating to the computation of the period of limitation and the time occupied in conducting **bona fide** proceedings, in a wrong court after the last day of limitation cannot be deducted in reckoning the number of days to see if the time prescribed by the article has expired. There is nothing improper or want of good faith, within S. 14 of the Act, in a creditor to discharge the debt. 24 M.L.T. 214=8 L.W. 256=47 Ind. Cas. 624.

——Ss. 4 and 14—Wrong Court—Presentation in, on re-opening day—Exclusion of holiday.

The last day of limitation for a suit on a promissory note happening to be a Sunday the suit was filed the next day in a court having no jurisdiction and having been returned by that court to be presented to the proper court; it was done so but was dismissed as barred by limitation. **Held,** that even allowing he days during which the suit was pending in the wrong court, the suit was barred by time as the plaintiffs were not entitled to exclusion of the extra day. 14 A.L.J. 310= 35 Ind. Cas. 292.

——Ss. 4 and 14—Wrong Court—Presentation in, on the re-opening day—Exclusion of holidays.

Where a suit, on the last day for filing which the Court closed for recess was filed in a wrong Court on the re-opening day and was returned several months later for presentation in a right Court and was presented there soon after, the period from the date of filing to the date of presentation in the right Court would be deducted under S. 14 of the Limitation Act but not the period of recess and S. 4 could not be invoked to save the later period. 36 Mad. 131=10 M.L.T. 254=(1911) 2 M.W.N. 221=21 M.L.J. 1000=12 Ind. Cas. 58.

6. (d) Scope and effect—Ss. 4, 19 and 20.

——S. 4—Acknoledgement on re-opening of course.

Section 4 has nothing to do with computing the period prescribed under S. 19, Limimitation Act. Where, on the date when the previous acknowledgement was due to expire, the Courts were closed for the summer vacation, the limitation would not be saved even if the fresh acknowledgment was executed on the day when the Courts re-opened. The argument that because a suit could have been instituted on the old acknowledgement when the Courts re-opened, the party could accept the fresh acnowledgement while still he had right to sue is not good. A.I.R. 1941 Nag. 100= 1940 N.L.J. 607=I.L.R. (1941) Nag. 144=194 Ind. Cas. 806.

——Ss. 4, 19—Acknowledgment.

Section 4 has no aplication to acknowledgments where the period of limitation expires on a holiday and an acknowledgment is made on the next day. Such an acknowlement is not valid. A.I.R. 1937 Lah. 642= 174 Ind. Cas. 258.

——S. 4,—Applicability and scope—Acknowledgments under S. 19.

Section 4 applies to acknowledgments under S. 19 A.I.R. 1937 Lah. 162=38 P.L.R. 934=164 Ind. Cas. 650.

——Ss. 4, 19—Acknowledgment within period of limitation extend by S. 4—Validity of.

On a true construction of the language of S. 19 of the Limitation Act, the words "period prescribed for a suit" can have reference only to the period prescribed at the end in Sch. I of the Act and the special provision which has been made applicable to suits by reason of the Court being unable to entertain a suit, application of an appeal on a day the Court is closed cannot be made applicable to acknowledgments under S. 19 of the Act. 35 C.W.N. 370=A.I.R. 1931 Cal. 785= 58 C.1148=134 Ind. Cas. 1132.

——S. 4—Per **Ramesam, J.** Section 4 cannot be tacked on prior to the period of extension given by S. 19. 26 Bom. 782, Foll. 63 Ind. Cas. 924=44 Mad. 817=13 M.L.W. 631=1921 M.W.N. 442=A.I.R. 1921 Mad. 654=41 M.L.J. 84.

——S. 4—Consideration of S. 4 is not to be introduced in wording of Ss. 19 and 20.

It is quite unworkable and really impossible to suppose that the effect of a payment or the effect of an acknowledgment should depend upon the day on which some body who never brought a suit at all could have brought it. If one was to introduce into the wording of Ss. 19 and 20, the consideration that is brought into force by S. 4, the Limitation Law would become extremely unworkable.

Where interest was paid after the expiration of the period limited for payment on the bond but during the period of the Civil Court vacation and where no suit was instituted on the day that the Court re-opened;

Held, that a fresh period of limitation could not be computed, as interest had not been paid before expiration of the prescribed period. 26 Bom. 782, Foll. 15 Bom. L.R. 348, Diss from. 114 Ind. Cas. 483=55 Cal. 1210=A.I.R. 1929 Cal. 68.

——Ss. 4 and 20—Scope and effect of S. 4—Payment during holidays after expiry of limitation—If would save limitation.

S. 4 of the Limitation Act does not prescribed a period of limitation but merely enables a suit, the limitation of which has expired during the time when the Courts are closed, to be filed on the reopening day. It does not add to any period of limitation. Accordingly, a payment made after the expiry of limitation but during the holidays when the suit could not be filed cannot be pleaded to save limitation. 21. Luck. 447=A. I. R. 1947 Oudh 3=225 Ind. Cas. 497=1946 A.W.R. (C.C.) 175=1946 O.A. (C.C.). 175=1946 O.W.N. 224.

——Ss. 4, 20—S. 4, if can be employed to extend period prescribed under S. 20.

Section 4 cannot be employed to extend the prescribed period under S. 20.

The plaintiff sued on October 4, 1933, on the basis of a promissory note dated September 13, 1927. He relied on a payment made on October 4, 1930, as saving limitation. The date on which the payment was made was more than three years from the date of promissory note, but the plaintiff relied on the provisions of S. 4, for the purpose of extending the period of limitation:

Held, that the plaintiff could not employ S. 4 to extend the period of limitation prescribed by S. 20 and hence the suit was time-barred. A.I.R. 1939 All. 252=1939 A.W.R. 153=181 Ind. Cas. 899.

——S. 5.

Synopsis

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1. **Applicability of section.**

(a) **Appeal.**
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(c) **Execution application.**
(d) **Insolvency petitions.**
(e) **Other applications and proceedings.**
(f) **Proceedings under special or local law.**
(g) **Suits.**

—1. (a) Applicability of section—Appeals.

——S. 5 Appeal, meaning of, explained.

Section 5, contemplates an appeal, application for review of judgment or for leave to appeal or any other application to which S. 5 may be made applicable, and an appeal there means an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended latter on account of any defect having been noticed in the memorandum of appeal. Unless, therefore, this section is made especially applicable to such cases, S. 5 cannot be invoked by an appellant, who has omitted to implead a necessary respondent in the case and the effect of whose omission is the dismissal of the appeal. A.I.R. 1940 Lah. 314=42 P.L.R. 355=190 Ind. Cas. 332.

——S. 5—Applicability—Letters Patent Appeal.

The provisions of S. 5 of the Limitation Act do not apply to cases which are governed by a special or local law, and cannot, therefore, be invoked in the case of a Letters Patent Appeal. 51 P.L.R. 50=A.I.R. 1949 E. P. 299.

——S. 5—Applicability—Appeal against decision of Calcutta Improvement Trust Tribunal—Calcutta Improvement Act, 1911.

S. 5 of the Limitation Act is applicable to an appeal against the decision of the President of the Tribunal, as the case may be, established under the Calcutta Improvement Act. A.I.R. 1950 Cal. 356=54 C.W.N. 297.

——S. 5—Applicability—Bengal Land Revenue Sales Act—Appeals—Delay in presentation—Power to excuse.

S. 5 of the Limitation Act has no application to cases of Revenue sales under the Bengal Land Revenue Sales Act and appeals arising therefrom.

The Land Revenue Sales Act is a self-contained Act, even in respect of limitation, and it does not provide for appeals being admitted when presented after a certain period (1947) P.W.N. 23.

——Ss. 5 and 29 (2)—Scope and effect of S. 29 (2)—Applicability of S. 5 to appeals under special laws—Application under Madras Agriculturists' Relief Act (IV of 1938)—Dismissal—Revision—Right of appeal given newly by S. 25-A—Appeal on dismissal of revision—Application to excuse delay under S. 5, Limitation Act—S. 29 of the Limitation Act if excludes the Application of S. 5 of that Act.

All that S. 29 (2) of the Limitation Act lays down is that where a special or local law prescribes a special period of limitation the excluded provisions of the Limitation Act shall not apply. In S. 25-A, newly introduced into Madras Act (IV of 1938), though a right of appeal is given no period of limitation different from the period prescribed by the first schedule to the Limitation Act is indicated. Therefore the provisions of S. 29 (2) of the Limitation Act have no application so as to exclude the provisions of S. 5 of the Limitation Act from being applied to appeals under the special law. A debtor's application under the provisions of the Madras Agriculturists' Relief Act was dismissed on some legal ground, and because of the lack of a right of appeal under the then existing provisions of the Act he had to file a revision petition to the High Court. But in the meantime owing to the amendment of that Act in 1943 by the addition of S. 25-A he became entitled to appeal against that order and preferred an appeal after the rejection of his revision petition and also prayed that the delay in filing the appeal should be excused under S. 5 of the Limitation Act.

Held, that S. 5 of the Limitation Act would apply to the case and that the petition has to be disposed of on the merits. 59 L.W. 202=1946 M.W.N. 385=A.I R. 1946 Mad. 351=(1946) 1 M.L.J. 271.

——**Ss. 5, 29** —Time for appeal fixed by Bengal Emergency Powers Ordinance cannot be extended under S. 5, Lim. Act. A.I.R. 1933 Cal. 132=37 C.W.N. 201=34 Cr. L.J. 299=60 C. 618=142 Ind. Cas. 280.

——**S. 5—Limitation prescribed by Ordinance.**

Where a person is convicted and sentenced by a Special Magistrate under S. 39 (1), Ordinance II of 1932, and he files an appeal after a period of seven days fixed for filing the appeal by S. 39 the Court is not competent to extend the period under S. 5, inasmuch as a general provision cannot be read as interfering with the specific provision in regard to question of Limitation. A.I.R 1933 Cal. 124=37 C.W.N. 195=34 Cr. L.J. 633=60 C. 571=143 Ind. Cas. 802.

——**S. 5—Appeal—Appeal requiring leave to be filed—Leave obtained after expiry of limitation.**

Where the law allows an appeal to be taken only by leave to do so, the appeal cannot be regarded as having been duly instituted until such leave is obtained.

Where such a leave is obtained long after the expiry of the period of limitation from the date of the order which is to be appealed against, it is essential that sufficient cause must be shown within the meaning of S. 5, for not duly instituting the appeal within the period of limitation. It will render the provisions in the Limitation Act prescribing the period of limitation for an appeal nugatory, if it is held that in all cases leave to appeal may be obtained after the period of limitation for the appeal and the appeal filed either within the period of limitation or after its expiry is rendered competent by the grant of leave to appeal at any time.

[Sufficient cause, when can be said to be made out explained.] A.I.R. 1937 Rang. 283=172 Ind. Cas. 253.

——**S. 5—Appeal filed without Court-fee.**

In principle, there is no difierence between a plaint or memorandum of appeal bearing no court-fee stamp at all and that bearing insufficient court-fee. An appeal filed without a court-fee stamp should not be deemed a nullity and would be a case for the application of S. 5. 1935 O.W.N. 162=1935 R.D. 78=A.I.R. 1935 Oudh 231=10 Luck. 569=154 Ind. Cas. 135.

——**S. 5—Criminal Appeal—Time cannot be extended.**

In an application of a criminal nature it would not be proper to extend the time given for the appeal even if the delay arises in consequence of any genuine mistake which could have been averted by a proper enquiry. 95 Ind. Cas. 316=20 S.L.R. 90=27 Cr. L.J. 780=A.I.R. 1926 Sind 215.

——**Ss. 5, 12, Art. 177.**

Non-applicability to appeals to Privy Conneil. **See** C.P. CODE S. 108. 1906 A.W.N. 55=28 A. 391.

1. (b) Applicability of section—Compromise decree.

—S. 5—Applicability—Compromise decree.

As neither S. 5 of the Limitation Act nor S. 10 of the General Clauses Act applies to a compromise decree, a party who was bound to do a particutar thing under such decree is not entitled to any extension of time on account of the Courts being closed on that day. On the question of the date, from which the time should be counted:

Held, that it should be counted from the date of decree. 66 Ind. Cas. 273=9 O.L.J. 53=A.I.R. 1922 Oudh 145.

1. (c) Applicabiliy of sections—Execution—Applications.

——**S. 5**—Section 5 does not apply to applications in execution at all. A.I.R. 1941 Rang. 56=1940 Rang. L.R. 725=193 Ind. Cas. 318.

——**S. 5—Execution petition.**

Section 5 cannot be invoked in the case of an application for execution of decree. A.I.R. 1932 All. 601=(1932) A.L.J. 731=138 Ind. Cas. 692.

——**S. 5—Applicability—Execution applications.**

Section 5 does not apply to execution applications. It applies only to such applications as to which it has been expressly made applicable. 93 Ind. Cas. 292=A.I.R. 1926 All. 345.

——**S. 5.—Applicability—Execution application—Extension of time.**

In the absence of any rule of enactment making S. 5 of the Act applicable to an application for execution of a decree the section does not apply to such an application. 3 Pat. L. J. 132=44 Ind. Cas. 570.

——**S. 5**—Section has no application to application for setting aside sale in execution under O. 21. Rr. 90 and 91, Civil P. Code. A.I.R. 1939 Cal. 310=69 C.L.J. 138=43 C.W.N. 383=I.L.R. (1939) 1 Cal. 452=184 Ind. Cas. 453.

——**S. 5**—Section 5 does not apply to an appication made under R. 90, O. 21. Civil P. Code A.I.R. 1934 All 314, (1934) A.L.J. 859=3 A.W.R. 545=151 Ind. Cas. 244.

——**S. 5—Execution application.**

Period of limitation under Art. 166 being fixed by statute and not by Court, it cannot be extended under S. 148, Civil P. Code or under S. 5, Limitatoin Act. A.I.R. 1934 Pesh. 25:=148 Ind. Cas. 1082.

——**S. 5—Deposit under O. 21, R. 89, Civil P.Code**

Under O. 21, R. 89, Civil P. Code the money to get the sale set aside must be deposited within 30 days of date of sale and there is no provision of law under which this time can be extended. Section 148, Civil P. Code does not apply inasmuch as this period of 30 days is not fixed as granted by the Court but it is fixed by the Code, and cannot be extended by Limtation Art. A.I.R. 1933 Rang. 8=147 Ind. Cas. 130.

——**S. 5—Applicability—Setting aside—Sales.**

The provisions of S. 5 of the Limitation Act do not apply to an application under O. 21, R. 89. 87 Ind. Cas. 722=12 O.L.J. 137=A.I.R. 1925 Oudh 411.

——**S. 5—Applicability—Application under Art. 166—Extension of time.**

S. 5 does not apply to extend the period of 30 days provided by Art. 166. 2 P.W.R. 1919=29 P.L.R. 1919=50 Ind. Cas. 610.

——**Ss. 5 and 18—Applicability—Cases under S. 47 of the C.P. Code.**

Neither S. 5 nor S. 18 of the Limitation Act has any application to cases under S. 47 of the C.P. Code 23 Ind. Cas. 240 (Cal.)

——**1. (d) Applicability of section—Insolvency petitions.**

——**S. 5**—Section 5 does not apply to petitions for insolvency. A.I.R. 1933 Lah. 821=6 R.L. 753 (2)=149 Ind. Cas. 853.

——**S. 5—Insolvency petition.**

The power to excuse delay in respect of applications uinder S. 78, Prov. Insol. Act by reference to

S. 5 Limitation Act is not applicable to excuse delay in filing a 'creditors' petition' under S. 9 of the Prov. Insol. Act. Such a petition filed more than 3 months after the alleged act of insolvency is barred by limitation. A.I.R. 1932 Mad. 352=(1932) M. W. N. 204=35 L.W. 544=53 M.L.J. 152=55 M. 766=137 Ind. Cas. 740.

——S. 5—Insolvency petition.

Where a person was indebted to a firm, and one of the partners of the firm describing himself as the managing partner applied for the adjudication of the debtor as an insolvent but the petition was not in the firm name or in the name of all the members of the firm, nor signed on behalf of firm or its members:

Held, that S. 5 could not be invoked inasmuch as an insolvency petition was not an application by a creditor or debtor 61 M.L.J. 544=A.I.R. 1932 Mad. 112=(1932) M.W.N, 164=34 L.W. 799=135 Ind. Cas. 613.

——S. 5—Applicability.—Petition to adjudicate a person as insolvent—Section in applicable.

Although it is true that S. 78, Provincial Insolvency Act, makes S. 5, Limitation Act, applicable to appeals and applications under the Provincial Insolvency Act, yet does not extend the application of S. 5, Limitation Act, to petitions to adjudicate a person insolvent. Such petitions are not included in the word "applications" as used in S. 78, Provincial Insolvency Act. Delay in presenting petitions beyond three months will not therefore be excused in any case. 112 Ind. Cas. 646=A.I.R. 1928 Sind 177.

——S. 5—Section 5 of the Indian Limitation Act did not apply to petitions made under Act III of 1907. But under the new Insolvency Act, S. 5 has been specifically declared to be applicable. 90 Ind. Cas. 254=7 L.L.J. 201=26 P.L.R. 501=A.I.R. 1925 Lah. 436.

——S. 5—Applicability—Provincial Insolvency Act.

S. 5 Applies to proceedings under Prov. Insol. Act. 80 P.W.R. 1916=33 Ind. Cas. 730.

——1. (e) Applicability of section—Other application and proceedings.

——S. 5—Applicability—Application under S. 66 (1), Income-tax Act—Delay in making—Condonation—Power of Appellate Tribunal and of High Court. **See** INCOME-TAX ACT, S. 66 (1) AND (3). 1950 I.T.R. 72.

——S.5—Section 5 has not been extended to applications under S.s. 26-F. Ben. Ten. Act. A.I.R. 1936 Cal. 388=40 C.W.N. 506=166 Ind. Cas. 492.

——S. 5—Suit dismissed for default—Application to set aside order the granting of.

Whete an order dismissing a suit for default is arbitrary and illegal, the Court would be justified in granting the benefit of S. 5 of the Limitation Act in the case of an application to set aside the order of dismissal made beyond time. 1950 R. D. 96.

——S 5—Section 5, is not applicable to applications for restorations of suit dismissed for default and the Court has no power to extend the time for making such applications. A.I.R. 1923 Pat. 557=147 Ind. Cas. 179.

——S. 5—Applicability—Dismissal for default—Civil P.C., O. 9, R. 4—Time to file application under R. 4 cannot be extended under S. 5.

Where an application for restoration of the case under O. 9, R. 4, is filed more than 30 days after the date of the dismissal, time cannot be extended under S. 5, Limitation Act, as there is no express provision in that order which S. 5 applicable to such application. 113 Ind. Cas. 767=51 All. 487=1929 A.L.J. 323=A.I.R. 1929 All. 127.

—S.5. Section 5 has not been made applicable to applications under O. 9, R. 4. 110 Ind. Cas. 47=1928 M.W.N. 239=A.I.R. 1928 Mad. 556.

——S. 5—Section made applicable by rate under S. 122 to application under O.9, R. 9—Rule is intra vires and retrospective.

The extension of the provisions S. 5, Limitation Act, to an application under C.P. Code, 9, R. 9, is not an enactment of a new period of limitation. Section 5 is not in any way amended or repealed. The change effected by the rule under C.P. Code, S. 122, relates to the procedure governing applications to restore suits, dismissed for defaul, to the file. The application was governed by Limitation Act, Art. 164, and it continued to be governed by the same article. The rule, therefore, extending S. 5, Limitation Act, to O. 9, R. 9 is **intra vires** and is retrospective. 53 Bom. L.R. 453=31 Bom. L.R. 484=A.I.R. 1929 Bom. 262.

——S.5—Section 5 has not been made applicable by any enactment or rule to an application under O. 9, R. 9, and therefore, the Court has no jurisdiction to admit the application on the ground that the applicant had sufficient cause for not preferring his application within the time prescribed. 90 Ind. Cas. 610=49 Bom. 839=27 Bom. L.R. 1150=A.I.R. 1925 Bom. 521.

——S. 5—Application for setting aside ex parte **decree.**

In the absence of special rules in that behalf, the Courts have no power to exend time under S. 5 for applications for setting aside **ex parte** decrees. Judicial Commissioner's Court at Nagpur have not framed any rules under S. 122, Civil P.C., extending the application of s. 5 to enlarge the time under Art. 164. A.I.R 1934 Nag. 43=144 Ind. Cas. 394.

——S. 5—Application to set aside ex parte **decree time-barred—Court re-opening decree—Exercise of jurisdiction not vested by law—Revision.**

Section 5 does not apply to applications for re-opening an **ex parte** decree.

Where a Judge who had before him application for re-opening an **ex parte** decree which, on the face of it, was time-barred, and which he recognized as time-barred allowed an extension of time:

Held, that in re-opening the case, he exercised a jurisdiction which he had not got and that the order re-opening the case should be set aside. A.I.R. 1933 Rang. 110=144 Ind. Cas. 980.

——S. 5—Applicability—Ex parte decree.

Section 5 does not apply to application under Art. 164. 100 Ind. Cas. 936=A.I.R. 1927 Lah. 342.

——S. 5—Section 5 of the Act applies only to appeals or applications for review of judgment or for leave to appeal. The section does not apply to applications to set aside **ex parte** decree or to restore an application dismissed for default. 85 Ind. Cas. 324=2 Rang. 655=A.I.R. 1925 Rang. 187.

——S. 5—The High Court rule under the C.P Code, under S. 122, extending S. 5 of the Limitation Act to applications under O. 9, R. 13 is **intra vires.** 80 Ind. Cas. 877=47 Mad. 824=20 M.L.W. 332=35 M.L.T. 43=1924 M.W.N. 682=A.I.R. 1925 Mad. 14 =47 M.L.J. 409 (F.B.).

——S. 5—Section 5 of the Limitation Act does not apply to an application to set aside an **ex parte** decree. Section 151 of the C.P. Code must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. 66 Ind. Cas. 270=A.I.R. 1922 Lah. 266.

——**S. 5—Applicability**—Exparte **decree, application for.**

S. 5 has not been extended to applications to have an **ex parte** decree set aside. 12 Bom. L. R. 462=6 Ind. Cas. 901.

——**S. 5**—The provisions of S. 5 are applicable to applications for substitution of names under O. 22, Ri. 3 and 4 of the Civil P.C. A. I. R. 1939 All. 717=(1939) A. L. J. 928=1939 R. D. 516=I. L. R. (1939) All 892=139 A. W. R. 713=185 Ind. Cas. 402.

——**S 5**—The provisions of S. 5, apply to an application under sub-r.R. (2) of r. 9 of R. 22, Civil P. C. A. I. R. 1938 Bom. 6=39 Bom. L.R. 1156=I.L.R. (1938) Bom. 64=172 Ind. Cas. 919.

——**S. 5—Applicability—Legal representative.**

——The provisions of S. 5 of the Limitation Act do not apply toapplica tions to bring on to the record the legal representatives of a deceased respondent. 65 Ind. Cas. 121=14 P.W.R. 1922=A.I.R. 1922 Lah. 131.

——**S. 5—Applicability—Application for substitution.**

S. 5 dose not apply to an application for substitution field beyond six months, but the remedy of the party after the abatement is to apply to have it set aside on the ground that he was prevented by sufficient cause; to this S. 5, I.L.A. will apply. 36 All. 235=12 A. L. J. 299=25 Ind. Cas. 48.

——**S. 5—Applicability—Application under Art. 158.**

The Court cannot extend the time prescribed by Art. 158. 18 C. L. J. 35=18 C. W. N. 626=17. Ind. Cas. 7.

——**S. 5—Applicability—Application under O., 34, R. 5, C. P. Code, for final decree in mortgage suit.**

S. 5 of the Limitation Act has no application to an application for a final decree in a mortgage suit and hence the Court has no power to condone the delay in making such an application under O. 34, R. 5, C. P. Code. I. L. R. (1946) Mad. 889=226 Ind. Cas. 153=59 L. W. 150=1946 M. W. N. 207=A.I.R. 1946 Mad. 381=(1946) 1 M. L. J. 192.

——**S. 5—Applicabliity—Application under O. 41, R. 19 C. P. Code.**

S. 5, Limitation Act, dose not govern applications under O. 41. R. 19, C.P. Code. A.I.R. 1950 E.P. 255.

——**S. 5—Application under R. 41, r. 19, Civil Procedures Code—S. 5, if applies.**

There is no general discretion given to the Court to waive the period of limitation, or to extend it in hard cases. Section 5 does provide for extension in certain cases, but this section only applies to appeals or applications to which this section has been made specifically applicable; it dose not apply to applications under O. 41, R. 19, Civil P. C. for it has not been specifically made to apply. A. I. R. 1943 Sind 132: (1943) Kar. 409=209 Ind. Cas. 326.

——**S. 5—Application to set aside ex parte decree appeal.**

There is no law extending the provisions of S. 5 to an application under O. 41, r. 21 Civil P.C., for setting aside an **ex parte** decree passed in appeal. (1944) 2 M. L. J. 121=1944 M. W. N. 522=A. I. R. 1944 Mad. 571=218 Ind. Cas. 451.

——**S. 5.**—The provisions of S. 5 apply to an application for leave to appeal **in forma pauperis**. A.I.R. 1942 Oudh 240 : 1942 O.W.N. 106=1942 R.D. 181=1942 A.W.R. 79 (2)=17 Luck. 628=199 Ind. Cas. 614.

——**S. 5.**—Section 5 has no application to an application under O. 44, R. 1, Civil P. C. 1940 A. W. R 89 (1)=1940 O.W.N. 172=(1940) 95 Luck. 390=186 Ind. Cas. 161.

——**S. 5—Application for leave to appeal.**

An order rejecting an application for leave to appeal as a pauper on the ground of limitation at the preliminary stage before it is actually judicially considered by the Court under O. 44, R. 1. Civil P.C., is technically an order rejecting a moeion to present an application and not an order reject the application itself undet O. 44, r. 1. and where an application is rejected ar that stage, the Court cannot subsequently entertain an application under S. 5 Lim. Act, for extension of time. A. I. R. 1933 All. 308=(1933) A. L. J. 585=144 Ind. Cas. 79.

——**S. 5—Applicability—Pauper application.**

Per **Ross J.**—When an appeal is instituted with an application for leave to appeal **in forma pauperis**, the terms of R. 1 of O. 44 make it clear that the judgment and decree are appealed from and the rejection of the application has no effect necessarily on the appeal from the judgment and deerce. There is a distinction between the proceedure in a pauper appeal. In the latter case there is an appeal before Court which was presented within the time limited by law but as no part of the Court fee has been paid S. 149, C. P. Code, gives the Court a discretion to allow the payment at any stage. Even if S. 149 had not this effect, this would be a case for the application of S. 5 Limitation Act. 115 Ind. Cas. 678=9 P.L.T. 613.

——**S. 5—Construction—"For leave to appeal."**

The words "for leave to appeal" in the section are wide enough to include an application for leave to appeal as a pauper. 111 Ind. Cas. 655=26 A.L.J. 847=A.I.R. 1928 All. 499.

——**S. 5.**—Delay in filing an application to appeal **in forma pauperis** cannot be condoned S. 5. 30 Cal. 790, Foll. 101 Ind. Cas. 320=A.I.R. 1927 Nag. 197.

——**S. 5.**—Section 5 is applicable to an application for leave to appeal to His Majesty in Council. Where an application for review of an order dismissed after it was granted:

Held, the order being wrong must be ignored and the time taken must be deducted in computing the period of limitation for appeal from the original order. 74 Ind. Cas. 214=9 O. L. J. 531=26 O. C. 24=A. I. R. 1923 Oudh 93.

——**S. 5—Applicability—Privy Council—Appeal.**

An application for leave to appeal to His Majesty in Council clearly comes within the purview of S. 5. Where on affidavit was filed to the effect that the agent of the applicant was coming to Allahabad for the purpose of filing the application that when he reached the Aligarh station, he had an attack of Renal Colic, which confined him to bed till the 2nd of November, following and the affidavit was uncontradicted and supported by a medical certificate.

——**S. 5—Applicability—Privy Council—Appeal.**

Held, that sufficient reason had been shown for the delay. 76 Ind. Cas. 375=A.I.R. 1923 All. 536.

An application for leave to appe l to Privy Council field during long vacation comes under Art. 5 of the Limitation Act. 10 C.L.J. 120=3 Ind. Cas. 401.

——**S. 5—Applicability—Application for leave to Appeal to P. C.**

S. 5 of the Act applies to Art. 179 of the Act. Thus the benefit of S. 5 of the Act may be invoked for an application for leave to appeal to the Privy

Council, where such application was filed in the office of the High Court when it was closed during the long action. 10 C.L.J. 1183=Ind. Cas. 400.

——S. 5—Applicability—Land Acquisition Act.

Section 5 has no application to proceedings under the Land Acquisition Act. 103 Ind. Cas. 295=8 P.L.T. 710 A.I.R. 1927 Pat. 333.

——S. 5—Applicability—Provincial Small Cause Courts Act.

A Court has discretion under S. 5 of the Limitation Act to excuse delay in making the application as required by S. 17 of the Provincial Small Cause Courts Act. 102 Ind. Cas. 228=10 N. L. J. 76=A. I. R. 1927 Nag. 238.

——S. 5—The proviso as to a deposit or security being made at the time of presenting an application is merely directory and not mandatory and Court has power to extend the time. 99 Ind. Cas. 779=A. I. R. 1927 Nag. 165.

——S. 5—Applicability—Provincial Small Cause Courts Act.

The provisions of S. 5 of the Limitation Act do not apply to an application under the Provincial Small Causes Courts Act, S. 17 to set aside an **ex parte** decree. 89 Ind. Cas. 482=2 O. W. N. 440=A. I. R. 1925 Oudh 446.

——S. 5—Court can excuse the delay.

Along with an application to set aside the **ex parte** decree which was passed under the provisions of the Provincial Small Cause Courts Act, the full amount of the decree and costs was not, owing to a mistake on the part of the vakil's **gumasta**, paid within the 30 days. The difference was made up after the 30 days when the error was discovered.

Held, the Court could excuse the delay. The payment of the decretal amount into the Court is not independent of the petition for setting aside the **ex parte** decree. 66 Ind. Cas. 104=46 Mad. 628=15 M.L.W. 494=1922 M.W.N. 266=30 M.L.T. 342=A.I.R. 1922 Mad. 186=42 M.L.J. 484.

——S. 5—Applicability—Application under S. 17, Provincial Small Causes Courts Act.

An application for review of judgment of a Small Cause Court was made on the last day of the period prescribed for limitation but without deposit of the amount of costs or security for the same as required by S. 17. On the following day the Court allowed the applicant time for making the deposit which was eventually made and the application for review was granted:

Held, that the application failed to comply with S. 17 and was barred under Art. 161, Limitation Act., it was doubtful whether S. 5, Limitation Act applied to the case at all as the application was made within time. 24 C.W. N. 380=31 C.L.J. 197=56 Ind. Cas. 551.

——S. 5—Applicability—Rangoon Rent Act.

Section 5 does not apply to application under S. 18 of the Rangoon Rent Act to the Chief Judge of the Small Cause Court. 84 Ind. Cas. 284=3 Bur. L.J. 157 =A.I.R. 1924 Rang. 377.

——S. 5—Applicability—Revision to Oudh Chief Court.

Revision applications cannot be admitted by the Chief Court beyond the time allowed for appeals except for special reasons. 7 O. W. N. 894=A. I. R. 1934 Oudh 496.

——S. 5—Applicability—Rules of High Court.

Whether in a case the limitation is fixed not under the Limitation Act, but under the rules framed by the particular High Court, the section is not applicable and time cannot be extended if there is no power to extend under the rules. 110 Ind. Cas. 719=50 All. 865=26 A.L.J. 1317=A.I.R. 1928 All. 708.

——S. 5—Applicability—Setting aside Award.

Section 5 does not apply to applications under Art. 158. 100 Ind. Cas. 955=8 Lah. 274=28 P.L.R. 441=A.I.R. 1927 Lah. 273.

1. (f) Applicability of section—Proceedings under special or local law.

See also Notes (1) (a) and (e).

——S. 5—Scope—If excluded by S. 29 (2) (b).

S. 29 (2) (b) of the limitation Act cannot be read as excluding the operation of S. 5 of the Act. S. 29 (2) (b) only applies for the purpose of determining the period of limitation prescribed for a suit, appeal or application. Once that period has been determined, S. 5 of the Act comes in and gives the Court discretion o extend it for sufficient cause. 12 B R. 62.

——S. 5—Applicability—Special or local law.

Section 5 under which the Court can excuse delay is not one of the provisions, the application of which is extended by Act X of 1922 to proceedings under a special or local law. 71 Ind. Cas. 217=16 M. L. W. 764=24 Cr. L.J. 89=A.I.R. 1923 Mad. 95=43 M.L.J. 561.

1. (g) Applicability of section—Suits.

——S. 5—Applicability—Suits.

Section 5 does not appear to apply to suits, and it provisions can only be invoked when the period of limitation has actually expired. A.I.R. 1934 Nag. 145= 30 N.L.R. 294=149 Ind. Cas. 956.

——S. 5—Applicability—Suits.

Section 5 of the Limitation Act applies only to those proceedings which are specifically mentioned in that section or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not such a proceeding. 87 Ind. Cas. 17=12 O. L. J. 66=2 O. W. N. 144=A. I. R. 1925 Oudh 369.

——Ss. 5 and 29—Applicability—Suit under S. 77 Registration Act—Extension of time.

The special rule of limitation in S. 77, Registration Act is controlled by S. 5 of the Limitation Act. Hence a suit under S. 77 brought on the day on which the Court is opened after it was closed on the day on which the limitation ended, is within time. 8. C. 910. Foll. 5 Ind. Cas. 416 (Cal.).

2. Amendment of Act.

——S. 5—Amendment of Act—Party's acknowledge Effect not appreciated—No excuse.

While it might be permissible to regard a "mistake of law" as amounting to "sufficient cause" within the meaning of S. 5 in certain circumstances on the ground that an amendment of an Act was not fully appreciated by the Bar, it cannot be so regarded where the alteration of law is proved to be known to the party (even though it may be Government through its law officers) seeking to take advantage of the plea especially when the delay is a long one. 104 Ind. Cas. 281=9 Lah. 76=A.I.R. 1928 Lah. 216.

——S. 5.—The Limitation Act was amended so as to reduce the period of limitation for application under Art. 177 from six months to 90 days between the death of a defendant on 30th September, 1920 after the passing of the preliminary decree in a suit for dissolution of partnership and his son applying on the 6th January, 1921 to be brought on the record;

Held, that in the circumstances of the case it was in the interests of justice necessary for all parties interested to be added under O. I. R. 10, 78 Ind Cas. 168=A.I.R. 1925 Mad. 347.

——**S. 5.—Mistake of pleader—Delay was excused.**

Where the applicant's application for leave to appeal to His Majesty-in-Council was out of time by about a fortnight, owing to his local legal advisers not knowing the recent change in law curtailing the period of limitation for such applications but applicant acted in good faith and with due diligence.

Held, the delay should be excused. **In re Coles and Ravenshear,** (1907) 1 K.B. 1 is no longer good law. (1908) W. N. 9, Foll; 23 Bom. L R. 89 Foll. 8-Ind. Cas 862=48 Bom. 442=26 Bom. L. R. 395=A.I.R. 1924 Bom. 399.

——**S. 5.**—Where an application for leave to appeal to Privy Council was made 29 days beyond time and the party alleged that he was misled by the advice of his Counsel who was not aware of the reduction in limitation brought about by Act XXVI of 1920:

Held, that there was no sufficient cause to excuse delay. 78 Ind. Cas. 154=A.I.R. 1924 Nag. 279.

——**S. 5**—The error that the defendant's heirs were brought on the record more than three months after the death of the original defendant without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death, was rightly excused as the application was made within six months, which was the period allowed by the Act of 1908 and the change in the period of limitation effected by Act XXVI of 1920 may not have been and probably was not known to the parties, and the omission to set aside the abatement was a formal defect not affecting the merits of the order. 75 Ind. Cas. 283=47 Bom. 92=24 Bom. L.R. 909=A.I.R. 1922 Bom. 449.

3. Amendment of decree.

——**S. 5**—Amendmenent of decree. If the grounds of appeal taken, or any one of them are intimately connected with the ground for amendment of the decree, or if the appeal is directed against the decree so far has it has been amended, the extension of time under S. 5 will be granted almostas a matter of course. If they are not so, the Court in considering theapplication for extension of time will have to exercise its discretion, and time can be extendedin a fit case. 40 C.W.N. 83=165 Ind Cas 53.

——**S. 5.—Amendment after expiry of time for appeal.**

Where there has been no mistake in the operative part of the decree and the application for amendment, which was made after the time for appealing from the decree had expired, did not touch the operative part, but was directed to the correction of the mistakes in the recital of the claim of the plaintiff as made in the said decree, the Court will be exercising its discretion rightly in not extending the time under S. 5. 40 C.W.N. 83=165 Ind. Cas. 53.

——**S. 5—Whether ground for extension.**

Under S. 5, the Court may admit an appeal after the period of limitation prescribed therefor, where the decre has been amended even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal if there is nothing to show that the appellant's conduct in not preferring the appeal eariler was not actuated by anything else than a **bona fide** belief that he was entitled to wait. A.I.R. 1932 Cal. 534=36 C.W.N. 218=59 C 1052=138 Ind. Cas. 754.

——**S. 5—Time, whether runs from origina decree.**

Where in a suit, upon a mortgage a decree, was made directing the mortgagor to redeem on playment of a certain sum and on a subsequent application by the mortgagor, the amount was reduced and the mortgage thereupon appealed, questioning the right of the mortgagor to redeem. after the expiry of the period of limitation for filing an appeal from the original decree but within the period of limitation from the date of the amended decree.

Heid, that even assuming that an appeal from the original decree would be the proper appeal in which the question of mortgagor's right to redeem could be raised, the case was a fit one for extension of time under **S.** 5.

Per **Suhrawardy, J.**—The appeal was not time barred as the appeal against amended decree is the only appeal the mortgagee could bring, and in such appeal he had the right to question the very right of the mortgagor to redeem. A.I.R. (1931) Cal. 578=35 C.W.N. 251=133 Ind. Cas. 571.

——**S. 5.—Amendment of decree—Amendment uncounected with Grounds of Appeal—No extension.**

It is not every amendment in a decree which has been made **suo motu** by the Court that entitles a party to claim an extension of time under S. 5; whether there is sufficient cause for extension must depend on the circumstances of each individual case. If the amendment has no relation to the grounds upon which the validity of the decree has been challenged, such appeal should not be admitted out of time.

Where the only mistake was, that in two suits against the same defendant, the decree which should have been attached to the file of the first case was attached to the second and **vice versa**. and the decrees were subsequently amended and it was contended that limitation ran from the date of the amendment:

Held, that no sufficient cause had been shown for extension of the period of limitation for the appeal. The grounds of appeals were not based upon the form which the decrees had taken alter the amendment A.I.R. 1930 Oudh 463.

——**S. 5.**—Whether a decree is amended or is no amended the date of the decree is the date of the judgment and the fact that the decree is amended does not operate of itself to extend the time, for appealing. 50 C.L.J. 12=33 C.W.N. 958=A.I.R. 1929 Cal. 676.

——**S. 5**—When there has been an amendment of decree and it is reasonable that the time for appealing should be extended recourse has to be had to the power of the Court under S. 5. 50 C.L.J. 12=33 C.W.N. 958=A.I.R. 1929 Cal. 676.

——**S. 5—Whether pendency of application for amending decree saves limitation depends on the facts of each case.**

Whether an application for review or an application for an amendment is or is not a sufficient ground for extension of time depends upon the particular facts of each case.

Where the fact, that the application for amendmet of the decree was pending. did not prevent the petitioner from presenting his application to the High Court for leave to appeal as a pauper mainly upon the merits of the case, and the question of costs in regard to which the application for amendment was made would have been only one of the grounds upon which he would be entitled to asail the decree:

Held, that the pendency of the application for amendment of the decree was not a sufficient ground for extension of time. 113 Ind. Cas. 580=A.I.R. 1928 Pat. 265.

——S. 5—Every amendment made in a decree does not necessarily entitle a party who prefers an appeal against the decree to claim an extension of time under the second paragraph of S. 5. If the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, an admission of the appeal out of time cannot be claimed merely on the ground that an amendment has been mad ein the decree. 61 Ind. Cas. 69=43 All. 380=19 A.L.J. 152=A.I.R. 1921 All. 60.

——S. 5—' Sufficient cause '—Amended decree—Appeal from—When amendment " sufficient cause ".—

Where the plaintiff obtained a decree in a mortgage suit on the 31st January 1901 which was made absolute on the 28th September following and the decree was subsequently amended under S. 206, C.P.C., on the 12th July, 1902, and the plaintiffp referred an appeal the High Court against the amended decree.—**Held,** that an amended decree was a decree between the parties within the meaning of the Code, and, as such, was appealable, and the plaintiff was accordingly competent to prefer an appeal against the amended decree. 9 C.W N. 605 foll. **Held**, also, that for the purpose of determining whether the appeal was barred by limitation, time must be taken to have run from the date of the decree as originally drawn up 14 M. 150; 6 C. 22; and 22 M. 364, foll. Every amendment made in a decree under S. 206, C.P.C. does not necessarly entitle a party, who prefers an appeal against the decree, to claim an extension of time under the second paragraph of S. 5 of the Limitation Act. Whether there is sufficient cause for such extension mus depend upon the circumstances of each individual case.' If the amendment has no relation to the grounds upon which validity of the decree is sought to be challenged in appeal such appeal should not be admitted out of time. On the other hand, if the grounds on which the appeal is based are intimately connected with the amendment of the decree, or if the grounds are directed against the decree only in so far as it has been amended the court should exercise in his favour the discretion vested in it by para. 2 of S. 5 of the Limitation Act. (1905) 3 C.L.J. 188.

4. Appeal, Second appeal and Revision.

——S. 5—The order of the Single Judge refusing to extend time under s. 5 is not a judgment within Cl. 10, Letters Patent and accordingly, no appeal lies from that order. A.I.R. (1935) All. 620 (2)=1935 A.W.R. 743=(1935) A.L.J. 681=57 A. 983=157 Ind. Cas. 347 (F.B.).

——S. 5 Discretion of Court—Appeal—Interference.

A Court of appeal will not interfere if the discretion of the lower Court under S. 5 of the Limitation Act has been judicially exercised. But if it is found to have been exercised arbitrarily or on a wrong conception of law, it is the duty of the appellate Court to interfere with it and pass an order which would be in the circumstances in consonance with justice and in accordanee with law. 225 Ind. Cas. 291=A.I.R. 1947 Lah. 76=48 P.L.R. 325.

——S. 5—In Letters Patent Appeal High Court will not interfere with the discretion of the Judge in Chambers in refusing to excuse delay in presenting the appeal. 69 Ind. Cas. 895=A.I.R. 1922 Lah. 170.

——S. 5—Appeal to P.C.—Delay in presenting appeal to High Court—Interference.—

Where the High Court refused to admit an appeal, on the ground that it was out of time, and there was no sufficient cause for not presenting it in time the Judicial Committee held that they could not interfere, unless they were satisfied that the refusal was wrong; and that the delay which had occurred since the rejection of the appeal by the High Court and which was not accounted for miliated against any interference. (1902) 30 C. 309=30 I.A. 20 (P.C.).

——S. 5—" Sufficent cause "—Erroneous advice given by pleader on question of limitation for filing appeal—Finding by lower appellate Court that mistake of pleader is not bona fide—Interferences in second appeal.

The High Court in second appeal will not interfere with a finding of the lower appellate Court that an erroneous advice given by a pleader on the question of limitation for filing an appeal cannot be regarded as a **bona fide** mistake on pleder's part such as would justify an extension of the period of limitation under S. 5 of the Limitation Act. A.I.R. 1949 Assam 24.

——S. 5—Discretion of Court—Interference in second oppeal.

The question of excusing or condoning the delay under S. 5 of the Limitation Act is a matter of discretion of the Court concerned and so long as that the Court exercises that discretion in a judicial manner, its decision is perfectly within its competence and within legal validity and when sound and plausible reasons have been given by an appellate Court its order is not open to question in second appeal. 1948 A. W. R. (Rev.) 318=1948 R. D. 420.

——S. 5—No second appeal lies from an order refusing to excuse delay under S. 5, Lim. Act. 55 L.W. 426=(1942) 2 M. L. J. 104=A. I. R. 1942 Mad. 604=1942 M.W.N. 503=I.L.R. (1942) Mad. 868=203 Ind. Cas. 5.

——S. 5—District Judge exercising discretion and condoning delay in filing appeal which was originally filed in wrong Court:

Held, that the order was not illegal and cannot be contested in second appeal. A.I.R. 1937 Lah. 767=39 P.L.R. 995=174 Ind. Cas. 927.

——S. 5—Plea that lower Court was wrong in applying S. 5—Interference.

The High Court will not entertain a second appeal on a plea that the lower Appellate Court was wrong in not applying the provisions of S. 5, but the High Court would interfere if the Court rejected such a plea arbitrarily without exercising a judicial discretion or if its reasoning is based on erroneous view of law. A. I. R. 1936 Lah. 742=168 Ind. Cas. 698.

——S. 5—Discretion under S. 5 exercised properly—No interference in second appeal—But where it has been exercised arbitrarily, it may be challenged in second appeal. (1933) A. L. J. 561=A. I. R. 1933 All. 294=144 Ind. Cas. 133.

——S. 5—Extension of time—Discretion—Interference.

Where the Court below, upon consideration of the facts before it and the surrounding circumstances, comes to the conclusion that no proper case has been made out for exercising its discretion for extending the period of limiation under S. 5 and dismisses the appeal upon that ground, there is no point of law involved in the case under Section 100 of the Civil P. C. for interfernce in second appeal. A.I.R. 1931 All. 28=(1930) A. L. J. 1256=130 Ind. Cas. 840 (2).

——S. 5—Discretion of Court.

——The question whether sufficient case existed for non-presentation of an appeal within time in the lower Appellate Court is primarily one for decision by that Court. High Court cannot interfere with the exeise of that discretion when exercised in a sound and reasonable manner and after due enquiry and careful consideration

concerned. There is no ground for interfering under S. 115, Civil procedure Code, with the exercise of such a discretion by a lower Court.

Ignorance of the death of a defendant would constitute sufficient cause within the meaning of S. 5, Limitation Act, for excusing the delay in seeking to set aside the abatement caused by the death of that defendant. 1949 M.W.N. 29=A I.R. 1949 Mad. 624=(1949) 1 M.L.J. 144.

—S. 5 Court has discretion to excuse delay under S. 5—Interference.

Under S. 5, itis a matter for the Court's discretion to decide wheiher it should excuse the period of delay or not, and when it has decided that no sufficient grounds existed for excusing the delay, it is not within the High Court's powers of revision under S. 115, Civil P. C., to interfere with that decision. A.I.R. 1942 Mad. 604=55 L.W. 426=1942 2 M.L.J. 104=1942 M.W.N. 503= I.L.R. (1942) Mad. 868=203 Ind. Cas. 5.

——S. 5—Delay in applying for leave to appeal in forma pauperis—**Extension of time under S. 5. granted—Interfereuce.**

An appeal was filed within the period of limitation. The appellant was asked to pay a larger court fee and then he applied for leave to appeal **in forma pauperis** after the period of 30 days, allowed by Art. 170, Lim. Act. The Court extended the time for making the application ufider S. 5 Limitat on Act in view of the special circumstances of the case and the **bona fide** action of the appellant :

Held, that the Court could not be said to have acted illgeally or with material irregularity so as to justify interference in revision. A.I.R. 1942 Oudh 240=1942 O.W.N. 106=17 Luck. 628=1942 R.D. 181=1942 A.W.R. 79=199 Ind. Cas. 614.

——S. 5—Lower Court exercising discretion wrongly—Interference.

In revision, it is not the practice os the Patna High Court to interfere in the exercise of discretion under S. 5, Limitation Act by the Court below even when the exercise of that discretion is founded on a mistaken view of the law. A.I.R. 1937 Pat. 528=4 B. R. 540=171 Ind. Cas. 700.

——S. 5. When once a discretion has been exercised in the matter under S. 5 by the lower Appellate Court, the High Court will not interfere. 37 P.L.R. 784=A. I. R. 1936 Lah. 200=159 Ind. Cas. 173.

——S. 5—Ex parte order excusing delay.

An **ex parte** order excusing delay under S. 5, is liable to revision and re-consideration by the Appellate Court at the hearing of the appeal. 44 L. W. 152=A.I.R. 1936 Mad. 600=1936 M. W. N. 804=165 Ind. Cas. 471.

——S. 5 Discretion exercised by Judge under S. 5, Limitation Act, will not be interfered within revision. A.I.R. 1936 Pesh. 97=162 Ind. Cas. 416.

——S. 5 There is no ground for the High Court to interfere under S. 115 Civil P.C., where an application for extension of time under S. 5 is rejected by the Court in the exercise of its discretion. 35 P. L. R. 374=153 Ind. Cas. 259 (1).

——S. 5 Failure of Appellate Court to consider question of extension of time under S. 5, Limitation Act.

Held, also, that the lower Court acted with material irregularity in rejrcting the appeal without considering the question of extentsion of time under S. 5 and that the application for revision was competent. A.I.R. 1933 Lah. 260=145 Ind. Cas. 153.

——S. 5—Application for review time-barred—Proceedings thereon are wishout jurisdiction.

Legal duty of Judge to determine question of "sufficient cause" for extension of period—Where review application was **prima facie** time-barred lower Court's order admitting it, without sufficient cause being shown for delay, is not only irregnlar but without jurisdiction —Proceedings consequent on review must be set aside as of no legal effect. 29 I. C. 975. Foll. 1930 A.L.J. 1057=A.I.R. 1930 All. 815.

——S. 5 Where a lower Appellate Court has exercised its discretion to extend or refuse to extend the period of time allowed for filling an appeal the High Court has no jurisdiction ta decide whether the Court was or was not right in refusing to extend the time. 9 A.L.J. 292, **Foll.** 111 Ind. Cas. 816=A.I.R. 1929 All. 31.

——S. 5 Discretion exercised by the lower Appellate Court will not interfered with by the High Court. 103 Ind· Cas. 90=28 Pat. L.R. 257=A.I.R. 1927 Lah. 908.

——S. 5.—No revision lies against an order refusing extension of time under S. 5, where it ought to be extended as at the best it amounts to an error of law. 24 I.C. 872, Foll. 98 Ind. Cas. 892=A.I.R. 1927 Lah. 43.

——S. 5—Discretion of Court.

In admitting appeals under S. 5 of the Act there must be a judicial exercise of discretion on judicially congnisable facts and the High Courts will not distrust the lower Court's exercise of it discretion unless for want of appreciation and consideration of material facts on right principle. 8 L.B.R. 566=10 Bur. L.T. 221=37 Ind. Cas. 815.

——S. 5—Discretion of Court—Interference.

Punjab Chief Court will interfere in exceptional cases. Partieularly in cases of change introduced by the new Punjab Courts Act, on the ground of erroneous legal advice. 18 P.W.R. 1916=33 Ind. Cas. 808.

——S. 5—and C.P. Code, S. 115—Revision of order—Delay in presentation of appeal—Order refusing to excuse if open to revision.

An order refusing to excuse delay in presentation of an appeal is not open to revision even for showing that the appeal was in time. 24 Ind. Cas. 872 (Mad.).

5. Burden of proof—See also Note 8.

——S. 5.—" Deligence " is not a word which occurs in s. 5, and although it is frequently referred to in judgments on the meaning of this section, the question of deligence arises only in cases where there has been a delay beyond the period of limitation after the judgment from which the appeal is preferred has been delivered in accordance with law. Under that section all that the appellants have to do is to satisfy the Court that they had sufficient cause for not preferring the appeal within the period os limitatson allowed. A.I.R. 1941 Rang. 194=1941 Rang. L.R. 213=195 Ind. Cas. 296.

——S. 5—Illness.

It is the duty of a litigant to know the last date on which he can present his appeal, and if, through delay on his part, it becomes necessary for him to ask the Court to exercise in his favour the favour the power contained in s. 5, the burden rests on him of adducing distinct proof of the sufficiene cause on which he reliess.

A certificate obtained from a native physician some time afrer the appeal has been filed in which the physician himself does not say that he treat the appellant is of no evidentiary value and cannot, be relied upon to show that the appellant was ill so as not to be prompt in filing the appeal. A.I.R. 1938 Nag. 156 I.L.R. (1938) Nag. 409=173 Ind. Cas. 369.

——S. 5—For the application of S. 5, sufficient cause to satisfy the Court is necessary. (1936) 38 P.L.R. 311.

——S. 5—Where no reason is shown why when the applicant was away at another place, he should not have given instructions to his Advocate to present the appeal in time and there is no medical certificate or any other corroborateive evidence to support the allegation

of the case, even though the High Court itself would have arrived at a different conclusion if it had heard the case as Court of first appeal. A.I.R. 1926 Lah. 445. Foll. 123 Ind. Cas. 83.

——S. 5—Interference with—When justified.

In matters of discretion a Court of second appeal ought not and ordinarily dose not interfere with the exercise of discretion on the part of the subordinate Courts, but that non-interference must necssarily be limited to cases where there is sufficient material on record to justify the exercise of discretion in any particular way. Where, however, it appears that the lower Appellate Court has exercised its discretion in a judicially unsound manner without proper legal materials to support its decision, the High Court will surely interfere.

A memo. of appeal was accepted by the appellate Court after the period of limitation had expired, without enquiring into sufficient cause for condoning the delay in the presentation of the memo. The appeal was acceptod on merits setting aside the deerce of the lower Court :

Held, that the appellate Court acted wrongly in entertaining appeal as it had no jurisdiction to touch the decree, and decide the case on merits on the basis of time-barred memo. 25 Mad. 166 Foll. 114 Ind. Cas. 612=11 N. L. J. 186=A.I.R. 1929 Nag. 8.

——S. 5—The Court of second appeal cannot consider the sufficiency or otherwise of the reasons given by the lower Appellate Court for declining to exercise his discretion under S. 5. 95 Ind. Cas. 565=A. I. R. 1926 Lah. 542.

——S. 5—The discretion under S. 5, is a judicial one and when it is not exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts, the High Court can interfere in second appeal. 94 Ind. Cas. 396=A.I.R. 1926 Lah. 445.

—S. 5—Where discretion has been exercised one way or the other by an appellate Court under S. 5, the High Court will not interfere in second appeal. 91 Ind. Cas. 865=A.I.R. 1926 All. 252.

—S. 5 Discretion, judicially exercised—Appellate Court will not interfere.

Where a Judge purporting to exercise discretion does so under the view that there is no general rule when in fact there is one which he ought to follow as being binding upon him, he misdirects himself as to the law to be applied to the case ; he does not exercise a judicial discretion and an appellate Court should either remand the case or exercise the discretion itself ; but where he does exercise a judicial discretion, the High Court will not interfere in second appeal. 74 Ind. Cas. 1039=21 A.L.J. 319=45 All. 432=4 L.R.A. Civ. 178=A.I.R. 1923 All. 455.

—S. 5—Discretion of Court—No interference in second appeal.

When Lower Appellate Court has considered the matter carefully and decided that the period of limitation need not be extended under S. 5, the Chief Court will not interfere in second appeal. 92 P.R. 1916=36 Ind. Cas. 614.

—S. 5—Discretion of Court—Second appeal—"Sufficient cause".

"Sufficient cause" is a question of fact and there can be no second appeal as to the exercise of discretion by the Lower Court. 43 P.W.R. 1916=88 P.R. 1916=132 P.L.R. 1916=35 Ind. Cas. 67.

—S. 5—Discretion of Court—Second appeal.

If the Lower Appellate Court has come to a definite finding as to the 'Sufficient cause' for filing an appeal beyond time, High Court will not interfere in second appeal. 20 C.W.N. 1303=1 Pat. L.J. 485=1 Pat. L.W. 209=35. Ind. Cas. 888.

—S. 5—Discretion of Court—Interference in Second Appeal.

Where the Lower Appellate Court has refused to act under S. 5 and dismissed the appeal, the High Court will not interfere in second Appeal unless the Lower Court has acted arbitarily and without exercising discretion. 9 A.L J. 292=14 Ind. Cas. 59.

—S. 5—Judicial discretion—Second appeal—Civil Procedure Code (1882), S. 584.

Where an appellate court dismissed an appeal as one presented out of time after consideration of all the facts and not arbitrarily, there is no legal ground to interfere with such exercise of discretion in second appeal. An appellant who ought to have appealed to the District Court within a month, but was under the impression that the appeal lay to the High Court owing to a **bona fide** mistake as to valuation, discovered the mistake after time and preferred the appeal to the District Court more than a month after the dicovery of the mistake. The District Judge having refused to excuse the delay on the ground that the delay after discovery was unexplained :— **Held**, that there was no ground for a second appeal. 1902 A.W.N. 203=25 A. 71.

—S. 5—Delay in appeal—Dismissal of Karnam—Suit—Reference to Revenue Court—Proceedings in Revenue Courts—Appeal—Delay—Diseretion to excuse—Duty of Appeallate Court :

A zemindari karnam, dismissed by the zemindar in 1893, applied for redress to the Revenue authorities in 1894. Having been referred to a civil suit, he filed this suit for a declaration of his right to the office and for recovery of its emoluments in the District Munsif's Court of Satur. On January 29, 1898, the Munsif dismissed the suit as he was of opinion that Act II of 1394 ousted the jurisdiction of civil courts. The plaintiff obtained a copy of the judgment on February 18 and moved the Deputy Collector on March 5. The petition having been rejected on June 13, he appealed to the Cellector on July 25. copy of the order rejecting his petition having been furnished to nim on the 14th. This appeal was rejected on the 25th November. A copy of this order he obtained on December 7, and the records were returned to him on the 28th. Now he prefered an appeal to the District Court against the order of the Munsif dated January 29, 1898, on the 4th Jrnuary 1899. The Subordinate Judge of Tinnevelly who heard the appeal excused the delay on the ground that the appellant was misled by the District Munsif and had lost time by trying to follow his advice. But he did not consider the delay between November 25, 1898, and January 4, 1899, in filing the appeal. **Held** by **Benson** and **Boddam**, JJ., that the suit being one for satisfaction of wrongful dismissrl under S. 11 of Regulation XXV of 1802, was triable by a District Munsif and not by a Subordinate Judge. S. 7 of Regulation XXIX of 1802 has no application to such a suit. Per **Benson** J.—Act II of 1894 was not applicable to such a suit as the same came into force only in 1897 as regards this zamindari. **Held** by the Court (Benson, J., dissenting) that the delay was inexcusable and the appeal was barred by limitation. An appellate tribunal should not interfere with the discretion of the lower court where it has been exercised judicially after a consideration of all the facts. But where, as in this case, facts having a material bearing on the exercise of a discretion have not been considered, the exercise of discretion is judicially unsound and should be corrected. (1901) 25 M. 166=11 M.L.J. 406. (F.B.).

—S. 5—Discretion of Court—Interference under S. 115, Civil Procedure Code.

The question of excusing the delay and the question whether sufficient cause for excusing the delay is made out are essentially within the discretion of the Court

of the applicant that he was ill at all, the applicant must be held to have failed to discharge the onus that lies upon him to satisfy the Court that he had sufficient cause for not preferring the appeal within the time limited by law. A.I.R. 1936 Rang. 183=14 R. 155=162 Ind. Cas. 664 (2).

——**S. 5**—Section 3, Lim. Act imposes a duty upon the Court to dismiss a suit or an application, which is out of time unless the delay can be condoned under S. 5. In case relief under S 5 is claimed, the burden lies heavily on the person who claims it of adducing distinct proof of the sufficient cause A.I.R. 1936 Sind 169=30 S.L.R. 242=165 Ind. Cas. 91.

——S. 5—Misleading of letter of Counsel's clerk—Non-production of letter.

Where the period of limitation for filing an appeal expired on December 9, 1931, but the appeal was filed on December 19, 1931, and S. 5 of the Lim. Act was called in aid on the ground that the appellant had made a mistake in reading the date in the letter sent to him by his Counsel's clerk and the letter itself was not produced:

Held, that under the circumstances of the case, the appellant had not made out sufficient cause for the delay in filing the appeal. 9 O.W.N. 227=A.I.R. 1932 Oudh 167=136 Ind. Cas. 338.

——**S. 5**—It is the duty of a litigant to know the last day on which he can present his appeal, and if, through delay on his part, it become necessary for him to ask the Court to exercise in his favour the power contained in S. 5, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. 24 S.L.R. 415=A.I.R. 1931 Sind 58=132 Ind. Cas. 473.

——S. 5—Onus.

It is the duty of the litigant to know the last day on which he can present his appeal and if there is delay the burden rests on him of adducing strict proof of the sufficient cause on which he relies. 41 M. 412=34 M. L. J. 63=4 P.L.W. 54=16 A. L. J. 57=7 L.W. 156=23 M.L.T. 101=27 C.L.J. 253=2 P.L.R. 1918=22 C.W.N. 481=21 Bom. L.R. 541=11 Bur. L.T. 121=(1918) M. W. N. 906=45 I.A. 25=43 Ind. Cas. 493 (P. C.).

6. Delay not explained.

——S. 5.—Delay not oxplained.—Extension cannot be allowed.

The decree of the trial Court was passed on 29th August, 1924. On 22nd October, 1924, the appeal was field. Application for copies was made on 17th September, 1924. The application was returned for correction of particulars on 2nd October, 1924. It was re-field on 3rd October, 1924. The copies were ready for delivery on 9th October, 1924. Actual delivery was taken 11th October, 1924. There was no affidavit explainting the delay, or the facts as to what happened between the 3rd and 11th:

Held, that no ground was shown for extension of time under S. 5. 98 Ind. Cas. 942=A.I.R. 1927 Lah. 59.

——**S. 5.**—It is a well-recognised principle that a petition field out of time must show on the face of it the reason for delay, and there must further be an express prayer for condonation of the delay under the section. 92 Ind Cas. 179=4 Pat. 766=7 P.L.T. 362=A.I.R. 1926 Pat. 73.

——S. 5.—Delay of 53 days owing to negligence of. Dewan of plaintiff—Delay was not excused.

The reason for not filing the copy of the decree appealed against, along with the memorandum of appeal was that the Dewan of the appellant did not send a copy of the decree along with the papers to be field and as the last day for filing the appeal was the 7th November, 1918, the clerk of the Vakil for the appellant, field the appeal without the copy of the decree. On the application to set aside the **ex parte** order excusing the delay, no affidavit had been filed either by the appellant or his Dewan or any other person explaining why a copy of the decree was not sent along with the other papers or why there was a delay of 53 days:

Held, that the delay has not been properly explained. 72 Ind. Cas. 308=17 M.L.W. 352=32 M.L.T. 232=1923 M.W.N. 164=A.I.R. 1928 Mad. 482=44 M.L J. 279.

——S. 5—Delay not explained—Effect.

If the plaintiff has brought his suit just within limitation no adverse inference can be drawn from the delay but when each day's delay entails additional loss on a plaintiff, his omission to bring a suit until just before the expity of the period requires some explanation without which his case becomes doubtful. 34 Ind Cas. 617 (Mad.)

——S. 5—Delay not explained—Effect

Omission to account for the major portion of the delay in presenting an appeal will disentitle a party to benefit under this section. 3 L.W. 109=19 M.L.T. 86=32 Ind. Cas. 579.

——S. 5 and C. P. Code Order XXII 22. 9—Delay explained—Effect.

An application made on 2nd October, 1914 for setting aside an abatement which took effect on the 23rd of November, 1913, is barred by limitation especially when no excuse is shown for the delay in bringing the legal representative on record and setting aside the order of abatement under O. 22, R. 9 of the C.P.Code. 16 M.L.R. 547=26 Ind. Cas. 472.

——S. 5—Delay not explained—Effect of.

When the delay is not sufficiently explained it should not be excused under S. 5 of the Act. 12 A.L.J 837=25 Ind. Cas. 30.

7. Discretion and duty of Court.

——**S. 5.**—The Court is not bound to show indulgence to a litigant, who is not prompt in seeking his remedy, by extending time under S. 5, Lim. Act. A.I.R. 1942 Oudh 488=1942 O.W.N. 475=1942 A.W.R. 309 (3) =202 Ind. Cas. 87.

——**S. 5**—A Court is not bound to show indulgence to a litigant who is not prompt in seeking his remedy. 68 Ind. Cas. 777=A.I.R. 1923 Lah. 96.

——S. 5—Delay of several years.

Where the order appealed against was passed several year ago, the Court should be reluctant to grant the necessary extension except on very strong grounds. A.I.R. 1942 Oudh 339=1942 O.W.N. 248=1942 A.W.R. 173=199 Ind. Cas. 801.

——**S. 5**—The question of excusing the delay has to be approached from the point of view of the petitioner's conduct rather than of the advantage gainend by the other side. A.I.R. 1942 Mad. 170=1941 M.W.N. 989 =(1941) 2 M.L.J. 873=201 Ind. Cas. 84

——S. 5,—Extension of time on equitable grounds.

Obiter.—Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes and defaults of its offieers inadverteatly committed. The principle, **Actus curiae neminem gravabit** ought to be applied even when for relieving a party from such injury, the Court has to consider the question of time. Consequently, the Court should grant the extension of time on equitable grounds apart from S. 5 40 C,W.N. 680=A.I.R. 1936 Cal. 343=63 C. 1079=166 Ind. Cas. 641.

——**S. 5**—The Court has a discretion under S. 5 to excuse delay that takes place between the date on which the copy of the decree is delivered to the applicant and the

date of actual filing of the appeal The discretion is judicially exercised when the Court thinks that that time is reasonably necessary for the appeal to be prepared. 11 O.W.N. 1359=A.I.R. 1935 Oudh 30=10 Luck. 250=152 Ind. Cas. 419.

——S. 5—Discretion of Court.

Whether there is sufficient cause within the meaning of S. 5 is a question of fact, and on account of the elasticity of the term "sufficient cause," the Court has a wide field of discretion in determining what, in the circumstances of a particular case, amounts to sufficient cause, but it gives no countenance to the view that a time-barred application not falling within the purview of R. 5, can, in the exercise of discretion, be admitted. A.I.R. 1935 Rang. 466=13 R. 595=159 Ind. Cas. 845.

——S. 5—Delay in filing appeal is excusable if Court is satisfied that the petitioner was prevented from filing is on the last day of limitation prescribed. (1931) M.W.N. 1161.

——S. 5—Reasonable diligence is the test.

Where in case of a belated appeal the delay having been due to the mistake of a clerk, the Subordinate Judge refused to exercise discretion favourably on the ground that the mistake of a clerk is tantamount to the mistake of a party.

Held, that the sole index for the exercise of such discretion is whether the appellant has acted with reasonalble diligence. A.I.R. 1917 P.C. 156, Foll. 119 Ind. Cas. 447=A.I.R. 1929 All. 351.

——S. 5—Court should exercise its discretion in each case.

In determining whether there is a sufficient cause the discretion of the Court has to be exercised on all the facts in each particular case, no vide and general rule can be laid down.

Where, from ordinary point of view, the mistake had been made without any real excuse.

Held, that there was not "sufficient cause" within S. 5. A.I.R. 1928 Cal. 249.

——S. 5—Discretion allowed by S. 5 should be exercised only when application is made beyond time but without delay. 100 Ind. Cas. 727=A. I. R. 1927 All. 386.

——S. 5—Laches.

In exercising discretion in favour of the applicant under S. 5 of the Limitation Act, the Court must be satisfied that the applicant was not guilty of unnecessary laches. 86 Ind. Cas. 270=12 O. L. J. 94=2 O. W. N. 58=28 O. C. 378=A. I. R. 1925 Oudh 371.

——S. 5—Bad case on merits—No ground for refusal.

The lower Appellate Court did not apply its mind to the question whether having regard to the circumstances under which the appeal before it was filed after the expiry of the usual period of limitation, appellant should be granted an extension of time. The only ground on which it refused to extend the time was that in its opinion the appellant had a bad case on the merits.

Held, that this is wrong and under the circumstances the High Court should interfere as no proper thought was given to the cause of presenting appeal out of time. The lower Appellate Court had not used its discretion judicially and reasonably. 122 Ind. Cas. 575=A.I.R. 1930 Lah. 1068.

——S. 5—Merits—Immaterial.

That the appellant has a good case on the merits is not a ground for excusing delay in filing the appeal within time. A valuable right accrues to the opposite party by reason of the appeal having become barred by time. 2 Lah. 277, Foll. 73 Ind. Cas. 910=A.I.R. 1923 Lah. 144.

——S. 5—Merits of case.

An appellant filing in time but in a wrong court under a **bona fide** mistake may be allowed to put the mistake right unless disentitled by laches on his part; but not when he appears to have no substantial point to argue. 14 A.L.J. 212=33 Ind. Cas. 546.

——Ss. 5 and 12—Merit's of case—Consideration of—Time for obtaining a copy.

Where a party wishing to file an appeal waited till the 90 days were about to expire and then applied for judgment and decree and was asked to present the application at the proper place and the appeal was consequently filed a day too late it was held that he was not entitled to an extension of time and that the plea of the appeal being a strong one and likely to succeed would not entitle him to indulgence. 66 P.W.R. 1912 =170 P.L.R. 1912=13 Ind. Cas. 714.

——S. 5—Merits of the case.

The Court would excuse the delay in the presentation of an appeal if there are any merits in the appellant's case. But when the appeal is on a mere technical ground the principle of technicality defeating technicality may well be brought into play. 25 Ind. Cas. 28 (Mad.).

——S. 5—Copy of main connected judgment not filed. Time was extended. 96 Ind. Cas. 416=8 L.L.J. 239 =27 P.L.R. 841.

——S. 5—Discretion of Court—Extension of time—Subsequent amendment of decee.

The defendants are not obliged to appeal at a time when the plaintiff had, within the period of 90 days allowed for an appeal, already applied for an amendment and in any event the Court would grant an extension of time under S. 5 of the Limitation Act to the defendants. 64 P.R. 1919=51 Ind. Cas. 712.

——S. 5—Discretion of Court.

Where in a redemption suit the Lower Court framed two issues, **viz.** (1) as to limitation and (2) as to the amount due to defendant and decided the first issue in favour of the plaintiff on 22nd March and the 2nd issue on 31st May and the defendant appealed to the Dt. Judge against the final order on 25th June but the Dt. Judge rejected the appeal as time-barred, calculating the time from the 22nd March. **Held,** on appeal (1) that the order of the 22nd March was not a preliminary decree against which a separate appeal could have been preferred and therefore the appeal was not barred by time (2) that even if technically it was time-barred, it was a fit case for excuse under S. 5 of the Limitation Act. 7 P. R. 1917=39. Ind. Cas. too.

——Ss. 5 and 12—Discretion of Court—When exercised—Expiry of time allowed for appeal on a holiday.

Indulgence under S. 5 on the ground of mistake is only allowed where it is shown that the appellant has acted with due care and diligence and in computing the period prescribed for an appeal time taken to obtain copies is excluded only if the application for copies is made while the right of appeal subsists. So where the last day of limitation expired on a holiday and an application was made for copies on the re-opening day and the appeal was filed as soon as the copies were received, it was held that even deducting the time spent in obtaining copies the appeal was time-barred. 55 P.W.R. 1916=125 P.L.R. 1916=79 P. R 1916=35 Ind. Cas. 233.

——S. 5—Discretion of Court—Letters Patent, S. 15—Power of High Court.

Under special circumstances the High Court can (has extended) extend the time by more than 5 years for preferring an appeal under S. 15 of the Letters Patent. 34 Ind. Cas. 584 (Cal.).

——S. 5—Discretion of Court.

In an appeal from a decree filed beyond the period of limitation from the date of decree but within time from the date of its amendment the appellant is to be limited to the grounds of appeal referring to the amendment unless he can claim benefit under S. 5. 34 Ind. Cas. 556 (Cal.).

——S. 5—Discretion of Court—Not to be fettered—No set rules should be laid down.

In the admission of appeals filed out of time the discretion of the appellate Court should not be fettered by any definite or crystallised set of rules. 19 C.W.N. 1113=31 Ind. Cas. 705.

——Ss. 5 and 14—Discretion of Court—Admission of appeal after time.

When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must be fully satisfied of the justice of the ground for an extension of the time for attaching the decree and thus perhaps depriving the successful litigant of the advantage he has obtained. 30 B. 329, Rel. upon. There is no analogy between Ss. 5 and 14 of the Act and the latter section cannot be of any use in the exercise of discretion under S. 5 of the Act. 17 C.L.J. 596=20 Ind. Cas. 513.

——Ss. 5 and 14—Construction.

S. 5 of the Act allows a discretion, the wording being 'May be admitted,' while S. 14 allows no such discretion, the words being 'shall be excluded'. 254 P.L.R. 1913 =159 P.W.R. 1913=20 Ind. Cas. 3.

——S. 5—Discretion of Court—Appeal filed without copy of decree—Appellant asked to file on next hearing day—Copy filed after expiry of limitation.

Where an appeal was filed without copy of the decree and the appellant being asked to file it on the next date of hearing and being misled by the order, filed it, long after the period of limitation had expired on the date of the hearing, it was held that there was sufficient cause for not filing the appeal in time. 189 P.W.R. 1912= 14 Ind. Cas. 244.

——S. 5—Discretion of Court.

Whether the application for permission to appeal *in forma pauperis* be treated as falling under S. 5 or under S. 7, the result would be the same. For an appeal the Court has jurisdiction to excuse delay under S. 5. 34 Bom. 589=12 Bom. L.R. 694=7 Ind. Cas. 944.

——Ss. 5, 7—Application for leave to appeal "in forma pauperis"—Delay—Excuse of delay—Minor applicant.

The plaintiff, a minor, filed a suit *in forma pauperis* for a declaration that he was the adopted son of Vyankat rao and to recover possession of his property. The suit was dismissed on 10th February, 1908. An application for leave to appeal *in forma pauperis* was presented to the High Court on the 10th April, 1908, but having been beyond time it was rejected. On an application to excuse the delay, the High Court excused the applicant being a minor and S. 7 of the Limitation Act, 1877, applied. At the hearing the respondent objected that the application for permission to appeal *in forma pauperis* must be treated as an appeal and that S. 5 and not S. 7 of the Limitation Act, 1877, applied to it. *Held*, overruling the contention that whether the application be treated as falling under S. 5 or 7 the result was the same. If it fell under S. 5 and was an appeal, then, under the second paragraph of that section which applied to appeals the Court had jurisdiction to excuse the delay. If, on the other hand, it be treated as an application and fell under S. 7 it was clearly within time and there was no need of excusing delay because the section provided that a minor son could apply even after he had attained the age of majority but within a period prescribed. 12 Bom. L.R. 694=34 B. 589=7 Ind. Cas. 944.

——S. 5, Art. 157—Delay in filing appeal—Excuse of delay.

S. 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood, the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant. 11 M. 269, followed. Delay on the part of the Government in filing appeal against acquittal not excused. 9 Bom. L.R. 893=6 Cr. L.J. 221.

——S. 5 (5-A)—Appeal, "in forma pauperis"—Court's duty.

The word "appeal" in S. 5 of the Limitation Act does not include an application for leave to appeal *in forma pauperis*. 2 M. 230, 12 A. 19 approved. The Court is bound when an application is out of time to dismiss it, even although the point may not be raised by the other side. But where an application for leave was dismissed their lordships allowed the applicant to file an appeal on payment of full Court-fee within a certain time. 8 C.W.N. 906=30 C. 790.

——S. 5—Discretion, exercise of.

When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must, therefore, be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained. *Held*, also, that where the lower Court had exercised its discretion in one way, it is for the appellant to show that the discretion had been exercised arbitrarily or without proper material to support its decision. (1906) 8 Bom. L.R. 858=31 B. 33. Also (1905) 7 Bom. L.R. 965=30 B. 329.

——S. 5 (5-A)—Appeal "in forma pauperis"—Leave to appeal refused—Time granted to file a regular appeal—Discretion of Court.

Where a District Judge, after refusing an applicant leave to appeal *in forma pauperis* granted time beyond the expiry of the period of limitation for the applicant to file a regular appeal on the full Court-fee, *Held*, that inasmuch as the appeal could only be admitted by the aid of S. 5, Limitation Act, the Court must be taken to have exercised the powers conferred by the section, although the section was not referred to by that Court. 1904 A.W.N. 24= 26 A. 329.

8. Duty of applicant.

See also NOTES.

——S. 5—Duty of applicant.

The applicant is only required to satisfy the Court that he was unable to present his appeal in time on account of some misadventure on the *last date* on which it ought to have been presented; it is not necessary for him to account for his inactivity during the entire period prescribed by law. 34 C.W.N. 1119=58 Cal. 549 =A.I.R. 1931 Cal. 298.

——S. 5—An appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefore is guilty of negli-

gence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing his appeal within time. 12 N.L.R. 171, Foll. 119 Ind. Cas. 679=A.I.R. 1930 Nag. 121.

——**S. 5**—Appellant unwell in the last portion of limitation and filing his appeal two days later—Two days delay should be excused, but the whole period of sickness cannot be excused—The period of sickness is not to be added like the period for obtaining copies. 119 Ind. Cas. 215=6 Rang. 571=A.I.R. 1928 Rang. 165.

——**S. 5**—Appellant seeking to avail of S. 5 must explain each day of delay. (1937) 39 P.L.R. 897.

——**S. 5**—It is settled law that in order to have the benefit of S. 5 it is the duty of the appellant to explain the delay for every day that elapses beyond the period allowed by the Limitation Act for filing an appeal. 103 Ind. Cas. 498=A.I.R. 1927 Lah. 717.

——S. 5—Equitable relief.

Persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. 72 Ind. Cas. 868=46 Mad. 148=1928 M.W.N. 1=17 M.L.W. 216=A.I.R. 1923 Mad. 284=44 M.L.J. 107.

9. Ex parte admission.

——S. 5—Ex parte admission.

Where an order admitting an appeal and condoning the delay is made *ex parte*, a Court has jurisdiction to re-consider, the question when the appeal comes for hearing. A.I.R. 1917 P.C. 179, Foll. 111 Ind. Cas. 816=A.I.R. 1929 All. 31.

——**S. 5**—Admission of a time-barred appeal on hearing the appellant only on the grounds of sufficient cause cannot be revised where the respondent did not object to the admission in the course of his argument. 80 Ind. Cas. 617=A.I.R. 1925 Oudh 148.

——**S. 5**—Where an *ex parte* order is passed excusing the delay under S. 5, Limitation Act, it is open to the other party to apply to have it set aside Courts no doubt have power to excuse the delay in the presentation of a copy of the decree appealed against, if they are satisfied that the discretion vested in them under S. 5 of the Limitation Act should be exercised in favour of the appellant. 72 Ind. Cas. 308=17 M.L.W. 352=32 M.L.T. 232=1923 M.W.N. 164=A.I.R. 1923 Mad. 482=44 M.L.J. 279.

——**S. 5**—The admission of the appeal subject to objection was irregular. An appellate Court ought not to interfere with the discretion exercised by the Court below, merely because, upon the material before it, it might have arrived at a different conclusion. But where no discretion at all is exercised it is certainly open to the party aggrieved to raise the question on appeal. 64 Ind. Cas. 55=1922 P.H.C.C. 20=3 Pat. L.T. 110=6 Pat. L.J. 444=A.I.R. 1922 Pat. 47.

——**S. 5**—An order admitting and appeal *ex parte*, is not binding on the respondent, who can at the hearing raise any objection to such admission, that is legally possible. 63 Ind. Cas. 726 (Lah.).

——**S. 5**—An *ex parte* order granting an application for excuse of delay in applying for leave to appeal as a pauper, may be considered at the instance of the party prejudicially affected thereby. 60 Ind. Cas. 212=12 M.L.W. 500.

——S. 5—Ex parte admission—Sufficient cause—Burden of proof—Duty of Court to decide the question of excusing the delay before final hearing—Question of limitation—Power to decide.

An appellant seeking the benefit of S. 5 of the Limitation Act must adduce distinct proof of sufficient cause on which he relies and must furnish a detailed affidavit explaining the cause of the delay. Where an Appellate Court exercises the discretion vested in it, it must record the reasons for allowing an extension of the period of Limitation. Where a respondent fails to object to the admission of a time-expired appeal, the Court is not precluded from considering the question of limitation. Even an agreement between the parties that the objection should not be raised would not prevent the High Court from interfering. The practice of admitting appeals out of time provisionally without notice to the respondent and allowing objection to its admission to be taken at the hearing should be discontinued. 54 Ind. Cas. 36 (Pat.).

——S. 5—Ex parte admission—Appeal filed after time—Effect of.

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made *ex parte*, it is open to consideration at the respondent's instance at the hearing. It is an implied term of the order. The question of limitation should not however be left open till the hearing of the appeal. The Courts in India should adopt a procedure which will secure to the stage of admission the final determination of any question of limitation affecting the competence of an appeal. 41 Mad. 412=34 M.L.J. 63=4 P.L.W. 54=16 A.L.J. 57=7 L.W. 156=23 M.L.T. 101=27 C.L.J. 253=2 P.L.R. 1918= 22 C.W.N. 481=21 Bom. L.R. 541=11 Bur. L.T. 121=(1918) M.W.N. 906=45 I.A. 25=43 Ind. Cas. 493 (P.C.).

——S. 5—Exparte admission—Right of respondent to contest.

A respondent is entitled to contest an *ex parte* order extending the appeal time. 90 P.L.R. 1915=46 P.R. 1915=71 P.W.R. 1915=29 Ind. Cas. 265.

——S. 5—Ex parte admission—Competency of Court.

Where an appeal has been provisionally admitted, a Judge can entertain and decide the question whether there was sufficient cause for extending the time for appeal under S. 5 of the Limitation Act. 38 Bom. 613=16 Bom. L.R. 516=25 Ind. Cas. 369.

——S. 5—Ex parte admission—If can be set aside by the successor of admitting Judge.

An *ex parte* order by a Judge admitting an appeal presented out of time can be questioned and set aside by his successor in office at the final hearing of the appeal after notice. 9 M. 450; 21 M. 228; 34 C. 216; 1 L.W. 440, Foll. 1 L.W. 517=27 M.L.J. 147=16 M.L.T. 100=(1914) M.W.N. 619=25 Ind. Cas. 746.

——S. 5—Ex parte admission—Objections overruled and appeal admitted—Effect.

White, C.J., Oldfield, J., Contra.—Where notice as to why delay should not be excused was served by appellant's vakil but without proper order from Court and the appeal was admitted on appearance of other respondents and after hearing them, *held*, the respondent was not entitled on the hearing of the appeal to set up want of notice of proceedings in the Admission Court. Notice without proper order of Court is a nullity and cannot by mere inaction amount to an estoppel. 25 M.L.J. 281=(1913) M.W.N. 751=21 Ind. Cas. 96.

——S. 5—Ex parte admission—If respondent can object afterwards.

The order admitting an appeal *ex parte* can be reopened on the objection of the respondent at the hearing. 17 C.L.J. 596=20 Ind. Cas. 513.

——S. 5—Ex parte admission by Dt. Judge—Transfer to Sub-Judge.

An appeal was admitted by a Dt. Judge under S. 5

of the Limitation Act, on the *ex parte* statement of the appellant, the respondent not having entered appearance. The case was thereafter transferred to Sub-Judge for trial. *Held*, that the Sub-Judge had jurisdiction, on proper cause being shown to cancel the *ex parte* order and dismiss the appeal on the ground that it was barred by limitation at the time when it was admitted. 40 Cal. 259=17 C.W.N. 42=16 Ind. Cas. 407.

——S. 5—Ex parte admission—Re-opening of.

The opposite party can raise objection at the hearing to the admission of an appeal without notice to him after the prescribed period of limitation. 23 M.L.J. 219=12 M.L.T. 260=(1912) M.W.N. 962=16 Ind. Cas. 486 [Affirmed O.A. 41 M. 412=43 Ind. Cas. 493 P.C.].

——S. 5—Ex parte admission—Appeal filed out of time.

A respondent is not bound by an order of admitting a barred appeal in the exercise of the discretion under S. 5, Limitation Act if it is passed before an issue of process to him, but such admission order cannot be at once discharged on an objection of the respondent on the ground already considered before the order and made before the Judge other than that who passed the order of admission in the exercise of his discretion. 8 N.L.R. 50=15 Ind. Cas. 562.

——S. 5—Application for admission granted ex parte by a Division Court—Application for discharge of order by respondent—Delay—Costs incurred by appellant.

Where an application for the admission of an appeal which was filed out of time by two days was heard *ex parte* before a Division Bench and admitted.

Held, that though the order was not conclusive on the respondents and they are entitled to object to the admission of the appeal at a later stage the order of the Division Bench admitting the appeal should not be discharged when no facts which were not before that bench are urged on behalf of the respondents.

Held further, that on the facts of the present case, the order admitting the appeal should not be discharged *inter alia* because the respondent's application was made after the records had been printed and costs incurred by the appellants although the respondents appeared to have become aware of the filing of the appeal out of time shortly after it was filed. Per *Woodroffe, J.*—Each case must be decided on its own facts. In this case besides the delay on the part of the respondents in bringing their objections before the Court there was a *bona fide* mistake of calculation on the part of the appellant's pleader which led to the delay in filing the appeal. (1907) 12 C.W.N. 25.

10. Inability without fault.

——S. 5—Illness of applicant.

Delay of 16 days in filing revision application, caused by an acute attack of appendicitis to the applicant a week before the expiry of limitation was condoned. 1942 N.L.J. 311.

——S. 5—Illness of applicant.

A mere plea of sickness in itself unless the effect of the sickness was such that in the circumstances it would afford reasonable excuse for the delay in presenting the appeal would not justify the Court in exercising its discretion in admitting the appeal under S. 5. It is a matter for the Court to consider in each case whether the effect of illness as proved is such that it afforded sufficient cause for the failure to present the appeal within the time prescribed by law. A.I.R. 1936 Rang. 183=14 R. 155=162 Ind. Cas. 664 (2).

——S. 5—Act of God—Legitimate excuse.

A party prevented by an act of God from prosecuting a copy application has a legitimate excuse. 1932 M.W.N. 328.

——S. 5—Inability without fault.

Copies of judgment and decree sent to a lawyer for advice lost in transit—New application made on last day of limitation and copies obtained on expiration and appeal filed immediately—Extension under S. 5 was granted. 120 Ind. Cas. 169=11 Lah. 111=31 P.L.R. 356=A.I.R. 1930 Lah. 216.

——S. 5—Delay caused by the appellant not having knowledge of complaint under S. 476, Cr.P. Code, can be excused. 108 Ind. Cas. 26=52 Bom. 164=30 Bom. L.R. 76=29 Cr.L.J. 315=9 A.I. Cr.R. 435=A.I.R. 1928 Bom. 64.

——S. 5—Extension of time.

Where at the instance of the Court a party is informed that his application cannot be received on that day, but the next day limitation expires, he is entitled to the necessary extension of limitation under S. 151, C.P. Code. 96 Ind. Cas. 376=9 N.L.J. 57=A.I.R. 1926 Nag. 331.

——S. 5—Where the person who is bound to pay the money produces the money in Court and complies with the rule which requires him to take out a challan and pay the money at a different place and there is a delay in the actual payment of the money into the treasury bank owing to reasons beyond the control of the person making the payment, the payment must be deemed to have been made on the date the money is produced and the challan obtained. To hold otherwise would be to penalise a party for events beyond his control. 79 Ind. Cas. 651=47 Mad. 543=18 M.L.W. 844=33 M.L.T. 106=1923 M.W.N. 811=A.I.R. 1924 Mad. 324=45 M.L.J. 849.

——S. 5—Where the filing of the cross-objection raised a question of proprietary title and thus made the appeal to the Commissioner incompetent.

Held, the delay in filing it in Court of District Judge should be excused as appellant could not take this event into consideration when he filed the appeal. 77 Ind. Cas. 955=A.I.R. 1923 All. 170.

——S. 5—Appeal without judgment copy not possible to be filed before filing of main appeal—Court would excuse delay. 74 Ind. Cas. 383=36 C.L.J. 389=A.I.R. 1923 Cal. 261.

——S. 5—The last day for filing an appeal in a Sessions Court expired during the Court's civil vacation. On that day the Judge held criminal sittings of which, however, neither the appellant nor his Counsel had timely notice. The appeal was filed on the day Court re-opened after the civil vacation.

Held, that as notice of Judge's intention to hold sittings on the day when limitation for the appeal expired was not given either to the appellant or to his Counsel the appeal ought not to have been dismissed as time-barred but time for the same should have been extended. 61 Ind. Cas. 714=22 Cr.L.J. 426.

——S. 5—Inability without fault—Party not able to conform to limitation created by court without any fault of his own.

When the Court creates a limitation and a party is unable to conform to it, for no fault of his own *e.g.*, failure to set a Conciliator's certificate owing to the cancellation of the appointment of Councillor or Government, and has no other remedy, the law will ordinarily excuse him. 38 Bom. 656=16 Bom.L.R. 444=25 Ind. Cas. 67.

——S. 5—Inability without fault—Party not able to conform to law—Without any fault of his.

Where the law creates a limitation and a party is unable to conform to it for no fault of his own *e.g.*, failure to get a Conciliator's certificate owing to the cancellation of the appointment of Conciliator or the Government and he

has no other remedy, the law will ordinarily excuse him. 38 Bom. 653=16 Bom.L.R. 441=25 Ind. Cas. 66.

11. Litigant misled by practice of Court.

——S. 5—Litigant misled by practice of High Court in computing limitation—Formal application under section—If necessary.

Where the appellant is misled by the judgments and practice of the High Court before which he files the appeal in computing the period of limitation prescribed for it, no formal application under S. 5 of the Limitation Act is necessary. I.L.R. (1950) Assam 12=A.I.R. 1950 Assam 83.

——S. 5—'Sufficient cause'—Litigant misled by change in practice of Court.

Under S. 5, Limitation Act, time can be extended when a litigant has been misled by a change in the practice of the Court. 85 C.L.J. 299.

——S. 5—Land Acquisition Act—Appeal under—Appeal wrongly preferred to High Court returned for re-presentation to District Court—Exclusion of time.

An appeal under the Land Acquisition Act was filed in the High Court on 15th July, 1925. On 18th September, 1930, it was directed to be returned and re-presented to the District Court. It was duly re-presented but it should, in the normal course, have been presented to the District Court on 15th April, 1925. The District Judge held that the period between 15th April, 1925, and 15th July, 1925 could not be excluded in computing the period of limitation though the period aftr 15th July, could be excluded :

Held, that as the practice was to file such appeals in the High Court, until the High Court decided otherwise in 1927, the period between 15th April, and 15th July should also be excused. A.I.R. 1934 Mad. 637=(1934) M.W.N. 991=67 M.L.J. 902=152 Ind. Cas. 155 (2).

——S. 5—Omission to file copy of award in time—Excused.

In an appeal from an award of District Judge in a land acquisition case, the appellant failed to file a copy of the award with the appeal. The appeal was filed in 1922. The decision of Lahore High Court in A.I.R. 1925 Lah. 438, under which the amendment to Land Acquisition Act in 1921 was interpreted making the filing of copy of award with appeal obligatory, was decided in 1925. The appellant's counsel applied during the hearing of the appeal in 1927 for an extension of time under S. 5, Limitation Act, and put in a complete copy of the award together with an affidavit and statement of reasons asking for indulgence.

Held, that the application should be allowed and that the appeal should be heard. 112 Ind. Cas. 797=A.I.R. 1928 Lah. 263.

——S. 5—Where the appellant has been misled by the rules of the Court followed for a long time, the provisions of S. 5 can be invoked. 88 Ind. Cas. 443=48 Mad. 631=21 M.L.W. 672=1925 M.W.N. 190=A.I.R. 1925 Mad. 725=48 M.L.J. 384.

——S. 5—Ignorance of a change in a rule of practice is no excuse where the change was given ample publicity before it was brought into force. 75 Ind. Cas. 878=A.I.R. 1925 Nag. 193.

——S. 5—Doubtful point of practice.

Where a matter allowed several possible views, and a party reasonably doubted the course to be followed he should be excused for delay in filing an appeal. A judgment was altered at the instance of one of the defendants and other defendants applied for revision, but did not succeed in it. Then they appealed against the decree based on the altered judgment :

Held, that the matter allowed several views and the delay in filing the appeal should be excused. 6 O.L.J. 622=58 Ind. Cas. 995.

——S. 5—Doubtful point of practice.

Time may be extended when a litigant has been misled by a change in the practice of the Court. 32 C.L.J. 121=58 Ind. Cas. 408.

——S. 5—Doubtful point of practice—Sufficient cause—Appellant misled by practice.

An appellant is entitled to an extension of time if he had been misled by the practice which had hitherto prevailed in the Subordinate Courts but which has recently been held to be wrong. An appellant relying on S. 5 of the Limitation Act ought ordinarily to be deemed to have acted with ordinary diligence during the whole period between the date of the decree appealed against and the date of presenting the appeal. The time spent in applying a review of judgment might, if *bona fides* is proved to be deducted under S. 5 of the Limitation Act, when the appeal would be in time but for the time spent in review. 52 Ind. Cas. 959 (Pat.).

——S. 5—Doubtful point of practice—Conflicting decisions of the High Court.

Certain conflicting decisions of the High Court confused the appellant as to the proper remedy against an order directing the amendment of a decree, *viz.*, whether it is by notion or by way of appeal, and then prevented him from presenting the appeal within time,

Held that it was a sufficient excuse. 13 N.L.R. 25=39 Ind. Cas. 54.

——S. 5—Doubtful point of practice.

An appeal from the order of the District Judge was preferred to the High Court. A single Judge held that the appeal from the order of the Settlement Officer lay to the Commissioner and not to the District Judge. When the memorandum of the appeal was presented to the Commissioner, he held that appeal lay to the District Judge. Then the appellant's application for review of the judgment of the single Judge of the High Court who had heard the case was dismissed. Thereupon they appealed under S. 10, Letters Patent.

Held, that there was sufficient cause for delay in presenting the appeal beyond time. 15 A.L.J. 200=37 Ind. Cas. 818.

12. Mistake in calculation.

——S. 5—Mistake in calculation—Party misled by neither legal adviser nor clerk.

Calculation done neither by Pleader not by clerk but by somebody else—Appeal filed 2 days after the period of limitation was over :

Held, that the case was not one for the exercise of the discretion of the Court under S. 5 as the mistake was not of the legal adviser or of his clerk but of somebody else who was in no better position than the man in the street. A.I.R. 1933 Cal. 462=57 C.L.J. 39=145 Ind. Cas. 116.

——S. 5—Mistake in calculation—Differing opinion of two Judges about limitations—Appellant probably misled—Time should be extended.

Where there was a case decided by two Judges of the High Court, where one was of opinion that an appeal under S. 476-B, Cr.P. Code, must be treated as an ordinary appeal under the Cr.P. Code, but the other was of opinion that such an appeal must be treated as a miscellaneous civil appeal and regulated by O. 41, C.P. Code.

Held, that the difference of opinion between two Judges may afford a reasonable ground for a party to suppose that such an appeal was a civil appeal and he had 90 days' time from the date of the order to prefer an appeal and in such a case extension of time should be granted.

104 Ind. Cas. 456=46 C.L.J. 40=8 A.I. Cr.R. 433=28 Cr.L.J. 840=A.I.R. 1927 Cal. 718.

——**S. 5**—Discretion under S. 5 should be exercised in favour of a party who has been misled by a judgment of the High Court in computing the period of limitation. 102 Ind. Cas. 123=A.I.R. 1927 Nag. 247.

——**S. 5**—Where an applicant on his own mistaken view files the appeal on the last possible day extension should not be granted. 94 Ind. Cas. 121 (Nag.).

——**S. 5**—An appellant who does not display promptitude must suffer if his calculation is wrong. 61 Ind. Cas. 889=A.I.R. 1921 Nag. 141.

——**S. 5—Mistake in calculation.**

A mistake in calculating the period of limitation for filing an appeal is not a sufficient cause for extending the period under S. 5 of the Act. 41 Mad. 855=35 M.L.J. 138=5 P.L.W. 179=8 L.W. 167=16 A.L.J. 725=(1918) M.W.N. 621=24 M.L.T. 231=28 C.L.J. 403=20 Bom.L.R. 1041=23 C.W.N. 177=46 Ind. Cas. 481=45 I.A. 156 (P.C.).

——**S. 5—Mistake in calculation.**

Mistake in calculating period of limitation is not sufficient cause of for extension. 46 Ind. Cas. 480 (Cal.).

——**S. 5—Mistake in calculation.**

If a man chooses to adopt his own method of calculation which is found to be erroneous, and files an appeal on the last possible day, no extension can be granted. 13 N.L.R. 89=40 Ind. Cas. 425.

——**S. 5—Mistake of pleader—Mistake in calculation.**

Delay caused by the mistake of the party's Vakil in calculating the time is sufficient cause for excusing delay under S. 5. 86 Ind. Cas. 114=21 M.L.W. 24=A.I.R. 1925 Mad. 462.

——**S. 5—Mistake in calculation**—*Bona fide* **miscalculation by pleader whether sufficient cause.**

The expression sufficient cause in S. 5 should be liberally construed so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to appellant. A *bona fide* mistake by the pleader in calculating the period of limitation in consequence of which the appeal is filed out of time may constitute sufficient cause whcih must be decided by the court having regard to all the facts and circumstances of the case. 17 C.W.N. 807=19 Ind. Cas. 931.

13. Mistake of Court or its office.

——**S. 5**—The *dictum* that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors should be read together with S. 5, Limitation Act and the expression "sufficient cause" used therein should not be construed in too narrow a sense. A litigant is entitled to expect that the infringement of the rules and orders of the Court by the Judge should not hamper him in his appeal. A.I.R. 1941 Rang. 194=1941 Rang. L.R. 213=195 Ind. Cas. 296.

——**S. 5—First Appellate Court pronouncing judgment without notice to parties, contrary to O. 41, r. 30, C.P. Code—Appellant in second appeal, if entitled to full statutory period from date of his knowledge of judgment.**

Where the lower Appellate Court grants a decree to the appellant, but in contravention of the provisions of O. 41, r. 30, C.P. Code, pronounces the judgment some weeks later without giving notice to the parties, the appellant, in second appeal from such decision, cannot be prejudiced by the irregularity, committed by the first Appellate Court and under S. 5, must be granted the period allowed by statute in which to file the second appeal from the date on which he came to know of the judgment of the first Appellate Court. It would be to put a new standard into the law of limitation to say that when a Court made a mistake of this character the appellant was only to be given such time as the superior Court might, in the exercise of its judgment, think reasonable. The standard of what is reasonable depends upon the period of limitation which the Legislature has sought to impose in the first case. 1941 Rang. L.R. 213=A.I.R. 1941 Rang. 194=195. Ind. Cas. 296.

——**S. 5**—Where the necessity for filing the second memorandum late, arose out of the erroneous rejection of the first memorandum which had been filed within time, this in itself forms a sufficient ground for extending time under S. 5. A.I.R. 1941 Pat. 108=7 B.R. 126=22 P.L.T. 549=190 Ind. Cas. 671.

——**S. 5—Error in certified copy.**

Omission of the name of the Official Receiver from the array of parties to the appeal—Mistake caused by the error in certified copy of the judgment of the lower Court supplied to the appellant—Application to add the Official Receiver after the period of limitation has expired

Held, that the delay should be condoned under S. 5, and the name be added. A.I.R. 1941 Lah. 402=43 P.L.R. 471=I.L.R. (1942) Lah. 603=198 Ind. Cas. 726.

——**S. 5**—Charge against complainant under S. 211, Indian Penal Code—No opportunity to show cause why complaint should not be made, given to him—Complainant soon after knowing of complaint having been filed against him applying for copy of order of complaint and by that time, his appeal to High Court going out of time more than thirty days having elapsed :

Held, that the delay must be condoned. A.I.R. 1939 Sind 78=40 Cr.L.J. 449=I.L.R. (1939) Kar. 648.

——**S. 5**—Appeal from Civil Court's order filing complaint under S. 476, Cr.P. Code—Time to be computed from filing of complaint—Ignorance of filing of complain, sufficient cause to condone delay. (1938) 1938 N.L.J. 183.

——**S. 5**—*Held*, on facts that the delay was due to the mistake of the Court in giving wrong date on the copy of the decree and, therefore, the decree-holder should not be prejudiced by such mistake. 4 B.R. 427=A.I.R. 1938 Pat. 149=174 Ind. Cas. 397.

——**S. 5**—An appeal to Sessions Judge against conviction under S. 124-A, I.P.C., wrongly admitted and sentence reduced—Accused again appealing to the High Court, but beyond limitation :

Held, that there was sufficient cause for extension of time under S. 5. (1937) A.L.J. 365=A.I.R. 1937 All. 466=(1937) A.W.R. 401=38 Cr.L.J. 972=170 Ind. Cas. 874.

——**S. 5—Copy of grounds of appeal not given along with copy of judgment by copying department.**

An application for a copy of the grounds of appeal before the lower Appellate Court was made along with an application for the copy of the judgment appealed against and the copy of the grounds of appeal was not given along with the copy of the judgment by the negligence of the Copying Department. Subsequently, another application for the copy of the grounds of appeal was made on which a copy was given to the appellant :

Held, that the time should be extended under S. 5. A.I.R. 1937 Lah. 691=39 P.L.R. 34=171 Ind. Cas. 812.

——**S. 5**—Where the reason why a defendant's name was omitted from the names of the respondents obviously was that his name did not find a place in the decree and he was impleaded later on within 30 days of the amendment :

Held, that the Appellate Court erred in the exercise of its discretion in dismissing the appeal merely on the ground that the appellant had not applied under S. 5,

Limitation Act. A.I.R. 1936 All. 666=1936 R.D. 300 (1)=(1936) A.W.R. 702=(1936) A.L.J. 1281=164 Ind. Cas. 1066.

——S. 5—Applicant misled by action of Court.

Where, due to the Action of the Copying Department in not following the rules prescribed, it may very well be urged on behalf of the appellant that he was misled into thinking that his period of limitation would exclude all the days from 29th August till 19th September, *i.e.*, the period from the date of the application for the copy of the judgment and the decree to the date on which the copies were obtained ; inasmuch as where a person has been misled by the action of the Court or any officer of the Court, S. 5 should be applied. A.I.R. 1936 Lah. 670=38 P.L.R. 852=161 Ind. Cas. 215.

——S. 5—Decree not clear—Respondent also filing appeal in wrong Court—Appellant filing appeal in wrong Court.

Where the decree as framed by the lower Court was not clearly worded and the plaintiff respondent was himself misled in choosing the forum, having been the first to file the appeal and the appellant subsequently filed the appeal in the wrong Court :

Held, that the provisions of S. 5, applied and the period during which the appeal remained pending in the wrong Court should be excluded. A.I.R. 1936 Lah. 168=161 Ind. Cas. 251.

——S. 5—Application for copy made personally—Copying Department accepting it without objection and not demanding deposit of fees—Endorsement that certain number of days have been requisite for supply :

Held, that the applicant is entitled to deduction of the time required for getting the copies and the Court refusing an extension under S. 5, Limitation Act, errs in the exercise of its jurisdiction. A.I.R. 1936 Lah. 693=38 P.L.R. 903=165 Ind. Cas. 516.

——S. 5—Delay in filing appeal due to wrong practice of Copying Department.

Where the delay in filing the appeal was due to the delay caused by Copying Agency on account of the erroneous practice prevailing in the District :

Held, that there was sufficient cause for not filing the appeal within the period of limitation. A.I.R. 1936 Lah. 200.

——S. 5—Where any delay that took place in the applicant's getting copies of the judgment and decree was attributable more to the Copying Department of the trial Court than to the applicants, they are entitled to the benefit of S. 5, Limitation Act. A.I.R. 1936 Lah. 132 =161 Ind. Cas. 457.

——S. 5—Where delay in filing an application for review is caused by the supply of wrong information on the part of the copying department which resulted in delay in getting the copy of the decree, a person making the application is not entitled to deduction, of time under S. 12 as of right. He has to satisfy the Court that the wrong information was given in circumstances for which he was not responsible, and if the Court is satisfied as to the justness of his contention, the Court will then extend the time under S. 5. Where the appeal, on the face of it, is time-barred, it is the duty of the applicant to append to his appeal the reason for the delay and to ask for condonation of the delay under S. 5.

An appellant is entitled to presume the accuracy of the figures which are given him in the copy of the judgment. A.I.R. 1935 Nag. 109=155 Ind. Cas. 588.

——S. 5—Where it is stated in the affidavit accompanying an application under S. 5 that the application was not made earlier because, at the time of presentation of the appeal, the Court accepted it as within time, and the appeal was presented in the High Court at the earliest opportunity after the memorandum had been returned by the District Judge :

Held, that there was, in the circumstances, sufficient cause for the appeal not being presented to the High Court earlier and that the period of limitation could be extended under S. 5. 1935 O.W.N. 168=A.I.R. 1935 Oudh 296=10 Luck 587=154 Ind. Cas. 125.

——S. 5—Where no application for leave to appeal from an order under S. 61, Provincial Insolvency Act has been made, it cannot be inferred that leave was granted because the appeal was admitted. Leave could be granted at the hearing and time extended under S. 5. A.I.R. 1934 Lah. 33=149 Ind. Cas. 935 (1).

——S. 5—Order returning plaint for presentation to proper Court—Delay of office in returning :

Held, that the plaintiff, in computing period of limitation was entitled to exclusion of the period till the date he received the plaint back from the office. No litigant or party can suffer on account of the laches ro delay of the Court or its office. 34 P.L.R. 634=A.I.R. 1933 Lah. 611=144 Ind. Cas. 5.

——S. 5—Where the appellant claimed exclusion of time in respect of the copies of the judgment and the decree and it appeared that the copies were to be despatched by post and the appellant urged that he was never informed that any advance had first to be deposited by him and that, as a matter of fact, an order was passed in his presence that necessary copies be supplied :

Held, in revision, that in the circumstances extension of time under S. 5 ought to have been granted. A.I.R. 1933 Lah. 260=145 Ind. Cas. 135.

——S. 5—Appellant prosecuting case in good faith and with diligence—Delay in filing appeal, if can be condoned.

Where the appellant has been prosecuting his case in good faith and with due diligence, but the case has not been tried on merits and the appellant has been sent from Court to Court without the matter in controversy being decided, the delary in filing appeal could be condoned under S. 5. A.I.R. 1933 Oudh 83.

——S. 5—The applicant who had applied for copies failed to supply the additional folios. It appeared, however, that he did not know of the deficiency and that when he came to know of it, he took the necessary steps in all haste. He filed the appeal seven days after vacation but the period for filing appeal had expired during vacation. It appreared, further, that the procedure of the copying department was not such that the applicant could be held to have received information of the deficiency :

Held, that the Court could, under the circumstances, excuse the delay in filing the appeal. 8 O.W.N. 191 = 6 Luck. 578=A.I.R. 1931 Oudh 314.

——S. 5—Mistake of Court—Mistake of Court is sufficient excuse.

Before an appeal is admitted, it is the duty of the Court to see that all the papers that should be filed have been filed before the Court. Where an appeal is filed without a copy of the decree and the Court instead of bringing the omission to the notice of appellant admits the appeal it cannot subsequently dismiss the appeal on the ground that it had not been filed in time and the appellant should not suffer for the fault of the Court in not discovering his mistake in time. 126 Ind. Cas. 641=A.I.R. 1930 Rang. 235.

——S. 5—Persons misled by order of Court can claim benefit of S. 5.

An appeal was filed without copy of decree. The appellant had filed an affidavit to the effect that he had made an application for copy but could not get it as no decree was found in the proceedings. The appel-

late Court granted the application for dispensing with the copy and to prosecute the appeal without it. When the copy was filed, the appeal was time-barred and consequently dismissed.

Held, that in view of the steps taken by the appellant when he filed an appeal and the order of the Court dispensing with the copy, the appellant must be considered to have exercised due care and attention. 127 Ind. Cas. 167=A.I.R. 1930 Rang. 182.

——**S. 5**—Where the date actually entered on the decree apparently misled the appellant it would obviously be a sufficient cause for admitting the appeal after time. 126 Ind. Cas. 543=A.I.R. 1930 Rang. 67.

——**S. 5**—Where the proper Court-fee was not paid within time owing to the fact that the value of purposes of Court-fees was not correctly given in the copy of the judgment appealed from.

Held, that an extension of time should be granted under the circumstances. 112 Ind. Cas. 455=29 P.L.R. 410=A.I.R. 1928 Lah. 737.

———**S. 5**—Appellant misled by error of Court and paying insufficient Court-fee due to *bona fide* mistake is protected. 92 Ind. Cas. 319=A.I.R. 1926 Lah. 509.

——S. 5—Legal representatives—Wrong.

Where on the death of the executor of one of two defendants, during the pendency of suit, plaintiff applied for substitution of heirs of defendant on the record and the Court without investigating under R. 5 whether the heirs were proper representatives directed the suit to proceed but subsequently at the appellate stage it transpired that the proper legal representative was the next executor and not heir of defendant and therefore the suit was contended to have abated.

Held, that plaintiff was misled by the order of Court allowing suit to proceed and should be entitled under S. 5 of the Limitation Act to have the abatement, if there was an abatement set aside. 93 Ind. Cas. 129= 4 Pat. 448=7 P.L.T. 431=1925 P.H.C.C. 345=A.I.R. 1925 Pat. 765.

——**S. 5**—When the appellants did not appeal in time owing to an omission on the part of the Trial Court in not mentioning their names in decree.

Held, that the delay, if at all, should be excused on the ground of honest mistake. 85 Ind. Cas. 627=A.I.R. 1925 All. 567.

——**S. 5**—Where a Court dismissed a suit as plaintiff was not ready with his witnesses as he had not paid the process fee in time but the Court drew up a decree after 17 months of such dismissal and that too after it was directed by the High Court so to do.

Held, that an appeal filed within time computed from the drawing up of the decree was in time and that the question of excusing delay did not arise in such a case. 78 Ind. Cas. 996=20 N.L.R. 131=A.I.R. 1924 Nag. 271.

——**S. 5**—Court's neglect to do its duty, namely, to draw up a decree, is a sufficient cause for excusing the delay. 78 Ind. Cas. 996=20 N.L.R. 131=A.I.R. 1924 Nag. 271.

——S. 5—Wrong order as to jurisdiction, Civil and Revenue Courts.

A *pattidar* sued for the recovery of revenue paid on account of the defendants, who were *sub-pattidars*. The Munsif before whom these suits were pending thought that they were excluded from the cognizance of the Civil Court. He returned the plaints for presentation to Revenue Court; the latter held that the suits were cognizable by the Civil Court. The order of the Revenue Court was upheld in appeal by the Deputy Commissioner. The plaintiffs then came back to the Civil Court and sought relief by filing the same plaints again in the Court of the Munsif. The Munsif then held that the decision in the previous proceedings operated as *res judica'a*. The plaintiff then filed two sets of appeals directed against the original order of the Munsif and against the subsequent order. The former set of appeals was barred by time.

Held, that time should be extended under S. 5. 74 Ind. Cas. 263=26 O.C. 56=A.I.R. 1923 Oudh 238.

——S. 5—Mistake of Court—Notice of judgment date not given.

A delay in filing an appeal caused by the failure of the Court to give notice of the date of delivery of judgment ought to be excused. A discretion exercised by the Court under S. 5 should not be interfered with on appeal unless exercised arbitrarily or illegally. 9 Bur.L.T. 250=38 Ind. Cas. 575.

——S. 5—Mistake of Court—Notice of judgment date not given.

Where a court delivers judgment without notice to the parties or their pleaders as prescribed in O. 20, R. 1, C.P. Code and the appeal becomes barred entirely through the negligence of the Judge, it is a fit case for excusing the delay. 8 Bur.L.T. 99=27 Ind. Cas. 784.

——S. 5—Mistake of Court—Decree of Appellate Court legally incorrect in form—Inability to obtain relief in lower Court—Remedy.

Where a decree of the Appellate Court is legally incorrect in form and so a decree-holder cannot obtain relief in the Lower Court, his remedy is for review of judgment of the Appellate Court and not for revision of the Lower Court's order and the time spent in seeking relief under the decree is allowable to him when he applies for a review. 1 O.L.J. 193=24 Ind. Cas. 113.

——S. 5—Mistake of Court—Appeal—Presentation in proper time to proper Court—Return of appeal—Subsequent presentation.

An appeal was presented within the period of limitation to the proper Court, which taking a wrong view of the jurisdiction value, returned it for presentation to the Chief Court where it was filed after the period of limitation.

Held, that as the appeal was presented in time to the Divisional Court, it was not barred. The Chief Court instead of returning the appeal for re-presentation to the Divisional Court treated it as transferred from that Court to its own file. 12 P.L.R. 1912 Sup.=276 P.W.R. 1912=16 Ind. Cas. 979.

14. Mistake of fact.

——S. 5—Mistake of fact—Gazetted holiday—Substitution of by another day—Second appeal.

When an appellant was misled by a particular day, gazetted public holiday being substituted by another day,

Held, that it was sufficient cause for excusing the delay and when the Lower Appellate Court does not apply its mind to the question, it can be considered in second appeal. 77 P.R. 1917=147 P.W.R. 1917= 42 Ind. Cas. 343.

——S. 5—Mistake of fact—Sufficient cause.

When a judgment disposes of two differently valued suits and the appellant being misled files an appeal, under the *bona fide* mistake in the Court of District Judge after time, the appeal is not time-barred under S. 5. 2 O.L.J. 562=32 Ind. Cas. 380.

——S. 5—Mistake of fact.

An appellant is bound to show that there has been no negligence, inaction or want of *bona fides* before he can claim an extension of time on the ground of a mistake of fact. When a pleader was misled as to the date of the decree the copy having been dated wrongly and the

appeal unverified, was consequently filed out of tim there was no sufficient cause within the section to excuse the delay. 8 S.L.R. 235=28 Ind. Cas. 82.

——S. 5—Mistake of fact.

The Court can extend the period in favour of an appellant under S. 5 of the Act if he has omitted to include the name of a respondent on account of oversight or *bona fide* mistake. 12 A.L.J. 941=26 Ind. Cas. 68.

——S. 5—Mistake of fact—Two cross-appeals—Two decrees—Appellant believing in one decree—Sufficient cause.

Two cross-appeals were decided by an Appellate Court and two separate decrees were framed. A second appeal was filed in respect of only one decree. The appellant in the second appeal was misled into thinking that only one decree had been drawn up.

Held, that the appellant had sufficient cause within S. 5 for not filing the appeal as to the other decree within the prescribed period and should be allowed to file a copy of the other decree. 115 P.R. 1912=6 P.L.R. 1912 Supp.=191 P.W.R. 1912=15 Ind. Cas. 140.

——S. 5—Mistako of fact—Date on which copy ready.

A *bona fide* mistake as to the date on which the applicant was told by the copying department to come to take delivery of decree copy, is sufficient cause to justify extension of time under S. 5. Where an appellant has no notion at the time of filing his appeal that it is time-barred he cannot be expected to have explained the cause of delay at the time of filing the appeal. 71 P.W.R. 1911=79 P.L.R. 1911=9 Ind. Cas. 607.

15. Mistake of law.

——S. 5—Sufficient cause—Ignorance of law.

Ignorance of law is not a sufficient ground for condoning the delay in filing an appeal. 1949 R.D. 265.

——S. 5—Ignorance of law.

The ignorance of the law prevailing in the minds of the clients and their Counsel is no sufficient cause under S. 5. A.I.R. 1943 Oudh 57=1942 O.W.N. 438=1942 R.D. 850=1942 A.W.R. 114 and 292=203 Ind. Cas. 579.

——S. 5—Sufficient cause—Mistake of law.

An error of law is no ground for extending the period of limitation under S. 5, Limitation Act. A.I.R. 1943 Oudh 78=1942 O.W.N. 465=1942 A.W.R. 305=205 Ind. Cas. 628.

——S. 5—*Bona fide* ignorance of the law, where there is no question of bad faith or negligence can be, in proper cases, a good excuse for extension of time under S. 5, Limitation Act. A.I.R. 1937 Rang. 199=169 Ind. Cas. 398.

——S. 5—Mistako of law, when can be condoned.

A mistake of law is not a good ground for condonation under S. 5. The rule is subject to certain qualifications. There must be no negligence ; there must be no inaction ; and there must be no want of good faith ; a party who has legal advice at his elbow and does not choose to avail himself of it is either lacking in good faith, or is acting negligently and hence such a person is not entitled to condonation under S. 5. A.I.R. 1936 Nag. 246=167 Ind. Cas. 260.

——S. 5—Court-fees.

Where the only question is that the court-fees are payable *ad valorem* on a particular amount, there is no *bona fide* mistake justifying extension of time for appeal. 33 P.L.R. 12=142 Ind. Cas. 829 (1).

——S. 5—Where an appeal is preferred against decree based on a modified award instead of against order modifying award under a *bona fide* belief that such appeal lies, it is a good ground to allow extension of time under S. 5, Limitation Act. 36 C.W.N. 1069=A.I.R. 1932 Cal. 713=138 Ind. Cas. 848.

——S. 5—A mere mistake of law is not *per se* sufficient for asking the Court to exercise its discretion under S. 5. A.I.R. 1932 Cal. 171=36 C.W.N. 40=144 Ind. Cas. 561.

——S. 5—Ignorance of law as explanation for late objection.

Although ignorance of law is no excuse, it may explain why an objection was not raised at an early stage. (1931) A.L.J. 653=A.I.R. 1931 All. 689=53 All. 747=136 Ind. Cas. 353.

——S. 5—Mistake of law.

Ignorance of law cannot be sufficient excuse for not filing an application in time. 12 Bom. 320 and 12 All. 461, Foll. 117 Ind. Cas. 282=A.I.R. 1929 Nag. 74.

——S. 5—Misconstruing law is not sufficient cause.

The words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fides* is imputable to the appellant but the mere fact that an appellant has misconstrued one of the rules and by reason of such mistake has omitted to bring his appeal in time is not a sufficient ground for enlarging the time for appeal. 104 Ind. Cas. 281=9 Lah. 76=A.I.R. 1928 Lah. 216.

——S. 5—Sufficient cause—Test laid down.

If the mistake or carelessness is real and unintentional and no damage has been done to the other side that cannot be repaired by costs or otherwise, the application must be granted ; if on the other hand, the negligence is culpable.or there are *mala fides* on the part of the applicant, or irreparable hurt would result to the other side, the application must be dismissed.

Where a suit by a minor through next friend was conducted by the aged father of the next friend and on the death of a defendant, the suit abated as no L.R.'s were brought on record and ignorance of law was pleaded as an excuse.

Held, that the delay must be excused and the abatement set aside. 108 Ind. Cas. 288=27 M.L.W. 756=A.I.R. 1928 Mad. 404=54 M.L.J. 234.

——S. 5—Bona fide **ignorance of law can be "sufficient cause."**

Where the appellant was an ignorant milkman with out any previous experience of litigation and pleaded his ignorance of his duty to substitute the legal representative of the deceased respondent though he was warned of the respondent's death.

Held, that in the circumstances of the case, the delay was *bona fide* and that sufficient cause was shown within the meaning of S. 5. 94 Ind. Cas. 929=29 C.W.N. 472=A.I.R. 1925 Cal. 684.

——S. 5—Ignorance of law cannot be accepted as a sufficient cause for not filing an application for leave to appeal as pauper. 87 Ind. Cas. 952=A.I.R. 1925 Lah. 602.

——S. 5—The fact of the plaintiff having made a mistake of law does not necessarily preclude him from obtaining the benefit of the section 45 Cal. 94. Foll. 78 Ind. Cas. 677=22 A.L.J. 365=5 L.R.A. Civ. 298=A.I.R. 1924 All. 867.

——S. 5—Rule newly passed—Ignorance of the rule is sufficient excuse.

Where the Lahore High Court made a rule on 17th October, 1917 that in the case of second appeals the memorandum of appeal shall, in addition to the copies specified in O. 41, R. 1, be accompanied by a copy of the judgment of the Court of the first instance, which was published in the Punjab Government Gazette of the 24th October, 1919, as Notification No. 4685-G and the

appeals in question were filed on the 30th October, 1919 in other words, six days after the new rule was published in the Government Gazette,

Held, that there is a sufficient cause within the meaning of S. 5 for admitting the appeals beyond time, as there had not been sufficient time for the new rule to become well-known by the 30th October, 1919. 74 Ind. Cas. 451=4 Lah. 122=5 L.L.J. 246=A.I.R. 1924 Lah. 41.

——**S. 5**—Ignorance of law is no excuse for delay and therefore the fact that the appellant previously was under the impression that limitation was 90 days for a Letters Patent Appeal in Lahore, is no excuse for not filing it within 30 days period prescribed by the rules. 61 Ind. Cas. 327=2 Lah. 127=3 L.L.J. 415=74 P.L.R. 1921=A.I.R. 1921 Lah. 26.

——Ss. 5 and 12—Mistake of law—Leave to appeal to Privy Council—Two appeals one judgment—Delay in preparing decrees.

The practice of the Patna High Court being to insist upon the filing of the decree either along with the petition for leave to appeal to the Privy Council or if it is not ready to allow the decree to be filed later on, when it is obtained, the period of six months was not to be computed from the date when the decree was signed but from the date of the decision. The time actually spent in obtaining a copy of the decree could only be deducted under S. 12 (2) of the Limitation Act. 13 Cal. 104, Not Foll. 12 All. 461 (F.B.); 23 Bom. 442 ; 39 Cal. 766, Rel. Where there are two appeals decided by one and the same judgment two petitions for leave to appeal have to be presented in respect of the two decrees. The above practice being well known and the later decisions having settled the law, no indulgence could be granted under S. 5. 1 P.L.T. 262=57 Ind. Cas. 312.

——S. 5—Mistake of law—Stare decisis—Procedure—Discretion—Appellate Court.

The judicial discretion given by S. 5 of the Limitation Act to admit an appeal after the prescribed period of limitation should be exercised if the appeal has been prosecuted with due diligence. The time occupied by an application,in good faith for review of the judgment, although made on a mistaken view of the law, might be excused. The Privy Council refused to overrule this practice it having been acted upon for many years by all the courts in India though not warranted on a strict construction of the language of S. 5 of the Limitation Act, where in the exercise of a judicial discretion a Judge fails to apply a rule laid down for its exercise the Appellate Court should either remit the case or itself exercise the discretion. 45 Cal. 17=22 M.L.T. 403=22 C.W.N. 74=26 C.L.J. 557=16 A.L.J. 1=34 M.L.J. 1=20 Bom.L.R. 38=(1918) M.W.N. 16=7 L.W. 94=4 P.L.W. 1=44 I.A. 229=42 Ind. Cas. 849 (P.C.).

——S. 5—Mistake of Law—Mistaken proceedings.

Mistake of law is *per se* no ground for exclusion of time but when in fact erroneous proceedings are instituted owing to the mistake, extension may be granted. 45 Cal. 94=44 I.A. 218=33 M.L.J. 486=22 M.L.T. 362=6 L.W. 592=126 P.W.R. 1917=15 A.L.J. 777=19 Bom. L.R. 866=3 Pat.L.W. 313=26 C.L.J. 572=104 P.R. 1917=(1917) M.W.N. 811=22 C.W.N. 169=127 P.L.R. 1917=42 Ind. Cas. 43 (P.C.).

——S. 5—Mistake of law.

A *bona fide* mistake of law is a sufficient cause for excusing delay in presenting an appeal. Where a person mistook the preliminary order as a final order which a man of ordinary prudence would not have mistaken and filed an appeal against it beyond the period of limitation."

Held, that the mistake was not a "sufficient cause" for excusing the delay. (1917) M.W.N. 362=39 Ind. Cas. 975.

——S. 5—Mistake of law.

The respondent brought on record by an order passed before he was a party can challenge the validity thereof after he is made a party. A mistake of law is not 'used cient cause' unless it was made in 'good faith ,'*i.e.*, in spite of due care and attention. A court should no doubt interpret the words "sufficient cause" liberally. but it must be in accordance with judicial principle. The apeal time must not be extended simply because the appellant's case is hard. 59 P.L.R. 1913=88 P.W.R. 1913=59 P.R. 1913=18 Ind. Cas. 37.

——S. 5—Mistake of law—Sufficient cause.

Ignorance by a *pardanashin* lady of the rule of procedure is not sufficient cause within S. 5 of the Limitation Act. 8 P.W.R. 1911=9 Ind. Cas. 222.

——S. 5—"Sufficient cause".

The fact that an appeal was not presented under the erroneous impression that a memo. of objection will lie as between co-respondent in a particular case is no sufficient cause within the meaning of S. 5. (1903) 30 C. 655.

16. Mistake of pleader.

See also NOTE 19.

——S. 5—Sufficient cause—Wrong legal advice owing to negligence or want of legal knowledge.

A *bona fide* mistake of fact or law will be a sufficient cause within the meaning of S. 5, Limitation Act, to excuse a delay, but it must have been committed *bona fide*, that is in spite of due care and caution. This means that every wrong advice given by the counsel will not amount to sufficient cause. It will amount to sufficient cause when the advice was given *bona fide* ; but it is was due to the negligence or gross want of legal skill on the part of the counsel, the mistake cannot be held to be a *bona fide* mistake. A.I.R. 1950 Raj. 2.

——S. 5—Sufficient cause—Wrong legal advice.

Where the delay is due to the wrong legal advice which though sound was wrong because of later rulings, it would be sufficient cause to excuse the delay. 1949 R.D. 35 (2).

——S. 5—Sufficient cause—Mistake of junior counsel.

S. 5 of the Limitation Act can only be invoked where the circumstances are exceptionally strong and justify its use. The mistake of a junior counsel which was responsible for the delay would not be a 'sufficient cause' within the meaning of S. 5. 1947 A.W.R. (Rev.) 105 (2).

——S. 5—Sufficient cause—Application for copies—Delay in making caused by erroneous advice of advocate—If sufficient cause for excusing delay.

Where the delay on the part of an appellant for applying for copies is caused by the advice, erroneous though it be, received by the appellant from his advocate, that is a sufficient cause for excusing the delay under S. 5, Limitation Act. I.L.R. (1946) Bom. 431=226 Ind. Cas. 95=48 Bom.L.R. 97=A.I.R. 1946 Bom. 437.

——S. 5—Su=cient cause—Delay 'caused by counsel's mistake.

It cannot be laid down as a general proposition that the delay caused by counsel's mistake can never be regarded as a sufficient cause within the meaning of S. 5 of the Limitation Act. 225 Ind. Cas. 291=48 P.L.R. 325=A.I.R. 1947 Lah. 76.

——S. 5—Where, on the mistaken advice by the Pleader who was not conversant with recent notification the party filed his appeal in the wrong Court.

Held, that there was sufficient causewithin the meaning

of S. 5, Limitation Act and the time taken in transmitting the appeal from such Court to the proper Court should be excluded. A.I.R. 1942 Lah. 94=43 P.L.R. 502=199 Ind. Cas. 851.

——**S. 5**—Delay in filing appeal due to mistaken advice of Counsel—Mistake natural :

Held, there was sufficient cause for time being extended 1941 O.W.N. 1282=1941 A.W.R. C.C. 379=A.I.R. 1942 Oudh 125=17 Luck. 487=197 Ind. Cas. 723.

——**S. 5**—There is no provision in the Limitation Act which would entitle a party who has failed to file a cross objection within period of limitation to extension of time simply because his legal advicer was under a wrong impression. A.I.R. 1940 Cal. 150=70 C.L.J. 397 =187 Ind. Cas. 416.

——S. 5—Mistake of Counsel, when justifies extension of time.

The mistaken advice of Counsel is not sufficient to justify extension of time under S. 5, unless the advice was given in good faith, that is, with due care and attention. A.I.R. 1939 Oudh 245=1939 O.W.N. 755= 1939 A.W.R. 123=1939 R.D. 467=14 Luck. 701= 183 Ind. Cas. 436.

——**S. 5**—Where there has been negligence or want of reasonable skill that such a skilled person as a legal adviser, might make, the litigant is entitled to indulgence But where there has been negligence or gross want of legal skill in the legal adviser and not a *bona fide*, mistake, the party should not be allowed to avail of the benefit of S. 5. (1938) 67 Cal.L. J. 107.

——S. 5—Mistaken advise of Counsel.

Held, that Counsel did not act in good faith and no extension could be granted. A.I.R. 1938 Lah. 81= I.L.R. (1938) Lah. 379=40 P.L.R. 986=178 Ind. Cas. 510.

——S. 5—Delay, when can be condoned.

When the time for filing the appeal has once passed, a very valuable right is secured to the successful litigant and the Court must, therefore, by fully satisfied of the justice of the grounds on which the appellant seeks to obtain an extension of time for attacking the decree, and thus perhaps depriving the successful litigant of the advantages which he has obtained.

An appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefore, is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time. Where an appellant relies on a letter of his Pleader's clerk and being misled by it as to the duration of the High Court's vacation, presents his appeal beyond the period of limitation, the cause is not sufficient as the applicant cannot be said to have acted with due care and attention. In fact the mistake of a Pleader's clerk amounts to the mistake of the party himself. There is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if *bona fide* acted upon by a litigant, will entitle him to the protection of S. 5. A.I.R. 1938 Nag. 156= I.L.R. (1938) Nag. 409=173 Ind. Cas. 369.

——S. 5—Advocate choosing wrong forum—No lack of due deligence.

The duty of the appellant is over when he consults a lawyer of a long standing who is known as a careful advocate. No amount of care or diligence on the part of any advocate can make him anticipate what view the Judge would take upon such a difficult matter as the valuation of a suit for the purpose of court-fees, where the value depended upon an addition or substraction of the amount claimed as mesne profits, past, present and future and the advocate cannot be said to have acted without due diligence if it is found by the Court that the appellant has taken a wrong forum of appeal and memorandum is returned to be presented to proper Court. In such a case, the time should be extended under S. 5, when the appeal is filed in a proper Court. A.I.R. 1938 Pat. 413=19 P.L.T. 309=17 Pat. 507= 4 B.R. 841=177 Ind. Cas. 564.

——**S. 5**—Party acting on advice of Counsel and filing appeal in wrong Court—Counsel found not negligent—Appeal presented before proper Court beyond limitation ;

Held, on facts there was 'sufficient cause' within S. 5, for extension of time. A.I.R. 1937 P.C. 276=46 M.L.W. 219=1937 O.W.N. 771=41 C.W.N. 1189= 3 B.R. 756=1937 R.D. 362=39 Bom.L.R. 1021= (1937) M.W.N. 937=18 P.L.T. 878=1937 A.W.R. 979= 31 S.L.R. 672=169 Ind. Cas. 769 (P.C.).

[Reversing : A.I.R. 1934 Oudh 360=11 O.W.N. 653].

——S. 5—Copy understamped.

Where the copy of trial Court's order refusing costs directed to be paid by Privy Council has been understamped on account of the impression which the Counsel has that orders passed in execution of the decree of His Majesty in Council have not the force of a decree and it is a *bona fide* mistake under S. 149, C.P. Code, the appellate Court can allow the appellant to make up the deficiency and under S. 5 condoned the period from the day on which the appeal was presented with an insufficiently stamped copy up to date. A.I.R. 1937 Pesh. 3=167 Ind. Cas. 879.

——S. 5—Extension of time to make up deficient court-fee—Error of Counsel not bona fide.

Where application for extension of time to pay deficient court-fee is not made by the Pleader till after about seven months since the time when the deficiency is discovered and the question of court-fee, not being difficult, the error of Counsel cannot be treated as a *bona fide*, one, refusal to grant time for making up the deficiency is proper. A.I.R. 1936 Lah. 935=39 P.L.R. 448=167 Ind. Cas. 756.

——S. 5—Mistaken advice of Counsel.

Where a Counsel gives advice with due care and attention but nevertheless arrives at a mistaken conclusion and the appellant, misled by that advice, files in good faith an appeal beyond limitation, the Court is justified in admitting the appeal filed after limitation but not otherwise, and an appellant is not entitled to the benefit of S. 5 of the Limitation Act where he has acted in good faith on the advice of the Counsel, which advice has been given honestly, though negligently. The fact that the defendants were guilty of omission or commission by way of admissions or otherwise is immaterial when the Counsel

of the plaintiffs has acted negligently in advising his clients to file the appeal in the wrong Court. 11 O.W.N. 1530=A.I.R. 1935 Oudh 108=153 Ind. Cas. 161.

——S. 5—Pleader authorised to entrust presentation of appeal to another Pleader entrusting it to another Pleader in good faith—Appeal presented by another Pleader without written authority—No objection at first hearing—Extension of time, should be granted. A.I.R. 1934 Lah. 444 (2)=150 Ind. Cas. 731.

——S. 5—Whether a litigant is entitled to an extension of limitation owing to a mistake of his Pleader must depend entirely on the circumstances of the case. He is not precluded from showing that he acted on the advice given him by the Pleader, but that advice must be honest advice arrived at after study of the case. He is not entitled to extension of time if the advice of the Pleader was given recklessly and carelessly, (*e.g.*, failure to notice the effect of a Full Bench decision concerning the law in the province where the pleader, himself, practices). A.I.R. 1934 Nag. 52 =141 Ind. Cas. 41.

——S. 5—Where, through honest mistake and advice of the Counsel and not due to carelessness or negligence on their part the appellants prefer their appeal in the Court of the District Judge instead of the Court of the Judicial Commissioner, where it properly lay, the appellants should not suffer for the mistake of their Counsel and an extension of time under S. 5, Limitation Act, should be given to them. A.I.R. 1934 Pesh. 57= 152 Ind. Cas. 323.

——S. 5—A legal adviser's mistake to justify extension of time must be a *bona fide* one, that is, his act must have been done with due care and attention. A.I.R. 1933 Lah. 568=144 Ind. Cas. 627.

——S. 5—Filing of appeal in wrong Court through honest but careless and negligent advice of Counsel —Whether sufficient cause for exemption from bar of limitation—Practice of Courts in Oudh.

On the dismissal of an application for execution, the decree-holder filed an appeal in the Chief Court. On objection by the judgment-debtor that the appeal lay to the District Judge and not to the High Court, the memorandum of appeal was returned for presentation to the proper Court. The appeal was presented to the District Judge with an application under S. 5, read with S. 14, Limitation Act, praying that, in the circumstances of the case, the appellant should be deemed to have had sufficient cause for not filing the appeal within time. He also filed an affidavit stating that he had filed the appeal in the Chief Court on the advice given to him by a Vakil of the Subordinate Court and that the mistake was not pointed out to him even by the Advocate who filed the appeal in the Chief Court :

Held, that the appellant was not entitled to the benefit of S. 5, Limitation Act, though he had acted in good faith on the advice of Counsel which advice had been given honestly but negligently. 10 O.W.N. 1154= A.I.R. 1933 Oudh 523=9 Luck. 193=146 Ind. Cas. 127 (F.B.).

——S. 5—Copy of wrong decree filed by bona fide **mistake.**

Where, owing to a *bona fide* mistake, a copy of a decree which had been passed at an earlier stage of the suit was filed with a memorandum of appeal against a decree which had been subsequently passed and the applicant's Counsel, on discovering the mistake, filed a copy of the proper decree :

Held, that there was a proper case for condoning the delay under S. 5. A.I.R. 1933 Lah. 1=33 P.L.R. 1085= 140 Ind. Cas. 495.

——S. 5—Where an Advocate, on proceeding to England left the matter of an appeal entirely to his clerk and his clerk misappropriated the copying charges sent by the client during his absence and absconded and the Advocate did not look into the matter even for three months after his return :

Held, that as reasonably due care had not been exercised by the Advocate, the delay could not be excused.

In the case of a mistake of an Advocate in order that the provisions of S. 5 of the Limitation Act may be invoked in favour of an appellant, it must be found that the error which caused the delay was one that might easily have occurred even if reasonably due care and attention had been exercised by the Advocate. A.I.R. 1933 Rang. 96=142 Ind. Cas. 185.

——S. 5—Bona fide but gross and inexcusable mistake of lawyer.

It cannot be laid down that a mistake of a legal adviser, however gross and inexcusable, if *bona fide* acted upon by a litigant, will entitle him to the protection of S. 5. In case where a suitor has suffered from negligence or gross want of legal skill of his legal adviser, he has his remedy against that legal adviser and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct or through negligence nor through want of reasonable skill, but such as a skilled person might make, there is no reason why the rights of the client should be forfeited thereby. In such cases, the client is entitled to indulgence. A.I.R. 1932 Cal. 589 =36 C.W.N. 420=59 Cal. 781=140 Ind. Cas. 662.

——S. 5—When the Counsel made *bona fide* mistake in failing to get a fresh power-of-attorney after the death of the party for the purposes of impleading the legal representative :

Held, that the Court could extend time under S. 5. 133 Ind. Cas. 877.

——S. 5—Under S. 5, a *bona fide* mistake on the part of a Pleader may be condoned, but gross negligence on his part cannot justifiably be condoned. In the latter case the client has his remedy against the legal adviser. A.I.R. 1931 Rang. 80=131 Ind. Cas. 507.

——S. 5—Mistake of pleader—Bona fide.

Though an error on the part of an advocate might be sufficient cause within the meaning of S. 5 the mistake or error must be a *bona fide* one, that is, it must have been made in spite of due care and attention having been exercised. Where the advocate does not himself consider that matter and accepts the statement of his clerk that 8 days are allowed for obtaining copies of decree and does not examine the paper himself to see whether the statement was correct, he cannot be said to have exercised due care and attention. A.I.R. 1924 Rang. 148, Foll. 127 Ind. Cas. 379=A.I.R. 1930 Rang. 209.

——S. 5—Mistake of pleader—Good faith—Counsel's advice.

When it is established in the first place that a Counsel has given advice with due care and attention but has nevertheless arrived at a mistaken conclusion, and that the appellants, misled by that advice, has in good faith filed an appeal beyond limitation, then when compliance has been made with all these conditions a Court is justified in admitting an appeal filed after limitation, but not otherwise. 28 All. 414 and 29 All. 638. *Held broadly decided.* 6 O.W.N. 1042=A.I.R. 1930 Oudh 49.

——S. 5—Where a party intending to engage a pleader executes a vaklatnama but by pure mistake omits to mention his name in the said vakalatnama and the pleader in his turn fails to endorse his acceptance and the mistakes are due to pure inadvertence and accident and do not proceed from any dishonest intention there is sufficient cause for extending the period of limitation of an appeal, which, though in proper form has been presented after a short delay. 121 Ind. Cas. 546=1930 A.L.J. 394=A.I.R. 1930 All. 112.

——S. 5—No doubt a *bona fide* mistake on the part of a pleader is sufficient cause for admitting an appeal after time, but no mistake is *bona fide* unless made in spite of due care and attention. Time cannot be excused under S. 5 on the ground that the pleader accepted the statement of the clerk of the Court that an application for copy would not be accepted until decree was signed 117 Ind. Cas. 251=7 Rang. 18=A.I.R. 1929 Rang. 116.

——S. 5—Mistake of pleader—Oversight.

The oversight of an advocate is a sufficient cause for extending the period of limitation. 34 C.W.N. 119.

——S. 5—Mistake of pleader—When sufficient.

The mistake of the vakil may be pleaded as sufficient ground under S. 5 to excuse limitation, but such mistake is not in all circumstances conclusive ground. 112 Ind. Cas. 307=A.I.R. 1929 Mad. 91.

——S. 5—The mistake of a legal practitioner or his clerk causing delay of one day was found sufficient cause within the meaning of S. 5 for condoning the delay. 108 Ind. Cas. 619=A.I.R. 1928 Lah. 643.

——S. 5—Mistake of pleader—Party not bound.

In a matter falling under S. 5, the pleader does not act as an agent of his client and his act or default is not binding upon the latter within the meaning of S. 5. 111 Ind. Cas. 708=55 Cal. 798=32 C.W.N. 372=A.I.R. 1928 Cal. 468.

——S. 5—Mistake of pleader—Proceeding in wrong Court.

A mistake of a pleader cannot always and under all circumstances afford ground for extension of time under S. 5—Appeal filed in a wrong Court on the advice of a pleader—Appeal filed in proper Court after limitation.

Held, that the appellant was entitled to the extension of time as the appeal was wrongly filed before the District Judge on the advice of a pleader of some standing on whose words he had good reason to rely. 111 Ind. Cas. 708=55 Cal. 798=32 C.W.N. 372=A.I.R. 1928 Cal. 468.

——S. 5—An appeal filed on 17th September, 1926, was found to be one day beyond time. All the papers of this appeal had been made over to the pleader who thought that the appeal was not due till the 22nd, but at the instance of the appellant it was filed at an earlier date, *viz.*, the 17th.

Held, that it was neither just nor proper that the plaintiff appellant should suffer for his pleader's mistake and hence he was entitled to an extension of time under the provisions of S. 5. 105 Ind. Cas. 217=46 C.L.J. 257=A.I.R. 1927 Cal. 829.

——S. 5—A *bona fide* mistake on the part of a pleader may be sufficient cause within the meanirg of S. 5. But no mistake is *bona fide* unless made in spite of due care and attention. A.I.R. 1927 Rang. 20, Foll. 101 Ind. Cas. 363=5 Bur.L.J. 227.

——S. 5—Mistake of pleader—Negligence.

Whether a mistake made by a counsel does or does not amount to sufficient ground for extending time within S. 5, depends upon the peculiar facts of each case and it is not possible to lay down a hard and fast rule applicable to all cases.

But if the mistake on the part of counsel cannot be said to be due to inadvertence or ignorance but is manifestly the result of sheer carelessness, *i.e.*, a total lack of due care and attention ; it cannot be a ground for extending time. 93 I.C. 876 and 95 P.R. 1917, Foll. 110 Ind. Cas. 533 (Lah.).

——S. 5—Mistake of pleader—Honest mistake.

An honest mistake that is committed by a litigant because of an incorrect advice given to him by his lawyer, constitutes a sufficient cause for extending the period of limitation for filing an appeal. A.I.R. 1922 All. 490 (F.B.), Foll. 101 Ind. Cas. 777=8 L.R.A. (Rev.) 1109=A.I.R. 1927 All. 758.

——S. 5—Though a *bona fide* mistake on the part of a pleader may be sufficient cause for admitting an appeal after time, no mistake is *bona fide* unless made in spite of due care and attention. A.I.R. 1924 Rang. 148, Foll. 98 Ind. Cas. 417=4 Rang. 265=5 Bur.L.J. 187=A.I.R. 1927 Rang. 20.

——S. 5—Where the delay in filing the copy of the first Court's judgment was due to the fact that the pleader in his remainder for a copy stated by mistake that a copy of the decree was wanted instead of mentioning that a copy of the judgment was required, but the original application was only for a copy of the judgment,

Held, there was sufficient cause to excuse the delay. 94 Ind. Cas. 629=8 L.L.J. 101=27 P.L.R. 239=A.I.R. 1927 Lah. 92.

——S. 5—The delay in filing an appeal caused by honest mistake of the party's Vakil in calculating the time is sufficient cause for excusing the delay under S. 5. A.I.R. 1925 Mad. 462, Foll. 96 Ind. Cas. 857=7 A.I. Cr.R. 28=9 N.L.J. 180=27 Cr.L.J. 1001=A.I.R. 1926 Nag. 503.

——S. 5—Whether a mistake on the part of a pleader is or is not a sufficient cause for the extension of time will depend on the facts of each case. 95 P.R. 1917, Foll. Where a suit is deliberately undervalued in order to minimise the cost of litigation and as a result the appeal is filed in a wrong Court, the delay caused due to such mistake cannot be excused. 93 Ind. Cas. 876 (Lah.).

——S. 5—It is not each and every mistake of a Counsel which *per se* is to be considered a sufficient ground for automatically giving his client the benefit of S. 5. Where a party has a vested right in the order of the lower Court in his favour which is sought to be attacked in appeal he should not be deprived of this advantage unless there has been on his part some conduct raising an enquiry against him, or unless there has been some inevitable accident. 92 Ind. Cas. 33=A.I.R. 1926 Nag. 162.

——S. 5—General rule as to discretion must be applied to each case—Discretion must be judicially exercised and on materials judicially cognizable.

The true guide for a Court in the exercise of discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal and, that he ought ordinarily to be deemed to have acted with ordinary diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not after excluding the time spent in prosecuting with due diligence another proceeding challenging the judgment exceed the period prescribed by law for presenting the appeal. 45 Cal. 94, Foll. There may be a general rule as to the exercise of discretion but each case must nevertheless be examined as to its own circumstances to see whether they make it fall within the terms of the general rule. The discretion in admitting an appeal under S. 5 must be judicially exercised and must be based on materials judicially cognisable though it has been held that a *bona fide* mistake of a pleader affords sufficient cause for admitting an appeal after time that mistake must have been one made in spite of due care and attention that had been exercised. Fact that the error had escaped the attention of the counsel for the respondent and also that of the Judge does not affect the matter in the slightest degree. The real question is whether the error was one that is in any way excusable or whether it was one which might easily have occurred even if reasonably due care and attention had been exercised by the Advocate. In some cases, no doubt, such as when there is a reald oubt as to the forum or the question is for some reason difficult to decide, the fact that it has not been observed by other people may tend to excuse the mistake. But where there was a mistake that can only be accounted for by the fact that no care at all was taken, that no consideration was given to the question as to the forum in which the appeal lay and the very obvious necessity for considering the value of the lands for purposes of jurisdiction was entirely neglected.

Held, there is no sufficient cause for admitting the appeal after due date. 77 Ind. Cas. 385=1 Rang. 584 =A.I.R. 1924 Rang. 148.

——S. 5—Where the only excuse put forward in the affidavit for not filing the appeal within time was that the appellants had no knowledge, before the order of the District Judge returning the memorandum of appeal, that it had to be presented to the High Court but there was sufficient room to hold that they had such knowledge, and the same pleader had been working for the appellants and had filed various appeals rightly, in connection with this case.

Held, the mistake pleaded in this case was not *bona fide* and extension was refused. 72 Ind. Cas. 732=28 P.W.R. 1923=A.I.R. 1923 Lah. 612.

——S. 5—It could not be laid down as an inflexible rule of law that in no case can be circumstance that a litigant has under the erroneous advice of Counsel or Pleader, presented on appeal out of time, be deemed a sufficient cause' within the meaning of S. 5. Where the mistake is of such a description that it may arise even amongst practitioners of experience, a litigant should not be made to suffer for such an error.

A person could not deduct the same perod twice over and where a legal practitioner though he could.

Held, that such a mistake cannot be sufficient cause. 63 Ind. Cas. 278=3 P.L.T. 96=6 P.L.J. 237=A.I.R. 1923 Pat. 140.

——S. 5—An honest though a negligent mistake about High Court practice by a pleader in the muffasil was held to be a sufficient cause for extending the period of limitation under S. 5 in the present state of the profession in the muffasil. 68 Ind. Cas. 812=44 All. 636= 20 A.L.J. 674=A.I.R. 1922 All. 490 (F.B.).

——S. 5—S. 5 of the Act must be applied under equity to a case where an appeal is filed in time and no laches can be attributed to the appellant, but the pleader through oversight did not sign the memorandum of appeal. 63 Ind. Cas. 726 (Lah.).

——S. 5—Where an appeal is preferred in the wrong Court, on the advice of a pleader, want of good faith need not be necessarily presumed. "In good faith" means honestly though negligently. 20 Bom. 133, Foll. 60 Ind. Cas. 744=45 Bom. 607=23 Bom.L.R. 89=A.I.R. 1921 Bom. 302.

——S. 5 and Art. 152—Mistake of pleader.

An appeal which lay to the District Court was presented under wrong legal advice to the High Court which returned it for presentation to the District Court. At the time of presentation to the District Court the time for appealing to that court had expired, but the appeal would have been in time if it lay to the High Court. The District Judge admitted the appeal *ex parte* subject to objections on the ground of limitation. The appeal was afterwards transferred to the High Court, which excused the delay holding that the mistake of appellant's legal adviser was sufficient cause within S. 5.

Held, that the order of the High Court was proper. 45 Cal. 94 (P.C.), Foll. 43 Bom. 376=1919 M.W.N. 254=23 C.W.N. 753=20 Bom.L.R. 1148=46 I.A. 15= 52 Ind. Cas. 897 (P.C.).

——S. 5—Mistake of pleader—Bona fide advice based on false information.

An honest and *bona fide* advice of a legal adviser given upon an untrue statement of facts by the party is not a sufficient cause within S. 5 of the Limitation Act. 49 Ind. Cas. 1000 (Pat.).

——S. 5—Mistake of pleader—Recalling order excusing delay.

In order that a mistake of the pleader may be sufficient

cause for granting an extension of time under S. 5, there must be a proper evidence establishing that a *bona fide* mistake was committed. A Judge has power to revoke an order excusing delay before the appeal is admitted. 45 Ind. Cas. 725 (Cal.).

——S. 5—Mistake of pleader.

A legal advisor's mistake in order to justify an extension of time must be a *bona fide* one. Filing an appeal in a court which has obviously no jurisdiction cannot be considered to be a *bona fide* mistake. A mistake is not *bona fide* if it is done without due care and attention. 10 P.L.R. 1918=69 P.W.R. 1918=45 Ind. Cas. 542.

——S. 5—Mistake of pleader.

A legal advisor's mistake to justify an extension under S. 5 of the Limitation Act, must be a *bona fide* one. 95 P.R. 1917=174 P.W.R. 1917=13 P.L.R. 1918=43 Ind. Cas. 317.

——S. 5—Mistake of pleader.

A pleader's mistake is a good ground for admitting a time-barred appeal, when the mistake is *bona fide*, *i.e.*, made in of due care and attention. 8 L.B.R. 566=10 Bur.L.T. 221=37 Ind. Cas. 815.

——S. 5—Mistake of pleader.

Where an appeal was filed out of time under the advice of a pleader who was misled by a change in law, it was held that there was sufficient cause under S. 5 for not filing within time. 17 C.W.N. 807, Foll. 37 P.W.R. 1916=32 Ind. Cas. 640.

——S. 5—Mistake of pleader.

Where an advocate's firm delayed presenting an appeal by two days after the last date for filing it, despite their knowledge that costs and fees had been sent to them by Telegraph money-order which could not be received owing to the absence of the member of the firm to whom it was addressed.

Held, there was no sufficient cause to excuse the delay. 27 Ind. Cas. 639 (L.B.).

——S. 5—Mistake of pleader—Omission to file copy of decree.

Where the copy of the decree appealed from had been given to the *vakil* but by an unexplicable mistake it had not been filed along with the memorandum of appeal and the *vakil* had since died the High Court extended the time under S. 5 of Limitation Act. 17 C.L.J. 66=17 Ind. Cas. 155.

——S. 5—Mistake of pleader.

The plaintiffs correctly valued their claim for Court Fees at a certain sum; but for the sake of jurisdiction they valued it erroneously due to the legal adviser's omission to give effect to S. 8 of Suits Valuations Act. Defendants did not raise objection to the same. Plaintiff's case was dismissed and they appealed to the District Judge where also they did not object at once but asked for an adjournment. At the hearing they raised the objection on which the memorandum of appeal was returned to be presented to the High Court. They promptly filed at before the High Court but after the expiry of due period.

Held, that sufficient cause required by S. 5 of the Limitation Act had been made out and the appeal, ought to be admitted even though out of time as some responsibility was on the defendant for the difficulty which the plaintiffs presently experienced. 16 C.L.J. 366=16 Ind. Cas. 425.

——S. 5—Mistake of pleader.

Though generally erroneous advice of pleader is not a sufficient cause, a litigant should not be made to suffer for the pleader's error if the mistake is of such a nature as would mislead even experienced practitioners. The true test is whether the litigant has acted under honest though mistaken belief, formed with due care and attention. 12 Ind. Cas. 677 (Cal.).

——S. 5—Mistake of pleader.

A mistake of law by an advocate showing lack of ordinary diligence is not a sufficient cause within S. 5 of the Limitation Act. 4 Bur.L.T. 175=11 Ind. Cas. 812.

——S. 5—"Sufficient cause"—"Bona fide misled" by pleaders as to court to which appeal lay.

The fact that the appellant was *bona fide* misled by advice of his pleaders as to the court to which the appeal lay is "sufficient cause" within the meaning of this section. 1903 A.W.N. 32. *See also* (1) 1906 A.W.N. 67=3 A.L.J. 218=28 A. 414.

(2) 1907 A.W.N. 219=4 A.L.J. 515=29 A. 638.

17. Mistake or fraud of pleader's clerk.

——S. 5—Application to set aside *ex parte* small cause decree—Delay in depositing amount due to *bona fide* mistake of Pleader's clerk:

Held, that the applicant was entitled to the benefit of S. 5 whether the mistake was on the part of the vakil or his clerk is immaterial if it is *bona fide*. 61 M.L.J. 710=34 L.W. 795=A.I.R. 1932 Mad. 142=135 Ind. Cas. 737.

——S. 5—Mistake of Counsel's clerk.

Mistake on the part of counsel's clerk cannot be considered a sufficient ground for extension of time under S. 5. A.I.R. 1924 Lah. 401, Foll. 110 Ind. Cas. 374=A.I.R. 1928 Lah. 488.

——S. 5—Where an appeal is filed a day later, through oversight of the counsel's clerk, time may be extended under S. 5. 98 Ind. Cas. 514=8 L.L.J. 479=27 P.L.R. 623=A.I.R. 1926 Lah. 693.

——S. 5—Mistake of the pleader's clerk is not sufficient cause.

The mistake of the clerk of the pleader does not stand on a higher plan than a mistake of a party and is no ground of extension of time under S. 5. 82 Ind. Cas. 484=A.I.R. 1925 Oudh 189.

——S. 5—Where an appeal is not filed in time due to a deliberate fraud of the Counsel's clerk and there is no fault on the part of the client who has paid everything required to be paid by him or on the part of the Counsel who trusted his clerk, there is sufficient reason for the extension of time under S. 5, Limitation Act. A.I.R. 1934 Lah. 986.

18. Negligence of party.

——S. 5—Party asking Counsel to file appeal and leaving it entirely to him to take necessary steps —Appeal filed in wrong Court:

Held, that the litigant cannot be said to have acted in good faith unless lawyer so acted. 1939 Rang.L.R. 639=A.I.R. 1940 Rang. 14=186 Ind. Cas. 715.

——S. 5—Negligence of party.

Where the applicant has been negligent in leaving the matter in the hands of his counsel without making any enquiry about his application for four months he is not entitled to the benefit of S. 5 Negligence on the part of the pleader's clerk is negligence on the part of the party and is not sufficient cause within the meaning of S. 5. 118 Ind. Cas. 212=A.I.R. 1929 Sind 206.

——S. 5—Setting aside ex parte decree—Gross Negligence of defendant.

Where the defendant did not apply to set aside an ex parte decree in a proper manner in the proper Court, but instead filed an appeal beyond limitation together with an application to extend the time:

Held, that the defendant was guilty of gross negligence and carelessness in the matter, and no case was made out to grant an extension of time under S. 5, Limitation Act. 11 O.W.N. 256=A.I.R. 1934 Oudh 131 (1)=151 Ind. Cas. 529 (1).

——S. 5—Sufficient cause—Agent's mistake or negligence.

It is possible for the act of an agent done within time to be subsequently ratified by the principal and in such circumstances, the act becomes the act of the principal even though when it was performed, it was performed without his knowledge or approval. Subsequent approval means the adoption of the act of the agent by the principal as to the date when the agent performed the act. 15 P.L.T. 233=A.I.R. 1934 Pat. 290 (2)=149 Ind. Cas. 596.

——S. 5—Application for copies was returned—Application not represented in time-applicant saying that he waited till the printing charges were called for by Court—Court could not compute charges as application was with the vakil's clerk.

Held, that the excuse put forward was not one which would excuse delay. 1932 M.W.N. 328.

——S. 5—Sufficient cause for non-presentation on last day—Antecedent inaction or negligence of appellant, whether material.

Where the appellant sent all the documents relating to the appeal to his Counsel on the last day of limitation but the Counsel, being too busy with more pressing work, was unable to examine the papers and on looking into them, when he returned from the office in the evening discovered that the period of limitation had expired on the same day, and the appeal was presented the next day with an application for an extension of time under S. 5:

Held, per Suhrawardy and Mitter; JJ. (Graham, J., contra.)—That sufficient cause for exercise of powers under S. 5 had been made out inasmuch as it was only through accident that the appeal was not filed in time and the delay caused was not due to any fault on the part of the client.

Per **Graham, J., Contra.**—The cause required to be shown applies not to any particular part of the period but to the entire period and if no explanation whatever be forthcoming why the appeal was not filed during the major portion of the period of limitation, an explanation, designed merely to explain why it was no filed on the last day before it became time-barred is insufficient. 34 C.W.N. 1119=A.I.R. 1931 Cal. 298=58 Cal. 549.

——S. 5—A judgment was delivered on October 19, 1925. An application for a copy was made on December 11. The plaintiff's attorney sent a letter on January 21, 1926, stating that he had applied in December for the copies to be sent to him by post, but there was in fact; no such application; The appellant waited till January,25 , when he arranged with another person to get the copies. The latter got the copies on January, 27; and the appeal was filed on February 4, a fortnight after the correct time.

Held that there was no ground for extending time. 24 S.L.R. 415=A.I.R. 1931 Sind 58.

——S. 5—An appellant, filing an appeal after the expiry of limitation owing to stupid misconstruction of the lower Court's order appealed against is not entitled to the benefit given under S. 5. 91 Ind. Cas. 867=13 O.L.J. 172=A.I.R. 1926 Oudh 206.

——S. 5—Negligence of client's agent is not sufficient cause.

The appeal was decided in the Court below on the 28th March. About 6 weeks later the appellant's agent went to a pleader's clerk and deposited Rs. 6 with him to obtain copies. No instructions were given to the pleader himself. A week later the Subordinate Courts closed for thirty days for the vacation. The copies were not applied for till 27th June, a week after the Courts re-opened, and were obtained on July 3. Even then the copy of the judgment of the Trial Court was not applied for and this was obtained between July 3 and July 5.

Held, that no sufficient cause was proved so as to admit the appeal beyond time. 75 Ind. Cas. 254=21 A.L.J. 817=4 L.R.A. Civ. 580=A.I.R. 1924 All. 176.

——S. 5—Sufficient cause—Great laches disentitle party to benefit of section.

The decision appealed against was dated the 20th June, 1921. An application for copies of the decrees and the lower Appellate Court's order was filed on the 27th June of 1921 and those copies appeared to have been received by the appeliant on the 9th of July, 1921. The appeal itself was filed on the 4th of October, 1921, and was returned on the same date on the ground that it was not accompanied by a copy of the judgment of the Trial Court. The appellant appeared to have done nothing further in the matter until the 26th October, 1921; when he applied for a copy of the necessary judgment which was ready on the 31st of that month and actually delivered to the appellant on the 7th of November, 1921. The appeal was then re-filed on the 22nd of November, 1921,

Held, even allowing for the fact that Kangra is at some distance from Lahore and the parties are Jats, this delay is unwarranted and time cannot be extended. 79 Ind. Cas. 812=A.I.R. 1923 Lah. 208.

——S. 5—Where there is want of due diligence in the filing of an appeal within the proper time, the appellant is not entitled to any extension of time. 68 Ind. Cas. 792=A.I.R. 1923 Lah. 98.

——S. 5—Where an appeal which was returned was not represented for 3 weeks though appellant could have easily done so.

Held, no sufficient cause is made out. 4 L.L.J. 475=39 P.L.R. 1922=A.I.R. 1923 Lah. 95.

——S. 5—Where the last day of limitation was 25th June, 1919 and the appellant applied for copy of the Trial Court's judgment by post on the 24th June, 1919, but the application did not reach the Copyist Department till the 2nd July, 1919.

Held, that period between the 25th June and 2nd July cannot be excused. 72 Ind. Cas. 797=A.I.R. 1922 Lah. 415.

——S. 5—In two appeals one judgment was passed but two decrees were made, Plaintiff in second appeal, filed along with the memo. of appeal copies of decree and judgment in one appeal only. to which the parties in other appeal were not parties. Subsequently they produced the other decree and prayed for excusing the delay.

Held, it would not be fair to them to extend the time under S. 5. 77 Ind. Cas. 541=3 Lah. 215=A.I.R. 1922 Lah. 390.

——S. 5—Where negligence of the party is alone responsible for the delay in filing the copy of the lower Court's decree, time need not be extended. 4 L.L.J. 381=A.I.R. 1921 Lah. 266.

——S. 5—The delay caused in filing an appeal by applying for a translation of the judgment appealed against due to ignorance or to carelessness cannot be excused under S. 5 of the Lim. Act as an appellant guilty of such delay cannot be said to have acted bona fide, i.e., with due care and attention. 59 Ind. Cas. 965 (Lah.).

——S. 5—Negligence of party—Notice of judgment—Date.

In the absence of any indication to the contrary it must be presumed that the notice required under O. 20, R. 1; C. P. Code was given. A person who wishes to take advantage of S. 5 must show that he has not been negligent and that he has been prosecuting his case with due deligence. 22 O.C. 379=2 U.P.L.R. (J.C.) 60=55 Ind. Cas. 837.

——S. 5—Negligence of party—Carelessness.

Delay due to carelessness is not sufficient cause to enable a Court to excuse delay under S. 5 of the Limitation Act. 55 Ind. Cas. 271 (Pat.)

——S. 5—Negligence of party—Negligence of servant or agent.

The Court can extend time under S. 5 only for sufficient cause. The negligence of a servant in the performance of the duties entrusted to him does not amount to sufficient cause. 55 Ind. Cas. 17 (Pat.)

——S. 5—Negligence of party—Delay — Explanation—Negligence of servant.

Where law provides a time limit within which a step is to be taken and a party waits until the last moment before taking that a step, he is not entitled to the Court's indulgence if an accident prevents the step from being taken within the time. A party is not entitled to plead the negligence of his servants as a ground for excusing delay. 3 Pat.L.J. 381=52 Ind. Cas. 225.

——Ss. 5 and 2 (7)—Negligence of party—Due care on appellant's part required.

Due care and attention are required on the part of an appellant to warrant an extension of the appeal time by the Court under S. 5 of the Act. 27 P.W.R. 1917=37 Ind. Cas. 828.

——S. 5—Negligence of party—No extension of to negligent appellant.

An extension of time to appeal cannot be granted on the ground of unforeseen contingency in the case of negligent appellant postponing to present the appeal till the last day of the prescribed period. 12 N.L.R. 171=37 Ind. Cas. 503.

——S. 5—Negligence of party—Appeal filed with copy of the judgment but without copy of decree.

Appeal filed without copy of decree though with copy of judgment is not properly presented

and becomes barred if the copy of decree is filed after the period of limitation. 8 P.W.R. 1911=9 Ind. Cas. 222.

——S. 5—"Sufficient cause" — Each day's delay should be explained—Mistakes of unqualified agent, no excuse — Want of funds, no sufficient cause.

The words "sufficient cause" in S. 5 should receive a liberal construction so as to advance substantial justice when of no negligence nor inaction nor want bona fides is imputable to the appellant. A client who entrusts his business wholly to an unqualified man cannot be heid to have acted without negligence and bona fide, i.e.: with due care and attention, and he cannot be allowed to plead the mistake made by his unqualified agent as sufficient cause within the meaning of the section. Want of funds is not sufficient cause within the meaning of S. 5, Cl. (2). An appellant who invokes the discretion vested in the courts by reason of S. 5 is bound to give a proper explanation for every day's delay. (1908) 19 M.L.J. 209=5 M.L.T. 28=1 Ind. Cas. 73. See also 25 M. 166=11 M.L.J. 406.

19. Negligence of pleader.

See also NOTE 16.

——S. 5—Sufficient cause — Negligence of counsel.

Negligence of counsel is no ground for giving the benefit of S. 5 of the Limitation Act. 1948 R.D. 433.

——S. 5—Party in position of Municipal Board, if can be relieved from the hardship caused by negligence of counsel.

Held, on facts, that though it was easy to conceive of circumstances where Counsel might be faced with two possible views, and if he honestly took one view rather than the other, his advice given on the strength of this view and acted upon by the litigant, could not be deemed to be advice given negligently, yet the present was not a case in which there was the slightest justification for the Counsel for the Municipal Board in spite of the amended limitation having been in force for nearly 23 years, to think or to labour under any misapprehension that the old period of limitation was still in vogue. It is an elementary proposition that ignorance of law is no excuse and the presumption that the law is well known and well understood was particularly strong in the case of responsible public bodies, such as the Municipal Board which, including the Chairman, had several legal gentlemen represented on it. A.I.R. 1944 Oudh 135=1944 O.W.N. 118=1944 A.W.R. C.C. 92=211 Ind. Cas. 499.

——S. 5—Held, that after sending the copies of judgment and decree to a senior lawyer for filing the application for leave to appeal to the Privy Council, the Municipal Board was not completely absolved of its responsibility to see that necessary steps were taken by the Counsel in the matter. The Municipal Pleader, or any other official of the Legal Department, could very easily have been deputed to see that action was taken by Counsel in pursuance of the Board's resolution. The alleged misapprehension in the mind of the Counsel as to the period of limitation in filing the application on the ground that he relied on the old edition of the standard commentary on the Lim. Act, could not be said to be bona fide misapprehension. Such negligence of Counsel in the circumstances of the case did not entitle the Board to urge that it was prevented by any sufficient cause from filing the application for leave within time. 1944 O.W.N. 118=A.I.R. 1944 Oudh 135=1944 A.W.R. 92=211 Ind. Cas. 499.

——S. 5—Appeal filed with deficit court fee—Order for making good deficiency within time fixed—Appeal rejected on default:

Held, that extension cannot be granted as it is the appellant's business, or the business of any Pleader who is acting for him in connection with this matter, to ascertain the date fixed for the depositing the deficit court-fees. In a case of this sort, it is expected that Pleaders shall make themselves acquainted with the nature of the orders passed and it is not the duty of the Court to send record to the Pleaders in order that their signatures may be taken on the order sheet. A.I.R. 1940 Cal. 530=71 C.L.J. 540=191 Ind. Cas. 701.

——S. 5—'Good faith', if necessary to bring a case under S. 5.

In order to bring a case within the purview of S. 5, the element of "good faith" is necessary.

Where an appeal lies to the District Court but is preferred to the Chief Court and is returned for presentation to proper Court and there is no proof that the presentation of appeal to the Chief Court was due to the Council's bona fide mistake, it is a case of gross negligence and cannot be excused and the appellant is not entitled to the benefit of S. 5. 10 O.W.N. 1247=A.I.R. 1934 Oudh 10=147 Ind. Cas. 799 (1).

——S. 5—Negligence of pleader—No ground for extension of time.

A woman advised by her pleader filed a suit valuing her claims for jurisdiction and pleader's fee at an amount bringing it within the category of special jurisdiction cases, appeal from which lay to High Court. The case was admitted and registered as special jurisdiction case and was treated as such throughout the proceedings. From the decree in that suit the woman acting on the advice of the same pleader preferred an appeal to the District Court. The appeal was returned for want of jurisdiction and was subsequently presented to High Court. On the day when it was presented to High Court, it was out of time. The woman claimed extension under S. 5.

Held, that there was no likelihood of any reasonable or bona fide belief that the suit was

not a special jurisdiction case and the appeal lay to the District Court; that the advice given by the pleader was result of negligence and not of any bona fide or considered belief and the woman was not entitled to extension of time and the appeal was barred. A.I.R. 1924 Rang. 148; 34 Cal. 216, Foll. 31 Bom.L.R. 954=A.I.R. 1929 Bom. 393.

——S. 5—The carelessness of the pleader is no ground for extending the period of limitation. 114 Ind. Cas. 101=A.I.R. 1929 Sind 32.

——S. 5—Where the appellant's Counsel acted with gross negligence in valuing the appeal, and thus it was presented with insufficient Court-fees and the deficit was made good beyond limitation,

Held, that the delay in making good the deficiency that occurred in consequence of clear negligence cannot be condoned. A.I.R. 1922 Lah. 233; 1 Lah. 234 and 55 P.R. 1913, Foll. 102 Ind. Cas. 615=9 L.L.J. 290=28 P.L.R. 338=A.I.R. 1927 Lah. 884.

——S. 5—Omission to implead a person as respondent owing to negligence in drafting the appeal is no ground for extending the time for impleading him. 99 Ind. Cas. 619=A.I.R. 1927 Lah. 118.

——S. 5—A bona fide act is one done with due care and attention.

Where clear provisions of the Court-fees Act were brought to the notice of the party's Counsel and he was asked to make up the deficit Court-fees, but Counsel and the party were both negligent in not paying the deficit Court-fee.

Held, there was no ground to extend the time. 92 Ind. Cas. 991=27 P.L.R. 91=A.I.R. 1926 Lah. 343.

——S. 5—The fact that an appeal is presented beyond time owing to forgetfulness of the appellant's Counsel is not a sufficient reason for excusing delay under S. 5. 85 Ind. Cas. 693=A.I.R. 1925 Oudh 374.

——S. 5—Where an appeal was filed without the order appealed against being stamped and the same was returned and filed again with proper stamp but out of limitation.

Held, a Counsel when filing an appeal ought to see that all the documents which require stamp are properly stamped. He cannot shelter himself behind his clerk, and if his clerk has been guilty of any carelessness he is responsible for that. 71 Ind. Cas. 736=A.I.R. 1924 Lah. 401.

——S. 5—Where the mistake of pleader is pleaded as a ground for extension of time but it is found that the pleader was negligent in advising his client, no extension would be allowed. 72 Ind. Cas. 158=A.I.R. 1923 Nag. 133.

——S. 5—Negligence of pleader.

Where it is shown that an Advocate who is a Barrister or other professional gentleman, received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as a result of the negligence of the Barrister or practitioner to file the appeal or application within time, such Barrister or Vakil would be liable in a Court of Law. That however is no ground for excusing the delay. When an appeal was filed 37 days out of time, and no explanation for the delay was given except that instructions had been given in time to the Barrister together with a sum of money for costs the Dt. Judge could not admit the appeal. 37 All. 267=13 A. L. J. 286=28 Ind. Cas. 265.

——S. 5—Negligence of pleader.

Under S. 5 neither delay caused by negligence in applying for delivery of copies at the office nor delay caused by pleader's clerk's negligence in filing the appeal is "sufficient cause". 7 S.L.R. 201=24 Ind. Cas. 977.

——S. 5—Negligence of pleader—Sufficient cause—What is.

Appellant's mukhtear omitted to file his power-of-attorney authorising him to present an appeal, and the copy of the first Court's judgment with the appeal and filed them long after the presentation of the appeal and no reasons were given for the delay. Held, the appeal was barred by limitation. 94 P.L.R. 1918.

——S. 5—Negligence of pleader.

Where an appeal is filed in a wrong Court owing to gross carelessness of the pleader and after return was filed in the right Court after time, it was held there was no sufficient cause for not filing in time. 9 P.L.R. 1914=23 P.W.R. 1914=23 Ind. Cas. 86.

——S. 5—Negligence of pleader—Appeal presentation for—Vakalatnamah not signed by appellant.

Where the memorandum of appeal was presented in time but was signed by a pleader whose vakalatnamah was not signed by the appellant the mistake being bona fide, is a sufficient cause for extending time under S. 5 of the Limitation Act. 11 A.L.J. 779=21 Ind. Cas. 444.

——S. 5—Negligence of pleader—Sufficient cause.

Notwithstanding the carelessness of the appellant's counsel in filing a copy of deposition instead of a copy of the decree, at the time of filing an appeal, time should be extended to enable him to file a copy of decree. 104 P.W.R. 1913=173 P.L.R. 1913=85 P.R. 1913=19 Ind. Cas. 438.

——S. 5—"Negligence of pleader — Delay when excusable.

Held that "Sufficient cause" within S. 5, for not filing the appeal within time had been made

out, though the pleader was not free from blame as the pleader's clerk neglected to file the papers in time. The Counsel must see that their client's appeals are presented within time. 126 P.W.R. 1912=7 P.L.R. Sup. 1912=16 Ind. Cas. 488.

——S. 5—Negligence of pleader's clerk.

Negligence of the agent is negligence of the principal and there is no distinction between the two. 101 Ind. Cas. 448=A. I. R. 1927 Pat. 232.

20. Poverty.

——S. 5—Sufficient cause—Poverty of litigant.

The poverty of a litigant cannot possibly be regarded as a sufficient cause for the extension of time under S. of the Limitation Act. 227 Ind. Cas. 95=48 P.L.R. 393=A. I. R. 1947 Lah. 210.

——S. 5—Poverty—If sufficient cause for extending periods of limitation.

Poverty is not a sufficient cause within S. 5 for extending the period of limitation. 7 L.B.R. 90=22 Ind. Cas. 884.

——S. 5, Cl. (2)—Poverty — 'Sufficient cause'—What is.

Entrusting the business of filing an appeal to an incompetent man who filed the appeal out of time and want of sufficient funds are not "sufficient cause" within the meaning of S. 5, Cl. (2). 5 M.L.T. 28=19 M.L.J. 209=1 Ind. Cas. 73.

——S. 5—Appeal in forma pauperis—Leave refused—Court fee paid after limitation but within time allowed—Condonation of delay — Applicability of S. 149, C. P. Code.

Where an application for leave to appeal in forma pauperis is dismissed, but no time is given to the applicants to pay court fee at the time but only when the applicants apply for it after the expiration of limitation for filing the appeal and the court fee is paid within the time so allowed, the case is covered by S. 149 and the appeal is within time. Even if it is not, the delay would be condoned by S. 5, Limitation Act. 1945 A.W.R. (C.C.) 5=1945 O.W.N. (C.C.) 20=A. I. R. 1945 Oudh 172.

——S. 5—Poverty — Application to appeal as pauper.

An appeal presented after time with full stamp, may be admitted if a previous application for leave to appeal as pauper was presented within time and rejected. 74 P.R. 1916=173 P.W.R. 1916=30 P.L.R. 1917=36 Ind. Cas. 84.

——S. 5 (5-A)—Sufficient cause—Application for leave to appeal "in forma pauperis" not allowed—Court-fee not paid within time allowed.

Application to be allowed to file an appeal in forma pauperis was not granted but the ground that the applicant was allowed time to pay up the Court-fee and he failed to do so. On his application further time was allowed to him subject to just exceptions. The court fee was paid up during the extended period. The respondent contended that the limitation period having expired at the date when application to file the appeal in forma pauperis was refused, and the appellant having failed to pay court-fee within the time alowed to him, he was not entitled to any extension of time. Held, that the contention was valid and the appeal must be dismissed as barred by limitation. 130 P.L.R. 1909=94 P.R. 1909=95 P.W.R. 1909=4 Ind. Cas. 896.

——S. 5 (5-A)—Appeal—Delay—Excuse.

Over the thirty days beycnd the prescribed period an application was made for leave to appeal as a pauper and rejected. The appellant stamped the memo of appeal which was one day beyond time. Held, that it was no sufficient excuse. (1904) 6 Bom.L.R. 373.

——S. 5—Poverty—Application for leave to appeal as a pauper—Subsequent change of condition if sufficient cause.

Where during the pendency of an enquiry into the financial condition of an applicant applying for leave to appeal as a pauper, the applicant inherited some properties and paid court-fee after the expiry of the limitation peiod held, that the applicant was entitled to an extension of time under S. 5 of the Act. 47 P.R. 1899; 26 C. 925, Foll. 34 P.W.R. 1912=52 P.L.R. 1912=13 Ind. Cas. 73.

21. Power of successor.

——S. 5—Power of successor — Order excusing delay—Successor of Judge bound.

An order made by one Judge extending time owing to delay in getting copies of decree should not be interfered with, by his successor. 50 Ind. Cas. 882 (Cal.).

——S. 5—Power of successor—Appeal admitted—Successor of Judge bound—Admission subject to objection.

An order admitting a time-barred appeal subject to objection at the hearing is binding on the successor of the Dt. Judge who cannot re-open it except at the instance of the respondent. The practice of admitting appeals 'subject to objection at the hearing' has been condemned by Privy Council and should therefore cease. 50 Ind. Cas. 374 (Cal.).

22. Procedure.

——S. 5—An order granting an application under S. 5 Limitation Act, for extending the period of

limitation for filing a Letters Patent appeal under Cl. 15 , without giving the respondent an opportunity to present his case with regard to the prayer of the appellant for extension of the period of limitation is irregular. A.I.R. 1942 Cal. 606 =I.L.R. (1942) 1 Cal. 403=75 C.L.J. 419=46 C.W.N. 131=203 Ind. Cas. 580.

——S. 5—Per Suhrawardy, J.—An order passed extending time under S. 5, Limitation Act, should give sufficient indication that the discretiin given by the law has been judicially exercised.

In all cases where an appeal is presented beyond the period of limitation, notices ought to be issued before registering it, upon the respondents and the question of extension of time under S. 5 of the Limitation Act should be determined before such registration. A.I.R. 1932 Cal. 482=59 C. 388=138 Ind. Cas. 643.

——S. 5—Order rejecting memorandum of appeal for insufficient court-fee — Fresh memorandum of appeal with requisite court-fee after limitation:

Held, that the Judge should not register the appeal without deciding the question as to whether the appellant was entitled to extension of time under S. 5. If, however he omits to do that and registers it, the order cannot be said to be passed without jurisdiction but there is a tacit term that the question will be considered on objection being taken the by the respondent. A.I.R. 1932 Cal. 482=59 C. 388=138 Ind. Cas. 643.

——S. 5—Procedure.

A legal duty is cast upon the Judge to determine the question in the first instance as to whether there is sufficient cause for extending the period of limitation under Limitation Act, S. 5. Where the Court below in an application for review wihch is **prima facie** time-barred without determining the question of limitation proceeds to admit the application for review, the order passed by the Court is not only irregular but is possibly without jurisdiction. If review as apparently time-barred is admitted without cause being shown for the delay the entire proceedings consequently on such review must be set aside as of no legal effect. 29 Ind. Cas. 975, Foll. 1930 A. L.J. 1057=128 Ind. Cas. 753=A.I.R. 1930 All. 815.

——S. 5—Court ought to give detailed reasons while rejecting an appeal under S. 5 for an appealable decree follows such a judgment. 112 Ind. Cas. 246=A.I.R. 1929 All. 101.

——S. 5—Where, in ignorance of the death of a respondent, the appeal is heard and a decree is passed against the respondent, the appellate Court is competent to decide the question as to whether the application for substitution should be entertained having regard to the provisions of S. 5 of the Limitation Act and decide the appeal after impleading the representatives af esh. 101 Ind. Cas. 841=1 L.C. 60=2 Luck. 592=A.I.R. 1927 Oudh 221.

——S. 5—The question of extending time under S. 5 arises when a memorandum of appeal accompanied by certified copies of decree and the judgment are filed. Parties are not entitled to invite the Court to decide the question of limitation before they actually file an appeal. 95 Ind. Cas. 959=24 A.L.J. 602=A.I.R. 1926 All. 555.

——S. 5—Application under, made but rejected—Court should record opinion on it. 98 Ind. Cas. 748=44 C.L.J. 44=30 C.W.N. 926=A.I.R. 1926 Cal. 1105.

——S. 5—Application for setting aside abatement —Court must investigate whether the plaintiff was lawfully prevented from applying within statutory period. 90 Ind. Cas. 811=A.I.R. 1926 Cal. 175.

——S. 5—According to the rules framed by the Lahore High Court, an affidavit to account for the delay should be filed along with the memoran lum of appeal. 95 Ind: Cas. 565=A.I.R. 1926 Lah. 542.

——S. 5—Opposite party should be heard—Applicant must show good faith and due diligence.

Where an application is made to the Court for an extension of time for presentation of the appeal under S. 5 of the Limitation Act, a rule should be issued on the respondent to show cause why an extension of time should not be granted. 41 Mad. 412 (P.C.) Foll.

If the appellant succeeds in establishing due diligence, good faith and the absence of neglect, he is entitled to argue that it will be sufficient cause within the meaning of S. 5 so as to persuade the Court to extend the time for presentation of the memorandum of appeal.

Whether the time should be extended under the section should be answered in the light of the peculiar circumstances of each case. The broad proposition that where there is a chance of mistake the Court should in every case excuse the delay is not supported by authority. 79 Ind. Cas. 924=A.I.R. 1925 Cal. 175.

——S. 5—Criminal appeals.

A criminal appeal filed after the expiry of the prescribed period of limitation may be admitted if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the period of limitation. But if the appellate Court is not satisfied that the appellant had sufficient reason for the delay, it cannot excuse the delay. If in such a case, the appellate Court desires to help the appellant the proper procedure would be to move the High Cout to exercise its powers of revision.

In this case where the lower Appellate Court had extended the period of limitation without being satisfied as to the sufficiency of the grounds for doing so and had admitted the appeal, the

High Court in revision refused to interfere as there was no gross miscarriage of justice occasioned by the lower Court's action. 88 Ind. Cas. 278=26 Cr.L.J. 1110=A.I.R. 1925 Mad. 709=48 M.L.J. 457.

——S. 5—Procedure.

If there was no evidence at all before the Court, explaining or accounting for the delay in making the application, any order that may be purported to be made under S. 5 excusing the delay, is an order made without jurisdiction, or is the result of material irregularity in the exercise of jurisdiction. 86 Ind. Cas. 905=21 M.L.W. 220=A.I.R. 1925 Mad. 494.

——S. 5—Appeal admitted out of time—Preliminary objection raised after one year should not be allowed.

An appeal presented out of time was admitted by the Court under S. 5. After over a year when the appeal came on for hearing, the respondent raised a preliminary objection to the appeal.

Held, it is not a preliminary point at all, and any such application ought to be made by way of motion and even by way of motion a Court will never allow people to wait upon their rights while the other party incurs expenses in a case of this kind it being open to the respondent to move the Court to set aside the leave. 70 Ind. Cas. 827=16 M L.W. 662=1922 M.W.N. 727=31 M.L.T. 466=A.I.R. 1923 Mad. 82.

——S. 5—Procedure — Delay in filing appeal—Extension of time—Implied from the procedure of the High Court.

The Secretary of a company registered was granted by the company a charge on the unpaid calls. In the winding up proceedings, the Secretary applied to enforce the charge and the District Court recognised the validity of the charge though unregistered, in spite of the opposition of the liquidator. Neither the liquidator nor the debenture holders appealed against the irder. More than a year after the expiry of the time for appeal, when it was sought to enforce the charge the debenture-holders objected and on their objections being overruled by the District Court, appealed to the High Court on the ground of non-registration. The High Court allowed the appeal on that ground.

Held, that the High Court must be taken to have impliedly extended the time for appealing against the first order of the District Judge, though the proper procedure would have been to allow an extension of time on an application for leave to appeal. 43 M. 550=38 M.L.J. 444=18 A.L.J. 489=22 Bom. L.R. 568=28 M.L.T. 28 12 L.W. 92=(1920) M.W.N. 419=2 U.P.L.R. (P.C.) 118=56 Ind. Cas. 163 (P.C.).

——S. 5—Procedure — Delay in presentation of appeal—Procedure.

When a memorandum of appeal is presented beyond the prescribed period of limitation the judge should endorse upon it the date of presentation and order that notice be given to the respondents. The Court should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competence of the appeal. 43 Bom. 376=(1919) M.W.N. 254=23 C.W.N. 753=21 Bom.L.R. 1148=46 I.A. 15=52 Ind. Cas. 897 (P.C.).

23. Proceedings in wrong Court.

——S. 5—Sufficient cause — Proceedings in wrong Court.

In considering the words "sufficient cause" under S. 5, the equities on which S. 14 is based may be taken into account even if that section may not in terms, be applicable. Hence the existence of circumstances mentioned in S. 14 constitutes a sufficient ground for excusing the delay under S. 5, caused by wrong proceedings. A.I.R. 1942 Mad. 170=1941 M.W.N. 989=(1941) 2 M.L.J. 873=201 Ind. Cas. 84.

——S. 5—Appellant wrongly filing revision instead of appeal.

Where the appellants had wrongly applied for revision of the Assistant Commissioner's order to the Commissioner although this was not a proper way of proceeding in the matter:

Held, that it was a mistake which afforded them a reasonable excuse for not preferring the appeal in the Court of the District Judge within the time provided by law. Difficult questions of jurisdiction constantly arise in appeals of this nature and a bona fide mistake as this should not be held to debar the appellants from being heard in the proper tribunal, viz., that of the District Judge. (1936) A.L.J. 132=1936 A.W.R. 218=1936 R.D. 95=A.I.R. 1936 All. 366=161 Ind. Cas. 52.

——S. 5—When the suit was valued wrongly for the purpose of jurisdiction and appeal prosecuted in wrong Court in good faith—Appeal to proper Court after expiry of time.

Held, that the appellants should be held to have had sufficient cause within the meaning of S. 5. 1936 O.W.N. 325.

——S. 5—Application under S. 151, C. P. Code, when other remedy open.

When a remedy is provided by law, resort to the inherent jurisdiction under S. 151, C. P. Code, is not permissible. Where a person prosecutes an application under S. 151, when he has another remedy open to him under some other provisions of the Code, he cannot be said to be acting i good faith, and delay due to such wrong prosecution cannot be condoned under S. 5. A.I.R. 1936 Lah. 672=38 P.L.R. 868=165 Ind. Cas. 661.

——Ss. 5, 14 and 3—S. 14, if applies to appeals—Defence n t pleading bar of limitation — Appeal filed out of time—Duty of Court to dismiss it in the absence of sufficient cause under S. 5.

Section 14 is not applicable to appeals. But under S. 5 it is competent to a Court to admit an appeal after the expiry of the period of limitation if the appellant satisfies the Court that he had sufficient cause for not preferring an appeal within the prescribed time. Where an appeal is filed out of time, it is open to the Court to admit it on being satisfied that the appellant had shown good cause for not filing the appeal within the time allowed by law. It is the duty of the Court to see that an appeal which had not been filed within time should be dismissed even if the defence did not take up such a plea unless sufficient cause was shown by the appellant for its admission under the provisions of S. 5. 18 R.D. 706=A.I.R. 1935 All. 92=4 A.W.R. 1460=152 Ind. Cas. 939.

——S. 5—Bona fide presentation in wrong Court.

An appeal was presented to the Court of a Senior Subordinate Judge within time but a copy of the decree could not be filed as no decree-sheet had been prepared. The appeal was transferred by the District Judge to his own Court and a copy of the decree sheet was filed in the District Court as soon as the appellant got it from the trial Court. The then District Judge, holding that the transfer was **ultra vires**, returned the memorandum of appeal and it was re presented by the appellant on the same day in the Court of the Subordinate Judge, Objection was raised that the appeal was time-barred:

Held, that the time during which the appeal was pending before the District Court should be excluded as there was a **bona fide** mistake and the appeal was not, therefore, time barred. 32 P.L.R. 907=33 P.L.R. 27=A.I.R. 1932 Lah. 183 =135 Ind. Cas. 221.

——S. 5—Proceedings in wrong Court.

Where an appeal which lies to the High Court, is filed beyond time but the appellant sufficiently explains the delay by the circumstance that he was prosecuting in good faith the appeal before other Courts, time for filing the appeal should be extended. 120 Ind. Cas. 125=1930 A.L.J. 224=A.I.R. 1930 All. 15.

——S. 5—Instead of preferring appeal claimant filing suit against what was subsequently held to be order under S. 47 by High Court—Suit dismissed—Subsequently claimant filing appeal—Time taken in prosecuting suit can be excluded. A.I.R. 1930 Pat. 307=129 Ind. Cas. 660.

——S. 5—Scope of Ss. 5 and 14 explained.

Under S. 5 two matters have got to be considered: (1) whether there was sufficient cause for not preferring the appeal within the time prescribed by law, and (2) whether there are circumstances which would justify the Court in exercising the discretion that is granted to it under that section for extending the time for preferring the appeal.

A revenue officer rejected the application of appellant to adduce further evidence and made final order making correction in the record as against appellant. Appellant first appealed against the portion of the order rejecting his application believing **bona fide** that he would thereby get the whole relief that he wanted. The appeal, however, was dismissed. About 17 or 18 days after the appeal was dismissed he again appealed against the other portion of the order whereby correction in the record was made against him.

Held, that S. 14 constitutes sufficient cause within the meaning of S. 5, but that section would entitle one to the deduction of the period during which the suit or proceeding was prosecuted.

Held, further, that S. 14 is not exhaustive of all the circumstances that may constitute sufficient cause. In this case as the appellant acted **bona fide** in preparing his first appeal, there was sufficient cause for him for not preferring the present appeal within time. And this case is fit for the Court to exercise its discretion under S. 5, since the 17 or 18 days that elapsed between the dismissal of the first and the preferring of the present appeal is not a period which can be called unreasonable or which would show that there was any want of dilligence on the part of the appellant in preferring the appeal. 119 Ind. Cas. 383=33 C.W.N. 76=A.I.R. 1929 Cal. 240.

——S. 5—Where an appeal was filed in time in wrong Court following wrong advice, but was subsequently filed in right Court, by which time the date of limitation had expired.

Held, that the delay could be excused and the period of limitation extended. 108 Ind. Cas. 123 =9 L.R.A. Rev. 26=A.I.R. 1928 All. 144.

——S. 5—What constitutes.

An appeal was preferred to the Court of the District Judge, but the presiding officer returned the memorandum of appeal for presentation to the proper Court as the value of the claim was below Rs. 1,000. Appeal was, therefore, re presented the same day to the 1st Additional Judge of the District Court, who found that the appeal was presented one day late, but after inquiry held that there was sufficient cause for condoning the delay of one day. He thought that this was not, however, the only thing for him to decide. He considered that he could not condone the delay of eight days caused by the presentation of appeal in the District Court.

Held, that the question of limitation never arose as the District Court and Additional District Judge's Court were part and parcel of the same District Court. No question of the exercise of judicial discretion and condoning delay for sufficient cause within the meaning of S. 5, Limitation Act, ever really arose or could have arisen before

him so as to necessitate the application of the principle laid down in 5 N.L.R. 25 to the facts and circumstances of the case. A.I.R. 1917 P.C. 156, Foll. 109 Ind. Cas. 79=A.I.R. 1928 Nag. 199.

——S. 5—The circumstances contemplated in S. 14 might and ordinarily would constitute a sufficient cause in the sense of S. 5. 91 Ind. Cas. 865=A.I.R. 1926 All. 252.

——S. 5—If a party files an appeal in a wrong Court under the advice of his pleader, he is not precluded from showing that it was owing to the reliance placed on such advice that he could not present the appeal in the proper forum within the proper time. In such cases the true guide is whether the appellant acted with reasonable diligence in the prosecution of the appeal. 43 Bom. 376 (P.C.) and 45 Cal. 94 (P.C.), Foll. 95 Ind. Cas. 245=43 C.L.J. 106=30 C.W.N. 479=A.I.R. 1926 Cal. 688.

——S. 5—Bona fide mistake about forum.

Where, due to bona fide mistake, appeal was presented to a District Judge who dismissed it, which really lay to the High Court, an appeal from the decree of the District Judge, was held to be within limitation by exclusion of the time taken in the Court of the District Judge. 84 Ind. Cas. 741=40 C.L.J. 288=A.I.R. 1925 Cal. 212.

——S. 5—That there was serious illness in the petitioner's family and that some time was required in making arrangement in the Court is not sufficient explanation for the delay. Under S. 14, Limitation Act, the appellant who seeks to deduct the period must prove that he carried on the litigation with due diligence. 79 Ind. Cas. 924=A.I.R. 1925 Cal. 175.

——S. 5—Where a responsible officer like the Commissioner never thought that the appeals were not entertainable by him, under the circumstances, if the appellants thought that, they had a right of appeal to the Commissioner and the mistake must be taken to be a bona fide mistake until the contrary is shown. 82 Ind. Cas. 594=5 L.R.A. Rev. 163=A.I.R. 1924 All. 915.

——S. 5—Where the point of law was a doubtful one and the appellants filed their appeal in a wrong Court but within 5 days of the return of memorandum of appeal by the wrong Court, filed it in the proper Court.

Held, that extension of time under S. 5 ought to be granted. 79 Ind. Cas. 402=A.I.R. 1923 All. 364.

——S. 5—When an appeal is presented, out of time, the Court when called upon to exercise the discretion vested in it under S. 5 may well be guided by the provisions of S. 14, though it does not in terms apply to appeals. 68 Ind. Cas. 575 =35 Cal. 106=A.I.R. 1922 Cal. 247.

——S. 5—Revision deliberately filed instead of appeal—Revision found not to lie—No sufficient cause exists for excusing delay for filing appeal later on. 2 Lah. 1=A.I.R. 1922 Lah. 233.

——S. 5—Delay in filing a criminal appeal should be excused under S. 5 of the Limitation Act where it was erroneously filed in another Court since there is no question of a litigant losing a "valuable right". 59 Ind. Cas. 556=22 Cr.L.J. 124 =1 Lah. 508.

——S. 5—Proceedings in wrong Court—Duty of Court.

When time-barred appeals are filed in wrong Court the Court can dismiss them and need not return them for presentation to the proper Court in order that the latter might consider the question as to whether the time for presentation could be extended. 39 M.L.J. 195=28 M.L.T. 149 =18 A.L.J. 1095=22 Bom.L.R. 1370=47 I.A. 255=57 Ind. Cas. 606 (P.C.).

——S. 5—Proceedings in wrong Court — Legal advice—Bona fides of appellant.

Where an appeal is preferred to a wrong Court in good faith under legal advice the time spent in prosecuting the same should be excused under S. 5 of the Limitation Act. 45 Cal. 194 (P.C.) and 20 C.W.N. 49, Foll. 10 U.P.L.R. (J.C.) 9= 52 Ind. Cas. 235.

——Ss. 5 and 14—Proceedings in wrong Court—Sufficient cause.

The Bona fide prosecution of an appeal in a wrong Court should be regarded as a proper ground or as sufficient cause within S. 5 of the Act for extending the time for filing an appeal, notwithstanding that S. 14 of the Act does not apply to appeals. 24 C.W.N. 594=46 Ind. Cas. 116.

——Ss. 5 and 14—Prosecution of invalid application.

Where there was no actual delay in fact but only a kind of constructive delay imputed to the appellant, a Muhammadan female by reason that certain applications made from time to time by her legal advisers were not applications valid and efficient under the law, held that it was a case calling for the application of Ss. 5 and 14 of the Act. 42 Bom. 295=20 Bom.L.R. 343=46 Ind. Cas. 14.

——S. 5—Proceedings in wrong Court—Bona fide mistake of guardian—Sufficient cause.

Where an illeterate mother of a minor, as his guardian, presented the appeal in a wrong Court but on its being returned presented it to the proper Court the mistake is bona fide and the delay in presenting the appeal to the proper Court is excusable. 2 O.L.J. 325=30 Ind. Cas. 211.

——S. 5—Proceedings in wrong Court—Mistake of law.

The presentation of appeal to a wrong Court through a mistake of law is not sufficient excuse for admitting the appeal out of time. The appellant must, when he files an appeal out of time; state in his memorandum of appeal the grounds on which he seeks to get the delay excused. 7 Bur.L.T. 250=27 Ind. Cas. 967.

——S. 5—Proceedings in wrong Court.

The High Court ordered under S. 5 of the Limitation Act that the memorandum of appeal to the District Judge be registered as an appeal from an original decree against the order of the Sub-Judge. 17 C.W.N. 116=16 C.L.J. 77=16 Ind. Cas. 940.

——Ss. 5 and 14—Proceedings in wrong Court—Carelessness—Minority—Effect of.

Held, that as S. 86 of the Probate and Administration Act clearly specified the High Court as the Appellate Court, the appeal against an order appointing a receiver was filed in the Divisional Court by carelessness and not by mistake of law. There was no sufficient cause for not filing the appeal in the High Court within the time prescribed. The time taken up in the Divisional Court could not be excluded; the fact that the appellant was a minor did not justify extension of the period of limitation. 205 P.W.R. 1912=15 Ind. Cas. 170.

——S. 5—Proceedings in wrong Court.

An appeal was filed by oversight in the Divisional Court instead of the Chief Court and the Court passed judgment thereon without noticing the error. The facts are a sufficient cause for not presenting the appeal within time. 4 Bur.L.T. 224=12 Ind. Cas. 28.

——Ss. 5, 14—Proceedings in wrong Court—Bona fide mistake—Discretion of Court.

Where an appeal filed in time but in wrong Court owing to a b na fide mistake, is returned on the last day of limitation for presentation to a proper Court, the fact that it is not presented on the proper day ought not to be a ground for rejecting it as barred; judicial discretion should point to its admission. 8 A.L.J. 793=11 Ind. Cas. 814.

——S. 5—Proceedings in wrong Courts — Sufficient cause for excuse.

On the 25th November, 1909, a judgment-debtor was sent to jail by the Court executing the decree. He had filed a petition in Insolvency which was then pending. He sought the aid of the Insolvency Court to release him prior to adjudication. That Court by order passed on the 19th March, 1910, held that it had no power to release him. Then he appealed against the order of the 25th November. **Held,** that though the appeal was prima facie barred by limitation there was sufficient cause for entertaining it under S. 5 of the Act. 83 P.W.R. 1910=81 P.L.R. 1910 =7 Ind. Cas. 351.

——S. 5—Proceedings in wrong Court—Presentation of appeal in wrong Court.

Held, there was not a shadow of execuse for filing the appeal in the wrong Court and that the mistake was not excusable and the appeal was barred. 2 Lah.L.J. 390.

——S. 5—Proceedings in wrong Court.

Where a memorandum of appeal was wrongly presented to a Court owing to the mistake of the clerk of the appellant's counsel it was held that time could not be deducted and that these facts were not sufficient cause within the meaning of S. 15. The rule to be applied in explaining delay is whether the wrong action was taken b na fide under a mistaken belief and with due care and attention. Mere presentation in wrong Court is no ground for exemption; there must be a mistaken belief besides. 5 N.L.R. 25=1 Ind. Cas. 904.

——S. 5—Proceedings in wrong Court — Discretion.

If the appellant did not file the appeal in a proper Court, owing to some bona fide mistake as to jurisdiction, the period during which he had been under the mistake shall be excluded from the period of limitation. 1 Ind. Cas. 902 (All.).

——S. 5—Proceedings in wrong Court — Appeal presented in proper Court after limitation.

Where an appeal was originally presented in a Court which was afterwards found by the second appellate Court to have no pecuniary jurisdiction over that appeal, and then the appeal was filed in the proper Court, it was held that these facts were sufficient cause within the meaning of S. 5 for the appeal not being filed in time. 12 O.C. 31 =1 Ind. Cas. 687.

——S. 5—'Sufficient cause' — Appeal preferred to wrong Court—Mistake—Due diligence—Negligenc —Extension of time — Ex parte order—Respondent, if binding on.

Where the appellants, being themselves pleaders and well acquainted with the facts of the case, preferred an appeal from an order in a suit valued at over Rs. 50,000 to the District Judge instead of to the High Court (the proper tribunal under Act XII of 1887), they had not acted in good faith but with gross negligence and carelessness and they were not entitled to an extension of time under S. 5 of the Limitation Act. The words 'sufficient cause' should receive a liberal con t uction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. The fact that the appeal was filed a month after the District Judge

had returned the memorandum of appeal for presentation to the proper court was an additional proof of want of diligence in the appellants. The order of the court for admission of an appeal under S. 5 before notice is given to the respondent is in no way binding upon the respondent when he appears, and he may question the validity of such order. (1907) 5 C.L.J. 380=34 C. 216.

24. Review.

——S. 5—Review application — Period for, can be excluded unless not made in good faith.

The time taken by a review application may be excluded unless the application has not been made in good faith. The period, need not, however, invariably be excluded. The mere fact that the grounds shown in the application were not such grounds as are referred to in the provisions in r. 1 of O. 47 for such an application does not by itself warrant the inference that the application was made in bad faith merely with the object of gaining time. A.I.R. 1944 Oudh 193=1944 A.W.R. 72=1944 O.W.N. 46 =216 Ind. Cas. 107.

——S. 5—Review application.

Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending from the period of limitation required for filing an appeal, specially when the grounds for review were really grounds of appeal. A.I.R. 1940 Oudh 310=1940 O.W.N. 281=15 Luck. 526=1940 A.W.R. 145=187 Ind. Cas. 83.

——S. 5—Section 5 is applicable to review proceedings. 42 C.W.N. 317=A.I.R. 1938 Cal. 321=I.L.R. (1938) 2 Cal. 22=177 Ind. Cas. 729.

——Ss. 5, 14 — Review application—Time taken, if can be excluded in computing period for subsequent appeal.

Although S. 14, Limitation Act does not in terms apply to appeals as it deals with suits and not with appeals, that section is relevant in considering applications under S. 5, Limitation Act, and may be availed of in excluding the period taken by an appellant in applying to the lower Court for review of judgment. 30 S.L.R. 301= A.I.R. 1936 Sind 43=162 Ind. Cas. 257.

——S. 5—Review application.

Where the appellant shows sufficient cause within the meaning of S. 5, for not filing the appeal within time as he was prosecuting with due diligence his application for review in the lower Appellate Court, the appeal cannot be held to be barred by time. A.I.R. 1935 Lah. 844=159 **Ind. Cas. 641.**

——S. 5—Review application.

Under S. 5, the time spent in prosecuting with due diligence a proper application for a review should be excluded in calculating the period of limitation for preferring an appeal. A.I.R. 1931 Sind 3=25 S.L.R. 242=130 Ind. Cas. 545.

——S. 5—Review.

It is possible for a party to make an application for review and at the same time before that is decided to file an appeal. The right course where parties adopt simultaneous remedies or endeavour to do so if the review measures are successful to any extent whatever is that a new decree should be drawn up and the party choosing to file an appeal should file it against the decree as it appears in its final shape.

Per **Suhrawardy, J**—In a proper case the Court may grant time to a party to file an appeal from the final decree in the place of the appeal from the original decree. 34 C.W.N. 1002=A.I.R. 1931 Cal. 323.

——S. 5—Applicability — Review of order passed under—Companies Act.

The provisions of S. 5, are applicable to an application for review of an order passed under Companies Act as there is no special period prescribed by the latter Act for such an application. 116 Ind. Cas. 427=A.I.R. 1929 Nag. 185.

——S. 5—Where the Court finds that the appellant had presented and prosecuted a petition for review with due diligence, the time spent in prosecuting the infructuous application should be excluded as it is a sufficient cause within the meaning of S. 5 for not preferring the appeal in time. 117 Ind. Cas. 96=11 L.L.J. 491=A.I.R. 1929 Lah. 824.

——S. 5—The ground that the appellants were presenting, in good faith, an application for review which was granted but was subsequently reversed on a point of law is sufficient for granting extension of time. 120 Ind. Cas. 179=11 L.L.J. 61=30 P.L.R. 283=A.I.R. 1929 Lah. 283.

——S. 5—Where an application for review is admitted to a hearing and there is a reasonable ground for review inasmuch as the Court had referred to statements that were not a part of the record of the suit, the application is prosecuted bona fide and the period should be exempted. A.I.R. 1917 P.C. 156, Foll. 116 Ind. Cas. 315= A.I.R. 1928 Lah. 964.

——S. 5—Where party applies to the High Court for excusing his delay in prosecuting an application for leave to appeal to Privy Council he is bound to satisfy the Court that there are sufficient circumstances existing in his case to account for the delay. Time taken in prosecuting an application for review ought not to be deducted in calculating the period of limitation, unless there is a reasonable ground for asking for a review. 18 Bom. 48; 15 Cal. 242, Foll. 101

Ind. Cas. 432=29 Bom.L.R. 344=A.I.R. 1927 Bom. 221.

——S. 5—In computing the period of limitation for an application for leave to appeal to Privy Council, the time taken up for review of the judgment sought to be appealed against should be excluded. 85 Ind. Cas. 191=49 Bom. 149=26 Bom.L.R. 1261=A.I.R. 1925 Bom. 137.

——S. 5—If an appellant claims extension of time on account of his prosecuting a review application, all that the applicant has to show is that he prosecuted the review application with due diligence and that there were reasonable grounds for filing such an application for review. If these conditions are fulfilled, the Court is to decide whether it should exercise its discretion to extend time. 92 Ind. Cas. 1031=A.I.R. 1926 Cal. 677.

——S. 5—The issue of notice by the Court upon the opposite party is sufficient evidence of the reasonableness of filing the application for review. Prospect of success in such application is not the test. 92 Ind. Cas. 1031=A.I.R. 1926 Cal. 677.

——S. 5—Time taken for review in lower Court may be excused but appellant must be otherwise diligent in presenting and prosecuting the appeal and the application for extension of time. 85 Ind. Cas. 996=A.I.R. 1926 Cal. 457.

——S. 5—A proper application for review of judgment prosecuted with due diligence entitles appellant to exclusion of time but where the application for review does not state the reason and where no reasonable ground for seeking the review is shown extension of time cannot be claimed. 80 Ind. Cas. 786=A.I.R. 1925 Cal. 253.

——S. 5—Time in prosecuting a well-founded application for review should be excluded in computing the period of limitation provided for the appeal against the order. 88 Ind. Cas. 326=26 P.L.R. 456=A.I.R. 1925 Lah. 534.

——S. 5—The time spent in prosecuting with due diligence a proper application for review of judgment can be deducted. 78 Ind. Cas. 677=22 A.L.J. 365=5 L.R.A. Civ. 298=A.I.R. 1924 All. 867.

——S. 5—Want of knowledge of a fact is a good excuse.

Where a party could not reasonably know a defect in the decree but applied for amendment immediately after knowledge and the application was rejected on a technical ground,

Held, the application could be treated as a review application and prior delay may be excused. 76 Ind. Cas. 786=18 M.L.W. 876=33 M.L.T. 221=A.I.R. 1924 Mad. 225.

——S. 5—An appellate Court should not exercise its discretion under S. 5 in the case of an appeal being filed after time owing to review proceedings if the grounds for review seem to be unreasonable. 1 L.B.R. 313, Foll. 74 Ind. Cas. 39 =1 Bur.L.J. 154=A.I.R. 1923 Rang. 75.

——S. 5—The grounds for granting review on account of the discovery of fresh evidence may in certain cases be a ground for also extending time i.e., when the new evidence was discovered late and could not in spite of due diligence be discovered earlier. 78 Ind. Cas. 527=A.I.R. 1921 Nag. 174.

——S. 5—Where a litigant files an application for review on totally insufficient grounds, the time taken by him cannot be deducted under S. 5 of the Limitation Act. 64 Ind. Cas. 516=13 Bur. L.T. 219.

——S. 5—Review—Time taken in.

An appellant is not entitled as a matter of right to deduction of the period during which an application for review remained pending in the Court below. He has to seek extension of time under S. 5 of the Act. 28 C.L.J. 20=47 Ind. Cas. 677.

——S. 5—Review—Time spent in—Exclusion.

An application for review preferred with a reasonable expectation of success and not prosecuted with reasonable diligence, does not justify an excuse of the delay for filing an appeal caused by the prosecution of the review application. 125 P.W.R. 1918=107 P.R. 1918=103 P.L.R. 1918 =46 Ind. Cas. 23.

——S. 5—Review—Time taken in.

The time taken for review of judgment can be excluded under S. 5 of the Act reckoning the period of limitation for filing an appeal if the Appellate Court finds that there was a good ground for review and that the proceedings amount to sufficient cause within the meaning of the section. 88 P.W.R. 1918=89 P.R. 1918= 87 P.L.R. 1918=46 Ind. Cas. 588.

——S. 5, Art. 173 — Review — Cross-review—Extension of time.

Where one party applies for review the time for cross-review by the other party should be extended if necessary as one is a counter blast to the other. 94 P.W.R. 1917=144 P.L.R. 1917=42 Ind. Cas. 54.

——S. 5—Review.

Time spent in an infructuous application for review will not be excluded if the grounds of review were only grounds of appeal. And time spent in unsuccessfully prosecuting an application for review is not always "a sufficient cause". 34 Ind. Cas. 44 (Pat.)

——S. 5—Review—Time taken in.

The time spent in an infructuous application or

review will not be excluded if the grounds of review were only grounds of appeal. 19 C.W.N. 1113=31 Ind. Cas. 705.

——S. 5—Review — Time taken for—Exclusion of.

A review was attempted by putting forwad a fresh document before the Court, which was rejected. An appeal was filed after the period of limitation but within time, if the time taken for adjudicating review was excluded from computation and the Appellate Court excused the delay in appealing and decreed the appeal on the basis of the new document.

Held, that the appeal was rightly admitted and the procedure of the Appellate Court was not irregular. 55 P.L.R. 1915=50 P.W.R. 1915=28 Ind. Cas. 926.

——S. 5—Review — Time taken in — Exclusion of.

Time occupied in obtaining a review of an erroneous order, cannot be deducted from the time required to present an appeal against the order sought to be reviewed. 26 M.L.J. 356=15 M.L.T. 263=(1914) M.W.N. 310=22 Ind. Cas. 919.

——S. 5—Review.

Where on an application for review the lower court heard fresh evidence, considered the merits of the case but finally reejected the application for review and it was not clear whether the lower Court granted the review and re heard the case or whether it had rejected the application for review and it was difficult to see from which decision of the lower Court the appeal should be made.

Held, that it was a fit case for admitting the appeal out of time under S. 5 of the Act. 20 Ind. Cas. 647 (All.).

——S. 5—Review—Time spent in.

Time spent in review proceedings based on reasonable grounds may be sufficient cause but an unexplained delay of two months after rejection of the review application is no sufficient cause. 140 P.L.R. 1911=222 P.W.R. 1911=10 Ind. Cas. 129.

——S. 5—Review — Time taken in — Exclusion of.

Pendency of an application for review is not a "sufficient cause" for not presenting an appeal within time unless the review is on reasonable grounds. 1 Ind. Cas. 242=183 P.R. 1888, F.B., Foll. 100 P.R. 1910=43 P.L.R. 1911=8 Ind. Cas. 1156.

——S. 5—Review—Time taken in—Exclusion.

A bona fide application for review made with good reason is a sufficient cause for not filing an appeal within time. What is a sufficient cause is a question depending upon the circumstances of each case. 10 C.L.J. 39=2 Ind. Cas. 961.

——S. 5—Sufficient cause — Review, bona fide application for.

What is or is not sufficient cause, within the meaning of S. 5 depends upon the circumstances of each particular case. Bona fide application for review of judgment is a sufficient cause for not presenting an appeal within the prescribed period. An application for review made without any good reason is not made bona fide merely because it was admitted in the first instance. 10 C.L.J. 39=2 Ind. Cas. 961.

——S. 5—'Sufficient cause' — Review, proceeding in, whether sufficient cause for not presenting appeal in time.

The general rule for extending the time to prefer an appeal and for extending the time taken up in prosecuting an application for review is that the delay may be excused if the applicant can show that he had reasonable grounds for applying for a review instead of preferring an appeal.

Per Rampini, J.—The general rule deducible from judicial decisions is that bona fide application for review of judgment presented and prosecuted with due diligence, should, except in special cases be regarded as a sufficient cause for not presenting an appeal within the prescribed period. The principle above laid down is a valuable guide in indicating the manner in which the judicial discretion of courts is to be exercised, but it does not embody an inflexible rule of law which fettered the exercise of that discretion in any particular case. What is a 'sufficient cause' within the meaning of S. 5, Cl. (2), must depend upon all the circumstances of each particular case. The words "sufficient cause" in the section ought to receive a liberal construction so as to advance substantial justice, where no negligence or inaction of want of good faith is imputable to the appellant. (1906) 3 C.L.J. 545=10 C.W.N. 986=33 Cal. 1323.

——S. 5, Art. 173—Second application for review beyond time—Time spent in first application—Deduction of.

A second application for review of judgment, if presented beyond the prescribed period, is barred by limitation, and the time occupied by the pevious application for review cannot be excluded in counting the period. (1902) 4 Bom.L.R. 121=26 Bom. 485.

25. Sufficient cause.

(a) Construction.

(b) Question, one of law.

(c) What is.

25. (a) Sufficient cause—Construction.

——S. 5—Sufficient cause—Good faith—If necessary.

In finding a "sufficient cause" under S. 5 of the Limitation Act, a man's good faith would have to be kept in view but that "good faith" is more in general sense of that word as grammatically understood rather than in the sense in which it has been defined in S. 2 (7) of the Act. 225 Ind. Cas. 291=48 P.L.R. 325=A.I.R. 1947 Lah. 76.

——S. 5—Construction of.

The words "sufficient cause" in S. 5 should be liberally construed so as to advance substantial justice particularly when no negligence nor inaction nor want of b na fides is imputable to the appellant. A.I.R. 1942 Mad. 170=1941 M.W.N. 989=(1941) 2 M.L.J. 873=201 Ind. Cas. 84.

——S. 5—Construction favourable to minor.

Minority is a factor to be taken into account when considering circumstances which justify the application of S. 5, Limitation Act. Applications for the extension of time under S. 5 have to be more liberally construed in favour of minors than other litigants. A.I.R. 1939 Lah. 439=I.L.R. (1939) Lah. 433=41 P.L.R. 843=186 Ind. Cas. 77.

——S. 5—'Sufficient cause'—Meaning.

The expression 'sufficient cause' in the context must be regarded merely as indicating that the Court must be satisfied that the delay was an excusable delay. 110 Ind. Cas. 837=1928 M.W.N. 634=A.I.R. 1928 Mad. 690.

——S. 5—Sufficient cause.

In order that the provisions of S. 5 of the Limitation Act, should be available it should be shown that the party had sufficient cause for not preferring the appeal in time. Where there was nothing to show that the appellant had in any way been misled,

Held, that the section could not be invoked. 50 C.L.J. 397=A.I.R. 1925 Cal. 166.

——S. 5—Sufficient cause — Liberal construction of.

In interpreting S. 5 of the Limitation Act the expression "Sufficient cause" must be accorded a liberal construction. But when the time for appeal has once passed, a successful litigant acquires a valuable right which must not be taken away from him unless the Court is satisfied that it is necessary in the interests of justice to extend the time for appeal and unless it is further shown that the petitioner has not been guilty of any inaction or negligence on his part. 78 Ind. Cas. 953=17 S.L.R. 306=A.I.R. 1925 Sind 60.

——S. 5—Construction

Section 5 should be liberally construed so as to advance substantial justice but not when negligence in action or mala fides could be imputed to the appellant. 13 A.L.J. 1101=31 Ind. Cas. 876.

25. (b) Sufficient cause—Question, one of law.

——S. 5—"Sufficient cause" is a question of law.

The question of "sufficient cause", so far as it is one of inference drawn by Court as to whether certain facts found by it to have been established amount to sufficient cause or not is one of law and not of fact. (1946) 225 Ind. Cas. 291=48 P.L.R. 325=A.I.R. 1947 Lah. 76.

——S. 5—'Sufficient cause'—Question of fact or law.

Where the relevant facts have been found, the question whether these facts are such as to constitute sufficient cause becomes a question of law. A.I.R. 1942 Lah. 94=43 P.L.R. 502=199 Ind. Cas. 851.

——S. 5—Sufficient cause — Question of fact or law.

The question whether the admitted facts and circumstances constitute sufficient and reasonable cause for extension of time for preferring an appeal is one of law and not of law and not of fact. 32 P.L.R. 907=33 P.L.R. 27=A.I.R. 1932 Lah. 183=135 Ind. Cas. 221.

25. (c) Sufficient cause—What is.

See also NOTES 2, 3, 10 TO 20; 23; 24 AND 26 TO 29.

——S. 5—'Sufficient cause'—Extension of limitation—Application under O. 9, R. 9, C. P. Code.

When an application is made by the plaintiff under O. 9, R. 9; C. P. Code; after the expiry of the period of limitation prescribed under Art. 163 of the Limitation Act, the Court is not entitled to extend the period of limitation by taking into consideration certain circumstances which appear to operate harshly against the plaintiff. In order to obtain such extension, the plaintiff must satisfy the Court that there is "sufficient cause" for not making the application within the period of limitation. A.I.R. 1950 Cal. 217=54 C.W.N. 110.

——S. 5—Sufficient cause — Extension of limitation — Application to set aside order of dismissal for default. See C. P. CODE (5 OF 1908), O. 9, R. 9. (1946) 2 M.L.J. 382=A.I.R. 1947 Mad. 153.

——S. 5—Sufficient cause for not applying in time to bring L.R. on record—Failure of L.R. to instruct his advocate about the death of the party. See C. P. CODE (V OF 1908), O. 22, RR. 4, 9 AND 11 AND LIMITATION ACT (IX OF 1908), S. 5. (1949) 2 M.L.J. 246=A.I.R. 1950 Mad. 52.

——S. 5—Sufficient cause — Delay in impleading legal representative—Omission by typist.

Where the omission to implead the legal representatives is due to the omission by the typist, it is not a good ground for allowing the benefit of S. 5 of the Limitation Act and condoning the delay. 1948 A.W.R. (Rev.) 227=1948 R.D. 410.

——S. 5—Time for appeal pasing before representatives are brought on file—Bona fides proved.

In a case in which the petitioner can prove his bona fides, the period for presenting the appeal can also be extended under S. 5, if the time for appealing has passed before the representatives are brought on the file. A.I.R. 1936 Pesh. 192 =165 Ind. Cas. 201.

——S. 5—Appeal — Wrong person impleaded as respondent — Court giving time—Party not brought on record within time:

Held, on facts that there was no sufficient cause within the meaning of S. 5. A.I.R. 1936 Lah. 793=165 Ind. Cas. 154 (1).

——S. 5—Ignorance of the death of a party is not a sufficient ground for the extension of period of limitation, prescribed for substitution of the legal representative. A.I.R. 1935 Lah. 478=37 P.L.R. 400.

——S. 5—Municipal Committee appellant—Respondent dying within limits of appellant—Failure to implead legal representative within time—Extension cannot be granted. A.I.R. 1933 Lah. 556=146 Ind. Cas. 154.

——S. 5—Sufficient cause—What is.

Respondent living in different province—Dying four days before filing of appeal—Appellants, not aware of death—Application to amend memo. of appeal made after expiry of limitation—Time was extended. 123 Ind. Cas. 824=A.I.R. 1930 All. 131.

——S. 5—In an appeal which had been long pending and had numerous parties, a party failed to make an application for bringing the legal representative of a deceased party living at a long distance within time, due to ignorance of the latter's death. But he had been diligent in making several other applications of the same nature.

Held, under S. 5 time for making an application for setting aside abatement should be extended. 95 Ind. Cas. 236 (Lah.).

——S. 5—Fact of death of a party not known to parties for more than three months—Mistake excused.

The judgment under appeal was given on the 21st of January, 1922. The appeal was filed on the 19th of April, 1922. On the 6th July, 1922; an application was made to remove from the memorandum of appeal the name of one R and substitute the names of P and H as R had died before the presentation of appeal and name had wrongly been continued on the record. R had in fact died before the decision of the lower Appellate Court, but his name, by an oversight, was retained in the decree of the lower Appellate Court.

Held, that the retention of the name of the deceased was not intentional, that having regard to this circumstance the mistake should be overlooked and the time for appeal against the heirs of R should be extended. 75 Ind. Cas. 903=A.I.R. 1924 Lah. 692.

——S. 5—Where the plaintiff failed to bring on record the legal representative of the defendant though with smallest diligence he would have discovered that defendant had died,

Held, the abatement could not be lightly set aside; the plaintiffs had to satisfy the Court that there was sufficient cause for not applying in time. 67 Ind. Cas. 917=49 Cal. 62=A.I.R. 1922 Cal. 335.

——S. 5—'Sufficient Cause'—Ignorance of death.

Mere ignorance of death is not a 'sufficient cause' under S. 5. 118 P.R. 1916=38 Ind. Cas. 7.

——S. 5—Court holding that defendant was dead —Plaintiff instead of setting aside abatement—Appealing against order, and after its dismissal; applying for substitution of Legal Representatives —No sufficient cause. 84 Ind. Cas. 1001=2 Pat. 168=A.I.R. 1923 Pat. 417.

——S. 5—Sufficient cause—Laches.

Appeal by applicant under S. 4, U. P. Encumbered Estates Act—Creditors necessary parties, but not impleaded within time:

Held, that application under S. 5 cannot succeed. A.I.R. 1943 Oudh 78=1942 O.W.N. 465 =1942 A.W.R. 305=205 Ind. Cas. 628.

——S. 5—Sufficient cause—'Misled by order or judgment."

New statement of law by High Court—In view of certain rulings of High Court—Appellant advised that no second appeal lay—These rulings subsequently upset by Full Bench—Second appeal subsequently filed beyond limitation—Application to excuse delay:

Held, that there was no good ground for excusing delay. 1942 O.W.N. 439=A.I.R. 1942 Oudh 447=1942 R.D. 647=1942 A.W.R. 294= 201 Ind. Cas. 658.

——S. 5—Conflict of view on certain point.

In a case where there are conflicting views on a certain point and the delay caused in filing the appeal is due to adopting one of the views, even though the Court takes the contrary view, it can

extend the time under S. 5, Limitation Act. A. I.R. 1941 Pesh. 74=196 Ind. Cas. 654.

——S. 5—Sufficient cause—Wrong remedy.

Where a party having two alternative remedies deliberately adopts one remedy, his failure to get it is not a sufficient cause for extending the period of limitation prescribed by law for seeking the other. A.I.R. 1942 Oudh 362=1942 O.W.N. 206=1942 A.W.R. 156=199 Ind. Cas. 835.

——S. 5—Two remedies allowed by law—Prosecution of one is good ground for extension of time. 98 Ind. Cas. 892=A.I.R. 1927 Lah. 45.

——S. 5—Held, per Din Muhammad, J. (In order of reference).—The delay in filing appeal could be condoned under S. 5 as the appellant had sufficient cause for not preferring the appeal within time. A.I.R. 1939 Lah. 492=41 P.L.R. 610= I.L.R. (1940) Lah. 447=185 Ind. Cas. 877.

——S. 5—Counsel filing appeal on behalf of client —Signature on power-of-attorney doubted— Court directing personal appearance of client— Client not attending on ground of personal inconvenience—After final hearing, agent of client asking permission to sign power-of-attorney— Court disallowing on ground that it would defeat provisions of Limitation Act—Appeal dismissed under O. 41, R. 17, C. P. Code.

Held, that the non-appearance of the client on the ground of personal inconvenience was not a reasonable cause within the meaning of S. 5. A. I.R. 1938 Rang. 214=177 Ind. Cas. 364.

——S. 5—Parties, agreeing to end litigation by accepting High Court's decision as final—One of parties backing out of agreement — The other applying for leave to appeal to Privy Council but time expiring:

Held, that in the circumstances, there was sufficient cause for extending time under S. 5. A.I. R. 1938 Lah. 836=40 P.L.R. 399=181 Ind. Cas. 248.

——S. 5—Suit for declaration that plaintiffs and pro forma defendants were owners and entitled to profits as against A—Suit decreed —Appeal by A not impleading pro forma defendants — Appellate Court impleading them after the period of limitation for appeal:

Held, that the case was fit one to extend the time under S. 5. A.I.R. 1937 All. 82=1936 A. W.R. 1099=(1937) A.L.J. 424=167 Ind. Cas. 405.

——S. 5—Appeal filed without copy of decree— Copy not applied for till after filing appeal—Delay not excusable as appellant was not diligent. 1936 O.W.N. 1109=A.I.R. 1936 Oudh 9=158 Ind. Cas. 19.

——S. 5—Application for restoration.

Upon the dismissal of the application to restore the execution petition, the decree-holder is not entitled to extension of time for an appeal from the order discharging the surety, in respect of the time spent in the application for restoration. Such an application cannot be considered to be proper alternative remedy for getting the order of discharge of surety set aside, as the liability of the surety is not automatically revived on the restoration of the application. A.I.R. 1934 Lah. 349= 155 Ind. Cas. 503.

——S. 5—Appeal memo. filed with no stamp—A delay of 21 days in payment of court-fees cannot be excused under S. 5, even though the applicant was a pardanashin lady. 37 C.W.N. 179=A. I.R. 1933 Cal. 796=146 Ind. Cas. 359.

——S. 5—The appeal was filed with insufficient stamp within limitation but the balance of Court-fees was made up within a week under the orders of the Court.

Held, the mistake clearly was a bona fide one, and this is a fit case for the extension of time under S. 5. 77 Ind. Cas. 416=A.I.R. 1923 Lah. 513.

——S. 5—Two appeals from same order—Copy of order appealed against filed out of time in one.

Where from one and the same order, two appeals were filed, but only one copy of the order appealed against was filed along with the appeal and the copy was filed out of time in the other appeal:

Held, that though the latter appeal was technically time barred, it was a fit case in which the period of limitation should be extended under S. 5. 13 P.L.T. 612=A. I. R. 1932 Pat. 349=12 Pat. 36=141 Ind. Cas. 37.

——Ss. 5 and 14—The High Court delivered judgment on January 25, 1929 in favour of the opposite party. The petitioner who came to know of the order, immediately applied for leave to appeal to the Privy Council on April 22, 1929, and leave was granted on July 2, 1929. Their Lordships of the Judicial Committee held on March 20, 1931; that no appeal lay. The petitioner having come to know of this in the first week of May, 1931, filed an application for review of the judgment of the High Court on June 12, 1931:

Held, (i) that the petition was barred and that the period between the judgment of the High Court and the application for leave to appeal could not be excluded under S. 5. 36 C.W.N. 40= A.I.R. 1932 Cal. 171=144 Ind. Cas. 561.

——S. 5—Ignorance of date of order.

An objection to the valuation of a building was preferred to the Deputy Executive Officer on May 2, 1928 and it was heard and disposed of on the very day. The assessee had no knowledge of the order. He made efforts to ascertain about it by letter to the Chief Executive Officer and enquiries through Ward Councillor and Bill Collector and preferred an appeal beyond the period of limitation:

Held, that as the assessee, in making the enquiries that he did, acted under an honest belief that orders had not been passed on the date of hearing and as there was no want of bona fides on his part, the case was a fit one for extension of time under S. 5, Limitation Act. 35 C. W. N. 283=58 Cal. 793=A.I.R. 1931 Cal. 506=54 C. L.J. 475=133 Ind. Cas. 332.

——S. 5—Delay in making an application to set aside the ex parte decree was condoned on the ground that the plaintiffs had acter quite reasonably in waiting to see whether the legal representatives would resist the decree on the ground that it was a nullity being against a person of unsound mind. 34 C.W.N. 989=A.I.R. 1931 Cal. 168 =130 Ind. Cas. 878.

——S. 5—Suit instituted in Patna High Court for restitution of conjugal rights—Respondent wife on

proper advice from her counsel offered no defence —Suit decreed — Subsequently wife seeking redress by petitioning to ecclesiastical Court at Calcutta where marriage was solemnised and on decree of that Court declaring marriage nullity, petitioning Calcutta High Court for same decree —Solicitors entrusted with petition, for first time coming to know of decree for restitution of conjugal rights against their client and advising her to apply for review of judgment to Patna High Court—Time for review was extended under circumstances. 120 Ind. Cas. 465=A.I.R. 1930 Pat. 63.

——S. 5—Appeal filed against an order on an application for restitution on Rs. 2 stamp — Court holding that Court-fee was payable ad valorem—Applicant taking time to pay deficiency but applying to permit to appeal as a pauper—Prayer to extend time also made—Application was allowed and time was extended. 111 Ind. Cas. 655=26 A.L.J. 847=A.I.R. 1928 All. 499.

——S. 5—C. P. Code, S. 92—Scheme suit.

In a representative suit about a temple property certain persons, on behalf of the temple; filed an appeal which was returned for representation. It was not represented in time. Certain other persons interested in the temple property and in the result of the appeal then applied to the appellate Court for taking the appeal on file and also paid fresh Court-fee. It was found that the non-representation of the appeal by the original appellant was not **bona fide.**

Held, that the fresh appellants should be considered as constructive parties and thus entitled to continue the appeal, and even assuming the representation was a fresh appeal, time should be excused under S. 5, Limitation Act. 108 Ind. Cas. 298=28 M.L.W. 279=A.I.R. 1928 Mad. 456=54 M.L.J. 629.

——S. 5—Where a copy of the order of the Court below on a preliminary issue was not filed along with the copy of the final order, and when it was filed the period of limitation had expired, but it was found that preliminary order was not contested,

Held, that it would be but fair to condone the delay under S. 5, Limitation Act. 106 Ind. Cas. 826=9 L.L.J. 566=A.I.R. 1927 Lah. 905.

——S. 5—Delay in filing appeal—Appellant doubtful whether order appealed against was order or decree and therefore paying insufficient Court-fee —Court-fee made up after time—Delay should be excused. 86 Ind. Cas. 1=6 Lah. 233=7 L.L.J. 149=26 P.L.R. 100=A.I.R. 1925 Lah. 381.

——S. 5—Where a judgment is delivered on the day preceding the last working day before the Court's vacation for a month and an application for a copy is made on the very day on which the Court opens after the vacation, the applicant is entitled to the indulgence of having his application for copy being accepted as equivalent to an application made a month earlier, nor does he forfeit his claim to indulgence because he arranges to have the copies sent to him by post. 90 Ind. Cas. 115=2 O.W.N. 678=A.I.R. 1925 Oudh 643.

——S. 5—Filing copy of order referred to in the judgment as part of it after expiration of the limitation, where copy of the final judgment is filed in time may be excused under S. 5. 82 Ind. Cas. 609=6 L.L.J. 340=A.I.R. 1924 Lah. 731.

——S. 5—Delay due to proceedings for obtaining Succession certificate was excused.

Decree-holder died during the pendency of the execution proceedings on the 21st October, 1918. As his legal representatives did not appear to proceed with the execution, the Court struck off the execution proceeding on the 14th December, 1918. The application for the substitution of their names was made on the 19th December, 1921. The delay was due to the fact that the legal representatives were minors, who could not have obtained execution without obtaining a succession certificate under Act VII of 1889. The succession certificate was obtained on the 31st August, 1920.

Held, that there was sufficient reason to excuse the delay within the meaning of S. 5, read with O. 22, R. 9 of the Code of Civil Procedure and Art. 181 of the Indian Limitation Act. 73 Ind. Cas. 215=26 O.C. 244=A.I.R. 1924 Oudh 83.

——S. 5—Where communication between client and pleader was interrupted by heavy rain,

Held, that it was not a sufficient cause to excuse even one day's delay. 75 Ind. Cas. 1055=A.I.R. 1924 Lah. 599.

——S. 5—When the delay in filing the appeal is due to the fact that cholera broke out in the appellant's family,

Held, that this was a sufficient ground to extend the time for filing the appeal. 68 Ind. Cas. 787=A.I.R. 1923 Lah. 100.

——S. 5—Ignorance of a special order is a ground for excusing delay.

The last day for filng an application (19-2-21) was a holiday as a penultimate Saturday. But the Court sat and the day was treated as not a public holiday with the special permission of the High Court given in its order date 4-2-21. But the Court's order permitting the Lower Court to sit on 19-2-21, though passed on 4-2-21, was despatched to the Lower Court only on 8-2-21, and was presumably received there next day.

Held, that it not being shown what publication of the order there was or that the petitioner who was a resident of mofusil could reasonably be expected to take notice of it, he had sufficient cause for assuming that the Court would as usual be closed on 19-2-21, the penultimate Saturday, and for postponing the presentation of his petition to the next Court day, 24-2-21. 72 Ind. Cas. 13=17 M. L. W. 413=1923 M.W.N. 211=A.I.R. 1923 Mad. 489.

——S. 5—Addition of parties—In suit and in appeals after time has expired—Effect.

S. 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit under S. 32, C. P. Code (1882); O. 1; R. 10 or to an appeal under S. 559 of the old Code (O. 41, R. 20) and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. S. 22 of the Limitation Act applies to appeals as much as to suits in principle. But a suit in which a defendant is joined, after the period of limitation has expired, must necessarily be dismissed as against him. In an appeal, however; there may be possibly reasons justifying its admission after time under S. 5 of

the Limitation Act. 66 Ind. Cas. 217=5 N.L. J. 192=A.I.R. 1922 Nag. 213.

——S. 5—Where an appeal against a preliminary decree was filed after passing of the final decree, but the appellant finding that this was not maintainable wished to file an appeal against the final decree and the same was barred by time, the Court may excuse the delay under S. 5 of the Act. 67 Ind. Cas. 261=A.I.R. 1922 Nag. 179.

——S. 5—Held, that having regard to the fact that the appellant was a pardanashin lady and was living with her parents in a different province there was sufficient cause for not filing her appeal by presenting it in person within the period allowed by law and that the representation of the papers by the appellant in person after the expiry of the period was sufficient. 11 Lah. L.J. 226.

——S. 5—Neglect of guardian.

Where the Court of wards had the authority to make an application on the wards behalf but did not so within the limitation period, the ward cannot after release from the superintendence of Court of wards, be said to have had sufficient cause for not making the application during the period of his wardship. 5 O.L.J. 153=46 Ind. Cas. 68.

——S. 5—Leave to appeal to P.C.—Application filed during vacation—Limitation Act (11 of 1877), Art. 177.

The second paragraph of S. 5 of the Limitation Act, 1877, applies to Art. 177. When, therefore, an application for leave to appeal to His Majesty in Council was filed in the Privy Council department of the office of the High Court during the long vacation when the Court was notified as closed, but the offices were open, the applicant was entitled to the benefit of the second paragraph of S. 5 of the Limitation Act. (1908) 10 C.L.J. 118=3 Ind. Cas. 400 Also=(1909) 10 C.L.J. 120=3 Ind. Cas. 401.

——Ss. 5, 14—Appeal—Delay—Excuse.

Where a party files a second appeal against the order of a District Judge on the ground that the latter had no jurisdiction to dispose of the appeal presented to him but should have returned it for presentation to the High Court and after the High Court disposes of the second appeal in his favour, prefers the original appeal to the High Court.

Held, that the appellant having become aware of the fact that the original appeal lay to the High Court and not to the District Court at least on the date on which he filed the second appeal to the High Court, there was no sufficient cause for excusing the delay from that date up to the date on which it was actually filed in the High Court, *i.e.*, after the disposal of the second appeal within the meaning of S. 6 of the Limitation Act. (1903) 5 Bom.L.R. 947=28 B. 235.

26. Technical defect.

——S. 5—Appeal within time—Absence of names of parties in power-of attorney—Defect pointed out by office after limitation—Defect removed.

Where the power-of-attorney in favour of the Counsel for the appellant did not give the names of the parties at the time of filing the appeal but the defect was removed on the office pointing it out after the expiry of limitation :

Held, thot the appeal could not be said to be barred by time. At any rate, it was a fit case for extension of time under S. 5. A.I.R. 1934 Lah. 1011=36 P.L.R. 277=155 Ind. Cas. 893.

——S. 5—Technical defect.

Appeal against O. 7, R. 10—Returned plaint with endorsement filed with memo. of appeal but not certified copy of order prior to endorsement—Appellant being under belief that filing of plaint with endorsement was sufficient—Objection raised that as appeal was not properly presented within limitation it should be dismissed—Tenchnical non-compliance with O. 43, R. 2, might well be condoned under Limitation Act, S. 5. A.I.R. 1930 Sind 252.

——S. 5—An appeal was instituted accompanied by a vakalatnama, which, though accepted by the counsel filing the appeal, was not properly signed. The appeal was returned to remedy the defect. At the time of re-institution the appeal was time-barred.

Held, that the defect was only technical and that it was a fit case for extending the time under S. 5. 36 All. 46, Not appr. 103 Ind. Cas. 537=A.I.R. 1927 Lah. 618.

——S. 5—Omission to sign a memorandum of appeal by oversight, which was otherwise in order and had been duly presented, is sufficient cause for extension of time under S. 5. 84 Ind. Cas. 518=A.I.R. 1923 Lah. 402.

——S. 5—Where the Vakalatnama filed along with an appeal was accepted by the pleader but by oversight the pleader's name was not inserted in the body of the Vakalatnama.

Held, that the error was such as to support an application to excuse delay under S. 5 61 Ind. Cas. 410=43 All. 392=19 A.L.J. 183=A.I.R. 1921 All. 210.

27. Time spent in proceedings to get ex parte decree set aside.

——S. 5—Ex parte decree—Time spent in proceedings to get *ex parte* decree set aside, cannot be excluded in computing limitation for appeal. A.I.R. 1938 Bom. 459=40 Bom.L.R. 957=178 Ind. Cas. 307.

——S.5—C.P. Code, O. 9, R. 13—Exclusion of time taken by proceedings under O. 9, R. 13.

The period of time taken by proceedings under O. 9, R. 13, C. P. Code, should not be deducted from the time taken to prefer an appeal from the decree under S. 5, when such proceedings have failed on the merits. A.I.R. 1932 Cal. 558=36 C.W.N. 352=59 C. 1057=138 Ind. Cas. 748.

——S. 5—Sufficient cause—Application for setting aside ex parte decree.

Where an appeal lies against the *ex parte* decree, the time taken by the party in applying for setting aside the *ex parte* decree and in preparing an appeal against the order refusing to set it aside cannot be excluded in computing the period of limitation for appeal against the main *ex parte* decree. 124 Ind. Cas. 266=A.I.R. 1930 Rang. 41.

——S. 5—Time spent in prosecuting application for setting aside ex parte **order should be excused in appeal from original order.**

A judgment-debtor applied under O. 21, R. 2, for an adjustment of the decree. An *ex parte* order allowing the adjustment was made without notice to the decree-holder. The decree-holder subsequ ntly applied for restoration of his case after setting aside the *ex parte* order but the application was rejected. An appeal was subsequently preferred against the *ex parte* order but beyond limitation.

Held, that the time spent in prosecuting application to set aside the *ex parte* order ought to have been excused. A.I.R. 1921 Lah. 67 and A.I.R. 1917 P.C. 156, Foll. 115 Ind. Cas. 467=30 P.L.R. 512=A.I.R. 1930 Lah. 113.

28. Time taken in getting copies.

——S. 5—Second appeal—Time spent in obtaining copy of trial Court's judgment—If can be extended.

According to the statute no copy of the first Court's judgment need be filed with the memorandum in a

second appeal, although it is required to be filed by a rule made by the Lahore High Court. Therefore the appellant is not entitled as of right to deduct the period spent in obtaining a copy of the first Court's judgment for the purpose of computing the period of limitation for filing a second appeal. But the Court can allow the time taken by him in procuring such copy in granting extension under S. 5 of the Limitation Act. In order to have the benefit of this section, the appellant is bound to explain every day by which the period allowed by the Limitation Act is exceeded thereafter. 49 P.L.R. 72=A.I.R. 1947 Lah. 276.

——**S. 5—Exclusion of time in obtaining copy of judgment on review.**

Though there is no absolute necessity to obtain a copy of a judgment on review it may help in the drafting of grounds of appeal. Hence the period taken in obtaining such a copy may be excluded in computing time for appeal. 1946 A.M.L.J. 26.

——**S. 5—"Sufficient cause"—Disturbed state of country in 1942—Application filed late even after exclusion of time spent in taking copies in pursuing other remedies and the period of Court's vacation—Excuse of delay—Duty of Court.**

The fact that the whole country was in disturbed state in 1942, and that it was not easy for litigants to appear in Court to make applications or take delivery of copies of documents applied for by them within a reasonable time of the copies being ready, would constitute "sufficient cause" entitling litigants to ask the Court to condone the delay in making applications to Court even when the application are late after excluding the time requisite for obtaining copies, the period of pendency of other proceedings and the period of the recess of the Court. 224 Ind. Cas. 160=12 B.R. 488=A.I.R. 1946 Pat. 417.

——**S. 5**—Limitation expiring on Sunday—Application for copies on Monday—Filing of appeal on next day of getting copies—Appeal, held within time—One day's delay, held excussable. A.I.R. 1939 Bom. 46=40 Bom.L.R. 1211=179 Ind. Cas. 645.

——**S. 5—Time spent in obtaining copy of trial Court's judgment, if can be excluded—Delay of three or four days in making deposit.**

Where, under the rules of the Court, an appeal would not be deemed to have been properly presented if the copy of the judgment of the first Court does not accompany the copies of the judgment and decree of the lower Appellate Court, the appellant can claim the benefit of the provisions of S. 5 Limitation Act, and ask the Court for excluding from the period of limitation the time spent in obtaining the copy of the trial Court's judgment:

Held, that delay of three or four days in making the deposit after the demand has been formally made cannot be treated as a result of negligence or carelessness. A.I.R. 1936 Lah. 1007=169 Ind. Cas. 176.

——**S. 5**—When the copy of the trial Court's judgment has been obtained before the expiry of the period of limitation, the time spent in obtaining the same cannot be added under S. 5 of the Act to the end of the period of limitation. A.I.R. 1934 Lah. 464=36 P.L.R. 103=148 Ind. Cas. 818 (1).

——**S. 5—Delay in getting copies.**

Where the Counsel for appellant makes a note in the memorandum of appeal that the copy of the judgment of the trial Court was applied for within period of limitation but was not received when the appeal was instituted and the copy is eventually filed only one day late, the necessary extension of time may be allowed. A.I.R. 1930 Lah. 129.

——**S. 5**—Memorandum of appeal was filed in time without the judgment and decree of the lower Court. Two days after expiry of limitation the decree and judgment of the lower Court was filed.

Held, that the case was a fit case for extension of period under S. 5. 6 O.W.N. 1035=A.I.R. 1930 Oudh 184.

——**S. 5**—Where the High Court insists also on a copy of the first Court's judgment being filed in appeal, time occupied in obtaining copy of such a judgment though it cannot be excluded under S. 12, should be allowed under S. 5. 115 Ind. Cas. 880=A.I.R. 1928 All. 416.

——**S. 5**—Where the copy of the first Court's judgment is applied for within limitation and it is only because of inordinate delay in the preparation of the copy that the appellants are unable to present it with the memorandum, under S. 5 time should be extended. 94 Ind. Cas. 959 =7 Lah. 447=8 L.L.J. 521=27 P.L.R. 660=A.I.R. 1926 Lah. 458.

——**S. 5**—Delay in obtaining copy due to applicants not furnishing date of judgment cannot be excused. 91 Ind. Cas. 425 (All.).

——**S. 5**—Where the delay in producing a copy of the decree was due to the office not informing the applicant of the date when the copy would be ready, limitation was extended under S. 5. 91 Ind. Cas. 6=7 L.L.J. 595=26 P.L.R. 738=A.I.R. 1926 Lah. 84.

——**S. 5**—Delay due to obtaining copy of judgment not required to be filed and for consulting a lawyer to prepare grounds of appeal under the Letters Patent is not excused to extend the period of limitation under the section. 92 Ind. Cas. 786=4 Bur.L.J. 138=A.I.R. 1925 Rang. 361.

——**S. 5—Delay in getting copies—Mistake in copyist office.**

A mistake in the copyist office, in not preparing copies of the judgment and decree is a sufficient cause under S. 5 of the Act. 25 Ind. Cas. 26 (Oudh).

——**Ss. 5 and 12—Delay in getting copies—Appeal filed beyond time.**

Where judgment was delivered on the 1st and the Court closed on the 3rd and the application for copies was made on the Court reopening and the appeal was filed the day after the copies were delivered, *held* there was sufficient cause for delay and furthe. the time spent in obtaining copies should be deducted. 23 Ind. Cas. 874 (All.).

——**Ss. 5 and 12—Delay in getting copies—Appeal presented out of time—Delay, if can be excused.**

Non-availability of a copy of a decree is sufficient ground for excusing delay in filing an appeal in time. 26 M.L.J. 356=15 M.L.T. 263=(1914) M.W.N. 310=22 Ind. Cas. 919.

——**S. 5—Delay in getting copies—Appeal filed a day beyond—Delay in office to deliver copy—Sufficient cause.**

Where an appeal was obliged to be filed a day beyond time on account of the delay caused by the officer of the Court it was held that this was sufficient cause for not filing the appeal in time. 9 A.L.J. 15=13 Ind. Cas. 943.

——**Ss. 5 and 12 and Rules and Orders of the Chief Court, Vol. 1, R. 23 (1) and (2)—Delay in getting copies—Mistake of copyist Office.**

It is the duty of the copying department to inform the applicant of the date on which a copy will be ready for delivery and omission to do so is sufficient cause for delay in filing an appeal. 11 P.W.R. 1912=13 Ind. Cas. 850.

——**S. 5—Delay in getting copies.**

A judgment was passed on 15th October and the decree was signed on 9th November. There was no delay in paying copying fees.

Held, that the delay was due to want of payment of proper copying fee and not to the late signing of the decree. Therefore the appellant cannot take advantage of S. 5 of the Limitation Act. 5 S.L.R. 47=10 Ind. Cas. 210.

——S. 5—Delay in getting copies—Sufficient cause.

Where the appellants did not apply for a copy of the judgment and decree themselves but came to Lahore to engage counsel who sent a letter to the Copying agent asking for copies without however remitting money until he replied asking for money and money was sent to him so late that he could apply for copies only after the expiry of the period of limitation.

Held, the appellants were guilty of gross negligence and were not entitled to the benefit of S. 5. 61 P.L.R. 1911=189 P.W.R. 1911=9 Ind. Cas. 381.

29. Want of stamp.

——S. 5—Want of stamp.

Delay in filing an appeal owing to the non-availability of stamp on the last day for filing the appeal will be excused. 1 Pat.L.J. 16 =37 Ind. Cas. 211.

——S. 5—Want of stamp—Difficulty in obtaining stamp.

Semble—Difficulties in the procuring of the necessary Court-fee stamp constitute sufficient cause within S. 5 for not having filed the appeal within time. 3 P.L.J. 74=5 P.L.W. 18=42 Ind. Cas. 675.

——Ss. 5 and 12—Want of stamp—Delay in presenting appeal.

In the case of presenting an appeal against a Lower Court's judgment when there is no unreasonable delay on the part of appellant to supply Folios and to follow up his application for copy, the appellant is entitled to the benefit of S. 12 of the Limitation Act and delay caused by Stamps not being procurable on the last day of limitation is excusable under S. 5 of the Act. 1 P.L.J. 163=37 Ind. Cas. 211.

——S. 5—Want of stamp.

An unstamped memorandum of appeal is held to be presented on the date on which the Court-fee is paid and the mere presenting of application to appeal as a pauper not made in good faith and within the time prescribed is not sufficient under S. 5 of Act to bring the appeal within time. 144 P.W.R. 1909=4 Ind. Cas. 1002.

30. Miscellaneous.

——S. 5—*Bona fide* mistake—Test to be applied.

Where the provisions of S. 5 of the Limitation Act are invoked on the ground of a *bona fide* mistake, the test is not merely whether the mistake was *bona fide* or not, but also whether in a case of *bona fide* mistake sufficient cause exists for condoning the negligence or other factor which might have led to that mistake. 1948 R.D. 433.

——S. 5—If can be applied in second appeal for first time.

Quaere.—It is doubtful whether the High Court can, in second appeal, apply the provisions of S. 5, when there was no application filed in the lower Appellate Court. A.I.R. 1939 Nag. 233=176 Ind. Cas. 33.

——S. 5—Jurisdiction.—Transferee Court, if can deal with question of limitation.

Where an appeal is transferred by the District Judge to the Subordinate Judge for hearing, the latter is fully competent to decide the appeal and deal with every point arising in it including the question of limitation. It cannot be said that the Subordinate judge had no jurisdiction to try the question of limitation after the appeal had been admitted under S. 5 of the Limitation Act by the District Judge. 1936 O W N 1109=A.I.R. 1936 Oudh 9=158 Ind. Cas 19.

——S. 5—Inherent powers.

The wording of S. 151, C. P. Code militates against the view that the inherent powers of the Court under it can be invoked to override the provisions of the Limitation Act. A.I.R. 1935 Rang. 466=13 R. 595= 159 Ind. Cas. 945.

——S. 5—Corporate body as party.

If a corporate body chooses to embark on litigation its officials and advisers must act with at least as much diligence as is expected from an ordinary litigant. The corporate is not entitled to greater indulgence than a private individual. 123 Ind. Cas. 83 (Lah.).

——S. 5—In considering an application for extending period fixed by law for presentation of appeal a distinction must be made between Government and a private person. Though any delay is evidence of laches in the case of a private individual, the same cannot be said of Government and so delay can be condoned if it is inevitable. A.I.R. 1929 Sind 211.

——S. 5—English Law is different.

There is considerable difference between the wording of the English Statute bearing on the point and the language employed in S. 5, Limitation Act. 110 Ind. Cas. 837=1928 M.W.N. 634=A.I.R. 1928 Mad. 690.

——S. 5—The period between date of the judgment and the date of signing the decree should be excluded in computing the period of limitation. 13 Cal. 104, Foll. 97 Ind. Cas. 539=A.I.R. 1927 Cal. 65.

——S. 5—In the absence of proof of sufficient cause under S. 5 extention of time to file appeal cannot be got by a party when he or his attorney has not made any application to the Registrar's Office to ascertain whether the plaintiff had in fact sent in a requisition to have the decree drawn up. 92 Ind. Cas. 563=29 C.W.N. 163 =A.I.R. 1925 Cal. 291.

——S. 5—Pauper appeals.

An order dismissing the application to appeal as a pauper does not affect the fact that the appeal has been preferred within the prescribed period of 30 days if the appellant has paid the Court-fee in obedience to the Court's order and the presentation of the appeal cannot be held to be after the expiry of limitation and the appellant is entitled to have the appeal heard. There is a distinction between applications to sue as a pauper and applications to appeal as such. In the former the plaint is an integral portion of the application ; in the latter the memorandum of appeal is a separate document. A person who wishes to sue as a pauper is expected to put in his application in sufficient time to allow of a suit being filed within limitation, if and after his application to sue has been rejected. In most cases a would-be appellant, who must file his appeal within 30 days, cannot secure a decision on his application within that period. 65 Ind. Cas. 741=3 Lah. 35=26 P.W.R. 1922=A.I.R. 1922 Lah. 225.

——S. 5—A second appeal is not time-barred, because of the copy of the First Court's interlocutory order, which is mentioned in that Court's judgment as being a part of the judgment, is filed after the expiry of the period of limitation, when the points decided by the interlocutory order do not arise in the appeal. 4 Lah. L.J. 20=A.I.R. 1922 Lah. 93.

——S. 5—Per Woodroffe, J.—An order dismissing an appeal as barred by limitation prescribed therefore after further refusing an application under S. 5 of the Limitation Act to admit the appeal after the prescribed time is "passed on appeal" under S. 109, C. P. Code. 62 Ind. Cas. 216=33 C.L.J. 128 =A.I.R. 1921 Cal. 415.

——S. 5—Delay of one day.

A delay of one day in presenting an appeal is as fatal

as delay of any longer period. 10 S.L.R. 165=38 Ind. Cas. 464.

——S. 5—Appeal by heir.

An appeal preferred beyond time by the heir of the defendant who died just before judgment is barred. 18 Bom.L.R. 751=41 Bom. 15=36 Ind. Cas. 439.

——S. 5-A—Appeal by dead man—Legal representatives brought on record—Delay excused.

An appeal presented on behalf of a deceased party may be had, but the Court may, in a proper case, treat the appeal as filed on the day on which the legal representatives were brought on record and excuse the delay. (1908) 18 M.L.J. 461.

——S. 5—Appeal from wrong order—Conversion of appeal as one from another order—Limitation Act, S. 5—Return to the lower appellate Court.

When the High Court found that the order appealed against to the lower appellate Court did not lie in law, but that property the appeal should have been filed against another order of a different date, their Lordships converted the appeal to the lower appellate Court into an appeal from the right order and returned the records to the lower appellate Court for the exercise of its discretion under S. 5 of the Limitation Act, on a consideration of the facts that led up to the delay. (1905) 7 Bom.L.R. 664=30 B. 56.

——S. 5 (5-A)—Appeal against a representative of a party deceased since the passing of the lower Court.s decree.

In Rule 8 (*d*) of the Rules of Court of the 18th January, 1898, the words "subject to the law of limitation" means "subject to the law of limitation applicable to appeals. The words imply that the application for substitution must be made within the period prescribed for the appeal from the decision of the Court below, and that if the applicant seeks substitution after that period, he must bring the case within the terms of the second paragraph of S. 5 of the Indian Limitation Act (1877). 1901 A.W.N. 46.

——S. 5 (5-A)—Appeal—Delay—Excuse—Reasonable ground for only one appellant.

Where an appeal was preferred after time by a number of appellants and one of them alone applied to have the delay in prefering the appeal excused, his appeal alone should be admitted and the appeal by the rest should be dismissed as barred, unless such a case falls under S. 544, C. P. Code (1882) and the appellate Court should not interfere with the decree as regards the latter who are barred. (1901) 3 Bom.L.R. 400=25 B. 699.

——S. 6.

Synopsis.

1. Acknowledgment.
2. After born son.
3. Applicability and scope.
4. Burden of proof.
5. Child in womb.
6. Computation.
7. Court of Wards.
8. Execution application.
9. Existence of guardian.
10. Interpretation.
11. Legal representatives.
12. Non-execution application.
13. Personal privilege.
14. Plea under.
15. Reversioners.
16. Right to extension.
17. Several plaintiffs.
18. Subsequent disability.
19. Miscellaneous.

1. Acknowledgment.

——Ss. 6 and 19—Applicability and scope—Minor—Extended period of three years—Acknowledgment made after expiry of period prescribed in scheme but within extended period given by S. 6—If gives fresh start.

The period of limitation prescribed for a suit for a minor is not the period mentioned in the First Schedule to the Limitation Act but a special period as mentioned in S. 6, Limitation Act. In the case of a minor, therefore, it cannot be said that the period of limitation has expired till the period of limitation laid down in S. 6 has elapsed. Where therefore an acknowledgment of liability is made by a debtor of the minor in his favour after the expiry of the period mentioned in the first schedule but within the extended period given to the minor under S. 6 such an acknowledgment is a valid acknowledgment giving a fresh start of limitation, and a suit brought by the minor within there years of such acknowledgement is within time and not barred. I.L.R. (1950) Bom. 741=A.I.R. 1950 Bom. 94=51 Bom.L.R. 830.

——Ss. 6, 19—S. 19, how far controls S. 6—Words "time from . . . . record" in S. 6, meaning of.

An effective acknowledgment does not postpone the time from which the limitation for a suit is to be reckoned and to that extent S. 19 must be said to control S. 6. The words "at the time from which the period of limitation is to be reckoned" occurring in S. 6 mean what they say, that is, the time at which the right to sue accrued to the plaintiff. Hence, when after the accrual of the cause of action, there is an acknowledgement which is valid under S. 19 to save limitation in the ordinary course, the time from which the period of limitation is to be reckoned must be taken to be the date of the acknowledgment and not the date of the cause of action. A.I.R. 1942 Bom. 248=44 Bom.L.R. 522=I.L.R. (1942) Bom. 574=202 Ind. Cas. 196.

——S. 6—Acknowledgment given when creditor was under legal disability.

Where, at the time when a payment by cheque towards a debt is made by a debtor, the creditor is under a legal disability, being a minor, the payment does not merely extend limitation for a period of three years but it operates under S. 6 to produce the result that at the time from which the period of limitation is to be recknoned, the creditors were under the legal disability of being minors and, therefore, they have all the period for their suit given to them by S. 6. A.I.R. 1936 All. 152=(1936) A.L.J. 59=1936 A.W.R. 99=161 Ind. Cas. 330.

——Ss. 6, 19—Mortgage—Suit by mortgagee's son within three years of becoming major—Mortgage becoming time-barred—Acknowledgment in another mortgage during plaintiff's minority—Plaintiff, is entititled to benefit of S. 6. 54 A. 1019=(1932) A.L.J. 1012=A.I.R. 1933 All. 100=142 Ind. Cas. 994.

——S. 6—Acknowledgment of liability—Proper time for valid acknowledgment.

Under S. 6, a minor may institute the suit and make an application within the same period after the disability has ceased as he would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. The time prescribed therefore in the third column of the first schedule is different from the extended period within which a minor may bring a suit after the disability has ceased. The acknowledgement of liability must, therefore, under S. 19, be given before the expiration of the period prescribed therefor in the third column of the first schedule and not before the expiration of the period within which a minor may bring the suit. 26 Bom. 782; 15 Bom.L.R. 348, Foll. 112 Ind.

Cas. 24=52 Bom. 521=30 Bom.L.R. 733=A.I.R. 1928 Bom. 319.

2. After-born-son.

——S. 6—After-born-son—Period, when claimable—Person not in existence.

The extended period of 3 years' limitation after majority can be claimed only by a person entitled to institute a suit at the time from which the period of limitation is to be reckoned. A person not in existence at such time is not entitled to 3 years' extension. 46 Bom.L.R. 683=A.I.R. 1945 Bom. 63=219 Ind. Cas. 766.

——Ss. 6 and 7 both go together—After-born son not in existence at time mentioned in S. 6—S. 7, if can be invoked.

Both Ss. 6 and 7, Limitation Act go together. In fact worded, S. 7 is obvioulsy an extension of S. 6, where th point of time at whixh the existence of disability is to be recognized is clearly defined as "the time from which the period of limitation is to be reckoned." Consequently, the joint right of suit dealt within S. 7 will also have to exist at the time specified in S. 6 and if an after-born reversioner is non-existent then, S. 7 cannot be invoked in his case. 45 P.L.R. 345=A.I.R. 1943 Lah. 281=I.L.R. (1944) Lah. 287=209 Ind. Cas. 257 (F.B.).

——Ss. 6, 7, 8, 9—Alienation by widow in 1901 and 1904—Plaintiff adopted by widow in 1934, after death of prior major adopted son in 1918—Suit by plaintiff to set aside alienation.

Held, that since the effect of Ss. 6, 7,8 and 9, Limitation Act, was to bar the right of the prior adopted son to sue to set aside the alienation, no further right to sue in respect of these assignments could accrue to the plaintiff. A.I.R. 1941 Bom. 197=43 Bom.L.R. 222=195 Ind. Cas. 732.

——S. 6—After-born son.

An alienation by the manager without any legal necessity and consent of other co-parceners then living is invalid againstthose co-parceners and also other co-parceners born after the alienations provided the alienation has not been ratified by other co-parceners before his birth. Here the period of limitation would run from the date of the sale, and there is only one scause of action which would arise in favour of other members who have not consented to the sale. Successive causes of action cannot arise as new members are born year after year. Such after-born co-parcener cannot rely on S. 6 of the Limitation Act. A.I.R. 1940 Nag. 94=1939 N.L.J. 591=185 Ind. Cas. 881.

——S. 6—After-born son.

Under Hindu Law, a son, who was not born at the time of the alienation made by his father has no cause of action to institute a suit to set aside the alienation or to avail himself of the privileges given by S. 6, Limitation Act. (1935) M.W.N. 304=A.I.R. 1935 Mad. 431=41 L.W. 610=156 Ind. Cas. 83.

——S. 6—After-born son—Suit challenging alination under custom—Reversioner not born on date of alienation—Benefit of section.

Limitation for a suit challenging an alienation under the Customary Law begins to run from the date of alienation and where the reversioner is born subsequent to this date, he cannot avail himself of an extension of time under S. 6. A.I.R. 1934 Lah. 290=154 Ind. Cas. 592

——S. 6—After-born son—Suit to impeach alienation by father—Cause of action—Starting point of limitation.

A, who was born on September 20, 1903, and *B* who was born on April 1, 1912, instituted a suit on February 23, 1922, for possession of the land in suit sold by their father *f* by registered deed, dated January 12, 1910.

Held, that owing to the minority of *A* on the date of alienation, time began to run against him from September 20, 1921, and that as *B's* right to sue was only derived from *A's* capacity to sue, time would not begin to run against *B* until September 20, 1921, and the time within which he could sue would be co-extensive with the time allowed to *A*:

Held, further that *B* was entitled to take advantage of the cause of action so long as it subsisted, though he did not obtain a fresh period of 21 years from the date of his birth. A.I.R. 1932 Lah. 605=13 L. 520=33 P.L.R. 808=140 Ind. Cas. 375.

——S. 6—Birth after cause of action.

For a suit to set aside an alienation by father the sons were not born on the date of alienation do not get a fresh cause of action from their birth, and at the most can only join in the suit with such sons as were born on the date of alienation and subject to the same period of limitation. 97 Ind. Cas. 591=A.I.R. 1927 All. 54.

——S. 6—After-born son—Elder son's right barred on date of suit—Suit not sustainable.

Where on the date of the suit by the eldest son who was over 21 the other sons were less than 21 and were within time so far as they were concerned and where they were not born on the date of the alienation by the father but were in existence before the eldest son attained majority.

Held, that the minor plaintiffs being not born when the right to sue accrues, *i.e.*, the date of the alienation, the suit was barred by limitation. 59 Ind. Cas. 678=1 Lah. 558.

——S. 6—After-born son—Minor born or conceived after the expiry of limitation against all the coparceners existing at time of sale cannot revive, cause of action.

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser take possession (*See* Art. 126, Limitation Act), and a new cause of action does not accrue upon the subsequent birth of a son in the family.

The after-born son does not acquire a fresh cause of action and arfesh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and when he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of S. 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth. 8 W.R. 285; 4 All. 120, Foll. 82 Ind. Cas. 307=5 L.R.A. (Civ.) 663=A.I.R. 1925 All. 54.

——S. 6—After-born son—Co-parcener's existence on date of alienation entitles after born co-parcener to sue but only within the period within which the former co-parcener could sue.

Where a co-parcener who could challenge a deed was alive at the execution of the deed, and the plaintiffs were born during his lifetime and within twelve years of the alienation.

Held, they undoubtedly obtained a right to challenge it. A right to sue is not however co-parcenary property in which a son acquires interest by birth. Section 6 of the Limitation Act cannot be pleaded by a plaintiff who was not in existences when the alience took possession. He is entitled to take advantage of the existing cause of action so long as it subsists, but he does not obtain a fresh period of 21 years from the date of his birth. Even a co-parcener who challenges an alienation does so in virtue of his own independent right as a person who has acquired interest in the family estate by birth. Plaintiffs cannot rely on S. 7 where there was no joint right when the period of limitation commenced; plaintiffs can bring their suit within three years of the date when the co-parcener

could have attained majoirty. 33 All. 654 ; 1 Lah. 558 ; 24 O.C. 330 ; 4 All. 235 ; 27 All. 704, Foll. 79 Ind. Cas. 1019=5 L.R.A. (Civ.) 325=A.I.R. 1924 All. 912.

——S. 6—After-born son—Subsequently born son has no fresh start for limitation though he can question alienation which was invalid at the time it is made.

Although it cannot be disputed that a subsequently born Hindu son has a right to avoid an alienation which took place at a time when other members of the family, not parties to the deed, were alive, it does not follow that he has fresh start for the purpose of limitation from the time of his birth. When an alienation is made which is not justified by necessity a cause of action arises in favour of the other members to have it set aside and to recover possession from the alienee but there is only one cause of action in favour of the other members of the family. Successive causes of action cannot arise as new members are born year after year. 83 Ind. Cas. 1052=5 L.R.A. (Civ.) 634=22 A.L.J. 809=46 All. 882=A.I.R. 1924 All. 798.

——S. 6—Son born after, cannot claim benefit of S. 6.

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation, when the purchaser takes possession and a new cause of action does not accrue upon the subsequent birth of a son in the family. In the case of an after-born son the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability on that date he cannot obtain the benefits of the provisions of S. 6 of the Limitation Act. When he cannot save limitation for himself he can give no benefit under S. 7 to his elder brothers. 66 Ind. Cas. 938=9 O.L.J. 45=A.I.R. 1923 Oudh 52.

3. Applicability and scope.

——Ss. 6 and 29 (2) (b)—Applicability of S. 6 to local laws.

It has been made clear in S. 29 (2) (*b*) of the Limitation Act that S. 6 of the Limitation Act does not apply to special or local Acts and as such the benefit of that section cannot be claimed in a suit under the U.P. Tenancy Act. 1949 R.D. 169 (1).

——S. 6—Applicability—Suits under U. P. Tenancy Act.

S. 6 of the Limitation Act is not applicable to suits under the U.P. Tenancy Act which is a local Act prescribing its own period of limitation. 1949 R.D. 400.

——S. 6—Applicability—Shebait on attaining majority bringing suit as next friend of deity—Exemption of period of minority.

If a shebait is a minor he is entitled to exemption of the period of his minority under the provisions of the Limitation Act when he brings a suit in his own name. This principle will also apply when the shebait on attaining majority brings the suit as the next friend of the deity. 51 C.W.N. 383=I.L.R. (1946) 2 Cal. 447.

——Ss. 6 and 7—Applicability—Both reversioners suing to set aside alienation born at the time of alienation—One of them a minor at the time of suit—Suit by one barred—Suits by the other, if and when barred. *See* HINDU LAW—ALIENATION. (1946) 2 M.L.J. 214=A.I.R. 1947 Mad. 102.

——S. 6—Applicability—Property in possession of Court of Wards continuously from time of plaintiff's father to date of attainment of majority—If saves limitation.

The fact that the property of a plaintiff has been in continuous possession of the Court of Wards from before the death of the plaintiff's father until the plaintiff attained majority will not prolong the period of limiation under S. 6 of the Limitation Act. 226 Ind. Cas. 97=12 B.R. 67 = A.I.R. 1941 Pat. 154.

——S. 6—Applicability—Subsequent disability arising after accrual of right to apply—Holder of decree dying two years after decree—Some heirs minors at that time—Execution application after attainment of majority of all—Limitation.

S. 6 of the Limitation Act cannot apply to a case of a subsequent disability ; it only applies to a case of an initial liability.

A decree for money was passed on 29th August, 1927. The decree-holder died two years later, when some of his legal heirs were minors. After they attained majority. an execution application was filed on 2nd October, 1945.

Held, that the application was barred, and S. 6 did not apply. 52 Mys. H.C.R. 332=27 Mys.L.J. 298.

——S. 6—Applicability and scope—Civil Procedure Code, S. 48.

S. 6 is not applicable to the limitation mentioned in S. 48, C.P. Code and the period mentioned in S. 48, C.P. Code would remain unaffected. A.I.R. 1944 Lah. 10=46 P.L.R. 26=I.L.R. (1944) Lah. 592=217 Ind. Cas. 119.

——S. 6 and Art. 182—Applicability and scope.

The provisions of S. 6 cannot be taken as overriding the prohibition, for they are expressly confined to cases falling under the same Act. The minor cannot also derive benefit from Art. 182, read with S. 6 for Art. 182, only applies in cases not covered by S. 48, C.P Code A.I.R. 1944 Lah. 68=46 P.L.R. 24=I.L.R (1945) Lah. 448=212 Ind. Cas. 228.

——S. 6—Applicability and scope—Application to set aside sale or proceedings in execution.

The benefit of S. 6, Lim. Act is available to a minor only in respect of a suit or an application for execution of a decree. The section does not apply to an application to set aside a sale or the proceedings in execution of a decree. A.I.R. 1943 Mad. 55=55 L.W. 663=(1942) 2 M.L.J. 558=1942 M.W.N. 660=205 Ind. Cas. 596.

——S. 6—Applicability and scope—Period of stay of proceedings.

Where after passing of a preliminary mortgage decree in favour of a minor represented by a next friend, the next friend dies and all further proceedings in the suit are stayed under Order 32,rule 10,C.P. Code the period during which the proceedings were stayed should be excluded in computing the period of limitation for making an application for final decree on the ground that the right to apply for a final decree was suspended during the period in which the suit was stayed. Section 6, Limitation Act has no application to such a case. A.I.R. 1941 Bom. 203=43 Bom.L.R. 329=I.L.R. (1941) Bom. 435=197 Ind. Cas. 30.

——S. 6—Applicability and scope.

Minor entitled by custom to succeed to office under Madras Hereditary Offices Act—Suit for recovery of office and endowments under that Act:

Held, that a decree for mesne profits for more than three years before the suit cannot be passed as S.6 of the Limitation Act does not apply to such a suit. 53 L.W. 736 =A.I.R. 1941 Mad. 693=(1941) 2 M.L.J. 91=1941 M.W.N. 620=200 Ind. Cas. 38.

——S. 6—Applicability and scope—Time from which limitation runs.

Where the appointment of the minor as a *mahant* automatically follows the death of the previous *mahant* of the *math*, the minor can claim the benefit of S. 6, Limitation Act, but where his appointment is made after the period of Limitation as started to run consequent on the

death of the previous manager, S. 6, cannot help him. A.I.R. 1941 Mad. 449=I.L.R. (1941) Mad. 599=(1941) 1 M.L.J. 644=53 L.W. 569=1941 M.W.N. 408=199 Ind. Cas. 225 (F.B.).

——Ss. 6, 7—Applicability and scope—S. 48, C. P. Code overrides Ss. 6 and 7 and not vice versa.

Section 6, Limitation Act is made to govern not the periods of limitation prescribed generally in and Act, but only the periods prescribed in the third column of the First Schedule of the Limitation Act itself. There is thus a very strong implication from the wording of S. 6 that it was intended not to apply to period of limitation prescribed under other Acts, and accordingly S. 6 is subject to S. 48 of the C.P. Code. Section 48¡(2) (*b*), C.P. Code. implies that S.48 is intended to affect remaining provisions of the Limitatation Act and this implication is supported by the wording of the first paragraph of S. 48, which does not merely prescribe period of limitation but lays down in categorical terms that in the circumstances contemplated no order for the execution of the same decree shall be made, the implication clearly being that this is meant to bar any order for execution even where, so far as limitation is concerned, the right to execute might otherwise exist.

Section 7, Lim. Act is, in a sense, a subsidiary section to S. 6 and must be read with it. This is clear from the fact that it is not self-contained. It refers only to 'such' disability the word "such" manifestly referring to the disabilities enumerated in S. 6. Where therefore S. 7, says that time will or will not run, that time must be taken to be the time referred to in S. 6, that is to say, the time specified in the third column of the First Schedule of the Act. Both Ss. 6 and 7 of the Limitation Act must be read subject to the provisions of S. 48, C. P. Code A.I.R. 1941 Pat. 45=21 P.L.T. 721=7 B.R. 15=20 Pat. 1=190 Ind. Cas. 369.

——S. 6—Applicability and scope.

Section 6 has no application when the plaintiff, all along her minority was under the impression that the possession of the defendant was on her behalf. It is when the plaintiff demands possession from the defendant and when the defendant refuses it that the caus of action for suit arises. 188 Ind. Cas. 872 (Bhopal).

——S. 6—Applicability and scope.

S. 6 does not govern S. 48 of the C.P. Code, I.L.R. (1939) Nag. 559= A.I.R. 1939 Nag. 245=1939 N.L.J. 387= 184 Ind Cas. 72.

——S. 6—Applicability and scope—Personal right—Assignee of minor, if can claim benefit of S. 6.

An assignee from a person, who was a minor cannot claim the benefit of S. 6.

Where a mother of a minor sells his property and the minor who is born in 1909, assigns in 1930 his right to recover the property as a reversioner and both the assignor and the assignee jointly bring a suit to recover the property on the ground that the sale by the mother was unauthorised without necessity and, therefore, void. The suit is not barred by limitation as the assignor, even after the transfer of his right in the property does not lose the right even to be joined as a co-plaintiff in a suit by assignee to recover possession of the property assigned by him. A.I.R. 1938 Bom. 358=40 Bom.L.R. 548=177 Ind. Cas. 475.

——S. 6—Applicability and scope.

S. 6, is limited to cases where limitation is prescribed in Sch. 1. Since S. 48, C.P. Code specially provides for limitation, it is not governed by the provisions of S. 6 or S. 7, Lim. Act. Hence the decree-holders are not entitled to that extended period. A.I.R. 1938 Cal. 25= I.L.R. (1937) 2 Cal. 373=65 C.L.J. 403=176 Ind. Cas. 212.

——S. 6—Applicability and scope.

A minor having the benefit of S. 6, is not precluded from bringing his suit before attaining majority. A.I.R. 1936 All. 152=(1936) A.L.J. 59=1936 A.W.R. 99= 161 Ind. Cas. 330.

——S. 6 (As amended in 1922), if applies to suit for recovery of proprietary profits.

Section 6 of the Lim. Act applies to suit by co-sharers for recovery of their shares of proprietary profits from the *lambardar*.

The amendment in 1922 in reality amplified the scope of the old S. 29 of the Lim. Act. The amended section applies to the local law certain specified sections, namely S. 4 and Ss. 9 to 18 and S. 22 unless they are expressly excluded by the local law and further says that the rest of the provisions of the Lim. Act in which S. 6 is included shall not apply. 18 N.L.J. 285=163 Ind. Cas. 623.

——S. 6—Applicability and scope.

Section 6 does not apply to cases, under para. 20, Sch. II, Civil P. Code. A.I.R. 1936 Pat. 161=17 P.L.T. 20=14 Pat. 855=2 B.R. 353= 161 Ind. Cas. 691.

——S. 6—Applicability and scope.

S. 6 only applies when the disability is in existence at time when limitation begins to run. A.I.R. 1935 Lah. 144.

——S. 6—Applicability and scope—Application to set aside sale.

S. 6 deals with cases where a person entitled to institute a suit or make an application for the execution of decree is, at the time from which period of limitation is to be reckoned, a minor, or insane or an idiot. The section does not cover the case of an application under O. 21, R. 90, C.P. Code., to set aside a sale held in execution of a decree. A.I.R. 1935 Pat. 450=2 B.R. 693=16 P.L.T. 923=159 Ind. Cas. 253.

——S. 6—Applicability and scope.

Suit after death of widow whose alienation is challenged is governed by Act 120—Minority of plaintiff—Suit within three years of majority—Plaintiff is entitled to benefit of S. 6 if he was minor on date of alienation or subsequently born. 16 P.L.T. 236=A.I.R. 1935 Pat. 256=1 B.R. 418 =155 Ind. Cas. 244.

——S. 6—Applicability and scope—Minor in existence at time of alienation—Question of limitation does not arise if he brings suit during minority challenging it—Custom (Punjab)—Alienation.

Under the Punjab Customary Law, every minor who was in existence at the time of alienation which is being challenged by him, can bring a suit within three years of attaining majority. Therefore, where the plaintiff is still minor, he has ample time to bring his suit and no objection on the ground of limitation can be taken. A.I.R. 1934 Lah. 908=154 Ind. Cas. 603.

——S. 6—Applicability and scope.

Suit by minor through father as next friend—Preliminary decree passed—Death of next friend —No fresh appointment—Suit does not abtate but remains in abeyance by virtue of O. 32, R. 10—Application for final decree within three years of minors attaining majority but after the expiry of thee years from date on which the period of grace fixed by the preliminry decree expired—Section 6 has no application—Application is not barred. A.I.R. 1933 Cal. 508=37 C.W.N. 184=144 Ind. Cas. 768.

——S. 6—Applicability and scope.

If the period within which an ex-minor can institute a suit under the provisions of S. 6, expires on a day when the Court is closed, the suit can be filed on the re-opening day. (1931) M.W.N. 1127=34 L.W. 650=55 M. 286=A.I.R. 1932 Mad. 139=61 M.L.J 675=135 Ind. Cas. 587.

——Ss. 6 and 8—Applicability and scope.

Alienation by widow—Adoption—Death of adopted son during minority—Succession of mother—Suit by reversioner within 12 years of mother's death—Conten-

tions that the mother was divested of the property by reason of adoption and that the period of limitation was abridged under S. 6 in the case of the adopted son who was a minor cannot stand as the mother succeeded him after his death. 59 M.L.J. 949=(1930) M.W.N. 811=33 L.W. 378=A.I.R. 1931 Mad. 273=129 Ind. Cas. 460.

——Ss. 6, 7—Applicability and scope—Disqualification under Court of Wards Act—Whether extends limitation.

The Lim. Act does not touch disqulification under S. 6 (*a*), Court of Wards Act, and a disqualified proprietor is not exempted from suing so long as the property remains in the hands of the Court of Wards. A.I.R. 1931 Oudh 177=8 O.W.N. 349=136 Ind. Cas. 642.

——S. 6—Applicability and scope—Idol or math.

The only disabilities which save the operation of the Limitation Act are those which are created by the statute itself, S. 6 of which recognizes only three classes of persons as being under legal disability, namely, a minor and insane person and an idiot, and does not include idol or math. 11 P.L.T. 403=A.I.R. 1930 Pat. 455.

——S. 6—Applicability and scope—Principal and agent.

Where an agency does not terminate with the death of the principal but terminates with the completion of a transaction which has occurred in the lifetime of principal, the terminus a *quo* for limitation under Art. 89 begins from the completion of the transactions and the minor claiming through the principal, an amount credited to the name of the principal in a firm account, cannot ask the help of S. 6. A.I.R. 1929 Lah. 883.

——S. 6—Applicability and scope—Restitution proceedings.

S. 6 applies to an application made under S. 144, C.P. Code. 92 Ind. Cas. 23=13 O.L.J. 731=1 Luck. 40=3 O.W.N. 65=A.I.R. 1926 Oudh 199.

——S. 6—Applicability and scope—Setting aside compromise decree.

Minor must sue within three years of his becoming major even to set aside a compromise decree sanctioned by Revenue Court. 77 Ind. Cas. 588=22 P.W.R. 1923=A.I.R. 1924 Lah. 427.

——S. 6—Applicability and scope—Period for suit.

The period of limitation prescribed for a suit of the nature to which the provisions of Ss. 6,7 and 8 of the Limitation Act apply must be taken to be the period reckoned on the basis of the time provided for by the schedule and also of the provisions of S. 8 of the Act. 81 Ind. Cas. 484=11 O.L.J. 295=A.I.R. 1924 Oudh 385.

——S. 6—Applicability to Kumaun Rules.

S. 6 of the Limitation Act is made applicable to the Kumaun Rules by a notification of 1918 and it confers on a minor a larger period of limitation for instituting a suit to avoid a sale of Khaikari right. 14 R.D 635.

——S. 6—Applicability and scope—Local acts.

S. 6 applies not only to period of limitation prescribed by that Act but also to any period prescribed by a special or local Act. 71 Ind. Cas. 140=6 N.L.J. 1=A.I.R. 1923 Nag. 164.

——S. 6—Applicability and scope—Filing award.

An appliction to file an award does not become a suit by the provisions of Para. 20 (2), Sch. 11, C.P.Code and hence the applicant cannot claim the benefit of S. 6. 1 Rang. 256=A.I.R. 1923 Rang. 226=76 Ind. Cas. 493.

——S. 6—Applicability and scope—Application for re-admitting appeal.

Article 168 applies to an application for the re-admission of an appeal under O. 41, R. 19 under which if sufficient cause is shown for default, the Court is bound to readmit the appeal as such an application is outside the terms of S. 6. 60 Ind. Cas. 919=45 Bom. 648=23 Bom. L.R. 110=A.I.R. 1921 Bom. 20.

——Ss. 6 and 7—Applicability and scope.

Ss. 6 ad 7 of the Limitation Act are not mutually exclusive; the latter section supplements the former. 41 All. 435=17 A.L.J. 649=49 Ind. Cas. 990.

——S. 6—Applicability and scope—Application under S. 144, C. P. Code.

The section is an enabling section to enable persons under disability to exercise their legal rights within a certain time and it should be construed literally. The section applies to applications under S. 144, C.P. Code. 41 Bom. 625=19 Bom.L.R. 638=41 Ind. Cas. 238.

——S. 6, Arts. 44 and 144—Applicability and scope.

The section lays down a general rule for all kinds of disabilities and in all kinds of suit while Arts. 44 and 144 apply to only one case of disability, *i.e.*, minority and one class of suits, *i.e.*, a suit to set aside a sale by guardian. 10 M.L.T. 418=(1911) 2 M.W.N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——S. 6—Applicability and scope.

S. 6 does not govern the applications made before the Act came into force. The S. 7 of the Limitation Act (1877) was not confined to applications made by minors after attaining majority but also applied to applications made by guardians during minority of their wards. 5 P.L.R. 1910=118 P.W.R. 1910=6 Ind. Cas. 488.

——S. 6—Applicability and scope—Idol not a perpetual infant.

An idol cannot be regarded as a perpetual infant and the shebait is manager for the purposes of S. 7 of the Limitation Act. 13 C.W.N. 805=3 Ind. Cas. 93

——S. 6 (S. 7)—Applicability and scope—Death of decree-holder pending stay of execution—Right of pending stay of execution—Right of minor to revive—Proceedings—Limitation.

Where a mortgagee decree-holder applied for sale of the mortgaged properties but on objection the proceedings were stayed, and before the stay order was removed the decree-holder died leaving a minor son, and shortly afterwards the stay order was removed and the application for sale also was struck off.

Held, that the minor heir of the decree-holder was entitled to the protection of S. 7 of the Limitation Act (1877) and an application for sale made on his behalf more than 3 years after was not barred by limitation. (1907) 11 C.W.N. 831.

——S. 6—Applicability and scope—The 'period of limitation'—Benefit of, to unborn reversioners and minor adopted sons—Cause of action accruing to an infant Hindu widow—Adoption—Suit by adopted son.

The words 'period of limitation' signify the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. Where a cause of action in respect of a claim for possession of land by right of purchase at a *putni* sale accrued to an infant Hindu widow who adopted a son during the continuance of her minority.

Held, that the adopted son (an infant) in bringing a suit when no suit had been brought by the widow, was entitled to the benefit of S. 7(O.A.). There is no privity as between Hindu reversioners. The right of a reversioner to sue for a declaration cannot accrue before he is born, and if, therefore, he is an infant at the date of the alienation or is born subsequently, he is entitled to the benefit of S. 7 of the Limitation Act (1877). (1905) 2 C.L.J. 87=9 C.W.N. 795.

——S. 6 (Ss. 7, 17)—Applicability and scope—Minority of plaintiff—Right to sue, accrual of, to administrator pending minority—Effect.

S. 7 (O.A.) must be read in conjunction with S. 17, and the operation of the earlier section must be regarded as qualified by and subject to the exception provided in the latter section. Where pending minority of plaintiff, the right to sue accrued to the administrator on taking out letters of administration.

Held, plaintiff will not be entitled to the benefit of S. 7. 20 Cal. 15 Foll. (1905) 9 C.W.N. 537.

——S. 6—Applicability and scope—Shebait of an idol minority of—Right of suit.

The possession and managment of a property dedicated to on idol belongs to the shebait, and this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the shebait and not in the idol. Where the right to sue accrued when the shebait was a minor, the case fell within the clear language of S. 7 of the Limitation Act (1877) and the shebait might institute the suit after coming of age as provided in that section Although a guardian might have maintained a suit on behalf of the minor, that does not deprive the minorof the protection given to him by the Limitation Act, when it empowers him to sue after he attains his majority. 8 C.W.N. 809 =6 Bom.L.R. 765=1 A.L.J. 585=32 C. 129=31 I.A. 203 (P.C.).

——S. 6 (S. 7)—Applicability and scope.

Nor where a mother who is the guardian of her infant son lends money out of her son's estate, but takes the promissory note in her name. (1904) 15 M.L.J. 249=28 Mad. 205.

——S. 6 (S. 7)—Applicability and scope.

S. 6 (S. 7) does not apply to a case where some of the appellants are majors and are consequently able to apply to bring the representatives of the deceased respondent on record.

Per *Subramanya Aiyar, J.*—The right to apply to bring the legal representatives of a deceased respondent on record is a joint right vesting in all the appellants, irrespective of the question whether the right of the appellants in the subject of the appeal itself was several or joint. 27 M. 531, Foll. (1904) 28 Mad. 359.

——S. 6—Applicability and scope—Minor—Suit by guardian.

A suit was brought upon a mortgage bond. The original mortgagee was a guardian acting for a minor and the suit was also brought by him in the same capacity. The lower appellate Court held that the suit was barred and that the guardian could not claim any special benefit as regards limitation. *Held*, that the lower appellate Court was wrong. (1903) 7 C.W.N. 594.

——S. 6—Applicability and scope—Two minor heirs of a deceased Hindu—Suit for deceased's property and to set aside an adoption—One of the heirs barred—Effect of.

Where a Hindu left two daughters and one of them sued to recover his property and to set aside an adoption by her mother within three years after attaining majority, the fact that her elder sister is barred by limitation is no bar to her suit. (1902) 4 Bom.L.R. 140.

——S. 6 (S. 7)—Scope of—Minor—Bengal Tenancy Act (8 of 1885), S. 167—Application to bar encumbrance.

S. 7 of the Limitation Act (1877) extends the periods of limitation prescribed by the Act itself, but does not affect the limitation prescribed by S. 167 of the Special Act, *viz.*, the Bengal Tenancy Act. (1902) 29 Cal. 813.

4. Burden of proof.

——S. 6—Burden of proof.

A plaintiff must prove affirmatively and clearly that his suit is within time. A mere entry that a son was born to a man of the name of the plaintiff's father does not necessarily prove that the entry relates to the plaintiff, unless the entry can be supported by evidence. 79 Ind. Cas. 211=A.I.R. 1923 Lah. 41.

——S. 6—Burden of proof.

The plaintiff has to show that his suit is in time where a person after attaining majority sues to recover property alienated by his guardian, he must prove that he is within the time allowed by S. 6. 213 P.L.R. 1910=86 P.W.R. 1910=7 Ind. Cas. 505.

5. Child in womb.

——Ss. 6 and 8—Applicability—"Person"—"Minor"—Hindu son in mother's womb—Right to challenge alienation by father—Limitation for suit—Computation of limitation—Majority Act, S. 3.

The benefit of Ss. 6 and 8 of the Limitation Act can be availed of by a Hindu son attacking an alienation made by his father when he had been in his mother's womb, the period of his minority being computed from the date of his birth and not from the date of his conception. A son in his mother's womb must for the purposes of Ss. 6 and 8 of the Limitation Act, be regarded as a "person" and also a minor".

Under S. 3 of the Majority Act, the minority does not terminate until the age of 18 had been completed, and that age has to be computed from the date of birth of the person in question and not from the date of his conception. I.L.R. (1947) Bom. 750=49 Bom.L.R. 775= A.I.R. 1948 Bom. 150.

——S. 6—Child in womb.

Although, under certain systems of law, such as Hindu Law, a child *en ventre sa mere* is by a legal fiction and for certain purposes considered to be born in the sense that he has a right of inheritance in his father's property yet such a fiction does not govern the rule laid down by the law of limitation. The minority under Limitation Act begins at the date of birth and not at the date of conception.

Hence where a person challenging the alienation of the ancestral property was in the mother's womb but not born at the time of the alienation, he cannot be said to be a minor and cannot therefore claim an extension of time contemplated by S. 6. A.I.R. 1939 Lah. 290=42 P.L.R. 237=183 Ind. Cas. 451.

——S. 6—Child in womb.

While, for certain purposes, a child in the womb of his mother cannot be regarded as a person in existence for certain other purposes he may be regarded as a person in existence. Further, a person in existence must be either a minor or a major and obviously an infant *en ventre sa mere* cannot be a major and must therefore, be a minor. A suit instituted by a son, within three years of attaining majority, to set aside certain alienations made by the father while the son was *en ventre sa mere*, is therefore, within time. (1935) M.W.N. 920=42 L.W. 349=58 M. 886=A.I.R. 1935 Mad. 839=69 M.L.J. 425=159 Ind. Cas. 1 (F.B.).

——S. 6—Child in womb—Period of minority—Whether to be computed from date of birth or conception—Limitation Act (9 of 1908), S. 6—Applicability of.

The period of minority is to be computed from the date of birth and not from the date of conception of the child. S. 6 applies to the case. (1935) M.W.N. 920=42 L.W. 349=69 M.L.J. 425=58 M. 886=A.I.R. 1935 Mad. 839=159 Ind. Cas. 1 (F.B.). [*Over ruling* A.I.R. 1931 Mad. 456=60 M.L.J. 521=132 Ind. Cas. 816.].

——S. 6—Child in womb—Co-parceners.

A Hindu, challenging the alienation by his father, who is not born on the date of alienation, is not entitled to benefit of S. 6 merely on the ground that he was conceived on that date. If he was not born he could not be said

to be a minor and therefore subject to a disability. A.I.R. 1930 Lah. 394=31 P.L.R. 305=127 Ind. Cas. 708.

——S. 6—Child in womb.

Where a cause of action accrued to a person when he was in embryo, he cannot get the advantage of S. 6 as he cannot be deemed to be a minor in existence on the date of the conception. 116 Ind. Cas 545=10 Lah. 713=30 P.L.R. 737=A.I.R. 1929 Lah. 254.

6. Computation.

——S. 6—Three years' period—Computation—Day on which minor attains majority—If to be excluded.

The period of three years under S. 6 of the Limitation Act has to be counted not from the date of attainment of majority by the person under disability, but from the date of cessation of minority or disability. The date on which the minor attains majority cannot therefore be excluded in computing that period. A.I.R. 1950 Pat. 206.

7. Court of Wards.

——S. 6—Decree in favour of Court of Wards in name of manager—Execution of decree by minor after attaining majority.

Where a decree is in favour of Court of Wards but stands in the name of the manager of the Court of Wards, and the wards are minors, they are entitled to the benefit of S. 6 in regard to the execution of the decree. 1935 A.W.R. 1334=A.I.R. 1936 All. 63=(1935) A.L.J. 1336=160 Ind. Cas. 275.

——S. 6—Court of Wards.

Where the Court of Wards has assumed the supreintendence of the property of the minor, it can apply for execution of a decree passed in favour of the minor's father after the period of limiation and rely upon the provisions of S. 6. A.I.R. 1936 Sind 84=30 S.L.R. 30=163 Ind. Cas. 379.

8. Execution application.

——S. 6—Execution application.

A minor in whose favour a decree is passed can execute the same at any time within three years of his attaining majority. 16 Bom. 536, foll. 32 Bom.L.R. 1093=A.I.R. 1930 Bom. 508.

——S. 6—Execution application.

Where a minor decree-holder makes an application for execution of his decree after he attains majority the period during which he was a minor shall be deducted for the purpose of computing the period of limitation. 117 Ind. Cas. 909=30 P.L.R. 398=A.I.R. 1929 Lah. 661.

——S. 6—Execution application.

Where execution application is put in by the next friend of the minor beyond three years since the previous execution application, also by the next friend, such application is not barred by limitation because Ss. 6 and 7 import that during minority the operation of Limitation Act is suspended. 119 Ind. Cas. 39=1929 M.W.N. 158=30 M.L.W. 361=A.I.R. 1929 Mad. 394.

——S. 6—Execution application.

An application for the continuance or rivival of a previous execution proceeding struck off or suspended for no act or default of the decree-holder is governed by Article 181. Such an application is substantially an application for the execution of a decree within the meaning of S. 6 of that Act, which protects the minors, so long as the disability continues, and postpones the commencement of limitation till the date on which such disability ceases. 80 Ind. Cas. 775=26 O.C. 206=11 O.L.J. 133=A.I.R. 1924 Oudh 31.

——S. 6—Execution application.

Under S. 6, the last date for a minor decree-holder to apply in execution is within three years after attaining majority. The guardian of a minor can also apply in execution at any time during the minority even though his previous application is more than three years old. 32 Bom.L.R. 1299=A.I.R. 1930 Bom. 593.

——S. 6 (S. 7, Arts. 178, 179)—Execution application—Execution of decree—Limitation—Minority.

On the 11th of May, 1886, a decree under S. 88 of the Transfer of Property Act, 1882, was passed in favour of one *S.L.* In June, 1888, *S.L.* dies, leaving him surviving three sons, all minors. On the 30th of April, 1889, these three sons, still minors, made an application for a decree absolute under S. 89 of the Act. Nothing further was done towards execution of the decree until the 1st of October, 1904, when the three sons, one being still a minor again applied for a decree absolute for the sale of the mortgaged property. *Held*, that the application of the 1st October, 1904 was not barred by limitation. (1907) A.W.N. 45=4 A.L.J. 145=29 A. 279.

9. Existence of guardian.

——S. 6—Existence of guardian—Decree by guardian on behalf of minor—Execution application dismissed as barred—Minor, if precluded from applying for execution within three years of his attaining majority.

S. 6 applies to every minor whether he has a guardian or not, and the existence of a minor competent to sue is immaterial.

Where, after obtaining a decree on behalf of a minor, the guardian applies for its execution but the application is held barred by time, the minor can apply for execution of the decree within three years from the date of his attaining majority and the order in the previous proceedings is not binding on him. A.I.R. 1938 Pat. 92=18 P.L.T. 989=4 B.R. 400=174 Ind. Cas. 193.

——S. 6—Existence of guardian.

Where the father of the minor plaintiffs was carrying on business without any partner and on his death, his minor sons succeeded him and the business was thereafter carried on through their agent or guardian in the name used by the father and the defendants drew up a *hundi* in favour of that name and the *hundi* became payable when they were minors:

Held, that the minor plaintiffs could avail themselves of the provisions of S. 6. They were not debarred from taking the benefit of S. 6 simply because the *hundi* under which they were suing was given, not in their own name but in a name by which they were known to those with whom they had business relations. The fact that there was a manager who could have sued during the minority of the plaintiffs made no difference. 16 P.L.T. 649=A.I.R. 1936 Pat. 194=1 B.R. 844=158 Ind. Cas. 25.

——S. 6—Existence of guardian.

The mere fact that there was a guardian on behalf of a lunatic who could have sued earlier will not deprive him of the protection given to him under S. 6. A.I.R. 1934 All. 434=(1934) A.L.J. 803=3 A.W.R. 671=148 Ind. Cas. 1166.

——S. 6—Existence of guardian—Guardian ad litem or next friend—Effect of existence of—Minor—Limitation.

The existence of a next friend or guardian *ad litem* cannot deprive the minor of the benefit of S.6 of the Limitation Act and a minor can apply for execution of decree on attaining majority within the time prescribed by S. 6. 16 O.C. 206=21 Ind. Cas. 365.

10. Interpretation.

——S. 6 (1)—Interpretation—S. 6 (1) explained.

There is no connection between the words " time from which the period of limitation is to be reckoned" and the words "time prescribed therefore in clause 3, of Sch. 1"in S. 6 (1). The section may be paraphrased as follows : " When a plaintiff is a minor at the time from which the period of limitation is to be reckoned, he may institute his suit within the same period, starting from the date of his becoming a major as (but for his minority) would have been available to him starting from the date prescribed for such a suit in clause 3 of Sch. I." For example if col. 3, provides two years from the date of the cause of action which means the original cause of action—then the plaintiff gets two years from the date of his majority. That is all that it means. A.I.R. 1942 Bom. 248=44 Bom.L.R. 522=I.L.R. (1942) Bom. 574=202 Ind.Cas. 196.

——S. 6 (3)—Interpretation—S. 6 (3), refers to physical death and nothing else.

S. 6 (3), itself, where it says "where the disability continues up to the death of such person" refers to physical death and nothing else, and the legal representative must be a legal representative whose title depends on the death of the person he represents. A.I.R. 1935 Bom. 420=37 Bom.L.R. 706=159 Ind. Cas. 272.

——S. 6—Interpretation—Alteration of words—Effect.

The effect of the substitution of the words "make an application for execution of a decree" in S. 6 of the present Act in place of the words "make any application" in S. 7 of the old Act, is that the privilege enjoyed by a minor of making an application within the prescribed period after the cessation of disability has been taken away, and now any application by the minor except an application for the execution of a decree has to be made within the prescribed period from that time when the right to apply accrued. 122 Ind. Cas. 201=49 C.L.J. 362=33 C.W.N. 519=56 Cal. 1117=A.I.R. 1930 Cal. 34.

11. Legal representative.

——Ss. 6, 8, 9—Devolution of mortgagee's right on minor son—Son dying during minority—Suit by mother—Limitation.

The mortgage was in 1916. A period of three years was fixed for payment of the amount. After the death the mortgagee which occurred in 1920 the right devolved upon his son, then a minor, and while he was a minor, there were two acknowledgments, one in 1924 and the other in 1927. The minor died and within 3 years of his death, his mother as his legal representative instituted the suit.

Held, that reading Ss. 6 and 19 together, when an acknowledgment was made, a fresh period of limitation was to be computed from the time of the acknowledgment and where a person entitled to institute a suit was, at the from which he period of limitation was to be reckoned, a minor, he may institute the suit within the same period after the disability had ceased. Under S. 6 (3) where the disability continued up to the death of the minor, his legal representative could institute a suit within the same period after the death as would otherwise have been allowed from the time so prescribed. The suit, therefore, was within time. (1945) 1 M.L.J. 3=57 M.L.W. 66 =A.I.R. 1945 Mad. 149.

——S. 6—Acknowledgment—Fresh limitation—Acknowledgee minor—Limitation for suit by minor—Minor dying during minority—Suit by legal representative—Limitation.

When an acknowledgment is made, a fresh period of limitation is to be computed from the time when the acknowledgment is made and signed, and if the person entitled to institute the suit is at the time from which the period of limitation is to be reckoned, a minor, he may institute within the same period after disability has ceased. If, however, the minor dies before the cessation of disability, the suit filed by his legal representative would be within time if brought at a time when it would have been within time if brought by the minor after cessation of disability. 57 L.W. 612=1944 M.W.N. 732=(1945) 1 M.L.J. 3=A.I.R. 1945 Mad. 149.

——S. 6—Legal representatives of minor—S. 6, if applies.

The provisions of the Limitation Act regarding legal disability and consequent extension of time are personal tothe minor and do not apply to legal representatives of the minors except as stated in S. 6 of the Act itself. A.I.R. 1943 Nag. 284 =I.L.R. (1943) Nag. 331=1943 N.L.J. 286=207 Ind. Cas. 338.

——S. 6—Legal Representative.

In a suit for possession, where a minor dies before attaining majority his representative would have either the total period of 12 years from the date of accrual of the cause of action or three years from the date of the minor's death, which ever is greater. 87 Ind. Cas. 315=6 L.R.A. Civ. 284=A.I.R. 1925 All. 692.

——Ss. 6, 7—Legal representative—Minority—Death of decree-holder, leaving a minor representative surviving him—Limitation.

Held, that the person whose minority would under S. 7, of the Limitation Act, 1877, save the operation of limitation must be the person who was entittled to bring the suit or make the application on the date from which the period of limitation for the particular suit or application was to be reckoned. 1886 A.W.N. 49, Foll. (1905) A.W.N. 163=2 A.L.J. 453=27 A. 704.

12. Non-execution application.

——S. 6—Non-execution applications—Decree barred by C. P. Code, S. 48—Effect of.

S.6 of the Limitation Act only applies to cases dealt with by the statute itself and does not apply to cases barred by S. 48 of the Code. Minority, therefore, is no ground for exemption from the operation of limitation provided for by S. 48 of the Code. 37 M. 186, foll. 37 All. 638= 13 A.L.J. 826=30 Ind. Cas. 512.

——Ss. 6 and 181—Non-execution applications—Application for final decree.

S. 6 of the Limitation Act will not save limitation inasmuch as an application for a final decree in a mortgage suit is not an application for execution. 40 All. 203= 16 A.L.J. 85=43 Ind. Cas. 870.

——S. 6—Non-execution applications—Application under O. 22, R. 3.

The section does not apply to applications under O. 22, R.3 of the C.P. Code to bring on record legal representatives of a deceased appellant nor to applications to set aside an *ex parte* decree on the ground of minority. 10 Bur.L.T. 27=35 Ind. Cas. 438.

——S. 6—Ss. 5, 6, 7, 8 and 14—Non-execution applications—Pre-emption suit.

A suit where the representative of one of two joint vendees is brought on record, after the period of limitation the suit being barred against the representative,is really barred against the surviving vendees. The period of limitation could not be extended as Ss. 5 and 14 of the Limitation Act were not applicable and the provisions of Ss. 6 and 7 did not extend to suits to enforce a right of pre-emption under S. 8 of this Act. 86 P.R. 1919=52 Ind. Cas. 587.

——S. 6—Limitation Act (15 of 1877), S. 7—Non-execution applications—Applications to set aside ex parte decree.

Minority can be successfully invoked as a plea only in suits and execution applications under S. 6 of Limitation

Act of 1908, by which S. 7 of old Act is replaced ; and so the exception in S. 6 of the Act of 1908 does not include the case of an application to set aside an *ex parte* decree. 101 P.R. 1916=37 Ind. Cas. 292.

——S. 6 and Art. 166—C. P. Code (1882), S. 311—Non-execution applications.

An application under S. 311, C.P. Code (1882) to set aside an auction sale is not barred under Art. 166 though presented after one year by the guardian or next friend of the minor. The period of limitation is extended according to S. 7, Limitation Act (1877) as this section applies to applications made by guardians during the minority of their wards too. 5 P.L.R. 1910=118 P.W.R. 1910=6 Ind. Cas. 488.

——S. 6 and Art. 170—Non-execution applications—Application for pauper appeal.

S. 7 of the old Act does not apply to an application for pauper appeal made in the name of a minor by his next friend. It must be made within the time allowed under Art. 170 of the Act. 144 P.W.R. 1909=4 Ind. Cas. 1002.

——S. 6—Non-execution applications—C. P. Code, S. 48—Application under.

S. 6 of the Limitation Act, does not operate to extend the period of twelve years under S. 48, C. P. Code. 13 M.L.T. 79=1913 M.W.N. 114=24 M.L.J. 96=37 Mad. 186=18 Ind. Cas. 586.

——S. 6 and Art. 164—Non-execution applications—Application to set aside ex parte decree—New or old Act applicable—General Clauses Act, S. 6—Act enforced some months after its passing—Effect.

An *ex parte* decree was passed on 4th September, 1894, the third defendant then a minor, said that he attained majority on 16th January, 1909 and applied on 25th January, 1909, to set aside the *ex parte* decree. The new Limitation Act, came into force on 1st January, 1909.

Held, that the application to set aside the *ex parte* decree was governed by the new Act and under Art. 164 the application was barred. S. 6 of the New Limitation Act, applies only to suits and applications for execution and not to other applications. As the Legislature has deliberately modified S. 7 of the old Act so as to confine the operation of disability to suits and applications for the execution of decrees, minority should not be allowed, to operate as a ground of disability in case so deliberately excluded. S. 6 of the General Clauses Act and Ss. 3 and 13 and Art. 164 of the Limitation Act, clearly indicate that the new Act applies. The right to apply to set aside an *ex parte* decree is acquired under C. P. Code and not under Limitation Act. The Limitation Act merely limits the period within which the right given by the C. P. Code may be exercised. The new Limitation Act though passed in August, 1908 only, came into force nearly 5 months later on the 1st January, 1909 and thus gave ample notice to all who would be seriously affected by the change in the law to seek their remedy under the Old Law. 35 Mad. 678=(1910) M.W.N. 711=9 M.L.T. 75=8 Ind. Cas. 543.

——S. 6 and Art. 181—Non-execution applications—Application for order absolute.

S. 6 of the Limitation Act is not applicable to an application to make a decree absolute which is governed by Art. 181. 15 N.L.R. 36=48 Ind. Cas. 934.

13. Personal Privilege.

——S. 6—Personal privilege—S. 6, whether applies to assignee from minor.

The extended period allowed by S. 6 only applies to the case of a minor and his representatives after his death and not to an assignee from the minor. A.I.R. 1935 Bom. 420=37 Bom.L.R. 706=159 Ind. Cas. 672.

——S. 6—Personal privilege—Transferee of minor

An assignee cannot take advantage of S. 6. 90 Ind. Cas. 741=2 O.W.N. 811=A.I.R. 1926 Oudh 20.

——S. 6—Personal privilege—Transferee cannot take advantage of S. 6.

The general principle of law is that transferee from a minor cannot claim the benefit of S. 6 of the Limitation Act.

The transferee cannot, therefore, maintain a suit there being no reason for the distinction between a suit brought on the date of the transfer and a suit brought on a subsequent date. As soon as the transfer is made the special privilege which is vested in the minor is extinguished. 9 Cal. 663 ; 42 Mad. 637, *Foll.* 66 Ind. Cas. 101=9 O.L.J. 88=A.I.R. 1922 Oudh 31.

——S. 6—Personal privilage—Assignee of minor.

The purchaser of the property of a minor has not got, by the assignment, the rights of a person under disability under S. 6 of the Limitation Act. 9 Cal. 663 (F.B.), *Foll.* 22 C.W.N. 831=46 Ind. Cas. 802.

——Ss. 6, 7 and 8—Personal privilege—Assignee of minors.

S. 8 is ancillary to and restrictive of the concession granted by Ss. 6 and 7 and does not confer any substantial privilege. The assignee of a minor cannot avail himself of the privilege under S. 6 which is personal to the minor. 42 Mad. 637=(1919) M.W.N. 448=26 M.L.T. 147=10 L.W. 333=50 Ind. Cas. 380.

——S. 6—Personal privilege—Assignee from minor.

The Assignee of property from a Mahomedan minor cannot avail himself of the benefit of S. 6 of the Limitation Act. 14 P.W.R. 1918=44 Ind. Cas. 890.

——S. 6—Personal privilege—Transferee from minor.

The privilege conferred by S. 6 is personal. The privilege is not transferable and an assignee from minor must file the suit the suit either within the ordinary period provided for the suit or on the date of the transfer if the transferor's right subsists till that date. 10 L.J. 747=18 O.C. 34=27 Ind. Cas. 118.

——Ss. 6, 7—Personal privilege—Assignee of minor—How far section applicable.

S. 7 does not extend, in any case, to a purchaseer from the minor. (1902) 4 Bom.L.R. 513=26 B. 730. *See also* 1901 A.W.N. 12.

14. Plea under.

——S. 6—Plea under.

Point of minority for calling in aid S. 6 cannot be raised for first time in second appeal. A.I.R. 1941 Nag. 100=1940 N.L.J. 607=I.L.R. (1941) Nag. 144=194 Ind. Cas. 806.

——S. 6—Plea under.

Father doing business without partner under a name —Death of father—Minor sons carrying on business through guardian in name used by father —Defendants drawing *hundi* in favour of such name—*Hundi* becoming payable during minority—Suit on *hundi*—Benefit of S. 6 :

Held, that the contention that the plea of minority to save limitation was not raised in the plaint and it came to the defendants as a surprise at the time of argument was without force as it was clear from the pleading itself that the money was taken from the plaintiffs during their minority and that the money became due to them during their minority. 16 P.L.T. 649=A.I.R. 1936 Pat. 194=1 B.R. 844=158 Ind. Cas. 25.

15. Reversioners.

——S. 6—Two reversioners suing to set aside an alienation—Both born when alienation made—One a minor when suit filed—Suit of one barred—If suit of minor also barred.

Two sisters *A and B* inherited their father's property. *A* sold her share to defendants. Sons of *B* were both born when alienation took place. One of the two was a minor when the suit was filed. Both sought a declaration that the alleged alienation by *A* was nugatory as against them :

Held, since both reversioners were born on the date of alienation, and one of them was a minor when the suit was filed, the minor was not barred from suing merely because another reversioner who was also alive, when alienation was made, waited until his sight became barred. 59 M.L.W. 504=1946 2 M.L.J. 214=1946) M.W.N. 605=231 Ind. Cas. 143=A.I.R. 1947 Mad. 102.

——Ss. 6 and 9—Reversioners—Presumptive reversioner failing to sue—Remote reversioner minor at time of alienation.

If a presumptive reversioner has failed to sue, a remote reversioner, who happens to be a minor at the time of the alienation, can avail himself of the benefit of S. 6. Section 9 does not come into operation in such a case. Time, no doubt, will start running both against the major and minor reversioners but they will have their own periods of limitation and in no case will the one provided for a minor reversioner be affected by that of a major reversioner, whether of equal or of a different degree. A.I.R. 1944 Lah. 409=46 P.L.R. 316=I.L.R. (1945) Lah. 231=216 Ind. Cas. 10 (F.B.)

——S. 6—Reversioners.

There were in existence at the time of the alienation five sons of the alienor who was a limited owner and three minor grandsons. The five sons took no step within limitation to getthe alienation of their father set aside although they were the persons immediately affected :

Held, that a suit by other reversioners, minors at the time of the alienation, to set aside the alienation was not barred. The suit by the reversioner born after the alienation was not also barred. If the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6 in his own right he cannot be deprived of the benefit of the extended period claimable by the reversioner in existence at the time of the alienation. A.I.R. 1938 Lah. 1=40 P.L.R. 188=I.L.R. (1937) Lah. 769=175 Ind. Cas. 824.

——S. 6—Reversioners.

Minor son of the alienor and other major but distant collaterals living at the time of the alienation—No suit by such collaterals to challenge the alienation within limitation—Suit by minor after limitation but within 3 years from attaining majority :

Held, that the right of reversioners to contest an alienation is independent and individual. The suit is, therefore, maintainable and not barred. 39 P.L.R. 559=A.I.R. 1937 Lah. 653=172 Ind. Cas. 218.

[Reversing A.I.R. 1937 Lah. 485=39 P.L.R. 127].

——S. 6—Reversioners—Reversionary suit by minor in presence of nearer reversioners—Benefit of extended time.

Where a minor files a reversionary suit challenging alienation of ancestral property under custom notwithstanding the presence of nearer reversioners including his father, he is entitled to the benefit of extension of time under S. Limitation Act. A.I.R. 1933 Lah. 866 =147 Ind. Cas. 399.

——S. 6—Reversioners.

The right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and time begins to run simultaneously against them all and no subsequent disability stops it. 21 P.W.R. 1907 ; 22 P.R. 1907 ; 41 Mad. 659 (F.B.), *Foll.* 6 Lah. 405=26 P.L.R. 695 =A.I.R. 1925 Lah. 654=90 Ind. Cas. 1022.

——S. 6—Reversioner—Death of minor—Suit by reversionary heir for possession of property sold—Limitation.

The mother and guardian of a minor sold certain property belonging to the ward in 1873, and, the ward having died an infant in 1879 or 1880, she succeeded to his other property and died in 1921 without taking steps to set aside alienation. A reversionary heir instituted a suit in 1922 to recover possession of the property sold from persons holding under the original vendee :

Held that the suit was barred by limitation because of S. 6 (3) read with Art. 44 of the Limitation Act. The suit became barred on the lapse of three years after the death of the ward, notwithtanding the fact that he was succeeded by a female heir. 18 Mad. 193 ; 4 M.L.J. 275, *Foll.* 59 M.L.J. 196=1930 M.W.N. 708=32 M.L.W. 206=127 Ind. Cas. 801=A.I.R. 1930 Mad. 821.

——S. 6—Reversioner in Hindu Law.

A reversioner who is a minor at the date of the alienation or who is born subsequently during the life of the widow is entitled to the benefit of S. 7 (O.A.). (1904) 14 M.L.J. 209=28 M. 57. [*Also* 9 C.W.N. 25=32 C. 62].

16. Right to extension.

——S. 6—Right to extension.

Where any Court is of opinion, on the true construction of a document, that it is taken in the name of a minor or in the name of a minor acting by his guardian ; then the minor has got three years from attaining his majority within which to bring his suit on the document. But if on the other hand, a Court is of opinion that the document is taken solely by the guardian, then that extended period would not be open for the benefit of the minor. 10 Bom. 241, *Foll.* 100 Ind. Cas. 95= 50 Bom. 831=28 Bom.L.R. 1431=A.I.R. 1927 Bom. 61.

——S. 6—Right to extension—Adverse possession against minor—Minority—No ground to stop running of limitation—An extended period alone is given.

It cannot be said that there can be no adverse possession of property belonging to minor during the continuance of the minority. Section 6 does not prevent the possession being adverse or the running of limitation against a minor. It only gives an extension of limitation in favour of the minor after the cessation of disability on the death of the person subject to it.

Where on the death of a proprietor, the widow of his pre-deceased son enters into possession of half the property, mutation in respect of which is effected in her name, during the minority of his second son who subsequently dies she cannot be dispossessed of that share in a suit brought by a reversioner of the son after 12 years of her possession and she becomes the absolute

owner of that shares by adverse possession in respect thereof for over 12 years. 113 Ind. Cas. 258=5 O.W.N. 832=A.I.R. 1928 Oudh 481.

——S. 6—Right to extension—Three years' extension after majority cannot be claimed by a person not born at time of alienation.

Where a suit is brought to contest an alienation of joint family property it is from the date on which the cause of action arose that period of limitation must be reckoned. Subsequent birth of a co-parcener does not create a fresh cause of action or a new starting point from which limitation should be reckoned. By the express terms of the section the extended period of three years after majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. A person who was not in existence at the time does not come within this description and therefore is not entitled to the three years' extension. 86 Ind. Cas. 249=29 C.W.N. 666 =26 P.L.R. 113=23 A.L.J. 176=27 Bom.L.R. 175 =21 M.L.W. 236=52 I.A. 69=6 L.R.P.C. 47=1925 M.W.N. 262=12 O.L.J. 74=2 O.W.N. 1=47 All. 165=A.I.R. 1925 P.C. 33=48 M.L.J. 29 (P.C.).

——S. 6—Right to extension—Subsequent birth of other members does not extend time.

If at the date of the transfer of property belonging to a Hindu joint family there was in existence any person who had a cause of action for a suit to set aside the alienation, time begins to run and cannot be extended by the subsequent birth of other members of the family who would also be entitled to challenge the alienation.

Time for a suit to set aside the alienation will expire either after 12 years from the alienation or 3 years after the attaining of majority of any person who had a cause of action on the date of the alienation. 87 Ind. Cas. 662=6 L.R.A. (Civ.) 320=A.I.R. 1925 All. 563.

——S. 6—Right to extension—Adverse possession against lunatic—Lunacy does not prevent limitation running but only gives the lunatic right to sue within 3 years of the ceasing of the disability.

Lunacy would not by itself prevent limitation from running against a lunatic. Where a person entering into possession of a lunatic's property was in no fiduciary relationship to the lunatic but entered into possession for his own benefit and in assertion of a title hostile to the lunatic, limitation would begin to run from the date when he so took possession though the lunatic would be entitled to sue for recovery of the property within 3 years from the date when his disability ceases; if he dies a lunatic leaving his widow as legal representative, then she could sue within three years of his death but if the widow fails to sue within the said period for recovery of the property, the reversioners to the estate of the lunatic would also be barred and they cannot reckon limitation from the death of the widow. 70 Ind. Cas. 678=45 Mad. 361=1922 M.W.N. 136= 15 M.L.W. 382=30 M.L.T. 128=A.I.R. 1922 Mad. 12=42 M.L.J. 262.

——S. 6—Right to extension.

The extended period under S. 6 can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. 22 P.R. 1907; 103 P.R. 1907 and A.I.R. 1925 P.C. 33, *Foll.* 97 Ind. Cas. 435=8 Lah. 19=28 P.L.R. 283=A.I.R. 1927 Lah. 97.

——S. 6—Right to extension.

A person cannot take advantage of his minority when limitation has already begun to run before his birth. A.I.R. 1925 P.C. 33, Foll. 94 Ind. Cas. 180 (All.).

——S. 6—Right to extension.

A suit on a promissory note taken by the guardian of a minor must be instituted by the guardian within three years of its date. Section 6 has no application to such a suit. 80 Ind. Cas. 474=26 Bom.L.R. 426 =A.I.R. 1924 Bom. 468.

——S. 6 (Ss. 7, 28, Arts. 142, 144)—Right of extension —Separate property—Joint possession—Prescription.

Where the separate property of one member of a family, is for over the statutory period in the joint possession of himself and the other members of the family, these latter acquire a prescriptive right to joint ownership in such property. The statutory period is 12 years from the date of the joint possession under Art. 142 or 144, and where the cause of action arises in favour of a minor, it extends up to three years after the cessation of disability. (1901) 5 C.W.N. 545=3 Bom.L.R. 303 24 M. 387=28 I.A. 81 (P.C.).

17. Several plaintiffs.

——S. 6—Several plaintiffs.

Where a suit by Hindu co-parceners to set aside an alienation of joint family property is barred by limitation as regards one of the plaintiffs it is also barred as regards the other plaintiffs though they were minors at the date of the institution of the suit, if they were not in existence at the date of the alienation. A.I.R. 1925 P.C. 33, *Foll.* 86 Ind. Cas. 704=6 L.R.A. Civ. 302=A.I.R. 1925 All. 247.

——S. 6—Several plaintiffs—Applicability of section.

S. 6 applies only where a single claimant or all the claimants, where there are more than one, are under some disability. 25 M. 431, Relied upon. 31 All. 156 =6 A.L.J. 62=1 Ind. Cas. 824.

——Ss. 6 and 7, Art. 144—Several Plaintiffs—Disability of single plaintiffs—Joint interest of other plaintiffs.

In 1895 a Mahomedan mortgaged his property to defendant. The mortgagor having died, his widow sold the equity of redemption to the mortgagee in 1901, and placed him in possession. The three plaintiffs (sons and daughters of the mortgagor) who owned the remaining seven shares, sued in 1914, to redeem the mortgage. Plaintiffs 1 and 2 had attained majority in 1901 and 1908.

Held, that, as neither of the plaintiffs who attained majority more than three years before suit was qualified to discharge or release the equity of redemption and the right was indivisible, the suit having been brought within three years of the date when the youngest plaintiff attained majority, was within time, under S. 7 of the Limitation Act. 43 Bom. 487=21 Bom.L.R. 353=51 Ind. Cas. 79.

——Ss. 6 and 7—Several plaintiffs—Joint Decreeholders—One minor—Whether other can grant valid discharge.

A joint execution creditor is a joint creditor within S. 8 of the Limitation Act of 1877. Where one of two joint execution creditors is a minor the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minor. 15 Ind. Cas. 664 (Cal.).

——S. 6—Several plaintiffs—Time, when begins to run.

Minority does not prevent limitation running against minors except as is provided under S. 7 of the old Act. In the case of several minor plaintiffs extension of more than 3 years cannot be allowed after the date of attaining majority by the youngest. 100 P.R. 1909 =148 P.W.R. 1909=152 P.L.R. 1909=4 Ind. Cas. 854.

——Ss. 6, 7, 8 and 15 (2)—Several plaintiffs—Disability—Extension of time.

Where one of two plaintiffs attained majority more than three years prior to suit and was capable of giving a discharge for both, the suit is barred under S. 7 of the Limitation Act. 38 M. 118, Foll. S. 15 (2) of the Limitation Act does not refer to the extension of time allowed to persons under disability under Ss. 6 and 8. (1919) M.W.N. 440=10 L.W. 156=37 M.L.J. 256=52 Ind. Cas. 725.

——Ss. 6 and 7 and Art. 44—Several plaintiffs—Bar against elder—Effect.

Per *Abdur Rahim, J.*—The sections apply to cases falling under Art. 44. The Act does not deprive persons under disability of the common advantages under the Act. It makes certain concessions in their favour. A suit by two Hindu brothers to recover properties alienated by their mother and guardian during their minority without necessity is barred if brought more than 3 years after the elderbrother becomes major but within 3 years of the attainment of majority by the younger.

Per *Sundara Iyer, J.*—The section does not apply to suits by number of plaintiffs some of whom are under disability. The words "the same period after the disability has ceased, etc.," show that the section applies where but for the disability time would run against the litigant before the cessation of disability. 10 M.L.T. 418=(1911) 2 M.W.N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——Ss. 6 and 7—Several plffs.—Joint trustees—Minor, a trustee.

When the right of one of joint trustees to plaintiffs recover the rus. property has become time-barred against a person holding the property in adverse possession, the right of the other joint trustee also is time-barred though the latter brings his suit within three years of his attaining majority. 34 M. 284=20 M.L.J. 421= 8 M.L.T. 134=(1910) M.W.N. 425=6 Ind. Cas. 992.

18. Subsequent disability.

——S. 6—Subsequent disability—Eldest son's right barred on date of suit—Sons born after alienation but before the eldest was 18.

Where on the date of the suit by the eldest son who was over 21, the other sons were less than 21 and were within time so far as they were concerned and where they were not born on the date of the alienation by the father but were in existence before the eldest son attained majority, held, that the minor plffs. being not born when the right to sue accrues, *i.e.*, the date of the alienation the suit was barred by limitation. 1 Lah. 558=59 Ind. Cas. 678.

——Ss. 6 and 9—Subsequent disability—Trespass before birth of minor.

Where a person trespasses on immoveable property belonging to a person and after such trespass the owner dies leaving a minor son, the minor is not entitled to the exemption in S. 6 of the Limitation Act. 55 Ind. Cas. 335 (Lah.).

——S. 6—Subsequent disability.

A minor is not entitled to the benefit of S. 6 of the Limitation Act in respect of a right to sue which accrued before his birth. 2 U.P.L.R. (L.) 39=54 Ind. Cas. 838.

——S. 6—Punjab Limitation Act I of 1900—Subsequent disability—Commencement of minority.

S. 6 of the Limitation Act does not apply to the case of a minor born subsequent to the alienation objected to. Minority begins at birth and not at conception. 173 P.W.R. 1912=14 Ind. Cas. 60.

——S. 6 (Ss. 7, 9 13), Art. 179 (4)—"At the time from which"—Application for execution—Minor—Initial disability—Subsequent disability—Inability to sue—Disability to sue.

On the 13th October, 1891 a decree was passed, and applications for execution were made in 1894 and 1897, the last having been presented on the 10th September, was within time. It was made by *G*, a major, who died on the 24th July, 1900. *G*'s son, who was a minor made no further application for execution until 1903.

Held: (1) that the application by *G*'s son in 1903 was barred by time, since the application from which it was sought to date the period of limitation was made by an adult and it was only on his subsequent death within the period of three years and after time had commenced to run that *G*'s son became entitled to apply; (2) that S. 9 of the Limitation Act, 1877, applied to the case, because here there was not an initial disability, but a subsequent disability. 20 C. 716, dist. Inability to sue is distinct from disability to sue, which means want of legal capacity. Inability to sue, for the purposes of the Limitation Act, is the state of being a minor insane or an idiot. (1904) 6 Bom. L.R. 639=29 B. 68

19. Miscellaneous.

——S. 6—Determining age—Medical evidence is not of much help in determining age.

Medical evidence in cases of age of a party to a suit which falls to be decided for purpose of limitation cannot throw much light because from its very nature it is based on conjectures only and it cannot possibly be looked upon for the purposes of determining with precision the exact age of a particular person. In cases when limitation is pleaded in defence, a difference of even a single, day settles the fate of the case one way or the other and no doctor, however conscientious and competent

he may be, can give the precise age of a person so as to enable the Court to determine the exact date of that person's birth. 113 Ind. Cas. 53=10 L.L.J. 183=A.I.R. 1928 Lah. 250.

——S. 6—Miscellaneous—Insanity, what is.

Per *Shah, J.*—To be in a state of great mental weakness on account of serious injuries is not a sufficient condition to constitute insanity within the meaning of S. 6. 84 Ind. Cas. 796=25 Bom. L.R. 1333=A.I.R. 1924 Bom. 290.

——S. 6—Miscellaneous—'Affect or alter'—Meaning.

The words 'affect or alter' in S. 6 refer to period prescribed but not to the mode in which the period is to be computed. 34 All. 496=10 A.L.J. 3=16 Ind. Cas. 149.

——S. 6 (1)—Miscellaneous—Death of minor—Disability of legal representative.

Where a minor acquiring a cause of action to sue for possession lies within 3 years of his attaining majority his personal representatives can sue on the same cause of action within the 3 years' period though 12 years had expired since the cause of action accrued. 40 Bom. 564=18 Bom. L.R. 579=37 Ind. Cas. 221.

——S. 6—Miscellaneous—Suit by minor and an adult to set aside sale.

A suit by one co-sharer after one year from sale, to set aside the sale on the ground that it was illegal, fraudulent or without jurisdiction, is not governed by S. 8. 14 C.W.N. 128=11 Cr. L.J. 34=2 Ind. Cas. 77.

——Ss. 6 and 8 and Art. 12—Miscellaneous—Suit to set aside auction sale—Limitation.

S. 6 of the Limitation Act gives the minor the same period of Limitation after his attaining his majority as an ordinary person gets. There is nothing in S. 8 to extend the period. A suit by a minor to set aside a sale under Art. 12 of the Limitation Act must be brought within one year from the date of the plaintiffs majority. 40 P.L.R. 1918=30 P.W.R. 1918=43 Ind. Cas. 712.

——S. 6—Miscellaneous—Starting point.

Under the Punjab Limitation Act time runs from the date of Limitation and where the plaintiff in a suit governed by that Act was a minor on that date, he can under S. 6 of the Indian Limitation Act bring his claim within 3 years of his attaining majority. 84 P.L.R. 1914=47 P.W.R. 1914=22 Ind. Cas. 637.

——S. 7.

Synopsis.

1. **Applicability and scope.**
2. **Co-heirs.**
3. **Co-partners.**
4. **Discharge by adult-brother.**
5. **Discharge by guardian.**
6. **Discharge by manager.**
7. **Interpretation.**
8. **Joint decree-holders.**
9. **Joint promisees.**
10. **Running of limitation.**
11. **Setting aside alienation.**
12. **Miscellaneous.**

1. Applicability and scope.

——S. 7—Applicability—Dayabhagha family of one adult and four minor nephews—Minors under protection of mother—Execution—Limitation—Extension of time till majority of last minor nephew.

A decree was obtained by one *S* and his four minor nephews, who were members of a family governed by the Dayabagha School of Hindu Law. The minors were under the protection of their mother, the natural guardian. The decree was passed on 23-6-1932, and an application for execution was presented on 22-5-1944; limitation was sought to be saved on the ground that the four nephews were minors at the time of the decree, and therefore S. 7 applied to the case. The youngest minor was still below eighteen.

Held: that the natural guardian of the minor decree-holders (mother), not having been a co-decree-holder, could not give a valid discharge on the minors' behalf during their minority, and therefore S. 7 of the Limitation Act, applied to the case and operated to save limitation in favour of the decree-holders. S. 7 could not be availed of only when a co-decree-holder could give a valid discharge and it was only in such a case that limitation would not be extended under S. 7. 26 Pat. 744=A.I.R. 1949 Pat. 212.

——S. 7—Applicability—One of decree-holders a minor—Others not competent to give discharge. I.L.R. (1946) 1 Cal. 45=49 C.W.N. 558=80 C.L.J. 198=A.I.R. 1945 Cal. 387.

——S. 7—Applicability and scope—Joint Hindu family of two borthers—Suit by younger brother within three years of his becoming major but more than three years after his elder brother's attaining majority, when barred.

Although a suit by the younger of the two brothers constituting a joint Hindu family filed within three years of his attaining majority would be barred by limitation if the elder brother had failed to sue within three years of his majority if the former was a manager of the family, S. 7, Lim. Act, would not operate as a bar if the adult brother was not the manager of the family during the relevant period. 58 M.L.W. 100 (2)=(1945) 1 M.L.J. 200=1945 M.W.N. 182=A.I.R. 1945 Mad. 498.

——S. 7—Applicability and scope.

In 1913, a Malabar *tarwad* consisted of one *K*, and his niece *R*, and son of another niece *A*. On January 14 of that year *K* executed a deed of gift of certain immovable properties in favour of his own children who were members of another *tarwad*. According to the deed, the properties were the private properties of *K*, but in addition to signing the document in his personal capacity he signed it as the *karnavan* of the *tarwad* and the guardian of *A* who was then a minor. *R* had signed the deed in her individual capacity, not as the *karnavan*, and it was found that she was the victim of a fraud and not a party to the fraud. *K* died in 1919, and from that date, *R* became the lawful *karnavan* of the *tarwad*. *A* attained his majority on October 28, 1927, and within three year of that date, he filed a suit impeaching the gift and relies on S. 7, Lim. Act to save the bar of limitation :

Held, that the limitation for the suit started to run in 1919, when, on the death of *K*, *R* admittedly became the *de jure* and the *de facto karnavan*. Limitation having commenced to run against the *tarwad*, it ran against the plaintiff, and S. 7 was not, therefore, of any avail to him. 53 M.L.W. 724=1941 M.W.N. 632=A.I.R. 1941 Mad. 678=197 Ind. Cas. 245. [Reversing A.I.R. 1939 Mad. 907=189 Ind. Cas. 167].

——S. 7—Applicability and scope—Suit by father as manager of joint family to recover debt due to joint family—Minor son joined as co-plaintiff unnecessarily.

Section 7 is intended to apply to a case where each of the several persons is jointly entitled to file a suit.

It does not, however, necessarily follow that every suit which a Hindu father brings for himself and as next friend for his minor son is a suit by a father as manager of a joint Hindu family to recover a debt due to the joint family and that the minor son, if joined, is joined unnecessarily and the father's appointment as next friend is unnecessary. The Court is not justified in such a matter in acting merely on the ground of a presumption of jointness. A.I.R. 1941 Sind 166=I.L.R. (1941) Kar. 72=196 Ind. Cas. 572.

——S. 7—Applicability and scope.

Decree in January 1932 in favour of grand-father *Karta* of family and minor grandson—First execution application in September, 1935 :

Held, that minor must be assumed to have appeared, by next friend—Next friend could not give discharge and application was nottime-barred against grand-father. 5 B.R. 15=19 P.L.T. 855=A.I.R. 1939. Pat. 33=177 Ind. Cas. 713.

——S. 7—Applicability.

Minor members of family carrying on business which is not a joint family business—One member on becoming major not competent to give valid discharge as contemplated by S. 7 of Lim. Act—Claim of other member brought within three years of attaining majority *held*, not barred though suit was brought after 14 years of transaction. (1938) 67 C.L.J. 88.

——S. 7—Applicability and scope.

Final decree for sale obtained on February 4, 1931, by *B* for himself and as guardian of minor brothers—Execution application by *B* on February 2, 1934, in same capacity—Contention by judgment-debtor that *B* could give valid discharge and so benefit of S. 7 could not be claimed :

Held, (1) that *B* could not give valid discharge without leave of Court under O. 32, R. 6, C. P. Code.

(2) Principles and procedure under O. 32 applied to execution proceedings.

(3) Decree-holders could claim benefit of S. 7, Lim. Act. A.I.R. 1937 Cal. 649=65 C.L.J. 981=174 Ind. Cas. 887.

——S. 7—Applicability and scope—Suit by two brothers of joint Hindu family, one being minor—No evidence to show major brother was karta.

Where a suit is brought by two brothers belonging to a joint Hindu family, one of whom had become a major and the suit would have been time-barred but for the minority of one of them and there is no evidence to show that the brother who was major was *karta* of the family, the suit is not barred, inasmuch as the major brother could not have given a valid discharge or ratification. A.I.R. 1937 Pat. 155=3 B.R. 367=18 P.L.T. 383=167 Ind. Cas. 934.

——S. 7—Applicability and scope.

Joint Hindu family—Suit by member against stranger transferee from manager—Stranger setting up title by adverse possession—Time run out against manager—Existence of minor members does not save limitation—Section 7 does not apply. 1935 A.W.R. 474=1935 R.D. 182=A.I.R. 1935 All. 746 (2)=(1935) A.L.J. 838=57 A. 891=155 Ind. Cas. 569.

——S. 7—Applicability and scope.

It cannot be laid down that in all cases where the operation of S. 7 is invoked, there must be proof of *de facto* management by the major member.

The fact that there was no other property except the suit property and that, therefore, there was nothing for managing member to manage is no test for the application of S. 7. (1935) M.W.N. 964=A.I.R. 1935 Mad. 1085=158 Ind. Cas. 874.

——S. 7—Applicability and scope—Failure of Hindu manager to sue—Whether affects minor members.

Where, in a suit for recovery of possession of property which the plaintiffs alleged had been given in trust to the defendants during the plaintiff minority the defendants contended that, as the manager of the family, one of the plaintiffs had failed to sue within three yearr after attaining majority, the whole suit was barred undes S. 7, but this contention was rejected on the ground that the manager of the family was not competent to give a valid discharge in the circumstances of this case as there was obviously no benefit to the family in not instituting a suit for the property in dispute and allowing it to remain in the possession of the defendants :

Held, that S. 7 could not be held to be inapplicable on the ground alleged by the lower Court. The fact that the act of manager was not for the benefit of the family was immaterial for the purposes of S. 7.

Section 7 is not confined in its operation to discharge of debts but is wide enough to cover rights to immovable property. A.I.R. 1933 Lah. 479=34 P.L.R. 384=142 Ind. Cas. 295.

——S. 7—Applicability and scope—Gift by widow—Failure of major reversioner to sue—Suit by minor reversioner within three years of attaining majority—Limitation.

A widow made a gift in 1908. In 1925, the plaintiff, who was admittedly a collateral and below 21 years of

age, instituted a suit for a declaration that it would not affect his reversionary rights. The plaintiff's father and elder brother who were alive when the gift was made had not challenged the gift, and the defendant contended that the suit was, therefore, barred under S. 7.

Held, that S. 7 was not applicable and the suit was not barred. A.I.R. 1932 Lah. 39=132 Ind. Cas. 665.

——S. 7—Applicability—Mahomedans—Suit to recover dower by sons.

The right to recover dower of Mahomedan lady descends to her heirs. The position of the sons *qua* their right to the dower debt is not that of joint tenants but is that of tenants-in-common. Where the right to recover the dower debt was inherited in part by the debtor himself, *viz.*, the husband, S. 7 will not apply to a suit by the minor sons on attaining majority. 116 Ind. Cas. 481=1929 A.L.J. 284=A.I.R. 1929 All. 142.

——S. 7—Applicability and scope.

Section 48, C. P. Code, is not a rule of limitation and does not imply that running of time will not be suspended against a minor, because S. 48 cannot override, S. 7, Lim. Act which definitely says that time will not run. 119 Ind. Cas. 39=1929 M.W.N. 158=30 M.L.W. 361=A.I.R. 1929 Mad. 394.

——S. 7—Applicability—Reversioners—Section 7 does not apply to the case of reversioners.

The plaintiff brought a suit within three years of his attaining majority to set aside an alienation made by a limited owner. At the time of the alienation he was an infant and there were two persons, one his brother and another a cousin, who could have challenged the alienation. They did not choose to challenge it and the plaintiff's suit was more than twelve years after the date of alienation.

Held, that the suit was barred. 99 Ind. Cas. 668=25 M.L.W. 161=A.I.R. 1927 Mad. 216=52 M.L.J. 13.

——S. 7—Applicability.

Section 7 does not apply to the case of a suit by minor to set aside alienation by a *de facto* guardian. 99 Ind. Cas. 1050=A.I.R. 1927 Nag. 145.

——S. 7—Applicability—Idol.

Section 7 is not applicable to a suit to set aside an improper alienation by a shebait of the property belonging to a Hindu God, as the God cannot be deemed a perpetual minor for the purpose of limitation. 93 Ind. Cas. 652=48 All. 348=24 A.L.J. 351=A.I.R. 1926 All. 392.

——S. 7—Applicability and scope—Joint Hindu family—Redemption suit—Major member not filing suit for redemption in time—Minor member is not barred.

The right to redeem a mortgage of joint family property vests in all the members of the family whoever is the manager, and it is difficult to see how the right of a minor member to redeem, which was in existence during his minority could be defeated by the fact that a major member did not file a suit to redeem within the period allowed to him. A suit for redemption of a mortgage, limiation of whichexpired during the minority of the two sons of the deceased mortgagor, brought three years after the attaining of majority of the elder brother but within three years of the attaining the majority of the younger brother, is not barred. 64 Ind. Cas. 972=46 Bom. 535=23 Bom. L.R. 1191=A.I.R. 1922 Bom. 319.

——S. 7—Applicability—Subsequent disability—No saving of limitation.

Where time had already commenced to run against the decree-holders from the date on which their application for the execution of the decree was struck off, the decree-holders were not entitled to the benefit of S. 7 by reason of the minority of some of the decree-holders. 16 A.L.J. 633=40 All. 630=46 Ind. Cas. 584 (F.B.).

——S. 7—Applicability.

The section provides that a minor could apply even after he had attained the age of majority but within a period prescribed. 34 Bom. 589=12 Bom. L.R. 694=7 Ind. Cas. 944.

——Ss. 7 and 8—Applicability—Non-liability of minor to the law of limitation.

Minors have no privilege of disability, in respect of limitation, under the Act of 1908, except as regards suits and applications for execution, though under the older Act, they had this privilege in respect of all applications in judicial proceedings. This is a privilege conferred by law and cannot be affected by any subsequent statute. 14 C.W.N. 845=11 Ind. Cas. 401.

——S. 7—Applicability.

Section does not apply where disability had not existed when the right to apply accrued. 20 C.W.N. 852=34 Ind. Cas. 86.

——S. 7—Applicability.

The provisions of Revenue Sale Law are complete and S. 7 of the Limitation Act does not apply to a suit brough out by a minor to set aside a Revenue Sale. 13 C.W.N. 518=4 Ind. Cas. 70.

——S. 7—Applicability.

Section 7 would apply where time has not run out, under Limitation Act of 1877 before coming into force of the new Act. 8 M.L.T. 341=(1910) M.W.N. 540=8 Ind. Cas. 164.

——S. 7 (S. 8)—Applicability—Bengal Regulation—Putni Regulation (VIII of 1819), S. 14—All co-sharers if must sue jointly.

Where one or more of several plaintiffs is or are a minor or minors if the provisions of S. 8, of the Limitation Act, (XV of 1877), apply time would not have commenced to run against any of them and it would not be necessary to expressly claim exemption. One of several co-owners of a *putni* taluk can alone institute a suit to set aside a *putni* sale as contemplated by S. 14 of Reg. VIII of 1819, provided that the purchaser is made a party and the whole sale is sought to be set aside S. 8 of the Limitation Act (XV of 1877) has no application to such a suit, and a minor co-owner would be entitled to bring such a suit even though the adult co-owners would have allowed their right to be time barred.C.W.N. 128=11 G.L.J. 34=2 Ind. Cas. 77.

——S. 7, Arts. 12, 25—Applicability—Suit by co-sharer of a revenue paying estate for declaration that sale did not affect his interest. *See* **REVENUE SALE LAW, S. 33. 13 C.W.N. 518=4 Ind. Cas. 70.**

——S. 7 (S. 8)—Applicability and scope—Tenants in common—Joint obligees.

S. 8 of the Limitation Act does not affect the rule of equity that one tenant in common cannot give a valid discharge for his co-tenants in common and consequently the fact that one of two tenants-in-common is a minor cannot stop the running of limitation as against the other. (1902) A.W.N. 216=25 A. 155.

2. Co-heirs.

——S. 7—Co-heirs—Tenants-in-common—No right to give discharge.

In Mahomedan family, the heirs are entitled to definite shares as tenants-in-common and the cause of action of such heirs cannot be said to be a joint one for the purpose of limitation. 36 M.L.J. 184=51 Ind. Cas. 748.

——S. 7—Co-heirs—Must oin ijn suit for accounts of partnership.

In a suit for accounts of the partnership on the death of a partner all the representatives of the deceased should join. S. 7 applies to the case. 33 Ind. Cas. 564. (Mad.).

3. Co-partners.

——S. 7—Co-partners—Dissolution of partnership—Limitation.

One member of a partnership even if it has been dissolved is entitled to give a valid discharge of a debt to the partnership. A suit by a minor partner for his share of a loan by the partnership within three years after he became a major but more than three years after dissolution is barred. 10 L.W. 67=52 Ind. Cas. 456.

4. Discharge by adult brother.

——S. 7, Art. 182—Discharge by elder brother.

Joint decree in favour of two brothers—Elder acting as next friend of younger who is insane—Decree empowering elder to recover amount—Power of elder to give valid discharge—Younger brother is not entitled to benefit of S. 7. (1933) M.W.N. 895=A.I.R. 1934 Mad. 103 (1)=39 L.W. 62=148 Ind. Cas. 54 (1).

——S. 7—Discharge by adult brother.

A joint elder brother in a Hindu family represents the entire family and can therefore give a discharge within the meaning of S. 7 on behalf of his minor brother. 41 All. 435, Foll. 87 Ind. Cas. 177=6 L.R.A. Civ. 299=A.I.R. 1925 All. 672.

——S. 7—Discharge by adult brother—Every adult brother in a Hindu family is not necessarily manager—The question is one of fact and must be alleged and proved as a fact.

It cannot be predicated of every Hindu family, that an adult brother, as soon as he becomes major becomes the manager and therefore necessarily competent to give discharge. Payment to one may not in every case operate as full discharge. This depends upon several questions of fact and upon a variety of circumstances varying with different families, and unless the necessary facts are properly alleged and proved by the party who wants to deprive the person under disability of the benefit of S. 6 of the Limitation Act the claim cannot be thrown out as barred by limitation.

Unless the questions as to whether the major brother was or was not a manager, as a fact and whether, and if so when, he became capable of giving discharge without the concurrence of others, and whether the right of suit was of such a nature as could be enforced jointly, are decided as questions of fact, it is not possible to decide upon the applicability or otherwise of the first or the second part of S. 7. 88 Ind. Cas. 268=A.I.R. 1925 Nag. 385.

——S. 7 and Art. 126—Discharge by adult brother—Joint Hindu family Alienation by father—Suit by Sons subsequently born.

Where a suit to set aside an alienation by a Hindu father is brought by the eldest son within three years of his attaining majority, sons born subsequent to the alienation are entitled to join in the suit and get their share. 44 Cal. 966=(1913) M.W.N. 661=14 M.L.T. 163=17 C.W.N. 1189=18 C.L.J. 237=15 Bom. L.R. 867=11 A.L.J. 865=25 M.L.J. 512=10 N.L.R. 1=40 I.A. 213=20 Ind. Cas. 958 (P.C.).

——Ss. 7 and 6—Discharge by adult brother.

A suit by two sons of one of whom attained majority more than 15 years before suit and the other only within 3 years before suit, to recover properties sold away by their guardian is within time because the elder son could not have given a valid discharge without the concurrence of the younger brother under S. 8, old Act, and the suit was brought within 3 years of the latter attaining majority. 31 All. 156=6 A.L.J. 62=1 Ind. Cas. 824.

——S. 7 and Art. 44—Discharge by adult brother—Sale by mother as natural guardian—Suit to set aside.

Where a Hindu mother as natural guardian of the minor sons sells their property without necessity, a suit to set aside the sale is barred by limitation under S. 7 and Art. 44 if brought more than three years after the eldest son attained majority. 22 Bom. L.R. 1383=45 Bom. 446=A.I.R. 1921 Bom. 289.

——S. 7—Discharge by adult brother—Power to give—Cash allowance.

Where plaintiffs are jointly interested in a cash allowance, they can sue to recover it, though one of them is a minor at the date of the suit. 42 Bom. 277=20 Bom. L.R. 161=44 Ind. Cas. 851.

——S. 7 and Art. 44—Discharge by adult brother—Minor co-parceners—Attainment of majority by eldest—Limitation.

Where a minor could on attaining majority give discharge in a joint family on behalf of other minors in the family a suit for setting aside an alienation by a testamentary guardian barred as regards him would be barred against the other minors too. 38 Bom. 94=15 Bom. L.R. 882=21 Ind. Cas. 350.

——Ss. 7 and 8 and Art. 44—Discharge by adult brother—Mitakshara joint family—Suit by younger brother more than 3 years after attaining majority.

A suit brought by a younger undivided brother of a *Mitakshara* joint family is wholly barred under Ss. 7

and 8 and Art. 44 of the Limitation Act, if brought more than three years after the elder brother attained majority even though the younger brother attained majority, within three years prior to the suit. 38 Mad. 118, Foll. 43 Mad. 842=39 M.L.J. 375=12 L.W. 243=59 Ind. Cas. 662.

——S. 7—Discharge by adult brother—Suit for possession and mesne profits—Enfranchisement of inam.

Time began to run from the date of enfranchisement of an *inam*, both as against the elder brother and against the present minor plaintiffs and their claim for mesne profits was barred except as to three years before suit. 10 L.W. 422=53 Ind. Cas. 161.

——S. 7—Discharge by adult brother—Joint cause of action.

Where two brothers have got the same cause of action and the elder brother could institute the suit for himself and his younger brother, on that joint right and joint cause of action, S. 7 would become applicable and would bar the younger brother's right when the elder brother's becomes barred. But where the cause of action is distinct, the mere fact that the elder brother could have oined it with his, does not bring the suit within S. 7 of the Act. 41 Mad. 102=33 M.L.J. 309=40 Ind. Cas 664.

——S. 7—Discharge by adult brother—Suit to set aside alienation by guardian—Starting point.

For a suit to set aside alienation by the members of a joint Hindu family, limitation begins to run from the date of the elder brother's attaining majority. (1915) M.WN. 908=32 Ind. Cas. 802.

——Ss. 7, 8 and Art. 44—Discharge by adult brother—Alienation by mother—Suit to set aside alienation—Limitation.

Properties belonging to two minor brothers forming a joint Hindu family were sold in 1895. In 1909 the plaintiffs sued for recovery of possession of the properties and on the date of suit the elder brother was 23 years old. *Held*, that the suit was governed by Art. 44 of the Limitation Act and the suit was barred against both the brothers on the expiry of 3 years after the date of the elder brother's attaining majority. 38 Mad. 113=25 M.L.J. 405=14 M.L.T. 401=21 Ind. Cas. 410.

——S. 7—Discharge by elder brother—Hindu family.

(Per *Abdur Rahim, J.*)—Co-parceners of a Hindu joint family seeking to recover family property from alienee are claimants within S. 7 and it is immaterial whether the alienation is manager or guardian. The elder brother on attaining majority becomes capable of giving a valid discharge within S. 7. (Per *Sundara Iyer, J.*).—The section applies whether the third column of the schedule provides that time would run from a certain date, and the section postpones the running of time. Hence though the elder brother's right of action is barred, that of the younger is not barred. The section does not apply to cases governed by Art. 44. 10 M.L.T. 418=(1911) 2 M.W.N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——S. 7—Joint Hindu family of brothers—Discharge by one.

The mother of the plaintiffs, who was appointed their certificated guardian in 1886 obtained permission to sell a portion of the minors' property, and effected a sale on 28th April, 1886, contrary to the terms on which sale had been sanctioned by the District Judge. The present suit was brought by the minors for cancellation of sale-deed and possession of the property. The suit was brought within 3 years of the plaintiff No. 2's attaining majority, but after 15 years of plaintiff No. 1's attaining majority. The lower Court dismissed the suit on the ground that plaintiff No. 1's long silence amounted to giving a discharge by him to the defendant within the meaning of S. 8, of the Limitation Act, and consequently, the suit was barred. *Held*: that all that plaintiff No. 1 did was to remain quite inactive and he could not give a valid discharge without the concurrence of plaintiff No. 2 within the meaning of S. 8, of the Limitation Act. (1908) 6 A.L.J. 62=31 A. 156=1 Ind. Cas. 824.

——S. 7 (Ss. 7, 8)—Discharge by adult brother—Decree in favour of one adult and three minors, his brothers—Decree for rent—Starting point of limitation—Art. 179.

Where a decree for rent is in favour of one adult and three minors, his brothers by their mother as next friend, the adult plaintiff can give a valid discharge for all and and so S. 8 and not S. 7, of the Limitation Act, applies. The starting point of limitation in such a case is when the money is payable. (1901) 6 C.W.N. 348.

5. Discharge by guardian.

——S. 7—Scope of—Discharge by certificated guardian out of Court—Validity of—Civil Procedure Code, O. 32, R. 7.

Section 7 Limitation Act, contemplates a legal capacity to give discharge without the concurrence of the person under disability. The section requires that the co-decree-holder, in addition to his capacity as a co-decree-holder, must have such legal capacity as would empower him alone to realize the decretal debt and give a discharge without putting the decree into execution, even if his minor co-decree-holder had been under no disability and had the capacity to give his assent.

Consenquently, where one of the joint decree-holders is a minor and one of the others is his certificated guardian, a discharge given by such guardian out of Court is not a discharge without the concurrence of the minor within the meaning of S. 7, as whatever may be the power of the certificated guardian to collect other moneys of the minor, his power to receive money payable to a minor under a decree is subject to the permission of the Court. A.I.R. 1935 Cal. 631=63 C. 92=158 Ind. Cas. 567.

——S. 7—Discharge by guardian—Joint Hindu family—Decree in favour of.

Whether a valid discharge for payments made by the judgment-debtors can be given by a manager of joint. Hindu family acting as guardian having regard to O. 32, R. 6, depends upon the construction of the decree.

When the decree dispenses with the separate application and sanction which might otherwise be necessary and allows manager to receive the amount so long as he furnishes security, the manager is competent to grant discharge in favour of the minor and he is not entitled to benefit of S. 7. 121 Ind. Cas. 446=31 Bom. L.R. 963=A.I.R. 1929 Bom. 382.

——S. 7—Discharge by guardian—Joint Hindu family—Granting discharge.

Time cannot be extended under S. 7 in a suit for accounts where, although one of the plaintiffs is a minor the other can give a valid discharge on behalf of both.

Plaintiffs formed a joint Hindu family. One of them was a minor but the other was the manager of the family as well as his certificated guardian.

Held, that the elder plaintiff could give valid discharge in either of his capacities and no time could therefore be extended. 115 Ind. Cas. 354=48 C.L.J. 555=A.I.R. 1929 Cal. 165.

——S. 7—Discharge by guardian—Joint Hindu family—Decree in favour of minor—Hindu father acting as next friend of plaintiffs cannot give a valid discharge nor can eldest among brothers—Extension of time is available.

Where Hindu father and his minor sons sue, the latter suing through the former as next friend, the period of limitation for execution of decree runs against each son from the date of the majority.

Where a decree was obtained in a suit in which the plaintiffs were a father and his three sons and the three sons were described on the face of the proceedings as suing through their next friend and guardian, the first plaintiff, *i.e.*, the father and where the father died before execution:

Held, that an execution application taken out by the eldest son within three years after his attaining majority was not barred though more than three years had passed after the passing of the decree, since neither the father nor the eldest son could give a valid discharge for the defendant:

Held, further that so long as one of the decree-holders was a minor no question of limitation really arose in the case. 82 Ind. Cas. 785=47 Mad. 920=20 M.L.W. 342=35 M.L.T. 92=1924 M.W.N. 773=A.I.R. 1925 Mad. 78=47 M.L.J. 389.

——S. 7—Discharge by guardian—Right to give valid discharge.

A Muhammadan mother who is a *de facto* guardian having no authority to transfer or deal with the property of the minors cannot give a valid discharge for the payments made to the minors. 41 All. 473=17 A.L.J. 582=50 Ind. Cas. 770.

——S. 7—Discharge by guardian—Application by guardian of a major decree-holder.

Application for execution made by the guardian of a major decree-holder is not invalid as per decisions in 20 B. 383 and 22-A. 199 and the applicability of those cases had not ceased owing to any change in the words of S. 7 of the Limitation Act of 1908. 34 Bom. 672=12 Bom. L.R. 682=7 Ind. Cas. 939.

——S. 7 (S. 8)—Discharge by guardian manager—Managing member of Hindu joint family—Joint right to sue for tort—Joint creditors or claimants.

In the case of a joint *Mitakshara* family where a right is vested in all the members jointly, the managing member may, within the meaning of S. 8 of the Limitation Act, give a discharge without the concurrence of the minor members of the family and time may, therefore, run against all the members of the undivided family including the minor members thereof. As a general rule where a joint right to sue arises out of a tort one or some of the holders of such right cannot give a discharge without the concurrence of the others unless they are all partners or executors or members of a joint Hindu family the manager of which has implied authority to bind all the members by a discharge given by them. The test to be applied is whether it is the intention of the parties that each of the persons, in whose favour the obligation is created, is a creditor for the whole; if so a payment to one liberates the debtors against all the creditors; if not each is a creditor for his own share and cannot give a discharge for the whole obligation. The powers of a guardian appointed by the Court to take care of a minor's property cannot be nullified, and the minor's elder brother cannot give a discharge as regards the minor's share without the concurrence of such guardian. S. 8, of the Limitation Act, applies only to cases where the joint creditors or claimants are persons whose substantive right is joint, that is where more than one individual possesses the same identical substantive right; the section does not apply to persons whose right are distinct and different, but who are permitted to enforce such separate right by one judicial process. (1907) 6 C.L.J. 383.

6. Discharge by manager.

——S. 7—Discharge by manager.

Suit in name of joint Hindu family firm by manager on his own behalf and as next friend of his minor brother—Decree obtained—*Held*, that, manager cannot give valid discharge within S. 7 without leave of Court. 44 P.L.R. 368=A.I.R. 1942 Lah. 280=203 Ind. Cas. 295.

——S. 7—Discharge by manager—Eldest member of joint Hindu family—Presumption—Whether can give discharge without concurrence of other members—Burden of proof.

When there is an eldest member of a family, the presumption is that under the Hindu Law, he is the manager of the family. If he is the manager, under S. 7, Limitation Act, discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned. If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge, it is incumbent on the person to prove the facts rebutting the said presumption 51 M.L.W. 648=(1940) 1 M.L.J. 195=A.I.R. 1940. Mad. 530=(1940) M.W.N. 582=I.L.R. (1940) Mad. 752=191 Ind. Cas. 369.

——S. 7—Discharge by manager.

The manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree, just as he can in the case of a suit and the mere fact that one of the members is a minor will not prevent time running against all the members of the family. 41 All. 435; A.I.R. 1921 Bom. 289; 42 Bom. 277 and 21 M.L.J. 1088, Foll. 110 Ind. Cas. 276=52 Bom. 441=30 Bom. L.R. 537=A.I.R. 1929 Bom. 13.

——S. 7—Discharge by manager.

The Manager of a joint Hindu family being member of a joint Hindu family, can give a valid discharge on his own behalf and on that of a minor brother, and therefore the minor cannot take advantage of S. 7. 41 All. 435, Foll. 94 Ind. Cas. 922 (All.).

——S. 7—Discharge by manager—Joint Hindu family—Receipts by manager.

The managing member of a joint Hindu family can give good receipts on behalf of the family, which will bind the family. 34 All. 549 ; 38 Mad. 118 ; 45 Bom. 446, Foll. 80 Ind. Cas. 12=5 L.R.A. (Civ.) 386= A.I.R. 1924 All. 738.

——Ss. 7, 9 and 19—Discharge by Manager.

Where a father obtained a loan in September, 1897 and acknowledgment was made on 19th July, 1899 and again on 22nd August, 1902 and a suit was brought by the creditor on the 8th of July, 1902 and a decree obtained in November, 1902 and when the creditor proceeded to execute it against the sons after the father's death the sons resisted execution and then the plaintiff the creditor's son instituted another suit against the debtor's sons,it was held that the acknowledgment merely created a new period but did not give the plaintiff a new cause of action entitling him to rely on S. 7 of the Act ; but that the decree in the previous suit was a debt which the sons had a pious duty to discharge. 6 A.L.J. 378=1 Ind. Cas. 759.

——S. 7 and Art. 109—Discharge by Manager.

The managing member of a joint Hindu *Mitakshara* family may give a valid discharge without the concurrence of the other members and so time begins to run against those who were minors at the time of the accrual of the cause of action and they will be entitled to mesne profits, only for 3 years prior to the suit. 13 C.W.N. 815 =1 Ind. Cas. 670.

——S. 7—Discharge by Manager—Decree debt—Joint Hindu family.

A major manager of a joint Hindu family can give a valid discharge of a decree debt within S. 7 of the Limitation Act so as to make time run against minor members of the family. 21 M.L.J. 1088, Foll. (1917) M.W.N. 816=44 Ind. Cas. 566.

——S. 7—Discharge by Manager—'Discharge'—Meaning of—Malabar Tarwad—Karnavan's right to give discharge.

'Discharge' in S. 7 is not confined to pecuniary liability but includes also "release of rights to immoveable property." 25 M. 26, Foll. In the absence of fraud, a *Karnavan* sufficiently represents a *tarwad* as to be able to give a discharge even on behalf of the minor members. 1914 M.W.N. 231, Foll. 16 M.L.T. 241=1914 M.W.N. 689=25 Ind. Cas. 755.

——S. 7—Discharge by Manager—Decree in favour of a joint Hindu family—Managing member a major and the rest minors.

In the case of a decree in favour of a joint Hindu family and the managing member where a major is in a position to give a discharge without the concurrence of the other members, the minority of the latter does not extend the period of limitation for execution of the decree. 15 M.L.T. 100=(1914) M.W.N. 159=22 Ind. Cas. 76.

——S. 7—Discharge by Manager—Execution of decree.

The Manager of a joint Hindu family has a right to execute a decree for his own benefit and that of the remaining members of the family and to give a valid discharge without the concurrence of the other members. If the Manager fails to exercise his right, time runs against all the members of the joint family including minors. 30 Ind. Cas. 75 (Oudh).

——S. 7—Hindu Law—Joint family—Managing member's right to give discharge.

In the case of a joint *Mitakshara* family where a righ is vested in all the members' jointly the managing member may within the meaning of S. 8 of the Limitation Act (1877) give a discharge without the concurrence of the minor members of the family and time may consequently run against all the members of the undivided family including the minor members thereof. (1909) 13 C.W.N. 815=1 Ind. Cas. 670.

7. Interpretation.

——S. 7—"Discharge", whether includes release of rights to institute suit.

The term 'discharge' in S. 7 does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immovable property such as even the equity of redemption or a release of other rights, as for instance, a right to institute a suit. 18 P.L.T. 385=A.I.R. 1937 Pat. 435=3 B.R. 717=16 Pat. 422=170 Ind. Cas. 362 (F.B.).

——S. 7—Interpretation.

Section 7 refers beck to S. 6 to which it serves as an appendix and the words "such disability" in S. 7 means a disability of a kind which is of the nature and existed at the time, referred to in the preceding section. 64 Ind. Cas. 757=8 O.L.J. 667=24 O.C. 330=A.I.R. 1921 Oudh 196.

——S. 7 (S. 8)—'Joint claimants', meaning of.

The term "joint claimants" is used in S. 8 with reference to persons whose substantive right is joint, *i.e.*, with refernce to more than one individual possessing the same identical substantive right. The expression does not comprehend persons whose rights are *distinct* and *different*, but who are permitted to enforce such separate rights by one judicial process to which all are parties or by a process instituted by one on behalf of all. A right to sue for an account by the members of a deceased partner is joint and indivisible, notwithstanding the several character of their interests *inter se* in the profits. 15 M.L.J. 363=28 M. 479.

——Ss. 7, 8—Combined operation of—'Discharge —'Joint claimants'.

S. 8 saves the bar in the case of all claimants if they claimed jointly and none of them could give or could at any time have given a valid discharge without the concurrence of the others. 20 M. 461 will not apply to the case of co-heirs of a single promisee. Under the Mahomedan law the manager cannot give a valid discharge on behalf of the minors and so S. 8 will apply. It will be different in the case of a Hindu family. The discharge contemplated by S. 8 of the Limitation Act is by one or more of the joint creditors or claimants by virtue of their being such creditors or claimants. The fact that a minor's guardian, who also happens to be a co-claimant with the minor, can in his or her capacity as guardian of the minor give a discharge is not a discharge within the purview of the section. The combined operation of Ss. 7 and 8 of the Limitation Act considered. 20 M. 461, discussed; 13 M. 236; 7 A. 313, approved on the construction of the Limitation Act. (1901) 25 M. 26.

——Ss. 7, 8, Sch. II, Art. 179—Interpretation—Joint decree in favour of three persons—Previous application more than three years before while one decree-holder

was a minor—Attainment of majority by that decree-holder within three years of present application—'joint execution creditors' are not 'joint creditors' within S. 8—C. P. Code, S. 231. (1902) 12 M.L.J. 166=25 M. 431 (F.B.).

8. Joint decree-holders.

——S. 7—Joint decree-holders—One of deceased legal representatives minor—Majors cannot give valid discharge—S. 7 is not affected by C. P. Code, O. 21, R. 15.

S applied for execution of a money decree which he had obtained against the judgment-debtor. During the pendency of their proceedings he died leaving three sons, *A*, *B* and *C*, of whom *C* was a minor. They were brought on record as the legal representatives of *S* and continued the proceedings which were ultimately consigned to the record room on 21st June, 1924, leaving a balance still payable under the decree *C* on attaining majority applied for execution on 16th August, 1929 and was met with a plea that the application was barred by limitation.

Held, that the minor and his two brothers, being legal representatives of their father, who was the original decree-holder, constituted one legal representative of the decree-holder and that one of them could not execute the decree nor give a valid discharge.

Held, further that O. 21, R. 15, C. P. Code, did not confer an unconditional right on one of the decree-holders to execute the decree, that such a right was subject to control by the executing Court, that the above rule did not affect S. 7, Limitation Act, and that the application for execution was not barred by limitation. A.I.R. 1931 Lah. 5=130 Ind. Cas. 403.

——S. 7—Joint decree-holders.

Where a joint decree for possession of land and demolition of a construction is passed in favour of a major and a minor although their interests were distinct and separate, the major cannot give a valid discharge for the minor and, therefore, an execution applicatiin by the minor within three years from attaining majority is not barred. 118 Ind. Cas. 229=1929 A.L.J. 72=A.I.R. 1929 All. 267.

——S. 7—Joint decree-holders—Joint decree—Minor daughters—Time extended.

One of several minor Mahomedan daughters, who are joint decree-holders, cannot after attaining majority give a discharge without the concurrence of others. Section 7 will, theefore, apply and time will not run against any of them till all of them become major for the purpose of the execution of the decree and it would make no difference that there was a next friend who had instituted the suit on minor's behalf. 119 Ind. Cas. 234=A.I.R. 1929 Lah. 467.

——S. 7—Joint decree-holders—Decree-holders not proved to be members of a joint Hindu family—The adult alone cannot give a valid discharge.

A joint decree was passed in favour of three persons, two of whom were minors. It was not proved that the decree-holders were members of a joint undivided Hindu family, nor whether they were living under the Mitakshara or Dayabhaga School of Hindu Law, nor whether the major member was acting as karta of a joint Hindu family of which the decree-holders were members,

Held, that the adult member was not able to give a discharge to the judgment-debtors within S. 7, Limitation Act. 104 Ind. Cas. 668=47 C.L.J. 38=32 C.W.N. 192=A.I.R. 1927 Cal. 952.

——S. 7—Joint decree-holder—Succession certificate under Act (VII of 1889)—Concurrence of all decree-holders necessary.

Adult certificate-holders are not competent to give a valid discharge to the judgment-debtor without the concurrence of the minor decree-holders.

Where the certificate under Act VII of 1889 was issued in the name of all the decree-holders and where the decree was passed in the name of the adult son and the widow of a deceased person and his three minor sons represented by their adult brother as their guardian.

Held: *Suhrawardy*, *J.*, (Contra).—S. 7 of the Limitation Act contemplates a case where a decree-holder holds such a legal character as to be able in law to give discharge on behalf of his co-decree-holders. 17 A.L.J. 649, Foll. 84 Ind. Cas. 204=51 Cal. 566=A.I.R. 1924 Cal. 710.

——S. 7—Joint decree-holders.

Where two of three joint execution creditors are minors the other execution creditor who is *sui juris* is not competent to grant a valid discharge so as to bind the interest of the minors. 78 Ind. Cas. 285=A.I.R. 1924 Lah. 681.

——S. 7—Joint decree-holders—Decree in favour of major and minor members of joint Hindu family—Discharge—Limitation.

Where a decree is in favour of major and minor member of joint Hindu family the manager has the same power of dealing with the decree and granting a discharge to the debtor as he had before the debt merged into the decree. S. 7 of the Limitation Act treats the suit by joint creditors on the same footing as an application by joint decree-holders and contemplates that one oint creditor can be empowered to give a discharge without the concurrence of the others. That power could not be given by a minor after the decree in his faovour so that the section contemplates an authority apart from and anterior to the decree. (1913) M.W.N. 288=13 M.L.T. 304=18 Ind. Cas. 723.

——S. 7—Joint decree-holders—Discharge by.

If one of several decree-holders can give a discharge without the concurrence of others, S.7 applies. The cases in which one decree-holder can give a discharge binding the other decree-holders must be decided by the substantive law of the parties. 21 M.L.J. 1088=10 M.L.T. 370=(1911) M.W.N. 420=12 Ind. Cas. 503.

——S. 7—Joint decree-holders.

One of the two joint decree-holders cannot give a valid discharge of the decree without the concurrence of the other. Therefore, such a discharge does not prevent the decree-holder from taking advantage of S. 7. 9 M.L.T. 482=(1911) 2 M.W.N. 307=10 Ind. Cas. 464.

——Ss. 7, 8—Joint decree-holder—Limitation Act (XI of 1908), S. 7—Minors—Decree-holders minors—Application to execute the decree an behalf of some of the joint decree-holders—Application ensures for all discharge by one decree-holder under S. 231, C. P. Code, 1882, or O. 21, R. 15, C. P. Code

1908, not one contemplated by S. 8 of the Limitation Act of 1877 or S. 7 of the Act of 1908.

Two minors represented by a guardian obtained a decree in 1901. Applications to execute the decree were made in 1904, 1905 and 1906. At those dates one of the decree-holders had attained majority, but the other was a minor. In 1908 both the decree-holders applied to execute the decree as majors. The defendants contended that the elder decree-holder having attained majority, the applications by the guardian had been, as to her, unauthorized and the present darkast for execution of the decree was barred as regards her. It was also contended that as the elder decree-holder was able to give a discharge, since her majority, for the decretal debt, without the concurrence of the minor time had run against both under S. 8 of the Limitation Act, 1877 and certainly under S. 7 of the Limitation Act of 1908. *Held*, that though the elder decree-holder had attained majority, the applications made by the guardian as next friend of the younger decree-holder took effect in favour of both, for by reason of the first explanation of Arts. 179, 182, of the Limitation Act an application made by one of several joint decree-holders took effect in favour of all.

Held also, that the contention under S. 8 of the Limitation Act of 1877, or S. 7 of the Act of 1908 was inconsistent with the decisions in 20 Bom. 383, and 22 A. 199. The applicability of 20 B. 383, 22 A. 199 has not ceased owing to any change in the words of S. 7 of the Limitation Act of 1908. (1909) 12 Bom. L.R. 682=7 Ind. Cas. 939=34 Bom. 672.

——S. 7—Joint decree-holder—One of several joint decree-holders being a minor.

Where one of several joint decree-holders is a minor, S. 7 of the Limitation Act can save an appliation for execution by the minor decree-holder from being barred by limitation. That section is not limited to a case where the sole decree-holder is a minor, or all the decree-holders are minors. (1901) 5 C.W.N. 767=28 C. 465. *Also* (1904) 1 A.L.J. 407=1904 A.W.N. 163=27 A. 67.

9. Joint promisees.

——S. 7—Joint promisees—Minority of one.

A payment to one of several joint promisees is a good discharge of the liability. A minor promisee of a pronote cannot sue on it after 3 years, when the adult copromisee allows it to be barred. 36 Mad. 544=13 M.L.T. 268=(1913) M.W.N. 328=24 M.L.J. 333=19 Ind. Cas. 12 (F.B.).

——S. 7—Joint promisees—Person severally entitled—Suit for possession.

Where several persons jointly entitled to a certain property are dispossessed and a suit is brought for the recovery of possession, S. 7 of the Limitation Act does not apply if each individual plaintiff is entitled to sue for his individual share. 51 Ind. Cas. 797 (Cal.).

10. Running of limitation.

——S. 7—Running of limitation.

Where no valid discharge can be given without the concurrence of the minor decree-holder by the other decree-holders, time does not run against any of them till the minor attains majority. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198.

——S. 7—Running of limitation.

Elder brother attaining majority but not being manager unable to sue on behalf of minor brother :

Held, that in such a case, the time will not run against the minor brother. A.I.R. 1938 Bom. 206=40 Bom. L.R. 127=174 Ind. Cas. 820.

——S. 7—Running of limitation—Co-mortgagees—One of the co-mortgagee decree-holders a minor—Time, if begins to run against adult decree-holders

A co-mortgagee cannot give a valid discharge in respect of mortgage debt so as to bind his co-mortgagee. Where one of the mortgagee decree-holders is a minor, limitation does not begin to run against the major decree-holders until the disability of the minor decree-holder ceases. 37 C.W.N. 838=A.I.R. 1934 Cal. 1 (3)=149 Ind. Cas. 1062.

——S. 7—Running of limitation.

Mijority—Suit by two brothers—Elder attaining majority more than three years before suit—Time runs against younger brother also and the suit is barred under S. 7. 39 L.W. 795=A.I.R. 1934 Mad. 469=67 M.L.J 27=(1934) M.W.N. 635=58 M. 155=150 Ind. Cas. 76.

——S. 7—Running of limitation—Death of decree-holder—Joint legal representatives—Minority of some, whether stops running of time.

If a decree-holder dies leaving several legal representatives, one of these alone cannot execute the decree or give a valid discharge without the concurrence of the others, and if one of them happens to be a minor, time for applying for execution of the decree will not run against any of them under S. 7, until the minor attains majority.

O. 21, R. 15, C. P. Code does not give an unconditional right to one of several decree-holders to execute the decree and does not really affect the operation of S. 7, Limitation Act. A.I.R. 1931 Lah. 5=130 Ind. Cas. 403.

——S. 7—Joint Hindu family—Running of limitation—Adverse possession.

Where co-parceners other than the father or the manager are suing, a limitation runs even against a minor member of a joint Hindu family as regards adverse possession if his father who was joint with him was a major at the time that the adverse possession began. 110 Ind. Cas. 293=A.I.R. 1928 Lah. 484.

——S. 7—Joint Hindu family—Running of limitation.

Where a cause of action accrues to two brothers of a joint Hindu family when they are minors, limitation runs from the date on which the elder of the two becomes major. 59 Ind. Cas. 662=43 Mad. 842=12 M.L.W. 243=39 M.L.J. 375.

11. Setting aside alienation.

See also LIMITATION ACT, S. 6—REVERSIONERS.

——S. 7—Setting aside alienation.

Sons of daughter of last Hindu male-holder—Elde cannot give valid discharge on behalf of younger—Son are joint tenants—Suit by sons one major and one minor

to set aside alienation by their mother and for possession—Limitation did not begin to run until all persons entitled to sue became majors. A.I.R. 1944 Mad. 512=(1944) 2 M.L.J. 117=57 M.L.W. 459=1944 M.W.N. 516.

——S. 7—Setting aside alienation—Hindu minor barred—Alienation by mother guardian—Suit to set aside alienation—Suit barred against elder brother—Whether barred against younger.

There can be no doubt that the right of the members of the joint Hindu family consisting of two brothers to institute a suit to recover the property alienated by their mother as their guardian and in the possession of a third person is a right jointly enjoyed by them and they must be regarded as persons jointly entitled to institute the suit. There is no justification for holding that the manager of the joint Hindu family consisting of these two persons is not capable of giving a discharge or release of the right to institute such a suit. On the failure of the elder brother to institute a suit within the period of limitation prescribed for a suit by him, the right of suit for the recovery of this property becomes barred not only against him but also against the other members of the Hindu joint family and it cannot be said that the younger brother has a separate individual right to institute such a suit. A.I.R. 1941 Oudh 165=1940 O.W.N. 1237=1941 A.W.R. 12=191 Ind. Cas. 825.

——S. 7—Setting aside alienation—Eldest major brother not acting as manager—Suit by other brothers to set aside alienation by father within three years of their attaining majority.

Where, in a joint Hindu family, the eldest major brother never acted as the manager and could not have given a valid discharge without the concurrence of other brothers, a suit by other brothers to set aside an alienation of the joint family property by their father instituted within three years of their attaining majority is not barred by time. A.I.R. 1938 Bom. 500=40 Bom.L.R. 1029=179 Ind. Cas. 33.

——S. 7—Setting aside alienation—Alienation by mother of two minor sons—No other property belonging to minor brothers as members of joint familt and they maintained by aunt—Presumption—Suit by elder brother after more than three years after attaining majority to set aside alienation.

It is correct to say that he presumption under the Hindu Law is that ordinarily the eldest brother would be the manager of the joint family, but where in a case, the evidence shoes that excepting the property sold by the mother of two minor sons there was no other property as such which belonged to the two brothers as members of the jojnt family and the two brothers were actually thrown on the streets on the dea h of their father and for a long time they were being maitntained by their aunt it cannot be held that the ordinary presumption, which arisesi n the case of a joint Hindu family possessed of ancestral property, that the eldest brother must be deemed to be the manager of the family and its property, can apply to such a case and the suit is, therefore, barred only against the elder brother and not as against the younger brother. A.I.R. 1938 Bom. 392=40 Bom.L.R. 521=177 Ind. Cas. 286.

——S. 7—Setting aside alienation—Alienation of property belonging to Hindu minors by their mother—Suit by minors to set aside alienation.

Where, during the minority of four undivided Hindu brothers their mother sold land belonging to their joint family and after the expiry of more than three years from the date on which the eldest brother had attained majority, the other brothers instituted a suit to set aside the sale :

Held, that as the eldest brother was the manager of the family, and was, as such, capable of giving a discharge without the concurrence of his younger brothers, time ran from the date when the eldest brother attained majority and the suit was time-barred.

The presumption is that the eldest brother, when he is the senior adult member of a joint family consisting of himself and his younger brothers is the family manager and the fact that at some time or other, he did not live with his brothers but at some distance is not sufficient to rebut this presumption and to render S. 7, inapplicable. 44 L.W. 479=(1936) M.W.N. 1128=A.I.R. 1936 Mad. 914=165 Ind. Cas. 656.

——S. 7 and Art. 44—Setting aside—Alienation—Sale by mother as guardian-Suit to set aside sale—Cause of action, when arises for minor—Limitation against eldest son—Bar, if operates against younger son.

A suit to set aside a sale of a family property without necessity by a Hindu mother acting as natural guardian of her sons is barred under S. 7 and Art. 44, if instituted after three years of the eldest son's attaining majority. Where the eldest of the sons is capable of giving a discharge within the meaning of S. 7, when the bar of limitation operates against him, it will so operate against his younger brother also. A.I.R. 1935 Bom. 259=37 Bom.L.R. 225=157 Ind. Cas. 592.

——Ss. 7, 6—Setting aside alienation—Personal right—Joint family—Alienation by mother without legal necessity—Failure of elder son to sue within three years of becoming major—Whether debars younger son from suing to set aside sale.

The manager of a joint Hindu family is supposed to represent the interests of the co-parceners in all matters which are for the benefit of them as a whole, but he cannot prejudice the personal right of any one of them by his inaction. The right of a Hindu son to impeach a sale executed by his mother without legal necessity is personal to him and the failure of the elder son to sue within three years of his attaining majority does not debar the younger from instituting the suit, even though the elder may be the manager of the joint family. 15 N.L.J. 87=141 Ind. Cas. 520.

——S. 7—Setting aside alienation—Applicability to suits for setting aside transfers.

Section 7 has got no application to any but the cases to which it is made applicable, namely, to debts and to execution of decrees. Therefore the fact that the manager of the family would have granted a discharge of a debt due to the family does not mean that the claim of each individual member of a joint Hindu family is barred because the *karta* or manager did not choose to institute a suit to avoid any transfer that any other member could challenge. A.I.R. 1931 All. 398=133 Ind. Cas. 155.

——S. 7—Joint Hindu family—Setting aside alienation.

The right to impeach an alienation by father or manager of a joint Hindu family is an individual right enjoyed severally by each of the joint members of the family an consequently a suit by one of the several members of the family is maintainable, and if certain members are minors

on the date of alienation any one of such minor members can bring the suit within three years of his date of majority. 1930 A.L.J. 852=A.I.R. 1930 All. 861.

——S. 7—Joint Hindu family—Setting aside alienation—Declaratory suit by major member—Time-barred suit by major plaintiff—Suit barred against minors as well.

Plaintiffs brought a suit for declaration to the effect that a mortgage-deed executed by their deceased guardian during their minority was not binding on them. Plaintiffs were members of a joint Hindu family. One of them was major while rest of them were minors. The major plaintiff was the managing member of the joint family and the suit was filed by him on his own behalf and on behalf of the minors. He had, however, filed the suit more than three years after the attaining of his majority.

Held, that the suit of the major plaintiffs and so also of the minors was barred by limitation as the manager (the major plaintiff) could give a valid discharge and acquitance of the claims without the concurrence by the minor members. 38 Mad. 118 and A.I.R. 1921 Bom. 289, Foll. 114 Ind. Cas. 59=A.I.R. 1929 Lah. 14.

——S. 7—Joint Hindu family—Setting aside alienation.

If the eldest brother, who is naturally the managing member of the joint family, does not bring a suit within time to set aside an alienation, any suit by a younger brother would be barred inasmuch as the suit is barred against the elder brother. 38 Mad. 118, Foll. 106 Ind. Cas. 863=1927 M.W.N. 911=A.I.R. 1928 Mad. 42=53 M.L.J. 677.

——S. 7—Setting aside alienation.

A suit brought by the younger son to recover property of his father passing to a third person after the father's death within three years of attaining majority is not barred by limitation, although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation. 98 Ind. Cas. 508=A.I.R. 1927 All. 188.

——S. 7—Setting aside alienation.

A suit brought by some sons within three years of their majority to set aside alienation by father is not barred though one of the sons had long before three years reached majority. 16 Mad. 436 and 83 Mad. 118, impliedly overruled. 93 Ind. Cas. 216=48 All. 152=53 I.A. 36=24 A.L.J. 97=1926 M.W.N. 197=3 O.W.N. 365=43 C.L.J. 374=28 Bom.L.R. 851=30 C.W.N. 698=A.I.R. 1926 P.C. 16=50 M.L.J. 344 (P.C.).

——S. 7—Setting aside alienation—Alienation by father—Elder son attaining majority but not questioning it—Suit by younger son within three years of his attaining majority is not barred.

A suit brought by the son within three years of his attaining majority to avoid the sale effected by his father is not barred by limitation although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation. A.I.R. 1926 P.C. 16, Foll. 98 Ind. Cas. 31=24 M.L.W. 475=1926 M.W.N. 767=A.I.R. 1926 Mad. 1190=51 M.L.J. 845.

——S. 7—Setting aside alienation—Right to challenge alienation is a personal right of every co-parcener.

The right of avoidance, or of challenging an alienation is a personal right which every co-parcener enjoys in virtue of his position as such co-parcener in a joint family owning joint or ancestral property and its non-enforcement does not depend upon the sweet will of any particular individual It is the birth right of every member and cannot be therefore taken away by anything done or omitted to be done by another member of the family, unless that another can bind the other. A minor co-parcener is not bound by the mere failure of the major co-parcener to avoid the alienation within 3 years of his attaining majority. expecially where it is found to be not supported wholly by necessity and therefore not binding as against him. 88 Ind. Cas. 268=A.I.R. 1925 Nag. 385.

——S. 7—Setting aside alienation.

Suit by minor sons to set aside mortgage of ancestra. property by father—Minor brother of vendor living at the time of mortgage—Sons can get no benefit thereby. 1 Lah. 558, Foll. 63 Ind. Cas. 760=3 Lah. 99=A.I.R. 1922 Lah. 275.

——S. 7—Setting aside alienation—Rule explained

The plaintiffs sued to recover possession of lands after setting aside the sale-deed passed by their mother during their minority. The plaintiffs were brothers, members of a joint family. One of them was more than 21 years of age and manager of the joint family when he filede the suit.

Held, that he could have given a discharge and acquittance of all claims against the defendants without the concurrence of the other plaintiffs as manager of the joint Hindu family and so the entire suit was barred by limitation.

Per *Fawcett, J.*—The main object of the Legislature in S. 7 is to limit the indulgence which is otherwise given to minors, so that if there are several minors who can claim the benefit of S. 6 that concession does not extend to cover the whole period of time up to the youngest of the minors becoming a major, but can only be availed of by the eldest of them. 38 Mad. 118, Foll. 59 Ind. Cas. 759=45 Bom. 446=A.I.R. 1921 Bom. 289.

——S. 7—Setting aside alienation—Individual right to set aside alienation by father.

The rights of Mahomedan co-heirs to set aside alienation made by father are independent of each other. The fact, therefore that the eldest brother of the minor plaintiff can no longer sue does not affect the right of the plaintiff to sue. 122 Ind. Cas. 92=A.I.R. 1929 Lah. 582.

12. Miscellaneous.

——S. 7—Period for suit.

The period of limitation prescribed for a suit of the nature to which the provisions of Ss. 6, 7 and 8 of the Limitation Act apply must be taken to be the period reckoned on the basis of the time provided for by the schedule and also of the provisions of S. 8 of the Act. 81 Ind. Cas. 484=11 O.L.J. 297=A.I.R. 1924 Oudh 385.

——**S. 7—Miscellaneous—Discharge by Receiver—Receiver of decree-holder's estate—Right to give valid discharge.**

Where in a suit between partners some of whom were minors a Receiver was appointed with full powers to realise the decree debts of the firm,

Held, that the decretal debts vested in the receiver on the date of the appointment and from that date he was competent to give a discharge. An application for execution more than 3 years after the appointment of the Receiver will be barred. 18 C.W.N. 138=20 Ind. Cas. 701.

——**S. 7—Miscellaneous—Idol—Shebait.**

S. 7 cannot be construcd in such a way as to regard an idol as a perpetual infant with the *shebait* as its Manager. 13 C.W.N. 805=3 Ind. Cas. 93.

——**S. 7—Miscellaneous—If Court bound to raise** ex proprio motu **the special plea in party's favour—C.P. Code, S. 115.**

A Court is bound to throw out a suit or application filed after the period of limitation, but is not bound to protect the interest of a party by raising *ex proprio motu* the point whether he is entitled to proceed out of time by reason of some special provision of law, *e.g.*, S. 7 of the Limitation Act. 17 C.W.N. 667=18 Ind. Cas. 391.

——**S. 8—Alienation by Hindu father.**

A suit brought by younger son to set aside alienation by father within three years of his attaining majority, though the elder son had attained majority more than three years earlier and had allowed his claim to set aside the alienations to become barred, is not barred. A.I.R. 1926 P.C. 16, Foll. 109 Ind. Cas. 572=51 Mad. 627=28 M.L.W. 311=1928 M.W.N. 708=A.I.R. 1928 Mad. 1055=55 M.L.J. 30.

——**S. 8—Cause of action in minority.**

Where plaintiff is minor when cause of action arises time does not run against him until minority is over. 1929 A.L.J. 1233=A.I.R. 1929 All. 963.

——**S. 8—Minority — Adverse possession—Title when complete.**

Title by adverse possession against a minor is not complete before the end of three years after his attaining majority. 33 Mad. 366=20 M.L.J. 355=7 M.L.T. 140=5 Ind. Cas. 84.

——**S. 8—Period for suit.**

The period of limitation prescribed for a suit of the nature to which the provisions of Ss. 6, 7 and 8 of the Limitation Act apply must be taken to be the period reckoned on the basis of the time provided for by the schedule and also of the provisions of S. 8 of the Act. 81 Ind. Cas. 484=11 O.L.J. 297=A.I.R. 1924 Oudh 385.

——**S. 8—Ratification—Effect of.**

Where an application for execution was made by the guardian *ad litem* of a minor the minor had attained majority, but the latter ratified the application with 3 years of his attaining majority :

Held, that the ratification rendered the application valid from the date of ratification. 32 P.L.R. 290=A.I.R. 1931 Lah. 600=135 Ind. Cas. 207 (2).

——**S. 8—Revival of right to sue—Revival of right to sue may occur when previous satisfaction is nullified. (Case-law fully discussed).**

Ordinarily limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re-animated. Whenever proceedings are being conducted between the parties *bona fide* in order to have their natural rights and obligations in respect of a matter finally settled the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settle such rights and liabilities. 79 Ind. Cas. 520=39 C.L.J. 40=A.I.R. 1924 Cal. 600.

——**S. 8—Right to extension.**

Where any Court is of opinion, on the true construction of a document, that it is taken in the name of a minor or in the name of a minor acting by his guardian, then the minor has got three years from attaining his majority within which to bring his suit on the document. But if on the other hand, a Court is of opinion that the document is taken solely by the guardian, then that extended period would not be open for the benefit of the minor. 10 Bom. 241, Foll. 100 Ind. Cas. 95=50 Bom. 831=28 Bom.L.R. 1431=A.I.R. 1927 Bom. 61.

——**S. 8—Scope and effect.**

S. 8 of the Limitation Act provides that, in those case, in which the application of S. 6 of the Act results in an extension of the period prescribed by Schedule I, that extension is not to be for more than three years after the cessation of the disability. If on the other hand, the original period prescribed by Sch. I expires more than three years after the termination of the disability then, up to the date on which the limitation prescribed by that schedule expires, there is no question of any extension of time and S. 8 will not operate to curtail the period of limitatioon. A.I.R. 1948 Oudh 351.

——**S. 9**

Synopsis.

1. Adverse possession.
2. Applicability.
3. "Disability."
4. Execution proceedings.
5. Limitation, when begins to run.
6. Reversioners.
7. Scope and effect.
8. Suspension or revival.
9. Miscellaneous.

1. Adverse possession.

——**S. 9, Art. 141—Adverse possession against Hindu last male-holder—Intervention of limited estate—Effect.**

Where adverse possession commences to run against the last male owner himself, the intervention of the limited estate will not prevent time running and will not enable the reversioner coming after the limited owner to say that he has got a fresh cause of action on the death of the owner of the limited estate. A.I.R. 1942 Oudh 303=1942 O.W.N. 191=1942 A. W.R. 139=200 Ind. Cas. 265.

——S. 9—Adverse possession, interruption of—Co-sharers—Ouster of, by stranger—Subsequent acquisition of ownership to a portion of the property.

Where a person has begun to hold possession of land adversely to two co-sharers, each being the owner of a moiety, and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, although he has become jointly interested with the other. 46 I.A. 285=10 L.W. 679=(1919) M.W.N. 724=24 C.W.N. 346=38 M.L.J. 313=18 A.L.J. 274=53 Ind. Cas. 901 (P.C.).

——S. 9—Adverse possession as against vatandar—Title not fully prescribed—Death of the vatandar and succession of minor.

Where a person was in adverse possession against one vatandar for seven years and the vatandar died and was succeeded by a minor, the successor's minority will not stop limitation that had already commenced to run in favour of the person in adverse possession. (1904) 7 Bom.L.R. 135.

2. Applicability.

——S. 9—Applicability—Cause of action remaining cancelled till certain event.

Section 9, Limitation Act contemplates cases where the cause of action continues to exist. S. 9 cannot apply to cases where the cause of action is cancelled by subsequent events. A.I.R. 1943 Nag. 178=I.L.R. (1943) Nag. 422=1943 N.L.J. 159=207 Ind. Cas. 214.

——S. 9—Applicability.

Assuming that the words 'to sue' in S. 9 include an application for delivery of possession, the section contemplates cases where the cause of action continues to exist. It cannot apply to cases where the cause of action is cancelled by reason of subsequent events. A.I.R. 1935 Cal. 333=62 C. 66=158 Ind. Cas. 191.

——S. 9—Proviso—Applicability.

The proviso to S. 9 applies only to an administrator under the grant of letters where he is a debtor of the deceased. 11 Bom.L.R. 1187=4 Ind. Cas. 283.

——S. 9—When applicable.

S. 9 has no application in a case where the plaintiff who institute the suit does not derive his right to sue from or through the person who was dispossessed, *e.g* where a son adopted by the widow sues for recovery of possession of property from which the adoptive mother was dispossessed. (1905) 9 C.W.N. 795=2 C.L.J. 87.

3. "Disability".

——Ss. 9 and 15—"Disability"—"Inability"—Alien enemy—S. 9 of the Limitation Act covers the case of an alien enemy who is disbarred from suing in consequence of a declaration of war.

The general rule is that once a limitation has begun to run, a subsequent 'Disability' to sue will not avail to stop it in the absence of express statutory provision. Per *Sanderson, C.J.* :—The Legislature in enacting S. 9 of the Limitation Act did not mean the same thing by the use of two words "disability" and "inability". An express statutory provision on a particular matter would have the effect of overriding any common law rule regarding the same. Per *Woodroffe, J.*,—S. 15 of the Limitation Act refers to orders of Civil Courts and not to the case of an alien enemy is prevented from suing owing to a declaration of war. 46 Cal. 526=23 C.W.N. 157=47 Ind. Cas. 398.

——S. 9—"Disability"—Alien enemy.

S. 9 of the Act makes no exception in favour of alien enemies who are prevented from suing in consequence of a declaration of war. The "disability" in S. 9 means want of legal ability and is quite different from inability to sue. 47 Ind. Cas. 122 (Cal.).

——Ss. 9 and 31—Disability, subsequent—Application of S. 6 to S. 31.

Limitation once begun to run, cannot stop by any subsequent disability and there is no distinction between voluntary and involuntary disabilities. The period fixed under S. 31 cannot be extended by an application of S. 6. 18 Ind. Cas. 306 (O).

——S. 9—Inability and disability to sue Distinction between. See S. 7. 6 Bom.L.R. 639=29 B. 68.

4. Execution proceedings.

——S. 9—Execution proceedings.

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted when the decree on appeal is one of dismissal.

Where a decree-holder purchases a property in execution but loses possession of the same in a separate suit by a third party, his fresh application for execution or for revival of execution, if one is maintainable, must be filed within three years of the trial Court's decree. 107 Ind. Cas. 42=50 All. 211=25 A.L.J. 937=A.I.R. 1928 All. 46.

——S. 9—Execution proceedings—Injunction ordered by High Court conditionally on paying interest from dismissal of suit—Time for recovering interest runs from dismissal of suit.

The respondents filed a suit calling in question the validity of petitioner's decree against a common debtor *N* and for an injunction to prevent petitioner from drawing an amount deposited by *N*. The respondent's suit was dismissed by the Subordinate Judge on 22nd December, 1915, and the High Court ordered a new trial on 19th October, 1916. Previously on 28th January, 1916, the High Court granted an injunction on condition that the respondents paid 9 per cent. interest to the petitioner from 22nd December, 1915, the date of the dismissal of their suit by the Subordinate Judge. On 28th October, 1919, the High Court finally dismissed the respondent's suit. On 1st October, 1920 the injunction was dissolved on an appeal to the Privy Council being abandoned. The petitioner applied for execution together with 9 per cent. interest on 23rd February, 1922.

The appellant clearly could, from 22nd December, 1915 to 19th October, 1916 (at least) the date when the High Court ordered a re-trial, seek execution. It is extremely doubtful whether having regard to S. 9, Limitation Act, any deduction ought to be made in favour of the appellant and the application must fail on the point of limitation. 104 Ind. Cas. 750=1927 M.W.N. 529=39 M.L.T. 394=A.I.R. 1927 Mad. 927.

——S. 9—Execution proceedings.

Where the creditor fails to execute decree, the time taken to prove his will cannot be excluded in calculating the period for execution of decree. 79 Ind. Cas. 284= 1 Bur.L.J. 192=A.I.R. 1923 Rang. 98.

Limitation, when begins to run.

——S. 9—Limitation, when begins to run—Where cause of action has not arisen limitation cannot begin to run.

It is a fundamental principle that limitation always implies an existing cause of action and unless the cause of action for a suit has arisen limitation for such suit cannot begin to run. A.I.R. 1946 Nag. 277=1946 N.L.J. 690=I.L.R. (1946) Nag. 159.

——S. 9—Limitation, when begins to run—Time runs from the knowledge of order.

Where an order has been duly issued and a party is apprised of that order, time will run, even though it is directed that a notice of an order shall be sent.

The appellant knew of an order of an Official Receiver rejecting the proof of her debt in 1926 by 1927. She appealed in 1930, and urged that her knowledge was immaterial so long as formal notice was not conveyed to her as required by the High Court Rules :

Held, that the appeal was barred. 40 L.W. 145= 57 M. 1030=68 M.L.J. 65=A.I.R. 1935 Mad. 149= (1935) M.W.N. 176=153 Ind. Cas. 167.

6. Reversioners.

——S. 9—Reversioners.

The right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and time begins to run simultaneously against them all and no subsequent disability stops it. 22 All. 32 (F.B.), *Diss.* ; 21 P.W.R. 1907 ; 22 P.R. 1907 ; 41 Mad. 659 (F.B.), *Foll.* 90 Ind. Cas. 1022=26 P.L.R. 695=A.I.R. 1925 Lah. 654.

——S. 9—Reversioner—Suit for possession—Time, once it begins to run cannot stop running.

The father of plaintiff filed a suit during thr lifetime of the widow to set aside alienations by her. The suit was held to be not maintainable as he was held not to be the nearest heir, but another *B*. After the widow's death *B* brought a suit to recover possession of the properties. But he was found not to be a reversioner at all. Then plaintiff filed another suit for possession of the properties more than 12 years after the death of the widow.

Held, that limitation when it once begins to run cannot stop running except in the particular exception mentioned in S. 9 of the Limitation Act. 35 All. 227, *Foll.* 70 Ind. Cas. 446=16 M.L.W. 529=A.I.R. 1923 Mad. 108= 44 M.L.J. 87.

——S. 9—Reversioner—Suit to declare an adoption invalid—Nearest reversioner for bearing to sue—Suit by next reversioner, born after adoption—No fresh cause of action.

A suit for a declaration that an adoption is invalid is a representative suit which the nearest reversioner is entitled to bring on behalf of the whole body of reversioners, born and unborn, within the period prescribed in Art. 118, and time begins to run from the time the adoption becomes known to the plaintiff.

The fact that the nearest reversioner did not bring the suit because he had been bribed to give his consent to the adoption and that the next reversioner was born after the alleged adoption and before the suit had become barred under Art. 118, would not give him any fresh cause of action or stop time running which had begun to run against the whole body of reversioners from the date of the adoption. 60 Ind. Cas. 98=44 Mad. 218= A.I.R. 1921 Mad. 380=12 M.L.W. 499=29 M.L.T. 43=39 M.L.J. 621.

——S. 9—Reversioner.

When time once begun to run against a reversioner for contesting the validity of an alienation of ancestral property no subsequent disability to sue on the ground of minority of another reversioner, can suspend it. 61 P.W.R. 1915=144 P.L.R. 1915=29 Ind. Cas. 761.

7. Scope and effect.

——S. 9—Scope and effect of the rule in—Suit for possession on mortgagor entitling mortgagee to possession on default in payment of interest—Payment and acceptance of interest after due dates—Effect on starting point.

While the principle laid down in S. 9 of the Limitation Act cannot be disputed, it is subject to certain exceptions Even where time has begun to run, it can be stopped provided the cause of action which had given the right to sue is discharged or in any way disappears. If the cause of action is discharged the right to sue no longer exists and consequently the time will no longer continue to run.

Where a mortgage provides for the mortgagee obtaining possession in case of default in the payment of interest and there are defaults but the interest is subsequently paid and accepted by the mortgagee and a suit for possession is brought more than 12 years after the execution of the mortgage but within twelve years of the last default, the suit would be in time. The right to sue arising on defaults were satisfied by payments and the cause of action having been discharged, the time for limitation would no longer continue to run. A.I.R. 1950 All. 526.

——S. 9, scope and effect.

Per *Cornish, J.*—Section 9 fixes the conditions and not a period of limitation to a creditor's right to present an insolvency petition. No period is fixed by the Insolvency Act for presenting an insolvency petition. What the Act provides is that a creditor shall not be entitled to present a petition grounded upon an act of insolvency which occurred more than three months before, which is quite a different thing from saying that a petition may be presented within three months from the commission of an act of insolvency. (1935) M.W.N. 685=42 L.W. 330=69 M.L.J. 283=A.I.R. 1935 Mad. 857=58 M. 794=158 Ind. Cas. 1 (F.B.).

——S. 9—Scope and effect.

Section 9 prescribes that once time has begun to run, no subsequent disability or inability to sue stops it. 25 A.L.J. 861=A.I.R. 1927 All. 818.

——S. 9—Scope and effect—Succession of limited owner.

Limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended.

if he dies and is succeeded by a limited owner. 92 Ind. Cas. 177=5 Pat. 441=7 P.L.T. 393=1925 P.H.C.C. 343=A.I.R. 1926 Pat. 192.

——S. 9—Scope and effect of—Time, Interruption of—Satisfaction of claim—Annulment of—Subsequent cause of action.

Certain disputes between a principal and an agent were referred to arbitration and under the award thereon certain moneys were paid by the agent in satisfaction of the claim. The agent afterwards sued to set aside the proceedings on the ground that they were brought about by coercion and succeeded in getting back the amount paid. The principal subsequently sued the agent to enforce the original liability to account. The defendant *inter alia* pleaded that the suit was barred.

Held, that the setting aside of the satisfaction in the former proceedings gave rise to a fresh cause of action, and that the suit was therefore in time. 43 M. 845=39 M.L.J. 312=(1920) M.W.N. 505=12 L.W. 240=59 Ind. Cas. 472.

——S. 9—Scope and effect—Time—Continuous running of—Merger of interests.

Once time begins to run for a suit on a mortgage there is no suspension of the running of time during the period when there has been a fusion of the interests of the mortgagor and the mortgagee. 35 All. 227=40 I.A. 74=25 M.L.J. 131=13 M.L.T. 437=17 C.W.N. 605=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom.L.R. 489=19 Ind. Cas. 291 (P.C.).

——S. 9—Scope and effect—Time—Continuous running of—C.P. Code, S. 48.

The period of 12 years prescribed by S. 48, C.P. Code must be computed from the day on which it begins to run. The running of time of 12 years under S. 48 is not suspended during minor's minority succeeding to his deceased father who died after the decree is passed. 36 Bom. 498=14 Bom.L.R. 387=15 Ind. Cas. 829.

——S. 9—Scope and effect—Time—Continuous running of—Running.

Where once time has begun to run against a party the subsequent minority of his heirs does not stop it. 42 Ind. Cas. 809 (L.B.).

——S. 9—Scope and effect—Time—Continuous running of.

Where a landlord comes to know of a transfer time commences to run from the date of the knowledge and a successor cannot compute time from the date of his the latter's knowledge. 5 N.L.R. 28=1 Ind. Cas. 906.

——S. 9—Scope and effect—Time—Continuous running of—Instalment bond—Commencement of limitation before minor is vested with right.

Where limitation to recover instalments due under a certain instalment bond had begun to run before the right to recover those instalments had vested in a minor; the time having once commenced to run the minority of the minor could not arrest the running of limitation. 36 Cal. 394=9 C.L.J. 226=13 C.W.N. 1004=1 Ind. Cas. 49.

——S. 9, Art. 75—Scope and effect—Instalment bond—Default—Waiver—Cause of action—Hindu widow—Adoption—Abstinence from suing.

In the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment, limitation runs from the date of the non-payment of that instalment unless there has been a waiver by the payee or the obligee by the acceptance of overdue instalments: 11 C.W.N. 903 not foll. An unregistered instalment bond was executed in favour of a Hindu widow. It stipulated for payment of money in certain instalments falling due on certain dates and in the event of default in payment of two consecutive instalments the creditor should be at liberty to recover the entire amount due on the bond. Default was made and there was no payment. Shortly after the default the widow adopted the plaintiff, who while still a minor, instituted a suit for the recovery of the amount of instalments other than the first two, more than 9 years after the first two instalments became due.

Held:—That as the cause of action arose on the failure of the first two instalments and as under S. 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation, the suit was barred under, the three years' rule of limitation under Art. 75. A mere abstinence on the part of the plaintiff from bringing a suit for the recovery of the whole amount due on the failure of payment of the first two instalments does not amount to waiver. 7 W.R. 21: B.L.R. Sup. Vol. 618 foll. 9 C.L.J. 226=36 C. 394=13 C.W.N. 1004=1 Ind. Cas. 49.

——S. 9—Scope and effect.

C.P. Code, S. 146—Attachment—Arrest of time running—Fresh start—Bengal Tenancy Act, Sch. III, Art. 3—Limitation which has commenced to run does not cease; nor is a fresh period given by an attachment made under S. 146 of the C.P. Code. Limitation under Art. 3 of Sch. III, Bengal Tenancy Act, begins to run from the date of the ouster and an attachment under S. 146, Cr.P. Code, does not stop nor give a fresh period of limitation. (1906) 5 C.W.N. 160=28 C. 86 (D.B.). *See also* 11 M.L.J. 344=26 M. 410.

8. Suspension or revival.

——S. 9—Suspension of limitation.

Once the period of limitation has begun to run, it cannot be suspended unless such suspension is expressly provided for in the Limitation Act. A.I.R. 1937 All. 481=1937 R.D. 302=I.L.R. (1937) All. 628=1937 A.L.J. 979=1937 A.W.R. 539=170 Ind. Cas. 657.

——S. 9—Suspension or revival of cause of action—Tests.

After limitation has begun to run, the question whether it can be suspended otherwise than in accordance with S. 9 or other provisions of the Limitation Act admits of two conflicting answers; (1) that there may be a revival of the right to sue when the previous satisfaction of the claim is nullified with the result that the right to sue which has been suspended is animated, and the true test to determine whether a cause of action accrued is to ascertain the time when the plaintiff could have maintained his action to a successful result; (2) that except perhaps in case where injustice has been occasioned by a Court by its own act or oversights, there is no scope for the application of any principles of equity in the administration of the statute law of limitation, and a revival of a cause of section once satisfied or cancelled is foreign to the conceptions of the statute law of limitation. A.I.R. 1933 Bom. 276=35 Bom.L.R. 440=145 Ind. Cas. 190.

——S. 9—Suspension or revival of cause of action—Submersion of land.

The fact that the mortgage property becomes submerged under water does not cause any suspension of the period of limitation for a suit to enforce the mortgage. A.I.R. 1933 Pat. 693=146 Ind. Cas. 856.

——Ss. 9 and 15—Time—Suspension of—Pendency of insolvency proceedings.

It is not open to a plaintiff suing on a pro-note to deduct the time during which insolvency proceedings were pending against the defendant. S. 15 of the Limitation Act does not apply so as to save limitation in a case where a suit could have ben instituted with the leave of the Insolvency Court. 42 Mad. 319=36 M.L.J. 104 =25 M.L.T. 247=(1919) M.W.N. 698=49 Ind. Cas. 625.

9. Miscellaneous.

——S. 9—Appointment of Receiver.

Where the Receiver, or the Proprietors, or both jointly, could take steps to recover *khas* possession.

Held, the mere appointment of a Receiver could not prevent the statute of limitation running. 76 Ind. Cas. 511=38 C.L.J. 220=A.I.R. 1924 Cal. 118.

——S. 9—Miscellaneous appeal—Failure to file decree copy—If sufficient cause for extension of time.

Failure to present the decree copy in an appeal within the time allowed for appeal amounts to not filing the appeal at all and time cannot be extended especially when the opportunity once granted, was lost. 2 P.W.R. 1914= 25 P.L.R. 1914=23 Ind. Cas. 319.

——S. 9—Miscellaneous—Exemptions.

Exemptions not covered by Ss. 9 and 14 and the other sections should not be imported by Courts to relieve a party from the bar of limitation. 71 Ind. Cas. 495= 4 Lah. 90=A.I.R. 1924 Lah. 40.

——S. 10.

Synopsis.

1. Applicability and scope.
2. Assigns.
3. Beneficiary.
4. Executors or administraters.
5. Express Trust.
6. Guardian or manager.
7. Implied Trust.

See also LIMITATION ACT, S. 10—APPLICABILITY AND SCOPE.

8. Interpretation.
9. Religious Endowments.
10. Specific trust.
11. Trust by operation of law.
12. Trustee de son tort.
13. Trust property with stranger.
14. Trustee, who is.
15. Trust property.
16. Miscellaneous.

1. Applicability and scope.

——S. 10 and Art. 98—Applicability—Suit against legal representative of guardian of minor's property for amount taken by guardian from minor and not repaid by him.

A suit against the legal representative of a guardian of minor's property for an amount taken by the latter from the minor while he was his guardian and which had not repaid, is governed not by S.10 of the Limitation Act but by Art. 98 of that Act. S. 10 is inapplicable to the suit as a guardian of property appointed under the Guardians and Wards Act is not a person in whom property is vested for a specific purpose. He is however a trustee within the meaning of the Limitation Act as that term is widely used in that Act in its generic sense to cover every variety of trust including, not only trusts proper, but also all obligations in the nature of a trust, save only those expressly excepted by the definition given in S. 2 (ii). Therefore Art. 98 of the Act applies to the suit. I.L.R. (1948) Nag. 794=A.I.R. 1949 Nag. 235= 1949 N.L.J. 154.

——S. 10 (as amended)—Applicability—Transfer of endowered property for value.

S. 10 (as amended) of the Limitation Act applies to transfers of endowed property which are not for value. Transfer for value are outside that section. 54 C.W.N. 960.

——S. 10—Applicability—Suit to recover trust property—Trustees fraudulently dividing it among themselves.

Where properties have been conveyed to trustees upon express trust for a deity and the trustees fraudulently put an end to the trust and divide the properties amongst themselves, S. 10 of the Limitation Act applies to a suit by the deity to recover the properties and there can be no question of limitation at all. 51 C.W.N. 383= I.L.R. (1946) 2 Cal. 447.

——S. 10—Applicability and scope—Section covers only express trustee and not constructive trustees.

Section 10 contemplates trustees who are known in English Law as express trustees. A trust for specific purpose is one for a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which from the specified terms, can be certainly affirmed. Trusts Act makes a sharp distinction between trust created by act of parties and certain obligations which are not trusts but which are considered to be in the nature of trusts. Only the former class is covered by S. 10. Under English Law, however constructive or resulting trusts are as much trusts as express trusts. 47 Bom. L.R. 934=A.I.R. 1946 Bom. 131.

——S. 10—Applicability—Sale of property of deceased Mahomedan—Sale proceeds handed over to person for distribution among heirs—If express trust created—Suit for share by one heir—Limitation—Starting point. I.L.R. (1946) Mad. 423=224 Ind. Cas. 21=1945 M.W.N. 671=58 M.L.W. 555=A.I.R. 1946 Mad. 116=(1945) 2 M.L.J. 422.

——S. 10—Applicability and scope.

The word 'trust' in S. 10, Limitation Act is used in the same sense as in the Trusts Act, 1882, and the expred sion 'vested in trust' implies that the ownership in the property has been conveyed to the person referres to in the section.

Where a banker accepts a deposit of trust money with notice of the trust, he does not become a trustee of the money in the strict sense of that expression and consequently a suit for recovery of the deposit by the cestui que trust will not be governed by S. 10, Limitation Act. A.I.R. 1946 Mad. 519=(1946) 1 M.L.J. 31=I.L.R. (1946) Mad. 429=1946 M.W.N. 9=59 M.L.W. 725.

——S. 10—Applicability and scope.

Section 10 applies only to a case of property which has become vested in trust for specific purpose and it has, therefore, no application to a case where property is held by a donee under a deed of gift which was executed under undue influence. I.L.R. (1945) Kar. P.C. 115 (Sup.)=49 C.W.N. 303=47 Bom. L.R. 274=A.I.R. 1945 P.C. 54=(1945) 1 M.L.J. 253=1945 M.W.N. 217=58 L.W. 176=(1945) A.L.J. 280=11 B.R. 470=I.L.R. (1945) Bom. 440=220 Ind. Cas. 28 (P.C.).

——S. 10—Applicability and scope—Suit for declaration that property is trust.

Section 10 contemplates the following or pursuit of concrete property and not right where the suit is not under S. 92, C. P. Code but under S. 42, Specific Relief Act, for a declaration that certain property is trust property S. 10, Lim. Act does not apply. Suit is governed by Art. 120, Lim. Act. A.I.R. 1945 Sind 57=I.L.R. (1945) Kar. 40.

——S. 10—Applicability and scope—(Before amendment)—No distinction can be made between property of temple and profits thereof in hands of trustees.

Section 10 is not limited to tracing actions. Section 10 can be used for the purpose of following property in the hands of a trustee or for an account of such property; the section applies where the trustee or the legal representative is asked to account for money that was in his hands as trustee.

The profits of a land are an accretion to the land and stand in precisely the same position as property itself. When the trustees of a temple collect rent from the cultivators, they act as the agents of the temple. The moment the money is paid to them, it belongs to their principal, the temple, and not to them, the agents. Consequently, under S. 10 no distinction can be made between the property of the temple and the profits of that property which comes into the hands of the trustees. A.I.R. 1943 Mad. 691=56 L.W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Scope and applicability—Suit against trustee barred before amendment—Amendment cannot revive it.

Although there is provision in Lim. Act of 1908 corresponding to S. 2 of Lim. Act 15 of 1877 the principle embodied in that section, namely, that a suit once barred cannot be revived by a subsequent change in the law still operates. Hence a suit against the trustee of a temple is barred where the plaintiff had lost his remedy against the trustee before the amendment of S. 10 took place. Section 6, General Clauses Act also applies to the amendment of S. 10 and bars such a suit. A.I.R. 1943 Mad. 691=56 L.W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Applicability and scope—(Before amendment of 1929)—S. 10 or its amendment if creates vested right.

Section 10 or its amendment does not create any vested right. It, in effect, says that the periods of limitation laid down in the other provisions of the Lim. Act shall not apply in certain cases to person in whom property has vested in trust for a specific prupose. It does not create any right in the property or take away any right in it. The trustee who retains or misappropriates temple funds never acquires any right to them. A.I.R. 1943 Mad. 691=56 L.W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Applicability and scope.

Where the right of the plaintiff had become barred by limitation before the amending Act of 1929 was passed, the mere institution of the suit after 1929 cannot prove the effect of reviving the right. A.I.R. 1943 Pat. 289=22 Pat. 133=10 B.R. 31=208 Ind. Cas. 129.

——S. 10—Applicability and scope.

Trust void—Property under such trust in possession of the trustee for more than 12 years :

Held, that S. 10 has no application to such a case the provision in the will creating trust being invalid and therefore, the property not having become vested in trust for specific purpose. A.I.R. 1942 P.C. 64=9 B.R. 70=(1942) A.L.J. 718=1943 O.W.N. 1=47 C.W.N. 46 (2)=(1943) 1 M.L.J. 11=56 L.W. 8=45 P.L.R. 36=I.L.R. (1942) Kar. (P.C.) 166 (Sup.)=45 Bom. L.R. 275=1943 M.W.N. 205=76 C.L.J. 451=69 I.A. 137=203 Ind. Cas. 1 (P.C.).

——S. 10—Applicability and scope.

Where the persons are suing, not on behalf of the trustees of the temple but as administrators of the will, in order to enable them to administer the estate S. 10 does not apply. A.I.R. 1941 Nag. 181=I.L.R. (1942) Nag. 92=1941 N.L.J. 184=201 Ind. Cas. 220.

——S. 10—Applicability and scope.

What S. 10 contemplates is a breach of an express trust by a trustee, a diversion of trust property or the proceeds thereof to purposes not specified in the trust or a conversion of trust property or the proceeds thereof and a suit for the recovery of such property or proceeds for the benefit of the trust so that such property or proceeds may be utilized for the purposes of the trust. [Essentials stated]. A.I.R. 1942 Sind 145=I.L.R. (1942) Kar. 392=208 Ind. Cas. 230.

——S. 10—Applicability and scope—Benamidar.

The relationship between a *benamidar* and the real owner is a relationship of trust. Although he has no beneficial interest in the property or business standing in his name, the *benamidar* represents the real owner and is in the position of a trustee. A trust of this nature it not an express trust within the meaning of S. 10, Lim. Act. (1941) 2 M.L.J. 222=54 L.W. 115=1941 M.W.N. 727=A.I.R. 1941 Mad. 767 (2)=200 Ind. Cas. 249.

——S. 10, Art. 89—Applicability and scope—Executants of deed entrusting property to another for good management with power of sale, but reserving to themselves power to sell or mortgage with consent of manager.

A trust contemplates that the trustee is the legal owner of the trust property. There must be a transfer of the property to the trustee before a trust is created.

Where certain persons have executed a deed entrusting their property to another for good management with power of sale, reserving, however, to themselves the power to sell or mortgage the property with the consent of the manager, the deed does not vest the property in the manager as trustee and a suit for rendition of accounts is not governed by S. 10, Lim. Act but by Art. 89. A.I.R. 1940 Pat. 90=6 B.R. 405=5 C.L.T. 18=186 Ind. Cas. 859.

——S. 10—Applicability and scope—Clim for account of corpus of trust funds vested in trustee.

Section 10, Lim. Act has no applica tion to a claim for an account of moneys which ought, but for the default of the trustee, to have come into his hands, but in actual fact, never became vested in him. It does apply to a claim for an account on the footing of wilful default. Such a claim is liable to be barred by limitation, and Art. 120, Sch. I is the article applicable. A.I.R. 1940 Rang. 207=1940 Rang. 273=193 Ind. Cas. 61.

——S. 10—Applicability and scope—Agents not trustees.

The words " vested in trust " in S. 10, if they do not necessarily imply a transfer of ownership in the strict sense, do, at any rate, imply something more than mere possession and temporary control of property.

The plaintiff was the *deshmukh* and was entitled to certain fees and emoluments out of the revenues of those villages. These were collected for him by people called *ajahat gumastas* whose office was hereditary. They were either appointed in the first instance or their appointment was confirmed and recognized by the *peshwa's* Government and the plaintiff had no power to remove them and to collect the money for himself. The defendants were some of these *gumastas*. They collected moneys belonging to the plaintiff and had not paid them over, and the plaintiff brought a suit to recover the collections made with interest :

Held, that the money collected by the defendants did not become vested in them in trust within the meaning of S. 10 Lim. Act and S. 10 did not therefore, apply. A.I.R. 1939 Bom. 126=41 Bom. L.R. 215=I.L.R. (1939) Bom. 154=181 Ind. Cas. 375.

——S. 10—Applicability and scope—Trust invalid ab initio.

Once the trust has been declared invalid *ab initio*, S. 10, Lim. Act, can have no application at all to a suit for account of rents of property held under trust. A.I.R. 1939 Rang. 365=1940 Rang. 136=186 Ind. Cas. 210.

——S. 10—Applicability and scope—Trust not declared by specific words but which are to be implied from existence of particular facts or fiduciary relations.

There is a well-marked distinction between the relation of agency and that of trust, but agency may often be involved a relation of trust and confidence, and property in the hands of an agent may sometimes be impressed with a trust for the benefit of the principal, and an agent may not in such circumstances, set up the statute of limitation in bar of a suit for an account by the principal.

But S. 10, Lim. Act, was not intended to comprise all fiduciary relations whatsoever. By "specific purpose" in the section must be meant a purpose which has been specified by the person who created the trust. The Indian Legislature did not think it desirable after a certain lapse of time, to enforce trusts which had to be gathered from the terms of a conveyance and had not been declared by any specific words. Such trusts as the law would imply from the existence of particular facts of fiduciary relations are excluded from the operation of S. 10. A.I.R. 1938 Cal. 673=I.L.R. (1938) 1 Cal. 652 =181 Ind. Cas. 190.

——S. 10—Applicability and scope.

One useful test for determining whether any particular trust is within the provisions of this section or not is to see if a suit for the purpose of following the trust property in the hands of the trustee would be to restore it to the trust. A.I.R. 1938 Cal. 673=I.L.R. (1938) 1 Cal. 652=181 Ind. Cas. 190.

——S. 10—Applicability and scope.

Section 10 does not apply to a suit by the next-of-kin for recovery of property under trust. A.I.R. 1936 Bom. 30=37 Bom. L.R. 946=160 Ind. Cas. 612.

——S. 10—Applicability and scope—Claim for damages for wilful default.

A claim for damages on the footing of wilful default is not one to follow trust funds, and is not saved by S. 10. A.I.R. 1936 Bom. 30=37 Bom. L.R. 946=160 Ind. Cas. 612.

——S. 10—Applicability and scope.

The purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section. A.I.R. 1934 Cal. 87= 58 C.L.J. 502=61 C. 119=150 Ind. Cas. 398.

——S. 10—Applicability and scope.

One of the two brothers of a joint Hindu family deposited Government Promissory Notes belonging to the joint family as a security for his service. When partition took place, the other brother gave a receipt acknowledging the receipt of his share in Government Promissory Notes which remained in deposit with the former. The Government Promissory Notes were given back from security to the former after his retirement, soon after which he died. Afterwards the heirs of the other brother brought a suit for recovery of their share of Government Promissory Notes against the heirs of the former :

Held, that even assuming that the Government Promissory Notes vested in the former brother for serving as security deposit for his service, the suit was outside the scope of S. 10, Lim. Act, as the present suit was not for restoring those notes to that trust, which had been completed and was no longer capable of administration. 58 C.L.J. 502=A.I.R. 1934 Cal. 87=61 C. 119=150 Ind. Cas. 398.

——S. 10—Applicability and scope.

Suit by succeeding trustee against prior trustee for recovery of sums taken by latter from temple funds—

Section 10 did not apply. A.I.R. 1934 Mad. 542=40 L.W. 275=(1934) M.W.N. 1032=152 Ind. Cas. 345.

——S. 10—Applicability and scope.

Section 10 is not applicable to an equitable claim against a trustee liable to account for an account and ascertainment of what may be due, inasmuch as there is no trust for a specific purpose in such a case. 60 M.L.J. 1=A.I.R. 1931 P.C. 9=33 L.W. 30=35 C.W.N. 145=8 R. 645=33 Bom.L.R. 168=(1931) M.W.N. 137=54 C.L.J. 175=58 I.A. 1=130 Ind. Cas. 609 (P.C.).

——S. 10—Applicability and scope—Administrator—Not a trustee.

An Administrator in whom no special trust is vested for a specific purpose is not a trustee within the meaning of S. 10. 2 P.L.J. 642=4 P.L.W. 337=1918 Pat. 170=40 Ind. Cas. 860.

——S. 10—Applicability and scope—Administrator—Following property.

In England equity would follow the property in the hands of the administrator who misappropriated it without bar of time. 7 M.L.T. 123=5 Ind. Cas. 832.

——S. 10—Applicability and scope—Adverse possession.

Where trust property is being adversely possessed, a suit to follow such property in the hands of the adverse possessor will be barred after 12 years. The exception in S. 10 shows that the claim may be defeated by adverse possession. 74 Ind. Cas. 492=40 C.L.J. 20=2 Pat. L.R. 104=18 M.L.W. 903=21 A.L.J. 730=50 I.A. 295=25 Bom.L.R. 1275=28 C.W.N. 493=46 Mad. 751=33 M.L.T. 285=1924 M.W.N. 26=4 L.R.P.C. 180=A.I.R. 1923 P.C. 75=45 M.L.J. 588 (P.C.).

——S. 10—Applicability and scope—Adverse possession—No tacking is allowed between persons standing in entirely different categories.

The executor appointed by will (but who had not taken probate) mortgaged for his own benefits the *debutter* property which according to the will was not to be alienated on any account and the property was purchased at the sale in execution of mortgage decree by defendant. Plaintiff was granted letters of administration so far as the *debutter* property was concerned and he sued for possession of the property.

Held, the defendant against whom the suit was in time cannot be allowed to contend that the possession of the mortgagor (executor) was adverse to the *debutter* and to tack on to his own possession. He was clearly a person in whom the estate became vested in trust for a specific purpose within the meaning of S. 10 of the Limitation Act. The adverse possession of a person so situated in relation to the *debutter* estate is fundamentally different in quality from the hostile holding of a stranger claimant and it would obviously be unsound on principle to tack together the possession of persons who stand in entirely different categories. There is no cause of action until there is a party capable of suing, so that the Statute of Limitation began to run from the time of granting the letters of administration. 74 Ind. Cas. 630=50 Cal. 49=36 C.L.J. 35=A.I.R. 1923 Cal. 1.

——S. 10—Applicability and scope.

In order to bring a case within the purview of S. 10, there must be a trust for a specific purpose *i.e.*, "a purpose that is either actually and specifically defined in the terms of the will, or the settlement itself or a purpose which, from the specified terms can be certainly affirmed". 49 I.A. 37, Foll. 35 C.W.N. 145=33 M.L.W. 30=33 Bom.L.R. 168=1931 M.W.N. 137=8 Rang. 645=130 Ind. Cas. 609=58 I.A. 1=54 C.L.J. 175=A.I.R. 1931 P.C. 9=60 M.L.J. 1 (P.C.).

——S. 10—Applicability and scope—Directors of Companies, not trustees.

Directors of Companies under the Indian Companies Act are not trustees for the purpose of S. 10, and the entrustment of the Company's moneys to the directors for the general purpose of carrying on the business of the company cannot be deemed to be an entrustment for a specific purpose. (English cases referred to. Observations in 44 M.L.J. 431 commented upon as too wide). 128 Ind. Cas. 477=1930 M.W.N. 966=32 L.W. 555=54 Mad. 153=60 M.L.J. 280=A.I.R. 1931 Mad. 58.

——S. 10—Applicability and scope.

Section 10 of the Limitation Act does not apply to directors of companies as they are not persons in whom the property of the company is vested, as is contemplated by S. 10. This section applies to cases of express trusts only. 71 Ind. Cas. 899=A.I.R. 1923 Lah. 58.

——S. 10—Applicability.

Where the defendant does not purport to hold the property in a manner adverse to trust, and the plaintiffs do not purport to bring their suit either as beneficiaries under the trust, or on behalf of the trust, but for their own personal right to manage or in some way to control the management of the endowment. S. 10 does not apply. 6 All. 1 (P.C.), *Appl.* 112 Ind. Cas. 496=55 Cal. 903=32 C.W.N. 913=A.I.R. 1928 Cal. 670.

——S. 10—Applicability and scope.

S. 10 is confined to cases in which property has became vested in trust for any specific purpose and excludes from its operation such trusts as the law would imply merely from the existence of particular facts or fiduciary relations. 105 Ind. Cas. 721=26 P.L.R. 288=A.I.R. 1927 Lah. 773.

——S. 10—Applicability and scope—Constructive trust.

Per *Dawson Miller, C.J.*—Where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose but after some time he withdraws from the venture completely but the person directed continues his exertions and entirely as their result, acquires the property; there is only a constructive trust and S. 10 does not apply.

Per *Mullick, J.*—There is no trust at all in such a case and limitation begins to run from the date of the withdrawal of the principal. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68.

——S. 10—Applicability and scope—Where trust is only a constructive one, S. 10 does not apply.

In a case where the plaint lands were purchased with the plaintiff's money and in the sale-deed taken by defendants 1 and 2 in their own names there is a rectial

that the purchase was on behalf of the plaintiff, and defendants were receiving the rent of the lands subsequently, it is difficult to infer the existence of an express trust or anything other than a constructive trust.

This case being one of a constructive trust or of an obligation in a nature of a trust as the Trusts Act calls it, falling under Chapter IX, S. 10 of the Limitation Act has never been held to apply to such cases. 66 Ind. Cas. 858=45 Mad. 415=1922 M.W.N. 117=30 M.L.T. 238=16 M.L.W. 886=A.I.R. 1922 Mad. 57=42 M.L.J. 119.

——S. 10—Applicability and scope—Co-sharers.

Section 10 of the Act does not apply to a suit by one co-sharer against other for mesne profits as it cannot be said that the defendant co-sharers in possession have been holding the profits in trust for a specific purpose within S. 10 of the Act. 61 Ind. Cas. 393=3 U.P.L.R. Lah. 53.

——S. 10—Applicability—Suit by co-trustee.

The words of S. 10 are wide enough to cover a case by one of two trustees who claims against the other that the property ought to be held by the two. 74 Ind. Cas. 120=18 M.L.W. 907=33 M.L.T. 225=1924 M.W.N. 90=A.I.R. 1924 Mad. 125.

——S. 10—Applicability—Fresh suit based on failure of Trustee to reduce property to possession, S. 10 does not apply.

If a trustee held money which he ought to have held as trustee in another capacity, he could not be heard to say that he held it in the other capacity and not in the capacity of a trustee, and therefore, in such a case S. 10 would apply and prevent him from relying on the Limitation Act. But a suit based on the failure of a trustee to reduce trust property into possession is barred under the Act, notwithstanding S. 10. Trustees are relieved from indefinite liability except in cases of fraud of fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by trustee or previously received by them and converted to their own use. 70 Ind. Cas. 87=1922 M.W.N. 620=A.I.R. 1922 Mad. 409.

——S. 10—Applicability.

Section 10 does not to apply obligations in the nature of trusts under Chapter 9 of the Trusts Act. Where money is paid by a trustee in breach of the trust to creditors who receive it with the knowledge of the breach of trust, a suit by beneficiary to recover the money from the creditor does not fall under S. 10. The cause of action arises on the date of the payment. If the beneficiary is a minor at the time, he can rely on S. 6 of the Limitation Act, but there will be no fresh cause of action on his attaining majority. 61 Ind. Cas. 907=44 Mad. Mad. 277=13 M.L.W. 56=1921 M.W.N. 37=A.I.R. 1921 Mad. 125=40 M.L.J. 52.

——S. 10—Applicability and scope—Lease by shebait—Lease by a trustee for no necessity is not valid beyond his life—Transfer by a trustee is not governed by Art. 134 or 144 of the Act and new shebait can eject transferee.

The language of S. 10 of the Limitation Act gives the clue to the meaning and the applicability of Art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust". Neither under the Hindu Law nor in Mohamedan system is any property "conveyed" to or vested in a *shebait* or *mutwali*, in the case of a dedication. Therefore alienation made by either cannot be treated as an alienation made by a trustee under S. 10. A lease without justification granted by the head of the mutt is valid for his life, and if adopted by his successor would endure during his terms of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession. Possession of the lessee becomes adverse to the successor only on his accession to the office. 65 Ind. Cas. 161=15 M.L.W. 78=3 Pat. L.T. 245=26 C.W.N. 537=20 A.L.J. 497=24 Bom.L.R. 629=30 M.L.T. 66=48 I.A. 302=44 Mad. 831=1921 M.W.N. 449=A.I.R. 1922 P.C. 123=41 M.L.J. 346 (P.C.).

——S. 10—Applicability and scope—Legal representative of co-trustee.

Suit by co-trustee against legal representatives of his co-trustee for recovery of trust property is governed by Art. 120. Section 10 does not apply to such a case. 103 Ind. Cas. 225=29 Bom.L.R. 418=A.I.R. 1927 Bom. 424.

——S. 10—Applicability and scope—Office of trustee—Adverse possession—Suit to recoverp ossession as Hukdar.

A suit to recover possession of certain villages as *Hukdar* and for an injunction restraining the defendants, from interfering with the plaintiff's discharge of his duties is barred if it is found that the right of management has been in the adverse possession of the defendant. for nearly 60 years before suit. S. 10 has no application to such a suit. (1915) M.W.N. 76=28 M.L.J. 217=17 M.L.T. 271=26 Ind. Cas. 841.

——S. 10—Applicability and scope—Office of trustee—Adverse possession.

Where a person has been performing the duties of a *shebait* of an idol and applying the trust funds for the trust, and claims the right to hold that office and perform those dutires adversely to the lawful *shebait*, S. 10 has no application and he can acquire that right as against that original *shebait* by such adverse possession. 36 Cal. 1003; 7 Mad. 387; 023 Mad. 271; 31 Cal. 314 Foll. 3 Pat.L.J. 327=4 Pat. L.W. 283 =(1918) P.H.C.C. 247=47 Ind. Cas. 290.

——S. 10—Applicability and scope—Palla money kept with bride's father can be recovered at any time.

The plaintiffs were husband and wife. On the occasion of their betrothal in 1871, a sum of Rs. 366, being the amount of the female plaintiff's *palla* or *dowry* was made over by the husband's father to keeping of the wife's father, as a fund constituing her *Palla* in accordance with the usual practice prevailing in the caste. This fund having been misappropriated either by original trustee or after his death by his legal representatatives, a suit was instituted against the latter to recover the sum. It was contended in answer that the suit was barred. *Held*, that S. 10 applied to the case, and that it was, therefore, not barred. A suit to recover trust money is a suit to follow the trust property within the meaning of S. 10. S. 10 requires, as condrtions precedent to its applicability, first that the suit should be against a person in whom pro-

perty has become vested in trust for a specific purpose or against his legal representatives or assigns, and secondly, that the suit should be for the purpose of following such property in his or their hands. The phrase "trust for a specific purpose" in S. 10, is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" of English Law. It is used, in the section, in contradistinction to trusts arising by implication of law, trusts resulting and trusts constructive. (1908) 10 Bom.L.R. 540=32 Bom. 394.

——S. 10—Applicability and scope—Principal and agent.

S. 10 applies only in the presence of a trust between the parties, it does not apply to a suit by a principal against his agent. 81 Ind. Cas. 505=A.I.R. 1925 Nag. 115.

——S. 10—Applicability and scope—Property subsequent to trust.

It is open to a person to create a trust empowering another to go to a certain place for the purpose of acquiring land for him and the land so acquired would become vested in the trustee from the moment of its acquisition and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68 (F.B.).

——S. 10—Applicability and scope—Recovering property from trustee.

There is no limitation for suits for recovery of property from trustees. 84 Ind. Cas. 631=22 A.L.J. 866=5 L.R.A Civ. 697=47 All. 17=A.I.R. 1924 All. 884.

——S. 10—Applicability and scope—Suit to recover land placed in charge of defendant's ancestor—Trustee.

Where property was made over to the predecessor in title of the defendant in trust to be restored on demand to the *cestui que trust*, a suit to recover the same falls within S. 10. Per *Aikman, J. Quære.*—Whether the trustee had not also khaikari rights which the resumption of the trust would not put an end to. (1905) A.W.N. 89=2 A.L.J. 247.

——S. 10, Art. 62—Applicability and scope—Sui for recovery of deposit.

A suit for recovery of a sum of money kept in deposit with a particular person is governed by Art. 62 and not by S. 10. (1904) 1 A.L.J. 422.

——S. 10, Art. 48—Applicability and scope—Secretary of State—Trustee.

By a consent decree in 1829, certain funds were directed to be invested in Government papers for the maintenance of *A*, and held by the Registrar of the Sudder Dewani Adawlut so that *A* should not have the power to negotiate or transfer the papers. By a subsequent order of a Judge in 1837, *A* was permitted to hold the papers only for the purpose of drawing interest thereon and an endorsement was made upon the papers referring to correspondence which disclosed *A*'s limited interest. One of the papers standing in the name of one *I*, was renewed in his name without having the endorsement placed upon it and passed to the defendant *J* in due course. *A*'s representative came to know of this in 1885 and brought this suit in 1898 to recover the note of its equivalent :

Held, that under the circumstances Government was not a trustee for *A*'s representative and that the suit was barred by limitation. 9 C.W.N. 443=32 C. 799.

——S. 10 and Arts. 120 and 148—Applicability and scope—Suit for redemption after voidable sale.

Where a mortgagor sued for redemption of the mortgage after sale of equity of redemption contrary to the provisions of Order 34, rule 14, C.P. Code.

Held, S. 10 of the Limitation Act would not apply to such a case and the mortgagor must set aside the sale before redemption. 47 Cal. 377=24 C.W.N. 229=31 C.L.J. 98=55 Ind. Cas. 157 (F.B.).

——S. 10—Applicability and scope—Suit for remuneration—Suit to recover remuneration as dwaris of temple is not covered by S. 10.

A suit by the dwaris of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connection with the temple is not a suit covered by S. 10. Such a suit is governed by Art. 120 and neither by Art. 102 nor by Art. 131.

There is a vast distinction between a suit brought to establish a periodically recurring right and a suit brought to enforce payments due as remuneration for the performance of services arising out of that right. Article 131, was intentionally drafted so as to include merely a suit to establish a right. 94 Ind. Cas. 826=5 Pat. 249=7 P.L.T 465=1926 P.H.C.C. 1=A.I.R. 1926 Pat. 205.

——S. 10—Applicability and scope—Suit for scheme of management.

Where the plaintiffs bring a suit not to assert their own individual rights but on behalf of the general public, who are interested in the institution for the settlement of a proper scheme of management of the charities and for other reliefs,

Held, there is no limitation against such a suit. 69 Ind. Cas. 15=16 M.L.W. 122=1922 M.W.N. 464=31 M.L.T. 125=A.I.R. 1922 Mad. 394=43 M.L.J. 448.

——S. 10—Applicability and scope—Vesting of property in trustee—Property is not conveyed to shebait under Hindu Law nor to muttawali under Muhammadan Law, and no property vests in them.

For this section two conditions must combine, *viz.*, the trust must have been created for some specific purpose and the property must have become vested in the trustee with the object of carrying that purpose into effect. Neither under the Hindu Law nor in the Muhammadan system is any property conveyed to a shebait or muttawalli in the case of a dedication. Under the Muhammadan Law the moment *wakf* is created all rights of property pass out of the *wakf* and vest in God Almighty ; the curator, whether called mutawalli or sajjadanishin or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system. A.I.R. 1922 P.C 123, Foll. Section 10 has no application to the case of an endowment in which there is a dedication in favour of the deity. 94 Ind. Cas. 235=44 C.L.J. 399=30 C.W.N. 415=A.I.R. 1926 Cal. 568.

——S. 10—Applicability and scope—Village pasture lands.

——S. 10—Assign—Gratuitous transferee of trust property.

A gratuitous transferee of trust property is within S. 10 of the Act, and therefore there is no limitation of time for following up the property in his hands. 38 M. 1064=33 Ind. Cas. 45.

——S. 10—Assign—Gratuitous transferee of trust property.

A transferee of trust property not acting in good faith and who has paid no consideration is not an 'assign' and in his case, a suit is not barred by any length of time. 26 M.L.J. 537=(1914) M.W.N. 581=24 Ind. Cas. 369.

——S. 10—Assigns.

Under S. 10 or the Limitation Act, time is no bar to an action against the trustee himself, his representative or assigns, except an assign for valuable consideration, but as regards the latter the period of 12 years from the date of the purchase is to the period within which the suit must be brought. (1906) 3 C.L.J. 306=10 C.W.N. 738=33 Cal. 511.

3. Beneficiary.

——S. 10—(Before amendment of 1929)—All trustees of temple involved in breach of trust—Time would not run until trustees are removed and one capable of suing is appointed

Although, for certain purposes, an idol can be compared to a person under tutelage who has a guardian to look after its affairs, the analogy should not be over-strained: otherwise the amendment of 1929 to S. 10, Limitation Act, as well a Arts. 134-A to 134-C, of that Act would be superfluous.

If all the trustees were involved in the same breach of trust, then it might be argued that there was no representative of that temple who could sue and that therefore, until those trustees had been removed and one capable of bringing a suit had been appointed time would not begin to run, but when there was never any lack of trustees who had authority to bring suits to recover money due to the temple from defaulting trustees, limitation must begin to run. A.I.R. 1943 Mad. 691=56 L.W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Beneficiary.

Suit to recover from trustees of testators' estate amount alleged to have been bequeathed to plaintiff under will—Declarations prayed for unnecessary and constituting mere grounds of plaintiff's claim—Section 10 does not apply—Suit is governed by Art. 123. A.I.R. 1942 Sind 145=I.L.R. (1942) Kar. 392=208 Ind. Cas. 220.

——S. 10—Beneficiary—Heir of settlor claiming property as trust was void.

A person who claims to be an heir of the settlor and claims to be entitled to the property on the ground that the trust deed was void is not a person claiming against a trustee holding the property for an express purpose. To such a case S. 10, Limitation Act does not apply.

Consequently where, ever since the death of the settlor the trustees administered the property as under the trust deed and their possession is of trustees claiming to be so under the deed in question, they do not claim to hold the property for anyone except the beneficiaries mentioned in the trust deed and, therefore, the claim of the plaintiff as the settlor's heir's heir brought 30 years after the death of the settlor is clearly barred by the law of limitation. A.I.R. 1941 Bom. 307=43 Bom.L.R. 622=196 Ind. Cas. 821.

——S. 10—Beneficiary—Person entitled to receive annuity under will, suit by, against executor for arrears.

Section 10 of the Act has no application to such a case. To claim the benefit of S.10, Limitation Act, a suit against a trustee must be for the purpose of following the trust property in his hands. A.I.R. 1938 Pat. 600=19 P.L.T. 202=17 Pat. 350=5 B.R. 551=181 Ind. Cas. 283.

——S. 10—Beneficiary—Money paid monthly to person for benefit of another during her minority.

Where a sum of money is paid monthly to a person for the benefit of another during her minority, the sum becomes vested in trust for a specific purpose, within the meaning of S. 10, Limitation Act. 62 Cal. 393=164 Ind. Cas. 109.

——S. 10—Beneficiary—Sttlement of property on son—Direction to pay certain sums to daughters on attaining majority.

By a document called a settlement deed executed in 1903 the defendant's grandfather settled Rs. 15,000 worth of family properties upon his son, then a minor, and directed the son to pay to each of his three unmarried daughters, Rs. 500 on their attaining majority. The daughters sued in 1926 to recover the Rs. 500.

Held, that as the settlement deed created a valid trust in favour of the daughters for Rs. 500 each, the trust was not indefinite, and the suit was not, therefore, barred by limitation. (1934) M.W.N. 64=A.I.R. 1934 Mad. 273=39 L.W. 496=148 Ind. Cas. 685.

——S. 10—Beneficiary.

The plaintiff deposited in 1899, with the defendants, a firm consisting of her brothers, a certain sum of money which had been given to her by her father's family as *stridhanam* for investment in the firm. A suit was filed by the plaintiff for recovery of the amount in 1925:

Held, (i) that though there was no express trust, the transaction was in the nature of a trust and the suit fell under Art. 120 of the Limitation Act.

The Court, on finding that a fiduciary relationship exists, will put a wide construction on the expression 'trust' rather than regard the transaction in the light of its mere formal characteristics. 63 M.L.J. 232=(1932) M.W.N. 918=36 L.W. 514=A.I.R. 1932 Mad. 685=139 Ind. Cas. 164.

——S. 10—Beneficiary—Receiving and holding property—Duty of receiving property and holding it for another can only be discharged by handing it over to the person entitled and not by appealing to the lapse of time.

Where the duty of person is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody

entitled to it. Nor can it make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self-imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must in every case follow. 94 Ind. Cas. 433=5 Pat. 539=7 P.L.T. 679 =1926 P.H.C.C. 145=A.I.R. 1926 Pat. 321.

——S. 10—Beneficiary—Suit by beneficiary—Administration suit

A suit by a beneficiary under a will against the executors for administration of the estate, for accounts, for setting aside certain transactions is in fact a suit to follow trust property and falls under S. 10 of the Limitation Act. 5 C. 914, foll. (1902) 7 C.W.N. 353=30 C. 369.

——S. 10—Beneficiary.

A suit by a legatee to recover the rents bequeathed from the executor who had collected them is not barred by limitation. A testator bequeathed the rents of certain houses to his wife and sister-in-law and directed his son to provide them with maintenance. The son was also directed to pay the taxes and keep the house in repair. The son collected rents for six years, but did not pay them over to the widows. In a suit by them to recover the amount:

Held, that the son was executor according to the tenor and that no portion of the claim was barred by limitation. (1900) 3 Bom.L.R. 45=25 B. 429.

4. Executors or Administrators.

——S. 10, Arts. 62 89, 120 and 123—Executors or Administrators—Part of estate of deceased Muhammadan sold by one of heirs and proceeds handed over to third party for distribution among heirs—Suit by unpaid heir for his share of proceeds—S. 10 does not apply as no trust is created by vendor heir's handing over of proceeds to third person—Art. 62 applies and not Arts. 89, 120 and 123—Time runs from date when proceeds were handed over to third party and not from date when plaintiff knew that proceeds were held by third party—Trusts Act (1882), S. 5.

A Muhammadan *H* died in 1917 leaving several heirs of whom *P* was one. A part of his estate was sold by *R*, one *P*'s step-brothers in 1921 with the consent of the majority of heirs and the sale proceeds were handed over to *D* for distribution amongst the heirs. *D* paid some of them. *P* was not paid. *P* brought a suit against *D* in November, 1940, to recover the amount of his share from the sale proceeds, alleging that till 1940, he did not know that the amount was in the hands of *D*. The suit was brought after three years from the date of sale but within three years from the time *P* knew that the amount was in the hands of *D*.

Held (1) that, *R*, who handed over money to *D* was not its owner but only held it on behalf of the estate of *H*, and could convey no title to *D* so as to transfer ownership within meaning of S. 5, Trusts Act, to create a trust but could only be regarded as an administrator *de son tort*. As S. 10 Limitation Act, applies to cases in which there is an express trust, the suit was not governed by S. 10, Limitation Act:

(2) that Art. 123 cannot apply as this is neither a suit for the administration of an estate nor a suit against a person legally charged with the duty of distributing any portion of the estate;

(3) that Art. 89 could not apply as *D* was never the agent of *P*;

(4) that Art. 62 applied to the case and the time began to run when the amount was handed over to *D*. There is nothing in Art. 62 which implies that knowledge of payment is a factor to save such time; observation of Coutts-Trotter, C.J., to the contrary in;

(5) that as the Article applicable to the case is 62, the residuary Art. 120 did not apply. 1945 Mad.W.N. 671 =(1945) 2 Mad.L.J. 422=A.I.R. 1946 Mad. 116=58 Mad. L.W. 555.

——S. 10—Executor—Question of fact.

Whether an executor is a trustee for a specific purpose depends upon the acts of each case. I.L.R. (1942) Kar. 392=A.I.R. 1942 Sind 145=208 Ind. Cas. 230.

——S. 10—Executor.

Section 10, Limitation Act applies to executors under a will who are therein expressly called trustees and are entrusted with the testator's property for certain definite purposes. A.I.R. 1942 Sind 145=I.L.R. (1942) Kar. 392=208 Ind. Cas. 230.

——S. 10—Executor and Receiver.

Where a suit is filed by executors under a will for the recovery of properties left by the testator and some of the properties are in the hands of Receiver appointed by the Court, the Receiver holds the properties subject to the order of the Court for the benefit of those entitled under the will and there can be no question of limitation as regards such properties. 63 Ind. Cas. 104=13 M.L.W. 392=1921 M.W.N. 248=A.I.R. 1921 Mad. 528=40 M.L.J. 532.

——S. 10 and Art. 123—Executor—Suit for accounts against—Law of limitation, if a law of proceedure.

Where a legatee brings a suit against the executor of a will for accounts such suit must be restricted to the taking of accounts for 6 years before the date of the suit, S. 10 and Art. 123 of the Act do not apply to this case. If before the amendment of the law of limitation the executor had acquired the right of immunity to render accounts for more than six years before suit that right cannot be lost by any amendment in the law at a later day. The Law of Limitation is not always a law of procedure. 12 Bom.L.R. 881=8 Ind. Cas. 189.

——S. 10 and Sch. II, Art. 120—Executor—Suit for accounts against—Limitation.

Art. 120 will apply to a suit for accounts pure and simple against an executor and S. 10 will have no application to such a suit because it is not a suit against an executor in whom the property had become vested for the purpose of following such property. 13 C.W.N. 557=9 C.L.J. 383= 1 Ind. Cas. 289.

——S. 10—Executor, if a trustee.

The mere appointment of a person as executor does not make him a trustee. Whether an executor is a trustee for a specific purpose within S. 10 is a mere question of fact. 11 Bom.L.R. 1187=4 Ind. Cas. 283.

——S. 10, Art. 120—Executor—Suit against executor—Limitation.

In order to make S. 10 of the Limitation Act applicable it has to be established *in the first place*, that the executor was a person in whom property had become vested in trust for any specific purpose and for that purpose, it has to be seen whether the provisions of the will are such that the executor as trustee must be treated as trustee. *In the second place* in order to make the section applicable, the scope and character of the suit have to be considered. It must be a suit for the purpose of following in the hands of the trustee or of his legal representatives property which had become vested in them for a specific purpose, which means, for the purpose of recovering such property, for the trust in question. A suit for account pure and simple, the object of which is not to recover any property in specie but merely to have an account of the stewardship of the defendants and of their predecessors in the administration, which means an account of the money received and disbursed by them on behalf of the beneficiaries, and to obtain any balance which may be found due on the taking of the accounts, cannot be treated as a suit against a trustee for the purpose of following a trust property and S. 10 of the Limitation Act has no application and the only provision applicable is Art. 120. (1909) 9 C.L.J. 383=13 C.W.N. 557=1 Ind. Cas. 289.

——S. 10—Executor.

Under S. 10 of the Indian Limitation Act, 1908, time will cease to run against an executor only if he is trustee for a specific purpose. (1909) 11 Bom.L.R. 1187=4 Ind. Cas. 283.

——S. 10, Art. 120—Executor—Suit for accounts against.

In a suit brought by the plaintiff against the executors of the will of her grandfather praying for a declaration that in the events that had happened, she was entitled absolutely and solely to the property left by her grandfather, and for account of the property in the hands of the executors the plaintiff is only entitled to accounts from the defendants for six years preceding the suit, as she took no interest under the will, and the executors were not trustee for her, and the property did not vest in them for any specified purpose in her favour. Such a suit is not a suit for the purpose of following such property in the hands of the executors and trustees. (1908) 10 Bom.L.R. 117=32 Bom. 364.

——S. 10—Executor—Executor when debtor, time does not run.

Where an executor who owes money to the deceased accepts the executorship the debt becomes at once assets and he is responsible for the amount of it. In that case no limitation would run as long as he remained executor or died, whichever happened first. (1908) 10 Bom. L.R. 346.

5. Express trust.

——S. 10—Express trust—Trustee must be express trustee, i.e., for specific purpose—Indian law makes distinction between trust for specific purpose and obligation in nature of trust.

A trust for a specific purpose is one for a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. The Indian law as found in the Trusts Act the Legislature has made a sharp distinction between trusts created by the act of parties and certain obligations which are not trusts but which are considered to be in the nature of trusts. Section 10 does not apply in the case of a person whom the law looks upon as a trustee because he has to discharge certain obligations in the nature of a trust. It only applies to a trustee of a trust in the strict sense of the term, *i.e.* an express trustee. 47 Bom.L.R. 934=I.L.R. (1945) Bom. 1047=A.I.R. 1946 Bom. 131.

——S. 10—Express and constructive trustee—Stranger trespasser.

Under S. 10 no length of time will bar a suit against an express trustee for his legal representative or assign (but not being assign for valuable consideration) for the purpose of following the trust property in his or their hands. The rule is that an express trustee cannot prescribe for a title by adverse possession against his beneficiary and, of course the trustee's legal representatives or assigns (without valuable consideration) are in no better position than the trustee himself. But the rule does not prevent stranger to the trust who takes possession of the trust property independently of the trustee from acquiring title by adverse possession.

Where a person has assumed either with or without consent to act as a trustee of money other property and has in consequence been in possession of or has exercised command or control over such money or property a Court of equity will impose upon him all the liabilities of an express trustee. A trespasser *ab initio* cannot be said to be a trustee or manager *de son tort* within the meaning of para. 2 of S. 10. I.L.R. (1945) Kar. 40=A.I.R. 1945 Sind 57.

——S. 10—Express trust—Nattukottai Chettis—Presents given to bride at time of marriage—Deposit of, with another person.

Where the defendant the person with whom the presents made to the bride at the time of her marriage were deposited well knew that the moneys which were deposited with him formed part of the cash provided by his own father and the father of the bride as her marriage presents or her *stridhanam* and that they were deposited with him in the name of the husband for the purpose of earning interest and to be augmented for the benefit of the children of the bride and bridegroom and that whoever could demand payment from him whether it was the *marladar* or the husband on the death of the *marladar* the fund and its accretions were not personal either to the *marladar* or the husband but were the children's property:

Held that the defendant had control of the fund which was placed with him for the specific purpose of interest being earned and the total fund being increased or augmented for the benefit of the children of the husband and his wife. That the said fund was a trust money that the defendant was an express trustee coming within the meaning of S. 10, Limitation Act and that S. 10 applied to the suit claiming the amount from him. A.I.R. 1941 Mad. 841=(1941) 2 M.L.J. 558=200 Ind. Cas. 357.

——S. 10—Express trust.

S. 10, Limitation Act has no application to what are sometimes called constructive trusts more accurately described in the Trusts Act as "obligations in the nature of a trust" but only to the trust properly so called as defined in the Trusts Act. A.I.R. 1939 Mad. 722=(1939) M.W.N. 437=49 L.W. 605=(1939) 1 M.L.J. 820=189 Ind. Cas. 316.

——S. 10—Express trust.

Plaintiff making over certain sum to defendant No. 3 for investment—Defendant No. 3 advancing it to defendants Nos. 1 and 2 on registered bond—Bond taken in his own name—Plaintiff knowing of real facts after over three years—Suit by him on simple mortgage against defendants for recovery of money from defendants Nos. 1 and 2 or for simple money-decree against defendant No. 3—Suit framed as simple mortgage suit.

Held, S. 10, Limitation Act applied the money being given to defendant No. 3 on express trust. A.I.R. 1938 Cal. 336=42 C.W.N. 381=66 C.L.J. 541=I.L.R. (1938) Cal. 81=176 Ind. Cas. 681.

——S. 10—Express trust.

Where according to a family arrangement a certain *hundi* vests in a defendant for payment of debts of the husband of the plaintiff and the balance after payments is to be paid to the plaintiff's husband the arrangement is a trust for specific purpose within the meaning of S. 10 and the plaintiff's husband is entitled to call upon the defendant to account for the proceeds of the *hundi*. A.I.R. 1936 Mad. 876=(1937) M.W.N. 368=169 Ind. Cas. 362.

——S. 10 and Art. 89 Express trust.

Dispute as to property—Agreement between parties that one of them may collect rents and account to the rightful claimant—Suit for account by successful party:

Held, (i) that there was no property constituted trust such as would bring the case within S. 10 and there was also no contract of agency which would bring in Art. 89: Art. 120 applies. A.I.R. 1936 Mad. 170=161 Ind. Cas. 845.

——S. 10—Express trust—Suit for accounts—In an express trust part of trust money misappropriated by the trustee—Suit for account and refund of the amount is not barred by lapse of time.

Where on the death of her husband in 1904 a widow handed over a certain sum of money to her brother for the benefit and education of her two sons and the brother applied part of the trust moneys for that purpose put the balance amounting to Rs. 1,600 and upwards into his pocket. On his death his representatives were called on to refund this balance and to account.

Held that the money being vested for specific purpose a suit for account and refund of the trust property cannot according to S. 10, Limitation Act, be time-barred by lapse of time. 107 Ind. Cas. 705=52 Bom. 184=30 Bom. L.R. 45=A.I.R. 1928 Bom. 58.

——S. 10—Express trust, what is.

Where pending disposal of a criminal case property was entrusted to the sapurdar and the reversioners of the owner sued for recovery of the property after seven years:

Held on construction of the document that the case was one of express trust and S. 10 applies. 101 Ind. Cas. 427=A.I.R. 1927 Oudh 614.

——S. 10—Express trust.

Per *Mullick, J.*—It is not necesary that an express declaration should be proved. Inferences can be drawn from the conduct of the parties sufficient to establish an express trust. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68 (F.B.).

——S. 10—Express trust, what is.

Two Mahomedan brothers executed a partition deed wherein they stated that their deceased brother entrusted to them a certain amount which one of the two executan's undertook to pay to plaintiff on his attaining majority with interest at ¼ per cent.

Held, that an express trust was created in favour of plaintiff and the amount was not a deposit.

Held, further that the partition deed evidenced and acknowledged the trust already created by the deceased brother. 85 Ind. Cas. 508=20 M.L.W. 546=1924 M.W.N. 876=A.I.R. 1924 Mad. 920.

——S. 10—Express trust for a specific purpose—Trust not exhausting estate—Residue—Trust created by operation of law.

When the testator's property is vested in the trustees for a specific purpose, no resulting trust of the residue which necessarily arises by law, need be specific in words in the will in order to bring it within S. 10. 21 B. 646, Foll. 35 Bom. 49=12 Bom.L.R. 947=8 Ind. Cas. 635.

——S. 10—Express trust—Fiduciary relationship.

An express trust within the meaning of S. 10 of the Limitation Act does not result from a mere fiduciary relationship between two parties such as solicitor and client despositor and banker, principal and agent and creditor and debtor. (But a son-in-law does not stand in a fiduciary relationship to his father-in-law by reason of the matrimonial relationship). 1 L. W. 577=(1914) M.W.N. 606=16 M.L.T. 199=22 Ind. Cas. 936.

——S. 10—Express trust—Applicability.

Section 10 of the Limitation Act 1877 applies to trustees who hold the property for a specific trust and no limitation runs against the particular beneficaries for whom the property is held in trust. But the benefit of the section cannot be sought by parties other than the parties for whom the trust was created. (1905) 7 Bom.L.R. 324.

6. Guardian or Manager.

——S. 10, Explanation—Mere custodian or manager—Explanation, if applies to de facto manager.

The seizin to the property that is the actual *de facto* seizin and not necessarily the legal seizin cannot reside in two persons at one and the same time unless of course they are co-owners, or co-trustees holding under one right or one title and unless the seizin to the estate resides in the person sued, S. 10, Limitation Act cannot apply. But this fictitous seizin must for the limited purposes of this section reside in one person or set of persons and not in two. There cannot be a manager of a manager for the purposes of the explanation. A mere custodian or manager of property handed over to him for safe custody or management by the legal or *de facto* manager cannot be reached by this section.

The explanation to S. 10 applies as much to *de facto* managers as to those legally entitled. A person who wrongfully holds as trustee and pretends to act as such cannot turn round and reprobate the right which he asserts and claim to hold adversely to his beneficiary. An estoppel would arise. A.I.R. 1944 Nag. 181=I.L.R. (1942) Nag. 92=1941 N.L.J. 184=201 Ind. Cas. 220.

——S. 10—Guardian or manager—Court guardian—Suit by minor for accounts against guardian more than three years after his becoming major.

In order that a Court guardian may become a trustee in whom property is vested for specific purpose and as such comes under S. 10, some property must vest in him for a specific purpose. There is however no vesting section in the Guardians and Wards Act. The scheme of the Guardians and Wards Act shows that a guardian in is regarded as an agent acting on behalf of the minor with a liability analogous to that of a trustee. That, however, does not make him an express trustee. In the Trusts Act also the only refernce to a guardian is in Ill. (*h*) to S. 88 which comes under the chapter "Of certain obligations in the nature of trust." This would mean that the relation between a guardian and minor is fiduciary, and his obligations are based on a constructive as opposed to an express trust.

Consequently when a minor files a suit against the guardian for accounts more than three years after his attaining majority the suit is time-barred as section 10 does not apply, the Court guardian not being an express

trustee. 39 Bom. L.R. 351=A.I.R. 1937 Bom. 334=I.L.R. (1937) Bom. 636=170 Ind. Cas. 647.

——S. 10, Art. 120—Guardian or manager.

Section 10 of the Limitation Act does not apply to an implied trust by to an express trust. A *Karta* of a Hindu joint family is not vested with the property belonging to a joint Hindu family. Art. 120 of the Limitation Act applies to a suit for accounts against a *Karta* of joint Hindu family. 32 C.L.J. 25=58 Ind. Cas. 877.

——S. 10—Guardian or manager—Joint Hindu family.

Section 10 does not apply to suits for accounts against manager of joint family by a member thereof. Article 120 applies to such suits. 25 C.W.N. 356=A.I.R. 1921 Cal. 571.

——S. 10—Guardian or manager—Taking charge and managing of minor's property creates constructive trust and property does not vest in the person taking charge.

The plaintiff while a minor inherited certain property which the defendant her father took charge of and managed for her. On suit by minor after attaining majority.

Held, that as a minor cannot create a trust the position was that the defendant as the plaintiff's father had taken charge of her property and managed it for her and that therefore thee was in fact no trust in that case.

Held, also that as the Indian Trust Act in Chapter IX treats constructive trusts not as trusts but as 'obligations in the nature of trusts' and that as the defendant was not a trustee but by his acts had only incurred obligations similar to those of a trustee the provisions of S. 10 of the Limitation Act would not apply. 18 Bom. 119, Foll.

The word "vest" implies that the property becomes in law the property of the trustee. 20 Cal. 51; 44 Mad. 277 and 84 P.R. 1891, Foll. 86 Ind. Cas. 297=3 Rang. 206=A.I.R. 1925 Rang. 289.

——S. 10—Guardian or manager—Trust property—Acquisition by guardian.

When the guardian gave a discharge for a decree in favour of the minor in consideration of the transfer to him of certain property he holds the property as a trustee for the minor. 28 Ind. Cas. 861 (All.).

——S. 10—Guardian or manager—Suit against trustee—Suit against karta.

S. 10 of the Act expressly provides for the cases of vested trust in a trustee for specific purpose only; a suit against a *karta* for account is not governed by it as *karta* is not vested with property of the family. 32 C.L.J. 25=58 Ind. Cas. 877.

7. Implied trust.

See also LIMITATION ACT, S. 10—APPLICABILITY AND SCOPE.

——S. 10—Implied trust.

Where the money is held under an implied trust for the benefit of the plaintiff then S. 10 of the Indian Limitation Act applies to the case. 39 Bom. 572=17 Bom.L.R. 641=31 Ind. Cas. 277.

——S. 10—Implied trust.

A person claiming under a resulting trust may be barred by limitation unless the resulting trust is of such a kind as to fall within the scope of S. 10 of the Limitation Act. A trust for a specific purpose is a trust for a specified purpose. A resulting trust in favour of the heirs of a testator upon failure through invalidity of one of the trusts declared in the will, is not a trust for a specified purpose within the meaning of S. 10. For the purpose of limitation there is a distinction to be drawn between resulting trusts and trusts for specific purposes and limitation may run in favour of a trustee, whether by express words or by operation of law even where he is in not as a trespasser. 37 Bom 447=14 Bom.L.R. 987=17 Ind. Cas. 689.

——S. 10—Implied trust—Applicability.

S. 10 has a very limited application and does not refer to trusts founded on an unexpressed but implied intention of the party creating them or to trusts which are raised by construction of equity without any reference to the intention of parties. 8 S.L.R. 132=27 Ind. Cas. 392.

8. Interpretation

——S. 10—Interpretation—'Trust' and 'vested in trust' meaning of—Deposit of trust money with banker with notice of trust—Suit by cestui que trust for recovery of deposit—S. 10 does not apply.

The word 'trust', S. 10, Limitation Act, is used in the same sense as in the Trusts Act, 1882, and the expression 'vested in trust' implies that the ownership, in the property has been conveyed to the person referred to in the section.

Where a banker accepts a deposit of trust money with notice of the trust he does not become a trustee of the money in the strict sense of that expression and consequently a suit for recovery of the deposit by the **cestui que trust** will not be governed by S. 10, Limitation Act. A.I.R. 1946 Mad. 519=(1946) 1 M.L.J. 31=1946 M.W.N. 9=I.L.R. (1946) Mad. 42=59 M.L.W. 725.

——S. 10—(Before amendment)—Interpretation—Word "vested in trust" in S. 10—Meaning of.

The word "trust" in S. 10 is used in the same sense as in the Trusts Act, 2 of 1882, in which a trust is defined as an obligation annexed to the ownership of property so that the expression "vested in trust" implies that the ownership in the property has been conveyed to the person referred to in section. The rules of equity that a person who received money while in a fiduciary relationship to the person for whom he received it was to be treated as an express trustee cannot be imported into S. 10.

Gifts of land can be made to the manager of a temple to be held in trust for the temple. Such a gift would constitute the manager a trustee in the English sense so as to attract S. 11 as it stood before. A.I.R. 1943 Mad. 691=56 L.W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Interpretation—"Specific purpose".

The specific purpose required by S. 10, Limitation Act, is the specific purposes mentioned in or deducible from the deed. A.I.R. 1941 Nag. 181=I.L.R. (1942) Nag. 92=1941 N.L.J. 184=201 Ind. Cas. 220.

——S. 10—Interpretation.

"Trust for specific purpose" is same as "express trust". A.I.R. 1941 Mad. 841=(1941) 2 M.L.J. 558=200 Ind. Cas. 357.

——S. 10—Interpretation—"Specific purpose".

The words "for any specific purpose" merely indicate an express trust, *i.e.*, a trust that is not constructive or one arising by implication of law or such that there is no doubt as to its specified terms nor any uncertainty as to affirming them. 32 Bom. 394, A.I.R. 1922 P.C. 212, Rel. on. 124 Ind. Cas. 18=A.I.R. 1930 All. 96.

——S. 10—Interpretation.

The expression 'trust for any specific purpose' is merely a more expanded mode of expressing the same idea as that conveyed by the term "express trust" of the English Law, both the terms being synonymous in meaning and thus the section excludes from its operation such trusts as the law, would imply merely from the existence of particulars facts or fidicuary relations. 116 Ind. Cas. 70=A.I.R. 1929 Nag. 298.

——S. 10—Interpretation.

"A specific purpose," within the meaning of S. 10, must be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose, which, from the specified terms, can be certainly affirmed.

The purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trustee which is specified in the earlier part of the section. A.I.R. 1922 P.C. 212 (P.C.), Foll. 103 Ind. Cas. 418 =29 Bom. L.R. 241=A.I.R. 1927 Bom. 398.

——S. 10—Interpretation—"Vested".

The view that the word "vested" in S. 10 is to be taken, when speaking of a person standing in a fiduciary relation, not in the sense of "owned," but in the sense of "held in possession," can no longer be maintained. A.I.R. 1938 Cal. 673=I.L.R. (1938) 1 Cal. 652=181 Ind. Cas. 190.

——S. 10—Interpretation—'Property'.

It is unnecessary that the property followed should be identical property in respect of which a breach of trust has been committed. It can be anything into which the original property has been converted in whatever form the conversion may have taken provided, of course, the one can be clearly and definitely connected with the other. But under S. 10, Lim. Act whatever form the original property may have taken, it is essential that it should be in the hands of the person sued. A.I.R. 1938 Nag. 30=I.L.R. (1940) Nag. 94=176 Ind. Cas. 57.

——S. 10—Interpretation—'Vesting'—Requirements of.

While transfer of proprietary rights is not intended mere transference of management or control is not enough to satisfy the requirements of 'vesting' as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also a power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the 'vesting'. 58 C.L.J. 502=A.I.R. 1934 Cal. 87=61 C. 119=150 Ind. Cas. 398.

9. Religious Endowment.

——S. 10 and Art. 144—Mutawalli—Adverse possession—Acts showing adverse possession are referable to position of Mutawalli..... Mutawalli is estopped from setting adverse title to trust property.

Where a person is a mutawalli of a public charitable trust, all his acts which are claimed as acts showing adverse possession are referable to his lawful fiduciary position as Mutawalli. Adverse possession in such circumstances, is a nation almost void of content. However flagrant the breaches of duty be on the part of the mutawalli he acts on behalf of the trust and has no right to claim adverse possession. Having entered into possession as trustee he is estopped from setting an adverse title until he obtains a proper discharge from the trust. A.I.R. 1946 Nag. 401=I.L.R. (1946) Nag. 518=1946 N.L.J. 511.

——S. 10—Religious endowment—(As amended in 1929)—Amendment, if retrospective—Prior to amendment, legal representatives of mutawalli completing their title to waqf properties by adverse possession—Suit by subsequent mutawalli for recovery of wakf property.

Nothing is contained in the amendment of S. 10 in 1929, which gave it a retrospective effect and revived titles which had already become extinguished by reason of S. 28, Lim. Act. Where certain properties were claimed by legal representatives of a mutawalli adversely to the waqf by reason of having completed their title by twelve years' adverse possession prior to the amendment, S. 10, as amended, could have no application and the suit by the subsequent mutwalli brought after the amendment for recovery of the waqf properties would fail. (1945) A.L.J. 11=1 L.R. (1945) All. 75=A.I.R. 1945 All. 121=1945 A.W.R. (H.C.) 414 =222 Ind. Cas. 196.

——S. 10—Religious endowment—Waqf of immovables under Mohamadan law.

Limitation is a matter of procedure and the Lim. Act applies to immovables made waqf under the Muhammadan Law. A.I.R. 1944 Nag. 190= 1944 N.L.J. 170=I.L.R. (1944) Nag. 775=220 Ind. Cas. 57.

——S. 10—Religious endowment—Dedication of property to temple is "specific purpose" within S. 10.

"A specific purpose" within S. 10 is a purpose which is either actually and specifically defined in the deed of trust or a purpose which from the specified terms can be certainly affirmed. The dedication of property to a temple generally, i.e., for conducting of pujas and ceremonies and the upkeep of the temple is sufficiently specific to satisfy the requirements of S. 10. 56 L.W. 479(2)= A.I.R. 1943 Mad. 691=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Religious endowment—(Before amendment of 1929)—Dharmakaratha of temple.

The property of a temple belongs to the idol and does not vest in the manager, although he has a wide discretion in the spending of the funds of the institution. The dharmakartha of a temple, therefore, is not the trustee of its property and, therefore, S. 10, Lim. Act as it stood before the amendment of 1929 does not apply to him. A.I.R. 1943 Mad. 691=56 L. W. 479 (2)=(1943) 2 M.L.J. 339=212 Ind. Cas. 518.

——S. 10—Religious endowment.

Suit under S. 539 of old Civil P. C. (Act XIV of 1882), corresponding to S. 92, Civil P.C., (Act V of 1908), for appointing a new trustee for temple and for vesting property in trustees in trust for temple—Decree in terms of section — Person appointed trustee according to scheme given in decree—Property of temple vested in him—Such person is a trustee within meaning of S. 10. A.I.R. 1941 P. C. 130=8 B. R. 151=22 P.L.T. 981= 1941 O.W.N. 1367=74 C. L. J. 440=(1942) 1 M.L.J. 8= (1942) A.L.J. 53=55 L.W. 31=1942 M. W. N. 106= 46 C.W.N. 377=1941 A.W.R. 107=44 Bom. L. R.

183=21 Pat. 96=I. L. R. (1941) Kar. (P. C.) 176 Sup.=44 P.L.R. 200=196 Ind. Cas. 696 (P. C.)

——S. 10—Religious endowment—(As amended in 1929)—Express trustee — Manager of a religious endowment.

For the purpose of S. 10, a manager of a religious endowment is in the same position as an express trustee. A.I.R. 1935 Mad. 483=157 Ind. Cas. 181 (2).

——S. 10—Religious endowment.

Where a village was dedicated in waqf for the maintenance of a shrine and for the maintenance of the sajjadanashin, the plaintiff as sajjadanashin and manager of the waqf sued to recover possession of certain lands in the village from the mujawars whom the predecessors of the plaintiff had allowed to occupy the land in suit, being part of the waqf lands, for their maintenance and relied on S. 10, to overcome the bar of limitation:

Held, that in order to bring the suit within S. 10 it would be necessary for the plaintiff to show that the lands in question had become vested in the defendants in trust for a specific purpose, or that they were the assigns of the sajjadanashin, in whom the lands had become vested for such purpose, and as the sajjadanashin could not be said to be a trustee but was only a manager, the suit did not come within the provisions of S. 10. 11 O.W.N. 297=39 L.W. 421=A.I.R. 1934 P. C. 77 =33 C.W.N. 400=36 Bom.L.R. 408=66 M.L.J. 431 =59 C.L.J. 157=(1934) M.W.N. 258=(1934) A.L.J. 466=56 A. 111=3 A. W. R. 387=61 I.A. 50=147 Ind. Cas. 887 (P.C.).

——S. 10—Religious endowment.

The plaintiffs sued as representatives of the Parsi Anjuman of Chikhli. The suit was to recover two houses which had been mortgaged by defendant No. 1 to defendant No. 4. Their case was that originally the father of defendants No. 1 and two other persons, who were the vahivatdars or managers of the old Agyari or fire-temple of Chikhli and were representatives of the Parsi Anjuman, purchased the two houses, which were on either side of the Agyari, for the Anjuman, but subsequently, defendant No. 1's father treated this property as his own and mortgaged it to various persons and ultimately to defendant No. 4 who was in possession. Defendants Nos. 1, 2 and 3 were brothers. The only contending defendants were defendants Nos. 1 and 4:

Held, that in the mofussil, Parsis were governed by rules of justice, equity and good conscience; the vendees, and his two associates, were acting on behalf of Anjuman; the purchase was for the Anjuman, and was made for the express purpose of guarding against the danger of these two houses which adjoined the fire-temple on either side falling into non-Parsi hands and thereby causing some annoyance or obstruction to the religious ceremonies to be performed there; and that there could not be a clearer instance of an express trust, the property having become vested in these three vendees for a specific purpose, namely, the maintenance of the fire-temple without interruption and avoidance of the possibility of alienation of the houses on either side and as there was an express trust or a trust for a specifie purpose, S. 10 of the Lim. Act applied and a suit would not be barred by limitation. 35 Bom. L. R. 1091=A.I.R. 1934 Bom. 1=149 Ind. Cas. 317.

——S. 10—Religious endowment — Property appertaining to an asthan—Whether can be said to have become vested in trust for any specific purpose.

The property held by a mahant of a math for the purpose of maintaining the math and the office relating thereto is not property which "has become vested in trust for any specific purpose." The endowments of a Hindu math are not "conveyed in trust" nor is the head of a math a "trustee" with regard to them save as to specific property proved to have been vested in him for a specific object. Property appertaining to an asthan cannot be said to have become vested in trust for any specific purpose and S. 10, will not apply to a suit by the mahant of the astham for recovery of possession of the property. 11 O.W.N. 39=A.I.R. 1934 Oudh 96=9 Luck. 384= 147 Ind. Cas. 607.

——S. 10—Religious endowment—Alienation by trustee.

A trustee cannot convey a valid title to the transferee and, therefore, Art. 134 does not apply to a suit for the recovery of the temple property, improperly alienated by the trustee. A.I.R. 1922 P.C. 123 (P.C.), Foll. 96 Ind. Cas. 371=49 Mad. 543=23 M.L.W. 657=A.I.R. 1926 Mad. 769=50 M.L.J. 589.

——S. 10—Religious endowment—Alienation of wakf property.

Article 144 and not Art. 134, governs a suit to set aside an alienation by a Mutawalli of ordinary waqf property gifted for general pious or religious purposes. Section 10 controls Art. 134 of the Limitation Act of 1908. It clearly shows that the Article refers to cases of specific trust and relates to property "conveyed in trust". There is under Hindu and Muhammadan Law, a distinction between a specific trust and a trust for general religious or charitable purposes. 65 Ind. Cas. 722=A.I.R. 1922 Lah. 271.

——S. 10—Religious endowment—Alienation by Mahant.

The limitation for a suit for possession of endowed property by a successor in office of a Mahant who alienated the endowed property runs from the date of the latter's death, as the Mahanth had a life-estate in the endowed properties and time did not begin to run until his death. 63 Ind. Cas. 231=3 Pat. L.T. 264=1922 P.H.C.C. 188= A.I.R. 1922 Pat. 178.

——S. 10—Arts. 12, 131—Religious endowment—Suit for specific share of Tasdik—Suit by Katlai Manager against temple trustee—Relative positions of.

The plaintiffs, as mangers of a Katlai, sued the temple trustee for recovery of a specific share of the tasdik amount received by the latter from the Government for eleven odd years before suit, the same having been allotted for the purpose of th

katlai. Held:—(1) That there was nothing in the case to support the view that the trustee acted as agent of the Katlai manager in so receiving the amount. (2) That it was reasonable to presume that the temple trustees were appointed trustees for the receipt of the katlai amount. (3) That S. 10 of the Limitation Act governed the case and not Arts. 62 or 131 and that arrears were recoverable for the whole period of eleven years odd. (1910) 20 M.L.J. 374=8 M.L.T. 130=6 Ind. Cas. 781 (1).

——S. 10, Art. 143 — Religious endowment — Temple trustee getting property from private owner in exchange for temple lands—Transfer for valuable consideration—Suit by paramount owner for lands exchanged—Decree in first Court—Temple dispossessed in execution—Appeal by temple—Final decree—Suit by trustee within 12 years from date of final decree—Limitation.

A transfer by way of exchange of land alleged to belong to a private owner to a temple in exchange for temple properties transferred to such private owner by the temple trustee is a transfer for valuable consideration and is not a mere voluntary transfer within the meaning of S. 10 of the Limitation Act. A temple trustee suing to recover property exchanged by him or by his predecessor by reason of the temple being deprived of property got back in exchange owing to a defect of title will be barred by Art. 143 and will not be saved by S. 10. The cause of action for such a suit does not run when the temple is dispossessed for the first time in execution of a decree obtained in a suit instituted against the temple by a third party claiming under a paramount title but only from the date of the final decree in such suit. A plaintiff's cause of action under S 119 of the Transfer of Property Act does not arise before the date of the final decree in the suit in which he was dispossessed and he will be in time if he brings a suit before the expiration of 12 years from the date of such decree. 30 M. 316=17 M. L. J. 149.

——S. 10 — Religious endowment — Shebait—Person "in whom property has become vested in trust for any specific purpose" — Revival of right to sue barred by the Act.

A shebait of property endowed for the worship of a deity and other religious purposes is a person "in whom the property has become vested in trust for any specific purpose" within the meaning of S. 10. 11 M. 274, foll. 4 C. 455, ref. to. A right barred before the passing of any provision corresponding to S. 10 cannot be revived by reason of the enactment of S. 10. 11 M.I.A. 315, 361; 27 C. 1004; 20 W.R. 375 (P. C.), Foll. (1903) 31 C. 314.

——S. 10—Religious endowment—Trusts—Specific purpose—Limitation.

Properties were vested in the defendants as trustees in trust for a temple. No breach of trust in reference to such trust was alleged, but the plaintiff alleged that income of the properties after defraying the expenses of the trust should be distributed among various persons, including himself, **in accordance with the custom** of the vatan and claimed a share. **Held,** that S. 10 did not save limitation in respect of such a suit, as it did not relate to the specific purpose for which the properties were vested in the defendants as trustees. (1901) 3 Bom. L.R. 422.

10. Specific trust.

——S. 10—Trustee for specific purpose—Person merely asked to manage and control minor's share in business.

Where on the death of a minor's father, the minor's mother and other relation merely ask a person as an elderly relation to manage and control the minor's share in his father's business in the minor's interest until the minor comes of age, they cannot be held to have intended to vest the minor's share in the property of his father's business in such person as a trustee. Such a person is not a trustee for a specific purpose, or indeed a trustee at all within the meaning of S. 10 of the Limitation Act. I.L.R. (1947) Kar. 109=A.I.R. 1947 Sind 187.

——S. 10—Specific trust.

Pre-settlement mokhasa in certain zemindari attached in 1831 under Cl. 6 of S. 34, Madras Regulation XXVIII of 1802—Zemindari sold for arrears and came in possession of Government — Government resumed mokhasa in 1856, wrote off arrears and regranted it unconditionally to zemindar in 1860—Zemindar held it since then in his own right—Mokhasadar having knowledge of resumption, acquiescing in and abandoning his right in mokhasa—Suit for possession brought in 1927—It was alleged that zemindar was trustee and no question of limitation arose:

Held, no trust was created and time began to run from date of disclaimer and suit was time-barred. A.I.R. 1938 Mad. 295.

11. Trust by operation of law.

——S. 10—Pre-British watan grant—Presumption as to recognition by British Government—Nadgir watandar holding land subject to payment of fixed judi—Default—Sovereign power assuming management—Whether tantamount to trust.

There is no presumption that upon the assumption of sovereignty by the British Government, the pre-British watan grant was recognized.

In order that the statute of limitation might be ousted, there must be a direct trust constituted by the act of parties and not a constructive trust arising by implication of law. Where land is held by a **nadgir** subject to payment of fixed **judi**, the mere assumption of management by a sovereign power of lands on failure to pay the customary **judi** is not tantamount to 'vesting' in trust of such lands under S. 10, Lim. Act. The words "in trust for a specific purpose" in that section must obviously receive a restrictive interpretation. Assuming that the lands were freely surrendered by the nadgirs into the possession of the ancient rulers or the grantees through them on account of their inability to pay the customary judi, the payment of which was the essential condition of the tenure, that surrender, whether voluntary or not, will not necessarily create a trust of the limited character and nature attaching to property within the meaning of S. 10, Lim. Act. A.I.R. 1937 Bom. 455= 39 Bom. L.R. 572=171 Ind. Cas. 844.

——S. 10—Trust by operation of law—Trust for a specific purpose—Trust by operation of law—Trust dedicated in a will—No specific trust—Suit to follow residue in trustee's hands.

Once the testator's property is vested in the trustees for a specific purpose, it is not necessary that any resulting trust of the residue which necessarily arises by operation of law should be specified in words of the will in order to bring it within the scope of S. 10. 21 B. 646. (1910) 12 Bom. L.R. 947=35 Bom. 49=8 Ind. Cas. 635.

——S. 10—Trust by operation of law—Trust for a specific purpose—Express trust—Trust Act, Ss. 81, 83.

S. 10 does not apply to a resulting trust in favour of the settlor which arises by the operation of Ss. 81 and 83 of the Indian Trust Act, 1882, on the ground that the object of the original trust is uncertain or undiscoverable. Whether the resulting trust flow from the invalidity of the declared trust or from the impossibility of ascertaining the declared trust, it is equally a substituted trust, that is, a trust which is created by the law **forte de mieux**, that is, as the best arrangement which the law regards as possible in difficult circumstances. This general rule is affected to this extent only, that where there is a trust covering the whole estate and the bequest do not exhaust the whole estate the trustees are express trustees of the residue for the heir of the testator. (1906) 8 Bom. L.R. 328=31 B. 222.

12. Trustee de son tort.

——S. 10—Administrator de son tort.

Section 10 applies only to a case of an express trust. Where, however, the defendant who undertook to distribute the moneys of the sale proceeds of a property to the persons entitled to it in their proper shares, has no legal title to the moneys under S. 5, Trusts Act, S. 10 has no application. At most, the defendant can be regarded as an administrator **de son tort** in this connection. 1945 M.W.N. 671=(1945) 2 M.L.J. 422=58 L.W. 555=A.I.R. 1946 Mad. 116=124 Ind. Cas. 21.

——S. 10—Trustee de son tort—Constructive trustee—Possession of trespasser.

The wrongful invasion or continuance in possession of a stranger whether with or without knowledge of the infirmity of his title will not make the wrong-doer a construtive trustee unless he has been admitted into possession by a trustee.

A person who has been held to be a trespasser **ab initio** cannot be said to be a trustee or manager **de son tort** within the meaning of para. 2 of S. 10. A.I.R. 1945 Sind 57=I.L.R. (1945) Kar. 40.

——S. 10—Trustee de son tort.

Section 10 does not apply in the case of trustee **de son tort**. For an executor to be considered holding property in trust for a specific purpose, an express trust must be enacted by the will itself, as the position of an express trustee does not arise from the status of the executor by itself. 1944 N.L.J. 458=I.L.R. (1944) Nag. 817=A.I.R. 1944 Nag. 377.

——S. 10—Trustee de son tort.

In a suit for accounts against the trustee **de son tort** S. 10, Lim. Act will not apply, for, it applies to cases of express trust alone. Such a point is governed by Art. 120. A.I.R. 1941 All. 1=I.L.R. (1940) All. 815=(1940) A.L.J. 705=1940 A.W.R. 607=193 Ind. Cas. 697.

——S. 10—Trustee de son tort.

Trustees **de son tort** would come within the operation of S. 10 but the existence of a trust must be first established before S. 10 may be applied against trustees **de son tort.**

Where a person who is unable to look after his properties, leaves the management thereof to his nephews, who continue in the management after his death, even if it be supposed that a fiduciary relationship was created under the circumstances after his death, such a relationship could, by no stretch of language, be deemed a trust for a specified purpose within the meaning of S. 10. A.I.R. 1938 Cal. 673=I.L.R. (1938) 1 Cal. 652=181 Ind. Cas. 190.

——S. 10—Trustee de son tort.

Section 10 applies to express trustees and their representatives and not to a trustee **de son tort.** A.I.R. 1937 Oudh 373=1937 O.W.N. 745=13 Luck. 344=168 Ind. Cas. 593.

——S. 10—Trustee de son tort.

An executor **de son tort** does not come within the purview of S. 10 for that section is confined merely to what are called express trustees and has no application to such trusts as the law implies merely from the existence of particular facts or fiduciary relations. 30 P. L. R. 503=A.I.R. 1929 Lah. 753.

——S. 10—Trustee de son tort.

To a suit for accounts against a trustee **de son tort** S. 10 will not apply, for it applies to cases of express trust. 44 Mad. 277; 45 Mad. 419, **Foll.** 84 Ind. Cas. 631=22A.L.J. 866=5 L.R.A. Civ. 697=47 All. 17=A.I.R. 1924 All. 884.

——S. 10—Trustee de son tort — Trustees — Suits against—Applicability to suits against trustee de son trut.

See Trust. 7 Bom. L.R. 45=29 B. 267.

13. Trust property with stranger.

——S. 10—Trust property with stranger.

An express trustee cannot prescribe for a title by adverse possession againt his beneficiary, and the trustee's legal representatives or assigns (without valuable consideration) are in no better position than the trustee himself. But the rule does not prevent a stranger to the trust, who takes possession of the turst property independently of the trustee, from acquiring title by adverse possession. A.I.R. 1935 Mad. 483=152 Ind. Cas. 181.

14. Trustee, who is.

——S. 10—Trustee, who is.

The shebait under the Hindu Law is not a trustee for the idol and no legal estate vests in him. He is only a manager of the estate bestowed upon the idol which is the real owner. A.I.R. 1922 P. C. 123; 13 M. I. A. 270 (P. C.); and 27 C. L. J. 605, **Rel. on.** Limitation

Act, S. 10 does not apply to a suit for accounts against him. 114 Ind. Cas. 734=1929 A.L.J. 229=A.I.R. 1928 All. 689.

——S. 10—Trustee, who is—The position of a mutawali is not that of a trustee within S. 10.

A mutawali or custodian of the endowed property of the temple may, in a general way, be described as a "trustee"—a person in a position of trust with respect to the administration of the temple properties—but no property is vested in him upon trust for any specific purpose. Therefore his position is not that of the express trustee referred to in S. 10, Limitation Act. Whatever sums, therefore, he has received for and on behalf of the idol installed in the temple can be treated only as sums received to the use of the idol, and a suit to recover the money so received is governed by Art 62. A.I.R. 1922 P. C. 123, **Foll**. 108 Ind Cas. 452=50 All. 265=25 A.L J. 1047=A.I.R. 1928 All. 134.

——S. 10—Trustee, who is.

There is no authority for converting an executor into a trustee by anything like a performance of his duties **qua** executor. 103 Ind. Cas. 225=29 Bom. L.R. 418=A.I.R. 1927 Bom. 424.

——S. 10—Trustee, who is.

An executor though not a trustee for specific purpose is a trustee with a fiduciary character even as regards, the next of kin. 93 Ind. Cas. 385=42 C. L. J. 280= A.I.R. 1926 Cal. 1.

——S. 10—Trustee, who is.

The mere fact that a person comes to land which originally may have been trust property for an idol and places on that land a new namghur and sets up a new idol, does not constitute him a trustee **de son tort** for the original idol that was upon the land and S. 10 does not apply to such a case. 89 Ind. Cas. 133=A.I.R. 1925 Cal. 1244.

——S. 10—Trustee, who is—Person obtaining jewels under promise to give them to plaintiff is a trustee as per S. 10.

By some agreement the jewels in question which had been pledged to a third person were settled on the plaintiff to be enjoyed by her during her life without power of alienation and upon her death to be divided between the defendant and other parties to the agreement. At the time the document was executed there was an express promise by the defendant that he would within ten days obtain the jewels and deal with them in accordance with the document. The defendant got the jewels from the pledgee but did not hand them over to the plaintiff:

Held, that defendant was 'trustee' within S. 10. The phrase "trust for a specific purpose" in this section is merely a more expanded mode of expressing the same idea conveyed by "express trust" in English Law; and it is used in this section in contra-distinction to "trusts arising by implication of law, trusts resulting and trusts constructive". The word "vested" in S. 10 means nothing more than properly having control of the property. 72 Ind Cas. 842=17 M.L.W. 467=32 M.L T. 217=1923 M. W. N. 284=A.I.R. 1923 Mad. 578=44 M.L.J. 431.

15. Trust property.

——S. 10 and Art. 120—Trustee—De son tort—Suit for accounts—Limitation.

A suit for accounts in respect of trust property comes under S. 10 and a trustee **de son tort** stands in the same position as an express trustee The claim for accounts for six years prior to the institution of the suit would be saved by Art. 120 the obligation of a trustee to account being continuous. Under the new Act, a suit for accounts can be launched against a trustee. Though under the New Act there in no limit to a suit for accounts against a trustee, a right to sue barred under the old Act cannot be revived under the New Act. 24 C.W.N. 752=57 Ind. Cas. 805.

——S. 10—Trust property—Suit by trustee to recover from person claiming as trustee.

A suit by an alleged trustee for recovery of trust property against person claiming himself to be trustee is governed by Art. 144 of the Limitation Act. 46 I A. 201=37 M L J 460=(1919) M W N 850=17 A L J. 1097=10 L. W 642=26 M L.T. 479=24 C.W N. 249 =53 Ind. Cas. 288 (P. C.)

——S. 10—Trust property—Suit against trustee—Misappropriation by trustee—Limitation.

The time against a creditor trustee who had misappropriated begins to run from the date of misappropriation. 1 Ind. Cas. 347 (All.)

——S. 10—Trust property—Deposit as security.

The plff deposited as security his P. O Savings Bank Pass Book with the deft., then manager of an estate. On the plff.'s dismissal a sum due to him was with the Collector's sanction and plff.'s consent and authority, withdrawn from the Savings Bank and credited to the estate. The plff demanded money from the deft. The decree given by the trial court to the plff. was revised by the High Court which held that no property vested in the deft. in trust for the plff and the suit was barred by Limitation being instituted after more than three years. 52 Ind. Cas. 65 (Cal.)

——S. 10—Trust property—Suit against trustee—Neglect to get income of trust property.

S. 10 of the Act of 1877 does not save from limitation, cases where it is sought to render a trustee accountable for property which, but for his wilful default or neglect, would come into his hands. The effect of S. 10 of the Act of 1908 is to make a trustee liable for an indefinite time and without bar of limitation for breaches of trust consisting in failure to get in trust property. A suit against a trustee for failure to obtain possession of the corpus and income of the trust property is not within S. 10 of the Act but is governed by the ordinary law of limitation 42 Ind. Cas. 543 (Cal.).

——S. 10—Trust property—Land granted to custodion as dharmarth.

A suit for the recovery of property from a person in whom it was vested in trust for the upkeep of a shrine, or from a gratuitous transferee from him is governed by S. 10. The custodian of a shrine can acquire private property if he is not a sanyasi. 78 P. R, 1912. 109 P R, 1919=53 Ind. Cas. 577.

——S. 10—Trust property—Land assigned by mutual agreement — Suit for its recovery—Limitation.

Suit against defts. to whose predecessors in interest the suit lands were assigned and who were in posses ion as assignees according to mutual agreements is governed by S. 10 and is consequently not barred by limitation. 12 P.L.R. 1918=70 P.W R. 1918=66 P. R. 1918=45 Ind. Cas. 325.

——S. 10—Trust property—Suit against trustee—Neglect to get income of trust.

A suit against a trustee for failure to obtain possession and income of the trust, falls under the ordinary law of limitation and not under S. 10. 41 Mad. 319=(1917) M W.N 651=6 I. W. 523=22 M. L. T. 388=42 Ind Cas. 544.

——S. 10—Trust property—Suit against trustee—Former trustee.

A suit on behalf of a Devasthanam for recovery of property from a former trustee is governed by S. 10 of the Limitation Act though the former trustee's title to the office was not legally valid. 25 M. L. J. 452=14 M.L.T. 437=21 Ind. Cas. 421.

——S. 10 and Arts. 134, 142 and 144—Trust proprty - Permanent lease—Possession for 12 years—Effect of.

When trust property was permanently leased to the deft. on condition of paying yearly rent and the tenant was in possession for over 12 years; held, that S. 10 did not apply as he was an assignee for valuable consideration and that the deft. acquired by prescription the right of permanent lessee under either Art. 142 or 144 of the Act, Art. 134 does not apply. 23 M. 271; 36 C. 1003; 38 C. 526, Rel. on. There was no creation of a tenancy from year to year by the mere payment of rent as such tenancy can be created only by express or implied contract. 23 M.L. J. 260=12 M L.T. 218=(1912) M.W.N. 870=16 Ind. Cas. 53.

16. Miscellaneous.

——S. 10—Miscellaneous—Director of company—Position of.

Whether a director whose acts are the subject of construction was a trustee or a partner or an agent to the Company or to the body of share-holders is to be determined according to the circumstances of each case. 79 Ind. Cas. 740=5 Lah. 27=A.I.R. 1924 Lah. 435.

——S. 10 — Miscellaneous — Execution against-trustees.

So long as the original trustees are not removed. and they remain in control of the property it cannot be contended that they are not the proper judgment-debtors to be on record in the execution petition. The crucial date on which the trustees cease to be actual judgment debtors is that on which they are ousted from the control of the trust property. 92 Ind. Cas. 709=23 M.L.W. 22=A.I.R. 1926 Mad. 321=50 M.L J. 153.

——S. 10—Miscellaneous—Legal representative——New trustee.

A new trustee succeeds to the office of a former trustee and not to him personally and is not therefore his legal representative under this section. 4 L.W. 369 =(1916) 2 M.W.N. 87=34 Ind. Cas. 945.

——S. 10—Miscellaneous—Trustee—Right to reimbursement.

Where a trustee is removed and an account ordered against him, his claims against the estate, though barred, may be gone into and a decree may be given to him if the accounts should turn out to be in his favour. An executor has a right of retainer, but no charge on properties not in his possession for sums due to him from the estate and his claim in respect of them is governed by Art. 120 of the Limitation Act. 39 Mad. 365=28 M L. J. 285=2 L.W. 241=28 Ind. Cas. 221.

——S. 11 (1) and (2)—Effect of—Migration of both parties—Suit on promissory note—Law applicable.

After the execution of a promissory note in Sindh both parties to it migrated to Kutch long before the period of limitation expired. On a question of the law applicable in regard to limitation for a suit on that promissory note in Kutch:

Held, the pro-note became subject to the law of the land to which the defendant went (i.e.) Kutch before it had expired in Sindh. It is only a liability already dead when the parties were still in the country of its origin that cannot be revived by their migration thereafter. A.I.R. 1950 Kut. 58.

——S. 12.

Synopsis.

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1. Applicability and scope.

——S. 12—Applicability—Letters Patent appeal.

The provisions of S. 12 of the Limitation Act are applicable to Letters Patent appeals under Cl. 10, Letters Patent of the Patna High Court. The section does not make any reference to C.P. Code or to any other Act and is a general provision which applies to the whole of British India. 26 Pat. 157=A.I.R. 1947 Pat. 329 (S.B.)

——S. 12—Scope—"Prescribed"—If means prescribed by any law.

The word "prescribed" in S. 12 of the Limitation Act must be taken to apply to any Act which may be the subject of consideration in a particular case 26 Pat. 157=A.I.R. 1947 Pat. 329 (S.B.)

——S. 12 (3)—Applicability—Execution.

Section 12 (3) does not apply to an application for execution. (1945) 24 Pat. 421.

——S. 12—Applicability and scope.

Entire law of limitation has not been certified for all times and for all purposes in Lim. Act—Central and Provincial Legislatures can make additional and supplemental provisions which become part and parcel of law of limitation applicable to an action. A.I.R. 1942 All. 396=(1942) A.L.J. 571=1942 A.W.R.H.C. 315=I.L.R. (1943) All. 55=203 Ind. Cas. 331 (F.B.)

——S. 12—Applicability and scope.

Under S. 12, time spent for obtaining copy of order or decree sought to be revised has to be deducted from the period of limitation prescribed for filing revision, where, according to the Rules of the Court, it is essential to file a copy of the order sought to be revised along with the application. Such a practice prevails is Oudh according to R. 5, Chap XII of Oudh Chief Court Rules A.I.R. 1942 Oudh 392=1942 O.W.N. 335=1942 A.W.R.C.C. 220=200 Ind. Cas. 608.

——S. 12—Applicability and scope.

The provisions of S. 12 (2) are applicable to an application under S. 12 (2) of the Oudh Courts Act. Hence the time spent in obtaining copy of judgment should be excluded in computing the period of 30 days prescribed by R. 7, Chap. XII of the Rules of the Oudh Chief Court. A.I.R. 1942 Oudh 316=1942 O.W.N. 21 =1942 R.D. 73=1942 A.W.R. 25 (1)=18 Luck. 66= 199 Ind. Cas. 712.

——S. 12—Applicability and scope.

The rules under Cl. 27 of the Letters Patent amount to 'special law.' Within the meaning of S. 29 of the Limitation Act and therefore S 12 of the Limitation Act governs appeals under Cl. 10 form the judgment passed by the High Court in its appellate jurisdiction and the 'time requisite' in obtaining a copy of the judgment appealed from must be excluded. A.I.R. 1041 Lah. 257=I.L.R. (1941) Lah. 191=43 Pun. L.R. 297 =195 Ind. Cas. 452 (F.B.)

——S. 12—Applicability and scope—Appeal under S. 202, Companies Act.

Section 12, Lim. Act governs an appeal preferred under S. 202, Companies Act from an order of a single Judge of High Court exercising original jurisdiction. A.I.R. 1941 Lah. 257=I.L.R. (1941) Lah. 191=43 P.L.R. 297=195 Ind. Cas. 452 (F.B.)

——S. 12—Applicability—Companies Act, appeal under—No.

See: Companies Act, S. 169. 19 M.L.J. 511=4 Ind. Cas. 872.

——S. 12—Applicability and scope.

Appeal from judgment passed by High Court in exercise of original civil jurisdiction—Section 12, Lim. Act applies. A.I.R. 1041 Lah. 257=I.L.R. (1941) Lah. 191=43 P.L.R. 297=195 Ind. Cas. 452 (F.B.)

——S. 12 (2)—Applicability and scope—Appeal and revision—Petition under S. 73, Madras Village Courts Act (I of 1889)—Certified copy of decree.

A petition under S. 73 of the Mad. Village Courts Act can be regarded as being comprehended within the term "appeal" occurring in S. 12 (2), Lim. Act.

Consequently, though S. 73 does not require an applicant to produce along with his petition a certified copy of the decree, yet S. 12 (2), Lim. Act is applicable. Section 12 (2) is applicable even to a case where appeal or application need not be accompanied by a copy of the decree objected to. A.I.R. 1941 Mad. 589=(1941) 1 M.L.J. 540=53 L.W. 487=1941 M.W.N. 349=199 Ind. Cas. 651.

——S 12—Applicability and scope—Rules as to computation laid down in Part III, whether apply to other enactments.

The rules as to computation of period of limitation laid down in Part III of the Lim. Act, which rules accord with common sense, are not intended by the Legislature to apply only to periods of limitation prescribed by the Schedule but apply to periods of limitation provided for by other enactments. A.I.R. 1939 All. 403=(1939) A.L.J. 522=1939 A.W.R. 498=I.L.R. (1939) All. 647=183 Ind. Cas. 242.

——Ss. 12 and 29—Applicability and scope.

Section 12 has been made applicable to all special and local laws, by virtue of the amended S. 29. 15 P.L.T. 301=A.I.R. 1934 Pat. 353=151 Ind. Cas. 107.

——Ss. 12 and 29—Applicability and scope.

Sections 12 and 29, do not apply to an application for reference under S. 18 of the Land Acquisition Act. A.I.R. 1932 All. 598=54 A. 282=143 Ind. Cas. 111.

——S. 12—Applicability and scope.

Section 12, Lim. Act, does not apply to proceedings under S. 66 (3). (1931) A.L.J. 593=53 A. 634= A.I.R. 1931 All. 673=133 Ind. Cas. 621.

——S. 12—Applicability.

Section 12 does not apply in computing the periods of limitation prescribed for an application under S. 18 (1), Land Acquisition Act, 1894. 79 P.R. 1904, Foll. 104 Ind. Cas. 397=A.I.R. 1927 Lah. 858.

——S. 12—Applicability.

Sections 12 and 14 are only applicable to suits in British India and not to proceedings in foreign Courts. 102 Ind. Cas. 523=8 Lah. 54=A.I.R. 1927 Lah. 200.

——S 12—Applicability.

Section 12 (4) applies to an application to the Collector to refer a matter to the Court and the applicant is entitled to exclude the time requisite for obtaining the copy of the Collector's award. 96 Ind. Cas. 110 =5 Bur. L.J. 26=A.I.R. 1926 Rang. 135.

——S. 12—Applicability.

The provisions of S. 12 are applicable to the pauper appeals. 77 Ind. Cas. 908=A.I.R. 1923 Lah. 684.

——S. 12—Applicability.

Where accused was convicted and sentenced to 4 years' rigorous imprisonment and fine:

Held, that the appeal from the sentence lies to the Special Judge and not the High Court. Since Act X of 1922, S. 12 of the Limitation Act has been made applicable to this act also. Time for obtaining copies may be excluded. 71 Ind. Cas. 217=16 M.L.W. 764=24 Cr.L.J. 89=A.I.R. 1923 Mad. 95=43 M.L.J. 561.

——S. 12—Applicability.

Rule 2, Chap. 7 of the Patna High Court Rules, excludes the applicability of S 12 of the Limitation Act to appeals under Cl. 10 of the Letters Patent. 59 Ind. Cas. 179=2 P.L.T. 42=A.I.R. 1921 Pat. 365.

——S. 12—Applicability—Prov. Insol. Act, S. 46—Appeal.

An appeal presentend under S. 46 Prov. Insol. Act falls under S. 12, Limitation Act. 10 A.L.J. 3=34 All. 496=16 Ind. Cas. 149.

——S. 12—Applicability and scope—Application to be before expiry of the period allowed.

To claim the deduction of the period of obtaining copies under S. 12 of Limitation Act from that allowed for the appeal, the application must be made before the expiry of the period allowed as the time requisite for obtaining copy counts from the date on which application is made. 32 C.L.J. 127=58 Ind. Cas. 408.

——S 12—Applicability — Period for obtaining copies.

S. 12 will not apply unless the application for obtaining copies is made before the expiry of the prescribed period. 61 P.L.R. 1911=189 P.W.R. 1911=9 Ind. Cas. 381.

——S. 12 and S. 4—Applicability—Appeals under—Madras Forest Act (1882), S. 10.

Provisions of S. 12, Limitation Act as regards exclusion of time required for taking copies of orders, do not apply to appeals under S. 10, Mad. Forest Act, S. 12 must be read with S. 4 of the Act. 10 M. 210, overruled. 23 M. 389; 22 M. 179; Dist. The section does not apply if under certain Act copy of order appealed against, need not accompany the notice of appeal. 34 Mad. 505=7 M.L.T. 132=20 M.L.J. 283=5 Ind. Cas. 884.

——S. 12—Applicability and scope—Appeals under the Companies Act.

S. 12 does not apply to appeals under the Companies Act and therefore the time requisite for obtaining a copy of the order appealed against cannot be excluded from the period of limitation. 19 M.L.J. 511=4 Ind. Cas. 872.

——S. 12—Applicability—Letters Patent appeal—Time taken in getting copies.

Copies of the judgment need not be filed in an appeal under the Letters Patent from the decision of a single Judge of the High Court and the time taken in obtaining them cannot be deducted from the period of 30 days prescribed by the rules of the High Court for filing such appeal. Per **Miller, C. J.**, S. 12 of the limitation Act is not limited to the class of cases in which it is necessary to file copies of any of the documents referred to in that section. (1920) P.H.C.C. 333=5 Pat. L.J. 709.

——S 12—Applicability—Decree drawn up—Time spent in obtaining copy of decree.

Where a formal decree has been drawn up in a miscellaneous execution case the time requisite for obtaining a copy of such a decree is to be deducted under S. 12. 17 All. 213; 14 Ind. Cas. 1006, Foll. 1 P.L.T. 33=(1920) P.H.C.C. 75=2 U.P.L.R. (Pat.) 26=54 Ind. Cas. 630.

——S. 12 (2)—Applicability and scope—Review—Copy of judgment, if necessary—Applicant obtaining copy—Time for obtaining copy—Whether can be excluded.

According to the practice of the Allahabad High Court, it is not necessary for an applicant to obtain a copy of the judgment for the purpose for making his application for review. But if the applicant obtains such copy under S. 12 (2), Lim. Act, time for obtaining the copy should be excluded for the purposes of limitation. (1933) A.L.J. 1631=A.I.R. 1934 All. 367=3 A.W.R. 48=56 A. 591=148 Ind. Cas. 290.

——S. 12—Applicability and scope—Review—Application for—Limitation.

S. 12 of the Limitation Act applies to an application for review and the period of limitation does not begin to run until at all events the day on which the decree was signed even though it is unnecessary to attach a copy of the decree to such application. 20 C.W.N. 967=24 C.L.J. 235=35 Ind. Cas. 348.

——S. 12 (2)—Applicability and scope—Review—Deduction of time spent in obtaining copies.

A petitioner for review is entitled under S. 12 of the Limitation Act to deduct the time taken in obtaining a copy of the judgment sought to be reviewed. 38 M.L.J. 224=(1920) M.W.N. 228=11 L.W. 217=55 Ind. Cas. 444.

——S. 12—Applicability and scope—Review—C. P. C., O. 47, R. 3.

Though no copy of judgment is required to be filed with the review application, the time spent in obtaining a copy of it must be excluded in computing the period of limitation. 17 A. 213, 24 C.L.J. 235 Rel. 42 Ind. Cas. 504 (Mad.)

——S. 12—Applicability and scope—Suit to set aside certificate of sale.

See : Bengal Acts—Public Demands Recovery Act. 11 C.W.N. 745=34 C. 787=But see 11 C.W.N. 756=5 C.L.J. 696.

2. Copies of other documents.

See also: Limitation Act, S. 12—Judgment other than appealed from.

——S. 12—Copies of other documents.

Deduction of period spent in obtaining copy of first Courts judgment may be allowed if appellant had applied for copy before limitation and filed it soon after obtaining it. A.I.R. 1939 Lah. 378.

——S. 12—Copies of other documents—Time if can be allowed.

The words "time requisite" in S. 12, mean simply the time required by the appellant to obtain a copy of the decree assuming that he acted with reasonable promptitude and diligence. The time requisite for obtaining a copy is the shortest time during which a copy could have been obtained by the appellant and it has nothing to do with the amount of time spent by him in obtaining the copy which he chooses to file with the memorandum of appeal. A.I.R. 1935 Lah. 682=38 P.L.R. 1054=17 L. 621=161 Ind. Cas. 72.

3. Copy obtained by another person.

——S. 12 (2)—Copy obtained by another person—Exclusion of time.

The appellant in an appeal preferred to the High Court applied within the prescribed period for a copy of the decree but allowed the application to be dismissed for non-payment of copying charges and subsequently filed the appeal with a copy of the decree obtained by another party, held, that the appellant was entitled to deduct the time for obtaining such copy. 12 M.L.J. 385, not Foll.; 29 A. 264, Foll. S. 12 does not lay down that the copy of the decree must have been obtained by the appellant himself. 43 Mad. 633=38 M.L.J. 340=11 L.W. 370=(1920) M.W.N. 246=56 Ind. Cas. 73.

——S. 12—Copy obtained by another person—Application for copy—Who should make.

It is not necessary that an application for copy should be made by the party himself. 23 Ind. Cas. 209 (Oudh).

——S. 12—Copy obtained by another person—Time taken for copies—No application by appellant—Minority.

Under S. 12 an appellant is entitled to a deduction of the time taken up in obtaining copies only if he had applied for the copy. He is not entitled to a deduction of the time taken by another party in obtaining the copies. Limitation runs against a person for appeal, though he is a minor. (1902) 12 M.L.J. 385.

4. Copy sent by post.

——S. 12—Copy sent by post.

Where copies are despatched by post the period intervening between completion and despatch of the copies is also excluded in the Punjab. 8 N.L.R. 11 and 10 N.L.R. 139 and 6 O.L.J. 660, Foll. 69 Ind. Cas. 818=3 Lah. 280=4 L.L.J. 500=A.I.R. 1922 Lah. 219.

——S. 12—Copies sent by post—Time spent between completion and despatch—Central Provinces Courts Act (II of 1904), S. 8 (1) (c).

The period between the completion and despatch of copies of the decree and judgment by post must be included in computing the period of Limitation in cases where copies are applied for and sent by post. 8 N.L.R. 11=14 Ind. Cas. 403.

——S. 12—Copies sent by post.

The time requisite under S. 12 of the Limitation Act is the time from the date of the application to the date of posting the copies irrespective of the fact that the copies are ready for delivery before the latter date in a case where the applicant has asked for the copies to be sent to him by post. 6 O.L.J. 660=54 Ind. Cas. 831.

5. Copy of award.

——S. 12—Copy of award.

Period requisite for obtaining the copy of an award should be allowed in computing the period for filing objections to an award. A.I.R. 1933 Rang. 38=142 Ind. Cas. 835.

——S. 12 (4), Art. 158—Copy of award.

Under S. 12 (4), the period required for obtaining copy is to be excluded in computing the time allowed by Art. 158. A.I.R. 1932 Mad. 588=140 Ind. Cas. 11 (2).

——S. 12 and Art. 158—Award—Time requisite for obtaining copy of—Application to set aside award.

The period taken for obtaining a copy of the award must be excluded in computing the period of limitation for an application to set aside the award. 46 Cal. 721=23 C.W.N. 280=53 Ind. Cas. 46.

——S. 12 (4)—Award—Setting aside—Exclusion of time necessary to get copy.

In an application to set aside an award filed in Court, the time requisite for obtaining a copy of the award may be taken into account under S. 12 (4) in calculating the period of limitation. 29 Ind. Cas. 860 (Mad.).

6. Copying agent.

——S. 12—Copying agent—If private agent of applicant.

A 'copying agent' in dealing with an application presented in accordance with the rules, does not act as a private agent for the applicant, but as an official of the Copying Department, which is entrusted with the duty of preparing and certifying copies. A.I.R. 1936 Lah. 771=38 P.L.R. 493=17 L. 429=166 Ind. Cas. 467 (F.B.).

——S. 12—Copying agent.

The Copying Department cannot be regarded as a private agent of the applicant. 37 P.L.R. 510=A.I.R. 1936 Lah. 120=158 Ind. Cas. 736.

——S. 12—Copying agent.

The copying agent does not remain the agent of the applicant but is the agent of the Court, when an applicant for a copy of judgment and decree complies with the rules framed by the High Court regarding the application for copies of records. A.I.R. 1035 Lah. 682=38 P.L.R. 1054=17 L. 621=161 Ind. Cas. 72.

——S. 12—Copying agent.

The copying agent could only be treated as an agent of the applicant and not that of the Court. A.I.R 1935 Lah. 625=160 Ind. Cas. 788.

——S. 12—Copying agent.

The Copying Agency cannot be regarded as other than an agent of the applicant and is not an agent of the Court. Time spent by the Copying Agency in getting the estimate and putting in the application should not be allowed to the applicant. 61 P.L.R. 1911, Foll. 104 Ind. Cas. 586=28 P.L.R. 605=A.I.R. 1928 Lah. 16.

——S. 12—Copying agent.

Held, the copying agent must be taken as an agent of the appellant and delivey of the copies to him must be regarded as delivery to his principal. The appellant was entitled to a deduction of the time till the copies were delivered to the Copying agent. 55 Ind. Cas. 406 (Lah.).

7. Day of judgment or decree.

——S. 12—Day of judgment or decree—Defendant being absent, judgment informed to his Counsel at later date—Limitation for appeal, when starts.

After hearing the arguments of the parties, the Court did not fix any date for the pronouncement of judgment. The judgment was delivered on December 23, 1936, but the defendant being absent, the judgment was sent to the Counsel for the defendant on January 8, 1937, and he wrote down the word "noted" on the margin of the judgment:

Held, that January 8, 1937, must, therefore, be regarded as the date for pronouncing judgment of which due notice was given to the Counsel. A.I.R. 1938 Lah. 707=182 Ind. Cas. 108.

——S. 12—Day of judgment or decree—Limitation for appeal.

Limitation for an appeal runs from the date of the judgment, but as the law requires the memorandum of appeal to be accompanied by a copy of the decree, an appellant is entitled to take into account under S. 12, the time taken for obtaining copy of the decree which would necessarily include the period between the date of the judgment and the date of the signing of the decree plus some time taken in the copying department of the Court. Where, therefore, the judgment itself stands, the starting point of limitation would be date of the judgment. Cases where a review of judgment is granted wholly or in part, and thereafter the original decree is amended in conformity with the final judgment passed after review stand on a different footing. The original judgment, in the eye of law, in that case is superseded by the judgment after review. Even where after the review is granted, the original judgment is not altered with the consequence that the original decree is not altered, the original judgment, in the eye of law, is gone and the only judgment is the judgment passed after review; which in that case is a mere repetition of the original judgement. In these cases there is a fresh decree. 40 C.W.N. 83=165 Ind. Cas. 53.

——S. 12—Day of judgment or decree.

Where, deducting the days for the copies, the appeal was within time, even from the date on which the judgment was ready but the date, however, was not communicated to the parties and the record showed that the order was not communicated to the appellants (through their Counsel), till a later date:

Held, that the period of limitation must be reckoned from the latter date in the circumstances. A.I.R. 1934 Lah. 135=149 Ind. Cas. 1127.

——S. 12—Day of judgment or decree.

The date of decree means the date when the judgment is signed and not the date when the decree is signed. 94 Ind. Cas. 121 (Nag.).

——S. 12—Day of judgment or decree.

Where application for copies is made on the same day the judgment is pronounced, that day cannot be excluded twice, once as the day on which judgment was pronounced and the second time as one of the days requisite for obtaining copies. The day on which judgment is pronounced has to be excluded first and then the time requisite for obtaining copies has to be excluded. 75 Ind. Cas. 1055=A.I.R. 1924 Lah. 599.

——S. 12—Day of judgment or decree.

For the purposes of limitation it is impossible to hold that the date of judgment should be any other than that upon which judgment is pronounced in Court, when the parties know the effect of that judgment, whether it would be necessary for them to appeal or not. 75 Ind. Cas. 879=1 Pat. 771=A. I. R. 1923 Pat. 129.

8. Decree later than judgment.

See also: Lim. Act, S. 12— Interval between Judgment and decree.

——S. 12—Decree later than judgment.

The date of a decree for the purposes of the Limitation Act is the date of the judgment and time can be allowed as time requisite for obtaining copies if the applicant or appellant has actually made an application for a copy. The time requisite for obtaining the copy cannot stop to run until the decree is actually signed. 117 Ind. Cas. 251=7 Rang. 18=A.I,R. 1929 Rang. 116.

——S. 12—Decree later than judgment.

The fact that a decree has not been drawn up is no sufficient reason for not applying for a copy of the decree. 118 Ind. Cas. 212=A.I.R. 1929 Sind 206.

——S. 12—Decree later than judgment.

The period between date of the judgment and the date of signing the decree should be excluded in computing the period of limitation. 13 Cal. 104, **Foll.** 97 Ind. Cas. 539=A.I.R. 1927 Cal. 65.

——S. 12—Decree later than judgment.

An applicant cannot claim as a matter of right a deduction of the period between judgment and signing of the decree, when his application for a copy has not been filed until after the signing of the decree. A.I.R. 1026 Nag. 340, **Foll.** 98 Ind. Cas. 1057=A.I.R. 1927 Nag. 1 (F.B.).

——S. 12—Decree later than judgment.

Where a decree was signed the next day the judgment was pronounced, the time for filing an appeal runs from the day the judgment was pronounced. 97 Ind. Cas. 307=22 N L.R. 60=A.I.R. 1926 Nag. 349.

——S. 12—Decree later than judgment.

The period between the date of judgment and the preparation of decree cannot be excluded as time requisite for obtaining a copy. 89 Ind. Cas. 479= 12 O. L. J. 444=2 O.W.N. 420=A.I.R. 1925 Oudh 600.

——S. 12—Decree later than judgment.

There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. 38 Bom. 331, **Foll.** Nor is there any obligation on the parties even to apply for a copy of the decree until the Court drew it up. 78 Ind.Cas. 996=20 N.L.R. 131=A.I.R. 1924 Nag. 271.

——S. 12—Decree later than judgment.

The period between the delivery of judgment and the preparation and signing of the decree would be excluded from the period of limitation prescribed for filing the appeal if the application for copy is made before the preparation of the decree. 75 Ind. Cas. 265 =1 Pat. L.R. Civ. 479=A.I.R. 1923 Pat. 529.

——S. 12—Decree later than Judgment.

Appellant may be entitled to exclusion of time from date of judgment or from date of copy application up to the date of the preparation of the decree, and may also be entitled to exclude the time taken by the copying department in preparing and delivering the copy, but he is not entitled to the exclusion of time between the date of preparation of the decree and the date of his application for copy of the decree. 69 Ind. Cas. 895=A.I.R. 1922 Lah. 170.

——S. 12—Decree later than Judgment.

Time requisite for obtaining a copy of the decree within the meaning of S. 12 does not begin until the actual application for a copy has been made; and if the appellant does not apply for copies until after the expiration of the period prescribed by the Limitation Act, provided copies were obtainable within that period, he is not entitled to deduct the time between the actual signing of the decree and the delivery of the judgment. 62 Ind. Cas. 649=2 P.L.T. 361=6 P.L.J. 350=1921 P.H.C.C. 177=A.I.R. 1921 Pat. 175 (F.B.).

(1 P.L.J. 573 (F.B.) Overruled).

——S. 12—Decree later than Judgment—Delay by Court in preparation of decree should be included in the "time requisite for obtaining copy."

Where in a suit for accounts the Court gave judgment but the preliminary decree prepared in accordance therewith was not signed by the Judge until about one year and the appellant in the meanwhile applied for a copy of the decree but failing to receive it filed an appeal without such copy:

Held, that as there was an omission of the Court to sign the decree for a long time a liberal interpretation should be given to the words, "time requisite for obtaining a copy of the decree" and that there is no substantial reason for excluding, from the time requisite for obtaining copy, any part of the time between the application for a copy and the preparation of the decree. 62 Ind. Cas. 537=15 S.L.R. 16=A.I.R. 1921 Sind 42.

——S. 12—Decree later than Judgment.

In appeal, limitation runs from the date on which the decree was actually signed and the same rule applies in an application for review of a judgment of the High Court. 20 C.W.N. 967=24 C.L.J. 235=35 Ind. Cas. 348.

——S 12 (2)—Decree later than Judgment—Copying fees paid before decree.

An application for a copy of judgment and decree was made on 2nd July 1910. The applicant obtained the copy of the judgment on the 8th July, but his deposit money for the copy of the decree was returned to him on the same date, the decree not being then signed by the Court. The decree was signed on 11th July and on 15th July an application for a copy of a decree was made, which copy was delivered to him on 20th July. He filed his appeal on 17th August. **Held,** that the appeal was in time, the appellant getting a deduction of the days between the delivery of judgment and signing of the decree. The application for a copy of the decree made on 2nd July ought to have been held pending on 11th July. 15 C. W. N. 787= 10 Ind. Cas. 542.

——S. 12(2)—C.P.C., O. 20, R. 7—Decree later than Judgment—Date of decree.

The 'date of decree' for calculating time for appeal is the date of the judgment but when the decree is drafted later owing to time being granted for extra Court fee, the time given must be excluded under S. 12 (2), Limitation Act. 25 Ind. Cas. 67 (Mad.).

——S. 12—Decree later than Judgment—Delay in signing.

The delay in signing a decree cannot entitle an appellant to His Majesty in Council, to deduct the period between the signing of the judgment and of the decree in computing the period of limitation except when the appellant has made an application prior to the signing of decree but if no application is made the non-signature has no effect. 1 P. L. T. 262=57 Ind. Cas. 312.

——S. 12—Decree later than Judgment.

The time which elapsed between the delivery of the judgment and the signing of the decree should be excluded from computing the period of limitation for the appeal. 20 C.W N. 1303, Rel. The period during which the Court was closed for the long vacation was time requisite for obtaining copies within S. 12 of the Limitation Act. 1 Pat. L. J. 573, Rel. 49 Ind. Cas. 664 (Pat.).

9. Delay in obtaining copies.

See also: Lim. Act, S. 12—Laches.

——S. 12(1)—Time requisite for obtaining copies—Application omitting to furnish particulars—Non-exercise of reasonable diligence by Copying Department—Delay due to—Whether may be excluded.

No time could be excluded as time requisite for obtaining copies if that time was lost on account of the mistake on the part of the applicant, but this cannot be said when with reasonable diligence on the part of the Copying Department which under the rules it is expected to exercise, that delay could have been avoided. In such cases final cause for the delay is non-exercise of reasonable diligence on the part of the Copying Department and for that reason therefore time wasted on that account should be excluded under S. 12 (1) of the Limitation Act. If the applicant omits to give in his application for copies the necessary particulars,. (e. g.), the case number and the date of disposal, the defect is one which could be discovered by the Copying Department immediately on presentation of the application and could be set right by bringing it to the notice of the applicant. If the defect is not discovered and brought to the notice of the applicant immediately, the days between the date of the presentation of the application and the date on which the defect is shown to the applicant at a later stage can be excluded as days requisite for obtaining copies. I.L.R. (1948) Nag. 167=A. I. R. 1948 Nag. 395=1947 N.L.J. 552.

——S. 12 (2) and (3)—Delay in obtaining copies—Duty of Court under S. 29 (g) of Stamp Act to direct proportion of stamp duty to be borne by each party in respect of partition decree—Court not doing so—Time taken in furnishing stamps and getting copy of decree can be excluded in computing limitation for filing an appeal.

S. 29 (g) of the Stamp Act makes it clear that it is the duty of the Court in respect of a decree for partition to direct the proportion of stamp to be borne by each party. Where the Court did not do so and in consequence a party had to postpone furnishing the full amount of the stamp paper required, there is no delay on the part of the party in furnishing the stamps and in computing limitation for filing an appeal against the decree the time taken in obtaining the copies of the decree and judgment must be excluded. I.L.R. (1948) Mad. 413=1947 M.W.N. 501=60 L. W. 502=A.I.R. 1948 Mad. 172=(1947) 2 M.L. J. 201.

——S. 12—Time requisite for taking out copies.

The decree was signed on March 13, 1937, and the appeal was filed on April 26, 1937. Application was made for copies of the judgment and decree on March 18, 1937 and the plaintiff was notified about the requisite number of folios and stamps on the same date. Stamps and folios as required were supplied on March 19, 1937, and March 25, 1937, was the date fixed for delivery of the copies. On March 20, 1937, the copying department notified that further folios and stamps would be required. This fact was not notified directly to the plaintiff or his lawyer but was notified in the manner provided by R. 626 and R. 636 of the High Court Rules and Circular Order by making an entry in the prescribed register which was kept in the Court offices at a place convenient for public inspection. On March 25, 1937, the plaintiff came to know that further stamps and folios would be required. March 26 to March 29, were holidays. On March 30, the plaintiff supplied the additional stamps and folios and on March 31 the copies were delivered:

Held, that as the plaintiff was expressly told that the copies would be ready on March 25, 1937, there was no further duty on him or his lawyer to go to the Court on intervening days to ascertain from the register whether further stamps or folios were necessary. In circumstances like these, an entry in the register on an intervening date to the effect that more folios and stamps were required would not amount to a notice to the plaintiff. The Court, by its previous intimation to the plaintiff that the copies would be ready for delivery on March 25, 1937, relieved the plaintiff of the duty of making any further inquiry before March 25, hence, the whole period from March 18, 1937, to March 31, 1937, was requisite for obtaining copies. A.I.R. 1941 Cal. 378=45 C.W.N. 498=74 C.L.J. 121 =I.L.R. (1941) Cal. 536=196 Ind. Cas. 193.

——S. 12 (2) — Delay in obtaining copies — Time during which copying is stopped for want of funds, whether should be excluded as time required for obtaining copy of decree when extra charges are paid without delay—Delay by Court in finding out that wrong number is given, whether also should be excluded.

Time during which copying is stopped for want of funds, at least where there is no absence of bona fides, and where there is no delay in supplying the extra charges when demanded, should not count but should be excluded as time required to get a copy of the decree. Time required means time properly required, and if time is wasted because of the appellant's own negligence, that time does not count. But if a wrong number is given and a Court takes three weeks to find out that wrong number is given, the error is the cause of the delay. The error causes such delay as it is due to it. If the office does not take up the application for a week, there would be a week's delay error or no error. Then, there being an error, the office is delayed. It is delayed until after communicating with the applicant, or where the applicant is ordered to appear, the correct information is given and that delay is due to the order. 1938 N.L.J. 159= A.I.R. 1938 Nag. 287=I.L.R. (1940) Nag. 312=177 Ind. Cas. 538.

——S. 12—Delay in obtaining copies—Validity of application.

Application bearing necessary court-fee stamp addressed to proper officer is valid even if not accompanied by full cost of preparing and certifying copy. A.I.R. 1936 Lah. 771=38 P.L.R. 493 =17 L. 429=166 Ind. Cas. 467 (F.B.).

[Overruling A.I.R. 1935 Lah. 625=160 Ind. Cas. 788 and A.I.R. 1935 Lah. 889=160 Ind. Cas. 897.]

——Ss. 12, 5—Delay in obtaining copies—Application for copy—Demand for payment—Payment made under impression that it was for copies of decree judgment decree not signed—Deposit not demanded for decree—Delay in filing appeal.

Judgment was pronounced on August 28, 1933, and on August 29, the appellant applied for copies of the judgment and the decree. No deposit, as required by the rules, was made with this application nor was the application returned to the applicant (as also required by the rules). On September 1, 1933, Rs. 7-12-0 were paid by the applicant. This sum was demanded from him and was, therefore, paid and he remained under the impression that his sum had been demanded for copies, both of the judgment and the decree, and when a copy of the judgment was furnished to him on September 1, 1933 he thereafter repeatedly made demands for a copy of the decree-sheet as well. He was told that the decree had not been signed and therefore no copy could be supplied. On September 19, 1933, annas 12 were deposited by him for the decree-sheet and, the decree having been signed on that date, a copy of the said decree was supplied to him, on the same day. During this period no sum was ever demanded from him as deposit for the decree-sheet. On October, 16, 1933, he filed the appeal:

Held, that the appellant was entitled to the time between August 29, 1933, and September 19, 1933, and the appeal was within time by reason of S. 12, Lim. Act. A.I.R. 1936 Lah. 670=38 P.L.R. 852=161 Ind. Cas. 215.

——S. 12—Delay in obtaining copies.

The appellant applied for copy of judgment and decree on the 4th January and went to the copying department on the 5th, 6th, 7th and 8th but was told that the file had not come. On the 9th, a note demanding deposit of Rs. 10 for costs was written on the application. But this was not communicated to the appellant. He again called on the 16th and deposited Rs. 10 and got copy on the same day. When the application was made there was no practice of demanding deposit in advance and the appellant was also not asked for deposit:

Held, that appellant was entitled to an allowance of 12 days, (from 4th to 16th January) as time requisite for obtaining a copy of the Judgment. A.I.R. 1936 Lah. 650=166 Ind. Cas. 716.

——S. 12—Delay in obtaining copies.

A litigant cannot be made to suffer for the laches and inaction of any department connected with the administration of justice and hence there is no reason why a party should loose his right of appeal for the dilatory methods of the copying department. The copying department is not the agent of the applicant for copies but of the particular department of the Government which is in charge of the Deputy Commissioner. 38 P.L.R. 220=A.I.R. 1936 Lah. 550=163 Ind.Cas. 223.

——S. 12 — Delay in obtaining copies — Time noted by department as having elapsed between application and completion of copy—Whether can be regarded as time requisite.

'Requisite time' within the meaning of S. 12 (2), means time properly required. When there has been no mistake of Counsel, no negligence nor inaction nor want of bona fides imputable to the applicant but the delay in giving a copy is due to the slipshod and negligent procedure of the Copying Department, the time which the department itself notes as having elapsed between the application and the completion of the copy is to be regarded as 'time requisite' and such period should be excluded in computing limitation for the appeal. 37 P.L.R. 510=A.I.R. 1936 Lah. 120=158 Ind. Cas. 736.

——S. 12—Delay due to negligence of party.

Under S. 12 (2), the time requisite for obtaining copy of decree has to be excluded. But the time requisite does not include the time which may have elapsed by reason of carelessness or negligence on the part of the parties in applying for a copy or in paying the amount of the costs thereof. The appellant must show that no part of the delay beyond the prescribed period was due to his default. A.I.R. 1936 Sind 53=29 S.L.R. 445=163 Ind. Cas. 30.

——S. 12—Delay due to non-preparation of decree-sheet.

Copies of the judgment and decree-sheet were applied for urgently on January 3, 1934, with an urgent fee of Rs. 2. From January 3 to 13, 1934, copies could not be given as the Court had not prepared the decree-sheet. On January 13, this had been done, and the Copying Department was able to prepare an estimate for the preparation of copies on that date. The estimated price was not paid till January 25, and copies were ready on January 30:

Held, that the appellant was entitled to the time from January 3 to 13, and from January 25 to 30. 37 P.L.R. 235=157 Ind. Cas. 181.

——S. 12—Party responsible for delay.

Any delay in obtaining a copy of the decree or order for which delay the appellant is responsible is not to be excluded in computing the time requisite for obtaining such a copy.

Where a draft decree was settled and passed but it could not be signed and filed due to the negligence of the appellant and failure to rectify an error on the application for amendment under the Courts' order:

Held, that the time occupied for completing the order for amendment was not time requisite for obtaining a copy of the decree and that the delay thus caused could not be excluded in computing the period of limitation for the appeal. 61 C. 306=38 C.W.N. 702=A.I.R. 1934 Cal. 543=151 Ind. Cas. 809.

——S. 12—Delay in obtaining copies.

No period can be regarded as requisite under the Act which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. A.I.R. 1922 P.C. 352, Foll. 97 Ind. Cas. 728 (Cal.).

——S. 12—Delay in obtaining copies.

If the applicant does not appear and apply for the copy on the date on which, he is told, the copy of the decree would be ready, any further delay is due to his own default and that period cannot be considered to be time requisite for obtaining the copy unless there are some special reasons why the applicant could not obtain the copies on the day on which they were ready. A.I.R. 1930 Rang. 209.

——S. 12—Delay in obtaining copies.

Any failure in reasonable diligence which produces unnecessary delay owing to default of appellant to do things required by law to be done by him at some stage of obtaining copies will disentitle an appellant to claim the whole of the time actually occupied in obtaining the copy as the time unnecessarily occupied is not time "requisite" within S. 12. 103 Ind. Cas. 235=54 Cal. 481=45 C.L.J. 553=A.I.R. 1927 Cal. 623.

——S. 12—Delay in obtaining copies—A delay caused by the error of the applicants in making the computation is not to be included in the time requisite for obtaining the copy.

The Judgment of the Trial Court was delivered on the 30th of May, 1925. On the 1st of June following the defendants made an application for copies of the judgment and the decree. On the 8th of July the application was returned to the defendants on the ground that the folios supplied were insufficient. The application thus returned was received by the defendants on the 15th of July. On the 17th of July the application reached back the office with the necessary folios:

Held, that the time requisite for obtaining a copy should be computed from the 17th of July and not from 1st June. A.I.R. 1922 P.C. 352, Foll. 101 Ind. Cas. 136=2 Luck. 447=4 O.W.N. 220=A.I.R. 1927 Oudh 129 (F.B.).

10. Interval between Judgment and decree.

See also: Lim. Act, S. 12—
Decree later than Judgment.

——S. 12—Applicability—Interval between Judgment and decree—Application for copy of decree not filed within period of limitation for appeal by reason of decree not being signed.

Under S. 12, Limitation Act, the time requisite for obtaining a copy of the decree begins to run in favour of the proposed appellant from the date on which he applies for a copy. Where the appellant is prevented from filing an application for a copy within the period of limitation prescribed for the appeal by reason of the decree not being signed, he cannot rely upon S. 12 of the Limitation Act. He is not entitled to ask the Court to deduct the period between the signing of the judgment and the signing of the decree in computing the period of limitation for appeal. 85 C.L.J. 299.

——S. 12—Interval between Judgment and decree—Time requisite for obtaining copy—Time between date of judgment and signing of decree—Whether can be excluded.

The time taken from the date of the pronouncement of the judgment to the date of the signing of the decree, cannot be properly excluded as time requisite for obtaining a copy of the decree under S. 12 of the Limitation Act. 12 A. 461, Foll. I.L.R. (1950) Assam 12=A.I.R. 1950 Assam 83.

——S. 12—Construction—Time for obtaining copies—Time between date of judgment and date of signing of decree—If to be excluded twice over.

Under S. 12, Limitation Act, the period between the pronouncement of judgment and the signing of the decree is properly and necessarily excluded both as part of the time required for obtaining a copy of the decree and also as part of the time required for obtaining a copy of the judgment. For all practical purposes therefore, time always begins to run from the date on which the the decree is actually signed. Once time has begun to run, it continues to run unless interrupted by an application being made. Where an application for a copy of decree and an application for a copy of the judgment are made consecutively and the two periods overlap, the common days can be excluded only once and cannot be excluded twice over. The same period cannot be deducted twice over. 26 Pat. 295=A.I.R. 1948 P. 260.

——S. 12—Reasonable time in applying for copies can be included in period requisite under S. 12—Each case is to be decided on its own facts.

Having regard to the fact that some time is bound to be taken up between the passing and the signing of the decree, if an applicant for leave to appeal to his Majesty in Council waits for a reasonable time in applying for copies, he would be entitled to include that time in the period requisite under S. 12. If, however, he waits for an unreasonable time in applying for copies, he will not be able to include that period within the requisite time. So that each case is to be decided on its own facts. (Interval of 26 days was held unreasonable). A.I.R. 1946 Bom. 437=48 Bom. L.R. 97=226 Ind. Cas. 95.

——S. 12—Interval between delivery of judgment and signing of decree can be excluded.

The Interval between the delivery of the judgment and the date of the signing of the decree can be excluded under S. 12 irrespective of the date of the application for copies of the judgment and decree. A.I.R. 1946 Cal. 10=49 Cal. W.N. 753=222 Ind. Cas. 475.

——Sub-S. 2 of S. 12—Interval between Judgment and decree—Decision of case on May 18, 1939—Decree-sheet to be prepared on supply of stamp duty—Application by A on January 28, 1943 for preparation of decree-seeet on payment of stamp duty—Time between May 18, 1939 and January 28, 1943, held not requisite.

The case was decided on May 18, 1939 and the trial Court ordered that decree-sheet should be prepared if proper stamp duty was supplied by the parties on either on them within a week. No stamp duty was put in by either of the parties with the result that no decree was prepared. On May 26, 1939, A made an application for copies and it was returned to him on June 2, with the endorsement that no copy could be given because the decree had not been prepared and decree-sheet could not be prepared until stamp duty had been put in. Nothing further happened till January 28, 1943 when A applied to the trial Court saying that he was prepared to pay stamp duty and praying that a decree-sheet be prepared. The decree was prepared on February 21, and the appeal was instituted on March 13, 1944:

Held, that the time between the date of the judgment and the preparation of the decree-sheet

could not be allowed to be deducted under S. 12 as the time which would not have elapsed if A had taken reasonable and proper steps to obtain a copy of the decree could not be regarded as requisite time within Sub-S. (2) of S. 12:

Held, also that A could not claim indulgence as he was negligent in complying with the orders of the Court.

Held, further that it was for A to put in entire stamp duty since it was he who wanted to have the decree quashed or modified on appeal and it was for him to enable the Court to prepare the decree. 47 P.L.R. 193=A.I.R. 1945 Lah. 233.

——S. 12—Interval between Judgment and decree.

Where the decree or order is to be drawn up without reference to the parties, the party appealing is entitled to the exclusion of the time between the date of judgment and the date on which the decree is signed. A.I.R. 1944 Oudh 154=1943 O.W.N. 408=1943 A.W.R. C. C. 127=19 Luck. 456=215 Ind. Cas. 272.

——S. 12—Interval between Judgment and decree.

In case an application for obtaining a copy of the decree has already been made, and a decree is signed later on, the period which thus elapses would be deemed to be the time requisite for the obtaining of the copy, because the signing of the decree is a matter which is not within the control of the applicant. By the mere act of applying for the copy, the applicant does whatever is within his power with due diligence and caution to obtain the benefit of S. 12, Lim. Act. But if he does not put in the application for a copy till after the decree has been signed, he cannot be, said to have exercised due diligence and caution, and in that case, the period which elapses between the date of the judgment and the date of the signing of the decree cannot be considered to be the time requisite for obtaining the copies. A.I.R. 1941 Pesh. 74=196 Ind. Cas. 654.

——S. 12—Interval between Judgment and decree.

The judgment was pronounced on June 1, and the decree was signed on June 15. On August 28, the appellant applied for a copy of the decree, and a copy was supplied to him on September 5. He filed his appeal on September 13:

Held, that though there was some delay in applying for the copy of the decree, the appeal was filed very shortly after the application for the copy; so that the actual delay in applying for the copy of the decree was not very material. The applicant was entitled to a reasonable time to apply for a copy. A party was entitled to some time to make up his mind whether a copy of the decree was required. If the time between the date when the decree was pronounced and the date when it was signed which was only 14 days were excluded, the appeal was within time and that was time which was requisite, that is to say, properly required for obtaining a copy of the decree. A.I.R. 140 Bom. 415 =42 Bom.L.R. 872=192 Ind. Cas. 275.

——S. 12—Interval between Judgment and decree.

There is nothing in S. 12 which says that time requisite is not so because an application for copy has not been made. In those cases where the decree of the trial Court must follow upon the judgment without the parties to the suit or proceeding being required to do anything for the purpose of the decree being drawn up, appellant is entitled to the exclusion, not only of that time which is spent between the date of his making an application for copy and the date on which the copy is ready for delivery but also to the time spent between the date of the judgment and the date of the signing of the decree, excepting when the portions of the said two periods overlap, in which case, that time should be excluded only once. 1940 O. W. N. 158=A.I.R. 1940 Oudh 173=1940 A.W.R. 80=15 Luck. 376=186 Ind. Cas. 136.

——S. 12—Interval between Judgment and decree —Application for copy of decree not made within 30 days.

An appellant is entitled to get the benefit of the period between the signing of the judgment and the signing of the decree even though he made no application for a copy of the decree within 30 days of the signing of the judgment. A.I.R. 1939 Cal. 711=43 C.W.N. 1139=186 Ind. Cas. 58.

——S 12—Interval between Judgment and decree —Time taken for preparing decree including assessment of cost, if can be excluded in computing limitation for execution.

The costs are allowed by the judgment itself and not by any subsequent order. The decree merely gives effect to the judgement. The law requires that the decree should be considered to be of the same date as the judgment, although some time would ordinarily be taken in the preparation of the decree. The period of limitation usually leaves sufficient margin for such preparation. The time taken for preparation of a decree including the assessment of cost cannot, therefore, be deducted in computing limitation for an application for execution. A.I.R. 1939 Lah. 110=41 P.L.R. 105=I.L.R. (1939) Lah. 319=182 Ind. Cas. 871.

——S. 12—Interval between Judgment and decree.

In computing the period of limitation for an appeal, the period between the date of the delivery of the judgment and the date of the signing of the decree should be excluded, treating it as a time requisite for obtaining a copy of the decree, as such time is not within the control of the appellant. Even where an application for the copy of the decree is not made within the period of limitation this exclusion can be claimed. A.I.R. 1939 Pat. 135=5 B. R. 455=20 P.L.T. 316=180 Ind. Cas. 314.

——S. 12—Interval between Judgment and decree.

Judgment pronounced—Decree signed after an interval —Application for copies after the decree was signed—Claim to exclude period between the date of judgment and the date on which decree was signed—Cliam cannot be allowed. 1939 Rang. L.R. 686.

——S. 12—Interval between Judgment and decree.

Mofussil Court signing decree later than judgment—Party applying for copy within 30 days—Exclusion of time between date of judgment and date of signing decree in addition to period actually taken in obtaining the copy of the decree can be allowed. A.I.R. 1937 Cal. 732=42 C.W.N. 72=176 Ind. Cas. 361.

——S. 12—Interval between Judgment and decree.

According to practice of the Calcutta Court, the interval between judgment and the signing of the decree

should be excluded as part of the time requisite for obtaining the copies. A.I.R. 1937 Cal. 732=42 C.W.N. 72=176 Ind. Cas. 361.

——S 12—**Interval between Judgment and decree** —Decree not drawn up within time—Limitation, when commences—Practice in Punjab deprecated.

There can be no legal obligation on a litigant to apply for a copy of the decree which is non-existent; the existence of a decree is a necessary condition precedent to the accrual of a right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date.

[Practice prevalent in the Punjab, regarding obtaining of copies criticised and the necessity of framing simpler rules for this purpose, pointed out.] A.I.R. 1936 Lah. 976=168 Ind. Cas. 897.

——**S. 12—Interval between Judgment and decree.**

Where a judgment was delivered on December 6, but the decree was not signed until the 13th, and the copy of the decree was delivered to the appellant on the 15th:

Held, that the period between December 6, the date of delivery of the judgment and December 15, the date on which the copy of the decree was delivered to the appellant was not under the control of the appellant and should be excluded in computing the period of limitation. A.I.R. 1936 Pat. 45=16 P.L.T. 849=2 B.R. 213=15 Pat. 284=160 Ind. Cas. 447 (F.B.)

[Overrules A.I.R. 1921 Pat. 175=62 Ind. Cas. 649 (F. B.).]

——**S. 12—Interval between Judgment and decree —When can be excluded.**

Section 12 does not apply to a case where it is not necessary for the applicant to file a copy of the decree with the grounds of appeal or the application. In such a case, the period between the delivery of the judgment and the signing of the decree cannot be excluded. A.I.R. 1935 Lah. 341=158 Ind. Cas. 120.

——**S. 12—Interval between Judgment and decree** —Appeal—Limitation for—Beginning of limitation, if affected by date on which decree is actually signed.

As a decree must bear the same date as the judgment and since limitation begins to run from the date of the decree, the date from which the period of limitation begins to run is not affected by the date on which the decree is actually signed 11 O.W.N. 1359=A. I. R. 1935 Oudh 30=10 Luck. 250=152 Ind. Cas. 419.

——**S. 12—Interval between Judgment and decree.**

In the Central Provinces, the interval between the delivery of judgment and signature of decree could not be excluded from the period of limitation prescribed for an appeal unless the preparation of the copy was actually delayed. A.I.R. 1933 Nag. 125=29 N.L.R. 220=143 Ind. Cas. 745.

11. Judgment other than appealed from.

See also: **Lim. Act, S. 12—Copies of other documents.**

——**S. 12—Judgment other than appealed from.**

Where the High Court insists also on a copy of the first Court's judgment being filed in appeal, time occupied in obtaining copy of such a judgment though it cannot be excluded under S. 12 should be allowed under S. 5. 115 Ind. Cas. 880=A.I.R. 1928 All. 416.

——**S. 12—Judgment other than appealed from.**

Where the judgment passed on review by the trial Court does not give all facts of the case but is merely supplementary to the first judgment, inasmuch as it modifies a portion of the first it is necessary for the appellant to file copies of both the judgments as the two must be regarded as one judgment, and the appellant is entitled to deduct time spent in obtaining copies of the first judgment also and not only of the second. 112 Ind. Cas. 46=A.I.R. 1928 Lah. 655.

——**S. 12—Judgment other than appealed from.**

The High Court may allow the deduction of time spent in obtaining copy of the first Court's judgment where the appellant had applied for the same before expiry of the period for filing the appeal, though he is not entitled to the deduction as of right. 113 Ind. Cas. 498=A.I.R. 1927 Lah. 717.

——**S. 12—Judgment other than appealed from.**

There is no legal authority empowering the High Court in second appeal to interfere with the provisions of S. 12 and allow an extension of time for obtaining a copy of the order of the Court of first instance. A.I.R. 1925 Rang. 344, Not foll; A.I.R. 1923 Lah. 96; A.I.R. 1923 Lah. 461, **Foll.** 100 Ind. Cas. 854=9 L.L.J. 5= A.I.R. 1927 Lah. 192.

——**S. 12—Judgment other than appealed from.**

Where an application under S. 476 of the Cr.P. Code was treated as a separate miscellaneous civil case, and given a separate number and was treated quite distinct from the civil suit which gave rise to it and when the Court passed its order according to the approved practice, a formal order was drawn up on the printed form provided for such formal order in miscellaneous cases, embodying the result of the judgment passed in the case:

Held, that time taken for obtaining a copy of the formal order should be deducted under the provisions of S. 12 of the Limitation Act. 1920 P.H.C.C. 75, **Foll.** 87 Ind. Cas. 417=47 All. 462=23 A.L.J. 297=26 Cr.L.J. 961=6 L.R.A.Cr. 109=A. I.R. 1925 All. 419.

——**S. 12—Judgment other than appealed from.**

Technically under S. 12 the only deduction should be for the time occupied in obtaining the copies of the decree and judgment of the lower Appellate Court but where the rules of the High Court require that a certified copy of the judgment of the trial Court should also be filed with the appeal, the Court might in its discretion excuse the dealy caused in obtaining the copy of the judgment of the Court of first instance. 90 Ind. Cas. 910=3 Rang. 310=A.I.R. 1925 Rang. 344.

——S. 12—Judgment other than appealed from.

Only the time requisite for obtaining copy of judgment appealed against and of the decree can be excluded but not the time taken to obtain copies of the Trial Court's judgment. 40 All. 1 (F.B), **Foll.** 73 Ind. Cas. 919=A.I.R. 1923 Lah. 461.

——S. 12—Judgment other than appealed from.

Only the time requisite for obtaining the copy of the judgment on which the decree appealed against is founded should be excluded. The rule framed by the High Court making it necessary to file a copy of the First Court's judgment with the memorandum of appeal cannot operate to extend or alter the period of limitation provided by the Act. 40 All. 1, **Foll.** 68 Ind. Cas. 777=A.I.R. 1923 Lah. 96.

——S. 12 — Judgment other than the one appealed from—Second appeal—Time taken in obtaining copy of first court's judgment.

An appellant preferring a second appeal is entitled to deduct the time occupied in obtaining a copy of the Ist Court's judgment. 53 Ind. Cas. 137 (Lah).

12. Laches.

See also: **Lim. Act, S. 12—Delay in obtaining copies.**

——Ss. 12 and 5—Laches—Copies applied for after expiry of period for appeal.

An appellant who does not, within the period of limitation, apply for a copy of the order appealed from, and who was within that period taken no steps to procure the copy, can not be allowed after the period of limitation has run out, to claim exclusion of time requisite for procuring such a copy. The appeal could not be admitted under S. 5 of the Limitation Act as there was no sufficient cause for not preferring the appeal within time. 23 C.W.N. 553=52 Ind. Cas. 582.

——S. 12—Laches—Period requisite—Meaning.

The period to be excluded under this section is the period requisite and not that actually spent in obtaining copies. An appellant is not therefore entitled to deduct the days during which the copies lie ready but undelivered in the office. 4 P.L.R. 1919=50 Ind. Cas. 760.

——S. 12 (2) (3)—Laches—Time spent in getting Vernacular decree copy—When to be excluded.

Where a decree of the first court is drawn up in English, an appellant is not entitled to the exclusion of the time he has to wait for getting a copy of the decree in vernacular which he filed with the memorandum of appeal, inasmuch as the practice was to file only an English copy of the decree in the Lower Appellate Court. 64 P.W.R. 1917=124 P.L.R. 1917=39 Ind. Cas. 617.

——S. 12—Laches—Application for a copy of the judgment mislaid in jail—Limitation for appeal.

Where in an appeal filed through the jail authorities it appeared that an application for a copy of the judgment of the Magistrate was made within the period of limitation but was somehow mislaid and a second application had to be sent after the limitation, **Held,** in the circumstances that the appeal must be treated as filed within time. 191 P.L.R. (1915)=3 P.R.Cr. 1915=16 Cr.L.J. 300=28 Ind. Cas. 524.

——S. 12—Laches—'Time requisite for obtaining a copy.'

An appellant required to appear on a certain day to ascertain if copy was ready, failing so to appear, is not entitled to count it, as 'time requisite.' 12 N.L.R. 66=34 Ind. Cas. 458.

——S. 12—Laches—Time requisite for obtaining copies—How reckoned.

The time requisite for obtaining copies is the time which an applicant takes to obtain copies using all due diligence either by himself or by an agent. The applicant must (1) present an application at the proper time and place, accompanied by the prescribed fee. (2) He must take delivery of the copies on the appointed day. If an applicant elects to work through an agent he does so at his risk because the time is the same for both the Principal and Agent. No discretionary extensions of the time for obtaining copies of judicial records are permissible. 10 N.L.R. 139=26 Ind. Cas. 819.

——S. 12—Laches—Copy of decree—Application for—Date fixed for attendance to obtain copy—Copy ready before time.

Under the general Rules and Circular Orders of the Calcutta High Court followed in Patna, the copying department notified on the counterfoil of the application for copies the date when the applicant was to attend the office for receiving copies. The copies were as a matter of fact made ready much earlier. **Held,** that the applicant was entitled to a deduction of time upto the date when he was required to attend the office for copies. The period of time spent in obtaining a copy can be enlarged if the delay has been caused not through his fault but by the negligence of the copying department. 1 Pat. L.T. 383=57 Ind. Cas. 266.

——S. 12—Laches.

Delay in supplying copy stamps not to be deducted. An applicant for copies should deposit the required number of folios and deposit stamps not later than the first day on which the office is open after that on which the number of folios and stamps is notified to him and if he neglects to do so, he is not entitled to deduct the intervening days between the notification and supply of the stamped folios. 49 Ind. Cas. 1000 (Pat.)

——S. 12—Laches.

An appellant is entitled to deduct the whole time spent in obtaining copies irrespective of the fact that he supplied less stamps and was called upon to furnish more but delay in furnishing folios after the number of such folios were notified will not entitle him to such indulgence. 1 Pat. L.J. 573=1 Pat. L.W. 35=(1917) P.H.C.C. 21=35 Ind. Cas. 868 (F. B.)

——S. 12—Laches—Delay in getting decree copy.

Where an application for a copy of the decree is refused on account of the decree not being ready, the delay in obtaining the copy will be excused, though copying charges have not been deposited. 6 S.L.R. 244=19 Ind. Cas. 671.

13. Leave to appeal to Federal Court.

——S. 12 (2)—Application for leave to appeal to Federal Court—No application made for copy of decree—Time spent in obtaining such copy—If can be deducted.

Under S. 12 (2) of the Limitation Act, an applicant for leave to appeal to the Federal Court who never made an application for a copy of the decree, is not entitled to deduct the days spent in obtaining the copy of the decree, even though he has obtained a copy of the decree. A.I.R. 1950 E.P. 195.

——S. 12 (2)—Application for leave to appeal to Federal Court—Time taken in obtaining copy of judgment—If can be excluded.

S. 12 (2), Limitation Act, is a specific provision which deals with applications for leave to appeal, and an applicant for leave to appeal to the Federal Court is not entitled to deduct any time expended on his obtaining a copy of the judgment. A.I.R. 1950 E.P. 195.

14. Leave to appeal to Privy Council.

——S. 12 (3) — Applicability — Application for leave to appeal to Privy Council.

S. 12 (3) of the Limitation Act is inapplicable to an application for leave to appeal to His Majesty in Council. Therefore, the time requisite for obtaining a capy of the judgment cannot be excluded in computing the period of limitation for such an application. A.I.R. 1950 Lah. 76=Pak. L.R. (1949) Lah. 884.

——S. 12—Application for leave to appeal to Privy Council—Time requisite for obtaining copy of judgment and decree can be excluded.

In the case of an application for leave to appeal to the Privy Council the time taken in obtaining certified copies of the judgment and decree can be excluded. A.I.R. 1946 Cal. 10=49 Cal. W.N. 758=222 Ind. Cas. 475.

——S. 12 (2)—Leave to appeal to Privy Council.

Application for leave to appeal to Privy Council—Copy of judgment and decree applied for—Judgment supplied earlier but decree subsequently—Judgment contatining all information required:

Held, whole time spent in getting copy of decree should be excluded. A.I.R. 1935 All. 258=(1935) A.L.J. 291=1935 A.W.R. 138=57 A. 751=157 Ind. Cas. 170.

——S. 12—Leave to appeal to Privy Council.

Section 12 (3) is to be read as enabling an applicant for leave to appeal, to exclude in computing the period of limitation for his application, the time requisite for obtaining a copy of the judgment on which it is founded. A party who seeks leave to appeal to the Privy Council is entitled in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation, the period which has elapsed from the date of the judgment. A.I.R. 1941 Oudh 247=1941 O.W.N. 352=1941 A.W.R.C.C. 106=16 Luck. 638=1932 Ind. Cas. 295.

——S. 12 (2) and (3)—Leave to appeal to Privy Council.

In computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the judgment cannot be excluded. 11 R.L. 651=41 P.L.R. 152=I.L.R. (1939), Lah. 156=A.I.R. 1939 Lah. 43=179 Ind. Cas. 912.

——S. 12—Application for leave to appeal to Privy Council—Time for obtaining copy of judgment.

Section 12, sub-s. (3), permits the time requisite for obtaining a copy of the judgment to be excluded from the 90 days within which the application for leave to appeal to the Privy Council must be presented. A.I.R. 1936 Rang. 82=13 R. 762=161 Ind. Cas. 464.

——S. 12—Leave to appeal to Privy Council.

Section 12, subs-s. (3), Lim. Act, does not apply to an application for leave to appeal to the Privy Council but applies only to appeals.

Judgment in a case was pronounced on January 23, 1934 and and a decree was prepared later on. An application for copy of decree was filed on April 28, 1934, and the copy was ready for delivery on May 16, 1934. An application for leave to appeal was filed on July 21, 1934:

Held, that it would be barred by time unless the applicant could show good cause for extension of time under S. 5, Lim. Act. (1934) A.L.J. 1211=A.I.R. 1935 All. 99=4 A.W.R. 848=57 A. 455=152 Ind. Cas. 384.

——S. 12, Sch. 1, Arts. 179, 181—Income-tax Act (XI of 1922), S. 66 (a) (2)—Application for leave to appeal to Privy Council.

An application in an income-tax case for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council is governed by Art. 179 of Sch. 1 of the Lim. Act rather than by Art. 181, and, therefore, time has to be computed for the purposes of limitation from the date of the judgment. Further, a party in such a case is entitled to the time required to obtain a copy of the judgment by virtue of the provisions of S. 12, Lim. Act. A.I.R. 1932 Cal. 587=36 C.W.N. 127=59 C. 251=139 Ind. Cas. 236.

——S. 12—Leave to appeal to Privy Council.

Sub-section (3), S. 12 does not apply to an application for leave to appeal but merely to appeals from decrees. The time requisite for obtaining copy of judgment can be excluded in addition to time for obtaining a copy of the decree only in cases where a decree is appealed from or sought to be reviewed. Therefore in an application for leave to appeal the law permits exclusion only of the time occupied in obtaining copy of the decree and the applicant is not permitted to deduct time required for obtaining copy of judgment. 118 Ind. Cas. 212=A.I.R. 1929 Sind 206.

——S. 12—Leave to appeal to Privy Council.

The time requisite for obtaining a copy of the decree should be excluded in computing the time prescribed for presenting an application for leave to appeal to Privy Council. Such petition after 90 days is not barred if in support of exclusion of copying time, the

copy of decree is filed by applicant. 105 Ind. Cas. 852=24 N.L.R. 97=10 N.L.J. 242=A.I.R. 1928 Nag. 63.

——S. 12—Leave to appeal to Privy Council.

Sub-Section (3) of S. 12 does not apply to a case of an application for leave to appeal to His Majesty in Council, and so such an applicant is not entitled to exclude the time for obtaining a copy of the judgment of the High Court. 92 Ind. Cas. 897=24 A.L.J. 349=A.I.R. 1926 All. 286.

——S. 12—Leave to appeal to Privy Council.

Time requisite for obtaining a copy of the judgment appealed against may be excluded in calculating limitation even in the case of an application for leave to appeal to the Privy Council. 90 Ind. Cas. 601=48 Mad. 939=22 M.L.W. 330=1925 M.W.N. 288=A.I.R. 1925 Mad. 1241=49 M.L.J. 418.

——S. 12—Leave to appeal to Privy Council.

Time taken in obtaining copy of judgment can be excluded in addition to the time taken for the copy of the decree only where decree is appealed from or is sought to be reviewed.

Therefore time taken in taking copy of judgment cannot be excluded in an application for leave to appeal to Privy Council. 78 Ind. Cas. 953=17 S.L.R. 306=A.I.R. 1925 Sind 60.

——S. 12—Leave to appeal to Privy Council—Time taken for obtaining copies of decree and judgment, can be excluded.

In computing the period of limitation under Art. 179 the applicant is entitled under S. 12, Cl. 2 to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree. Section 12, Sub-S. 2 is general in its terms and applied to all applications for leave to appeal including an application for leave to appeal to His Majesty in Council. Under Sub S. 3 of S. 12 the time requisite for obtaining a copy of the judgment ought also to be deducted in cases of application for leave to appeal to His Majesty in Council. The provisions of Sub-S. 3 are meant to apply generally to cases covered by Sub-S. 2 and the reason seems to be this that if the appeal in question is from a decree then it is generally necessary that the judgment on which that decree is based should also be obtained. 66 Ind. Cas. 88=3 Pat. L.T. 289=1922 P.H.C.C. 193=1 Pat. 429=A.I.R. 1922 Pat. 255.

——S. 12, Sch. 1, Art. 179—Leave to appeal to Privy Council.

S. 12 of the Act applies to applications for leave to appeal to the Privy Council and hence time required for obtaining a copy of the decree is excluded. 38 All. 82=13 A.L.J. 1114=31 Ind. Cas. 906.

——S. 12—Leave to appeal to Privy Council—Computation of period.

In an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the decree is to be excluded. 42 Cal. 35=18 C.W.N. 1066=24 Ind. Cas. 273.

——S. 12 (2) and Art. 179—Leave to appeal to Privy Council—Time for obtaining copies of judgment and decree—Exclusion of.

The time spent in obtaining the copies of the judgment and decree of the High Court is to be excluded in computing the period of six months within which an application for leave to appeal to the Privy Council must be presented. 39 Cal. 510=15 Ind. Cas. 497.

——Ss. 12 (2) and 5—Leave to appeal to Privy Council—Period occupied in obtaining copy of decree—Date of decree—Delay of applicant—Sufficient cause—Erroneous decision.

S. 12 of the Limitation Act, 1908 is applicable to application for leave to appeal to His Majesty in Council and allowance must be made for the period occupied in obtaining a copy of the decree. The applicant is only entitled to be excused for a delay for which he was not himself responsible. 12 A. 461 (F.B.) Rel. There is no rule in the High Court providing for the Judge's signing decrees to note the date on which they sign so that in fact there is no definite record from which the date when a decree signed can be accurately ascertained. An applicant for copies of a High Court's decree could not be allowed to say that he was prevented from filing the application in time by reason of the fact that the decree was not signed. He is not entitled to a deduction of the period which expired between the signing of the judgment and the signing of the decree. 13 C. 104 (F.B.), Dist. But as he was possibly misled by the Full Bench ruling in 13 C. 104 the High Court under S. 5 of the Limitation Act admitted the application. 39 Cal. 766=15 Ind. Cas. 59.

——S. 12—Leave to appeal to Privy Council—Separate appeals—Disposed of by one judgment—Separate petitions for leave.

Only time actually and necessarily required by the plaintiff in making active steps to obtain a copy of decree or judgment is excluded in computation. Separate appeals disposed of by one judgment require separate petitions for leave to appeal to His Majesty in Council. 1 Pat. L.T. 262=57 Ind. Cas. 312.

15. Plea under.

——S. 12—Plea under.

A Court is not bound to go beyond the **prima facie** facts in matters of limitation and, to inquire how long the applicant took to obtain copies. There are many ways in which limitation, as fixed by definite period of time, may be extended but if the appropriate plea is not put forward, it is not the business of the Court to conduct an investigation in order to satisfy itself before acting that it has complied with all the provisions of the law. A.I.R. 1932 Mad. 588=140 Ind. Cas. 11 (2).

16. Time requisite.

(a) Computation.

——S. 12—Computation—Time spent in preparing copy outside the copying department—If can be excluded.

Where a copy of a judgment filed with an appeal was not prepared in the copying department of the Court which passed the order (though certified by the office

of that Court as a true copy), the time spent for obtaining that copy cannot be excluded under the provisions of S. 12 of the Limitation Act. The time spent in the preparation of the copy anywhere cannot be treated as time requisite for the obtaining of the copy of the decree. 51 Cr.L J. 1310=1950 A.L. J. 794 =A.I.R. 1950 All. 486=4 A.I.Cr.D. 541.

——**S. 12 —Computation of limitation for appeal—** Rule as to—Exclusion of time taken in obtaining copy of decree, application for which was made after expiry of period of limitation

An appellant would be within time if his appeal is filed within the total amount of periods granted to him under S. 12 of the Limitation Act, namely the initial period of limitaiton plus the time requisite for obtaining a copy of the judgment plus the time requisite for obtaining a copy of the decree. Where an application for a decree is made within the expiry of the initial period of limitation as extended by the time required for obtaining a copy of the judgment, the time taken for obtaining such a copy of the decree can be excluded. 1949 R.D 98.

——**S. 12 (2)—Computation—Time requisite for** obtaining copy—Date on which necessary funds were paid—Whether can be excluded.

In calculating the time requisite for obtaining a copy the applicant is entitled to exclude under S. 12 (2) of the Limitation Act the date on which he pays the necessary funds. 1944 N. L. J. 313, dissented from. I.L.R. (1947) Nag. 323=230 Ind. Cas. 83=A.I.R. 1948 Nag. 50=1947 N.L. J. 206.

——**S. 12 — Computation — Review application, time taken by.**

Time taken by an application for review of the judgment, which has been deligently prosecuted should be excluded in calculating the period of limitation for preferring an appeal from the second judgment. 49 C. W. N. 758=A. I. R. 1946 Cal. 10=222 Ind. Cas. 475.

——**S. 12—Computation.**

While computing the time requisite for obtaining copies the day on which the copies are applied for and the day on which they are delivered are both excluded. The law takes no account of the fraction of a day. But if the copying work is stopped for inadequate funds, the day on which the intimation about the deficiency is given to the applicant should be excluded, but the day on which funds are supplied cannot be excluded. I.L.R. (1944) Nag. 725=1944 N.L.J. 313= A.I.R. 1944 Nag. 356.

——**S. 12—Computation.**

Under S. 12 (2), Lim. Act, in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded even though, by the Rules of the Court, it is not necessary to obtain such copies. A.I.R. 1942 Oudh 316=1942 A.W.R.C.C. 25 (1)=1942 O.W.N. 21= 1942 R. D. 73=18 Luck. 66=199 Ind. Cas. 712.

——**S. 12 (2)—Computation—Application for copies made on same day on which judgment is pronounced.**

Per **Stone, C. J. and Niyogi, J., Clark, J., contra,—**

There is nothing fundamentally unjust or unreasonable in excluding the same day twice. The day on which copies are applied for is a day requisite for obtaining copies.

Consequently, where an application for copies of judgment and decree is made on the day on which the judgment is pronounced, that day should be included in the days requisite for obtaining copies, though that day is otherwise excluded by law in computing the prescribed period of limitation for appeal. A.I.R. 1939 Nag. 150=I.L.R. (1939) Nag. 185=1939 N.L.J. 173= 182 Ind. Cas. 662 (D.B.).

(Overrules A.I.R. 1917 Nag. 196=40 Ind. Cas. 425).

——**S. 12—Computation—Day on which copy is notified to be ready.**

What is "time requisite," would depend upon what, in the circumstances, is reasonably requisite. Although the word "requisite" is a strong word and may be regarded as meaning something more than the word "required," the idea of reasonableness is inherent in the word: it means nothing more than "properly required". It, therefore, follows that it is consonant to reason that the day on which the copy is notified to be ready should be excluded. A.I.R. 1938 Mad. 823 =(1938) 2 M.L. J. 283=48 L.W. 242=(1938) M.W.N. 847=182 Ind. Cas. 759.

——**S. 12—Computation.**

In computing the period of limitation for filing an appeal both the periods of time taken for obtaining the copies of judgment and of decree are to be excluded. (1937) 65 C.L J. 415.

——**S. 12—Computation.**

The plaintiff applied to have the decree drawn up on March 7, 1936, and the decree was finally filed on April 28, 1936. On May 18, 1936, when limitation was about to expire but had not expired the defendant applied for a copy of the decree. He obtained a copy on May 20, 1936, on which date he filed his memorandum of review:

Held, that as under the Rules the person against whom a decree or order is obtained cannot apply for drawing it up unless the other party fails to do so within four days from the date of the decree or order, the defendant was entitled to exclude the period from May 18 till May 20, as well as the period from March 4 to April 24, and he was just within the period of limitation. 41 C.W.N. 129=170 Ind. Cas. 653.

——**S. 12—Computation.**

The judgment of the first Court was dated May 30, 1933, and the vacation began on June 3, and ended on July 2. An appeal was put in on the first opening day, but it was not accompanied by copies of the judgment and of the decree, and it was accordingly returned for proper presentation by an order of the District Judge dated July 7, 1933. The copies were applied for on July 3, 1933, that is to say, they were applied for on the last day of limitation. The copies were ready on July 12, and delivery of them was taken on July 13. The appeal was presented again on that date and was admitted on July 17, 1933. There was a deficiency in the court-fee. This was ordered on

July 17, 1933, to be made good within a week and the deficiency was made good within that time:

Held, that the appellant was clearly entitled, for the purpose of saving limitation, to the period from the 3rd to July 12, 1933, inclusive, and that as the appeal was presented again on July 13, 1933, it was within time. 1936 O. W. N. 967=A.I.R. 1937 Oudh 26=12 Luck. 531=165 Ind. Cas. 269.

——S. 12—Computation—Period between date of application and date on which full costs are deposited.

Under the rules for the supply of copies, the time neeessary for ascertaining the costs of preparing a copy is time 'requisite' for obtaining the copy within the meaning of S. 12, and an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full cost of preparing the required copy is deposited provided he deposits with reasonable diligence the aforesaid amount as and when required by the Copying Department and provided further that in the case of an application made by post, he remits Rs. 5 with the application. A.I.R. 1936 Lah. 771=38 P.L R. 493=17 L. 429=166 Ind. Cas. 467 (F.B.).

— S. 12—Computation.

Under the note to R. 10 of Chap. XIII-A of the Lahore High Court District Office Manual, where the cost of the copy cannot be quickly ascertained, the procedure in Sub-Cls. (iv) and (v) should be followed. These provide for applications for copies by post and lay down that Rs. 5 must be paid with the application and any other sum paid in, if necessary, when the estimate is prepared. Where this is done, the whole period from date of application for copies with deposit for expense until the date on which copies are supplied should be held to have been requisite and excluded. (1936) 17 L. 574=38 P. L. R. 1050=167 Ind. Cas. 275 (1).

——S. 12—Computation—Time to be excluded under S. 12—Computation of.

In computing the time to be excluded under S 12 from a period of limitation, the 'time requisite for obtaining a copy' does not begin until an application for copy has been made. It, therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless an application for copy having been made, the applicant is actually and necessarily delayed through the decree not having been signed. 11 O W.N. 1359=A.I.R. 1935 Oudh 30=10 Luck. 250=152 Ind. Cas. 419.

——S. 12—Computation.

When the requisite copying fees are not filed with the application for copies, the date of the application must be considered to be that on which the fees were filed. (1934) 35 P.L.R. 713.

——S. 12—Computation.

Judgment pronounced—Application by plaintiff for copy of judgment and decree—Order that decree was not drawn up in view of High Court Rules—Subsequent petition that no decree need be drawn up—Appeal by plaintiff;

Held, that the period between the date upon which a copy of the judgment was given to the plaintiff, and when he petitioned the Court to order the preparation of the decree was a period within the control of the plaintiff and therefore, could not be deducted for the purpose of determining the question of limitation. A.I.R. 1934 Pat. 266=13 Pat. 371=15 P.L.T. 649=149 Ind. Cas. 142.

——S. 12—Computation.

In computing the period of limitation for filing an appeal, it is impossible to exclude from the time requisite for copying the day on which the copy was finally finished and was ready for delivery. A. I. R. 1933 Nag. 362=147 Ind. Cas. 1113.

——S. 12 (2) — Computation — Period during which copy is stopped for want of funds.

An applicant, for obtaining copy from Court, is not bound in the very first instance, to deposit the whole of the advance required or obtaining copies. At the time of presenting his application for copies, he should make the deposit according to his own estimate. If this estimate is discovered by the Copying Department to be mistaken, it is their obvious duty to bring the mistake to the notice of the applicant and demand the deficit of the costs when he appears on the successive dates. Consequently, the period during which the copying is stopped for want of funds during the first period when he is told to appear after the date of the representation of the application for copies, or during the subsequent weekly periods to which delivery of copy may be postponed, must not be counted against an applicant if he attends on those dates but is not asked to pay further advance and this period must be counted as time requisite for obtaining copies within the meaning of S. 12 (2). A.I.R. 1933 Nag. 218=145 Ind. Cas. 742.

——S. 12—Computation.

The time which may be legitimately excluded from limitation under S. 12 is that between the date of the application for the copy of judgment and decree and the date on which it is despatched, whether by ordinary post or V. P. P., from the copying department. A.I.R. 1933 Peth. 22=142 Ind. Cas. 230.

——S. 12—Computation—Time requisite—Time before applying for copies, whether can be excluded.

In the case of an appeal from the Original Side, the time requisite for obtaining a copy of the decree or order within the meaning of S. 12, may begin to run before an application for a copy has been made.

The question whether S. 12 applies when the application for a copy is made after the expiry of 20 days from the date of the decree or order depends on the facts of each particular case.

An order was made on March 17, 1931. The respondents' attorneys filed a requisition for drawing up the order on March 18. On March 25, the appellants' Attorney filed a similar requisition but it was refused as a requisition had already been filed on behalf of the respondents. On April 30, the appellants' Attorney requested the Registrar to expedite the drawing up of the order. On May 6, he received the draft order for approval. It was returned on May 8, and the order was settled by the Registrar on May 20, and filed on June 1. Meanwhile, the appellant's Attorney had applied for copies on May 18;

Held, that in the circumstances of the case, the appellant was entitled to claim that the period prior to May 18 should be excluded under S. 12. 36 C.W.N. 459=A.I.R. 1932 Cal. 331=59 C. 1215=56 C.L.J. 537=137 Ind. Cas. 526 (F.B.).

[Overrules A.I.R. 1927 Cal. 623=103 Ind. Cas. 235]

——S. 12—Time requisite—Computation.

According to practice of Nagpur High Court in the case of an application for copy of the judgment and decree, time begins to run not from the date on which application compliance with which owing to wrong information given in it, is impossible is made but from the date on which correct information is supplied. S. A. No. 227 of 1928 of Nagpur, Misc. Judicial Case No. 25 of 1928 of Nagpur, Rel. on; 121 Ind. Cas. 647=26 N.L.R. 149=A.I.R. 1930 Nag. 129.

——S. 12—Computation.

Where an application for amendment of a decree is rejected, the period of limitation cannot be computed from the date on which the application for amendment of the decree was rejected. 113 Ind. Cas. 580=A.I.R. 1928 Pat. 265.

——S. 12—Computation.

Where an appeal of one district is heard by the District Judge of another District in his capacity as Additional Judge of the former district and application for copies of judgment and decree is filed in the former District Court and the appellants' deposit of fees is accepted there and an order made for supply of copies but the application is subsequently returned directing it to be presented in the latter Court and copies are obtained from there:

Held, that the time from the date of first application to the date of obtaining copies may be excluded. 94 Ind. Cas. 1055=A.I.R. 1926 Lah. 455.

——S. 12—Computation.

The time to be allowed for copies should be calculated from the date of application up to the date when the copies were despatched. 92 Ind. Cas. 966=27 P.L.R. 18=A.I.R. 1926 Lah. 223.

——S. 12—Computation.

The Court in calculating the time requisite for obtaining copies under S. 12, is to consider that the appellant has acted with due diligence, but by due diligence it should not be understood that a party should be ready and willing to pay any sums which are not legally leviable from him. 91 Ind. Cas. 406=A.I.R. 1926 Sind 114.

——S. 12—Computation.

Under S. 12 only the time from the date of making the application for copies up to the date on which the copies are ready for delivery can be excluded. The time between the latter date and the date of actual delivery cannot be excluded. The finding as to is one of fact. 73 Ind. Cas. 447=A.I.R. 1923 Lah. 696.

——S. 12 — Computation — Time required for obtaining certificate includes time during which appeal from order refusing certificate was continued.

The judgment of the lower Appellate Court was pronounced on the 24th June, 1918, and the appeal to High Court was preferred on the 14th May, 1919. An application for certificate was presented on the 31st July, 1918, and though it was rejected on the following day, the appellant succeeded in obtaining from the Chief Court order remitting the question of the grant of certificate to the lower Appellate Court who upon re-consideration granted the certificate on the 7th May, 1919:

Held, in the circumstances the application for certificate must be deemed to have been pending during the period from 31st July, 1918 to 7th May, 1919, and this period should be excluded in computing the period prescribed for filing the appeal. 70 Ind. Cas. 299=A.I.R. 1923 Lah. 11.

——S. 12—Computation.

From the day when copy is ready, to the day when it is despatched, the time is excluded. 72 Ind. Cas. 797=A.I.R. 1922 Lah. 415.

——S. 12 (3)—Computation — Practice of Patna High Court—Connected appeals—One copy of the judgment filed—Time for obtaining copies.

According to the practice of the Patna High Court when several suits are disposed of by one judgment, only one copy of the judgment is required to be filed in appeal to the High Court. Under S. 12 (2) of the Limitation Act the time taken for obtaining a copy of the judgment will be deducted in computing the period of limitation for each of the several analogous appeals. 17 All. 213, Appl. Thus in the computation of the period of limitation in all such cases, the time required for obtaining the copies will be excluded although only one copy is filed. 1 Pat. L.T. 562=58 Ind. Cas. 991.

——S. 12—Computation of time.

'Time requisite' for obtaining a copy in S. 12 must be computed by the whole days and not by hours. Days must be reckoned from midnight to midnight and a part of a day is equal to a whole day. 5 L.B.R. 15=2 Ind. Cas. 359.

——S. 12 (2) — Computation of time—Decision, date of—Communication to parties.

The date of a decision for purpose of limitation is the date of its communication to the parties. 6 M. 139 and 12 M. 1, Foll. Where sufficient notice is given to parties of the day on which a decision would be announced and the decision is so announced on that day, that is the date of communication though the parties may not care to listen. But when the decision is published by sending copies thereof to the parties, the date of the receipt of the order is the date of communication. 34 Mad. 151=8 M.L.T. 310 =(1911) 1 M.W.N. 28=8 Ind. Cas. 398.

—— Ss. 12 and 5—Computation of time—Exclusion of one day twice over.

The appellant applying for copies on the day on which the judgment is delivered is not entitled to exclude that day twice over. 13 N.L.R. 89=40 Ind. Cas. 425.

——S. 12—Computation of time.

In computing the time required for obtaining copies for the purpose of appeal, an extra day cannot be

allowed for the delivery of the copies in addition to the day they are ready for delivery. 10 S.L.R. 165 =38 Ind. Cas. 464.

——S. 12 (1)—Computation of time.

In a suit filed on 9th May, 1910 a Monday, on a promissory note dated 7th May 1907 held that limitation began to run from the expiration of the 7th Mav 1907 and expired, at 12 midnight on 7th May 1910 and hence the suit was barred by time. U.B.R. (1912) 1. 146=18 Ind. Cas. 574.

——S. 12—Computation of — Appeal—C.P C., S. 212—Determination of mesne profits before decree—Time to obtain copy.

Where the Court determines the amount of mesne profits before passing the final decree, the party dissatisfied with the decree is entitled to deduct in his favour the period required for obtaining the copy of the final decree for purposes of limitation of the appeal. (1904) 32 C. 175.

——S. 12—Computation of time—Appeal—Copies of judgment and decree, time for —See: Limitation Act, S. 5. 3 Bom. L.R. 244=25 B. 586.

16 (b). Holidays.

——S. 12—Time Requisite—Holidays.

Judgment delivered by trial Court on day when Civil Court closed for vacation—Party applying for copy of judgment and decree on first day when Courts reopened after vacation:

Held, that period of vacation can be excluded as time requisite for obtaining copies. 1941 A.W.R. 944=1941 O.W.R. 1223=17 Luck. 314=196 Ind. Cas. 689.

——S. 12—Holidays.

Limitation expiring on Sunday—Application for copies on Monday—Filing of appeal on next day on getting copies—Appeal, held within time—One day's delay, held excusable. A.I.R. 1939 Bom. 46= 40 Bom. L.R. 1211=179 Ind. Cas. 645.

——S. 12—Time Requisite — Holidays—Judgment delivered on last working day—Limitation for filing appeal expiring during vacation —Application for copies of Judgment and decree not made on opening day but later on.

Where a judgment is delivered on the last working day before vacation, the period of limitation for filing appeal will not be extended if the application for copies of judgment and decree is not made on the opening day after the vacation but later on, if the period has already expired during the vacation. It is only in case the application for copy is made on the opening day that S. 12 (2), Lim. Act, can be applied. A.I.R. 1938 All. 106= (1937) A.L.J. 1279=1937 A.W.R. 1192=I.L.R. (1938) All. 209=174=Ind. Cas. 50.

——S. 12—Holidays.

Limitation for appeal expiring on Sunday—Next day public holiday—Appeal presented before limitation—Application for copies made next working day—Appellant, held entitled to deduct time required for obtaining copies. A.I.R. 1938 Bom. 288=40 Bom. L.R. 389=175 Ind. Cas. 508.

——S. 12—Holiday—Limitation for filing application for copy of decree expiring on holiday—Application on re-opening day—Whether within time.

In calculating the period of limitation for filing an appeal, time requisite for obtaining a copy of the judgment of the appeal and a copy of the decree-sheet must be excluded.

Even if it be assumed that the application for obtaining a copy of the decree does not strictly fall within the purview of S. 4, the general principle underlying this section, which has been reproduced in S. 10, General Clauses Act, must be given effect to, namely that where an act or proceeding is allowed to be done on a certain day, then if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is opened. A.I.R. 1938 Lah. 707=182 Ind. Cas. 108.

——S. 12—Holidays.

Appeal — Limitation expiring when Court is closed—Application for copies made on re-openirg day—Time required for copies can be deducted. A.I.R. 1938 Lah. 317=40 P.L.R. 74=177 Ind. Cas. 672.

——S. 12—Holidays—Copy stopped for want of correct information—Supply of correct information on day immediatey following holiday.

Where the original advance is insufficient and the deficiency is supplied on a day immediately following a holiday, credit may be given for the period during which the deficiency could not be supplied. The same principle applies to supplying correct information. A.I.R. 1936 Nag. 289=I.L.R. (1938) Nag. 342=166 Ind.Cas. 965.

——S. 12—Holidays.

A decree was passed on August 23, 1935. The Court closed during the long vacation from August 27 to November 5, both days inclussive. During the vacation, however, the copying department of the Court remained open and this was known to the appellant's Advocate. On October 23, 1935, a memorandum of appeal was presented but it was not accompanied by a copy of the decree. Copy was applied for on November 6, and the appeal was filed with the copy on November 11. The appellant contended that it must be deemed that the appeal was duly presented on November 6, 1935, because he said that the appellant was entitled to deduct the period from November 6 until November 11, as being "the time requisite for obtaining a copy" of the decree under S. 12 (3), Lim. Act:

Held, that the appellant was not entitled to deduct these days as being time "requisite for obtaining a copy" of the decree in the circumstances as he might have applied for a copy of the decree during the four days preceeding the commencement of the vacation or at any time during the vacation, but that he failed to do so and that he was not entitled to deduct the period from November

6 to November 11, as being "time requisite for obtaining a copy" of the decree. 14 R. 276=A.I.R. 1936 Rang. 201=162 Ind. Cas. 853.

——S. 12—Holidays—Rangoon High Court Rules and Orders, Appellate Side, Chap. 1, Part III, Chap. I(A)Cl. 5—Appeal from original side—Time requisite for obtaining copies of Judgment and decree —Vacation period.

The judgment at the trial on the Original Side was delivered on July 25, 1933, in favour of the respondents: the 20 days within which the memorandum of appeal normally ought to have been filed expired on August 14, 1933. An application for a copy of the judgment, however, was made on August 3, 1933, and the copy of the judgment was ready for delivery on August 10. An application for a copy of the decree was made on August 5, and the copy of the decree was ready for delivery on August 23; the long vacation of the High Court commenced on September 2, the memorandum of appeal was filed on September 6, 1933:

Held, that the appeal was in time under the provisions of S. 12, Lim. Act, and of Rules and Orders of the High Court Appellate Side. 12 R. 525= A.I.R. 1935 Rang. 65=154 Ind. Cas. 852 (F.B.).

——S. 12—Holidays.

A certain judgment was delivered on September 28, 1932. The Civil Courts were closed from September 29 to November 1, 1932, on account of the annual vacation. The appellant applied for copies on November 19, and received the copies on November 29. Appeal was filed on February 8, 1933, the appellant excluding the period during which the courts were closed:

Held, that the appellant was entitled to exclude the period contended for and that the appeal filed on February 8, 1933, was in time. A.I.R. 1934 Pat. 4 =146 Ind. Cas. 931.

——S. 12—Holiday.

Application for copy — Holiday immediately following the day of notification of requisite number of stamps and folios:

Held, holidays must always be excluded in computing the period of limitation for appeal. This exclusion is not resricted to the cases where the stamps and folios are supplied on the re-opening day. A.I.R. 1931 Cal. 731=35 C.W.N. 451=58 C. 969=134 Ind. Cas. 895.

——S. 12 (4), Sch. I, Art. 155—Holidays—Court closed on expiry of peroid of Limitation—Copy applied for on re-opening day—Limitation—Right to exclude time taken for copies.

A judgment was pronounced on September 27, 1929, and a copy of the decree was applied for an November 8, 1929; the decree, however, was signed on November 9, 1929, and the copy was ready on the same day, that is, November 9, 1929. The copy of the judgment was applied for on January 2, 1930; it was ready on January 6, and the appeal was filed on January 7. The period of limitation was 90 days from the date of the decree which expired on December 26, 1929. The Court was, however, closed on that date and re-opened only on January 2;

Held, that the appellant was entitled to 96 days as the Court re-opened only on January 2 and he was entitled to exclude from this the seven days taken for obtaining copies and the appeal was consequently not barred. A.I.R. 1931 Pat. 60=14 P.L.T. 91=130 Ind. Cas. 265 (1).

——S. 12—Holidays.

Provided copies of judgment and decree have not been obtained previously, if the period prescribed for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the re-opening of the Court, whilst his right of appeal is still alive he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before expiry of that time it is not barred by limitation. 19 All. 342, Foll.; 120 Ind. Cas 169=11 Lah. 111=31 P.L.R. 356=A.I.R. 1930 Lah. 216.

——S. 12—Holidays.

The order rejecting the plaint was made on 4th October, 1926. The Courts closed for annual vacation on 5th October, 1926, and re-opened on 8th November, 1926. The plaintiff applied for a copy of the order on 23rd November, 1926, and the copy was furnished on the same day. The appeal was filed on the 1st December, 1926,

Held, that under the circumstances the period of vacation can be excluded and the appeal was not barred by limitation. 120 Ind. Cas. 765=10 P.L.T. 545=A.I.R. 1929 Pat. 615.

——S. 12—Holidays.

Where the time for filing an appeal expires during vacation and the appellant applies for copies on the day the Court re-opens, an appeal filed on the day next after the issuing of the copies is within time. 19 All. 342 and 25 Bom. 584, Foll. 115 Ind. Cas. 667= 6 Rang. 743=A.I.R. 1929 Rang. 96.

——S. 12—Holidays—Copies can be applied for when the right of appeal still subsists.

Time for filing an appeal expired during the vacation. The appellant applied for the copies of judgment and decree after the prescribed period but while the right of appeal was subsisting (before the Court was opened) and obtained the copies two days after the Courts opened. The appeal was filed on the next day of obtaining the copies.

Held, that copies can be applied for at any time when the right of appeal still subsists even though the application is made after the expiry of the period prescribed. The appeal was, therefore, in time. 112 Ind. Cas. 670=10 L.L. J. 257=A.I.R. 1928 Lah. 655.

——S. 12—Holidays.

If on the date when the copies of judgment or decree were applied for, the limitation for filing the appeal had not expired in consequence of holidays then the appellant is entitled to file the appeal on the day when he obtained copies. 19 All. 342, Foll.; 89 Ind. Cas. 956=6 L.R.A. Civ. 589=A.I.R. 1926 All. 111.

——S. 12—Holidays.

Copying agent, who receives his salary from the Government, is not the agent of the litigant for the purpose of receiving applications for grant of copies. If the period prescribed for the presentation of an appeal expires on a date on which the Court is closed, and if the appellant has not obtained copies of the decrees and judgment before closing the Court, and applies for such copies on the date of re-opening of of the Court whilst his right of appeal is still subsisting, he is entitled to the benefit of time requisite for obtaining copies, and if his appeal be presented before the expiry of that time, it is not barred by limitation. 19 All. 342, Foll. 89 Ind. Cas. 437=A.I.R. 1926 Lah. 121.

——S. 12—Holidays.

The general rule is that the time requisite for obtaining a copy does not begin until an application for copies has been made. 12 All. 461, Ref. to.

But the case, where the judgment is not delivered until the last day before vacation and the application is made on the first day, when the Courts re-open it is an exception to that rule and it is reasonable to include vacation as part of the time requisite for obtaining copy. 68 Ind. Cas. 250=25 O. C. 71=9 O.L. J. 436=A.I.R. 1922 Oudh 39.

——S. 12—Holidays.

It is no doubt correct that an application for copies may be made so long as the right of appeal was subsisting but there is no warrant for the proposition that, not only the period following the application for copies but all the prior holidays can be excluded. 28 Mad. 452; (1911) 1 M.W.N. 264; 43 Mad. 640; 12 L.W. 460; 36 Mad. 131; 36 Mad. 482 and 36 Bom. 268, Appr. and Foll.; 63 Ind. Cas. 924=44 Mad. 817=13 M.L.W. 631=1921 M.W.N. 442=A.I.R. 1921 Mad. 654=41 M.L. J. 84.

——S. 12—Holidays.

Holidays should be taken into consideration in computing the time where judgment was pronounced sufficiently early on the last day preceding the vacation. 63 Ind. Cas. 922=12 M.L.W. 460.

——S. 12 (2)—Holidays.

The time from the date of the application till the re-opening of the courts should be taken as the time requisite for obtaining copy of judgment though the notice of readiness was posted on the board during the vacation as the applicant was not bound to take cognizance of the notice. 34 All. 41=8 A.L. J. 1095=12 Ind. Cas. 183.

——S. 12—Holidays—Closing of Court immediately after date of signing of decree—Exclusion of time.

Where immediately after the signing of a decree, the court is closed, the period during which it is so closed ought to be excluded in computing the period of limitation. 13 C.L. J. 544=11 Ind. Cas. 387.

——S. 12—Holidays—Closing of Courts after pronouncing of Judgment—Application on the re-opening day.

Judgment was pronounced and the court closed the next day. An application for copy was made on the re-opening day and an appeal was duly filed. **Held**, that the appeal was in time as the days on which the court was closed do not count against the appellant. The intervention of holidays between the date of judgment and the application for copies (made on the re-opening day) entitles the appellant to deduct such holidays. 7 Cr.L.R. 235.

——S. 12—Holiday.

An applicant should pay in advance a sum sufficient for the preparation of the copy. If the applicant is informed that the advance is insufficient and supplies the deficiency on the day immediately following a holiday, he may be given credit for the holidays during which he could not supply the deficiency. But where he supplies the deficiency not on the day immediately succeeding the holidays but on a subsequent day he is not entitled to this privilege. 61 Ind. Cas. 889=A.I.R. 1921 Nag. 141.

——S. 12—Holidays — Application for Judgment after re-opening day—Vacation time.

"Time requisite" means 'time reasonably requisite.' Where the judgment was delivered on the first day of the Christmas vacation and the appellant applied for copies on 7th January, i. e., some days after the re-opening. **Held**, that the time for appeal began to run from the first day of the Christmas vacation and that the appellaat was not entitled to add the days during which the Court was closed for Christmas as part of the time requisite for obtaining copies. 43 Mad. 644=38 M.L. J. 465=11 L.W. 483=(1920) M.W.N. 293=56 Ind. Cas. 67.

——S. 12 (2) and (3)—Holidays—Long vacation—Notification that copies will be supplied—Vacation, if can be excluded.

The publication of a notification that copies will be granted during the long vacation prevents the vacation from being excluded as the period for granting a copy of the judgment or decree. On the other hand, the whole period of the vacation must be reckoned in computing the period. 36 M.L. J. 122=(1918)M.W.N. 886=9 L.W. 8=25 M.L.T. 245=50 Ind. Cas. 518.

——S. 12—Holidays—Gazette notification for delivering copies during vacation.

Where a party applied for copies before the long vacation of the Court and in accordance with a Gazetted notification the copies were ready during the vacation but the copies were taken delivery of only on the re-opening day of the Court after the vacation he is not entitled to deduct the time between the date when the copies were ready and the re-opening date. 5 Mad. 189, Foll. 36 M.L. J. 62=49 Ind. Cas. 626.

——S. 12—Holidays—Intervention of Sunday.

Sundays intervening after the calling for the stamps and the date the copies being announced as ready must be included in the time requisite for obtaining copies and should be deducted in calculating the time for appeal. 14 M.L.T. 194=25 M.L. J. 354=(1913) M.W.N. 805=21 Ind. Cas. 192.

——S. 12—Holidays—Judgment delivered during vacation—Application made long after re-opening—Deduction if can be allowed.

Where judgment in a case was delivered during the summer vacation of a Court but application for copies

of the decree and judgment was made 17 days after the re-opening of the Court the time during which the Court was closed cannnot be deducted in computing limitation for an appeal as such an application was not made at the first available opportunity. (1911) 1 M.W.N. 364=11 Ind. Cas. 339.

——S. 12 (2)—Holidays—Court closing the next day after judgment.

Where the decree was signed on the day when the judgment was delivered and the Court closed for a month from the next day except for copying purposes and the party applied for copies on the re-opening date and filed the appeal the next day after grant of copies to him, **held**, that the appeal was in time. (28 M. 452, Dist.). 11 N.L.R. 104=29 Ind. Cas. 833.

——S. 12—Holidays—Tender of copying fees on—Validity of.

Where a copy application is made through post, the time occupied by the Post Office in conveying the application and fees to the copying office and in carrying back the copies to the applicant is outside the computation under S. 12 of the Act. A tender of copying fees transmitted by money-order and reaching the office on a holiday, is not a tender at the proper time. 10 N.L.R. 139=26 Ind. Cas. 819.

——S. 12—Holidays—Copies applied by post reaching office only after vacation.

A decree was passed on 12th May 1911 and on 15th May the deft. applied by post for a copy of the judgment and decree. The application did not reach the office before the vacation and so it was treated as received on 16th June after the Courts re-opened. The copy was ready on the 3rd July; the deft. took it personally on 4th. On the same day he preferred an appeal against it. **Held,** that the appeal was not barred and that the 3rd and 4th of July should be included in the time requisite for obtaining copies. 8 N.L.R. 172=17 Ind. Cas. 624.

——S. 12—Holidays—"Time requisite for obtaining a copy of the decree"—If continuous.

Time requisite for obtaining a copy need not be continuous; hence vacation is part of such time. 20 C.W.N. 1303=1 Pat. L.J. 485=1 Pat. L. W. 209=35 Ind. Cas. 888.

——S. 12—Holiday—'Time requisite for obtaining copies.'

Where the lower court was closed for the recess but the appellant had prior to such closing some 80 days to apply for copies and failed for no reasonable cause to do so and applied for copies after the appeal time was over on the first day of the re-opening of the lower court after the midsummer recess, and the second appeal was filed on the first day of the re-opening of the lower court, the time during which the lower court was closed could not be excluded under S. of as the time requisite for obtaining copies. (1905) 15 M.L.J. 109=28 M. 452.

——S. 12—Holidays—Time required to obtain copies of judgment and decree.

A decree was issued on the 11th September 1903, and prepared on the 8th September; application for copy of decree was made on the 12th September, with four folios; the applicant was asked on the 23rd September, to supply the deficient court fees when the court was closed for the Dusserah vacation; the comparing clerk refused to receive the folios on the 23rd and directed the applicant to file them on the re-opening day, i.e., the 26th October. The appeal was filed without the copies on the 26th; the deficient court fees were supplied on the 26th; the copies were received on the 27th and filed on the 31st October.

Held, that the appeal was not barred. (1903) 8 C.W.N. 141.

——S. 12—Holidays—Time requisite for obtaining copies—Judgment pronounced by Court after 4 p. m.—Court closed for Christmas—Application for copy on the first day of re-opening—Computation of time.

Where judgment was pronounced in a suit at 4 p. m., on the last day the court sat before the Christmas holidays, and according to the practice of the court no papers would be received after 4 p. m. and application was made for a copy of the judgment on the day the court re-opened for the first time after Christmas:

Held, that an appeal presented within 90 days after deducting the Christmas holidays when no application could have been presented was in time and that the appellant was entitled to a reduction of such time under the circumstances as being time requisite for obtaining copies of the judgment. (1903) 13 M.L.J. 300 =27 M. 21.

——S. 12—Holidays—Appeal barred during holidays—Copies obtained after re-opening—Deduction of time.—See **Limitation Act, Ss. 5, 12.** 3 Bom. L.R. 143=25 B. 584.

16 (c). Scope and interpretation.

——S. 12—Time requisite—Reference to copy accompanying appeal and not any other copy.

The time requisite for the preparation of a copy is to be with respect to the time required for preparation of the copy which accompanied the appeal and not for the preparation of any other copy. I.L.R. 57 Mad. 560, **Foll.** 51 Cr.L.J. 1310=1950 A.L.J. 794=A.I.R. 1950 All. 486=4 A.I.Cr.D. 541.

——S. 12 (2) and 3—Scope and interpretation—Construction—Time 'requisite'—Meaning of—Time for obtaining copy of decree and time for obtaining copy of judgment—If can be deducted twice over in case of overlapping.

The term "requisite" in the expression time requisite in S. 12 (2) and (3) of the Limitation Act, means something much more than required. The proper connotation of that expression is that the time indicated in sub-sections (2) and (3) of S. 12 must be properly required before it could be excluded. The right given to an appellant to exclude the two periods is no doubt absolute; but in order that the appellant should get the time excluded which falls under sub-Ss. (2) and (3), the time taken for obtaining a copy of the decree and the time taken for obtaining a copy of the judgment must be distinct. If the time taken for obtaining a copy of the decree and the time required for obtaining a copy of the judgment is identical, then the sub-sections do not provide that the time should be computed over again, although the time is overlapping.

The expression "shall also be excluded" in S. 12 (3) cannot be read as indicating that the two periods covered by sub-Ss. (2) and (3) should be excluded even though they may be overlapping. "Also" in Cl. (3) only means that an additional right is given to the appellant to exclude the period for obtaining a copy of the judgment. But if such time has already been excluded as falling under Cl. (2) then that period is not to be computed over again for the purpose of Cl. (3).

The judgment under appeal was pronounced on 29—9—1948. Copies of the judgment and the decree were applied for on 11—10—1948. Copies of the judgment were furnished on 21—10—1948. The decree was signed on 22—10—1948, and a copy thereof was furnished on 26—10—1948. The appeal was preferred to the High Court on 27—1—1949.

Held, that though the decree was not signed till 22—10—1948, and therefore no copy of the decree could have been supplied, once the time was excluded because the decree was not signed till 22—10—1948, the same period could not be excluded over again because the appellant had applied for a certified copy of the judgment or he had applied for a certified copy of the decree and the only exclusion to which the appellant would be entitled was from 29—9—1948, when judgment was pronounced and 26—10—1948, when the copy of the decree was furnished, and on that basis the appeal should have been properly preferred on 24—1—1949, and the appeal preferred beyond that time was out of time.

Held, further, that since the delay was only of three days, the same should be condoned for "sufficient cause". A.I.R. 1950 Bom. 350=52 Bom. L.R. 405.

——S. 12 (2)—"Time requisite" — Scope and interpretation—If includes time taken in preparation of decree-sheet.

Under S. 12 (2), Limitation Act, no period can be regarded as time requisite which is not subsequent to the presentation of an application for a copy. Therefore the time spent in the preparation of the decree-sheet cannot be excluded under the section. A.I.R. 1950 E.P. 195.

——S. 12 (2)—Scope—Appellant applying for copy of decree after limitation—If entitled to extension of time.

In order to secure under S. 12 (2), Limitation Act the benefit of the time that elapsed until the date when the decree is signed, it is not necessary for an appellant to apply for a copy of the decree before the expiry of the period of limitation for the appeal if the application is made even a day before the decree is signed. I. L. R. (1947) Kar. 76=A.I.R. 1948 Sind 18.

——S. 12—Scope and interpretation.

Section 12 assumes that time requisite for obtaining copy of decree must begin before prescribed period is over—Section 4, pre-supposes that prescribed period has expired and cannot extend period prescribed under Act—Application for copy of decree made under S. 4 on date on which Court re-opened:

Held, that extension granted under S. 4 cannot be combined with extenion sought under S 12. 1942 M.W.N. 503=A.I.R. 1042 Mad. 604=(1942) 2. M.L. J. 104=I.L.R. (1942) Mad. 868=55 L.W. 426=203 Ind. Cas. 5.

——S. 12—Scope and interpretation—What is not—Time to obtain copies.

The application for copies filed on August 10, 1932, in terms only asked for "a copy of the order" and it was not until September 3, 1932 that a memorandum was filed asking that a decree might be drafted and a copy of it might be granted:

Held, that the earlier application dated August 10, 1932, was not an application for a copy of the decree and that there was no ground for excusing the delay in filing memorandum asking copy of the decree. A.I.R. 1939 Mad. 203=49 M.L.W. 147=(1939) 1 M.L.J. 120=(1939) M.W.N. 443=189 Ind. Cas. 320.

——S. 12—Scope and interpretation—Whether can be excluded when application for copy of decree is not made till after expiry of time for appeal.

There is no justification in the language of S. 12 to impose a restriction upon the statutory right of an appellant not warranted by the Act and in computing the time for appealing from a decree, it is legitimate in a proper case to exclude the period requisite for obtaining a copy of the decree when no application for such copy was made till after the expiration of the time limited for appeal. Consequently, a rule providing that no time shall be allowed for obtaining a copy of the decree unless such copy be applied for within 20 days from the date of the decree would be **ultra vires.** 39 Bom. L R. 32=A.I.R. 1937 Bom. 162=I.L.R.(1937) Bom. 443=168 Ind. Cas. 77 (F.B.)

[Overrules:—(1) (15) Bom. L.R. 681=20 Ind. Cas. 537. (2) 23 B. 442.]

——Ss. 12 (2), 5—Scope and interpretation—"Time requisite", meaning of.

"The time requisite" does not mean the time actually taken in obtaining a copy of the decree, but means the time properly required for such purpose, and does not include time taken unreasonably by the appellant. In applying S. 12 (2), the Court has to consider whether the appellant has exercised reasonable and proper diligence in obtaining a copy of the order.

Judgment on July 31—Draft order sent on August 2, to appellant for approval—Application to Prothonotary for settling order on August 16—Appellant doing nothing between August 2 and 16—Copy issued on September 10—Appeal on September 28:

Held, that the delay, under S. 12 (2) was reasonable, which, according to the practice of the Bombay High-Court, was excusable under S. 5, though, in future, it would not be excused. A.I.R. 1937 Bom. 64=38 Bom. L.R. 1281=I.L.R. (1937) Bom. 421=167 Ind. Cas. 664.

——S. 12—Scope and interpretation.

In order to enable the appellant to deduct the period required for obtaining necessary copies, a proper application for copies must be made within the period of limitation, and not after the appeal had alredy become time-barred. In the Punjab it is laid down by the rules governing the grant of copies in the year 1933 that every application for copy of a record, other than an application made by post shall be accompanied by a deposit in cash of a sum which shall not be less than the cost of preparing and certifying such copy. An application not accompanied by such deposit is not a proper application which can save limitation. 39 P.L.R. 374=167 Ind. Cas. 250.

——S. 12—Scope and interpretation.

An application for certified copy of the judgment was properly made to the District Copying Agent but no payment accompanied, although a fixed sum should have ordinarily accompanied the application for copies. No demand for the deposit was made and the application was accepted as valid. The preparation of copies was not held up, for want of deposit and the full copying fee was paid on date of delivery of the copy:

Held, that the applicant, was entitled to deduct the full time spent in obtaining copies, no fee having been demanded from him at the time of the presentation of his application although the rules require that an application should be returned when it is not accompanied by a deposit. A I.R. 1936 Lah. 123=37 P. L. R. 792=161 Ind. Cas. 243.

——S. 12—Scope and interpretation—Period under appellant's control.

The words in S. 12 Sub-Ss. (2) and (3), "the time requisite for obtaining copy of the decree appealed from" mean "time which would have been necessary in any case" for obtaining the copy of the decree appealed from. No period, which may be under the control of the appellant between the date upon which judgment is pronounced (which is the date of the decree under the Civil P.C.) and the date on which copy of decree was delivered can be considered as the time requisite within the meaning of S. 12. A.I.R. 1936 Pat. 45=16 P.L.T. 848=2 B.R. 213=15 Pat. 284=160 Ind. Cas. 447 (F. B.)

[Overrules A.I.R. 1921 Pat. 175=62 Ind. Cas. 649 (F. B.)].

——S. 12—Scope and interpretation.

Time spent in ascertaining cost of copies is time requisite for obtaining them. (1935) 37 P.L.R. 794.

——S. 12—Scope and interpretation.

An application for the copies need not be made by the appellants in person. A.I.R. 1934 Lah. 135=149 Ind. Cas. 1127.

——S. 12—Scope and interpretation.

Where two copies were obtained, time requisite refers to time requisite for copy actually filed with memorandum of appeal. 66 M.L.J. 687=39 L.W. 559=57 M. 560 =A.I.R. 1934 Mad. 306=(1934) M. W. N. 105=149 Ind. Cas. 172 (F. B.)

——S. 12—Scope and interpretation.

Time which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order cannot be regarded as "requisite" time within the meaning of S. 12 (2). 7 O.W.N. 600= A.I.R. 1930 Oudh 369.

——S. 12—Scope and interpretation.

The word "requisite" is a strong word; it may be regarded as meaning something more than the word required. It means "properly required" and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default. 109 Ind. Cas. 1=6 Rang. 302=55 I. A. 161=32 C.W.N. 845= 26 A.L.J. 657=47 C.L.J. 510=30 Bom.L.R. 842= 5 O.W.N. 479=28 M.L.W. 207=A.I.R. 1928 P. C. 103 =54 M.L.J. 696 (P. C.).

——S. 12—Scope.

There can be no saving of limitation apart form the provisions of Limitation Act. 102 Ind. Cas. 523=8 Lah. 54=A.I.R. 1927 Lah. 200.

——S. 12—Scope and interpretation.

In determining what is the requisite time referred to in S. 12, Sub-S. (2) of the Limitation Act, the conduct of the appellant must be considered, and no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree of order. 89 Ind. Cas. 277=52 Cal. 342= A.I.R. 1925 Cal. 735.

——S. 12—Scope and interpretation.

No period can be regarded as requisite under the Act, which need not have elapsed, if the appellant had taken reasonable and proper steps to obtain an order. There is no warrant for the preposition that, the time actually consumed in obtaining the decree must be deducted. 13 Cal. 104, **Ref. to.** 68 Ind. Cas. 900=31 M.L.T. 193=49 I.A. 307=49 Cal. 999= 37 C.L.J. 86=21 A.L.J. 118=27 C.W.N. 156=18 M.L.W. 56=1923 M.W.N. 526=A.I.R. 1922 P.C. 352 =43 M.L.J. 765 (P.C.)

——S. 12—Scope and interpretation.

Period from the date when copies are ready to the date of actual delivery is not time requisite. 67 Ind. Cas. 478=A.I.R. 1922 Lah. 423.

——S. 12—Scope and interpretation—"Time requisite for obtaining a copy".

The words "time requisite for obtaining a copy" in the second and third paragraphs of S. 12 are not confined to cases where the person appealling has in person or by a properly authorized agent applied for a copy of a judgment or a decree. 12 M.L.J. 385, diss. from. (1907) A.W.N. 67=4 A.L.J. 152=29 A. 264. affirming 1906 A.W.N. 223.

——S. 12—Separate applications—"Time requisite for obtaining copies"—Separate applications for Judgment and decree.

A party is entitled to deduct the aggregate period taken in obtaining copies of Judgment and decree even though he put in seperate applications for the same the one after obtaining copy of the other. A party applied for copy of the decree on 18-10-05 and obtained it on 19-12-05. He then applied for a copy of the judgment on 22-12-05 and obtained it on 16-2-06. The appeal, was filed ond 3-3-06. **Held,** the party was entitled to deduct both the periods from 18-10-05 to 19-12-05 and the periods from 22-12-05 to 16-2-06 =(1909) 33 M. 256=7 M.L.T. 29=(1910) M.W.N. 141 =4 Ind. Cas. 301 (2)=21 M.L.J. 152.

16 (d). Separate applications for decree and Judgments.

——S. 12—Time requisite—Separate applications for decree and judgments.

Not only the time taken for obtaining a copy of the decree but time taken for obtaining a copy of judgment also is deducible in calculating the period of limitation for filing an application for leave to appeal

in forma pauperis. 57 M.L.W. 165 (1)=1944 M.W.N. 160=(1944) 1 M.L.J. 229=A.I.R. 1944 Mad. 430.

——S. 12—Separate applications.

Where applications for copies of the judgment and the decree are made at different times, the appellant is entitled to the time occupied in obtaining the copies of both the judgment and the decree. 1936 O.W.N. 1008=A.I.R. 1937 Oudh 65=12 Luck. 472=165 Ind. Cas. 578 (2).

——S. 12—Separate applications.

Under S. 12, a litigant is entitled to seperately apply for the copy of the judgment and the decree-sheet, and the aggregate amount of time spent in obtaining the two copies should be allowed to him, provided that the overlapping period is not counted twice over. (1936) 165 Ind. Cas. 712 (Peshavar).

——S. 12—Separate applications—Aggregate time spent in getting copies when shall be allowed.

A party can separately apply for copy of the judgment and the decree-sheet and the aggregate amount of time spent in getting the two copies should be allowed to him, provided the overlapping period is not counted twice over. The Appellate Court cannot disallow the time spent in taking the copy of the decree-sheet merely because he had applied for it during the extended time and not during the period orginally allowed for appealing against the order of the trial Judge. A.I.R. 1936 Pesh. 179=164 Ind. Cas. 1069.

——S. 12—Separate application for judgment and decree—Time for obtaining copy of judgment plus time requisite for obtaining copy of the decree must be excluded—Overlapping period is, however, to be subtracted from total.

Where a party applies for a copy of the judgment alone and sometimes later applies for a copy of the decree, the time required for obtaining the copy of the judgment plus the time requisite for obtaining a copy of the decree should be excluded, provided that days on which both copies were being prepared cannot be doubly excluded, from the computation of the period of limitation. It is immaterial whether the period of limitation prescribed in Sch. 1 to the Limitation Act had expired when a copy of the decree was applied for. 123 Ind. Cas. 470=26 N.L.R. 66=13 N.L.J. 51=A.I.R. 1930 Nag. 113 (F.B.)

——S. 12—Separate application for Judgment and decree—Application for copies of judgment and decree need not be made at the same time provided they are made before the period of limitation.

The law does not prescribe any particular time for making of applications for copies or require that copies of both decree and judgment must be applied for simultaneously provided they are made before the expiry of the period of limitation prescribed for filing the appeal. The aggregate period taken in obtaining copies of judgment and decree should be excluded when computing limitation, even though applications for those copies were made on different dates.

Where on the dismissal of a suit on 24th August, 1926, the plaintiff applied for a copy of the judgment on 8th September, 1926, and obtained the same on 30th September, 1926, and thereafter applied for a copy of the decree on 7th October, 1926, and obtained it on 12th october, 1926 and the appeal was filed on that day:

Held, that the appeal was not time-barred. 106 Ind. Cas. 57=A.I.R. 1928 Nag. 131.

——S. 12—Separate application for Judgment and decree.

(**Obiter**).—Under S. 12 (2) of the Act, when an application is made for copy of a judgment even the period required for obtaining copy of the decree may also be excluded provided the application for the copy of the decree is made before the expiry of the extension of time allowed by S. 12 (3) as time required for obtaining copy of the judgment. 106 Ind. Cas. 57=A.I.R. 1928 Nag. 131.

——S. 12—Separate application for Judgment and decree.

Where on the day the application for a copy of the decree appealed from is made, the appeal would have been in time adding the time required for obtaining a copy of the judgment, the time required to obtain the copy of decree should be also excluded in computing the time allowed for filing of the appeal. 95 Ind. Cas. 302=A.I.R. 1926 Lah. 529.

——S. 12—Separate application for Judgment and decree.

An appellant would be within time, according to S. 12 if his appeal is filed within the total amount of periods granted to him, namely, the initial period granted by Sch. I, plus the time requisite for obtaining a copy of the decree, plus the time requisite for obtaining a copy of the judgment. Of course, if any of the two periods requisite for obtaining copies overlap each other, one of the overlapping periods has to be left out of account. 87 Ind. Cas. 484=23 A. L. J. 342=47 All. 509=A.I.R. 1925 All. 436.

——S. 12—Separate application for Judgment and decree—Time for copies of judgment and decree is to be excluded.

The order appealed against was passed on the 7th January, 1921. On the same day the plaintiff applied for a copy of judgment and that copy became ready for delivery and was delivered to him on the 14th January, 1921. He filed an appeal on the 4th February, 1921 accompanied by a copy of the judgment, but without any copy of the decree, for no decree was then in existence. On the 10th February, 1921, he applied for a copy of the decree. On 15th February, 1921, the formal order was drawn up and a copy of that formal order became ready on the 17th February, 1921 and was delivered to him two days later. On the 23rd February, 1921, he filed the copy of the formal order in the appeal:

Held, that adding the time spent in obtaining the copy of the formal order the appeal was clearly within time. 74 Ind. Cas. 486=A.I.R. 1924 All. 162.

——S. 12—Separate application for Judgment and decree.

Where the period for obtaining a copy of the judgment and the one for obtaining a copy of the decree are distinct and separate both of the two distinct periods should be excluded in computing the

time for the admission of the appeal. 87 Ind. Cas. 545=48 Bom. 433=26 Bom. L. R. 362=A.I.R. 1924 Bom. 425.

——S. 12—Separate application for Judgment and decree.

In order that a party may be entitled to deduct the time taken in obtaining a copy, it is necessary for him to make an application for copies of the decree and the judgment before the expiration of the time allowed to him by law to prefer an appeal. If this is done there is no reason why the time occupied in obtaining copies of the decree and the judgment should not be deducted as provided by S. 12 excluding the overlapping period. (1916) 21 C.W.N. 217 and (1909) 33 Mad. 256, **Foll.** 87 Ind. Cas. 93=48 Bom. 292=25 Bom. L.R. 1309=A.I.R. 1924 Bom. 185.

——S. 12—Separate application for Judgment and decree—The time taken for preferring the copies of judgment and decree is to be excluded though both applied for at different times.

The term of 90 days for filing an appeal against the decree expired on the 29th January, 1923, but before the time expired the appellant applied for a copy of the judgment on the 17th November, 1922 and obtained a copy on the 23rd of November, 1922 thus the time for filing the appeal was extended, from the 29th January, 1923 to the 5th of February, 1923; but before the expiry of this extended time, the appellant made an application for a copy of the decree on 31st January, 1923 and obtained a copy on the same date. On the 6th February, 1923 he filed the appeal.

Held, that the appeal was filed within time. 77 Ind. Cas. 401=1923 P.H.C.C. 235=4 P.L.T. 619=A.I.R. 1924 Pat. 113.

——S. 12—Separate application for Judgment and decree.

A party is entitled to exclude both periods one for obtaining copy of judgment and for copy of decree so long as they are not counted twice over. 33 Mad. 256 and 8 M.L.J. 148, **Foll.** 66 Ind. Cas. 23=14 M.L.W. 269=1921 M.W.N. 557=41 M.L.J. 273.

——S. 12—Separate copy applications for decree and judgment—Both periods, to be excluded.

Under S. 12 Cls. (2) and (3) the appellant can deduct the time requisite as well for obtaining a copy of the judgment though he has applied for copies of the judgment and decree at different times, both these periods should be excluded, unless the two periods overlap partially or entirely in which case the appellant cannot deduct the same time twice over. 21 C.W.N. 217=38 Ind. Cas. 66.

——S. 12—Separate copy applications for decree and judgment—Exclusion of time.

Deduction of time cannot be had twice for the same cause and therefore when the time for obtaining copy of judgment is included in the period during which the decree was being drawn up both the periods cannot be deducted. 12 Ind. Cas. 677 (Cal.).

——S. 12 (2) and (3)—Separate copy application for decree and judgment—Exclusion of time—Mode of calculation.

The appellant is entitled to deduct the time requisite for obtaining a copy of the decree appealed from as well as the time requisite for obtaining a copy of the judgment under S. 12 (2) & (3) of the Limitation Act respectively and he is not obliged to ask for both copies in the same application. 163 P. R. 1919=54 Ind. Cas. 879.

——S. 12—Separate copy applications for decree and judgment—"Time requisite for obtaining copies".

Under S. 12 of the Limitation Act an appellant can only deduct such time as was "requisite" for obtaining copies. A person cannot claim deduction of the time spent in obtaining copies of the judgment and decree by separate applications. What time is requisite for this purpose is a question of fact. Where the Divisional Judge has decided that two deductions, **viz.**, one for obtaining the copy of the judgment and another for obtaining copy of the decree of the lower court were not requisite in the particular case and made only one allowance, the question whether he was right or wrong is not a question of law. 100 P.R. 1918=185 P.W.R. 1918=48 Ind. Cas. 31.

——S. 12 (2)—Separate copy applications for decree and judgment—Exclusion of time.

An application for copy of a decree was made beyond the period of limitation prescribed for appeal but within the period if the time taken in obtaining copy of the judgment is excluded. An appeal was filed appending the copies so obtained. **Held,** that the appeal was filed in time. 18 O. C. 74=2 O. L. J. 159=28 Ind. Cas. 366.

——S. 12—Separate copy applications for decree and judgment—Exclusion of time.

The time occupied in obtaining copy of a judgment ought also to be deducted in addition to the time required for obtaining copy of the decree. (33 M. 256 F.) 12 M.L.T. 360=17 Ind. Cas. 393.

——S. 12—Sch. II, Art. 152—Separate copy applications for decree and judgment—Computation of time.

Where after obtaining a copy of the judgment the copy of the decree was applied for:

Held, that in computing the time for filing the appeal the time taken for obtaining the judgment copy and the time taken for getting the decree copy, should both be excluded. 33 Mad. 256=7 M.L.T. 29=21 M.L.J. 152 =(1910) M.W.N. 141=4 Ind. Cas. 301.

——S. 12—Separate copy applications for decree and judgment—Computation, mode of.

An appellant is entitled to deduct the aggregate period taken in obtaining copies of judgment and decree if they are applied for on different dates provided that both the applications are made before the expiry of the period of Limitation prescribed for filing the appeal. 42 Ind. Cas. 965, **Foll.** 49 Ind. Cas. 961 (Nag.).

——S. 12—Separate copy applications for decree and judgment—Aggregate period—Whether excluded.

Where two separate applications are filed for copies of the judgment and the decree in a case, each within the period of limitation prescribed by law for appealing, the aggregate period occupied in obtaining copies on

both the judgments and the decree is excluded from the period for filing the appeal. 42 Ind. Cas. 965 (Nag.).

——S. 12 and 5—Separate copy applications for decree and Judgment.

The time requisite for obtaining a copy of the decree appealed from does not ordinarily begin till an application for the same is made and the period required for obtaining the copy is excluded. But when first only copy of judgment is asked for and then afterwards, after the usual period of limitation is run out, a copy of the decree is asked for, the period required for that copy cannot be excluded unless sufficient reason is shown. The words "time requisite for obtaining copy" should be strictly construed. 7 N.L.R. 67=10 Ind. Cas. 866.

16 (e). Sufficient cause.

——S. 12—Time requisite — Sufficient cause —Time occupied in making application to Registrar for something connected with the settling of the order—Held, **period should be excluded in computing limitation for appeal.**

The period occupied in an attempt to obtain a variation of the order as to costs and the period occupied by an attempt by application to the Registrar for something which was connected with the settling of the order, can be deducted under S. 12 (2), Lim. Act in computing the period of limitation under Art. 151 for appealing against the order:

Held, also, that it was arguable that the period that elapsed between a letter by the appellant to the Registrar asking him to do something, and a second letter which was a reminder that he had asked him, although, in form, it made no reference to the previous letter, could also be deducted. 1937 O.W.N. 364=A.I.R. 1937 P.C. 107=3 B R. 405=45 L.W. 449 =18 P.L.T. 335=41 C.W.N. 650=(1937) A.L.J. 440 =(1937) M. W. N. 649=39 Bom. L. R. 744=(1937) 1 M. L. J. 702=31 S. L. R. 239=65 C. L. J. 289 =(1937) A.W.R. 408=167 Ind. Cas. 345 (P.C.).

——S. 12—Sufficient cause.

Where necessary stamps and folios were supplied in time, but the Court unnecessarily asked for more folios which were not promptly supplied:

Held, that this delay in supplying additional folios should not count against the appellant. 98 Ind. Cas. 748=44 C. L. J. 44=30 C. W. N. 926=A. I. R. 1926 Cal. 1105.

16 (f). Unnecessary copies.

——S. 12—Time requisite—Unnecessary copies—Time spent in obtaining copy not filed with application.

Petitioners are not entitled to have the time spent in obtaining a copy of the judgment which has not been filed together their application for review but which they have filed in another case, excluded in computing the period of limitation. A.I.R. 1935 Rang. 184=156 Ind. Cas. 733.

——S. 12—Unnecessary copies—Unsigned translation of decree filed with memo of appeal.

Where an appeal was filed on the last day of limitation after deducting the time taken in obtaining the copies of the judgment and the decree but with the memorandum of appeal, a translation of the decree not signed by the Judge was filed and no copy of the decree was applied for till late after filing the appeal:

Held, that the unsigned translation was not a proper substitute for a copy of the decree. A.I.R. 1934 Lah. 304=150 Ind. Cas. 781 (1).

——S. 12—Unnecessary copies.

In reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded, even though by the rules of the Court it is not necessary to obtain such copies. 109 Ind. Cas. 1=6 Rang. 302=55 I. A. 161=32 C.W.N. 845=26 A.L. J. 657=47 C.L.J. 510=30 Bom. L.R. 842=5 O. W. N. 479=28 M.L.W. 207=A. I. R. 1928 P.C. 103=54 M.L. J. 696 (P.C.).

——S. 12—Unnecessary copies.

Time spent in obtaining copy of an order which is not necessary for filing is not excluded. 106 Ind. Cas. 324=46 C.L.J. 452=A.I.R. 1928 Cal. 46.

——S. 12—Unnecessary copies.

No period can be regarded as "requisite" under the Act when there is no need at all to apply for and obtain a copy of the decree, the rules of the Court allowing the appellant to file his memorandum of appeal unaccompanied by a copy of the decree. A.I.R. 1922 P.C. 352 (P.C.), **Foll.** 98 Ind. Cas. 417=4 Rang. 265=5 Bur. L. J. 187=A.I.R. 1927 Rang. 20.

——S. 12—Unnecessary copies.

In an application for restoration of a suit dismissed for default, the time spent in obtaining copy of the order dismissing the suit for default cannot be excluded. 93 Ind. Cas. 1023 (Lah.).

——S. 12—Unnecessary copies.

The time spent in obtaining a copy of the translation of the judgment appealed against cannot be excluded in computing the period of limitation for an appeal under S. 12. 59 Ind. Cas. 965 (Lah.).

17. Miscellaneous.

——S. 12—Miscellaneous.

Where parties' Counsel have been duly communicated the date fixed for delivery of judgment limitation for appeal will run from such date in spite of the fact that neither the parties nor the Counsel were present. 98 Ind. Cas. 942=A.I.R. 1927 Lah. 59.

——S. 12—Miscellaneous.

Where an application for copies is struck off under R. 129 of Madras High Court Civil Rules of Practice for non-deposit of requisite stamp, papers and a subsequent petition is put in for restoration of the previous application, the Court has power to restore the original application and to treat the subsequent application as a continuation of the original application for the purpose of computing the time for filing an appeal. A.I.R. 1942 Mad. 369=1942 M.W.N. 261=(1942) 1 M.L. J. 372= 55 M.L.W. 113=204 Ind. Cas. 523.

——S. 12—Miscellaneous.

Where cause of action arose, on 17-2-13, in the case of breach of contract not in writing and registered, a suit filed on 17-2-16, is in time. 78 Ind. Cas. 87=A.I.R. 1924 Lah. 709.

——S. 12—Miscellaneous—The word 'day' in S. 19 and 'time' in S. 12 have the same meaning.

The plaintiff filed the suit on 13-7-20, for debts which had been acknowledged in writing on 13-7-17 to be due. The Subordinate Judge held that the provisions of S. 12 do not apply to the computation of a period starting from the signature of an acknowledgment under S. 19 for the reason that the word **time** is used in the latter section and the word **day** in the former and therefore dismissed the suit.

Held, that the two words have the same meaning and therefore the suit is in time. 71 Ind. Cas. 556= 6 N.L. J. 281=A.I.R. 1923 Nag. 143.

——S. 12—Miscellaneous.

By S. 12 (1) or S. 8 of the General Clauses Act and S. 160 of the Land Revenue Act the period of limitation is not three years but three years and one day.

Therefore, either the claim in respect of the first year is not time-barred or the claim in respect of the fourth year is not premature, if the suit is brought on the first day of the Revenue year which is the first day of limitation in respect of the fourth year and last day in respect of the first year. 69 Ind. Cas. 527=A.I.R. 1922 Nag. 261.

——S. 12 (2)—Miscellaneous—Copies—Deduction of time.

An appellant is not entitled to deduct time taken to obtain a copy of the judgment to be filed in another connected appeal. 25 Ind. Cas. 28 (Mad.).

——S. 12—Miscellaneous—Exclusion of time.

Exclusion of time under S. 12 can be claimed only from the date of the deposit of the copying fee and not from the date of the application accompanied by the deposit. 5 S.L.R. 47=10 Ind. Cas. 210.

——S. 12 and Sch. 1, Art. 151—Miscellaneous—Extension of time for appeal—Practice.

An extension of the time provided in Art. 151 of the Act cannot be claimed unless an application is made to the Court for a copy of the decree or judgment indicating the intention to appeal, within the period fixed by the Article. 15 Bom. L. R. 681=20 Ind. Cas. 537.

——S. 13—Applicability—"Time during which defendant has been absent," interpretation.

The expression "time during which the defendant has been absent from British India" must be read as "time during which the defendant or any person from or through whom the defendant derives his liability to be sued has been absent from British India."

Where defendant No. 1 from or through whom defendant No. 3 derived his liability to be sued, was absent from British India, S. 13 would apply and save the suit from being barred against the appellant. 58 M.L.W. 181=(1945) 1 M.L. J. 275=1945 M.W.N. 244=A.I.R. 1945 Mad, 315.

——S. 13—Applicability.

Section 13 is attracted only when the cause of action has arisen in British India. Payments made in discharge of a decree of a foreign Court do not save limitation. 57 M.L.W. 355=A.I.R. 1944 Mad. 437= (1944) 1 M.L. J. 440=1944 M.W.N. 494.

——S. 13—Condition precedent.

Quaere.—Whether S. 13 applies only to cases where defendant was in India at the time when the transaction took place and left it afterwards, or whether it applies to all cases of person not in British India. 112 Ind. Cas. 139=1928 M.W.N. 543=28 M L.W. 645 =A.I.R. 1928 Mad. 1088.

——S. 13.

In order to get the benefit of S. 13 the cause of action or the transaction which gives rise to the cause of action must have taken place in British India. 112 Ind. Cas. 139=1928 M.W.N. 543=28 M.L.W. 645 =A.I.R. 1928 Mad. 1088.

——S. 13.

A Suit would be in time provided that the defendant has not been within British India beyond the time allowed by the Indian Law of limitation, to bring the action, wherever the cause of action may have risen. 63 Ind. Cas. 959=45 Bom. 1228=23 Bom. L.R. 543=A.I.R. 1921 Bom. 460.

——S. 13—Construction and scope—Chiefs of Foreign States can be held to reside in British India in so far as they actually carry on their business through representatives in British India.

Section 13 must be read consistently with the provisions contained in Part IV, C. P. Code, for "suit in particular case" against defendants who ordinarily would be always out of British India, e. g., (1) the Secretary of State for India in Council; (2) an alien corporation and (3) a Sovereign Prince or Ruling Chief sued in the name of his State.

Section 13 must be read so as to avoid the obvious absurdity that arises, if such corporate bodies are deemed to reside out of British India, so that suits against them can never be barred at all. And this can be done by treating them as defendants, who, by reason of their special character, are not absent from British India within the meaning of the section, because they have not got the same liberty as private individuals to reside personally in British India and attend to their affairs and they must do so through agents or representatives. They can be held to reside in British India in so far as they actually carry on business through representatives in British India. 115 Ind. Cas. 369=53 Bom. 12=30 Bom. L. R. 1463= A.I.R. 1929 Bom. 14 (F.B.).

——S. 13—Military occupation of place.

The military occupation of Basra in 1914 did not bring Basra within "territories and places" governed by Governor-General of India so as to exclude the operation S. 13. 20 A.L. J. 786, **Foll.** 68 Ind. Cas. 978 =20 A.L. J. 786=45 All. 18=A.I.R. 1923 All. 64.

——S. 13—Person staying in Secunderabad Contonment—If can claim extension.

Secunderabad Cantonment is under the administration of the Govt. of India though it is not within British India. A person, therefore, cannot claim any extension of time under S. 13, Lim. Act, on the ground of his residence at a place in Secunderabad. A. I. R. 1938 Lah. 225=40 P. L. R. 92=176 Ind. Cas. 255.

——S. 13—Burden of proof—Secunderabad, if under administration of the Government of India.

When a person seeks to take advantage of the extension of time allowed under S. 13, Lim. Act, he must bring himself within tha terms of the section. That is to say, the burden is upon him to prove both that the defendant has been absent from British India and from territories under the administration of the Govt. of India. Secunderabad is under the administration of the Govt. of India. 39 Bom. L.R. 263=A.I.R. 1937 Bom. 242=169 Ind. Cas. 651.

——S. 13—Absence from British India—Proof.

Strict proof of the duration of the deft.'s absence from British India must be adduced by the plaintiff. 9 M.L.T. 217=9 Ind. Cas. 568.

——S. 14.

Synopsis.

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1. Applicability and scope of section.

(a) General
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1 (a). Applicability and scope of section—General.

——S. 14—Applicability—Cases governed by Bengal Tenancy Act.

S. 14 of the Limitation Act applies to cases governed by the Bengal Tenancy Act. I.L.R. (1949) 1 Cal. 365 =53 C.W.N. 159.

——S. 14—Applicability—Complaint under Cattle Trespass Act, S. 20—Computation of 10 days' time—Exclusion of time.

S. 14, Limitation Act, is not applicable to the case of a complaint under S. 20 of the Cattle Trespass Act, in the computation of the period of 10 days fixed in that section. 4 A.I.Cr.D. 256=16 C.L.T. 51=A.I.R. 1951 Orissa 40.

——S. 14—Complaint under S. 9, Child Marriage Restraint Act (XIX of 1929).

Section 14, is, in terms, restricted to civil proceedings and cannot be taken advantage of by a person making a complaint under S. 9, Civil Marriage Restraint Act. A.I.R. 1939 Mad. 512=49 M L.W. 547 (1)= (1939) M.W.N. 415=(1939) 1 M.L.J. 775=40 Cr.L.J. 816 (1) =183 Ind. Cas. 595.

——S. 14.

Scope—If controls S. 46, C.P. Code. See: C.P. Code, S. 48. 50 C.W.N. 12.

——S. 14—Benefit of—Availability—Delay in filing suit under S. 180, U. P. Tenancy Act by reason of prosecution of miscellaneous proceedings for the correction of village papers—Time taken in such proceedings —If can be deducted.

The mere fact that certain miscellaneous proceedings for the correction of village papers was prosecuted in the S. D. O.' s. Court would not justify the delay in the filing of ejectment suit under S. 180 of the U. P. Tenancy Act and the benefit of S. 14 of the Limitation Act cannot be claimed in such a case. (1947) A.W.R. (Rev.) 136 (2) =1947 R.D. 394.

——S. 14.

Objection that a portion of debt alleged in the certificate was not due—Certificate modified by the certificate-officer—But maintained with full amount by Collector in appeal—Debtor moving Commissioner and then the Board in Revision—Revision rejected—Suit in Civil Court:

Held, that time spent in agitating the Commissioner and the board could not be excluded under S. 14. A.I.R. 1942 Pat. 378=23 P.L.T. 263=8 B.R. 668=200 Ind. Cas. 309.

——S. 14—Certificate proceedings.

Certificate proceedings by co-sharers for recovery of 12 annas arrears of rent—Pending it suit by 3 annas co-sharers for recovery of arrears of their share—12 annas co-sharers withdrawing certificate-proceedings and joining as co-plaintiffs—Period covered by certificate-proceedings cannot be excluded under S. 14 in computing limitation for their claim. A.I.R. 1938 Cal. 517= I.L.R. (1938) 1 Cal. 262=177 Ind. Cas. 948.

——S. 14.

Partition proceedings under C. P. Land Revenue Act —Order referring objector to Civil Court—Omission to direct that application should be made within six months—Time spent in appeal:

Held, the time taken in appeal in the Rev. Court cannot be excluded in calculating the period of limitation for a suit in such cases. A.I.R. 1933 Nag. 340=29 N.L.R. 350=149 Ind. Cas. 622.

——S. 14—Applicability—Proceedings in Revenue Courts.

Time spent in revenue courts fruitlessly to eject a tenant cannot be excluded. 3 O.L.J. 445=36 Ind. Cas. 770.

——S. 14—Applicability—Proceedings of Revenue Court.

The proceedings in a Revenue Court do not fall under S. 14 of the Act so as to extend the period of limitation. 83 P. R. 1914=232 P.L.R. 1915=26 Ind. Cas. 441.

——S. 14—Proceeding in Revenue Court.

The plff. is entitled to a deduction of time from the date of institution of the suit wrongly in the Revenue Court to the date on which the plaint was returned for representation. 9 M.L.T. 315=(1911) 1 M.W.N. 233 =9 Ind. Cas. 642.

——S. 14

There being a special provision for the exclusion of time in the local Act (U. P. Village Panchayat Act), S. 14, Lim. Act has no application to suits filed before Panchayats. 1941 O.W.N. 111=A.I.R. 1941 Oudh 276 =16 Luck. 512=1941 A.W.R. 92=192 Ind. Cas. 840.

——Ss. 14 and S. 71 (2) Village Panchayats Act—Scope.

Section 71 (2) of the Village Panchayat Act provides a special rule of limitation which must derogate from the provisions of the general rule embodied in S. 14. 98 Ind. Cas. 1050= A.I.R. 1927 All. 181.

——Ss. 14 and 29 (1)—Applicability—Registration Act, S. 77.

Under S. 29 (1) nothing in this enactment affects or alters any period of limitation specially prescribed for any suit, appeal or application by any special or local law, and inasmuch as Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused, and as S. 77 limits the period within which suit is to be brought to 30 days, the period cannot be extended under S. 14 of the Limitation Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction in the matter. 89 Ind. Cas. 884=A.I.R. 1926 Nag. 126.

——S. 14—Applicability and scope

The tendency has been not to restrict the operation of S. 14 but to follow its principle in suitable cases even in proceedings which cannot strictly be called proceedings in a Court of Law. Where the party seeking its benefit has established his good faith and that he has been prosecuting with due diligence another civil proceeding, he is entitled to its benefit. I. L. R. (1945) All. 394=A.I.R. 1945 All. 377=(1945) A.L.J. 185.

——S. 14—Conditions for applicability.

Under S. 14 the time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the same defendant can be excluded where the proceeding is founded on the same cause of action, is prosecuted in good faith and and in a Court which, from defect of the jurisdiction or other cause of a like nature, is unable to entertain it. 33 P.L.R. 360 =138 Ind. Cas. 621.

——S. 14.

Section 14, Lim. Act, does not require that the earlier proceeding must have been a suit, nor does it require that it must have been initiated by this plaintiff subsequently seeking advantage from the section. A.I.R. 1942 Sind 37=I.L.R. (1941) Kar. 495=199 Ind. Cas. 438.

——S. 14.

A mere fact that the appellants have wrongly prosecuted proceedings for scaling down the decree-debt in a wrong Court (trial Court) is no ground for applying S. 14, so as to enable them to move the Appellate Court for the same relief. (1944) 2 M.L.J. 338=57 M.L.W. 582=1945 M.W.N. 20=A.I.R. 1945 Mad. 86.

——S. 14—Futile application.

An application to the Collector by the plaintiff to recall the sale proceeds that had been returned to the Civil Court and paid out by the Civil Court under S. 73, Civil P. C. to the defendants is futile and S. 14 Lim. Act cannot save limitation. 1944 N.L.J. 391= A.I.R. 1944 Nag. 313.

——S. 14 (2).—Section 14 (2), Lim. Act is not meant to cover cases in which the holder of a mortgage decree attempts to proceed against other property without exhausting the property held under the mortgage. A.I.R. 1943 Oudh 453=19 Luck. 279=1943 O.W.N. 352=209 Ind. Cas. 129.

——S. 14—Insolvency petition dismissed on merits.

D executing pro-note in favour of **P** in 1929—In 1932, **P** filing insolvency petiton against **D** alleging that alienations made by him amounted to fraudulent preference—Petition dismissed on merits in 1939—Suit on pro-note in 1940—**Held**, S. 14 did not save limitation. A.I.R. 1942 Mad. 713=55 M.L.W. 644 (2)= (1942) 2 M.L.J. 515=1942 M.W.N. 820 (2)=205 Ind. Cas. 326.

——S. 14—When the previous suit is decided on merit and not on want of jurisdiction, in a subsequent suit filed after limitation—Section 14 cannot be applied.

Mortgage filed Darkhast against other properties of mortgagor. The High Court decided that the mortgage decree could not be said to be a personal decree merely because it directed the defendants to pay the amount and that there must be a decree personally made against the mortgagors before it could be executed against property other than the mortgaged property. Thereupon the mortgagee filed an application under O. 34, R. 6 on 10th February, 1920. And the time occupied by the previous darkhast was sought to be excluded in computing limitation under S. 14, Lim. Act:

Held, S. 14 did not apply as the previous darkhast in this case was decided on the construction of the decree and not on the ground of want of jurisdiction or other cause of a like nature. The decree-holder's proper remedy, if any, was to apply under O. 34, R. 6, for a supplemental decree and not execute the previous decree which had not given any personal relief. 113 Ind. Cas. 515=30 Bom. L.R. 724=A.I.R. 1928 Bom. 323.

——S. 14—Former action falling through on merits.

Section 14 is inapplicable to a suit if the former proceeding founded on the same cause of action fails

through on the merits and not from defect of jurisdiction. 101 Ind. Cas. 254=28 P.L.R. 158=9 L.L.J. 215=A.I.R. 1927 Lah. 186.

——S. 14—Application dealt with on merits.

Where the Court dealt with an application on the merits and came to the conclusion that the judgment-debtors and the decree-holder were alike bound by the order made in the course of the execution proceeding, S. 14 is of no avail. 74 Ind. Cas. 279=A.I.R. 1924 Cal. 419.

——S. 14—Applicability to execution petitions.

Section 14 is wide enough to cover **bona fide** applications for execution which had been filed and prosecuted in wrong Court. A.I.R. 1932 Lah. 531=33 P.L.R. 740=14 L. 106=138 Ind. Cas. 646.

——S. 14—Execution application.

Section 14 is not applicable to an application for execution. It applies exclusively to suits. 93 Ind. Cas. 292=A.I.R. 1926 Lah. 345.

——S. 14 and Art. 182 (5)—Applicability—Decree passed by District Munsiff as Small Cause Judge in 1939—Successive execution petitions on the Original Side of same Court in 1941 and 1942 successively dismissed and last execution petition pending in 1945—Decree-holder realising mistake and filing execution petition on Small Cause side—Limitation.

A District Munsiff sitting as a Small Cause Judge passed a decree for a sum of money on 19th January, 1939, and the decree-holder filed successive execution petitions on the Original Side of the same Court. The first of them filed on 1st September, 1941, was dismissed for default of prosecution on 25th September, 1941. The second filed on 15th July, 1942, was dismissed on 19th February, 1943. A third application was filed on 17th July, 1943, and after various interlocutory and other orders, this was pending on 3rd September, 1945, when the decree-holder realised his mistake and filed an execution petition in the Small Cause Side. On a question of limitation:

Held: (1) the decree-holder is entitled to invoke the aid of S. 14 of the Limitation Act and thereby deduct the period during which the three execution petitions were pending before the Original Side of the District Munsiff's Court, because he was **bona fide** prosecuting petitions for the same relief which the Court, in which they were prosecuted could not give on account of want of jurisdiction.

But since the decree was passed on 19th January, 1939, and the correct execution petition was filed only on 3rd September, 1945, a period of six years, seven months and fifteen days had elapsed and deducting two years, nine months and odd during which the petitions on the Original Side were actually pending there is a gap of three years and ten months and odd and that being more than three years as provided under Art. 182 (5) of the Limitation Act, the application for execution is barred by time. It cannot be contended that the successive applications on the Original Side should be deemed to be continuations of the earlier applications as each of the three applications were distinct and separate. 1949 M.W.N. 219=A.I.R. 1949 Mad. 849=(1949) 1 M.L.J. 432.

——S. 14, Art. 182 (5)—Distinction pointed out—Words of Art. 182 (5) cannot be imported in S. 14.

Article 182 (5) and S. 14 deal with quite distinct matters. The former prescribes the **terminus a quo** the point from which limitation shall begin to run the latter has nothing to do with this and relates only to the method to be adopted in calculating the total time that is to be counted after the starting point has been fixed. Clause (5) of Art. 182 has nothing to do with any period of time; it has only to do with a fixed point of time. Only five conditions have to be satisfied for the application of 14 (2), and no condition that the proceeding must be in accordance with law is to be found in them, either expressly or by implication. Nor, can the words of Art. 182 (5) be imported into S. 14 (2), since the provisions relate to quite different matters. 19 Pat. 354=A.I.R. 1940 Pat. 677=7 B.R. 245=191 Ind. Cas. 695.

——S. 14.

Decree certified as satisfied—Decree-holder applying for re-consideration on ground of mistake—Application treated by Court as one of review—In revision, review, held not tenable—Fresh application under Ss. 47 and 151, Civil P. C.:

Held, that the decree-holder was entitled to the benefit of S. 14. A.I.R. 1943 Nag. 335=I.L.R. (1944) Nag. 370=1943 N.L.J. 521=214 Ind. Cas. 12.

——S. 14.

An order passed in execution proceedings by Assistant Collector—Appeal before District Judge—District Judge holding that it had no jurisdiction to entertain the appeal which was for the order passed in execution proceeding and not in suit—Second appeal.

Second Appellate Court holding that 'suit' included execution proceedings and reversing the judgment of the District Judge:

Held, that the District Judge had no jurisdiction. Memorandum of appeal directed to be sent to Commissioner and not to be thrown out as time-barred as the time elapsed is excused under S. 14 of the Lim. Act. 1942 O.W.N. 595=A.I.R. 1943 Oudh 52=1942 R.D. 762=18 Luck. 480=204 Ind. Cas. 215.

——S. 14.

Execution petitions filed in competent Court—Last petition dismissed by Court on erroneous ground that it had no jurisdiction—All petitions could be availed of to save limitation under S. 14. A.I.R. 1941 Cal. 493=73 C.L.J. 410=196 Ind. Cas. 534.

——Ss. 14 and 184—Scope.

Section 184 provides the period of limitation, and S. 14, provides, not the period of limitation but means to compute that period which is an entirely different thing. Therefore S. 184 does not exclude the application of S. 14. 56 Cal. 805=33 C.W.N. 227=A.I.R. 1929 Cal. 325.

——S. 14—Plaintiff failing to execute the decree within the given time under a bona fide **mistake when defending another suit concerning the same subject matter—Time occupied cannot be deducted.**

Plaintiff obtained a decree for possession on February 13th, 1913. There was an appeal first to

the District Court and then to the High Court, which ultimately confirmed the decree on December 10, 1913. He filed his application for execution of this decree on June 28th, 1920. During the interval, however, the defendant filed Suit No. 42 of 1916 for a declaration that the plaintiff's decree had been obtained by fraud. That litigation lasted till July 31st, 1920, and ended in the present plaintiff's favour:

Held, that plaintiff may have been under an honest but mistaken impression that during all this time it would be futile for him to prosecute the application for execution of the decree which was challenged by the suit of 1916. That in a case of this kind it may be desirable that the plaintiff ought to be in a position to deduct the time taken up in defending a litigation of the nature such as in the present case. But that, as it was impossible to bring the case within the provisions of the Indian Limitation Act, the application was time-barred. 76 Ind. Cas. 557=25 Bom. L.R. 863=A.I.R. 1924 Bom. 39.

——S. 14—Execution application—Prosecution of suit—Error of Law.

In counting the period of limitation for an application for refund of excessive moneys levied in execution of a decree the time taken up by the deft. in prosecuting a suit for the purpose in another Court, under an error of law, ought to be deducted under S. 14 of the Indian Limitation Act. 44 Bom. 97=22 Bom. L.R. 238=55 Ind. Cas. 967.

——S. 14—Plaint presented in Court having no jurisdiction.

Obiter.—Where a plaint is presented in a Court which has no jurisdiction and it is re-presented after return by that Court in a Court which has jurisdiction, the date of presentation in the latter Court must be deemed to be the date of its institution in the said Court. The proceedings in the former Court are of no avail and the proceedings in the latter cannot be treated as a continuation of the proceedings in the former suit. A.I.R. 1939 Mad. 724=50 M.L.W. 139=(1939) 2 M.L.J. 329=189 Ind. Cas. 204.

——S. 14—Suits for recovery of arrears under Bengal Ten. Act.

Section 14 being a rule for the computation of the period of limitation, applies to suits for recovery of arrears of rent of agricultural land, although the period of limitation for such suits is prescribed in the Ben. Ten. Act. A.I.R. 1938 Cal. 517=I.L.R. (1938) 1 Cal. 262=177 Ind. Cas. 948.

——S. 14—Mistake of Court.

Where it is on account a mistake more on the part of the Court than through any fault of the plaintiffs that the case remained pending in the wrong Court, the plaintiff is entitled to the benefit of S. 14, Lim. Act. 1935 O W.N. 1045=A.I.R. 1935 Oudh 501=158 Ind. Cas. 267.

——S. 14.

Suit filed in wrong Court—Plaint returned to be filed in proper Court very late—Plaint filed in proper Court next day—Suit beyond limitation—**Held,** benefit of S. 14 should be given. 1935 O.W.N. 1942=A.I.R. 1935 Oudh 444=157 Ind. Cas. 629.

——S. 14—Order dismissing suit on the ground of being filed in wrong Court—Whether bars institution of second suit before Court having jurisdiction.

The plaintiff is entitled to claim the benefit of this provision whether he comes up on the second occasion with the original plaint or with a new plaint. It cannot be argued that the plaintiff could not have believed in good faith that his suit should be instituted in the Court of the Subordinate Judge, when this was the view taken by the Subordinate Judge himself. In such circumstances, the case properly falls within the provisions of S. 14 of the Lim. Act. An order dismissing a suit on the ground that it ought to have been instituted in the Settlement Court is not a disposal of the suit on the merits; it is merely a refusal of relief which, from the defect of jurisdiction, he was unable to give, and the order of dismissal by a Court which had no jurisdiction to entertain the suit cannot operate as a bar to a second suit instituted before a Court having jurisdiction. A.I.R 1935 Pat. 82=1 B.R. 133=153 Ind. Cas. 155(2).

——S. 14—Continuance of same proceeding.

Section 14 does not apply in the case of continuance of the same proceeding. A.I.R. 1934 Lah. 412=36 P.L.R. 215=150 Ind. Cas. 739.

——S. 14—Withdrawal of proceeding.

Execution sale—Proceedings under O. 21, R. 89 and R. 90 by different sets of defendants—Sale set aside under R. 90—Withdrawal of application under R. 89—Sale confirmed on appeal—Application to revive proceedings under O. 21, R. 89.

Held, that S. 14, Lim. Act had no application to the case. 40 M.L.W. 26=67 M.L.J. 189=A.I.R. 1934 Mad. 593=152 Ind. Cas. 519.

——Ss. 14 and 15.

Section 14 is mandatory and if the Court has to exclude the time spent in prosecuting a case in good faith, the Court must determine whether the prosecution was, in fact, in good faith or not and it appears to be a necessary corolary that if the prosecution time of the suit is divided into stages, it must, in order to arrive at the period which is to be excluded, also determine how much must be included whether, by reason of prosecution in bad faith or owing to any other reason.

After the order of February 27, 1930 to the effect that the Court had no jurisdiction, the plaintiff still had five months and two days from the date of his original cause of action within which he could either file a fresh suit or get his case transferred to the right Court. But he filed the suit in the proper Court on August 10, 1931:

Held, that under Ss. 14 and 15 of the Lim. Act, he was entitled to present his plaint on any date upto February 25, 1932 and how he spent his time upto that date was no concern of the Courts. He was entitled to remain idle and do nothing until that date and he was equally entitled in law to prosecute his suit in a wrong Court in bad faith until that date. A.I.R. 1934 Nag. 145=30 N.L.R. 294=149 Ind. Cas. 956.

——S. 14.

A cause of action is not suspended while the plaintiff is seeking to prove in other proceedings the facts upon which his cause of action depends. In a suit for damages for wrongful attachment, the time taken in

getting the seizure declared illegal either on appeal or by other means cannot be deducted. 7 Rang. 269= A. I. R. 1934 Rang. 329=154 Ind. Cas. 153.

——S. 14—Suit against dead person—Legal representative impleaded after time.

Where a plaint is filed against a person who is in fact, dead at the time of presentation, no application by way of amendment or bringing on record legal representatives can be validly made because the whole proceeding is void and has no effect whatever and if the Court wrongly allows the legal representative to be brought on the record, the plaintiff cannot claim the exclusion of the period during which he was prosecuting the suit against the deceased under S. 14, Lim. Act. 37 L.W. 489=(1933) M.W.N. 644=A I.R. 1933 Mad. 454=143 Ind. Cas. 596.

——S. 14—Applicability.

A decree was passed on 22rd November, 1922 and the money claimed was payable within one year from that date. In December, 1922 however one of the parties applied to have the decree set aside under O. 9, R. 13. The same was dismissed in 1923 and an appeal having been preferred the latter was dismissed on 28th July, 1926. An application for execution was filed in January, 1928:

Held, that S. 14 was inapplicable to the circumstances of the case. 35 C.W.N. 155=131 Ind. Cas. 263= 52 C.L.J. 594=A.I.R. 1931 Cal. 332.

——S. 14—Applicability.

Section 14 has no application when bad faith is established. 122 Ind. Cas. 241=8 Pat. 851=A.I.R. 1930 Pat. 54.

——Ss. 14 and 19—Acknowledgment of liability and bona fide prosecution of suit held to have extended period of limitation.

A firm carrying on business at Amritsar agreed to purchase 2,00,000 francs from a Bank doing business in Bombay, and paid Rs. 10,000 as margin money. The date of delivery was 30th April, 1923. In its correspondance dated 13th July, 1923, and 6th August, 1923 the Bank admitted receipt of Rs. 10,000. On 29th April, 1926, the firm filed a suit to recover the deposit from the Bank in the Court at Amritsar. In this suit the Bank again, in its written statement filed on 1st July, 1926, averred the acknowledgment of deposit money. On 2nd December, 1926 the Court at Amritsar returned one plaint to the firm for presentation to proper Court. The firm brought the prerent suit in the Bombay High Court on 29th January, 1927. The Bank pleaded bar of limitation.

Held, that Ss. 14 and 19 should be read together.

Held, also that the period of 29th April, 1926, to 2nd December, 1926, must, under S. 14, be deducted from the period of limitation prescribed for the suit.

Held, further, that the statements made in the written statement of 1st July, 1926, and those made in the letters of 13th July and 6th August amounted to an acknowledgment of liability under S. 19 and therefore the present suit was instituted prior to the expiry of the period of limitation. 32 Bom. L.R. 58=A.I.R. 1930 Bom. 187.

——S. 14—Section 14 applies when a fresh cause of action arises as a result of the judgment in a previous case.

The purchaser did not buy the goods from the seller according to a previous agreement between them; so the seller sold the goods by public auction and sued the purchaser to indemnify it for loss sustained. But the suit was dismissed. Thereupon the sellers instituted a suit for damages for breach of contract. They further maintained that original cause of action remained suspended from the date of award or the filing thereof or of the execution proceedings up to the date of the judgment of the Court of appeal, that alternatively a fresh cause of action for the same amount arose in consequence of that judgment: that their original claim remained satisfied up to the judgment and that they had a right of set off against the sum which they had been ordered to refund.

Held, the suit was maintainable either on the ground that upon literal construction of S. 14, Limitation Act, limitation was in suspense or upon the ground that a fresh cause of action arose as a result of the judgment of the Court of appeal. 12 M. I. A. 244 and A.I.R. 1916 P.C. 96, **Foll.** 120 Ind. Cas 710=56 Cal. 639=A.I.R. 1930 Cal. 5.

——S. 14.

The parties to the two suits were not different, and the previous litigation was carried on with due diligence. There was no want of good faith on the part of plaintiff in instituting previous suit.

Held, that S. 14 is directly applicable. 112 Ind. Cas. 715=1929 A.L.J. 73.

——S. 14.

So long as there was no legal impediment to the filing of the suit eariler, no time can be excluded under S. 14 and the third column of Art. 73 operates. 100 Ind. Cas. 776=50 Mad. 417=25 M.L.W. 426=1927 M.W.N. 160=39 M.L.T. 116=A.I.R. 1927 Mad. 597= 52 M.L.J. 396.

——S. 14—Suit for alternative remedy.

There is no provision of law according to which a plaintiff, who upon failing to obtain one remedy sues for an alternative one is entitled to exclude the time taken up by the former proceedings. 100 Ind. Cas. 40=25 M.L.W. 11=A.I.R. 1927 Mad. 273.

——S. 14.

An application which does not lie in any Court cannot be taken into account for the sake of extending time under S. 14. 22 P.R. 1912, **Foll.** 92 Ind. Cas. 299 (Lah.).

——S. 14—Proceeding taken in right Court but continued in wrong Court justifies exclusion of time occupied by proceeding in wrong Court.

On 10th April, 1912, an application to execute decree was presented to the proper Court (Wadgaon Court). As the Judge happened to sit in the Court at Haveli he passed orders at Haveli on April 15th, 1912. The High Court on appeal held on 3rd February, 1915, that the proceedings from and after 15th April were without jurisdiction. On the direction of the High Court the application was therefore further heard but was struck off on 30th June, 1915. A fresh application was presented on 3rd January, 1919. The application was in time by excluding the period from 15th April, 1912 to 3rd February, 1915;

Held, that the period should be excluded under S. 14 (2) for the decree-holder ought not to suffer because when the proper proceedings were in the Wadgaon Court, the Judge sitting in the Haveli Court wrongly passed the orders on 15th April, 1912, and the proceedings thereon should be treated as a separate proceeding and pertaining to the original proceeding which was held in the Wadgaon Court. 85 Ind. Cas. 778=26 Bom. L. R. 470=A.I.R. 1925 Bom. 113.

——S. 14.

To claim exception under S. 14, the claimant must prove that the right to enforce which the exemption is sought, was the subject of litigation in the prior suit. 91 Ind. Cas. 833=21 M.L.W. 593=1925 M.W.N. 361=A.I.R. 1925 Mad. 675.

——S. 14.

A suit in respect of an order under S. 283 of the Code of 1882 made against a minor ought to be filed within one year of his attaining majority under Art. 11.

Where within one year from the date of the order the minor's grandmother instituted such suit which was dismissed;

Held, it was not afterwards again permissible to bring the suit and the period of limitation cannot be extended. 80 Ind. Cas. 992=A.I.R. 1925 Mad. 379.

——S. 14—Proceeding partially wrong is also covered. (Pratt, J., contra).

Per **Marten, J.**—The two separate Courts of Poona and Wadgaon have a Common Judge; from the 1st to the 20th of each month, the judge sits at Haveli, Poona, from 21st to 25th he sits at Wadgaon, and from the 25th to 30th of the month he sits at Lonavli a part of the Wadgaon Court. The plaintiff filed his Darkhast No. 284 of 1912 on the 10th April, 1912. He filed it at Wadgaon quite correctly, but as the Judge was then sitting at Haveli, the Court officials apparently sent the papers to the Judge at Haveli, and he on the 11th April, 1912 gave a notice to the defendants returnable on the 14th or 15th April, 1912 in the Haveli Court. The defendants did not appear, and on the 15th April the Judge sitting in the Haveli Court made the warrant for possession absolute. Defendants appealed and on the 26th February, 1913 this order was set aside on the ground that the Judge had no jurisdiction to direct the defendants to appear in the Haveli Court nor to make the order against them in that Court. It was accordingly directed that the Court of first instance should take up the Darkhast at the point where it was when the order for issuing the warrant of possession was passed. The plaintiff appealed to the High Court, but on 3rd February, 1915 his appeal was dismissed. On 29th June, 1915 the Darkhast was brought on again, the plaintiff was present but as the Judge was away the proceedings were adjourned to the next day. The plaintiff this time was not present in Court and accordingly the Darkhast was struck off. The next Darkhast he filed was on the 7th June, 1916.

Held, that it was not time barred. 76 Ind. Cas. 317=A.I.R. 1923 Bom. 218.

——S. 14—Application to set aside ex parte decree.

Section 14 does not apply to an application to set aside an **ex parte** decree. 84 Ind. Cas. 538=21 A.L.J. 205=45 All. 332=4 L.R.A.Civ. 144=A.I.R. 1923 All. 319.

——S. 14—Wrong remedy—Time spent in prosecution of.

The plffs. applied to continue a prior suit but their application was dismissed as the suit was held to have abated and the dismissal was confirmed on appeal. The plffs. then brought a suit in their own right. **Held**, that in computing the limitation for the second suit plff. could deduct the interval between the date of their application to be allowed to continue the previous suit and the date of the High Court's order in second appeal dismissing that suit. 25 M. L. T. 360=9 L. W. 345=52 Ind. Cas. 465.

——S. 14 — Prosecuting one suit for several claims—Deduction of time.

Several portions of a property were sold to separate vendees on different occasions but the pre-emptor in good faith sued all the vendees jointly, the suit was eventually restricted to only one of the sales. **Held**, that S. 14 applied in computing the period of limitation for the other suits subsequently instituted in respect of the rest of the property. 26 P.W.R. 1915=87 P.L.R. 1915=27 Ind. Cas. 927.

——S. 14—Applicability—Collector.

S. 14 does not apply to a case where the Zemindar sues for possession of lands on the ground that the Collector who during his minority managed the estate treated the lands granted for **Jadaha** service as Government property and dealt with them as such. 1 L.W. 662=25 Ind. Cas. 878.

——S. 14—Not applicable when order is a nullity.

See: **Ganjam and Vizagapatam Agency Rules.**

30 M. 280=17 M.L.J. 147=2 M.L.T. 195.

——S. 14 — Applicability to payments under S. 310, A.C.P.C. (1882).

See: 6 C.W.N. 776=29 C. 626.

1 (b). Applicability and scope of section — Appeals.

——S. 14—Applicability—Appeals.

The principles of S. 14 apply to the appeals also. 1936 O.W.N. 325.

——S. 14—Applicability—Appeals.

Section 14 is not applicable to appeals. But the Court can admit it if sufficient cause is shown under S. 5. 18 R.D. 706=A.I.R. (1935) All. 92=4 A.W.R. 1460=152 Ind. Cas. 939.

——S. 14.

Time spent in carrying out a wholly independent litigation cannot be excluded from the time given to an appellant to appeal. 112 Ind. Cas. 246=A.I.R. 1929 All. 101.

——S. 14—Applicability—Appeals.

Provisions of S. 14 can be applied to appeals.

Where the appellant through **bona fide** mistake preferred his appeal in a wrong Court, but lost no time in re-filing it in the proper Court after it was returned to him;

Held, that the provisions of S. 14 would apply and the appeal should be heard. 14 A. L. J. 212 and A.I.R. 1917 P C. 156, **Foll.** 101 Ind. Cas. 750=49 All. 555=25 A.L.J. 410=A.I.R. 1927 All. 719.

——S. 14—Appeal — Deduction of time—Dismissal for default.

An appeal under the Letters Patent filed against the order by a single Judge dismissing an application for restoration of an appeal cannot be treated as an appeal against the order dismissing the appeal if it is beyond time. The question of deduction of time on account of the mistake of the appellant under S. 14 will arise when the latter appeal is filed. 28 M. L. J. 67=(1915) M.W N. 101=28 Ind. Cas. 64.

——S. 14—Applicability—Appeals—Not governed by section.

S. 14 of the Limitation Act has no application to appeals. 22 C. L J. 66=19 C. W. N. 473=28 Ind. Cas. 211.

——Ss. 14, 5—Applicability to appeals.

S. 14 applies only to suits and not to appeals, but the circumstances contemplated in S. 14 might, and ordinarily would, constitute a sufficient cause in the sense of S. 5, and the reason why S. 14, is limited to courts of original jurisdiction is merely because the earlier section has given a large and more unfettered power in the same behalf to appellate courts. 5 A. 591, foll. (1907) A.W.N. 219=4 A.L J. 515=29 A. 638.

1 (c). Applicability and scope of section —Insolvency proceedings.

——S. 14—Insolvency proceedings.

Quaere.—Whether proceedings in insolvency are completely outside the scope of S. 14, Lim. Act. A.I.R. 1942 Mad. 438=(1942) 1 M.L.J. 588=1942 M.W.N. 430=I.L.R. (1942) Mad. 852=55 M.L.W. 301=202 Ind Cas. 490.

——S. 14—Insolvency proceedings.

Time during which the insolvency proceedings were pending, held could be deducted under Ss. 14 and 15, Lim. Act. 13 L. 70=A.I R. 1932 Lah. 281=33 P.L.R. 1003=137 Ind. Cas. 820.

——S. 14—Section 14 does not apply to insolvency proceedings.

The original insolvency petition was presented by a creditor under S. 6 (4) of Act III of 1907, on June 28th, 1919, to the District Munsif of Razole who had no jurisdiction to entertain it. Having been returned by that Court on September 22nd, 1919, it was represented to the District Court which had jurisdiction under S. 3 on October 1st, 1919, on which date more than 3 months had elapsed since the commission of the act of insolvency upon which the petition was grounded. Thus the petition was liable to be rejected as out of order. But the District Judge, on a petition to excuse delay being presented on Febrauary 21st, 1921, acted under S 5 of the Limitation Act, and holding that there was "sufficient cause" for the petition not being presented earlier, excused the delay and proceeded to enquire into the merits of the case.

Held, that S. 78 of the new Provincial Insolvency Act (1920) was not in force on 1st October, 1919, and S. 14 of the Limitation Act does not apply to insolvency proceedings. Hence the order of District Judge excusing delay was wrong. 72 Ind Cas. 488=1923 M.W N. 195=18 M.L.W. 35=A.I.R. 1923 Mad. 462=44 M.L.J. 303.

——S. 14—Insolvency proceedings.

A creditor taking no part in the insolvency proceedings of his debtor cannot, in a suit to recover his debt, exclude the period of insolvency of the debtor from the limitation period either under S. 14 or S. 15 of the Act. 64 Ind. Cas. 50=13 Bur. L. T. 197.

——S. 14—Applicability—Prov. Ins. Act, S. 36.

S. 14 cannot be invoked to enlarge the period under S. 36 of the Prov. Ins. Act. 5 L.W. 123=(1917) M.W.N. 103=36 Ind. Cas. 828.

——S. 14—Applicability—Insolvency proceedings.

The provisions of the Limitation Act are not applicable to proceedings under the Prov. Ins. Act. Therefore the fact that the petition was filed in wrong court not having jurisdiction cannot save limitation under S. 6 of the Prov. Insolv. Act. 39 Mad. 74=29 M.L. J. 451=27 Ind. Cas. 144.

1 (d). Applicability and scope of section —Withdrawal of suit.

——S. 14—Withdrawal of suit.

Where a suit is withdrawn under O. 23, R. 1, Civil P. C. with liberty to file a fresh suit and the plaintiff accordingly files a fresh suit, S. 14, Lim. Act does not apply. (1942) 2 M.L. J. 442=1942 M.W.N. 622=A.I.R. 1943 Mad. 80=55 L.W. 622=206 Ind. Cas. 394.

——S. 14.—When Rr. 1 and 2 of O 23, Civil P. C. apply, it would exclude the application of S. 14, Lim. Act. A.I R. 1940 Sind 125=I.L.R. (1940) Kar. 225=190 Ind. Cas. 328.

——S. 14.—There is no conflict between S. 14 and O. 23, R. 2. A.I.R. 1940 Sind 125=I.L.R. (1940) Kar. 225=190 Ind. Cas. 328.

——S. 14—Feeling difficulty on question of jurisdiction, plaintiff obtaining leave to withdraw suit with liberty to file fresh one on same cause of action—No decision on question of jurisdiction.

The plaintiff, feeling that he might get into difficulty on the question of jurisdiction, applied for leave of the Court to withdraw the suit with liberty to institute a fresh one on the same cause of action. The Court, however, without deciding the question of jurisdiction granted leave:

Held, that the provisions of S. 14. Lim. Act, could not be invoked in order to save limitation for the fresh suit instituted subsequently. 69 C.I. J. 540=43 C.W.N. 1074=A.I.R. 1939 Cal. 625=I.L.R. (1930) 2 Cal. 316=184 Ind. Cas. 631.

——S. 14.—Order 23, R. 2, Civil P.C. is an exception engrafted on S. 14, Lim. Act.

[Case when comes under S. 14, Indicated.]

A.I.R. 1939 Cal. 625=69 C.L J. 540=43 C.W.N. 1074=I.L.R. (1939) 2 Cal. 316=184 Ind. Cas. 631.

——S. 14.—Suit on pro-note in High Court having jurisdiction to entertain it—Defendants, alleging themselves agriculturists—Plaintiff withdrawing suit—Fresh suit filed in Court of Subordinate Judge:

Held, that the jurisdiction of the High Court to decide the question whether the defendants were agriculturists was not affected by the action of the plaintiffs. The Court had jurisdiction to make an order under O. 23, R. 1, and the case, therefore came under O. 23, R. 2, and not under S. 14, Lim. Act, and the plaintiffs were bound by the law of limitation just if as the first suit had not been instituted. The time of prosecution of the first suit could not, therefore, be excluded. A.I.R. 1938 Bom. 281=40 Bom. L.R. 377=I.L.R. (1938) Bom. 327=175 Ind. Cas. 528.

——S. 14—Withdrawal of suit—Subsequent suit on same cause of action.

Where a plaintiff chooses to withdraw his suit under O. 23, R. 1, he is not entitled to the benefit of S. 14, Lim. Act, in a subsequent suit founded on the same cause of action, because it can not be considered that the previous suit failed on account of a defect of jurisdiction or other cause of a like nature. A.I.R. 1937 All. 124=1936 A.W.R. 1014=167 Ind. Cas. 371.

——S. 14—Withdrawal of suit.

Where plaintiffs are permitted to withdraw their suit and bring a fresh suit, in such fresh suit, they must be bound by the law of limitation in the same manner as if the first suit had not been instituted. That is to say, S. 14, Lim. Act, cannot apply. A.I.R. 1935 Bom. 259=37 Bom. L.R. 225=157 Ind. Cas. 592.

——S. 14—'Is unable to entertain it'—Significance and meaning of—Application of S. 14, Limitation Act and O. 23, Rr. 1, 2, Civil Procedure Code.

When O. 23, R. 2, Civil P. C. provides that a previous suit should be treated as non-existent, then it cannot be taken into account by the Court at all when applying the provisions of S. 14. The words "is unable to entertain it" in S. 14, do not merely mean that the court has expressed its mind that the suit is defective, but must mean that the Court has passed an order terminating the suit or proceeding on the ground that there is a defect of jurisdiction or other cause of a like nature on which the suit must fail. So long as the Court has not terminated the proceeding but has merely given an option to the plaintiff to choose one of two alternatives and the plaintiff voluntarily chooses one, it cannot be said that the case falls within S. 14 of the Lim. Act. (1934) A.L.J. 535=A.I.R. 1934 All. 688=3 A.W.R. 806=57 A. 145=150 Ind. Cas. 135 (F.B.).

——S. 14—Conflict between special law and general law.

The provision in O. 23, R. 2, Civil P. C. is a special provision relating to suits, as a particular case whereas the provision in S. 14 is a general provision applying to all suits which have failed for want of jurisdiction or causes of a like nature. In case of a real conflict, the special provisions would, therefore, prevail and must be treated as an exception to the general rule. (1934) A.L.J. 535=A.I.R. 1934 All. 688=3 A.W.R. 806=57 145=150 Ind. Cas. 135 (F. B.).

——S. 14.—The provisions of S. 14 are not applicable where a suit is withdrawn by a plaintiff under O. 23, R. 1, C. P. Code, with permission to bring a fresh suit, and the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. 29 Bom. 219 and 39 Mad. 936, **Foll.** 114 Ind. Cas. 910=9 L.R.A. Rev. 178=A.I.R. 1928 All. 402.

——S. 14—Suit withdrawn with liberty—Limitation for fresh suit.

Where a suit is withdrawn with liberty to bring a fresh suit the limitation for the latter nevertheless runs from the date of the original cause of action. 29 B. 219=20 C. 205, **Foll.** 39 Mad. 936=2 L.W. 1002=18 M.L.T. 385 =29 M.L.J. 569=(1915) M.W.N. 850=31 Ind. Cas. 234.

——S. 14—C.P.C., Ss. 373, 374—Leave to withdraw under S. 373 given in a case of which the Court had not proper seizen by reason of leave of Registrar only under Cl. 12, Letters Patent.

A Court is not properly seized of a case instituted with the leave of the Registrar only under Cl. 12 of the Letters Patent; and has no jurisdiction to grant leave to withdraw under S. 373 (C. P. C.). When leave is given without jurisdiction, S. 374, (C. P. C.) will not apply and S. 14 of the Lim. Act can be invoked for the purpose of excusing the delay. (1908) 12 C.W.N. 921= 35 C. 924.

1 (e). Applicability and scope of section —Ss. 4 and 14.

See also under S. 4 supra.

——Ss. 14 and 4—Interpretation and scope.

Section 4 can be applied to a case in which extension of time has been claimed under S. 14 and a plaintiff is entitled to the benefit of S. 14 and S. 4 tacked together. 33 C.W.N. 221=A.I.R. 1929 Cal. 315.

——Ss. 14 and 4.—Provisions of S. 4 can be available only where the period prescribed expires when the Court is closed and the application is made to the proper Court on the day on which the Court re-opens; but if on the re-opening day the applicant files his application in a wrong Court he cannot be entitled to take advantage of both the sections and to tack on the vacation to the period spent in prosecuting the application filed in the wrong Court. 36 Mad. 131; A.I.R. 1921 Mad. 654; 14 A.L.J. 310; A.I.R. 1923 Mad. 114, **Foll.** 118 Ind. Cas. 617=929 A.L.J. 976=A.I.R. 1929 All. 677.

——Ss. 14 and 4—Applicability—Presentation to wrong Court.

Where a suit, which, in order to be within limitation had to take the advantage of a holiday under S. 4 was instituted in a wrong Court, S. 14 will not be applicable to bring it within time when subsequently instituted in a proper Court, A.I.R. 1923 Mad. 114; 116 P.L.R. 1920, **Foll.** 116 Ind. Cas. 314=11 Lah. 12=A.I.R. 1929 Lah. 425.

——S. 14.

Holidays preceding the period specified by S. 14 cannot be excluded under S. 14. If a plaintiff, after the expiration of the full period of limitation on account of the intervening holiday, files a suit on the re-opening day in a wrong Court, S. 14 can never be of any avail to him. 69 Ind. Cas. 724=16 M.L.W. 911=31 M.L.T. 258=1923 M.W.N. 42=A.I.R. 1923 Mad. 114=43 M.L.J. 579.

——Ss. 14 and 4.

Where on the day the limitation period expires the Court having jurisdiction is closed and on the day of re-opening, the suit is instituted in a Court having no jurisdiction and the plaint is thereafter returned for presentation to the proper Court and is accordingly presented therein, the suit should be held to be barred; for the purposes of S. 4 account cannot be taken of the closing and re-opening of any other Court than that in which the suit was rightly instituted. 36 Mad. 131; 36 Mad. 482 and 8 M.L.W. 256, **Foll.**

The period allowed by S. 14 cannot be tacked on to the period during which the proper Court was closed, when such latter period precedes the period under S. 14. 63 Ind. Cas. 924=44 Mad. 817=13 M.L.W. 631=1921 M.W.N. 442=A.I.R. 1921 Mad. 654=41 M.L.J. 84.

1 (f). Applicability and scope of section —Ss. 5 and 14.

See also under S. 5 supra.

——S. 14—Applicability—Excusing delay under S. 5.

The existence of circumstances mentioned in S. 14 constitutes a sufficient ground for excusing the delay under S. 5, caused by wrong proceedings. A.I.R. 1942 Mad. 170=1941 M.W.N. 989=(1941) 2 M.L.J. 873=201 Ind. Cas. 84.

——S. 14—Application under S. 5.

Although S. 14 does not, in terms, apply as it deals with suits and not with appeals, that section is relevant in considering applications under S. 5, and may be availed of in excluding the period taken by an appellant in applying to the lower Court for review of judgment. A.I.R. 1936 Sind 43=30 S.L.R. 301=162 Ind. Cas. 257.

——Ss. 14 and 5.

The circumstances contemplated in S. 14 might and ordinarily would constitute a sufficient cause in the sense of S. 5. 91 Ind.Cas. 865=A.I.R. 1926 All. 252.

——S. 14—See S. 5.

28 B. 235=5 Bom. L.R. 947.

2. "Civil proceeding."

See also: Notes 13, 15 and 17.

——S. 14—'Civil proceeding'.

The term "civil proceeding" used in S. 14 is not meant to cover an application made under Ss. 28 and 29 or S. 42 of the Land Registration Act and the Land Registration Deputy Collector cannot be called "a Court" for the purpose of deciding cases under those sections. 90 Ind. Cas. 244=7 P.L.T. 61=A.I.R. 1926 Pat. 194.

——S. 14—Collector having power to determine application under O. 21, R. 100, C. P. Code, is Civil Court but not where he had no jurisdiction.

It is necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken in order to decide whether it should properly be termed a Civil proceeding in a Court. If the proceeding in question was one which the Collector was competent to determine, he should be regarded as a Court within the meaning of S. 14, Collector is not invested with power to dispose of objections under O. 21, R. 58, C. P. Code. It would appear that he has no power under O. 21, R. 100, C. P. Code, which is of the same nature as O. 21, R. 58. When the Collector had no jurisdiction there is no bona fide mistake of jurisdiction such as would justify the Court in excluding the time occupied in applying to the Collector from the period of limitation. 23 Bom. 531 and 44 Bom. 50, Foll. 78 Ind. Cas. 580=A.I.R. 1924 Nag. 309.

——S. 14—Proceeding need not be in another Court.

The fact that S. 14 requires that there should have been "another civil proceeding" does not contemplate a proceeding in a different Court to the one in which the proceeding said to be time-barred is pending. 62 Ind.Cas. 507=15 S.L.R. 11=A.I.R. 1921 Sind 13.

——S. 14—Civil proceeding—Application for copies.

When person applies for a copy of judgment and the decree or order to enable him to prefer an appeal against that order he may be taken to have been prosecuting a civil proceeding during the time taken to prepare the certified copies. 15 C.L.J. 160=7 Ind. Cas. 775.

——S. 14—"Civil proceeding"—Suit to recover possession of immovable property—Time occupied in prosecuting—Mutation proceedings before Revenue Officers.

The prosecution of an application for mutation of names under the provisions of U. P. Land Revenue Act, 1873, and of appeals from the order of the Settlement Officer refusing mutation does not fall within the terms of S. 14. "Prosecuting with due diligence another civil proceeding in a court of first instance or in a court of appeal, &c., &c.," An application for mutation of names is not a civil proceeding nor are the Settlement Officer, the Commissioner and the Board of Revenue "Court," but are executive officers of Government. 1904 A.W.N. 54=26 A. 382.

3. "Court"—Meaning of.

See also: Note 13.

——S. 14—Governor-General in Council, if Court—Proceedings before Railway Advisory Board.

For the applicability of S. 14, Lim. Act, an enquiry by the plaintiff must have been prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, was unable to entertain it. But where the plaintiff had recourse to the Advisory Board which is not a Court instead of to the Railway Commissioner, he cannot be said to have prosecuted his claim in good faith and hence, in such a case S. 14, cannot extend time.

Similarly, though the Governor-General in Council is the supreme executive authority in India, there is no statute constituting him a Court. A.I.R. 1939 Nag. 141=1939 N.L.J. 124=185 Ind. Cas. 241.

——S. 14—Court, if includes foreign Court.

The word 'Court' in S. 14 applies only to Courts in British India and does not include a foreign Court such as a Court in a Native State. An arbitrator might take into consideration the principles of the Lim. Act and exclude from the period of limitation, time spent in a previous instructuous arbitrations. 41 C.W.N. 193=I.L.R. (1937) 1 Cal. 541=169 Ind. Cas. 788.

——S. 14.

A Berar Court is not a Court contemplated by S. 14. The word 'Court' in that section means Court in British India. 76 Ind. Cas. 305=A.I.R. 1923 Nag. 321.

——S. 14—'Court'—Foriegn Court not included.

Court in S. 14 does not include Foreign Court. All legislation is primarily territorial and a limit must be placed upon the general sense of a word used in a statute with reference to this principle of law unless the language or object of the statute which contains something compels the Court to interpret the word in its wider sense. (1910) 35 Bom. 139=12 Bom. L.R. 977=8 Ind. Cas. 645.

——S. 14—Court—Exclusion of time—Proceeding before Collector—Bombay Heriditary Offices Act (III of 1874), S. 11.

An application to the Collector to take action under S. 11-A, of the Bom. Heriditary Offices Act, 1874, is not a proceeding in a Court within S. 14 of the Limitation Act; and the time taken up in prosecuting such an application cannot be excluded under S. 14. 20 Bom. L.R. 918=43 Bom. 201=48 Ind. Cas. 467.

——S. 14—"Court" — Regulation Collector—Claim made within time—Reference by Decree Collector—Extension of time.

Where there were both a Regulation Collector and a Decree Collector and a claim was preferred to the Regulation Collector in respect of a debt before the recovery of it was barred by limitation, the claim is not liable to be dismissed as barred on the ground that the reference by the Decree Collector to the Civil Court was made after the expiry of the limitation period in consequence of the delay that happened in the disposal of the Regulation Collector. The reference by the Decree Collector to the course is not to be regarded as the institution of a suit by the claimant, and S. 4 of the Limitation Act has no application to it. The question that could properly be referred is whether the claim was legally enforcible when it was made to the Regulation Collector and not whether it was legally recoverable on some subsequent date arbitrarily fixed by the Regulation Collector. Obiter: —The case will be different if there was no Decree Collector at all, but there was only the Regulation Collector, when the suit will have to be filed before it is barred. A Regulation Collector is not a Court "which from defect of jurisdiction was unable to entertain the claim" within the meaning of S. 14 of the Limitation Act, and S. 14 will not avail for the exclusion of the time taken before the Regulation Collector. (1907) 18 M.L.J. 581=31 M. 495=4 M.L.T. 321.

4. Same cause of action.

——S. 14—Same cause of action.

In order to claim exemption under S. 14, the cause of action in the two suits must be the same. 35 Bom. L.R. 929=A.I.R. 1933 Bom. 450=58 B. 200=145 Ind. Cas. 630.

——S. 14—Applicability—Different causes of action.

The essential point to be considered in any application under S. 14 of the Act is that the previous proceeding was founded upon the same cause of action as is sought to be enforced in the subsequent suit. The section would not apply when the causes of action in the two suits are entirely distinct. 14 B. 365 approved. 17 C.L.J. 596=20 Ind. Cas. 513.

——S. 14—Same cause of action.

Suit to enforce mortgage—Return of plaint for presentation to proper Court—Plaintiff amending the same plaint—Change in relief and not in cause of action:

Held, that the plaintiff could get the benefit of S. 14. A.I.R. 1943 Mad. 498=(1943) 1 M.L.J. 362=1943 M.W.N. 310=I.L.R. (1944) Mad. 104=213 Ind.Cas. 270.

——S. 14—Suit on mortgage—Striking out relief for sale of property, whether changes cause of action.

"Cause of action" and "relief" are quite distinct and the question whether two proceedings are based upon the same cause of action or different causes of action cannot be decided upon the terms of the reliefs claimed in either proceeding.

A suit based upon a mortgage deed is essentially a suit to recover a loan and the cause of action for such a suit is the failure of the defendant to discharge the loan. A mortgage in a suit founded upon a simple mortgage proceeds on the same cause of action whether he claims only to recover the loan advanced by him or process also for the additional relief of enforce the charge in his favour. Where the plaint based on a mortgage deed after deletion of relief as to sale is returned from regular side for presentation to the Small Cause Court, the plaintiff is entitled to the benefit of S. 14, Lim. Act. A.I.R. 1940 All. 145=(1939) A.L.J. 1075=1939 A.W.R. 875=187 Ind. Cas. 336.

——S. 14—Prior suit claiming one relief—Subsequent suit for different relief.

Where the same cause of action entitles a party to several reliefs and he chooses to sue only for one of them he cannot subsequently bring a suit for another relief and so far as limitation is concerned, claim the benefit of S. 14 of the Lim. Act. In order that S. 14 may be applicable, the relief should also be the same. 38 L.W. 595=A.I.R. 1933 Mad. 778=146 Ind.Cas. 361.

——S. 14(1).—Suit for partition—Issues framed not covering question of how property was to be divided—Appointment of arbitrator to decide "all matters at issue between parties"—Arbitrator attempting compromise—Several properties divided by agreement—Respondents agreeing to pay plaintiff certain amount in lieu of certain share and executing pro-note—Compromise failing—Award by arbitrator—Appellant treating incomplete partition as binding and seeking to enforce it in partion suit—Respondent pleading that award was void—Preliminary decree in accordance with award—On appeal, Appellate Court holding that incomplete partition was binding on parties but could not be enforced in partition suit—Suit by appellant to recover amount on pro-note beyond limitation:

Held, that the case fell within the very words of S. 14 (1), and the limitation began to run from the date of the Appellate Court's decree as the appellant was seeking to enforce the incompleate partition by means of the partition proceedings and was, therefore, founding himself upon precisely the same cause of action as that upon which the subsequent suit was founded and in seeking to enforce the partition in the earlier proceedings, the appellant was acting with due diligence and in good faith. A.I.R. 1939 P.C. 128=5 B.R 671=43 C.W N. 648=1939 O.W.N. 800=(1939) A.I.J. 738=1939 A.W.R. 174=50 L.W. 708=I.L R. (1939) Kar. (P.C) 211 Sup.=181 Ind. Cas. 471 (P.C.).

——S. 14—Cause of action—Act of Court restraining person from obstructing possession of another.

An order of the Court does not give a cause of action to a party to start a judicial proceeding. A cause of action briefly means "right and the infringement of the right." An act of the Court restraining a person from obstructing the possession of another can never amount to an infringement of his right to the property. A right can only be infringed by an act on the part of the opposite party. A.I.R. 1939 Bom. 1=40 Bom. L.R. 1134= I.L.R. (1939) Bom. 173=179 Ind. Cas. 178.

——S. 14.

Where a claim is satisfied either by agreement of parties or by a decree of the Court, and if the satisfaction or the decree is set aside subsequently in a judicial proceeding, then a new cause of action will arise in respect of which the claimant will either get a fresh period of limitation provided for in the Act or the cause of action will be revived and he will be entitled to deduction of the time occupied in the proceedings resulting in the annulment of the satisfaction or the setting aside of the prior decree. A.I.R. 1939 Bom. 1=49 Bom. L.R. 1134=I.L.R. (1939) Bom. 173=179 Ind. Cas. 178.

——S. 14—Claim for rent and for the mesne profits or damages, distinction between.

The claim for rent and claim for mesne profits or for damages for use and occupation are founded on distinct causes of action; the claim for rent being founded upon a subsisting relationship between the land-lord and tenant either based on a tenure or on a contract. The claim for mesne profits is not based on such relationship but essentially on trespass:

Held, on facts that since the claim for rent was not founded on the same cause of action as the claim for mesne profits, the condition of the identity of the causes of action required under S. 14 was wanting and consequently, S. 14 had no application. A.I.R. 1939 Mad. 724=50 L.W. 139=(1939) 2 M.L.J. 329=189 Ind. Cas. 204.

——S. 14.

Where, in a subsequent suit, a larger sum of money has been claimed by way of damages or mesne profits because the claim has been made for a large period of time, that is, four years instead of two years as in the previous suit, the dispossessions, though for a longer period of time, is the same dispossession as regards a part of the period as was the subject of cause of action in the previous suit. Therefore, as regards two years of the period of dispossession, the cause of action is identical and may be excluded. As regards the period prior to that period of two years, the cause of action is different in this sense that although the cause was the same dispossession it was for a different period of time and hence can not be excluded. A.I.R. 1934 All. 824=(1934) A.L.J. 630=4 A.W.R. 258=152 Ind. Cas. 800.

——S. 14.

A suit was filed on a pro-note in a Native State and decreed. A suit was then filed in British India on the basis of the foreign judgment which was dismissed on the ground that the Court in Native State had no jurisdiction. Plaintiff then filed a fresh suit on pro-note in British India and claimed benefit of S. 14:

Held, that causes of action in the two suits in British India were different and S. 14 did not apply. 112 Ind. Cas. 139=1928 M.W.N. 543=28 M.L.W. 645 =A.I R. 1928 Mad. 1088.

——S 14—A person is not entitled to the benefit under the section when there is not the same cause of action and when the suit is not conducted with due diligence and in good faith.

A Chettiar firm being a partnership of three partners carried on a money lending business at Thonze by an agent. It made certain advances to a certain person and when accounts were settled between them it was found that he owed a certain sum to the firm. The respondent guaranteed payment of this amount to the firm and gave their agent a promissory note. Two of the three partners sued the debtor to recover the sum. They instituted the suit at Tharrawaddy and they alleged that the defendant had borrowed the sum from their firm at Thonze which is within the jurisdiction of the Tharrawaddy Court. In the plaint they did not refer to the document mentioned above, but they mentioned it in an annexure to their plaint as one of the documents on which they relied.

The suit was filed on the last day of limitation and the third partner—the present appellant—joined the suit as plaintiff later. The suit was found not within jurisdiction of the Court. The plaint was subsequently presented in the Small Cause Court of Rangoon, but before the case came on for trial there, appellant filed an amended plaint in which he claimed to sue alone on the basis of the document as a promissory note. He claimed exemption from the law of limitation on the ground that he had been in good faith prosecuting against the respondent another suit on the promissory note in the Tharrawaddy Court:

Held, that as the latter cause of action, which was based on the document as a promissory note, was not the cause of action in the suit as originally instituted, and the appellant was not prosecuting the suit with due diligence and in good faith, he was not entitled to the benefit of S. 14. A.I.R. 1922 P. C. 249, **Foll.** 105 Ind. Cas. 701=5 Rang. 600=A.I.R. 1928 Rang. 21.

——S. 14.

When defendant sued plaintiff for a declaration that a certain sale was invalid and after his suit was finally dismissed, plaintiff sued for possession of the land sold to him:

Held, that the time occupied by defendant's suit cannot be availed of by plaintiff under S. 14, especially where causes of action for two suits were different and defendant's suit was not in a wrong Court. 104 Ind. Cas. 726=28 P.L.R. 403=9 L.L. J. 477=A. I.R. 1927 Lah. 785.

——S. 14—Different cause of action.

A suid for recovery of rent against a non-occupancy raiyat is barred if not brought within three years from the last day of the agricultural year in which the arrear fell due, under the provision of Art. 2 (b) of Sch. III. The period cannot be extended under the provisions of S. 14 owing to pendency of proceedings under S. 46, B.T. Act, as the two suits are not founded on the same cause of action. 92 Ind. Cas. 37=43 C.L.J. 45=A.I.R. 1926 Cal. 693.

——S. 14—Ejectment—Arrears of rent.

The limitation for a suit to recover arrears of rent accruing due whilst a suit by land-lord for ejectment of the tenant on the ground of forfeiture was pending is not extended by reason of the continuation of the ejectment suit. 39 Ind. Cas. 865 (Cal).

——S. 14—Suit for arrears of rent—Pendency of suit for possession.

The pendency of a suit for possession does not save limitation for the rent suit. 1 L. W. 438=23 Ind. Cas. 942.

5. Same parties.

——S. 14—Same parties—Suit by firm against D—Subsequent suit by some partners against D—Other partners joined as defendants—Both suits are between same parties.

A suit by an unregistered firm against **D** and a subsequent suit against **D** by some of the partners as partners **in personam** impleading the other partners in the firm, as defendants they being absent from the station, are suits between the same parties within S. 14. A.I.R. 1946 Sind 14=I.L.R. (1945) Kar. 293.

——S. 14—Appeal by Offical Receiver against dismissal of application under Ss. 53 and 54, Provincial Insolvency Act, 1920—Appellate Court directing that suit by creditor under S. 53, Transfer of Property Act (IV of 1882) for declaration of transfer as void was proper remedy—Suit by creditor.

In the insolvency proceedings, the Official Receiver applied for setting aside transfers by the insolvent under Ss. 53 and 54, Prov. Insol. Act. The Court held, that the transfers were **bona fide** and dismissed the application. On appeal, the District Judge directed that the further remedy was a suit by the creditors under S. 53, T. P. Act for declaration that the transfers were void. In the suit by one of the creditors under S. 53, T. P. Act, the plaintiff claimed to deduct the time spent in the prosecution of the appeal before the District Judge:

Held, that S. 14, Lim. Act had no application. Although the Official Receiver represented the credtiors, it could not be said that the plaintiff was prosecuting those proceedings. The person who was prosecuting the proceedings, was the Official Receiver, who was asking that the transfers be set aside under the provisions of Ss. 53 and 54, Insol. Act, which refer to transactions which are void against the Official Receiver. The cause of action in the suit by the creditor fell within the provisions of another Act the T. P. Act. Moreover, the suit which was filed by the creditor as the result of the order of the District Judge could have been filed by him during the pendency of the insolvency proceedings. A.I.R. 1942 Mad. 483=(1942) 1 M.L. J. 588=55 L. W. 301=1942 M.W.N. 430=I.L.R. (1942) Mad. 862=202 Ind. Cas. 490.

——S. 14.

Party claiming exemption need not have been described as plaintiff or applicant in previous proceedings. A.I.R. 1938 Sind 50=32 S. L. R. 151=174 Ind. Cas. 172.

——S. 14—Parties.

A suit against a firm, and a subsequent suit, against the surviving partners of the firm and the heirs of a deceased partner are both against the same parties within the meaning of S. 14 of the Limitation Act. 112 Ind. Cas. 715=1929 A.L.J. 73.

——S. 14—Suit against same defendant in different capacity is not covered. (Obiter).

Where the plaintiff had sued defendant for some cotton yarn as part of the accounts which were presented against the defendant in the partnership and in a second suit by the plaintiff for the price of the same cotton yarn against the same defendant in his personal capacity:

Held, that the plaintiff could not be said to have been prosecuting with due diligence another civil proceeding which was founded upon the same cause of action. 102 Ind. Cas. 870=A.I.R. 1927 All. 628.

——S. 14.

Section 14 excludes time taken in proceedings **bona fide** in Court without jurisdiction against the particular defendant. 87 Ind. Cas. 17=12 O.L.J. 66=2 O. W. N. 144=A.I.R. 1925 Oudh 369.

——S. 14.

Section 14 of the Limitation Act renders it essential that the proceedings should be between the contesting parties. 64 Ind. Cas. 315=60 Ind.Cas. 698=33 C.L.J. 366=26 C.W.N. 271=A.I.R. 1921 Cal. 596.

——S. 14—Properties beyond pecuniary Jurisdiction of first court—Person not entitled added as co-plaintiff in first suit—Same cause of action—Same parties.

Where two plaintiffs as next heirs of the last male owner brought a suit in the District Munsif's Court for the recovery of certain properties and a third person who, however, was subsequently found to have no

real claim was added on that third person's application as a co-plaintiff and on its being found that the value of the properties was beyond the pecuniary jurisdiction of the District Munsif, the plaintiffs withdrew a portion of the claim, but the final order was that the plaint should be returned to the proper court.

Held: (1) that a subsequent suit by the two plaintiffs for recovery of the properties including the properties withdrawn in the course of the first suit was founded upon the same cause of action; (2) that such subsequent suit was between the same parties not withstanding the fact that a third person who, however, was found to have no real claim, was added as a co-plaintiff in the first suit on his application; and (3) that the plaintiffs were entitled, under S. 14 to a deduction of the time occupied in prosecuting the first suit. (1903) 14 M.L.J. 287.

6. Same relief.

—S. 14 (2)—"Same relief"—Application by decree-holder to get debtor adjudicated insolvent—Time spent in prosecution—Right to exclude from period of limitation for execution application.

A decree-holder who asks the Court to get his judgment-debtor adjudicated insolvent is not asking for the "same relief" as the decree-holder who applies for execution of his decree against his judgment-debtor within the meaning of S. 14 (2), Limitation Act. Therefore the period spent by a decree-holder in prosecuting a petition for his debtors' adjudication as insolvent cannot be excluded under S. 14 (2), Limitation Act, in computing the period of limitation prescribed for an execution application. 25 Lah. 451 (F.B.), foll. I.L.R. (1949) Bom. 634=51 Bom. L.R. 603=A. I. R. 1949 Bom. 379.

——S. 14 (2)—Applicability—Same relief—Application for final decree and subsequent application for execution.

An application for a final decree in a mortgage suit and an application for execution of a decree are not applications for the same relief within the meaning of S. 14 (2), Limitation Act. Hence a prior application for a final decree though made **bona fide** can be of no avail to limitation in respect of the subsequent application for execution under S. 14 (2). 49 Bom. L.R. 864=A.I.R. 1948 Bom. 185.

7. "Prosecuting proceeding."

——Ss. 14 and 15.

Administration suit—Preliminary 'decree' passed and Receiver appointed—Suit dismissed on appeal:

Held, that decree-holder defendant could not deduct period between date of suit and its dismissal in calculating limitation for execution of his decree, Sections 14 and 15 did not apply. A.I.R. 1944 Mad. 67=56 L.W. 658=(1943) 2 M.L.J. 510=(1943) M.W.N. 728=I.L.R. (1944) Mad. 410=215 Ind. Cas. 318.

——S. 14—Merely defending suit, whether prosecuting it.

Merely defending a suit is not and cannot amount to the prosecution of a suit. The terms "plaintiff" and "defendant" have a well-known technical meaning. The Legislature must be deemed to be aware of that meaning when they choose to allow benefit of the time occupied by an earlier proceeding only to the plaintiff as against the defendant. A.I.R. 1939 Bom. 1=40 Bom. L.R. 1134=I.L.R. (1939) Bom. 173=179 Ind. Cas. 178.

——Ss. 14 and 15.

Dispute about family property—Reference to arbitration and an award in favour of defendant—Decree on award without objection — **P**, a minor member of the family on becoming major disputing the claim of defendant at the time of mutation—Revenue authorities referring them both to civil suit—**G**'s suit for declaration that the adoption of **P** was invalid and for injunction against him—**G** obtaining decree which was upheld by High Court but was reversed by Privy Council—Suit by **P** for recovery of possession of property from defendant, seeking the benefit of S. 14:

Held, that S. 14 did not apply as **P** was not prosecuting the earlier suit but was merely defending it. Section 15 also did not apply as the injunction and the decree in the earlier suit did not operate as a stay of the suit for possession by **G**. A.I.R. 1939 Bom. 1=40 Bom. L.R. 1134=I.L.R. (1939) Bom. 173=179 Ind. Cas. 178.

——S. 14.

The plaintiff applied for execution of their decree on August 21, 1926, upon which there was objection preferred by the judgment-debtor under S. 47, Civil P. C. and the execution proceeding started by the plaintiffs was held to be not maintainable in view of the order passed by the Court on August 27, 1925, recording full satisfaction. The order passed by the Court of execution on January 8, 1926, against the plaintiffs, was appealed against and there was a further appeal by the plainstiffs against the decision of the Appellate Court to the High Court. The order in the execution proceedings holding against the plaintiffs that they were not maintainable was affirmed by the High Court on March 18, 1929. The suit for the rectification of the petition of adjustment was instituted by the plaintiffs on March 26, 1931, and the bar of limitation was sought to be avoided by asserting that the plaintiffs were prosecuting some other proceedings:

Held, that the application for execution made by the plaintiffs on August 21, 1926, must be taken to be a proceeding which the plaintiffs had been prosecuting till March 18, 1929, and it would be going against the scope and operation of S. 14, Lim. Act, if it were held that it was the judgment-debtor's objection that was the proceeding before the Court of execution, and not the proceeding in execution started by the plaintiffs to which objection was raised by the judgment-debtors and that the plaintiffs were entitled to invoke the aid of the provisions contained in S. 14 of the Lim. Act. for saving the bar of limitation. A.I.R. 1936 Cal. 400=40 C.W.N. 914=165 Ind. Cas. 756.

——S. 14—Plaintiff in later suit consisting same matter by way of defence in previous suit.

In order that S. 14 may be applicable, the plaintiff in the later suit must have been prosecuting another civil proceedings. The word 'prosecuting' used in first paragraph of the section means that the plaintiff in the later suit must be either the plaintiff or applicant in the previous civil proceeding which was not entertained by reason of defect of jurisdiction. This position has been made clear by Expl. II. Consequently, the plaintiff in the later suit, is not entitled

to deduct time during which he had been contesting the same matter by way of defence to a petition of objection filed under S. 47, Civil P. C. 39 C.W.N. 966=164 Ind. Cas. 651.

——S. 14.

Decree for sale in terms of compromise—Instalment payment—Default—Application for execution—Objection that final decree has not been made—Dismissal of application by High Court—Application for final decree:

Held, that plaintiff was not entitled to exclusion of time spent in lower Court and High Court. 4 A.W.R. 1352=(1935) A.L. J. 201=A.I.R. 1935 All. 323=153 Ind. Cas. 1058.

——S. 14—Whether applies to defences.

Where the defendant who had executed a promissory note to the plaintiff instituted a suit for a declaration that the note had been discharged and for an injunction restraining the plaintiff from suing upon it and the plaintiff in a subsequent suit upon the note sought to exclude the period of time during which he was defending the former suit:

Held, that S. 14 was not applicable to the case of a defendant defending a suit. 28 N.L.R. 348=A.I.R. 1933 Nag. 13=141 Ind. Cas. 34.

——S. 14—'Prosecuting'.

The expression "prosecuting" referred to in S. 14 is generally applicable to a proceeding by a person as a plaintiff or an applicant and not to a proceeding in which such person is merely resisting as a defendant or respondent the claim of another. A.I.R. 1933 Sind 379=27 S.L.R. 422=147 Ind. Cas. 94.

——S. 14—Claims in defendants' written statements found against but suit dismissed wholly —The pendency of appeal does not save limitation as to the claims made in the written statements.

The suit was a partition suit. The controversy was between the plaintiff and his son (the 5th defendant) on the one side and the remaining defendants on the other. The question was as to whether the limitation as to the plaintiffs' claim to certain items was saved by reason of a previous litigation in which he and his son (the 5th defendant) had taken part. The previous litigation was also a partition suit by another co-parcener. The plaintiff of that suit claimed on the footing that he had been adopted by a deceased co-parcener. The present plaintiff and his son who were defendants in that suit alleged that the present plaintiff's son was adopted by the deceased co-parcener in question, that the adoptive father had been divided from the rest of the family and had left a will. They also alleged that various items were due to the joint family from the father of the plaintiff of that suit. The trial Court found that both the alleged adoptions were false. The alleged division and the will were also found against. As regards the disputed items claimed from the father of the plaintiff of that suit, the trial Court found that some of the items claimed in the present suit were due. But there was no decree in respect of it. As the plaintiff's case had failed the Court dismissed the whole suit. There was an appeal by the plaintiff. The present plaintiff and his son filed a joint memorandum of objections in which the stated that the trial Court's finding as regards thy adoption of the present plaintiff's son, the will and and the partition were wrong and unnecessary and that his findings about the liabilities and outstandings of the family were not entirely correct. But they contended that the Trial Court having found against the (then) plaintiff's adoption rightly dismissed suit but erred in disallowing costs to them. The (then) plaintiff's father also put in a memorandum of objections in regard to the findings against him about the family's liabilities and outstandings; but that was superfluous as there was neither any decree nor appeal in respect of them. There was no dispute about these matters between the (then) plaintiff and his father. The appellate Court dismissed both the appeal and the memorandum of objections:

Held, that while the appeal was pending, the present plaintiff and his son were not prosecuting their claim in respect of the unadmitted items now in question, within the meaning of S. 14 of the Limitation Act. 91 Ind. Cas. 202=1925 M. W. N. 241=A.I.R. 1925 Mad. 922.

——S. 14 and Art. 178—Prosecution of proceeding —Resisting a suit.

An applicant to file an award could not be allowed to deduct the time spent by him as deft. in setting up the award in bar of a prior suit instituted by the plaintiff. 89 P.R. 1919=52 Ind. Cas. 561.

——Ss. 14 and 15—Prosecution of proceeding—Resisting an application in insolvency.

In computing the period of limitation for a suit the plaintiff is entitled to exclude the time during which he has been opposing the deft.'s application for insolvency. 12 Bur. L.T. 83=52 Ind. Cas. 934.

——S. 14—Prosecution of proceeding.

A mere routine order registering an application for review does not constitute a **bona fide** prosecution of a civil litigation. 19 C.W.N. 1113=31 Ind. Cas. 705.

8. Good faith and due diligence.

——S. 14—"Good faith"—Meaning of.

The expression "good faith" in S. 14 (2) itself involves due care aad attention, as is clear from the definition of "good faith" in S. 2 (7) of the Act. A.I.R. 1946 Pat. 301=25 Pat. 50=12 B.R. 698=226 Ind. Cas. 195.

——S. 14.

"Good faith" means that which is done with due care and attention. (1936) 38 P.L.R. 311.

——S. 14—Applicability—Suit filed by layman in wrong Court after attempting to ascertain law—Court also falling into error in thinking it had jurisdiction—Suit filed on last day of limitation—Plaintiff, if entitled to protection.

Where a plaintiff who is a layman files his suit in Court having no jurisdiction after doing all he can to ascertain the law, and the Court also falls into an error in thinking at the time that it has jurisdiction, the plaintiff must be held to have acted in good faith and

with due diligence and he is entitled to the protection of S. 14 of the Limitation Act, although the suit is filed by him in the wrong Court on the last day of limitation. I.L.R. (1949) Nag. 743=1949 N.L.J. 586=A.I.R. 1950 Nag. 37.

——S. 14—"Good faith"—Application for execution omitting to mention property to be attached.

An execution application, if it is intended for purposes of execution, cannot be said to have been made in good faith, (e. g.) with due care and attention if it omits to set out the property which the decree-holder wants to be attached and brought to sale. I. L. R. (1947) Nag. 497=1947 N.L.J. 376=A.I.R. 1948 Nag. 189.

——S. 14—Due diligence—High Court in revision ordering return of plaint for presentation to proper Court—File returned to trial Court and trial Court again ordering return of plaint—Held, period elapsing after date of order of High Court or at least of trial Court could not be excluded under S. 14.

Section 14 allows exclusion of that period only during which the plaintiff has been prosecuting with due diligence another civil proceeding.

A suit was filed on 25—3—1935. On 30—4—1936 the Court ordered the return of the plaint for presentation to the proper Court. This order was set aside in appeal but was restored in revision by the High Court on 12—8—1938. The file was returned and received by the trial Court on 21—9—1938. That Court, on the same date, noted that the plaint be returned for presentation to the proper Court. But nobody appeared. The plaint was actually returned on 26—9—1938 after a notice was issued by the Court to the plaintiff's counsel, and was presented in proper Court on 27—9—1938:

Held, that the conduct of the plaintiff or his counsel did not show that he acted with due diligence. The civil proceeding ended on 12—8—1938 or at the latest on 22—9—1938 when the trial Court noted the result of the case and ordered the plaint to be returned. Any period that elapsed after that date was not such a period which the plaintiff was entitled to exclude in computing the period of limitation prescribed for the suit. A.I.R. 1946 Oudh 116=1946 Oudh W.N. 24=222 Ind. Cas. 355.

——S. 14—Legal adviser found to have acted not in good faith—Party, if entitled to benefit of S. 14.

In certain cases, mistakes or slips on the part of an Advocate may be condoned. It is human to err and such mistakes may be consistent with a general mental attitude on the part of an Advocate to apply due care and attention to his professional work. But where it is found on the evidence that the legal adviser has not acted in good faith, i. e., with due care and attention, the party is not entitled to the benefit of S. 14, Lim. Act. A.I.R. 1944 Mad. 47=(1943) 2 M. L. J. 375=56 M.L.W. 580=1943 M.W.N. 703=211 Ind. Cas. 480.

——S. 14 has no application where there is negligence.

Where the plaintiff had not only failed to give notice but also failed to implead an obviously necessary party, it would be impossible to hold that there had been no gross negligence. A.I.R. 1941 Lah. 256=43 P.L.R. 530 =199 Ind. Cas. 866.

——S. 14.

Judgment-debtor not aware of decisions whether certain order under N. W. F. P. Agri. Relief Act (IV of 1939), is appealable or only revisable—Appeal wrongly but **bona fide** filed, dismissed as not maintainable—Time taken in prosecuting appeal can be excluded in computing limitation for revision. A. I. R. 1941 Peh. 85=197 Ind. Cas. 183.

——S. 14—Party acting contrary to clear provision of law.

A party proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith. A.I.R. 1940 Bom. 5=41 Bom. L.R. 1190=187 Ind. Cas. 85.

——S. 14—Proceedings carried on in wrong Court.

Although, where a person had initiated proceedings contrary to clearly expressed provisions of law, he cannot, in the words of S. 14, be regarded as prosecuting another civil proceeding in good faith, and therefore, is not entitled to claim the benefit of that section, yet where the procedure to be followed is not clearly indicated, a person carrying on abortive proceedings can claim the benefit of S. 14. A.I.R. 1936 Rang. 184=162 Ind. Cas. 865.

——S. 14—Good faith and diligence—Proceeding contrary to law.

Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Act.

Thus if a person, against whom an order is made under O. 21, R. 63, C. P. Code, instead of bringing a suit applies for revision of the order, and brings a suit when his application for revision is dismissed, he is not entitled to the exclusion of the period for which he was prosecuting his application for revision. 120 Ind. Cas. 236=7 Rang. 466=A.I.R. 1929 Rang. 297.

——S. 14—Ignorance of law.

Ignorance of law may afford a good ground for the application of S. 14.

A sued **B** who was an agriculturist in the Court at **X** on the basis of a **bahikhatas** on May 2, 1936. The transaction took place within the jurisdiction of the Court at **X.** The suit, however, ought to have been instituted in the Court at **Y** within whose jurisdiction the defendant resided, under S. 7 of the U. P. Agri. Relief Act. The plaint, after being returned on July 13, 1936 was, presented the very next day in the proper Court and was beyond limitation by merely two and half months:

Held, that the plaintiff should be deemed to have been prosecuting in good faith the proceedings following the presentation of his plaint in the Court at **X** and was entitled to the benefit of S. 14, Lim. Act. A.I.R. 1940 Oudh 412=1940 O.W.N. 657=1940 R.D. 357=1940 A.W.R. 325=190 Ind. Cas. 93.

——S. 14—Ignorance of law.

Ignorance of or inattention to the law by persons who should be well aware of its provisions cannot be regarded as a **bona fide** mistake within the scope of S. 14. A.I.R. 1933 Lah 58=145 Ind Cas 245

——S. 14.

Plaint presented in wrong Court due to ignorance of provisions of newly passed Act—**Held,** plaintiff should be deemed to have been prosecuting in due diligence and was entitled to benefit of S. 14. 1937 A.W.R. 140= (1937) A.L.J. 176=1937 R.D. 113=A.I.R. 1937 All. 333 =168 Ind. Cas. 936.

——S. 14—Ignorance of law.

Proceedings coming under S. 14 must be such as are recognized by law as legal in their initiation, though a party has carried the proceeding to the wrong Court. It can hardly be said that a party who is proceeding in ignorance of law has been proceeding with due diligence or in good faith. The word "good faith" connotes due care and attention. 78 Ind. Cas. 482=A.I R. 1924 Pat. 716.

——S. 14—Right to institute suit in more than one Court—Plaintiff's choice causing inconvenience to defendant—No lack of good faith.

A plaintiff who has a right to institute a suit in more than one Court is not bound to consider the convenience of his opponent in making his choice. If the unfortunate effect of that choice is to cause inconvenience to the defendant, it does not constitute lack of good faith on the part of the plaintiff in the sense in which that phrase is used in S. 14. A.I.R. 1939 Pat. 86=5 B.R. 792=20 P.L.T. 893=182 Ind. Cas. 632.

——S. 14—Tests of bona fides—**Plaintiff instituting suit in place convenient to him.**

If two Courts have jurisdiction to try a suit it is initially the privilege of the plaintiff to decide in which Court he would file the suit and the exercise of this option by filing it in a particular Court does not affect the question of jurisdiction or his **bona fides.** The mere fact, therefore, that the plaintiff instituted the suit in the Civil Court at a certain place because it was convenient for him to do so, does not indicate that he did not institute the suit in good faith. A.I.R. 1933 Lah. 264=144 Ind. Cas. 184.

——S. 14 (2).

Application for execution made on last day of limitation and filed in good faith in wrong Court—Application returned and presented in proper Court next day:

Held, that the application was not barred by limitation. A.I.R. 1938 Cal. 791=179 Ind. Cas. 160.

——S. 14.

Section 14 is not intended to apply where the suit has failed owing to the negligence and laches of the plaintiff and where that suit was not prosecuted in good faith. 62 Cal. 510=39 C.W.N. 606=A.I.R. 1938 Cal. 377=164 Ind. Cas. 111 (2).

——S. 14.

Indulgence should be granted only in cases where error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution:

Held, that applying this rule the plaintiff did not make such an error as to disentitle him to the benefit of S. 14 in lodging the suit at J where the defendant had land and to where he originally belonged. He was, therefore, entitled to deduct the time spent in prosecuting the suit at J. A.I.R. 1938 Lah. 704=40 P.L.R. 631 =181 Ind. Cas. 290.

——S. 14—Circumstances justifyiug either of two views as regards value of property.

'Good faith' as used in S. 14 means 'exercise of due care and attention.' Where the circumstances are such as would justify either view as regards the value of the property, the plaintiffs cannot be regarded as having acted dishonestly and without due care and attention, because they followed the view which was more advantageous to them. 1938 N.L.J. 107=A.I.R. 1938 Nag. 300=I.L.R. (1939) Nag. 422=179 Ind. Cas. 837.

——S. 14—Negligence of Pleader.

Held, on facts that this was a case of gross negligence, and that, therefore, the plaintiffs were not entitled to the benefit of S. 14 and the fact that the Court did not point out the mistake to the plaintiffs could not help them where they had begun with a mistake caused by gross negligence. A.I.R. 1938 Oudh 112=1938 O.W.N. 360=173 Ind. Cas. 956.

——S. 14.

Speaking generally, a negligence on the part of Counsel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application in good faith though in a wrong Court within the meaning of S. 14, Lim. Act. 1938 O.W.N. 360=A.I.R. 1938 Oudh 112=173 Ind. Cas. 956.

——S. 14 (2).

Time spent in prosecuting entirely unnecessary applications cannot be excluded. A.I.R. 1938 Rang. 318= 177 Ind. Cas. 923.

——S. 14—Good faith—Persistence with suit in village Court and re-presentation of plaint to proper Court with delay—Benefit of section.

Since, without the consent of the defendant, the village Court has no jurisdiction to hear suit beyond the value of Rs. 60, if in a suit filed in such Court, he refuses to give consent, the plaintiff should at once represent his plaint to the proper Court. If he delays, that would be evidence of lack of good faith and he will not be entitled to the benefit of S. 14, Lim. Act. 1937 M.W.N. 715.

——S. 14—Plaint filed on last date of limitation in Court having no jurisdiction—Plaint ordered to be filed in another Court.

A plaintiff who files a suit on the very last date available to him under the law of limitation does so at his own risk, especially as the law does not make any provision for extension of time except in cases coming under Cl. (2) of S. 14. Where the Court has no jurisdiction to try a case, it has also no jurisdiction to pass an order to the prejudice of one of the parties. Besides, the rule of equity can be invoked only in aid of a party who has been diligent in persuing his remedy and not of a person who, having postponed the institution of his suit until the last date of limitation, institutes it in a Court which has no jurisdiction to try it. 18 P.L.T. 250=3 B.R. 363=A.I.R. 1937=Pat. 495=167 Ind. Cas. 941.

——S. 14.

Deputy Commissioner wrongly and without sufficient care moving Subordinate Judge—**Held,** S. 14 does not apply and time cannot be excluded. A.I.R. 1936 Lah. 857=167 Ind. Cas. 501.

——S 14—Necessary condition.

In order that S. 14 may apply, the plaintiff must show that he had used due care and attention in prosecuting proceedings in a wrong Court and it must also be shown that the proceedings failed for want of jurisdiction or a defect of a like nature. The mere fact that the plaintiff might have honestly believed that he could get all he wanted by proceeding in a particular way is not enough. 41 M.L.W. 138=(1935) M.W.N. 107=68 M.L.J. 487=A.I.R. 1935 Mad. 731=156 Ind. Cas. 640.

——Ss. 14, 15.

Time spent in prosecuting a case in wrong Court—Part of it in good faith—Time left from the original cause of action after an order directing the suit to be presented to proper Court—Benefit of Ss. 14 and 15 can be allowed. A.I.R. 1934 Nag. 145=30 Nag. L.R. 294=149 Ind. Cas. 956.

——S. 14—Erroneous advice of Pleader.

Presentation of an appeal in the wrong Court on the mistaken advice given **bona fide** by a Pleader is a sufficient ground for excusing delay in presenting the appeal to the proper Court. 14 Lah. 206=A.I.R. 1933 Lah. 541=34 P.L.R. 554=149 Ind. Cas. 968.

——S. 14—Bona fide **mistake of Advocate.**

Where the Advocate's mistake is **bona fide,** the time spent in prosecuting a prior proceeding can be excluded. A.I.R. 1933 Oudh 231=10 O.W.N. 424=8 Luck. 646=150 Ind. Cas. 533.

——S. 14—Due diligence—Error which could have been avoided with due care—Party acting on the advice of pleader.

The fact that a litigant acted on the advoice of a pleader will not improve his position if the error made is so patent that it would have been avoided with the exercise of due care. 6 L.J. 294=226 O.C. 39=51 Ind. Cas. 590.

——S. 14 and Art. 11—Due diligence—Mistaken advice of pleader—Duties of Court.

A party suing under O. 21, R. 63, C.P.C. to establish his title cannot deduct the time spent in appeal or revision from the claim owing to the mistaken advice of his pleader, and is bound by the advocate's negligence. S. 5 leaves it to the discretion of an appellate court to exclude the time where as S. 14 obliges a court to exclude time if it finds a certain state of facts. 8 Bur. L.T. 93=8 L.B.R. 146=27 Ind. Cas. 829.

——S. 14—Due diligence—Litigant prosecuting—Proceedings after taking wrong legal advice.

A litigant who takes action without taking legal advice or consults only a practitioner of inferior standing cannot be said to have exercised due diligence within S. 14 of the Act. But when he consults a leader of the Bar and follows his advice he cannot be said not to have exercised due diligence merely because the court holds that the advice was wrong. 254 P.L.R. 1913=159 P.W.R. 1913=20 Ind. Cas. 3.

——S. 14—Due diligence—Acting on pleader's advice.

S. 14 will operate to save limitation in a case of **bona fide** mistake such as where a plaint is presented in a wrong court under the advice of the pleader and then represented in the proper court. 6 A.L.J. 711=3 Ind. Cas. 79.

——S. 14 - Filing of plaint in Civil Court - Admission by plaintiff that suit is cognizable by Revenue Court—Return of plaint for presentation to proper Court.

Cases are easily conceivable in which a party may be in doubt as to whether a suit should be instituted in a Civil or a Revenue Court. If a suit is honestly and with due care and caution instituted in one of such Courts but at a subsequent stage, it is found that a wrong forum had been chosen, it cannot be doubted that if an admission to that effect be made and the Court which has no jurisdiction returns the plaint for presentation to the proper Court, S. 14 of the Lim. Act, which is couched in comprehensive terms, will be applicable.

Where a plaint filed in a Civil Court, could be construed as one for avoidance of a lease and for compensation for use and occupation of land, and as the parties and the Subordinate Court construed it as a simple suit for arrears of rent by a land-holder against the thekadar and the plaint was returned for presentation to the Revenue Court:

Held, that there was no want of good faith on the part of the plaintiff who was consequently entitled to the benefit of S. 14. (1932) A.L.J. 421=A.I.R. 1932 All. 377=138 Ind. Cas. 108.

——S. 14—Suit for contribution decreed ex parte against one defendant—Appeal—Non-service of notice on that defendant—Application for re-hearing of appeal.

A decree was passed in a suit for contribution against certain persons and the liability of each of the defendants was specified. The decree was **ex parte** against one of them **P,** and all excepting **P** appealed in vain. **P** was made a party to the appeal but notice was not served on him. The plaintiff applied for a final decree and **P** then applied to the original Court to have the **ex parte** decree set aside. On dismissal of this application **P** appealed against the decision and also applied for re-hearing of the appeal against the original decision:

Held, that the order of the Appellate Court dismissing the application for re-hearing the appeal was erroneous; S. 14, Lim. Act applied, and as **P** had been contesting a **bona fide** application in the original Court to have his case re-heard, his application could not be dismissed as too late. A.I.R. 1932 All. 340=(1932) A.L.J. 257=54 All. 423=140 Ind. Cas. 178.

——S. 14—Institution of suit in wrong Court through under-valuation.

Where a suit has been instituted in a wrong Court owing to under-valuation, the plaintiff may invoke the provisions of S. 14, if he had acted **bona fide** and had not intentionally under-valued the suit. 36 C.W.N. 326=A.I.R. 1932 Cal. 504=138 Ind. Cas. 349.

——S. 14—Good faith—Under-valuation.

S. 14 of the Limitation Act had no application where it was found as a fact that the plaintiff was not acting in good faith in under-valuing the property and instituting the suit and prosecuting it in the Munsif's Court. (1919) P.H.C.C. 409=53 Ind. Cas. 892.

——S. 14—Good faith—Under valuation not wanton.

Where there is nothing to show a deliberate or reckless under-valuation, S 14 will apply. 17 O.C. 210=25 Ind. Cas. 403.

——S. 14—Good faith—Form of appeal mistaken by reason of under-valuation in plaint.

Where a deft. has been misled in selecting form of appeal owing to a wrong valuation in the plaint, he is entitled to the benefit of S. 14 of the Limitation Act. 18 Ind. Cas. 92 (Oudh)

——S. 14—Good faith—Reckless valuation—Effect of.

If a plaintiff relies on S. 14 he must prove that he prosecuted the previous proceeding in good faith (i.e.) with due care and attention. So when a person recklessly under-values his claim and prosecutes the suit in a wrong Court, he is not entitled to the benefit of S. 14. 14 Ind. Cas. 86 (Oudh).

——S. 14 (2).

High Court judgment—Dismissal of appeal to Privy Council—Application for review:

Held, that the period between the granting or leave to appeal and the Privy Council judgment could not be excluded under Ss. 14 (2) as there were no grounds for believing that an appeal lay to the Privy Council as a matter of law. A.I.R. 1932 Cal. 171=36 C.W.N. 40=144 Ind. Cas. 561.

——S. 14—Negligence, effect of.

The benefit of S. 14 cannot be claimed by parties who are guilty of negligence, laches, inaction or bad faith. 9 O.W.N. 430=A.I.R. 1932 Oudh 220=138 Ind. Cas. 149.

——S. 14—Party displaying great carelessness is not entitled to benefit of S. 14.

Since Act X of 1922 was passed the provisions of S. 14 undoubtedly apply to proceedings under S. 111, Land Revenue Act of 1901. In other words, when a party is required to institute within three months a suit in Civil Court for the determination of such a question and he does institute such a suit and prosecutes it with due diligence he shall have the right, if it be discovered that the Court in which he has instituted the suit has no jurisdiction, to obtain the extension contemplated in S. 14 when proceeding in the Court which has jurisdiction. 18 O. C. 343 and 4 O.L.J. 553, **held no longer good law.**

But it must be shown that the party can be granted this aid; where the party is guilty of great carelessness and the error committed is not an error which could be committed by a reasonable and prudent man exercising due diligence and caution, the party is not entitled to the benefit of S. 14. 6 O.W.N. 932=A. I.R. 1930 Oudh 64.

——S. 14—Negligence in prior proceeding.

A plaintiff cannot invoke the aid of S. 14 to bring his claim within limitation for the simple reason that the proceedings in insolvency failed not for want to jurisdiction or other cause of a like nature within the meaning of S. 14 but on account of the plaintiff's negligence in not effecting service of notice of the order admitting his petition on the defendant according to law. 121 Ind. Cas. 55=A.I.R. 1931 Nag. 109.

——S. 14—Time taken in prosecuting the previous suit in good faith and due diligence should be excluded.

A person filed an objection petition claiming certain property as his own and seeking to have it excluded from attachment in execution of a decree. The claim was refused whereupon he filed a suit to establish his title. The suit was finally dismissed by the High Court as it considered the application as one under S. 47 against which order they held that the applicant should have preferred an appeal and not filed a suit referred to. The applicant therefore filed the appeal but the appeal was time-barred:

Held, that as the claimant was diligently prosecuting his case, hence time taken in suit ought to be excluded. A.I.R. 1930 Pat. 307=129 Ind. Cas. 660.

——S. 14—Application to sue as pauper, mala fide—**Its rejection—Court-fee paid on date when suit was time-barred.**

Where an application to sue as a pauper is **mala fide** and is rejected under O. 33, R. 7 (3), Civil P.C. and on applicant's paying court-fee the suit is regarded as filed on the date on which court-fee was paid, S. 14 does not apply and the period during which the applicant was prosecuting his pauper application cannot be deducted. A. I. R. 1939 Cal. 394=I L.R. (1939) 2 Cal. 68=43 C.W.N. 686=69 C.L J. 420=184 Ind. Cas. 345.

——S. 14—Good faith and diligence—Pauper application.

Where an application for leave to sue as a pauper has been disposed of and dismissed and where, moreover, it has been found that the application was made in bad faith, any payment of Court-fees made thereafter cannot operate retrospectively for the purposes of calculation of limitation. 118 Ind. Cas. 687=12 N.L.J. 69=A.I.R. 1929 Nag. 268.

——S. 14—An appellant acted bona fide **in preferring his first appeal, there was sufficient cause within S. 5—His second appeal therefore will be protected.**

A revenue officer rejected the application of appellant to adduce further evidence and made final order making correction in the record as against appellant. Appellant first appealed against the portion of the order rejecting his application believing **bona fide** that he would thereby get the whole relief that he wanted. The appeal, however, was dismissed. About 17 or 18 days after the appeal was dismissed he again appealed against the other portion of the order whereby correction in the record was made against him.

Held, that S. 14 constitutes sufficient cause within the meaning of S. 5 but that section would entitle one to the deduction of the period during which the suit or proceeding was prosecuted. A.I.R. 1917 P.C. 156, **Rel. on.**

Held, futher, that S. 14 is not exhaustive of all the circumstances that may constitute sufficient cause. In this case as the appellant acted **bona fide** in preparing his first appeal there was sufficient cause for him for not preferring the present appeal within time. And this case is fit for the Court to exercise its discretion under S. 5 since the 17 or 18 days that elapsed between the dismissal of the first and preferring of the present appeal is not a period which can

be called unreasonable or which would show that there was any want of diligence on the part of the appellant in preferring the appeal. 119 Ind. Cas. 383=33 C.W.N. 76=A.I.R. 1929 Cal. 240.

——S. 14—Error of judgment.

Mere error of judgment is quite a different thing from bad faith. 112 Ind. Cas. 715=1929 A.L.J. 73.

——S. 14—Bona fide claim.

A plaintiff obtained a decree for rent which was revised in appeal on the ground that provisions of S. 12, Rangoon Rent Act, were not satisfied. In Trial Court no specific issue was raised on the point. Plaintiff sued again for the rent.

Held, that the plaintiff was entitled to deduct the whole time required for the previous suit as he was **bona fide** litigating his claim throughout that period. 117 Ind. Cas. 52=6 Rang. 691=A.I.R. 1929 Rang. 55.

——S. 14—What is a bona fide claim.

In a suit by some trustees of a mosque for removal of its manager and for the appointment of a Receiver, the manager (defendant) claimed that the suit was not maintainable and that the mosque owed him considerable sums of money which he had spent out of his pocket. An issue was raised as to the amount payable to or by the manager and the Trial Court found on evidence that the manager was entitled to be paid a sum of Rs. 3,302 from the mosque and directed the Receiver appointed in the suit to pay up the said sum. The manager thereupon brought a suit for recovery of the amount found to be due to him deducting the amounts actually paid by the Receiver appointed in the previous suit. The trustees pleaded that the suit was barred by limitation:

Held, that the manager was entitled to exclusion of the time spent in the prior suit and in appeal therefrom under S. 14. 73 Ind. Cas. 139=A.I.R. 1923 Mad. 347=44 M.L.J. 179.

——S. 14.

Where a plaint is returned for presentation to proper Court, and the order returning the plaint is appealed against, but before the decision of the appeal the plaint is presented to the proper Court, the period required for the prosecution of the appeal subsequent to the presentation of the plaint to the proper Court cannot be excluded under S. 14, as the plaintiff cannot be said to have prosecuted his appeal in good faith. 116 Ind. Cas. 509=25 N.L.R. 99=A.I.R. 1929 Nag. 219.

——S. 14.

Where an application for review is admitted to a hearing and there is a reasonable ground for review inasmuch as the Court had referred to statements that were not a part of the record of the suit, the application is prosecuted **bona fide** and the period should be exempted. A.I.R. 1917 P.C. 156, Foll. 116 Ind. Cas. 315=A.I.R. 1928 Lah. 964.

——S. 14—S. 14 applies when the suit is filed in a wrong Court in good faith.

A suit for redemption the value of which for the purposes of jurisdiction was Rs. 99, was decreed against the appellant who presented an appeal to the Court of the Senior Subordinate Judge who, after enquiry, held that the suit was for possession by redemption of "land" as the property in suit was initially land and its character had not been changed by anything alleged to have been done thereon by the defendant. He, therefore, returned the memorandum of appeal for presentation to the proper Court. The next day, the appellant filed the appeal in the Court of the District Judge though the presentation was not within time. The appellant claimed reduction of the time spent by him in prosecuting his appeal in the Court of the Senior Subordinate Judge under S. 14.

Held, that the provisions of S. 14, Lim. Act, applies to this case as the reasons given by the appellant in support of his contention that the property in suit had changed its character were not such as could summarily be rejected. It had not been shown that the appellant had any motive for filing the appeal in the Court of the Senior Subordinate Judge; he honestly believed that the appeal lay to that Court. 106 Ind. Cas. 812=A.I.R. 1928 Lah. 136.

——S. 14.

Where the decree on the face of it shows that it has been passed by the Court of the Subordinate Judge, there have been two previous execution proceedings, both in the Court of the Subordinate Judge and some money had been realised, and the heading of the decree showed it was one of the Subordinate Judge's Court; but still the decree-holder filed the next execution application in Munsif's Court and re-filed it in proper Court, beyond limitation:

Held, that the decree-holder was not entitled to the protection of S. 14 as such an act cannot be said to be done with due care and attention. 101 Ind. Cas. 674=8 P.L.T. 561=A.I.R. 1927 Pat. 256.

——S. 14—Suit against wrong person.

In computing the period of limitation for a suit against the Secretaay of State, time spent in conducting a suit wrongly filed against Traffic Manager instead of against Secretary of State cannot be deducted. 96 Ind. Cas. 144=A.I.R. 1926 Lah. 572.

——S. 14—Mistake in judgment.

Where a suit is decided under C. P Code, O. 17, R. 3, but by mistake R. 2 is mentioned in the judgment instead of R. 3 and the party is misled by this and wastes his time in seeking for re-hearing and after limitation for appeal is over, files an appeal, he can apply to be excused for the delay. 86 Ind. Cas. 356=A.I.R. 1925 Oudh 495.

——S. 14.

A claim cannot be said as not **bona fide** when two Courts concur in decreeing the claim, although the final Court of appeal holds the decree to be erroneous. 86 Ind. Cas. 130=29 C.W.N. 202=A.I.R. 1925 Cal. 456.

——S. 14.

Where the defendants were recorded in the revenue record as tenants under the plaintiffs:

Held, that the plaintiff's action in attempting to secure their ejectment as tenants cannot be held to have been other than a **bona fide** proceeding even if their evidence was stigmatized by the Revenue Courts as false. 84 Ind. Cas. 733=6 L.L.J. 522=26 P.L.R. 27=A.I.R. 1925 Lah. 264.

——S. 14—Good faith was held not to be established on the facts.

Where the suit was prosecuted in wrong Court owing to plaintiff's allegation in plaint that accounts had been made but which was found to be untrue and was left unamended in the plaint when it was presented for the first time in the right court; and though the matter was brought prominently to the plaintiff's notice when the plaint was again returned to him and it was practically the only matter discussed in his appeal; and the plaintiff was very reluctant to make up his mind to amend the plaint and abandon the allegation that there had been a settlement of accounts:

Held, that the allegation was made deliberately in the hope of establishing later on an allegation of fact that had been found to be untrue and was now admitted to be untrue; and that whatever may be the full extent of the meaning of "good faith" in S. 14 it cannot cover conduct of that sort. 74 Ind. Cas. 317=8 N.L.J. 76= A.I.R. 1923 Nag. 241.

——S. 14—Good faith and diligence—Bona fide mistake.

Where an application was made under S. 144, C. P. Code under a **bona fide** mistake instead of filing suit for money wrongly paid under a decree in a previous suit, time required for prosecuting the application was excluded. 71 Ind. Cas. 42=A.I.R. 1923 Nag. 94.

——S. 14.

The interpretation to be put upon the section must be a wide one. "Limitation would without doubt remain in suspense whilst the plaintiffs were **bona fide** litigating for their rights in a Court of Justice". 73 Ind. Cas. 139=A.I.R. 1923 Mad. 347=44 M.L.J. 179

——S. 14—Execution application by one of several decree-holders.

When application to execute a decree was taken by only one of the several decree-holders and it was dismissed as not in accordance with law and subsequently all the decree-holders joined in the application it was held that the previous application was prosecuted in good faith and the second application is not time barred. 62 Ind. Cas. 507=15 S.L.R. 11=A.I.R. 1921 Sind 13.

——S. 14—Error of law.

A proceeding may be treated to have been prosecuted in good faith even though it was founded upon an error of law. 45 Cal. 94 (P.C.), **Foll.** 10 All. 587, **held obsolete**. So, where a plaint is returned under C. P. Code, O. 7, R. 10, for presentation to the proper Court, the period spent in the first Court may be excluded, in a proper case. 61 Ind. Cas. 203=24 O.C. 137=8 O.L.J. 76=A.I.R. 1921 Oudh 100.

——S. 14—Good faith—Bona fide prosecution of suit.

A suit was filed in the S. C. Court for contribution. The plaint were returned for presentation to the proper Court, but plaintiff filed a revision in the High Court against the order of return. The revision was dismissed. Three months after the order of dismissal plaintiff applied for the return of the document which was returned 15 days after the application on which day the plaint was presented in the proper Court:

Held, on the above facts that it was not a valid presentation and the interval of time between the application for return of the plaint and the date of representation should not be excluded since the plaintiff did not prosecute the suit with due diligence as required by S. 14 of the Limitation Act and she waited for three months to apply for a return of the plaint. 16 A.L.J. 429=45 Ind. Cas. 991.

——S. 14—Execution—Dismissal of application for transfer—Subsequent application for attachment—Appeal and second appeal.

The time for preferring an appeal and a second appeal against an order refusing the transfer of a decree should not be deducted so as to save limitation for an execution application for the abetment of the judgment debtor's properties. The second application being more than 3 years from the date of the first application, is barred by time. S. 14 of the Limitation Act is not applicable to such a case since there is no **bona fide** mistake in persuing a wrong remedy or no want of jurisdiction in the Court in dealing with the first application. 33 M.L.J. 682=45 Ind. Cas. 460.

——S. 14—Good faith—Suit in wrong Court.

Where plaintiff acted in good faith and neither the court nor the defendant objected to the cognizance of the suit he is entitled to the benefit of S. 14. 15 A.L.J. 573=40 Ind. Cas. 447.

——S. 14—Good faith—Deduction of time—Ejectment—Suit by some co-owners other co-owner's made defendants setting up their own title—Decree in their favour by first court, set aside on appeal—Fresh suit.

Some of the co-sharers in a **Dayabhaga** joint family sued for a declaration that purchase in the name of a widow was **benami** for themselves and the other co-sharers whom they joined as defendants. The latter associated themselves with plaintiffs and asked for an adjudication of their right to a one-third share and a distinct issue in respect of their claim was without objection raised and decided and the court made a decree on 20th April 1903 in favour of both co-sharer defendants. But on appeal the decree so far as it was in favour of the co-sharer defendants was set aside on 22nd February 1904 on the ground that not being plaintiffs they could not be given any relief in that suit; and the co-sharer defendants, thereupon on 14th November 1904 instituted a fresh suit for recovery of their fresh share.

Held, that though limitation began to run against them from January 1892, it remained in suspense whilst they were **bona fide** litigating their rights in the previous suit and this suit was therefore not time-barred. 12 C.W.N. 326; 35 Cal. 209, Affirmed. 43 Cal. 660=20 C.W.N. 522=24 C.L.J. 1=30 M.L.J. 529=(1916) 1 M.W.N. 332=20 M.L.T. 10=3 L. W. 471=18 Bom. L. R. 418=33 Ind. Cas. 452 (P.C.).

——S. 14—Due diligence.

A person who claims exclusion of time during which a former proceeding was pending must prove first that he had prosecuted the former proceeding with due diligence and secondly that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature. Where therefore, each of the two plaintiffs in a suit came into a court originally to sue separately in respect of a contract which gave them a joint but not several right and their error was pointed out to them and they were given every opportunity of rectifying it, but they elected to proceed with their suits

as then framed and by the time they were dismissed on the ground of non-joinder the period of limitation had expired.

Held, that the plaintiffs had not exhibited that degree of diligence which alone could entitle them to the benefit of S. 14. 19 P.R. 1888, Foll. 41 P. R. 1916=33 P.W.R. 1916=32 Ind. 497.

——S. 14—Good faith—Absence of fraud.

Whether a party acted in good faith in S. 14 is a mixed question of law and fact. When a plaint is presented in wrong court on the last day and returned, was later filed in right Court, **held** the plaintiff is not entitled to benefit under the section as the error was not one that would be committed by a reasonable and prudent man acting in good faith with due diligence. A Court can grant the indulgence allowed by S. 14 only where the error is one that might be committed by a reasonable and prudent man exercising due diligence and acting in good faith. Mere absence of fraud is no ground for exemption. Where plaintiff filed a suit in a Sub-Judge's Court which should have been filed in a Munsif's Court on the last day of limitation, and the plaint on being returned was filed in the latter Court, held that the plaintiff cannot get the benefit of S. 14. 3 O.L.J. 387=19 O.C. 367=36 Ind. Cas. 702.

——Ss. 14 (2) and 15 (1) and Art. 18—Good faith.

The appellant obtained a mortgage decree against respondents on 15th October 1900 for sale; the decree was made absolute on 12th August 1902. The mortgaged property was sold on the 25th June 1906, and a portion of the decree was realized. On 24th July 1906 one of the Respondent instituted a suit for a declaration that the decree was not binding on him. The suit which was dismissed by the First Court was decreed by the first appellate court on 30th April 1907. This decree was reversed by the second appeal on 8th July 1908. On 8th December 1909, the present application for execution was made. On objection as to limitation it was urged that the mortgaged decree was in abeyance from 30th April 1907 to 8th July 1908 and that time should be excluded. **Held,** that the appellant could not claim the benefit of S. 14 (2) or 15 (1) as it was not a case of **bona fide** proceedings in a wrong court or of the staying of a decree by injunction. Even on general principles of equity the time could not be excluded. 10 Ind. Cas. 21 (Oudh).

——S. 14—Pre-emption suit instituted in Subordinate Judge's Court—Plaint returned for presentation to the Munsif—Exclusion of time—Bona fide mistake.

The plaintiffs instituted a suit for pre-emption on the last day of limitation in the Court of the Subordinate Judge. The plaint was admitted, but on an objection by the defendants, it was returned for presentation to the proper court. The next day it was presented to the Munsif who admitted it and decreed the suit on the merits. The subordinate Judge on appeal dismissed the suit, holding that the plaint had not been filed in the Subordinate Judge's Court under a **bona fide** mistake. **Held,** that the question of **bona fides** in this case was not a question of fact but was one of legal inference from facts, and that it was manifest from the conduct of the parties that the mistake was **bona fide.** S. 14 of the Limitation Act was applicable, and the plaintiffs were entitled to exclusion of the time during which they had been prosecuting the proceedings in the Subordinate Judge's Court. **Held,** further, that the suit instituted in the Subordinate Judge's Court was a different proceeding from that in the suit instituted in the Munsif's Court, although the plaint filed in both the suits was the same. (1909) 6 A. L. J. 741=3 Ind. Cas. 79.

——S. 14—"Due diligence"—U. P. Rent Act, (XVI of 1881), S. 148—Suit by intervenor to establish title in a civil court.

D sued **C,** for rent of agricultural land alleging **C** to be his occupancy tenant. **C,** pleaded that he was not the tenant of **D,** but of **B** and others. **B** and others were accordingly added as defendants to the suit. The suit was decided by the Rent Court of first instance against **B** and others. **C,** the tenant, appealed to the Collector. **B** and others did not appeal to the Collector, but when **C's** appeal was dismissed, appealed to the District Judge. The District Judge, on the 28th March 1895, dismissed this appeal. **B** and others then brought a suit in the civil court for declaration of their title. The suit was filed on the 3rd August, 1898. **Held** that the suit was barred by limitation. Whatever might have been the case with **B, C** and others, though perhaps acting in good faith, did not prosecute the former proceedings in the Court of Revenue with due diligence within the meaning of S. 14. (1901) A.W.N. 123=23 A. 434.

——S. 14—Good faith—Has to be decided on facts.

What amounts to good faith is to be decided on the facts of each case. 9 S.L.R. 167=32 Ind. Cas. 616.

——S. 14—Good faith—"Due diligence".

Held, on the facts that the plaintiff acted in good faith and with due diligence up to 22nd July 1913 when the plaint was returned for presentation to the proper court but after the date he did not, and failed to satisfy the requirements of S. 14 of the Limitation Act. 51 P.L.R. 1915=54 P.W.R. 1915=28 Ind. Cas. 347.

——S. 14—Onus to prove good faith.

A person who claims to come within S. 14, Lim. Act has to show that in persuing this remedy in other proceedings, he acted in good faith, the burden of showing lack of good faith is not on his opponent. This is made clear by O. 7, R. 6, Civil P. C., and S. 103, Evi. Act. (1937) 1937 M. W. N. 465=A. I. R. 1941 Mad. 319=53 M.L.W. 164=1941 M.W.N. 125=(1941) I M.L.J. 257=I. L. R. (1941) Mad. 347=194 Ind. Cas. 328 (F.B.).

——S. 14—Finding about 'due diligence' is finding of fact and binding in second appeal.

S. 14 allows exclusion of that period only during which the plaintiff has been prosecuting with due diligence, another civil proceeding. The finding by the lower appellate Court holding that the plaintiff had not succeeded in showing that he acted with due diligence is **prima facie** a finding of fact and is binding in second appeal. (1946) 1946 O.A. (C.C.) 10 =A.I R 1946 Oudh 116.

——S. 14.

Question whether plaintiff acted with due diligence is a mixed question of law and fact. A.I.R. 1938 Lah. 704=40 P.L.R. 631=181 Ind. Cas. 290.

——S. 14.

Obiter.—(**Smith, J.,** contra). The question of good faith under S. 14 of the Lim. Act, is a question of fact.

Per **Smith, J.**—It is a mixed question of law and fact. A.I.R. 1938 Oudh 100=1938 O.W.N. 257=14 Luck. 4=173 Ind. Cas. 648.

9. Defect of Jurisdiction.

——S. 14 (2)—Execution application dismissed on ground that decree was superseded by that of High Court—Dismissal, if due to defect of jurisdiction.

If an application for execution of a decree was dismissed on the ground that the decree was not in existence, having been superseded by the decree of the High Court on appeal, the dismissal was not due to a defect of jurisdiction as to a defect similar to a defect of jurisdiction. The decree-holder, therefore, is not to entitled to exclude the time spent in prosecuting that execution application in computing the period of limitation for a subsequent execution application. A.I.R. 1949 Pat. 117.

——S. 14 (2).

Petition by creditor to adjudicate debtor as insolvent dismissed as alleged act did not constitute act of insolvency—Execution application by creditor against debtor:

Held, that the time spent in prosecuting insolvency petition cannot be excluded firstly because the reliefs in the insolvency petition and the execution application cannot be said to be the same and secondly because the insolvency petition cannot be said to have been dismissed by the insolvency Court as a result of its inability to entertain it for "defect of jurisdiction or other cause of a like nature."

[Difference between execution application and petition for adjudication of debtor as insolvent explained.] A.I.R. 1914 Lah. 136 (141)=I.L.R. (1944) Lah. 451=217 Ind. Cas. 65 (F.B.).

——S. 14.

Suit under O. 21, R. 103, Civil P.C.—Order in claim case—High Court refusing to interfere:

Held, that limitation runs from date of original order and not from order of High Court—Section 14 does not apply as High Court's refusal is not due to defect of jurisdiction. A.I.R. 1944 Pat. 225=23 Pat. 14=11 B.R. 243=218 Ind. Cas. 75.

——S. 14 (2)—Applicability.

S. 14 (2) of the Limitation Act is available only where there was initial want of jurisdiction. I. L. R. (1948) 2 Cal. 334=A.I.R. 1948 Cal. 226.

——S. 14—Defect of jurisdiction existing at beginning or occurring at later stage.

A Court may have no jurisdiction at all to entertain, that is to say, to embark upon a particular suit. Or it may have jurisdiction to entertain it at the outset, but a defect of jurisdiction may occur, at a later stage. In that case, it will, from the moment when the defect occurs, be unable to entertain the suit. Whether the defect exists at the beginning or whether it occurs at a later stage, the requirements of S. 14 are equally satisfied. A.I.R. 1943 All. 162=(1943) A. L. J. 69=1943 A. W. R. 62=I. L. R. (1943) All. 467=207 Ind. Cas. 571.

——S. 14—Objection to jurisdiction taken—Court acquiring jurisdiction during pendency of suit but after expiry of limitation for suit—Plaint, if should be returned.

Where objection to the jurisdiction of the Court was taken under S. 7 (a) of the U. P. Agri. Relief Act, but the Court acquired jurisdiction during the pendency of the suit but at a time when the limitation for the institution of the suit had expired and it was established that the suit was prosecuted with due diligence and in good faith;

Held, that the original plaint did not become time-barred and the Court could not return the plaint for presentation to proper Court under O. 7, R. 10, Civil P.C. In any case, the plaintiff was entitled to the benefit of S. 14, Lim. Act. 1940 O.W.N. 1212=1940 R. D. 590=A. I. R. 1941 Oudh 61=1941 A.W.R. 3=16 Luck. 402=191 Ind. Cas. 708.

——S. 14—Want of jurisdiction, if should exist at date of suit.

The want of jurisdiction or other cause of a like nature referred to in S. 14, need not be in existence at the very institution of a suit. All that the law requires for the applicability of S. 14 is that the Court in which the previous proceeding is prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. Want of jurisdiction or other cause of a like nature may arise at any stage of a suit or proceeding and, it upon that basis, the Court in which the suit or proceeding is being prosecuted arrives at the conclusion that it cannot entertain it and makes an order accordingly, the condition laid down in S. 14 is sufficiently fulfilled. A.I.R. 1940 All. 145=(1939) A. L. J. 1075=1939 A. W. R. 875=187 Ind. Cas. 336.

——S. 14—Court in other proceeding erroneously holding that it had no jurisdiction.

Even if the Court, in the other proceeding, erroneously decided its inability to entertain the question, S. 14 would apply. In such a case, it is not open to the second Court to say that there was no want of jurisdiction in the first Court. A.I.R. 1943 Cal. 460=76 C.L.J. 183=209 Ind. Cas. 71.

——S. 14.

The time spent in prosecuting a suit in a Court which has no pecuniary jurisdiction over the subject-matter cannot, under S. 14, be allowed in computing the period of limitation for a suit under O. 21, R. 63, Civil P.C. Hence, in a case where the suit is filed in the Court of a Munsif on a valuation which is found to be a gross under-statement of the value of the property, the time spent in the Munsif's Court cannot be allowed in computing the period of limitation for filing the suit. 24 Pat. 462=A. I. R. 1945 Pat. 369=26 P.L.T. 245.

——S. 14.

Plaint returned for presentation to proper Court for want of pecuniary jurisdiction—Plaintiff striking off part of claim to bring it within jurisdiction and representing amended plaint on date when suit was time-barred;

Held, that suit must be deemed to have been instituted on date of representation and was barred—Plaintiff could not claim benefit of S 14 A I R. 1940 Mad 689=(1940) 1 M L. J 590=51 M. L. W. 471 =(1940) M.W.N. 662=194 Ind. Cas. 646.

Reversing A.I R. 1939 Mad. 397.

——S. 14—Return for want of pecuniary jurisdiction—If delay could be excused.

Where plaint is presented to the proper court but is sent by that court for trial to a court which, for want of pecuniary jurisdiction, returned the plaint, suit when again represented must be treated as a continuation of the suit 18 P.W.R. 1916=33 Ind. Cas. 808.

——S. 14.

Where the suit fails for want of jurisdiction in the Court and is, on the order of the Court, returned for presentation to the proper Court, S 14, Lim Act, applies. A.I R. 1040 Sind 125=I.L.R. (1940) Kar. 225 =190 Ind. Cas. 328.

——S. 14.

Where a suit for refund of **nazrana** by the lessee against the lessor is filed in a Court of Small Causes and the Court returns the plaint for presentation to the proper Court on the ground that it has no jurisdiction to hear the case, the plaintiff is entitled to the benefit of S. 14. A I R. 1935 All. 759=1935 R.D. 345=(1935) A L. J. 966=1935 A.W.R. 818=155 Ind. Cas. 1092.

——S. 14.

Previous execution application not in accordance with law—Court discovering defect:

Held, that the executing Court in this case was not one that did not have jurisdiction to execute this decree. It had jurisdiction, but the decree holder failed to move the Court in accordance with law. Section 14, therefore, had no application to a case like this. A. I. R. (1937) Mad. 760=(1937) M. W. N. 355=174 Ind. Cas. 28.

——S. 14.

Suit filed in Bombay Small Cause Court—Court holding, it has no jurisdiction—Plaint subsequently filed in proper Court—Bombay decision becoming final—Time taken in prosecuting suit in Bombay can be deducted. A I R. 1937 Nag. 69=I.L.R. (1937) Nag. 311=170 Ind. Cas. 115.

——S. 14.

Suit filed in Court without jurisdiction—Objection not taken—Subsequent discovery in Court—Time spent in former Court can be deducted in computing limitation. A.I.R. 1933 Lah. 652=146 Ind. Cas. 125.

——S. 14.

Where the defendant instituted a suit for a declaration that the pro note which he had executed, has been discharged and for restraining the plaintiff from suing upon it and the plaintiff, in a subsequent suit upon the note sought to exclude the period of the former suit:

Held, that even assuming that the present plaintiff was prosecuting the proceeding or defending a suit brought by the defendant, it would be difficult to say that the Court was unable to entertain the proceeding within the meaning of S. 14 (2) from the defect of jurisdiction or other cause of a like nature and the plaintiff was not, therefore, entitled to the exclusion of the period in computing limitation. 28 Nag. L. R. 348=A.I.R. 1933 Nag. 13=141 Ind. Cas. 34.

——S. 14.

Absence of jurisdiction of Court in which suit is instituted—Subsequently the suit instituted in Court of proper jurisdiction—Later suit is not in continuation of the former one. The plaintiff may, however, claim under S. 14. exemption from time during which he was proceeding with due diligence and in good faith his first suit. A.I.R. 1933 Sind 117=144 Ind. Cas. 56.

——S. 14.

The word 'jurisdiction' in S. 14 must be construed liberally.

If all the requisites mentioned in S 14 are found to exist, the benefit given by that section cannot be taken away on the mere ground that, in the opinion of the Court, the court adopted before was not a well conceived one.

Section 14 was intended to protect a **bona fide** plaintiff from the consequence of some mistake which was made by his advisers in prosecuting his claim. (1932) M W. N. 1317=A. I. R. 1933 Mad. 197=140 Ind. Cas. 270.

——S. 14—Misconceived litigation.

Time spent in previous litigation cannot be excluded, when the previous suit does not fail from any defect of jurisdiction or other causes of like nature but fails because it is misconceived. 121 Ind. Cas. 70=A.I.R. 1930 Lah. 211.

——S. 14—Proceeding and remedy misconceived.

Section 14 of the old Act, allowed an applicant the time spent only in making another application, not in conducting a suit, whereas under the present law, allowance can be claimed for the time spent in prosecuting another civil proceeding, whatever its character. Where the proceeding and the remedy have been wholly misconceived, S. 14 has no application because the failure of the appellant in the prosecution of his claim by suit cannot be attributed to anything connected with the jurisdiction of the Court. 70 Ind Cas. 743= 16 M.L.W. 178=1022 M.W.N. 514=31 M. L. T. 135 =A. I. R. 1922 Mad. 417=43 M.L. J. 184.

——S. 14.

It is only when the civil proceedings is prosecuted in a court, which from defect of jurisdiction or other causes of like nature, is unable to entertain it, that S. 14 can apply.

When the court sold properties after an attachment, which was proved '**ultra vires**' in appeal, the time, spent by the party in determining the legality of the sale cannot be excluded under S. 14 The Court had jurisdiction to sell the property. A.I.R. 1931 Nag. 47 =13 N.L. J. 200=130 Ind. Cas. 157.

——S. 14—Defect of jurisdiction—Fresh suit.

Where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of

the first, even though the subject-matter and the parties to the suits were identical. 115 Ind. Cas. 713=1929 A.L.J. 254=33 C.W.N. 485=29 M.L.W. 682=6 O.W.N 473=49 C.L.J. 462=31 Bom. L.R. 741=56 I.A. 128=1929 M.W.N. 546=56 Cal. 1048=A.I.R. 1929 P.C. 103=56 M.L.J 614 (P.C.).

——S. 14—Defect of Jurisdiction—Change in Law.

Plaintiff losing time in seeking appointment of land revenue in a Civil Court was held to be entitled to the benefit of S. 14.

Plaintiff who was already the owner of a 12 annas share bought a four annas share of a certain village except a sir field from the defendants. The plaintiff sued defendants claiming proportionate land revenue in respect of the sir field for five years from 1920 to 1926 as fixed by the Sub-Divisional Officer in 1925. But before that he had sued the defendant in 1923 for contribution in the Civil Court but there it was decided that a Civil Court had no jurisdiction to make on apportionment. The defendant contended that plaintiff was not entitled to land revenue for the years 1920 to 1923 as the claim was time-barred.

Held, that the claim was not time-barred and the plaintiff was entitled to get the benefit under S. 14, Limitation Act, as before the new Land Revenue Act came into force, the Civil Court had power to make apportionment and the time which the plaintiff spent in persuing his remdy of apportionment of land revenue in a Civil Court must be deducted. 107 Ind. Cas., 910 =11 N.L.J. 93=A.I.R. 1928 Nag. 227.

——S. 14—Defect of Jurisdiction—Court not declining to entertain.

Where a suit to recover money lent upon interest payable on demand was filed before a Union Court and that Court finding that it was desirable, that the suit should be tried by persons versed in law, ordered that it should be conducted in proper Court and by the time the suit was filed in the Small Causes Court, the cause of action was time-barred:

Held, that the plaintiff is not entitled to deduct the period during which he was prosecuting the suit in the Union Court. 106 Ind. Cas. 324=46 C.L.J. 452= A.I.R. 1928 Cal. 46.

——S. 14—Defect of Jurisdiction—Delay owing to Court's mistake.

Where owing to some mistakes of the Court itself the plaintiff was driven from Court to Court for a period of six to seven months, after which he could finally file his suit in the right Court:

Held, that he should be given the benefit of S. 14. 89 Ind. Cas. 443=12 O.L.J. 297=2 O.W.N. 383=A.I.R. 1925 Oudh 493.

——S. 14—Defect of Jurisdiction—What is not.

The rejection of an application that a certain decretal debt be entered in the schedule of creditors of the J. D during insolvency procéedings for want of affidavit is not due to any defect of jurisdiction and S. 14 is not applicable. 79 Ind Cas. 696=1923 P.H.C.C. 271= A.I.R. 1924 Pat. 40.

——S. 14.

Where a prior suit is in different capacity and is on a different cause of action, the period of that suit cannot be excluded as the proceedings were not infructuous on the ground of defective jurisdiction or any other cause of a like nature. 76 Ind. Cas. 639=1 Rang. 402=A.I.R. 1924 Rang. 123.

——S. 14—Return for want of Jurisdiction—Wrong valuation.

Time spent in prosecuting an infructuous appeal, due to wrong valuation may be deducted in computing the period of limitation. 4 P.W.R. 1919=31 P.L.R. 1919= 70 P.R. 1919=50 Ind. Cas. 645.

——S. 14—"Defect of jurisdiction"—Scope.

The words "defect of jurisdiction" in S. 14 of the Limitation Act mean a defect of jurisdiction which is quite peculiar to the court in which proceedings were taken; they do not cover such general questions as presentation and prosecution of an appeal which did not lie at all, in any court. 63 P.R. 1886; 55 P.R. 1893; 34 P.R. 1898, Foll. 22 P.R. 1912=163 P.W.R. 1911= 244 P.L.R. 1911=11 Ind. Cas. 880.

10. "Other causes of a like nature."

——S. 14—"Other cause of a like nature"—Bona fide mistake of law or defect of procedure—Sufficiency of.

The essential object of and the principle which underlies, S. 14, Limitation Act, is that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits, but failing, the Court being unable to give him such a trial. This principle is clearly applicable not only to cases in which a man brings his suit in the wrong Court, that is, a Court having no jurisdiction to entertain it, but also where he brings his suit in the wrong Court in consequence of a **bona fide** mistake of law or defect of procedure. Given good faith and due diligence, a cause is not prevented from being of a like nature to defect of jurisdiction, merely because it was in the plaintiff's own power to avoid, or resulted from his own act, or from a **bona fide** mistake of law or procedure which prevented the Court **in limine** from entertaining the suit. 23 Pat. 14, Overr. 28 Pat. 102=A. I. R. 1949 Pat. 293= 30 P.L.T. 201 (F.B.).

——S 14—"Defect of Jurisdiction"—"Other cause of a nature"—Meaning of—Party misconceiving remedy—Right to exclusion of time—"Due diligence".

Where a suit fails not because of want of jurisdiction in the Court in which it is instituted, but because the plaintiff had misconceived the remedy open to him, S. 14, Limitation Act, cannot apply, so as to entitle him to exclude the period spent in prosecution of that suit. The words "other cause of a like nature" cannot be construed as being wide enough to include instances in which the failure of the plaintiff's suit is due to the fact that the remedy he sought is misconceived.

Where a party persists in preferring an appeal which does not lie, after he is advised by the Court as to his proper remedy instead of adopting that course, he is not entitled in a subsequent litigation to the benefit of the exclusion of the period occupied in the prosecution of the appeal. It cannot be said in such a case that he was persuing the previous litigation with due diligence. The failure of the appeal is due not to any defect in the jurisdiction of the Court to entertain it, but is due to the party's own fault in choosing a remedy not open to him. 43 M.L.J. 184, foll. 27 Pat. 137=A.I.R. 1949 Pat. 362.

——S. 14 (1)—Time spent in prosecuting application dismissed as barred by time—Whether can be excluded.

When a Court dismisses a suit or an application on the ground that it is barred by limitation it decides it on merits. In any case, it cannot be said that it is unable to entertain it either from defect of jurisdiction or other cause of a like nature. The time spent in prosecuting such suit or application cannot, therefore, be excluded under S. 14 (1) of the Limitation Act. 50 P.L.R. 185=A.I.R. 1948 E P. 63.

——S. 14, Expl. III.

Applicability—Abandonment of suit against one of the defendants—Liberty to file a fresh suit—Fresh suit filed beyond time. See: C.P. Code, O. 23, R. 1 and 2 and Limitation Act, S. 14, Expl., III. (1947) 2 M.L.J. 337.

——S. 14—"Other cause of a like nature"—First suit dismissed for non-registration of plaintiff's firm—Time taken in prosecuting—Right to deduction of.

Two partners of a firm filed a suit in the firm's name against the appellant to recover a sum of money, but the suit was dismissed on the ground that the firm was not registered as required by S. 69, Partnership Act. This dismissal was affirmed in appeal and second appeal. A second suit was then brought by the two partners impleading as defendant to that suit not only the appellant but also the other partner of the firm as well, found on the same cause of action.

Held, that the period taken in prosecuting the first suit could be deducted in computing the period of limitation for the second suit under S. 14 of the Limitation Act as the Court was unable to entertain the first suit "for other cause of a like nature" within the meaning of the section. I.L.R. (1945) Kar. 293=223 Ind. Cas. 291=A.I.R. 1946 Sind 14.

——S. 14.

The words "or other cause of a like nature," must be read so as to convey something **ejusdem generis** or analogous with the preceding words relating to the defect of jurisdiction. If these words are read along with the expression "is unable to entertain" they would denote that the defect must be of such a character as to make it impossible for a Court to entertain the suit or application either in its inception or at all events as to prevent it from deciding it on its merits. It is not possible to give an exhaustive list of defects that these words may be taken to cover. (Scope of the expression discussed.) A.I.R. 1944 Lah. 136=I.L.R. (1944) Lah. 451=217 Ind. Cas. 65 (F.B.).

[Overruling A. I. R. 1936 Lah. 736=156 Ind. Cas. 378.]

——S. 14—Arbitration proceedings.

Where one of the arbitrators appointed by the parties refuses to act in the course of the arbitration proceedings and the agreement to refer contains no provision as to what should be done in such a case, the remaining arbitrators are not competent to go on with the proceeding and the provisions of S. 14 will be applicable on the ground that the defect is "of a like nature" to defect of jurisdiction within the meaning of S. 14. A.I.R. 1943 All. 162=1943 A.W.R. 62=(1943) A.L.J. 69=I.L.R. (1943) All. 467=207 Ind. Cas. 571.

——S. 14, Sch. I, Art. 83.

What is a "defect of a like nature" within the meaning of S. 14 must depend upon the facts of each case. These words must mean and connote something which is quite distinct from defect of jurisdiction. Only because it is held that the cause of action was premature, it cannot be said S. 14 cannot apply.

If a claim of a person is fully satisfied, either by an agreement or by a decree of a Court and if that satisfaction is subsequently annulled by another decree of the Court, a fresh cause of action would accrue in favour of the claimant, or would entitle him to deduction of time occupied in the previous litigation.

Where claim was fully satisfied by agreement or decree of Court but the satisfaction was subsequently annulled by another Court:

Held, that under S. 14, plaintiff was entitled to exclude the time occupied in prosecuting the proceedings in pursuance of the personal decree. A.I.R. 1939 Bom. 26=40 Bom. L.R. 1169=I.L.R. (1939) Bom. 9=179 Ind. Cas. 441.

——S. 14.

Where the jurisdiction of a Court to entertain a particular suit depends upon leave being granted by that Court, and leave is so granted, the subsequent recalling of the leave brings the case within the words "other cause of a like nature" in sub-S. (1) of S. 14. The time between the granting of the leave and its recall should, therefore, be excluded under S. 14. 20 P.L.T. 893=A.I.R. 1939 Pat. 86=5 B. R. 792=182 Ind. Cas. 632.

——S. 14 (2).

Order of executing Court on plaintiff's claim-petition on November 10, 1923—Appeal to Sub Court and then to High Court according to law then prevailing—High Court deciding on November 11, 1927, that plaintiff's remedy was by separate suit—Suit filed on August 7, 1928:

Held, that the plaintiffs, according to interpretation of the law in 30 M. 215 (subsequently overruled by 51 M. 46) then prevailing had no right of suit and, therefore, the appeals were preferred **bona fide** in 'good faith.' The failure of the plaintiffs in their appeals was, therefore, due to 'a cause of like nature' with want of jurisdiction within meaning of S. 14, and the matter, therefore, fell under S. 14. The time, therefore, spent in prosecuting the appeals could be excluded in computing the period of limitation. A.I.R. 1938 Mad. 41 =(1937) M.W.N. 141=175 Ind. Cas. 767.

——S. 14—Party's mistake regarding relief.

There is nothing analogous to a defect of jurisdiction in a mistake of a party with regard to the relief he seeks: such a question arises out of incompetence on the part of those advising the litigant. A.I.R. 1934 Rang. 158=152 Ind. Cas. 415.

——S. 14—Cause of like nature.

Where a suit is dismissed for default of prosecution under O. 9, R. 2, C.P. Code and a fresh one is brought under R. 4 of the same order, S. 14 is not applicable as the prior suit failed for plaintiff's negligence in prosecuting it and not because of defect of jurisdiction or other cause of a like nature within the meaning of S. 14. 6 W. R. 184 (F.B.), **Foll.** 116 Ind. Cas. 509=25 N.L.R. 99=A.I.R. 1929 Nag. 219.

——S. 14.

A holder of money-decree against one brother as member of a firm attached certain property to which the other brother of judgment-debtor objected under O. 21, R. 58, C. P. Code. The objection was allowed. After this the decree-holder applied under O. 21, R. 50 (2), C. P. Code, but was unsuccessful, the Court holding the order on claim petition as a bar. He then sued as required by R. 63, but was met with the defence of bar of limitation:

Hold, that the cause of action on which the application under O. 21, R. 50, was based was the same as the cause of action in the suit and the reason why his application under O. 21, R. 50 was held as not maintainable was a reason contemplated by S. 14; therefore, the period during which the application under R. 50 was pending should be excluded in computing the one year's period. 108 Ind. Cas. 134=26 A.L.J. 127=A.I.R. 1928 All. 10.

——S. 14.

The interpretation of S. 14 should be a wide one. Where in a prior suit for declaration of title possession was not prayed for and the suit was dismissed as not maintainable on that ground:

Held, that the defect was of a nature similar to a defect of jurisdiction and that time taken for prosecuting that suit can be deducted under S. 14. 98 Ind. Cas. 14=24 M.L.W. 634=A.I.R. 1926 Mad. 1081=51 M.L.J. 391.

——S. 14.

——S. 14.

The dismissal of the previous execution application on the ground that the relief asked for was not in conformity with the decree is a cause of a nature similar to defect of jurisdiction. 75 Ind. Cas. 312=3 Pat. 42 =A.I.R. 1924 Pat. 471.

——S. 14.

Res judicata does not constitute "other cause of a like nature" under S. 14 (2), 13 C.L.R. 214 and 32 Cal. 118, **Foll.** 63 Ind. Cas. 593=2 P.L.T. 585=6 P.L.J. 593=1921 P.H.C.C. 233=A.I.R. 1921 Pat. 225.

——S. 14—'Cause of a like nature'—Failure to give notice under S. 80, C. P. Code.

The failure to give notice under S. 80, C.P. Code is not a 'cause of a like nature' with defect of jurisdiction within S. 14 of the Act. 5 S.L.R. 181=13 Ind. Cas. 260.

——S. 14—'Cause of a like nature'—Mesne profits, suit for—Mesne profits accrued due during the pendency of the former suit.

The words 'other cause of a like nature' cannot be so construed as to include a case where the claim for mesne profits was actually made in the prior suit, and the court, though by inadvertence or otherwise, did not deal with it, but yet did entertain it and there was no defect of jurisdiction which prevented it from giving plaintiff a decree. (1903) 32 C. 118.

——S. 14—Non-joinder of parties.

Mis-joinder and non-joinder are only variations of the same defect, namely, the omission to have the proper parties or causes of action included in a suit or application. There is nothing that requires a Court to make an absolute distinction between cases of mis-joinder and non-joinder in regard to S. 14. 62 Ind. Cas. 507=15 S.L.R. 11=A.I.R. 1921 Sind 13.

——S. 14 (1) and Limitation Act (IX of 1908) S. 14, Expl.—"Causes of like nature"—Exclusion of time.

Where a suit on a promissory note executed to a firm was dismissed for want of endorsement to the plff. of the note and a second suit was instituted with the necessary requirements, **Held,** that the 1st. suit having failed from a cause not within the knowledge of the plff. and by reason of a rightly technical and legal character, the plaintiff was entitled to exclude the time spent in it. The words "causes of like nature" include mis-joinder of parties and causes of action. 22 A. 248, followed. 6. L.B.R. 43=14 Ind. Cas. 437.

——S. 14—Suit dismissed for mis-joinder of causes of action—Time of prosecuting it diligently deducted. (1900) 24 M. 361.

——S. 14—'Cause of like nature.'

An improper joinder of parties or causes of action is not a 'cause of like nature' inasmuch as the court has jurisdiction to entertain the suit but is not able to decide the suit by reason of defect in the form of the suit. 8 P. R. 1911=77 P.L.R. 1911=78 P.W.R. 1911=9 Ind. Cas. 680.

——S. 14—"Cause of a like nature"—Non-joinder —Dismissal of suit after trial and before trial.

S. 14 cannot apply to a case where the prior suit is dismissed for non-joinder and such dismissal is based on the findings arrived at by the lower courts after trial. (1904) 28 M. 338.

——S. 14—'Cause of a like nature'—Mis-joinder of causes of action and parties. (1904) 7 Bom. L.R. 90=29 B. 219.

See also: 12 C.W.N. 473=35 C. 728.

11. "Entertain" — Meaning of.

——S. 14—"Entertain," meaning explained.

To "entertain" is to "admit a thing for consideration" and when a suit or proceeding is not thrown out in **limine** but the Court receives it for consideration and disposal according to law, it must be regarded as entertaining the suit or proceeding no matter whatever the ultimate decision might be. A.I.R. 1945 Cal. 381=49 C.W.N. 499=221 Ind. Cas 429.

——S. 14—'Unable to entertain.'

'Unable to entertain' is not equivalent to 'unable to decide.' (34 P.R. 1898, 28 M. 338; 35 C. 728, Foll. 22 A. 248, Diss.) 8 P.R. 1911=77 P.L.R. 1911=78 P.W.R. 1911=9 Ind.Cas. 680.

12. Computation of period.

——S.14—Only time during which other proceeding was actually being prosecuted can be excluded under S. 14 (2).

The time that can be excluded under S. 14 (2) is merely the time during which the other proceeding is actually being prosecuted with due diligence.

Where the decree-holder files an application for execution in a wrong Court and allows it to be dismissed for default and then files another application almost three years after and has been doing nothing during the long period between the dismissal of the first and the filing of the second execution application he cannot be said during that interval to have been actually prosecuting a proceeding within the meaning of. S.14 (2). No doubt, if the interval has been short and such as has been necessary for taking steps, acquiring information and so on different considerations might arise. A.I.R. 1946 Pat. 301=25 Pat. 50=12 B.R. 198=226 Ind. Cas. 195.

——S. 14—Scope and effect—Suit re-filed in proper Court—Period of limitation—How determined.

S. 14 of the Limitation Act does not prescribe any period of limitation but provides only for a method of calculation of that period where a suit has been instituted **bona fide** in a Court without jurisdiction. It is well settled that the effect of the section is not to render the suit after refiling in the proper Court a continuation of the original suit, and consequently the period of limitation has to be determined for that suit as if it was a new suit, and the period will be that which was prescribed for the original suit, but excluding the period during which the suit was being prosecuted **bona fide** in a wrong Court. I.L.R. (1948) 1 Cal. 488=52 C.W.N. 316.

——S. 14—Return of plaint for presentation to proper Court—Extent of time claimable as a deduction.

A plaintiff claiming a deduction of time between the date of the filing of a plaint and its return for presentation to the proper Court would be entitled to the deduction of only the time till the date of the endorsement on the plaint required by R. 10 (2) of O. 7, C.P. Code is actually made. He would not be entitled to any deduction thereafter except perhaps where he can show that the Court delayed the return of the plaint in spite of his endeavour to take it back. I.L.R. (1947) Mad. 694=60 L. W. 135=1947 M.W.N. 66=A.I.R. 1948=Mad. 26=(1947) 1 M.L.J. 90.

——S. 14—Expl. 1—Scope—Exclusion of time—Time between order for return of plaint and actual return—If allowable.

The period between the pronouncement in Court of the want of jurisdiction in the Court and the return of the plaint to the plaintiff or his pleader would be allowable as time under S. 14, Expl. I, Limitation Act, if during that period also the plaintiff was prosecuting his suit with due diligence. 48 Bom. L.R. 788=A.I.R. 1947 Bom. 140=231 Ind. Cas. 282.

——S. 14.

When plaint is returned for want of jurisdiction, the time up to the date of actual return of the plaint can be excluded in a proper case. A.I.R. 1944 Bom. 37=45 Bom. L.R. 1014=215 Ind. Cas. 121.

——S. 14—Expl. 1.

Proceedings end on date on which plaint is actually returned and not on date on which order directing return of plaint is recorded. A.I.R. 1939 All. 590=(1939) A.L.J. 460=I. L. R. (1939) All. 709=1939 A.W.R. 477=184 Ind. Cas. 860.

——S. 14.

Suit filed before Munsif at **B** on last day of limitation—Court finding that it should have been filed before himself at **M**, and ordered the plaint to be presented to proper Court on or before a certain date—Plaint so presented on that date:

Held, that for purposes of computation of time for limitation, plaintiff was entitled to exclude only the time during which the plaint was pending in Court at **B** and not between the date on which the plaint was returned and the date on or before which it was ordered to be presented to the proper Court. 18 P.L.T. 250=3 B. R. 363=A.I.R. 1937 Pat. 495=167 Ind. Cas. 941.

——S. 14 (2), Expl. 1—Return of plaint for presentation to proper Court—Period between date of order and date on which plaint is ready for return.

No litigant should be made to suffer on account of the laches or delay of the Court or its officers. The time between the date of the order for return and the date when the plaint was ready to be returned is to be deducted for purposes of limitation and the proceedings are not considered to be at an end for the purpose of S.14, Expl. 1, Lim.Act, until the endorsement is made and the plaint is ready for return. The plaintiff is entitled to exclude the period till the plaint is ready for return. A.I.R. 1937 Lah. 47=41 P.L.T. 371=182 Ind. Cas. 732.

——S. 14.

Where a suit is filed in a wrong Court but the plaint is returned to be filed in proper Court, the only period which can be excluded under S. 14, is the period between the date of the presentation of the plaint in a wrong Court and its return for presentation to the proper Court. A.I.R. 1938 All. 78=(1937) A.L.J. 1308=1937 A.W.R. 1186=I.L.R. (1938) All. 192=173 Ind. Cas. 461.

——S. 14—Return of plaint for presentation to proper Court—Period of time between date of order and date on which plaint is ready for being returned.

Where a Court orders a plaint to be returned for presentation in the proper Court, the proceedings cannot be regarded as having ended until the Court, in whom the duty lies of conforming to the provisions O. 7, R. 10, Civil P. C., is in a position to carry out the order of return of the plaint. Till that point of time, no question can possibly arise as regards the plaintiff not being entitled to exclusion of time under S. 14. When that point of time is reached, the question whether the plaintiff would or would not be entitled to a further deduction of time thereafter would depend upon various factors. Ordinarily, no further time would be excluded. But it is not inconceivable that in exceptional circumstances, even subsequent to such point of time, the proceedings may have to be regarded as still continuing. And in determining whether they should be so regarded or not, the question of the plaintiff's diligence or otherwise may have to be considered. 60 C. 1122=A.I.R. 1933 Cal. 914=149 Ind. Cas. 79.

——S. 14—Plaint represented under an order of the Court is to be deemed to be presented when it was first presented.

There is no provision of law which necessitates or even empowers the Court to return a plaint on the ground that the plaintiff has not mentioned therein

the list of the documents on which he relies. The only effect of a person not furnishing the list of documents on which he relies is that, unless the Court permits him to do so, he is not entitled to produce them at a later stage.

Where a plaint is returned under circumstances mentioned above, and it is represented, the suit must be deemed to have been instituted on the date when the plaint was first presented and not on the date on which it was represented after the order of the Court had been complied with. 122 Ind. Cas. 488=A.I.R. 1930 Lah. 480.

——S. 14.

When a plaint is returned by a Court for want of jurisdiction and is represented to another Court, the suit is considered to be instituted on the date on which the plaint is presented to the latter Court and if by that time the period of limitation prescribed by the law in force (Punjab Act III of 1923 in this case) has expired the suit becomes time barred. 117 Ind. Cas. 900=A.I.R. 1929 Lah. 877.

——S. 14.

Where a plaint is returned under O. 7, R. 10, C. P. Code, the time to be excluded under S. 14, is the period from the date of presentation until the date of return of the plaint. 3 M.L.J. 190, Diss.; 92 Ind. Cas. 373=22 M.L.W. 816=A.I.R. 1926 Mad. 178.

——S 14.

Where a Court returns a plaint for want of jurisdiction the time occupied in that Court counts towards limitation and saves it under S. 14 from being barred. 80 Ind. Cas. 286=A.I.R. 1925 Nag. 54.

——S. 14.

The plaintiff filed a suit in a Court without jurisdiction and his plaint was ordered to be returned for presentation to the proper Court but was actually returned after five days after the order on which day it was presented to the proper Court which dismissed it on the ground of being without the period of limitation.

Held, the five days of delay must be excluded in computing the period of limitation. 64 Ind. Cas. 160 =46 Bom. 211=23 Bom. L.R. 1023=A.I.R. 1922 Bom. 160.

——S. 14.

When a party is ordered to take back his plaint and present it in the proper Court, the proceedings do not end until the party gets back his plaint.

Where the first court was closed when limitation expired and so the plaint filed on the re-opening day was in time, the plaintiff is entitled to take advantage of those days during which the first Court was closed for the vacation, and the calculation should be made in the same way as if the second Court had been closed for the vacation. 36 Mad. 131, Dissented from. 59 Ind. Cas. 743=45 Bom. 443=A.I.R. 1921 Bom. 379.

——S. 14—Computation of time—Vacation—Time taken in obtaining delivery of copy of the plaint.

The plaintiff is entitled to exclude the vacation period on the termination of which he filed the suit in the wrong court and also the period from the date when the order for return was made and the date when the plaint was actually returned. 22 Bom. L.R. 1387=A.I.R. 1921 Bom. 379.

——S. 14—Discretion of Court—Time within which plaint must be represented.

The only period which the plaintiff is entitled to exclude under S. 14 of the Limitation Act, is the period during which the suit was actually pending on the file of the Dt. Munsiff's Court and Munsif had no power to alter or enlarge the period within which the suit ought to have been filed by fixing a period of one month for presenting the plaint to the proper Court. 30 C.L.J. 522=53 Ind. Cas. 955.

——S. 14—Discretion of Court—Suit filed on last day, returned as under-valued.

There is no provision in the Limitation Act or in the C. P. Code for allowing further time to refile a plaint. 24 C. L. J. 355=35 Ind. Cas. 595.

——S. 14, Expl. 1—Computation of time—Plaint returned—When proceedings ended.

Where a plaint is returned and costs ordered, the proceedings terminate on the day of the return and on the day when the costs are assessed. 24 C.L.J. 355=35 Ind. Cas. 595.

——S. 14—Delay after order of return—Plaint returned three days after order for return—Exclusion of time.

Where a plaint was actually returned for presentation to the proper court only three days after the order directing the plaint to be returned was signed, **Held,** that for purposes of S. 14 of the Limitation Act the date on which the plaint was actually returned must be taken to be the date on which the order was promulgated. 24 W.R. Dist. A.W.N. (1887) 302, Foll. 17 C.W.N. 1043=20 Ind. Cas. 183.

——S. 14—Computation of time—Date of institution—What is.

The date of institution of a suit is the date on which the plaint is filed in the proper court excluding for the purpose of reckoning limitation, only the periods excluded under that section. 17 C.W.N. 515= 18 Ind. Cas. 121.

——S. 14—Computation of time—Plaint ordered to be presented in proper court.

Proceedings instituted wrongly in an incompetent court are not legally valid and capable of being continued in another court. Where the plaint instituted in a wrong court is represented in the proper court the proceedings in the right court are not a continuation of the proceedings in the wrong court for purposes of limitation. 21 M.L.J. 1000, Foll; 36 Mad. 482=22 M.L.J. 377=(1912) M.W.N. 457=14 Ind. Cas. 157.

——S. 14—Delay after order of return—Exclusion of.

For the purposes of limitation, an applicant for representation is entitled to deduct the time spent in the Dt. Munsif's Court after order of return. 9 M.L.T. 374=9 Ind. Cas. 157.

——S. 14.

Court ordering plaint to be returned to proper court —Costs awarded—Time required till preparation of decree can be excluded. A.I.R. 1938 Pat. 203=4 B.R. 522=175 Ind. Cas. 89.

——S. 14—Plaint returned for amendment and then for representation—Exclusion of both period, legality of.

Where a plaint was returned first to have it amended and then for representation to proper Court, and the Court before which the plaint was re-presented, while computing the period of limitation excluded both the periods, the High Court did not interfere in second appeal with the discretion exercised by the trial Court. A.I.R. 1931 Mad. 632=131 Ind. Cas. 461.

——S. 14—Dismissal of pauper application—Court fee paid beyond limitation.

Application to sue as pauper dismissed—Court fee paid beyond limitation but within time allowed by Court under S. 149, Civil P. C. If suit is regarded as filed when court-fee paid, plaintiff is entitled under S. 14, Lim. Act to be excused the period during which the pauper application was pending. A.I.R. 1938 Cal. 730=I.L.R. (1939) 1 Cal. 112=179 Ind. Cas. 271.

——S. 14.

Defendant, as share-holder of a company, had his shares forfeited more than a year prior to commencement of winding up. The winding up order by the Court was on 21st July, 1923. On 10th October, 1924, the liquidator filed his list of contributories under S. 156, Companies Act. On 13th October, 1925, the Court held that the name of the defendant had been wrongly entered in the list of contributories, and it directed a suit to be filed. A suit was accordingly filed against defendant on his liability under Art. 28 of Table A.

Held, that the period between 10th October, 1924 and 13th October, 1925, cannot be excluded under S. 14. 110 Ind. Cas. 33=52 Bom. 477=30 Bom. L.R. 549=A.I.R. 1928 Bom. 252.

——S. 14.

Plaintiff's suit was dismissed for default on 27th July, 1926. The plaintiff applied for copy on 29th July, 1926 and obtained it on 5th August, 1926. He appealed against the decree on 2nd September, 1926, and was informed on 27th October, 1926, that he had misconceived his remedy and should apply to set aside the order of dismissal under O. 9, R. 4, C. P. Code. On 18th November, 1926, he made the application.

Held, that the period between 27th July, 1926, and 2nd September, 1926, cannot be excluded as until 2nd September, 1926, there was neither Court nor proceeding. 110 Ind. Cas. 47=1928 M.W.N. 239= A.I.R. 1928. Mad. 556.

——S. 14—Plaintiff must have been prosecuting the previous suit or his claim must have been adjudicated upon if he wants to apply S. 14.

A putni tenure was sold for arrears of rent under Regulatidn VIII of 1819 on 15th May, 1916. On 29th May some of the putnidars brought a suit for setting aside the sale. During the pendency of this suit the putni having fallen again into arrears was sold on the 16th November, 1916, a second time and the putnidars applied for amendment for setting aside the second sale also. On 21st February, 1918, both the sales were set aside. But the zemindar appealed and the High Court, reversing the decision, confirmed the sales on the 29th February, 1920. In the mean-time one of the putnidars instituted a suit alleging that he had an 8 annas share in the purchase at the first sale, he having paid one half of the purchase-money and prayed that the second sale might be set aside. On 24th January, 1917, the purchaser with-drew the surplus sale proceeds from Court and subse-quently the plaintiff on 31st May, 1920, made on application for amendment of his plaint adding a prayer for the recovery of one half of the surplus proceeds:

Held, claim for the surplus sale proceeds came under Art. 62 of the Limitation Act, under which a suit has to be brought within three years from the date on which the money was received be the defen-dant. The period between the date on which the sale was set aside by the Court below and the date on which the High Court reversed that decision and upheld the sale (23 Feb. 1920) should not be deducted and that the claim for the surplus sale proceeds was barred. 83 Ind. Cas. 110=41 C.L.J. 149=28 C.W.N. 1009=A.I.R. 1925 Cal. 67.

——S. 14.

The time during which a Court holds up a case while it is discovering that it ought to have been presented in another Court, is time which ought to be excluded in computing the period of limitation which is applicable, as provided by S. 14. It cannot be said that a plaintiff is not prosecuting a suit with due diligance in a Court of first instance when the delay is caused by the action of the Court itself. 70 Ind. Cas. 613=A.I.R. 1922 All. 404.

——Ss. 14 and 4—Computation of time—Suit filed in wrong court—Holiday.

A plaintiff though entitled to deduct time of actual pendency in a wrong court, cannot exclude any extra day on the ground that it is a holiday. 14 A.L.J. 310 =35 Ind. Cas. 292.

13. Time spent in arbitration proceedings.

——S. 14—"Court"—If includes arbitrator—Time spent in arbitration proceedings—If may be excluded.

Arbitrators are a "Court" and proceedings before them are civil proceedings before a Court within the meaning of S. 14 of the Limitation Act. It would therefore follow that time spent in arbitration proceedings is to be excluded from computation of the period of limitation in a suit instituted subsequently in respect of the same subject-matter, provided the other requirements of S. 14 are satisfied. Even if the failure of arbitration proceedings may not be due to defect of jurisdiction, nevertheless the section would apply on the ground that there was "a cause of a like nature" to a defect of jurisdiction within its meaning. I.L.R. (1947) Nag. 477=1947 N.L.J. 417=A.I.R. 1948 Nag. 334.

——S. 14—Proceeding before arbitrators—Civil proceeding.

The proceeding before the arbitrators appointed by parties is a civil proceeding in a Court within the mean-

ing of S. 14, and hence time spent in those proceedings must be excluded in computing limitation in subsequent suit or proceedings in the Civil Court. A.I.R. 1943 All. 162=1943 A.W.R. 62=(1943) A.L.J. 69=I.L.R. (1943) All. 467=207 Ind. Cas. 571.

——S. 14—Proceedings under Arbitration Act.

In an arbitration between a Bank which was a company with a limited liability, and a private individual, an award was given in favour of the Bank, which, diligently and in good faith prosecuted proceedings for the execution of the award in the Court of the Sub-Judge believing that Court to have jurisdiction. Subsequently, it was ruled that the awards of the nature were cognizable by the District Judge:

Held, that the Bank was entitled to the benefit of S. 14, Lim. Act. A.I.R. 1941 Pesh. 3=192 Ind. Cas. 758.

——S. 14—Time spent in arbitration proceedings subsequently set aside by Court.

In a suit brought in a Civil Court, the time taken in previous arbitration proceedings relating to the subject matter of the suit cannot be excluded for the purpose of computing limitation under S. 14.

Arbitrators are not a Court within the said section and further the decree of a Civil Court that an award delivered by arbitrators is not valid and binding does not deprive the arbitrators of their jurisdiction and the cancellation of the award cannot be considered a cause of a like nature within the meaning of S. 14. A.I.R. 1933 Nag. 130=29 N.L.R. 272=144 Ind. Cas. 948.

——S. 14.

Proceedings before an arbitrator are proceedings in a Court. 120 Ind. Cas. 710=56 Cal. 639=A.I.R. 1930 Cal. 5.

——S. 14.

Aribtrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits but by procuring awards and filing them in Court and resisting applications to set them aside; so also civil proceedings in a Court cover civil proceedings before arbitrators whom the parties have substituted for the Courts of law to be the Judges of the dispute between them. An arbitrator should, therefore, exclude the time spent in prosecuting in good faith the same claim before an arbitrator who was without jurisdiction. 115 Ind. Cas. 713=1929 A.L.J. 254 =33 C.W.N. 485=29 M.L.W. 682=6 O.W.N. 473= 49 C.L.J. 462=31 Bom. L.R. 741=56 I.A. 128=1929 M.W.N. 546=56 Cal. 1048=A.I.R. 1929 P.C. 103=56 M.L.J. 614 (P.C.).

——S. 14—Arbitration proceedings are not covered unless such proceedings oust Civil Court's jurisdiction.

The mere fact that there is an arbitration pending before an arbitrator does not and cannot oust the jurisdiction of the Civil Court.

Could the defendant have taken the plea that the Civil Court had no jurisdiction to entertain the action because identically the same matter was pending before a certain arbitrator and if it be held that such a plea would be available to the defendant, then it must follow that the right to sue remained in suspense until the arbitrator made his award. 61 Ind. Cas. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.

14. Time spent in appeal.

——S. 14.

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal, nor is its operation interrupted, where the decree in appeal is one of dismissal. Where a sale is set aside and an appeal against the decree setting aside the sale is dismissed, limitation for a suit by the vendee to recover the purchase-money from the vendor begins to run from the date of the decree setting aside the sale not from the date when the appeal against the decree is dismissed. A.I.R. 1921 Bom. 184 and A.I.R. 1918 P.C. 151, **Foll.** 100 Ind. Cas. 19=28 P.L.R. 1=A.I.R. 1927 Lah. 734.

——S. 14—Temple trustee is not entitled to deduct period between first Courts decree and the decree in High Court in a suit against the defendants who were the same in a previous suit.

Where the trustee of a temple filed a suit on 15th August, 1919, against the archakas and staneekas for the recovery of offerings of money taken without right, by the latter from the hundials of the temple during the period 25th August, 1911 to 31st August, 1914, and sought exemption from the obvious bar of limitation, on the ground that a suit filed on 25th August, 1911, by the worshippers against the same defendants for a declaration that the lease to the latter of the said offerings by the Devasthanam Committee was invalid, failed both in the Munsiff's Court on 22nd February, 1913, and an appeal before the Sub-Court on 15th December 1913, but succeeded in the High Court on 22nd September, 1916:

Held, that the period between 22nd February, 1913, and 22nd September, 1916, could not be deducted in favour of the plaintiff as the decisions of the Munsif and Subordinate Judge were only declaratory and, therefore the suit was barred by limitation. 89 Ind. Cas. 938= 21 M.L.W. 716=A.I.R. 1925 Mad. 1188.

——S. 14.

Where the plaintiff was given a decree by which it was ordered that on his paying certain sum within a certain date the defendadnt was to execute a conveyance of certain property to him and where the matter went up in appeal and second appeal:

Held, that the time for the payment of the amount by the plaintiff should be calculated only from the date of the decree passed in the second appeal. 39 Bom. 175, **Foll.** 86 Ind. Cas. 358=4 Pat. 378=6 P.L.T. 547=3 Pat. L.R. 43=1925 P.H.C.C. 57=A.I.R. 1925 Pat. 369.

——S. 14—Putni sold for arrears—Sale set aside and possession restored—Appeal by purchaser—Time between restoration of possession and decision of appeal cannot be deducted.

A putni taluk was sold under Regulation VIII of 1819 for arrears of rent for the year 1321 and purchased by one **B.** The defendants sued to set aside that sale. The suit was decreed on the 4th October, 1917, by the Trial Court. The sale was set aside and the defendants were held entitled to possession and they actually got possession in October 1917. There was an appeal by the purchaser but the decree of the Trial Court was confirmed by the High Court on the 12th August, 1919. Plaintiff instituted a suit for rent on the 20th March, 1920. It was originally for rent of 1323 and for the kists up to Falgun 1326. Subsequently on the 4th March, 1921, there was an applica-

tion for the amendment of the plaint and the arrears of rent for the year 1322 were included in the claim. The defendants were restored to possession of the putni in October, 1917, which was more than 3 years before the 4th March, 1921, and there was nothing to prevent the plaintiff from suing them for rent of 1322 and accordingly the claim for the year 1322 was barred by limitation. The period between the date when defendants got possession and the date of decision in appeal cannot be deducted. (1868) 12 M.I.A. 244, **Foll.** 84 Ind. Cas. 425=40 C.L.J. 97=A.I.R. 1924 Cal. 1059.

——S. 14.

Per **Spencer and Devadoss, JJ.**—When an appeal to a Superior Court only results in the decree appealed against being confirmed, in India there is no interruption in running of time calculated from the date of the original decree. 74 Ind. Cas. 416=17 M.L.W. 254=A.I.R. 1923 Mad. 392.

15. Time spent in execution proceedings.

——S. 14—Execution application.

Decree-holder prosecuting **bona fide** execution before Judge believing him **bona fide** though erroneously, to have jurisdiction—Time taken by such proceeding can be excluded. A.I.R. 1940 Pat. 677=19 Pat. 354=7 B.R. 245=191 Ind. Cas. 695.

——S. 14—Applicability to steps taken after decree—"Civil proceeding."

The principle of S. 14 is that if andso long as a person has been bona fide and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court. The reason of the rule applies equally to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree does not affect the underlying principle of S. 14, Lim. Act. A party is seeking the relief that he was eltitled to as much in the execution stage as during the pre-decree stage; and in mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he bona fide believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in another civil 'proceeding' within the meaning of S. 14. (1936) M.W.N. 1221=45 L.W. 270=(1937) 1 M.L.J. 303=I.L.R. (1937) Mad. 161=A.I.R. 1937 Mad. 357=170 Ind. Cas. 524.

——S. 14—Decree against minor—Proceedings in execution attacking validity of decree on the ground of fraud and gross negligence of guardian—Subsequent suit for same relief—Exclusion of period of prior proceedings.

Where the plaintiff instituted a suit to set aside a decree which had been passed against him in a former suit on the ground of the fraud and negligence of his guardian, and sought to exclude in computing the period of limitation for the suit the time during which he was prosecuting certain proceedings in execution of the former suit in which he had attacked the validity of the decree on the ground that the guardian had suppressed the fact of his adoption and was grossly negligent and that he was not a party at all to the decree in the sense that there was no representation of him as the adoptod son:

Held, (i) that the material facts constituting the cause of action in the suit were substantially the same as were alleged in the former application (ii) that the former proceedings must be deemed to have been taken in good faith as the plaintiff had acted under legal advice, (iii) that the executing Court had no jurisdiction to grant the relief sought for in the suit, (iv) that the prior proceedings ware not entirely mis-conceived and the plaintiff was, therefore, entitled under S. 14, to the exclusion of the period during which he was unsuccessfully prosecuting the proceedings in execution. (1932) M.W.N. 1317=A.I.R. 1933 Mad. 197=140 Ind. Cas. 270.

——S. 14—Different reliefs.

While counting limitation for the presentation of an application for the preparation of the final decree, time spent in prosecuting previous application for the execution of the decree cannot be excluded as the two reliefs are different S. 14 (2) will not be applicable. 118 Ind. Cas. 670=1929 A.L.J. 976= A.I.R. 1929 All. 677.

——S. 14—Time spent in execution proceedings.

Time spent in prosecuting the first application must be excluded under S. 14 of the Limitation Act from limitation. 1 Pat. L.T. 612=58 Ind. Cas. 40.

——S. 14 and Art. 36—Time spent in execution proceedings—Extension of time.

Under Ss. 5 and 6 of the Malabar Com. for Ten. Impr. Act, the Court executing the decree in a suit brought for ejectment of a tenant has jurisdiction to award compensation to the decree-holder for damages done to his property after passing of the decree. In a suit brought by a decree-holder against his judgment debtors to recover compensation for damages done by them after and before the decree-holder's entry upon the property, the plaintiff is not entitled under S. 14 of the Limitation Act to a deduction of the time spent by him in prosecuting execution proceedings to obtain the same relief though the Executing Court held that it had no jurisdiction to grant that relief. 33 M.L.J. 463=6 L.W. 696=(1917) M.W.N, 822= 43 Ind. Cas. 6.

——S. 14—Time spent in execution proceedings—Exclusion of time.

Time spent in another execution proceedings in respect of the same property is excluded in counting limitation for application for execution. 78 P.W.R. 1909=52 P.R. 1909=2 Ind. Cas. 102.

——S. 14—Application for execution to wrong court—Jurisdiction—Bona fide mistake—Mistake of law.

Proceedings in execution taken before a wrong court which the petitioner bona fide believed under a mistake of law to have jurisdiction are within S. 14 and the time taken up by such proceedings are excusable under that section. (1900) 5 C.W.N. 150=28 Cal. 238.

16. Time spent in review.

——S. 14—Time spent in review.

In computing the period of limitation prescribed for preferring an appeal, the appellant is entitled to deduct the period during which an application for review was pending. 68 Ind.Cas. 200=A.I.R. 1923 Cal. 291.

——S. 14—Time spent in review.

Before the appellant can claim the deduction of the period occupied in review proceedings, it must be found that the proceedings in the review were reasonably presented and in good faith. 62 Ind. Cas. 957 (Cal.).

——S. 14—Review.

The time spent in prosecuting with due diligence a proper application for review of judgment can be deducted under S. 5. 78 Ind. Cas. 677=22 A.L.J. 365=5 L.R.A. Civ. 298=A.I.R. 1924 All. 867.

——S. 14—Time required for review before Registrar—Registration Act, S. 76.

S. 14 will not help a party in excluding the time taken by him in prosecuting a review petition before the Registrar against an order by him under S. 76 of the Registration Act refusing to register a deed. 18 C. 368; 18 M. 99 and 17 C. 263 ref. to. 10 C. 265 diss. from. (1903) 7 C.W.N. 550 =30 C. 532.

17. Time spent in revision.

——S. 14—Scope—"Civil proceedings in the Court of appeal" — Meaning of—If includes revision petition in High Court.

There is no reason why a revision petition in the High Court should not be regarded as a "Civil proceeding in a Court of appeal." The expression "Court of appeal" should be taken as being used in a broad sense of any Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court. S. 14 ought to be liberally construed.

Manohar Lall, J.—Any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptation of the term. 28 Pat. 102=A.I.R. 1949 Pat. 293=30 P.L.T. 201 (F.B.).

——S. 14 (1).

Word "appeal" in S. 14 (1) includes revision. A.I.R. 1943 Mad. 633=(1943) M. W. N 455 = (1943) 2 M.L.J. 41=213 Ind. Cas. 236.

——S. 14—Quaere.

It is doubtful as to whether the expression "Court of appeal" as used in S. 14 (1), would include a Court of revision. A.I.R. 1938 Cal. 577=68 C.L.J. 261=42 C.W.N. 1051=179 Ind. Cas. 40.

——S. 14—Time taken in civil revision.

The words "Court of Appeal" merely indicate the Court whose order is in question and the words "civil proceeding" are wide enough to include not merely an appeal but also a revision and, therefore, the time taken in a civil revision in a High Court may be excluded under S. 14. A.I.R. 1938 All. 78=(1937) A.L.J. 1308=1937 A.W.R. 1186=I.L.R. (1938) All. 192 =173 Ind. Cas. 461.

——S. 14—Exclusion of time spent in revision.

There is no inflexible rule that when the statute provides for a remedy by way of suit, a party who applies for revision cannot be regarded as having done so in good faith. If, on examining, the proceedings in revision, it is found that there was no want of due diligence and good faith, there is no reason why the plaintiff should be deprived of the benefit of S. 14. A. I. R. 1931 Nag. 17=27 N. L. R. 251=130 Ind. Cas. 145.

——S. 14 (1).—Claim under O. 21, R. 58, Civil. P.C., allowed—Revision by decree-holder against claim order dismissed—Suit by decree holder under O. 21, R. 63 filed more than one year after claim order—**Held,** S. 14 (1) applied. A. I. R. 1943 Mad. 633=1943 M.W.N. 455=(1943) 2 M.L.J. 41=213 Ind. Cas. 236.

——S. 14.

Application under O. 21, R. 100, Civil P.C. dismissed—Revision on order of dismissal, also dismissed after notice to opposite party—Subsequent suit under O. 21, R. 103, Civil P.C., that the plaintiff was entitled under S. 14, Lim. Act, to the exclusion of the time spent in prosecuting the application for revision, but even in this view, the suit was barred. A.I.R. 1931 Nag. 17= 27 N.L.R. 251=130 Ind. Cas. 145.

——S. 14—Revision proceedings.

Where a person does not file a suit within one year after the adverse order under O. 21, R. 103 and chooses to apply for revision of such order, he cannot get the benefit of S. 14 and ask for exclusion of time taken in the revision proceedings. Proceedings contrary to the clearly expressed provisions of law cannot be regarded as civil proceeding in good faith. 39 Mad. 62; A.I.R. 1929 Rang. 297, **Foll.** 32 Bom.L.R. 1186= A.I.R. 1930 Bom. 505.

——S. 14—Time spent in revision.

Time cannot be deducted under S. 14 in favour of a person ocupied in prosecuting a revision petition in the High Court when he had another remedy open to him. 39 Mad. 62=16 M.L.T. 509=27 M.L.J. 640=1 L.W. 952=26 Ind. Cas. 219.

——S. 14—"Civil proceeding"—Revision petition to the High Court.

A revision petition under S. 115, C. P. Code is a "Civil proceeding" within S. 14. The expression 'Court of appeal' in S. 14 means a court which has the power to bring under review the decision of an inferior court, irrespective of the extent of jurisdiction that the superior court may possess in reviewing the decision of the inferior court. Where a plaint was returned for presentation to a proper court and the plaintiff having unsuccessfully appealed against that order moved the High Court in revision and the High Court dismissed the revision petition. **Held,** that plaintiff should deduct the time during which the revision petition in the High Court was pending. 17 Ind. Cas. 593 (Mad.).

——S. 14—Time spent in revision—Plaint returned for presentation to proper court.

Where a person, whose plaint was returned for presentation to proper court, filed an appeal against the order which was also dismissed and thereupon filed a revision petition to the High Court he could deduct the time spent up to the disposal of the appeal but not the time spent in revision. 14 Ind. Cas. 259 (Mad.).

18. Miscellaneous.

——S. 14—Miscellaneous.

Exclusion of time—Provisions for exclusion must be sought within the Act—Equitable considerations cannot be allowed. (1935) A. L. J. 201=A.I.R. 1935 All. 323=4 A.W.R. 1352=153 Ind. Cas. 1058.

——S. 14.

No equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. 100 Ind. Cas. 776=50 Mad. 417=25 M.L.W. 426=1927 M.W.N. 160=39 M.L.T. 116=A.I.R. 1927 Mad. 597=52 M.L.J. 396.

——S. 14.

The Act is undoubtedly an exhaustive Code governing the law of limitation in India. The cases in which the running of limitation can be suspended are contained in the sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended. 35 All. 227 (P.C.), **Foll.** 102 Ind. Cas. 96=49 All. 565=25 A.L.J. 425=A.I.R. 1927 All. 446.

——S. 14.

Exemptions not covered by Ss. 9 and 14 and the other sections should not be imported by Courts to relieve a party from the bar of limitation. 71 Ind. Cas. 495=4 Lah. 90=A.I.R. 1924 Lah. 40.

——S. 14.

Lower Appellate Court exercising its discretion under S. 14—High Court should not interfere unless discretion has been improperly exercised. A.I.R. 1938 Oudh 100=1938 O.W.N. 257=14 Luck. 4=173 Ind. Cas. 648.

——S. 14.

Award under Arbitration Act—Arbitrator filing award in Court at request of plaintiff in whose favour it was made—Objection to Court's jurisdiction by defendant two years later—Court holding it had no jurisdiction—Award filed in another Court—Time spent in deciding question of jurisdiction, held could be excluded. A.I.R. 1938 Sind 50=32 Sind L.R. 151=174 Ind. Cas. 172.

——S. 14.

R, along with three other persons obtained a contract from the Municipal Committee, and the firm in whose name the contract stood deposited Rs. 2,000 by way of security. Subsequently, one S instituted a suit for recovery of some money against R in his individual capacity and obtained a decree against him. In execution of that decree, he made an application for attachment and sale of the amount lying in deposit with the Municipal Committee. That amount was sold in favour of B. In the meantime, one of the four partners of the firm in whose name the contract had been obtained instituted a suit against the Municipal Committee for recovery of the deposit money. Throughout the pendency of the suit or the appeal, B never made an attempt to be brought on the record as a plaintiff in the case. He, however, instituted a suit for recovery of certain sum against the Municipal Committee, on the basis of the alleged purchase of R's rights in the monies lying in deposit with the said Committee. The suit was beyond limitation:

Held, that anything done behind the back of a debtor did not tend to extend the period of limitation originally provided for the recovery of a debt under the Lim. Act. Had R put forward a claim against the Municipal Committee for recovery of the amount lying in deposit with it, he could sue only within the period prescribed for the suit under the Lim. Act. His rights were in the execution of a decree purchased by B who, as an assignee from R, stood in his shoes and could not, by the mere fact of his purchase, override the provisions of the Lim. Act. It could not be argued, that once an attachment of debt is made, the Lim. Act ceases to operate and that an auction-purchaser is at liberty to recover the amount at any time that he likes in complete disregard of the provisions of the Lim. Act. Moreover, B could not claim a fresh period of limitation merely on the basis of an order which referred him to a regular Court of law, if so advised. A.I.R. 1938 Lah. 437=40 P.L.R. 768=181 Ind. Cas. 294.

——S. 14 and Art. 74—Suit to set aside award—Waiver—Estoppel.

Under an award in a business dispute the defts. passed an instalment bond in plff.'s favour. The bond, besides providing for monthly instalments, provided for the recovery of principal and interest on default of three instalments. The deft. paid the instalment till May. The instalments for May and June were returned by the plff. In August he sued to set aside the award which was upheld on 26th February 1908 and by the appellate court by 19th January, 1910. During the appeal the plff.'s vakil applied for the decree of unpaid instalments but it was rejected. After the appeal the plff. sued for the recovery of instalments due. Deft. pleaded Art. 75 as bar. **Held,** there was no default on the part of the deft., that there was waiver on the part of the plff. and that the plff. could not deduct under S. 14 the period of previous litigation and also that the defts. could not plead the bar of limitation and that the plffs. were entitled to interest on the instalments due as there was no true legal tender of those instalments. 23 M.L.J. 335=(1912) M.W.N. 967=17 Ind. Cas. 513.

——S. 14—Period during which right to sue is suspended whether allowable.

An issue was raised between co-defendants in a suit. One of them got judgment in his favour which however, was reversed on appeal. Then the unsuccessful respondent filed a suit against the successful appellant:

Held—That the plaintiff is entitled to deduct the period during which there was a judgment of the lower court in his favour. 12 M. I. A. 244; 7 M. I. A. 323 (357). Courts of Justice ought to relieve parties of the injustice occasioned by its own acts or oversights at the instance of the party against whom the relief is sought. (1907) 7 C.L.J. 59=35 C. 209=12 C.W.N. 326.

——S. 14—Non mention of claim to extension in the plaint, not fatal:—See C. P. C., O. 3, R. 4. 7 C.L.J. 560=12 C.W.N. 617.

——S. 15.

Synopsis.

1. Scope and applicability of section
2. Stay of execution
3. Stay of suit
4. Stay against one of several judgment-debtors or defendants.
5. Injunction
6. Insolvency of judgment-debtor

7. Revival or continuation of execution
8. Notice of suit—Sub-S. (2).
9. Miscellaneous.

1. Scope and applicability of section.

——S. 15—**Scope**—If exhaustive—General principles of suspension of limitation or right of action. **See** Limitation Act, Arts. 62 and 120. 228 Ind. Cas. 493= A.I.R. 1947 A. 256.

——**S. 15—Applicability — Application for final decree.**

There is no reason in principle why an application for a final decree in a suit on the basis of a mortgage should be excluded from the relief allowed by S. 15 of the Limitation Act. I.L.R. (1946) All. 709=A.I.R. 1947 All. 187=226 Ind. Cas. 424=1946 A.L.J. 394= 1946 A.L.W. 457=1946 A.W.R. (H.C.) 452.

——**S. 15.**

Section 15 applies in terms to institution of suits and execution applications only. An application for final decree in a mortgage suit being neither, it does not apply to it. 1945 R.D. 303=1945 O.W.N. (H.C.). 135.

——**Ss. 15, 6.**

Preliminary mortgage decree passed in favour of minor represented by next friend—Next friend dying—Suit stayed under O. 32, R. 10, Civil P. C.:

Held, that in computing limitation for application for final decree, period during which suit was stayed can be excluded. 43 Bom. L. R. 329=A.I.R. 1941 Bom. 203=I.L.R. (1941) Bom. 435=197 Ind. Cas. 30.

——S. 15 (1)—**Applicability—Limitation prescribed under S. 48, C. P. Code.**

S. 15 (1) of the Limitation Act governs S. 48 (1), C. P. Code, and is to be taken into consideration in computing the period of 12 years prescribed by S. 48, C. P. Code. I.L.R. (1947) Nag. 25=228 Ind. Cas. 576 =1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

——**S. 15.**

In computing the period of limitation prescribed for an application for the execution of decree, S. 15, Lim. Act, allows a certain period to be excluded. The provision is perfectly general. It is not restricted to the limitation prescribed by Sch. I, Lim. Act. Section 48, Civil P. C., prescribed limitation. Therefore, the provisions contained in S. 15, Lim. Act, can be invoked in computing the period of limitation prescribed by S. 48, Civil P. C. A.I.R. 1944 Nag. 155=1944 N.L.J. 127= I.L.R. (1944) Nag. 250=217 Ind. Cas. 298.

——**S. 15.**

S. 15, Lim. Act controls S. 48, Civil P. C. and consequently, a stay order from the Court has the effect of extending the period of limitation prescribed by S. 48. A.I.R. 1943 Bom. 164=45 Bom. L. R. 234=208 Ind. Cas. 254.

——S. 15.

Limitation prescribed by Civil P. C., S. 48, is controlled by S. 15. A.I.R. 1939 All. 403=1939 A.W.R. 498 =(1939) A.L.J. 522=I.L.R. (1939) All. 647=183 Ind. Cas. 242 (F.B.)

[Overrules:—

(1) A.I.R. 1919 All. 64=42 All. 118=17 A.L.J. 1140 =52 Ind. Cas. 742.

(2) A.I.R. 1918 All. 216=40 All. 198=16 A.L.J. 71 =44 Ind. Cas. 24.]

——**S. 15.**

On general principles, S. 15 should be applied so as to extend the period prescribed by S. 48 of the Civil P.C. A.I.R. 1939 Bom. 75; 40 Bom.L.R. 1278; I.L.R. (1939) Bom. 87=180 Ind. Cas. 45.

——**S. 15.**

Quaere.—Whether bar of limitation provided by S. 48, Civil P.C. is not controlled by the provisions of S. 15. 9 O.W.N. 513=A.I.R. 1932 Oudh 246=137 Ind. Cas. 603 (1).

——**S. 15 (1).**

Section 15 (1) does not control S. 48, Civil P.C. 8 O.W.N. 642=7 Luck. 49=A.I.R. 1931 Oudh 351= 132 Ind. Cas. 257.

——**S. 15—If controlled by S. 48, C. P. Code.**

Section 48, C. P. Code is not controlled by S. 15, Lim. Act, and the only exception to Sub-S. (1) is that contained in Sub-S. (2). (**Obiter**). 120 Ind. Cas. 315= A.I.R. 1929 Pat. 597.

——**S. 15—Does not apply to S. 48, C. P. Code.**

Section 15, Lim. Act applies only to the periods prescribed in the Schedule to that Act and does not apply to the period of limitation prescribed by S. 48, C. P. Code. 45 Mad. 785, Foll. 113 Ind. Cas. 260= A.I.R. 1928 Mad. 1154.

——**S. 15—Does not control, S. 48, C. P. Code.**

The prohibition against the execution of decrees more than 12 years old contained in S. 48, C.P.Code is not controlled by S. 15, Limitation Act. 70 Ind. Cas. 396=45 Mad. 785=16 M.L.W. 68=1922 M.W.N. 424=31 M. L. T. 140=A. I. R. 1922 Mad. 268=43 M.L.J. 168.

——**S. 15—Applicability—Suits and applications for execution stayed under U. P. Encumbered Estates Act.**

The rule contained in S. 15 of the Limitation Act applies to suits and applications for execution stayed under the U. P. Encumbered Estates Act. I.L.R. (1946) All. 709=A.I.R. 1947 A. 187=226 Ind. Cas. 424=1946 A.L.J. 394=1946 A.L.W. 457=1946 A. W. R. (H.C.) 452.

——**S. 15—Exclusion of time under—Time between date of order under S. 6 of the U.P. Encumbered Estates Act and the rejection of the debtor's application.**

The order passed under S. 6 of the U.P. Encumbered Estate Act, is such an order as contemplated under S. 15 of the limitation Act having an effect of staying all suits in Civil Courts against the debtor. Hence a creditor suing such a debtor on a promissory note is entitled to have the time between the date of the order under S. 6 of the U. P. Encumbered Estates Act and the date of the rejection of the debtor's application under the U. P. Encumbered Estates Act excluded for purposes of computing the period of limitation for his suit against the debtor. 229 Ind. Cas. 62=1947 A.W.R. (C.C.) 33=1947 O.A. (C.C.) 33= 1947 O.W.N. 156=A.I.R. 1947 Oudh 157.

——**S. 15—Compromise decree passed on 16th October 1933—Application by judgment-debtor under S. 4, U.P. Encumbered Estates Act [25 (XXV) of 1934] on 3rd January 1936—Application dismissed for default on 19th April 1938—Application for restoration dismissed—Appeal against dismissed on 2nd December 1938—Application for execution of decree on 9th September 1939—Period from 3rd January 1936 to 2nd December 1938 held should be excluded—Application held was within time—U.P. Encumbered Estates Act. [25 (XXV) of 1934], Ss. 7 (1) (a) and 6 and 4.**

A compromise decree dated 16th October 1933 provided that the judgment-debtor shall pay a certain sum either in a lump sum or in instalments, but within three years. Interest on decretal amount at 6 per

cent. per annum was payable every six months till realisation. In case of default the plaintiff had a right to realise the amount of the decree from the judgment debtor's property. On 3rd January 1936, the judgment-debtor applied under S. 4, U. P. Encumbered Estates Act, which was forwarded to Special Judge in due course but was dismissed for default on 19th April, 1938. The application for restoration was also dismissed. His appeal against the dismissal was also dismissed on 2nd December 1938. The decree-holder applied for the execution of the decree on 9th September 1939. The judgment-debtor contended that the decree became executable six months after its date i.e., from 16th April 1934 when the first default in payment of interest occurred, and no application for execution could be entertained after 16th April 1937 and hence the application dated 9th September 1939 was barred by time:

Held, that though the judgment-debtor was liable to pay interest on the decretal amount every six months, yet, the realisation of the decretal amount would not have been warranted before the expiry of three years. The language of the comprimise was rather vague but the default could hardly be ascribed to the default in payment of six monthly interest:

Held further that the decree became incompetent of execution by reason of S. 7 (1) (a), U.P. Encumbered Estates Act, from 3rd January 1936 when the order under S. 6 of that Act was passed and the incompetency continued till 2nd December 1938, i. e., till the judgment-debtor's application for liquidation of his debts under the Act was dismissed finally. According to S. 15, Limitation Act, the decree-holder was entitled to the exclusion of this period and hence the execution application dated 9th September 1939 was clearly within time. A.I.R. 1946 Oudh 161=1946 Oudh W.N. 125=223 Ind. Cas. 225.

——S. 15.

Since, after an order by the Collector under S. 6, U.P. Encum. Estates Act, no creditor can, during the pendency of proceedings under the Encum. Estates Act, institute a suit for the recovery of the debt due to him from the land-lord, the order of the Collector under S. 6 attracts the provision of S. 15, Lim. Act, and the period intervening between the date of that order and the conclusion of the proceedings under the Encum. Estates Act must, therefore, be excluded in the computation of the period of limitation for a suit by a creditor. A.I.R. 1943 All. 291=(1943) A L. J. 258=I.L.R. (1943) All. 569=1943 A.W.R. H.C. 140 (2)=209 Ind. Cas. 541.

——S. 15—Principle of S. 15 applies to restitution proceedings.

Though the provisions of S. 15 cannot be attracted to proceedings for restitution because an application for restitution under S. 144, Civil P. C., is not to be regarded as an application for execution and the time during which a party is precluded from making an application for restitution cannot be excluded under S. 15, there is no reason why the same principle on which S. 15 is based should not be extended to an application for restitution as well. A. I. R. 1945 Lah. 227.

——S. 15.

Quaere.— Whether S. 15, Lim. Act applies to an instalment rent-decree without an exigibility clause. 24 Pat. 222=A.I.R. 1945 Pat. 398.

——S. 15—Stay by injunction or order—Basis.

The question whether, in order to attract the application of S. 15, in a particular case, a party has been restrained by an injunction or order from instituting a suit must always depend for its decision upon the order or the decree made in the case. Where there is nothing in the injunction or in the decree to support the contention that the party was prevented from instituting a suit for possession at any time before the expiry of the period of limitation, the provisions of S. 15 can have no application. 1944 M. W. N. 711=I. L. R. (1945) Kar. P. C. 43=(1944) 2 M.L. J. 358=49 C.W.N. 6=47 Bom. L.R. 1=A.I.R. 1945 P.C. 5 (P.C.).

——S. 15—Condition for applicability—Barring suit or execution—Must be a bar in substance and not merely in form—Decree declaring promisee not entitled to sue on promissory note—Reversed in appeal—Filing of suit effectively suspended till the date of the appellate decree.

In order to justify application of S. 15 the Court has to see whether the order or decree in a previous litigation between the same parties is in substance and not merely in form one which prevents a party from filing a suit or executing a decree. 5 Pat. L. J. 39; 47 Ind. Cas. 907, **Appl.**

A promissory note was executed in 1917 in renewal of a prior promissory note of 1914 executed by the defendant in favour of the plaintiff's father. The alpintiff's father's sister filed a suit on the promissory note of 1914 alleging that the note was nominally taken in plaintiff's father's name, with her money and that she was entitled to the amount due on the promissory note. The District Munsif passed a decree in her favour in 1919. Subsequent suit was filed on the 11th October, 1922. The decree in 1919 declared the plaintiff's right and directed the present plaintiffs who were defendants in that suit to endorse the promissory note in her favour. There was an appeal and the Subordinate Judge on 13th October, 1919, reversed the decision of the District Munsif and dismissed the plaintiffs' suit. Both the present plaintiffs and the defendant were parties to the previous suit.

Held, that the effect of the decision of the District Munsif was that the present plaintiffs had no right to recover the money due on the first promissory note, and as they were directed to endorse that note to the plaintiff in that suit they could not, when that decree was in force, claim any money on the renewed promissory note till the decision of the District Munsif was reversed in appeal. The fact that they were defendants in that suit made no difference. 105 Ind. Cas. 304=1927 M.W.N. 757=A.I.R. 1927 Mad. 997=53 M.L. J. 520.

——S. 15.—Section 15, Lim. Act is applicable to cases in which either as a direct or as an indirect consequence of an order of a Court, a plaintiff is debarred from instituting a suit. A.I.R. 1943 All. 291=(1943) A.L. J. 258=1943 A.W.R.H.C. 140 (2)=I.L R. (1943) All. 569=209 Ind. Cas. 541.

——S. 15—Injunction or order must be express in its terms.

Section 15 of the Lim. Act is explicit in its terms. In order to call its provision in aid, it must be shown that a suit or application for the execution of a decree had been stayed by an injunction or order. The injunction or order must be express in its terms and a person cannot escape the bar of limitation under that section by pleading in equity an implied order or a collateral litigation which would render the proceedings futile.

Some months after the appellant obtained her decree on a mortgage, certain worshippers impleading both the mortgagor and the mortgagee got it declared that

the security of the mortgage was a religious endowment and not the property of the mortgagor. On an application to execute her decree, the mortgagor sought to treat this decree as an order staying the execution of her prior decrees until it was set aside on appeal by the High Court.

Held, that the applicant was not entitled to exclusion of the period under S. 15, Lim. Act. 37 M.L.W. 607=64 M.L.J. 664=A.I.R. 1933 Mad. 418=(1933) M.W.N. 566=56 M 490=143 Ind. Cas. 1 (F.B.).

Under S. 15, "expressly excluded" means excluded by express words. A.I.R. 1933 Sind 240=148 Ind. Cas. 178.

——S. 15.

Provisions of S. 15, Lim. Act have not been excluded in computing the period of limitation prescribed by Sch. III of Bihar Ten. Act. A.I.R. 1941 Pat. 499=8 B.R. 59=196 Ind. Cas. 609.

——S. 15—Applicability—Stay under administrative orders.

Stay of execution proceedings in lower Courts under administrative orders of Chief Court—Section 15, does not apply. 1940 O.W.N. 1202=A.I.R. 1941 Oudh 93 =1940 A.W.R. 472=16 Luck. 495=191 Ind. Cas. 757.

——S. 15—Application for delivery of possession by auction-purchaser.

Section 15, refers to a suit or an application for the execution of a decree. An application for delivery of possession by the auction-purchasers may be treated as an application in an execution proceeding but it cannot be treated as an application for execution. A.I.R. 1935 Cal. 333=62 C. 66=158 Ind. Cas. 191.

——S. 15.

An order which stayed the execution of a decree being merely an order staying the Court and not putting an end to the rights of either the judgment-creditor or the judgment-debtor to apply for execution will not come under S. 15, Lim. Act. A.I.R. 1935 Mad. 352=164 Ind. Cas. 896.

——S. 15—Applicability—Royal proclamation.

Effect of S. 15 of the Limitation Act relates to injunctions or orders of Court, and not to royal proclamations which prevent the institution of suits by alien enemies. 47 Ind. Cas. 122 (Cal.).

——S. 15 (1)—Applicability—Execution application.

S. 15 of the Limitation Act 1877, was limited in its application to suits and had no application for execution of decrees. But in the case of a previous application for execution followed by an injunction or prohibitory order, the subsequent application for execution could be treated as one in revival of the previous application. S. 15 of the Limitation Act of 1908 however has been so framed as to be applicable not only to suits but also to applications for execution of decrees. 7 Ind. Cas. 886 (Cal.).

——S. 15 (1)—Applicability—Property under Court of Wards—Execution.

A mortgagee holding a decree against an Estate under the Court of Wards management is not entitled to the benefit of exclusion of the period of management by the Court of Wards when the decree itself was not transferred to the Collector for execution. 29 Ind. Cas. 556 (Mad.).

——S. 15—Applicability—Estate under Court of Wards—Madras Court of Wards Act, S. 45.

The provisions of S. 45 of the Madras Court of Wards Act allowing deduction of time during which the estate was under the Court's management will apply when decrees have been transferred to the Collector for execution, and an amendment of it in execution petition cannot be permitted to revive a barred claim. 36 M 378; 35 W. R. 820; 26 M.L.J. 83. Foll. 37 M. 186, Diss. Whether the section of the Limitation Act relating to exclusion of time spent in necessary acts, etc., govern also the 12 years period prescribed by S. 48, C. P. C. 27 M.L.J. 25=24 Ind. Cas. 195.

2. Stay of execution.

——S. 15 (1)—Order for stay—Order granting time to pay decretal amount—If amounts to.

An order of an executing Court granting time to a judgment-debtor to pay the decretal amount by certain date operates as an order for stay within S. 15 (1) of the Limitation Act. I.L.R. (1947) Nag. 25=228 Ind. Cas. 576=1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

——S. 15—Time for payment given to judgment-debtor operating as stay—Must be excluded.

An application for execution was made on 21st September, 1923, the judgment-debtor paid Rs. 50 in part payment and prayed for a week's time for payment of a sum of Rs. 200. The Court granted time to the judgment-debtor to pay the money up to 29th September, 1923. No payment was, however, made on this date and the execution case was dismissed on 3rd October, 1923. On 24th September, 1926 an application for execution was filed:

Held, that the application was not barred. The order granting time prevented decree-holder from taking any further step and the order of 21st September must be considered to be an order of stay of execution and not in furtherance of execution. 119 Ind. Cas. 890=7 Pat. 829=A.I.R. 1929 Pat. 36.

——S. 15—Time to judgment debtor for payment—Does not operate as stay.

An order merely giving time to judgment-debtor for payment is not an order staying execution or an injunction and S. 15 does not apply in such a case. 40 All. 198, **Foll.** 100 Ind. Cas. 475=9 L.L.J. 76=28 P.L.R. 93=A.I.R. 1927 Lah. 106.

——S. 15—Time given for paying decretal amount—Subsequent application within three years from the expiry of such period is within time.

Section 15 applies to suits and execution proceedings alike and so the time for which execution proceedings are stayed is excluded.

Where after stay of execution on application of parties, a certain period is given to the judgment debtor for paying off the decretal amount a subsequent application from execution, made within three years from the expiry of the period given to the judgment-debtor, is within time. 94 Ind. Cas. 482=A.I.R. 1926 All. 473.

——S. 15 (1)—Stay of execution—Order granting time to judgment debtor—If operates as.

An order granting time to the judgment debtor for the payment of the decree-amount is not an order staying execution within S. 15. "Prescribed" in S. 15 refers to periods prescribed by the Act and has no application to the provisions of S. 48 of the C. P. Code. 40 All. 198=16 A.L.J. 71=44 Ind. Cas. 24.

——S. 15—Execution not absolutely stayed.

Section 15 does not come into play if the execution is not completely and absolutely stayed. Thus where the execution of a decree is stayed as regards a portion of the property and the decree-holder is at liberty to proceed against the rest of the property, the section can have no application. 46 Bom. L.R. 666=A.I.R. 1944 Bom. 303.

——S. 15.

Sale of some property of judgment-debtor stayed—Benefit of S. 15 cannot be claimed. A.I.R. 1930 Lah. 75 =190 Ind. Cas. 379.

——S. 15 — Stay of execution — Absolute stay — contemplated.

Section 15 contemplates an absolute stay of execution which renders the decree-holder incapable of taking out execution of the decree. 120 Ind. Cas. 315=A.I.R. 1929 Pat. 597.

——S. 15—Stay-partial.

Quaere.—Whether a partial stay order may be governed by S. 15, Limitation Act. 110 Ind.Cas. 518=51 Mad. 583=28 M.L.W. 60=A.I.R. 1928 Mad. 627=57 M.L.J. 156.

——S. 15—Stay must be absolute — Stay under O 21, R. 53 (1) (b)—Does not apply to.

Section 15 only applies to an absolute stay, and not to a limited stay as would be ordered by the notice under O. 21, R. 53 (1) (b). The stay under this rule does not prevent either the holder of the decree sought to be executed or his judgment-debtor from seeking to execute the original decree and that being the case, time must be taken as running against them. 80 Ind. Cas. 239=48 Bom. 435=26 Bom. L.R. 317=A.I.R. 1924 Bom. 383.

——S. 15—Bar of arrest in execution—Attachment still open—Period of bar therefore not to be excluded.

Though the decree-holders may have been debarred from one particular mode of execution still it is open to them to execute their decree in any other way, e.g., by attachment and sale of any movable or immovable property of the judgment-debtor. Therefore S. 15 of the Limitation Act does not apply. 82 Ind. Cas. 1=5 L.R. A.Civ. 408=A.I.R. 1924 All. 707.

——S. 15 (1)—Stay of execution — Execution of decree in part—Exclusion of time.

Where on appeal an order staying the execution of a decree was obtained, the decree-holder was entitled under S. 15 (1) to exclude the period of stay in computing time for an another execution application. The fact that the execution order related only to a part of the decree is immaterial. 38 Bom. 153=15 Bom.L.R. 936=21 Ind. Cas. 713.

——S. 15(1)—Stay of execution—Partial—Execution of time.

A partial stay of execution in respect of a particular property against which execution is sought amounts to a stay of execution within the meaning of S. 15 of the Limitation Act so that in computing the period of limitation prescribed for an appplication for execution of a decree the time during which the execution of the decree has been partially stayed should be deducted. 3 U.B.R. (1918) 73=46 Ind. Cas. 399.

——S. 15—Stay of execution.

Section 15 does not contemplate case of one decree being rendered impossible of execution by subsequent inconsistent decree passed in other suit.

A decree-holder obtained a decree for possession of a temple in 1926. Before he could execute his decree, a suit was instituted by the **pujari** of the temple and a decree was passed in 1928 declaring the pujari to be the owner of the temple an restraining the decree-holder in the previous suit from taking possession of the temple. In 1931, this decree was set aside by the High Court and the decree-holder in the previous suit applied in 1933 for execution of his decree passed in 1926:

Held, that S. 15 did not apply, the decree of 1928 did not operate as an injunction or stay of execution within the meaning of S. 15 and therefore, the decree of 1926 was time-barred in 1933 when the decree-holder attempted to put the decree into execution. 1939 A.W.R. 93=A.I.R. 1939 All. 82=(1939) A.L.J. 29=I.L.R. (1939) All. 207=180 Ind. Cas. 927.

——S. 15—Stay of execution.

The decree-holder was a judgment-debtor under the decree passed in previous case which decree he was challenging in appeal. He applied to the Court for stay pending the disposal of the appeal. The Court ordered stay on terms as to security. The then judgment-debtor, (the decree-holder in subsequent decree) was offering as security the subsequent decree which he had, by that date, obtained. It was a decree for a sum of over Rs. 10,000 and it was against a judgment-debtor whose estate had recently been taken under the management of the Court of Wards. The Judge considered the security proper and ordered that the officer-in-charge of the Court of Wards should be written to deposit the amount in Court. The order contained the following sentence: "The judgment-debtor undertakes not to accept any payment direct from the Court of Wards towards the satisfaction of his decree":

Held, that the order was not tantamount to a stay by an injunction or order within the meaning of S. 15. 1939 N.L.J. 40=A.I.R. 1939 Nag. 81=I.L.R. (1940) Nag. 627=181 Ind. Cas. 516.

——S. 15—Stay of execution.

Where, after a person had obtained a decree against another, a Receiver was appointed for the judgment-debtor's properties in another suit and on an application made by the decree-holder in the latter suit for permission to levy execution against the property in the hands of the Receiver, the Court ordered that he should wait for some time and it appeared that there was in fact no application for execution pending in the former suit at the time when the application for permission was made:

Held, that the order made in the latter suit was not in any sense a stay of the execution by injunction or order within S. 15 and the decree-holder was not entitled to exclude the period during which that order was in force in computing the period for a subsequent application to execute the decree. 10 O.W.N. 226=37 L. W. 335=(1933) M.W.N. 112=A.I.R. 1933 P.C. 52 =14 P L.T. 167=37 O.W.N. 548=(1933) A.L.J. 359 =12 Pat. 195=64 M.L.J. 599=35 Bom. L. R. 526= 57 C.L.J. 276=60 I. A. 43=141 Ind. Cas. 760 (P.C.).

——S. 15—By agreement.

Only an agreement to desist from execution would not attract the provision of S. 15, Limitation Act. 100 Ind. Cas. 20=38 M. L. T. 42=A.I.R. 1927 Mad. 347=52 M. L. J. 137.

——S. 15 (1) and Art. 182 (5)—Agreement not to execute—Running of time.

An agreement not to arrest the judgment-debtor is not binding on the decree-holder or judgment-debtor especially where it had been broken by the decree-holder and it would not save the period of limitation from running against him. 13 A.L.J. 305=28 Ind. Cas. 381.

——S. 15—There must be clear order for stay.

Although under S. 15 a written order staying the execution of the decree is not necessary, there must be clear order staying the execution of the decree. 60 Ind. Cas. 916=23 Bom. L.R. 107=A.I.R. 1921 Bom. 33.

——S. 15 (1)—Stay of execution—Due to decree-holder—Exculsion of time.

Where the stay of a sale in execution is due entirely to the decree-holder, such stay cannot be regarded as a legal stoppage of the execution proceedings, so as to entitle the decree-holder to the benefit of S. 15 of the Limitation Act. (1920) P.H.C.C. 109=53 Ind. Cas. 85.

——**S. 15 and Art. 182—Stay of execution—Execution application—Case struck off—Suspension of limitation.**

Where the final decree in a mortgage suit was set aside against some of the owners of the equity of redemption, and the case was ordered to be retried, the decree-holder's application for execution, against the other defts. was struck off till the liability of the defts. against whom the decree had been set aside, was finally settled the execution of the decree is thus stayed until the liability is determined. 47 Ind Cas. 907 (Cal.).

——**S. 15 (1)—Stay of execution—Decree accepted as security for costs of appeal—If operates as.**

Plaintiff appealed to the Privy Council and offered as security for respondent's costs in that appeal a a decree which he had obtained against the latter in another suit. **Held,** that the acceptance of the decree as security did not amount to an order by the Court that execution of the decree should not proceed pending the disposal of the appeal to the Privy Council. The period between the dismissal of the suit by the High Court and the date on which the application for execution of the decree was filed could not be excluded under S. 15 of the Limitation Act. 3 Pat. L. J. 132=44 Ind. Cas. 570.

——**S. 15 (1)—Stay of execution—Attachment—Before judgment—If operates as.**

An attachment before judgment is not an injunction or order staying execution within the meaning of S. 15 of the Limitation Act whether the subject matter of attachment is decree or any other property. 21 C.W.N. 1147=40 Ind. Cas. 816.

——**S. 15 (1)—Stay of execution—Attachment of decree, if operates as—Limitation—C. P. Code, O. 21, R. 53.**

An attachment of a decree under O. 21, R. 53, C. P. C. operates as a stay of execution of the decree by order of Court and that the time during which it was under attachment should be deducted in computing the period of limitation for execution. 30 Ind. Cas. 587 (Cal.).

——**S. 15 (1)—Stay of execution — Adjournment of execution application, if operates as.**

In order to apply S. 15 a party must point out the injunction or order staying the execution of the decree, the dates of its issue and withdrawal. The section does not apply where the hearing of an application is adjourned for some time as the judgment-debtor objected to the execution. 36 Ind. Cas. 939 (Cal.)

——**S. 15.**

If, by the order of a competent Court, the decree has been rendered a nullity, the period during which that order is in force must be excluded, otherwise the period of limitation allowed to the decree-holder would be reduced to less than three years. A.I.R 1944 All. 88=(1944) A.L.J. 98=1944 O.W.N.H.C. 50=1944 A.W.R.H.C. 67=I.L.R. (1944) All. 197=212 Ind. Cas. 621.

——**S. 15—By injunction or by decree being set aside—Period excluded.**

Where a decree-holder is restrained by injunction from executing the decree or where his decree has ceased to exist having been set aside in a separate suit the time of injunction or the period for which the decree ceased to exist should be excluded. 102 Ind. Cas. 327=6 Pat. 635=8 P.L.T. 770=A.I.R. 1928 Pat. 86.

——**S. 15—Stay on condition of security—Period from date of order to date of acceptance of security to be deducted.**

Where an order granting stay of delivery of possession is made conditional upon security being furnished and security is subsequently given and accepted, the order of stay must be taken to have been in force from the date of the original order granting stay and the time that elapsed between the date of the stay order and the date of the actual acceptance of the security should also be deducted in favour of the purchaser. 99 Ind. Cas. 632=25 M.L.W. 108=1927 M.W.N. 60=A.I.R. 1927 Mad. 391.

——**S. 15—By injunction—Period of exclusion—From date of last execution to date of dissolution of injunction.**

On 7th July, 1917, the execution of a mortgage decree for a sale of a house was first taken out. On September 12th, 1917, injunction was granted restraining the sale of half the house. On 19th November, 1917 an application was made to take a step-in-aid of execution with respect to the other half of the house. That half of the house was sold. The injunction was dissolved on 8th November, 1918. Application for execution with respect to the other half was made on January 10th, 1922:

Held, that the last application was made on 19th November, 1917, and limitation began to run from that date. The only period which the decree-holder was entitled to exclude on account of the injunction was from 19th November, 1917, the date on which limitation began to run, to 8th November, 1918, the date on which the injunction was dissolved. Therefore, the application made on 10th January, 1922, having been made more than 3 years after the date of the last application, after deducting the period covered by the injunction the application was time-barred. 78 Ind. Cas. 478=A.I.R. 1925 Pat. 298.

——**S. 15—Decree-holder required to produce judgment in a suit—Period till that judgment was passed should be excluded.**

The decree-holder was asked by the executing Court to produce the judgment in a certain suit before a certain date before the decree could be transferred to the Collector for execution. The judgment in that suit was passed at a much later date. Upon the decree holder's failure to produce the judgment before the required date, the Court dismissed the application for execution. In calculating the limitation for a subsequent execution application by decree-holder:

Held, that the time during which the suit, the judgment in which was required to be produced, continued should be excluded. 64 Ind. Cas. 598=19 A.L.J. 905=A.I.R. 1921 All. 174.

——**S. 15—Injunction as to part by another Court—Stay as to the rest by executing Court—Period till both the injunction and stay ceased to be operative to be excluded.**

Sub-section (1) of S. 15 contemplates the stay of execution of a decree either by injunction or by order; an injunction to stay execution may be issued in a proceeding other than the execution proceedings, while an order for stay of execution may be made be the execution Court itself in the course of those proceedings.

Where a decree is stayed by injunction as to part of the properties and by order of the executing Court itself as to the rest, the decree-holder is entitled to deduct the time during which the injunction and the order continued, the date on which the injunction was issued and the order was made, and the date on which the injunction and the order ceased to be operative. 64 Ind. Cas. 594=34 C. L.J. 163=A.I.R. 1921 Cal. 696.

——S. 15—Injunction—Entire proceedings stayed—Period of stay excluded.

Where in consequence of an injunction obtained by a claimant to a share in the property sought to be sold in execution, the executing Court stays the whole proceedings, S. 15, Sub-section (1) applies, and the decree-holder is entitled to a deduction of the time between the date when the order for stay was made and the date when that order ceased to be operative. 64 Ind. Cas. 849=35 C.L.J. 135=A.I.R. 1921 Cal. 594.

——S. 15 (1) and Arts. 181 and 182—Execution—Limitation, suspension of.

Where no obstacle actual or resulting is imposed upon the execution of a decree by the Executing Court or by a Court before which an appeal is pending or by the Court before which a suit or appeal to contest the validity of the decree or the order passed in execution, is awaiting trial, there is nothing to stop the running of limitation either under Art. 181 or under Art. 182. 6 O.L.J. 656=54 Ind. Cas. 426.

——S. 15 and Art. 182—Stay of execution—Order permitting execution on security—Deduction of time during which order was in force.

Pending appeal to the Privy Council, the High Court made an order allowing the decree-holder to execute the decree on furnishing security within one month. The decree-holder was unable to find the required security. Thereupon execution could not proceed and the Privy Council eventually dismissed the appeal for default. **Held,** that the order of the High Court whatever its form, did in fact stay the execution of the decree, prevented him from executing the decree unconditionally as he was entitled to do. As the condition could not be performed, the effect was to stay the execution altogether. The time during which the order was in force could be deducted in reckoning the period of limitation for filing the execution petition. 5 Pat. L. J. 39=(1919) P.H.C.C. 434=53 Ind. Cas. 9.

——S. 15 (1) and Art. 181—Stay of execution.

Where there was nothing to prevent the decree-holder from prosecuting the execution such as an order staying further execution, the decree-holder is not entitled to deduct the time spent in proceedings started by the judgment-debtor. (1917) P.H.C.C. 58=42 Ind. Cas. 811.

3. Stay of suit.

——S. 15 and Arts. 109 and 129—Suit for mesne profits — Execution proceedings to take delivery of property restrained—S. 15 of the Limitation Act, if applies—Acknowledgment of liability for mesne profits—Period for which mesne profits could be decreed.

The plaintiff purchased certain property in execution of a mortgage decree on 22nd November, 1937, and the sale was confirmed in his favour on 18th February, 1938. Some of the defendants then filed a suit impugning the mortgage and both the trial Court and the appellate Court (High Court) dismissed the same. Pending the disposal of the appeal the defendants obtaining an order of injunction restraining the plaintiff from interfering with their possession on 7th November, 1938, and the order was confirmed on 6th March, 1939. After the appeal was dismissed, the plaintiff obtained delivery of the property on 12th November, 1941, and sought during the course of execution to obtain mesne profits by way of restitution, and during these proceedings, on 8th December, 1942, some of the defendants filed a counter in which inter alia they admitted that if at all, they were liable only from and after 6th March, 1939. The plaintiff's application for mesne profits was dismissed, where upon he filed the present suit for the same from 22nd November, 1937, the date of his purchase to 12th November, 1941. The trial Court gave a decree for mesne profits only for three years prior to the date of the suit, but the appellate Court admitting the counter, as additional evidence and treating the contents therein as an acknowledgment gave a decree from 7th November, 1938, the date of the order of injunction passed by the High Court. On appeal, held, (i) that S. 15 of the Limitation Act did not, in so many words, apply to the facts of the case, for the institution of the present suit was not stayed by the injunction order and that the institution of a suit can never be said to be futile if it would thereby prevent the running of limitation.

(ii) It cannot be said that the defendant's possession was not wrongful and it could become rightful possession by the filing of the suit.

(iii) But even treating the counter as an acknowledgment, it was made on 8th December, 1942, and can therefore only be regarded as an acknowledgment of mesne profits that had not become time-barred by that date and the acknowledgment would entitle the plaintiff to mesne profits only from 8th December, 1939; and as it was not signed by all the defendants it would bind only those who signed it. 61 L.W. 609=A.I.R. 1949 Mad. 279=1948 M.W.N. 631=(1948) 2 M.L.J. 314.

——S. 15—Stay of suit.

Mere stay of delivery of possession of property in execution of a decree cannot serve to extend time for the institution of a suit for mesne profits under S. 15, Lim. Act.

A plaintiff cannot be allowed any extension of time to save limitation merely on equitable consideration unless the extension is provided for by the statute. A.I.R. 1933 Lah. 615=34 P.L.R. 1085=146 Ind. Cas. 939.

——S. 15—Estate attached under Chota Nagpur Encumbered Estates Act—Suit if filed, keeps alive claim—If not filed, period of attachment cannot be excluded.

There is no provision in the Chota Nagpur Encumbered Estates Act providing that a vesting order under S. 2 has the effect of barring the institution of suits. 20 Cal. 609, Diss. But if such a suit be instituted, the institution of the suit has the effect of keeping the claim alive as against the person whose estate is attached under the Act. But where no such suit is filed, the period during which the property was under attachment cannot be excluded by the mortgagee of the attached property from limitation for instituting his suit on mortgage. 105 Ind. Cas. 643=7 Pat. 109=9 P.L.T. 252=A.I.R. 1929 Pat. 179.

——S. 15 (1)—Stay of suit —Ejectment suit—If suspends rent suit.

During the pendency of a suit for ejectment the right to sue for rent for the period of suit continues and the limitation for a suit for the rent is not suspended by the ejectment suit. 11 W.R. (P.C.) 5 Dist. 9 C. 255 (P.C.), Foll. 57 Ind. Cas. 992 (Cal.)

4. Stay against one of several judgment-debtors or defendants.

——S. 15—Stay against one of several judgment-debtors.

The institution and continuance of the insolvency proceedings against one of the judgment-debtors does not prevent the decree-holder from proceeding to execute the decree as against the other judgment-debtors as the liability of the other judgment-debtors in respect of the decree is not in any way affected by the insolvency proceedings. The period between the stay order and final disposal of insolvency case cannot be excluded under S. 15 as against the other judgment-debtors. A.I.R. 1940 Pat. 149=6 B.R. 64=21 P.L.T. 618=184 Ind. Cas. 701.

——S. 15—Stay against one Judgment-debtor—Period of stay not excluded against other Judgment debtors.

Period which should be excluded from computation because there was a stay order against one judgment-debtor should not be excluded from computation as against the other judgment-debtors, when there is no stay order against them. A.I.R. 1921 Mad. 116, Diss. 110 Ind. Cas. 518=51 Mad. 583=28 M.L.W. 60=A.I.R. 1928 Mad. 627=55 M.L.J. 156.

——S. 15—Several defendants—Plaintiff entitled to deduct time against one defendant entitled against all defendants as well.

In a single suit brought against several defendants if the plaintiff is entitled to deduct a certain period from the period of limitation in respect of one defendant, he is also entitled to the same period of limitation in the case of the other defendants. A.I.R. 1922 Pat. 549 and A.I.R., 1927 Pat. 344, Foll. 111 Ind.Cas. 749=9 Lah. 519=A.I.R. 1928 Lah. 349.

See also: 70 Ind. Cas. 109=3 Pat. L.J. 643=1922 P.H.C.C. 254=A.I.R. 1922 Pat. 549.

——S. 15—Suspension.

Where execution against one of several joint judgment-debtors is stayed, limitation is suspended against the others also. 61 Ind. Cas. 901=13 M.L.W. 59=1921 M.W.N. 188=A.I.R. 1921 Mad. 116.

——S. 15 and Sch. I, Arts. 181 and 182—Stay of execution—Mortgage decree against three persons—Stay order on application by one under Chota Nagpur Encumbered Estates Act—Fresh application for execution after stay order withdrawn.

Where an application for execution of a mortgage decree against A, B and C was dismissed by reason of an order staying the proceedings, issued by the Commissioner on an application therefor by A under the Chota Nagpur Encumbered Estates Act, a fresh application for execution after the withdrawal of the stay order must be deemed to be one for the revival and continuance of the previous application and is governed by Art. 181 of the limitation Act, Where the mortgaged property was to be sold substantially as the property of A and it would have been futile for the decree-holder to proceed against B and C while the order of stay of execution against A was in force, the decree-holder is, as against B and C entitled to a deduction, under S. 15 of the Limitation Act, of the period during which the stay order was in force. 20 Ind. Cas. 439 (Cal.)

5. Injunction.

——S. 15—Attachment before judgment of decree—Amounts to injunction.

An attachment before judgment of a decree and a consequent order issued by the court attaching the decree absolutely prohibiting the execution of the decree by anybody amounts to an injunction and the period of its pendency is excluded under S. 15 in executing the decree. 80 Ind. Cas. 103=19 M.L.W. 650=1924 M.W.N. 527=47 Mad. 641=A.I.R. 1924 Mad. 673=47 M.L.J. 4.

——S. 15 (1)—Injunction—If includes attachment.

The words "injunction or order" in S. 15 of the limitation Act do not include "attachment". 42 Mad. 637=10 L W. 333=26 M.L.T. 147=(1919) M.W.N. 448=50 Ind. Cas. 380.

——S. 15 (1)—Injunction—Execution.

Where a decree-holder is prevented by an injunction from executing his decree he must apply for execution within three years from the termination of the injunction period, to save his decree from being barred. 18 A.L.J. 642=56 Ind. Cas. 1006.

——S. 15—Injunction—Order striking off case on ground of insolvency—Revival of execution—Execution against firm.

A decree-holder applied on 30-8-1912 for execution of a decree against the firm B and J. On 1-10-1912 an order striking the case off the list was passed on the ground that the firm had been adjudicated an insolvent. On 3-4-1916 it was decided in the insolvency proceedings that B alone was the proprietor of the firm. Thereafter on 19-4-1917 they made an application for execution against J. Held, that the application for execution dated 19-4-1917 was not barred by limitation under Art. 182 as the application of 13-8-1912 was to be considered against all the persons who were mentioned in the decree as members of the firm. Even if the application dated 19-4-1917 be regarded as new, the order of 1-10-1912 amounts to an injunction within S. 15 of the limitation Act. The period from 1-10-1912 to 3-4-1916, is therefore to be excluded. 17 P.W.R. 1919=51 Ind. Cas. 64.

——S. 15—Execution—Injunction—Limitation.

The period during which an injunction not to execute a decree is in force will be deducted from the period of limitation for execution of the decree. 2 Pat. L. J. 24=38 Ind. Cas. 85.

——S. 15 (1)—Injunction—No order of—Exclusion of time.

A party cannot claim to exclude under S. 15 the time during which no injunction staying a suit was in force against him 27 M. L. J. 734=26 Ind. Cas. 267.

——S. 15 and Art. 182—Injunction—Exclusion of time—Pendency of claim suit.

Where in execution of a decree a claim was put in by two persons and was disallowed and the latter brought a regular suit to set aside the attachment and an injunction was obtained and an order was passed releasing the property from attachment, it was held that an application by the decree-holder for execution within three years of the date when the attachment was raised was not barred by limitation since time began to run from that date and that time should in any case be deducted during which the injunction staying sale was in force. 34 All. 436=9 A. L. J. 540=14 Ind. Cas. 343.

6. Insolvency of Judgment—debtor.

——S. 15—Applicability—Exclusion of period between date of adjudication and the date of the closing of the proceedings. **See** PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 78 (2.) (1947) 1 M.L.J. 4=A.I.R. 1947 Mad. 238.

——S. 15—Insolvency of judgment-debtor—Whether insolvency operates as stay.

Quaere. Whether an order adjudicating a person as an insolvent does not operate as an order staying execution of the decree against him. 110 Ind. Cas. 518=51 Mad. 583=28 M. L. W. 60=A.I.R. 1928 Mad. 627=55 M.L.J. 156.

——S. 15—Adjudication—No bar to suit—Period of pendency of insolvency—Not to be excluded.

It cannot be said that when an adjudication order is made there is any injunction or order against the institution of a suit by a creditor. Section 17 of the Presidency Towns Insolvency Act does not present an absolute bar to the creditor's right to institute a suit but only prevents him from suing without the leave of the Court. And it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit. The creditor cannot, therefore, claim a deduction of the time during which the insolvency was pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed. 67 Ind. Cas. 757 24 Bom. L. R. 509=47 Bom. 244=A. I. R. 1923 Bom. 33.

——S. 15 and Art. 182—Stay of execution—Insolvency proceedings—Absence of protection order—Time does not stop.

The pendency of an insolvency proceedings under the Presy. Towns Ins. Act does not in the absence of a protection under S. 15 of the Act, bar the remedy of the decree-holder to execute his decree by the arrest of the judgment-debtor. The limitation for the execution of a decree, therefore continues to run against a decree-holder during the pendency of an insolvency proceeding (1918) P. H. C. C. 357=47 Ind. Cas. 798.

——S. 15 (1)—Stay of execution—Insolvency proceedings, if operates as.

The pendency of an insolvency proceedings at the instance of the judgment-debtor will not arrest the running of time as against the decree-holder seeking execution unless the proceedings are stayed by the Insolvency Court or Executing Court. 80 P. W. R. 1912=155 P. L. R. 1912=14 Ind. Cas. 335.

7. Revival or continuation of execution.

——S. 15—Where there is no stay order passed under S. 10, Agri. Debtors Relief Act, S. 15, Lim. Act, has no application. Where an execution case is struck off for the time being, because some other suit is pending with regard to the property involved in the execution, the application to proceed with the execution after the matter has been finally decided in appeal and revision amounts to an application for revival of the original application, although the application may not say it in so many words and is governed by Art. 181, Lim. Act. A. I. R. 1941 Pesh. 17=212 Ind. Cas. 628.

——S. 15—A decree was passed on January 17, 1931. An application for execution was made on January 22, 1931. Property was attached but the judgment-debtor made an application for being declared an insolvent, and on January 31, 1931, had obtained an order from the Insolvency Court that execution be stayed. In the circumstance, the decree-holder's Pleader made a statement to the execution Court on February 17, 1931, which was the date fixed for sale that the case be consigned to record, but that attachment should continue. Accordingly, the execution Court made an order to the same effect. Ultimately, the judgment-debtor withdrew his insolvency petition on September 9, 1932. On August 8, 1934, the decree-holder made another application praying that the execution proceedings which were consigned to records be revived. He prayed in the alternative that proceedings be started afresh against the property which had been attached previously and the said property be sold :

Held, that the application dated August 8, 1934, should be treated as a continuation of the previous application dated January 22, 1931. 1936 O. W. N. 1239=A. I. R. 1937 Oudh 158=12 Luck. 743=165 Ind. Cas. 798.

——S. 15—The enlargement of the scope of S. 15 by the Lim. Act of 1908 has not superseded the principle that a later application can, in certain circumstances, be treated as an application for revival or in continuation of the earlier application. Section 15 contemplates the filing of an application for execution and does not in terms, apply to any other application. If, therefore, an application is made by the decree-holder, after the removal of the bar to execution, to revive or continue an application for execution which could not have been by reason of the bar, proceeded with, such an application not being in terms a fresh application for execution, does not come within the section. A.I.R. 1936 Cal. 239=39 C.W.N. 1030=63 C. 57=162 Ind. Cas. 654.

——S. 15—Revival of pending execution—Not prohibited.

The Limitation Act, as amended, does not prohibit either expressly or by necessary implication the making of an application for revival of execution pending in Court. 27 All. 334 (P.C.) and A. I. R. 1921 All. 99, Foll. 100 Ind. Cas. 692=49 All. 276=25 A.L.J. 201=A.I.R. 1927 All. 16 (F.B.).

——S. 15—Revival of execution.

There is an essential difference between an application for the execution of a decree and an application to a Court asking it simply to revive a previous application made for the execution of the decree. It is to an application of the former class that S. 15 would apply and not to an application of the latter class.

Per **Sulaiman, J.**—The question of exclusion of time can only arise when a fresh application for execution is made, whereas it is only a pervious application which has not been properly and finally disposed of which can

be revived. The application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely to request the Court to take up and continue the proceedings which have not finally terminated, but which have remained in abeyance for some reason or other beyond his control. It is not correct to say that the amendment of S. 15 was intended to sweep away and replace the old doctrine of revival. The two principles are not co-extensive or identical. The application for revival not being a fresh application for execution cannot be governed by Art. 182. The proper article is Art. 181. 42 All. 564, Foll. 100 Ind. Cas. 692=49 All. 276=25 A.L.J. 201=A.I.R. 1927 All. 16 (F.B.).

——S. 15—Execution suspended by orders of Court—Revival after three years—If valid.

Where the execution of a decree has been suspended through no act or fault of the decree-holder, the execution proceeding will not be time-barred even if the subsequent application is presented more than three years after the order of suspension was passed. 27 All. 334 (P.C.); 43 All. 383 and 37 Cal. 796, Foll. 87 Ind. Cas. 205=6 L.R.A. (Civ.) 249=A.I.R. 1925 All. 572.

——S. 15—Execution suspended by objection found groundless—Subsequent application may be a continuation or revival.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction. 37 Cal. 796, Foll. 68 Ind. Cas. 207=35 Cr. L. J. 84=26 C.W.N. 338=A.I.R. 1921 Cal. 472.

——S. 15—No fault of decree-holder—Right to revive suspended execution.

Where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended. 61 Ind. Cas. 417=43 All. 383=19 A.L.J. 174=A.I.R. 1921 All. 99.

——S. 15 (1)—Execution—Application in continuation of a former application - When valid.

An application **prima facie** barred could be deemed as in continuation of a former application only if the decree-holder shows that he has not been remiss. 35 Ind. Cas. 579. (Pat.).

8. Notice of suit—Sub-S. (2).

——S. 15 (2)—Section 15 (2) applies in computing the special limitation under S. 535 (2), Beng. Municipal Act. A.I.R. 1942 Cal. 544=46 C. W. N. 943=202 Ind. Cas. 762.

——S. 15—Period of one month's notice can be deducted under S. 15 from period of three months provided in S. 146, Ben. Local Self Govt. Act. A.I.R. 1940 Cal. 305=44 C.W.N. 362=188 Ind. Cas. 705.

——S 15 (2)—Plaintiff sent some goods by Railway from **F** to **Z**. The delivery of the goods was not taken by the consignee. After some correspondence between the parties, the defendant railway wrote to the plaintiff to take delivery of the goods within 15 days from the receipt of the letter. Within this period, the plaintiff sent his man to **Z** to take delivery. On reaching there the plaintiff's man found that the goods had been sent by the Railway authorities to the lost property office at **H**. The plaintiff wrote to the Chief Commerical Manager who asked him to pay the railway freight from **Z** to **H** and back from **H** to **Z** and take delivery; the plaintiff refused to do so. He thereafter filed a suit for damages for wrongful detention of goods. The summons was served on Agent, E. I. Ry. The goods had arrived at Zon December 30, 1935, and the suit was filed on February 24, 1937:

Held, that the suit was within time even if Art. 31 applied. The period of two months should be deducted from the period of limitation for the suit under S. 15 (2). A.I.R. 1939 All. 277=(1939) A.L.J. 154=I.L.R. (1939) All. 392=1939 A.W.R. 216=181 Ind. Cas. 948.

——S. 15—Section 15, does not operate so as to exclude from the benefit of the proviso to S. 48 (c), Ben. Ten. Act, any period covered by the ejectment notice. I.L.R. (1937) 1 Cal. 499=A.I.R. 1937 Cal. 656=174 Ind. Cas. 31.

——S. 15—Per **Jailal, J.**—The phraseology of S. 15 (2) is sufficient to include a notice which has been given in accordance with the requirements of an enactment of a local Legislature.

[Whether S. 54, U. P. Court of Wards Act is an enactment in force for the time being in the Province of Delhi within the meaning of S. 15 (2) considered.] 38 P.L.R. 992=A.I.R. 1937 Lah. 41=I.L.R. (1937) Lah. 11=164 Ind. Cas. 1090.

——S. 15—Although under S. 15 (2), the period of notice prescribed by the Court of Wards Act will be excluded in computing the period of limitation for a suit, it cannot be made the basis of an argument that a suit is barred in every case in which notice is prescribed by the Court of Wards or any other Act. 1937 O.W.N. 165=A.I.R. 1937 Oudh 282=13 Luck. 171=166 Ind. Cas. 928.

——S. 15 (2)—Section affects the provision of S. 167, Bom. District Municipal Act and consequently, a plaintiff is entitled to exclude the period of one month of notice from the period of limitation for his suit. A.I.R. 1932 Bom. 259=56 B. 135=34 Bom. L.R. 143=137 Ind. Cas. 545.

——S. 15—Section 15 (2) does not apply to extend time for filing suit under S. 167 of the Bombay District Municipal Act (1901).

Section 167 of the Bombay Dt. Municipal Act (1901) in plain and unambiguous terms prevents the claimant from commencing his suit after six months from the date of act complained of and thereby expressly excludes the time being extended, under S. 15, Cl. 2 of the Limitation Act. Public interests require that such suits should be instituted without any delay and the period of six months is sufficiently long to enable a claimant to comply with both the conditions precedent required by S. 167 of the Municipal Act. 32 Cal. 277, Foll. 90 Ind. Cas. 44=A.I.R. 1925 Sind 322.

——S. 15—Suit against Government wards—Government wards, at the date of cause of action Ceasing to be wards before hearing—Time is extended by two months.

Plaintiff is entitled to include in the limitation period the two months required to serve notice as required by S. 31 of the Court of Wards Act, on defendants who were Government wards at the time the cause of action arose, and the extension cannot be refused on the ground that they ceased to be wards before the suit came on for hearing. 81 Ind. Cas. 750=26 Bom. L.R. 364=A.I.R. 1924 Bom. 364.

——S. 15—Suit to recover water cess paid under protest—Period of notice of suit—Exclusion of period of. 73 Ind. Cas. 106=46 Mad. 485=17 M.L.W. 683=32 M.L.T. 236=1923 M.W.N. 258=A.I.R. 1923 Mad. 652=45 M.L.J. 12.

——S. 15(2)—Notice—Suit against private person—Joinder of Secretary of State—Limitation.

Where a plaintiff under a mistake of law or fact conceives that he has a cause of action against the Secretary of State and impleads him as a party along with a private individual he shall not be entitled to invoke S. 15 of the Limitation Act and to extend the period of limitation ordinarily allowed against the private person by two months. 22 O.C. 342=2 U.P.L.R. (O.C.) 25=54 Ind. Cas. 535.

——S. 15 (2)—Applicability—Suits under S. 104-A of the B. T. Act.

S. 15, sub-S. (2) of the Limitation Act, does not extend the period of six months mentioned in S. 104-A, of the B. T. Act. 45 Cal. 934=27 C.L.J. 374=45 Ind. Cas. 228.

——S. 15 (2)—Notice—C.P. Code, S. 80.

When notice to government is compulsory under S. 80 C.P.C. the period of two months should be excluded in computing the period of limitation prescribed for the suit against government. 42 P.W.R. 1917=52 P.R. 1917=38 Ind. Cas. 600.

——S. 15—Claim against joint defendants—Notice necessary against only one defendant—Period of notice given excluded with regard to other defendants also.

If it is necessary, for the plaintiff to bring a suit claiming relief against all the defendants jointly, and if notice under enactment was necessary against one defendant only and was in fact given, the period of notice is to be excluded in computing the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned. 1930 A.L.J. 1443=A.I.R. 1930 All. 742.

9. Miscellaneous.

——S. 15.—' Period of limitation **'—Per Thom, C. J.—** If the result of a statutory provision is, in substance, to fix a period within which a person must take appropriate and necessary action if he desires to assert his rights in a Court of law, that provision prescribes a period of limitation. 1939 A. W. R. 498=A. I. R. 1939 All. 403 =(1939) A. L. J. 522=I. L. R. (1939) All. 647=183 Ind. Cas. 242 (F.B.).

——S. 15—Suit on foreign judgment—Application before foreign court to set aside ex parte decree—Deduction of time.

Plaintiff suing on a foreign judgment is not entitled to deduct the time during which the defendants were applying before the foreign Courts to set aside the **ex parte** decree; for until it is in fact set aside it remains a final decree capable of execution. 102 Ind. Cas. 523=8 Lah. 54=A.I.R. 1927 Lah. 200.

——S. 15—Decree nisi for foreclosure—Receiver appointed pending appeal—Right to apply for final decree accrues from date of discharge of receiver.

In a case where, after the passing of the preliminary decree for foreclosure in a mortgage suit, a Receiver was appointed at the instance of the defendant pending an appeal to His Majesty in Council and the latter appeal is dismissed for non-prosecution, the right to apply for making decree final accrues from the date of the order giving the decree-holder liberty to so apply. The decree-holder is incompetent to make such an application so long as the Receiver is in possession of the mortgaged properties. 66 Ind. Cas. 97=3 Pat. L. T. 565=1 Pat. 435=1922 P. H. C. C. 342=A.I.R. 1922 Pat. 201.

——S. 15—Application for decree absolute—Order of court suspending right to apply—Period of suspension to be excluded.

Subsequent to the date fixed for payment in the preliminary decree obtained by a third mortgagee a second mortgagee obtained a decree on his mortgage in which the Court expressed opinion that the third mortgagee could not sell the property before he had paid off the second mortgage:

Held, that the period from the date of the judgment which contained that opinion to the date when the third mortgagee paid the sum due to the second mortgagee, should be deducted in calculating the time limit for an application for decree absolute by the third mortgagee, assuming Art. 181 applied. 62 Ind. Cas. 418=33 C.L.J. 260=25 C. W. N. 376=A. I. R. 1921 Cal. 381.

——S.16—Applicability—Auction-purchaser obtaining symbolical possession.

S. 16 of the Limitation Act can help an auction-purchaser only when he has not obtained possession through Court. Where he has obtained symbolical possession, he cannot avail of the provisions contained in that section. A.I.R. 1950 Assam 50.

—— S. 16 and Arts. 138 and 144—Property purchased at auction-sale and formal possession obtained—Suit by purchaser for actual possession—S. 16 and Art. 138 not applicable—Art. 144 applies.

Plaintiff obtained through an executing Court formal possession of the property purchased at an auction-sale and brought a suit for actual possession of the same after 12 years from the date when formal possession was given to him seeking to exclude under S. 16 the period during which the proceedings to set aside the sale were prosecuted:

Held, (1) that S. 16 could be helpful only to an auction-purchaser who had not obtained possession through Court. As the plaintiff had obtained symbolical possession he could not avail of S. 16.

(2) that Art 138 had no application as the suit by the plaintiff was not one by an auction-purchaser but an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of the sale and delivery of symbolical possession.

(3) that the possession of the defendant-judgment-debtor became adverse from the date of the delivery of symbolical possession and as the suit for possession was brought more than twelve years of the date it was barred under Art. 144. A.I.R. 1946 Pat. 202=24 Pat. 717.

——S. 16—Suit by auction-purchaser—Symbolical possession delivered—Period during which application to set aside sale continued cannot be excluded.

Symbolical possession is as effective as actual possession against the judgment—debtors; and if the judgment-debtors continued in possession even after symbolical possession is delivered to the auction-purchaser, their possession becomes adverse against such purchaser from that very day. The purchaser therefore has a fresh cause of action for instituting the suit for possession against the judgment-debtor, and such a suit would not be one governed by Art. 138, which evidently refers to a case where the purchaser has not obtained delivery of possession, but Art. 144 would apply, and in such a case the period during which an application to set aside sale continued cannot be excluded. 70 Ind. Cas. 420=26 C.W.N. 364=A.I.R. 1921 Cal. 385.

——S. 16 Proceeding—If applies to suits as well as applications.

The word 'proceeding' in the section is comprehensive and includes a suit as well as an application (**Per Mookerjee, J.**)—Limitation does not run against an auction-purchaser during the time the land is unoccupied, as possession vests in him as the rightful owner, as soon as the judgment-debtor has vacated it. 21 C. W. N. 304=25 C. L. J. 133=38. Ind. Cas. 547.

——S. 17—Scope.

Intention of section is to limit the time during which an action may be brought and not to take away the rights of a person who is a possible defendant to an action, and it is not intended to accelerate any right of action against such a person. 2 B. R. 797 =1936 O. W. N. 851=A.I.R. 1936 P. C. 309=44 L.W. 579 =(1936) M.W. N. 1258=38 Bom. L. R. 1233=41 C. W. N. 22=71 M.L.J.831=17 P. L. T. 914=I. L. R. (1937) Mad. 94=63 I. A. 429=164 I. C. 337 (P. C.).

——S. 17—'Legal representative', if include heir-at-law.

The expression "legal representative" in S. 17 is not intended to be confined to an executor or administrator, but also includes heir-at-law. A. I. R. 1938 Mad. 157=(1937)M. W. N. 1153=46 L. W. 880=(1938) 1 M. L. J. 146=I. L. R. (1938) Mad. 533=174 Ind. Cas. 638.

——S. 17—A residuary legatee under the will of a Hindu male in Sind and relating to property in Sind is not bound to take probate of a will before he sues as a legatee. Consequently, a legatee residing in Sind is, even before he obtains letters of administration "a legal representative capable of instituting suit" within the meaning of S. 17. A.I.R. 1937 Sind 318=172 Ind. Cas. 805.

——S. 17—Underlying presumption—Assumes that legal representative holds property in the right of testator.

Section 17 of the Limitation on Act proceeds on the assumption that the legal representative holds the property in the right of the deceased and that it is his duty to sue in respect of a cause of action that has accrued to the testator after his death. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——S. 17 (1) and (2)--Capability to sue—Executor and administrator—Accrual of right to sue.

The executor of a will capable of probate in Br. India is a legal representative capable of instituting a suit within S. 17 (1) from the date of the testator's death and not only from the date when he obtains probate. The title and authority of the executor are derived from the will and not from the probate. An administrator on the other hand derives his title solely under his grant, and cannot, therefore, sue an administrator before he gets his grant.

Quaere:—As to an executor who renounces probate, the cause of action arises in favour of the estate of a deceased person at or after his death (1) if there be an executor, time will begin to run at once, even though probate has not been obtained; (2) if there be no executor time runs only from the actual grant of letters of administrtaion. 20 C.W.N. 833=)1916) 1 M.W.N. 455=18 Bom. L.R. 642=85 L.J.P.C. 179= 43 I. A. 603=(1916) 1 A.C. 113=114 L.T. 1002=35 Ind. Cas. 323 (P.C.).

——S. 17—Capability to sue—Executor—Accrual of right—Probate and Administration Act (5 of 1881), S. 4.

The right of an executor to sue, begins from the date of the death of the testator. 37 Mad. 175=24 Ind. Cas. 852.

——S. 17 and Art. 124—Capability to sue—Trespasser of temple properties—Vacancy of trusteeship—Adverse possession.

Limitation will not run where there is no person competent to sue and a trespasser of the temple properties cannot be said to be in adverse possession till some person is appointed as trustee. 18 Ind. Cas. 373 (Mad.).

——Ss. 17, 7—Effeect of S. 17 on S. 7—See S. 7. 9 C.W.N. 537.

——S. 18

Synopsis.

1. **Applicability of section.**
2. **Construction—"Against any person."**
3. **Execution sale.**
4. **Fraud.**
5. **Knowledge of fraud.**
6. **Knowledge of right.**

1. Applicability of section.

——S. 18—Applicability to proceedings under U.P. Encumbered Estates Act.

Section 18 Limitation Act is applicable proceedings under the U. P. Encum. Estates Act. (1944) A.L.J. 504 =1944 A.W.R. 250=1944 O.W.N. 274=1945 R.D. 1 =A.I.R. 1945 All. 35=I.L.R. (1944) All. 703.

——S. 18—Section 18, Limitation Act, is applicable to proceedings under the U. P. Encumbered Estates Act. 1939 A.W.R. 520=1939 R.D. 425=A.I.R. 1939 All. 542=(1939) A.L.J. 447.

——S. 18—In view of S. 29 (2) Limitation Act there can be no doubt that S. 18 will be applicable to proceedings under the U. P. Encumbered Estates Act. A. I. R. 1939 Oudh. 227=1939 O. W. N. 719=1939 R. D. 453=14 Luck. 694= 1939 A.W.R. 109=183 Ind. Cas. 382.

——S. 18—Suit for dower—Knowledge of divorce withheld.

Where a Muhammadan husband has deliberately and fraudulently withheld from the wife all knowledge of the divorce, time for instituting a suit for dower by the wife would only begin to run against her when the fraud has become known to her. A I.R 1943 Lah. 215=I.L.R. (1944) Lah. 186=45 P.L.R. 231=209 Ind. Cas. 157.

——S. 18—Scope.

Section 18, Limitation Act, has nothing to do with Art. 6 of Sch. III of Bihar Ten. Act. Section 18 is confined to cases in which a person has been fraudulently kept-out-of knowledge of his rights. A.I.R. 1941 Pat. 499 =8 B.R. 59=196 Ind. Cas. 609.

——S. 18—Applicability—Suit by certificate-debtor to set aside sale—Fraud of—Auction-purchaser.

Section 18 has no application where a certificate-debtor brings a suit to set aside a sale of his property held in execution of a certificate, on the ground of fraud of the auction-purchaser after the expiry of period of limitation prescribed by S. 36, Ben. Public Demands Recovery Act. A.I.R. 1940 Cal. 207=70 C.L.J. 329=43 C.W.N. 849=188 Ind. Cas. 169.

——S. 18—Suit on ground of want of consideration and necessity—Attempt to conceal factum of gift.

In a suit by reversioners challenging a mortgage on the ground of want of consideration and necessity, the reversioners ore not bound to disclose that the mortgaged property was gifted to them by the mortgagor and even

an attempt on their part to conceal the factum of gift cannot bring the case within the purview of S. 18, Limitation Act. A.I.R. 1940 Lah. 262=192 Ind. Cas, 105.

——S. 18—Sale fraudulently described as transaction conferring occupancy rights to defeat pre-emption:

Held, that time runs when fraud becomes known to pre-emptor. A.I.R. 1937 Lah. 97=I.L.R. (1937) Lah. 202=39 P.L.R. 889=172 Ind. Cas. 104.

——S. 18—Extended time cannot be claimed against innocent third party.

Under S. 18 the extended time can only be claimed against a person guilty of the fraud and against accessory thereto and against a person who claims through the person who committed the fraud, and it cannot be claimed against an innocent third party against whom ordinary limitation would apply. A.I.R. 1936 Cal. 706=166 Ind. Cas. 127.

——S. 18—Applicability—Suit for pre-emption—Plea of fraud—Starting point of limitation.

Where the document was executed as a deed of gift but it appeared that the parties really effected a sale and the person who sued for pre-emption was shown to have been aware of the passing of consideration:

Held, that he should sue within the time prescribed by Art. 10 and that S. 18 did not save limitation. 128 Ind. Cas. 257=5 Luck. 492=57 I.A 251=53 C.L.J. 24=7 O.W.N. 1219=A.I.R. 1931 P.C. 12 (P.C.).

——S. 18 and Art. 164—Fraud.

The fraud which can be relevant to be considered for the purpose of Art. 164 is not only a fraud with reference to the service of notice but it covers any fraud and S. 18 can be applied. 94 Ind. Cas. 56=A.I.R. 1926 Nag. 388.

——S. 18—Fraud by judgment-debtor guardian—Minor decree-holder—Judgment-debtor getting guardianship by fraud—Time allowed to lapse—Judgment-debtor cannot plead limitation.

A judgment-debtor, who gets himself appointed guardian of a minor decree-holder without disclosing his indebtedness to the estate, perpetrates fraud and if he allows the period of limitation for the execution of the decree against him to elapse, he cannot plead limitation as a bar to the execution of the decree. 88 Ind. Cas. 61=52 Cal. 63=A.I.R. 1925 Cal. 584.

——S. 18—Fraudulently keeping from exercising right.

Section 18 does not deal with the exercise of the right, but with the knowledge of the right. Where it was alleged that the decree holders had fraudulently kept the judgment-debtor for exercising his rights under O. 21, R. 2 by giving him assurances, no extension was granted. 68 Ind. Cas. 924=11 L.B.R. 363=1 Bur. L.J. 226=A.I.R. 1923 Rang. 103.

——S. 18—Discovery of void sale—Time runs from date of discovery.

When the true nature of rights bought was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted:

Held, limitation began from the date of resistance. 71 Ind. Cas. 629=50 I. A. 69=37 C.L.J. 346=45 All. 179 =27 C.W.N. 949=26 O. C. 223=18 M.L.W. 383=33 M.L.T. 216=5 Pat. L.T. 281=9 O.L.J. 652=5 P.L.T. 281=2 Pat. L.R. Civ. 237=A.I.R. 1922 P.C. 403=44 M.L.J. 489 (P.C.).

——S. 18—Fraudulent collection of debts—Suit to recover the money—Time runs from plaintiff's knowledge of the collection.

Where defendant has wrongfully collected the debts due to a deceased's estate and holds them as against plaintiff the heir of the deceased and has been concealing from the plaintiff the fact of his having made the collection, S. 18 applies and limitation for the suit to recover the money from the defendant runs only from the time that plaintiff comes to know of the collection. 60 Ind. Cas. 774=45 All. 440=19 A.L.J. 268=A.I.R. 1921 All. 155.

——S. 18—Fraud antecedent to accrual of cause of action—If comes within S. 18.

The view that fraud antecedent to the accrual of the right of action can never be considered under S. 18 is erroneous. Such fraud can and must be considered because fraud is a continuing influence and until that influence ends it retains its power of mischief. 17 Bom. 341, Foll. 85 Ind. Cas.622=6 P.L.T. 567=A.I.R. 1925 Pat. 521.

——S. 18—Fraud—Antecedent to cause of action—Applicability of section.

S. 18 of the Limitation Act applies only to such cases of fraud as amount to concealment and is intended to keep from the injured party the knowledge of his wrong or of its remedy ; it is however doubtful if the section applies to a case in which the fraud was antecedent to the accrual of the right. 15 C.W.N. 965=11 Ind. Cas. 295.

——S. 18—Case covered by Art. 62—Subsequent act of fraud—S. 18 does not apply.

Section 18 cannot apply to a case under Art. 62 where there was no fraud at the date when the payment was made and the cause of action arose, but a subsequent act of fraud was relied on to save limitation. 69 Ind. Cas. 274=1921 M.W.N. 539=A. I. R. 1921 Mad. 283 =41 M.L.J. 274.

——S. 18 and Art. 147—Applicability—Suit to set aside order under S. 145, Cr. P. Code.

S. 18 and Art. 147 apply to a suit brought to set aside the order of the Magistrate under S. 145, Cr. P. Code. 9 M.L.T. 81=12 Cr. L.J. 47=9 Ind. Cas. 285.

2. Construction—"Against any person."

——S. 18—Construction of—'Against any person.

The words "against any person" should be understood to follow the words "a suit" in the beginning of the section. **A** sold his land to **B. M.** being the real purchaser, **K** who had a right to pre-empt brought a suit for pre-emption within one year of the knowledge of **M's** rights, but after one year from the sale to **B**: **Held**, that the suit was within time and that time began to run from the knowledge of the fraud. 89 P.R. 1911 =186 P.W.R. 1911=156 P.L.R. 1911=10 Ind. Cas. 114.

3. Execution Sale.

——S. 18 and Civil Proceedure Code (5 of 1908), Order 21, rule 90—Fraud contemplated by S. 18—Application to set aside execution sale filed beyond time—Allegation of fraud of decree-holder in publishing and conducting rule—Requirements to attract S. 18 of the Limitation Act.

The fraud contemplated under S. 18 of the Limitation Act must be a fraud of the person against whom the suit or application is made. An application under

Order 21, Rule 90, Civil Procedure Code, is an application against the decree-holder though those who are affected by the sale would be necessary parties. A judgment-debtor who is kept out of the knowledge of the execution sale by fraud can, in an application under Order 21, Rule 90, Civil Procedure Code, to set aside the sale, invoke the aid of S. 18 of the Limitation Act to extend the period of limitation where fraud is proved to have been committed by the decree-holder or the auction-purchaser or both. 65 M.L.J. 139= I.L.R. 56 Mad. 734, followed. 63 L. W. 322=A.I.R. 1950 Mad. 509=(1950) 1 M.L J. 471.

——S. 18—Scope of—Applicability against bona fide auction-purchaser—Conditions to be satisfied —Application to set aside execution sale pleading fraud of decree-holder.

Where in an application to set aside an execution sale filed nearly 15 months after the confirmation of the sale it is alleged that the judgment-debtor was kept in ignorance of the decree by the fraud of the decree-holder, what S. 18 of the Limitation Act requires is not merely proof of fraud which vitiates a sale but also proof of fraud which kept the judgment-debtor in ignorance of his right to make an application for setting aside the sale. The decree-holder's fraud may have an continuing influence so as to keep the applicant, in ignorance of his right to file a petition for setting aside a sale. In cases where he is unaware of the decree and of the sale this will ordinarily be so. But, when the sale has been confirmed in favour of a **bona fide** auction-purchaser the ignorance of the applicant of his right to file an application must also be established as due to the fraud of the auction-purchaser. Otherwise, the right of the auction-purchaser which though inchoate before the confirmation have become crystallised by confirmation, would run the risk of being nullified by petitions filed long after the due time and after considerable delay for which he is in no way responsible. The policy of the Legislature appears to be that judicial sales should be challenged only within a comparatively short period. Except in cases where there was no jurisdiction to sell and the sale is a nullity, on that ground **bona fide** Court auction-purchasers must not be deprived of the benefit of the provisions of the Limitation Act under Article 166 and Article 12 and it is not consistent with the policy of the Act to apply S. 18 against them where they were not shown to be parties to the continuing influence of the fraud of the decree-holder. (1914) 28 M.L.J. 525=I.L.R. 38 Mad. 1076: followed. 1950 M.W.N. 240=A.I.R. 1950 Mad. 460 =(1950) 1 M.L.J. 432.

——S. 18—Application to set aside sale—Extension of limitation—Ground for—Fraud of decree-holder—Auction-purchaser not accessory thereto.

S. 18, Limitation Act, may be availed of to extend the period of limitation of an application for setting aside a sale where fraud is proved to have been committed by the decree-holder though the auction-purchaser who was a stranger was not a party or accessory to the fraud. 53 C.W.N. 587, foll. A.I.R. 1950 Cal. 166.

——S. 18—Applicability—Application under O. 21, R. 90, C. P. Code—Fraud established on part of decree-holder—Dismissal of application as out of time for want of proof of fraud on part of purchaser—If justified.

For setting aside a sale under O. 21, R. 90, C. P. Code, on the ground of fraud in publishing and conducting a sale, the judgment-debtor has to prove fraud only on the part of the decree-holder as such, and not on the part of the auction-purchaser, when he happens to be a third party, and not the decree-holder himself. The auction-purchaser third party does not come into the picture at all, for if there is fraud on his part, it can be only after the sale, and fraud subsequent to the sale is not necessary to be proved in an application under O. 21, R. 90. Where, therefore, fraud has been proved against the decree-holder, in an application under O. 21, R. 90, C. P. Code, the applicant is entitled to have the delay in presenting his application, excused, under S. 18, Limitation Act; S. 18 does not become inapplicable or unavailable because no fraud is proved as against the auction-purchaser. A.I.R. 1949 Cal. 212=53 C.W.N. 587.

——S. 18—Application for setting aside execution sale—Limitation—Extension of time—Fraud of auction-purchaser—Necessity for proof. **See** B. T. ACT, S. 174 (3). 82 C.L.J. 9=A.I.R. 1948 Cal. 63.

——S. 18—Auction-purchaser guilty of fraud—Applicants, if entitled to benefit of S. 18.

Where the auction-purchaser against whom the application for setting aside the sale under S. 173, Ben. Ten. Act is directed along with some of the judgment-debtors, is guilty of fraud, the applicants for setting aside the sale can avail themselves of the provisions contained in S. 18. 60 C.L.J. 36=A.I.R. 1935 Cal. 89= 154 Ind. Cas. 347.

——S. 18—Fraud, not of decree-holder but of auction—purchaser—Applicability of S. 18—Civil P. C., O. 21, R. 90.

Any person whose fraud has kept from another person the knowledge of his right to institute a suit or make an application is within the provisions of S. 18.

If a judgment-debtor is able to show that the auction-purchaser committed such a fraud as brought about the circumstances which appear in the first part of S. 18 then time for his application to have the confirmation of the sale set aside, would run only from discovery of such fraud. (1933) M.W.N. 589=65 M.L.J. 139=38 Mad. L.W. 131=A I.R. 1933 Mad. 626=56 Mad. 34=145 Ind. Cas. 388.

——S. 18—Execution sale—Fraud of the decree-holder to be proved—Fraud of auction-purchaser, if need be proved.

Where an application under O. 21, R. 90, C. P. Code was made out of time and the judgment-debtor sought the benefit of S. 18 of the Limitation Act:

Held, that it was incumbent on the judgment-debtor to show that he was kept from the knowledge of his right to apply within the period of limitation by the fraud of the party concerned and that the same continued till that date:

Held, also that though the auction-purchaser was a necessary party to such proceedings fraud on his part need not be alleged and proved. 99 Ind. Cas. 946=44 C.L.J. 565.

——S. 18—Fraud by third person—Application to set aside execution sale—Decree-holder not party to fraud—S. 18 does not apply.

A judgment-debtor is not entitled to the benefit of S. 18 for the purpose of making an application under C. P. Code, O 21, R. 90 to set aside an execution sale if the decree-holder was not a party to the fraud alleged. 86 Ind. Cas. 745=A.I.R. 1925 Cal. 1227.

——S. 18—Unless there is fraudulent concealment of execution proceedings on the part of decree-holder limitation could not be extended under S. 18. 85 Ind. Cas. 622=6 P.L.T 567=A.I.R. 1925 Pat. 521.

——S. 18—Fraudulent sale without notice to judgment-debtor—Suit to set aside one year later—Fraud not specifically pleaded—Fraud can be inferred and relief given.

In spite of an order passed in his first execution application that the decree-holder was not entitled to proceed against the shares of the property allotted to a party defendant, the decree-holder again applied by a fresh execution application some time later for the same relief and for the sale of the whole of the property ; and without giving any notice to the party defendant had the whole property sold in 1918, and himself became the purchaser ; and again without any notice to him the decree-holder managed to get symbolical delivery behind his back. The party defendant came to know about the fraudulent act of the decree-holder only in 1919, when the decree-holder interfered with his possession.

Held, that in the circumstances though S. 18 has been specifically referred to in the plaint, the case would really come under S. 18 and the period before 1919 could not be counted ; such an inference could not legitimately be drawn in the particular circumstances of this case, though originally facts bringing a case under S. 18 have to be specifically pleaded. 123 Ind. Cas. 24=1929 M.W.N. 811=A.I.R. 1930 Mad. 12.

——S. 18—Suppression of powers—Section 18 applies.

Even after the payment of decretal amount decree-holder's karinda proceeded to sell the judgment-debtor's property and took steps so that no notice of the sale may reach the judgment-debtor. Thereupon the judgment-debtor applied to have the sale set aside.

Held, that S. 18 would apply to such a case. 108 Ind. Cas. 899=26 A. L J. 412=A. I. R. 1928 All. 354.

——S. 18—Applicability of section—What must be proved—Process fraudulently suppressed—Suit to set aside sale—Sale not known to plaintiff till a few days before suit—Suit maintainable.

When a judgment-debtor makes an application to have an execution sale set aside under O. 21, R. 90, after the expiry of 30 days he must bring his case within S. 18 of the limitation Act and to enable him to do so, it is not enough for him to show that the execution proceedings were irregular and fraudulent but he must carry the fraud further and show that the existence of his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or the auction-purchaser. 1 C.W.N. 67, Foll. But in order to make limitation operate when a fraud has been committed by one who has obtained property thereby, it is for him to show that the injured complainant has had clear and definite knowledge of the facts constituting the fraud at a time which is too remote for the suit to be brought. 17 Bom. 341, Foll.

Where in a suit to set aside an execution sale it was found that processes in connexion with the execution case had been fraudulently suppressed and that the plaintiffs came to know of the fraudulent sale only seven or eight days before the institution of the suit.

Held, that it was not an unreasonable inference to draw that as a matter of fact the fraud that had been committed in the execution proceedings continued and by reason of its continuing influence the plaintiffs were kept out of the knowledge of the sale, and the plaintiffs were entitled to the benefit S. 18 of the Limitation Act. 87 Ind. Cas. 555=A.I.R. 1926 Cal. 229.

——S. 18—Fraudulent concealment of execution proceedings—Judgment-debtor's right to apply to set aside sale—Accrues when he became aware of the sale.

If owing to the fraudulent concealment of the proceedings by the decree-holder all knowledge of the proceedings up to the time of sale is withheld from the judgment-debtor, then so long as he does not come to know of the sale the effect of the fraud continues and the only conclusion which can be drawn is that he had been kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder. It is only after he becomes aware of the sale that he comes to know of his right to apply. 88 Ind. Cas. 500=47 All. 850=23 A.L.J. 760=6 L.R.A. Civ. 388=A.I.R. 1925 All. 778.

——S. 18—Time runs from knowledge of sale.

Period of limitation for application to set aside execution of sale where notice of the sale was fraudulently suppressed runs from the date when the applicant came to know of the sale. 84 Ind. Cas. 970=20 M.L.W. 606=1924 M.W.N. 759=35 M.L.T. 96=A.I.R. 1924 Mad. 859=47 M.L.J. 535.

——S. 18—Setting aside sale in execution—Time runs from the date of knowledge.

The starting point for limitation is the date of the knowledge of fraud committed by the decree-holder who brought about the sale in fraud of the judgment-debtors. Section 18 applies to application under R. 90. 80 Ind. Cas. 761=5 P.L.T. 200=A.I.R. 1924 Pat. 496.

——S. 18—C. P. Code, O. 21, R. 92.

Where fraud is alleged and proved, S. 18 of the Limitation Act applies and the time for application to have the sale set aside is 30 days from the time the applicant becomes aware of the fraud. Judgment of **Piggott, J.** in 17 Cal. 769 at 776, Foll. 71 Ind. Cas. 631=45 All. 316=21 A.L.J. 176=4 L.R.A. Civ. 129=A.I.R. 1923 All. 282.

——S. 18—Concealment of sale—Fraud—Judgment debtor kept in ignorance of a Court sale—Section applied.

Where a decree-holder not merely failed to serve judgment-debtor with notice of the intended sale but even after sale actively concealed from him the knowledge of his right to object to the sale.

Held, that S. 18 of the Indian Limitation Act, 1908 applied. 72 Ind. Cas. 46=17 M.L.W. 152=32 M.L.T. 252=A.I.R. 1923 Mad. 353.

——S. 18—Time for application runs from applicant's knowledge not only of sale but of fraud.

The applicant for setting aside a sale under O. 21, R. 90, must have knowledge not merely of the factum of the sale, but a clear and definite knowledge of the facts which constitute the fraud before time can run against him. When by a fraud involving suppression of process and submission of false returns the applicant is kept out of knowledge of the sale of his property,

such fraud must be held to have a continuing influence in such a case it is for the other side to show that the injured party had clear and definite knowledge of the facts with constitute the fraud at a time from which, taken as a starting point, the suit is barred. 60 Ind. Cas. 801=48 Cal. 119=A.I.R. 1921 Cal. 251.

——S. 18—Execution sale—Setting aside of—Fraud subsequent to sale, if to be proved.

In order to avail himself of S. 18, the judgment-debtor need not prove fraud subsequent to execution sale. The right to have execution sale set aside accrues the very moment the sale takes place, and if the judgment-debtor was by means of fraud, kept from the knowledge of the sale, he was necessarily kept from the knowledge of his right to have the sale set aside and S. 18 of the Act will apply to such a case. 19 C.W.N. 553=24 Ind. Cas. 249.

——S. 18 Fraud—Antecedent to execution sale—Effect.

There can be no inflexible rule of law that fraud antecedant to an execution sale necessarily indicates fraud subsequent to the sale. It is also clear that fraud antecedent to the sale may have an important bearing on the question whether there was fraud subsequent to the sale, sufficient for the purpose of S. 18. 17 C.W.N. 478=16 C.L.J. 581=17 Ind. Cas. 972.

——S. 18 and Art. 166—Execution sale—Setting aside—Limitation.

When a sale is confirmed it becomes absolute under the code; but it is liable to be challenged by a person interested, who is able to satisfy the Court that the sale ought not to have been confirmed either because of fraud or irregularity; and the petitioner can bring his case within S. 18 of the Limitation Act. 16 Ind. Cas. 436 (Cal.).

4. Fraud.

(a) Burden of proof.
(b) What is.

4. (a) Fraud—Burden of proof.

——S. 18—Burden of proof.

Where an applicant for pre-emption had been kept from the knowledge of the sale by the fraud of the vendee, it is for the latter to establish that the influence of his fraud had ceased to operate at sometime beyond the period of limitation. If he does not discharge that onus, the benefit of the fraud will continue to be available to the applicant for pre-emption. A. I. R. 1949 Cal. 307.

——S. 18—Burden of proof.

In cases falling under S. 18, Limitation Act, it is for the party who has committed fraud to show that injured complainant has had clear and definite knowledge of the facts constituting the fraud. Proof of the fact that some hint or clue had reached the aggrieved party which might have led to such knowledge is not enough. A.I.R. 1943 Pat. 377=9 C.L.T. 37=10 B.R. 166=209 Ind. Cas. 521.

——S. 18—Transfer of non-transferable tenancy and relinquishment of possession amounts to forfeiture of tenancy. Where no case under S. 18 has been made out by the landlord, the transferee acquires limited interest of a permanent tenant by adverse possession for more than 12 years. A.I.R. 1941 Cal. 541=I.L.R. (1941) 2 Cal. 44=45 C.W.N. 590=74 C. L. J. 145=97 Ind. Cas. 376.

——S. 18—Burden of proof, Evidence of fraud.

It is clear from the language of S. 18, that a person who makes an application after the ordinary statutory period of limitation, must prove that he has been kept from the knowledge of his right to make the application by the fraud of the person against whom the application is directed. In case, therefore, in which an applicant is seeking under O. 21, R. 90, Civil P. C., to set aside a Civil Court sale, if his application has been filed more than 30 days after the date of the sale, he will have to prove fraudulent concealment on the part of the decree-holder or such other person against whom his application may be directed. If by doing so he establishes his right to file a time-barred application it will then be for him to prove fraud or irregularity in publishing or conducting the sale, within the meaning of O. 21, R. 90, Civil P. C., sufficient to enable him to have the sale set aside under that rule. It is not merely necessary to show that fraud has been committed in order to enable the judgment-debtor to get the benefit of S. 18. Limitation Act, but the element of fraudulent concealment requires to be established. Mere under-valuation of property in the sale proclamation cannot possibly amount to the fraudulent concealment which is required under S. 18. It is a matter which, along with other matters, may be considered but in order to establish fraudulent concealment, it would be necessary to show that through the fraudulent conduct of the decree-holder or such other person against whom the application has been directed, the jugment-debtor had been prevented from having any knowledge of the sale proclamation or the fact that a sale had actually taken place.

Obiter.—A Court may be perfectly justified in setting aside a sale in a proper case established on an application filed within the prescribed period of limitation where the Court is satisfied that the property sold was grossly undervalued. Civil Court sales should not, however, be lightly set aside and, even in a case in which no question of limitation arose, the Court would necessarily demand a high standard of evidence to prove that there had been fraud or irregularity in publishing or conducting the sale on account of under-valuation. A.I.R. 1939 Cal. 663=I.L.R. (1939) 2 Cal. 163=43 C.W.N. 862=186 Ind. Cas. 335.

——S. 18—Plaintiff establishing defendant's fraud in keeping him away from knowledge of his right—Burden of proof, if shifts to defendant.

The terms of S. 18 are materially different from S. 26, Real Property Limitation Act (3 and 4 Will. IV, C. 27) and when a plaintiff has established that by fraud of the defendant, he had been kept from the knowledge of his right to sue, the burden is shifted on to the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation. A.I.R. 1935 Cal. 779=160 Ind. Cas. 250.

——S. 18—Nature of fraud to be proved under S. 18.

Where a suit is, on the face of it, barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person, who, in such circumstances, desires to invoke the aid of S. 18, must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue, or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. Mere sug-

gestions of fraud do not amount to such knowledge as is required by S. 18. A. I. R. 1934 Lah. 878=36 P. L. R. 114=16 Lah. 408=155 Ind. Cas. 654.

——S. 18— Co-sharer having duty to disclose knowledge about property—Non-disclosure :

Held, that there was conceald fraud and S. 18 applied. The burden was on defendant to show that the plaintiff had 'clear and definite knowledge,' of the facts which constituted fraud. A. I. R. 1933 Cal. 253=36 C. W. N. 758=55 C. L. J. 420=143 Ind. Cas. 402.

——S. 18—Burden of proof—Party defrauding should show that effects of fraud had been removed.

Where fraud has been established in a case against a party who is deriving benefit therefrom it is for him to show that the continuing effects of fraud which was perpetrated have been removed. 17 Bom. 341 (P.C.) : A.I.R. 1923 Pat. 435 and A. I. R. 1924 Pat. 496. Foll. 123 Ind. Cas. 637=A.I.R. 1930 Pat. 58.

——S. 18—Initial burden to prove date of knowledge on plaintiff—When onus shifts.

Where the plaintiff alleges fraud and states that he acquired knowledge on a particular date in ordinary cases the initial burden would be on him to lead evidence, **prima facie** at any rate establishing the date of his knowledge. 17 Bom. 341 (P. C.). Expl.; 27 All. 540, Not appr.

But if notwithstanding the fact that the plaintiff did in most specifie terms allege in his suit the date and the circumstance in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the date of the plaintiff's acquisition of knowledge the burden of proving the date is not on him. 1929 A.L.J. 1153= A.I.R. 1929 All. 721.

—S. 18—Proof of fraud essential—Onus on party defrauded.

Before a plaintiff can avail himself of the provisions of S. 18 it is incumbent upon him to show that he was kept out of the knowledge of his right to institute the suit by means of fraud. 116 Ind. Cas. 726=49 C.L.J. 16=33 C.W.N. 248=A.I.R. 1929 Cal. 188.

——S. 18—Fraud proved—Starting point must be proved by party commiting fraud.

When once fraud is established, then it is for the decree-holder to establish at what precise point the judgment-debtor had clear and definite knowledge of those facts which would entitle him to set aside the sale. 16 C.W.N. 894, Foll. 117 Ind. Cas. 46=10 P.L.T. 231=A.I.R. 1929 Pat. 228.

——S. 18—Proof of removal of effects of fraud—Onus on party guilty of fraud.

The party guilty of fraud must show that the continuing effects of the fraud had been removed. Where judgment-debtors were kept from knowledge of the sale by the fraud of the decree-holder und consequently must also have been kept from knowledge of their right to apply to set aside sale so long as that fraud continued and its effect was not removed :

Held, unless the decree-holder shows that the effect of that fraud was removed, the judgment-debtors were entitled to the benefit of S. 18. 17 Bom. 341 (P.C.) and 19 C.W.N. 553, Foll. 72 Ind. Cas. 625=4 P L.T. 906=A.I.R. 1929 Pat. 435.

——S. 18—Continuation of fraud—Decree-holder's fraud—Onus on him to prove opportunity for judgment-debtor to discover fraud and when fraud was discovered.

Fraud once committed continues and therefore the decree-holders guilty of fraud in bringing about a sale in ignorance of the judgment-debtors must prove that the judgment-debtor was given opportunity to discover the fraud and the time when the fraud was actually discovered. 80 Ind. Cas. 761=5 P. L. T. 200= A. I. R. 1924 Pat. 496.

——S. 18—Party invoking S. 18 must prove fraud—Burden then shifts to the other side to prove date of knowledge.

Where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstance which would prevent the statute from having its ordinary effect. A person who, in such circumstances desires to invoke the aid of S. 18, must establish that there has been fraud, and that by means of such fraud, he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established the burden is shifted on to the other side. 63 Ind. Cas. 94=49 Cal. 886=36 C.L.J. 295=A.I.R. 1922 Cal. 157. **See also** 80 Ind. Cas. 590=20 N.L.R. 23=A.I.R. 1924 Nag. 94.

——S. 18—Specific allegations of fraud—Fraud must be specifically alleged.

It is incumbent on a plaintiff seeking the benefit of S. 18 to distinctly allege the particular fraud, by which he has been kept from the knowledge of his right of suit against the defendant, specifically and with detailed particulars. 101 Ind. Cas. 322= A. I. R. 1927 All. 437.

——S. 18—Fraud—Onus of proof.

The onus is on the person committing the fraud to prove that the person injured thereby has had clear and definite knowledge of the fact constituting the fraud at a time too remote to allow him to seek the assistance of the Court. 27 C.L.J. 528=46 Ind. Cas. 221.

——S. 18—Fraud—Suit to set aside decree obtained by fraud—Burden of proof.

In a suit to set aside a decree on the ground of fraud the onus is on the plaintiff to give some evidence of the fraud on which the onus is shifted on to the defendant to prove that the plaintiff had knowledge more than three years before suit. The plaintiff is not required to prove when he became aware of the alleged fraud where he alleges a date within 3 years of the suit. 2 Pat. L.W. 12=41 Ind. Cas. 385.

——S. 18 and Art. 144—Non-transferable holding—Ejectment by landlord.

A plaintiff suing in ejectment a purchaer of a non-tranferable occupancy holding cannot succeed unless he makes out a case under S. 18 of the Act where his right to possession accrued long before 12 years before commencement of suit. 19 C.W.N. 136=28 Ind. Cas. 708.

——S. 18 and Art. 181—Fraud—Proof—Onus—C. P. Code, S. 47.

Where more than six years after an execution had taken place the representative of the judgment-debtor applied under S. 47, C.P.Code, to recover possession of a house from the decree-holder on the ground that it was fraudulently obtained possession of by the latter by misleading the Court, **held**, that the onus lay on the applicants to prove that they are within S. 18 of the

Limitation Act. 36 C. 654. Foll. 20 Ind. Cas. 538. (Oudh).

——**S. 18—Fraud—Concealment—Alienation by a sonless male proprietor—Limitation—Burden of proof.**

It is for the plaintiffs who sue as reversionary heir to show that their claim is within time. Where the alienation is made openly and mutual union is published and there have been settlements giving effect to the alienation there is no fraudulent concealment of which advantage can be taken under S. 18 of the Limitation Act. 177 P.L.R. 1912=236 P.W.R. 1912=16 Ind. Cas. 844.

——**S. 18—Applicability—Burden of proof.**

In a suit or application which is on the face of it barred, the plaintiff or applicant must satisfy the court, of circumstances preventing the statute from having its ordinary effect. 36 Cal. 654=2 Ind. Cas. 844.

——**S. 18—Onus.**

When a suit or an application is, in the face of it, barred, it is for the plaintiff or the applicant to satisfy the court or circumstances which would prevent the statute from having its ordinary effect ; and it is incumbent upon a petitioners who seeks to set aside an execution sale on the ground of fraud to show that not only had he know knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in S. 18 of the Limitation Act. (1909) 36 C. 654=2 Ind. Cas. 844.

——**S. 18—Fraud—Proof of knowledge of facts.**

When a man has committed a fraud and has got property thereby, it is for him to show that the person injured by the fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud as a time which is too remote to allow him to bring a suit. (1905) 2 A.L.J. 350= 1905 A.W.N. 88=27 A. 540.

——**S. 18—Fraud—Proof.**

Fraud must be clearly alleged and proved with precision to invoke S. 18 of the Limitation Act. In a suit to recover joint possession plaintiff proved his title by prescription for over the statutory period. The defendant pleaded that the property was granted to his father exclusively and that the plaintiff fraudulently concealed the original deed of grant and kept him in ignorance of his rights. It appeared in the evidence that the plaintiff had the deed, but it was not produced by him. The defendant who gave evidence did not say that he was ignorant of the deed or when he became aware of it.

Held, that fraudulent concealment had not been definitely made out and that the plaintiff had made out a prescriptive right. (1901) 5 C.W.N. 545=3 Bom. L.R. 303=24 M. 387=28 I. A. 81 (P.C.).

4 (b). Fraud—What is.

——**S. 18**—Suit under S. 36, Bengal Public Demands Recovery Act, brought more than one year after the delivery of possession to purchaser, alleging fraudulent suppression of notice under S. 7, Public Demands Recovery Act—No attempt made to prove fraud—Finding that service of notice was not effected—Question of limitation in appeal to the High Court :

Held, that no fraud having been established under S. 18, plaintiff's suit was time-barred. (1942) 76 C.L.J. 323.

——**S. 18—Suit for pre-emption.**

Vendor residing in **Tahsil A** and vendee and pre-emptor residing in **Tahsil G**—Small and useless piece of land situate in **Tahsil A** included in sale-deed to get sale-deed register at **A** and conceal sale from pre-emptor—Vendee not applying for mutation till after one year from date of registration nor taking possession nor collecting rent:

Held, that the vendees were guilty of fradulent concealment of the fact of sale from the plaintiff pre-emptor under S. 18, Limitation Act, and the plaintiff pre-emptor was, therefore, entitled, while filing suit for pre-emption to exclude the time during which he was kept out of knowledge of the sale deed. 1938 A.W.R. 847=A.I.R. 1939 All. 113=180 Ind. Cas. 525.

——**S. 18**—Application under S. 4, U. P. Encum. Estates Act, omitting to mention debt—No notice to creditor—Creditor not having knowledge of proceedings—His claim under S. 10, U. P. Encum. Estates Act beyond limitation:

Held, that the time can be extended under S. 18' A.I.R. 1939 Oudh 227=1939 O.W.N. 719=1939 A.W.R. 109=1939 R. D. 453=14 Luck. 694=183 Ind. Cas. 382.

——**S. 18—Auction-purchaser, held should get benefit of S. 18 and his suit was within time.**

Held, on facts that after the plaintiff-auction-purchaser got the sale certificates, the landlord did realise rents from him for about three years knowing full well that he had no right to receive the same. It was an act of fraud on the part of the landlord which lulled him into security and led him to believe that it was only a third party who was obstructing him in getting possession. He did institute a suit against this third party who set up the title of the real tenant and it was in course of litigation that he came to know the real state of affairs. The auction-purchaser could get extension of time under S. 18, Limitation Act, as against defendant who, by fraudulent misrepresentation and suppression of truth subsequent to the sale, kept the auction-purchaser out of knowledge of his right to institute the suit within the proper period. A.I.R. 1938 Cal. 263=67 C.L.J. 16=I.L.R. (1938) 1 Cal. 512=182 Ind. Cas. 244.

——**S. 18—Fraud, what is not.**

Under statement of price in a sale proclamation does not bring the case within the purview of S. 18 of the Limitation Act. I.L.R. (1937) 2 Cal. 496=41 C.W.N. 993.

——**S. 18**—Decree against female member—Execution of decree against minor sons and sale of property—Suit by minor to set aside sale—Concealment of existence of near relations in guardianship application, does not amount to fraud. (1935) M.W.N. 964=A.I.R. 1935 Mad. 1085=158 Ind. Cas. 874.

——**S. 18**—Possessory mortgage—Possession not delivered—Defect in title—Suit for mortgage-money or in alternative for possession and substituted security:

Held, that the mere fact that the mortgagor had concealed his want of title from the plaintiff did not amount to fraud so as to attract the application of S. 18. 6 Luck. 374=7 O.W.N. 1045=A.I.R. 1931 Oudh 5=129 Ind. Cas. 168.

——**S. 18—Active concealment with intention to deceive is fraud.**

If a vendor or a vendee wishes that a sale should not be nullified by a pre-emption suit, it is necessary

for him to inform the pre-emptor before the transaction and get his refusal but a mere omission to inform the pre-emptor or the bare fact of concealing the sale transaction from him cannot amount to a fraud, but where there is an active concealment of the transaction coupled with an intention to deceive the pre-emptor there would undoubtedly be a fraud within the meaning of S. 18. 115 Ind. Cas. 798=1929 A.L.J. 342=A.I.R. 1929 All. 213.

——S. 18—Actual fraud with intent to keep the person out of knowledge, omission to furnish information—No fraud.

Per **Fawcett, J.**—Section 18 requires that a person should have been kept from certain knowledge by means of fraud. There must be actual fraud in the means adopted to keep the person out of knowledge, and it is entirely a misuse of words to say that merely because certain persons did not fur ish the particulars which they ought to have done under the contract, there was fraud. 117 Ind. Cas. 417=53 Bom. 271=31 Bom. L.R. 21=A.I.R. 1929 Bom. 119.

——S. 18—Not constructive but actual and active fraud.

The fraud contemplated by S. 18 is an actual and active fraud and not what is called constructive fraud The words "has . . . been kept," in S. 18 point to the conclusion, that in order to constitute a fraud, it is not enough that there should be merely a tortuous act unknown to the injured party but that there must be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts: there must be something actually said or done which is directly intended to prevent discovery. 101 Ind. Cas. 322= A.I.R. 1927 All. 437.

——S. 18—Fraud, what is.

A mere omission by mortgagor to inform the mortgagee regarding his want of title in the property mortgaged is not enough to constitute active fraud so as to attract the application of S. 18. The section is directed against cases of active and designed fraud. 7 O.W.N. 1045=6 Luck. 374=A.I.R. 1931 Oudh 5.

——S. 18—Mere carelessness or negligence—No fraud.

There is all the difference in the world between a failure to serve the notices and a deliberate contrivance on the part of a party to suppress the notices. The one is due to negligence, carelessness or various other circumtances ; the other is the result of a deliberate contrivance on the part of a party for his own advantage. Mere negligence or carelessness on the part of the process-server or the identifier is insufficent as a basis for a finding of fraud. 97 Ind. Cas. 798=8 P.L.T. 28=A.I.R. 1926 Pat. 397.

——S. 18—Fraud—Neglect by agent to settle accounts.

Neglect to settle accounts with the object of concealing his misconduct from the principal is not "fraud" within this section. 9 Bur. L. T. 130=36 Ind. Cas. 418.

——S. 18—Fraud—Mis-statement of value of property in execution petition.

To make S. 18 applicable to an application to set aside an execution sale, the fraud need not be subsequent to the sale for a fraud is a continuing influence and until that influence ends, it retains its power of mischief. Fraud is not to belightly charged or lightly found. The mis-statement in an execution petition of the value of the property assuming it to be a fraud, does not constitute such fraudulent concealment as is necessary to save limitation. Even if the non-publication of the sale proclamation in the mofussil exposed the sale to attack, to bring the case within S. 18 of the Act, it must be shown that the judgment-debtor was by means of fraud of which the decree-holder was guilty or to which he was accessory, kept from the knowledge of his right. 16 C.W.N. 894=16 Ind. Cas. 464.

——S. 18—Fraud—plea of—Ex parte decree.

For getting benefit of S. 18 in setting aside an **ex parte** decree, fraud in keeping defendant ignorant of the decree must be proved. Mere fraud in getting decree is not sufficient. 57 Ind. Cas. 15. (Lah.).

——S. 18—Fraud—What is—Plea of—Express avertment—Necessity of.

If the allegations in the plaint imply fraud on the part of the defendant or indeed suggest that any such imputation is intended, the absence of express description of the defendant's conduct as fraudlent is no bar to the plaintiff's relying on it. In such cases, the court should return the plaint under O. 6, Rr. 4 and 17, C.P.Code, to the plaintiff for amendment. A mere omission to give notice of a breach of the contract to the plaintiff. cannot of itself be regarded as an act of fraud on the part of the defendent. who was so in default. 265 P.W.R. 1912=259 P.L.R. 1912=32 P.R. 1913=16 Ind. Cas. 804.

——S. 18—Fraud—Failure to give pre-emptor notice of sale.

The omission by a vendor to give notice of sale to a pre-emptor does not amount to fraud within the meaning of S. 18, unless there was an intentional fradulent concealment or an indication to that effect. 130 P.W.R. 1911=209 P.L.R. 1911=11 Ind. Cas. 313.

——S. 18—Insolvent not disclosing acquisition of property after personal discharge—No fraud.

There is no duty cast upon the insolvent to disclose to the Official Assignee that he has become possessed of property since the making of the order of personal discharge and consequently the non-disclosure of the fact cannot be regarded as fraud within the meaning of S.18. (1904) 28 M. 168.

5. Knowledge of fraud.

——S. 18—Knowledge of fraud—Nature of knowledge to be proved.

To show that the plaintiff had knowledge of the transaction beyond the period of limitation, such knowledge must be clear and definite knowledge of the facts constituting the particular fraud. It is not sufficient for the defendant to show that the plaintiff had some clues and hints which, perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud. 6 All. 406 ; 16 C.W.N. 894 ; 18 C.W.N. 1266 ; 19 C.W.N. 553 ; 16 Ind. Cas. 517 ; 25 M.L.J. 531 and 40 Ind. Cas. 37, Foll. 68 Ind. Cas. 94=49 Cal. 886=36 C.L.J. 295=A.I.R. 1922 Cal. 157.

——S. 18—Knowledge of fraud—Guardian's knowledge, if binds ward.

Where a fraud was committed in a business and was brought to the notice of the guardian after two years, the ward cannot say that he got its notice 10 years after and sue to set aside the transaction within 3 years from the time, the fraud became known to him. 37 Bom. 158=15 Bom. L.R. 192=19 Ind Cas. 406.

——S. 18—Knowledge of fraud—Onus.

The onus is on the defendant, setting up the plea of limitation to prove that the injured plaintiff has had clear and definite knowledge of the fraud at a time which is too remote for the suit to be brought. (17 B. 341, Foll.) 14 Bom. L.R. 771=17 Ind. Cas. 10.

——S. 18—Knowledge of fraud—Fraudulent transfer.

Where a **Lambardar** gets a common land mutated in his own name on the basis of a fraudulent deed of transfer, limitation begins to run only when the claimants become aware of the fraud. 53 P.W.R. 1909=4 Ind. Cas. 313.

6. Knowledge of right.

——S. 18—Fraud affects limitation only when the fraud prevents a person from knowing of his right or the title on which his right is founded. A.I.R. 1933 Rang. 110=144 Ind. Cas. 980.

——S. 18—Essentials—Mere fraud insufficient—Party defrauded must have been kept from knowledge of his right or title.

It is not sufficient to make S. 18 operative that the cause of action should be based on fraud. It is necessary that the right claimed or the title on which it is founded, should have been kept from the knowledge of the applicant by means of fraud, although it may be that in certain circumstances it could be assumed from the act of fraud itself which gave the cause of action that this act of fraud was fraudulently concealed from the person affected. A.I.R. 1922 Pat. 507; 17 Cal. 769 and 30 Cal. 142, Appr. 117 Ind. Cas. 63=7 Rang. 104=A.I.R. 1929 Rang. 62.

——S. 18—Fraud by which party is kept from knowledge of right.

For purpose of S. 18 it is not the alleged fraud by which dispossession was carried out which is pertinent, but the fraud by which the plaintiffs have been kept from the knowledge of their right to institute a suit. 92 Ind. Cas. 597=7 L.L.J. 600=27 P.L.R. 24=A.I.R. 1926 Lah. 128.

——S. 18—Adjustment of decree—Fraud on judgment-debtors—Right to apply for certifying adjustment.

Where a settlement had been come to, to satisfy the respective decrees in two suits and the decree-holders represented to the judgment-debtors that this was the case, and on the strength of such representation judgment-debtors signed it, and thought that as it was filed, the two decrees were adjusted:

Held, such conduct could be said to keep the judgment-debtors from the knowledge of the right of applying to the Court for the adjustment of the decree to be certified. 70 Ind. Cas. 859=1 Bur. L.J. 43=A.I.R. 1922 L.B. 31.

——S. 18 and Art. 174—Knowledge of right—C.P. Code, O. 21, R. 2.

S. 18 of the Limitation Act applies only to those cases in which a person has been kept from knowledge of his rights. Where a decree-holder fraudulently promised to certify an adjustment out of Court and failed to do so, the judgment-debtor cannot claim the benefits of S. 18, in order to extend the time for an application under R. 2 (2) of O. 21 of the C. P. Code, which owing to the fraud of the decree-holder is made after the time prescribed therefor. 3 U. B. R. (1919) 169=52 Ind. Cas. 958.

——S. 18—Knowledge of right—Fraud of decree-holder, if can extend time for judgment-debtor to apply under O. 21, R. 2 (C.P.Code.)

In the case of an uncertified adjustment, it is not open to the judgment-debtor to claim an extension of time to apply under O. 21, R. 2, C. P. Code on the ground of fraud on the part of the decree-holder because the judgment-debtor cannot be held to be kept thereby from his knowledge of his right to apply within the meaning of S. 18 of the Limitation Act but only from the exercise of his right. 16 C. W. N. 923=16 C. L. J. 174=13. Ind. Cas. 63.

——S. 18—Fraud—Plea of—How sustained.

To take the benefit of the section the party must show that he was prevented by fraud from knowledge of his right to institute a suit or make an application. Fraud in any other connection is immaterial. 2 P.W.R. 1919=29 P.L.R. 1919=50 Ind. Cas. 610.

——S. 18 and Art. 166—Knowledge of right—Court auction sale—Setting aside of—Court—Duty of.

When an application to set aside a sale is made after 30 days from the date of the sale the court cannot apply S. 18 of the Limitation Act without first finding the time when the applicant came to know of the sale. 48. Ind. Cas. 970 (Cal.).

——S. 18 and Art. 166—Knowledge of right—Execution sale—Application to set aside—Fraud.

Where a judgement-debtor was by the fraud of the decree-holder and auction purchaser induced to omit to make an application under R. 89 of O. 21 of the C.P. Code on the assurance that they would themselves apply to have the sale set aside. **Held**, that the fraud was not of the kind which would operate to extend the limitation provided for an application to set aside a sale on the ground of irregularity. The fraud did not keep the judgment-debtor from the knowledge of his rights but merely prevented him for making an application. 43. Ind. Cas. 671 (All.).

——S. 18—and Art 62—Knowledge of right.

On 6th July, 1893, plaintiff a **Jenmi** granted a **Kanom** to the second defendant and on 28th January, 1904, he granted **Melcharth** of the same and to the first defendant who was to redeem the **Kanom** and to pay the plaintiff the rent due by **Kanombar** for 1896 to 1905 and 1910 to 1913; the first defendant getting possession of the property did not redeem the **Kanom** but assigned the **Melkanom** to the second defendant in 1909 under which the latter undertook to pay the arrears of rent to the plaintiff. On 18th January, 1912, the plaintiff by a notice demanded the arrears and brought the persent suit. **Held**, (**Wallis, C. J., and Kumaraswami Sastri, J.**) the **Melkanom** was not invalid, the plaintiff could recover the arrears from the second defendant, that Art. 62 governed the suit. (**Wallis, C. J.**) Owing to the assignment the second defendant became bound to redeem the old **Kanom** the redemption cannot be considered as having taken place on the date of assignment; even if it were, time runs against the plaintiff under Art. 62 and S. 18 so long as he did not know as to the manner in which the assignment affected his right. (**Kumaraswami Sastri, J.**) The assignment extinguished the **Kanom** from the date the **Jenmi** assented to the assignment; the **Kanomdar** could not claim the advantages by the assignment of the **Melcharth** without performing the obligations

imposed by it. (**Bakewell, J.**) The demise under the **Melkanom** did not take effect till **Melkanomdar** paid the rent to plaintiff. The first defendants stipulation to redeem the **kanom** to pay rent to **Jenmi** was persent and could not be enforced against the **Kanomdar**. 41 Mad. 488=8 L.W. 118=22 M.L.T. 543=(1918) Mad. W.N. 93=34 M.L.J. 193=43 Ind. Cas. 625.

——S. 18—Knowledge of right.

Where a right of suit is not known owing to the practice of fraud, limitation runs only from the date of discovery of the fraud. 42. Ind. Cas. 548. (Cal.).

——Ss. 18 and 22—Knowledge of right—Benamidar impleaded deftendant.—Real owner added after period of limitation—Effect.

Where in a mortgage suit a **Benamidar** subsequent mortgagee was made a defendant. And on objection being taken, the real subsequent mortgagee was impleaded but after the limitation period. **Held**, that the suit is not barred against him either in the view that he must be deemed to have been on the record in the name of his **Benamidar** or in view that the plaintiff's cause of action against him had been kept concealed from the plaintiff's until the date of the objection and that **S.** 18 of the Limitation Act would apply. 26 Ind. Cas. 860 (Cal.).

——S. 18—Knowledge of right.

S. 18 of the Limitation Act applies only when a party is kept by fraud from **knowledge** and not from **exercising** his right. 25 Ind. Cas. 884 (Cal.).

——S. 18—Fraud—Ignorance of right.

Mere ignorance of a plaintiff of his right to sue would not prevent time from running against him; it is only when such ignorance has been brought about by the fraud of his opponent that S. 18 of the Limitation Act can be applied in his favour. To constitute fraud within S. 18, it is not enough that the right to sue should be merely unknown to plaintiff but there must have been some intentional imposition or some deliberate concealment of facts by which the ignorance of the plaintiff was brought about. 16 Ind. Cas. 547 (Cal.).

——S. 18—Knowledge of right—Nature of proof required.

A party gaining by fraudulent action of his, must show that the other party had full knowledge of the circumstances. A mere suggestion of his having been defrauded does not amount to knowledge. 17 B. 341 (P. C.), Foll. 15 C.W.N. 102=6 Ind. Cas. 154.

——S. 19.

Synopsis.

1. Applicability and scope of section.
2. Acknowledgment.
3. Admission.
4. Authority to acknowledge.
5. Basis of suit.
6. Endorsement.
7. Evidence of acknowledgment.
8. Execution application.
9. Implied acknowledgment.
10. Mortgagor and Mortgagee.
11. "Period prescribed."
12. Miscellaneous.

1. Applicability and scope of section.

——S. 19—Suit under s. 72, Dekhan Agriculturists' Relief Act.

Having regard to S. 29 (2), the plaintiff in a suit govetned by S. 72, Dekkhan Agriculturists Relief Act, is not entitled, for the purpose of limitation, to the benefit of S. 19. A.I.R. 1945 Bom. 200=47 Bom. L. R. 27=I.L.R. (1945) Bom. 167=220 Ind. Cas. 67 (F.B.).

Overruling A.I.R. 1944 Bom. 89=I.L.R. (1944) Bom. 71=212 Ind. Cas. 531=45 Bom. L.R. 1064.

——S. 19—Section 19, is applicable to suits under Bengal Tenancy Act, by virtue of the provisions of S. 185 (2), Bengal Tenancy Act. 15 P.L.T. 289=A.I.R. 1934 Pat. 198=148 Ind. Cas. 717.

——Ss. 19 and 20—Sections 19 and 20, Limitation Act applied to cases under Sch. III of the Bengal Tenancy Act, even between years 1922 and 1928. 36 C.W.N. 833=A.I.R. 1933 Cal. 90=141 Ind. Cas. 716.

——S. 19—Section applies to execution of rent decrees under the Bengal Tenancy Act. 64 Ind. Cas. 993=26 C.W.N. 486=34 C.L.J. 195=A.I.R. 1922 Cal. 187.

——S. 19—Applicability—Suit for rent—Essentials and effect of acknowledgments—Joint crediters.

S. 19 of the Limitation Act is applicable to suits for rent. Although the plaintiff is obliged to rely on S. 19 his claim does not cease to be a claim for rent. An acknowledgment does not alter the quality of the debt. The acknowledgment referred to in S. 19 must point with reasonable certainty not merely to **a liability** but **the liability** or that out of which it **arises.** An acknowledgment of sums due for rent to two creditors jointly is sufficient to keep alive the right of one of the creditors to enforce the claim for rent under the Bengal Tenancy Act. (1909) 10 C.L.J. 517=3 Ind.Cas. 34.

——S. 19—Applicability—Application of, for execution of rent decree—Bengal Tenancy Act, Sch. III Art. 6, S. 185—Acknowledgment of liability saves limitation of application for execution of rent decree not exceeding Rs. 500.

S. 19 of the Limitation Act is applicable to applications for execution of rent decrees, coming under Art. 6 of Sch. III of the Bengal Tenancy Act by reason of sub-S. 2 of S. 185 of that Act. S. 19 of the Limitation Act applies to applications for execution of decrees and an acknowledgment of liability under that section can save an application for execution of a decree for arrears of rent for a sum of money not exceeding Rs. 500 from being barred by limitation. 8 C. 716; 9 C. 730, App. (1902) 3 C.L.J. 347.

——S. 19—Special and local laws—Applicability to U.P. Rent Act, S. 94—Suit by assignee of co-sharer for profits—Acknowledgment—Limitation.

The general provisions of the Indian Limitation Act, are applicable to suits and proceedings under special or local laws except in so far as they affect or alter the period of limitation prescribed by those laws, unless the special or local law is a complete code in itself. Hence where the assignee of profits from a co-sharer sued the lambardar to recover profits for certain years, the claim in respect of some of which was apparently barred by limitation, it was **held** that the plaintiff was entitled to pray in aid an acknowledgment made by the lambardar in a suit brought by other assignees from the same assignor for

the profits of those years against the lambardar. (1902) A.W.N. 34.

——S. 19—Person having two separate and distinct remedies arising out of one and same transaction—Acknowledgment to save one of remedies—Other remedy, if also saved.

In a case where, for the unpaid sale price, the vendor has taken a promissory note from the vendee, he has two remedies open for the recovery of the unpaid sale price, one by way of enforcement of the personal liability under the note and the second by way of enforcement of the statutory charge by sale of immoveable properties which is not extinguished by the execution of the promissory note. Where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential feature, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. Therefore, an acknowledgment of liability evidenced by endorsement on the promissory note cannot be treated as acknowledgment of liability in respect of the vendor's lien. A.I.R. 1942 Mad. 167=(1941) 2 M.L.J. 939=54 L.W. 591=1942 M.W.N. 102=201 Ind. Cas. 172.

——Ss. 19 and 20—Not mutually exclusive.

Sections 19 and 20 are not mutually exclusive. 1945 N. L. J. 213=I. L. R. (1945) Nag. 745=A.I.R. 1945 Nag. 181.

——Ss. 19 and 20—Party setting up case under S. 20, in trial Court and under S. 19, in Appellate Court:

Held that the party could set up such pleas provided the aggrieved party was not taken by surprise. A.I.R. 1937 Oudh 391=1937 O.W.N. 719=13 Luck. 334=168 Ind. Cas. 799.

——Ss. 19 and 20—Sections 19 and 20 do not apply to S. 48 of Civil P. Code. 10 Luck. 208=11 O. W. N. 1103=A.I.R. 1934 Oudh 465=151 Ind. Cas. 541.

——Ss. 19 and 20—Scope of—Not exclusive.

Ss. 19 and 20 are not mutually exclusive. Part-payment endorsed, but not in the debtor's hand-writing is ineffectual under S. 20 but is effectual in saving limitation under S. 19. 40 Mad. 698=3 L. W. 576=(1916) 2 M.W.N. 256=36 Ind. Cas. 240.

——Ss. 19 and 21 (2)—Application restricted to cases satisfying its requirements.

The word "only" in S. 21 (2) is not a mere surplusage and if effect be given to the word the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements. 98 Ind. Cas. 381=44 C.L.J. 475=A. I. R. 1927 Cal. 193.

——S. 19—Scope—Acknowledgment if need be communicated.

There is nothing in the terms of S. 19 to suggest that an acknowledgment of a debt to be operative must be addressed or communicated to the creditor or some one on his behalf. 33 Cal. 613, Diss. 7 O. W. N. 1195=A.I.R. 1931 Oudh 54.

——S. 19—Enforceability of claim when making acknowledgment—Not material.

Under S. 19 it is not material whether the claim in respect of which acknowledgment was made, could have been enforced against him personally at the time when he made the acknowledgment. 80 Ind. Cas. 940=A.I.R. 1925 Mad. 134.

——S. 19—Oral acknowledgment.

An oral acknowledgment of a debt would not extend the period of limitation under S. 19 of the Limitation Act. 93 P. R. 1911=151 P.W.R. 1911=223 P.L.R. 1911=11 Ind. Cas. 445.

——S. 19—Starting point of limitation—Oral agreement to give time for payment of debt, not barred—Validity of.

An oral agreement, before a debt is barred, to give further time to payment is valid and does not contravene S. 19, Limitation Act, or S. 25 Contract Act. Limitation begins to run from the end of such extended period. (1902) 4 Bom. L.R. 50.

2. Acknowledgment.

(a) Construction.
(b) Effect of.
(c) Essentials.
(d) By whom.
(e) To whom.
(f) What constitutes.

2. (a)—Acknowledgment—Construction.

——S. 19—Ackuowledgment—Construction of document—Construction in the light of context.

A document taid to constitute an acknowledgment has to be construed in the context in which it is given and where its language is not clear in itself, the context may be examined to see what it is to which the words refer. That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgor was. That is quite a different thing. But where, after examining in the light of the context what it was that the person giving the acknowledgment was actually referring to the conclusion follows that it is an unequivocal acknowledgment of a right, then that acknowledgment is sufficient to satisfy S. 19, Limitation Act. I.L.R. (1947) All. 11=229 Ind. Cas. 583=1947 A.W.R. (H.C.) 101=1947 A.L.J. 129=1947 A.L.W. 376=A.I.R. 1947 All. 74 (F.B.).

——S. 19—Whether the words used constitute an acknowledgment the Court can only have regard to the words used. A.I.R. 1942 Mad. 353=55 L.W. 240 (2)=(1942) 1 M.L.J. 469=1942 M.W.N. 325=I.L.R. (1942) Mad. 595=201 Ind. Cas. 586 (F.B.).

——S. 19—Per **Venkataramana Rao, J.—(In order of reference)**: The purpose for which the acknowledgment was made is immaterial for the purposes of S. 19, Limitation Act. The question is whether there was an acknowledgment and not why an acknowledgment was made. 54 L.W. 186=1941 M.W.N. 704=I.L.R. ((1942) Mad. 95=(1941) 2 M.L.J. 311=A.I.R. 1941 Mad. 772=197 Ind. Cas. 199 (F.B.).

——S. 19—Entry in creditor's account book.

Entry in creditor's account books "the sum of Rs. 800-11-3 will be paid by me immediately"—Lower Court holding the entry as pro-note not duly stamped and hence inadmissible :

Held, that the entry was not a pro-note as there was no name of the payee. But it was an agreement or a memorandum of agreement. 38 L.W. 846=A.I.R. 1934 Mad. 25=(1933) M.W.N. 1243=146 Ind. Cas. 943.

2. (b) Acknowledgment—Effect of.

——S. 19 Acknowledgment Effect off.

In case of an acknowledgment of liability, the fresh period of limitation is to be computed from the time when the acknowledgment is signed even though it purports to fix a period of payment. 57 L.W. 499=(1944) 2 M.L.J. 225=A.I.R. (1945) Mad. 10=219 Ind. Cas. 231=1944 M.W.N. 788.

——S. 19—Fresh period commences from date of acknowledgment.

Where a mortgage document dated 1906 acknowledged the liability under a mortgaged dated 1904 a fresh period of limitation can commence only from 1906, the date of the later mortgage and not from the date fixed for payment of the amount due under that mortgage. 6 N.L.J. 14=A.I.R. 1922 Nag. 256.

——S. 19—The admission of the execution of a promissory note **prima facie** it no more than an admission of liability as at the date of the note. A.I.R. 1935 Cal. 721=40 C.W.N. 132=63 C. 512=159 Ind. Cas. 618.

——S. 19—An acknowledgment does not imply a promise to pay. It only confirms the old debt and does not supersede it. (1933) A.L.J. 1530=A.I.R. 1934 All. 76=56 A. 281=149 Ind. Cas. 571.

——S. 19—An unconditional acknowledgment implies a promise to pay. 33 Cal. 1047 (P.C.), Foll.; 119 P.R. 1908, **held no longer good law.** 115 Ind. Cas. 853=10 Lah. 748=30 P.L.R. 226=A.I.R. 1929 Lah. 264. **See also** 115 Ind. Cas. 764=10 Lah. 745=30 P.L.R. 240=A.I.R. 1929 Lah. 263.

——S. 19—Acknowledgment—If a promise to pay—Express promise to pay—If barred debt also revived.

No doubt under the English Law an acknowledgment of a debt implies a promise to pay (even a barred debt). But in India in view of the express provision in S. 19 an acknowledgment, in which there is no express promise implying a new contract to pay, must be made before the several components of the account at various dates are barred by time and in this respect an acknowledgment under S. 19, Limitation Act, differs from a promise to pay a barred debt under Cl. (3), : S. 25, Contract Act. Where, however, the acknowledgment is not merely an admission of an existing debt but the words there are such from which a clear promise to pay is made out, such as fixing the date of payment and so on, such an acknowledgment would come under S. 25 (3), Contract Act and not only under S. 19, Limitation Act. 120 Ind. Cas. 470=8 Pat. 706=10 P.L.T. 169=A.I.R. 1929 Pat. 258.

——S. 19—Acknowledgment—If a promise to pay.

An acknowledgment that a debt was due, without anything more, will be held to imply a promise to pay. 33 Cal. 1047, Foll. 78 Ind. Cas. 919=5 P.L.T. 551=A.I.R. 1924 Pat. 806.

——S. 19—Effect of.

An acknowledgment of liability though made after the expiry of the period of limitation for a suit on the mortgage but within the special period of limitation prescribed by S. 31 gives a fresh period from the date of acknowledgment. 34 All. 375; 49 All. 67; 26 M.L.J. 23; 55 Cal. 1210, Foll. 1930 M.W.N. 930 =32 M.L.W. 502=128 Ind. Cas. 867=A.I.R. 1930 Mad. 991=59 M.L.J. 881.

——S. 19—Effect of—Definite sum acknowledged—Limitation saved only to that extent.

Although no doubt if no definite sum is mentiond and there is acknowledgment in general terms, the amount of debt can be discovered from evidence as mentioned in S. 19, Expl. 1, where a definite sum has been aeknowledged, the acknowledgment can be used to save limitation only with respect to sum acknowledged. A.I.R. 1930 All. 461=127 Ind. Cas. 424.

——S. 19—Acknowledging part of claim—Saving as to that part only.

Where in a suit against Railway for loss of goods, a letter written by Railway Company was relied upon which stated that Railway Company was liable for Rs. 1,000 and nothing more:

Held, the letter saved limitation to the extent of Rs. 1,000 only but not in respect of the whole claim 86 Ind. Cas. 228=A.I.R. 1925 Sind 8.

——S. 19—Effect of—Acknowledgment—Partial liability.

Where there is a liability to account and it is admitted in part, the admission, but not under S. 19 of the Limitation Act operates to save the entire right. 22 C.W.N. 104=27 C.L.J. 403=43 Ind. Cas. 893.

——S. 19—Revival of barred debt.

The statute of limitation, being a law of procedure, is generally retrospective in its operation but there is no provision in the Act so retrospective in its effect as to revive and make effective a barred right. A.I.R. 1935 Mad. 245=68 M.L.J. 63=(1935) M.W.N. 122=41 L.W. 721=157 Ind. Cas. 272.

——S. 19—Acknowledgment does not revive barred debts.

Acknowledgment only gives a fresh period of limitation from the date of acknowledgment in respect of such items only as were not already barred at the time when the acknowledgment was made. 1 P.L.T. 190, **Foll.** 120 Ind. Cas. 470=10 P.L.T. 169=8 Pat. 706=A.I.R. 1929 Pat. 258.

——S. 19—Effect of acknowledgment—Barred debt.

An acknowledgment under S. 19 of the Limitation Act saves limitation if it is made before the original debt, which is always the basis of the suit, is time barred. 5 Pat. L.J. 37=1 Pat. L.T. 190=2 U.P.L.R. (Pat.) 105=56 Ind. Cas. 379.

——S. 19—Effect of acknowledgment—Barred right—Not revived.

An acknowledgment does not revive a right which has become barred at the date of acknowledgment. 22 M.L.T. 419=(1917) M.W.N. 864=33 M.L.J. 753=43 Ind. Cas. 50.

——S. 19—Effect of acknowledgment—Admission of a barred debt.

An admission of a barred debt is not an "acknowledgment of the debt." 18 Ind. Cas. 595, Foll. 24 Ind. Cas. 507 (Mad.).

——S. 19—Effect of—Acknowledgment—Barred debt.

After a right is lost there can be no acknowledgment of liability within S. 19. 12 Bom. L.R. 621=7 Ind. Cas. 134.

——S. 19—Effect of—Acknowledgment—Minor—Effect.

If a balance be struck or an acknowledgment made within S. 19 of the Limitation Act in favour of a minor, the period of limitation is to be computed from the date when the plaintiff becomes a major. 37 P.L.R. 1919=52 Ind. Cas. 115.

——S. 19—Effect of acknowledgment—Fresh cause of action.

If a payment is made by way of an acknowledgment on foot of general debt a new cause of action springs from it and limitation begins to run afresh. 2 Pat. L.J. 24=38 Ind. Cas. 85.

——S. 19—Effect of—Acknowledgment—General Clauses Act, S. 6 (b).

An acknowledgment of liability only extends the period of limitation and does not confer title and is not a "thing done" within S. 6 of the General Clauses Act. 35 All. 227=40 I.A. 74=25 M.L.J. 131=13 M.L.T. 437=17 C.W.N. 605=11 A.L.J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L.R. 489=19 Ind. Cas. 291 (P.C.). [Affirming 32 All. 33=6 A.L.J. 931=6 M.L.T. 348=3 Ind. Cas. 725.].

——S. 19—Effect of—Acknowledgment—Extension of time.

An acknowledgment does not confer title; it only extends limitation for filing the suit. 32 All. 33=6 A.L.J. 931=3 Ind. Cas. 725.

——S. 19—Effect of acknowledgment—Judgment debt.

A valid acknowledgment of a judgment debt gives a fresh starting point under S. 19 of the Act. 80 P.W.R. 1912=155 P.L.R. 1912=14 Ind. Cas. 335.

——S. 19—Effect of—Acknowledgment—New Act.

An acknowledgment invalid under Act (14 of 1859) but valid under subsequent Limitation Acts is valid within S. 19. 34 All. 109=8 A.L.J. 1272=12 Ind. Cas. 604.

——S. 19—Effect of acknowledgment—Acknowledgment of mortgage in a plaint, if an acknowledgment of liability in respect of mortgagor's right to redeem.

A statement in a plaint admitting a mortgage in plaintiff's favour amounts to an acknowledgment of his liability in respect of the mortgagor's right to redeem the mortgage within the meaning of S. 19 of the Limitation Act. 82 P.W.R. 1911=180 P.L.R. 1911=11 Ind. Cas. 377.

——S. 19—Effect of—Acknowledgment—Rent—Limitation—B.T. Act, S. 185.

An acknowledgment by the purchaser of certain properties that he would himself pay the arrears of rent is not a novation so as to make him personally liable but the property in his hands is liable. An acknowledgment does not alter the quality of the debt or operate as a novation. The acknowledgment must point with reasonable certainty not merely to a liability but the liability of that out of which it arises though all its legal consequences need not be specified. 10 C.L.J. 517=3 Ind. Cas. 34.

2 (c). Acknowledgment—Essentials.

(i) Before expiration.
(ii) Intention.
(iii) Particular liability.
(iv) Signature.
(v) Stamp and Registration.
(vi) Subsisting liability.
(vii) Miscellaneus.

2 (c) (i.) Acknowledgment—Essentials—Before expiration.

——S. 19—Barred debt.

An acknowledgment of a barred debt does not save limitation under S. 19. But the acknowledgment made on December 5, 1928, relating to mortgage which was executed on December 19, 1916, was of a subsisting liabilty and therefore, amounted to an acknowledgment under that section. (1945) A.L.J. 58=(1945) A.W.R. (H.C.) 22=1945 O.W.N. (H.C.) 28=A.I.R. 1945 All. 224=I.L.R. (1945) All. 120.

——S. 19—Acknowledgment must be made within time. A.I.R. 1938 Nag. 180=I.L.R. (1940) Nag. 441=174 Ind. Cas. 374.

——S. 19—Execution of fresh pro-note for balance due after 3 year's from date of mortgage, if valid acknowledgment.

By the terms of S. 19, sub-S. (1), an acknowledgment in writing of a liablity to permit of a fresh period of limitation shall be computed from the date of the acknowledgment only where the acknowledgment is made before the expiration of the poriod prescribed. Consequently, the fresh promissory note having been executed after the personal remedy was barred could not operate as an acknowledgment within the meaning of S. 19 even though the plaintiff could have sued on the promissory note which was a new promise under S. 25 (3), Contract Act. A.I.R 1938 Rang. 134=1938 Rang. L.R. 6=177 Ind. Cas. 63.

——S. 19—Distinction between "acknowledgment" under S. 19 and "promise" under S. 25(3), Contract Act (9 of 1872), pointed out.

The distinction between an acknowledgment under S. 19, Limitation Act, and a "promise" within the meaning of S. 25 (3), Contract Act, is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the petiod of limitation, a promise under S. 25 (3) to pay a debt may be made after the limitation period. After the period of limitation expires nothing short of an express promise will provide a fresh period of limitation. A. I. R. 1937 Lah. 642=174 Ind. Cas. 258.

——S. 19—Acknowledgment must be before expiry of the limitation period.

One condition precedent to the application of S. 19 is that the acknowledgment should have been made before the expiration of the period prescribed for the suit. 7 O.W.N. 420=A.I.R. 1930 Oudh 287.

——S. 19—Acknowledgment must have been made within period of limitation.

A letter by the general agent written at the instructions of the judgment-debtor can serve as a valid acknowledgment only when it is shown that it was made within the time prescribed by the law of limitation for the recovery of debt due under a decree and where it is not so shown the acknowledgment does not save limitation. 120 Ind. Cas. 825=6 O.W.N. 776=A.I.R. 1929 Oudh 479.

——S. 19—Acknowledgment to be made before expiry of limitation.

An acknowledgment of debt implies a promise to pay, and though an acknowledgment is required by S. 19, Limitation Act, to be made before the expiry of the period of limitation a promise under S. 25, Contract Act, may be made after the period. 106 Ind. Cas. 661 =A.I.R. 1928 Nag. 124.

——S. 19—Admission after limitation ineffective.

Admission of mortgage by mortgagee in a suit for possession against mortgagors does not extend period of limitation for redemption when the admission was made after the 60 years had run out. 78 Ind. Cas. 617=6 L.L.J. 194=A.I.R. 1924 Lah. 484.

——S. 19—Acknowledgment—Must be before claim is barred.

An acknowledgment of a debt to be effective for the purpose of saving limitation must be made before the enforcement of it by suit is barred. An acknowledgment of a barred debt is of no avail to save limitation. 67 Ind. Cas. 298 (Cal.).

——S. 19—Acknowledgment—Essentials.

An acknowledgment of a liability, after the right to enforce it is barred, is not a good acknowledgment, and the onus of proving that it was made at such a time is upon the person who set up the bar by limitation. (1903) A.L.J. 1=1904 A.W.N. 38=26 A. 313. **See** also 26 M. 34; 10 C.L.J. 517.

2. (c) (ii) Acknowledgment—Essentials—Intention.

——S. 19—Acknowledgment of liability—Balance-sheet of company—Signing by director—If saves limitation.

The mere signing of a balance-sheet of a company by a director does not operate to save limitation because the director in drawing up a balance-sheet does not do so with the intention of acknowledging liability but under a duty where he is bound to set out, among other things, the claims made on the company. It is then for the directors, and later for the company, to pass on these claims and either accept them or reject them. I.L.R. (1950) Nag 562=1950 Comp. C. 225=A.I.R. 1951 Nag. 255.

——S. 19—Mortgage replacing prior mortgage—Subsequent mortgage invalid—Whether an acknowledgment of the prior one.

Identical parties to a mortgage of 1916 created a second mortgage in 1922. Clause II of the mortgage-deed read: "This document has been executed in place of the previous document therefore, the creditors shall have all the usual rights to the property hypothecated under this document, which they had under the document dated the 12th and registered on February 15, 1916." The second mortgage was held to be invalid on ground of fraud:

Held, that, as the intention of the parties could be clearly seen, the deed was an acknowledgment of the liability of 1916, under S. 19. I.L.R. (1946) All. 375=A.I.R. 1947 All. 211=1946 A.W.R. (H.C.) 476=1946 A.L.J. 104=222 Ind. Cas. 632 (D.B.).

——S. 19—In the **khewat** of 1852 Fasli, there was a mention of two areas of 6 **biswansis** odd being in possession of Lachhman, Maharam and Mahasukh as mortgagees, the mortgage-money being shown as Rs. 278-4-0 and Rs. 383, respectively. In the settlement **khewat** of 1283, Mahasukh and Maharam were shown as mortgagees of these two properties in equal shares. A reference was made to the earlier **khewat** prepared at the time of revision settlement, and it was further stated that the interest was equal to profits and that the mortgage was redeemable at Daschra in the month of Jeth. These entries both in 1852 and in 1878, were attested by the mortgagors and the mortgagees or their representatives.

(Per **Collister, Allsop, Bajpai** and **Hamilton, JJ**).—It could not be said that the mortgagees or their representatives at the time of attesting the entries were conscious that they were acknowledging a subsisting and enforceable liability against themselves and admitting the title of the mortgagor and the liability of the mortgages to be redeemed. The entries therefore, did not save limitation. A.I.R. 1943 All. 393=1948 A. W. R. H. C. 291=(1943) A.L.J. 548=I.L.R. (1944)All. 76 =212 Ind. Cas. 238 (F.B.). **Overruling** A.I.R. 1920 All. 92.

——S. 19—Intention to make new contract must be clear.

The intention of the law is to make an admission in writing of an existing jural relation equivalent for the purposes of limitation to a new contract, but for this purpose, the consciousness and intention must be as clear as they would be in a contract itself.

The writing in question contained details of account and the amount finally due by the debtor. The debtor had also mentioned therein that he was giving certain documents to the creditor in lieu of the amounts due and the word **bhuktan** which means fully satisfied was also used:

Held, that the admission was an admission of liability due by the debtor to the creditor and he proposed to hand over the document on account of his dues which would be satisfied by the assignment thereof. Something more was to be done before the documents would be held to have satisfied the debt and in order that the documents in the hands of the creditor should be capable of realising the amount mentioned against each document, a formal assignment would be necesary; otherwise the document cannot be said to be equal to the amount mentioned against it:

Held, also, that there was only an inchoate proposition on arrangement for the liquidation thereof and there was no novation of contract within the meaning of S. 62, Contract Act. 22 P.L.T. 1057=A.I.R. 1942 Pat. 170=8 B.R. 608=199 Ind. Cas. 657.

——S. 19—Decree in respect of charge—Application by judgment-debtor for adjournment.

To bring a case within S. 19, there must be a clear acknowledgment of liability.

Where a decree in respect of a charge on property is passed, applications by the judgment-debtor for adjournment on various dates in the proceedings for rehearing under O. 9, R. 13, Civil P. C., do not constitute any acknowledgment of liability within S. 19, Limitation Act. Adjournments are often obtained for the purpose of delay and often for the purpose of convenience and the prayer for adjournment to compromise the dispute as to debt by no means admits the debt itself when proceedings to set it aside have been taken. A.I.R. 1939 Cal. 488=43 C.W.N. 800=70 C.L.J. 320=183 Ind. Cas. 473.

——S. 19—For the purpose of S. 19, there must be a clear acknowledgment of liability in respect of a right. A.I.R. 1936 All. 522=(1936) A.L.J. 625=1936 A.W.R. 533=1936 R.D. 254=163 Ind. Cas. 872.

——S. 19—Conscious admission of liability, necessity of.

In order to find whether there is an acknowledgment in a document, the document should be read as a whole and there must be conscious acknowledgment that the party concerned is liable to pay.

The purchaser of properties which were subject to a mortgage agreed to sell one of them to the mortgagee and the latter paid an advance of Rs. 700. The contract did not fructify and the sale did not come off. The mortgagee sued upon the mortgage and in the written

statement, the defendant set up the agreement and receipt of Rs. 700 and contended that the suit was not maintainable on account of the said agreement, which the defendant was prepared to complete :

Held, in a subsequent suit to recover the Rs. 700, that the admission in the written statement was not an acknowledgment of any liability by the defendant to pay Rs. 700 to the plaintiff sufficient to save limitation. (1935) M.W.N. 237=A.I.R. 1935 Mad. 287=41 L.W. 476=159 Ind Cas. 486.

——**S. 19**—Where there is no definite or unequivocal acknowledgment of the debt, a case cannot be brought within the purview of S. 19. A.I.R. 1935 Rang. 152=156 Ind. Cas. 783.

——**S. 19**—A signature by a debtor on the back of the Promissory note executed by him is not an acknowledgment of liability. Unless intention is proved, it does not indicate liability to pay. A.I.R. 1934 Rang. 287=152 Ind. Cas. 501.

——S. 19—Entry by mortgagor in mortgagee's book—Mortgagee signing as scribe.

Where the mortgagor signed an entry in the **bahi** of the mortgagee showing the balance due to the mortgagee and the mortgagee in whose handwriting the entry was made, also put down his name under the entry as its scribe :

Held, that the entry was not an acknowledgment of the mortgage debt by the mortgagee and the fact that the mortgagee wrote it at the instance of the person acknowledging the debt and put down his own name under it merely as a scribe, could not alter the nature of the entry or convert it into an acknowledgment by the mortgagee.

An acknowledgment must be a conscious acknowledgment of liability, in order to be effective under S. 19. A.I.R. 1931 Lah. 122=131 Ind. Cas. 349.

——S. 19—Definite acknowledgment—Creditor can pursue his claim in any way.

Where the liability to pay the debt is definitely acknowledged by an authorized agent, it is immaterial that the right to enforce the liability in any particular manner is not admitted. The liability to pay having been admitted the creditor can pursue his claim in any way recognized by law. 109 Ind. Cas. 872=27 M. L.W. 544=A.I.R. 1928 Mad. 713 (F.B.).

——S. 19—Exact nature of right need not be stated but definite acknowledgment essential—Ambiguity—Effect.

An acknowledgment under S. 19 may be sufficient though it omits to specify the exact nature of the right. But there must be a definite acknowledgment.

An endorsement on a money bond stated that accounts made up showed a certain sum and that a usufructuary mortgage was executed for a portion of the sum. It was not clear whether the execution of the usufructuary mortgage was in lieu of the whole amount due to the creditor or whether the debtor still held himself bound to pay the balance of the debt:

Held, that in order to extend the period of limitation the creditor must show that the debtor signed an acknowledgment to the effect that there was a balance due to the creditor on the bond after crediting the debtor with what was properly due to him in respect of the execution of the usufructuary mortgage deed, and as the endorsement was ambiguous on this point it could not be held to be an acknowledgment deed. 89 Ind. Cas. 617=23 A.L.J. 869=6 L.R.A. Civ. 399=A.I.R. 1926 All. 75.

——S. 19—Admission of purchase of mortgagee rights—No acknowledgment as to being redeemed.

When a man says that he purchased a certain mortgage rights he only means that he purchased certain property which came into possession of the vendor as a mortgagee. All that he admits is that the vendor came into possession of the property on foot of a mortgagee. No question arises in his mind as to whether the mortgage subsists or has become time-barred. The statement by itself does not signify to the mind of the person making the statement or to anybody else that the maker of the statement thinks or believes that he is liable to be redeemed at the date of making the statement. Such statement therefore is not an acknowledgment within S. 19 as any acknowledgment of the original transaction would not necessarily amount to an acknowledgment that the liability which would follow from the original transaction subsists at the date of the statement. 85 Ind. Cas. 584 =6 L.R.A. Civ. 139=A.I.R. 1925 All. 553.

——S. 19—Admission must be conscious—Jural relationship when admission was made must have existed.

An acknowledgment under S. 19, Limitation Act, must be a conscious admission of the existing liability in respect of the property or right which is claimed in the suit and must show an existing jural relationship between the parties at the time when the admission was made. 79 Ind. Cas. 914=17 S.L.R. 324=A.I.R. 1925 Sind 181.

——S. 19—Letter of information.

A letter of information of the trace of the goods and its disposal awaiting instructions, is not an acknowledgment within S. 19 of the Act. An acknowledgment after the expiry of the period of limitation cannot save the operation of the Act. 42 All. 390=2 U.P.L.R. (All.) 84=18 A.L.J. 377=58 Ind. Cas. 547.

——S. 19—Hatchita entry in—Signature sufficient—Customary mode—Intention of parties.

Where at the foot of certain entries made in a **hatchita** which bore at its top the debtor's name of signature, the debtor wrote the words **likhitar knode** (writer's self) .

Held, that this was the mode adopted by the debtor of signing the **hatchita,** and as it appeared that it was the debtor's intention thereby to acknowledge a debt, the entry constituted an acknowledgment. It is necessary in such cases to consider the intention of the parties. 18 B. 586, appl. (1904) 9 C.W.N. 83=31 C. 1043.

2 (c) (iii) Acknowledgment—Essentials—Particular liability.

——S. 19—Words must indicate acknowledgment of liability of particular debt.

Before S. 19, Limitation Act can apply, the words used must be words which clearly indicate an acknowledgment of liability of the particular debt. It is wrong to say that unless the words used amount to a total repudiation of liability they should be read as an acknowledgment of liability:

Held, on facts that there was no evidence on record which identified the word 'debts' used in the statement to the mortgage deeds of August 9, 1921 and January 6, 1923, and that the words used there did not amount to acknowledgment of these debts. 54 M.L.W. 718=A.I.R. 1941 Mad. 892=1941 M.W.N. 827=(1941) 2 M.L.J. 460=198 Ind. Cas. 611.

——S. 19—Only one debt in existence.

A letter amounting to an acknowledgment need not specify the debt in respect of which the acknowledgment is made where there is only one debt. A.I.R. 1937 Lah. 827=169 Ind. Cas. 973.

——S. 19—Mere statement of existence of earlier mortgage deed.

Where a second mortgagee who had obtained a a decree on his mortgage stated in the verified statement accompanying an application for sale of the property under O. 21, R. 66, Civil P.Code, that upon an examination of the Registration Office, he found that there was a mortgage deed of the property of which the sale proclamation was to issue which had been registered on a certain date (which was prior to the date of his mortgage).

Held, that this did not amount to an acknowledgment of any liability affixed to the property or personal, under the earlier mortgage and did not give a fresh starting period for a suit on the earlier mortgage. A.I.R. 1932 All. 62=(1931) A.L.J. 862=136 Ind. Cas. 624.

——S. 19—Receipt showing payment under decree does not amount to an acknowledgment of liability to deliver properties under same decree. 8 O.W.N. 1117 =A.I.R. 1932 Oudh 154=134 Ind. Cas. 1022.

——S. 19—Identity of right—Right claimed must be acknowledged.

The acknowledgment referred to in S. 19 of the Limitation Act must be an acknowledgment of liability in respect of the right claimed, and the right acknowledged must be the of same description as the right which is the subject of suit. A recital in a sale-deed that a sum of money has been left with vendee to pay off a mortgage by the vendor does not amount to an acknowledgment of the rights of the mortgagee to obtain possession of the mortgaged property. 21 O.C. 151=46 Ind. Cas. 813.

——S. 19—Identity of right—Acknowledgment of liability.

An acknowledgment of liability need not be made to the person entitled to the right; if it points with reasonable certainty to the liability in dispute or to the rights out of the which that liability arises as a legal consequence, it is an "acknowledgment" of liability within the meaning of S. 19 of the Limitation Act. 19 C.W.N. 263=22 Ind. Cas. 650.

——S. 19—Identity of right—General acknowledgment—Nature of—Admission that accounts be taken.

The acknowledgment of the liability in respect of a right must be in respect of the right which is the subject of the suit. In a suit for a definite sum of money and admission that accounts must be taken and settled does not amount to an acknowledgment. 36 Mad. 68=10 M.L.T. 251=(1911) 2 M.W.N. 225=21 M.L.J. 1024=12 Ind. Cas. 378.

——S. 19—Acknowledgment must refer to the liability and not any liability.

An acknowledgment must distinctly and definitely relate to the liability in dispute. It need not be express; it may be left to implication. It must be a necessary implication from the words used that the person acknowledging was referring to and admitting the liability, not any liability. (1907) 9 Bom. L.R. 715.

——S. 19—Acknowledgment—Khatas—Limitation.

Under S. 19, it is open to the plaintiff by reference to the accounts or otherwise to establish a connection between the two khatas and show that the latter one was an acknowledgment of the debt due under the first. (1900) 2 Bom. L.R. 1086=25 B. 330.

2 (c) (iv)—Acknowledgment—Essentials —Signature.

——S. 19—Signature—Giving name of firm only.

It is customary in business circles in India to give the name of the firm only in statements of accounts, and this amounts to signature for the purpose of S. 19, Limitation Act. A.I.R. 1941 Oudh 376=1941 R.D. 279=1941 O.W.N. 527=1941 A.W.R. 300=16 Luck. 727=194 Ind. Cas. 168.

——S. 19—An endorsement at the back of the bond was as follows: "to-day.....Rs. 360-10-0.....were paid towards this bond." It was thumb-marked by the debtor;

Held, that it amounted to an acknowledgment under S. 19, Limitation Act. A.I.R. 1941 Lah. 23=192 Ind. Cas. 118.

——S. 19—Name of debtor written by person with authority to do so and acknowledge debt.

Section 19, Limitation Act, does not draw any distinction between a person who is literate and one who is not literate. In either case, an acknowledgment signed by an agent with his authority would be enough. The section also does not say as to what should be the form of the singature, and it is now well-settled that if the name of the debtor is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own such name, whether written or printed, would constitute his signature within the meaning of the expression as used in S. 19. Thus it is not necessary that the name should be written by the debtor himself. It is suffieient if it is written by a person acting with authority to write his name and to acknowledge the debt in question. A.I.R. 1940 Pat. 6=18 Pat. 715=20 P.L.T. 927=6 B.R. 312=186 Ind. Cas. 225.

——S. 19—Affixing of initials.

A party's initials are equivalent to his signature for the purpose of S. 19. The word 'signed' in the said section does not mean 'signed in full.' (1935) M.W.N. 490=68 M.L.J. 623=41 L.W. 744=A.I.R. 1935 Mad. 555=59 M. 72=156 Ind. Cas. 449.

——S. 19—Initials—Not proper.

Acknowledgment merely bearing initials instead of signature is not proper. 96 Ind. Cas. 700=23 M.L.W. 771=1926 M.W.N. 392=A.I.R. 1926 Mad. 827=51 M.L.J. 414.

——S. 19—Rubber stamp containing principal's name affixed.

When the acknowledgment is written by an agent duly authorised in that behaif and if he affixes there to the name of his principal in any position, even by impressing it with a rubber stamp, such affixation of the name of the principal must be held to be a 'signing' of the document within the meaning of S. 19. A. I. R. 1935 Rang. 160=13 R. 322=156 Ind. Cas. 589.

——S. 19—Acknowledgment must be signed.

Section 19 makes it perfectly clear that an acknowledgment must be signed by a person making it. 109 Ind. Cas. 398=26 A.L.J. 420=A.I.R. 1928 All. 310.

——S. 19—Actual signature not necessary—Signing in the manner usual to the party sufficient.

Under S. 19 of the Limitation Act, the actuel signature of the acknowledger is not necessary. Acknowledg-

ment in the acknowledger's handwriting aud signed by him in a manner which is customary with him in his communications is enough. Where the habitual method of a Guru while sending communications to his disciples is to subscribe the communication with the words "Shree Hari Sharanam" and not to affix his signatures, any communication of this form and written by the Guru himself personally will be regarded as signed by him even though it may not contain his actual name; so that, any acknowledgment of liability signed in this manner and made in the Guru's own handwriting will save limitation under S. 19. 75 Ind. Cas. 1004=A.I.R. 1925 All. 85.

——S. 19—Plan attached to plaint—Plan unsigned and unverified—Contents of plan cannot be considered as admitted.

An admission in a plan filed with a plaint, might possibly for certain purposes be regarded as an admission made in the plaint, but such an assumption does not convert an unsigned and unverified plan into writing signed by the plaintiff or plaintiffs. 86 Ind. Cas. 859=A.I.R. 1925 Lah. 529.

——S. 19—Acknowledgment must be signed.

Where a certain acknowledgment said to have been made at the time of the settlement by the predecessors-in-title of the defendant was relied on and it was contended that under S. 19 of the Limitation Act a fresh period of limitation arose from the date of that acknowledgment:

Held, the acknowledgment under S. 19 in order to be operative must be signed by the party against whom any particular right is claimed, and if there was no evidence to show that the alleged acknowledgment was ever signed by any of the predecessors-in title of the present defendant, it was not operative as such. 78 Ind. Cas. 617=6 L.L.J. 194=A.I.R. 1924 Lah. 484.

——Ss. 19 and 20—Signature—Vilasam of the firm written at the top of the letter—No signature—Nattukottai Chetties.

According to the practice of Nattukottai Chetties who do not sign their letters at the foot but begin by saying that the sender is such and such a firm, the name so written is a sufficient signature within S. 19 of the Limitation Act, I.A 683: 6 C. 340, Foll. 6 L. W. 790 =1918 M.W.N. 42=43 Ind. Cas. 20.

——S. 19—Signature—Usage.

Where it is proved that **Nattukottai Chetties** usually do not sign their name but write words invoking the help of the family deity, a letter so signed may be taken as signed by the writer for the purpose of S. 19 of the Limitation Act. 27 M.L.J. 631=26 Ind. Cas. 911.

——S. 19—Essentials of acknewledgment—Future promise—"Will sign after looking into accounts."

A letter merely saying that the writer after looking into the account will sign it is not an acknowledgment of liability; even assuming that it were, it is not an acknowledgment of liability to pay the sum due on the accounts for the year. 19 C.W.N. 170=23 Ind. Cas. 57.

——S. 19—Document undated and unsigned.

A document undated and unsigned by the mortgagee or his duly authorised agent cannot save limitation under S. 19 of the Act, in a suit for redemption of the mortgage. 20 Ind. Cas. 62 (Oudh.).

——S. 19—Unsigned entries in accounts.

Entries as to payment of rent in an account book not signed by defendant or his authorised agent are not acknowledgment. 34 All. 464=10 A.L.J. 1=16 Ind. Cas. 146.

——S. 19—Essentials of acknowledgment—Signature—Valid signature.

A Signature written by a third person under the directions of the person whose signature is in question, and in his presence, is proper signature and is personal signature for the purposes of S. 19 of the Limitation Act. 10 Ind. Cas. 215 (All.).

——S. 19—Accounts settled—Settlement not signed.

An account settled must be signed by the debtor and in view of the absence of signature three years from its date cannot be allowed for limitation purposes. 7. M.L.T. 372=6 Ind. Cas. 719.

——S. 19—Certified copy.

It is one of the essential elements of an acknowledgment under S. 19 of the Limitation Act that it must be signed by the party personally, or by an agent duly authorised in his behalf, or by some person through whom he derives title or liability. It is not necessary according to Expl. I of S. 19 that an acknowledgment must be addressed to the mortgagor. Any statement contained in a certified copy of the translation of a judgment under S. 185 of Act 8 of 1859 does not satisfy the requirements of S. 19 of the Limitation Act. 4 Ind. Cas. 579 (All.).

——S. 19—Signature.

The acknowledgment must be signed by the person to be bound thereby. 1907 A.W.N. 263=4 A.L.J. 628=29 A. 773.

——S. 19—Signature obtained by intimidation.

Acknowledgment of liability to pay a certain sum cannot be held to be binding where it is found that the signature of the excutant was obtained by intimidation and that the amount acknowledged has been paid. 59 Ind. Cas. 781=29 P.L.R. 1921=A.I.R. 1921 Lah. 362.

2. (c). (v). Acknowledgment—Essentials—Stamp and registrotion.

——S. 19—Acknowledgment—Registration, whether necessary.

An Acknowledgment does not in itself create any title or right in the owner which would attract the provisions of 3. 17 (1) of the Registration Act but is a mere statement, an admission of an existent fact. A.I.R. 1942 Nag. 102 = 1942 N.L.J. 412=I.L.R. (1942) Nag. 541 : 201 Ind. Cas. 748.

——S. 19—Unstamped signature in an account book showing a certain amount as due on previous dealings. **See STAMP ACT (2 OF 1899), SCH I, ART. 1.** (1949) 2 M.L.J. 543=A.I.R. 1950 Mad. 135.

——S. 19—Unstamped unconditional acknowledgment. 119 Ind. Cas. 417=A.I.R. 1930 Lah. 177.

——S. 19—Unstamped acknowledgment — Inadmissible.

An unstamped acknowledgment is inadmissible in evidence for extending limitation. 1921 P.H.C.C. 304=A.I.R. 1921 Pat. 292.

——Ss. 19 and 20—Stamp—Unstamped payment—Acknowledgment.

Payments in discharge of a debt evidenced by unstamped and therefore inadmissible pronote are

payments against or acknowledgments of the original debt and not on account of the pronote. 34 Ind. Cas. 417 (Mad.).

2 (c) (vi). Acknowledgment—Essentials Subsisting liability.

——S. 19—Ordinary meaning—Subsisting liability.

In the absence of anything to the contrary, when a debtor makes an acknowledgment of his liability to pay a debt, it would ordinarily mean that he was admitting a subsisting liability to pay. (1945) A.L.J. 58=1945 A.W.R. (H. C.) 22=1945 O.W.N. (H. C.) 28=A.I.R. 1945 All. 224=I.L.R. (1945) All. 120.

——S. 19—Admission of liability coupled with plea of discharge—Effect.

Where there is a statement in a document by the debtor that he was under a liability and at the same time it is coupled with a statement that he had discharged the debt, the intention of the executant must be gathered by reading the document as a whole and such a statement will not amount to an acknowledgment of a subsisting liability so as to save limitation under S. 19 of the Limitation Act. 1948 M. W. N. 743=61 L. W. 786=A. I . R. 1949 Mad. 401=(1948) 2 M. L. J. 454.

——S. 19—Debt admitted but discharge stated—No acknowledgment.

The statement that there was a debt but it has been discharged is not sufficient. 42 Mad. 637, Foll.

Where there was an acknowledgment that there was a mortgage but there was no express statement that it was discharged but there was a statement that in order to pay it off a sale was effected and since the date of the sale the vendees had been in possession of the property:

Held, that the writing did not constitute acknowledgment of liability under S. 19. 78 Ind. Cas. 919=5 P. L. T. 561=A. I. R. 1924 Pat. 806.

——S. 19—Acknowledgment—What will not constitute.

As an acknowledgment should be of a subsisting liability, a letter written by the defendant to the plaintiff along with a statement of account to the effect that according to the account it is the plaintiff who owed something to the defendant, cannot amount to an acknowledgment of liability by the defendant. On the other hand it is a denial of liability. 50 P. L. R. 85=A. I. R. 1948 E. P. 36.

——S. 19—Statement that creditor owes more than the debtor and calling for payment of balance due after deduction—No acknowledgment.

A letter sent by the debtor to the creditor stated: "I do not understand why you persist in sending me bills when you yourself owe me Rs. 528. Please deduct your bill from the money you owe me and send the balance of Rs. 181-8 at your earliest. It will oblige. Don't send any more bills please;"

Held, that it is not an acknowledgment of liability coupled with a claim to a set-off within S. 19, but it is one denying any liability. 100 Ind. Cas. 189=A.I.R. 1927 All. 317.

——S. 19—Mortgage decree for sale—Execution by mortgagee barred—Subsequent execution by simple money creditor by sale—Application for leave to bid—Statement admitting mortgage and expressing willingness to purchase subject to mortgage—If saves limitation.

An acknowledgment under S. 19, Limitation Act, must be an admission of some present liability of the person acknowledging corresponding to a present right in some one else. The person making an acknowledgment must, if he is not personally liable, be interested in some property which was liable for the debt in respect of which the acknowledgment is made.

Where a mortgagee's right to execute a mortgage decree for sale has become barred by limitation, a statement by a simple money decree-holder in a subsequent execution application by him to execute his decree and for leave to bid at the sale, to the effect that he would be willing to purchase the property subject to the mortgage, will not amount to an acknowledgment to save limitation for a later execution application for sale by the mortgagee. I. L. R. (1947) Bom. 827=49 Bom. L. R. 770=A. I. R. 1948 Bom. 125.

——S. 19—Acknowledgment should merely import existing liability—Oral evidence to show that acknowledgment refers to debt in suit.

Per **Lokur, J.**—Though the exact amount or the nature of the liability need not be disclosed by the written acknowledgment, the writing should unmistakably import that the person making the acknowledgment is then under an existing liability to the plaintiff. There is nothing in S. 19 or in the Evidence Act which precludes the letting in of other evidence (also oral) to explain to what debt a document said to be an acknowledgment necessarily refers. 47 Bom. L.R. 27=A.I.R. 1945 Bom. 200=I.L.R. (1945) Bom. 167=220 Ind. Cas. 67 (F. B.).

——S. 19—Letter acknowledging subsisting liability.

A decree was obtained by plaintiff against his brother; and a charge was kept on defendants' property. Plaintiff then assigned the decree to a stranger who sought the arrest of judgment-debtor in the execution proceedings of the decree. The judgment-debtor wrote the following letter to his brother:

"When you have the security of the property why should you send me to jail unnecessarily? Realise the amount by proceeding against the property":

Held, that the letter unmistakably shows that there was a subsisting liability and it amounts to an acknowledgment under S. 19. A.I.R. 1945 Mad. 407 =(1945) 2 M.L.J. 17.

——S. 19—Person acknowledging need not have interest at time of acknowledgment—It is sufficient if right is claimed against him. A.I.R. 1943 Bom. 461: =45 Bom. L.R. 831=I.L.R. (1943) Bom. 701=211 Ind. Cas. 6.

——S. 19—If limitation is to be saved under S. 19, one must be able to read into an endorsement not merely that a payment has been made but that a further sum is admitted to be due. Bare statements of payments cannot serve as acknowledgments of a debt. (1942) 2 M.L.J. 610=A.I.R. 1943 Mad. 133=55 L.W. 808=1942 M.W.N. 685=205 Ind. Cas. 546.

——S. 19—In order that an acknowledgment should be valid, it must be a conscious acknowledgment of

an existing liability. A.I.R. 1943 Oudh 425=1943 O.W.N. 302=209 Ind. Cas. 604.

——**Ss. 19, 21**—An acknowledgment, by its very nature, must be an admission of some present liability of the person making it, corresponding to a present right in someone else.

Hence a statement made by a mortgagee relating to the original mortgage subsequent to the redemption of the mortgage by one of the co-mortgagors, cannot be regarded as an acknowledgment of any liabitity or right. A.I.R. 1941 Pat. 147=21 P.L.T. 702=6 B.R. 861=19 Pat. 938=189 Ind. Cas. 855.

——S. 19—Payment of monthly allowance alal hisab.

Entries of payments towards **guzara**, followed by words that they are made **alal hisab**, **i.e.**, on account, amount to general and unconditional acknowledgment within the meaning of S. 19, Limitation Act and would cover any arrears existing within three years of the date at which that acknowledgment was made. A.I.R. 1940 Oudh 305=1940 O.W.N. 425=1940 A.W.R. 204=15 Luck. 537=187 Ind. Cas. 624.

——**S. 19**—An acknowledgment, to save limitation, must either be a direct acknowledgment of the debt or an acknowledgment of such a kind that an acknowledgment of the debt is inevitably implied. An acknowledgment of a decree debt is obviously and necessarily the same as an admission that if the debt which had ripened into a decree had still been alive at the time of the acknowledgment he would have been liable. A.I.R. 1937 Mad. 826=176 Ind. Cas. 939.

——S. 19—Acknowiedgment after transfer of title.

There is nothing in the wording of S. 19 to support the contention that where the acknowledgment is made by a person from whom the defendant derives his title, it must have been made before the transfer of the title. 39 P.L.R. 21=I.L.R. (1937) Lah. 171=A.I.R. 1937 Lah. 507=170 Ind. Cas. 245.

——S. 19—Acknowledgment by transferor after transfer.

For an acknowledgment under s. 19, it is enough that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability. The operation of this section, in the case of acknowledgments made by some persons through whom a party derives title or liability is not confined to acknowledgments made before such title or liability was derived. 8 O.W.N. 522=7 Luck. 26=A.I.R. 1932 Oudh 314=139 Ind. Cas. 626.

——S. 19—Suit for redemption—Acknowledgment by mortgagee at the sale of his rights.

Held, that mere making of an acknowledgment does not and cannot imply that it was being made within time nor does the fact of a mortgagee having claimed the status of a mortgagee and not that of an owner estop his assignee from demanding proof from the mortgagor that the mortgage was subsisting at the time the mortgagee described himself as a mere mortgagee. A.I.R. 1935 Lah. 515=37 P.L.R. 392=155 Ind. Cas. 576.

——S. 19—Admission of past liability unaccompanied by allegation of discharge.

There is no rule of law that an admission of a past liability unaccompanied by an allegation of discharge should, in all cases, be interpreted as an admission of subsisting liability. The question in each case is, is it a proper inference to draw from the facts and circumstances, that the debtor intended to make an admission that on the date it was made the debt was existing.

Where a letter from the defendant in effect was as follows: "there was on my part a past liability for a larger sum. But owing to certain claims I made, the mediators fixed my debt at a reduced amount. For that sum alone I am liable, which I am remitting";—

Held, that far from being an admission, there was distinct assertion amounting to a denial of the original amount being due and that the letter did not constitute an acknowledgment. A.I.R. 1935 Mad. 371=68 M.L. J. 73=41 L.W, 747=(1935) M.W.N. 783=157 Ind. Cas. 259.

——S. 19—Acknowledgment coupled with refusal to pay.

Under S. 19, the words relied on, in order to constitute a valid acknowledgment, must be such as to show an existing jural relationship of debtor and creditor. An admission of a present debt coupled with a refusal to pay because parties have arranged for payment elsewhere amounts to an acknowledgment. 44 L.W. 362=(1936) M.W.N. 881=A.I.R. 1936 Mad 943=(1937) 2 M.L.J. 24=170 Ind. Cas. 288.

——S. 19—Admissions, accompanied by refusal to pay.

Explanation 1 of S. 19 is very wide in its scope. It shows that admissions, however indirect, and even if accompanied by a refusal to pay can be sufficient as acknowledgment. A.I.R. 1935 Oudh 170=11 O. W.N. 880=153 Ind. Cas. 987.

——S. 19—Statement admitting execution of pro-note but denying consideration.

A statement admitting the execution of a promissory note but containing a clear and express denial of the receipt of consideration and, therefore, of any liability does not amount to an acknowledgment within the meaning of S. 19. 36 Bom. L. R. 334=A. I. R. 1934 Bom. 186=151 Ind. Cas. 376.

——**S. 19**—Where the debtor promises to execute a document which will give the creditor the right to claim payment, it cannot be held to be a promise to pay the debt. A.I.R. 1933 Cal. 658=60 C. 714=37 C.W.N. 326=146 Ind. Cas. 834.

——**S. 19**—Mortgage of 1834—Admission in **kabuliyat** of 1864—Further admission by heirs of mortgagee in 1877—Suit for redemption in 1924:

Held, that the admissions in the **kabuliyat** in 1864 and in the plaint of 1877, were acknowledgments and as they were made when the right to sue subsisted, they saved limitation.

Whether an acknowledgment is an acknowledgment of an existing liability or not, depends upon the terms of the acknowledgment. A.I.R. 1932 Bom. 531=34 Bom. L. R. 953=139 Ind. Cas. 218.

——**S. 19**—An "acknowledgment of liability" may be and is generally found in a statement of facts. Thus, if in a later deed the fact is stated that there is a mortgage, it must mean that the debt secured thereby is an existing debt and the statement will amount to an acknowledgment of liability. 8 O.W.N. 541=A.I.R. 1931 Oudh 295=132 Ind. Cas. 542.

——S. 19—Answer to interrogatories in previous suit merely stating presence of entry in account-books no acknowledgment.

The answer given to one of the interrogatories in a previous suit by the firm merely stated an existing fact, namely, that there was an entry in the firm's account-books credited to the name of a certain person; a bare

Held, it was wrong to infer that an acknowledgment of an existing liability was made at the time the answer was given to the interrogatories. A.I.R. 1929 Lah. 883.

——S. 19—Admission must be distinct and of an existing liability—Not limited to a debt, can be of any property or right need not be express.

An acknowledgment must be a conscious and distinct admission of an existing liability or jural relation between the parties but there is nothing in law to require that an acknowledgment should be express. It may be implied provided the implication is a necessary implication so as to render the acknowledgment clear and unequivocal.

An acknowledgment of liability is not limited in respect of a debt. It may be in respect of any property or right which is the subject-matter of the suit, and it need not specify every legal consequence of the thing acknowledged. 104 Ind. Cas. 572=22 S. L. R. 117=A.I.R. 1928 Sind 45.

——S. 19—Acknowledgment must be clearly of an existing liability.

An acknowledgment under S. 19 in itself should import that the person, making the acknowledgment is then under an existing liability and such liability cannot be read into it by proof aliunde. 91 Ind. Cas. 833=21 M.L.W. 593=1925 M.W.N. 361=A.I.R. 1925 Mad. 675.

——S. 19—Statement that a decree was passed does not amount to acknowledgment.

The mere statement of a fact that a decree was passed against a party, on a certain date, for a certain amount, is not an acknowledgment that that decree is capable of execution, so as to come within S. 19. It is merely a statement of a fact that a decree was passed, and not an acknowledgment that there was a present liability under the decree. 18 All. 384, Foll. 91 Ind. Cas. 833=21 M.L.W. 593=1925 M.W.N. 361=A.I.R. 1925 Mad. 675.

——S. 19—Acknowledgment of present liability only necessary—Promise to pay not necessary.

It is not necessary that there should be a promise to pay the amount due. All that is necessary under S. 19 of the Limitation Act is there should be an acknowledgment of the liability before the claim is barred by limitation. 85 Ind. Cas. 297=48 Mad. 693=A.I.R. 1925 Mad. 261=47 M. L. J. 840.

——S. 19—New consideration or promise to pay unnecessary—Mere acknowledgment in writing—Sufficient.

All that is required by S. 19 of the Limitation Act is the acknowledgment of the existing debt. Neither new consideration nor an actual promise to pay is required. Acknowledgment alone is required. That must be in writing and signed by the defendant and the original debt can be enforced. But a new promise for a new consideration is a cause of action in itself and is in no way obnoxious to the Limitation Act. 10 Cal. 284, Foll. 79 Ind. Cas. 489=28 C. W. N. 322=50 Cal. 974=A.I.R. 1924 Cal. 388.

——S. 19—Non-denial of existing debt in a written statement—Intention to represent the debt as subsisting—If can be inferred.

An admission to prevent the running of the time under the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission, if the proper inference to be drawn from the admission, which is made is that it was intended to represent the debt as then subsisting. 33 Cal. 1047, particularly at page 1059; 16 M. L. J. 30; 41 M. L. J. 217, Foll.

For the purpose of preventing the running of the statute of limitation it would be quite enough, if there was such a passing over of a certain allegation in silence in a written statement signed by the party making the admission which in law amounted to an admission; because he must be taken to know the law and therefore he would be making an admission at that time; for the purpose of limitation an admission made to some other person is sufficient.

In each case the Court has to consider the circumstances in which the statement was made that there was a debt and see whether it was really intended to convey an impression that that debt was subsistlng at the date of the statement or not; and if it can from the circumstances infer that the intention of the person making the statement was to convey the impression that the debt was still subsisting it will be justified in holding that it is an acknowledgment of subsisting liability. 77 Ind. Cas. 740=19 M.L.W. 331=33 M.L.T. 235=1924 M.W.N. 19=A.I.R. 1924 Mad. 286=46 M. L. J. 1.

——S. 19—Subsisting liability—Mortgage proved but date unknown—Onus of proving acknowledgment is in time.

In a suit for redemption plaintiff set out and proved all the particulars of the mortgage excepting the date for which he mainly relied on an acknowledgment, enumerating the mortgage in detail, and mentioning that it was redeemable upon payment. There was no evidence either way as to whether this acknowledgment within 60 years of the mortgage. **Held, Per Piggott and Walsh, JJ.** that no inference could be drawn that the mortgage was at that date subsisting as a mortgage and was not barred by limitation; before the plaintiff could succeed upon an acknowledgment at all, he had to establish that it was made before the expiration of the period of limitation. (Per **Banerji, J.**) Where a mortgagee has acknowledged a mortgage, that acknowledgment is **prima facie** evidence until rebutted, that it was a mortgage which subsisted at the time when the acknowledgment was made and was not a mortgage which had become extinct by lapse of time. 42 All. 575=2 U.P.L.R. (All.) 187=18 A. L. J. 789=56 Ind. Cas. 986 (F. B.).

——S. 19—Essentials of acknowledgment—Recital of past events—Whether acknowledgment.

Recitals of past events cannot be construed as acknowledgment of existing liability. Such a recital coupled with a statement that it was already discharged, is no acknowledgment. 20 M. 239=25 M. L. J. 259=18 A. 384, foll. 41 P.R. 1916=33 P.W.R. 1916=32 Ind. Cas. 497.

——S. 19—Essentials of acknowledgment—Execution—Application for order for foreclosure—Limitation—Application for certifying payments.

Where in an application by the mortgagor for cerifying payments made by instalments the decree ordering payment for redemption is mentioned as an outstanding decree, if amounts to an acknowledgment within S. 19 of the Limitation Act. 38 Bom. 47=15 Bom. L. R. 930=21 Ind. Cas. 407.

——S. 19—Essentials of acknowledgment—Existing liability.

There must be a distinct acknowledgment of an existing liability or jural relation. 5 Bur. L. T. 81=15 Ind. Cas. 363.

——S. 19—Essentials of acknowledgment—Statement of liability.

A statement setting out the admission of liability in general terms, amounts to an acknowledgment. 35 Bom. 302=13 Bom. L. R. 264=10 Ind. Cas. 888.

——S. 19—Existing liability.

Acknowledgment of liability existing at a past date without any allegation that the liability has since ceased, is presumed to be an acknowledgment of a liability existing when the statement is made. 5 M.L.T. 71=2 Ind. Cas. 522.

——S. 19—Acknowledgment by a preson, who, when he made the acknowledgment had no right, to the property.

S. 19 does not require that the person making an acknowledgment should have an interest in the property in respect of which the acknowledgment was made at the time when the acknowledgment was given. It is sufficient, if, before the period of limitation expired an acknowledgment of liability or right has been made in writing by the person against whom the right is claimed. (1906) A. W. N. 286=3 A. L. J. 680=29 A. 90.

2. (c) (vii). Acknowledgment—Essentials—Miscellaneous.

——S. 19—Acknowledgment—Validity without promise to pay.

There may be a valid acknowledgment of liability under S. 19, Limitation Act, without a promise to pay. I. L. R. (1950) Bom. 741=A. I. R. 1950 Bom. 94=51 Bom. L. R. 830.

——S. 19—Promise to pay.

An acknowledgment for the purposes of S. 19, Limitation Act, need not necessarily contain a promise to pay or amount to a promise to pay. A. I. R. 1936 Mad. 939=166 Ind. Cas. 750 (1).

——S. 19—Promise to pay not necessary—English law.

There is a fundamental difference in the theory of acknowledgment according to the law in India as compared with the law in England. In England, the acknowledgments or part payments, in order to be effective, must be such as to amount to a fresh promise to pay. Under the Indian law no promise to pay, either express or implied, is required. Therefore, the English authorities cannot afford any guidance in determining the question, which must be decided on the proper construction of the provisions of the Indian Lim. Act. A.I.R. 1932 Oudh 1 (4)= 8 O.W.N. 1160=7 Luck. 279=138 Ind. Cas. 800.

——S. 19—Section 19 is undoubtedly free from the doctrine of English Law which puts the value of an acknowledgment upon its being the equivalent of a new promise to pay. Under S. 19 there must be no doubt about the identity of the debt; and once it is clear that the defendant admits that he owes the money and it is clear what debt he has admitted, it cannot be said that it is not made to the person claiming or through whom he claims. 97 Ind. Cas. 710=30 C.W.N. 968=44 C.L.J. 529=A.I.R. 1926 Cal. 1140.

——S. 19—Acknowledgment need not amount to promise to pay.

Under the Indian Law there is no necessity to show anything in the acknowledgment from which a promise to pay could be inferred. A Statement by the debtor, **viz.**, "I executed the promissory note and the contents of the note are correct" amounts to acknowledgment of the debt under the note if there is no allegation that the note was satisfied. 70 Ind. Cas. 593=14 M.L.W. 148=1921 M.W.N. 475=A.I.R. 1921 Mad. 464=41 M.L.J. 270.

——S. 19—Promise to pay—Plea of discharge.

Under S. 19 all that is necessary is an acknowledgment of liability and a promise to pay is not necessary. Neither a plea of accord and satisfaction nor a plea of denial and in the alternative that debt if due is set off against money due is an acknowledgment. (1913) M.W.N. 682=25 M.L.J, 259=21 Ind. Cas. 30.

——S. 19—Nothing short of an express promise can provide a fresh period of limitation. A.I.R. 1936 Lah. 164=161 Ind. Cas. 703.

——S. 19. Expl. 1—Omission to specify exact nature of amount of liability.

Per **Sen, J. (In second appeal.)**—Under Expl. 1 to S. 19, Lim. Act, the omission to specify the exact nature of the amount of the liability is immaterial, or even the averment that no balance is due from the defendant. Hence the words, "you should take proper accounts and if, on taking accounts, some balance be found due from the defendant, you should absolve him from those dues" addressed to the creditor by Counsel on behalf of his debtor-client constitute a valid acknowledgment. A.I.R. 1940 Bom. 172=I.L.R. (1940) Bom. 225=42 Bom. L.R. 262=188 Ind. Cas. 805.

See also A.I.R. 1933 Rang. 147=144 Ind. Cas. 996.

——S. 19—Need not be express—Exact nature of right need not be specified.

Section 19 does not prescribe that an acknowledgment should be express; it may be implied. Nor is it necessary that it should specify the exact nature of the right. The question as to whether there is or is not an acknowledgment is one of construction of document in which the alleged acknowledgment is contained and to construe the document is function of the Court. 6 O.W.N. 943= A.I.R. 1930 Oudh 67.

——S. 19—Acknowledging something due or may be due—If sufficient—Written admission of unsettled accounts—Sufficient.

The word "acknowledgment" is not a word of art, and ought to be construed in its plain literal sense. It need not contain an admission that a precise sum is owing, but an acknowledgment that something is, or may be due is sufficient. Any written admission by the debtor of the existence of unsettled account either with or without a promise to pay the balance, if any, due, is a sufficient acknowledgment. A statement of accounts by defendant showing a balance due from defendant to plaintiff is sufficient acknowledgment. 96 Ind. Cas. 79=21 S.L.R. 396=A.I.R. 1926 Sind 264.

——S. 19—Liability in respect of property or right—Not necessary that particular relief should be acknowledged.

It is a sufficient acknowledgment, if it is of a liability, whether pecuniary or in relation to other obligation, and is in respect of the property or right which is the subject-matter of the suit or application. The acknowledgment need not necessarily be in respect of the particular relief prayed for in a suit or application.

The word "exact" in Expl. (1) to S. 19 is intended to qualify the specification of the nature of the property or rights rather than of the properties or right itself. 60 Ind. Cas. 189=23 O.C. 176=7 O.L.J. 451=2 U.P.L.R. (J.C.) 152.

——S. 19—Acknowledgment—Partial—It is open to an executant of a promissory note to acknowledge a part of debt—Such acknowledgment, is good to the extent of amount acknowledged. 1936 M.W.N. 886.

——S. 19—Contained in sale-deed not intended to take effect—Still an acknowledgment.

In considering whether a particular document amounts to a proper acknowledgment within the meaning of S. 19, all that one has to see is whether the document contains an acknowledgment of liability in respect of the debt now sued upon. The circumstance that the acknowledgment was contained in a sale-deed executed by the debtor which was not to take effect at all or was executed with an ulterior motive is not a relevant consideration in connexion with the question arising under the Act. 125 Ind. Cas. 68=33 M.L.W. 264=A.I.R. 1930 Mad. 796.

——S. 19—Legal consequences need not be acknowledged.

An acknowledgment by a judgment-debtor of the amount due by him under a mortgage decree falls under S. 19 of the Limitation Act and saves limitation for a final decree for sale. If the right itself is acknowledged, the right to take legal steps for enforcing the right need not be acknowledged. 42 Mad. 52=(1918) M.W.N. 792=35 M.L.J. 552=8 L.W. 526=24 M.L.T. 486=48. Ind. Cas. 298.

——S. 19—Legal consequences need not be acknowledged.

Reference to the mortgage and its transfer as the title under which a party holds is sufficient acknowledgment of the right to redeem within S. 19 of the Limitation Act. The legal consquences need not be acknowledged. 28 M.L.J. 266=17 M.L.T. 170=(1915) M.W.N. 105=28. Ind. Cas. 69.

——S. 19—Admission of legal consequences of right unnecessary.

An admission of a right necessarily implies the admission of the legal consequences of that right, so that when a person admits that a certain property of which he is in possession is the property of another, he admits his liability to restore it to him by implication. 19 C.W.N 263=22. Ind. Cas. 650.

——S. 19—Acknowledgment — Specification of legal consequence not necessary :—

It is not required that an acknowledgment should specify every legal consequence of the thing acknowledged. 25 I. A. 95 foll. (1902) 4 Bom. L.R. 447=26 B. 562.

2 (d) Acknowledgment—By whom

See also NOTE 4.

——S. 19—Acknowledgment must be by party against whom right is claimed or by person through whom he derives title.

It is not sufficient to show that an acknowledgment has been made. It has to be shown that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability. 32 Cal. 1077, Appr.. 6 O.W.N. 1068=A.I.R. 1930 Oudh 56.

——S. 19—Acknowledgment when effective—Purchaser subsequent to creation of charge—Acknowledgment by purchaser—Whether can save bar of limitation to execution.

The appellant, a mortgagee decree-holder was seeking to execute the decree against properties in the hands of contesting respondent, who came to be impleaded before decree as legal representative of 5th defendant in the suit. The 15th defendant was the purchaser of properties subsequent to the mortgage. In an execution filed more than 3 years from the date of the order in the last petition the appellant contended that the execution petition was saved from bar of limitation by a letter of acknowledgment passed by the 15th defendant within three years of the present petition. On the question whether the acknowledgment of purchaser of the property subsequent to the charge could be deemed binding on the charge holder or her legal representative:

Held, that as the person sought to be bound by the acknowledgment was a person who had, prior to such acknowledgment or payment, acquired an interest in the property, the acknowledgment would be not binding upon him, although he making the acknowledgment or payment, was at the time possessed of some interest or other in the properties mortgaged.

Under S. 19 of the Limitation Act, the 5th defendant or her legal representative the 22nd respondent, could not be treated as a person deriving title or liability from the 15th defendant long prior to whose purchase the charge in favour of 5th defendant had come into existence. 63 L.W. 384=A.I.R. 1950 Mad. 553=(1950) 2 M.L.J. 13.

——S. 19—Acknowledgment by a person through whom title is derived—Attaching creditor, if bound by acknowledgment made by the judgment-debtor

Under S. 19, an acknowledgment must be by the party against whom such property or right was claimed, or by some person through whom he derives title or liability. It is now well-settled that an attaching creditor derives his title through the judgment-debtor and, therefore, any acknowledgment by the judgment-debtor will be deemed to be an acknowledgment by a person through whom the attaching creditor derives his title and the ackgowledgment would be a good acknowledgment against him under S. 19. (1945) A. L.J. 58=1945 A.W.R. (H.C.) 22=1945 O.W.N. (H.C.) 28=A.I.R. 1945 All. 224=I.L.R. (1945) All. 120.

2 (e) Acknowledgment—To whom.

——S. 19—Acknowledgment—To third person—Good evidence of debt.

As between solvent persons, an acknowledgment, express or even implied by **A**, that he owes money to **B**, is about as good evidence as could be had that **A** owes **B** that money, even if it does not, as in some circumstances it clearly does give **B** a fresh cause of action. A.I.R 1941 Rang. 244=198 Ind. Cas. 516.

——S. 19—Recital in deed executed to third person and addressed to him.

An acknowledgment in a deed of assignment executed by the obligor in a favour of a third person is sufficient to save limitation within S. 19 of the Limitation Act. An acknowledgment is valid even if it is addressed to a person other than the person entitled to the property. 49 Ind. Cas. 868 (Pat.).

——Ss. 19, 20 — Validity—Acknowledgment not addressed to any person.

Acknowledgments made in documents, though not addressed to any particular persons, are good acknowledgments. A.I.R. 1939 Bom. 237=41 Bom. L.R. 391=183 Ind. Cas. 225.

——S. 19—Acknowledgment addressed to dead person.

where an acknowledgment of a debt is duly signed by the acknowledgor, it will operate as a valid acknowledgment of the debt to save limitation, although it is addressed to a dead person. A. I. R. 1938 Pat. 180=4 B. R. 480=174 Ind. Cas. 779.

——S. 19—Execution of bond in favour of some persons having equal shares—Acknowledgment in favour of one—Other persons, whether entitled to benefit of S. 19.

There is a clear distinction between addressing the acknowledgment and acknowledging. In order to bring his case within limitation, the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him, as acknowledgment of liability to the person who is claiming relief may be addressed to another person. Consequently where an acknowledgment of liability is made in favour of only one of the obligees having equal shares, the others are not entitled to the benefit of S. 19.

And the obligee having the benefit of S. 19, is entitled to recover his share only and not the whole amount. 38 P.L.R. 855=A.I.R. 1936 Lah. 659=165 Ind. Cas.74.

——S. 19—Acknowledgment of a debt, to be operative under S. 19, need not be addressed to the creditor. 7 O. W. N. 1195=A. I. R. 1931 Oudh 54=130 Ind. Cas. 347.

——S. 19—Acknowledgment to whom—Acknowledgment in document to which creditor is not a party is valid.

It is not necessary that the acknowledgment should be made in a document to which the creditor need be a party and an acknowledgment made in a document to which the creditor is not a party is a valid acknowledgment. 33 Cal. 1047, Foll. 115 Ind. Cas. 263=A. I. R. 1928 Cal. 850.

——S. 19—Not necessarily to claimant.

A general acknowledgment under S. 19 is sufficient and it is not necessary that it should be addressed to the person claiming or to somebody through whom he claims. 37 Bom. 326 (P.C.) and 16 C. W. N. 263 Appl. 97 Ind. Cas. 710=30 C. W. N. 968=44 C. L. J. 529=A. I. R. 1926 Cal. 1140.

——S. 19—Recital in a deed as to subsistence of debt—Sufficient.

The acknowledgment need not be addressed to the creditor or to any one representing him. A statement contained a kobala that a certain mortgage on some of the properties comprised in the kobala is still subsisting has the effect of an acknowledgment so as to create a new period of limitation. 33 Cal. 613, Diss. from: 33 Cal. 1047 (P. C.), Foll. 91 Ind. Cas. 461=A. I. R. 1926 Cal. 686.

——S. 19—Need not be addressed to person entitled.

An admission of liability contained in an endorsement of the Sub-Registrar about admission of execution and receipt of consideration and signed by the debtor is acknowledgment within S. 19. An acknowledgment need not be addressed to the person entitled to the property or right. 33 Cal. 1047, Foll. 76 Ind. Cas. 751=A. I. R. 1923 Lah. 369.

——S. 19—Sanad register—Entry signed by Sanad holder showing him to be mortgagor—Acknowledgment—Sufficient.

Entries made in a register of Sanads, showing that the Sanad-holder is a mortgage and signed by the Sanad-holder, may be an acknowledgment within S. 19.

Explanation 1 to S. 19 does away with the necessity of the acknowledgment being addressed to the creditor. 37 Bom. 326 (P.C.), Foll. 61 Ind. Cas. 406=45 Bom. 934=23 Bom. L.R. 294=A.I.R. 1921 Bom. 291.

——S. 19—Acknowledgment to whom—Government—Kist—Mortgage—Redemption—Limitation.

The acknowledgment in a receipt given as mortgagees to the Government is a sufficient acknowledgment that the interest of the persons receiving money from Government was that of mortgagees and a suit for redemption can be brought within 60 years from the date of such acknowledgment. 37 Bom. 326=17 C. W. N. 573=13 M. L. T. 415=(1913) M.W.N. 428=40 I. A. 68=25 M.L.J. 101=11 A.L.J. 432=17 C.L.J. 474=15 Bom. L. R. 483=18 Ind. Cas. 909. (P. C.) [Affirming 11 Bom. L. R. 318=2 Ind. Cas. 469.]

——S. 19—Acknowledgment of liability in sale-deed—Mortgage—Wrong date—Effect.

An acknowledgment of liability of a mortgage cannot be ruled out merely because the date of the mortgage given is not correct. An acknowledgment need not be made to the person entitled to the property or right. 11 A.L.J. 86=18 Ind. Cas. 95.

——S. 19—If must be addressed to the person entitled.

An acknowledgment to have the effect of saving limitation need not be addressed to the person entitled to the property. So where a judgment-debtor filed an insolvency petition in which he set out his debts including the one for which execution was sought. **Held,** that it was an acknowledgment within the meaning of S. 19. 16 C.W.N. 346=13. Ind. Cas. 603.

——S. 19—Acknowledgment to whom—Creditor.

Acknowledgment to be valid need not be addressed to the creditor. 12 C.L.J. 423=8 Ind. Cas. 788.

[Also 11 A.L.J. 86=18 Ind. Cas. 95.]

——S. 19—Amount due—Creditor—Not specified.

An acknowledgment is valid within S. 19 though it does not specify the amount due to the creditor and is not addressed to him if it does admit that he has a good and subsisting claim. 43 P.R. 1910=14 P.L.R. 1909=79 W.R. 1909=4 Ind. Cas. 902.

——S. 19—Acknowledgment by mortgagee in a sub-mortgage.

An acknowledgment of a mortgage debt in a sub-mortgage by a mortgagee is sufficient to save limitation and an acknowledgment to be effective need not necessarily be made to the person entitled. 1 Ind. Cas. 510 (All.).

——S. 19—Acknowledgment in written statement—Need not be addressed to creditor.

An acknowledgment contained in an application by the judgment-debtor by way of a written statement, wherein he said that he was unable to pay the amount then but would pay if time were given him, is a valid acknowledgment. (1908). 10 Bom. L.R. 374=32 B. 296. Also 24 M. 36.

Also (1907) 1908 A.W.N. 226.

Also (1903) 30 C. 687.

2 (f). Acknowledgment—what constitutes.

See also NOTES 3 AND 6.

——S. 19—Writing in sarkat—Effect of—Negotiable Instruments Act, S. 4—Stamp Act, S. 2 (22).

A writing in a sarkat or book of the creditor by the debtor to the effect "for making your account of the

sarkat I will come on 22nd November, 1936, to your place and will give (make payment)", is not an unconditional undertaking to pay a certain sum of money, and does not therefore amount to a promissory note as defined in S. 4 of the Negotiable Instruments Act, or as defined by S. 2 (22) of the Stamp Act, which is more comprehensive. The writing only amounts to an acknowledgment of liability with a promise to pay the amount found due on taking accounts. I.L.R. (1946) Nag. 796=226 Ind. Cas. 568=1946 N.L.J. 622= A.I.R. 1947 Nag. 145.

——S. 19—Letter promising to pay money within certain days.

Where a debtor writes a letter to the creditor that he would pay the amount due to the latter within certain time, say eight or nine days, the acknowledgment contained in the letter saves limitation for 3 years from the date of the letter and the period or the days within which the payment is promised to be made cannot be taken into account. 1944 A.L.J. 447=1944 A.W.R. 295 (2)=1944 O.W.N. 286.

——S. 19—Debtor's letter to the effect that according to his accounts only a particular amount was due from him, amounts to acknowledgment of his full liability on the settlement of accounts. A.I.R. 1939 Lah. 216= 41 P.L.R. 557.

——S. 19—The expressions, **baqi dene, baqi lene,** or **baqi rahe,** mean really the same things. Balance couched in words **baqi rahe lene lekha karke** written by creditor, signed by debtor and attested by witnesses, amounts to acknowledgment within Art. 1 and not to agreement within Art. 5 or to bound within Art. 15. A.I.R. 1942 Lah. 50=I.L.R. (1942) Lah. 282=44 P.L.R. 10=199 Ind. Cas. 161 (F.B.)

Overruling—(1) A.I.R. 1939 Lah. 486=188 Ind. Cas. 420=41 P.L.R. 194. (2) A.I.R. 1938 Lah. 511= 40 P.L.R. 231=178 Ind. Cas. 197. (3) A.I.R. 1938 Lah. 503=40 P.L.R. 193=177 Ind. Cas. 270. (4) A.I.R. 1934 Lah. 835=16 Lah. 258=155 Ind. Cas. 1074. (5) A.I.R. 1932 Lah. 470=33 P.L.R. 940=137 Ind. Cas. 840.

——S. 19—Admission of existence of open account.

Where there is an admission of the accountability by a person liable to pay to a person to whom the payment is due, an admission that the account was not settled, an expression of willingness to have it settled, and a query whether anything would be due as a result, implies an admission of liability for the amount which may be found due upon the settlement. This is sufficient to save limitation for a suit for the balance due on an account. 49 L.W 106=A.I.R. 1939 Mad. 300=(1939) M.W.N. 392=184 Ind. Cas. 108.

——S. 19—An admission of liability coupled with a declaration as regards the arrangement proposed for its satisfaction is a sufficient acknowledgment. A.I.R. 1938 Mad. 496=(1938) M.W.N. 207=47 L.W. 351=(1938) 1 M.L.J. 450=179 Ind. Cas. 236.

——S. 19—An extension of time granted by the creditor upon the written application of the debtor will amount to an acknowledgment and will operate to save the bar of limitation. A.I.R. 1937 Oudh 391=1937 O.W.N. 719=13 Luck. 334=168 Ind. Cas. 799.

——S. 19—Acknowledgment.

An extension of time granted by the creditor upon the written application of the debtor will amount to acknowledgment and will operate to save the bar of limitation. (1902) 12 M.L.J. 351.

——S. 19—Pro-note, when amounts to acknowledgment.

Where a person executes a pro-note in favour of another and after a time, the executant sells some of his immovable property to him and asks him to appropriate the sale price in part payment of the dues under the pro-note, if the document of sale is not registered, it cannot be relied upon by the vendee to prove his title to the property. Where, however, it is relied on to serve as an acknowledgment and part payment of the executant's liability it is relied upon to serve a collateral purpose and can be relied upon to save limitation of the pro-note under S. 19 Limitation Act. It is not necessary that the actual amount due should be mentioned so long as there is an acknowledgment of liability under the promissory note in writing signed by the debtor. A.I.R; 1936 Lah. 276=162 Ind. Cas. 306.

——S. 19—Acknowledgment of an unsettled account without more amounts to an acknowledgment of liability to pay whatever might be found due by either party on account being taken, and, therefore, it is an acknowledgment of liability within the terms of S. 19. A.I.R. 1936 Lah. 629=17 L. 737=165 Ind. Cas. 723.

——S. 19—A distinction exists between an acknowledgment of a right to an account and an acknowledgment of a debt. For an acknowledgment of a right to an account there need not be an acknowledgment that debt or even a specified amount thereof is actually due. There need not be an express statement that the balance would be paid: the words "settle the account" indicate that the parties agree to pay whatever is found to be due on the accounts being looked into.

Where, on a dissolution of partnership, the parties entered into an agreement that there was a right to pending account between them, each having a claim to recover the balance found due on taking accounts and each agreed to pay the balance found due and to settle the accounts according to the decision of arbitrators:

Held, that the agreement constituted an acknowledgment of right to account within S. 19, Limitation Act and being an agreement between the parties for consideration, could be enforced at law. A suit for account brought within two years of the agreement would, therefore, be in time. (1936) M.W.N. 998=A.I.R. 1937 Mad. 38=169 Ind. Cas. 340.

——S. 19—Document denying and repudiating liability to pay.

Whether a particular document or letter amounts to an acknowledgment of liability or not within the meaning of S. 19 must depend upon the terms thereof. Under the Indian statute, there need not be a promise to pay, but the document in question must, on a fair reading, amount to an admission of liability, absolute or conditional, and in the latter case, the condition must be fulfilled, But where the letter or the document relied upon expressly states that there is no liability, and the liability is, in fact, denied and repudiated, limitation cannot be said to be extended under S. 19. 39 C.W.N. 139=60 C.L.J. 396=A.I.R. 1935 Cal. 255=155 Ind. Cas. 721.

——S. 19—Repudiation of liability.

The acknowledgment under S. 19 must be an acknowledgment and not repudiation of liability. 86 Ind. Cas. 228=A.I.R. 1925 Sind 8.

——S. 19—Essentials of acknowledgment—Repudiation.

An express repudiation, by a letter, of the plaintiff's claim coupled with a denial of existing liability is not an acknowledgment of liability under S. 19 of the Act. 11 A.L.J. 601=20 Ind. Cas. 10.

——S. 19—Two pro-notes executed by defendant in favour of plaintiff—Suit on one—Admission of execution of two pro-notes in written statement.

Two promissory notes—Suit in respect of one—Written statement admitted having executed two promissory notes but pleaded that there had been agreement between the parties by which plaintiff agreed to accept a certain sum as the amount due to him on both the pro-notes and that a part of this amount had been paid. Plaintiff subsequently sued on the other promissory note

Held, that Expl. 1 to S. 19 shows that for the purposes of that section, an acknowledgment is sufficient thought it omits to specify the exact nature of the property or right, and that the written statement was a sufficient acknowledgment. A. I. R. 1933 All. 352=144 Ind. Cas. 903.

——S. 19—Condition not fulfilled.

Where there is a promise to pay on a condition, in order that the promise may operate as an acknowledgment, that condition must be fulfilled.

Where there was a conditional promise to pay if the arbitrator found the sum to be due and the arbitration proceedings proved abortive :

Held, that the condition was not fulfilled and there was no acknowledgment which was sufficient to save limitation. A. I. R. 1934 Lah. 973=154 Ind. Cas. 687. **See also** A.I.R. 1933 All. 348=144 Ind. Cas. 1029.

——S. 19—Refusal of conditional offer.

When a plaintiff refuses the defendant's offer made on 'certain conditions, he cannot claim that this sum should have been decreed to him in any case, as if it had been offered unconditionally. A.I.R. 1933 All. 348=144 Ind. Cas. 1029.

——S.19—Acknowledgment, conditional, effect of.

Acknowledgment of a conditional liability will not give a fresh starting point so long as the condition remains unfulfilled. (1906) 16 M.L.J. 563=29 M. 519 = 1.M.L.T. 318.

——S. 19—Acknowledgment, conditional—Fulfilment of condition—Acknowledgment of existence of open and current account.

An acknowledgment to take the case out of the statute of limitation, must be either one from which an absolute promise can be inferred, or secondly, an unconditional promise to pay the specific debt, or thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed. 6 Ch. A.C. 822, 828, Foll. An unconditional acknowledgment implies a promise to pay because that is the natural inference, if nothing is said to the contrary. Where the acknowledgment consisted in the statement " that the respondent had an open and current account " with the plaintiff's predecessor in title:—**Held,** that the words imported an admision of liability if the balance should prove to be against the respondent coupled with the fulfilment of that condition. S. 19 only requires a definite admission of liability. An unqualified admission and an admission qualified by a condition which is fulfilled stand upon the same footing. The English and the Indian Law are the same in respect of this matter. (1906) 8 Bom. L.R. 501=4 C.L.J. 94=10 C.W.N. 874=3 A.L.J. 525=16 M.L.J. 300=33 C. 1047= 1. M.L.T. 199=33 I.A. 165 (P.C.).

——S. 19—Acknowledgment.

Where a debtor acknowledges the balance claimed by the creditor and promises to pay it after some time, it is a vaild acknowledgment. 32 Bom. L.R. 1390=128 Ind. Cas. 911= A.I.R. 1931 Bom. 74.

——S. 19—Suggestion as to compromise—Not an acknowledgment.

Suggestion made by defendant that the matter in dispute might be settled "without prejudice" cannot operate to extend limitation as it does not amount to acknowledgment of liability. 90 Ind. Cas. 135= A.I.R. 1926 Nag. 57.

——S. 19—Admitting purchase—No admission of title.

An admission that a certain party has purchased the property is not an admission that that party has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law and did not operate to confer any title on the alleged purchasers. 88 Ind. Cas. 478=7 P.L.T. 9=1925 P.H.C.C. 111=A.I.R. 1925 Pat. 473.

——S. 19—Admitting correctness of account—Not acknowledgment.

A letter written in reply to a letter sending a statement of account, and stating that the account sent is correct is not an acknowledgment. 39 Cal. 789 and A.I.R. 1924 Mad. 352 Foll. 91 Ind. Cas. 494=22 M.L.W. 12= 1925 M.W.N. 484=A.I.R. 1925 Mad. 1215=49 M.L.J. 306.

——S. 19—Mablakbandi good acknowledgment but not promise to pay.

A Mablakbandi is not a promise to pay under S. 25 of the Contract Act capable of reviving any debt which was time-barred at the date it was made. But it is a good and valid acknowledgment under S. 19 of the Limitation Act so as to preserve any debt due and not barred at the time when the **Mablakbandi** was made. 78 Ind. Cas. 139=A.I.R. 1925 Cal. 333.

——S. 19—Adverse possession—Bidding at auction—No acknowledgment of liability to be ousted.

Where the tenants of a landlord who were in possession of certain tanks belonging to the landlord bid at an auction in connexion with the landlord's advertisement for tenants for the tank lands:

Held, that they might have done so from various motives and their action could not be either disturbance of the adverse possession otherwise constituted, or acknowledgment within the meaning of S. 19 of Limitation Act. 84 Ind. Cas. 657=40 C.L.J. 160= A.I.R. 1925 Cal. 193.

——S. 19—Promise to pay interest at certain rate—Acknowledgment—Not a pro-note.

A document was in the following terms :—

" Age rupai mau snu tumkare hamare pas jama hainge. Biyaj dar das aune sainkra denge:"

Held, that the document does not contain any unconditional undertaking to pay the principal sum of money and the only undertaking given is to pay interest at the rate of ten annas per cent., per mensem. The document clearly is an acknowledgment of a debt and not a promissory note. 78 Ind. Cas. 163=A.I.R. 1924 Lah. 684.

——S. 19—Admission of debt coupled with denial of liablity.

Where the debtor's statement was : "The debt due to the creditor was a mortgage debt. It ripened into a decree. He gave me a letter that he would

proceed against the mortgaged properties only and would not proceed against my person," together at the end with :—" These debts are due by me along with others, but they were paid by me alone. I therefore owe no debt to any of my creditors:"

Held, that the statement was an acknowledgment, within the meaning of S. 19. 82 Ind, Cas. 933=20 M.L.W. 562=1924 M.W.N. 877=A.I.R. 1924 Mad. 856.

——S. 19—Prayer that account may be taken and settled.

In a suit for balance due on taking accounts an admission that accounts must be taken and settled is a pertinent acknowledgment though the suit as framed was for definite sum where really the suit is for an amount due on accounts. 80 Ind. Cas. 355=19 M.L.W. 683=34 M.L.T. 200=1924 M.W.N. 355= A.I.R. 1924 Mad. 619=46 M.L.J. 468.

——S. 19—Admission of execution not acknowledgment.

On the back of the note there was in the handwriting of the defendant the words " Execution admitted " and the endorsement of the Munsif showing the date:

Held, the mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning of the section. 74 Ind. Cas. 353 =45 All. 579=21 A.L.J. 669=4 L.R.A. Civ. 315= A.I.R. 1924 All. 70.

——S. 19—Debt admitted in statement of accounts stamped and signed—Interest aud time for payment mentioned—Not acknowledgment but promise to pay.

The document executed by the defendants was in the following terms :— "Account of money, in the name of Panaullah Miji and Umer Ali Miji of Nanupur, Mokam Chandpore, amount due. Brought forward from the account of Panaulla Miji at page 24, of this book Rs, 3,535. Interest at the rate of one rupee per cent. per mensem, stipulated time for payment the month of Bhadra of the year 1318 B.S." Then followed the signatures of the executants on one anna stamp:

Held, that it sets out a promise made in writing and signed by the persons to be charged therewith to pay wholly the debt specified therein, and not an acknowledgment within the meaning of S. 19. 79 Ind. Cas. 77=A.I.R. 1923 Cal. 659.

——S. 19—Failure to deliver—Oral agreement to pay damages—No acknowledgment.

Where there was a **Sauda** and a date fixed for delivery and defendant failed to deliver and thereafter he said he would pay damages at a certain rate:

Held, the mere fact that at a later date he said he would pay the damages could not extend the time where the cause of action had already accrued. 75 Ind Cas. 440=A.I.R. 1923 Nag. 332.

——S. 19—Promise to pay if found due on comparing accounts—Not conditional on accounts being gone into.

Defendant wrote as follows in reply to the plaintiff " In case the account is compared now and any amount is due, my client is prepared to pay it. The amount mentioned in your notice is not due as per your accounts. As my client is not aware of certain amounts contained in the **kaichits** given to the aforesaid person, it is not possible to set right the accounts of my client. I am therefore instructed by my client that your client should be made to give forth wifh the **Kaichits** and accounts and on getting them compared should receive the amount found to be true."

Held, that there was sufficient acknowledgment of the liability to save limitation and it was not conditional on the accounts being gone into. 59 Ind. Cas. 898=12 M.L.W. 352.

——S. 19—Hatchitta—If effective acknowiedgment.

A hatchitta is an acknowledgment within S. 19 of the Limitation Act. 33 Cal. 1047, Foll. 46 Cal. 746 =53 Ind. Cas. 854.

——S. 19—Hundi and Cheque—Payment by—Dishonour.

A payment by a cheque and a Hundi which was dishonoured on presentation do not constitute an acknowledgment within S. 19 of the Limitation Act. 46 Cal. 168=27 C.L.J. 392=45 Ind. Cas. 241.

——S. 19—Dakhalnama.

The acknowledgment contained in the **dakhalnama** executed by defendant's predecessor is mere description of the property purchased and not an acknowledgment of liability within the meaning of S. 19. 38 All. 540=14 A.L.J. 834=36 Ind. Cas. 452.

——S. 19—Promissory note for pre-existing debt.

When a Court of Wards which has power to give an acknowledgment of an existing debt authorises a promissory note to be executed, the note could in any event be used as acknowledgment of the pre-existing debt. 43 Cal. 211=34 Ind. Cas. 205.

——S. 19—Promise to remit money due.

A promise to remit money due on a particular document is a sufficient acknowledgment. 29 Ind. Cas. 36 (Mad.).

——S. 19—Mortgage debt referred to in subsequent pro-note for another debt as an extra or additional debt.

Reference in a promissory note of a debt due under a mortgage executed some years previously as an extra or additional debt amounts to an acknowledgment of that debt under S. 19 of the Limitation Act. 38 Bom. 177=16 Bom. L.R. 20=23. Ind. Cas. 353.

——S. 19 and Art. 148—Receipt in Collector's books.

In 1793 a **desai** mortgaged with possession certain **desaigiri dastur.** In 1831 the Government resolved on paying a money allowance to the **desai** from the treasury instead of allowing him to collect from **raiyats.** In 1843 the persons in whom the mortgage rights were vested received the payments from the Government. The payment was entered in the Collector's books, the recipients being described as the mortgagees of the **desai.** To confirm this entry the mortgages signed a receipt as mortgagees.

Held, that the receipt amounted to an acknowledgment and a suit for redemption in 1901 was not barred. 37 Bom. 326=40 I.A. 68=17 C.W.N. 573=13 M.L.T. 415=(1913) M.W.N. 428=11 A.L.J. 432=17 C.L.J. 474=15 Bom. L.R. 483=25 M.L.J. 101=18 Ind. Cas. 909 (P.C.) [Affirming 11 Bom. L.R. 318=2 Ind. Cas. 469.]

——S. 19—Sarkhat.

Deft. executing a **Sarkhat** for fresh loans and admitting the previous claims of the plff. and agreeing

to pay a certain rate of interest is deemed to have made a fresh contract and not merely acknowledged the barred debt. 5 Ind. Cas. 418 (All.).

——S. 19—Admission of liability to pay interest,

Admission of liability to pay interest in subsequent bonds on a previous mortgage amounts to an acknowledgment of liability. 25 Cal. 844, 54 Ind Cas. 985, Foll. 2 Lah. L.J. 549.

——S. 19—Acknowledgment—Agreement to pay in instalments.

An agreement under which the defendants accept the accuracy of the accounts and agree to pay the debt in certain instalments with interest, the defendents not being able to pay interest on the original debt, gives a fresh cause of action. 4 Ind. Cas. 38=5 M.L.T. 351 19 M.L.J. 372=32 M. 284.

——S. 19—Acknowledgment.

Where **A** sends a bill to **B**, and **B** writes in reply that he will examine the same and see if anything is due by him to the former, such a reply would not be a sufficient **acknowledgment** within S. 19. Where plaintiff, a oontractor and builder, wrote to defendant enclosing a bill for repairs and work done on defendant's premises, and the defendant in reply sent a memo. in the following terms:—"Received from Babu Joggessur Roy a letter and bill for the works and repair done in the garden-house situated at No. 15-3, Gopal Lal Tagore's Road, Baranagore. The bill glanced over is incorrect; large amounts have been wrongly introduced, I will first have the work examined, although I know that the whole of the work is not yet finished. Then I will examine the estimates and after deducting what has to be deducted, I will see what is due." **Held**, that the memo. of the defendant did not constitute an acknowledgment as contemplated by S. 19. (1903) 8 C.W.N. 168=31 Cal. 195.

——S. 19 (1)—Acknowledgment.

The plaintiff delivered to defendants 200 cases of oil for carriage from Bombay to Jeddah. The steamer reached Jeddah on the 11th July 1900, where the defendant's agents delivered only 165 cases and granted to the consignee a certificate that 35 cases were short delivered. On the 15th November 1900 plaintiff, on receiving this certificate, made a claim in writing to the defendants. in Bombay. On the 18th July, 1901 the defendants, at plaintiff's request, wrote to their Jeddah agent for the 35 cases and handed up the letter to plaintiff for being forwarded to Jeddah. On the 20th December, 1902 they again wrote to their Jeddah agent for the cases and entrusted the letter to plaintiff to be despatched to Jeddah. On the 28th January, 1902, plaintiff sued defendants for damages for non-delivery of the 35 cases **Held**, that the certificate and the two letters contained acknowledgment of liability. (1902) 4 Bom. L.R. 447=26 B. 562.

3. Admission.

(a) In arbitration proceedings.
(b) In court.
(c) In letters:
(d) In settlement records.

3 (a). Admission—In arbitration proceedings.

——S. 19—Admission of liability contained in agreement of reference to arbitration—Whether amounts to acknowledgment.

Where an agreement of reference to arbitration contains an unqualified admission of the fact that the defendants purchased from the plaintiff goods and that a difference cropped up in the account in respect of those dealings, the legal effect of such an admission is that whoever on account should be shown to be the debtor is bound to pay the debt to the other. The admission is not subject to a condition that the defendants would be liable only if the liability is ascertained by the arbitrators. It therefore amounts to an acknowledgment of liability within the terms of S. 19 of the Limitation Act and affords a fresh starting point of limitation quite independently of the settlement of accounts by the arbitrators for purposes of a suit instituted after the failure of the arbitration proceedings. I.L.R. (1947) Nag. 477=1947 N.L.J. 417 =A.I.R. 1948 Nag. 334.

——S. 19—Recitals in reference to arbitration.

An acknowledgment in a reference to arbitration admitting liability to pay a debt extends the period of limitation even though the reference may prove infructuous. A.I.R. 1939 Sind 113=I.L.R. (1939) Kar. 693=181 Ind. Cas. 596.

——S. 19—Reference to arbitration implying promise to pay in case liability is found out.

A reference to arbitration implying a promise to pay in the event of the arbitrator deciding that there is a liability is not the same thing as unconditional promise to pay. It is, if anything, a promise to pay coupled with a condition, and unless that condition is fulfilled, that is to say, unless something is found by the arbitrator to be due, it will not operate to give a fresh start to limitation. A.I.R. 1937 Pat. 616=4 B.R. 89=171 Ind. Cas. 946.

——S. 19—Reference to arbitration—Recitals—Non-denial of liability.

Recitals in a reference to arbitration to settle partnership accounts and not denying any liability to pay under it amount to an acknowledgment to render account in Court to pay what is paid due, although the reference proves infructuous. 3 S.L.R. 53, Foll. 104 Ind. Cas. 572=22 S.L.R. 117=A.I.R. 1928 Sind 45.

——S. 19—May be absolute or conditional—Mortgage of joint family—Members of family disputing liability but agreeing to be bound by decision of arbitrator—Agreement to refer and award amount to acknowledgment of mortgage debt.

An acknowledgment to take a case out of the Statute of Limitations must be either one from which an absolute promise to pay can be inferred, or secondly an unconditional promise to pay the specific debt or thirdly there must be a conditional promise to pay the debt and evidence that the condition has been performed. 33 Cal. 1047, Rel. on.

Where there was a mortgage of the joint family property, and the members of the joint family were disputing among themselves as to the liability and all of them were ready to undertake to discharge the liability if it were found by the arbitrators to be existing:

Held, an agreement to refer to arbitration the dispute and the award thereon would amount to an acknowledgment of mortgage debt. 102 Ind. Cas. 181=49 All. 801=25 A.L.J. 526=A.I.R. 1927 All. 488.

——S. 19—Acknowledgment—Arbitration—Reference.

Where the parties to an abihalnama acknowledged that accounts remained unadjusted which the arbitrators were to adjust and each party agreed that he would pay such amounts as might be found due from him on adjustment of accounts. **Held**, that this was suffi

cient acknowledgment. It is not necessary that the acknowledgment should be addressed to any particular persons and it is a sufficient acknowledgment even if it be accompanied by a refusal to pay. 23 C.W.N. 921=53. Ind. Cas. 898.

——S. 19—Conditional acknowledgment.

A request to leave partnership accounts to arbitration and to accept its award is only a conditional acknowledgment of liability. It will not save the period of limitation under S. 20 if the arbitration fails and consequently there is no award. 37 M.L.J. 353=48 Ind. Cas. 89.

——S. 19—Essentials of acknowledgment—Arbitration—Reference.

Admission of the existence of relationship of creditor and debtor is necessary for an acknowledgment under S. 19. A reference to arbitration is not such relationship. A promise to pay on condition is a conditional acknowledgment which operates only on fulfilment of the condition. 40 Mad. 701=4 L.W. 48=20 M.L.T. 129=31 M.L.J. 231=35 Ind. Cas. 575.

——S. 19—Award—Acceptance.

Acceptance of an award directing the parties to share equally the outstandings and amounts found payable in the accounts of the partnership is not an acknowledgment of liability under S. 19 of the Limitation Act. 28 Ind. Cas. 864 (Mad.).

3 (b) Admission—In court.

——S. 19—Judgment-debtor admitting his liability in answer to application for making final decree—Effect.

Where in answer to an application by the decree-holder for making a final decree in mortgage suit, the judgment-debtor applies for instalments admitting his liability under the decree, the admission is an acknowledgment of liability under S. 19 of the Limitation Act, and if it is consciously made of a subsisting liability a fresh period will start from the date when that acknowledgment is made. I.L.R. (1947) Nag. 683=A.I.R. 1948 Nag. 308=1947 N.L.J. 502.

——S. 19—A statement that in view of the fact that all mortgage property has not yet been sold, the application for the preparation of a personal decree under O. XXXIV, R. 6, Civil P.C, is premature does not amount to acknowledgment within S. 19, Limitation Act. 1943 O.W.N. 352=A.I.R. 1943 Oudh 453=19 Luck. 279=209 Ind. Cas. 129.

——S. 19—Application to Debt Conciliation Board including decretal debt in list of claims—If amount to acknowledgment.

An application by the debtor under S. 6 (1) of the C.P. Debt Conciliation Act which includes in the list of claims against him a decretal debt with reference to the number of the decree amounts to an acknowledgment of liability in respect of that debt under S. 19 of the Limitation Act. I.L.R. (1946) Nag. 493=225 Ind. Cas. 340=1946 N.L.J. 368=A.I.R. 1946 Nag. 344.

——S. 19—Composition deed filed in insolvency.

A deed of composition filed in Insolvency Court signed by the insolvent and his creditors, held amounted to acknowledgment of debts specified in the deed. A.I.R. 1942 Mad. 327=(1942) 1 M.L.J. 173=55 L.W. 108=1942 M.W.N. 81=201 Ind. Cas. 782.

——S. 19—An entry of decretal debt in the list of creditors signed by the debtor in an application to the Official Assignee amounts to an acknowledgment within S. 19, Limitation Act. A.I.R. 1940 Cal. 210 (1)=I.L.R. (1939) 2 Cal. 523=44 C.W.N. 322=188 Ind. Cas. 280.

——S. 19—Mention of decree-debt in statemen of insolvent.

The inclusion of a decree-debt in an insolvency petition signed by the debtor amounts to an acknowledgment within the meaning of S. 19. Similarly, the mention of the decree-debt in a statement made by the insolvent at an examination made for the purpose of ascertaining his assets and liabilities and the reference to the decree-debt without mentioning any payment towards its discharge amounts to an implied admission that the decree was than subsisting. A.I.R 1933 Mad. 565=38 L.W. 204=1933 M.W.N.1303= 143 Ind. Cas. 681.

——S. 19—Schedule of Creditors—Signed by insolvent—Amount stated to be due—Valid acknowledgment.

Where the executants of a pro-note are adjudged insolvents and they file a schedule of creditors signed by them in which the payee of the note is described as one of the creditors and a certain amount is stated therein to be due to him, there is a valid acknowledgment of liability in respect of the amount. A.I.R. 1928 Rang. 326, **Foll.**: 117 Ind. Cas. 571=A.I.R. 1928 Rang. 327.

——S. 19—Signing schedule mentioning debt acknowledgment.

The mention of the debt and the signing of the schedules operates as an acknowledgment under the provisions of S. 19. 117 Ind. Cas. 570=6 Rang. 533=A.I.R. 1928 Rang. 326.

——S. 19—Acknowledgment—Inclusion in schedule filed by insolvent.

S. 19. is much wider and more comprehensive than the English law, and includes every case in which the debtor has acknowledged and signed in writing even though the acknowledgment may not have been to the creditor or may have been accompanied, by a refusal to pay. The inclusion by an insolvent debtor of a debt in his schedule which is signed by him is an acknowledgment. 35 Bom. 383= 13 Bom. L.R. 123=9 Ind. Cas. 944.

——S. 19—Acknowledgment—Insolvency petition—Statement by one of the judgment-debtors.

If one of several judgment- debtors in a joint decree acknowledges in a petition of insolvency the existence of the several pecuniary claims against him, the decree-holder gets a fresh starting point against that particular judgment-debtor to the extent of the amount stated in the petition of insolvency. 10 C.W.N. 551, Not Foll. 14 Ind. Cas. 1 (Cal.).

——S. 19—Application to Court time for payment.

A new starting point for limitation arises when the udgment-debt applies for time for payment. (1941) 22 P.L.T. 416.

——S. 19—Mortgage decree made final-Judgment-debtor transferring portion of property—Decree holder applying for injunction—Admission by judgment-debtor of existence of mortgage decree:

Held, that the statement of the judgment-debtor admitting the existence of the decree amounted to an admission of subsisting liability and was, therefore, an acknowledgment made within limitation. Consequently, the decree-holder's application was saved from being barred by time. A.I.R. 1939 All. 483=(1939) A. L. J. 746=I.L.R. (1939) All. 728=1939 A. W. R. 640=183 Ind. Cas. 685 (D.B.).

——S. 19—Admission before Registrar.

Upon a presentation of a document for registration, the executants not only admit the fact of its execution but also the contents of the documents, **viz.**, their liability upon it. So, where a person admits before the Registrar execution of a mortgage bond which recites the debt due, his acknowledgment of liability is implied and is sufficient to save limitation. A. I. R. 1938 Mad. 429=(1938) M.W.N. 113=182 Ind. Cas. 355.

——S. 19—Admission of execution before Sub-Registrar.

Admission of execution by the executant of a mortgage-deed before the Sub-Registrar will amount to an acknowledgment of liability within the meaning of S. 19, if, from the surrounding circumstances, an acknowledgment of liability is necessarily implied in uch admission.

Except where a **benami** transaction is suggested, the admission of execution before a Sub-Registrar within 4 moths after the execution of the document is to make the document operative. It will be the strongest case where a man is anxious to admit his liability. 38 L. W. 439=A. I. R. 1933 Mad. 713=65 M. L. J. 380=(1933) M. W. N. 1046=57 M. 43=145 Ind. Cas. 654.

——S. 19—Pro-note in consideration of previous loan granted on pro-note—Both pro-notes insufficiently stamped, hence inadmissible—Suit on original loan—Suit barred by time:

Held, that in view of the admissions by defendant in his written statement, the receipt for **Rs.** 400, dated August 4, 1931, constituted on acknowledgment of liability in respect of the loan advanced on August 10, 1928, and had the effect of extending the period of limitation under S. 19 of the Limitation Act. 1937 O.W.N. 622=A.I.R. 1937 Oudh 387=13 Luck. 376=168 Ind. Cas. 927.

——S. 19—Where, in a suit instituted for recovery of money due on various promissory notes executed by the same defendant, the defendant files a written statement wherein he admits the execution of the promissory notes but alleges that he had made several repayments in respect of several promissory notes, the statement amounts to an admission that all the pro-notes were at least in part undischarged at the date of filing the written statement. A.I.R. 1935 Cal. 721=40 C.W.N. 132=63 C. 512=159 Ind. Cas. 618.

——S. 19—Where the vendor brings a suit on the pro-note delivered to him by the purchaser for payment of the price of the goods, acknowledging the title of the purchaser, a suit brought within 3 years of that acknowledgment is within time. 1934 M.W.N. 1291.

——S. 19—Pleadings, statemets in—How for will constitute acknowledgment.

A died leaving a widow, a daughter married to **B** and a pre-deceased son's widow **C**. The widow gifted half the land to **B**. Certain reversioners brought a declaratory suit and it was decided that the alienation did not bind the reversioners. On the death of widow, the reversioners sued for possession of the house and for a declaration regarding the land of which they were already in possession. **B** contested the suit on a plea which succeeded, namely, that the reversioners could not sue for possession in the presence of **C**, the pre-deceased son's widow who was a preferential heir. **C** also filed a rent suit against the reversioners and in the written statement to this suit, **C** admitted the correctness of the plaint. The suit of the reversioners having been dismissed, **C** brought a suit for possession of the land which was gifted to **B** by **A's** widow. The suit was **prima facie** time-barred but it was contended that **B's** pleading in the suit by the reversioner and in **C's** rent suit constituted acknowledgments which extended the period of limitation:

Held, (i) that so far as the suit of the reversioners was concerned, **B** merely pleaded **jus tertii** to defeat the suit and this did not constitute acknowledgment within the meaning of S. 19, Limitation Act;

(ii) that so far as **C's** rent suit was concerned, she was a co-owner with **B** who merely stated that he did not object to her getting a decree for the whole amount of rent and that this also was not an acknowledgment within the meaning of S. 19.

Limitation must be dependant to some extent on the form and substance of the suit. A.I.R. 1933 Lah. 491=34 P.L.R. 841=145 Ind. Cas. 343.

——S. 19—Claim dismissed as barred—Subsequent admission in written statement in partition suit—Award on arbitration on the claim accepted—Sufficient promise tod ay.

Plaintiff sued for return of Rs. 500 deposited with defendant 1 and the father of defendant 2. Plaintiff's suit was dismissed on the ground of limitation. In a suit for partition which was instituted by the mother of defendant 2, as his next friend a written statement was put in by defendant 1, in which he admitted this deposit by the plaintiff. In the partition suit the matter was referred to arbitration and an award was made on 10th September, 1924, by which the liability of defendants 1 and 2 was declared in equal shares with regard to what ever was the deposit made by the plaintiff. That award was accepted by a petition to which both defendant 1 and the mother of defendant 2 were parties:

Held, that the written statement coupled with the award and joint petition amounted to a promise by defendant 1 to pay the debt. 115 Ind. Cas. 263=A.I.R. 1928 Cal. 850.

——S. 19—Written Statement.

A acknowledgment in a prior written statement of the delivery of certain articles in sufficient to save limitation in a suit for the recovery of its price. 25 C. 844, Foll. 6 M. 182, not Foll. 6 M.L.T. 155=19 M.L.J. 650=3 Ind. Cas. 19.

——S. 19—Prior written statement—Suit dismissed for misjoinder of causes of action—Written statement treated as acknowledgment.

Where a suit was dismissed for misjoinder of causes of action, in a later suit the Court treated the defendant's written statement in the first suit as an acknowledgment under S. 19 from the date on which the period of limitation should be calculated. (1900) 24 M. 361.

——S. 19—Where a judgment-debtor applied to the Court that a letter of the decree-holder, to the effect that there was a settlement between the parties that no further execution should be taken out in respect of the money due under the decree until a specified date, should be placed on the record:

Held, that the letter could not be construed otherwise than as an acknowledgment that the applicant was a judgment-debtor and that the decree was unsatisfied, and that this was a sufficient acknowledgment to satisfy the requirements of S. 19, Limitation Act. (1933) A. L. J. 256=A. I. R. 1933 All. 364=55 A. 393=146 Ind. Cas. 836.

——S. 19—Entry in dakhalnama filed in execution proceeding against mortgagors.

A suit for redemption of a mortgage was instituted more than sixty years after the date of mortgage. The plaintiff relied on an acknowledgment contained in a **dakhalnama** filed in Court in an execution proceeding

against the mortgagors where, after describing what property the auction-purchasers had purchased, they expressly stated that that property did not include an 8 **bighas** and odd area which was in their possession as mortgagees and which belonged to the mortgagor's representatives :

Held, that thereby, the mortgagees clearly admitted that they were in possession of the area belonging to specific persons as mortgagees and there was, therefore, the necessary implication that the mortgage was subsisting and they were in possession as mortgagees, and that it was a valid acknowledgment within the meaning of S. 19, Limitation Act. (1932) A.L.J. 1010=A.I.R. 1933 All. 99=142 Ind. Cas. 784.

——S. 19—A proprietor to whom the estate had been released and made over under the Chota Nagpur Encumbered Estates Act made a gift of a portion of the estate to his wife in 1909 without the sanction of the Commissioner and delivered possession to her. In 1916, the wife filed a petition to the Commissioner referring to the gift and requesting that the Commissioner may be pleased to sanction the gift or order a fresh grant on the same terms to be executed. The donor died in 1924 and his grandson filed a suit for possession in 1924 against the widow and her transferees :

Held, that the petition filed by the wife contained a clear acknowledgment of the title of her husband within the meaning of S. 19. 9 O.W.N. 43=36 C.W.N. 250=A.I.R. 1932 P.C. 55=35 L.W. 217=(1932) A.L.J. 186=55 C.L.J. 136=62 M.L.J. 296=34 Bom. L.R. 463=13 P.L.T. 279=11 Pat. 272=(1932) M.W.N. 660=59 I.A. 130=136 Ind. Cas. 798 (P.C.).

——S. 19—Deposition in Court—Acknowledgment may be inferred from.

Per **Ramesam, J.**—An acknowledgment in a deposition need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a mater of law.

Per **Reilly, J.**—When the admission of a liability in the past is made in a deposition given in Court, the Court must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability.

Plaintiff (vendor) sued for the recovery of a part of purchase money unpaid. In a previous suit there was a contention that the sale was a nominal one and the defendant (vendee) in order to make out a case that the sale was real transaction for consideration, stated : "I was directed to pay Rs. 6,000 to defendant's mother Seethalakshmi Ammal in Exhibit B. I executed a pronote in her favour on the date of Exhibit B immediately after Exhibit B was written and delivered the said pronote to Subbarama Aiyar. I owed Rs. 6,000 more under Exhibit B:"

Held, that the statement amounted to an acknowledgment of subsisting liability. 100 Ind. Cas. 10=50 Mad. 548=25 M.L.W. 411=A.I.R. 1927 Mad. 219=51 M.L.J. 856.

——S. 19—Deposition.

Deposition containing an admission may amount to an acknowledgment for the purpose of S. 19, if it is signed by the deponent. 194 P.W.R. 1911=151 P.L.R. 1911=10 Ind. Cas. 142.

——S. 19—Statement made and signed before a Judge.

An acknowledgment in a statement made and signed before a Judge in a suit, is sufficient within S. 19. 33 C. 1047 (P.C.), Foll. 35 All. 437=11 A.L.J. 638=20 Ind. Cas. 27.

——S. 19—Application.

An application signed by the widow of the deceased mortgagor distinctly admitting the mortgage constitutes an acknowledgment under S. 19. 191 P.W.R. 1911=75 P.R. 1911=152 P.L.R. 1911=10 Ind. Cas. 147.

3. (c) Admission—In letters.

——S. 19—Letters by debtor asking to send accounts.

In his first letter, the debtor made a request to send to him a complete statement of accounts. In the second letter, the debtor acknowledged the receipt of some sort of accounts and demanded further particulars and incidentally admitted the liability to pay interest. In the third letter, the debtor again said that the creditor should send him particulars of the net amount due and the interest charged thereon specifying the rate at which interest had been charged. The last letter said that the debtor wanted the name of each of his creditors from whom the plaintiff creditor had borrowed money for the debtor with particulars of the account payable to each such creditor so that payment of the debts could be made. A specific request was added when the letter said "Please also write the amount of money due to you" :

Held, that the letters were acknowledgments within the meaning of S. 19 and saved limitation. A.I.R. 1944 Lah. 65=215 Ind. Cas. 30.

——S. 19—A debtor wrote a letter to his creditor informing him that he had arranged with his debtor that the money due from him be despatched by money-order to the creditor and that he, too, was sending money in two or four days :

Held, that the debtor acknowledged that money was due from him and the acknowledgment was in respect of his total liability to the creditor on the date on which the letter was written, and it was not necessary for the debtor to specify any particular item. 1939 A.W.R. 6=(1939) A.L.J. 2=A.I.R. 1939 All. 179=180 Ind Cas. 542.

——S. 19—Creditor's letter stating amount due—Reply by debtor's secretary that arrears would be paid in a certain month.

In a letter, the creditor stated that a sum of money was due to him under accounts and the secretary of the debtor replied that he had been directed to intimate that all arrears under accounts would be paid by a certain month :

Held, that it was a statement by a duly authorised agent and constituted an acknowledgment of liability under S. 19, and saved limitation. 11 O.W.N. 880=A.I.R. 1935 Oudh 170=153 Ind. Cas. 987.

——S. 19—Letter—Inevitable deduction from admission is acknowledgment—Doubtful on which side balance would lie sufficient acknowledgment.

If from the letter it appears that inevitable deduction from the admission is that the party against whom money is claimed acknowledged his liability to pay his debts if the balance should be ascertained to be against him the statement is sufficient acknowledgment. Even where it is doubtful on which side the balance would lie the statement is sufficient acknowledgment within the meaning of S. 19. 124 Ind. Cas. 24=A.I.R. 1930 All. 124.

——S. 19—Banker and customer—Letter forwarding bills against overdraft—Sufficient acknowledgment.

Where defendants who carried on business in partnership opened an overdraft account with the plaintiff bank and it was arranged that each partner was eligible to sign cheques in the firm's name and the bank agreed to

advance money to enable the defendants to purchase materials and on receipt of bills given on payment for goods supplied to customers would collect the same on commission and deduct the same balance from the overdraft, a letter forwarding such bills with request to credit amount to sender's account is sufficient acknowledgment of the debt or payment of the principal. 56 Cal. 556=33 C.W.N. 412=A.I.R. 1929 Cal. 714.

——S. 19 -Letter assuring payment.

A letter written by a debtor to the creditor's brother recited: "There is no use creating unnecessary hitch, because I would pay and you would receive the balance, paying and dying cannot be avoided:"

Held, that the letter was a sufficient acknowledgment within S. 19. 33 Cal. 1047 (P.C.) and 10 Mad. 259, Foll. 111 Ind. Cas. 617=30 Bom. L.R. 688.

——S. 19—Promise to pay if found due on comparing accounts.

A statement contained in a letter that, if upon a comparison of accounts any amount is found due by the writer of the letter he is prepared to pay it, is a sufficient acknowledgment of liability under S. 19, Limitation Act. 33 Cal. 1047 (P.C.) and 12 M.L.W. 352, Foll. 107 Ind. Cas. 533=7 Pat. 238=A.I.R. 1928 Pat. 221.

——S. 19—Letter asking copy of account showing amount due.

Where, in a letter to writer definitely asked the plaintiff to send a copy of the account showing what amount was due by him to the plaintiff:

Held, that it was an acknowledgment within the meaning of S. 19. 33 Cal. 1047 and 1 Lah. 357, Foll. 101 Ind. Cas. 544=28 P.L.R. 169=9 L.L.J. 146=A.I.R. 1927 Lah. 832.

——S. 19—Letter stating that arrears have not been paid because accounts have not been made up.

A letter written by the agent of debtors stating that the arrears have not been paid up for the sole reason that the accounts have not been settled is an acknowledgment that accounts have to be settled and that the arrears found to be due, upon settling accounts, will then be paid up. Such acknowledgment is enough to extend limitation within S. 19. 91 Ind. Cas. 338=22 M.L.W. 195=A.I.R. 1925 Mad. 1260.

——S. 19—Admission of running account—Promise to pay if found due on comparing accounts.

The writer admitted the existence of a running account between the parties and went on to say that his representatives would compare accounts and pay what was found to be due:

Held, that the words were a clear admission of liability, within the meaning of S. 19. 33 Cal. 1047, Foll. 87 Ind. Cas. 985=23 A.L.J. 248=6 L.R.A. (Civ.) 301=A.I.R. 1925 All. 340.

—S. 19—Co-sharers—Letter by one to the other calling for payment of his share of expenses—Acknowledgment of title.

Where one co-sharer in possession called by letter on the other co-sharer out of possession to pay his share of the moneys expended on repairs or surrender his interests in the house.

Held, that the letter amounted to an acknowledgment and his possession could not be said to be adverse till the date of the acknowledgment. 79 Ind. Cas. 279=5 L.L.J. 47.

——S. 19—Debtor asking for account—Condition of acknowledgment.

The cash-keeper of a fund wrote to the manager thus; "If you write to me in detail as to how much is payable by me to the said **Nidhi** obtaining the orders of the higher authorities and communicate to me a copy of the order together with the aforesaid account, I am willing to pay accordingly."

Held, this was not a conditional acknowledgment of liability by the cash-keeper but was sufficient to keep the liability alive as against him. 10 L.W. 586=58 Ind. Cas. 446.

——S. 19 and Arts 30 and 31—Suit for damages—Misdelivery of goods—Letter repudiating liability.

In an action for damages for non-delivery of goods by a Railway Company, plaintiff relied on a letter by the Railway Company stating that the delivery of the goods under an indemnity bond was perfectly correct and that his claim, was against the person to whom the goods had been delivered and not the Railway. **Held**, that the letter relied upon by the plaintiff from the Railway contained no acknowledgment of liability under S. 19 of the Limitation Act, but, on the contrary, amounted to a denial of liability. 13 S.L.R. 1=51 Ind. Cas. 570.

——S. 19—Essentials of acknowledgment—Letter.

A letter admitting dues on settlement of accounts is an acknowledgment. 12 Ind. Cas. 410 (Mad.).

——S. 19—Reply asking for detail bill.

A reply by a customer to a tradesman to his bill with the words "accounts rendered," that detailed accounts be sent, does not amount to an acknowledgment. A debtor's letter in reply to a creditor's letter of demanding a definite sum of money, asking for a copy of accounts or their inspection does not amount to an acknowledgment. 36 Mad. 68=10 M.L.T. 251=(1911) 2 M.W.N. 225=21 M.L.J. 1024=12 Ind. Cas. 378.

——S. 19—Letter.

Letter by debtor to creditor requesting him to object to sale of debtor's property attached by another creditor and stating that his property is mortgaged to him amounts to acknowledgment. 75 P.W.R. 1909=52 P.R. 1909=2 Ind. Cas. 102.

3. (d) Admission—In Settlement records.

——S. 19—Entries in the khewat of the settlement evidencing acknowledgment of status as mortgagees.

Entries in the khewat of the second settlement evidencing an acknowledgment on the part of the predecessors of the appellants of their status as mortgagees **vis-a-vis** the predecessors-in-interest of the respondents as mortgagors, are enough to constitute a valid acknowledgment within the meaning of S. 19 of the Limitation Act where the accuracy of the entries have been accepted, signed, verified and attested at the foot of it by the parties concerned. 1948 O.W.N. 87=A.I.R. 1948 Oudh 257=1948 A.W.R. (C.C.) 83.

——S. 19—Entries in **khewat** of 1878 showing mortgagees to be in possession mentioning amount and stating that mortgage was redeemable at **Dasehra** in **Jeth**—Entries attested by mortgagors and mortgagees or their representatives.

Held, that entries did not save limitation. A.I.R. 1943 All. 393=(1943) A.L.J. 548=1943 A.W.R. 291=I.L.R. (1944) All. 76=212 Ind. Cas. 238 (F.B.).

Overrules—(1) A.I.R. 1929 All. 209=115 Ind. Cas. 451. (2) 1 A. 425. (3) 5 Ind. Cas. 77. (4) 1 A. 117 (F.B.).

——S. 19—Signed statement mentioning mortgagee in pedigree table and wajib-ul-arz—Sufficient acknowledgment.

Evidence of a statement mentioning the mortgage in a pedigree of the co-sharers of a village which was the subject of mortgage, signed by the mortgagees, and of an entry signed by them in the village **wajib-ul-arz**, duly verified before a Settlement Officer, the pedigree and **wajib-ul-arz** both forming part of the settlement record, satisfies all the essentials of a valid acknowledgment required by S. 19. 105 Ind. Cas. 93=4 O. W. N. 882=A.I.R. 1927 Oudh 457.

——S. 19—Statement in Settlement Report

A statement of the existence of a mortgage contained in Settlement Report thirty years old and purporting to have been signed by the mortgagor and coming from proper custody is an acknowledgment within S. 19. 15 A.L.J. 121=38 Ind. Cas. 162.

——S. 19 and Art. 148—Entry in a Settlement Record of mortgagor's right to redeem.

An entry in Settlement Record of the mortgagor's right to redeem the land on payment of the mortgage money and not signed by the mortgagee or anybody on his behalf is not an "acknowledgment" 116 P.R. 1891 75 P.L.R. 1905 (F.B.), Foll. 77 P.W.R. 1914=178 P.L.R. 1914=24 Ind. Cas. 898.

——S. 19—Mortgagor and Mortgagee—Co-mortgagee.

Signature on **Wajib-ul-arz** referring to the **Khewat**, by a mortgagee is not sufficient acknowledgment of mortgagor's title. The acknowledgment by one mortgagee does not bind other co-mortgagees. 8 A.L.J. 605 =10 Ind. Cas. 238.

——S. 19—Entries in Wajib-ul-arz.

Entries in **wajib-ul-arz** signed by a party to the effect that a certain mortgage was to be redeemed in the month of **Jeth** of any year, operates as acknowledgment within the meaning of S. 19. 5 Ind. Cas. 77 (All).

4. Authority to acknowledge

See also NOTE 10.

(a) **Agent.**
(b) **Co-heirs**
(c) **Court of Wards.**
(d) **Guardian.**
(e) **Joint Hindu family.**
(f) **Limited owner.**
(g) **Partner.**
(h) **Principal and surety.**
(i) **Other cases.**
(j) **Onus of proof.**

4. (a) Authority to acknowledge—Agent.

——S. 19, Expl. II—"Duly authorised on this behalf" authorisation, if must be in writing.

The words "duly authorised on this behalf" in Expl. II to S. 19, Limitation Act, do not connote that such authorisation must be in writing. A.I.R. 1950 Ajmer 4 (2).

——Ss. 19 and 47 (a)—Authority to acknowledge—Duly authorised agent.

'Duly authorised in that behalf' do not mean specially or expressly authorised, but the words correctly apply to an agent acting within the scope of his powers, ordinary or special. 55 P.R. 1910=136 P.L.R. 1910=6 Ind. Cas. 948.

——S. 19—Agent—Letter written at desire of debtor or by general agent having no special power to make acknowledgment.

A letter written by the general agent of the debtor at his desire, is a valid acknowledgment. The fact that he had no authority under the **mukhtarnama** to make the acknowledgment is immaterial when the letter is written at the desire of the debtor so as to give authority independently of the **mukhtarnama**. A.I.R. 1941 Oudh 254=1941 O.W.N. 108=1941 A.W.R. 70=16 Luck. 701=192 Ind. Cas. 885.

——S. 19—Agent.

Where a letter acknowledging debt is written by a person at the instance of and on the instructions given by the debtor and the debtor has got it duly posted to the address of the creditor, these circumstances clearly indicate that the writer had been duly authorised to make the acknowledgment. 18 Pat. 715=20 P.L.T. 927=A.I.R. 1940 Pat. 6=6 B.R. 312=186 Ind. Cas. 225.

——S. 19—Letter by general agent.

A letter written by a general agent of the debtor at the desire of the debtor within the period of limitation is an acknowledgment. 100 Ind. Cas. 784=4 O.W.N. 275=A.I.R. 1927 Oudh 613.

——S. 19—General agent—Presumption of authority.

It is unquestionable that no valid acknowledgment can be made by a general agent unless he is expressly or impliedly authorised in that behalf; but the authority may be presumed from the attendant circumstances. The question of authority in each case is one of fact or any inference to be drawn from the surrounding circumstances. 85 Ind. Cas. 633=5 L.R.A. (Civ.) 736=A.I.R. 1925 All. 176.

——S. 19—Authority to acknowledge—Person having general authority to settle claim.

An agent who had general authority to settle the purchase price of the goods and thus could pay the amount of the claim could plainly also arrange to prevent time from becoming a bar to it. 24 C.W.N. 153=2 U.P.L.R. (P.C.) 1=55 Ind. Cas. 543 (P.C.).

——S. 19—Usually writes letters for principal—If authorised agent.

The mere fact that the defendant used to write letters on behalf of his principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability. 80 Ind. Cas. 6=5 L.R.A. (Civ.) 638=22 A.L.J. 807=46 All. 892=A.I.R. 1924 All. 855.

——S. 19—Authority to acknowledge—Agent—Contract Act (9 of 1872), Ss. 208 and 209.

A had dealings with B's firm. C being the **gumasta** with whom A transacted his business. An acknowledgment of a debt was made by C to A shortly after B's death, but before A had knowledge of it:

Held, that it was a proper acknowledgment C being B's agent for A. 35 Bom. 302=13 Bom. L.R. 264=10 Ind. Cas. 888.

4. (b) Authority to acknowledge—Co-heirs.

——Ss. 19, 20—Co-heirs—Mortgage by deceased Muhammadan—Acknowledgment by one heir, if saves limitation against other.

An admission of liability contained in a deed executed by the debtor in favour of a third person is a valid acknowledgment under S. 19, Limitation Act, and it is not necessary for its validity that it should be addressed or communicated to the creditor. Hence an admission of liability in respect of the mortgage debt by the mortgagor in a sale-deed transferring the equity of redemption in favour of a third person constitutes a valid acknowledgment under S. 19.

A deceased Muhammadan mortgagor held a 14 annas share in the equity of redemption. Some of his heirs made acknowledgments of liability in the sale-deeds transferring their equity of redemption. But the remaining two annas sharer did not part with his share. The mortgagor instituted a suit on the mortgage and claimed that acknowledgments saved time against the two annas sharer as well:

Held, that since the parties were Muhammadans, the share of each of the heirs of the mortgagor was defined by law. The acknowledgments by the 14 annas sharers could not save limitation against the two annas sharer. A.I.R. 1942 Pat. 73=20 Pat. 770=8 B.R. 600=23 P.L.T. 431=199 Ind. Cas. 566.

——S. 19—Co-heirs.

An acknowledgment of liability by some only of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage has been passed does not operate to save limitation as against the other heirs of the mortgagor. What the Court has to see is the relation which subsists between the various persons at the time when the acknowledgment is made or the payment is made and not the relation which existed at the time of the original transaction. If, at the time when the acknowledgment is made or the payment is made, there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, than the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others. (1936) A.L.J. 1140=A.I.R. 1936 All. 820=I.L.R. (1937) All. 272=1936 A.W.R. 996=166 Ind. Cas. 106 (F.B.).

Overrules—A.I.R. 1918 All. 61=47 Ind. Cas. 845.

4 (d.) Authority to acknowledge—Court of wards.

——S. 19—Court of wards—Power of local authorities to act as agents on its behalf.

Obiter—Generally speaking, the local authorities have wide powers to act as agents on behalf of the Court of Wards. 47 P.L.R. 174=A.I.R. 1945 Lah. 210.

——Ss. 19, 20—Court of wards—Manager's statement in circumstances of the case, whether amounted to acknowledgment—Collector's letter, held did amount to acknowledgment and saved limitation.

The plaintiff was born on October 10, 1909. The defendant's father had executed a mortgage in favour of the plaintiff's father on July 22, 1907. The defendant's father died in 1908 and the plaintiff's father died on January 19, 1911. On attaining majority on October 10, 1930, the plaintiff filed a suit on October 9, 1933; payments towards the mortgage were made in the years 1916 and 1920. But they were neither made towards interests as such nor did the fact of the payment appear in the handwriting of the person making them. After framing of the issues in the suit, a clerk in the Collector's office produced on summons, the record of the Court of Wards pertaining to the defendant's property which was under its superintendence, during the years 1909 and 1913. During the course of the suit, the Collector informed the Court that the record was confidential and claimed privilege and requested the Court to decide the matter and return the papers. The Court, without taking any notice of the request, allowed the parties to take certified copies of the papers in the record, which, among other things, consisted of (1) report by the manager, appointed under the Court of Wards Act, of the defendant's estate to the Collector, dated October 18, 1910, regarding defendant's debts; (2) Collector's letter to the plaintiff's father, dated October 22, 1910, referring to the mortgage-deed and asking whether he was prepared to take eight annas in a rupee of the mortgage debt in full satisfaction of the claim; (3) a statement by the manager of the defendant's estate, dated May 12, 1911, addressed to the Collecter giving names of creditors of the defendant together with debts due to them and the amounts of interest calculated and due up to that date, the suit mortgage being specified therein with principal and interest shown under heading of amount of debt; and (4) Collector's report to the Commissioner, dated June 9, 1911, based on the manager's report of May 12, 1911:

Held, that the payments made by the defendant did not save limitation either under S. 19 or S. 20, Limitation Act.

Held, further that the letter of the Collector addressed to the plaintiff's father and dated October 22, 1910, did not extend the period of limitation in favour of the plaintiff as it was addressed during the life-time of the latter.

Held, (1) (Per **Sen, J.**) that the manager's statement of May 12, 1911, was a statement of a duly authorised agent within the meaning of S. 19 and since it satisfied all other requirements of S. 19, it saved limitation.

(2) (Per **Wassoodew, J.**) that the statement could not be accepted as such for purposes of S. 19.

Held, that the Collector's letter to the Commissioner of June 9, 1911, mentioning the defendant's debts due on mortgage bonds included an acknowledgment of the debt and consequently, a suit filed within three years of the plaintiff's attaining majority was within time. A.I.R. 1939 Bom. 237=41 Bom L.R. 391=183 Ind. Cas. 225.

——S. 19—Court of wards.

Where the Court of Wards is in charge of the property of the executant of a promissory note, the Collector in charge of the Court of Wards is the duly authorised agent of the executant for the purpose of making an acknowledgment within the meaning of S. 19 of the Limitation Act. A.I.R. 1938 All. 217=(1938) A.L.J. 252=1938 A.W.R. 153=I.L.R. (1938) All. 363=175 Ind. Cas. 556 (F.B.).

——S, 19—Held, on construction that the letter signed by the officer acting under the Deputy Commissioner as Special Manager of the Court of Wards as well as the letter under the orders of the Special Manager but initialled by head clerk and signed by an **ahlmad** constituted valid acknowledgment of the plaintiff's claim by the Court of Wards as duly authorised agent of the defendant, and the limitation for the suit was saved under S. 19. 1936 O.W.N. 967=A.I.R. 1937 Oudh 26=12 Luck. 531=165 Ind. Cas. 269.

——S. 19—Letter of offer by Collector—Bombay Court of wards Act (1905), S. 16.

The proviso to S. 16 of the Bombay Court of Wards Act does not prevent the claimant from using the letter of offer by the Collector as acknowledgment to start a fresh period of limitation under S. 19, Limitation Act. though the offer made by Collector cannot by proved in a suit by the claimant if he does not accept the offer. 22 Bom. L.R. 943=58 Ind. Cas. 319.

——S. 19—Authority to acknowledge—Court Wards.

Court of Wards has power to give an acknowledgment so as to give a new period of limitation. 43 Cal. 211=34 Ind. Cas. 205.

——S. 19—Authority to acknowledge—Court of Wards—Collector.

The Court of Wards as well as the Collector as agent of Court of Wards can make acknowledgment to extend the limitation against minor. But it is doubtful whether a **sarabarahkar** or manager can admit such fresh liability. 34 Mad 221=8 M.L.T. 105=(1910) M.W.N. 453=20 M.L.J. 808=6 Ind. Cas. 407.

4. (d) Authority to acknowledge—Guardian.

——Ss. 19 and 21—Acknowledgment by de facto guardian of minor debtor—Validity.

It is evident from S. 21 (1) of the Limitation Act that only a lawful guardian or manager can sign an acknowledgment for purposes of S. 19, or in their absence an agent duly authorised either by lawful guardian or by the manager. Accordingly an acknowledgment signed by a **de facto** guardian of a minor debtor does not fulfil the requirements of S. 19 read with S. 21 (1) of the Act. I.L.R. (1947) Nag. 710=A.I.R. 1948 Nag. 293=1947 N.L.J. 405.

——S. 19—De facto guardian.

The **de facto** guardian (paternal aunt) of a Hindu minor executed a mortgage purporting to act on behalf of the minor but without any legal authority to do so :

Held, that the circumstances did not justify any inference that the **de facto** guardian was acting as the agent of minor so as to save limitation. A.I.R. 1943 Bom. 386=45 Bom. L.R. 740=I.L.R. (1943) Bom. 486 =210 Ind. Cas. 532.

——S. 19—De facto guardian.

The expression "**de facto** guardian" means and implies a person who is not a legal or lawful guardian but merely in fact performs the functions of a guardian. The expression "agent duly authorised" in Ss. 19 and 20, Limitation Act does not, therefore, include a **de facto** guardian in view of S. 21. A.I.R. 1943 Bom. 381=45 Bom. L.R. 740=I.L.R. (1943) Bom. 486=210 Ind. Cas. 532.

——S. 19—De facto guardian.

A **de facto** guardian of a Hindu minor has no power to keep a debt alive against the minor. 24 M.L.J. 428, Diss. from. 108 Ind. Cas. 529=1927 M.W.N. 356= A.I.R. 1928 Mad. 226.

——Ss. 19, 21—Guardian de facto—Mahomedan mother.

A Mahomedan mother cannot made a valid acknowledgment on behalf of her minor son, not being the guardian of his property under Mahomedan law. 61 P.L.R. 1917=143 P.W.R. 1917=42 Ind. Cas. 17.

——Ss. 19, 21—Guardian.

Held, on facts that the execution application upon the personal decrees was within limitation as the written statement filed by the mother on behalf of her minor sons amounted to an acknowledgment of the decretal debt. A.I.R. 1939 Cal. 399=I.L.R. (1939) 2 Cal. 33= 69 C.L.J. 543=43 C.W.N. 604=187 Ind. Cas. 831.

——S. 19—Guardian.

Where a guardian has authority to borrow on behalf of the minor, he can well be invested with authority to keep also the debt alive by acknowledgment. A. I. R. 1939 Mad. 414=49 L.W. 207=(1939) I M.L.J. 664= (1939) M.W.N. 555=184 Ind. Cas. 735.

——Ss. 19, 20, 21—Acknowledgment by guardian on behalf of minor.

A guardian of a minor cannot acknowledge liabilities in respect of any debt due from a minor so as to extend the period of limitation against the minor in accordance with Ss. 19 and 20 unless it was shown that the Guardian's Act was for the protection or benefit of the minor's property. 10 O.W.N. 188=A.I.R. 1933 Oudh 132=145 Ind. Cas. 180.

——Ss. **19 and 21**—Payment by lawful guardian without permission of Court as required cannot save limitation. 1932 M.W.N. 1193.

——Ss. 19 and 20—Authority to acknowledge—Guardian—Powers of.

A guardian cannot renew or acknowledge a debt unless it is for the benefit of the minor or unless the document appointing him guardian expressly gives him such power. 1917 M.W.N. 744=22 M.L.T. 380=6 L.W. 640=43 Ind. Cas. 865. [**See also** 41 Mad. 561 =34 M.L.J. 381=45 Ind. Cas. 905.]

——S. 19, Expl. II—Acknowledgment—Natural guardian—Computation of limitation—Fresh start.

Held by **Banerji** and **Richards, JJ.** (**Stanley, C. J.,** dissenting) that when a natural guardian acknowledges a debt. such acknowledgment is by an agent duly authorized in this behalf within the meaning of S. 19 and gives fresh start for the computation of limitation against the minor. 26 A. 598, not foll.

Held, by **Stanley, C. J.**—that the relation between a guardian and a ward is not that of an agent to a principal but that of a trustee to a **cestui que trust**. A guardian is not competent to acknowledge a debt due from a minor so as to give a fresh start to the computation of limitation. The difference between the manager of a Hindu family and a natural guardian of a minor pointed out. 1908 A.W.N. 175=5 A. L. J. 375=30 A. 422 (F. B.). **Also** 37 C. 461=11 C.L.J. 484=14 C.W.N. 741=5 Ind. Cas. 484.

——Ss. 19, 20—"Agent duly authorised"—Guardian and minor—Payment of interest or acknowledgment of debt by mother as guardian on behalf of minor sons. 13 C. 292, 20 B. 61, appr. 18 M. 456, diss. from. 1904 A.W.N. 137=1 A.L.J. 302=26 A. 598.

——S. 19—Guardian and Ward—Acknowledgment of guardian or receiver—Payment of interest or part payment of principal.

Obiter; Per Bhashyam Aiyangar, J. For the purpose of giving a fresh starting point for computing the period of limitation, payment of interest or part payment of principal by a receiver or guar-

dian may stand on a different footing from an acknowledgment of liability made by him. (1903) 14 M.L.J. 84=27 M 243 (F. B.).

——Ss. 19, 20, Expl. II—Acknowledgment—Part-payment—Guardian—Ward's benefit.

A guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability or make a part-payment of principal so as to extend the period of limitation against the minor, provided the act was for the protection or benefit of the ward's property. (1901) 3 Bom. L.R. 817=26 Bom. 221. **See also** 4 Bom. L.R. 812.

4. (e) Authority to acknowledge—Joint Hindu family.

——S. 19—Acknowledgment of debt—Authority of manager of joint family.

A manager of a joint family has general authority to keep alive by acknowledgment a debt which is not yet statue barred. But the acknowledgment must be such as to satisfy the conditions of S. 19, Limitation Act. It must be in writing and it must be signed. 77 I. A. 22=29 Pat. 273=1950 A.L.J. 130=63 L.W. 150=16 Cut. L.T. 41=1950 A.W.R. 200=52 Bom. L.R. 466=A.I.R. 1950 P.C. 15=(1950) 1 M.L.J. 289 (P.C.).

——S. 19—Hindu joint family—Pro-note executed by father and son—Statement of family liabilities including pro-note prepared by son on behalf of himself and his father and initialled by father on behalf of himself and as agent of son, as acknowledgment of its correctness—Pro-note subsequently endorsed by payee to plaintiff—Suit by plaintiff on pro-note against son on death of father.

Held, (i) that the statement of liabilities amounted to an acknowledgment of liability within the meaning of S. 19, Lim. Act.

(ii) that the writing of the initials by the father on the statement of liabilities constituted a full compliance with the requirements of S. 19;

(iii) that since it was in evidence that the father had signed the statement on behalf of himself and as agent of his son, the acknowledgment extended limitation against the son as well;

(iv) that the plaintiff was entitled to recover the amount due under the pro-note. 55 L. W. 398=1942 M.W.N. 532=A.I.R. 1942 Mad. 680=I.L.R. (1942) Mad. 927=(1942) 2 M.L.J. 242=205 Ind. Cas. 583.

Overrules—A.I.R. 1926 Mad. 827=96 Ind. Cas. 700.

——S. 19—Joint Mitakshara family—Borrowing of loan by father who is karta for his personal needs—Acknowledgment by him—Effect.

A written acknowledgment by the father who is the **karta** or a part payment endorse and signed by him would not keep alive the liability of his sons and grandsons imposed by law and extend the period of limitation. Such an act of the father would keep the loan alive against him only. A.I.R. 1940 Cal. 137=70 C.L.J. 201 =44 C.W.N. 299=186 Ind. Cas. 891.

——S. 19—Authority to acknowledge—Manager—Joint Hindu family.

Manager, an agent—Could not acknowledge under Lim. Act of 1859. 107 Ind. Cas. 60=29 Bom. L.R. 1563=A.I.R. 1928 Bom. 28.

——S. 19—Father can bind by acknowledgment.

The father in a joint Hindu family is an agent duly authorised to acknowledge a debt binding on the family so as to extend the period of limitation. 86 Ind. Cas. 693=12 O.L.J. 114=A.I.R. 1925 Oudh 394.

——Ss. 19 and 20—Manager of joint Hindu family—Acknowledgment or payment by manager—Payment by an agent through his servant—Payment for principal.

An acknowledgment by the manager of a Hindu joint family cannot extend the period of limitation as against other members of the family who are also parties to the original contract. 25 Mad. 220 (F.B.), Foll. Where the son writes and attests a mortgage-deed executed by the father in which part of the consideration is the payment towards a promissory note signed by both of them and the mortgagee pays the money to the creditor under the promissory note:

Held, that the son must be deemed to have authorised his father to make the payment and acknowledgment and that time was saved as against him also. 10 L.W. 466=(1919) M.W.N. 797=54 Ind. Cas. 318.

——S. 19—Authority to acknowledge—Manager of Joint Hindu family.

A managing member of a joint Hindu family who executed a promissory note on behalf of himself and his brothers has no authority to renew it after he ceases to be the manager of the family and an acknowledgment by him will not bind the other members of the family so as to save limitation against them. 32 Ind. Cas. 997 (Mad.).

——S. 19—Authority to acknowledge—Karta of Joint Hindu family—Acknowledgment by.

A **Karta** of a joint Hindu family is an agent authorised to make acknowledgment under S. 19 of the I.L.A. of a debt not contracted for illegal or immoral purposes, 19 C.W.N. 860=31 Ind. Cas. 30.

——S. 19—Authority to acknowledge—Karta of Hindu family.

An acknowledgment by the **Karta** of a Hindu family would not be sufficient to keep the debt alive if the debt was contracted not for a family purpose but for securing a particular sum of money. 25 M. 220, foll. 26 Ind. Cas. 511. (Cal.).

——S. 19—Authority to acknowledge—Manager of a joint Hindu family—Whether binds other members.

An acknowledgment of a debt made within limitation by the manager of a joint Hindu family, binds other members of the family. 36 All. 264=12 A.L.J. 374= 23 Ind. Cas. 429.

——Ss. 19 and 20—Authority to acknowledge—Manager of joint Hindu family.

The manager of a joint Hindu family, is an agent duly authorised within the meaning of S. 20, he has power to acknowledge and to pay interest as such, so as to save limitation. Part payment operates to extend limitation against all persons liable to pay the debt, and not only against the person actually paying, when the latter is a manager of a joint Hindu family. 37 Cal. 461 =11 C.L.J. 484=14 C.W.N. 741=5 Ind. Cas. 484.

——S. 19—By manager of Hindu family. **See 25 M. 220.**

——S. 19—Hindu joint family—Father, if can acknowledge barred debt so as to keep it alive.

A father has no right to acknowledge a brrred debt so as to keep it alive against his son. He has no right to validate an acknowledgment unauthorisedly made by an agent by ratifying it and keep the debt alive. A.I.R. 1941 Mad. 6=51 L.W. 453=(1940) 2 M.L.J. 726=195 Ind. Cas. 329.

——S. 19—Acknowlodgment of barred debt—Manager bound but not others.

A Hindu Manager can bind himself in an acknowledgment of a time-barred debt but he cannot bind his co-parceners. 82 Ind. Cas. 96=5 Lah. 317=A.I.R. 1924 Lah. 611.

——S. 19—Hindu joint family—Signing of schedule in insolvency proceedings.

Per **Full Bench.**—The signing of the schedule in insolvency proceedings by the insolvent constitutes an acknowledgment within the meaning of S. 19, Limitation Act. The acknowledgment is, however, a purely personal matter, and where the insolvent is a Hindu father, he cannot be treated as being the agent of his sons. A.I.R. 1941 Mad. 772=(1941) 2 M.L.J. 311=54 L.W. 186=1941 M.W.N. 704=I.I.R. (1942) Mad. 95=197 Ind. Cas. 199 (F.B).

——S. 19—Authority to acknowledge—Brothers—Younger brother cannot bind elder—Father binds by acknowledgment minor son.

Where there was no evidence to show that the younger brother had been authorised by his brother or his minor nephews to make an acknowledgment,

Held, his acknowledgment is not binding on his brother or his nephews and S. 19 cannot help the plaintiff against them inasmuch as they did not deprive their title or liability through the acknowledgor. But minor son of the acknowledgor derives his liability through his father and an acknowledgment by the father and must be held to be binding on him. 71 Ind. Cas. 737=A.I.R. 1923 Lah. 135.

4. (f) Authority to acknowledge—Limited owner.

——S. 19—Hindu widow—Amendment in 1927.

After the amendment of S. 19, in 1927, a Hindu widow can, by acknowledgment save a debt from limitation and this acknowledgment is binding upon the reversioners. A.I.R. 1937 Pat. 40=17 P.L.T. 780=3 B. R. 183=16 Pat. 45=166 Ind. Cas. 555.

——S. 19—Hindu widow.

An acknowledgment by a Hindu widow is not operative against the reversioners. 86 Ind. Cas. 353=A.I.R. 1925 Cal. 862.

——S. 19—Female heir—Trespasser.

As against a reversioner the acknowledgment by a limited female heir of mortgage debt, or a renewal of the mortgage by a trespasser, cannot extend the period of limitation. 35 All. 227 (P.C.), Foll. 82 Ind. Cas. 1052=A.I.R. 1925 Nag. 207.

——S. 19—Authority to acknowledge—Limited owner—Effect of on reversioner.

An acknowledgment of liability by a Hindu woman in possession, for her limited interest, of the estate of her husband or father, will not extend the period of limitation as against the reversioners. The reversioners do not claim title through the limited owner within the section. 35 All. 227=40 I.A. 74=25 M. L. J. 131=13 M.L.T. 437=17 C.W.N. 605=11 A. L. J. 389=(1913) M.W.N. 470=17 C.L.J. 488=15 Bom. L. R. 489=19 Ind. Cas. 291 (P.C.) [**Affirming** 32 All. 33=6 A.L.J. 931=3 Ind. Cas. 725].

——S. 19—Authority to acknowledge—Widow—Effect on reversioner—Effect of acknowledgment.

An acknowledgment made by the widow does not extend the period of limitation as against the reversioner under S. 19. as a reversioner under the Hindu Law does not derive his title from the widow of the last male owner. 32 All. 33=6 A.L.J. 931=3 Ind. Cas. 725.

——S. 19., Sch. II, Arts 120, 148—Acknowledgment—Widow in possession of husband's estates—Reversioner not bound—General Clauses Act, S. 6—Suspension of limitation by fusion of the interests of mortgagor and mortgagee.

A reversioner does not derive his title from a female heir holding a limited interest. An acknowledgment by such a female heir of the right of redemption of the mortgagor of an estate subject to mortgage is not an act done for the benefit of the estate. A reversioner therefore, is not bound by such acknowledgment. The act does not bind the estate. The rule of **res judicata** by which a decree fairly and properly obtained against a widow is binding on the reversioner does not apply to an acknowledgment by the widow. An acknowledgment of liability only extends the period of limitation for the institution of suit and does not confer title to property. A suit based upon an acknowledgment made when Act 14 of 1859 was in operation, but which was instituted when the Act of 1877 had come into force, is governed as to limitation by the latter Act. S. 6, General Clauses Act of 1868, does not apply inasmuch as the acknowledgment, the basis of the suit, is not a thing done in pursuance of any legislature. Consequently under S. 19 of Act 15 of 1877 the suit would be barred, the reversioners not deriving title from the widow who had made the acknowledgment, Art. 120, Sch. II, Limitation Act, 1877, does not apply in that the mortgagor having acquired the widow-mortgagee's limited interest, there was not complete fusion of interest. (1909) 6 A. L. J. 931=3 Ind. Cas. 725=32 A. 33.

4. (g) Authority to acknowledge—Partner.

——Ss. 19, 21—Acknowledgment by partner in going mercantile concern.

In a going mercantile concern, a partner has an implied authority to make an acknowledgment on behalf of the others partners and this is a sufficient to save limitation in spite of the provisions of S. 21, Limitation Act.

It is more so, when the acknowledging partner was throughout acting on behalf of the firm and made acknowledgments from time to time. A.I.R. 1939 Lah. 397=41 P.L.R. 90=184 Ind. Cas. 734.

——S. 19—Acknowledgment by partner.

Where an endorsement is made and signed by one of the partners in the ordinary course of business with the implied consent of other partners, he does so with authority and the endorsement is sufficient to save limitation. Direct evidence of authority to acknowledge is not necessary. A.I.R. 1935 Lah. 559=158 Ind. Cas. 260.

——Ss. 19 and 21 (2)—Authority to acknowledge—Partnership—Evidence of express authority, if necessary.

Direct evidence of a specific authority by a co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, is unnecessary

and such an authority can be inferred from circumstances. 41 Mad. 427=34 M.L.J. 373=23 M.L.T. 261=(1918) M. W. N. 285=7 L. W. 552=46 Ind. Cas. 18 (F.B.).

——S. 19—Partnership dissolved — Acknowledgment by one partner authorised to collect or pay debts.

In the absence of express evidence of authority an acknowledgment of a partnership debt by an ex-partner, after the dissolution of partnership is not binding, on any ex-partner other than the one making it. Where however an ex-partner is authorised to collect the outstandings and pay all debts of the partnership, such authority includes the lesser power of acknowledging debts. 18 M.L.T. 273=(1915) M.W.N. 722=2 L. W. 823=30 Ind. Cas. 675.

——Ss. 19 and 20—Payment or acknowledgment by one partner, how far binding on others.

To render one of several partners liable by reason of a written payment or acknowledgment by another, it is not enough to show that the payment was an act necessary for the partnership. Authority to act on behalf of the other partners cannot be presumed but must be proved. 32 M. 421; 35 M. 142, Foll. 37 Mad. 146=25 M.L.J. 501=21 Ind. Cas. 634. [This is no longer correct. **See** 41 Mad. 427=45 Ind. Cas. 18.].

——Ss. 19, 20 and 21—Partners—Acknowledgment by one partner, how far binding on others—Implied authority.

There is no implied authority vested in one partner, to acknowledge a partnership debt so as to bind the other from the mere fact that the former is actually in management of the business; there should be an express authority to do so which should be clear and unequivocal. 35 Mad 142=(1911) 1 M.W.N. 347=9 M.L.T. 473=11 Ind. Cas. 332. [Dissente d from 41 Mad. 427=34 M.L J. 373=45 Ind. Cas. 18.].

——S. 19—Authority to acknowledge—Partners—Managing partner.

To say that the managing partner of a firm must have an express authority from every partner to give a valid acknowledgment of debt is to place a very narrow construction on S. 19 of the Limitation Act and to open the door to very serious fraud. Such is not the law. 32 All. 51=6 A.L.J. 953=4 Ind. Cas. 708.

——S. 19—Acknowledgment by one partner.

A partner may acknowledge liability on behalf of himself and his partners but unless he clearly acknowledges liability on behalf of others the acknowledgment will avail against him only. (1901) 3 Bom. L.R. 144.

——S. 19—Partner—Acknowledgment after dissolution—When binds firm.

Acknowledgment by a partner after the dissolution of the firm binds the firm if the creditor had no notice of the dissolution. 118 Ind. Cas. 229=A.I.R. 1929 Lah. 266.

——S. 19—Acknowledgment by one of partners—Partnership—Dissolution—Creditor ignorant of.

An acknowledgment taken from one of the partners in ignorance of a dissolution of the partnership of which no notice was given to the creditor, will save limitation just as if the partnership was not dissolved and the mutual agency between the partners still subsisted. (1901) 3 Bom. L.R. 484=26 Bom. 42.

——S. 19—Authority to acknowledge—Partner.

A partner of a money lending business, which is being wound up has no authority to give an acknowledgment for a subsisting debt so as to bind the firm. L.B.R. 363=9 Bur. L.T. 239=36 Ind. Cas. 225.

——Ss. 19 and 21—Authority to acknowledge partnership—Acknowledgment by insolvent partner, effect of.

An acknowledgment by a partner in accordance with statutory provisions, and not in the ordinary course of business, is not one made under authority of the other partners or on their behalf. Admission of liability by a partner in his insolvency schedule does not bind the other partners. 36 Ind. Cas. 389 (Mad.).

4 (h). Authority to acknowledge—Principal and Surety.

——S. 19—Principal and surety.

An acknowledgment by the principal debtor does not save limitation against the surety, unless it is shown that the latter allowed himself to be represented by the person who made the payment. This principle applies to the continuing guarantee also. The surety cannot be called on to pay a time-barred debt. A.I.R. 1939 Nag. 31=1939 N.L.J. 80=I.L.R. (1941) Nag. 415=179 Ind. Cas. 771.

——S. 19—Principal and surety.

An acknowledgment by the principal debtor does not save limitation against the surety unless it is shown that the latter allowed himself to be represented by the person who made the payment. 33 P.L.R. 59=A.I.R. 1931 Lah. 691=13 L. 240=132 Ind. Cas. 590.

4 (i). Authority to acknowledge—Other cases.

——S. 19, 20—Deposition of party admitting liability for claim reduced to writing and signed by judge—Judge, if agent.

Explanation 2 to S. 19, Limitation Act means not only that the agent must be duly authorised to sign the document in question but that he must be authorised to sign for the purpose which the section contemplates, that is to say, he must be authorised to sign on behalf of the person sought to be made liable for the purpose of acknowledging liability. The authorisation need not necessarily be direct, It can be implied, as for instance from the nature of the employment, but the authorisation, whether it be express or implied, must be to acknowledge the liability in question and not merely to sign the document. Though a Judge of a Court is authorised, and indeed required by law, to sign the statements which he records, he is authorised to do so for the purpose of authenticating the depositions and not for the purpose of acknowledging liability. 1940 N.L.J. 445=A.I.R. 1940 Nag. 354=I.L.R. (1942) Nag. 182=193 Ind. Cas. 401.

——S. 19—Court—Defendant's deposition in insolvency proceedings signed by clerk under Civil P.C., O. 18, R. 5 (Rang.)—If can be used as an acknowledgment within S. 19, Limitation Act.

In a suit on a pro-note, a deposition by the defendant made in an insolvency proceeding to the effect that "I borrowed Rs. 600 from the plaintiff on a promissory note" and recorded under Civil P.C., O. 18, R. 5, (Rangoon) was sought by the plaintiff to save limitation by way of acknowledgment under S. 19, on the ground that the clerk who signed the certificate at the end of the deposition was the agent of the defendant for the purpose of making such acknowledgment of indebtedness:

Held, that neither the Judge nor the clerk, who signed the certificate at the end of the deposition in the insolvency case, had any authority, either derived from the defendant himself or by reason of any duty cast upon them by law to make an acknowledgment of indebtedness on his behalf. In order that there should be an acknowledgment within the meaning of S. 19, it must in the form of a writing which has been signed either by the debtor or by some person duly appointed as his agent in that behalf, acknowledging the correctness of the statement contained in the writing. In this case, there was no such signature by the debtor or by any other such person. 12 R. 610=A.I.R. 1934 Rang. 282=153 Ind. Cas. 957.

——S. 19— Deposition—Not signed by the defendant or his agent.

A deposition made by the defendant in another case which was not signed by him or his duly authorised agent does not constitue a valid acknowledgment. 184 P.W.R. 1911, foll. 34 P.R. 1918=45 Ind. Cas. 99.

——S. 19—Deposition in previous suit of defendant acknowledging liability—Co-mortgagor has no authority as such to acknowledge on behalf of a mortgagor—Manager's acknowledgment not enough where previous dealings had been with all the members of the undivided family.

By a deed dated 4th August, 1882, three defendants mortgaged certain immoveable property. On 16th April, 1885 the mortgagors executed a written acknowledgment of their liability in respect of that advance. Plaintiff sued on 21st April, 1897 to recover the amount, and, in default of payment thereof, for sale of the mortgaged property. The first defendant had deposed in a previous suit that his estate was under mortgage:

Held, (1) The suit was not barred against the first defendant. For S. 19 the acknowledgment, if it is to be effective as saving the bar of limitation, must, on the face of it, purport to be that of an existing liability. But the name of the creditor, and the identity of the debt may be proved by parol evidence. 16 M. 366 ; 5 M,H.C.R. 320, foll. (2) The acknowledgment by a co-mortgagor won't save the bar of limitation against the other mortgagors. An agency within the meaning of the Explanation 2 to S. 19 cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor. (3) The acknowledgment by manager of an undivided family won't save the bar of limitation, if the creditor deals with all the members of the family as co-obligors, and enters into a transaction. There may, however, be cases in which that circumstance, viz., his managership coupled with the conduct of the joint contractors, may warrant the conclusion that as a matter of fact the managing member was duly authorised to make the acknowledgment on behalf of all. (4) In this case the mortgage sued upon was assigned by way of sub-mortgage with concurrence of the defendants—the mortgagors—and the plaintiff redeemed the sub-mortgage on 13th April, 1897, and it was contended that time should be reckoned from that date. But the contention was overruled. (1901) 25 M. 220 (F.B.).

——S. 19—Held, on facts, that the Court in recording payment of Rs. 50 as "admitted," was not making an admission within meaning S. 19 on behalf of the judgment-debtor. It was merely recording an admission made by the judgment-debtor or somebody appearing on his behalf. In any event, this admission having been made more than three years after the decree did not save limitation. A.I.R. 1937 Mad. 760=1937 M.W.N. 355=174 Ind. Cas. 28.

——S. 19—Mukhtar given authority to look after case work only.

It cannot be assumed that a **Mukhtar-i-am** or general agent has power to acknowledge liability within the meaning of S. 19 and such a liability can only be fastened upon the principal by a person duly authorised in this behalf, that is to say, who has been given authority to make such an acknowledgment of liability. 1936 O.W.N. 957=A.I.R. 1936 Oudh 332=162 Ind. Cas. 448.

——S. 19—Where a **purshis** signed by a Pleader in the course of a suit contains a statement of liability, it is binding on the client as an acknowledgment of liability under S. 19, Limitation Act. 36 Bom. L.R. 334=A.I.R. 1934 Bom. 186=151 Ind. Cas. 376.

——Ss. 19, 21—Authority of agent need not be express.

Sections 19 and 21, do not contemplate that the authority of an agent must in every case be an express authority.

Where the Vakil appointed by the guardian of a minor for making an application to the Court for appointment as guardian made an acknowledgment of a debt due by the minor in the application:

Held, that the acknowledgment was valid and binding on the minor even though the Vakil had no express authority to make any such acknowledgment. A.I.R. 1931 All. 398=133 Ind. Cas. 155.

——S. 19—Mukhtariam—Must be specially authorised to acknowledge.

A **Mukhtariam** has no power to acknowledge liabilities within the meaning of S. 19 of the Indian Limitation Act. Such a liability can only be fastened upon the principal by a person duly authorised in this behalf, that is, who has been given authority to make such an acknowledgment of liability. 66 Ind. Cas. 394=44 All. 546=20 A.L.J. 359=A.I.R. 1922 All. 230.

——S. 19—Official Assignee.

An acknowledgment by the Official Assignee of a debt due by the insolvent is not an acknowledgment made by an agent duly authorised on behalf of the insolvent which takes the case out of the Limitation Act. 35 Bom. L.R. 12=58 B. 505=A.I.R. 1933 Bom. 91=143 Ind. Cas. 698.

——S. 19—Husband and wife.

A wife has an implied authority to pledge the credit of her husband for necessaries and this implied authority is not taken away or diminished by reason of her husband's insanity. But it is a limited authority and limited only to necessaries.

The executant of a promissory note became insane and his wife put in a petition to get herself appointed guardian, in which she acknowledged the promissory note. Her petition was allowed but she never furnished security and was in fact not appointed guardian. It also appeared that the wife was managing the husband's business after he became insane. In a suit on the promissory note :

Held, that the wife was not an agent duly authorised, within the meaning of S. 19, and the acknowledgment of the promissory note could not give a fresh starting point for the running of limitation. (1933) M.W.N. 365=A.I.R. 1933 Mad. 686=38 L.W. 321=65 M.L.J. 355=56 M. 964=146 Ind. Cas. 49.

——S. 19—President of Committee.

Where the President of a Committee is authorised to purchase goods, he has equal authority to acknowledge

and such authority need not be express. 37 L.W. 429= A.I.R. 1933 Mad. 332=144 Ind. Cas. 784.

——S. 19—Pre-emptor and vendee.

A pre-emptor does not derive his title through the vendee within the meaning of S. 19, so as to make an acknowledgment of the vendee made in his written statement filed after the claim for pre-emption has been brought, an acknowledgment of his predecessor-in-title binding upon the pre-emptor. (1932) A.L.J. 898= A.I.R. 1932 All. 700=54 A. 1023=143 Ind. Cas. 41.

——S. 19 — Administrator — Acknowledgment before obtaining letter of administration—Effect.

An acknowledgment of liability professed to be made on behalf of a deceased's estate by a person whose power to make the acknowledgment solely depends upon his being the administrator of the deceased is not made effectual by his subsequently obtaining letters of administration. 122 Ind. Cas. 504=31 M.L.W. 65=1939 M.W.N. 16=A.I.R. 1930 Mad. 218= 58 M.L.J. 210.

——S. 19—Acknowledgment as heirs—Sufficient.

Where an acknowledgment of liability is made by the petitioners for administration in their character of heirs, being the sons and widow of a Mahomedan the acknowledgment has the effect of preventing limitation. 122 Ind. Cas. 504=31 M.L.W. 65=1930 M.W.N. 16= A.I.R. 1930 Mad. 218=58 M.L.J. 210.

——S. 19—Authority to acknowledge—Executor—Can bind the estate.

An executor has the power as legal representative to admit and dispose of claims against the testator's estate, when he includes such a claim in Annexure B, Sch. 3, Court-fees Act, as owing from the testator and payable from his estate and he may be assumed to acknowledge liability of the estate for the debt within the meaning of S. 19, Limitation Act. 122 Ind. Cas. 504=31 M.L.W. 65=1930 M.W.N 16=A.I.R. 1930 Mad. 218=58 M.L.J. 210.

——S. 19—Authority to acknowledge—Director—Managing Director—Can bind others.

An acknowledgment signed by a director, who is acting as a manager to do the ordinary acts necessary in the conduct of business of the company, is a sufficient acknowledgment within the meaning of S. 19. 115 Ind. Cas. 177=48 C.L.J. 597=33 C.W.N. 833=A.I.R. 1929 Cal. 155.

——S. 19—Authority to acknowledge—Trustee.

Constructive liability—Acknowledgment by beneficiary. A.I.R. 1927 Mad. 349=52 M.L.J. 135.

——S. 19—Authority to acknowledge—Trustees—Not binding on others.

A mere acknowledgment of payment by one of the trustees who did not really receive the money, cannot bind the institution. (1912) M.W.N. 181=15 Ind. Cas. 186.

——S. 19—Co-contractors—Special authority to bind—Essentials.

In case of co-contractors, jointly and severally liable, an acknowledgment of liability or a payment by one of them does not deprive the other of the benefit of limitation, unless the payer is authorized to make the payment by the other as an agent on his behalf. 96 Ind. Cas. 353=2 Luck. 180=6 O.W.N. 1232= A.I.R. 1926 Oudh 601.

——S. 19—Authority to acknowledge—Co-sharer—Special authority to bind other co-sharers—Essential.

A note of the Revenue Officer in his report to the effect that a mortgagee made an oral statement of an acknowledgment of the mortgage before him, does not help to extend limitation. A co-sharer as such cannot acknowledge that some other co-sharer is a mortgagee like himself. Authority to acknowledge must be duly proved. 89 Ind. Cas. 161=6 L.R.A. (Civ.) 481 =A.I.R. 1926 All. 85.

——S. 19—Acknowledgment by different sharers in respect of their shares, sufficiency of—Effect on the whole property.

Where the mortgaged property having been split up into two, each sharer represented his own share and made an acknowledgment in respect of it and the two acknowledgments put together comprised the whole property, it was held that they were valid acknowledgments although they were not signed at one time by all the mortgagees of that time or by each one in respect of the whole of the mortgaged estate. (1909) 11 Bom. L.R. 318=2 Ind. Cas. 469.

——S. 19, Expls. 11 and 21—Authority to acknowledge—Receiver—Acknowledgment by—Firm under dissolution.

An acknowledgment of a debt due by a firm under dissolution made by a receiver of that firm is valid to save limitation if it is authorised by the terms of the order appointing the receiver. A receiver may be an agent authorised to make an acknowledgment within S. 19, Expl. 11. A receiver appointed to take charge of the property of a firm with power "to do all things necessary for the preservation of the assets of the firm", is entitled to make acknowledgments if at the time the acknowledgments are made, they are acts necessary for the preservation of the estate. 35 M.L.J. 571=(1918) M.W.N. 877=8 L.W. 594=25 M.L.T. 371=48 Ind. Cas. 179.

——S. 19—Authority to acknowledge—Receiver of insolvent's property—Power to bind by acknowledgment.

A receiver of an insolvent's estate appointed under S. 351, C. P. Code (1882) applied for sanction of Court to sell the insolvent's property and in the petition admitted a mortgage on the property:

Held, that the admission is an acknowledgment of liability within S. 19, Limitation Act, against the mortgagor and the Receiver. 5 L.W. 222=38 Ind. Cas. 169.

——S. 19—Acknowledgment by Receiver—Limitation—Saving of—Receiver's authority.

An acknowledgment of a debt by a Receiver of a partnership firm whose powers were limited to collecting outstandings and doing all things necessary for the realisation and preservation of the assets, and upon whom no power of managing or carrying on the business of the firm had been conferred by the Court, does not save limitation. Payment of interest would stand on a different footing 8 L.B.R. 159=29 Ind. Cas. 27.

——S. 19—Acknowledgment by Receiver—Receiver, If agent—Admission—Estoppel—Bona fide prosecution of claim in administration suit—claimant directed to institute fresh suit—Limitation—Exclusion of time.

A receiver appointed in an administration suit instituted by a creditor of a deceased person against his executor is not an agent of the executor within the meaning of S. 19. He is the agent and an officer of the

court. But when in such a suit another creditor of the estate applied to rank as such and the receiver submitted a statement in the presence of the executor admitting the debt due to the applicant, but the court after some time directed the applicant, to bring a fresh suit, but on the suit being instituted he was met with the plea that the claim was barred by limitation:

Held, that in the face of the admission made in his presence the executor was estopped from setting up the statute of limitation as a bar. That in any case S. 14 applied and the time during which the plaintiff was **bona fide** prosecuting his claim in the administration suit should be excluded in computing the period of limitation. (1909) 10 C.W.N. 959.

——S. 19—Authority to acknowledge—Judgment-debtor—Auction-purchaser—If bound.

An acknowledgment by a judgment-debtor may save limitation against the auction-purchaser. An acknowledgment if made after the attachment cannot prevail against the auction-purchaser who is entitled to have property purchased by him in the condition in which it was at the time of the attachment. 22 C.W.N. 278=44 Ind. Cas. 533.

——S. 19—Authority to acknowledge—Co-judgment-debtors—Effect.

An acknowledgment in writing by some of several judgment-debtors within three years from the date of the last execution application saves limitation against all. 22 Ind. Cas. 709 (Cal.).

——S. 19—Authority to acknowledge—Co-judgment-debtor.

An acknowledgment made by one of several judgment-debtors cannot save limitation against any but the person making it. 15 C.L.J. 251=16 C.W.N. 439=13 Ind. Cas. 702.

——S. 19—Authority to acknowledge—Servant.

A receipt acknowledging delivery of goods by a **maistry** who had authority to grant the same, is an acknowledgment of liability. 19 M.L.J. 650, Foll. 8 M.L.T. 199=7 Ind. Cas. 797.

——S. 19—Authority to acknowledge—Village community.

A resolution whereby the members of a village community empower certain members to bind them by the latter's actions includes an authority to make acknowledgment under S. 19 of Limitation Act. 32 Mad. 284=5 M.L.T. 351=19 M.L.J. 372=4 Ind. Cas. 38.

4 (j). Authority to acknowledge—Onus of proof.

——S. 19—Onus to prove authority on person relying on acknowledgment.

The burden of proving why a certain acknowledgment was made by the person while **prima facie** he had no business to do so, lies upon the person who makes it; but in order that it may bind others, some sort of agency and authority must be proved, from the persons attempted to be bound. 80 Ind. Cas. 940=A.I.R. 1925 Mad. 134.

5 Basis of suit.

——See also CONTRACT ACT, Ss. 9 AND 25.

——S. 19—Unequivocal acknowledgment of liability involves implied promise to pay and gives fresh cause of action.

An agreement in which the debtor admits certain amount to be due and provides a contingent security for that amount involves an implied promise to pay the amount acknowledged to be due and the creditor can recover the amount by a suit on the agreement. A.I.R. 1944 Bom. 19=45 Bom. L.R. 957=211 Ind. Cas. 155.

——S. 19—Where a pro-note and a receipt executed in lieu of the amount due on previous transactions, are insufficiently stamped, but the necessary penalty is paid in respect of the receipt and thus it becomes admissible in evidence, the creditor is entitled to a decree on the basis of the acknowledgment contained in the receipt. A.I.R. 1942 Oudh 388=1942 O.W.N. 343=1942 A.W.R. 222=18 Luck. 191=200 Ind. Cas. 515.

——S. 19—No cause of action can be founded on an acknowledgment. All that an acknowledgment can do is to extend limitation. A.I.R. 1941 Nag. 294= I.L.R. (1942) Nag. 177=1941 N. L. J. 456=201 Ind. Cas. 77.

——S. 19—A guardian filed a list of debts due by the estate of the minor. At the end of the list, he added three notes, the third being to the effect that as the original documents were in the possession of the creditors, it was difficult to fix the correct amount of each debt and to admit the correctness of the documents until they had been seen:

Held, that it could not be said that this was an unconditional acknowledgment of the debts. No suit, therefore, could be based on it. A.I.R. 1939 Lah. 31 =41 P.L.R. 356=182 Ind. Cas. 330.

——Ss. 19, 4—Acknowledgment implying promise to pay—Suit on it—Defendant not raising plea of lack of consideration—Question referred to Full Bench being whether acknowledgment made after limitation but during time in which owing to S. 4 to S. 25 of Act, the suit might have been instituted, would give fresh start of limitation—Full Bench, if can allow such new plea.

Per **Dalip Singh** and **Din Muhammad, JJ., Coldstream, J.**, contra—Acknowledgments implying a promise to pay are agreements and, therefore, could form the basis of a suit provided consideration is proved. Where a suit is actually brought on the basis of such acknowledgments treated as agreements, plaintiffs must be taken to allege that the agreement was for consideration and the consideration must be taken to have been proved where the defendant does not plead the lack of consideration.

Looked at from this point of view, the question whether an acknowledgment of a debt made after the period of limitation for a suit prescribed by Sch. 1, Limitation Act, has expired but during the time in which, owing to the provisions of Ss. 4 to 25 of the Act, the suit might have been instituted, will start a fresh period of limitation under the provisions of S. 19, aoes not really arise, for, it is obvious that if this is an tgreement for consideration before the expiry of limitadion or even after it, a suit on its basis would succeed and could not be held to be barred by limitation.

Where the above question was referred to the Full Bench, it is open to the Full Bench to allow such point to be newly taken before it, as the question to be decided in both the points is the same, **viz.**, whether the suit is barred by limitation. A.I.R. 1938 Lah. 234= I.L.R. (1938) Lah. 193=40 P.L.R. 533=174 Ind. Cas. 277 (F. B.).

——S. 19—Oral acknowledgment of debt implying unconditional promise to pay cannot be basis of suit under S. 25 (3), Contract Act as it would make the provision of S. 19, Limitation Act, nugatory. A.I.R. 1938 Nag. 180=I.L.R. (1940) Nag. 441=174 Ind. Cas. 374.

——S. 19—Acknowledgment itself cannot be used as basis of suit—Suit must be on original cause of action. A.I.R. 1938 Nag. 180=I.L.R. (1940) Nag. 441=174 Ind. Cas. 374.

——S. 19—Receipt merely stating that money had been taken under pro-notes—Pro-notes not capable of being acted upon.

In order that a written acknowledgment may be of avail to a plaintiff under S. 19, it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorised agent. If an admission amounts to such an acknowledgment, then, if it is made before the expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment. In such an event, there is no question of there being a fresh cause of action or a fresh promise to pay a debt which can be sued upon. On the other hand, if the acknowledgment is made after the period of limitation has expired, then the acknowledgment is of no utility and cannot save limitation.

But a receipt containing an acknowledgment of a previous debt may not be a mere acknowledgment, **i.e.,** a bare admission of the existing liability, but it may contain words indicating an implied promise to pay the earlier debt. Whether it is a mere acknowledgment or it is more than an acknowledgment and contains an implied promise to pay will depend on the terms of the particular document. But assuming that it amounts to an implied promise to pay, it does not follow that it can be made the basis of a suit and treated as giving rise to a fresh cause of action. If the debt had not become barred by time then even an express promise to pay it is nothing more than a promise to do what a person is, under the law, bound to do. It cannot be treated as a fresh contract or a novation of the old contract and is on no higher footing than a mere acknowledgment. On the other hand, if the debt had become barred by time, then an implied promise to pay it would be of no avail because under S. 25 (3) of the Contract Act it cannot be treated as a promise made in writing to pay a time-barred debt. When there is no express promise to pay but the intention is inferred only indirectly, it cannot be treated as a promise in writing to pay the time-barred debt. The plaintiff, therefore, would not be entitled to take advantage of such an implied promise to pay a time-barred debt.

On the other hand, if there is fresh consideration proceeding from the promisee and the parties enter into a new contract which replaces the previous contract and supersedes it, then it certainly becomes the basis of a new cause of action and a suit would lie upon it because the contract is binding on the parties, being for consideration. But where there is no fresh consideration proceeding from the promisee, the transaction cannot be treated as an agreement between two parties as it is only a one-sided promise to pay a debt which was due.

Where certain receipts do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory notes of even dates by the executant, then if the promissory notes cannot be sued upon, the receipts cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage. (1934) A.L.J. 1185=A.I.R. 1935 All. 129=4 A.W.R. 754=57 A. 434=152 Ind. Cas. 370.

——S. 19—Promissory note not stamped according to law—Suit on pro-note, if maintainable—Acknowledgment of debt due on pro-note—Fresh cause of action, if arises.

When money is lent on a promissory note which is inadmissible, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. It is only when the debt is separable from the promissory note that the debt could be proved, although the promissory note was inadmissible in evidence.

Where a promissory note is not stamped according to law and the debt is acknowledged in it, the acknowledgment is part of same transaction of the loan by the promissory note and cannot be treated as an independent transaction upon which the plaintiff can frame a cause of action. A.I.R. 1933 All. 280=144 Ind. Cas. 130.

——S. 19—An unconditional acknowledgment implies a promise to pay and, therefore, a suit can be based upon such an acknowledgment. A.I.R. 1933 Lah. 47=34 P.L.R. 252=141 Ind. Cas. 425.

——S. 19—Acknowledgment—Implied promise to pay—fresh cause of action.

An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It can therefore be the basis of a suit. 124 Ind. Cas. 624.

——S. 19—Clear acknowledgment before expiry of limitation—Itself a basis.

An acknowledgment, clear and unconditional and made before the limitation period expires, can itself be the foundation of an action. 121 Ind. Cas. 108=1929 A. L. J. 1279=A.I.R. 1929 All. 980.

——S. 19—Acknowledgment on settlement of account before expiry of limitation—If implied promise to pay.

The result of certain dealings between the plaintiff and the defendant was that the defendant incurred debts to the plaintiff. When the account of the dealings was made, the defendant signed an acknowledgment for a certain sum. The plaintiff's suit to recover the amount due on the **khata** was dismissed by the Subordinate Judge on the ground that a suit on a **Ruzu Khata** was not maintainable :

Held inasmuch as the acknowledgment made before the limitation period expired implied an unconditional promise to pay, there was no reason why it should not form the basis of the suit. 33 Cal. 1047, Foll. 63 Ind. Cas. 923=46 Bom. 24=23 Bom. L.R. 606=A.I.R. 1922 Bom. 183.

——S. 19—Acknowledgment of time barred debt—Promise to pay—When can be basis of suit.

An unconditional acknowledgment always implies a promise to pay. The promise, express or implied, is a new contract, the consideration for which is the old debt and such a promise constitutes a new cause of action. Where two persons examine their mutual dealings and one of them formally acknowledges his indebtedness to the other to a certain extent in a document which complies with all the formalities of the law, for example, Stamp Act, no other explanation than that he promised to pay the amount is conceivable. If, in making the acknowledgment, he has included time-barred debts, which he might have well repudiated, it may still be open to him to plead failure of consideration to that extent. The creditor places himself in a disadvantageous position in this respect by omitting to take a bond containing an express promise to pay which alone can successfully meet the plea of want of consideration. This is to be taken to be the effect of S. 25, Contract Act.

Per **Sulaiman, Actg. C. J.**—A mere acknowledgment is not always evidence of a new contract which can be the basis of a suit.

The question whether a mete acknowledgment or a simple receipt can be made the basis of a suit is one more of procedure than of substantive law. If the transaction has amounted to a new contract, it can be made the basis of a suit. But if it is nothing more than a mere acknowledgment, then, if made beyond the period of limitation, it cannot be made the basis of a fresh suit; if made within limitation, then the cause of action is kept alive and all that would be at most necessary will be an amendment of the plaint if the original debt is not referred to therein.

An acknowledgment implies a promise to pay and every acknowledgment of liability may be treated as a fresh binding contract for consideration or the shifting of the onus of proof on the opposite party may be brought about by its means. A.I.R. 1932 All. 199=53 A. 963=(1932) A.L.J. 77=137 Ind. Cas. 243.

——S. 19—Basis of suit—Acknowledgment made after debt was barred.

Section 19, Limitation Act, requires that an acknowledgment should be made before the expiry of the period of limitation. An acknowledgment therefore contained in the sale-deed with respect to some items which had become time-barred at the date of the acknowledgment, cannot serve as a basis of plaintiff's claim. A.I.R. 1930 Lah. 985.

——S. 19—Acknowledgment after limitation—Nature of.

Though an unconditional acknowledgment has been held to imply a promise to pay, it is not by itself sufficient to constitute a 'promise' within the meaning of S. 25 (3) of the Contract Act. So an acknowledgment made after the expiry of the period of limitation on the original note cannot form the basis of a suit. A.I.R. 1930 Pat. 604=129 Ind. Cas. 95.

——S. 19—Barred debt—Mere acknowledgment—No promise to pay—Insufficient to create new contract—English and Indian Law.

Although the English Law, makes no distinction between an acknowledgment or promise which is sufficient to extend time in the case of a debt which is not yet barred, and an acknowledgment or promise which is sufficient to create a new contract where the debt has already become barred by lapse of time, in India a distinction has always been drawn between an acknowledgment which is sufficient to extend time under S. 19, Limitation Act, and a promise to pay a barred debt under S. 25 (3), Contract Act, and that a mere acknowledgment of the debt without a promise to pay is insufficient to create a new contract to pay. A I.R. 1921 Pat. 19, Foll. 112 Ind. Cas. 24=52 Bom. 521=30 Bom. L.R. 733=A.I.R. 1928 Bom. 319.

——S. 19—Contract Act, Ss. 25 (3), 62—Acknowledgment, whether gives fresh cause of action.

An acknowledgment satisfying the requirements of S. 19 does not create any new right of action but only enlarges the time and has the effect of making a new period run from the time of the acknowledgment.

A promise such as is referred to in S. 25, Cl. (3) of the Contract Act must be an express promise to pay a debt after the period of limitation in respect of it has expired.

Where a plaintiff sued upon a promissory note which was inadmissible in evidence for want of proper stamp and the evidence showed that the consideration for the promissory note was some previous debt but there was no evidence as to that debt:

Held, that no decree could be passed for plaintiff on the basis of the acknowledgment contained in the promissory note. 8 O.W.N. 1210=A.I.R. 1932 Oudh 49=7 Luck. 313=135 Ind. Cas. 390.

——S. 19—Acknowledgment amounting to novation.

Where, in a suit for recovery of money, it was alleged in the plaint that there had been an accounting between the parties in **Asarh** 1334-F., that Rs. 54-8-0 were acknowledged by the defendant as due to the plaintiff, that an entry to that effect was made by the defendant in plaintiff's account-book and that the defendant agreed to pay the principal amount with interest at 2 per cent. per mensem within six months:

Held, that the allegations made set up a case of novation and a suit on the acknowledgment was maintainable. 8 O.W.N. 126=A.I.R. 1931 Oudh 97=130 Ind. Cas. 503.

——S. 19—Ruqqa acknowledging liability—Rate of interest fixed—Amounts to new contract.

Where a claim was made on the ground of a 'ruqqa' containing an acknowledgment of liability and a post scriptum fixing a rate of interest was also found on it:

Held, that where an acknowledgment contains an entry fixing the rate of interest to be payable by the debtor it amounts to a new contract and constitutes a fresh cause of action. 117 Ind. Cas. 377=A.I.R. 1929 Lah. 511.

—S. 19—Acknowledging not creating new contract suit lies.

When from the plaint it is clear that the creditor sues on mere acknowledgment and not on basis of the old debts, and no new contract or no new obligation is created by the acknowledgment the suit cannot succeed. 121 Ind. Cas. 83=6 O.W.N. 902=A.I.R. 1929 Oudh 529.

——S. 19—Acknowledgment under S. 19 of Limitation Act cannot be construed as a contract under which the defendant can be held liable for any sum of money. It may extend the period of limitation for three years from its date but it cannot form the basis of fresh cause of action. 106 Ind. Cas. 619=A.I.R. 1927 Mad. 1200.

——S. 19—Acknowledgment cannot be basis of suit independently of original debt.

A mere acknowledgment of a liability cannot be made the basis of a suit so as to constitute a fresh cause of action but in a suit based on the original consideration the acknowledgment would be a good piece of evidence. 89 Ind. Cas. 402=23 A.L.J. 900=6 L.R.A. (Civ.) 525=A.I.R 1926 All. 155.

——S. 19—Acknowledgment, if can be basis of suit

It is doubtful if a suit can be maintained on a mere ackowledgment of debt, but an acknowledgment of debt at least implies a promise to pay. 97 Ind. Cas. 800=27 P.L.R. 317=A.I.R. 1926 Lah. 472.

——S. 19—Pro-note for past consideration—Failing as such—Serves as acknowledgment.

When a person borrows a certain sum of money and executes a promissory note, he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note and the acknowledgment can give rise to a cause of action, if the pro-note fails as pro-note for any cause. 92 Ind. Cas. 626=1926 M.W.N. 141=23 M.L.W. 678=A.I.R. 1926 Mad. 452=50 M.L.J. 36.

——**S. 19—Acknowledgment—Can form basis of suit.**

A suit is maintainable on the basis of a Ruju or acknowledgment as every acknowledgment implies a promise to pay. 78 Ind. Cas. 234=A.I.R. 1925 Nag. 9.

——**S. 19—Hatchita—Promise to pay amount due on adjustment—Stamped and signed.**

A suit on a **Hatchita** sthmped and signed by the debtor, containing a statement of adjustment of accounts and consisting in itself a distinct and unqualified promise to pay the amount found due on adjustment is governed by Art. 115 and not by Art. 64. In every case where Art. 64 is made applicable there need not be always a reciprocity of demands. 76 Ind. Cas. 603 =A.I.R. 1923 Cal. 578.

——**S. 19—Acknowledgment of old loan with new gives rise to a new agreement.**

Where old loan is acknowledged along with new, the transaction amounts to an agreement. 72 Ind. Cas. 692 =36 C. L. J. 228=A.I.R. 1923 Cal. 71.

——**S. 19—Effect of 'Ruqqa.'**

A 'Ruqqa,' which is an admission of indebtedness is not an express or implied agreement to pay upon which to base a suit. 76 P. R. 1915=154 P.W.R. 1915=31 Ind. Cas. 209.

——**S. 19—No promise to pay—Suit if lies.**

A suit based on an acknowledgment which contains no promise to pay is not maintainable. 180 P.W.R. 1913=292 P.L.R. 1913=20 Ind. Cas. 501.

——**S. 19 — Acknowledgment—Account, suit on balance of—Signature in account book.**

A suit for money lent and advanced can be based upon an acknowledgment by the principal defendant in the account book made by way of affixing his signature testifying to the accuracy of the details of the account. (1905) 3 A.L.J. 800=1906 A.W.N. 185.

6. Endorsement.

(a) In Account Books.
(b) Of payment.
(c) On Life Policy.
(d) On Pro-notes and Bonds.

6 (a). Endorsement—In account books.

——**Ss. 19, 20 — Endorsement of payment by debtor in creditor's bahikhata "towards above amount."**

A payment made merely in respect of the amount due on the promissory note on which the payment is endorsed may be a final payment, earlier payments not having been evidenced by endorsement so that a mere endorsement of a payment in respect of the note does not involve by itself an admission of further liability on the note.

(Distinction between Ss. 19 and 20 drawn.)

There was a loan made by the plaintiff to the defendant on April 2, 1933 of Rs. 1,120 which was entered in the **khata** of the plaintiff, and the entry was signed by the defendant. On April 10, 1935 that is to say, within three years of the loan, an entry was mad in the **khata** in these terms : "Credited Rs. 30-10-0 on December 15, 1934, as the price of paddy." This was signed by the defendant. Then the entry continued: "This has been credited this day the date April 10, 1935, towards the above amount." That again was signed by the defendant. That suit was filed on the **khata** on December 14, 1937 :

Held, that as the payment was not made in respect of interest but the creditor appropriated the amount towards interest, the payment did not operate to save limitation by virtue of S. 20, it being neither a payment of interest as such nor a part payment of capital :

Held, further that the payment 'towards the above amount,' clearly meant 'towards the amount specified on the other side of the **khata**' as due on the loan and therefore, the endorsement of April 10, 1935, did amount to an acknowledgment within S. 19, Lim. Act, and prevented the suit from being barred by limitation. A.I.R. 1942 Bom. 218=44 Bom. LR. 426=I.L.R. (1942) Bom. 512=202 Ind. Cas. 277.

——**Ss. 19, 20—Amount previously due by creditor to debtor—On subsequent date of accounting, such amount entered to credit of debtor.**

An acknowledgment for the purposes of S. 19, need not necessarily contain a promise to pay, or amount to a promise to pay. The endorsement made by the debtor acknowledging the correctness of an account which showed him a debtor to the extent stated is a clear acknowledgment of the debt with the ordinary implication of a promise to pay, and this is sufficient for the purposes of S. 19.

Under S. 20, Lim. Act, it is not necessary that money should actually pass, as a settlement of account may be as effectual as a real payment and a transaction whereby the parties agree that an amount previously due by the creditor to the debtor shall be treated as amount paid by the latter to the former, is, in substance, identical with a transaction where the debtor receives actual payments and pays the amount back to the creditor and gives a fresh start of limitation from such date. 4 B.R. 461=A.I.R. 1938 Pat. 139=174 Ind. Cas. 585.

——**S. 19**—If the debtor and creditor agree to the debtor making an entry in the books that a sum has been paid whereas, in fact, it has not been paid, such would be a payment to take the case out of the statute. It might be that entries could, in certain special circumstances, amount to acknowledgments by the debtor, but merely entering a fictitious payment cannot possibly amount to payment itself and what the statute requires is a payment or at least something which is tantamount to a payment. (1937) A.L.J. 166 =A.I.R. 1937 All. 260=1937 A.W.R. 138=168 Ind. Cas. 152.

——**S. 19—Entry in account books—Unsigned entry.**

An entry in the account books unsigned by the party against whom the money is claimed does not save limitation. 34 All. 464, Foll. 124 Ind. Cas. 24= A.I.R. 1930 All. 124.

——**S. 19—Accounts—Signature of debtor.**

Mere signature in the account book of another does not mean acknowledgment of debt. The signature alone signifies at the most the correctness of the figures entered in the book. M.L.T. 84=57. Ind. Cas. 756.

——S. 19—Signature in account book containing computation of interest.

A debtor signing his name in his creditor's book of account wherein interest up to a certain day has been calculated and admitting that he understood that he was liable for interest on an existing pronote is deemed to have acknowledged liability so as to save the bar of limitation, for action on the pronote though the entry of interest does not expressly refer to the pronote 3 Ind. Cas. 407 (Mad.).

6 (b). Endorsement—Of payment.

——S. 19—Endorsement of payment or of crediting of amount on promissory note—If acknowledgment.

Though a mere endorsement of payment by a debtor does not constitute an acknowledgment within the meaning of S. 19, Limitation Act, yet if the endorsement is so worded that an acknowledgment of the debt can be read into it, either in view of the express words used or by necessary implication, such endorsement may amount to an acknowledgment within the meaning of S. 19. Where an endorsement is made on a document creating liability against the executant thereof, as to a certain amount having been credited to such executant, the necessary implication and inevitable inference would be that the amount has been credited in the account evidenced by the document or towards the liability created by that document. Such an endorsement, when made by the debtor himself, must be held to constitute an acknowledgment by him of the liability evidenced by the document on which such endorsemcnt is made. A.I.R. 1949 E.P. 219.

——S. 19—Endorsement of payment—When amounts to acknowledgment.

A mere endorsement on a bond that a certain amount was paid would not constitute an acknowledgment of liability within the meaning of S. 19 of the Limitation Act although an endorsement that a certain amount was paid towards the bond would constitute such acknowledgment. 224 Ind.Cas. 65=12 B.R. 457=1946 P.W.N. 349=A.I.R. 1946 Pat. 404=27 P.L.T. 464.

——S. 19—Words "paid . . towards satisfaction" in an endorsement amount to an acknowledgment.

The words "paid. . . . towards the satisfaction" in an endorsement imply that a balance, for the payment of which the executant of the note was liable was due and hence amount to an acknowledgment of liability within the meaning of S. 19. 1945 N.L.J. 313=I.L.R (1945) Nag. 745=A.I.R 1945 Nag. 181.

——S. 19—Mere endorsement of payment.

A mere endorsement of payment without further specification does not operate as an acknowledgment within the meaning of S. 19. 26 P.L.T. 173=A.I.R. 1945 Pat. 271=24 Pat. 96=11 B.R. 491=220 Ind. Cas. 255.

——S. 19—An endorsement on the bond "paid Rs. 20" does not show that there was any acknowledgment o liability in regard to the balance of the money alleged to be due under the bond and does not amount to acknowledgment within S. 19. A.I.R. 1944 Lah. 88=45 P.L.R. 407=I.L.R. (1944) Lah. 528=213 Ind. Cas. 252.

——S. 19—Mere endorsement of payment.

An endorsement on a promissory note that "Rs. 75 was paid" on certain date does not amount to acknowledgment of any liability nor does it involve any promise to pay the unpaid balance. A.I.R. 1944 Bom. 37=45 Bom. L.R. 1014=215 Ind. Cas. 12.

——Ss. 19, 20—Document not coming within S. 20 may be acknowledgment within S. 19.

Section 19 and S. 20 are quite independent of each other. A document may be an acknowledgment within S. 19, although it does not evidence part payment within S. 20. Whether in any particular case the document relied upon amounts to an acknowledgment must depend on the language of that document. A.I.R. 1942 Bom. 218=44 Bom. L. R. 426=I.L.R. (1942) Bom. 512=202 Ind. Cas. 277.

——Ss. 19, 20—Amount paid towards pro-note—Endorsement not valid under S. 20, but sufficient acknowledgment under S. 19.

When a debtor pays a sum as a part payment of an interest bearing debt, without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under S. 20, Lim. Act, it is incumbent upon the creditor to appropriate the sum paid towards the principal before the expiration of the prescribed period of limitation. An unappropriated payment cannot avail the creditor under S. 20, as a payment towards interest as such or towards principal saving limitation. But when there is a part payment endorsed in such terms as to make it ineffective for the purpose of S. 20, it may, by implication, amount to such an acknowledgment as would save limitation under S. 19.

An endorsement on a pro-note: "Paid on November 15, 1938, towards this promissory note, Rs. 2" held though not under S. 20, saved limitation under S. 19—, A.I.R. 1942 Mad. 146=(1941) 2 M.L.J. 848=54 L.W. 624=1942 M.W.N. 31=I.L.R. (1942) Mad. 405=201 Ind. Cas. 182.

——Ss. 19, 20—Payment by debtor without specification, if acknowledgment of liability.

Where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore, no acknowledgment of liability on his part. If, for instance, on the back of a promissory note are written by the maker the words "paid Rs. 10" the endorsement cannot be construed as being anything more than a statement of the payment. The sum of Rs. 10 may constitute which remains due in respect of the debt evidenced by the instrument.

But an endorsement on a promissory note in the words, 'paid Rs. 350 towards this promissory note and endorsed the payment hereon' can be read as an acknowledgment of liability within the meaning of S. 19, Lim. Act. The use of the word "towards" in itself implies that more remains to be paid; in other words, that the payment is made on account of a larger sum due under the instrument. This amounts to an acknowledgment of liability within the meaning of S. 19. A.I.R. 1942 Mad. 353=55 L.W. 240 (2)=(1942) 1 M.L.J. 469=1942 M.W.N. 325=I.L.R. (1942) Mad. 590=201 Ind. Cas. 586 (F.B.).

——**S. 19—Mere endorsement of payment in respect of pro-note on back of note.**

An acknowledgment of payment made in respect of the promissory note, on which the acknowledgment is endorsed does not amount to an acknowledgment of any further liability on the promissory note within the meaning of S. 19, Lim. Act. A.I.R. 1942 Oudh 508=1942 O.W.N. 582=18 Luck. 241=202 Ind. Cas. 750.

——**Ss. 19, 20**—Payment and endorsement by debtor on pro-note—Whether amount paid as interest or principal not specified—Creditor appropriating it towards principal—Limitation is extended under Ss. 19 and 20. A.I.R. 1940 Lah. 106=42 P.L.R. 103=189 Ind. Cas. 264.

——**Ss. 19, 20—Difference between S. 19 and S. 20**

There is a fundamental difference between Ss. 19 and 20, Limitation Act. Under S. 20 all that is necessary is that an acknowledgment of payment, (or under the old section as it stood before the amendment: "the fact of payment"), should appear in the handwriting of, or signed by the person making the payment. If the person making the payment is a Judge of the Court, and acknowledgment of the payment, (or the facts of payment if the unamended section applies) appears in his handwriting or is signed by him, then that is enough. But that is not enough under S. 19. A.I.R. 1940 Nag. 354=1940 N.L.J. 445=I.L.R. (1942) Nag. 182=193 Ind. Cas. 401.

——**Ss. 19, 20—Distinction between.**

The effect of an acknowledgment in S. 19, Limitation Act, is more restricted, and in general it only affects not the person giving it. But payment under S. 20 affects not only the person making the payment but also other persons who are liable. A.I.R. 1938 Cal. 129=66 C.L.J. 104=42 C.W.N. 18=176 Ind. Cas. 191.

——**Ss. 19, 20**—Sections 19 and 20, Limitation Act, are independent of each other. One may have an acknowledgment of liability, which comes within S. 19, unaccompanied by any part payment; or one may have an acknowledgment of liability coupled with a part payment, which complies with the terms of S. 20 in which case the debt is saved from limitation both under S. 19 and under S. 20; but, if there is a part payment which does not comply with the terms of S. 20, that cannot prevent the document operating as an acknowledgment within the meaning of S. 19. All that is required under S. 19 is an acknowledgment of liability in respect of the debt.

Consequently, where endorsement on a pro-note states that certain payment has been made as **vasul, i.e.,** towards payment, but it is not paid expressly as interest, the payment being on account of the debt secured by the note on which the endorsement is made, the endorsement amounts to an acknowledgment of liability to pay debt within the meaning of S. 19. A.I.R. 1939 Bom. 252=41 Bom. L.R. 455=182 Ind. Cas. 965.

——**Ss. 19, 20**—A promisor made an endorsement on the back of the promissory note executed by him for Rs. 2,141, 'paid on accoun t Rs. 10' which was followed by his signature:

Held, that the endorsement meant that the promisor had not paid in the full the amount due and was, therefore, an acknowledgment of liability and a fresh period of limitation must be computed from its date. A.I.R. 1938 Rang. 401=1938 Rang. L.R. 594=178 Ind. Cas. 869.

——**Ss. 19 and 20—Sum payable every two years as profits or interest—Such sum paid and endorsement made on back of mortgage-deed before expiry of limitation.**

An endorsement on the back of the mortgage-deed to the effect that a sum of Rs. 82 on account of profit from June, 1923 to June, 1925 had been paid that day to the mortgage signed by both parties amounts to an acknowledgment of a liability in respect of the mortgage and if the period of limitation has not then expired, a fresh period of limitation commences from that date. Section 20 applies as well, as the sum of Rs. 82 payable every two years was in the nature of interest. A.I.R. 1934 Lah. 971.

——**S. 19**—An endorsement on the back of a promissory note that certain amount is paid in respect to the pro-note neither imports nor implies any acknowledgement whatsoever in respect to anything beyond the amount which was then being paid. (1938) A.L.J. 1233=1939 A.W.R. 23=A.I.R. 1939 All. 177=I.L.R. (1939) All. 200=180 Ind. Cas. 535.

——**S. 19**—There is no warrant for restricting the use of the word 'acknowledgment' in S. 19, to mean 'express' acknowledgment. It may be either express or implied. Each case must be decided on its merits.

Where in a case the promisor has endorsed the pro-note admittedly executed by him, to the effect that he had paid certain amount and had made a signature thereunder :

Held, that the only reasonable inference that could be drawn from this was that the promisor had acknowledged his liability to pay the balance due on the promissory note. The endorsement on the promissory note was an acknowledgment within the meaning of S. 19, Lim. Act. A.I.R. 1938 Rang. 84=1937 Rang. L. R. 421=175 Ind. Cas. 550.

——**S. 19**—Where an endorsement on the promissory note was to the effect that out of the amount due under the pro-note, Rs. 1,000 was paid this day, the endorsement, though it does not indicate that it is a payment towards interest, it contains a clear acknowledgment of liability enough to save limitation. 43 L.W. 665=(1936) M.W.N. 451=A.I.R. 1936 Mad. 616=163 Ind. Cas. 803.

——**S. 19—Endorsement of payment—If acknowledgment.**

An endorsement on the back of a mortgage bond was as follows : "Paid on account of the principal as per separate accounts Rupees one thousand seven hundred fifty-one only:"

Held, that the endorsement constituted an acknowledgment of the mortgagee's rights to receive the balance of the principal amount.

Whether a particular endorsement does or does not constitute an acknowledgment of the right claimed by the plaintiff must depend upon its terms. 64 Ind. Cas. 988=48 Cal. 1046=33 C.L.J. 433=26 O.W.N. 283=A. I. R. 1921 Cal. 331.



what is not contained in the document itself. A.I.R. 1936 Lah. 629=17 L. 737=165 In.. Cas. 723.

——S. 19—According to Explanation 1 to S. 19 it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there is to be no bar to extrinsic evidence being admitted for the purpose. A.I.R. 1934 Lah. 635=16 Lah. 258=37 P.L.R. 478=155 Ind. Cas. 1074. Overruled on another point in A.I.R. 1942 Lah. 50.

——S. 19—Where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid. It cannot, however, be said that the remaining liability shown by evidence aliunde should be deemed to have also been acknowledged. A.I.R. 1933 All. 453=55 All. 632 =1933 A.L.J. 930=144 Ind. Cas. 899.

——S. 19—Receipt for old loan executed on later date—Extrinsic evidence — Permissibility.

Where **A** borrowed money from **B** on July 3, 1927, and executed a pro-note and receipt in favour of **B** and again executed a receipt for the old loan on 19th June, 1930.

Held, that the latter receipt amounted to a sufficient acknowledgment of **A's** liability to repay the loan of July 3, 1927, and that as nothing was paid to **A** on July 10, 1930, extrinsic evidence was permissible to show the true meaning of the language used in the receipt, under S. 95, Evidence Act. A.I.R. 1933 Oudh 80=9 O.W. N. 1024=8 Luck. 195=141 Ind. Cas. 298.

——S. 19—Where an acknowledgment states that a debt is due to **A**, oral evidence is admissible to prove that the name of **A** was entered by mistake for that of **B** who was the real creditor, the case being one of latent ambiguity covered by S. 95, Evidence Act. A.I.R. 1931 Oudh 54=7 O.W. N. 1195=130 Ind. Cas. 347.

——S. 19 (2)—Oral evidence of date.

Where the date of a document containing an acknowledgment has been completely scored out by the executant, for the purposes of cl. (2) of S. 19, the document may be treated as undated and oral evidence may be given as to the correct date of the acknowledgment.

When a document filed in Court is undated, an acknowledgment contained in it may, in the absence of any evidence, be taken to be made on the date on which it was so filed. 63 M.L.J. 785=36 L.W. 865=(1932) M.W.N. 1330=A.I.R. 1933 Mad. 104=140 Ind. Cas. 774.

——S. 19—Oral evidence, of date — Alteration—Admissibility of.

Oral evidence is inadmissible to prove the date of an acknowledgment where it is not undated, but the date is unauthorisedly altered subsequently. (1901) 3 Bom.L.R. 574=26 Bom. 128. **See also** 25 M. 220.

——S. 19—Nature of acknowledgment—Oral evidence—Admissibility.

Although an acknowledgment may imply a promise for extending limitation it is, without a promise, insufficient to create a contract and cannot be enforced as such. Being neither contract, grant nor disposition of property nor analogous to any of them, it is not a document contemplated by S. 92 of the Evidence Act. So the prohibition regarding the admissibility of oral evidence is not applicable to an acknowledgment. 26 N.L.R. 320=A.I.R. 1930 Nag. 298.

——S. 19—Admissibility in evidence—No specific mention of debt—Reference to other parts permissible.

Where a document containing an acknowledgment of debt, does not specifically mention the debt due to the plaintiff, a reference to other parts of the deed to elucidate the meaning is permissible. 129 Ind. Cas. 281=A.I.R. 1930 Lah. 985.

——S. 19—Identity of liability—Proved by independent evidence—Acknowledgment good.

If the acknowledgment of the liability is capable of being identified with the liability sought to be enforced in the suit by adducing independent evidence, the acknowledgment should be regarded as a good acknowledgment for the purpose of saving limitation. 1930 A.L.J. 1018=126 Ind. Cas. 353=A.I.R. 1930 All. 368.

——S. 19—Acknowledgment must be in writing—Name and date—Oral evidence admissible.

Oral evidence is admissible to prove the identity of the debt, property or right in respect of which the acknowledgment is made, or the name of the creditor or of the person entitled to the right of property or the date of an acknowledgment, and these need not appear on the face of the writing, but the writing itself must import an acknowledgment of an existing liability. Such liability cannot be read into it by proof aliunde or by subsequent admission of the acknowledgor. 26 Mad. 34, Foll. 65 Ind. Cas. 279=17 N.L.R. 209=A.I.R. 1921 Nag. 1.

——S. 19—Debt under consideration—Proof.

Where the acknowledgment is contained in a document which does not prove a definite and certain debt any other debt proved is presumed to be the debt, under consideration. 60 Ind. Cas. 189 =7 O.L.J. 451=23 O.C. 176=2 U.P.L.R. (J. C.) 152.

——S. 19—Proof of debt.

It is settled law that the identity of the debt acknowledged in writing may be proved by parol evidence. 34 Ind. Cas. 417 (Mad.).

——S. 19—Plaintiff basing claim on hand-note altered by him—Hand-note executed in satisfaction of original one—Plaintiff, if can succeed on basis of original consideration—Whether can rely upon altered hand-note as acknowledgment of original one.

A person who has altered a hand-note upon which his suit is based and which is executed in satisfaction of the original hand-note is not entitled to succeed on the basis of the original consideration and cannot rely upon the altered hand-note as embodying an acknowledgment sufficient to save the bar of limitation. In such a case, the description by the defendant in his written statement of the manner in which the original hand-note had been executed, cannot properly be treated as an admission that he was still liable on the original hand-note and the whole claim on the altered hand-note is liable to be dismissed. A.I.R. 1939 Pat. 255=5 B.R. 318=179 Ind. Cas. 890.

——S. 19—Suit on insufficiently stamped promissory note—Receipt acknowledging liability under earlier loan in lieu of which the promissory note was executed—Plaintiff's claim based on the original loan, held was saved by the acknowledgment made in the receipt. (1943) O.W.N. 483=1943 A.W.R. 187=214 Ind. Cas. 146.

——S. 19—Insufficiently stamped pro-note, whether operates as acknowledgment.

An insufficiently stamped promissory note cannot operate as an acknowledgment. A.I.R. 1940 Nag. 215=1940 N.L.J. 658=187 Ind. Cas. 367.

——S. 19—Pro-note insufficiently stamped and inadmissible under S. 35, Stamp Act (2 of 1899)—Endorsement of payment appearing on it.

Although a pro-note itself is inadmissible in evidence under S. 35, Stamp Act, being insufficiently stamped, an endorsement of payment appearing on it can be validated as an acknowledgment of the liability upon the original debt. The instrument that is inadmissble under S. 35 of the Stamp Act, is the matter written on the substance by means of letters described as the promissory note. For the purpose of extending the period of limitation, what is relied on is not the writing which constitutes the promissory note and which is inadmissible, but the endorsement on the insufficiently stamped note. A.I.R. 1939 Mad. 34=48 L.W. 498=(1938) M.W.N. 875=(1938) 2 M.L.J. 840 =183 Ind. Cas. 882.

——S. 19—Insufficiently stamped promissory note —Whether can extend limitation.

By reason of S. 35 Stamp Act, an improperly stamped promissory note is inadmissible in evidence as acknowledgment of debt unde Art. 1 of the Stamp Act. But S. 35 cannot preclude the admission of that document to prove the mere fact that the debtor made an admission of liability to pay apart from any intention of supplying evidence of such debt. S. 35 would come into play only if the document were used as containing within itself any matter which would extend the creditor's right to recover the money, but if the creditor derives his right, not from the document itself as it would be if it were treated as an acknowledgment under Art. 1 of the Stamp Act, but from the Limitation Act in consequence of the admission of liability simpliciter contained in that document, then S. 35 has no applicability. A document which is relevant for the purpose of the application of S. 19 of the Limitation Act need not be an instrument within the meaning of the definition of the term in S. 2 (14) of the Stamp Act. Consequently the document is admissible to prove the fact of admission made by the debtor of his existing liability. S. 19 of the Limitation Act, therefore, comes to the aid in extending the period of limitation.

Obiter.—An insufficiently stamped promissory note is capable of being treated as an agreement chageable with duty under Art. 5 (c) of Sch. 1 to the Stamp Act. On that view, the document becomes admissible on payment of requisite duty and penalty. 1938 N.L.J. 145=A. I. R. 1938 Nag. 294=177 Ind. Cas. 678.

——S. 19—When a promissory note contains, in addition to promise, a statement that the amount for which it was given was due in settlement of a previous account and the instrument is not sufficiently stamped, it is inadmissible for any purposes and cannot even be used as an acknowledgment. A.I.R. 1938 Mad. 75=46 L.W. 692=(1937) M.W.N. 1050=(1937) 2 M.L.J. 805=I.L.R. (1938) Mad. 210=175 Ind. Cas. 24.

Overrules—(1) A.I.R. 1930 Mad 485=124 Ind. Cas. 53. (2) A.I.R. 1933 Mad. 251=141 Ind. Cas. 169.

——S. 19—An improperly stamped promissory note cannot be admitted in evidence to prove acknowledgment of liability in order to save limitation in respect of promissory notes previously executed. (1937) M.W.N. 1050=46 L.W. 692= (1937) 2 M.L.J. 805=I.L.R. (1938) Mad. 210 =A.I.R. 1938 Mad. 75=175 Ind. Cas. 24.

Overruling—(1) A.I.R. 1930 Mad. 485=124 Ind. Cas. 53. (2) A.I.R. 1933 Mad. 251=141 Ind. Cas. 169.

——S. 19—The admissibility of the invalid pro-note in evidence, as an admission by the promisor of his liability, depends upon proof of the original transaction which is evidenced by the invalid promissory note. A. I. R. 1937 Rang. 408=1937 Rang. L.R. 127=173 Ind. Cas. 604.

——S. 19—Insufficiently stamped pro-note.

Although an insufficiently stamped pro-note is not admissible in evidence, as such it can be used as an acknowledgment. A.I.R. 1934 All. 951= 4 A.W.R. 657=153 Ind. Cas. 551.

——S. 19—A promissory note which is inadmissible in evidence owing to defective stamp duty cannot operate as an acknowledgment within the meaning of S. 19, to save limitation. 16 N.L. J. 241=A.I.R. 1933 Nag. 391=147 Ind. Cas. 981.

——S. 19—Pro-note insufficiently stamped—Cannot be used even as an acknowledgment under S. 19.

A claim was originally based on a pro-note which was afterwards found to be insufficiently stamped. The plaint was amended and the plaintiff claimed that it might be treated as an acknowledgment of debt under S. 19, Limitation Act;

Held; that the pro-note could not be so used. 112 Ind. Cas. 247=5 O.W.N. 750=A.I.R. 1928 Oudh 408.

——S. 19—Pro-note—Insufficiently stamped renewal pro-note.

Where a pro-note is granted as a substitute for a previous pro-note, but is not sufficiently stamped, operate as a pro-note, it remains and is sufficient then, although a substituted pro-note, does not acknowledgment within the meaning of S. 19. 98 Ind. Cas. 75=1926 M.W.N. 757=A.I.R. 1926 Mad. 1148.

——S. 19—When the trial Court, holding that a pro-note was inadmissible in evidence not being duly stamped as such, nevertheless admitted it in evidence as a validly stamped acknowledgment:

Held, that the Appellate Court was debarred from interfering in the matter. A.I.R. 1933 Lah. 240 (1)=34 P.L.R. 501=141 Ind. Cas. 569.

——S. 19—Receipt inadmissible as bond—Admissible to prove acknowledgment.

A receipt bearing one anna stamp can serve as

proof of acknowledgment of a debt, though it may be inadmissible in evidence as a bond containing express promise to pay, for want of proper stamp. 121 Ind. Cas. 108=1929 A.L.J. 1279=A.I.R. 1929 All. 980.

——S. 19—Mortgage executed for past balances—Mortgage invalid owing to Tenancy Law of Oudh—Serves as acknowledgment.

Where a mortgage of tenancy rights was executed in consideration of past debts and was found to be invalid under Oudh Tenancy Law.

Held, that it served as an acknowledgment of old debts on the basis of which a decree can be passed. 89 Ind. Cas. 175=12 O.L.J. 334=2 O.W.N. 318=A.I.R. 1925 Oudh 401.

7. (b) Evidence of acknowledgment—Onus and proof.

——S. 19—Acknowledgments — Onus to prove handwriting of disputed signature.

Decree-holder relying on judgment-debtor's acknowledgment to bring execution within time—Judgment-debtor challenging the signature to be forgery—The burden lies on the decree-holder to prove that the signature is that of judgment-debtor. (1946) 12 B.R. 615=A.I.R. 1947 Pat. 139.

——S. 19—Entries in khewat of 1878 showing mortgagees to be in possession, mentioning mortgage amount and stating that mortgage was redeemable at Dasehra in Jeth—Entries attested by mortgagors and mortgagees.

(Per Collister, Hamilton, Bajpai and Dar, JJ.)—That even if the entries could be treated as acknowledgment of liability, the mortgages being oral and ancient of unknown date, the onus was still on the plaintiff to show that the liability was legally subsisting in 1878 by showing that the acknowledgment was made within 60 years of the mortgage or within 60 years of an earlier acknowledgment. No presumption could be made from the entries in favour of the plaintiff that the liability was subsisting at the time of the acknowledgment. A.I.R. 1943 All. 393=1943 A.W.R. 291=(1943) A.L.J. 548=I.L.R. (1944) All. 76=212 Ind. Cas. 238 (F.B.).

Overruled—1 All. 117 (F.B.)=1 All. 425=5 Ind. Cas. 77 (All.) and A.I.R. 1929 All. 209=115 Ind. Cas. 451.

——S. 19—In a suit for redemption of a mortgage, the onus lies on the plaintiff to show that at the time of the suit their mortgage was still subsisting and if they endeavour to rely on an acnowledgment, the onus still lies on them to prove that the acknowledgment was within time. A.I.R. 1934 Lah. 121=154 Ind. Cas. 773.

——S 19—Redemption suit—Onus of proof—Subsisting title.

In a suit for redemption the onus is on plaintiff to show not only that there is a mortgage, but also that he has a subsisting title to redeem. He must prove the date of the mortgage affirmatively. An acknowledgment, to be valid must amount to an acknowledgment of liability to plaintiff. It must appear, on the face of the acknowledgment, that there was an existing liability, and such liability cannot be read into it by proof, aliunde, though the nature of the right or liability referred to in the acknowledgment may be proved by evidence dehors the written acknowledgment. A mere declaration by the mortgagee that the mortgagor is the owner will not be a sufficient acknowledgment of the mortgagor's title, unless the mortgagee further acknowledges that he is in possession or holds under the mortgagor. (1902) 12 M.L.J. 101=26 M. 34. Also (1907) 6 C.L.J. 544.

——S. 19—Onus on a person relying on acknowledgment.

A plaintiff who is prosecuting a suit which is on the face of it barred by limitation and who is trying to bring it within limitation by proving an acknowledgment under S. 19 which gives him fresh period, must give cogent proof of his allegation. 66 Ind. Cas. 171=44 All. 360=20 A.L.J. 140=A.I.R. 1922 All. 37.

——S. 19—Acknowledgment that consideration has been paid.

An acknowledgment in a deed that the consideration has been paid is conclusive against the executant and where the document contains an acknowledgment of the receipt of the consideration, that is strong prima facie evidence that the consideration has been actually received and is evidenc not only against the mortgagors but also against persons claiming under them subsequent to the date of the mortgage. 1935 O.W.N. 1045=A.I.R. 1935 Oudh 501=158 Ind. Cas. 267.

——S. 19—Passage in a judgment in prior suit—Statement that a person admitted possession as mortgagee—Denial by the person—Exact statement not before Court—Statement is no acknowledgment.

A person against whom an acknowledgment that he was mortgagee of a holding was sought to be proved by reference to a judgment of settlement Court, had in fact in that case maintained that he was a full tenant of the holding and had denied that anybody had the right to redeem him. But in the judgment of the settlement Court it was stated "In his examination he admitted that he did not get the mutation of names effected because he held possession as mortgagee." The exact statement of the person in that case, however, was not before the Court,

Held, that the statement did not amount to acknowledgment of liability as mortgagee so as to give fresh start of limitation under S. 19. 119 Ind. Cas. 565=A.I.R. 1929 All. 332.

——S. 19—Admission of partnership accounts and of obligation to settle the accounts — Sufficient agreement to pay sum found due not necessary.

Where a plaintiff in a suit for the making of accounts of a dissolved partnership relies on an acknowledgment, all that the plaintiff is required to prove is that the defendant has admitted from time to time the existence of the partnership accounts between the parties and his obligation to settle such accounts. It is not necessary, for the acknowledgment to be operative, that he should go further and state that he was bound to pay any particular sum or such sum as may be found due

by him. 104 Ind. Cas. 572=22 S.L.R. 117=A. I.R. 1928 Sind 45.

8. Execution application.

——S. 19—Execution.

Section 19 applies to execution applications. 79 Ind. Cas. 897=A.I.R. 1925 Pat. 197.

——S. 19, Art. 183, Proviso — Execution proceedings — S 19 is not controlled by proviso to Art. 183.

It is clear from Expl. 3, S. 19, Limitation Act that the section as a whole does not cease to operate on decree. It applies to execution proceedings. The proviso to col. 3, Art. 183, relates directly to the fixing of the **terminus a quo** for the period of limitation mentioned in the preceding column. Section 19 is general and is not controlled or limited by the language of the proviso to col. 3, item No. 183. The two matters may be independent but it does not follow that the scope of S. 19 should be narrowed by the proviso. A. I.R. 1940 Cal. 210 (1)=I.L.R. (1939) 2 Cal. 528=44 C.W.N. 322=188 Ind. Cas. 280.

——S. 19—Payment by judgment-debtor in "part satisfaction" of decretal amount.

Certain payments made by the judgment-debtor towards the decretal amount were referred to in the petition filed by the judgment-debtor and the decree-holder under O. 21, R. 2, C. P. Code, which was signed by the judgment-debtor. After referring to the payments, the petition stated "both parties pray that payment be recorded in part satisfaction."

Held, that the words "in part satisfaction" amounted to an acknowledgment of liability within the meaning of S. 19, Limitation Act. A.I.R. 1945 Pat. 280=11 B.R. 498=220 Ind. Cas. 378 =11 Cut.L.T. 23.

——S. 19—Where a judgment-debtor states "I have this day agreed to pay to you Rs. 100 in full satisfaction of the said decree":

Held, the words, "in full satisfaction of the said decree" connotes that there is a subsisting liability under the said decree and constitute a sufficient acknowledgment of liability under the decree and the liability is not confined to Rs. 100 only. (1936) M.W.N. 1335.

——S. 19—Acknowledgment in application for adjustment gives fresh start.

An acknowledgment by the judgment-debtor of his liability for portion of money by means of an application for adjustment under O. 21, R. 2, gives a fresh start of limitation in respect of the entire amount. A.I.R. 1930 Cal. 304=124 Ind. Cas. 830.

——S. 19—Acknowledgment saves limitation for execution.

A letter by judgment-debtor to decree-holder acknowledging his liability to pay the decretal amount is an acknowledgment within S. 19 and saves limitation for execution. 79 Ind. Cas. 66 =A.I.R. 1924 Nag. 147.

——S. 19—Acknowledgment in satisfaction petition—Sufficient.

An acknowledgment of liability made in an application to enter satisfaction **pro tanto** of a decree is sufficient acknowledgment under S. 19. 61 Ind. Cas. 979=13 M.L.W. 37=1921 M.W. N. 181=A.I.R. 1921 Mad. 126.

——S. 19—Execution proceedings — Acknowledgment—Effect.

Effect of acknowledgment of right in execution proceedings is only to give 3 years from that date and not another 12 years therefrom. The words "fresh period of limitation" in S. 19 do not refer to term of 12 years prescribed by S. 48, C. P. Code. 20 C.W.N. 952=2 Pat.L.W. 370=1 Pat.L.J. 214=34 Ind. Cas. 27.

——S. 19—Execution proceedings — Uncertified payment—Effect.

An uncertified payment is no step-in-aid to save limitation. But in the execution application itself the decree-holder may apply to certify the payment and then it would save limitation. 43 Cal. 207=20 C.W.N. 272=23 C.L.J. 390=34 Ind. Cas. 606.

——S. 19—Execution of decree — Acknowledgment.

Under S. 19 of the Limitation Act of 1877 acknowledgment of decree debts had not the effect of saving limitation. A right barred under the old Act cannot be revived by a new Act without express words. 5 M. 171 (F.B.), Foll. (1914) M.W.N. 875=26 Ind. Cas. 368.

——S. 19—Execution of decree—Application by decree-holder not reciting terms of adjustment—Limitation.

An execution application by a decree-holder without reciting the terms of an alleged adjustment does not embody an acknowledgment of the judgment-debtor's right to have the adjustment recorded as certified and hence the application was barred by limitation under S. 19, Limitation Act. 19 C.L.J. 126=21 Ind. Cas. 926.

——S. 19—Execution of decree—Application for execution of a small amount — Subsequent application for execution for a larger additional amount.

Where an application for execution for a smaller sum was presented and the judgment-debtors acknowledged that sum and then another was put in for a larger sum left out of the first application, it was held that the acknowledgment of the smaller sum cannot save limitation as regards the larger sum. 15 C.L.J. 251=16 C.W. N. 493=13 Ind. Cas. 702.

——S. 19—Execution of decree — Compromise—Extension of time.

A compromise to have the rest of the decree executed at a future time without fixing any period for the same serves to extend the period of limitation under S. 19. S. 19 applies to an application for execution. 15 C.W.N. 82=6 Ind. Cas. 366.

——S. 19 and Art. 182—Execution proceedings.

The provisions of S. 19 apply also to a right to enforce a decree. An application by an arrested judgment-debtor praying for release and for an order to pay the decretal amount in instalments is a sufficient acknowledgment of liability for computing a fresh period of limitation. 8 C.W. N. 470, Foll. 5 N.L.R. 8=1 Ind. Cas. 240.

——S. 19, Art. 179—Execution—Decree obtained by pauper — Attachment by Government for Court-fees — Acknowledgment to Government, whether saves limitation to decree-holder.

A petition in which the judgment-debtor agreed to pay a certain sum to the person who attached the decree and took out execution, constitutes an

acknowledgment of liability to the decree-holder's representative. Hence an application for execution by the decree-holder within 3 years from the date of such petition is not barred. A person attaching a decree is a representative of the decree-holder. 15 C. 371 foll. A judgment-debtor in acknowledging his liability even for a part of his liability under the decree makes such an acknowledgment as, under S. 19 gives rise to a new period of limitation. It is sufficient acknowledgment to save limitation under the explanation to S. 19 although it was not addressed to the person entitled. (1906) 6 C.L.J. 141.

——S. 19—Judgment-debt — Acknowledgment of —Saving limitation—Change of law.

An acknowledgment of a judgment debt under S. 19 saves limitation. The law as it stood under S. 20 of the Limitation Act of 1871 has been changed. (1902) 6 C.W.N. 766. See also 8 C. W. 470; 26 A. 36.

——S. 19—Acknowledgment, effect of, in execution proceedings. 3 A. 247; 8 C. 716; 9 C. 730; 23 C. 374 foll. 5 M. 171 (F.B.) (diss. from. (1904) 8 C.W.N. 470, Also 6 C.W.N. 766.

[New made clear by Expl. III of the new section in the new Act.—ED.]

9. Implied acknowledgment.

——S. 19—Implied acknowledgment.

The acknowledgment of liability might be express but it may equally well be made impliedly as long as the implication is clear that the debtor or the person who was the debtor at the time did intend to acknowledge his liability. 45 P.L.R. 407=A.I.R. 1944 Lah. 88=I.L.R. (1944) Lah. 528=213 Ind. Cas. 253.

——S. 19 — Acknowledgment must be implied from facts and circumstances.

Section 19 says nothing about a promise to pay, but requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing.

The admission of liability or acknowledgment must be one which can be implied from the facts and surrounding circumstances and is not one which is implied as a matter of law. A.I.R. 1942 Pat. 170=22 P.L.T. 1057=8 B.R. 608=199 Ind. Cas. 657.

——S. 19—An acknowledgment of interest due implies acknowledgment of principal on which the interest is due. 1937 M.W.N. 1312.

——S. 19—Implied acknowledgment—Two bonds —Payments not satisfying either bond—Thumb impression of debtor is admission of debts under both bonds.

Where in the case of two bonds the payments made have not fully satisfied either bond, and to show the intention of the parties no specific reference thereto is made in the endorsement of payment, the only reasonable implication to be put on endorsements of payments is that the debtor by affixing his thumb impression thereto admitted by implication that the balance due under each bond is still due from him. 91 Ind. Cas. 402=A.I.R. 1926 Nag. 252.

——S. 19—Nature of the implication.

If an acknowledgment is not express it may be by implication but the implication must be a necessary implication so that the acknowledgment is clear and unequivocal. 8 Bom. 99; 6 Mad. 182; 30 Cal. 699 and 9 Bom.L.R. 715, Foll. 79 Ind. Cas. 914=17 S.L.R. 324=A.I.R. 1925 Sind 181.

——S. 19—Execution on some prior date admitted—No implication as to subsistence of liability.

In a previous suit the defendant had deposed as a witness "I am the third defendant. I and the second defendant purchased some land from the first defendant. For the balance of price due to her, Ex. A was executed."

Held, that this was not an acknowledgment of a liability subsisting at the date when the witness deposed. As the witness did not speak of the price as being till due to the first defendant at the time, no implied acknowledgment of liability can be spelt out of the mere statement that the witness on some prior date executed a certain bond. A.I.R. 1922 Mad. 104; 45 M. 443; 26 Mad. 34; 16 Mad. 220, Foll. A.I.R. 1921 Mad. 464, Doubted. 73 Ind. Cas. 952=17 M.L.W. 674=A.I.R. 1923 Mad. 634.

——S. 19—Admission of prior liability—Nothing said as to discharge—No acknowledgment of subsisting liability.

An admission of past liability unaccompanied by an allegation of discharge cannot in all cases be interpreted as an admission of subsisting liability. Liability can only signify present liability at the time of acknowledgment. From the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an implied acknowledgment of subsisting liability. 36 Mad. 68, Foll. 70 Ind. Cas. 576=45 Mad. 443=1922 M.W.N. 168=15 M.L.W. 325=32 M.L.T. 576=A.I.R. 1922 Mad. 104 =42 M.L.J. 268.

——S. 19—Rubkai of proceedings—Inference.

No admission, amounting to an acknowledgment under S. 19 of the Act, can be inferred from the Rubkai of proceedings under Regulation 17 of 1806. 63 Ind. Cas. 490=3 U.P.L.R. (All.) 179.

——S. 19—Implied Acknowledgment — Account debiting a particular sum.

Defendant sent a letter and a memorandum of account to the plaintiff stating that they were squaring an account of Rs. 1,654 by debiting against the plaintiff Rs. 1,497 due to the defendant from a third party and remitting the balance to the plaintiff. **Held**, there was an acknowledgment in respect of the whole sum of Rs. 1,654. 18 A. L.J. 1131=59 Ind. Cas. 941.

——S. 19—Implied acknowledgment —Promise to pay.

Defendant wrote as follows in reply to the plaintiff:—"In case the account is compared now and any amount is due, my client is prepared to pay it. The amount mentioned in your notice is not due as per your accounts. As my client is not aware of certain amounts contained in the kaichits given to the aforesaid person, it is not possible to set right the accounts of my client. I am therefore instructed by my client that your client should be made to give forthwith the kaichits and accounts and on getting them compared

should receive the amount found to be true." **Held,** that there was a sufficient acknowledgment of the liability to save limitation and it was not conditional on the accounts being gone into. 12 L.W. 352=59 Ind. Cas. 898.

——S. 19—Implied acknowledgment — Suit for balance of account.

Where the existence of an account is admitted, the inevitable deduction must be that the person making such an admission acknowledges his liability to pay his debt if any debt is found against him. The admission relied on in the case amounted to an acknowledgment of liability to pay and the bar of limitation was removed. 2 Lah. L.J. 107=1 Lah. 357=58 Ind. Cas. 787.

——S. 19—Implied acknowledgment—Liability in dispute — Acknowledgment of principal—Interest.

An acknowledgment of liability within S. 19 of the Limitation Act need not be express but there must be a necessary implication so that the acknowledgment is clear and unequivocal. The acknowledgment must also distinctly and definitely relate to the liability in dispute and not to any liability. An acknowledgment of liability in respect of the amount due as principal, does not involve an admission to pay interest. 13 S.L.R. 183=55 Ind. Cas. 822.

——S. 19—Implied acknowledgment — Recital in later bond.

An acknowledgment of liability need not be express but may be implied and the mention in a later bond of the earlier bond was by implication a sufficient acknowledgment of liability to bring the claim on the later bond within the time. 131 P.R. 1919=53 Ind. Cas. 425.

——S. 19—Implied acknowledgment — Endorsement of payment.

An endorsement of payment on the back of the bond in the handwriting of the debtor amounts to an implied acknowledgment of the debt. 48 Ind. Cas. 724 (Nag.).

——S. 19—Implied acknowledgment.

The assignee of a subscriber to a chit fund wrote to the manager of the fund asking for payment of the subscription due to his assignor; the manager replied "you have not shown me the deed of assignment under which you claim. Further I have been issued an injunction order prohibiting me from paying the amount to anybody. A third party Sunder Rao has sent me a notice that the amount was due to him. You are informed that you must send me the amount of subscription and I cannot give you credit for anything". **Held,** that the letter amounted to an acknowledment of liability. An acknowledgment of liability may be express or implied. 25 C. 844 (P.C.); 35 A. 437, Applied. 34 M.L.J. 551=46 Ind. Cas. 973.

——S. 19, Expl. 2—Implied acknowledgment — What is.

Where a judgment-debtor in an execution proceeding objected to his being arrested as he was a poor man and asked for the stay of the warrant till his objection had been decided, there is no acknowledgment of debt within the meaning of S. 19 as an acknowledgment must be a clear acknowledgment and not a mere inference. 39 All. 357 =15 A.L.J. 305=38 Ind. Cas. 105.

——S. 19—Implied acknowledgment—Pre-emption.

During a pre-emption suit, by an inferior pre-emptor, the vendee entered an agreement to sell the property, the subject-matter of the suit, to a superior pre-emptor. **Held** the agreement was an acknowledgment of the right under the section. 20 O.C. 13=38 Ind. Cas. 582.

——S. 19—Implied acknowledgment—Suit on accounts — Part-payment by insurance towards accounts—Whether acknowledgment.

A sum sent by debtor by insured post with directions to credit in his accounts amounts to acknowledgment. 4 L.W. 148=36 Ind .Cas. 593.

——S. 19—Implied acknowledgment.

Acknowledgment may be by implication but it must be a necessary implication. 9 S.L.R. 143 =32 Ind. Cas. 548.

——Ss. 19 and 20—Implied acknowledgment — Endorsement of payment—No payment.

An endorsement not good as a payment under S. 20, might still operate as a valid acknowledgment; where can endorsement of payment is made on a promissory note but no payment is in fact made, the endorsement will be sufficient as an acknowledgment to save limitation. 17 M.L.T. 139=28 Ind. Cas. 15.

——S. 19—Implied acknowledgment — Letter accompanying part-payment.

Where a lessee was bound to pay his rent under a registered lease in four intalments, the last of which was to be paid in February 1902 and the lessee sent to his lessor Rs. 20 on 15th February 1905 and a letter requesting him to credit the amount to the account on the lease, and the lessor brought a suit for recovery of amounts due under the lease **held** that the suit was not time-barred as the letter of the 15th February, 1905 contained a clear admission that the rent was then due and an implied promise to pay whatever was actually due. 17 M.L.T. 78=27 Ind. Cas. 744.

——S. 19—Implied acknowledgment — Endorsement of receipt of money—No actual payment—If sufficient acknowledgment.

Where an endorsement of payment is relied on as acknowledgment of liability, the fact that no amount was paid on that date does not make the endorsement inoperative if it was the intention of the parties that it should be treated as such. 26 Ind. Cas. 754 (Mad.).

——S. 19—Implied acknowledgment—Co-mortgagor's right to redeem.

A co-mortgagor's statement in the plaint of a redemption suit that the other co-mortgagors have been impleaded as defendants as they would not join as plaintiffs is an "acknowledgment" within the meaning of the section, of the latter's right to redeem. 36 All. 408=12 A.L.J. 674=24 Ind. Cas. 104.

——Ss. 19 and 20—Implied acknowledgment — Nature of.

An acknowledgment under S. 19, may be implied, but the implication must be a necessary deduction from the language used, that the party acknowledging was referring to and admitting the particular liability in dispute, and not vaguely any or every liability. 13 C.L.J. 139=8 Ind. Cas. 81.

——S. 19—Implied acknowledgment — Running account.

An admission that there was a current account between the parties is valid acknowledgment, though the correctness of the amount charged is not admitted and though it is made by an agent conditionally, and subject to the principal's approval. 55 P.R. 1910=136 P.L.R. 1910=6 Ind. Cas. 948.

——S. 19—Implied acknowledgment—Liability to account.

An acknowledgment of liability to render an account to plaintiff does not amount to an acknowledgment of any indebtedness or debt within S. 19 of the Limitation Act. 87 P.L.R. 1909=4 Ind. Cas. 929.

——S. 19—Implied acknowledgment — Reference to arbitration.

A reference to arbitration entrusting to the arbitrators, the whole business of winding up of the partnership with authority to award from one party to another, whatever may be due; if in writing and signed by the parties, amounts to acknowledgment within the meaning of S. 19, Limitation Act. For the purpose of saving limitation, it is immaterial that the defendants in the acknowledgment contended that nothing would be due to the plaintiff on taking accounts. 3 S.L.R. 53=2 Ind. Cas. 370.

——S. 19—Acknowledgment—English and Indian Law.

In India an acknowledgment to save limitation in respect of a debt must be an express acknowledgment of liability in respect of the debt claimed or some part of it. In English Law, the law is different and an acknowledgment of a partial and conditional character would be sufficient to prevent the operation of the law of limitation. 26 C. 175, Dis. 16 M. 221, Appr. Where an acknowledgment was made in the following terms: "The bill is incorrect.—I will examine the estimates and after deducting what has to be deducted I will see what is due." **Held**, that it is no acknowledgment within the meaning of S. 19. (1903) 7 C.W.N. 651=30 C. 699. Confirmed on appeal in 31 C. 195.

10. Mortgagor and mortgagee.

(a) Acknowledgment by mortgagor.
(b) Acknowledgment by mortgagee.
(c) Acknowledgment by sub-mortgagee.

10. (a) Mortgagor and mortgagee—Acknowledgment by mortgagor.

——S. 19—Acknowledgment by mortgagor in favour of first mortgagee—If operates against second mortgagee—Title of latter originating before acknowledgment.

The acknowledgment of a mortgagor in favour of first mortgagee would not operate against second mortgagee whose title originated before the acknowledgment had been given. A.I.R. 1949 Pat. 505.

——S. 19—Mortgagor and mortgagee—Acknowledgment by mortgagor in favour of prior mortgagee—If operates against subsequent mortgagee—Title of latter accruing before acknowledgment.

An acknownedgment given by a mortgagor in favour of a prior mortgagee will not operate against a subsequent mortgagee whose title accrued before the acknowledgment was given. This principle applies no less to a case in which the mortgagor giving the acknowledgment has retained some scintilla of interest in the form of an equity of redumption than to a case in which he has parted with his interest altogether. I.L.R. (1947) A. 11=229 Ind. Cas. 583=1947 A.L.J. 129=1947 A.L.W. 376=1947 A. W. R. (H.C.) 101=A.I.R. 1947 All. 74 (F.B.).

——S. 19—Acknowledgment by mortgagor in favour of first mortgagee after creating second mortgage—If binds second mortgagee.

S. 19 of the Limitation Act does not allow a mortgagor, after he has created a second mortgage and thus ceased to represent the entirety of the equity of redemption, to compromise the position of his own second mortgagee in point of limitation by an acknowledgment given behind his back in favour of the first mortgagee. I.L.R. (1946) A. 375=A.I.R. 1947 A. 214=1946 A.L.J. 104=222 Ind. Cas. 632=1946 A. W. R. (H.C.) 476.

——Ss. 19 and 20—Genuine acknowledgment by mortgagor of previous mortgage — Subsequent mortgage executed before acknowledgment—Acknowledgment, if binding on subsequent mortgagee — Amount kept in hands of mortgagee to pay off prior mortgage—Under deed, lien of previous mortgagee acquired by subsequent mortgagee—Payment by latter to former, of principal and interest in full before January 1, 1928—Such payment, whether attracts S. 20.

Per **Agarwala, J.**—Where an acknowledgment made by the mortgagor is genuine, it is sufficient to provide a fresh **terminus a qua** against the subsequent mortgagee even if his mortgage is executed before such acknowledgment. To confine the word 'acknowledgment' in S. 19 to an acknowledgment made prior to a transfer or mortgage would mean qualifying the phrase 'some person through whom he derives title' by reading it as 'some person through whom he derives title subsequent to the acknowledgment', and it is not permissible to add to or alter the language of a statute in this way.

The mortgagor executed the mortgage in favour of the plaintiff under which a sum of Rs. 3, 515 which was due to the previous mortgagee was kept with the plaintiff so that he himself may pay the debt and take back the mortgage bond and keep the same with him as evidence. The plaintiff accordingly paid the amount to the previous mortgagee which payment was endorsed by him on the back of the mortgage. There was a further recital in the mortgage bond in suit: "The mortgage lien possessed by the former mortgagee in respect of the mortgaged share.....is acquired entirely by the plaintiff mortgagee" The suit was instituted against the mortgagor and the subsequent mortgagees more than 12 years after the due date of payment fixed in the mortgage bond of the previous mortgage which was redeemed by the plaintiff but within 12 years of the date of the payment of those dues to the previous mortgagee:

Held, Per **Manohar Lall, J.**—That the endorsement showed that the total sum of principal and interest had been paid and, therefore, the interest

had been paid in full as such and this payment was made before January 1, 1928; by the plaintiff who was duly authorised to make payment and it kept alive the mortgage lien. In these circumstances the payment of interest as such could be validly treated as a payment on the bond of previous mortgage and, therefore, attracted the provisions of S. 20 of the Limitation Act, to enlarge the period of limitation for a suit to enforce the liability which had been transferred to the plaintiff by the doctrine of subrogation. A.I.R. 1942 Pat. 166=8 B.R. 316=198 Ind. Cas. 3.

——**S. 19—Transfer of part of hypotheca by mortgagor — Subsequent acknowledgment by him—Whether binds transferee.**

An acknowledgment made by a mortgagor after transfer of his interest in a particular property forming part of the hypotheca will not bind the transferee even if the personal remedy against the mortgagor was alive on the date of acknowledgment and the mortgagor had not parted with all the property hypothecated at the time when he made the acknowledgment. 58 M.L.W. 643 =1945 M.W.N. 774=(1945) 2 M.L.J. 556=A.I.R. 1946 Mad 88.

——**S. 19—Acknowledgment by mortgagor after puisne mortgage.**

A subsequent mortgagee is not bound by an acknowledgment in favour of a prior mortgagee made after the date of the subsequent mortgage. 1944 N.L.J. 229=A.I.R. 1944 Nag. 163=I.L.R. (1944) Nag. 383=216 Ind. Cas. 296 (F.B.).

——**S. 19—Acknowledgment by mortgagor after subsequent mortgage.**

An acknowledgment made by the mortgagor of a prior mortgage will extend the period of limitation as against a puisne mortgagee even though the acknowledgment was made subsequent to the date of the puisne mortgage. 8 O.W.N. 1160=A.I.R. 1932 Oudh 1=7 Luck. 270=138 Ind. Cas. 800.

——**S. 19—Mortgagor and Mortgagee—Acknowledging debt after execution of puisne mortgage.**

An acknowledgment by a mortgagor in favour of the first mortgagee is effective against a second mortgagee whose title originated before the acknowledgment was given. 17 A.L.J. 763=51 Ind. Cas. 829.

——**S. 19—Acknowledgment by mortgagor after sale of his interest.**

Section 19 perfectly general; it is not confined to mortgages; it applies to every form of property movable and immovable, and it would appear strange that a man in wrongful possession of property may transfer it to a **bona fide** purchaser and that the latter is not quieted in his possession by the lapse of time, but may be defeated by acknowledgments made without his knowledge by the person from whom he derived title.

Acknowledgments made by mortgagors after they had parted with all their interest to a purchaser do not bind the purchaser. A.I.R. 1942 P.C. 67=1942 O.W.N. 604=(1942) 2 M.L.J. 559=9 B.R. 57=(1942) A.L.J. 648=I.L.R. (1942) Lah. 686=1942 A.W.R. 41=55 L.W. 854=47 C.W.N. 43=1943 M.W.N. 1=I.L.R. (1942) All. 660=I.L.R. (1942) Kar. (P.C.) 153 Sup.=45 Bom.L.R. 267=76 C.L.J. 447=69 I.A. 130=202 Ind. Cas. 740 (P.C.) and 9 B.R. 58=I.L.R. (1942) Lah. 684=47 C.W.N. 46 (1)=202 Ind. Cas. 742 (P.C.).

——**Ss. 19 and 20**—A mortgagor who has lost all interest in the mortgaged property, cannot, by an acknowledgment within the meaning of S. 19, Limitation Act, or by the payment of interest or principal within the meaning of S. 20, bind the person on whom his interest has devolved. A.I.R. 1940 Mad. 470=(1940) 1 M.L.J. 766=I.L.R. (1940) Mad. 872=(1940) M.W.N. 448=51 L.W. 592=188 Ind. Cas. 603 (F.B.).

Overruling A.I.R. 1935 Mad. 899=8 R.M. 885=161 Ind. Cas. 924.

——**Ss. 19 and 20—Payment of interest by mortgagor after transfer.**

Payment of interest by a mortgagor after he has transferred a portion of the mortgaged properties to others would keep the mortgage alive even as against the latter and the properties transferred to them. A.I.R. 1933 Cal. 325=36 C.W.N. 1138=58 C.L.J. 422=60 C. 87=143 Ind. Cas. 315.

——**S. 19**—When a mortgagor has sold a portion of, the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the sale is effective to save limitation as against the property sold.

Quaere.—Whether after a mortgagor's personal liability had become barred and he had sold all the mortgaged property, any acknowledgment by him of the mortgage debt can save limitation against the purchaser. 36 L.W. 44=(1932) M.W.N. 614=A.I.R. 1932 Mad. 516=63 M.L.J. 111=55 M. 758=138 Ind. Cas. 632.

——**S. 19—Acknowledgment after cessation of interest in mortgaged properties—Who is bound by.**

A peson who was a party to the mortgage contract can make an acknowledgment even after interest in the properties had ceased but the acknowledgment binds only him or persons claiming through him, i.e.; assignees from him after acknowledgment. 86 Ind. Cas. 434=A.I.R. 1925 Mad. 1108.

——**Ss. 19, 20 and 21—Mortgage — Acknowledgment — Effect on previous purchaser of portion of mortgaged property.**

Acknowledgment of liability or part payment by by a mortgagor has the effect of keeping alive the mortgage debt as against even such of the mortgaged properties as the mortgagor has sold to a third person, whether the purchaser, when he bought, had notice of the mortgage or not. A mortgagee cannot by the act of parties who are entitled only to the equity of redemption be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released or given it up and so long as that mortgage is legally kept alive. 11 B.L.R. 115 fol. (1905) 9 C.W.N. 868=32 C. 1077.

——**S. 19—Mortgage—Preliminary instalment decree—Payment of instalment does not amount to acknowledgment.**

A payment of an instalment under a preliminary mortgage decree directing payment of mortgage money by instalments cannot, in any case, amount to recognition of the right of the decreeholder to apply for a final decree. It is merely a

payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. A.I.R. 1942 Mad. 581=55 M. L. W. 276=(1942) 1 M.L.J. 532=1942 M.W.N. 367=I. L. R. (1942) Mad. 770=202 Ind. Cas. 629.

——S. 19—Mortgagor and mortgagee.

Where there is an acknowledgment by a mortgagor, that acknowledgment can only bind a mortgagee who derives his title subsequent to the acknowledgment, but it cannot bind a mortgagee who derives title prior to the acknowledgment. A.I.R. 1936 All. 636=1936 A.W.R. 516=(1936) A.L.J. 586=58 A. 912=164 Ind. Cas. 725.

——S. 19—Written statement in another suit, admitting rights of mortgagee, sufficient acknowledgment.

A sued B and C for foreclosure of a mortgage. The suit was ex facie time-barred but A alleged written acknowledgment on the part of B and C. One D had filed a suit against B and C. D impleaded A as a defendant-mortgagee. B and C in the written statement of D's suit signed by them admitted the allegation of A's mortgage

Held, that there was sufficient acknowledgment. In D's suit A was clearly impleaded by D in the character of a mortgagee under the particular mortgage-deed and this was admitted in writing by B and C. This being so, the requirements of S. 19 were amply satisfied. D's plaint and written statement by B and C could be read as evidence of acknowledgment. 6 O.W.N. 943=A. I.R. 1930 Oudh 67.

——S. 19—Equitable mortgage—Personal remedy—Limitation — Acceptance of pro notes towards debt—If time extended.

Where plaintiffs who were secured creditors and who had a period of twelve years' limitation for instituting a suit to enforce their rights as mortgagees, but a period of only three years' limitation to enforce their rights for the deficiency, if any, arising put of the sale of the mortgaged property from the other property of the debtor, accepted promissory notes in respect of the loan.

Held, that the only purpose for which the promissory notes were taken was to extend the period of limitation in respect of the personal liability of the defendant and the original debt secured by the deposit of title-deeds continued to exist notwithstanding the execution of fresh promissory notes. 17 W.R. 201, Foll. 105 Ind. Cas. 765 =22 S.L.R. 222=A.I.R. 1928 Sind 17.

——S. 19—Mortgage — Sale of part of mortgage property — Subsequent renewal of mortgage by mortgagor is not acknowledgment but is like part-payment — Limitation commences from latter mortgage, even against intermediate alienee.

Where after sale of part of the mortgaged property, a fresh deed is executed by the mortgagor in renewal of the original mortgage, there is a new promise to pay by the mortgagor, and the question is not whether it operates as an acknowledgment to save the bar of limitation as against the intermediate alienee because it is a new covenant substituted for the old covenant and not a mere acknowledgment. There being a new covenant substituted for the old one the period of limitation even as against the alienee is, to be calculated from the date mentioned in the later mortgage and not from that in the original one. The effect of such a new covenant is more analagous to a part-payment under S. 20, Limitation Act, and not merely to that of an acknowledgment. 1 C.L.J. 337, Foll. 86 Ind. Cas. 434=A. I. R. 1925 Mad. 1108.

——S. 19—Admission as to third party's right in plaint valid acknowledgment of such right.

In a suit for redemption of mortgage a statement in the plaint made by some of the mortgagors that certain other mortgagors who did not join in that suit as plaintiff had a right to redeem the mortgage was an admission in respect of the latter's right with regard to the mortgaged property and is an acknowledgment within the meaning of S. 19 of the Limitation Act and gives a fresh start to limitation. 84 Ind. Cas. 5=5 L.R. A. Civ. 530=A.I.R. 1924 All. 876.

——S. 19—Suit for possession of mortgaged property—Bonds given in lieu of interest—Time extended.

Plaintiffs sued for possession of certain land which had been mortgaged to them and claimed an extended period by reason of the existence of certain acknowledgments by the mortgagor. This extension was claimed on the basis of acknowledgments contained in bonds, dated 1899 and 1903 executed by the mortgagor in the plaintiff's favour. In these bonds part of the consideration was entered as being the interest due to the plaintiffs on the mortgage in the suit.

Held, that the admission of liability to pay interest under the mortgage in the bonds of 1899 and 1903 amounts to an acknowledgment of liability under the mortgage including liability to give possession to the mortgagee. 25 Cal. 844; 54 Ind. Cas. 985, Foll. 68 Ind. Cas. 185=2 L.L. J. 549.

——S. 19—Mortgagor and mortgagee—Effect on remedies of mortgagee.

An admission by a mortgagor of his liability under the mortgage, within S. 19 of the Limitation Act carries with it an admission of all the remedies to which the mortgagee might be entitled under it. 1 U.P.R. (J.C.) 45=6 O.L.J. 248= 51 Ind. Cas. 985.

——Ss. 19 and 20—Mortgagor and mortgagee—Effect on puisne mortgagee.

An acknowledgment of mortgage debt is good not only against the person making it but against those who derive their title from him, i.e., puisne mortgagee. 1 C.L.J. 337, Expl.

Quaere.—What is the effect of an acknowledgment against the previous junior encumbrancer. 5 L.W. 111=21 M.L.T. 105=32 M.L.J. 263= 38 Ind. Cas. 240.

——S. 19—Acknowledgment of existence of mortgage but with a wrong date.

Where parties, defendants to a redemption suit, had, in a previous suit, in which it had been sought to eject them as trespassers, set up the existence of a mortgage, in virtue of which they alleged they were in possession, but assigned a wrong date to the mortgage.

Held, the mere fact that a wrong date was assigned will not take away from the admission its efficacy under S. 19. (1903) 1 A.L.J. 1=1904 A.W.N. 38=26 A. 313.

——S. 19—Admission in plaint of the rights of other co mortgagors—Sufficient acknowledgment.

Where in a suit for redemption instituted by a co-mortgagor, he admits in the plaint the rights of the other mortgagors not joined as parties to redeem, the statement is an acknowledgment of the other mortgagor's right to redeem within S. 19 of the Limitation Act. 36 All. 408, Foll. 64 Ind. Cas. 979 (All.)

——S. 19—Joint mortgagors—Under Acts of 1871 and 1877 acknowledgment must be by all the mortgagors.

Under the Limitation Acts of 1871 and 1877 an acknowledgment of the right of redemption must be made by all the mortgagees and if not so made, it did not save limitation even against the shares of those who signed it, if the mortgage was indivisible. 67 Ind. Cas. 463=5 L.L.J. 114.

——S. 19—Mortgagor and Mortgagee—Co-mortgagor—Acknowledgment by—Effect of S. 1 (15).

An acknowledgment by the mortgagee's son entitled to only a share in the mortgaged property cannot give a fresh starting point of limitation and the fact that he afterwards acquired the whole of property would make no difference because the acknowledgment to be effectual must be valid on the date when it was made. In a suit for redemption of a mortgage, an acknowledgment of the mortgagor's right of redemption to save limitation must be by a person in whom the entirety of the mortgagee's rights were vested. 5 M.L.T. 261 =1 Ind. Cas. 204.

——S. 19—Execution of fresh mortgage by one of co-mortgagors in consideration of previous mortgage after separation from other.

One of the two co mortgagors in consideration of a previous mortgage executed a fresh mortgage and absolved himself from all the liabilities under the first mortgage after separation between them:

Held, that the subsequent bond could not be an acknowledgment of liability under the first bond by or on behalf of the other. A.I.R. 1939 Pat. 451=20 P.L.T. 619=18 Pat. 434=6 B.R. 56= =184 Ind. Cas. 597.

——S. 19—An acknowledgment by a mortgagor of his liability under the mortgage in an alienation made after parting with the equity of redemption, is against his interest and amounts to an acknowledgment of liability within the meaning of S. 19, Limitation Act, and binds his successor-in-title.

Obiter.—Where such an admission is not against his interest, it would presumably be held that such an admission was no acknowledgment at all.

Where there is a recital in the mortgage-deed that there were no prior mortgages, the wording of the document merely shows that the mortgagee accepted that statement. It does not, however, safeguard the mortgagee against the existence of such a mortgage. A.I.R. 1937 Mad. 826=176 Ind. Cas. 939.

10. (b) Mortgagor and Mortgagee—Acknowledgment by mortgagee.

——S. 19—Applicability—Tahsildar's report that mortgagees had asserted before him as to the existence of mortgages—Fresh start for redemption.

Where in respect of mortgages of 1851 and 1853, the mortgagees asserted their existence in 1886 when there was a dispute about the existence of the mortgages and the Tahsildar before whom it was made has made a report of it, the reference to such an assertion in the Tahsildar's report would be admissible in evidence and would satisfy the requirements of S. 19 of the Limitation Act so as to afford a fresh starting point for redemption. I.L.R. (1950) A. 235=1949 A.L.J. 522=1950 A.W.R. 1.

——Ss. 19, 21—Acknowledgment by one of several co mortgagees, is insufficient to provide a fresh period of limitation—Held, that neither admission in deed of assignment nor plaint in partition suit provided fresh period. 19 Pat. 938=A. I. R. 1941 Pat. 147=21 P.L.T. 702=6 B.R. 864=189 Ind. Cas. 855.

——Ss. 19, 21—Co-mortgagees.

An acknowledgment of liability, to be redeemed; made by one of several mortgagees is not sufficient to keep the right to redeem alive either as against the mortgagee who signed the acknowledgment or as against the rest. A.I.R. 1934 Lah. 293=151 Ind. Cas. 385 (1).

——S. 19—Acknowledgment to one of several mortgagees—If other mortgagees bound.

A mortgagor whose interest in the property mortgaged to several persons has not wholly ceased to exist can acknowledge in favour of the first mortgagee so as to bind the subsequent mortgagees. 62 Ind. Cas. 833=29 M.L.T. 189 =40 M.L.J. 126.

——S. 19—Acknowledment by one of joint mortgagees.

An acknowledgment by one of two mortgagees of the title of a mortgagor would not save the mortgagor's right to redeem from being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piece-meal. 18 A. 458, Foll. 34 All. 371=9 A.L.J. 386= 14 Ind. Cas. 132.

——S. 19 — Authority to acknowledge — Co-mortgagee's acknowledgment.

Acknowledgment by mortgagee not proved to have been duly authorised as agent of his co-mortgagee does not extend the period of limitation. The Settlement Officer is not an agent of the mortgagee within S. 19. 35 P W.R 1910= 39 P.R. 1910=179 P.L.R. 1910=5 Ind. Cas. 992.

——S. 19 — Mortgagor and Mortgagee — Co-mortgagees.

Separate mortgagees signing separate acknowledgments that they were mortgagees in respect of their shares is sufficient acknowledgment within the meaning of S. 19. 11 Bom.L.R. 318=2 Ind. Cas. 469.

——S. 19—Acknowledgment by agent—Acknowledgment by one of two mortgagees — Act 14 of 1859.

Under Act 14 of 1859 an acknowledgment by an agent could not have the effect of saving the operation of limitation. 13 B.L.R. 177 (P.C.); 1 A. 642, foll. Where a mortgage is joint in favour of two mortgagees, an acknowlegment by

one of them cannot enure to the benefit of the mortgagor as against the other. 18 A. 458, foll. (1904) 1 A.L.J. 355.

——S. 19—Acknowledgment by one of several co-heirs of mortgagee—Not binding on others.

An acknowledgment made by one of the heirs of the moragagee who have divided the mortgage property among themselves without the consent of the mortgagor is binding on him or his heir so far as regards the property in his possession though it may not be binding on the co-heirs of the mortgagee. 32 Bom.L.R. 1096=A.I.R. 1930 Bom. 466=54 Bom. 625 (F.B.).

——S. 19—Acknowledgment by one of several heirs of a mortgagee.

An acknowledgment to be effectual, must have been a good acknowledgment at the date when it was made. An acknowledgment by one of several heirs of the mortgagee of the mortgagor's right of redemption is not sufficient to give a new starting point for limitation under S. 1, Cl. 15 of Act XIV of 1859 even to the extent of the interest of the person acknowledging. (1909) 19 M.L.J. 288=5 M.L.T. 208=1 Ind. Cas. 203 (2).

——S. 19—Prior mortgagee admitting genuineness of mortgage-deed in favour of subsequent mortgagee.

When a person admits the genuineness of a document, he admits his liability under it. Hence when a prior mortgagee admits the mortgage-deed in favour of a subsequent mortgagee, he admits the latter to be a subsequent mortgagee. That amounts to an acknowledgment of liability within the meaning of S. 19, Limitation Act. A.I.R. 1943 Oudh 164=1942 O.W.N. 766=1942 A.W.R. 355=18 Luck. 601=204 Ind. Cas. 444.

——S. 19—Mortgage of 1791—Redemption suit in 1933 — Acknowledgments signed by Pleader in 1849 and 1867—Acknowledgment of 1849 invalid under S. 1 (15), Limitation Act (14 of 1859)—Acknowledgment of 1867 also invalid under Art. 148, Limitation Act (15 of 1877)—Suit held barred under S. 1 (15), Limitation Act (14 of 1859), read with S. 1 of Amending Act (11 of 1861)—S. 2, Limitation Act (15 of 1877), held applied.

The general principle, that the Act of Limitation to apply to a suit is the one in force at the date of the suit is subject to the qualification that where a right to bring a suit had been extinguished before, it cannot be revived subsequently.

In October 1791, the plaintiff's predecessors-in-title mortgaged certain property with possession to the defendant's predecessor-in-title for a period of seven years. In 1848, in the suit by one of the mortgagors to redeem the mortgage the pleader of the mortgagee put in a statement of accounts signed by himself on June 21, 1849. In 1863 another redemption suit was filed and in the memo of second appeal by the descendant of the original mortgagee arising from that suit, the existence of the mortgage and relationship of the mortgagor and the mortgagee was admitted as subsisting. This memorandum dated January 28, 1867, was signed by the pleader of the appellant mortgagee. In 1921 and 1922, the descendants of the mortgagee sold a portion of the mortgaged property. In 1933 the representatives of the mortgagors filed suits to redeem the mortgage of 1791. The plaintiffs relied on the above-mentioned acknowledgments of 1849 and 1867:

Held, that the facts of this case attracted the application of S. 2, Limitation Act of 1877 as well as S. 6, General Clauses Act; because the mortgage in suit was in the year 1791, and it was governed by the provisions of S. 1, Cl. (15), Limitation Act of 1859 read with S. 1 of the amending Act (11 of 1861), according to which a suit for redemption of a mortgage, which would have been barred when the Act of 1859 came into force would be barred after January 1, 1862. The alleged acknowledgment by the pleader in 1849 did not save the suit because under S. 1, cl. (15) of the Act of 1859, the acknowledgment must be by a mortgagee or some person claiming under him, and here it was not by such a person but by a legal agent. Therefore, the suit was barred after the beginning of the year 1862. Under Art. 148 of the Act of 1871, also the acknowledgment must be given by the same type of person as mentioned in the Act of 1859. Therefore in any case the suit was barred at the date when the Act of 1877 came into force, and, therefore, S. 2 of that Act applied with the result that the right to sue having been lost, it could not be revived even though the acknowledgments were good under the Act of 1908 when the suits were brought. 43 Bom.L.R. 194=A.I.R. 1941 Bom. 178=I.L.R. (1941) Bom. 260=197 Ind. Cas. 88.

——S. 19—Where the sub-mortgage effected by the original mortgagee clearly recites the mortgagee's rights and liabilities under the original mortgage, this is an acknowledgment within the meaning of S. 19 of the Limitation Act. A.I.R. 1939 Pat. 427=5 B.R. 489=180 Ind. Cas. 795.

——S. 19—Sub-mortgage — Acknowledgment of mortgage right.

A sub-mortgage can amount to a valid acknowledgment that the property was on that date held under mortgage right. 32 Bom.L.R. 1096=A.I.R. 1930 Bom. 466=54 Bom. 625 (F.B.).

——S. 19—Mortgage merged into a decree—Acknowledgment of existence of decree, whether acknowledgment of subsistence of mortgage debt.

Where the original mortgage debt had ceased to exist by reason of the decree, the acknowledgment of the existence of the decree, cannot be taken to be an acknowledgment of the subsistence of the debt which that decree extinguished so as to save limitation. A.I.R. 1939 Mad. 678=49 L.W. 657=(1939) 1 M.L.J. 770=(1939) M.W.N. 590=189 Ind. Cas. 200.

——S. 19—Redemption by second mortgagee—Admission by first mortgagee regarding subsistence of mortgage if can rely on.

In a suit for redemption the second mortgagee can rely upon an admission made by the first mortgagee in a deed, executed within sixty years next before the suit, in which deed he admitted that the common mortgagor was the owner and that the suit properties were demised to his family on kanom. Such an admission necessarily implies that the mortgage was then subsisting and that it was liable to be redeemed. 30 M.L.W. 1045=A.I.R. 1930 Mad. 65=57 M.L.J. 789.

——S. 19—Admission of right to redeem—Mortgage held to be executed within period of redemption before acknowledgment.

Where an acknowledgment by mortgagee contains an admission in unequivocal terms that the mortgagor's right of redemption subsisted till the date of the acknowledgment, the mortgagor should be deemed to have established that the mortgage had been made some time within the period of limitation for redemption (60 years) before the date of such admission. 115 Ind .Cas. 451=A. I.R. 1929 All. 209.

——S. 19—Sale of mortgagee rights — Sufficient acknowledgment of the subsistence of mortgage.

In 1908, G the mortgagee, his brother and his son executed a sale-deed in favour of the defendant of mortgagee rights in a grove. In that sale-deed they stated that they were mortgagees of the grove of K and they purported to sell their rights as mortgagees to the defendant.

Held, that the very fact of G selling his mortgagee rights was an express acknowledgment of the existence of a subsisting mortgage and of subsisting rights which he was competent to sell and the very fact of defendant purchasing those rights was an acceptance on his behalf of an existing mortgage, a mortgage which was in force as a subsisting mortgage on the date of the sale to him, and therefore he cannot set up any defence inconsistent with mortgagee rights. 89 Ind. Cas. 118=4 L.R.A. Civ. 470=A.I.R. 1924 All. 458.

——S. 19—Authority to acknowledge—Assignor.

Acknowledgment by transferor of a mortgage right binds the transferee. 7 A.L.J. 847=6 Ind. Cas. 190.

——S. 19—Acknowledgment — Mortgagor narrating the relationship of mortgagor and mortgagee—Mortgagee admitting its correctness by signature—Effect of the writing.

Where a mortgagor describes his mortgagee as such and the latter admits in writing over his signature the correctness of that description, the meaning of the admission is as plain as language can make it. Thereby the mortgagee unmistakably affirms that he is what he is described to be —a mortgagee—and it is a necessary implication from the admission that he acknowledges all the legal consequences of his position as a mortgagee, on which his liability is to be redeemed. It is immaterial in what connection of for what purpose the description was made by the mortgagor and admitted as correct by the mortgagee—whether it was or was not made in a document which had nothing to do either directly or indirectly with the mortgage. The sole question is whether the writing, whatever its immediate purpose or occasion, contains an acknowledgment of the liability in dispute. (1908) 10 Bom.L.R. 385.

——Ss. 19 and 22—Mortgage — Relinquishment of charge on portion after payment of portion of debt. See 10 C.W.N. 551=33 Cal. 613.

10. (c) Mortgagor and Mortgagee—Acknowledgment by sub-mortgagee.

——S. 19—Execution sale—Prior mortgage mentioned in list of properties to be sold—Sufficient acknowledgment.

Where a sub-mortgagee in submitting a list of property to be sold in execution of his decree, described the property as subject to prior mortgage.

Held, that the description amounted to acknowledgment and saved limitation as against him for redeeming the original mortgage. 85 Ind. Cas. 330=22 A.L.J. 1018=5 L.R.A. Civ. 718 =A.I.R. 1925 All. 174.

——S. 19—Rent note signed by sub-mortgagee to mortgage — Property mentioned as mortgaged to mortgagee—If acknowledgment of liability to be redeemed.

Where in a rent note of 1878 given by the sub-mortgagee to the mortgagee the property was described as 'the property mortgaged to you."

Held, that the sub-mortgagee's signature on the rent note cannot mean an acknowledgment of liability to be redeemed by the original mortgagor.

If a suit against original mortgagee was barred, it is difficult to see how it would not also be barred against sub-mortgagee, unless he had directly admitted his liability to be redeemed by the mortgagor, and the signature on the rent note did not point with reasonable certainty to that liability. 70 I.C. 906=24 Bom.L.R. 713=46 Bom 1000 =A.I.R. 1922 Bom. 356.

11. "Period prescribed."

——S. 19—Acknowledgment made within extended period given by S. 6—Validity —"Period prescribed." See LIMITATION ACT, SS. 6 AND 19. 51 Bom.L.R. 830=A.I.R. 1950 Bom. 94.

——S. 19—Minor — Must acknowledge before expiry of limitation prescribed for the suit.

Under S. 6, a minor may institute the suit and make an application within the same period after the disability has ceased as he would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule. The time prescribed therefor in the third column of the first schedule is different from the intended period within which a minor may bring a suit after the disability has ceased. The acknowledgment of liability must, therefore, under S. 19, be given before the expiration of the period prescribed therefor in the third column of the first schedule and not before the expiration of the period within which a minor may bring the suit. 26 Bom 782; 15 Bom.L.R. 348; Foll. 112 Ind. Cas. 24=52 Bom. 521=30 Bom.L.R. 733=A.I.R. 1928 Bom. 319.

——S. 19—Acknowledgment after limitation but during period excluded by local enactment (i.e.) S. 9 (5), U. P. Encumbered Estates Act—If effective.

The words in S. 19 of the Limitation Act are 'before the expiration of the period prescribed.' This must mean prescribed by the Act in which S. 19 occurs, that is, the Limitation Act read by itself and without reference to any other enactment. Hence an acknowledgment beyond limitation but within a period which has to be excluded under a local or special Act (i.e.) S. 9 (5) of the United Provinces Encumbered Estates Act, is not an acknowledgment within S. 19 of the Limitation Act and would not save the suit from the bar of limitation. I.L.R. (1946) All. 532=

A.I.R. 1947 All. 199=226 Ind. Cas. 440=1946 A.L.W. 450=1946 A.W.R. (H.C.) 450.

——S. 19—Section 19 cannot apply to an acknowledgment made after expiry of the period of limitation prescribed but during the period excluded by S. 52, U. P. Court of Wards Act (Act IV of 1912). A.I.R. 1938 All. 217=(1938) A.L.J. 252=I.L.R. (1938) All. 363=175 Ind. Cas. 556 (F.B.).

Overrules—A.I.R. 1927 All. 577=102 Ind. Cas. 111.

——S. 19—Punjab Act (3 of 1923), S. 5—Period prescribed in—Applicability.

The period within which a suit could be instituted is the "period prescribed for the suit" within the meaning of S. 19, Limitation Act. Therefore the period of two years within which a suit could be filed under S. 5, Punjab Act 3 of 1923 is the "period prescribed for the suit" within the meaning of S. 19, Limitation Act.

On 17th May, 1921, A signed a balance in favour of B for an amount due and on 7th June, 1924, he acknowledged his liability under that balance. B instituted a suit for recovery of the amount on 9th March, 1927.

Held, that the suit was within time. Section 5 Punjab Act 3 of 1923, prevented the suit from being barred by time for two years from the date on which the Act came into force and therefore the right to sue being alive on 7th June, 1924, when the liability was acknowledged, the acknowledgment extended the time by virtue of S. 19, Limitation Act, by three years from its date. A.I.R. 1930 Lah. 978=129 Ind. Cas. 125.

——S. 19—Prescribed — Meaning — Limitation prescribed by Punjab Loans Act 3 of 1923.

There is no justification for holding that 'prescribed' in S. 19 of the Limitation Act must be limited to the time mentioned in the schedules to the Act. The period of within which a suit can be instituted is the "period prescribed for the suit" within the meaning of S. 19. Therefore the period of two years within which a suit can be filed under S. 5, Punjab Act of 1923 is the "period prescribed for the suit."

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——S. 19—Striking balance — Subsequent acknowledgment before limitation — Time runs from acknowledgment.

On 5th March, 1919, the defendant struck a balance in the plaintiff's bahi for a certain sum of money. On 29th November, 1923, the defendant sent to the plaintiff's a post card, duly signed by him, acknowledging liability for the debt due on this balance. The plaintiff's sued on 2nd October 1925, to recover the sum due on foot of the balance.

Held, that the suit was within time. On 5th March, 1919, when the balance was struck the Punjab Loans Limitation Act of 1904 was in force in which a period of 6 years was provided for suits of this description. The provisions of S. 19, Limitation Act were clearly made applicable to suits governed by it. Consequently the acknowledgment of 29th November, 1923; in writing being made within six years of the date of the balance gave a fresh starting point of limitation to the plaintiffs. 114 Ind. Cas. 702=A.I.R. 1919 Lah. 124.

——S. 19—Acknowledgment — Bengal Tenancy Act, Sch. II, Art. 16. See BENGAL TENANCY ACT, Sch. II, Art. 6. 9 C.W.N. 1025.

——S. 19—"Prescribed" — Meaning of.

The word 'prescribed' in S. 19 is not limited to the period prescribed in Sch. I of the Act; in computing the period prescribed, the period which a party is entitled to exclude under any law for the time being in force should be taken into account. A.I.R. 1938 Mad. 19=46 L.W. 559 =(1937) M.W.N. 929=(1937) 2 M.L.J. 703= I.L.R. (1938) Mad. 439=176 Ind. Cas. 321.

——S. 19—The words 'before the expiration of the period prescribed for a suit' in S. 19, Limitation Act, refer to the period prescribed by the law which was in force at the time when the acknowledgment was made. A.I.R. 1933 Lah. 47=34 P.L.R. 252=141 Ind. Cas. 425.

——S. 19—An acknowledgment of liability, to be valid and effective under S. 19 of the Limitation Act, must be made before the expiration of the period prescribed by the First Schedule. A.I.R. 1931 Lah. 691=33 P.L.R. 59=13 L. 240=132 Ind. Cas. 590.

——S. 19—I. e. by any law for the time being in force.

The word "prescribed" is not defined in the Act. It means "prescribed by any law for the time being in force" and not only the periods in the Sch. I to the Act. 80 Ind. Cas. 743=5 L. R.A. Civ. 657=A.I.R. 1925 All. 68.

——Ss. 19, 4—Acknowledgment beyond period of limitation prescribed by schedule—Period expiring during Court vacation — Acknowledgment made during vacation.

Section 19 does not say in so many words that the acknowledgment of liability should be before the expiration of the period prescribed for a suit in the Schedule. It merely says the "period prescribed" for the suit and the expression "period prescribed" should not be limited to the period prescribed in the Schedule alone, but the expression means the period prescribed by law, i.e., the period prescribed by the whole body of the Limitation Act.

Consequently, where the acknowledgment is made one day beyond the period of three years from the date of the bond, but the period expired during the month when the Civil Courts were closed for the vacation and the acknowledgment had been made before the date on which the Courts re-opened, it is a valid acknowledgment within S. 19 of the Limitation Act. 38 P.L.R. 934=A.I.R. 1937 Lah. 162=164 Ind. Cas. 650.

——S. 19—Limitation expiring on date when the Courts are closed for vacation—Fresh acknow-

ledgment on date when the Court reopens is not good in order to save limitation. A.I.R. 1941 Nag. 100=I.L.R. (1941) Nag. 144=1940 N.L.J. 607=194 Ind. Cas. 806.

Overrules—A.I.R. 1938 Nag. 192=110 Ind. Cas. 76.

——S. 19—An acknowledgment, where the period of limitation expires on a holiday and an acknowledgment is made on the next day is not valid. A.I.R. 1937 Lah. 642=174 Ind. Cas. 258.

——S. 19—Court closed on the day when period of limitation expiring — Acknowledgment after expiry of period of limitation but before re-opening of Court:

Held, that the acknowledgment did not give a fresh starting point. 45 L.W. 72=(1937) M.W.N. 108=(1937) 1 M.L.J. 262=A.I.R. 1937 Mad. 367=169 Ind. Cas. 653.

——Ss. 19 and 4—Applicability.

Section 4 of the Limitation Act cannot be made applicable to acknowledgments under S. 19. 58 C. 1148=35 C.W.N. 370=A.I.R. 1931 Cal. 785 =134 Ind. Cas. 1132.

——Ss. 19 and 4—Effect of acknowledgment—If dependant on the day when somebody could have brought a suit.

It is quite unworkable and really impossible to suppose that the effect of a payment or the effect of an acknowledgment should depend upon the day on which somebody who never brought a suit at all could have brought it. If one was to introduce into the wording of Ss. 19 and 20, the consideration that is brought into force by S. 4, the Limitation Law would become extremely unworkable. 114 Ind. Cas. 483=55 Cal. 1210=A.I.R. 1929 Cal. 68.

——S. 19—Period expiring in Court vacation—Acknowledgment made after expiry of actual period, but before expiry of vacation saves limitation.

The dealings between the parties ceased on 3rd June, 1921. On 13th June, 1924, that is over three years later the defendant executed a sarkat admitting liability. The Civil Court vacation extended until 16th June, 1927.

Held, that the acknowledgment must be held to have been made within the period prescribed by limitation for the suit, for that period in reality amounted to not merely the actual period but three years plus the unexpired portion of the vacation. 26 Bom. 782, Diss. 110 Ind. Cas. 76 =24 N.L.R. 83=11 N.L.J. 87=A.I.R. 1928 Nag. 192.

——S. 19—Includes schedule period read with S. 4.

The "period prescribed" means the period prescribed by the Schedule read with S. 4. Therefore, where an acknowledgment of a debt is made after the expiration of the three years' period prescribed by Sch. I for a suit on a promissory note, but before a suit on the note is actually bared by limitation, it is a good acknowledgment. 26 Bom. 782, Not. foll. 102 Ind. Cas. 111=49 All. 726=25 A.L.J. 589=A.I.R. 1927 All. 577.

——S. 19—I.e. by the Schedule.

The word "prescribed" in S. 19 means prescribed by the schedule and not with reference to S. 4. 65 Ind. Cas. 716=5 N.L.J. 178=19 N.L.R. 135=A.I.R. 1922 Nag. 250.

——S. 19—Section 4 has no application.

Per Ramesam, J.—Section 4 cannot be tacked on prior to the period of extension given by S. 19. 26 Bom. 782, Foll. 63 Ind. Cas. 924=44 Mad. 817=13 M.L.W. 631=1921 M.W.N. 442 =A.I.R. 1921 Mad. 654=41 M.L.J. 84.

——S. 19—Acknowledgment after period of limitation, but before right to sue expired—Validity of.

An acknowledgment of a debt, made more than three years after the date of the debt, cannot serve to keep alive the debt simply by the fact that the right to sue on the original debt was surviving to the creditor on the date of the acknowledgment, as the Courts had closed in vacation. (1902) 4 Bom.L.R. 608=26 B. 782.

——Ss. 19 and 20—The word 'prescribed' in Ss. 19 and 20 must not be understood as only meaning prescribed in the Second Schedule to the Limitation Act. It includes the special class of cases dealt with in S. 31 (before the amendment of 1930). 40 L.W. 893=(1934) M.W.N. 1343= A.I.R. 1935 Mad. 64=58 M. 270=68 M.L.J. 12=153 Ind. Cas. 2 (F.B.).

——S. 19—Interpretation—"Prescribed".

The word 'prescribed' does not exclusively refer to the schedule. It means prescribed by any section of the Act or article of the schedule. 1930 M.W.N. 930=32 M.L.W. 502.=A.I.R. 1930 Mad. 991=59 M.L.J. 881.

——S. 19—Scope of.

Plaintiff relying on acknowledgment of liability in suit on hypothecation bond made after expiry of period of 12 years but within two years provided by S. 31. S. 31 prescribes period of limitation and so suit is within time. A.I.R. 1930 Mad. 991=1930 M.W.N. 930=32 M.L.W. 502 =59 M.L.J. 881.

——S. 19—Not restricted to that in Sch. 1—Applies to special period under S. 31.

The term 'period' is not limited to the period prescribed in Sch. 1 of the Act but has been extended to apply to the special period of two years mentioned in S. 31 of the Act. A.I.R. 1925 All. 68; A.I.R. 1927 All. 114 and A.I.R. 1927 All. 577; 26 M.L.J. 268, Foll. 30 M.L.W. 419 =A.I.R. 1929 Mad. 791=57 M.L.J. 353.

——S. 19—Suit on hypothecation bond—Acknowledgment within extra time of two years under S. 31 but beyond ordinary limitation—Acknowledgment still valid.

Where a suit was brought on a hypothecation bond after the ordinary prescribed period of 12 years and where there was an acknowledgment of liability made after the prescribed period but within the extra period of two years granted by S. 31 the acknowledgment was held to be valid. 26 M.L.J. 23, Foll. 30 M.L.W. 419=A.I.R. 1929 Mad. 791=57 M.L.J. 353.

——S. 19—Includes period provided in S. 31.

A period for a suit can be prescribed by a section of the Act as well as by an article of the schedule.

Acknowledgment under S. 19 though obtained within the special period of limitation under S. 31 gives a fresh period from the time of acknowledg-

ment. 98 Ind. Cas. 1005=49 All. 67=24 A.L.J. 1039=A.I.R. 1927 All. 114.

12. Miscellaneous.

——S. 19—Acknowledgment and account stated—Difference between.

A real account stated is a very different thing from an acknowledgment. In a real account stated there is consideration in the shape of an agreement that items on one side of the account are to be taken as paid by items on the other side. In an account stated it does not matter if some of the items are time-barred, although it would be a different thing if all the items are time-barred. 1934 P.C. 144, 56 A. 376 (P.C.) and I.L.R. (1942) Nag. 369, Foll. I.L.R. (1948) Nag. 639 =A.I.R. 1949 Nag. 229=1949 N.L.J. 138.

——S. 19—Acknowledgment and novation distinguished.

Where, under a mortgage-deed executed in 1911, the mortgage amount was payable in five years, and if not paid within that time, the mortgagee was to take possession as owner, but the mortgagee did not take possession and the mortgagor, in 1927, made an acknowledgment in the mortgagee's bahi account to the effect that interest on the mortgage had been paid up to date and that a specified amount was due under the mortgage deed;

Held, that the acknowledgment did not amount to a novation of contract and, being unregistered, could not create a charge on the property:

Held, also, that even if the mortgagee had a remedy to sue for money, it was barred by time. A.I.R. 1933 Lah. 174=34 P. L. R. 1055=145 Ind. Cas. 159.

——S. 19—Decisions on English statutes—Applicability.

Except for the discovery of some general principle, it would be totally misleading and profitless to attempt to apply decisions on the English Statutes of Limitation to cases under the Limitation Act. (1932) M.W.N. 614=55 M. 758=A.I.R. 1932 Mad. 516=36 L.W. 44=63 M.L.J. 111=138 Ind. Cas. 632.

——S. 19—Question of fact or law.

A wrong application of S. 19 to contents of document is only an error of law and is no ground for revision. 33 P.L.R. 330=137 Ind, Cas. 513.

——S. 19—Plaintiff cannot be allowed to take up a new plea of limitation resting on certain acknowledgment at the stage of arguments when he finds his original position untenable. A.I.R. 1934 Lah. 753=155 Ind. Cas. 819.

——S. 19—Acknowledgment other than that pleaded in plaint, setting up of. See C. P. CODE, O. 7, RR. 1 TO 6. 8 C.W.N. 171.

——S. 19—The question as to the validity of the admissions as acknowledgments should be tested by the law of limitation in force at the time of the suit, i.e., by the Limitation Act of 1908. A. I.R. 1932 Bom. 531=34 Bom. L. R. 958=139 Ind. Cas. 218.

——S. 19—Acknowledgment ineffectual by law in force at the time.

An acknowledgment which is ineffectual for the purposes of the law in force at the time of the acknowledgment is no acknowledgment at all. 107 Ind. Cas. 60=29 Bom.L.R. 1563=A.I.R. 1928 Bom. 28.

——S. 19—Law applicable is that in force at the date of suit.

Where an acknowledgment is relied on to save limitation, the law to be applied is not the law in force at the date of the alleged acknowledgment, but the law which was in force at the time of the institution of the suit. 35 All. 227, Foll. 85 Ind. Cas. 633=5 L.R.A. (Civ.) 736=A. I. R. 1925 All. 176.

——S. 19—Adjustment of partnership accounts—Adjustment carried over to another year—Subsequent adjustment made — Adjustments unsigned —Time runs from subsequent adjustments.

Plaintiff and defendant carried on business in partnership and there was an adjustment of account in 1827 and a certain sum was found due from the defendant. This amount was carried over to the account of 1829 when another adjustment was made. Defendant had not signed the adjustments. Plaintiff sued for this amount after three years of first adjustment,

Held, a new cause of action arose at the end of 1829 and the suit being within three years from that date was not barred. 102 Ind. Cas. 617=31 C.W.N. 619=A.I.R. 1927 Cal. 495.

——S. 19—Mutually open account—Balance struck —Constitutes payment—Agreed unstamped statement of accounts items all on one.

Where there are debts due on both the sides and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment of the amount of the smaller debt. But it is the striking of the balance that constitutes the payment, not the mere existence or even statement in writing or cross demands. Hence it has been ruled that an agreed statement of accounts where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment will not be allowed to support an action on an account stated in respect of items which are statute-barred. 51 Cal. 418; 24 Bom. 394, Foll. 72 Ind. Cas. 692=36 C.L.J. 228=A.I.R. 1923 Cal. 71.

——S. 19—Current account — Each increase of overdraft is not separate loan. (Obiter.)

In the case of a current account between a banker and his customer it is not within the correct interpretation of the Act to regard each increase of the overdraft as a separate loan from the date of which the period of limitation must be computed. 56 Cal. 556=33 C.W.N. 412=A.I.R. 1929 Cal. 714.

——S. 20.

Synopsis.

1. Applicability and scope of section.
2. Amendment of section—Retrospective effect.
3. Acknowledgment of payment.
4. Appropriation by creditor.
5. Authority to act.
6. Evidence.
7. Handwriting.
8. Interest "as such".
9. Mode of payment.
10. Mortgagee in possession—Sub-S. (2).
11. Payment on account of money payable under decree—Explanation.
12. "Period prescribed".

13. Person liable to pay.
14. "Signed"—Proviso.
15. Starting time.
16. Miscellaneous.

1. Applicability and scope of section.

——S. 20—The plaintiff, in a suit under S. 3 (w) Dekkan Agriculculturists Relief Act, is entitled to the benefit of S. 20. A.I.R. 1944 Bom. 89=45 Bom.L.R. 1064=I.L.R. (1944) Bom. 71=212 Ind. Cas. 531.

——Ss. 20, 29—Suit under S. 3 (w), Dekkhan Agriculturists Relief Act (17 of 1879)—S. 20 cannot be availed of by plaintiff in view of S. 29. A. I. R. 1942 Bom. 131=44 Bom.L.R. 138=200 Ind. Cas. 12.

——S. 20—Applicability — Extention of time for redemption of mortgage.

S. 20 of the Limitation Act applies only to extend the time for recovery of the mortgage-debt, and not to extend the time for redemption. The section in terms refers to the payment of interest on a debt or legacy and makes receipt of the rent or produce of the land by a mortgagee in possession equivalent to a payment of interest, and a fresh period of limitation has to be computed from the time the payment was made. This must clearly mean a fresh period of limitation for payment of the debt or legacy, and no reference is made in the section to the right of redemption A.I.R. 1950 E.P. 157=52 P.L.R. 75.

——S. 20—Applicability—Redemption suit.

S. 20 of the Limitation Act applies only to extend the time for recovery of the mortgage-debt and not to extend the time for redemption of the mortgage. 74 I.A. 285=I.L.R. (1947) Lah 727=50 P.L.R. 21=29 P.L.T. 157=50 Bom.L.R. 539=1948 A.L.J. 20=1948 M.W.N. 34=61 L.W. 76=A.I.R. 1948 P.C. 36=52 C.W.N. 132 =(1948) 1 M.L.J. 130 (P.C.).

——S. 20—Redemption — Section not applicable

Section 20 applies only to cases where the suit is for the recovery of a debt or legacy, and does not operate to enlarge the period allowed by law to the mortgagor to redeem his property. 78 Ind Cas. 617=6 L.L.J. 194=A.I.R. 1924 Lah 484.

——S. 20—Period not extended in favour of mortgagor.

Held, that S. 20, sub-S. 2 extends the period of limitation in favour of mortgagee but not in favour of mortgagor. 70 Ind. Cas. 906=24 Bom.L.R. 713=46 Bom. 1000=A.I.R. 1922 Bom. 356.

——S. 20—Suit for redemption of a usufructuary mortgage.

S. 20 does not apply to a suit for redemption of a usufructuary mortgage in such a manner as to extend indefinitely the period of limitation within which such a suit must be filed. 18 A. 87 diss. from. 1903 A.W.N. 223=26 A. 167. 295; and P.R. 1883, p. 115 Foll. 1878 A.W.N.

——S. 20 and Art. 75—S. 20 if applies to cases governed by Art. 75.

S. 20 of the Limitation Act would apply to the case of a payment, made towards the amount due under an instalment bond and endorsed on it and would extend limitation. 1943 All. 172, foll. I.L.R. (1950) A. 701=1949 A.L.J. 291=A.I.R 1949 A. 764=1949 A.W.R. 377.

——S. 20, Sch. I, Art. 75—Instalment bond—Provision for payments in lump on default —Acceptance of overdue instalment—Suit for balance.

A mortgage bond provided for the payment of the principal sum in certain instalments with a condition that on default of two successive instalments, the entire sum would become due. The mortgagor paid on a certain date the sums due on the first three instalments which had then become due and the mortgagee, crediting this sum, sued for the balance of the instalments:

Held, that S. 20 had no concern with the suit which was governed by Art. 75, according to which the **terminus a quo** was the date of the default, in other words, not the date of payment; but the date of non-payment in accordance with the stipulations of the contract, and that the suit was, therefore, within time.

Held, further, that as the mortgagee had accepted overdue instalments and thereby waived the benefit of the provisions which gave him the right of the entire claim as to the default, S. 20, Limitation Act had no applcation at all. 52 C. L.J. 591=A.I.R. 1931 Cal. 157=58 C. 615=130 Ind. Cas. 571.

——S. 20—Scope—Instalment bond.

Time runs from date of default—Oral evidence on payments made admissible. 35 P.R. 1913, Not foll. 89 Ind. Cas. 294=26 P.L.R. 328=6 Lah. 163=A.I.R. 1925 Lah. 394.

——S. 20 and Art. 57—Customer of Bank overdrawing account on different occasions — Limitation for recovery — Repayment by customer—If saves limitation in respect of general balance of account. **See** LIMITATION ACT, ART. 57 AND S. 20. 26 Pat. 231=A.I.R. 1948 Pat. 18.

——S. 20—Section 20, Limitation Act openates to extend the time for the filing of an application for a final decree in a mortgage suit. A.I.R. 1941 Mad. 475=I.L.R. (1941) Mad. 739=(1941) M. W.N. 289=199 Ind. Cas. 710=(1941) 1 M.L. J. 388=53 L.W. 348.

——S. 20—"Decree"—Includes a preliminary decree—Payment extends time for applying for final decree.

A decree for the purposes of S. 20 means, not only a final decree capable of execution but also a preliminary decree for sale and such a preliminary decree constitutes a debt payable by the judgment-debtor within S. 20 (2) Explanation. The time may be extended for an application for a final decree under either S. 19 or S. 20 in a fit case. But the payment in order to extend time must satisfy the requirements of S. 20. 98 Ind. Cas. 818=49 All. 147=25 A.L.J. 154=A.I.R. 1927 All. 159.

——S. 20 as amended in 1942—Payment on account does not save limitation.

Where a debtor believes that principal and interest are both payable and makes a payment merely on account, it cannot save limitation. A.I.R. 1946 All. 58=I.L.R. (1945) All. 896=1945 A.W.R. (H.C.) 246=223 Ind. Cas. 175.

——S. 20—Payment of Rs. 10 by defendant within three years—Endorsement in plaintiff's *bahi* thumb marked by defendant—No mention whether towards interest or part payment of principal—Payment, held part payment of principal and S. 20, held applied. 42 P.L.R. 638=A.I.R. 1940 Lah. 442=191 Ind. Cas. 817.

——S. 20—No difference between payment of interest or of principal.

The Legislature did not intend to draw a distinction between the payment of interest and the payment of principal in saving limitation. A.I.R. 1941 Mad. 6=(1940) 2 M.L.J. 726=51 L.W. 453=195 Ind. Cas. 329.

——S. 20—S. 20 makes no distinction between simple contract debt and debt charged on land.

Section 20 makes no difference between a simple contract debt and a speciality debt or a debt charged on land like the English statutes. A.I.R. 1941 Mad. 6 =51 L.W. 453=(1940) 2 M.L.J. 726=195 Ind. Cas. 329.

——S. 20 (1), proviso—Proviso applies to sub-S. (1) only.

It was not the intention of the Legislature in enacting proviso to sub-s. 1 of S. 20, Lim. Act to abrogate the long established and traditional practice by which a mortgagee in possession of land is deemed to be in receipt of interest and to have a fresh start of limitation from the period when his possession ceases and in this view, the proviso was intended to apply to the first sub-section and not to the second sub-section of S. 20. 6 B.R. 477 =A.I.R. 1940 Pat. 512=21 P.L.T. 770=187 Ind. Cas. 484.

——S. 20—Section 20, by its terms, only applies to a suit for a debt or legacy or to the case of a mortgagee with possession. A.I.R. 1939 Lah. 212=41 P.L.R. 529.

——S. 20—Section 20 contemplates debts of all kinds. In India it is not necessary to import the doctrine of implied promise to save by payment a simple debt from limitation. Part payment of principal or interest saves from limitation a debt whether secured or unsecured, under the Indian Law. A.I.R. 1938 Cal. 129=66 C.L.J. 104=42 C.W.N. 18=176 Ind. Cas. 191.

——S. 20—In a suit for recovery of amount advanced on a pledge, neither the payment of interest nor the alleged pledge extend the period of limitation as regards the personal claim. A.I.R. 1935 Bom. 213=37 Bom. L.R. 165=156 Ind. Cas. 531.

——S. 20—The amendment to the proviso to S. 20. Lim. Act, has been made in favour of the creditor who is not able to prove the writing of the debtor, not only relating to the fact of the payment but also to the acknowledgment of the fact of the payment. 34 P.L.R. 179=A.I.R. 1933 Lah. 341=34 P.L.R. 514=14 L. 580 =141 Ind. Cas. 611.

——S. 20—An entry of payment of interest will save limitation even though there was no agreement for payment of interest at the time of the contract. 36 L.W. 918=A.I.R. 1933 Mad. 251=141 Ind. Cas. 169 (1).

——S. 20—Applicability—Time from date of payment.

Section 20 applies where the cause of action has already arisen and the plaintiff is seeking to have a fresh period of limitation computed from the time when a payment was made by the debtor. 75 Ind. Cas. 98=1924 P.H. C.C. 67=A.I.R. 1924 Pat. 439.

——S. 20—Scope of—Suit for recovery of a debt or legacy—Suit for possession of property.

The first part of S. 20 applies only to suits to recover a debt or legacy and not to a suit for possession of property; the second part of the section also does not apply to a suit for possession. 13 O.C. 179=7 Ind. Cas. 597.

——S. 20—Scope of—Suit by mortgagee for possession.

A suit for possession of mortgaged property by the mortgagee, on default by mortgagor in payment of the instalments is not a suit for recovery of a debt and therefore, S. 20 of the Limitation Act is not applicable, and payments made after default do not extend the period of limitation. 30 P.L.R. 1909=91 P.R. 1908 =156 P.W.R. 1908=4 Ind. Cas. 921.

——S. 20—Applicability of, to execution proceedings.

S. 20 is not applicable to applications in execution; 5 M. 151 foll. (1904) 27 M. 608; *also* 28 M. 40. 6 C.W.N. 766=8 C.W.N. 740.

See also 1903 A.W.N. 17 =26 A. 36.

2. Amendment of section—Retrospective Effect.

——S. 20 (as amended in 1942)—Amendment to law of limitation—Effect.

It is well settled that the law of limitation being procedural law, its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment. But it is equally well established that if a right to sue had become barred by the provisions of the Act then in force on the date of coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment.

Hence, ar "open payment" made prior to the amendment of section 20 of the Limitation Act by the Amending Act 16 of 1942 would not save a claim from the bar of limitation if it was already barred prior to the coming into force of the amendment. 1950 M. W.N. 650=63 L.W. 983=(1950) 2 M.L.J. 624=A.I.R. 1951 Mad. 314.

——S. 20—Amendment, if retrospective—Claim already barred if revived by amendment.

In the absence of anything to the contrary, if a claim is within limitation according to the old Act on the date when the new Act comes into force and a proceeding is commenced after the coming into force of the new Act, it is the new Act which would govern all decisions on the point of limitation. If, however, the right to sue or the right to apply had already been barred by the provisions of the Lim. Act then in force, then unless there was something in the latter Act which could be deemed to apply retrospectively to revive claims which had already become barred, the new Act could not be availed of for the purpose of saving limitation. 1945 A.W.R. (H.C.) 246 =A.I.R. 1946 All. 58=I.L.R. (1945) All. 896.

——S. 20—Amendment—Whether can revive barred debt.

The amendment of S. 20 made in 1942 cannot have the result of reviving what was barred under unenforceable claim at the time of the amendment. 58 M.L.W. 618=1945 M.W.N. 713=(1945) 2 M.L.J. 405=A.I.R. 1946 Mad. 72.

——S. 20—Amendment Act of 1942, retrospective effect.

Where the debt has become unenforceable long before the Amending Act of 1942 came into force as the payment was ineffectual to save time under S. 20 the amendment cannot operate retrospectively so as to revive the barred debt. 1944 M.W.N. 254=57 L.W. 280=(1944) 1 M.L.J. 347=A.I.R. 1944 Mad. 398.

——S. 20 (as amended in 1942)—Applicability—Suit on pronote instituted after amendment—Payment relied on to save limitation made before amendment.

S. 20 of the Limitation Act, as amended by Act 16 of 1942, which obliterates all distinctions between payment towards interest as such or payment towards principal, can be availed of by a plaintiff who institutes a suit on a promissory note after the amended section comes into force, although the payment relied on to save Limitation was made before the Amending Act came into force and the claim under the promissory

note had become barred by limitation by then. The fundamental principle that the law of limitation applicable to a suit is the law prevailing at the time of its institution is subject to this exception that its applicability will not operate so as to revive a right that has been extinguished on account of the pre-existing law of limitation. Under S. 28 of the Limitation Act right to immoveable property is extinguished if the remedy to recover the same becomes barred by lapse of time, but this does not apply to other rights. In the case of a promissory note, although the remedy to recover the debt becomes barred by limitation the right to the debt is not extinguished thereby, and no question of revival of an extinguished right can therefore, arise. I.L.R. (1949) 1 Cut. 281=A.I.R. 1949 Orissa 64.

——S. 20—Amendment is not retrospective.

The amendment to S. 20 cannot have retrospective operation in the sense that it can apply to a suit which had been instituted prior to this amendment. A.I.R. 1946 Pat. 59=11 B.R. 354=219 Ind. Cas. 159.

——S. 20—(As amended by Act 16 of 1942)—S. 20 as amended applies only to suits instituted after it came into force.

The law of limitation applicable to a suit is the law applicable which prevails at the date when the suit is instituted. Section 20 as amended, therefore, applies only to suits instituted after it came into force. A.I.R. 1946 Pat. 60=24 Pat. 391.

——S. 20—(As amended by Act 16 of 1942)—Advance of Rs. 200 by a hand-note on August 8, 1934—Suit for recovery of dues on May 4, 1943—Payments on August 4, 1937 and June 16, 1940—Amendments of 1942 held applicable to the case—Right to refuse payment not a vested right—Provisions of S. 28 applicable only to a right to recover property and not a debt or legacy.

A sum of Rs. 200 was advanced by *P* to *D* by a hand-note on August 8, 1934. The suit to recover dues was instituted by *P* on May 4, 1943. Two payments were made by *D*, one on August 4, 1937, for Rs. 20 and the other on June 16, 1940, for Rs. 7. The Court refused to give effect to these payments as amounting to an acknowledgment within meaning of S. 20 because payments were not made "as such towards interest". *P* contended that the suit was instituted after the provisions of S. 20 were amended by the Amending Act 16 of 1942 which came into operation on March 30, 1942.

Held, that the law of limitation which governed the action was the law which prevailed on the date when the suit was instituted. As the suit was instituted in 1943 when S. 20 as amended by Act 16 of 1942 was in operation, the provisions of that Act were applicable.

Held, also that the provisions of S. 28, applied only when the right in question was a right to recover property and not a debt or legacy. The right of *D* to refuse to pay to *P* was not a right which had become vested in him and it could be defeated by amendment of 1942. 24 Pat. 249=A.I.R. 1945 Pat. 368.

——S. 20—The amendment of S. 20 by Act of 1942 is not retrospective. A.I.R. 1944 Bom. 37=45 Bom. L.R. 1014=215 Ind. Cas. 12.

——S. 20—Amendment—Retrospective effect.

An applicant in revision cannot benefit by a change in the law made during the pendency of his application. 1944 O.W.N. 154.

——S. 20—(As amended in 1942)—Amendment during pendency of appeal and of revision—Distinction.

Section 20, Lim. Act as amended in 1942 is not applicable to a case decided before the Amending Act came into force. The right acquired by a party under the decision cannot be defeated by the subsequent legislation. In this respect, an appeal and a revision stand on different footings. An appellant may be entitled to the benefit of a change of law made during the pendency of an appeal but an applicant for revision cannot. A.I.R. 1942 Oudh 508=1943 O.W.N. 582=18 Luck. 241=202 Ind. Cas. 750.

3. Acknowledgment of payment.

——S. 20—Law previous and subsequent to amendment by Act 1 of 1927.

Previous to the amendment of S. 20, Lim. Act, the fact of payment of interest needed no acknowledgment in writing by the person making the payment whereas a payment towards principal required such an acknowledgments to extend limitation. After the Amending Act payments towards interest or principal require acknowledgments of the payments in the handwriting of the person paying in order to be effective in extending the time. The words "paid as such" may have been necessary in the section before it was amended; but, after the amendment, no effect can be given to them, and therefore they are redundant. A.I.R. 1939 Pat. 389=20 P.L.T. 175=18 Pat. 253=5 B.R. 924=183 Ind. Cas. 330.

——S. 20 (as amended by Act 1 of 1927)—Changes made by Amending Act, nature of.

Per *Rachhpal Singh, J.*—The only change that has been made in the provisions of S. 20 after the passing of the Amending Act 1 of 1927, is, that after the amendment, payment of interest in order to save limitation must also be in the handwriting of or in the writing signed by the person making the payment. Before the amendment only part payment of the principal in order to give fresh start of limitation has to be in the handwriting of the debtor. Now the same rule is made applicable in cases of payment of interest also. That is the only result of the amendment. In other respects the position is in no way altered. A.I.R. 1935 All. 946=(1935) A.L.J. 1029=1935 A.W.R. 1155=58 A. 261=159 Ind. Cas. 387 (F.B.).

——S. 20—Payment by cheque.

A payment by a cheque made by the debtor in favour of the creditor is a payment which satisfies the conditions of S. 20. 58 M.L.W. 406=A.I.R. 1945 Mad. 515=(1945) 2 M.L.J. 202=1945 M.W.N. 488.

——S. 20—Payment by cheque.

A cheque proved to be signed by a debtor and given by him in payment, which has been accepted by the creditor and duly honoured by the bank drawn on, amounts to an acknowledgment of payment within the meaning of the proviso to S. 20, Lim. Act. A.I.R. 1941 Rang. 344=198 Ind. Cas. 564.

——S. 20—Cheque accepted by payee.

The mode of payment under S. 20 need not be in cash. Payment and acknowledgment may be simultaneous. The Indian Statute only requires that the acknowledgment must be of the payment; it is not necessary that it must also be stated that the payment is towards a particular debt. Cheque accepted by payee operates as a payment as well as acknowledgment of payment in the handwritting of the person making the payment. A.I.R. 1938 Cal. 538=42 C.W.N. 548=I.L.R. (1938) 2 Cal. 320=177 Ind. Cas. 508.

——S. 20—Payment by cheque.

Where there is only one debt and a payment is made by the debtor to the creditor by cheque, the payment by cheque, if accepted by the creditor, must be deemed to be an acknowledgment of the payment of part principal by the debtor within the provisions of S. 20. A.I.R. 1937 Sind 95=31 S.L.R. 68=168 Ind. Cas. 820.

——S. 20—Where a cheque is accepted by the creditor and is subsequently honoured for the purpose of S. 20

the payment must be deemed to have been made by the debtor and it must further be deemed to appear in his handwriting by virtue of his signature and writing on the cheque. A.I.R. 1933 Lah. 741=144 Ind. Cas. 641.

——**S. 20**—The part payment of the principal of a debt before the expiration of the prescribed period, by means of a cheque which has been accepted by the creditor and has subsequently been cashed by him has the effect of extending the period of limitation so as to entitle the creditor to a fresh period of limitation from the time when the payment was made within the meaning of S. 20. 34 P.L.R. 179=A.I.R. 1933 Lah. 341=34 P.L.R. 514=14 L. 580=141 Ind. Cas. 611.

——**S. 20**—Where a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation, the cheque is not paid, the original debt revives. When such a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently honoured, the proviso to S. 20 has been complied with. A.I.R. 1931 Sind 28=25 S.L.R. 360=129 Ind. Cas. 909.

——S. 20, proviso—Part-payment of principal—Payment by cheque—How far effectual.

A cheque signed by a debtor and given in part payment of a debt would save limitation, provided the cheque is duly honoured. 42 Cal. 1043=19 C.W.N. 724=31 Ind. Cas. 626.

——S. 20—Payment by money order.

Where the alleged payment is made by money order and there is nothing at all to show on what account the remittance was made which in fact might have been in respect of some new cash transaction, the money order coupon is not sufficient to save limitation though the fact of payment is in the handwriting of the debtor. A.I.R. 1942 Pat. 47=8 B.R. 21=196 Ind. Cas. 392.

——S. 20—Payment of instalment.

A payment of an instalment under a preliminary mortgage-decree directing payment of mortgage-money by instalments cannot, in any sense, amount to a recognition of the right of the decree-holder tor apply for a final decree. It is merely a payment unde the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. A.I.R. 1942 Mad. 581=55 L.W. 276=(1942) 1 M.L.J. 532=1942 M.W.N. 367=I.L.R. (1942) Mad. 770=202 Ind. Cas. 629.

——S. 20, Proviso—Acknowledgment referred to in proviso, if must be made before expiry of limitation.

There is nothing in the proviso or in any other portion of S. 20, Lim. Act; to support the view that the acknowledgment referred to in the proviso should also have been made before the expiration of the period of limitation. An acknowledgment such as is referred to in the proviso to S. 20 should be made before the time when an application for execution or a suit is filed and it is not necessary that it should be simultaneous with the payment to which it relates. 1940 O.W.N. 156=A.I.R. 1940 Oudh 177=1940 A.W.R. 78=186 Ind. Cas. 163.

——**S. 20**—It is true that the payment has to be made within the prescribed period, but the Lim. Act does not provide that the acknowledgment is to be made within that period. It is the payment and not the acknowledgment which extends the period of limitation. The acknowledgment is merely a matter of evidence, and provided it is signed before the suit is commenced, that is sufficient. A.I.R. 1937 Cal. 284=I.L.R. (1937) 2 Cal. 137=172 Ind. Cas. 362.

——**S. 20**—Part payment of debt within period of limitation—Acknowledgment in writing, made only after expiry of period of limitation:

Held, that it gives fresh start to period of limitation under S. 20. (1933) A.L.J. 403=A.I.R. 1933 All. 363=55 A. 280=146 Ind. Cas. 510.

——S. 20—Acknowledgment, if to be made within prescribed time.

Under S. 20, although part payment has to be made within the prescribed period, the acknowledgment need not be made within that period. It is the payment and not the acknowledgment which extends the period of limitation. The acknowledgment is merely a matter of evidence and it is sufficient if it is signed before the suit is commenced. 35 Bom.L.R. 471=A.I.R. 1933 Bom. 252=57 B. 453=144 Ind. Cas. 990.

——**S. 20**—No doubt, if money is sent by a person by the hands of a messenger, the messenger having no responsibility in the matter except to hand over the money, the person making the payment is clearly the person who despatches the messenger with the money. But where the daughters of a promissor have made payments, not merely as messengers of their father but as independent persons, actually making the payment either on their own behalf or on behalf of their father, in order to save limitation, the endorsements must each be written or signed by that one of them who made each payment. A.I.R. 1939 Rang. 118=181 Ind. Cas. 765.

——S. 20—"Makes the payment"—Not necessarily mean person physically making payment.

The intention of the Legislature in enacting S. 20 appears to have been that a debtor should not be bound by the payment of part of the debt unless the person who in substance, though perhaps not in form, made the payment has stated in writing that such payment had been made. The words "makes the payment" in S. 20 do not necessarily mean the man who physically hands over the money. 23 C.W.N. 336, *foll.* 94 Ind. Cas. 657=53 Cal. 163=A.I.R. 1926 Cal. 510.

——S. 20—Part payment.

An entry in the interest book kept by the plaintiff which showed payments by the defendant towards part payment of principal made before expiry of limitation and signed by the defendant, held saved limitation under S. 20. I.L.R. (1946) Nag. 21=A.I.R. 1946 Nag. 112.

——**S. 20**—Where the payment made by the debtor to the creditor is of a sum larger than the amount due at the time of payment as interest, a part of it will necessary be presumed to have been made towards the principal and, therefore, this payment will save limitation. 42 P.L.R. 635=A.I.R. 1940 Lah. 513=191 Ind. Cas. 802.

——**S. 20**—Payment by debtor of sum towards debt amount—Endorsement of payment made on the bond—Payment not made towards interest as such, nor apportioned by creditor towards interest:

Held, that the payment gave the creditor a fresh period of three years from the date of the payment within which to sue for the debt. The payment was obviously made towards the principal, and under the latter part of S. 20, it was not necessary that the writing should specify that the amount was paid in part payment of the principal as such. A.I.R. 1938 Lah. 347=40 P.L.R. 124=181 Ind. Cas. 82.

——**S. 20**—Where there was no mention of interest in a *sarkhat* and there was no reference to interest in the two endorsements which appeared upon the back of the *sarkhat*:

Held, that the payments referred to in the endorsements on the back of the "*sarkhat*" must be regarded as payments of principal. Such payments towards

redemption of the principal sum under S. 20, interrupted the period of limitation and a fresh period commenced from the date of payment. (1935) A.L.J. 657=1935 A.W.R. 774=A.I.R. 1935 All. 605=156 Ind. Cas. 748 (F.B.).

——**S. 20**—Where a debtor makes a payment and acknowledges it in his own handwriting without specifying whether it is towards principal or interest, the acknowledgment gives a fresh period of limitation under S. 20, if the writing sufficiently identifies the debt. Once it is shown to be towards the debt, it is not necessary to show whether it is towards the principal or interest. A.I.R. 1939 Nag. 156=I.L.R. (1939) Nag. 235=1939 N.L.J. 205=182 Ind. Cas. 573.

——**S. 20**—To constitute a payment of interest sufficient to take a debt out of the operation of the statute of limitation, it was not essential that money should actually pass between the debtor and the creditor. Any facts which would prove a plea of payment of interest in an action brought to recover it, would be a payment sufficient to bar the statute. The transaction amounted in law to a payment of interest within S. 20. A.I.R. 1938 Mad. 579=47 L.W. 517=(1938) 1 M.L.J. 624 =(1938) M.W.N. 397=182 Ind. Cas. 468.

——S. 20—" Payment "—Actual passing of money unnecessary—Agreement that creditor should credit amount previously due by him to debtor Payment sufficient.

It is unnecessary under S. 20 that money should actually pass, for a settlement of account may be as effectual as a real payment. In fact, a transacton, whereby the parties agree that an amount previously due by the creditor to the debtor shall be treated as amount paid by the latter to the former is in substance identical with a transaction where the debtor receives actual payment and pays the amount back to the creditor. 117 Ind. Cas. 124=A.I.R. 1929 Mad. 432.

——**S. 20**—Where the creditor accepts a surety who agrees to pay him a certain amount instead of debtor and strickes out the claim against the debtor to that extent, the acceptance of the surety by the creditor cannot be regarded as tantamount to payment and will not operate to save limitation. (1937) A.L.J. 166= A.I.R. 1937 All. 260=1937 A.W.R. 138=168 Ind. Cas. 152.

——S. 20—Payment without prejudice.

No words such as "without prejudice" can override the words of the statute, which lay down that a part payment shall extend limitation, if it is in the handwriting of, or signed by the person making the payment. The words merely save the respective rights of the parties with regard to the substantial disputes with respect to the various claims and counter-claims on either side, and do not mean or purport to mean that limitation should not be saved by means of this payment. A.I.R. 1936 Lah. 62 =17 L. 737=165 Ind. Cas. 723.

——S. 20—Payment as a matter of grace and not towards admitted debt.

Limitation is not saved by a payment made as a matter of grace and not towards any admitted debt. A.I.R. 1934 Lah. 475=35 P.L.R. 529=155 Ind. Cas. 238.

——S. 20—An unappropriated payment, on account towards arreras of interest may in circumstances like the present suffice to keep alive all transactions which were not time barred on the day of payment. 1935 M.W.N. 970.

——S. 20—Appropriation of proceeds of pledged articles.

Where a creditor to whom jewels have been pledged as security for the loan, sells the jewels and appropriates the proceeds against the debt, there is no payment by the debtor within the eaning of S. 20 sufficient to keep the debt alive. 40 M.L.W. 270=67 M.L.J. 258=A.I.R. 1934 Mad. 549=(1934) M.W.N. 1076=152 Ind. Cas. 299.

——S. 20—Acknowledgment of payment should be in writing of person making it.

Under the proviso added to S. 20 of the Lim.Act in 1927, it is necessary that except in the case of a payment of interest made before January 1, 1928, an acknowledgment of the payment appears in the handwriting of or in a writing signed by a person making the payment.

Held, that the document in question could not be taken as an acknowledgment either under S. 19 or under S. 20. A.I.R. 1937 Oudh 410=13 Luck. 531=1937 O.W.N. 784=169 Ind. Cas. 785.

——**S. 20**—So far as the payment of interest is concerned, the acknowledgment in writing must be of the payment of interest as such. The word 'payment' in the proviso to S. 20, refers back to the section which it qualifies and the words 'as such' occur in relation to the payment of interest in the section itself. So far as the payment of principal is concerned, the substitution of the word 'acknowledgment' for 'fact' in the proviso does not require that the acknowledgment must be a n acknowledgment of the payment to part principal as such. The purpose of the proviso is to protect or assist the debtor, even more so after the amendment than before but not to the extent that the acknowledgment of the part payment o principal must be the acknowledgment of the payment of part principal as such. Acknowledgement of the payment in writing in such case is enough. A.I.R. 1937 Sind 95=31 S.L.R. 68=168 Ind. Cas. 820.

——**S. 20**—Endorsement on back of bond—*Held*, on facts that endorsement in question would save limitation A.I.R. 1937 Nag. 304=I.L.R. (1937) Nag. 374.=170 Ind. Cas. 213.

——**S. 2**—In order that a payment may save limitation under S. 20, it is necessary that the acknowledgment of payment must appear in the handwriting of or in a writing signed by the person making it, but it is not necessary that the fact that the payment was made towards principal or interest should also appear in writing. Evidence may be given that the payment was made towards principal of interest and there is no difference in this respect between payment towards interest and payment towards principal.

A promissory note executed in payment of interest due on a prior debt will, therefore, save that debt from limitation even though the promissory note does not on the face of it, show that it was executed towards interest. (1936) M.W.N. 718=44 L.W. 339=A.I.R. 1936 Mad. 848= (1937) 2 M.L.J. 54=165 Ind. Cas. 225.

——S. 20—Part payment—Alleged payment embodied in document—Document not indicating acknowledgment—Effect.

Where there is nothing in the document, which would in any way indicate that the judgment-debtor acknowledged the payment supposed to have been made and all that appears is his signature, it cannot be said that there is an acknowledgment of payment in the handwriting or in a writing signed by the person making the payment and S. 20 does not apply. A.I.R. 1936 Pat. 386=2 B.R. 680 =163 Ind. Cas. 915.

——Ss. 20, 19—Writing not fulfilling requirements of S. 20, due to some defect.

Although the writing, owing to some defect, does not fulfil the requirements of S. 20, it may nevertheless, as an acknowledgment of liability, operate to save the claim under S. 19. A.I.R. 1935 Mad. 245=68 M.L.J. 63= (1935) M.W.N. 122=41 L.W. 721=157 Ind. Cas. 272.

——**S. 20**—Where a part payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is [illegible] to be for interest or for principal or for both

and the fact that the writing does not say whether it is for interest or principal is, therefore immaterial. A.I.R. 1935 Mad. 101=68 M.L.J. 470=58 M. 413=68 M.L.J. 47=(1935) M.W.N. 17=154 Ind. Cas. 1053.

——Ss. 20, 19—Stranger writing endorsement over signatures of defendants without their authorisation.

Where the plaintiff alleged that the defendants signed their names and afterwards, without consulting them and without their authorisation, a third party wrote the endorsement over their signatures:

Held, that this cannot be held to be an acknowledgment of the payment in writing signed by the persons making the payment, and that limitation could not be extended under S. 20. A.I.R. 1934 Rang. 287=152 Ind. Cas. 501.

——S. 20—Where payments are not endorsed in the handwriting of the person paying, they cannot be taken into consideration. A.I.R. 1934 Rang. 227=151 Ind. Cas. 426.

——S. 20—The proviso added to S. 20 by the Act of 1927 makes it quite clear that a payment of interest as such does not now save limitation, unless there is an acknowledgment of the payment appearing in the handwriting of or in a writing signed by the person making the payment. (1932) A.L.J. 1035=A.I.R. 1933 All. 49=143 Ind. Cas. 324.

——S. 20—Writing not simultaneous with payment—Effect.

Under S. 20, the writing evidencing the part payment of principal need not come into existence simultaneously with the part payment and further, when the part payment is admitted and the fact of the part payment is made in writing by the debtor, the debt is revived and a suit can be maintained within three years of the part payment.

When a part payment on account is made, any sums of money that were due to the plaintiff within three years before the date of the part payment can be sued for and the period of limitation would run from the date of part payment. A.I.R. 1931 All. 375=131 Ind. Cas. 867

——S. 20—Essentials—Part payment of principal—Interest.

A part payment of the principal of a debt must appear in the handwriting of the person making the part payment and not in that of any other person, however authorized. *Held*, also that the mere crediting of interest in a banker's books cannot be regarded, for the purpose of saving limitation as equivalent to a payment of intereso 29 A. 773=1907 A.W.N. 263=4 A.L.J. 628, *also* (1901) 3 Bom.L.R. 834.

——S. 20—Part payment—Must it be part payment as such

Part-payment under S. 20 need not be made *as such* to save limitation. 9 M. 271, diss. from. (1901) 6 C.W.N. 218.

——Ss. 20, 19—Mere endorsement of payment is no acknowledgment of liability. A.I.R. 1942 Pat. 395=2 P.L.T. 21=8 B.R. 665=8 C.L.T. 1=200 Ind. Cas. 306

——S. 20—Acknowledgment under S. 20 is not of the debt but of the payment and if once limitation is saved, the debtor is liable for any sum which the Court, after investigation, finds to be due. A.I.R. 1938 Cal. 538=42 C.W.N. 548=I.L.R. (1938) 2 Cal. 320=177 Ind. Cas. 508.

4. Appropriation by creditor.

——S. 20—Payment without indication whether it is towards interest or principal—Appropriation by creditor towards principal, to save limitation, must be before expiry of limitation.

In order to obtain a fresh period of limitation under S. 20, any appropriation by the creditor towards the principal of any sum paid by the debtor without indicating whether the payment is towards interest or principal, must be before the expiration of the period of limitation. A.I.R. 1946 Pat. 59=11 B.R. 354=219 Ind. Cas. 159.

——S. 20—Interest bearing debt—Payment by debtor without appropriation—Appropriation by creditor towards principal—Such appropriation, when saves limitation.

Where a debtor has made a payment on account of an interest bearing debt without appropriating the sum paid either towards principal or interest, the creditormay appropriate and if he appropriates it towards principal, it becomes a part payment of principal within the meaning of S. 20 Lim. Act, and saves limitation nonetheless that it was notpaid as such. It is not necessary that the character of the payment as intended to go towards interest or towards principal must appear by the writing or must be ascertainable or ascertained at the time when the payment is made and the language of S. 20 has not been satisfied, unless,within the prescribed period the creditors has, in the exercise of his right, done something which treats the payment as made on account of principal. If, therefore, until after the expiry of the prescribed period, the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then, under the amended S. 20, part payment of principal has not been established. 24 Pat. 96=A.I.R. 1945 Pat. 271=11 B.R. 491=26 P.L.T. 173=220 Ind. Cas. 255.

——S. 20—Appropriation of payment by creditor towards interest or principal—Distinction between and effect of.

There is a definite distinction for the purpose of saving limitation between an appropriation by a creditor to principal and an appropriation by a creditor to interest. The former will save limitation if the appropriation is made within the prescribed period, even though the appropriation is not notified until after the prescribed period. But in the latter case, the limitation is not saved if made by the creditor alone. But although it is open to a creditor to treat a payment as payment towards interest or as payment towards principal provided he makes the appropriation within the period of limitation he obviously cannot be allowed to appropriate it towards principal during the course of the suit when he has in fact appropriated, and notified to the defendant that he has appropriated to interest. 17 R.B. 117=A.I.R. 1944 Bom. 37=45 Bom.L.R. 1014=215 Ind. Cas. 12.

——S. 20—Account books maintained on katauti system—Entry of payment by debtor on credit side.

Under S. 20 in the absence of definite instruction by the debtor, the creditor can appropriate payments made by the debtor. In the case of interest, if it is attempted to save limitation the instructions must be by the debtor and the payment must be of interest as such, but in the case of principal, if the debtor has given no instructions, the creditor can appropriate if, it he so chooses, towards principal and can save limitation provided time has not run out at the time of appropriation and provided acknowledgment of payment appears in the handwriting of or on the writing signed by the person making the payment. The execution of a *sarkhat* by the debtor in the creditor's books of account maintained on *katauti* system on the credit side, amounts to a part payment of principal within the meaning of S. 20. 1941 O.W.N. 293=(1941) A.L.J. 50=A.I.R. 1941 All. 132=1941 A.W.R. 42=I.L.R. (1941) All. 291=193 Ind. Cas. 854.

——S. 20—It cannot be maintained that a payment on general account is either a payment of interest as such or a payment of principal. The disjunction is incomplete; there are additional possibilities as well.

In the case of "open' payment the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot have been intended by the Legislature that at the end of the prescribed period, the right to

sue should be barred and yet that the creditor might thereafter remove the bar at his own choice by making an appropriation. Though it need not be shown that the creditor's appropriation has, within the time limited, been communicated to the debtor, the language of the section cannot be regarded as satisfied unless, within the prescribed period the creditor has, in exercise of his right, done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended S. 20, part payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the debtor's act, whereas the essential matter is really the debtor's act, but unless either a part payment of principal is required to be made as such in order to stop the running of the statute or a payment on account of an interest bearing debt, though made generally on account, is made sufficient for that purpose, there is no escape from this conclusion :

Held, on evidence that the debtor paid Rs. 100 in his own handwriting and the creditor appropriated it towards principal straightway. This payment must be held to be part payment of principal. A.I.R. 1940 P.C. 63=1940 O.W.N. 315=6 B.R. 535=51 L.W. 578=(1940) 1 M.L.J. 895=44 C.W.N. 625=I.L.R. (1940) Kar. (P.C.) 134=42 P.L.R. 328=71 C.L.J. 444=(1940) M.W.N. 620=42 Bom.L.R. 640=(1940) A.L.J. 639=7 C.L.T. 1=I.L.R. (1940) Lah. 470=22 P.L.T. 425=1940 A.W.R. 58=67 I.A. 160=187 Ind. Cas. 233 (P.C.).

Overruling—A.I.R. 1935 Mad. 371=157 Ind. Cas. 259.

——**S. 20**—When the debtor makes a payment to the creditor on a bond or a promissory note without specifying whether he makes it about principal or an account of interest and when the creditor also makes no appropriation at the time of the payment, the payment, in order to be available under S. 20, Lim. Act, to the creditor as payment on account of principal must be made within the time for filing a suit and further the creditor must be proved to have, in the exercise of his right of appropriation, done within the prescribed period something which treats the payment as made on account of principal. A.I.R. 1940 Oudh 340=1940 O.W.N. 647=1940 A.W.R. 270=15 Luck. 573=189 Ind. Cas. 481 (F.B.).

——S. 20—Words "paid as such", if superfluous—Payment made by debtor without specifying—Mere crediting of interest by creditor in his account book, if sufficient.

The words "paid as such" in S. 20, are not superfluous. The section provides that it must be payment as interest by the debtor to the creditor though the form of payment may differ. Mere crediting of interest by the creditor in his own account books is not enough to satisfy the provisions of the statute. It must be interest paid "as interest" and distinctly stated to be so at the time of payment.

So far as the payment of interest is concerned, the acknowledgment in writing must be of the payment of interest "as such." The word "payment" in the proviso refers back to the section it qualifies, and the words "as such" occur in relation to the payment of interest in the section itself.

Where money is paid by a debtor without his specifying whether the payment is towards interest or towards principal leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest "as such" nor a part payment of the principal within the meaning of S. 20 and the payment does not save limitation. 1939 O.W.N. 203=A.I.R. 1939 Oudh 141=14 Luck. 588=180 Ind. Cas. 15.

——**S. 20**—Where the debtor made payment within limitation and the fact of payment appeared in the handwriting of the person making it but the debtor did not specify whether it was towards principal o. interest or both:

Held, that if the creditor appropriated the payment towards interest, it was a payment of interest as such by the debtor and saved limitation. A.I.R. 1939 Pat. 389=20 P.L.T. 175=18 Pat. 253=5 B.R. 924=183 Ind. Cas. 330.

——**S. 20**—Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it wholly towards interest due, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20. A.I.R. 1938 Bom. 467=40 Bom.L.R. 967=178 Ind Cas. 844.

——**S. 20**—Where it was agreed between the parties that interest would be paid first of all and anything paid by the defendants would go first of all towards interest and the plaintiffs appropriated such payments towards interest, the payment must be deemed to be towards interest and as such, sufficient to save limitation. In order to bring a case within S. 20 of the Lim. Act, it is not essential that the debtor should, on the occasion of each payment, state explicitly that the payment is made on accounts of interest as such; it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. 3 B.R. 286=A.I.R. 1937 Pat. 583=167 Ind. Cas. 244.

——S. 20—Creditor crediting re payment towards interest—Whether makes payment towards interest as such.

The mere fact that the creditor chooses to credit a repayment towards interest does not make it a payment by the debtor towards interest as such. So long as the intention of the debtor is unequivocally conveyed in the acknowledgment, it is not necessary for him to use any particular formula of words. A.I.R. 1937 Nag. 165=I.L.R. (1937) Nag. 360=169 Ind. Cas. 513.

——**S. 20**—Where money is paid by a debtor without his specifying whether his payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20. 3 B.R. 286=A.I.R. 1937 Pat. 583=167 Ind. Cas. 244.

——S. 20—Debtor not exercising his option.

A debtor has the first option to state whether the deposit by him is to be appropriated towards payment of interest or principal and where he does not exercise the option and the creditor appropriates the amount towards the interest, the debtor must be presumed to consent to such appropriation and the payment can be held to have been made on account of interest as such within the meaning of S. 20 18 P.L.T. 309=16 Pat. 27=A.I.R. 1937 Pat. 410=3 B.R. 669=170 Ind. Cas. 130.

——**S. 20**—The mere fact of payment of an amount which is not specified to be either by way of interest or by way of part payment of principal does not save limitation. Such a payment is merely a general payment unspecified on account and does not comply with the requirements of the statute. If the creditor appropriates such a payment towards principal, then, in the case of a payment on account of this kind, the fact of appropriation would make it equivalent to a part payment of the principal, but such a payment either towards principal or interest must be appropriated before limitation in order to save limitation A.I.R. 1937 Lah. 820=39 P.L.R. 622=172 Ind. Cas. 455.

——**S. 20—Share-holder of Bank being director, auditor and mortgagor—Appropriation by Bank by adjustment of sums to mortgagor's credit from other accounts towards interest and subscription due from mortgagor—Audit notes written by mortgagor as auditor subsequently to adjustment.**

A shareholder and a director of a Bank took loan from the Bank on mortgage bonds agreeing to pay interest and subscription due on his shares regularly every month. He was also an auditor of the Bank and as such was auditing the accounts every month. He failed to pay certain instalments, whereupon the Bank made adjustments by appropriating sufficient sums from other accounts to the credit of the mortgagor, towards, interest and subscription due from the mortgagor. The mortgagor, subsequent to these adjustments, wrote audit notes for the year in which the instalments failed :

Held, that the fact that he was writing the audit notes for the year in question subsequent to the adjustment showed that he had at least an intimate knowledge of the accounts written upto the end of the year. It would be iniquitous if the mortgagor, knowing in advance that adjustments would, in the ordinary course of business, be made, knowing soon afterwards that adjustments were made, and obviously authorising the Bank to obtain funds from the accounts of others to discharge his debts, should be allowed to escape liability merely because he was not present on the actual day on which the adjustments were made. He must be considered to have ratified these adjustments towards subscription and interest. Consequently in a suit on the mortgage bond, the Bank's personal remedy was not barred by S. 20, Lim. Act. A.I.R. 1936 Mad. 946=169 Ind. Cas. 386.

——**S. 20—Both parties agreeing at time of endorsement of payment that it is to save limitation—Intention.**

Where both parties have agreed at the time of an endorsement of payment that it should be made for the purpose of saving limitation, the intention is to appropriate the payment towards the principal and not towards interest. A.I.R. 1935 All. 58=(1935) A.L.J. 304=4 A.W.R. 1342=154 Ind. Cas. 1070.

——**S. 20—No mention of mode of appropriation—Creditor appropriating amount towards interest—Whether can subsequently convert.**

It is possible that interest as such may not be paid by a debtor but payment by him may operate as payment of interest as would be the case where the creditor has got the right to appropriate a payment towards interest and does exercise that right. After the exercise of that right, no question can arise as to whether the payment was made towards principal or interest. It is not open to the creditor to convert it subsequently into payment of interest only, as it is for his benefit that he should reconsider his position as regards such payment. A.I.R. 1935 All. 47=(1935) A.L.J. 23=4 A.W.R. 1346=154 Ind. Cas. 1007.

——**S. 20—(As amended by Act 1 of 1927)—Payment by debtor without specification.**

Per *Full Bench* (*Thom and Bajpai, JJ.*, contra)—Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20.

Per *Thom and Bajpai, JJ.*, contra—Where an endorsement appears on the back of a bond in the handwriting of a debtor or his agent of the payment of a certain sum which is less than the amount of interest due, and less than the capital amount of the bond, a fresh period of limitation would run from the date of payment inasmuch as clearly the payment must be either towards interest or in part payment of principal, or partly towards interest and partly towards capital. 1935 A.L.J. 1029=1935 A.W.R. 1157 A.I.R. 1935 All. 946=58 All. 261=159 Ind. Cas. 385 (F.B.) Overrules A.I.R. 1930 All. 392=127 Ind. Cas. 581.

——**S. 20—Payment by debtor, without specifying whether it was towards interest or principal—A creditor appropriating towards interest.**

Where a debtor made a payment without specifying whether it was made towards interest or principal and the creditor appropriated it towards interest :

Held, that the payment was not payment of interest as such and cannot save limitation and though it is in writing, it cannot be assumed to be payment of principal so as to save limitation under S. 20, Lim. Act.

Where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid. It cannot, however, be said that the remaining liability shown by evidence *aliunde* should be deem d to have also been acknowledged. A.I.R. 1933 All 453=55 All. 632=(1933) A.L.J. 930=144 Ind. Cas. 899.

——**S. 20—Appropriation by creditor towards interest, if sufficient—Payment expressly for interest by debtor—If essential to save limitation.**

The creditor is entitled if the debtor makes no stipulation atthe time he makes the payment to creditor payment in such a way as would be most profitable to himself. He has a right to appropriate a payment made in a general manner towards interest due to him. But the creditor cannot by his own action and without any act of volition on the part of the debtor start a fresh period of limitation. Under S.20 the debtor must make the payment of interest definitely as interest and it is the act of the debtor which give limitation a fresh starting point. 120 Ind. Cas. 897=7 Rang. 522=A.I.R. 1929 Rang. 339.

——**S. 20—General payment—Appropriation towards interest by creditor—Claim not saved.**

Section 20 seems to contemplate a person liable to pay the amount and the interest making the payment and paying it for interest as such, and it has been repeatedly held by all the Courts in India that if a general payment should be made by a debtor, and a creditor should appropriate a portion of it towards interest, that would not amount to any payment by the debtor of interest as such and woud not have the effect of saving the claim from the bar of limitation. 111 Ind. Cas. 210=51 Mad. 549=29 M.L.W. 460=A.I.R. 1928 Mad. 509.

——**S. 20—Intention of debtor to pay towards interest must be proved—Appropriation by creditor not sufficient.**

Section 20 contemplates that the debtor has paid the amount with the intention that it should be paid towards interest and these must be something to indicate such an intention. The mere appropriation by the creditor of these payments to interest is not such an indication as would enable Court to hold that the payment were made towards interest as such by the debtor. 31 All. 495, Foll.

When there is nothing to show for what purpose payments were made towards a debt, the Court is entitled to ascertain the truth from the evidence. 44 Cal. 567, Foll. 98 Ind. Cas. 281=A.I.R. 1927 Mad. 110.

——**S. 20—Payment must be made by person liable or his agent—Appropriation by creditor—Not sufficient.**

The words of S. 20 are mandatory and interest must be paid as such by the person liable to pay the debtor or by his agent. An appropriation by the creditor to interest is not such an indication as would enable a Court to hold that the payments were made towards interest. 97 Ind. Cas. 384=1926 M.W.N. 558=A.I.R. 1926 Mad. 902.

——**S. 20—Payment of interest—Intention—Mere appropriation by creditor.**

Under S. 20 only payment of interest made as such will save limitation, *i.e.*, when the debtor has paid the amounts

with the express or implied intention that it should be paid towards interest. The mere appropriation by the creditor of the payments to interest is not such an indication. 19 Ind. Cas. 825 (Oudh).

——S. 20—Payment of interest—Requisites of.

Under S. 20 the interest must be paid as such *i.e.*, the debtor should pay it with the intention that it should be taken as interest; appropriation by a creditor of the payment as interest is not sufficient. 31 All. 495=6 A.L.J. 611=2 Ind. Cas. 379.

——S. 20 (unamended)—Payment of interest "as such"—Open payment by debtor—Creditor's right to appropriate it towards interest—Contract between parties that all payments should in first instance be towards interest—Endorsement not indicating that payment is towards interest—Extrinsic evidence—Admissibility.

When payment is made not specifically towards interest the creditor is not at liberty to appropriate it towards interest in order to save limitation. The choice lies with the debtor and unless he expressly, or by necessary implication, makes the payment towards interest "as such" at the time of making the payment, S. 20 of the Lim. Act is not attracted.

But when there is an express contract between the parties that all payment shall in the first instance be towards interest it is not necessary to repeat the formula each time the payment is made. The parties can, if they so choose, state expressly that they will make further payments in a particular way, and if the payment is made thereafter, it must be taken to have been made in the way they intended at the beginning unless there is anything to indicate to the contrary. This is particularly the case when the endorsement is on the bond itself and must be regarded as a sort of appendix or continuation of the bond. It is not necessary that the endorsement itself should indicate that the payment is towards interest as such. This can be deduced from extrinsic evidence. I.L.R. (1949) Nag. 478=A.I.R. 1949 Nag. 394=1949 N.L.J. 189.

——S. 20—Agreement as to appropriating towards interest first—General payment and appropriation by creditor—Saves limitation.

Where according to the terms of a mortgage, any payment made by the mortgagor was to be appropriated first to the interest due and the balance to principal, a general payment of debt and its appropriation by creditor accordingly saves limitation if interest is due at the date of payment and the payment does not cease to be payment of interest as such merely because overdue interest is treated under the deed as principal for the purpose of calculating interest. 43 Ind. Cas. 812, Foll. 99 Ind. Cas. 694=25 M.L.W. 69=A.I.R. 1927 Mad. 284.

——S. 20—Payment of interest—What is.

Where the agreement between a creditor and a debtor was that a credit in the creditor's book of a certain amount in favour of the debtor should be treated as "payment of interest" by the debtor and it is relied on to save limitation, the evidence must show that the debtor was a party to the arrangement and the accounts charging interest from time to time were accepted by him. A creditor cannot by a more unilateral act of his own turn a payment into payment of interest as such. (1916) 2 M.W.N. 264=4 L.W. 553=29 Ind. Cas. 422.

——S. 20—Payment of interest—Intention to pay—Appropriation.

An intention to pay interest as such ought not to be inferred merely from the creditor's appropriating payments in accordance with his legal power. But if the method of appropriation is determined at the outset by express contract between the parties, specific appropriation on the occasion of each payment is not necessary. 9 N.L.R. 78=19 Ind. Cas. 849.

——S. 20—Payment of interest—Appropriation by creditor towards interest.

Where there is an agreement between the parties that all payment made by the debtor would go first for payment of interest and then for principal, any appropriation made by a creditor towards interest in spite of the absence of directions from the debtor, would be the payment of interest as such within the meaning of S. 20. 31 All. 285=6 A.L.J. 207=1 Ind. Cas. 137.

——S. 20—Two debts—General payment—Appropriation by creditor to one—Limitation not saved.

Under S. 20 the payment is viewed from the standpoint of the debtor and hence the determining factor is the intention of the debtor in making the payment and not that of the creditor in appropriating it. Where, therefore, the debtor makes payment to his creditor, whom he owed two debts, the mere appropriation of the payment by the creditor to one of the debts, cannot, in the absence of evidence to show debtor's intention, save limitation. 116 Ind. Cas. 549=10 Lah. 750=30 P.L.R. 233=A.I.R. 1929 Lah. 288.

——S. 20—Appropriation of payment—Suit debt and another—Effect of, on limitation.

The plaintiff had appropriated the payments generally towards the defendant's debts due on the suit pronote, which was earlier and another due on a mortgage. *Held*, both the debts were saved and the suit was in time. 11 M.L.T. 429 and 13 C.L.J. 39, Foll. 51 Ind. Cas. 240 (Mad.).

——S. 20—Appropriation of payments—Payment—Several pronotes—Payment without specification of debt—Effect of—Limitation.

Where payment was made by a debtor to a creditor in respect of several pronotes without specifying the debt to which they were paid or whether it was paid for principal or interest but such payments were corroborated by an entry in the creditor's account in the handwriting of the debtor. *Held*, that the entry has the effect of saving limitation in respect of all notes whether the payment was for interest or principal or both. 11 M.L.T. 429=(1912) M.W.N. 754=14 Ind. Cas. 580.

5. Authority to pay.

See also NOTE 13.

——S. 20—Implied authority.

It may be that no formal authorisation is required under S. 20, but it must be shown that there was at least implied authority. A.I.R. 1939 Rang. 287=184 Ind. Cas. 622.

——Ss. 20, 21—Part payment by agent—Special authority.

The authority contemplated by S. 21 need not be special authority given for the purpose of making payment of the particular loan in question. A.I.R. 1933 Cal. 826=147 Ind. Cas. 459.

——Ss. 20 (1) and 21—"Agent duly authorised" to make payments and acknowledgments—Testamentary guardian of Hindu minor daughter—Payments and acknowledgments by, after the minor is married—If will save limitation.

As evidence can be given apart from the endorsement itself on a promissory note to show that a particular payment was towards the interest due on a debt, where interest has been paid towards the debts due on two promissory notes but by mistake the relevant endorsements as to payment of interest are made on the wrong notes, evidence *aliunde* would be admissible to show that the endorsement made on each note was an acknowledgment of the payment of interest in respect of the other so as to save limitation.

A testamentary guardian can be appointed by a Hindu father both as regards the person as well as the property of his minor daughter. Though on the marriage of the

minor the husband would in law become the guardian of her person unless there is an express provision in the will, the guardian appointed by it will not be cease to the guardian so far as the property is concerned. Hence a testamentary guardian who continues to be the lawful guardian of her property in spite of her marriage would be an " agent duly authorised " to make payments and acknowledgments will save limitation. I.L.R. (1948) Mad. 351=A.I.R. 1948 Mad. 155=60 L.W. 425=1947 M.W.N. 409=(1947) 2 M.L.J. 93.

——**Ss. 20 (1) and 21 (1)**—Pro-note executed by minor's paternal grandmother as his *de facto* guardian for sum due by his father on previous obligation—Suit on pro-note against minors alone.

Held, that payment by grandmother saved limitation. 56 L.W. 691=A.I.R. 1944 Mad. 152=(1943) 2 M.L.J. 556=1943 M.W.N. 807=215 Ind. Cas. 123.

——S. 20—De facto guardian.

Payment by even a *de facto* guardian for the benefit of minor to avoid law suits, extends periods of limitation against the minor. 1 Pat.L.W. 777=40 Ind. Cas. 809.

——Ss. 20, 21—Payment by interim guardian.

An *interim* guardian who without obtaining permission of the Court makes payment on promissory note executed by minor's father cannot be said to be agent authorised in that behalf and limitation cannot be extended. 1935 M.W.N. 274.

——S. 20—'Agent'—Certificated guardian of minors—How far agent of minor.

A certificated guardian of a minor is agent of the minor within S. 20 and payments by him would save limitation. (1902) 6 C.W.N. 729=29 C. 647.

——**S. 20**—Part payment—Guardian—Ward's benefit. *See* LIMITATION ACT, S. 19. 3 Bom.L.R. 817=26 Bom. 221.

——S. 20—Attachment and sale of movables of judgment-debtor in execution—Sale officer paying sale proceeds to decree-holder—If agent of judgment-debtor—Limitation, if saved.

Where in execution of a decree, the moveable property of the judgment-debtor is attached by a *Chagla Kanungo* under a warrant issued by the Court, and the *Chagla Kanungo* sells the property and pays the sale proceeds to the decree-holder, such payment does not save limitation under S. 20, Limitation Act. The warrant officer cannot be regarded as an agent of the judgment-debtor duly authorised to make such payment to the decree-holder. 11 Cut. L.T. 54=1946 P.W.N. 116=A.I.R. 1946 Pat. 131.

——Ss. 20, 21—Managing partner making payment towards partnership debt—Endorsement by him, held saved limitation against partners.

A partner *X* who was in charge of the business made the payment of interest and principal due on a pro-note which was a partnership debt, and entered the payment in the books of the firm. The creditor in his own account book also credited the amount to the joint account of the partners :

Held, that *X* was acting on behalf of the firm and not on his own behalf and the endorsement of the payment by *X* saved limitation against all the partners. (1945) 1 M.L.J. 279=58 M.L.W. 236=1945 M.W.N. 314=A.I.R. 1945 Mad. 263.

——S. 20—Partners—Implied authority.

Acknowledgment must be either by an authorised person or it can be inferred from the acts of parties. In the absence of direct evidence that a contractor or partner has authorised his co-contractor or co-partner to acknowledge a debt or to make payments saving limitation on his behalf the Court can infer such authority from other circumstances, such as the position of the other co-contractors or partners in the business. 37 M. 146, Foll. 41 Mad. 427=34 M.L.J. 373=23 M.L.T. 261=(1918) M.W.N. 285=7 L.W. 552=45 Ind. Cas. 18. [*Also* 37 Mad. 146=25 M.L.J. 501=21 Ind. Cas. 634].

——S. 20 (1)—Partner—Limitation—Saving of.

The mere fact that a partner is in charge of a branch of the partnership business does not authorise him to bind the firm by a payment or acknowledgment. He must be specifilly authorised to do so in order to bring the payment within S. 20 of the Limitation Act. 28 Ind. Cas. 845 (Mad.).

——S. 20—Part-payment by a partner.

Part-payment by one partner of a debt due by the firm is not binding on the other partners, unless the partner is shown to have such authority. As an ordinary rule, authority of one partner to pay part of the firm's debt so as to bind other partner is not to be presumed in a going mercantile concern. 32 Mad. 421=5 M.L.T. 102=2 Ind. Cas. 309.

——Ss. 20 and 21—Principal and surety.

Quaere.—Whether a payment by the principal debtor would keep alive the debts against the surety under S. 20, Limitation Act. A.I.R. 1942 Cal. 251=74 C.L.J. 327=I.L.R. (1941) 2 Cal. 576=201 Ind. Cas. 138.

——S. 20—Principal or surety is authorised by the other by implication to make payments.

The principal or the surety is authorised by the other, by implication, to make payments on account of the common debt, and in the manner provided by S. 20 (1), Limitation Act. The object and intention of the arrangement made by the principal and surety is that the principal shall pay the debt and thus reduce or cancel the surety's liability and the surety must be taken to be aware of the provisions of the section and the effect of payments made in accordance therewith. A.I.R. 1940 Cal. 401=I.L.R. (1940) 2 Cal. 362=44 C.W.N. 985=191 Ind. Cas. 608.

——S. 20—In cases of principal and surety, there are two distinct contracts in respect of one debt common to both. There cannot be two distinct debts, otherwise payments on account of principal or interest by the principal would not, *ipso facto*, reduce the debt due by the surety, and *vice versa* as they do. It follows that payments of principal or interest by either principal or surety, and acknowledgements in accordance with the provisions of S. 20 (1), Limitation Act, create a fresh priod of Limitation in respect of the common debt as against either the principal or the surety. The expression 'fresh period of limitation' is in general terms, and there is nothing in the section to indicate that the new periods of limitation is only to operate against the person making the payment. A.I.R. 1940 Cal. 401=44 C.W.N. 985=I.L.R. (1940) 2 Cal. 362=191 Ind. Cas. 608.

——S. 20—Principal and surety—Payment of interest by debtor.

Payment of interest by the principal debtor within limitation gives a fresh starting point against the surety under S. 20 of the Limitation Act. 105 P.R. 1919=53 Ind. Cas. 586.

——S. 20—The fresh period of limitation created under S. 20, by the payment of interest by the principal debtor can be only in respect of the debt of the principal debtor and the fact that the payment was made with the knowledge or consent of the surety or even at his request would not save limitation as against the surety unless the circumstances are such as to render the payment one on the surety's behalf. (1934) M.W.N. 118=40 M.L.W. 479=A.I.R. 1934 Mad. 639=152 Ind. Cas. 464.

——S. 20—Payments by a principal debtor do not extend the period of limitation against a surety. A.I.R. 1931 Oudh 310=8 O.W.N. 544=132 Ind. Cas. 798.

——S. 20—Payment by principal—No fresh starting point against surety.

The liability of the surety is not saved from the bar of limitation by the payment by the principal. 28 Bom. 248 and 21 M.L.J. 455, Foll.; 105 P.R. 1919, Not foll. 120 Ind. Cas. 576=A.I.R. 1930 Mad. 112.

——S. 20—Payment by principal—No saving against surety.

The payment of interest by the debtor within limitation under S. 20 does not give a fresh starting point for limitation against the surety. 84 Ind. Cas. 199=20 N.L.R. 140=A.I.R. 1924 Nag. 411.

——S. 20—Principal and surety—Interest—Payment of, by principal debtor.

A payment of interest made by the principal debtor with the knowledge and consent and at the request of the surety but not or his behalf does not extend the period of limitation under S. 20 so far as the surety is concerned. A payment by one person cannot keep alive the remedy against another unless payment by the one may be regarded as payment for the other. Payment by the principal will not in general bind the surety. The fresh period of limitation created under S. 20 by payment of interest by the principal debtor is only in respect of the debt upon which the interest was paid, *viz.*, the debt of the principal debtor. Though the liabilities of the debtor and the surety arise out of the same transaction, their liabilities are distinct for the application of S. 20. 44 Cal. 978=21 C.W.N. 482=25 C.L.J. 238=39 Ind. Cas. 705.

——S. 20—Principal and surety.

Payment of interest by principal debtor does not extend limitation as against surety. 28 B. 248, Foll. 9 M.L.T. 263=21 M.L.J. 455=9 Ind. Cas. 8.

——S. 20—Payment of interest—Principal—Surety—Limitation.

In the absence of a prohibition against the payment of interest by the debtor on his account, the payment of interest by the debtor within limitation does not give a fresh starting point of limitation against the surety under S. 20. (1903) 5 Bom.L.R. 1020=28 B. 248.

——S. 20—Claim barred by time against principal debtor—Payment by surety.

For the purposes of the application of S. 20, the liabilities of the debtor and his surety are distinct, though their liabilities arise out of the same transaction.

Where a suit was barred by limitation against the principal debtor, but the surety had made certain payments and endorsements on the suit bond thus preventing limitation running against him:

Held, that the plaintiff was entitled to a decree against the surety only. A.I.R. 1932 Rang. 88=10 R. 398 =139 Ind. Cas. 138.

——Ss. 20, 21—A payment by an heir saves limitation against other heirs. A.I.R. 1941 Mad. 110=(1940) 2 M.L.J. 326=(1940) M.W.N. 891=52 L.W. 364 (2) =195 Ind. Cas. 235.

——S. 20—Payment of interest by one of co-heirs of a deceased Muhammadan—Limitation saved against other co-heirs.

A payment of interest due on a promissory note, executed by a deceased Mohammedan, by one of his co-heirs is effectual under S. 20 to save limitation against other co-heirs also, because what S. 20 requires is only that the payment should be made by a person liable to pay the debt. 118 Ind. Cas. 302=1929 M.W.N. 146=29 M.L.W. 789=A.I.R. 1929 Mad. 419=56 M.L.J. 630.

——S. 20 (1)—Payment by one of heirs.

A payment of interest by one of the heirs of a deceased on the debts due by the latter would not save the running of limitation against the other heirs. 14 Ind. Cas. 129 (All.).

——S. 20—Co-heirs—One of joint-debtors—Effect.

The payment of interest, on a debt due by the deceased by one of his heirs does not save limitation as against the other heirs. 14 Ind. Cas. 128 (Cal.).

——S. 20—Payment by manager—Bengal Tenancy Act, S. 95.

Section 20, Limitation Act does not require any formal authorisation. Such an authority may even be implied from the facts and circumstances of the loan.

The common manager appointed under S. 95, Bengal Tenancy Act was authorised by the proprietors to raise a loan in his name without undertaking any personal liability and to repay the loan out of the shares of the proprietors in the profits of the estate. He paid interest within the period of limitation from time to time out of the share of the income of these proprietors and endorsed these payments on the back of the bond in suit and the creditor-plaintiff received interest presumably as paid on behalf of the debtors:

Held, that these payments saved limitation as against the proprietors.

Held, also the common manager was not liable. A.I.R. 1941 Cal. 643=73 C.L.J. 356=197 Ind. Cas. 869.

——S. 20—Mortgagor and mortgagee—Payment by mortgagee.

Per *Leach, C. J.* and *King, J.*—(*Patanjali Sastri, J.*, Contra)—Where a mortgagee undertakes as a part of the consideration for the mortgage in full a debt due by the mortgagor, he cannot be deemed to have authority to make a payment of interest or a part payment of principal. In such a case, the mortgagee cannot be deemed to have discretion in the matter of payment to the mortgagor's creditor. His duty is to discharge the debt in full and he has no authority to do anything else. Hence a payment made by the mortgagee cannot be regarded as a payment made by him as an agent of the mortgagor duly authorised in that behalf within the meaning of S. 20, Limitation Act. Whether there is authority to make a part payment is a question of fact and the decision in each case must depend upon the particular facts.

Per *Patanjali Sastri, J.*—Where a mortgagee undertakes a part of the mortgage consideration, to discharge a debt due by the mortgagor, a payment made by the mortgagee should be regarded as having been made with the authority of the mortgagor who gets the benefit of it by virtue of the stipulation. Section 20, Limitation Act does not require authority to keep the debt alive. The authorisation must relate to the payment of interest on the debt or to the part payment of the principal as the case may be, and the debt is kept alive as the legal consequence of such payment, irrespective of the intention of the debtor or his agent. It is, therefore, not strictly relevant, and may, indeed be somewhat misleading to enquire whether the person paying was authorised to keep alive the debt. The true principle is that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so-called but also when he makes the payment on behalf of the debtor; because he has bound himself by deed for value so to do. A.I.R. 1941 Mad. 67=I.L.R. (1941) Mad. 191=52 L.W. 935=(1941) 1 M.L.J. 77=1941 M.W.N. 9=195 Ind. Cas. 733 (F.B.).

——S. 20—"Duly authorised agent"—Mortgagee.

A mortgagee authorised to pay off a debt due by the mortgagor is not his "duly authorised agent" within S. 20 of the Limitation Act. 26 M.L.J. 509=23 Ind. Cas. 810.

——Ss. 20, 19—Direction by mortgagor to his vendee to discharge debt due by mortgagor—Part payment made by vendee.

Under S. 20, the agent whose payment would keep alive the debt must be one who was duly authorised

to make the part payment of interest or principal. A power to extinguish the debt would not carry with it a power to keep alive the debt. A direction or power to discharge a debt does not make the donee of the power an agent authorised to make a part payment so as to keep alive the debt. The part payment made by the purchaser would not be payment by an agent duly authorised within the meaning of S. 20. 51 L.W. 453=A.I.R. 1941 Mad. 6=(1940) 2 M.L.J. 726=195 Ind. Cas. 329 (D.B.).

——S. 20—Part-payment by vendee—Debt not kept alive.

A vendee has no authority to keep a debt alive by making a part payment when he was asked to pay it by the sale deed. A.I.R. 1922 Mad. 401.

——Ss. 20, 21—Pro-note executed by undivided father and son—Payment by father.

Where a pro-note is executed by the undivided father and son, a payment by the father alone cannot save limitation against the son in the absence of proof that the loan was contracted for the benefit of the entire family, the mere fact that the father was the manager of the family cannot save limitation. A.I.R. 1941 Pat. 208=7 B.R. 861=22 P.L.T. 1054=195 Ind. Cas. 52.

——S. 20—Hindu family—Payment by manager.

Part payment of a joint debt by manager of a joint Hindu family does bind another member of the family and the fact that the latter joined the manager in borrowing the loan cannot impair the representative capacity of the manager though it may serve to prove that the borrowing was for a necessary purpose of the family. A.I.R. 1939 Nag. 15=I.L.R. (1939) Nag. 235=1938 N.L.J. 205=182 Ind. Cas. 573.

——S. 20—Joint Hindu family—Pro-note executed by son—Endorsement of payment made by father.

A member of the joint Hindu family cannot simply because he is a member of that family, without specific authority, pay a debt on behalf of another member of the family or make an endorsement on behalf of the other member so as to enlarge the period of limitation. Hence where a promissory note is executed by a son who was a member of the undivided family with his father, an endorsement of payment made by the father cannot be presumed to have been authorised on behalf of the son unless there is something else to show that authority was, in fact, given to the father by the son to pay the debt on his behalf. (1940) 2 M.L.J. 369=(1940) M.W.N. 893=52 L.W. 399=A.I.R. 1940 Mad. 954=191 Ind. Cas. 853.

——Ss. 20, 21—Joint liability of Hindu undivided family for family debt, whether debt within S. 20.

The joint liabilities of the members of an undivided Hindu family for a family debt, is not a debt within the meaning of S. 20 so that one member, by making a part payment, can keep the debt alive against all the others.

Reading Ss. 20 and 21 together, therefore, it cannot be held that the members of a joint family are, for the purposes of S. 20, "persons liable to pay the debt" when the debt in question cannot be levied from them personally, but is merely recoverable by the sale of the joint family property, on foot of a decree made to that effect. Much less then are the said members "persons liable to pay the debt" when by reason of partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it. A.I.R. 1938 Mad. 774=(1938) M.W.N. 714=(1938) 2 M.L.J. 33=48 M.L.W. 251=I.L.R. (1938) Mad. 968=178 Ind. Cas. 243.

——Ss. 20, 21—Partition—Part payment by person to whom debt is allotted.

Where a debt was due by two brothers and on a partition between them, it was allotted to one of them:

Held, that a part payment by the brother to whom it was allotted could not save the debt from limitation as against the other brother.

Held, also that the partition had the effect of revoking a power-of-attorney which the former had executed to the latter. A.I.R. 1933 Cal. 826=147 Ind. Cas. 459.

——S. 20—Mortgage — Part-payment — Endorsement by karta of joint family—Fresh period of limitation begins.

The karta of a joint family is the agent of the entire family duly authorised to make part-payments on behalf of the family and when he makes a part-payment towards the satisfaction of a mortgage bond, the suit brought by mortgagee within 12 years of the part-payment, but after 12 years from execution of the mortgage bond against joint family on that bond, is not barred by limitation under S. 20, as fresh period of limitation begins to run from his endorsement. 37 Cal. 461=31 C.L.J. 7 and 19 C.W.N. 860, *foll.* 109 Ind. Cas. 655=6 Pat. 811=A.I.R. 1928 Pat. 156.

——S. 20—Payment by son—Debt by father for his own purposes—No acknowledgment—No presumption of agency.

Where a pro-note *prima facie* is for 1st defendant's necessity only and not for family necessity the mere fact that 2nd defendant is his undivided son will not suffice to make a payment by him tantamount to an acknowledgment in law on behalf of his father, for father's private debt, or suffice to raise any presumption that 2nd defendants acted as his father's agent in making such a payment. 32 M.L.T. 317=A.I.R. 1924 Mad. 96.

——S. 20—Payment by manager not acting as such—Junior members.

Payment towards principal and interest made by the manager and endorsed on the note in his writing and over his signature had the effect of extending the period of limitation as against the junior members also, though the payment and the endorsement did not purport to have been made and signed by him as manager. 37 M.L.J. 369=53 Ind. Cas. 878.

——S. 20—Joint Hindu family—Payment by karta binds other members.

The words "agent duly authorised" in S. 20 of the Limitation Act includes authority given by law as well as authority given by act of parties. Where the *karta* of a joint Hindu family purporting to act for himself as well as for his minor brother, made part payment of interest due on debt contracted by himself and his father for joint family purposes it has the effect of saving limitation in respect of the claim as against the minor member as well. 31 C.L.J. 7=52 Ind. Cas. 436.

——S. 20—Payment by manager through messenger—Effect.

A payment through a messenger made by a manager having general authority to make payments and followed by an entry by the manager of such payment with his own hand in his account book saves limitation. 23 C.W.N. 336=50 Ind. Cas. 862.

——S. 20—'Debtor'—Payment by son during lifetime of father.

The word "debtor" as used in S. 20 of the Limitation Act, means the persons who is liable under the contract of debt. Hence where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the lifetime of the father neither a debtor nor, in the absence of any evidence, an agent

of the father for the purposes of the said section. 5 O.L.J. 419=47 Ind. Cas. 655.

——Ss. 20 and 21—Authority to acknowledge—Joint Hindu family—One member managing for all after partition—Acknowledgment by him.

Where one member after partition was allowed to manage the properties on behalf of all, an acknowledgment by him after partition is not binding on the others unless it can be proved that he was then authorised agent under S. 21. 3 L.W. 231=(1916) 1 M.W.N. 162=38 Ind. Cas. 986.

——Ss. 20, 21—'Agent'—Managing member of joint family—Not certificated guardian—Mortgage debt contracted by father—Sons, adult and minor—Liability.

The managing member of a joint family, even though he is not the guardian of his minor brothers, is their 'agent' within the meaning of S. 20. A payment of interest by him saves limitation as against his brothers also. Where a mortgage debt is contracted by the father, the debt on his death descends to all his sons, and any payment made by one of them extends the period of limitation as against all. 37 C. 461=11 C.L.J. 484=14 C.W.N. 741=5 Ind. Cas. 484.

——S. 20—Agent—What would constitute one an agent of another—Payments by son from time to time—Implied authority of father to make them.

It is not necessary that *mukhtarnama* or written authority should be given to a person in order to constitute that the person as a duly authorised agent as contemplated by the Limitation Act. From the conduct of the parties it can and must necessarily be inferred as to whether there was any authority to make payments on his behalf or not. Hence where payments have from time to time been made by the debtor's son and endorsements duly made and signed by him, it would be inconceivable that the son made those payments without the authority of his father, the debtor. 229 Ind. Cas. 265=1947 O.W.N. 194 (1)=1947 A.W.R. (C.C.) 55 (2)=1947 O.A. (C.C.) 55 (2) =A.I.R. 1947 Oudh 173.

——S. 20—Payment by debtor through his son.

Where an amount is sent by the debtor to the creditor through his son, the son must be deemed to be the authorised agent of the debtor for the purpose of making the payment within the meaning of S. 20, Limitation Act. A.I.R. 1940 Lah. 513=42 P.L.R. 635=191 Ind. Cas. 802.

——S. 20—Payment through friend.

Money was sent by a debtor to his friend for making payment to the creditor as part of the principal. The money, however, was not actually paid by the friends himself but was sent to the creditor through a messenger with a letter that the amount had been sent to him by the debtor for payment and that it may be credited in the debtor's account:

Held, that the friend was debtor's agent within the meaning of S. 20, Limitation Act, and the payment operated as an acknowledgment of the debt. A.I.R. 1940 Mad. 691=51 L.W. 622=(1940) 1 M.L.J. 820=(1940) M.W.N. 927=I.L.R. (1940) Mad. 913=194 Ind. Cas. 707.

——S. 20—Promisor's agreement with 3rd party for payment of interest—Implied authority established.

Where it is agreed between a third person and the promisor that the former would discharge the latter' debt evidenced by promissory note to the promisee in respect of principal and interest, and it is clear from the promisor's evidence that he left it to the third person to do so, an implied authority from the promisor to the third person to pay the interest on his behalf as it became due is established so as to save limitation under S. 20. 121 Ind. Cas. 193=34 C.W.N. 145=31 M.L.W. 1=1930 M.W.N. 1=6 O.W.N. 1136=51 C.L.J. 56 =32 Bom.L.R. 136=57 I.A. 1=A.I.R. 1929 P.C. 297 (P.C.).

——S. 20—Agreement that promisor should execute and 3rd party to make payment—3rd party is agent of promisor.

Where a promissory note is executed in pursuance of an agreement between the executant and a third party that the former would execute the pronote but the latter would pay the interest on it and also the principal, there is sufficient evidence of an implied condition that third party should pay the interest as the duly appointed agent of the executant; but where the payment of interest is made not in consequence of any such agreement, but in consequence of an understanding between the executant and the promisee, there is no payment of interest by an agent to save limitation under S. 20. 92 Ind. Cas. 94=3 O.W.N. 83=A.I.R. 1926 Oudh 248.

——S. 20—Payment by Court—Debtor's assets attached—Court releasing for payment of debts—Act of Court is act of debtor—Payment out of father's money—If payment by debtor.

If a debtor's presumable assets are so placed by operation of law, *viz.*, a legal attachment, that the Court can release them for the purpose of making payment due from him, then the act of the Court must be treated as the act of the debtor himself the volition of the debtor being neither requisite nor relevant but it cannot be said that the volition of the debtor is neither requisite nor relevant when a Court is paying out moneys belonging to his father and not to the debtor himelf. 44 Mad. 971, Foll. 98 Ind. Cas. 571=A.I.R. 1927 Mad. 80=51 M.L.J. 610.

——S. 20—Court paying money due by judgment-debtor—Court is the agent of the debtor—Judge signing treated as his handwriting.

Per *Sadasiva Aiyar, J.*—A Court paying in the course of its duty the money due by the judgment-debtor is legally constituted agent of the judgment-debtor for that purpose and the handwriting of the Judge signing a paper indicating that a sum was paid to the decree-holder in the Judge's presence through the Court is the handwriting of the person making the payment. 24 W.R. 20, Diss. (1899) 2 Ir. Rep. 163; (1864) 11 H.L.C. 115 and 35 M.L.J. 571, Foll.

Per *Coutts-Trotter, J.*—The principle deducible from *Chinnery* v. *Evans*, (1864) 11 H.L.C. 115 is this. That if a debtor's assets are so placed, either by his own act or by operation of law, that, if some one other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words "his agent duly authorised in that behalf" in S. 20 of the Limitation Act are satisfied by the act of the Judge of Court which authorises the payment, and that his handwriting is rightly described as that of the person making the payment. 68 Ind. Cas. 100=44 Mad. 971=14 M.L.W. 320=1921 M.W.N. 683=A.I.R. 1921 Mad. 704=41 M.L.J. 423.

——S. 20—Agent need not be authorised to endorse payment.

Section 20 does not require that the agent "in this behalf" must be more than an agent for the purpose of payment. It does not say that the agent who pays should also be authorized to make the endorsement or get the same done by another. It is enough if he is authorized to make the payment and it is not necessary that he should also be authorized in respect of endorsing the payment.

Per *Venkatasubba Rao, J.*—The section assumes that authority to make the payment carries with it the authority to make the endorsement. 105 Ind. Cas. 475=26 M.L.W. 447=A.I.R. 1927 Mad. 959=53 M.L.J. 555.

——S. 20—Agent authorised to pay towards bond—Payment towards interest—If authorised.

When an agent is authorized to pay an amount towards the total amount of the bond the authority extended to his paying an amount towards the interest due on the bond and it cannot be held that the general authority to pay towards the total amount of the bond is confined to paying only towards the principal. But where the authority is specific, that is to say, where the agent is authorized only to pay towards the principal, the agent will not be justified in paying towards interest within S. 20 98 Ind. Cas. 162=24 M.L.W. 638=A.I.R. 1926 Mad. 1176=51 M.L.J. 472.

——S. 20—Payment of interest by agent—Effect.

Where interest is paid by duly authorized agent of the debtor within his authority before the prescribed period, fresh limitation starts. 96 Ind. Cas. 309 (Mad.).

——S. 20—Payment by agent beyond his authority—Creditor does not get the benefit of section.

The agent who can give the creditor the benfit of S. 20 has to act within the terms of his authority. If he exceed his authrority or does something which is not actually covered by his authority he cannot bind the principal so as to give the creditor the benefit of S. 20 of the Limitation Act. The guardian of the minor judgment-debtor executed with the sanction of the Court, a mortgage and directed the mortgagee to pay the amount to the decree-holder and obtain a receipt from him and to retain it as title. The mortgagee nearly a year and a half afterwards paid the money into Court and the decree-holder drew the money from the Court.

Held, that the payment of the money by the Court to the decree-holder could not extend limitation in favour of the decree-holder. 87 Ind. Cas. 989=A.I.R. 1925 Mad. 703=48 M.L.J. 506.

——S. 20—Actual handing over money not necessary.

Payment does not cease to be made by an agent because the actual handing over of the money is done by some menial servant under his orders. 61 Ind. Cas. 918=8 O.L.J. 115=A.I R 1921 Oudh 29.

——S. 20—Servant—Agent.

Payment by the agent through a servant is payment by the agent on behalf of the principal falling within S. 20 of the Limitation Act. 10 L.W. 466=(1919) M.W.N. 797=54 Ind. Cas. 318.

——S. 20—Payment by one of the co-reversioners—Effect against others.

Payment of interest made by some only of the reversionary heirs of a Hindu towards the amount due under a mortgage bond executed by his widow was not sufficient to save the bar of limitation as against the other reversioners. (1917) P.H.C.C. 348=4 Pat.L.W. 85=43 Ind. Cas. 351.

——S. 20—Receiver—Partition or administration suits—Acknowledgment of debts.

A receiver in a partition or administration suit authorised to pay interest on debts can, by his payment, keep alive the debts. 16 M.L.T. 489=26 Ind. Cas. 393.

——S. 20—Saving of—Receiver—Guardian and Ward—Acknowledgment of guardian or receiver—Payment of interest or part payment of principal.

Obiter: Per *Bhashyam Aiyangar, J.*—For the purpose of giving a fresh starting point for computing the period of limitation, payment of interest or part payment of principal by a receiver or guardian may stand on a different footing from an acknowledgment of liability made by him. (1903) 14 M.L.J. 84=27 M. 243 (F.B.).

——S. 20—Payment may be made by debtor or his agent.

Payment of interest must be proved to have been made either by the debtor or by his duly authorised agent. 23 Ind. Cas. 863 (All.).

—S. 20 (1)—Husband and wife.

Under S. 20 o the Limitation Act it is sufficient for an illiterate person paying the money to affix a mark below an endorsement written by another person. A Burmese married couple of the cultivating class, working on land together, work it as partners, to all intents. When one is temporarily incapacitated there is a natural presumption that the wife has ostensible authority to act for both on the quasi-partnership and is an agent within S. 20. 4 Bur.L.T. 217=12 Ind. Cas. 23.

——S. 20—Payment of interest one by defendant—If saves limitation against other.

Where payment of interest is made by one defendant on behalf of another, limitation as against the latter will be saved only on strict proof by plaintiff, that the former had authority to make such payment on his behalf. 4 Bur. L.T. 191=11 Ind. Cas. 858.

——S. 20—Agent of purdanashin lady.

A person holding a power of attorney from his wife and her sister is a duly authorised agent of both, for paying interest under S. 20 of the Limitation Act. 37 Cal. 526=14 C.W.N. 974=11 C.L.J. 563=5 Ind. Cas. 539.

6. Evidence.

See also A.I.R. 1948 Mad. 155 **under** NOTE 5

——S. 20 (2)—Debtor's acknowledgment of liability must bo proved.

Where, in a suit brought under S. 65, Contract Act, to recover money on the failure of a mortgage which was void *ab initio*, the creditor, in reply to the plea of limitation, pleads an acknowledgment by the debtor under S. 20 (2), Limitation Act, he must, in order to succeed, show that the debtor acknowledged the liability arising under S. 65 of the Contract Act. 1943 A.W.R. 22=A.I.R. 1943 All. 294=(1943) A.L.J. 250. I.L R. (1943) All 604=209 Ind Cas. 10.

——S. 20—Appropriation towards principal.

To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed, the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. 1943 A.W.R. 120=A.I.R. 1943 All. 289=(1943) A.L.J. 255=I.L.R. (1943) All. 598=208 Ind. Cas. 367.

——S. 20—Payment of interest—If must be in handwriting of or under signature of party making it—Whether can be inferred from circumstances.

For a payment of interest to come within the purview of S. 20, it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. The payment of interest "as such" need not necessarily appear in the handwriting of or under the signature of the party making the payments. No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest but where the payment is proved to be on account of interest not only by the evidence of the witnesses but also from the fact that an account of interest due has been drawn up on the back of each bond and the payment has been shown as being out of that amount the payment falls within the purview of S. 20. A.I.R. 1940 Oudh 179=1940 O.W.N. 289=1940 A.W.R. 151=15 Luck. 524=187 Ind. Cas. 94.

——S. 20—Payment made by a debtor can be proved by the creditor to have been made towards interest as such by extrinsic evidence, oral or documentary, other than the "writing" referred to in S. 20, Limitation Act. "Writing" referred to in Proviso to S. 20, Limitation Act, need not itself recite in so many words that the payment made was on account of interest as such or of part of the principal. A.I.R. 1938 Mad. 601=47 L.W. 520=(1938) 1 M.L.J. 620=(1938) M.W.N. 395=I.L.R. (1938) Mad. 1090=177 Ind. Cas. 743.

——S. 20—Payment—Evidence to show that it was towards interest.

The endorsement otherwise fulfilling the requirements of S. 20, need not show on the face of it, that the payment was towards interest. Sections 91 and 92, Evidence Act, do not preclude evidence being given to show that at the time when the payment was made the debtor expressly stated that it should be appropriated towards interest. Hence, where it is proved on evidence that the payment was towards interest, such endorsement would save limitation. A.I.R. 1937 All. 640=(1937) A.L.J. 992=I.L.R. (1937) All. 732=1937 A.W.R. 615=171 Ind. Cas. 422.

——S. 20—Part payment of debt, whether extends limitation—Fact of part payment, can be proved aliunde.

All that is required by the plain words of S. 20, Limitation Act, is that there should be a payment of a part of the debt due. The fact that there was such a debt and that that debt exceeded the amount paid, are facts which may be proved *aliunde*. They need not appear in the writing evidencing the part payment. All that has to be shown is that the payment was made towards this existing debt whose amount exceeded the amount paid, and once this is done, then by the words of the statute, time is extended. There is no reason to infer a conditional promise to pay any remaining liability. A.I.R. 1936 Lah. 629=17 L. 737=165 Ind. Cas. 723.

——S. 20—Evidence of intention—Payment of interest or principal.

Under S. 20, no payment of interest can be made to avail, unless it is a payment of interest 'as such'. Either some acknowledgement must be given by the payer at the time of the payment that the money paid is intended by him to be a payment of interest or there must be sufficient evidence from which it can be inferred that the debtor intended that the amount should be appropriated towards interest. A.I.R. 1935 Rang. 473=160 Ind. Cas. 314.

——S. 20—Written statement cannot be called in aid for purpose of S. 20.

A written statement filed in the suit itself cannot be called in aid for the purposes of S. 20 of the Limitation Act. When the plaintiff institutes the suit beyond the period of limitation prescribed in the Schedule to the Limitation Act, he has to state in his plaint the reasons why the suit is still within time. If there is no such statement, the Court has to dismiss the suit. A suit must be tried on the cause of action as laid in the plaint and any inherent defect of the said nature in the plaint cannot be supplied by a written statement in the suit. A.I.R. 1935 Cal. 255 =39 C.W.N. 139=60 C.L.J. 386=155 Ind. Cas. 721.

——S. 20—Inference—Amount due by way of interest more than sum paid—Costs less than amount paid.

In order to make a payment valid for the purpose of S. 20, it must be shown that the payment was wholly or partly on account of interest. 'Debt' referred to in S. 20 includes money payable under a decree. A question of this kind has to be determined on the facts of each case.

A sum of Rs. 50 was paid by the judgment-debtor towards the decree amount. On that date what was due for costs as such was only Rs. 22-13-0. The decree amount comprised both principal and interest and the amount due for interest alone was much more than Rs. 50.

Held, that in the absence of proof that the amount was earmarked for principal it could be inferred that a portion at least of the sum of Rs. 50 was paid on account of interest due under the decree so as to save limitation under S. 20. (1933) M.W.N. 1023=66 M.L.J. 40=A.I.R. 1934 Mad. 45=39 L.W. 237=148 Ind. Cas. 126.

——S. 20—Other evidence to explain.

In order to save limitation under S. 20, it is not necessary that the writing itself must show that the payment was in the nature of part payment. The character of the payment as opposed to the mere fact of payment can be proved by other evidence regarding the state of the account between the parties. 33 P.L.R. 42=A.I.R. 1932 Lah. 212=13 Lah. 448=135 Ind. Cas. 673.

——S. 20 (before amendment in 1942)—Payment on account of interest—Evidence.

The words "as such" in S. 20 mean that the payment must be made on account of interest which fact may be proved from the circumstances of that case from which payment as interest may be distinctly inferred and may be established by evidence. 90 Ind. Cas. 774=A.I.R. 1926 Cal. 150.

——S. 20—Court can find on evidence whether payment made was for principal or interest.

Where payments are made for the debt, but there is nothing to show whether they have been made in respect of the principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made. 44 Cal. 567, Foll. 90 Ind. Cas. 774= A.I.R. 1926 Cal. 150.

——S. 20—Part payment of principal and interest—Essentials—Proof 'aliunde'.

S. 20 requires interest must be paid as interest, *i.e.*, it must be distinctly stated at the time of payment that it is paid on account of interest or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, mere proof of payment is sufficient. Principal must always be paid as principal, but the fact of the payment must appear in the handwriting of the person making the same, *i.e.*, of the debtor or his duly authorized agent; it must appear that the payment is a part payment of the principal, and this fact cannot be proved *aliunde* by the creditor. The fact, however, of its being a part payment of principal, need not be stated in so many words. It may be inferred from the writing itself. (1907) 9 Bom. L.R. 1329.

——S. 20—Burden of proof.

An admission made by the promisor on the back of the pro-note to the effect that a part-payment was made by him on a particular date, must be presumed to be true for it has been said that what a man admits to be true must reasonably be presumed to be so. This admission shifts the burden on the makers of showing that this admission was untrue in fact or was made under circumstances which did not make the admission binding on them. A.I.R. 1937 Cal. 284=I.L.R. (1937) 2 Cal. 137=172 Ind. Cas. 362.

——S. 20—Onus.

Where there was no mention of interest in a "*sarkhat*" and there was no reference to interest in the two endorsements which appeared upon the back of the "*sar khat*":

Held, (i) that the onus lay heavily on the plaintiff to prove that interest was payable under the "*sarkhat*" and that he failed to prove it. (1935) A.L.J. 657=1935 A.W.R. 774=A.I.R. 1935 All. 605=156 Ind. Cas. 748 (F.B.).

7. Handwriting.

——S. 20—Money order coupon in handwriting of debtor sufficient.

Where the money order coupon which requests the credit of the sum sent towards the debt is in the handwriting of the debtor, the writing amounts to the fact of payment appearing in the handwriting of the person making the same as required by S. 20, and fresh period of limitation should be computed from the date of the payment. A.I.R. 1926 Cal. 510, Foll. A.I.R. 1930 All. 123=124 Ind. Cas. 22.

——S. 20—Cheque—Body written by somebody—Signature by debtor—Sufficient.

The signature of the person making the payment on the cheque is a sufficient compliance with the proviso to S. 20, although the body of the cheque might be written

up by a different person. 126 Ind. Cas. 898=9 Pat. 851=A.I.R. 1930 Pat. 372.

——S. 20 (before amendment)—Payment expressly towards interest—Writing not necessary—If not express, payment is towards principal—When writing in the hand of the maker is necessary.

Section 20 provides for cases in which a payment towards interest or a payment towards principal may be proved to save limitation. If there has been nothing in the handwriting of the debtor, as required by the proviso, the only way in which the creditor can show, that it is open to him to use the payment to save limitation is by proving that at the time it was made it was avowedly made and accepted as a payment towards interest. If it was so made, it does not come within the proviso and no writing is necessary. But if there is no question, of the payment being proved to have been made towards interest at the time it was made, then it must be treated as a payment towards principal, in which case the fact of the payment, and not the fact that the payment is towards the principal, must be recorded in the handwriting of the debtor. This is the meaning of the words "paid as such" in the first paragraph of S. 20 (1): 1930 A.L.J. 590=A.I.R. 1930 All. 392.

Ed. Note.—The distinction between payment of interest and part payment of principal in regard to the requirement as to writing has been abolished by Act I of 1927.

——S. 20 (before amendment)—Handwriting—Payment of principal and interest.

A part-payment of the principal of a debt must be in the handwriting of the person making the payment but this rule does not apply to payment of interest. 1 L.W. 529; 35 C. 813, foll. (1914) M.W.N. 910=16 M.L.T. 505=26 Ind. Cas. 507.

——S. 20—No stipulation for interest—Payment not in handwriting of person making Time cannot run.

Where in the hatchitta no stipulation for interest is made, any payment made must be deemed to be towards part-payment of the principal and if such payment does not appear in the handwriting of the person making it. time cannot run from the date of the payment. 49 C.L.J. 371=A.I.R. 1929 Cal. 432.

——S. 20—Endorsement by other than the maker—Insufficient.

In the absence of a mark by the debtor himself under the endorsement, the clear words of S. 20 requiring the payment and the handwriting to the made by one and the same person are not complied with by an endorsement by another person at the instance of the person making the payment. 28 C.L.J. 222, Foll. 108 Ind. Cas. 727=29 P.L.R. 438=A.I.R. 1928 Lah. 157.

——S. 20—Payment must appear in the handwriting of the person making the same.

Under the proviso to S. 20 a fresh period of limitation cannot be computed from the time when the payment was made, unless the fact of the payment appears in the handwriting of the person making the same. 88 Ind. Cas. 747=A.I.R. 1925 Pat. 806.

——S. 20—Part-payment of principal—Payment not in writing of the maker—Defendant's admission of claim does not save limitation.

Under proviso to S. 20, in the case of the part payment of the principal of the debt, the fact of the payment must appear in handwriting of the person making the same. The fact that one of the defendants admitted the claim does not affect the legal question 79 Ind. Cas. 848=11 O.L.J. 513=A.I.R. 1925 Oudh 34.

——S. 20—Must be in handwriting of debtor.

Limitation under S. 20 cannot be extended unless the payment towards the principal is in the handwriting of the debtor. A.I.R. 1922 Pat. 446.

——S. 20—Part-payment of principal—Handwriting of the person making the same.

If a creditor proves that the act of the payment appear in the handwriting of the person making the same and also that the payment is in fact in part satisfaction of the principal, the requirements of S. 20 are satisfied. 44 Bom. 392=22 Bom.L.R. 313=56 Ind. Cas. 429.

——S. 20—Entry in the hand of debtor's officer—Creditor concurring—Sufficient.

Where the payment was made by the debtor through the hand of his officer Naziruddin and the entry was made in the following form "through self and Naziruddin Paramanik".

Held, this entry must have been made with the concurrence of the creditor who had the *hatchita* in his custody When an entry has been so made with the mutual consent of the creditor and the debtor, the only two person interested neither of them can be permitted to repudiate the entry to the prejudice of the other. 72 Ind. Cas. 692=36 C.L.J. 228=A.I.R. 1923 Cal. 71.

——S. 20—Handwriting—Authority to agent.

Under S. 20 of the Limitation Act when an agent makes payment it is he who should endorse the entry of payment and the debtor's handwriting is not required. The law of limitation must be strictly interpreted, and the plaintiff has to prove that the person making payment is a duly authorised agent. 1 Pat.L.T. 17=2 P.L.R. (Pat.) 23=54 Ind. Cas. 802.

——S. 20 and Art. 182—Handwriting—Part-payment of decree—Limitation.

Part payment of a decree amount under S. 20 of the Limitation Act must be in the handwriting of the debtor to save limitation for an application for execution. (1919) P.H.C.C. 46=4 Pat.L.J. 365=48 Ind. Cas. 728.

——S. 20—Handwriting—Signature—Want of.

An endorsement of a part-payment of the principal bearing no signature or any mark of the payer will not extend, the limitation under S. 20. 28 C.L.J. 222=23 C.W.N. 930=44 Ind. Cas. 516.

——S. 20—Hadwriting—Hundi—Part payment of debt.

A part-payment of the principal of a debt must in order to be operative under S. 20 not only be in the handwriting of the debtor or his agent but it is also necessary that the writing should show that the part-payment was a payment towards the debt in question. It is not enough that the amount paid by the debtor is placed to his credit generally. Where the part-payment was by means of a hundi and the creditor wanted to rely on the language of the hundi itself as the writing signed by the debtor within S. 20 (1), Cl. 2, it would be his duty to summon for the production of the hundi itself and unless that was done secondary evidence as to the contents of the hundi would not be allowed. 6 L.W. 790=(1918) M.W.N. 42=43 Ind. Cas. 20.

——S. 20—Part-payment of principal—Presumption.

Where a claim is for principal and interest but the decree does not bear interest, any payment by judgment debtor should be taken as payment towards principal and therefore it should be in the handwriting of the judgment-debtor or his agent duly authorised in that behalf. 38 Ind. Cas. 293 (Cal.).

——S. 20—Handwriting—Signature of party making payment, if essential.

Under S. 20 the person making payment should be

cyl person signing the writing. 1 Pat. L.J. 474=35 Ind. Cas. 375.

——S. 20—Handwriting—Deposition—Part payment—Unsigned deposition.

A valid acknowledgment of a judgment-debt gives a fresh starting point under S. 19 of the Act but an unsigned deposition alleging part payment would not, because part payment must be in the handwriting of the person making it or his duly authorised agent. 80 P.W.R. 1912=155 P.L.R. 1912=14 Ind. Cas. 335.

——S. 20—Part-payment of principal—Instalment bond—Payment—Proof—Entries.

The proviso to S. 20 of the Limitation Act applies to payment of instalments fixed by and payable under a bond which provides that in default of payment of one instalment the whole sum secured will be recoverable ; and the fact that any instalment were paid cannot be proved except by the production of entries signed by the debtor and reciting the fact of such payments. The payment of each instalment is a part-payment of the principal amount due on the bond. 35 P.R. 1913=4 P.L.R. 1913=277 P.W.R. 1913=16 Ind. Cas. 961.

——S. 20—Handwriting—Decree debt—Payment of.

For the purposes of S. 20 the decree-holder must prove that the part payment was in the handwriting of the judgment-debtor. 31 All. 590=6 A.L.J. 836=2 Ind. Cas. 524.

——S. 20 (before amendment)—"Debts"—Includes money payable under decree—Person knowing how to write—Mere signature not enough.

The word "debt" includes money payable under decree. In the case of a person who knows how to write the payment must appear in that person's own handwriting and he cannot be allowed to adopt by mere signing, any writing made by somebody else as in the case of an illiterate man. 126 Ind. Cas. 540=A.I.R. 1930 Rang. 64.

[**Ed. Note.**—Under the section as now amended by Act 1 of 1927, it would be sufficient if there should be an acknowledgment of payment either in the handwriting of the person (though unsigned) or in a writing signed by him, even if the writing is made by another].

——S. 20 (before amendment)—Mere signature of payer appended to statement of payment written by another not enough where payer is literate.

In case of part-payment of principal where the prayer is literate the condition in S. 20 that the fact of payment must appear in the handwriting of the person making the payment is not satisfied by a mere signature by him being appended to a statement of the fact of payment written by another person. 62 Ind. Cas. 297=17 N.L.R. 40=A.I.R. 1921 Nag. 46.

——S. 20 (before amendment)—Handwriting—Mere signature insufficient.

A mere signature of debtor to an entry of payment in the handwriting of a third party does not bring the case within the section unless there is something in writing to which it is appended and which will record the fact of payment. 41 Bom. 166=18 Bom. L.R. 973=38 Ind. Cas. 359.

——S. 20 (before amendment)—Handwriting—Signature—Literate debtor.

If the debtor is literate, an endorsement written by another person and signed only by the debtor is not an endorsement in his handwriting under the proviso to S. 20 of the Limitation Act so as to create a new period of limitation. 23 C. 546 (F.B.), applied. 35 Cal. 813=13 C.W.N. 177=4 Ind. Cas. 321.

——S. 20—Illiterate debtor—Affixing mark—Sufficient.

It is sufficient to give a fresh starting point in the case of an illiterate debtor if the endorsement reciting the fact of payment is followed by mark of the illiterate debtor 28 Bom. 262 ; 41 Bom. 166 and 38 Bom. 438, Foll. 109 Ind. Cas. 702=52 Bom. 356=30 Bom. L.R. 500=A.I.R. 1928 Bom. 417.

——S. 20—Illiterate debtor—Another can endorse.

It is sufficient compliance with S. 20 of the person making the payment, being illiterate, gets another to make the endorsement on his behalf. 62 Ind. Cas. 644=2 P.L.T. 355=A.I.R. 1921 Pat. 476.

——S. 20—Handwriting—Whole entry—Illiterate debtor.

The term "handwriting" in S. 20 of the Limitation Act refers to the whole entry about the fact of payment ; where an illiterate debtor applies his mark to a statement of payment, he adopts the writing as his own, and thereby causes the fact stated therein to appear in his own handwriting. But where the debtor is literate, it is not sufficient to merely affix his signature to an endorsement of payment made by a third person not his agent. 23 C. 545 ; 26 B. 246 ; 13 C.W.N. 177, Foll. 5 L.B.R. 108=4 Ind. Cas. 374.

——S. 20—Writing need show only fact of payment.

The writing itself need not show that the payment is made in part payment of the principal. It is the fact of the payment which should appear in the handwriting of the person making the same. 59 Ind. Cas. 941=43 All. 216=A.I.R. 1921 All. 335.

——S. 20—Part-payment of principal—Need not be stated as such.

A part-payment of principal, appearing in the handwriting of the person making it is not required to be expressly stated as being such. 18 A.L.J. 1131=59 Ind. Cas. 941.

8. "Interest as such."

[**Ed. Note.**—The following decisions are under the section as it stood prior to its amendment by Act 16 of 1942, when interest should have been paid "as such" to save limitation.]

——S. 20—Payment by debtor who is agriculturist within Dekkhan Agriculturists' Relief Act on date of payment is payment of interest as such within S. 20. A.I.R. 1944 Bom. 37=45 Bom.L.R. 1014=215 Ind. Cas. 12.

——S. 20—Debtor agriculturist under Dekkhan Agriculturists' Relief Act—Payment by him must be taken towards interest as such and hence is good payment under S. 20. 45 Bom.L.R. 178=A.I.R. 1943 Bom. 115=206 Ind. Cas. 390.

——S. 20—"Interest as such"—Endorsement merely recording payment—Absence of evidence to show whether payment was towards interest—Allegation in plaint stating payment towards interest—Absence of denial—Effect.

It is not necessary for purposes of S. 20, Limitation Act, that an endorsement of payment on a promissory note shall itself show that the payment was towards interest as such. This can be established by external evidence, so that even when the endorsement is in blank, it may be shown that the payment was towards interest as such. In the absence of evidence on the point either way, the plaintiff would succeed on the pleadings or not at all. Where it is clearly asserted in the plaint, that a payment endorsed by the debtor was towards interest, and that ascertain is not denied by the debtor in his written statement, S. 20, can be applied and plaintiff would succeed, in view of O. 8, R. 5, C.P. Code. 228 Ind. Cas. 231=12 Cut.L.T. 80=13 B.R. 161=A.I.R. 1947 Pat. 275.

——**S. 20—Amount not paid towards interest as such—Creditor not appropriating it towards principal.**

In case of an open payment, it can be treated to have been paid towards interest only if from the circumstances it can be found as a fact that it has been paid towards interest "as such". It cannot be treated as paid towards the principal unless within the period of limitation the creditor has done something which treats the payment as made on account of principal. If therefore it is found that the amount was not paid towards interest as such, and the creditor has not appropriated it towards the principal within the period of limitation he cannot take advantage of any part of the provisions of S. 20 of the Limitation Act. 12 B.R. 457=224 Ind. Cas. 65=1946 P.W.N. 349=A.I.R. 1946 Pat. 404=27 P.L.T. 464.

——**S. 20—Endorsement on hand-note, held not sufficient to hold that there was any payment of interest as such.**

Where there was merely a brief endorsement on the hand-note in these words : "26th December, 1937—Rs. 4" and this endorsement bore the thumb impression of one of the debtors :

Held, that upon such an endorsement, it could not be held that there was any payment of interest "as such" 24 Pat. 96=A.I.R. 1945 Pat. 271=11 B.R. 491=26 P.L.T. 173=220 Ind. Cas. 255.

——**S. 20**—Payment without specification is not payment of interest as such. A.I.R. 1944 Lah. 88=45 P.L.R. 407=I.L.R. (1944) Lah. 528=213 Ind. Cas. 253.

——**S. 20**—A payment made towards principal and interest where both are due and the amount paid does not exceed the one or the other, without the debtor specifying what part of it was to go towards principal and what part towards interest, is no more than an "open payment" and cannot be regarded as a payment towards interest as such within the meaning of S. 20 and cannot operate to save limitation. A.I.R. 1944 Mad. 398=1944 M.W.N. 254=57 M.L.W. 280=(1944) 1 M.L.J. 347.

——**S. 20**—Where it is not clear whether the creditor even appropriated the payments on account specifically towards either principal or interest and it is clear that they were never paid towards principal and were never paid towards interest as such, the payments do not prevent the running of the time against the creditor. A.I.R. 1942 Pat. 395=24 P.L.T. 21=8 C.L.T. 1=8 B.R. 665=200 Ind. Cas. 306.

——**S. 20—General or open payment and payment towards principal, interest and costs distinction.**

The difference between what is called a general or an open payment and payment towards principal, interest and costs is no doubt rather fine, but lies in the fact that unlike the former, the latter negatives the possibilitiy that there was no intention of appropriation as between interest and principal. A payment by the mortgagor towards the principal, interest and costs of the decree so far as the interest is concerned amounts to a payment of interest as such and would attract the provisions of S. 20, Limitation Act. 23 P.L.T. 328=A.I.R. 1942 Pat. 363=21 Pat. 330=8 B.R. 839=202 Ind. Cas. 54.

——**S. 20—Amount not paid as interest as such.**

Section 20, Limitation Act must be construed carefully according to its terms, and effect must be given to the consideration that in order to give a fresh period of limitation, interest must be paid as such though there is no similar requirement in the case of a part payment of principal. It is not reasonable as a matter of construction of a statute to suggest that the words "as such" can be ignored ; or that their meaning has changed ; or that they can be given their meaning but only as regards payments made before 1st January, 1928.

By the amendment of S. 20 the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. Appropriation by the creditor can have effect under the section as it now stands and the character of the payment need not necessarily be determined at the time when the payment is made. A.I.R. 1940 P.C. 63=1940 O.W.N. 315=6 B.R. 535=42 P.L.R. 328=I.L.R. (1940) Kar. (P.C.) 134 Sup.=71 C.L.J. 444=(1940) M.W.N. 620=42 Bom.L.R. 640=(1940) A.L.J. 639=I.L.R. (1940) Lah. 470=1940 A.W.R. 58=51 L.W. 578=(1940) 1 M.L.J. 895=44 C.W.N. 625=22 P.L.T. 425=7 C.L.T. 1=67 I.A. 160=187 Ind. Cas. 233 (P.C.).

——**S. 20**—In order to save limitation, the payment must either be towards principal and appropriated as such or must be towards interest. If the person who pays does not specify whether the payment is towards principal or interest, limitation will not be saved unless possibly the payment is set off against the principal from the very beginning. Where the payment was not towards interest as such, it does not follow that the payment was towards principal. A.I.R. 1940 All. 338=(1940) A.L.J. 332=1940 A.W.R. 257=189 Ind. Cas. 686.

——**S. 20 (As amended in 1927)—Payment argued not to be towards interest as such—Whether must be towards principal.**

The provisions of S. 20, when they speak of payment of interest or principal, refer to the intention of the debtor in making the payment ; payment of interest means that the debtor intended to pay towards interest ; payment of principal means that the debtor intended to pay towards the principal. When the debtor makes a payment, he must intend to pay either towards interest or towards principal ; he must have one or other of these two intentions. Consequently, if the argument be that the sum was not paid towards interest as such, then it must have been paid towards principal, and therefore the endorsement brings the payment within the scope of the section. A.I.R. 1938 Rang. 280=1939 Rang.L.R. 591=176 Ind. Cas. 865.

——**S. 20**—Record of the payment of interest which was made after the expiry of limitation was made on the suit promissory note. The words used were "paid ten rupees towards the debt in this pro-note". The payee did not even say "my debt" or "what I tow under the pronote".

Held, that the mere expression "debt in this pro-note did not amount to fresh promise. A.I.R. 1938 Mad. 683=(1938) M.W.N. 513=47 M.L.W. 726=177 Ind. Cas. 759.

——**S. 20—Per Mackney, J., in order of reference.**—No doubt when any payment has to be proved, it must be established whether the payment was a payment of interest as such or a payment of part principal, but it is not necessary that it should be shown that when the payment was made, there was an express declaration on the part of the person making the payment that it was a payment of interest before the Court can regard it as such. The payment need not be expressly stated to be a payment of interest, it is sufficient to show that in fact the payment was a payment of interest. Where, therefore, circumstances (such as the amount paid being very much less than the amount of interest due) indicate that the payment was a payment of interest, it must be taken to be such. A.I.R. 1938 Rang. 401=1938 Rang. L.R. 594=178 Ind. Cas. 869.

——**S. 20 (As amended in 1927)—"As such"—Significance of, in respect of payments made before and after 1st January, 1928.**

As to payments made before 1st January, 1928, the words "as such" have some significance because they serve to make it clear that in the case of a payment towards interest which is not required to be evidenced by writing it should be clear that the payment was in fact towards

interest and not left as a matter of doubt. As to payments made after 1st January, 1928, they are now placed on an equality. Therefore, the words "as such" are material when the Court has to consider a payment made before 1st January, 1928, but they have no significance after the date mentioned. 16 Pat. 294=18 P.L.T. 563=A.I.R. 1938 Pat. 183=3 C.L.T. 33=174 Ind. Cas. 1005.

——**S. 20**—Under S. 20, if the creditor is to rely upon a payment of interest, it must be a payment of interest as such, but as regards a payment towards principal, no such specification is necessary. 18 P.L.T. 309=16 Pat. 27=A.I.R. 1937 Pat. 410=3 B.R. 669=170 Ind. Cas. 130.

——**S. 20—Creditor appropriating payment towards interest.**

If the payment is not payment of interest within S. 20 it cannot be said that it must of necessity be payment of principal and so fall under the second branch of the section. That is attractive but unsound. For, if the payments have been actually appropriated to interest, then, in fact, there has been no part payment of principal. A.I.R. 1935 Rang. 473=160 Ind. Cas. 314.

——**S. 20 (As amended by Act 1 of 1927)—'Paid as such,' meaning of.**

Per *Sulaiman, C.J.*—The Legislature must be deemed to have been aware of the importance attached to the words "paid as such" in the first paragraph in S. 20 and its deliberate act in not deleting those words should naturally be interpreted as implying that the interpretation put upon those words has been accepted by the Legislature and adhered to. A.I.R. 1935 All. 946=(1935) A.L.J. 1029=1935 A.W.R. 1155=58 A. 261=159 Ind. Cas. 387 (F.B.).

——**S. 20—Circumstantial inference, that payment was towards interest 'as such'—Value of.**

The fact that there are arrears of interest owing at the date of payment more than sufficient to absorb the payment itself is one of those circumstances which, together with other circumstances, may legitimately be taken into account in considering whether there is an intention to pay interest "as such." But this reasoning should not be stretched further as it ignores the question of intention, inasmuch as it may be nonetheless possible to have an "indiscriminate" payment where there are arrears of interest as in a case where there are not. A.I.R. 1935 Rang. 473=160 Ind. Cas. 314.

——**S. 20**—Where payments made by the defendan s have not been proved to be made as interest, S. 20 doc. not apply to save the suit from bar of limitation. A.I.R 1934 Pat. 244=146 Ind. Cas. 1033.

——**S. 20—Meaning of.**

Unless interest is received as such S. 20 cannot extend the period of limitation. Hence, where a father and his daughter are co-mortgagees, the mere fact that the father had maintained the daughter out of the income of the mortgaged property cannot amount to a receipt of rent by the daughter so as to extend the period of limitation for a suit by her for her share of the mortgage money. (1934) M.W.N. 929=40 M.L.W. 595=A.I.R. 1934 Mad. 656=153 Ind. Cas. 462.

——**S. 20—Money paid on general account—Not paid for interest.**

If money is paid on a general account without a definite appropriation on the part of the debtor, no part of the money can be said to have been paid for interest "as such." A.I.R. 1929 Oudh 479, *Foll.* 7 O.W.N. 420=A.I.R. 1930 Oudh 287.

——**S. 20—Credit of interest in defendant's account—Payment of interest, what amounts to.**

A mere credit of interest entered in the accounts of the defendant is not enough to save limitation under S. 20. But in cases where both parties agree to wipe out the previous balance and add the amount of interest to the principal so as to make it a new debt due, such an act may amount to payment of interest within the meaning of S. 20. But such addition of interest to principal must be the result of an agreement between the parties on the date of such addition. A.I.R. 1934 Nag. 219=17 N.L.J. 68=152 Ind. Cas. 319.

——**S. 20—Payment and appropriation towards interest—Wiping out old balance and adding interest to principal—Must be by agreement of parties—Original agreement not sufficient for every future addition.**

In cases where both parties agree to wipe out the previous balance and add the amount of interest to the principal so as to make it a new debt, it may be conceded that such an act may amount to payment of interest within the meaning of S. 20. But such addition of interest to principal must be the result of an agreement between the parties on the date of such payment. If either the creditor or the debtor by himself goes on adding interest to principal in his own books, even the same may be in pursuance of an agreement originally made between parties, there woud not be each time this is done a fresh payment to the creditor so as to extend the period of limitation under S. 20. 123 Ind. Cas. 820=1930 A.L.J. 552=A.I.R. 1930 All. 467.

——**S. 20—Payment of interest—Interest added to principal.**

Where in the accounts both of plaintiff and defendant's interest due upto 25th October was calculated and added to the principal, thus wiping out the debt on account of interest, it is a payment of interest which saves limitation under S. 20 of the Limitation Act. 24 B. 493=29 M. 234, Foll. (1915) M.W.N. 755=30 Ind. Cas. 777.

——**S. 20—Payment of interest—Addition of interest to principal.**

The addition of interest due to the principal amount by consent of the debtor, is payment of interest within the meaning of S. 20. 13 Bom.L.R. 482=11 Ind. Cas. 552.

——**S. 20—Payment on general account—Not payment for interest—Ordinary law of appropriation does not apply.**

The rule enacted in S. 20 is wholly independent from the rule that in absence of defined appropriation money received in respect of a debt should be at first applied in payment of interest and then in payment of the capital. Payment of interest must be made "as such" and money paid on a general account without a defined appropriation on the part of the debtor cannot be held to have been paid for interest "as such". 120 Ind. Cas. 825=6 O.W.N. 776=A.I.R. 1929 Oudh 479.

——**S. 20—Intention of payment towards interest—Proof necessary.**

The payment made by the debtor must have been made with the intention that it should be paid towards interest and there should be something to indicate that intention. There must be a definite specification by the debtor, since appropriation by the creditor is not such an indication. 31 All. 495 and A.I.R. 1926 Bom. 423, Foll. 117 Ind. Cas. 790=A.I.R. 1929 Mad. 811.

——**S. 20—"As such."**

The words "as such" in S. 20 must mean that there must be at the time of payment some mention that the payment is wholly or partly for interest. 96 Ind. Cas. 311=28 Bom.L.R. 569=A.I.R. 1926 Bom. 423.

——**S. 20—Terms of mortgage and conduct of parties—Inference may be drawn.**

The terms of the mortgage and the appropriation of payment to interest by the creditor, and the conduct

of the parties might be taken into account so as to raise the inference that payment was made as such, that is to say, as interest. 31 All. 285, Foll. 93 Ind. Cas. 295=A.I.R. 1926 All. 329.

——S. 20—Payment must expressly be towards interest—General law does not apply.

Under S. 20 payment towards interest must expressly be towards interest. It has nothing to do with the general right of the creditor to appropriate money either towards interest or towards principal. 87 Ind. Cas. 746=A.I.R. 1925 Cal. 1030.

——S. 20—Intention to pay for interest—Proof necessary—Fact that interest was due—Not sufficient indication of intention.

In order to have extension of limitation under S. 10 there must be something to indicate that the debtor made the payment with the intention that it should be taken in reduction or satisfaction of interest due and mere appropriation of the payment by the creditor to interest is not such an indication. The mere fact that the interest was due at the date of payment is not sufficient indication of the intention of the debtor. Such an indication might be found in the fact that the amount paid and the amount due for interest was exactly the same. 59 Ind. Cas. 709=A.I.R. 1921 Nag. 94.

——S. 20—Payment of interest—Payment by debtor without directions as to its appropriation—Effect of.

Where a payment made with the knowledge that it would be appropriate to interest was made with the intention that it should be so appropriated, it gave a fresh starting point of limitation within S. 20 of the Limitation Act. 46 Ind. Cas. 53 (Cal.).

——S. 20—Payment of interest—Interest as such.

To bring a case within S. 20 of the Limitation Act it is not essential that the debtor should on the occasion of every payment, state explicitly that the payment is made on account of interest as such. It is enough if circumstances exist which make the conclusion inevitable that the payment must have been made for interest. 9 Bom.L.R. 1329=31 A. 285. Foll. 27 C.L.J. 141=43 Ind. Cas. 812.

——S. 20 and Art. 85—Payment of interest—Proof of.

The defendant borrowed a sum in 1909 and further sums in 1910. He paid certain amount in instalments. The plaintiff settled the accounts and carried the balance forward. Last instalment was paid in 1912. The suit by the plaintiff in 1913 for the balance is barred as it was not a mutual account under Art. 85 and the payments by defendants were neither in his handwriting nor for interest. 39 All. 33=14 A.L.J. 949=35 Ind. Cas. 199.

——S. 20—Payment not expressly described—Whether towards interest or towards principal.

A payment not expressly made as towards interest will be considered as payment towards principal under this section. 44 Cal. 567=22 C.W.N. 190=33 Ind. Cas. 638.

——S. 20—Payment of interest—General balance of accounts—Payments not expressly made towards interest—Effect.

Payments made in reduction of a general balance of account but without intimating that it is to be appropriated towards interest are not payments towards interest and do not save limitation. 9 P.W.R. 1916=68 P.L.R. 1916=31 Ind. Cas. 782.

——S. 20—Payment of interest—Intention.

Payment towards interest must be payment of interest as such to save limitation under S. 20 of the Act and there must be something to indicate an intention to that effect. (1915) 11 U.B.R. 80=31 Ind. Cas. 101.

——S. 20—Payment of interest—As such.

Under S. 20 the payment of interest must have been made as such either by express declaration, or under circumstances from which such an intention on the part of the debtor may be inferred. 19 C.W.N. 237=20 Ind. Cas. 857.

——S. 20, Cl. (1)—Payment of interest—Payment in reduction of general balance of account—Limitation, if saved.

A payment by a debtor in reduction of the general balance of account against him without any intimation that it is towards interest due, is not to be treated as payment for interest as such as to save limitation under Cl. (1) of S. 20 of the Act. 3 B. 198, 35 C. 813, Foll. 7 Ind. Cas. 7 (Cal.).

——S. 20—Indefinite payment of principal and interest.

Where it is uncertain as to how much is paid for principal and interest, the payment is payment of interest as contemplated by S. 20. 6 Ind. Cas. 16 (Cal.).

——S. 20—Account books—Balance struck—Interest—Acknowledgment.

An entry in creditor's book of a balance due for principal and interest, or even a verbal assent to such balance cannot be treated as a payment of interest as such for the purposes of S. 20. 1906 A.W.N. 212=3 A.L.J. 506=28 A. 718.

——S. 20—Payment—Appropriation—Proof—Presumption.

Where payments are made towards the satisfaction of a debt and there is nothing to show whether they are made in respect of principal, or interest, or both or indefinitely on general account, they cannot serve to extend the time, under S. 20 unless it is clearly established in some way that payments were made on account of interest as such. (1903) 5 Bom.L.R. 350.

——S. 20—Payment of interest as such—Payment towards principal and interest.

A payment expressed to be for principal and interest due without specifying the amount paid for interest is payment of interest as such within S. 20 and will furnish a fresh starting point. (1902) 4 Bom.L.R. 231.

——S. 20—'Interest,' payment of—Enjoyment of land in lieu of interest.—

Payment of interest in order to save limitation need not be in money, but it must be of a nature that it would be an answer in a suit brought by the creditor to recover the amount. Where the plaintiff was placed in possession of the defendant's property to be enjoyed by plaintiff, in lieu of interest payable by defendant to plaintiffs, enjoyment of the produce by the plaintiff is payment of interest within the meaning of S. 20. (1905) 16 M.L.J. 99=29 M. 234. *Also* (1900) 13 M.L.J. 83.

[This view has been expressly affirmed by the Legislature, vide sub-S. (2)—Ed.].

——S. 20—Whole amount paid—Interest also paid

Where the amount paid was the whole amount which was due, both principal and interest. It is impossible to draw any other inference than that a part of that sum was paid as interest. 93 Ind. Cas. 295=A.I.R. 1926 All. 329.

——S. 20—The payment of interest saves limitation even though a part of the principal is paid at the same time. 74 Ind. Cas. 777=1923 M.W.N. 564=A.I.R. 1924 Mad. 123.

——S. 20—Payment of interest—Partial payment—Interest—Payment of.

"Interest" in S. 20 of the Act means interest or any part of the interest due. 35 All. 378=11 A.L.J. 477=20 Ind. Cas. 258.

——S. 20—Payment of interest—More than one debt due.

Where there is more than one debt, and a payment was made without specification such payment can save all the debts from limitation, where the attendant circumstances are such that the amount paid by way of interests was sufficient to pay up in full all the interests, due, except one, and when the balance of the amount paid as interest partially discharged the last interest due. 13 C.L.J. 139=3 Ind. Cas. 81.

See also NOTE 8.

9. Mode of payment.

——S. 20—Payment made in kind—Agreement to pay in kind to be proved.

Although payment within S. 20 need not be in cash or currency, yet if it is to be in kind the party alleging that the payment was made must prove that there was an agreement between the parties that the payment should be made in that particular manner. 96 Ind. Cas. 474=45 C.L.J. 119=30 C.W.N. 885=A.I.R. 1926 Cal. 1042.

——S. 20 and Art. 97—Mode of payment—Rents and profits—Suit for recovery of debt on dispossession.

A suit by the plaintiff for a debt for the interest of which, he was put in possession of land by the defendants is governed by Art. 97 of the Act and the taking of the profits by the plaintiff amounted to payment of interest under S. 20 of the Act. 7 L.B.R. 138=25 Ind. Cas. 933.

——S. 20—Mode of Payment—Payment by labour—Whether saves limitation.

If within three years before the suit, the servant had paid interest through his labour, a suit to recover balance of wages advanced is not barred under S. 20. 28 M. 234 Foll. 3 L.W. 552=35 Ind. Cas. 480.

——S. 20—Mode of payment—Rendering service—Whether equivalent to payment of interest.

In a suit against a servant for balance of advance of wages, his continuance in service within three years before suit was held equivalent to "payment of interest" and so saved limitation. 33 Ind. Cas. 134 (Mad.).

——S. 20—Mode of payment—Cash.

It is not necessary that payment of debt should be actually made in money. Any arrangement by which a discharge is effected has the same effect. 1 Pat. L.J. 472 (Note)=36 Ind. Cas. 77.

10. Mortgagee in possession—Sub-S. (2).

——S. 20 (2)—Scope and applicability—Conditions to be satisfied—Subsequent usufructuary mortgagee subrogated to rights of first mortgagee—Receipt of produce—If payment saving limitation for suit to enforce first mortgage—Suit by subrogee—Starting point for limitation.

Where a person becomes subrogated to their rights of the mortgagee by redeeming a mortgage, he is in precisely the same position as the mortgagee and must, therefore, bring his suit for recovery of the amount paid by him within twelve years of the original mortgage.

Where a mortgage has been discharged by the execution of a subsequent usufructuary mortgagee and the usufructuary mortgagee has been subrogated to the rights under the first mortgage, the receipt of produce by the usufructuary mortgagee when the rights under the first mortgage were subsisting would directly come under the provisions of clause (2) of S. 20 of the Limitation Act and should be deemed to be a payment for the purpose of sub-S. (1) of S. 20. To get the benefit of clause (2) of S. 20 only two conditions need be satisfied. One is that the person receiving the rents or produce must be a mortgagee, and the other is that he should be in the possession of the land. The intention of the mortgagee is irrelevant for the application of clause (2) of S. 20 of the Limitation Act. 1949 M.W.N. 792=(1949) 2 M.L.J. 829.

——S. 20—Simple mortgage—Subsequent usufructuary mortgage in discharge of—Enjoyment of usufruct—Does not amount to payment of interest towards simple mortgage.

A executed successive mortgages to *B* and *C*, and subsequently mortgaged portions of the properties usufructuarily to *B* in discharge of the prior simple mortgage to *B* under this mortgage. *B* was entitled on dispossession to sue for the amount and recover the same from the properties comprised in the first mortgage. On dispossession, *B* sued to enforce his first mortgage *C* who had sued on his mortgage and purchased some items resisted *B's* right.

Held, that the enjoyment of the usufruct under the usufructuary mortgage did not amount to a payment of interest due under the simple mortgage. 100 Ind. Cas. 670=49 All. 430=25 A.L.J. 353=A.I.R. 1927 All. 417.

——S. 20 (2)—Scope and applicability—Sale of equity of redemption to mortgagee himself—Sale subsequently annulled as invalid—Receipt of rents in the interval is tantamount to payment under S. 20 (2) sufficient to save limitation—C. P. Code (5 of 1908), O. 23, R. 1 (3)—Applicability—Second suit by first mortgagee impleading the second mortgagee and the owner of the equity of redemption—Not identical in its nature with the first suit to which the owner of the equity of redemption alone is a party.

On 24th March, 1908, *A* executed for himself and a guardian of his then minor sons *B* and *C* a deed of mortgage for Rs. 9,500 in favour of *D* mostly for the discharge of antecedent debts which he had incurred. The mortgage was to be repaid in 12 annual instalments and it was provided that if default was committed in respect of the first, second and third instalments consecutively the entire amount of principal and interest should then become payable. In 1918 a receiver appointed in another suit gave three mortgages over the same properties in favour of *X*. In 1919 the equity of redemption was brought to sale in execution of a money decree against *A* and his sons *B* and *C* and was purchased by *Y*. *A* and his sons having defaulted in the payment of the first three instalments due under the mortgage, their mortgagee *D* filed a suit in 1921 to recover the entire amount of principal and interest due under it impleading *A* and his sons and *Y*, but *X* who had obtained in 1918 the three mortgages from the receiver was not made a party to the suit. On 6th February, 1922, *Y* executed a sale-deed conveying his equity of redemption in the hypotheca to *D* and both of them filed a *razinama* in the Court. The subsequent mortgages of 1918 were referred to and it was provided that the vendee should retain the benefit of the first mortgage as against the subsequent mortgagee. The suit on the first mortgage was dismissed on 8th February, 1922. *X* filed a suit in 1930 on the foot of his three mortgages of 1918, impleading amongst other *Y*, *A* and his sons and *E* the son of *D* who had died in 1929. By the time *X's* suit came on for hearing the sale to *Y* was held to be one brought about in furtherance of a scheme to defraud the creditors of *A*, *B* and *C*. In the judgment in that suit it was recited that the sale to *Y* was invalid and *E* made no attempt to prove the sale to his father. The priority of *E's* mortgage was conceded and it was provided in the decree that the hypothecated properties should be sold "subject to the prior mortgage of *E* of 1908". In the sale proclamation it was mentioned that the "mortgage was executed fraudulently and without consideration." *X* the decree-holder himself purchased the hypotheca in Court auction and in the sale certificate it was again mentioned

that the sale was subject to the mortgage of 1908 and he applied for possession under O. 21, R. 95, C.P. Code. Meanwhile *E* was adjudicated insolvent in 1934, and the Official Receiver in whom the insolvent's estate was vested and who had not been impleaded in the application under O. 21, R. 95, succeeded in obtaining possession in fasli 1344 (1934-35). *X's* proceedings in the insolvency culminated in an appeal in which it was held that the receiver could only sell the right of the insolvent in the mortgage of 1908, but could not resist the application for delivery made by *X*. *X* accordingly obtained possession of the properties in fasli 1345 (1935-36). The Official Receiver sold the insolvent's rights in that mortgage to *M* on 8th January, 1942 and the shares of the insolvent's sons were also sold by them to *M* on 21st September, 1942. *M* filed a suit on 3rd March, 1943, on foot of the mortgage of 1908. *X* contested the suit on the ground of limitation. In the circumstances,

Held, (1) *X* had nothing whatever to do with the providing of the satisfaction of the mortgage by the sale by *Y* to *D* on 6th February, 1942, and no fresh cause o f action accrued on the annulment of that sale. Neither the predecessors in title of *M*, nor *X* were parties to the proceedings in which the sale to *Y* was set aside and even if that sale stood a suit had to be filed for working out the extinguishment of the puisne mortgage.

The decree in *X's* suit of 1930, cannot be construed as creating a new right in favour of *M's* predecessors in title or as affording a fresh cause of action.

But as *D* took possession of the mortgaged properties on 6th February, 1922, and continued to be in possession till his death in 192, when the properties passed into the hands of his son *E*, who retained possession till December, 1931, when the receiver in a partition suit between him and his sons took possession of all their properties and continued to be in possession till about the middle of 1934, and the Official Receiver in the insolvency of *E* took possession in 1934-1935, till *X* went into possession, S. 20 (2) of the Limitation Act applied and the suit was within time.

Though the sale to *Y* be invalid the receipt of rents by the vendee must be deemed to be possession in thier capacity as mortgagees and the receipt of rents is tantamount to payment within the meaning of S. 20 (2) of the Limitation Act.

(2) The rights of a second mortgagee or a purchaser of the equity of redemption who is left out of a mortgage suit filed by the first mortgagee remain altogether unaffected by such suit and by the sale in execution of the decree therein. A second suit by the first mortgagees impleading the second mortgagee and the owner of the equity of redemption is not so identical in its nature with the first suit to which the owner of the equity of redemption alone was a party as to come within the mischief of O. 23, R. 1, sub-R. (3) of the Code of Civil Procedure. If the rights of parties who were not impleaded remain unimpaired, it is a necessary corollary and consequence that the rights of the persons who failed to implead them should remain unimpaired too. 60 L.W. 382=1947 M.W.N. 434=A.I.R. 1948 Mad. 105=(1947) 1 M.L.J. 373.

——S. 20—Under invalid contract of sale.

Where a mortgagee enters into possession of the mortgaged property under an invalid contract of sale, he must be deemed to be in possession within the meaning of S. 20 (2). The fact that his sale proved to be invalid cannot vitiate his title as mortgagee and the rents and profits which he received must be deemed to have been received by him as the mortgagee. A.I.R. 1941 Mad. 475=I.L.R. (1941) Mad. 739=(1941) 1 M.L.J. 388=53 M.L.W. 348=1941 M.W.N. 289=199 Ind. Cas. 710.

Overruling A.I.R. 1937 Mad. 642=172 Ind. Cas. 576.

Reversing A.I.R. 1940 Mad. 461=(1940) 1 M.L.J. 134=192 Ind. Cas. 81.

——S. 20 (2)—Applicability—Person found to be in possession under a void mortgage but in receipt of rents of the property.

S. 20 (2) of the Limitation Act applies only in the case of profits received by a mortgagee in possession. Hence when a person is in possession under an alleged mortgage which was void the receipt of rent by him in respect of that property cannot have the effect of extending the time in his case by invoking the benefit of S. 20 (2). (1946) O.A. (C.C.) 228=1946 A.W.R. (C.C.) 228=1946 O.W.N. 341=A.I.R. 1947 Oudh 91=227 Ind. Cas. 577.

——S. 20—Mode of payment—Produce—Land held under mortgage, not registered—Receipt of produce, payment of interest.

Receipt of produce of land held under an unregistered mortgage though registration is required in law, cannot be deemed to be a payment of interest under S. 20 of the Limitation Act. 9 N.L.R. 140=21 Ind. Cas. 281.

——S. 20—Continuing in possession even after decree.

A usufructuary mortgagee goes into possession under the contract of mortgage and where he continues in possession even after decree, the decree does not change the character of his possession. His possession is in no way dependent on the decree. He was in possession *qua*-mortgagee before the decree and he continues in possession *qua*-mortgagee. Consequently, receipts by him of the profits must be treated under S. 20 (2), Limitation Act as receipts by mortgagee. 54 M.L.W. 124=A.I.R. 1941 Mad. 737=I.L.R. (1941) Mad. 963=(1941) 2 M.L.J. 248=1941 M.W.N. 749=200 Ind. Cas. 543.

Reversing A.I.R. 1941 Mad. 406=(1941) 1 M.L.J. 116=198 Ind. Cas. 316.

——S. 20—Receipt of usufruct during possession as trespasser.

The enjoyment of the usufruct of the property by the plaintiff year by year does not give him a fresh start for limitation for a suit to recover the money. A.I.R. 1940 Pat. 494=21 P.L.T. 219=19 Pat. 507=6 B.R. 446=187 Ind. Cas. 266.

——S. 20 (2) and Art. 116—Mode of payment—Trespasser in possession—Mortgage of vatan lands—Mortgage void on mortgagor's death—Bombay Hereditary Offices' Act (3 of 1874), S. 5—Mortgagor's heir recovering possession of mortgaged property—Suit by mortgagee to recover mortgage money—Limitation.

Some *vatan* lands were mortgaged in 1893 by the *Vatandar* with possession for a period of twelve years for a sum of Rs. 2,000. The deed of mortgage provided for personal liability to pay in case of any obstruction to the mortgagee. The mortgagor died in 1901. The mortgage having thereafter become void under S. 5 of the Bombay Hereditary Offices' Act, 1874, the mortgagor's son sued to recover possession of the property and obtained possession in 1914. Shortly afterwards on the mortgagees' sons suing to recover the mortgage amount.

Held, (1) that the suit was barred by time; (2) that the covenant in the mortgage deed, provided by the personal obligation by the mortgagor came to an end with his death; that the date of the subsequent dispossession or the hindrance caused to the enjoyment of the property after the death of the mortgagor had nothing to do with the question of limitation, and that the time against the mortgage could not be taken to commence from the date of such hindrance; and (3) that the suit was not saved under S. 20 (2) Limitation Act, for after

the death of the mortgagor the mortgagee was only a trespasser not claiming a limited interest in the property as a mortgagee. 44 Bom. 500=22 Bom.L.R. 385=57 Ind. Cas. 76.

——S. 20—Co-mortgagees—Purchase of equity of redemption by one co-mortgagee.

In law the purchase of the equity of redemption by one of several co-mortgagees puts an end to the mortgage and possession of the properties after the date of the purchase and receipt of rent or produce of such land cannot be deemed to be a payment for the purposes of extending the period of limitation for a suit by another co-mortgagor, under S. 20 (1). 40 M.L.W. 595=(1934) M.W.N. 929=A.I.R. 1934 Mad. 656=153 Ind. Cas. 462.

——S. 20—Mortgagee not given possession.

Where possession of the mortgaged property was never given to the mortgagee by virtue of the mortgage-deed, realisation of rent by the mortgagee from the mortgagor's tenants would not save limitation under S. 20, Limitation Act. A.I.R. 1933 Lah. 741=144 Ind. Cas. 644.

——S. 20—Mortgagee in possession.

Receipt of rent relating to portion of mortgaged property saves limitation against entire property. 118 Ind. Cas. 835=5 Luck. 53=6 O.W.N. 393=A.I.R. 1930 Oudh 178.

——S. 20—Possession mortgage—Mortgagor in possession under lease—Payment by mortgagor of Government revenue payable by mortgagee—Sufficient payment.

In a case of a mortgage with possession where the possession of the property is with the mortgagor under a lease by the mortgagee, payment of Government revenue by the mortgagor out of rent payable to the mortgagee, according to the terms of the deeds of mortgage and lease, comes within S. 20 (2) and amounts to receipt of rent by the landlord as mortgagee. 97 Ind. Cas. 941=A.I.R. 1926 Mad. 1061=51 M.L.J. 378.

——S. 20—Receipt of rent.

The receipt of rent mentioned in sub-S. 2 is not subject to the conditions mentioned in sub-S. 1. 97 Ind. Cas. 941=A.I.R. 1928 Mad. 1061=51 M.L.J. 378.

——S. 20—Ijara lease—Ijardar allowed to hold over after expiry of lease and to receive produce in lieu of interest—Limitation is extended.

Where after the expiry of an *ijara* lease the *ijardar* was allowed to continue in possession of the land and to receive the produce ofland in lieu of interest payable on the *Zuripeshgi* and on being dispossessed from the land he sued to recover the *Zuripeshgi*.

Held, that the receipt of produce in lieu of interest fell within S. 20 (2) and saved limitation. 72 Ind. Cas. 492=A.I.R. 1924 Pat. 169.

——S. 20—Receipt of rent by mortgagee, is a payment within Cl. (1).

S. 20, sub-S. (2) of the Indian Limitation Act does not refer expressly to the intention of the party who receive the rent or produce and may well be construed to apply wherever mortgaged land is, in fact, in possession of the mortgagee. In such an event the receipt of the rent and produce of the land may be deemed a payment for the purpose of sub-S. (1). 64 Ind. Cas. 903=35 C.L.J. 58=A.I.R. 1922 Cal. 114.

——S. 20—Mortgagee's suit for money—Possession within 3 years of suit—Suit in time.

Where the mortgagee filing a suit under S. 68 of the T.P. Act was in possession of the mortgaged property till within 3 years of the date of its suit, S. 20 of the Limitation Act will apply and the suit is within time. 65 Ind. Cas. 408=8 O.L.J. 660=A.I.R. 1922 Oudh 102.

——S. 20—Enjoyment of produce by mortgagee—Time extended.

Time runs from expiry of mortgage term but is extended so long as mortgagee enjoys produce in lieu of interest. 63 Ind. Cas. 234=45 Bom. 1206=23 Bom. L.R. 529=A.I.R. 1921 Bom. 437.

——S. 20—S. 20 (2) does not contemplate case of charge. A.I.R. 1943 Oudh 211=1943 O.W.N. 85=1943 A.W.R. 20=18 Luck. 637=206 Ind. Cas. 238.

11. Payment on account of money payable under decree—Explanation.

S. 20—Compromise decree in 1923—Execution application in 1928—Compromise again arrived at and certified under O. 21, R. 2 (2) C.P. Code—Last payment made according to compromise on 15th February, 1929—Application for execution of decree of 1923, made on 13th February, 1932, is not time-barred. As the last payment in respect of first instalment and interest was made on 15th February, 1929, S. 20, Limitation Act, comes into play and the period of limitation must be computed from 15th February, 1929. (1938) A.L.J. 150=4 B.R. 308=42 C.W.N. 509=1938 O.W.N. 310=1938 A.W.R. 45=47 L.W. 606=40 P.L.R. 606=(1938) M.W.N. 662=32 S.L.R. 415=172 Ind. Cas. 999 (P.C.).

——S. 20 (as amended in 1927).—Part payment by a judgment-debtor saves the entire debt from limitation. Any appropriation made by the decree-holder is immaterial. 16 Pat. 294=18 P.L.T. 563=A.I.R. 1938 Pat. 183=4 B.R. 496=3 C.L.T. 33=174 Ind. Cas. 1005.

——S. 20—Payments made—Liability not denied.

Where persons who undertake to pay a decree debt make certain payments and do not deny their liability, the payments made extend the period of limitation. A.I.R. 1937 Cal. 226=172 Ind. Cas. 121.

——S. 20—Certification—Payment out of Court.

Payments coming within S. 20, will entitle the decree-holder to a fresh period of limitation. But even in such cases, O. 21, r. 2 (3), C.P. Code will apply, that is to say, the decree-holder will derive no advantage from such payments as regards limitation unless he certifies them to the executing Court. 21 Pat. 481=A.I.R. 1943 Pat. 7=9 B.R. 139=204 Ind. Cas. 318.

——S. 20—Decree-holder mentioning payment by judgment-debtor in execution petition and producing receipts signed by judgment-debtor.

Where the decree-holder has mentioned three consecutive payments in his execution petition and produced a receipt purporting to bear the signatures of the judgment-debtor in respect of those payments, all the three payments must be held to be duly certified, and the writing alleged to have been executed by the judgment-debtor is sufficient to save limitation according to S. 20 of the Limitation Act, if it is proved to have been signed by him. Under such circumstances, the decree-holder should be given an opportunity to prove the payments in question. (1940) 189 Ind. Cas. 374.

——S. 20—Application for execution three years after decree—Reliance on alleged payment by judgment-debtor—Written acknowledgment by judgment-debtor alleged to have been lost—No affidavit showing existence of alleged acknowledgment—Held that mere fact of repayment, cannot extend limitation.

An execution application was filed more than three years after the decree on the strength of an alleged payment by the judgment-debtor. The application contained an allegation that a slip containing an acknowledgment of liability had been handed over to the decree-holder but was lost. A notice of the execution was served

on the judgment-debtor in which there was an intimation given to the judgment-debtor, that the decree-holder had alleged certain repayments, but there was no information that the allegation that the slip containing the acknowledgment was handed over to the decree-holder but was lost. The judgment-debtor did not appear in Court :

Held, that the mere fact of the payment of a sum of money by the judgment-debtor or its being certified by the decree-holder in Court, did not amount to any step which would extend the period of limitation. The Court had not before it either any written acknowledgment by the judgment-debtor or any affidavit showing that such a written acknowledgment had existed. No intimation of it was given in the notice to the judgment-debtor. The mere fact that he did not appear in response to the notice did not imply that he admitted that the application was in time when, on the face of it, it was barred by limitation. Therefore, in the absence of any petition or any written acknowledgment, the application filed more than three years after the decree was obviously barred by time and the Court should not have issued any notice at all. A.I.R. 1936 All. 21=(1935) A.L.J. 1189=58 A. 313=1935 A.W.R. 1371=160 Ind. Cas. 394 (F.B.).

——S. 20—Uncertified payment.

(*Quaere*).—Whether an uncertified payment of a sum due under a decree saves limitation for the execution of that decree. A.I.R. 1936 Oudh 297=1936 O.W.N. 533=162 Ind. Cas. 717.

——S. 20, (as amended by Act 1 of 1927)—Certificate more than years after decree.

Where towards a money-decree passed on 19th June, 1927, the judgment-debtor paid on 9th December, 1929, Rs. 85 out of Court to the decree-holder who applied to certify it on 16th March, 1931, and put in an application to execute the decree on 24th June, 1931 :

Held, that S. 20, as amended by Act 1 of 1927, applied to the payment of Rs. 85 and the payment of that amount on 9th December, 1929, did not keep alive the decree and that could not itself be regarded as a step-in-aid and that the certificate which was made three years after the decree could not help the decree-holder. (1932) A.L.J. 1035=A.I.R. 1933 All. 49=143 Ind. Cas. 324.

——S. 20—Certification of part-payment after expiry of time—When revives limitation.

Mere payment by the judgment-debtor of a certain amount towards part satisfaction of the decree, certified after the period of limitation for execution, cannot revive limitation unless it is made towards interest as such or towards principal, and the fact of such payments appears in the handwriting of the judgment-debtor. 101 Ind. Cas. 796=A.I.R. 1927 Sind 268.

——S. 20—It is sufficient for the purposes of certifications for the decree-holder to mention payments in his application for execution ; there is no fixed period of time within which payments have to be certified by the judgment-creditors, it is payment that keeps the decree alive ; and it is a mistake to regard the process of certification as a revival of the decree.

Where a judgment-debtor made a part payment by a cheque on 18th October, 1926, and in the subsequent application for execution filed on 16th October, 1929, the decree-holder mentioned the fact that he had received the part payment on 18th October :

Held, that the payment made on 18th October, gave a fresh starting point of limitation under S. 20, and the application was not barred. A.I.R. 1931 Sind 28=25 S.L.R. 360=129 Ind. Cas. 909.

——S. 20—Part payment and certification must be before execution is barred.

Payments may be certified in the application for execution of the decree. The part payments and the certification must, however, be made before the application for execution is barred.

Although the decree holder may either apply to certify payment before the execution or may do so in his application for execution of the decree, the provisions of S. 20 are in no way affected. 43 C. 207 ; 46 C. 22 ; 22 C.W.N. 325 ; 23 C.W.N. 320 ; 20 C.L.J. 131, *Foll.* 64 Ind. Cas. 72=35 C.L.J. 566=26 C.W.N. 534=A.I.R. 1921 Cal. 643.

——S. 20—Certification not necessary.

If the decree-holder, when applying for execution, wishes to rely upon S. 20, the fact that he has not certified the payment, until making this application, is no obstacle. 82 Ind. Cas. 743=20 M.L.W. 190=1924 M.W.N. 674=A.I.R. 1925 Mad. 131.

——S. 20—Part-payment entered in execution petition—Limitation extended.

If the part-payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment, it amounts, if the fact of payment is proved, to a certificate of payment under O. 2, R. 2 and will operate to save limitation under S. 20 of the Limitation Act. 43 Cal. 207, *Foll.* 75 Ind. Cas. 1029=A.I.R. 1924 Lah. 676.

——S. 20—Judgment-debtor.

Per *Seshagiri Aiyar, J.*—Payment by or by the authority of a judgment-debtor is covered by S. 20. 61 Ind. Cas. 979=13 M.L.W. 37=1921 M.W.N. 181=A.I.R. 1921 Mad. 126.

——S. 20 and Art. 182 (5)—Part-payment of principal portion of decretal amount—Limitation—Fresh starting point.

A decree holder gets a fresh starting point of limitation to execute the decree within Art. 182 (5) of the Limitation Act from the date on which a portion of the decretal amount is paid by the judgment-debor. 46 Cal. 22=45 Ind. Cas. 903.

——S. 20—Acceptance by Decree-holder of overdue instalment—Effect of.

The mere acceptance by a decree-holder of overdue instalments is not of itself sufficient proof of waiver on his part to execute the decree for the whole amount; whether such an acceptance amounts to a waiver so as to extend the period of limitation is a question of fact which will not be distrubed in second appeal. 11 S.L.R. 120=45 Ind. Cas. 324.

——S. 20—Part-payment of principal—C.P. Code O. 21, R. 2—Payment made within 3 years—Bound to be recognised by Court.

Alleged part payments made within three years but certified to the Court under O. 21, R. 2 more than 3 years after the date of the first application extend the limitation. 20 C.L.J. 131 Foll. 12 A.L.J. 287 and 825 and 666, diss. 29 M.L.J. 669=18 M.L.T. 475=(1916) 1 M.W.N. 127=31 Ind. Cas. 318.

——S. 20—Decree payable by instalments.

The holder of a decree payable by instalments can, after applying for execution, extend the period of limitation by entering the payment of interest towards the overdue instalments. 60 Ind. Cas. 935=14 S.L.R. 198.

——S. 20—Payment of interest—Debt not bearing interest.

A payment by a judgment-debtor for money, bearing no interest will not extend limitation unless it is in his hand-writing though the decree-holder certified it in the execution application as payment of interest. Decree-holder's application certifying payment does not affect S. 20. 22 C.W.N. 325=35 Ind. Cas. 177.

——S. 20 (1)—Uncertified payment—If can save limitation.

A payment under S. 20 must be of such a nature that

it could be an answer to a suit brought by the plaintiff to recover the amount 19 M. 340 ; 24 B. 496 ; 25 C. 852, (P.C.), Foll. A payment of the decree amount uncertified under O.21, R.2, C.P. Code before the expiration of the prescribed period as laid down in S. 20 cannot be relied upon by the decree-holder to prevent an application for execution being time-barred. 9 S.L.R. 27=30 Ind. Cas. 51.

——S. 20—Timber sold—Part payment—Proceeds of sale applied in execution—No part payment under S. 20.

In order that the provisions of S. 20, should apply infavour of the decree-holders, it is necessary that the fact of part payment of the principal of a debt should appear in the handwriting of the debtor. Where, therefore, some timber was sold in execution, and the proceeds were applied to satisfy a decree partly,

Held that the payment was not a good payment within the meaning of S. 20. (1909) 6 A.L.J. 836=2 Ind. Cas. 524=31 A. 590.

12. " Period prescribed ".

——Ss. 20, 4—Payment during summer vacation when limitation has lapsed, if could save limitation.

S. 4 of Limitation Act does not extend the limitation period, given in the schedule, but only enables a suit to be filed, if the limitation has expired during holidays, on the re-opening of the Court. So a payment made after the expiry of limitation but during the period the suit could not be filed on account of the fact that courts were closed for summer vacation cannot save limitation. 1946 O.W.N. 224=225 Ind. Cas. 497=1946 A.W.R. (C.C.) 175=1946 O.A. (C.C.) 175=A.I.R. 1947 Oudh 3.

——S. 20—The plaintiff sued on 9th January, 1939, to recover the money due on a bond executed on 28th. December, 1932, and repayable on 17th December, 1933 To save limitation, he relied on two payments endorsed on the back of the bond, the first dated 28th December, 1933, and the second dated 1st January, 1937. On 28th December, 1936, when the plaintiff could have sued, the Courts were closed and he could have filed his suit on 2nd January, 1937, when the Courts re-opened :

Held, that the suit was barred by limitation as the payment made on 1st January, 1937 was made after the expiration of the prescribed period. A.I.R. 1940 Nag. 401=1940 N.L.J. 227=188 Ind. Cas. 585.

——S. 20—Pro-note dated 13th September, 1927—Repayment towards pro-note on 4th October, 1930, the day on which the Courts re-opened after vacations—Suit filed on 4th October, 1933 :

Held, that the plaintiff could not employ S. 4, Limitation Act, to extend the period of limitation prescribed by S. 20 and hence the suit was time-barred. A.I.R. 1939 All. 252=1939 A.W.R. 153=181 Ind. Cas. 899.

——S. 20—Endorsement of payment after limitation but during holidays of Court.

An endorsement of payment made at the back of a pro-note more than three years after its execution but during the holidays of the Civil Courts which had begun prior to the completion of three years' period does not give a fresh start of limitation under S. 20 read with S. 4. A.I.R. 1938 All. 606=1938 A.W.R. 572=(1938) A.L.J. 1183=I.L.R. (1938) All. 861=178 Ind. Cas. 668.

——S. 20—In S. 20, Limitation Act, " period " means a definite space of time. " Prescribed for a suit " must mean " prescribed by this" Act and the only place where a " period " in the sense of a definite space of time is provided for in the Act is S. 3. The time prolonged under S. 4 for the Court being closed on the last day of limitation is not a " period." Nor it can be described as " the period prescribed for the suit." Where, therefore, the limitation period expires on Sunday, the payment of interest the next day does not give fresh start for limitation. A.I.R. 1938 Mad. 683=47 M.L.W. 726=(1938) M.W.N. 513=177 Ind. Cas. 759.

——S. 20—Payment after expiry of limitation—Suit not filed as Court closed for vacation—If time extended.

Where interest was paid after the expiration of the period limited for payment on the bond but during the period of the Civil Court vacation and where no suit was instituted on the day that the Court re-opened.

Held, that a fresh period of limitation could not be computed, as interest had not been paid before expiration of the prescribed period. 26 Bom. 782, *Foll.* ; 15 Bom. L.R. 348, *Diss. from.* 114 Ind. Cas. 483=55 Cal. 1210=A.I.R. 1929 Cal. 68.

13. Person liable to pay. *See also* NOTE 5.

——S. 20—Joint debtors—Payment and endorsement by one—Time, if saved against all.

Where a decree is passed against four Hindu brothers in respect of a debt due by their deceased father, and one of the brothers makes a payment towards the decree and endorses the same, that would save limitation for excution of the decree not only against him but against all the four judgment-debtors. 14 Cut.L.T. 51=A.I.R. 1949 Pat. 214.

——S. 20 and 21—Joint decree against number of persons—Payment by one—Whether saves limitation agains others.

Where a joint decree for under-proprietary rent is obtained by th superior proprietor against a number of persons, a payment towards the decree made by one of them does not save limitation against the other judgment debtors also. S 21 of the Limitation Act is explanatory of S. 19 as well as S. 20 and does not constitute an exception in the case of either of these sections. 23 Luck. 114=A.I.R. 1948 Oudh 193=1947 O.W.N. 623=1947 A.W.R. (C.C.) 402 (F.B.).

——S. 20—In order to be effective, the paymen of part of the principal must be by the debtor or his agent ; payment by the person liable to pay the debt, if he is not the debtor, would not give fresh start to limitation. In the case of payment of interest, however the payment need not be by the debtor ; it would suffice if the person liable to pay the debt makes the payment. " The person liable to pay the debt " is more comprehensive than " the debtor." A surety, for example, will be " a person liable to pay the debt " of the principal debtor, though he will not be " the debtor."

If there are several persons liable to pay payment of interest by any one of them will have the effect of giving a fresh start to limitation. ' Person liable to pays does not necessarily mean the entire body of such person, If a person liable to pay makes payment, such payment will, according to S. 20 Limitation Act, be available against another person who was also liable to pay. As soon as payment is made towards a debt within the specified time and by the specified persons, a fresh period of limitation for the debt will commence. A.I.R. 1941 Cal. 643=73 C.L.J. 356=197 Ind. Cas. 869.

——S. 20—The wording of S. 20 is quite general and no limited interpretation should be put upon the words " the person " as used in the section. The words " the person liable to pay " as used in the section do not mean that the payment must be made by the sole debtor, or the entire body of debtors, if there are more than one. Even where a payment is made by a debtor or by one of the joint debtors, it comes under the provisions of S. 20 and such payment gives a fresh start of limitation, not only against the person making it but also against all his

co-debtors. A.I.R. 1938 Cal. 129=66 C.L.J. 104=42 C.W.N. 182=176 Ind. Cas. 191.

——S. 20—Payment of interest by one of several debtors—When extends period of limitation—Divisible debt consisting of distinct debts each payable by respective obligor—Payment of interest by one—Limitation as against others.

Section 20 does not limit the extended period to the person who really makes the payment. If the debt is one and indivisible, payment by one would interrupt limitation against all the debtors unless they can come within the exception laid down in S. 21 (2). But if the debt is susceptible of division and though seemingly one consists really of several distinct debts, each one of which is payable by one of the obligors separately and not by the rest, S. 20 would keep alive that debt or rather the portion of the debt which has got to be discharged by the person who has made payment of interest. It cannot affect the separate shares of the other debtors unless, on the principle of agency, express or implied, the payment can be said to be a payment, on their behalf also.

Where a Muhammadan executed a pronote in the plaintiff's favour and on the death of the executant his property devolved on his widow and minor children and the widow paid a certain amount as interest within three years of the execution :

Held, that the widow inherited the $\frac{1}{8}$th share of the husband's estate and her liablity for the debt of her husband was also to that extent. The payment which she made was referable, therefore, to her own debt which was $\frac{1}{8}$th share of the total debt and in respect of this debt only, time could be extended under S. 20. Consequently, the payment of interest did extend the limitation only so far as the widow was concerned, but it did not affect the debt that was payable by the sons. A.I.R. 1937 Cal. 191=171 Ind. Cas. 712.

——S. 20—Joint provisions—Payment by one.

A payment by one joint promisor liable to pay the debt is, for the purpose of S. 20, sufficient to operate against all the joint debtors, for a fresh period of limitation begins, not merely in respect of the liability of the one who pays but in respect of the liability upon the whole debt. A.I.R. 1935 Rang. 473=160 Ind. Cas. 314.

——S. 20 (1)—Co-debtor—Payment by one under instructions from the other.

A and his son *B* executed a promissory note to *C*. When *C* pressed for payment, *B* told his father to get some money from *D* and to pay the same to *C*, *C* and *A* went to *D's* house. *D* executed a promissory note to *C* and *A*, made an endorsement of payment on the promissory note which had been executed by them to *C* :

Held, that under the circumstances, *A* was an agent of *B* in making the part payment and endorsing the same on the promissory note and the part payment saved limitation not only as against *A* but against *B* also. The question whether the money paid belonged to *A* or to the joint family or to *B* was irrelevant. (1934) M.W.N. 120=A.I.R. 1934 Mad. 623=40 M.L.W. 590=67 M.L.J. 908=151 Ind. Cas. 1087.

——S. 20—Hand-note by joint executions—Payment of interest by one.

The expression " the person liable to pay the debt " is not the same thing as " a person liable to pay the debt " that is to say, where there is joint liability. Consequently, payment of interest by one of the joint executants of a hand-note does not save limitation against the other. 15 P.L.T. 113=A.I.R. 1934 Pat. 224=151 Ind. Cas. 753 (2).

——S. 20—Payment by one of Judgment-debtors.

A payment by one of several judgment-debtors on his own behalf and not on behalf of the others also cannot save a subsequent application for execution from limitation as against the other defendants under S. 20, Limitation Act. A.I.R. 1933 Mad. 674=147 Ind. Cas. 586.

——S. 20—Joint debtors—Payment by one.

A payment made by one of several joint debtors will not extend the period of limitation as against the other debtors under S. 20. A.I.R. 1932 Cal. 620=36 C.W.N. 487=55 C.L.J. 347=59 Cal. 1128=138 Ind. Cas. 740.

——S. 20—Joint debtors—Payment by one by authority and in presence of the other—Signature of the other affixed—New period of limitation begins.

Where two persons are liable on a debt embodied in a Khata and they make payments towards the satisfaction of the debt, then it should be absurd to suppose that the law required that it would be necessary that both persons should make entries in the creditor's book. Where defendant No. 1 authorised the 2nd defendant to make payments towards the reduction of the joint debt and signified that authorisation not only by being present when the payment was made but by signing underneath.

Held, that clearly amounted to an acknowledgment, that the liability was continuing and a new period began against both. 74 Ind. Cas. 302=25 Bom.L.R. 354=A.I.R. 1923 Bom. 369.

——Ss. 20, 21—Part-payment by one of several judgment-debtors, effect of.

A payment made by one of several persons jointly liable under a decree otherwise than as agent of his judgment-debtors, cannot operate to save limitation as against any of the judgment-debtors other than the person making the payment. (1904) 1905 A.W.N. 108=2 A.L.J. 287=27-A. 575.

See also 1 A.L.J. 335.

——S. 20—" Debtor," meaning of.

The word " debtor " was intended to connote, not only the person who contracted the debt but his legal representative and in the case of a debt charged on land, the person who derived title from him ; in short the person who can be rendered liable for the debt by the creditor, that is, the person against whom the debt can be enforced. That is, the liability need not be personal in the sense of being liable to be arrested ; it may be proprietary, that is liability arising from the possession of property. A.I.R. 1941 Mad. 6=51 M.L.W. 453=(1940) 2 M.L.J. 726=195 Ind. Cas. 329.

——S. 20—Payment by mortgagor towards mortgage debt—Effect—When starts fresh period of limitation as against an item of the mortgaged properties which had been alienated before the date of such payment.

Where a mortgagor after alienating one of the four items but while still in possession of the remaining three items of mortgaged properties makes a payment to the mortgagee, a fresh period of limitation would start in favour of the mortgagee as against all items of mortgaged properties including the one which the mortgagor had alienated before his making the part payment.

So long as the mortgagor has not parted with his interest in the mortgaged properties and continues to be liable under the mortgage he can make a payment which will serve under S. 20 of the Limitation Act to start a fresh period of limitation. 60 L.W. 146=1947 M.W.N. 173 (1)=A.I.R. 1947 Mad. 329=(1947) 1 M.L.J. 153.

——Ss. 20, 19—Payment by mortgagor after he has parted with mortgaged property.

A payment stands on a different footing from an

acknowledgment as regards its effect in saving rights of action. Section 20 does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor and saves the right of suit by the creditor in its integrity against all the persons who might have been sued within the prescribed period. Hence a part payment by a mortgagor after he has parted with the mortgaged property but who is personally liable to pay on his covenant saves the right of suit against the purchaser of the equity of redemption. 54 M.L.W. 579=A.I.R. 1942 Mad. 200=I.L.R. (1942) Mad. 308=1941 M.W.N. 1000=(1941) 2 M.L.J. 913=201 Ind. Cas. 218.

——**S. 20**—A payment of interest as such by the mortgagor after he has parted with all his interest in the mortgaged property cannot be said to be a payment by a "person liable to pay the debt"; within the meaning of S. 20, Limitation Act, and cannot, therefore, save limitation. 23 P.L.T. 328=21 Pat. 330=A.I.R. 1942 Pat. 363=8 B.R. 839=202 Ind. Cas. 54.

——S. 20—Mortgagor selling equity of redemption but remaining liable for the debt—Payment by him saves limitation.

Payment of interest by the mortgagor, who remained liable *ex contractu* to pay the debt though he had alienated the equity of redemption is sufficient to save limitation, and as against the purchaser of the equity of redemption the fact that before payment a decree had been passed on the mortgage, does not make his payment ineffective. 98 Ind. Cas. 381=44 C.L.J. 475=A.I.R. 1927 Cal. 193.

——S. 20—Mortgagor after parting with equity of redemption—Effect on purchaser.

Payment of interest by the mortgagor after transfer of the equity of redemption, extends the period of limitation against the purchaser of the equity. 22 Ind. Cas. 510 (Cal.).

——S. 20—"Debtor"—Payment by mortgagor—Effect of on purchaser of part of the mortgaged property before part payment.

There is nothing in S. 20 to indicate that the extension of time effected by a part payment is only to operate against the person making the payment. Payment of a part of the mortgage debt by the mortgagor, and appearing in his handwriting, will give a fresh start of limitation to the mortgagee even as against a person who had purchased a portion of the mortgaged property prior to such payments. 32 C. 1077 Foll. (1906) 11 C.W.N. 107=33 C. 1278.

——**S. 20**—Per **Full Bench, Varma and Sinha, JJ.** contra.—A mortgagor can, by paying part of the principal or interest 'as such' due on a mortgage, give a fresh start to the period of limitation with respect to that mortgage. This he can do even without the consent and behind the back of a subsequent mortgagee. 1945 A.W.R. (H.C.) 199=(1945) A.L.J. 292=A.I.R. 1945 All. 239=I.L.R. (1945) All. 733 (F.B.).

——S. 20—Mortgagor—Subsequent mortgagee or purchaser, if bound.

A payment of interest as such by sale of certain other properties by the mortgagors saves time not only against themselves but also against the subsequent purchasers of the equity of redemption or subsequent mortgages. 41 All. 111=16 A.L.J. 790=47 Ind. Cas. 845.

——S. 20 (1)—Sub-mortgage—Payment by mortgagor or sub-mortgagor—Limitation—Suit as against original mortgagee.

If a mortgagor makes a payment to the sub-mortgagee it saves limitation also as against the sub-mortgagor There is no distinction between his position and that of an acknowledged surety. 3 P.R. 1918=44 Ind. Cas. 213.

——S. 20—Payment by purchaser of portion of hypotheca.

A payment made by a person entitled to do so under S. 20, Limitation Act, creates a fresh period of limitation against all persons who might have been served within the prescribed period. A payment falling within S. 20 by a purchaser of a portion of the hypotheca will save the mortgagee's claim against the unsold properties and he, the mortgagee, can proceed against them also. A.I.R. 1943 Mad. 395=56 L.W. 75=(1943) 1 M.L.J. 135=1943 M.W.N. 64=209 Ind. Cas. 300.

——S. 20—Payment by purchaser of portion of mortgaged property.

One of the properties comprised in the mortgage was agreed to be sold by the mortgagors to one *P* for Rs. 7,600, and it was stipulated that out of this sum, he should pay Rs. 1,500 to the mortgagee who, in his turn, should release the item purchased, from his mortgage security. There was sufficient evidence to show that the mortgagee gave his consent to this arrangement entered into between the mortgagors and *P*, and the mortgagee was made to attest the sale deed in token of his consent. Simultaneous with the execution of the sale-deed, a release-deed was executed by the mortgagee in favour of *P*. It recited that out of the amount due to the mortgagee, Rs. 1,500 was received for interest. The money was in fact paid on subsequent date on which date the payment was endorsed on the back of the mortgage-deed. The mortgagee instituted a suit on his mortgage and relied on payment by P to save his claim from bar of limitation :

Held, that *P* as the purchaser was a "person liable to pay the debt" and payment by him took the case out of the statute, he being the purchaser of an item comprised in the mortgage. Apart from that, the facts showed that he was the mortgagor's agent "duly authorised" to pay Rs. 1,500. On this ground also, the payment made by him saved the claim from the bar of limitation. A.I.R. 1938 Mad. 579=47 L.W. 517=(1938) 1 M.L.J. 624=(1938) M.W.N. 397=182 Ind. Cas. 468.

——S. 20—Payment of interest by one joint mortgagor, whether saves limitation against other.

Sub-section (2) of S. 21, Limitation Act, must be read in conjunction with Ss. 19 and 20. Therefore, a payment of interest as such by one of the joint mortgagors, who is not an agent of the others, does not of itself serve to keep alive the debt as against the others who have not authorised the payment. The claim against the other is barred personally as well as against the shares of the property pledged by him, for, each of the contractors is a principal, (although it may appear that one is as it were a surety for the other) ; the one does not give authority to the other to pledge the share of the one for the other's debt. The relationship of principal and surety does not exist between joint contractors ; each does the pledging in respect of his own liability ; that liability extends to the whole debt while the liability exists, and so the pledge refers to the whole debt ; but it is not a pledge which can be disclosed from the liability incurred. It could only be so if there were an express agreement to that effect. Consequently when the liability of one of the joint contractors ceases, his share of the property pledged as security is also discharged from liability. A.I.R. 1939 Rang. 287=184 Ind. Cas. 622.

——Ss. 20, 21—Co-mortgagors—Personal covenant—Payment by one.

The mortgage itself may be kept alive by payment by one of the mortgagors, but when the question which arises is a matter, not of the liability on the mortgage

but the liability on the personal covenant, the matter which has to be determined is whether the payment by one joint contractor can be deemed to be the payment of the other joint contractors, and that, as S. 20 quite clearly implies quite apart from S. 21, can only arise where the payment is made by the one as agent of the other. Two joint contractors are not agents one for the other, and in this particular case, S. 21 of the Act makes the matter abundantly clear. 19 P.L.T. 240=A.I.R. 1938 Pat. 383=174 Ind. Cas. 156.

——**Ss. 20, 21 (2)**—Body of persons interested in equity of redemption—Payment made by one :

Held, that payment by one joint mortgagor saves limitation against all. A.I.R. 1936 Pat. 361=2 B.R. 642=163 Ind. Cas. 808.

——**S. 20—One co-mortgagor, making payment keeps mortgage alive.**

Payment of interest by one of two mortgagors keeps alive the mortgage and not only the personal liability of the person who actually pays interest. 119 Ind. Cas. 437=1929 A.L.J. 846=A.I.R. 1929 All. 380.

——**S. 20—One mortgagor not signing endorsement—Payment and endorsement by others—No authorisation to sign.**

Where an endorsement on a mortgage deed is not signed by one of the mortgagors and there is nothing on record to show that those who signed the endorsement were specifically authorised for that purpose the mere fact that the payment of the money enures for the benefit of all the mortgagees cannot constitute a specific authorization to sign the endorsement on his behalf within the meaning of S. 20. 121 Ind. Cas. 858=30 M.L.W. 677=A.I.R. 1929 Mad. 881=57 M.L.J. 588.

——**S. 20—Payment by one of the mortgagors extends period against all.**

Every mortgagor is liable for the entire debt secured by the mortgage; so payment by one of the mortgagors comes within S. 20 and extends period against all and not only the payer. 99 Ind. Cas. 424=A.I.R. 1927 All. 209.

——**S. 20—Payment by one of the co-mortgagors—Extends time against others.**

The expression " person liable to pay " does not mean the entire body of persons liable to pay the debt but every person liable to pay the debt.

Under the law every mortgagor is liable for the entire debt secured by the mortgage, so payment by one of the mortgagors comes within S. 20. 90 Ind. Cas. 774=A.I.R. 1926 Cal. 150.

——**Ss. 20 and 21—Payment of by co-mortgagor, if binding on the other mortgagors.**

Where payment of interest as such is made by one of several co-mortgagors such payment cannot in view of S. 21 of the Limitation Act save limitation under S. 20 of that Act except as against that co-mortgagor unless it is shown that the other co-mortgagors, authorised the payment. 5 O.L.J. 73=45 Ind. Cas. 613.

——**Ss. 20, 21**—Payment of interest by one of several successors-in-interest of mortgagor in possession of part of property saves limitation against others. A.I.R. 1933 Pat. 1=14 P.L.T. 6=12 Pat. 93=140 Ind. Cas. 145.

——**S. 20—Some descendants of deceased mortgagor making payment—Others divided before payment—If bound.**

Payment of interest made by some of the descendant of a deceased mortgagors binds also the other descendants even though these latter were divided from the family before the payment was made. Section 21 (2) cannot save them because the categories mentioned in that section are not merely illustrative, and it does not cover cases relating to co-heirs and other persons who derive their liability not from direct contract with the promise. 14 Ind. Cas. 128, *Not foll.* A.I.R. 1930 Mad. 738=127 Indl Cas. 641.

——**S. 20—One of three co-mortgagees joint with his son—Son taking lease of the mortgaged property and promising to pay rent to mortgagees but appropriating rent himself—Appropriation by lessee amounts to payment to all the co-mortgagees.**

A mortgagor mortgaged his property with three mortgagees for a certain sum. Later on the mortgagor leased out the mortgaged property to a lessee who was put in its possession. The mortgagor authorised the lessee to pay out of the not profits interests and principal towards the mortgage-debt to the mortgagees. The lessee was the son of *H*, one of the mortgagees forming a joint Hindu family made with him. The lessee made payments to some of the mortgagees and acknowledged liability under the mortgage deed. One of the mortgagees did not get his share.

Held, that the lease must be deemed to be in favour of the joint family of *H* and his sons and the receipt of rents and profits by the son would be tantamount to a payment of interest and principal to *H* and hence to all the co-mortgagees within S. 20, it being immaterial whether he did or did not subsequently distribute it amongst all the mortgagees. 110 Ind. Cas. 561=26 A.L.J. 722=A.I.R. 1928 All. 387.

——**S. 20—Person liable to pay—Includes subsequent mortgagees and purchaser of equity of redemption liable to pay the 1st mortgagee.**

The expression " person liable to pay the debt " is not confined to the person who under every circumstances must be personally liable to pay, but it includes not only the mortgagor and his personal representative upon whom the contract would be personally binding, but also the second and the third mortgagees and the purchasers of equity of redemption, to whom the principal and interest due to the first mortgagee might with propriety be said to be payable. A.I.R. 1921 Mad. 102, *Foll.* 98 Ind. Cas. 202=54 Cal. 179=44 C.L.J. 188=A.I.R. 1926 Cal. 1218.

——**S. 20—Auction-purchaser of judgment-debtor's interest.**

The auction-purchaser of the interest of a mortgagor judgment-debtor is a person liable to pay within the meaning of S. 20. (1863) 1 De. G.J. and S. 122 and (1864) 11 H.L.C. 115, Foll. 62 Ind. Cas. 393=44 Mad. 544=13 M.L.W. 193=A.I.R. 1921 Mad. 102=40 M.L.J. 218.

——**S. 20—Person liable to pay—Hindu widow.**

A Hindu widow can keep a debt of her hsuband alive by making payments under S. 20. 112 Ind. Cas. 491=A.I.R. 1928 Mad. 972.

——**S. 20—Parties and privies.**

S. 20 requires that the payer should be one liable to pay the debts and the result of the payment would be to give a fresh period of limitation from the date of payment ; the debt being kep alive, the result must be to make it enforceable against any one liable for it. The 'party liable' means any person or persons against whom an action on the debt could be brought whether liable originally or as representing or taking the estate, real or personal, of the donor. 12 M.L.T. 610=24 M.L.J. 66=17 Ind. Cas. 619.

14. "Signed"—Proviso.

——**S. 20 (As amended in 1927)**—Under the present law all that is necessary is that the endorsement should have been signed by the person making the payment, and it is quite unnecessary that the whole endorsement should have been written by the person making the payment. A.I.R. 1939 Rang. 112=181 Ind. Cas. 393.

——**S. 20—Endorsement by another at instance of illiterate debtor making payment—No mark by debtor under endorsement.**

Where a debtor is illiterate, it is necessary for him to sign the writing under which the payment is made. The word "sign" includes, in view of the defintion given in S. 3 (52), General Clauses Act, "making a mark". An endorsement by another at the instance of the debtor making the payment is not sufficient for purposes of S. 20, Lim. Act, in the absence of a mark by the debtor himself under the endorsement. A.I.R. 1943 Pesh. 36=207 Ind. Cas. 51.

——**S. 20**—It is doubtful whether a single signature in regard to endorsements referring to a series of payments made at different times would suffice to comply with the provisions of the Proviso to S. 20 (1), Lim. Act. A.I.R. 1939 Rang. 118=181 Ind. Cas. 765.

——**S. 20—'Signature'—Person touching a pen and handing it over to another.**

Where *A* touched a pen and passed it on to *B* who wrote *A*'s name on a bond and made an endorsement "paid Rupee one" and subsequently added his own signature as scribe :

Held, that there was no sufficient signature of *A* for the purposes of saving limitation under S. 20. 42 M.L.W. 644=(1934) M.W.N. 1082=A.I.R. 1935 Mad. 1047=159 Ind. Cas. 158.

——**S. 20—Touching pen and authorising another to write executant's name.**

If it is established that it is the ordinary practice among illiterate persons to sign documents by touching the pen and authorising another person to sign by writing their name for them in their presence, this is a sufficient signature for the purposes of S. 20.

In Bengal this is the ordinary way in which illiterate persons sign documents. A.I.R. 1932 Cal. 440=36 C.W.N. 188=137 Ind. Cas. 788.

——**S. 20**—It is enough, if the payer affixes his mark beneath an endorsement not written by him. 5 Bom. L.R. 1031=28 Bom. 262.

15. Starting Time.

——**S. 20—Starting time.**

Time runs from date of payment and not from date on which it is endorsed. 8 C.L.T. 1=A.I.R. 1942 Pat. 395=24 P.L.T. 21=8 B.R. 665=200 Ind. Cas. 306.

——**S. 20**—Not the date on which endorsement is written but on which payment is made, is to be looked at. A.I.R. 1939 Rang. 118=181 Ind. Cas. 765.

——**S. 20—Starting point.**

The date of endorsement does not avail under S. 20 but the date of actual payment. 117 Ind. Cas. 124=A.I.R. 1929 Mad. 432.

——**S. 20—Payment before, but endorsement after expiry—Fresh period begins.**

Where payment is made before the limitation has expired a fresh period begins from the date of payment though the endorsement of payment is made by the debtor after the limitation has expired. 17 Mad. 92, Foll. 71 Ind. Cas. 17=19 N.L.R. 6=6 N.L.J. 121=A.I.R. 1923 Nag. 117.

——**S. 20 (1)—Reckoning of time—Whether from date of endorsement or payment.**

Under S. 20 time runs from date of payment and not from the date of endorsement of such payment. A mere endorsement of payment does not amount to an acknowledgment within S. 20. 9 M.L.T. 216=8 Ind. Cas. 349.

——**S. 20—Cheque given—Fresh period from giving of cheque and not its being cashed.**

If a cheque is given in part-payment of a debt, the fresh period of limitation under S. 20 should be computed from the actual giving of the cheque and not from the time when the Bank pays cash for it. 87 Ind. Cas. 508=29 C.W.N. 496=A.I.R. 1925 Cal. 937.

16. Miscellaneous.

——**S. 20**—A minor can validly pay any amount toward his debt and such a payment towards any instalment due under an instalment bond would be a good payment to prove that the said instalment was discharged. (1940) 187 Ind. Cas. 809 (Bhopal).

——**S. 20**—Where the pledge and the loan are not contetemporaneous, the payments of interest as such on the loan after limitation do not save the bar of limitation and the payment of interest on the loan so far as the pledge is concerned cannot save it either. A.I.R. 1935 Bom. 213=37 Bom. L.R. 165=156 Ind. Cas. 531.

——**S. 20—Mere statement of account—Not adjustment.**

A mere statement of account made over to the debtor without any actual settlement of the accounts between the parties does not amount to an adjustment so as to give a fresh start of limitation. 9 Pat. 851=126 Ind. Cas. 898=A.I.R. 1930 Pat. 372.

——**S. 20—Payment of interest must be proved—Creditor's admission of receipt not of much weight.**

When a creditor comes into Court with a claim which is capable of being regarded as a stale or time-barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this view, the mere fact that the statement of receipt of interest is against the pecunariy interest of the person making. the admission cannot be regarded as of great weight. Before the Court can hold that there were these payments of interest it must be satisfied that those payments were actually made. 111 Ind. Cas. 210=51 Mad. 549=29 M.L.W. 460=A.I.R. 1928 Mad. 509.

——**S. 20—Payments towards debt—Denied by debtor—No evidence let in—Court may presume payments.**

Where a debtor makes a payment, and the decree-holder relies on it as saving limitation as having been made towards principal and interest but the debtor denies the payment altogther and offers no evidence to support his allegations, the Court is entitled to presume that the payment was made towards principal and interest. 92 Ind. Cas. 687=22 M.L.W. 827=A.I.R. 1926 Mad. 183.

——**S. 20—Stranger—Suit for sale on a mortgage—Subsequent transaction between mortgagee and third person for paying off mortgage-debt—Whether time extended thereby.**

Limitation in respect of a suit for sale on a mortgage cannot be extended by subsequent transaction between the mortgagee and a third person for paying off the mortgage debt. 17 O.C. 38=23 Ind. Cas. 448.

——**S. 20—Part-payment of principal—Burden of proof.**

The burden of proving that a payment made by a defendant saves limitation under S. 20, rests on the plaintiff (1913) 1 U.B.R. 178=22 Ind. Cas. 959.

——**S. 20—Partner.**

Payment to one partner of a debt due to the firm is a valid discharge of the debt only when the payment is a money payment. 13 C.L.J. 234=9 Ind. Cas. 116

——**S. 21**—*See also* LIMITATION ACT, SS. 19 AND 20.

Synopsis.

1. **Acknowledgment or payment by co-contractor or co-debtor.**
2. **Acknowledgment or payment by co-heir.**
3. **Acknowledgment or payment by Co-mortgagor**

4. Acknowledgment by some of devisees.
5. Acknowledgment or payment by guardian.
6. Acknowledgment by agent of guardian, Committee or Manager.
7. Acknowledgment or payment by Hindu widow.
8. Acknowledgment or payment by Manager of joint Hindu family.
9. Acknowledgment or payment by member of joint Hindu family.
10. Acknowledgment or payment by partner.
11. Burden of proof—Sub-S. (2).
12. "Chargeable"—Meaning of—Sub-S. (2).
13. "Only"—Meaning of—Sub-S. (2).

1. Acknowledgment or payment by Co-contractor or co-debtor.

See also (1) NOTE 4 UNDER S. 19 AND (2) NOTE 5 UNDER S. 20.

——S. 21—Co-contractor, payment by

The payment by a co-contractor would not entitle the creditor to get an extension of time as against other co-contractors. A.I.R. 1942 Cal. 251=74 C.L.J. 327=I.L.R. (1941) 2 Cal. 576=201 Ind. Cas. 138.

——S. 21—Joint contractors.

A payment made by one of the joint contractors, after the death of the other, within limitation, does not save limitation against the heirs of the deceased joint contractor. A.I.R. 1941 Mad. 110=(1940) 2 M.L.J. 326=(1940) M.W.N. 891=52 M.L.W. 364 (2)=195 Ind. Cas. 235.

——S. 21—Joint contractor—Acknowledgment by one.

In order that an acknowledgment or a payment by one of two joint contractors shall bind a co-contractor, it must be shown that in making the acknowledgment or or in making the payment, he was, in effect, acting as the agent of his joint contractor. A.I.R. 1937 Rang. 195=169 Ind. Cas. 477.

——S. 21—Joint contractors—Acknowledgment by one—Saves limitation as against him alone and not others.

Other joint contractors cannot be chargeable on account of an acknowledgment made by one of them. But an acknowledgment signed by one of them would surely save the limitation as against himself though not against others. A.I.R. 1922 All. 37, Foll. 110 Ind. Cas. 561=26 A.L.J. 722=A.I.R. 1928 All. 387.

——S. 21—Cessation of joint business—Acknowledgment by one of two joint contractors after cessation of their business does not bind the other.

G and *K* were sub-contractors under *M*. They failed to carry out their sub-contract and were sued by *M* who obtained a decree against them for the performance of which *G* and *K* gave separate sureties. No business was carried on by them after that,

Held, in a suit against both *G* and *K* by one *B* for price of goods sold that an acknowledgment signed by *K* after close of the business was not enough to extend limitation as against *G*. 99 Ind. Cas. 563=7 Lah. 403=27 P.L.R. 598=A.I.R. 1926 Lah. 616.

——Ss. 21 (2), 20—Scope of S. 21 (2)—Joint contractors liable as such before passing of decree—Whether become joint judgment-debtors after passing of decree.

Sub-section (2) of S. 21 is merely explanatory; it does not lay down exceptions to any general principle embodied in S. 20. Joint contractors who are liable as such before decree is passed against them, remain contractors after decree against them and they become joint judgment-debtors.

Payment made by one joint judgment-debtor independently of other judgment-debtors, does not interrupt the running of the period of limitation as against the other judgment-debtors and cannot operate to save limitation as against them. A.I.R. 1939 All. 230=1939 A.W.R. 98=(1939) A.L.J. 66=I.L.R. (1939) All. 258=181 Ind. Cas. 490.

——S. 21—Acknowledgment or payment by one of several judgment-debtors.

The payment by the Receiver in insolvency on behalf of the insolvent judgment-debtor cannot save the limitation against the other. A.I.R. 1938 Pat. 395=4 B.R. 783=19 P.L.T. 831=176 Ind. Cas. 876.

——S. 21 (2)—Principal and surety.

Principals and sureties are not to be regarded as joint contractors within the meaning of S. 21 (2), Lim. Act A.I.R. 1940 Cal. 401=I.L.R. (1940) 2 Cal. 362=44 C.W.N. 985=191 Ind. Cas. 608.

——S. 21 (2)—Joint contractor—Surety.

Where the debt is kept alive by part-payment and the liability of other is several, then it should be proved that the person represented the other persons. 28 B. 248; 27 M.L.J. 455, Foll. S. 21 (2) of the Act is not exhaustive and the test is whether the person keeping the debt alive had express or implied authority on behalf of others. 32 Ind. Cas. 608 (Mad.).

——S. 21 (2)—Payment or endorsement by one debtor.

In the case of a simple promissory note jointly executed by two persons, payment or endorsement made by one debtor does not operate to save limitation against the other in the absence of evidence that the payments or endorsements were made on behalf of the co-debtor or by his authority. A.I.R. 1936 Rang. 504=165 Ind. Cas. 828.

——S. 21—Co-obligors—Authority of one to pay for others essential—Authority may be implied.

When nothing more appears than that one of several co-obligors has made a payment or an acknowledgment of liability, such payment or acknowledgment will not save limitation against the other obligors of the debt. It has to be shown that he made such payment or acknowledgment not only on behalf of himself but also as the duly authorized agent of his-co-obligors. Such authority, however, need not be express: it may be inferred rom the conduct of several co-obligors. 107 Ind. Cas. 646=27 M.L.W. 820=A.I.R. 1928 Mad. 173=54 M.L.J. 150.

——S. 21 (2)—Joint promisors—Acknowledgment by one—Effect.

The conduct of the parties might show that one joint promisor has implied authority to make an acknowledgment on behalf of the other. (1914) M.W.N. 792=25 Ind. Cas. 927.

2. Acknowledgment or payment by co-heir.

See also (1) NOTE 4 UNDER S. 19 AND (2) NOTE 5 UNDER S. 20.

——S. 21—Co-heirs—Divided descendants of deceased mortgagor—Bound by payments made by some of them—Not saved by section.

Payment of interest made by some of the descendants of a deceased mortgagor binds also the other descendants even though these latter were divided from the family before the payment was made. Section 21 (2) cannot save them because the categories mentioned in that section are not merely illustrative, and it does not cover cases relating to co-heirs and other persons who derive their liability not from direct contract with the promisee. 14 Ind. Cas. 128, Not Foll. A.I.R. 1930 Mad. 738=127 Ind. Cas. 641.

——**S. 21**—The extension of the sub-S. (2) by analogy to co-heirs is not warranted. 14 Ind. Cas. 128, Not Foll. 118 Ind. Cas. 302=1929 M.W.N. 146=29 M.L.W. 789=A.I.R. 1929 Mad. 419=56 M.L.J. 630.

——**S. 21 (2)—Co-heirs—Payment by one—Effect**

Payment of interest by one of the heirs on a debt due by the deceased person does not save limitation as against the other heirs. 14 Ind. Cas. 128, Foll. 9 L.B.R. 78=11 Bur. L.T. 132=40 Ind. Cas. 858.

3. Acknowledgment or payment by co-mortgagor.

See also (1) NOTE 10 UNDER S. 19 AND
(2) NOTE 13 UNDER S. 20.

——**Ss. 21, 19—"Joint contractors" whether include co-mortgagors.**

The words "joint contractors" in S. 21 (2), Lim. Act must be taken to include co-mortgagors. Hence, an acknowledgment under S. 19 or a payment under S. 20 by a co-mortgagor cannot save limitation against the other co-mortgagor. A.I.R. 1943 Bom. 381=45 Bom. L.R. 740=I.L.R. (1943) Bom. 486=210 Ind. Cas. 532.

——**S. 21—Mortgage by Muhammadan brother and sister.**

A payment by one of co-mortgagors (a Muhammadan brother and sister) cannot save limitation against the other. Nor can the brother be deemed to be his sister's agent for making payments to creditor in absence of proof of authority. A.I.R. 1941 Rang. 37=1940 Rang. L.R. 603=194 Ind. Cas. 177.

——**S. 21 (2)—Joint mortgagors.**

The term "joint contractors" in S. 21 (2), include joint mortgagors. A.I.R. 1939 Rang. 287=184 Ind. Cas. 622.

——**S. 21—Joint contractors—One not bound by payment of others.**

Whatever may be the law as to executors, it is impossible to say that of two joint contractors—which term has been held to include two mortgagors by the Madras High Court—one contractor is bound by the payments of the other. 121 Ind. Cas. 858=30 M.L.W. 677=A.I.R. 1929 Mad. 881=57 M.L.J. 588.

——**S. 21—Co-mortgagors—Payment by one—Mortgage kept alive.**

Payment of interest by one of two mortgagors keeps alive the mortgage and not only the personal liability of the person who actually pays interest. 119 Ind. Cas. 437=1929 A.L.J. 846=A.I.R. 1929 All. 380.

——**S. 21 (2)—Joint mortgagors—Payment of interest by one—Effect.**

The distinction between simple debts and real debts maintained in the English Statutes of limitation is abrogated by S. 21 of the Limitation Act. There is no distinction made by the section between the case of co-mortgagors and that of co-mortgagees. The word "joint contractors" in the section includes joint mortgagors also. S. 21 of the Limitation Act, is an explanation to Ss. 19 and 20 of the Act, the object being to provide that one only of the contracting parties shall not ordinarily impose a liability on the matter by anything done by him. Limitation whether created as a right or as a disability is *prima facie* personal and unless the legislature so provides a co-operative right or liability should not be imposed. 55 Ind. Cas. 763 (Mad.).

——**S. 21 (2)**—*A* and *B* purchasing one-half of hypotheca from mortgagors—*A* making payment and mortgagee accepting it in full satisfaction of amount due by him—Suit by mortgagee, subsequently against *B*.

Held, that S. 21 (2) applied and payment by *A* did not save limitation against *B*. A.I.R. 1938 Mad. 111=(1937) M.W.N. 194=56 M.L.W. 688=175 Ind. Cas. 426.

——**S. 21 (2)—Joint mortgagors—Joint mortgagors dying—Surving co-mortgagors, if remains joint mortgagors with heirs of deceased.**

The joint mortgagors come under the general description of joint contractors within the meaning of S. 21 (2). In case of joint contractors, the relationship does not cease with the death of one of the contractors and the surviving contractor still remains a joint contractor with the heirs of the deceased. The payment of interest on a mortgage loan made by a surviving mortgagor will not, therefore, give a fresh start of limitation against the heirs of the deceased co-mortgagor. A.I.R. 1933 Cal. 129=66 C.L.J. 104=42 C.W.N. 18=176 Ind. Cas. 191.

4. Acknowledgment by some of devisees.

——**S. 21—Devisees—Acknowledgment by some—Others not bound.**

Among devisees an acknowledgment by some does not keep alive the creditors' right against others who have not authorised the former to acknowledge liability on their behalf. 10 Hare, 217, *Foll.* 122 Ind. Cas. 504=31 M.L.W. 65=1930 M.W.N. 16=A.I.R. 1930 Mad. 218=58 M.L.J. 210.

5. Acknowledgment or payment by guardian.

See also (1) NOTE 4 UNDER S. 19 AND
(2) NOTE 5 UNDER S. 20.

——**S. 21**—By the amendment of S. 21 in 1927, the Legislature did not enact that for the purposes of that Act, the guardian shall be treated as an agent of his ward. A.I.R. 1943 Pat. 218=22 Pat. 114=9 B.R. 260=206 Ind. Cas. 126.

——**S. 21**—Agent duly authorised to make payments and acknowledgments—Testamentary guardian of Hindu minor daughter after marriage—Payments and acknowledgments by—If will save limitation. *See* LIMITATION ACT (9 OF 1908), SS. 20 (1) AND 21. (1947) 2 M.L.J. 93=A.I.R. 1948 Mad. 155.

——**S. 21—Acknowledgment by de facto guardian of Hindu minor does not prevent debt being barred.**

A *de facto* guardian of an adopted Hindu minor cannot extend the period of limitation in respect of the debts contracted by the adoptive father, by signing the promissory notes.

The promissory note signed by the *de facto* guardian does not operate to create fresh obligation. A.I.R. 1946 Mad. 1=(1945) 2 Mad.L.J. 375=58 Mad.L.W. 545=1945 Mad. W.N. 656 (F.B.).

——**Ss. 21, 20—Acknowledgment by de facto guardian.**

Per *Krishnaswami Ayyangar, J.*—The law does make a real distinction between a *de jure* guardian and a *de facto* guardian A *de facto* guardian may be a relation or even a mere intermeddling stranger who, in fact, assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that by reason of the decisions of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

An acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred A I R. 1940 Mad. 33=50 M.L.W. 896=(1939) 2 M.L.J. 884=(1940) M.W.N. 9=I.L.R. (1940) Mad. 358=186 Ind. Cas. 749 (F.B.).

——**S. 21—Guardian de facto.**

A *de facto* guardian cannot be considered to be a lawful guardian within the meaning of S. 21, for the purpose of acknowledging a debt to keep it alive against the minor. A.I.R. 1938 Mad. 853=48 M.L.W. 268=(1938) M.W.N. 878=(1938) 2 M.L.J. 501=I.L.R. (1939) Mad. 65=179 Ind. Cas. 201.

Overrules (1913) 24 M.L.J. 428=19 Ind. Cas. 362.

——S. 21—Pro-note by mother as guardian of her minor sons—One son attaining majority—Payment by mother subsequently.

Where a minor belonging to joint Hindu family has separate guardians for his person and for his property, an acknowledgment by the guardian of his person does not fall within S. 21, as there can be no such guardian in respect of a minor's interest in his joint family property; the only person who can bind him by a valid acknowledgment being the manager.

Where therefore a pro-note is executed by the mother as guardian for her minor sons, any payment by her after the elder son has attained majority cannot bind even the remaining son, who is a minor. 55 M.L.W. 529=A.I.R. 1942 Mad. 663=1942 M.W.N. 539=(1942) 2 M.L.J. 281=203 Ind. Cas. 212.

——S. 21—Paternal grandmother of minor—Endorsement of payment made by her, cannot bind minor under S. 21, Lim. Act. I.L.R. (1940) Mad. 358=50 M.L.W. 896=(1939) 2 M.L.J. 884=A.I.R. 1940 Mad. 33=(1940) M.W.N. 9=186 Ind Cas. 749 (F.B.).

——S. 21—Hindu mother's right to acknowledge debt on minor's behalf—Question of benefit.

A Hindu mother is the lawful guardian of her minor child and can act under S. 21 as an agent duly authorised to acknowledge a debt on the minor's behalf. The question of benefit is only relevant to the original debt If the original debt was binding upon the minor, the action of the guardian in acknowledging it merely extends limitation but does not alter the character of the debt. In the same way, if the original debt was tainted with immorality, and not therefore, binding upon the minor, the guardian's acknowledgment of it does not change its character. 35 P.L.R. 661=A.I.R. 1934 Lah. 685=153 Ind. Cas. 23.

——S. 21—Mother, if lawful guardian.

Where the mother is not only the natural guardian of her minor son but also his legal guardian under Hindu Law, she is his lawful guardian within the meaning of S. 21, and is competent to acknowledge previous debts so as the enable the creditor to reckon a fresh period of limitation from date of acknowledgment. 10 O. W.N. 188=A.I.R. 1933 Oudh 132=145 Ind. Cas. 180.

——S. 21 (1)—"Lawful guardian"—Hindu brother.

The brother under the Hindu Law is not a lawful guardian within S. 21 during the lifetime of the mother 45 Cal. 630=42 Ind. Cas. 472.

——S. 21 (1)—"Lawful guardian," meaning of

A person lawfully acting as guardian though not appointed for the purpose, is lawful guardian within the meaning of the section, when acting for the benefit of the minor. 24 M.L.J. 428=(1913) M.W.N. 364=19 Ind. Cas. 362.

——S. 21—Amount not stated—Acknowledgment not proper.

An acknowledgment which does not state the amount of liability in respect of which the guardian of minor acknowledged his liability is not a proper acknowledgment. 115 Ind. Cas. 263=A.I.R. 1928 Cal. 850.

6. Acknowledgment by agent of guardian, Committee or Manager.

——S. 21—Agent of guardian, Committee or Manager—Proof.

Provisions of S. 21 (1) expressly require proof that an agent for management appointed by the lawful guardian or committee or manager is duly authorised to sign acknowledgments. A.I.R. 1939 Bom. 237=41 Bom.L.R. 391=183 Ind. Cas. 225.

7. Acknowledgment or payment by Hindu widow.

See also (1) NOTE 4 UNDER S. 19 AND
(2) NOTE 5 UNDER S. 20.

——S. 21 (3)—Acknowledgment by Hindu widow binds reversioners.

Under sub-s. (3) of S. 21 an acknowledgment by a Hindu widow or her agent, of liability is binding against the reversioners. A.I.R. 1946 Pat. 120=12 B.R. 696=226 Ind. Cas. 186.

8. Acknowledgment or payment by Manager of joint Hindu family.

See also (1) NOTE 4 UNDER S. 19 AND
(2) NOTE 5 UNDER S. 20.

——S. 21 (3)—Acknowledgment or part payment by manager of joint Hindu family.

There is no doubt, incorporated in S. 21, by amending Act I of 1927, sub-S. (3) which provides that where a liability has been incurred by or on behalf of a Hindu family as such, an acknowledgment or payment made by or by the duly authorized agent of the manager of the family for the time being shall be deemed to have been made on behalf of the whole family. The said sub-section however, protects on the face of it only those acknowledgments or payments which have been made by or by the duly authorised agent of the manager of the joint family for the time being and would not cover a case where the status of the joint family had been changed prior to the date of such acknowledgment or payment. Sub-section (3) would apply in terms where the liability had been incurred by or on behalf of the joint family and the manager of the family for the time being made an acknowledgment of payment within the meaning of Ss. 19 and 20. In such cases, the acknowledgment or payment would be deemed to have been made by the manager of the family for the time being as one on behalf of the whole family and would be sufficient in law to start a fresh period of limitation against the whole family from the date of such acknowledgement or payment. It pre-supposes that the person who makes the acknowledgment or payment occupies the position of the manager of the family for the time being. If, however, there has been a severance of joint status between members of the family sub-s. (3) would not, in terms apply and even though the debt or liability had been incurred by or on behalf of the joint family by its manager for the time being the person who was the manager of the family on the date when the said debt or liability had been incurred by him on behalf of the joint family would not have the power to acknowledge the debt or make the part payment so as to extend the period of limitation as he would have ceased to be the manager of the family by the time he came to make the acknowledgment or payment. There is nothing, therefore, in S. 21 (3), which would save the creditor's suit from the bar of limitation, if a partition had been effected and there was a severance of joint status between the members of the defendant's joint family. 47 Bom. L.R. 470=A.I.R. 1945 Bom. 511.

——S. 21 (3) (As amended in 1927),—Applicability and scope—Manager of joint Hindu family—Acknowledgment or payment after severance of status in family—If saves limitation. I.L.R. (1945) Bom. 976 =47 Bom.L.R. 470=A.I.R. 1945 Bom. 511.

——Ss. 21 (3) (b), 19—Manager of joint Hindu family.

An acknowledgment made by a manager of a joint Hindu family in respect of a family debt after he was adjudged an insolvent can save limitation as against the other co-parceners. If an insolvent, after his adjudication, can acknowledge his own debt, surely he

can equally acknowledge a debt binding on the family of which he still remains the manager notwithstanding his insolvency. 1942 M.W.N. 480=55 M.L.W. 508 =(1942) 2 M.L.J. 233=A.I.R. 1942 Mad. 721=I.L.R. (1943) Mad. 53=204 Ind. Cas. 245.

——S. 21 (3) (b)—Document silent on point of purpose of loan—Oral evidence to show purpose.

In order to get benefit of S. 21 (3) (*b*), Lim. Act, it is not necessary that the document should, on the face of it, show that the loan was incurred on behalf of the joint family. If the fact that the loan has been incurred on behalf of the family can be established on the evidence, S. 21 (3) (*b*) would be attracted if the acknowledgment or part payments of the principal or interest had been made and endorsed by the *karta*. When a loan has been taken and is evidenced by a document, oral evidence is not excluded to show what the purpose of the loan was and specially when the document is silent on the point. By such oral evidence, the terms of the document are not varied. A.I.R. 1940 Cal. 137=70 C.L.J. 201=44 C.W.N. 299=186 Ind. Cas. 891.

——S. 21 (3) (b)—Mortgage decree against father and sons as members of joint Hindu family —Payment by father towards interest —Receipt showing payment as on behalf of and for benefit of family.

Held, that payment saves limitation against both father and sons. A.I.R. 1938 All. 638=(1938) A.L.J. 973=1938 A.W.R. 666=179 Ind. Cas. 90.

——S. 21 (2) (3) (b)—Mortgage of joint family property by major son and guardian of minor son appointed by will—Acknowledgment by both by payment of interest.

Where a major son and the guardian of the minor son appointed under the will of the father mortgaged the joint family property and both of them acknowledged the debt by paying interest ;

Held, that according to Mitakshara, it was incompetent to the only adult co-parcener of the joint family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. The appointment of the guardian, therefore, being invalid, the minor sons could not be regarded as parties to the mortgage in their indivicapacity. Section 21 (2), therefore, had no application and the acknowledgment by the major son must be regarded as an acknowledgment made by the manager on behalf of the joint family and was, therefore, binding on the minor sons. 44 M.L.W. 467=A.I.R. 1936 Mad. 871=(1936) M.W.N. 1274=170 Ind. Cas. 749.

——S. 21—Execution of mortgage-deed by two brothers—Part payment by older brother as managing member—Theory of implied agency.

A part payment will avail to save limitation not only against the person making it or those deriving title under him subsequent to such payment but even against other persons liable in respect of the same debt.

Where a mortgage-deed was executed by two brothers, one of whom was the managing member of the family, and a part payment was made by the managing member and the circumstances showed that he was acting on behalf of both :

Held, that the part payment was sufficient to save limitation against the younger brother also on the theory of implied agency notwithstanding the fact that the latter had also joined in the mortgage-deed. 41 M.L.W. 94=(1935) M.W.N. 17=A.I.R. 1935 Mad. 101= 68 M.L.J. 470=58 M. 418=154 Ind. Cas. 1053.

——S. 21 (3) (b) (as amended in 1927)—Managing member, not being father, making part payment after partition.

Only part payment or acknowledgment of debt by the managing member of a joint Hindu family can save limitation, under Cl. (b) of Sub-s. 3 of S. 21 as against other members . But if such payment is made by the managing member, who is not a father of a joint family of brothers, after a *bona fide* partition between them, it will not save the bar of limitation as against the other divided brothers because, after a partition, there is no undivided family and, therefore, no managing member of it ; and unless there is authority to acknowledge the debt or make a part payment, the other members of the family will not be bound by the acknowledgment or part payment of one member alone. A.I.R. 1937 Mad. 586=45 M.L.W. 767=173 Ind. Cas. 319.

9. Acknowledgment or payment by member of joint Hindu family.

See also (1) NOTE 4 UNDER S. 19 AND
(2) NOTE 5 UNDER S. 20.

——S. 21 (3) (b)—Debt incurred by managing member of joint Hindu family—Payment after partition by one member.

Under Hindu Law, the son's liability under the pious obligation rule in no sense arises out of contract. His liability is personal to himself. This does not mean that he is personally responsible in the ordinary acceptance of the expression of personal liability but that the obligation devolves upon him by reason of his relationship. The position is not different when he has brothers. Each is similarly but separately liable. The position of a member of a joint family with regard to a debt binding on the family is very much the same. His liability arises from the fact that he is a member of the family and the fact that it is limited to his individual share in the family properties emphasises the personal nature of the liability.

Hence a payment made after partition by a member of a Hindu family of interest due on a promissory note which was executed by the managing member when the family was joint cannot start a fresh period limitation against the other members of the family. The law of joint liability as understood in England is of no help in such a case. A.I.R. 1941 Mad. 925=54 M.L.W. 595=(1941) 2 M.L.J. 883=1941 M.W.N. 1012=I.L.R. (1942) Mad. 251=198 Ind. Cas. 177 (F.B.).

Overruling A.I.R. 1939 Mad. 69=180 Ind. Cas. 49=I.L.R. (1939) Mad. 140.

10. Acknowledgement or payment by partner.

See also (1) NOTE 4 UNDER S. 19 AND
(2) NOTE 5 UNDER S. 20.

——S. 21 (2)—'Only', meaning of—Authority of partners.

The meaning to be given to the word 'only' in S. 21 (2), is that it must also be shown that the partner signing the acknowledgment had authority, express or implied, to do so and in a going mercantile concern, such agency is to be presumed as an ordinary rule. 34 Bom. L.R. 623=A.I.R. 1932 Bom. 316=138 Ind. Cas. 805.

——S. 21—Partnership.

In the case of a going partnership concern, there is a presumption that each partner is entitled to sign an acknowledgment on behalf of the firm in the ordinary course of business. A.I.R. 1932 Lah. 456=33 P.L.R. 584=137 Ind. Cas. 771.

——S. 21—Partners—Letter by one forwarding bills against over-draft—Binding on the other.

Where a firm of partners opens an over-draft account and the bank agrees to collect bills and credit balance after deducting commission to the firm account, any acknowledgment by means of a letter forwarding bills as arranged sent by one of the partners, other having

severed his connexion with the partnership, is sufficient acknowledgment in the absence of a notice of dissolution to the bank, and is binding on the other partner. 56 Cal. 556=33 C.W.N. 412=A.I.R. 1929 Cal. 714.

——S. 21—Acknowledging partner must have authority.

Section 21 (2) simply means that mere acknowledgment or payment by one or more partners is not of itself sufficient to make the other or others chargeable apart from the question of authority. 56 Cal. 556=33 C.W.N. 412=A.I.R. 1929 Cal. 714.

——S. 21—Acknowledgment by one in the course of partnership business—Binds the others.

The mere fact that persons are partners does not make one partner liable under an acknowledgment by another; but if the acknowledgment is done in the course of partnership business, it is binding on the others. 111 Ind. Cas. 143=50 All. 982=26 A.L.J. 1036=A.I.R. 1928 All. 491.

——S. 21—Joint Hindu family—Acknowledgment in the course of family business by one member—Binding on other members.

Where a Hindu joint family carries on a business the members of the family are in the position of partners in regard to persons dealing with that business and an acknowledgement of liability made by a member in the usual course of the partnership business and such as is necessary for the business, is binding on the other members of the family as partners and extends the period of limitation. 10 All. 418, *Foll.* 111 Ind. Cas. 143=50 All. 982=26 A.L.J. 1036=A.I.R. 1928 All. 491.

——S. 21—General authority to partner to contract debt—Authority to keep alive a debt presumed.

An acknowledgment or a payment by a partner without special authority is binding upon the other partner. Under S. 21, a partner *ipso facto* has no authority to acknowledge or to make a part payment; but if he has general authority to contract debts or make payment he has implied authority to keep the debt alive and it is unnecessary to make out special authority. 41 Mad. 427 (F.B.), *Foll.* 112 Ind. Cas. 491=A.I.R. 1928 Mad. 972.

——S. 21 (2)—Scope explained.

Section 21 (2) does not say that a person shall not be liable on an acknowledgment signed by the partner but by reason only of a written acknowledgment signed by his partner: and it amounts to saying that if there is no more than a written acknowledgment signed by one defendant, the fact that the other defendant is his partner cannot affect the latter's liability. 92 Ind. Cas. 653=23 M.L.W. 199=1925 M.W.N. 707=A.I.R. 1926 Mad. 114=50 M.L.J. 67.

——S. 21 (2)—Joint partners—Acknowledgment—Implied authority.

An acknowledgment must be authorised or must be capable of being inferred from the acts of parties. In the absence of direct evidence that a co-contractor or partner has authorised his co-contractor of co-partner to acknowledge a debt or to make payments saving limitation on his behalf. The Court can infer such authority from other circumstances, such as the position of the othe co-contractors or partners in the business, 37 M. 146, *Foll.* 32 M. 421; 35 M. 142, Disapproved. 41 Mad. 427=34 M.L.J. 373=23 M.L.T. 261=(1918) M.W.N. 285=7 L.W. 552=45 Ind. Cas. 18 (F.B.).

——S. 21—Part payment by one partner, how far will save limitation as against others—Proof.

If a partner makes a part payment of a debt, there should be some evidence that in the course of business, the partner who had made the payment had authority to do so on behalf of the firm, in order that the par payment may save limitation against the other members of the firm. (1908) 32 M. 421=5 M.L.T. 102=2 Ind. Cas. 309.

11. Burden of proof—Sub.-S. (2).

——S. 21—Burden of proof.

The party who pleads S. 21 (2) has no show that he can claim exemption under its terms. A.I.R. 1930 Mad. 738=127 Ind. Cas. 641.

12. "Chargeable"—Meaning of—Sub-S. (2).

——S. 21—Interpretation "chargeable"—Not limited to personal liability.

The word "chargeable" in S. 21 *prima facie* means every kind of chargeability under a contract and it cannot be limited to personal liability only. 121 Ind. Cas. 858=30 M.L.W. 677=A.I.R. 1929 Mad. 881=57 M.L.J. 588.

13. "Only"—Meaning of—Sub-S. (2).

——S. 21—Interpretation "only"—Restricts the application of Ss. 19 and 20.

The word "only" in S. 21 (2) is not a mere surplusage and if effect be given to the word the sub-section would not in any way interfere with the operation of Ss. 19 and 20, but would restrict the application of those sections to cases which strictly satisfy their requirements. 98 Ind. Cas. 381=44 C.L.J. 475=A.I.R. 1927 Cal. 193.

——S. 22.

Synopsis.

1. **Addition of parties.**
2. **Amendment.**
3. **Applicability.**
4. **Effect of subsequent addition.**
5. **Interpretation.**
6. **Joint Hindu family.**
7. **Necessary parties.**
8. **Partnership.**
9. **Proper but not necessary party.**
10. **Scope and effect.** *See also* C. P. CODE, O. 1, R. 10.
11. **Substitution of parties.**
12. **Transposition of parties.**
13. **Suit against a dead person.**
14. **Miscellaneous.**

1. Addition of parties.

——S. 22 (1)—Applicability—Addition of party owing to devolution of interest during pendency of suit.

S. 22 (2) of the Limitation Act expressly lays down that nothing in sub-S. (1) of that section shall apply to a case where a party is added owing to a devolution of interest during the pendency of the suit. The addition of heirs is governed by O. 22, C. P. Code and if an application is made by one of the heirs in time, it would not matter if all the others are added later on. A.I.R. 1950 Kut. 83.

——S. 22—Addition of parties—Addition of legal representatives.

Mortgage suit against heirs of deceased mortgagor—Some heirs joined after limitation:

Held, S. 22 of the Lim. Act does not apply since no new defendants were added. A.I.R. 1943 Oudh 218=1943 O.W.N. 105=19 Luck. 183=207 Ind. Cas. 72.

——S. 22—Addition of parties—Person's name struck off from array of defendants—No objection—Application to implead him beyond limitation.

Where, in a suit under O. 21, R. 103, C. P. Code, the name of the auction-purchaser is struck off from the array of the defendants, the effect is that the suit as far as he is concerned, comes to an end. When his name is added at a later date, a new suit must be regarded

as having been brought against him, and if such is not brought within time (one year from the dismissal of application under O. 21, R. 100), then it is barred by limitation. The fact that the order expunging the person's name from the array of defendants was made under a mistake does not affect the question. A.I.R. 1942 Pat. 270=8 B.R. 526=199 Ind. Cas. 196.

——S. 22—Addition of parties—Plaintiff impleading leal representative after limitation—Suit decreed against all defendants—Dismissal of suit on appeal.

A mortgagee instituted a suit against the father of the legal representative of the deceased mortgagor. It was found that he could not be legal representative of the deceased, the property having been gifted to his sons by the mortgagor:

Held, that the mortgagee could not implead the legal representative of the deceased mortgagor after the expiry of the period of limitation. It was immaterial whether, in impleading the new party, the Court acted *suo motu* or on the application of a party.

Held, also that the dismissal of the suit on appeal by such legal representative involved the dismissal of the suit against the nonappealing defendants also specially where the mortgaged property was not in their possession or ownership and the decree appealed from pertained to the mortgaged property alone. A.I.R. 1940 Lah. 262=192 Ind. Cas. 105.

——S. 22—Addition of party—Suit against benamidar—Real owner made party beyond time.

A *benamidar* can represent the real owner. He is in a position of a trustee and the true owner will be bound by any adjudication in a suit in which the benamidar is a party.

Where a real owner is made a party to a suit against *benamidar*, beyond the period of limitation, it will not, by itself, let in the operation of S. 22, because the real owner will not be a new party and the suit as against the real owner will not be timebarred if it was within time against the *benamidar*. A.I.R. 1938 Mad. 687 =47 L.W. 665=(1938) M.W.N. 500=177 Ind. Cas. 381.

——S. 22—Addition of party against whom limitation has expired as pro forma defendan:—Effect.

The rules of limitation apply only to claims. The fact that a claim is barred against a particular defendant does not prevent defendant being impleaded as *pro forma*.

Where, in a suit for accounts, one of the partners who is a necessary party is made a *pro forma* defendan- only when the claim against him is barred, once he becomes a party, the suit cannot fail for non-joinder and the limitation period against the contesting parties cannot be affected by the fact that he is impleaded after the expiry of limitation. A.I.R. 1937 All. 502=(1937) A.L.J. 571=1937 A.W.R. 527=170 Ind. Cas. 743.

——S. 22—Addition of parties—Addition of Official Receiver appointed pendente lite.

Suit to enforce mortgage—Pending suit mortgagor adjudicated insolvent—Suit dismissed—Appeal —Application to implead Official Receiver as respondent but beyond period of limitation for filing appeal:

Held, that S. 22 (1) had no application and that he can be impleaded under O. 22, R. 10, C. P. Code. 36 P.L.R. 483=A.I.R. 1935 Lah. 316.

——S. 22—Addition of parties—Legal representatives.

Suit against wrong person as legal representative of deceased debtor—Addition of real representative after limitation—Section 22 applies and the suit is time barred—Even if the mistake was *bona fide*, it would not avail plaintiff for purpose of limitation. 33 P.L.R. 253=A.I.R. 1932 Lah. 314=137 Ind. Cas. 89.

——S. 22—Addition of parties.

Puisne mortgagee impleaded after 12 years in a suit for sale by mortgagee. Question of limitation can be raised and plaintiff cannot get relief against the puisne mortgagee. 1932 M.W.N. 330.

——S. 22—Addition of new defendants.

Suit against defendants as members of joint family —Addition of alternative claim as partners—Other members of the family also added as parties.

Held, that as regards the newly added defendants, under S. 22 (1), Lim. Act, the suit must be deemed to have been instituted when they were brought on record and suit was time-barred. A.I.R. 1931 Bom. 590= 33 Bom.L.R. 1385 =135 Ind. Cas. 423.

——S. 22—Addition after limitation.

An application, under O. 21, R. 100, C. P. Code, presented within 30 days of dispossession—The non-applicant auction-purchaser giving notice to the applicant that certain portions had been sold by him to third parties—Applicant impleading the sub-purchasers after the period of more than 30 days from the date of receiving such notice:

Held, that the application was not barred by limitation and the order was not open to any criticism on that ground. 58 Cal. 55=A.I.R. 1931 Cal. 385= 132 Ind. Cas. 631.

——S. 22 (1)—Addition of parties—Limitation—Bar of.

Plaintiff sued as the head of an impartible *raj* for possession of certain villages granted for the maintenance of a junior member of the family alleging that they had reverted to him under the family custom. This plea however failed. The plff. set up an alternative title to the villages by assignment from the grantee to the plff. father. The High Court held that the villages had ceased to be impartible under the assignment and that the plff.'s brother was a joint heir with plff. The High Court held, that the plff.'s brother was a proper party and directed him to be added as a party respondent after the expiry of the period of limitation, especially as no objection on the ground of non-joinder was pressed by the defts. at the trial. The Privy Council affirmed the judgment of the High Court. 32 All 241=37 I.A. 60=14 C.W.N. 842=12 Bom.L.R. 419=7 M.L.T. 414=(1910) M.W.N. 118=6 Ind. Cas. 981 (P.C.).

——S. 22—Addition of parties—Institution of suit, date of.

Against a party subsequently added, the suit is deemed to have been instituted on the date when he has been brought on the record. 13 Bom.L.R. 1014=12 Ind. Cas. 586.

——S. 22—Addition of parties—Application under S. 25 of the B. T. Act—Addition of junior members of Joint Hindu family—Limitation.

An application under S. 105 of the B. T. Act is not maintainable at the instance of the manager of the joint family and if the junior members are added after the period of two months from the final publication of the record of rights the application will be barred. 61 Ind. Cas. 549=25 C.W.N. 38=A.I.R. 1921 Cal. 591.

——S. 22—Addition of parties—Benamidar, suit against—Additional of real owner.

A principal cannot be added out of time in the shoe of his *benamidar* who is sued within time. 18 Ind. Cas 392 (Cal.).

——S. 22 (1)—Addition of parties—After time—Bar.

A claim for rent is not barred because one of the plaintiffs was added after the period of limitation to meet possible future objections. 14 C. 400 and 22 B. 672, Foll. 8 Ind. Cas. 890 (Cal.).

——S. 22—Addition of parties—Additional representatives.

In a suit to enforce rights of trust, by persons interested in the trust, additions of more representatives out of time does not bar the suit. 9 L.W. 377=(1919) M.W.N. 435=50 Ind. Cas. 353.

——S. 22—Addition of parties—Institution of suit, date of.

The date of institution of a suit as against a newly added party must be the date on which he was added as a party. 5 L.W. 222=38 Ind. Cas. 169.

——S. 22—Addition of parties—Assignee added—Limitation.

Per *Seshagiri Aiyar, J.*—S. 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the right of the original plaintiff. Where therefore a plaintiff is added in consequence of the assignment of the rights of the original plff. his right to a decree is not affected by S. 22. 23 A. 331, 14 C. 400, 20 C.L.J. 107, Foll. 40 Mad. 722=32 M.L.J. 407=29 Ind. Cas. 634.

——S. 22—Addition of parties—Assignee's application for execution.

Upon the death of the appellant during the pendency of an appeal from an order in an execution proceeding, it is open to the legal representative to apply for leave to prosecute the appeal. An assignee of a decree may apply to the execution Court for leave to carry on the execution proceeding which has been commenced by the original decree-holder. The Court is bound to allow execution at the instance of the recorded decree-holder unless intimation has been given in the regular way prescribed by law for the admission of another person who obtains leave to carry on execution as an assignee. 10 C.L.J. 396=3 Ind. Cas. 324=14 C.W.N. 752.

——S. 22 (1) and Art. 11—Addition of parties—Suit under O. 21, R. 103—Limitation.

Though a suit brought within one year of an order passed under S. 385 of the C. P. Code (1882) is not barred, a party added after the expiry of one year can raise the plea of limitation. 7 M.L.T. 306=6 Ind. Cas. 680.

——S. 22—Addition of parties—Party already represented—Joinder of after expiry of limitation—Effect.

The joinder of a person already represented in the suit as a party to it is not joinder within the meaning of S. 22 of the Limitation Act. 56 Ind. Cas. 386 (Nag.).

——S. 22—Addition of parties—After time—When acts as a bar.

The joinder of parties after time involves a bar only if the joinder was necessary to the suit. 10 S.L.R. 38 =35 Ind. Cas. 551.

——S. 22—Heirs added as parties.

In a suit brought against the minor son of the mortgagor a Mahomedan on contention that the suit was barred as against the other heirs who were afterwards added as parties on plff.'s application, it was held that the addition of the parties after expiry of required time fixed, did not involve a dismissal of the suit under S. 22 of Limitation Act; moreover the suit was not barred against them as money was specifically charged on the whole property by the deceased. 39 Bom. 729=17 Bom.L.R. 685=31 Ind. Cas. 180.

——S. 22—Addition of parties—Suit by agent on behalf of firm—Addition of partners as Co-plaintiffs.

The section will not apply when a suit is brought by an agent on behalf of a firm of partners, merely because it is so barred when the other members of the partnership are impleaded as co-plaintiffs. 2 L.W. 239=28 Ind. Cas. 210.

——S. 22—Dower, suit for—One of the heirs joined 3 years after death of wife as party defendant—Husband's suit not barred. *See* MAHOMEDAN LAW—DOWER. 6 C.L.J. 558=12 C.W.N. 84.

——S. 22—Addition of party-defendant by Court of its own motion or at the instance of party—Mortgage suit.

When in a suit a person is added as a party-defendant at the instance of the Court after the period of limitation applicable to the suit has expired, S. 22 applies and bars the plaintiff's remedy as against the added defendant. 24 C. 640; 4 C.W.N. 459 Foll; 27 C. 540, overruled; 12 C. 642, Expl.

Quaere: Whether the portion of the mortgage property in the hands of the added defendant was thereby exempted from liability under the mortgage. 11 C.W.N. 350=35 C. 519=9 C.L.J. 242 (F.B.).

Also 10 C.W.N. 551=33 C. 613=3 C.L.J. 576.

——S. 22—Adding of party—"New defendant".

Where relief was originally claimed against a party (here a debutter estate) who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a "new defendant" to the suit. 2 A. 296; 4 A. 37; 7 C.W.N. 75 Foll. (1905) 9 C.W.N. 421=32 C. 582.

——S. 22—Addition of new defendant.

Where on its being found that the deceased party to the suit had left a will, the record was altered by describing one of the two sons already brought on the records as the legal representatives as executor and striking out the name of the other.

Held, that there was no addition of a new defendant within the meaning of S. 22. (1903) 7 C.W.N. 575.

——S. 22—Addition of new parties by Court of Appeal—C. P. Code, S. 559.

If fresh parties are merely joined for the purpose of safeguarding the right subsisting as between them and others claiming generally in the same interest, the determination by application of the provisions of S. 22 of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit, and would not therefore, attract the application of the general provisions of the Limitation Act. 28 B. 11, Foll. (1900) 1 A.L.J. 543.

Also (1903) 5 Bom.L.R. 618=28 B. 11.

2. Amendment.

——S. 22—Amendment.

Redemption suit against member of unincorporated association in his personal capacity as mortgagee—Amendment seeking to sue member as representing association:

Held, that could not be allowed as large number of parties were being added—Fact that amendment was not opposed did not deprive association of its right to plead limitation. A.I.R. 1940 Mad. 639=(1940) M.W.N. 446.

——S. 22—Amendment—Change in description only.

Plaintiff wrongly described as major—Mistake *bona fide*—Court can, under O. 1, R. 10, C. P. Code, correct the error—It cannot be said in such case that a new plaintiff is added after limitation—Section 22 therefore, has no application. 1940 O.W.N. 1007=1940 A.W.R. (C.C.) 431=A.I.R. 1941 Oudh 43=16 Luck. 256=191 Ind. Cas. 150.

——S. 22—Amendment—" Misdescription "—Omision to record all partners as defendants in amended plaint.

Where the original plaint shows that the plaintiff has recorded four dissolved firms as defendants, but the amended plaint shows that only two of the partners of the four defendant firms are recorded as defendants despite O. 30, R. 3, C. P. Code, the omission of the remaining defendants amounts to " not naming defendants " and not misdescription under S. 22, and the plaintiff cannot take the protection of S. 22. A.I.R. 1936 Lah. 485=38 P.L.R. 827=163 Ind. Cas. 734.

——S. 22—Amendment—Misdecription.

The plaintiff filed a suit against one *G* alleging that *G* had, while plaintiff was a minor, obtained a fraudulent decree against him and realised money belonging to him. Plaintiff was not aware of the identity of *G*. One *G* was served but it turned out that he was not the person whom plaintiff wanted to sue. Plaintiff then amended the plaint and got service on the right person :

Held, that the plaintiff intended to sue the person who realised the money from Court and admittedly his name was *G* and the fact that he impleaded originally a wrong *G* amounted to a misdescription and not the substitution of a new defendant within the meaning of S. 22, and hence the suit was not barred. A.I.R. 1936 Lah. 147=162 Ind. Cas. 280.

——S. 22—Amendment.

Where a plaint is filed against a firm consisting of certain persons, it should be deemed filed as against them as existing persons although their names are not disclosed and if their names are subsequently disclosed, the amendment is merely for correcting a misdescription of the existing persons and the suit must be deemed to have been instituted when the plaint was presented and not when it was amended. A.I.R. 1935 Sind 225=159 Ind. Cas. 933.

——S. 22—Amendment.

Suit by agent against principal,first as against individual—Amendment of plaint as against firm :

Held, date of filing suit was the date of the amendment. (1932) 34 Bom.L.R. 1410.

——S. 22—Amendment in description.

Section 22 has been held to apply to cases where new plaintiff has been introduced and is not applicable to cases where there is only an amendment with regard to the description of the plaintiff. 113 Ind. Cas. 24=32 C.W.N. 396=A.I.R. 1928 Cal. 485.

——S. 22—Major represented by mistake as minor and suing by next friend.

Where a suit was wrongly instituted by a person as the next friend of the plaintiff but was subsequently allowed to be amended as plaintiff had already attained majority.

Held that when the proper amendment was made the plaintiff was not introduced as a new party to the suit but was already on the record when the plaint was filed ; and consequntly the amendment describing him properly at a later stage did not amount to the addition of a new party within the meaning of S. 22. 100 Ind. Cas. 469=A.I.R. 1927 Cal. 477.

——S. 22—Suit in personal capacity—Amended title as administrator.

Plaintiff brought a suit in his personal capacity against the defendant for a certain sum of money which he alleged that the defendant had realised from plaintiff's tenants but had retained in his own possession. The suit was brought within the period of limitation but after the expiration of that period the plaintiff prayed to be permitted to sue not only in his personal capacity but also as administrator to the estate of the deceased proprietor and the plaint was amended accordingly. The money belonged to the estate which was inherited by plaintiff and his two sisters and of which the plaintiff was the administrator.

Held that there was no change in 'person' and the suit was not barred by limitation. 43 I.A. 113 ; 7 C.W.N. 575 *Foll.* 79 Ind. Cas.403=51 Cal. 845=A.I.R. 1925 Cal. 419.

——S. 22—Amendment—Power of Court—Scope of Change in the name of parties.

The Court has jurisdiction to add or substitute parties *suo motu* untrammelled by the provisions of the Limitation Act under, O. 1, R. 9 or O. 1, R. 10 sub-R. 2, but it is rightly and finally settled that the Court acting on its own initiative is no more entitled when making amendments to effect the substitution or addition of parties under these two orders to disregard the provisions of the Limitation Act than it would be entitled to do so if the amendment was made upon an application by one of the parties.

Where in the pleadings the defendants are sufficiently described and those gentlemen are before the Court and are parties to the suit an application to amend the plaint *e.g.* to substitute for defendants Joharmal Manmull the words " Joharmull Khemka and Manmull Khemka " would not be for an amendment by which a new party was added but it would be an amendment merely for the purpose of more clearly describing parties who are already before the Court. Such an application would not be within S. 22 of the Limitation Act. 75 Ind. Cas. 81=50 Cal. 549=A.I.R. 1924 Cal. 74.

——S. 22—Amendment—Manager suing on behalf of temple—Temple's name added.

No substitution or addition of a new plaintiff is made by an amendment where only the description of the plaintiff is corrected. The plaint stated that Hiralal and Tulsiram were managers of the temple. The deed of gift of which the title in suit rested was filed. This deed mentioned the temple as the donee and Hiralal and Tulsiram as the managers.

Held that the suit was not filed by Hiralal and Tulsiram on their own behalf but on behalf of the temple and the omission to mention the temple in the heading was merely a mistake in the description of the plaintiff. No question of limitation arose when that description was corrected. 71 Ind. Cas. 39=A.I.R. 1923 Nag. 96.

——S. 22—Amendment—Correction under O. 1, R. 10, C. P. Code—When to be nade.

Under S. 22 a mistake to be corrected under O. 1, R. 10, C. P. Code (1908), must be corrected before the limitation period of the suit expires. 33 Mad. 115 =7 M.L.T. 185=5 Ind. Cas. 931.

——S. 22—Amendment—Clerical mistake—Misdescription of deft.—Amendment.

Where in a suit for the correction of a certain entry in the Record of rights the deft. was described as Mr. P.J. Forbes instead of Miss P.J. Forbes.

Held that the suit was not barred by limitation inasmuch as the mistake in the name of the deft. was but a clerical one and the case was merely of misdescription since the party that was meant to be deft. in the suit was the person whose name had been recorded in the Record of rights. 32 Ind. Cas. 872 (Cal.).

——S. 22—Amendment—New plaintiff — Suit amended as on behalf of company.

Where a person sued in his own name but amended it after time as suing on behalf of the company.

Held that it was not one of adding a new plff. within S. 22 and the suit was therefore not barred. 30 M.L.J. 57=33 Ind. Cas. 357.

——S. 22—New plff.—Suit in private capacity—Amendment of suit as managing director—Effect.

When a plff. sued in his private capacity and later applied for amendment of the suit as managing director.

Held that the amendment did not amount to adding a new plff. under S. 22 but had merely the effect of altering the ground on which the plff. could recover the amount. (15 M. 417 : 32 C. 582 : 25 M.L.J. 452 Foll.) 16 M.L.T. 251=25 Ind. Cas. 945.

——S. 22—Amendment—Suit against a wrong deft. joining a right one after time.

Where the mistake in the name of the deft. is a clerical mistake the suit is within time and such amendment. is also within time. 32 Ind. Cas. 872 (Cal.).

——S. 22—Amendment of plaint—After time—Non-essential particular—Bar.

Amendment of a plaint with reference to a non-essential particular made after time without adding a new plff. or deft. is not affected by S. 22. 19 O.C. 221=4 O.L.J. 49=36 Ind. Cas. 941.

——S. 22—Amendment—Pleadings—Limitation.

Plffs. sued for recovery of moneys from a trust impleading as defts. all persons who could possibly have a claim to be the trustee. The Court directed an amendment of the plaint so as to raise an issue as to which of the defts. was the proper trustee. At the time of the amendment the period of limitation for instituting the suit had expired.

Held, that the amendment did not alter character of the suit and that the suit was not barred. 37 Cal. 229=39 I.A. 27=14 C.W.N. 261=7 A.L.J. 125=7 M.L.T. 63=11 C.L.J. 220=12 Bom.L.R. 257=20 M.L.J. 171=5 Ind. Cas. 404 (P.C.).

——S. 22—Amendment—Misjoinder of parties—Names of parties struck off.

Several plaintiffs joined to institute a suit within the prescribed period of limitation; on an objection being raised as to misjoinder of parties and of cause of action the plaint was amended by striking out the names of all the plaintiffs but one who elected to continue to carry on the suit so instituted within the time.

Held the suit was not barred. (1907) 12 C.W.N. 490=35 C. 495 (F.B.).

3. Applicability.

——S. 22—Applicability—Person suing on his own behalf—Plaint amended by which suit converted into representative action under O. 1, R. 8, C. P. Code.

An amendment which does not seek to bring in a new party but only varies the ground on which the relief was orginally sought or asks for a different or additional relief without changing the cause of action, does not bring the case within S. 22, Lim. Act. Similarly where a party is already on the record either as a plaintiff or as a defendant an amendment which merely alters the capacity in which he has been impleaded to one of a different character doest nct involve an addition of parties so as to attract the provisions of S. 22. Hence an amendment of the plaint by which the suit is converted into a representative action under O. 1, R. 8, C. P. Code does not involve addition of fresh parties so as to attract the provisions of S. 22, Lim. Act. A.I.R. 1943 Mad. 531=1943 M.W.N. 304=(1943) 2 M.L.J. 1=56 M.L.W. 583=I.L.R. (1944) Mad. 133=212 Ind. Cas. 533.

——S. 22—Applicability.

——S. 22—Applicability—Suit for recovery against legal representative out of estate of deceased in his hands is one against estate and not against representative as individual.

Where in such a suit, one legal representative is impleaded first and then another one, the estate which is the object of the suit is represented throughout and there is no change of defendants in the real sense of the word and S. 22, Lim. Act, does not apply. A.I.R. 1914 Mad. 609=(1941) 1 M.L.J. 580=53 M.L.W. 501=1941 M.W.N. 383=200 Ind. Cas. 725.

——S. 22—Applicability.

Neither Art. 11 nor section 22 is applicable to a transferee from a successful objector who was not a party to the objection proceedings under O. 21, R. 58, C. P. Code. A.I.R. 1940 Lab. 497=42 P.L.R. 601=192 Ind. Cas. 663.

——S. 22—Applicability.

One of co-plaintiffs dying *pendente lite*. Plaintiff alone bringing suit on mortgage in spite of the fact that the right devolved on her jointly with sister—Death of sister during pendency of suit—Plaintiff is entitled to decree—Section 22 has no application—No new plaintiff or defendant is being substituted—Plaintiff's title to the whole of the mortgage amount even if incomplete at the time of suit is completed by the rule of survivorship. A.I.R. 1940 Mad. 412=(1940) 1 M.L.J. 240=(1940) M.W.N. 429=190 Ind. Cas. 657.

——S. 22—Applicability.

Section 22, by operation of S. 29 (2), applies to applications under S. 26-F, Beng. Ten. Act. 42 C.W.N. 316=A.I.R. 1938 Cal. 324=177 Ind. Cas. 798.

——S. 22—Applicability.

——S. 22—Applicability The proceedings under S. 68f Pro. Insol. Act, are more akin to an appeal than to a suit and the provisions of S. 22 have no bearing on the question. A.I.R. 1937 Lah. 611=168 Ind. Cas. 389

——S. 22—Applicability and scope.

Section 22 has no application to a case under S. 26-F (4) (*a*), Beng. Ten. Act. A.I.R. 1936 Cal. 388=40 C.W.N. 506=166 Ind. Cas. 492.

——S. 22 (2)—Applicability and scope—Benefi. under, when can be availed of.

Section 22 (2) can be availed of only in cases where the plaintiff and the defendant have a joint cause of action. 41 M.L.W. 177=(1935) M.W.N. 210=A.I.R. 1935 Mad. 240=69 M.L.J. 30=156 Ind. Cas. 455.

——S. 22—Applicability.

A right plaintiff under O. 1, R. 10, C. P. Code can be substituted in place of the wrong one only if his right to sue was not barred by S. 22. 36 Bom.L.R. 814=A.I.R. 1934 Bom. 385=58 532=153Ind. Cas. 800.

——S. 22—Applicability—Application to file award

Where an award was made in favour of several persons and one of them made an application to file it impleading the others as respondents and one of the respondents filed an application after the expiry of the period of limitation that his name may be transferred to the army of applicants :

Held, that the principle of S. 22 was applicable and there was no bar to the transposition of the respondent as an applicant. (1931) A.L.J. 863=A.I.R. 1931 All. 725=133 Ind. Cas. 410.

——S. 22—Applicability—Defendant added on his own application after time.

Where in a suit under S. 9, Specific Relief Act, a person is added one year after the date of the suit as defendant on his own application and a decree is passed against him, he cannot avoid the decree by taking advantage of S. 22, Limitation Act. 28 Bom. 11, Rel. on. 112 Ind. Cas. 786=30 Bom.L.R. 1405=A.I.R. 1928 Bom. 526.

——S. 22—Applicability—Application under O. 9, R. 13, C. P. Code.

A "suit" under S. 2 (10) does not include "application" and S. 22 of the Limitation Act does not apply to an application made under O. 9, R. 13 of the Code.

62 Ind. Cas. 536=1922 P.H.C.C. 75=6 P.L.J. 463=2 P.L.T. 771=A.I.R. 1923 Pat. 88.

——S. 22—Applicability—Order 1, R. 10, C. P. Code—Appeals.

Section 22 of the Limitation Act does not prescribe any period of limitation for the joinder of a party to a suit under S. 32, C. P. Code (1882), O. 1, R. 10 or to an appeal under S. 559 of the old Code, (O. 41, R. 20) and there is nothing to prevent such a joinder in either a suit or appeal even after it is barred by time. Section 22 of the Limitation Act applies to appeals as much as to suits in principle. But a suit in which a defendant is joined, after the period of the limitation has expired, must necessarily be dismissed as against him. In an appeal, however, there may be possibly reasons justifying its admission after time under S. 5 of the Limitation Act. 66 Ind. Cas. 217=5 N.L.J. 192=A.I.R. 1922 Nag. 213.

——S. 22—Applicability.

Section 22 of the Limitation Act, does not apply to proceedings in execution. 62 Ind. Cas. 30=2 P.L.T. 619=6 P.L.J. 358=A.I.R. 1921 Pat. 180.

——S. 22—Applicability—Execution proceedings.

S. 22 applies only to suits and not to execution proceedings. 10 C.L.J. 396=14 C.W.N. 752=3 Ind. Cas. 324.

——S. 22—Applicability—Pro forma defts. made plff.s

S. 22 of the Limitation Act does not apply to cases where *pro forma* defts. are made plffs. 137 P.W.R. 1912 =84 P.R. 1912=14 Ind. Cas. 566.

——S. 22—Applicability—Application to substitute legal representative.

S. 22 of the Limitation Act refers to suits and not to applications for the substitution of a legal representative. 15 N.L.R. 21=49 Ind. Cas. 34.

——S. 22—Applicability to execution proceedings—No.

S. 22 applies only to suits and does not govern execution proceedings. (1909) 10 C.L.J. 396=14 C.W.N. 752=3 Ind. Cas. 324.

——S. 22—Applicability—Defendant, addition of.

Per Curiam:—S. 22 applies equally to the addition or substitution of the defendant after the expiry of the period of limitation. (1909) 9 C.L.J. 523=36 C. 675=1 Ind. Cas. 626.

4. Effect of subsequent addition.

——S. 22—Effect of subsequent addition—O. 1, R. 10, C. P. Code.

A Court acting under O. 1, R. 10 is bound by the provisions of S. 22, Limitation Act, and it is immaterial whether the Court acts *suo motu* or upon the application of a party. 35 Cal. 519, *Foll.* 11 Lah. 688=126 Ind. Cas. 78=A.I.R. 1930 Lah. 747.

——S. 22—Effect of subsequent addition.

Where an application is made to join certain persons as parties, they become parties to the suit from the time when the application is presented and not when the Court passed its order joining them as parties. 17 Bom. 29; A.I.R. 1927 Mad. 468, *Foll.* A.I.R. 1925 Mad. 487, *Not foll.* 128 Ind. Cas. 675=A.I.R. 1930 Sind 259.

——S. 22—Effect of subsequent addition.

When parties are added by the Court after the institution of the suit under R. 10 (2), C. P. Code. S. 22 Limitation Act, provides that the date when they are added is to be deemed to be the date of the institution of suit so far as they are concerned for purposes of limitation and the rights which they may have acquired under the Limitation Act are therefore sufficiently safeguarded 107 Ind. Cas. 237=27 M.L.W. 1=1928 M.W.N. 20=4 O.W.N. 1231=47 C.L.J. 136=32 C.W.N. 281=30 Bom.L.R. 220=6 Rang. 29=26 A.L.J. 371=A.I.R. 1927 P.C. 252=54 M.L.J. 88 (P.C.).

——S. 22—Effect of subsequent addition.

When a party is added on application, the addition must be deemed to have effect from the date of the application. 17 Bom. 29, *Foll.* A.I.R. 1925 Mad. 487, *Diss. from.* 100 Ind. Cas. 680=50 Mad. 372=25 M.L.W. 477=38 M.L.T. 126=A.I.R. 1927 Mad. 468=52 M.L.J. 199.

——S. 22—Effect of subsequent addition.

If a party is added to a pending suit after the lapse of the period of limitation fixed for the suit the bar of limitation would not be saved. 40 M.L.J. 532, Foll. 86 Ind. Cas. 961=A.I.R. 1925 Mad. 917.

——S. 22—Effect of subsequent addition.

In the case of a person already on record, on the day on which the suit is filed, limitation ceases to run; but in the case of a person newely added as a party to a pending suit the suit shall as regards him be deemed to have been instituted, only when he is so added and not when an application to bring him on record is made. 86 Ind. Cas. 187=21 M.L.W. 125=A.I.R. 1925 Mad. 487.

5. Interpretation.

——S. 22—Interpretation—" When he was so made a party ", meaning of.

A person is made a party within the meaning of S. 22, on the day the application is made to bring him on the record and not on the day when the Court makes the order to bring him on the record. 1944 N.L.J. 510=I.L.R. (1944) Nag. 768=A.I.R. 1945 Nag. 57.

6. Joint Hindu family.

——S. 22—Joint Hindu family.

Plaintiffs, members of Hindu joint family doing business describing themselves in plaint by their names with addition of word ' firm '—Deletion of word ' firm ' by amendment after limitation does not bar suit. A.I.R. 1939 Pat. 40=5 B.R. 284=179 Ind. Cas. 761.

——S. 22—Joint Hindu family.

Pro-note in favour of family—Suit by some members—Impleading of other members as defendants after limitation :

Held, that such joinder does not render his suit liable to dismissal by reason of S. 22 Lim. Act, as against the original or real defendants, as that section does not apply where there is no community of interest between the two sets of defendants and the fresh parties are merely joined for the purpose of safeguarding the orginal defendant. This principle fully applies even if the plaintiff is not the *karta* of the joint family. A.I.R. 1937 Lah. 193 =39 P.L.R. 408=172 Ind. Cas. 596.

——S.22—Hindu joint family—Suit against manager—Addition of other members.

If parties are effectively represented through those whose action binds them so that a decree passed against them is binding on such parties, a specific mention of the names of such parties subsequently made in the title of the suit cannot be regarded as addition of a new defendant for the purposes of limitation. Where the members of joint Hindu family are subsequently impleaded as parties to a suit in which they were effectively represented by the manager, they cannot be deemed to be new defendants for the purposes of S. 22. (1931) A.L.J. 421=A.I.R. 1931 All. 585=135 Ind. Cas. 248.

——S. 22—Joint Hindu family—Substitution of the names of co-parceners.

Section 22 refers to cases where a new defendant is substituted or added. The substitution of the names of the co-parceners for what is admittedly a joint family business is no more than the correction of a mis-description and not an addition of parties and so the section is not applicable . 90 Ind. Cas. 685=27 Bom.L.R. 1122=A.I.R. 1925 Bom. 527.

——S. 22—Joint Hindu family—Sons impleaded too late—Effect.

Where a mortgage was executed by the father of a Hindu joint family and a suit by the mortgagee for possession was orginally brought against the father alone and his sons were subsequently brought on the record as defendants at their own instance on the allegation of their being joint with the father, and where at the time that the sons were brought on the record, the suit was barred as against them.

Held, that the entire suit could not be dismissed and that even if the suit be considered to be barred against the sons, relief could be granted to the plaintiff against the joint family property with only the father, the manager of the family, as sole defendant to the suit. 33 All. 272=35 Mad. 685 and 34 All. 459, *Foll.* 87 Ind Cas. 180=12 O.L.J. 235=2 O.W.N. 225=28 O.C. 393=A.I.R. 1925 Oudh 440.

——S. 22—Joint Hindu family—Adult members deemed to represent family.

Where all the adult members of a joint Hindu family appear on the record as defendants it is a legitimate presumption that they are acting as managers on behalf of themselvrs and of the minor members though it is not formally stated in the plaint that the defendants were being sued as managers and therefore the addition of minor members defendants, after limitation does not justify dismissal of suit. 34 All. 549 (F.B.), Foll. 79 Ind. Cas. 1001=46 All. 709=22 A.L.J. 602=5 L.R.A. Civ. 480=A.I.R. 1924 All. 908.

——S. 22—Joint Hindu family—Co-parcener added as co-plff.

The addition of a co-parcener as a co-plaintiff after the period of limitation against him in a suit for recovery of a debt due to ja joint family by other members will not make the suit barred by S. 22 as against the others also. 24 P.W.R. 1909=20 P.R. 1909=1 Ind. Cas. 455.

——S. 22—Joint Hindu family—Suit by manager of joint family—Other members added after time—Effect—Formal parties.

Where in a suit by the manager of a joint Hndu family junior members are added as parties after expiry of the period of limitation they are merely formal parties and the suit is not barred. 33 All. 272=38 I.A. 45=15 C.W.N. 321=8 A.L.J. 256=9 M.L.T. 343=13 C.L.J. 345=21 M.L.J. 378=13 Bom.L.R. 359=(1911) 2 M.W.N. 395=9 Ind. Cas. 739 (P.C.).

——S. 22—Joint Hindu family—Suit by manager of a Joint Hindu family—One member joined after limitation period—Effect.

Where a suit for rent was filed by the manager of a joint Hindu family within time, but after the period of limitation was over, one of the members was allowed to be joined as co-plaintiff. The addition of the new plaintiff would not affect the right of the original plaintiff to continue the suit and the claim is not barred by reason merely of the said addition. 19 C.L.J. 5=22 Ind. Cas. 798.

——S. 22—Hindu father defendant duying—Sons brought on record—Whether the suit should be considered to have been instituted against the sons. *See* LIMITATION ACT, ART. 61. 29 A. 627=1907 A.W.N. 214=4 A.L.J. 501.

——S. 22—Joint Hindu family—Joinder of minor plaintiff, member of Hindu joint family.

The joinder after the period of limitation of a minor member of the joint Hindu family of the plaintiff in a suit on a mortgage is not fatal to the suit. (1906) 33 C. 1079.

7. Necessary parties.

——S. 22—Necessary and proper party.

A distinction must be drawn between a case where a necessary party has been added after the period of limitation and the case where a proper party has been added after the said period of limitation. The suit would not be barred in the latter case but it would be barred in the former :

Held, on facts that it was held in the previous suit brought by the appellant against the present plaintiff (subsequent mortgage) and the mortgagor that the mortgage deed set up by the appellant in that suit was not genuine. The suit was decreed against the present plaintiff. The appellant could not claim to be a mortgagee, subsequent or prior against the present plaintiff. His suit was decreed against the purchaser of the property only and he could claim his mortgagee rights against him only. The present plaintiff could very well ignore him in a suit and the plaintiff was quite justified in one making the appellant a party to the suit. Even if the appellant were considered to be in the position of a puisne mortgagee as against the present plaintiff, he was only a proper party and the suit could not, in view of the provisions of O. 34, r. 9, C.P. Code, be dismissed by reason of his non-joinder and that the appellant having thrust himself into the case, his plea of limitation could not be allowed. 1942 O.W.N. 766=1942 A.W.R. (C.C.) 355=A.I.R. 1943 Oudh 164=18 Luck. 601=204 Ind. Cas. 444.

——S. 22—Necessary party.

Where the necessary parties have been brought on the record within one year of the suiit under O.21, R. 63, C.P. Code the alienee *pendente lite* cannot advance the plea of limitation as S. 22 (2) expressly excludes the operation of Cl. (1) in such cases. A.I.R. 1939 Pat. 138=17 Pat. 588=20 P.L.T. 76=5 B.R. 514=180 Ind. Cas. 983.

——S. 22—Necessary parties—Addition after limitation.

Where amendment of the plaint has been ordered, the amendment will not relate back to the date of the original plaint in cases where to do so would be to deprive any defendants of a right under the Limitation Act, which had accrued to them owing to the default of the plaintiff.

In a suit under O. 21, R. 63, C.P. Code, the decree-holder failed to implead to the judgment-debtors as parties and in appeal to the High Court the suit was remanded for disposal in accordance with law, that is to say, by adding the judgment-debtors as defendants in the suit by obtaining the permission of the Court to bring the suit and by following the provisions, of O. 1, R. 8, C.P. Code. At the time they were joined as parties, limitation for suit against them had expired and they objected to their being impleaded :

Held, that the order of the High Court only meant that the suit could not be effective unless the judgment-debtors were made parties, and if the suit could no be effective without them, as they were not made parties within limitation, the suit failed. A.I.R. 1937 Rang 124=170 Ind. Cas. 105.

——S. 22—Necessary parties—Co-sharer's suit for rent—Joining others after time.

One of the co-sharers cannot sue to recover the arrears of the whole rent even though the right to recover it is conceded to him by the other cosharers. But if one co-sharer alone sues to recover the whole rent and joins the other co-sharers after period of limitation prescribed for a suit to recover the arrears of rent, though the suit is

bad at its inception, it becomes absolutely flawless on other co-sharers being joined as parties so far as the plaintiff's right to recover his own share of rent is concerned and he is entitled to recover his share of rent. 123 Ind. Cas. 828=A.I.R. 1930 All. 209.

——S. 22—Necessary parties—Suit against trustee personally—Idol made party after time—Section applies.

A brought a suit for possession of certain property on allegation that all rights in the property had been transferred to him by reversioner *B* who got the property after the death of a widow, and that *C* who was in possession of the property had no title. *C* contended that he was in possession of the property only on behalf of an idol *S*. in whose favour the widow has executed a deed of gift and that *S* was a necessary party to the suit. *A* made an application asking *C* to be described as the representative of *S* and for adding *S* as a defendant.

Held, that originally the claim being against *C* personally the proposed change was obviously intended to change the character of the suit by introducing a new case and it could not be said that the amendment was intended to correct a misdescription and that it did not amount to introduction of new party within the meaning of S. 22. *S* was a necessary party and he being impleaded after 12 years the suit was barred and *A* could not also get any relief against *C* personally as *C* was in possession only on behalf of *S*. 123 Ind. Cas. 894=6 O.W.N. 1036=A.I.R. 1930 Oudh 43.

——S. 22—Necessary parties—Where title of an idol is challenged.

A shebait has a right of suit in matters arising out of the possession and management of the dedicated property. But a case, where the intrinsic title of the idol is challenged, stands on a different footing. In cases where the crucial question is about the ownership, the idol is a necessary party. 123 Ind. Cas. 894=6 O.W.N. 1036=A.I.R. 1930 Oudh 43.

——S. 22—Necessary parties—Addition of, after time.

If a necessary party is joined as plaintiff or defendant after time for the suit has run out, the entire suit must be dismissed. 100 Ind. Cas. 859=A.I.R. 1928 Lah. 33.

——S. 22—Necessary parties—Impleading sub-mortgagee after time.

Where a sub-mortgage, which was sinple, was effected within 60 years on the property sought to be redeemed but the simple mortgagee got a decree and bought the property in auction after 60 years had elapsed, when he was impleaded as defendant in the suit, to redeem the original mortgagee.

Held, that the suit was barred as against him as acquisition of interest by him dated back to the date of simple mortgage. 85 Ind. Cas. 330=22 A.L.J. 1018=5 L.R.A. (Civ.) 718=A.I.R. 1925 All. 174.

——S. 22—Necessary parties—Pre-emption suit.

The suit was for pre-emption. The vendee were several persons, *T.B.*, *D.J.*, etc. The plaintiff in his plaint joined as vendee defendants, "*T.* son of *B*" *D,J.*, etc, *B* was not joined. The omission was due to an error in the copy of sale deed supplied to the plaintiff.

Held, that there was not a mere misdescription of parties, and *B* could not be joined after the expiry of limitation and that consequently, the whole suit should fail. 88 Ind. Cas. 555=7 L.L.J. 76=26 P.L.R. 447=A.I.R. 1925 Lah. 343.

——S. 22—Necessary parties—Effect of addition.

Where a Court orders a necessary party to be added the whole suit shall be deemed to have been instituted when the party is added. 14 All. 524, Foll. 79 Ind. Cas. 914=17 S.L.R. 324=A.I.R. 1925 Sind 181.

——S. 22—Necessary parties—Pre-emption suit.

Where in a pre-emption suit one of the vendees was not included as defendant till after the expiration of the limitation, due to the mistake of the minor plaintiff's next friend.

Held, that though the plaintiff was a minor the suit should be dismissed. 7 Ind. Cs. 364=A.I.R. 1924 Lah. 23.

——S. 22—Necessary parties—Benami purchase.

Where in a proceeding under R. 90 of O. 21, C.P. Code, the ostensible purchaser was made a party within limitation but the real purchaser was joined as a party to the application after thirty days but the applicant had no means of knowing that the ostensible purchaser was not the real purchaser.

Held, that the addition of party after the prescribed period, does not entail the dismissal of the application as against the newly added real purchaser. 76 Ind. Cas. 507=A.I.R. 1923 All. 462.

——S. 22—Necessary parties—Suit by executor—Effect of adding co-executor after time.

Co-executor of a will is a necessary party to a suit by another executor for the recovery of devised properties and where such a co-executor is added as a defendant he being unwilling to be plaintiff after the limitation period the whole suit should be held to be barred, though it was originally instituted within the prescribed period. 43 I.A. 603 (P,C.), Foll.; 25 M.L. J. 452 and 9 L.W. 377, Diss. from. 63 Ind. Cas. 104=13 M.L.W. 392=1921 M.W.N. 248=A.I.R. 1921 Mad. 528=40 M.L.J. 532.

——S. 22 (1)—Necessary party—Addition after time—Effect.

If a necessary party without whose presence on then record the suit cannot be adjudicated upon has been omitted and is added after the period of limitation the suit is barred against all the defendants. 57 Ind. Cas. 52 (Lah.).

——S. 22—Necessary party—Alienee pendente lite.

An alienee *pendente lite* is not a necessary party to the suit and cannot, if made party after the period of limitation, advance the plea under S. 22 of the Limitation Act. 33 Mad. 535=26 M.L.J. 449=25 Ind. Cas. 11.

——S. 22—Necessary party—Added after limitation—Effect.

Where a necessary party is added after limitation the suit is barred. 33 Mad. 246=20 M.L.J. 79=7 M.L.T. 67=4 Ind. Cas. 392.

——S. 22—Necessary party—Bar of limitation—C. P. Code, O. 1, R. 9.

If a plaintiff sues to recover the joint property of two or more persons, and at the time of trial omits to join all proper and necessary parties, and if the rights of those who ought to be added as parties, to the suit are barred by limitation, the suit must be dismissed for want of proper or defective joinder of parties. The principle applies to cases where several person jointly seek to recover the assets of a deceased person. 18 C.W.N. 464; Appr. O. 1, R. 9 only applies to case where relief can be given if the necessary parties are joined and the application is within time, but not to cases where the parties to be joined, are barred in the assertion of their rights. In that case though they may be joined the suit must be dismissed. 36 Ind. Cas. 77 (Pat.).

——S. 22—Necessary parties—Joinder of plaintiffs after limitation period.

When the co-owner landlords were not unwilling to join as co-plaintiffs but did so with the utmost readiness

as soon as objection was taken by the tenants-defendants they should have been joined as plaintiffs in the first instance, and if they are brought on the record after the expiry of the date of the limitation, their claim is barred by limitation and the entire claim is barred as the claim was joint and indivisible. (1907) 7 C.L.J. 251.

8 Partnership.

——S. 22—Partnership—Names of proper representatives.

When a suit as originally laid is against the firm the description of the proper representative of that firm can always be corrected and such correction does not amount to either substitution or addition of a new party to the suit. No question of limitation under S. 22 arises in such a case. 109 Ind. Cas. 785=A.I.R. 1928 Nag. 319.

——S. 22—Partnership—Partner served after time.

When a suit is instituted against a firm in its name, whether the firm consists of members of a joint family or otherwise and one of the partners is afterwards served with the summons of the suit under O. 50, R. 3, C.P. Code, the original date of institution is to be taken even against the partner who is subsequently served though the firm has been dissolved to the plaintiff's knowledge before the institution of the suit. 105 Ind. Cas. 854=23 S.L.R. 54=A.I.R. 1928 Sind 57.

——S. 22—Partnership—Partner substituted after time.

Suit against firm of "Manmal Chandmal'—But defendant described as "Hindumal as owner and Manager of shop Manmal Chandmal"—Chandumal having died before suit, his heirs were brought on record but after the period of limitation.

Held, that though not in form, but in substance, the plaintiff sued the firm of 'Manmal Chandmall'. If he had simply described the defendant as "the firm of Manmal Chandmal" without mentioning the names of the owners or partners of the firm, the description would have been sufficient, having regard to the provisions of O. 30 of the C.P. Code. In that view the further description of the defendant Chandmal Hindumal as "the Manager and owner of the firm" may be treated as a mere surplusage. Therefore the suit was not barred. 77 Ind. Cas. 1035=25 Bom.L.R. 1081=A.I.R. 1924 Bom. 155.

——S. 22—Partnership—New partnership superseding old.

Where one partnership was the real contracting party but a new partnership with some of the partners of the old firm filed a suit,

Held, that amendment to bring on record the real plaintiffs cannot be taken to date back to the time when the suit was originally instituted. The amendment can only relate to the date on which the application for substitution was made and not to the date when the plaint was filed. 90 C.W.N. 833, Foll. 76 Ind. Cas. 119=17 S.L.R. 263=A.I.R. 1924 Sind 47.

——S. 22—Partnership—New partnership superseding old.

If a firm, newly constituted by the retirement of one partner and joining in of another, brings a suit on a contract entered into by the old firm, it cannot, after the expiration of the period of limitation for a suit on the contract, substitute the names of the partners of the old firm under S. 22 (2). 65 Ind. Cas. 26=15 S.L.R. 152=A.I.R. 1922 Sind. 13.

9 Proper but not necessary party.

——S. 22—Proper but not necessary parties—New plaintiff or defendant.

As limitation merely bars the remedy by a suit, the only parties in a suit between whom a question of limitation can possibly arise are those who seek relief and those against whom it is necessary to seek relief. Therefore, when a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party. 1939 Pat. 138=5 B.R. 514=17 Pat. 588=20 P.L.T. 76=180 Ind. Cas. 983.

——S. 22—Proper but not necessary party.

Promissory note by deceased—Suit against widow as legal representative—Widow pleading that daughter and grandson were also interested in estate according to will of deceased—Daughter and grandson made parties after suit had become barred:

Held, estate was sufficiently represented at title of suit and the added parties were bound by decree. A.I.R. 1935 Mad. 737=159 Ind. Cas. 129.

——S. 22—Proper party.

Proper but not necessary party impleaded to ensure against further litigation—Section 22 does not apply. A.I.R. 1924 Cal. 187=38 C.W.N. 409=59 C.L.J. 295=151 Ind. Cas. 1076.

——S. 22—Proper but not necessary.

Where a party is added to the suit not in order to validate the suit but to settle the dispute finally, the original defendants cannot claim limitation from the date the new party is added to the suit. A.I.R. 1930 All. 436=128 Ind. Cas. 7.

——S. 22—Proper but not necessary party.

Section 22 does apply to a case even where a person is not a necessary party but only a proper party to a suit and such a person cannot be added as a party after the expiry of the period of limitation provided for by that section. 36 Cal. 675, Foll.; 116 Ind. Cas. 726=49 C.L.J. 16=33 C.W.N. 248=A.I.R. 1929 Cal. 188.

——S. 22—Proper but not necessary party—Failure to add in time—No bar.

A and *B* executed a bond in favour of two brothers *X* and *Y* members of a joint Hindu family. *X* sued *A* and *B* for the recovery of the amount due on the bond alleging that in a family partition the bond fell to his share. *Y* was not originally made a party to the suit but on defendant's objection *Y* was impleaded after expiry of the period of limitation. The lower Court dismissed the suit on the ground that it was barred by limitation as *Y* was impleaded as a party more than three years after the execution of the bond.

Held, that when *Y* admitted that the bond fell to *X's* share and that he had nothing to do with it, the mere fact that he was impleaded after the expiry of three years did not in any way affect the maintainability of the suit and that the claim was not barred. 115 Ind. Cas. 74=30 P.L.R. 124=A.I.R. 1929 Lah. 505.

——S. 22—Proper but not necessary party.

When a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party. 6 C.L.J. 558, Foll. 104 Ind. Cas. 576=46 C.L.J. 118=A.I.R. 1927 Cal. 794.

——S. 22—Proper but not necessary party.

Joinder after limitation of proper but not necessary parties is not fatal. 22 Bom. 672 and 28 Bom. 11, Appr. 94 Ind. Cas. 575=27 Bom.L.R. 1168=A.I.R. 1925 Bom. 547.

——S. 22—Proper but not necessary party—Addition of—Section does not apply.

Where the holder of a bond was not impleaded by the plaintiff assignee until the expiry of the period of the limitation but the assignee admitted that he had authorised her agent to assignate bond for consideration.

Held, S. 22 of the Indian Limitation Act does not lay down that a joinder after the period of limitation shall in

all cases necessarily involve a dismissal of the suit. If the presence of a party added after the prescribed period is not necessary to enable the Court to award such relief as may be given in the suit framed by the plaintiff and he is joined *ex majore cautela* the suit is not barred merely because the limitation period had expired at the time when he was impleaded. 75 Ind. Cas. 781=A.I.R. 1923 Lah. 439.

——S. 22—Proper but not necessary party.

There may be circumstances in which addition of parties subsequently brought on record may not be essential and may be merely for the protection of the defendant; where it is not essential the suit is not barred. 65 Ind. Cas. 367=26 C.W.N. 488=A.I.R. 1922 Cal. 149.

——S. 22—Proper but not necessary party—Redemption suit—Persons interested in the equity of redemption.

In a redemption suit filed within time if some persons interested in the equity of redemption, and so necessary parties, are sought to be impleaded after the expiry of limitation, S. 22 does not warrant the dismissal of the suit as time-barred.

The persons so sought to be impleaded are merely necessary for the record in order to satisfy the provisions of O. 34, R. 1. It is within the discretion of the Court under O. 1, R. 10, sub-R. (2) to make these parties co-defendants, and then to consider after they have been made co-defendants what would be the legal result of such addition.

Per *Fawett, J.*—There is no provision in either the C.P. Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Limitation Act. 28 Bom. 11, Appl. 61 Ind. Cas. 590=45 Bom. 1009=23 Bom.L.R. 405=A.I.R. 1921 Bom. 152.

10 Scope and effect.

See also C. P. CODE, O. 1, R. 10.

S. 22 (1)—Scope and effect of—Suit to enforce mortgage by one of several mortgages—Other mortgagees impleaded as parties after expiry of period of Limitation for suit—Effect—Right to decree. *See* MORTGAGE—MORTGAGE SUIT. 50 Bom.L.R. 30=A.I.R. 1948 Bom. 211 (F.B.).

——S. 22—Scope.

Section 22 has not effected any change in the law. It only states what was always the law, viz., that the act of a partner, in order to bind the firm, should be done on behalf of the firm. But it is not necessary that it should also purport to be so done. (1945) 1 M.L.J. 279=58 M.L.W. 236=1945 M.W.N. 314=A.I.R. 1945 Mad. 263.

——S. 22—Scope.

Per *Agarwal, J.*—Section 22, Limitation Act, is not applicable when action is taken under O. 41, R. 20, C.P. Code. A.I.R. 1943 Oudh 78=1942 O.W.N. 465=1942 A.W.R. 305=205 Ind. Cas. 628.

——S. 22 (2)—Scope and object of.

Section 22 (2), provides for cases of this nature and by the enactment of this section, the Legislature has recognised that if a person is a party to a suit, his change of position will not affect limitation and it was to meet cases like these that it has been provided that if a party already on the record is transferred from the category of the defendant to that of the plaintiff or *vice versa*, provisions of Cl. (1) will not apply. A.I.R. 1932 Pat. 346=11 Pat. 616=140 Ind. Cas. 572.

——S. 22—Scope of—Devolution of interest—C. P. Code, O. 22, R. 10.

Section 22 (1) of the Limitation Act (corresponding to the Straits Ordinance) contemplates cases in which a suit is defective by reason of the right persons not having been made parties, but not cases in which the suit was originally properly instituted but has become defective owing to a devolution of interest. In the latter case an order to carry on proceedings should be made. 20 C.W.N. 833=(1916) 1 M.W.N. 455=18 Bom.L.R. 642=43 I.A. 113=(1916) 1 A.C. 603=35 Ind. Cas. 323 (P.C.).

——S. 22—Scope—Whether controls S. 559, C. P Code (O.C.).

There is nothing in the Limitation Act which controls the power of an appellate court in adding as party respondents persons who were parties in the original court, but who were not made parties when the appeal was filed, whether the appellate court adds them *suo motu* or on application of parties. (1905) 33 C. 329.

——S. 22—Scope of—Addition of party after limitation period—C. P. Code, O. 1, R. 10 (1).

No amendment can be made of the plaint by the addition of a rightful party as plaintiff when the suit, if brought even on the date on which the application for amendment was made, will be barred. (1909) 33 M. 115=7 M.L.T. 185=5 Ind. Cas. 931.

11 Substitution of parties.

——S. 22—Substitution of parties.

Suit against Chairman of Commissioners intended against corporation—Amendment impleading Commissioners themselves—It relates back to the date of the suit and S. 22 does not apply, as it does not amount to addition of new parties. 70 C.L.J. 583=A.I.R. 1940 Cal. 153=44 C.W.N. 277=187 Ind. Cas. 605.

——S. 22 (1)—Substitution.

Suit by *A* on pro-note executed by *C* in favour of *B*—Subsequently *A* disclaiming interest in suit and *B* claiming substitution in his place—Substitution allowed when claim was barred by time—*Held*, S. 22 (1) applied and suit was time-barred. A.I.R. 1940 Nag. 274=1940 N.L.J. 333=190 Ind. Cas. 430.

——S. 22—Substitution of party—Misdescription and substitution—Amendment seeking to substitute one legal entity for another.

The essential difference between an alteration that comes under the head of mere misdescription and an alteration that comes under the head of substitution is that in the case of a misdescription, there is the same person or legal entity throughout; merely the name of the person is to be altered; but when one person, be it a legal or other person, is to be substituted for another, then the alteration cannot fairly come under the head of misdescription. It is a case of substitution, and S. 22, applies. Hence an amendment of plaint seeking to substitute one legal entity for another after the period of limitation has passed cannot be allowed. A.I.R. 1939 Sind 172=I.L.R. (1939) Kar. 275=182 Ind. Cas. 881.

——S. 22—Substitution.

Suit on bond in favour of deceased by his father as heir—Subsequent application for substitution of minor son of deceased after limitation:

Held, that the suit is barred. A.I.R. 1937 Lah. 369=39 P.L.R. 585=173 Ind. Cas. 357.

——S. 22—Substitution of parties—Insolvency pendente lite.

Where, after the institution of the suit the defendant is adjudicated insolvent and the Receiver is brought on record he is brought in, not because he is an essential party to the suit in the sense that his absence is fatal

to the suit and if he is impleaded at a later date the suit will be regarded as filed on that date, but because of the provisions of S. 29 of the Insolvency Act.

There is a devolution of interest on the Receiver who is merely a continuation of the original defendants. Consequently there is no rule of limitation governing the application to bring in the Official Receiver as a party. 102 Ind. Cas. 444=1927 M.W.N. 245=26 M.L.W. 171=A.I.R. 1927 Mad. 693=51 M.L.J. 142.

——S. 22—Substitution of parties—Party discharged and reinstated.

Where the defendants were first made defendants as sons and legal representatives of the deceased tort-feasor but were discharged and the estate of the deceased was made defendant and the first defendants were again reinstated as defendants.

Held, the suit must be deemed to be filed as on the date of reinstatement. 96 Ind. Cas. 887=1926 M.W.N. 592=31 C.W.N. 174=A.I.R. 1926 P.C. 88 (P.C.).

——S. 22—Substitution of parties—Suit after Insolvency—Substitution of Official Assignee.

When a person is adjudicated as insolvent the whole of his property passes to the Official Assignee by virtue of the vesting order passed under the Presidency Towns Insolvency Act. Consequently nothing is left vesting in the insolvent which would give him a cause of action. So a suit by an insolvent in his own name, after his adjudication cannot be maintained and the substituting the name of the Official Assignee later on is adding a new plaintiff within Limitation Act, S. 22. 95 Ind. Cas. 538=28 Bom.L.R. 554=A.I.R. 1926 Bom. 366.

——S. 22—Substitution of parties—Misdescription.

Where the suit was brought against the defendant described as "Agent, E.I. Railway", the Railway Company contested the suit considering itself to be the party sued; no specific ground was taken that the proper party had not been sued,

Held, that it was a case of misdescription which could be rectified by a formal amendment. 94 Ind. Cas. 762=30 C.W.N. 209=A.I.R. 1926 Cal. 612.

——S. 22—Substitution of parties—Suit against Company—Defendant described as agent.

When there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other and no question of representation arises in the case, the case is not one of misdescription.

Where in a suit against a Railway Company the plaint described the defendant as the "Agent" of the Railway Company and where subsequently the plaintiff sought to amend the plaint by bringing the company on record.

Held, that it was not a case of misdescription. But if the amendment was allowed it would have the effect of adding a new party to the suit, and S. 22 of the Limitation Act would apply. 90 Ind. Cas. 426=52 Cal. 783=29 C.W.N. 614=A.I.R. 1925 Cal. 716.

——S. 22 (2)—Substitution of parties—Pro forma defendant made plaintiff—Limitation.

A person originally impleaded as a *pro forma* defendant but subsequently made a plaintiff is not a new party to whom the provisions of S. 22 of the Limitation Act apply. 19 C.W.N. 1269=21 C.L.J. 611=30 Ind. Cas. 34.

——S. 22 (1)—Substitution of parties—Amendments—Effect of.

Amendments made in the plaint by the leave of the Judge cannot amount to an addition or substitution of party within S. 22 of the Limitation Act. 19 C.W.N. 1193=28 Ind. Cas. 818.

——S. 22 (2)—Substitution of parties—Pro forma defendant made plaintiff—Obiter.

The transfer of the name of a *pro forma* defendant to the category of the plaintiff cannot rightly be treated as the addition of a new plaintiffs within S. 22. 38 Cal. 342=13 C.L.J. 3=8 Ind. Cas. 837.

——S. 22—Substitution of parties—After time—Effect.

A substitution of partics after period of limitation cannot save the suit from the bar of limitation. 5 Ind. Cas. 115 (Cal.).

——S. 22—Substitution of parties—Pro forma defendant made plaintiff.

A *pro forma* defendant subsequently made a co-plaintiff is not a "new plaintiff" within S. 22 of the Act, and the suit will not be barred even if he be transferred to the category of plaintiff after the period of limitation. 35 Cal. 1065=8 C.L.J. 286=13 C.W.N. 186=4 Ind. Cas. 369.

——S. 22 (2)—Substitution of parties—defendant made plaintiff.

S. 22 of the Limitation Act does not apply when a defendant is made a plaintiff. 28 M.L.J. 147=(1915) M.W.N. 143=28 Ind. Cas. 45.

——S. 22—Substitution of parties—Rectification of original improper representation.

When the *cestuique trust* is substantialy on the record from the beginning, the rectification of the original improper representation by inserting the name of a proper representative cannot be treated as the addition of new parties to come under S. 22 of the Limitation Act. 25 M.L.J. 452=14 M.L.T. 437=21 Ind. Cas. 421.

——S. 22—Substitution as plaintiff of assignee in place of assignor C. P. Code (O.C.), S. 372. (1907) 11 C.W.N. 521=5 C.L.J. 486=34 Cal. 612 (F.B.).

——S. 22—Substitution after claim barred—'New plaintiff'—C. P. Code, S. 372.

A instituted a suit on the last day of limitation. On subsequent date *B's* name was substituted in place of *A's* upon an application of *B* to which *A* consented, stating that *A* had sold his interest to *B*. Later on, *A* and *B* both representing that the alleged sale was a fictitious transaction, *A's* name was restored and *B's* struck out. Both the lower courts found that *B* was not benamidar of *A*.

Held, that the second substitution order could not have been made under S. 372 of the Civil Procedure Code (1882) and at its date *B* was a 'new plaintiff' within the meaning of S. 22 of the Limitation Act. The suit was therefore, barred. (1905) 9 C.W.N. 883.

——S. 22—Substitution of parties—Suit by a contractor against Executive Engineer—Addition of Secretary of State as party after period of limitation—Substitution or addition of parties.

In a suit to recover the price of work done to the Government where a servant of the Government was originally made the defendant and the Secretary of State was subsequently added as a defendant:

Held, that the addition was not a rectification or substitution of the original defendant, and for the purposes of limitation against the Secretary of State, the suit should be considered to have been instituted on the date when he was made a party. (1901) 6 C.W.N. 218.

——S. 22—Substitution of parties C.P. Code, (O.C.) S. 437—Suit brought by executor Beneficiaries' names subsequently added.

Where a suit for recovery of possession was brought by an executor on the 14th September, 1898, and the names of the beneficiaries who took possession of the estate during the pendency of the suit were substituted as plaintiffs on the 23rd November, 1900;

Held, that no new plaintiffs were substituted within the meaning of S. 22 and that the substitution of the names of the plaintiffs did not make the suit a new suit. (1903) 7 C.W.N. 817.

12. Transposition of parties.

——S. 22 (2)—Applicability—Transposition of defendant as plaintiff—Claim by transposed plaintiff to subject-matter not included in original plaint.

The word "suit" in S. 22 (1), Limitation Act, refers to the suit *as originally filed*. As transposition involves the addition of a plaintiff or defendant, as the case may be, to *the suit as originally filed*, it would follow that S. 22 (2) of the Act would be applicable only to those cases where the claim of the person transposed as plaintiff could have been sustained on the plaint as originally, filed, or where the person remaining as plaintiff after the transposition could have sustained his claim against the transposed defendant on the basis of the plaint as originally filed. S. 22 (2) would not be applicable where the person transposed as plaintiff has either to sustain his claim to the subject-matter of the suit as defined in the plaint as originally filed on a different cause of action, a cause of action not pleaded in the original plaint, or where his claim, though it may be supported on the cause of action as pleaded in the original plaint, is in respect of a subject-matter which was not included in the original plaint, but is in respect of a different subject-matter, which has to be brought in by way of addition after he is transposed. I.L.R. (1949) 1 Cal. 85.

——S. 22 (2)—Transposition of parties—Applicability—Removal of defendant to category of plaintiff—Plaint subsequently returned and re-presented in proper Court—Defendant again transposed to category of plaintiff.

A instituted a suit on a promissory note within time against *B* and *C*. *C* was removed from the category of defendants and added as plaintiff after the expiry of the period of limitation. Thereafter the Court returned the plaint to the plaintiff to be refiled in the proper Court. *A* refiled the plaint again making *C* a defendant but subsequently *C* was again taken from the category of defendants and added as plaintiff in the suit.

Held, that S. 22 (2) of the Limitation Act was applicable to the first suit and that when *C* was transposed to the category of plaintiffs in that suit, the suit was within the period of limitation so far as he was concerned. Assuming that that section applied even to the second suit, its effect would merely be the same as though *C* had instituted the second suit on the date on which the plaint was refiled, and as on that date the suit was apparently barred by limitation, limitation could only be saved if the provisions of S. 14 of the Limitation Act could be invoked by *C*. 51 C.W.N. 907.

——S. 22—Transposition of parties'

Suit for rent—Co-sharer made defendant—Such co-sharer made to co-plaintiff on application under S. 148-A, Bengal Tenancy Act—Claim to rent due to him by such co-plaintiff.

Held, it is not necessary for such co-plaintiff to call into his aid the provisions of S. 22, Limitation Act, for saving any bar of limitation A I.R. 1937 Cal. 333=173 Ind. Cas. 896.

——S. 22 (2)—Transposition of parties.

Transposition of defendant as plaintiff after limitation on mere consent of defendant, is ineffectual. 41 M.L.W. 177=(1935) M.W.N. 210=69 M.L.J. 30=A.I.R. 1935 Mad. 240=156 Ind. Cas. 455.

——S. 22—Transposition of defendant as plaintiff when a suit by him would have been time-barred.

The plaintiff instituted a suit, ostensibly for rent, against the first defendant claiming to be an assignee of the lessor who was impleaded as the 2nd defendant. The District Munsif held that the suit should have been a suit for damages for use and occupation and as the plaintiff obtained no right to sue by the assignment, dismissed the suit. The Subordinate Judge remanded the suit for an enquiry as to whether the suit was one for rent or for damages for use and occupation. The High Court set aside the remand order upholding the finding of the District Munsif and returned the case to the Subordinate Judge for disposal of the other issue. The plaintiff thereupon applied for transposition of the 2nd defendant as a plaintiff and for amending the plaint. The Court allowed amendment and transposed the 2nd defendant to the position of a plaintiff, even though the claim for damages was barred on the date of the amendment :

Held, that the order of transposition was not irregular or in excess of jurisdiction, though a suit by the 2nd defendant would have been barred on the date of transposition and the order of the lower Court was not, therefore, liable to be set aside in revision (1934) M W.N. 1396=40 M.L.W. 900=A.I.R. 1935 Mad. 95=154 Ind. Cas. 747.

——S. 22—Transposition of parties.

A transposition of parties should not be disallowed on the ground that it would affect limitation. 14 P.L.T. 252=A.I.R. 1933 Pat. 239=149 Ind. Cas. 760.

——S. 22 (2)—Transposition of parties—Co-shraer landlords transposed as co-plaintiffs—Payment of Court-fee—Claim for rent due.

Where, in a rent suit, the co-sharer landlords who had been brought on record as *pro forma* defendants on being transposed as co-plaintiffs paid court-fee on their own claim for arrears of rent, but the tenants contended that their claim for shares of rent had become time-barred on date of their transposition as co-plaintiffs :

Held, that S. 22 (2) applied to the case and no question of limitation arose under the circumstances. A.I.R. 1932 Pat. 304=13 P.L.T. 392=139 Ind. Cas. 535.

——S. 22—Transposition of parties.

Defendant 1 executed a promissory note in favour of defendant 2, a *benamidar* for plaintiff. As the plaintiff the beneficial owner of the promissory note, was not able to maintain a suit under the Negotiable Instrumen ts Act against defendant 1, defendant 2 desired to be joined as co-plaintiff as his independent suit would be time-barred.

Held, that the prayer should not be allowed as defendant 1 would then lose a valuable statutory right acquired by lapse of limitation. 104 Ind. Cas. 528=9 P.L.T. 235=A.I.R. 1928 Pat. 24.

——S. 22—Transposition of parties.

Where a person was a defendant to a suit as it was originally instituted, but in the subsequent proceedings his position from that of a defendant was changed into that of a plaintiff.

Held, that the case was entirely covered by sub-S. (2), S. 22. 105 Ind. Cas. 473=1 L.C. 546=A.I.R. 1927 Oudh 484.

——S. 22—Transposition of parties.

It is clear from the provisions of sub-S. (2) of S. 22 that the provisions of sub-S. (1) of the section will not apply where a defendant, who was made such by the plaintiff at the time of the institution of the suit, is transferred in that suit as a co-plaintiff. 90 Ind. Cas. 82=A.I.R. 1926 Pat. 28.

——S. 22—Transposition of parties.

The transfer of a party from *pro forma* defendant or otherwise to plaintiff is not an addition of a new party within the meaning of S. 22. 38 Cal. 242 Foll. 66 Ind. Cas. 873=16 S.L.R. 71=A.I.R. 1921 Sind 50.

13 Suit against a dead person.

——S. 22—Suit against dead person—Effect of.

A plaintiff cannot claim the benefit of the instituting of a suit against dead person for the purpose of extending the period of limitation against his heirs. 5 O.L.J. 546=47 Ind. Cas. 894.

14 Miscellaneous.

——S. 22—Miscellaneous.

Execution of promissory note by guardian of minor—Personal liability of guardians—Suit against minor and guardian—Addition of claim for personal relief against guardian after limitation:

Held, on construction of the pro-note that the second defendant had clearly undertaken personal liability by the promissory-note and the suit was not time-barred as to the claim for personal relief against second defendant. (1934) M.W.N. 854=A.I.R. 1935 Mad. 160=154 Ind. Cas. 582.

——S. 22—Miscellaneous—Minor defendant—Appointing guardian ad litem after time.

Subsequent to the discovery that the minor has not been properly represented by a duly appointed guardian it is open to the Court in the exercise of its inherent power under S. 151 to restore the case to its original number on the file and proceed with it after duly appointing a guardian. The restoration of the case and the appointment of a new guardian cannot be held to be tantamount to the addition of a new party to the suit. The appointment of a guardian *ad litem* must always be some time after the institution of the suit and the suit must be deemed to have been instituted against the minor on the date when it was filed, even though on that date the guardian *ad litem* was not or could not have been appointed. 1930 A.L.J. 938=A.I.R. 1930 All. 644.

——S. 22—Miscellaneous — Transferee pendente lite.

A transferee pendente lite who acquires an interest which may come in conflict with the rights of the decree-holder under the decree cannot be plead limitation on the ground that the suit or proceedings should be deemed to have been instituted or taken against him only on the date he was impleaded as a party. A.I.R. 1930 All. 597 =1930 A.L.J. 1302.

——S. 22—Miscellaneous — Specific Relief Act, S. 9—Suit under — Person joined as defendant after one year on his own application — He cannot avoid the decree—Evidence Act, S. 115.

Where in a suit under S. 9, Specific Relief Act, a person is added one year after the date of the suit as defendant on his own application and a decree is passed against him, he cannot avoid the decree by taking advantage of S. 22, Limitation Act. 28 Bom. 11, Rel. on. 112 Ind. Cas. 786 =30 Bom.L.R. 1405=A.I.R. 1928 Bom. 526.

——S. 22—Miscellaneous — Minor defendant — Appointing guardian ad litem after time.

Where in a pre-emption suit, guardian for one of the vendees who is a minor is appointed after the expiry of limitation for the suit, the defect is not fatal to the suit as a plea of limitation. 31 All. 55, Foll. 102 Ind. Cas. 624=49 All. 869=25 A.L.J. 655=A.I.R. 1927 All 787.

——S. 22 (1)—"Miscellaneous — Party not signing or verifying pleading—Wrong description of party.

Where one of the plaintiffs is wrongly described in the plaint as a minor and has not himself signed and verified the plaint, he is not, on that account; to be considered not a party. The plaintiff who has not signed or verified cannot be considered to be a new party, when he signs or verifies the plaint under S. 22. 25 M.L.J. 174=(1912) M.W.N. 1207=17 Ind. Cas. 580.

——S. 23.

Synopsis.

1. Attachment under S. 146, Cr. P. Code.
2. Breach of contract or covenants.
3. Cause of action.
4. "Continuing wrong"—Test and essence of.
5. Effect of trespass and dispossession.
6. Obstruction to light and air.
7. Obstruction to right of way.
8. Obstruction to water course.
9. Restitution of conjugal rights.
10. Scope and applicability.
11. Miscellaneous.

1. Attachment under S. 146, Cr. P. Code.

——S. 23—Suit to recover property after attachment under S. 146, Cr. P. Code.

Suits brought for recovery of property after attachment under S. 146, Cr. P. Code are cases of a continuing wrong within meaning of S. 23, Limitation Act and such suits brought more than six years after attachment are not barred. A.I.R. 1938 Pat. 212=4 B.R. 558=175 Ind. Cas. 256.

——S. 23—Attachment under S. 146, Cr. P. C.—Right to sue, when arises.

In a case of continuing wrong under S. 23, the right to sue accrues from moment to moment so long as the attachment lasts, and the suit cannot be held to be barred by lapse of six years from the date of the order by a Magistrate under S. 145, Cr. P. Code. 14 P.L.T. 113=12 Pat. 261 =A.I.R. 1933 Pat. 224=149 Ind. Cas. 561.

——S. 23—Attachment—S. 146, Cr. P. Code—No fresh period of limitation.

Where there was a dispute between the parties regarding the land in suit and in proceedings under Ch. XII of the Cr. P. Code the Magistrate attached the land under S. 146, and appointed a Receiver thereof referring the parties to the Civil Court for the determination of their rights, and where a suit was brought by the plaintiff for a declaration that he was the owner of the land,

Held, further that where it is not known whether it was the plaintiff or the defendant who was guilty of interference with possession or dispossession, all that one can say as to what led the Magistrate to take possession is that it was either his inability to decide who was in actual possession or his decision that neither party was in possession and that neither of these can be said to be a wrong by the defendant and hence no fresh period of limitation began to run under S. 23 of the Limitation Act, after the date of the attachment by the Magistrate. 85 Ind. Cas. 631 =20 N.L.R. 195=A.I.R. 1925 Nag. 236.

——S. 23—Attachment and adverse possession—S 146, Cr. P. Code—Effect of order.

A trespasser's possession is determined upon the Magistrate taking possession under the attach-

ment, for the possession of the Magistrate being in law, the possession of the true owner, the true owner must be taken to have been restored to possession constructively on the date of the attachment and must be taken to get a fresh starting point, the case being one of continuing wrong. 65 Ind. Cas. 200=49 Cal. 544=26 C.W.N. 432 =A.I.R. 1922 Cal. 419.

——S. 23, Sch. I, Arts. 120; 142—Continuing wrong—Order under S. 146, Cr. P. Code.

Where a Magistrate attached a disputed property under S. 146, Cr. P. Code when plaintiff was in lawful possession and plaintiff sued for declaration of title for recovery of possession it was held that the suits though framed as suits for possession could not be treated as such and were not governed by Art. 142, Limitation Act. The case should be treated as one of continuing wrong within S. 23 of the Limitation Act and the suit is not barred under Art. 120 of Limitation Act as a fresh period of limitation begins to run at every moment of the time the wrong continues, as the title continues unaffected in the true owner for under S. 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. 22 C.L.J. 283=20 C.W.N. 481=31 Ind. Cas. 242.

2 Breach of Contract or Covenant.

——S. 23—Marriage.

Marriage under Muhammadan Law is a civil contract and the husband's impotency is a continuing breach of contract within the meaning of S. 23. 41 P.L.R. 867=A.I.R. 1939 Lah. 454 =185 Ind. Cas. 744

——S. 23—Breach of Contract of Covenant—Continuing wrong.

Where a tenant builds a house on the land contrary to the terms of the tenancy or contrary to the purposes for which the land was let out, the building of the house is a continuing wrong and, even when it is finally erected, limitation does commence definitely against the landlord. A.I.R. 1939 Pat. 149=5 B.R. 237=179 Ind. Cas. 482.

——S. 23—Breach off contract—Surety undertaking to produce judgment-debtor on each date of hearing—Failure to produce him on a certain date—Execution proceedings terminating at a later date—Application for execution against surety:

Held, that the breach occurred on the date when the surety failed to produce the judgment-debtor and not on the date when the proceedings came to an end and that S. 23, Limitation Act did not apply as it was not a case of continuous breach. 37 P.L.R. 72=A.I.R. 1935 Lah. 174=153 Ind. Cas. 459.

——S. 23—Continuing breach.

Held, that the breach of a covenant to give possession was not a continuing breach, but occurred once and for all at the inception of the term and as soon as failure to comply with the terms of the lease in this respect took place. 35 M.L.W. 68=(1932) M.W.N. 51=A.I.R. 1932 Mad. 225 =138 Ind. Cas. 119.

——S. 23—Breach of contract or covenant—Failure to pay debts.

Where the vendee agreed to pay off a usufructuary mortgage on the property but no time was fixed for the payment of the money,

Held, that the vendee's failure to pay off the mortgage on the date on which the sale-deed in his favour was executed, constituted breach of covenant on his part, that the breach took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiff the vendor to sue. 34 All. 429, Foll. 87 Ind. Cas. 804=6 L.R.A. (Civ.) 222=A.I.R. 1925 All. 488.

——S. 23—Usufructuary mortgage—Covenant to repair—Breach—Continuing breach.

Breach of a covenant in a usufructuary mortgage by which the mortgagor undertook to keep the premises in repair is a continuing one and a suit on such covenant is not barred by limitation. (1901) 3 Bom.L.R. 156.

3 Cause of action.

——S. 23—Recurring cause of action.

Where a community has a right to worship the dhar but another community disputes that right and washes off puja ingredients, there is a recurring cause of action for the community entitled to worship as long as the dispute continues. A suit for declaration cannot become time-barred if it is within six years from the date of last dispute. 1945 N.L.J. 80=A.I.R. 1945 Nag. 106=I.L.R. (1945) Nag. 273.

——S. 23—Wrong—Meaning of—Suit for declaration of right to share in monthly allowance—Cause of action.

The cause of action for a suit for declaration of title arises when effective denial of that title first takes place. Where the trustees continued to pay a certain monthly amount to the male heirs of the deceased settlor month after month over a long period of years to the exclusion of the female heirs, for cause of action for a suit by the female heirs for declaration of their right to share in the monthly amount does not arise upon the making of each payment under S. 23. It would arise when effective denial of their title or right first took place. S. 23 has no application to such a case because the word "wrong" in S. 23 is used in a restricted sense and implies something in the nature of a tort. 1944 A.W.R. 11=1944 O.W.N. 37=A.I.R. 1944 Oudh 139=19 Luck. 515= 216 Ind. Cas. 276.

——S. 23—Cause of action arising in time of predecessor, from settlement proceeding.

If the plaintiff institutes a suit on the cause of action arising from the settlement proceeding, he cannot have a different terminus a quo for the starting of limitation from what his predecessor had. Whether the predecessor chose to sue or not, the limitation which once began to run in respect of a cause of action cannot be stopped by the property being afterwards sold, and the plaintiff could not acquire any independent right in respect of the same cause of action by reason of his subsequent purchase. A.I.R. 1937 Oudh 291=1937 O.W.N. 207=1937 R.D. 105=13 Luck. 143= 166 Ind. Cas. 774.

——S. 23—Cause of action—Continuing wrong.

If a defendant, by several acts; attempts to oust the plaintiff from his property, then every such act gives the plaintiff a fresh cause of action but

where the plaintiff himself has done some act which has merely been resisted by the defendant, he has no further cause of action. If it were so, the plaintiff would be able by his own act to create a fresh cause of action any time he wished. A. I.R. 1937 Pesh. 94=171 Ind. Cas. 267.

——S. 23—Cause of action—Illegal partnership—Claim for refund of capital.

An unregistered business association of more than 20 persons was formed in contravention of S. 4 of the Companies Act of 1882. About 20 years later, the heirs of one of the members brought a suit for a declaration that the partnership was illegal and for the recovery of the share of the capital contributed by their ancestor. They alleged that they had been pressing the other partners to get the partnership registered but that they had refused to do so.

Held, that the cause of action for return of the money accrued as soon as the money was paid and there was no continuing cause of action in plaintiff's favour. 64 Ind. Cas. 447=19 A.L.J. 836=A.I.R. 1921 All. 73.

——S. 23—Cause of action—Appropriation of income by co-sharer—Suit for declaration.

Every fresh appropriation of the income of property by one co-sharer to the exclusion of others is a fresh invasion of their rights and gives rise to a fresh cause of action to the other co-sharers for a suit for a declaration of their rights. 21 P.L.R. 1918=43 P.W.R. 1918=44 Ind. Cas. 31.

——S. 23—Cause of action—Alienation of offerings of a temple—Suit for declaration.

Alienations of future income of the offerings give a fresh cause of action on each successive act of appropriation by the alienee and a suit is therefore not barred by limitation. 40 Mad. 212 =31 M.L.J. 777=20 M.L.T. 490=5 L.W. 625 =(1917) M.W.N. 400=38 Ind. Cas. 73.

——S. 23—Continuing wrong — Trade mark—Infringement — Cause of action.

The infringement of a trade mark is a continuing wrong and so long as the infringement continues, a fresh cause of action arises de die in diem. 97 P.R. 1913=5 P.L.R. 1912 (Supp.)= 166 P.W.R. 1913=15 Ind. Cas. 116.

——S. 23 and Art. 120—Cause of action—Trespass.

Every act of trespass gives a fresh starting point for limitation. 12 A.L.J. 1150=25 Ind. Cas. 185.

——S. 23—Continuing wrong — Wrongful distraint—Cause of action.

Where the cause of action consists in a wrongful distraint, there is no continuing wrong and so no continuing cause of action under S. 23. 38 Mad. 655=1 L.W. 89=24 Ind. Cas. 754.

4 "Continuing wrong"—Test and essence of.

——S. 23—Applicability — "Continuing wrong" —Test of—Injury and effects of injury—Distinction between to be kept in view.

Where the injury complained of is complete on a certain date, there is no "continuing wrong" though the damage caused by that injury might continue. In such a case, the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the injured person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong". If however, the act is such that the injury itself is continuous, then there is a continuing wrong so as to give him a fresh cause of action on each such occasion. The distinction between an "injury" as such and the effects of that injury has to be kept in mind in considering whether a particular act constitutes a continuing wrong. A.I.R. 1950 E. P. 21.

——S. 23 — "Continuing wrong" — Test and essence of.

Per Mudholkar, J —The criterion for the applicability of S. 23, Limitation Act, is not whether the right is a continuing one but whether the wrong is a continuing one. 26 M. 410 and 54 B. 4, rel. on. I.L.R. (1950) Nag. 633.

——S. 23—Applicability — Test of — Essence of continuing wrong — Continuing wrong or continuing effects of injury—Distinction.

To give rise to a continuing wrong there must be not a single wrongful act from which injurious consequences follow, but there must be a state of affairs every moment's continuance of which is a new tort. The continuance of a legal injury is distinct from the continuance of the injurious effects of a legal injury. The former is a continuing wrong but the latter is not. Though the effect of a wrongful act may continue time will not be extended under S. 23, Limitation Act. Where the wrong consists in the omission of a legal duty if the duty is to continue to do something, the omission to continue to do it is a continuing wrong. The test is not whether the corresponding right is a continuing right, but whether the wrong is a continuing wrong. Where the act or wrong is complete, S. 23 will not apply. 14 Cut.L.T. 73=A.I.R. 1949 Orissa 1.

——S. 23—"Continuing wrong"—Test and absence of.

S. 23, Limitation Act can only apply where the wrong is really a continuing one, and this cannot be the case where the encroachment is by an act such as the building of a wall, which is over and done with once completed. A distinction must be made between the continuance of a legal injury and the continuance of its injurious effects. There is nothing in S. 23 upon which to base a distinction between public and private rights. Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the right infringed. A.I.R. 1940 Pat. 449=19 Pat. 208=6 B.R. 894=22 P.L.T. 46=190 Ind. Cas. 46.

——S. 23—"Continuing wrong"—Tests.

In the case of a continuing wrong, there must be not a single wrongful act from which injurious consequences follow, but a state of affairs every moment's continuance of which is a new tort. Further the person who intentionally produces the state of affairs must be intentionally causing it to continue, though in a position to terminate it at his pleasure. (1935) M.W.N. 634=42 M.L.W. 599=A.I.R. 1935 Mad. 867=69 M.L.J. 739 =59 M. 75=161 Ind. Cas. 658

——S. 23 and Art. 120 — 'Continuing wrong,'—Test and essence of—Encroachment by joint owner by building chabutra on land reserved for common purpose claiming it as his own — Suit for injunction, if governed by S. 23 of Art. 120.

Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue. In such a case, the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If, however, the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by S. 23.

In the case of a 'trespass', there is a fresh injury and a fresh cause of action at every moment during the period during which the trespass continues. But where the act complained of amounts to complete ouster of the plaintiff, the injury is complete at the date of the ouster. To such cases S. 23 does not apply. An encroachment made by a joint owner by building a chabutra on land reserved for common purposes, claiming it as his own, does not constitute a "continuing wrong" within the meaning of S. 23; the injury in such a case is complete at the time the construction is put up and the cause of action, whether for the removal of the chabutra or for possession of the land underneath, arises once for all when the chabutra is built, and a suit for injunction is governed by Art. 120 and not by S. 23. A I R. 1940 Lah. 359=I.L.R. (1941) Lah. 22=43 P.L.R. 400=191 Ind. Cas. 42 (F.B.).

——S. 23—Continuing wrong—Test.

The criterion is not whether the right is a 'continuing one', but whether the wrong is a continuing one'. (1902) 26 M. 410.

5. Effect of trespass and dispossession.

——S. 23—Effect of trespass and dispossession—'Continuing wrong', what is—Continuance of possession after trespass—Starting of limitation.

Continuance of possession after trespass is not a 'continuing wrong.' Hence when there has been a dispossession and ouster, the wrong is complete and the starting point of limitation is the date of ouster or dispossession. I.L.R. (1944) Nag. 753=1944 N.L.J. 467=A.I.R. 1945 Nag. 78.

——S. 23—Effect of trespass and dispossession—Distinction between encroachment upon private land and upon public land.

There is nothing in S. 23, Limitation Act, upon which a distinction can be made between the case of encroachment upon private land and upon public land and if in the one case, limitation may run, there is no reason why it should not also run in the case of a precisely similar act, committed upon public land. Whether the wrong is continuing or not must depend upon the nature of the wrong and not upon the nature of the land over which it is committed. A distinction must further be made between the continuance of a legal injury and the continuance of its injurious effects, and there is no perpetual right of suit under S. 23, where a wrong be continued or not, when the trespass itself gives rise to rights extinguishing any right of suit. When the wrong amounts to dispossession of the plaintiff, then, even although it may be a continuing wrong, the plaintiff cannot recover possession after 12 years because under S. 28 of the Limitation Act, he himself has got, no right left which he can enforce. 22 P.L.T. 1001=8 B.R. 302=A.I.R. 1942 Pat. 188=197 Ind. Cas. 818.

——S. 23—Effect of trespass and dispossession—Owner of gairmazrua-am and ahar land completely dispossessed by other person by building chabutra on land—Suit for possession beyond 12 years, is barred—S. 23 does not apply. A.I.R. 1941 Pat. 181=19 Pat. 852=7 B.R. 739=22 P.L.T. 986=194 Ind. Cas. 243.

——S. 23—Effect of trespass and dispossession—Continuing wrong—Where it amounts to dispossession, possession cannot be recovered after twelve years — Wrong, not amounting to dispossession, ripening into easemet—There is no cause of action.

Where the wrong amounts to dispossession of the plaintiff, then, although it may be a continuing wrong; the plaintiff cannot recover possession after twelve years, because under S. 28; Limitation Act; he himself has got no right left which he can enforce. Where the plaintiff is Government or is representing Government, this period will be 60 years under Art. 149, Limitation Act. Where the plaintiff is a local authority suing in regard to a public road, the period will be 30 years under Art. 146, Limitation Act. Where the obstruction does not amount to dispossession of the plaintiff, either because it is not the plaintiff's land, or because the plaintiff himself has only a right of easement, as in the case of rights of way of villagers originating in custom, then in such cases, even though the wrong be a continuing one, there would be no right of action after twenty years (or sixty years in the case of Government) where the defendant's wrong has itself ripened into an easement, and this right of the defendant is one subsisting with two years next before the date of the suit. 19 Pat. 208=A.I.R. 1940 Pat. 449=6 B.R. 894=22 P.L.T. 46=190 Ind. Cas. 46.

——S. 23—Effect of trespass and dispossession—Trespass—Continuing wrong—Ejectment suit dismissed—Subsequent suit.

Dispossession is a trespass and in one sense a continuance of possession thereafter is a continuance of the original wrong but that is not the meaning of S. 23, Limitation Act. The Act must be read as a whole and must be construed in such a manner that there is no conflict between S. 23 and Arts. 142 and 144. Complete usurpation of possession and occupation and consequent dispossession of the owner, is a wrong which is complete from the moment of dispossession. It is not a continuing trespass of a character contemplated by S. 23. Hence where a suit alleging that the defendant had taken possession of certain land and tank, forcibly and illegally, that the defendant's possession constituted a trespass and praying that the defendant be ejected, is dismissed, a subsequent suit alleging forcible and wrongful possession and praying for possesssion of the same land is barred, the cause of action being the

same and not a continuing one. A. I. R. 1939 Nag. 145=1939 N.L.J. 153=182 Ind. Cas. 613.

——S. 23—Effect of trespass and dispossession—Taking exclusive possession of land, if continuing trespass or dispossession.

Whether the land belongs to a community or not, if one person takes sole and exclusive possession of it, or some portion of it, and excludes all others who have a right to occupation from possession then the trespass is not a continuing trespass of the kind contemplated by S. 23, but is dispossession of the character dealt with in Arts. 142 and 144, Limitation Act. A.I.R. 1939 Nag. 145 =1939 N.L.J. 153=182 Ind. Cas. 613.

——S. 23—Effect of trespass and dispossession.

S. 23 would not apply to a case where the defendant has erected a chhappar on plaintiff's land and taken possession of the land adversely to the plaintiffs, as the cause of action is complete as soon as the chhappar is erected. 124 P.R. 1912 and 28 C.L.J. 494, Rel. on. 60 Ind. Cas. 20= 3 L.L.J. 128=A.I.R. 1921 Lah. 242.

——S. 23 and Art. 146—Effect of trespass and dispossession—Continuing wrong — Adverse possession—Encroachment in Municipal street.

Where the defendant had erected a rowak or platform as an integral part of his building over a street or a drain vested in the plaintiff. Municipality and the buiding had stood for half a centuary there is no continuing wrong and limitation for a suit by the plaintiff is not saved by S. 23 of the Limitation Act. The injury is complete on the erection of the rowak. 28 C.L.J. 494=49 Ind. Cas. 93.

6. Obstruction to light and air.

——S. 23—Obstruction to light and air.

The plaintiff obtained in 1914 an injunction forbidding the defendants from building their house in such a way as to interfere with the passage of light and air through certain ventilators constructed in the plaintiff's house. In 1933, the decreeholder filed an application in execution complaining that the defendants had disobeyed the injunction in that they had built their house in such a way that one of the ventilators had been closed and another interfered with and also that the injunction with regard to the other ventilator disobeyed:

Held, that the case was one of continuing breach and no limitation period applied. A.I.R. 1936 Lah. 334=162 Ind. Cas. 303.

——S. 23—Obstruction to light and air—Injunction restraining defendant from obtructing light by building—Defendant building and obstructing—Execution application beyond three years from such obstruction is barred. A.I.R. 1935 Lah. 702=37 P.L.R. 576=160 Ind. Cas. 777.

7. Obstruction to right of way.

——S. 23—Public way—Obstruction to, if continuing wrong—Starting point for limitation.

An obstruction to a public way which prevents someone from exercising a right of way does fall within the scope of the term, "continuing wrong" in S. 23; Limitation Act, and a fresh period of limitation begins to run under S. 23 at every moment of the time during which the wrong continues. (Principles enunciated). A.I.R. 1942 All. 77=(1941) A.L.J. 706=1942 R.D. 20=1941 A.W.R. (H.C.) 376=198 Ind. Cas. 532.

——S. 23—Obstruction to right of way—Erection of building on public street—Plaintiff suffering special damage, access to highway from his house being prevented—Suit for injunction more than six years after erection of building is not time-barred. A.I.R. 1937 Lah. 94=171 Ind. Cas. 509.

——S. 23—Obstruction to right of way—Defendant constructing sheds on land which plaintiff has right to use—Obstruction.

Where the plaintiff has a right to use the land on which certain sheds have been erected as a passage and these sheds are obstructing his passage way, there is a continuing wrong. Consequently, S. 23 applies to a suit by the plaintiff for declaration of his right to use the land and for removal of the sheds. A.I.R. 1935 Cal. 405 =156 Ind. Cas. 390.

——S. 23—Right of way.

Suit for declaration that certain pathways were lands to which the public had a right is governed by S. 23. A.I.R. 1934 Pat. 34=146 Ind. Cas. 408.

——S. 23—Obstruction to right of way—Co-owner, obstruction by.

A suit by one co-owner against another for the removal of the actual existing obstructions constructed by the other, on land; which by long usage and by agreement between the parties is reserved for use as a common passage is governed by Art. 144. Further the wrong is a continuing wrong within S. 23 of the Limitation Act. 76 Ind. Cas. 328=A.I.R. 1923 Cal. 356.

——S. 23—Continuing wrong—Encroachment on public way.

A suit for ejectment of a person from a specific field is not within S. 23 of the Limitation Act by the fact that the field has been recorded as a part of a thoroughfare and shamilat deh. Where in spite of encroachment on a road, the road left is sufficiently broad for the use of the public, the encroachment cannot be treated as an interruption of easement giving a recurring cause of action de die in diem under S. 23 of the Limitation Act. 124 P.R. 1912=2 P.L.R. 1913=132 P. W. R. 1912 =15 Ind. Cas. 285.

——S. 23—Right of way.

Where the plaintiff has got a right, every invasion of that right gives a fresh cause of action. 20 A. 35; A.W.N. (1898) 215, Rel. on. 12 O. C. 320=4 Ind. Cas. 159.

——S. 23—Continuing wrong — Obstruction to right of way—De die in diem.

Obstruction to the right of pathway acquired by long user is a continuing nuisance and gives a fresh starting point for limitation de die in diem. 2 Ind. Cas. 410 (Cal.).

8. Obstruction to water course.

——S. 23—Water-course—Obstruction to.

Obstruction to a water-course and to the flow of water is a continuing wrong as to which the cause of action is renewed de die diem so long as the obstruction causing such interference is allowed to continue. A.I.R. 1942 All. 77=1941 A.W.

R. (H.C.) 376=(1941) A.L.J. 706=1942 R.D. 20=198 Ind. Cas. 532.

——S. 23—Obstruction to water-course — Construction of dam by upper riparian owner—Obstruction to water by accumulation of silt—Injury to lower riparian owner is continuous. A.I.R. 1938 Mad. 180=46 M.L.W. 862=(1936) M.W.N. 948 (2)=174 Ind. Cas. 229.

——S. 23—Interference with flow of water.

In respect of interference with a water-course, the party injured has a continuing cause of action within the meaning of S. 23. (1935) M.W.N. 538=69 M.L.J. 42=42 M.L.W. 183=A. I. R. 1935 Mad. 668=158 Ind. Cas. 987.

——S. 23—Obstruction to water course—Disconnection of water pipe—U. P. Municipalities Act, S. 228 (b).

S. 228 (b), U. P. Municipalities Act, 1916 refers to the duty of the Board to allow the owner to connect his house for the purpose of obtaining water from the main. If therefore the connexion is cut off and the owner is prevented from obtaining water from the main pipe by means of his communication pipe, there is a continuing breach giving rise to continuing cause of action inasmuch as the owner is continually prevented from connecting his house with main pipe. The duty of the Board is continuing duty and the continuing breach of it gives cause of action to owner from day to day. A.I.R. 1929 All. 870=1930 A.L.J. 94=118 Ind. Cas. 713.

——S. 23—Obstruction to use well—'Continuing cause of action' explained.

A cause of action, in respect of which a plaintiff is entitled to have the prospective damages assessed is distinct from a continuing cause of action, that is to say, a cause of action which arises from the repetition or continuance of acts or omissions of the same kind as that from which the action has been brought. Similarly, where the damage consequent on an act or omission rather than the act or omission itself is actionable, then as the action is only maintainable in respect of the damage, or is not maintainable until the damage is sustained, an action will lie every time damage accrues from the act.

The obstruction from taking water from a well is a continuing injury. 98 Ind. Cas. 879=A.I.R. 1927 Nag. 85.

——S. 23—Obstruction to water-course—Closing drains.

Action of a person in closing up certain drains which emitted water from another's building on to the former's premises is a continuing wrong within S. 23. 92 Ind. Cas. 994=A.I.R. 1926 Lah. 242.

——S. 23—Continuing obstruction to water course.

If it is alleged by the plaintiff that the obstruction caused by closing the main sluice of a tank continued and he was prevented from removing the same by threat of violence it is continuing wrong under Art. 37 read with S. 23 of the Limitation Act. The suit would be within time if it is brought within three years of the last day to which the wrong continued. 82 Ind. Cas. 482=A.I.R. 1925 Nag. 189.

——S. 23 and Art. 120—Continuing wrong—Discharging rain water on plaintiff's roof.

Plaintiffs sued for perpetual injunction restraining defendant from discharging rain water on to the roof of the plaintiff's shop through a parnala.

Held, that each occasion when the defendant discharged water through the parnala on the plaintiff's roof the plaintiff's got a fresh cause of action and that the last occasion when this was done may be held as the starting point of limitation for the present suit, unless an indefeasible right of easement by twenty years' enjoyment has been acquired by the defendant. 25 Ind. Cas. 185; 24 W.R. 97, Foll. 2 U.P.L.R. (Lah.) 116 =2 Lah. L.J. 463=56 Ind. Cas. 1003.

——Ss. 23 and 26—Continuing wrong — Riparian right—Obstruction.

The obstruction of a stream, whether having a continuous flow or not, is a continuing wrong under S. 23 of the Limitation Act and a suit for its removal is not governed by S. 26. 3 Pat.L.W. 5=3 Pat.L.J. 51=43 Ind. Cas. 235.

——S. 23—Continuing wrong — Obstruction to discharge of water.

An obstruction to the discharge of surface water constitutes a recurring cause of action so that no question of limitation can arise in regard to a suit for the removal of the obstruction. 22 C.W.N. 666=41 Ind. Cas. 863.

——S. 23—Continuing wrong — Obstruction to waterflow—Right of way.

The obstructions which interfere with the flow of water are in the nature of continuing nuisances as to which the cause of action is renewed **de die in diem** so long as the obstructions causing such interference are allowed to continue. There is no distinction between an obstruction to a watercourse and one to a way and wrongful interference with a right of way constitutes a nuisance. Obstructions to easements other than watercourses may be treated as continuing nuisances. 21 C.L.J. 640=29 Ind. Cas. 385.

——S. 23, Sch. II, Art. 120—Continuing wrong—Obstruction by dam.

Suit for injunction to remove an obstructing dam is not barred, though the defendant had constructed the dam 17 years before suit, as the wrong was a continuing wrong. 3 S.L.R. 228=6 Ind. Cas. 881.

——S. 23—Flow of water—Continuing injury.

The flow of water over another's land is a continuing injury and S. 23 applies to such a case. (1904) 15 M.L.J. 32=28 M. 72.

9. Restitution of conjugal rights.

——S. 23—Restitution of conjugal rights.

The continuing wrong referred to in S. 23 includes failure of a wife to return to her husband.

Consequently where the husband brings a suit for restitution of conjugal rights within six years of the first refusal of the wife to return, it is within time under Art. 120. A.I.R. 1936 Bom. 289 =38 Bom.L.R. 502=164 Ind. Cas. 628.

——S. 23—Restitution of conjugal rights.

The cause of action for a suit for restitution of conjugal rights is founded on a breach of the contract of marriage and the breach continues so long as the person of the wife is withheld from

the husband and he is denied the undoubted legal right of her conjugal society. This view of the cause of action in a suit for restitution of conjugal rights places it within the purview of S. 23. 65 Ind. Cas. 452=8 O.L.J. 650=A.I.R. 1922 Oudh 109.

——S. 23, Art. 35—Restitution of conjugal rights —Demand and refusal.

A suit for restitution of conjugal rights is barred by limitation if such restitution had been demanded by one party and refused by the other who is of full age and sound mind, more than two years prior to the date of suit. 13 A. 126, diss. from. and 16 B. 714 overruled. (1901) 3 Bom. L.R. 371=25 Bom. 644 (F.B.).

——S. 23—Suit for restitution of conjugal rights —Not applicable. See ART. 35. 11 C.W.N. 437=34 C. 79.

10. Scope and applicability.

——Ss. 23, 24 and Art. 30—Scope and applicability — Suit for compensation against railway company for injuring goods—Deterioration of goods due to continued negligence of railway servants—Continuing cause of action—Measure of damages.

The plaintiff sued the defendant railway company for damages for injury caused to a consignment of goods which he made over to them. The defendant did not deliver the goods at the destination for which the consignment was intended owing to the shortage of wagons due to the war. Nor did the defendant permit the plaintiff to have his goods duly protected from rain by placing them under cover at the railway station or to remove them altogether. After some months, however, the plaintiff was permitted to remove the goods. He claimed damages in respect of the deterioration up to that date.

Held, (1) that S. 24 of the Limitation Act applied to the case and no suit would have lain unless and until specific injury occurred to the plaintiff;

(2) that S. 23 of the Limitation Act also applied because there was a continuing cause of action right up to the date on which the plaintiff was permitted to remove the goods. The deterioration of goods being due to the continuous negligence of the defendant's servants, was a continuing wrong;

(3) that the defendant was responsible for the total damage down to the date on which the plaintiff was for the first time allowed to take away his goods, because of the continuing negligence. I.L.R. (1947) Nag. 726=1947 N.L.J. 540=A.I.R. 1947 Nag. 224.

——S. 23, Arts. 144, 146-A—Scope and applicability.

Suit for possession by Union Board constituted under Bengal Village Self-Govt. Act 1919 in respect of strip of land which it claimed as part of public road—Defendant found in possession from before date of establishment of Board—Art. 144, held applied and not Art. 146-A—Suit held barred S. 23 held did not apply. A.I.R. 1942 Cal. 151 =73 C.L.J. 608=45 C.W.N. 802=200 Ind. Cas. 386.

——S. 23—Scope and applicability — Continuing wrong—Right to conduct festival.

A person who possesses a right to conduct a festival does not lose it because he does not institute a suit in respect of the first infringement of the right. If it is a recurring infringement, he can take action whenever he desires so long as he remains the holder of the right. A.I.R. 1941 Mad. 498=I.L.R. (1941) Mad. 544=53 L.W. 315=1941 M.W.N. 250=(1941) 1 M.L.J. 322 =43 Cr.L.J. 433=198 Ind. Cas. 793.

——S. 23—Scope and applicability — Private and public suits.

Section 23 Limitation Act makes no distinction between private suits and public or representative suits. A.I.R. 1941 Pat. 181=19 Pat. 852 =7 B.R. 739=22 P.L.T. 986=194 Ind. Cas. 243.

——S. 23—Scope—Commencement of limitation.

In the case of continuing breach of contract or continuing wrong independent of contract, fresh period of limitation begins to run from the moment the breach or the wrong continues. A.I.R. 1939 Pat. 149=5 B.R. 237=179 Ind. Cas. 482.

——S. 23—Scope.

Per Skemp, J.—Every invasion of right although it might be a repetition of the old one gives a new cause of action with a new starting point of limitation. The distinction between a fresh invasion and a repetition of a previous invasion is a distinction without a difference. A. I. R. 1938 Lah. 227=40 P.L.R. 600=181 Ind. Cas. 199.

——S. 23—Scope and applicability — Attachment, whether continuing wrong.

A mere continuation of a prior cause of action does not give rise to a fresh right, e.g., where property is attached, the procuring of the attachment is the wrongful denial and the cause of action arises where the attachment is effected. In such a case, it is wrong to say that there has been a continuing wrong so as to give a fresh starting point during the whole period the attachment subsists. A.I.R. 1938 Mad. 193=(1938) M.W.N. 244=47 M.L.W. 438=(1938) 2 M.L.J. 434=181 Ind. Cas. 688.

——S. 23—Scope and applicability — Order of Settlement Court about defendants being recorded as under-proprietors.

Where the order of the Settlement Court about the defendants being recorded as under-proprietors is a wrong to the plaintiff, the wrong is complete when the order is passed and the entry made and it cannot be regarded as a case of a continuing wrong. 1937 O.W.N. 207=1937 R.D. 105=A. I. R. 1937 Oudh 291=13 Luck. 143=166 Ind. Cas. 774.

——S. 23—Scope and applicability.

Order under S. 147, Cr. P. Code (Act 5 of 1898) passed in 1900 prohibiting plaintiffs who were Nadars by caste, from taking out procession until their right was declared by Civil Court—Suit brought more than six years of forder—Fresh obstructions:

Held, that S. 23; Limitation Act; was inapplicable as the order of 1900 did not constitute a continuing wrong within S. 23 and even if there was a continuing wrong, the defendants were not responsible for it,

Held, further, that the occurrence in 1918 when the plaintiffs made attempts to take processions over the route could not give a valid cause of action

to the plaintiffs. The general rule, viz., that where there are successive invasions or denials of a right, time will in general run from the first of the series, must be applied in the present case because in 1900 not only were the Nadars prevented from going in procession but an order was obtained disallowing all further processions until the right had been established. (1935) M.W.N. 634=42 M.L.W. 599=69 M.L.J. 739=59 M. 75=A.I.R. 1935 Mad. 967=161 Ind. Cas. 653.

——S. 23—Scope and applicability — Alterations made in the 'charans' (footprints) in the shrines worshipped by Jains, by swetambaris—'Digambaris' held had right to sue—Alterations held, was a continuing wrong under Limitation Act, S. 23. A.I.R. 1938 P.C. 193=(1933) M.W.N. 882=38 M.L.W. 306=65 M.L.J. 163=(1933) A. L. J. 1325=35 Bom.L.R. 990=37 C.W.N. 1021=12 Pat. 681=14 P.L.T. 559=58 C.L.J. 56=60 I. A. 313=144 Ind. Cas. 346 (P.C.).

——Ss. 23, 29—Scope and applicability.

S. 211 of the Madras Tstates Land Act, 1908, must be taken to override the general provisions of S. 29, Limitation Act. It may be possible in a suitable case to apply the principles of S. 23, Limitation Act but in a case where the date of occupation mentioned in Art. 7 of Sch. B of Mad. Estates Land Act has to be understood only as the date on which the occupation was begun, S. 23 could be of no avail. 38 M.L.W. 214=A.I.R. 1933 Mad. 521=(1933) M. W. N. 1230=144 Ind. Cas. 963.

——S. 23—Scope and applicability — Wrong — Change in religious views.

Change in religious views in not "wrong"; nor continuation of those views is a 'continuing wrong'. 53 P.R. 1909=2 Ind. Cas. 107.

——S. 23—Scope and applicability — Continuing injury.

Per **Shah, J.**—Where sulphuric acid was thrown at a person and injury was caused to his eye therefrom the continuance of its effect at a later date was not held to be continuing wrong within the meaning of S. 23 of the Limitation Act. 84 Ind. Cas. 796=25 Bom.L.R. 1333=A.I.R. 1924 Bom. 290.

——S. 23—Scope and applicability — Declaratory suit.

The principle of S. 23 which deals with continuing wrong can have no application to declaratory suit and there is no recurring cause of action for declaratory relief. 74 Ind. Cas. 403=2 Pat. 391=4 P.L.T. 675=A.I.R. 1923 Pat. 475.

——S. 23—Scope and applicability—Denial of title.

A declaratory suit under S. 42, Specific Relief Act, can be brought when the plaintiff's title is denied by some person, and the denial itself gives a cause of action for a declaratory relief. To such a suit S. 23, Limitation Act, cannot apply as it refers to a continuing wrong and not to a continuing right. 124 Ind. Cas. 773=31 Bom.L.R. 1240=54 Bom. 4=A.I.R. 1930 Bom. 61.

——S. 23—Scope and applicability — Continuing wrong—Non-transferable tenancy — Mortgage by tenants—Oudh Rent Act (12 of 1886), S. 52 (2).

Where tenants holding land under a settlement decree with heritable and non-transferable rights mortgaged their holding and a suit in ejectment was brought by the landlord 16 years after the mortgage, held, S. 23 of the Limitation Act applied as there was a continuing wrong. 1 O.L.J. 273=24 Ind. Cas. 780.

——S. 23—Scope and applicability—Nuisance.

The causing of a nuisance is a continuous wrong and a fresh period of limitation begins to run at every moment during which the wrong continues. 60 Ind. Cas. 529 (Lah.).

——S. 23—Scope and applicability — Seizure of movables.

Wrongful seizure of movable property is not a continuing wrong within the meaning of S. 23, although the party is deprived of the possession and use of the property during the period it is taken out of his possession. 31 M.L.W. 675=53 Mad. 621=59 M.L.J. 859=1930 M. W. N. 305=A.I.R. 1930 Mad. 635.

——S. 23—Continuing wrong—Using mosque as private residence.

Where the defendant, the mutwalies, built in 1903 a balakhana over the mosque and used it as a private residence and the plaintiff sought to eject them in 1912. Held, that the defendant's act was a "continuing wrong" within S. 23 of the Act so that a fresh period of limitation began to run at every moment of the time during which the wrong continued. 31 P.R. 1917=31 P.W.R. 1917=39 Ind. Cas. 116.

——S. 23—Wrongful distraint — U. P. Tenancy Act, S. 146.

The wrong inflicted by an unlawful distraint continues and is renewed every day that the distraint lasts the lawful owner of the property being thereby restrained from making use of it or exercising any right of ownership over it. The cause of action therefore for a suit for damages in respect of a wrongful distraint takes its origin from the day on which the distraint comes to an end and the suit may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. 73 Ind. Cas. 299 =45 All. 208=4 L.R.A. (Civ.) 48=A. I. R. 1923 All. 146.

——S. 23, Art. 36—Scope and applicability—Suit for damages for wrongful attachment before judgment—Wrongful seizure.

In a suit for compensation under Art. 36, S. 23 would be applicable if the damages caused by the tort complained of would be nil or a negligible quantity but for the continuance of the injury voluntarily caused or permitted by the tort-feasor. A wrong prohibitory order stands on a different footing from a wrongful seizure on complaint made. In the former case, the party who procures it may at any time obtain its removal and consequently S. 23 will apply in that case. In the latter case, the initial act of complaint is the only damage which the tort-feasor could have prevented and consequently S. 23 has no application to that case as the cause of action is complete on complaint made. (1903) 6 Bom.L.R. 704.

11. Miscellaneous.

——S. 12 and Arts. 120 and 131—Miscellaneous—Suit by succeeding manager to set aside a commutation—Arrangement made by his predecessor.

Where the defendant held lands belonging to a temple at half the Government rates and was also liable to render certain personal services and the manager commuted the latter into a money rent of one rupee, in a suit by the subsequent manager to set aside this commutation ten years after its date. Held, remanding the case (1) that if the arrangement was a temporary one the suit would not be barred if brought within 12 years of denial of the plaintiff's right inasmuch as the plaintiff's claim was either to assess rent which was a recurring right or to enhance the rent, and (2) that if the arrangement was a permanent one and the rent was fixed in perpetuity then it would amount to the creation of a permanent tenure, at a fixed rent by shebait and it must be set aside within 6 years of the plaintiff's succession to office. Otherwise the suit would be barred under Art. 120. 39 Ind. Cas. 522 (Cal.).

——S. 23 and Arts. 115 and 116—Miscellaneous—Usufructuary mortgage — Mortgaged property sold for arrears of revenue—Subsequent suit for redemption by mortgagor—Decree of redemption—Limitation for suit by mortgagor for damages for wrongful deprivation of property and wrongful cutting of trees by mortgagee.

A deed of usufructuary mortgage provided that the mortgagee should pay Government revenue. The mortgagee made default in the payment and the property was sold in public auction, subsequently the mortgagor sued for redemption and obtained a decree. Before six years from the date of redemption decree, but after six years from the date of the revenue auction sale, the mortgagor sued the mortgagee for damages for deprivation of property and for damages for the wrongful cutting of trees while in the mortgagor's possession: Held, (1) that the claim for damages for loss of property was governed by Arts. 115 and 116 read with S. 23 and was not barred as the time commenced to run from the date of the redemption decree and not from the date of the auction sale. The fortgagor need not have asked for a set off of this amount in the redemption suit under S. 76, T. P. Act, as that section only provides a cumulative remedy and does not bar any other remedy which may be open to the mortgagor. (2) That the claim in regard to the cutting of the trees was barred under Art. 36 as time commenced to run from the date of the alleged wrongful act. 33 Mad. 71=6 M.L.T. 239=19 M.L.J. 498=3 Ind. Cas. 433.

——S. 24—Applicability—Suit for breach of contract — Execution by decree-holder ignoring payment by judgment-debtor but not certified under O. 21, R. 2, C. P. Code—Suit by judgment-debtor — Limitation. See LIMITATION ACT, ARTS. 97 AND 115. A.I.R. 1951 Pat. 348.

——S. 24—Applicability.

Suit against Advocate for neglect and misconduct in not joining certain person as a party to appeal—Plaintiff aware of neglect but not knowing of legal consequences:

Held, S. 24 does not apply. S. 24 applies only to suits based on tort and not to suits based on contract. 11 Rang. 61=A.I.R. 1938 Rang. 258=1938 Rang. L. R. 457=176 Ind. Cas. 608 (F.B.).

——S. 24—Scope of.

Section 24 cannot have any control over Art. 115 or Art. 116. Section 24 applies not to suits based on contract but to suits based on tort. A.I.R. 1936 Rang. 510=166 Ind. Cas. 48.

——S. 24—Scope.

Per Shah, J.—Soction 24 of the Limitation Act relates to an act which does not give rise to a cause of action unless some specific injury actually results therefrom. 84 Ind. Cas. 796=25 Bom. L.R. 1333=A.I.R. 1924 Bom. 290.

——S. 24—Time, when runs.

Section 24 does not give, as the date from which time begins to run, the date on which the plaintiff became aware of the loss, but mentions the date on which the loss actually resulted. A.I.R. 1936 Rang. 310=164 Ind. Cas. 410.

——S. 24—Bodily injury — First suit for damages—Second suit for further injury consequential on the first injury.

Plaintiff is entitled to compensation not only for damages actually visible at the time when the suit is instituted or at the time of trial, but even such consequential damage as may reasonably be expected to arise in the future from the wrongful act complained of; where a plaintiff has sued for and recovered damages for injury to his person, a future suit for subsequent loss of the injured limb is not maintainable as it did not give rise to a fresh cause of action without any further wrong on the defendant's part. S. 24 of the Limitation Act was not at all applicable to the case. 1 Pat. L.T. 269=(1920) P.H.C.C. 193=58 Ind. Cas. 749.

——S. 24—'Injury'.

"Injury" in S. 24 of the Limitation Act includes a legal injury. 54 Bom. 226=32 Bom.L.R. 232=A.I.R. 1930 Bom. 572.

——S. 24—Malfeasance—Suits governed by Art. 36.

If a suit is for compensation for any malfeasance or misfeasance independent of contract and not otherwise provided for, the limitation will be two years not from the date of the malfeasance or misfeasance, but from the time when the injury results. 120 Ind. Cas. 626=10 P.L.T. 191=8 Pat. 776=A.I.R. 1929 Pat. 245.

——S. 24, Arts. 2 and 38—Municipality — Suit against, for compensation for injury to plaintiff's estate resulting from acts of Municipality—Starting point of limitation—Punjab Municipal Act (20 of 1891), S. 120 (A)—Omissions to give notice.

There is no justification for the proposition that Art. 2 of the Limitation Act can apply only in those cases in which the defendant at the time of doing the act, which has subsequently resulted in injury to the plaintiff in so many words, says that he is acting under such a provision of law. When there is a provision of law limiting the time or regulating the procedure of bringing actions for things done in pursuance of an enactment, the defendant is entitled to the benefit of protection of such provision if he honestly believed in the existence of a state of facts which, if it had exist-

ed would have justified him under the enactment to do the thing complained of. The reasonableness of the belief may be honest, though it is an important element in determining the question of honesty. Art. 2 is evidently intended to afford protection to persons doing acts in pursuance of some enactment in force. The limitation which it prescribes applies to all cases when the parties are intending to act upon powers given by the enactment and not merely using it as a cloak for private purposes.

Held, that no doubt the Punjab Municipal Act provides that due notice shall be given before operations are commenced under S. 120-A, but whatever rights a person may have against a committee, if operations are commenced on his property in the absence of said notice, it was not open to the plaintiffs to contend that the committee cannot be said to have been acting under the provisions of the Municipal Act simply because the notice in question was not given for no objection was taken by the plaintiff on this score to the proceedings of the committee during the time that the operations were being carried out.

Held also, that though the act of the Municipality did not **per se** result in such immediate injury to the plaintiffs that they could have been entitled to sue at once for compensation was filed within the period of 90 days from the date when the injury consequential upon the said act actually occurred. 72 P.R. 1909=108 P.L.R. 1909=2 Ind. Cas. 819.

——S. 25—Date of document.

Section 25 creates no presumption as to date of document—Document bearing English and non-English dates—Which of them is correct should be decided according to S. 96, Evidence Act. A.I.R. 1941 Mad. 587=(1941) 1 M.L.J. 502=1941 M.W.N. 335 (1)=53 M.L.W. 449 (1).

——S. 25—Exclusion of first day—Judgment-debtor asked to deposit certain sum within fifteen days from certain date—That date, if should be excluded.

It is desirable for the sake of uniformity that the same interpretation should be given to an expression occurring in a judicial order as would be given to it in a statute under S. 9, General Clauses Act, 1897. Hence, where in an execution of a decree, judgment-debtor is asked to deposit a sum within 15 days from a certain date that date has to be excluded. 40 Bom.L.R. 892=A.I.R. 1938 Bom. 447=I.L.R. (1938) Bom. 734=178 Ind. Cas. 78.

——S. 25—Bond—Six months provided for payment—Date fixed as per Kuar Sudhi Puran Mashi—Limitation.

Held, that the date of payment should be calculated as six months from April 16, 1924, the date of the bond and the suit was in time.
movable date with reference to the Gregorian Calendar and, therefore; cannot be taken as the
Kuar Sudhi Puran Mashi of the Fasli year is a date of payment with reference to which limitation should be calculated in view of the provisions of S. 25 of the Limitation Act. 8 O.W.N. 834 =A.I.R. 1931 Oudh 357=134 Ind. Cas. 601.

——S. 25—Instalment bond — Date in Hindi.

A mortgage bond executed on 24th July, 1892, provided for the payment in 8 yearly instalments, each instalment had to be paid on **Magha Sutha Powarnamasi** of each year. The last payment was to be made on that day in 1956, corresponding to 14th of February, 1900. In a suit on the bond brought on 19th July, 1912, held it was barred by limitation. S. 25 did not apply to this case. The true test is on what date plaintiff was entitled to claim his money if payment was not made of any instalment fixed in the bond. 13 A.L.J. 486=29 Ind. Cas. 980.

——S. 25—Intention of parties.

If a question of limitation arises, an instrument must be deemed to have been made with reference to the Gregorian calendar, the intention of the parties being quite immaterial. 4 Bom. 103: 6 Bom. 83; 24 Cal. 382 Foll.; 13 A.L.J. 486 and A.I.R. 1925 All 138, Not foll. 105 Ind. Cas. 241=26 M.L.W. 344=39 M.L.T. 284=A.I.R. 1927 Mad 917=53 M.L.J. 447.

——S. 25—Other calendar mentioned—Presumption as to computation of time.

If, in the deed or bond concerned, there is a clear statement that repayments will be made on a particular Marathi month or after so many months calculated according to the Marathi calendar then S. 25 will not affect the date fixed for payment. But the circumstances that a bond bears an Indian date cannot be used in order to draw an inference regarding the meaning of the word "month" used in subsequent clauses in the bond. Therefore the mere fact that the rate of interest was to be at 1 per cent per mensem for each Marathi month, is an insufficient basis on which to build the theory that for purposes of repayments also the period was to be calculated on the basis of Marathi months. 102 Ind. Cas. 588 =10 N.L.J. 117=A.I.R. 1927 Nag. 259.

——S. 25—Starting point—Intention of parties.

If the starting point is to be calculated, as so many months or so many years from a particular date that potni must be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself the Court cannot apply S. 25 of the Limitation Act. It is really a matter of interpretation in every case.

Where the intention was that the interest should be payable at the expiry of "six months" according to the Hindi calendar, that is to say, on a particular date and at the expiry of six months, and that the cause of action should arise on default. 82 Ind. Cas. 330=47 All. 66=22 A.L.J. 902=5 L.R.A. (Civ.) 636=A.I.R. 1925 All. 138.

——S. 25—Exclusion of the first day of the cause of action—"Month" — Meaning of.

In computing the period of limitation, the day on which the occurrence giving rise to the cause of action happened, should be excluded. S. 25 has no bearing on the question of the meaning of the word "month" in a contract drawn in the English language. (1908) 13 C.W.N. 425=36 C. 516.

——S. 26.

See also EASEMENTS ACT, SS. 15 AND 16.

Synopsis.

1 **Applicability.**
2. **Discharge of rain water.**

3. Essentials of acquisition.
4. Extinction of easement.
5. Fishery.
6. Interpretation.
7. Right of way.
8. Scope.
9. What is an easement.
10. Miscellaneous.

1. Applicability.

——S. 26—Applicability to Berar.

Though Easements Act is not in force in Berar, Limitation Act, S. 26 is. 96 Ind. Cas. 546=9 N.L.J. 136=A.I.R. 1926 Nag. 474.

——S. 26—Applicability.

Where the plaintiff in a suit to restrain the defendant from obstructing an artificial watercourse fails to prove that he has used the water of the water course as of right, S. 26 of the Act will not avail him. 73 Ind. Cas. 489=A.I.R. 1923 Lah. 257.

——S. 26—Applicability — Customary right.

A customary right of way for all the villagers is not a case of acquisition by prescription and is not governed by S. 26 of the Limitation Act. 65 Ind. Cas. 509 (Cal.).

——Ss. 26 and 27—Applicability—Easements.

Ss. 26 and 27 do not apply to cases where the easements are acquired under the Easements Act. The question even as regards an easement right claimed under the statutory prescription is not one of limitation, but whether the enjoyment necessary to acquire the prescriptive right, has been peaceable and as an easement without interruption for 20 years within 2 years before suit. 29 M.L.J. 685=18 M.L.T. 476=2 L.W. 1107=(1916) 1 M.W.N. 113=31 Ind. Cas. 528.

——S. 26—Applicability—Easement—Long user.

The section need not be applied where the plaintiff has an absolute and indefeasible right acquired many more than 20 years ago and enjoyed without interruption for a long time. 2 Ind. Cas. 410 (Cal.)

——S. 26—Applicability—Lost grant.

The provisions of S. 26 are not applicable where plaintiff sues for a declaration of a right of easement on the basis of lost grant, e.g., right to take water from a tank. 67 Ind. Cas. 244=A.I.R. 1923 Cal. 291.

2. Discharge of rain water.

——S. 26—Discharge of surplus water — Burden of proof.

Where a right to discharge water on another's immovable property is claimed the onus is on the dominant owner to prove all the points which are necessary to establish an easement under S. 26 of the Limition Act. 91 Ind. Cas. 485=84 Ind. Cas. 676=26 P.L.R. 42=A.I.R. 1925 Lah. 297.

——S. 26—Easement—Discharge of surplus water —Right to.

A plaintiff seeking to enforce a right to discharge surplus water through a watercourse may base his right either on the acquisition of an easement to be proved under S. 26 or as an alternative case on a natural right existing in him apart from any easement, provided the matter was brought before the trial Court in some form or other in which latter case on proof of the right the defendant has to establish the acquisition of a right to dam the flow under S. 26. 10 Bur.L.T. 38=35 Ind. Cas. 394.

——S. 26—Easement—Discharge of surplus water —Right to compel.

When the plaintiff has not proved the use of a watercourse carrying surplus water of adjoining lands over defendant's lands into his own peaceably and openly as an easement and as of right for statutory period within S. 26 of the plaintiff cannot compel the defendants, who claim to use the water entirely, to continue to discharge the water or prevent them from blocking up the channel in their own land, though the defendants and the adjoining owners may have acquired a right of easement to discharge such water on the plaintiff's land. 19 C.L.J. 45=22 Ind. Cas. 514.

——S. 26—Easement—Discharge of surplus water —Right to compel.

Where A has the right to discharge surplus rainfall from his land to B's land, no period of time will give B the right to compel A to send water on to him, provided A does not interfere with the flowing water in a natural and defined channel. Every owner of land has the natural right to collect or dispose of all water on the surface not passing in a defined channel. 4 Bur.L.T. 223=12 Ind. Cas. 27.

3. Essentials of acquisition.

——S. 26—Water diverted from its natural couse by erection of bund—Title by prescription.

The plaintiff's wet lands were irrigated by the water of his private tank which received water from a pond on plaintiff's land by means of a channel. The water from this pond tended naturally to flow south. In order to divert this water along the channel eastwards into the tank the plaintiff's father had built a bund on the southern side of the channel in or about 1888 and in this way the plaintiff's father and the plaintiff after him had uninterruptedly enjoyed the water flowing from the pond for the cultivation of their land from 1888 or thereabouts until 1936.

Held, that the plaintiff had made out a good title by prescription. A.I.R. 1948 P.C. 23.

——S. 26—Essentials of acquisition — Easement for use of water for irrigation—Proof of absolute continuous user—If necessary.

In the case of a claim of easement for use of water for irrigation or rights of an analogous nature, proof of absolute continuous user is not necessary. The right can be established by proof of periodical user, so long as the full period is covered, and the user has existed openly and uninterruptedly. 223 Ind. Cas. 470=50 C.W.N. 682=A.I.R. 1946 Cal. 444.

——S. 26—Essentials of acquisition.

Well used by people of mohalla constructed within living memory and property changing hands by sale—Right by prescription to use well cannot be said to have been acquired. A.I.R. 1939 Lah. 191=41 P.L.R. 536=184 Ind. Cas. 76.

——S. 26—Essentials of acquisition — Customary right—Right to village pathway—Evidence of.

Proof of a customary easement is immensely

more difficult than proof of an easement within the provisions of S. 26. The persons who rely on custom must prove that it was ancient, continuous, peaceable, reasonable, certain and compulsory. In other words, they must not only prove the elements required under S. 26, but something more. If the evidence shows that the right has been enjoyed for a considerable period, say 30 or 40 years; then the burden of negativing the right claimed is on those who deny its existence. It is unquestionable that the enjoyment must have been as of right, and neither by violence nor by stealth, nor by leave asked from time to time. Courts in India cannot apply the principle of English common law that a custom is not proved if it is not shown to have been enjoyed from time immemorial. If the pathway is claimed as a village pathway, and not as a public pathway; it is necessary to show that the user was of the pathway as a village pathway. In other words, the evidence must be that it was used by the inhabitants of the village or villages concerned as such, and not as members of the general public.

Where persons claim a right to a village pathway but none of the witnesses give evidence that the user of the pathway was as of right or that it was not by leave taken from anybody and all that the witnesses depose is that the pathway was used openly and without obstruction, such evidence would be quite consistent with the case of a permissive enjoyment and is not sufficient to prove a customary easement. A.I.R. 1938 Cal. 202=66 C.L.J. 270=175 Ind. Cas. 252.

——S. 26—Easement—Acquisition by prescription—Essentials—'As of right', 'peaceably' and 'without interruption', meanings of — Presumption of lost grant—Indian and English law.

The term 'as of right' is not synonymous with 'rightfully' but signifies enjoyment by a person in the assertion of a right. It is enjoyment had, not secretly or by stealth or tacit sufferance or by leave or favour or by permission asked from time to time on each occasion or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave, at any time by a person claiming to use it without danger of being treated as a trespasser and as a matter of right.

All that the word 'peaceable' in S. 26 means is that the plaintiff who claims to be the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within 20 years expiring within two years of the suit, nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right. A mere denial by the defendant of the plaintiff's alleged right and his unsuccessful attempt to have this right negatived in Courts of Law, does not affect the plaintiff's acquisition of easement.

In India, the acquisition of easement by prescription depends upon positive enactments and it is not necessary that any presumption of a supposed grant and its subsequent loss need be made.

In India, an 'interruption,' to be effective; must result in actual discontinuance of the enjoyment of the right of the claimant. A.I.R. 1931 Lah. 395=33 P.L.R. 139=12 Lah. 741=135 Ind. Cas. 51.

——S. 26—Essentials of acquisition.

In order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, without express or implied permission of the owner of the dominant tenement and without secrecy or stealth. 87 Ind. Cas. 19=41 C.L.J. 379=A.I.R. 1925 Cal. 788.

——S. 26—Easement—Acquisition—Essentials.

To become an easement the enjoyment of a right must be open, peaceable and as of right; and so the ability of the servient owner to stop the enjoyment, irrespectively of the dominant owner's will, is inconsistent with the idea of a real easement existing. 4 P.R. 1917=37 Ind. Cas. 788.

——S. 26—Easement—Supply of water from natural stream—Acquisition.

An easement of the supply of water from a natural stream may be acquired by twenty years' user under the provisions of S. 26 of the Limitation Act. 35 P.R. 1895, Foll. 49 P.R. 1888, not Foll. 57 P.R. 1918=130 P.W.R. 1918=104 P.L.R. 1918=46 Ind. Cas. 441.

——S. 26—Easement—Essentials of acquisition—Peaceable enjoyment for 20 years.

Where an easement is enjoyed peaceably and uninterruptedly for 20 years, the requirements of S. 26 of the Limitation Act are fulfilled and the right becomes absolute. 26 Ind. Cas. 781 (Cal.).

4. Extinction of easement.

——S. 26—Extinction of easement—Mere failure to exercise right within 2 years before suit.

Where an easement to carry water in a channel across the defendant's land for purposes of irrigation was established, the mere failure to exercise the right for a period of two years prior to suit does not extinguish the right of easement, nor does the mere fact that one year the plaintiffs irrigated one of their fields from another well affect their right of easement. 118 Ind. Cas. 521=A.I.R. 1929 All. 497.

——S. 26—Extinction of easement—Where a suit for asserting a prescriptive right is not brought within two years of the termination of the user, the right of user is lost. 120 Ind. Cas. 658=7 Rang. 487=A.I.R. 1929 Rang. 300.

——S. 26—Easement—Extinction — Question of fact.

An easement once acquired is not necessarily lost by mere non-user; the question of abandonment is one of intention which should be on the facts of the case decided. 7 Ind. Cas. 813 (Cal.)

5. Fishery.

——S. 26 (2)—Prescriptive right to fishery in public navigable river.

To acquire an exclusive prescriptive right of fishery in a public navigable river as an easement the user must be in assertion of a right higher than the general right of the public to fish in such rivers. 49 C.W.N. 539=A.I.R. 1946 Cal. 12=224 Ind. Cas. 175.

——S. 26, Sch. I, Art. 144—Jalkar rights; whether easement or rights in immovable property——Applicability of Art. 144—Grant — Construction—Jalkar right, whether passes without express words.

A case of exclusive right to fishing falls within the definition of interest in immovable property under Art. 144 and adverse possession of such a right for more than 12 years would, by the operation of Art. 28 of the Limitation Act, extinguish the right of the lawful owner to that extent, although such a right where it is claimed without any exclusion of the owner or in common with others may fall under definition of easement and may require twenty years' enjoyment.

Where there is evidence to show that the owner of a village has been treating the jalkar as forming part of the village settlement of the village would convey jalkar even though this right is not expressly conveyed. A. I.R. 1932 Cal. 300=35 C.W.N. 1256=59 Cal. 344=137 Ind. Cas. 279 (2).

——S. 26—Fishery — Exclusive right and the right exercised with owner.

If the right claimed is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in immovable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a profit **a prendre**, it has also the distinctive features of an interest in immovable property. Even if S. 26 of the Act should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions. 2 P.L.J. 283, Foll. 67 Ind. Cas. 954=1 Pat. 674=3 P.L.T. 477=1 Pat.L.R. Civ. 34=A.I.R. 1923 Pat. 58.

——S- 26—Fishery — Private rights — How acqnired—Prescription.

Private rights of fishing in public waters may be acquired either by a grant from the crown or by prescription from which a grant may be presumed.

Quaere.—Whether exclusive rights can be acquired in a tidal or navigable river by proof of mere enjoyment in the manner provided by S. 26 of the Limitation Act. A person to acquire the right of fishery, by prescription must show that he had an uninterrupted enjoyment of it openly, publicly and peacefully for over the statutory period; but where such an enjoyment was in exercise of a common right which he shared with others, he should show that his user was in assertion of a higher right than the general right, in himself and for exclusive benefit. 39 Cal. 53=15 C.W.N. 972=11 Ind. Cas. 180.

——S. 26—Fishery — Right of — Easement.

A right of fishing is an easement under S. 26, Limitation Act. A plaintiff claiming a statutory easement of fishery must prove that the right was exercised within two years before the commencement of the suit; but not so where plaintiff traces the right to the end of the 18th century. 14 C.L.J. 572=12 Ind. Cas. 305.

6. Interpretation.

——S. 26 (2)—Interpretation — "Belongs", meaning of—Servient tenement being transferee from Crown—60 years' rule, if applies.

In S. 26 (2), Limitation Act; the word "belongs" should be given its plain meaning and should not be interpreted by a forced construction as equivalent to "has belonged" Where, therefore, an easement is claimed over some property in the hands of a transferee from the Crown, the right would be acquired against the transferee to whom the property belongs by the expiry of a period of 20 years within two years' next before the suit brought. The 60 years' rule has no application. 44 P.L.R. 116=A.I.R. 1942 Lah. 124=I.L.R. (1943) Lah. 129=200 Ind. Cas. 438.

——S. 26—Interpretations.

"Easement", does not include customary right to use certain well on ground that it has been used by public. 41 P.L.R. 330=A.I.R. 1939 Lah. 12=182 Ind. Cas. 525.

——S. 26—Interpretations.

The expression "as of right" means more than "rightfully" or ' without trespass and under a strict legal right' and imports a claim or assertion of right to act against the will of the servient owner. A.I.R. 1938 Pat. 423=19 P.L.T. 511=4 B.R. 806=177 Ind. Cas. 315.

——S. 26—Interpretation — 'As of right,' meaning of — Acquisition of right under — Light and air.

Under S. 26, the words 'as of right' mean **'nec vi, nec clam, nec precario.'** Where premises in joint ownership were partitioned and the partition deed directed that the owners of each allotment were to make their allotments self-supporting and independent of all support from other allotments, and it was further directed that all allotments immediately adjoining any other allotment and overtaking it should be closed permanently.

In such circumstances, if one of them allowed air and light to the other's premises through his own premises for twenty years, unless it were shown that the latter's enjoyment was permissive the enjoyment would be as of right.

A right under S. 26 can be acquired even where one of the walls of the dominant tenement through the aperture of which light comes belongs to the owner of the adjoining servient tenements. A. I.R. 1932 Cal. 249=35 C.W.N. 963=59 Cal. 260=138 Ind. Cas. 193.

——S. 26—"As of right"—Interpretation.

An open user continued without interruption for a period of over 20 years and not shown to be attributable to permission or sufferance on the owner's part is **prima facie** evidence of enjoyment as of right, within the meaning of S. 26 of the Limitation Act. Failure on the part of Court to draw such a presumption will be an error of law making a second appeal competent. 85 Ind. Cas. 81=A.I.R. 1925 Nag. 270.

——S. 26 — Interpretation — "As of right"—Meaning of.

User as of right implies a user against the will of the owner of the property over which the user is sought: and so an annual payment for the use of a mill negatives the idea of the user being as of right, and consequently there can be no easement in such a case. 4 P.R. 1917=37 Ind. Cas. 788.

——S. 26—Interpretation—Person.

The term "person" in the first clause of S. 26 cannot be limited to the narrow meaning of individual, but when the claim to a right of way is made in virtue of the occupation of a piece of land, the terms means and includes the person in occupation of that land, whether that person is the same individual throughout the period of twenty years or not. 70 Ind. Cas. 915=4 U.B.R. 90= 1 Bur.L.J. 99=A.I.R. 1922 U.B. 23

7. Right of way.

——S. 26—Right of way.

The right of way claimed by the public or a section of public over certain lands described as village pathway is not a right of easement and is not governed by S. 26, Limitation Act. 25 P.L. T. 192=10 C.L.T. 78=A.I.R. 1945 Pat. 118= 220 Ind. Cas. 511.

——S. 26—Right of way.

Tenant of one land, cannot acquire for himself or on behalf of landlord right of way, as of right upon another land of his own. A.I.R. 1939 Rang. 421=1940 Rang.L.R. 93=185 Ind. Cas. 605.

——S. 26—Right of way.

Municipal sweepers passing over land of person to clean latrine over another person's land— Such user by sweepers, cannot entitle owner of latrine to claim right of way. A.I.R. 1939 Rang. 34=180 Ind. Cas. 477.

——S. 26—Presumption — Right of way.

Where a right of way has been used peaceably and openly without interruption for 20 years not attributable to any permission or sufferance on the part of any person whatsoever its user as of right may be legally inferred. 1 Lah. 206, Foll. 111 Ind. Cas. 186=29 P.L.R. 567.

——S. 26—User as of right—Open user for 20 years—Right of way.

An open user of a right of way for twenty years without interruption and without sufference on the owner's part is an enjoyment as of right within S. 26 of Limitation Act. Plaintiffs and defendants were co-sharers in a well. Plaintiffs had used a road across defendant's fields without let or hindrance for a period of 20 years and this road they could use to gain access to the well.

Held, that having regard to the habits of the people of this country, the enjoyment of the road "as of right" within S. 26 of the Limitation Act should have been presumed. 113 P.L.R. 1920=1 Lah. 206=56 Ind. Cas. 728.

——S. 26—User as of right—Private right of way —Origin — Special damage — Adquiescence— Enjoyment as of right must be "Nec vi, nec clam, nec precario."

In S. 26, the conditions **'Nec vi nec clam"** are separately provided in the words "peaceably and openly." It is therefore probable, that the special force of "of right" lies in the words **'Nec Precario'** which exclude enjoyment by caprice or the mere will or favour of the owner of the servient tenement. 'Special damage' need not be proved in the case of a private right of way. Mere acquiescence is enough; it need not be shown how the right originated. 3 Bur.L.T. 100=8 Ind. Cas. 1196.

——S. 26—Right of way—Enjoyment as of right.

Where the parties, brothers, had a common **deorhi** and both of them partitioned the house and defendant agreed to build another door-way but did not do so and continued to use the **old deorhi,** his user for the prescriptive period confers a right of way on him. 3 Ind. Cas. 271 (Lah.).

——S. 26—Right of way — Cessation of user— Effect of.

A person may be said to be in 'enjoyment' of a right of way during a period of time, though he does not actually "use" the way every moment. Cessation of user for a time is not an invariable indication of abeyance of enjoyment of a right. 29 C.L.J. 421=51 Ind. Cas. 372.

——S. 26—Right of way—Non user for two years prior to suit.

A plaintiff bringing an action for obstuction of a right of way for boats is not barred by S. 26 of the Limitation Act by non-user within two years prior to the institution of the suit. 8 C. 132, Foll. 26 Ind. Cas. 485 (Cal.).

——S. 26—Right of way—User by public — Presumption.

The user of a road by the public openly and as of right is sufficient, apart from the law laid down in the Limitation Act, 1877, S. 26; to raise a presumption of its dedication to their use, though such presumption might be rebutted by evidence of the owner's intention that the public should only have a permissive use or that the dedication was implied to a particular class of persons only. 62 P.R. 1898; 4 I.C. 870, Foll.; 8 I.C. 175, Foll. 108 P.R. 1916=146 P. W. R. 1916=35 Ind. Cas. 458.

——S. 26—Right of way — User as of right—Onus.

Under S. 26 of the Limitation Act which is the law in force in India, a right of way claimed must be proved to have been used as of right and the onus is on the plaintiff to prove it. 18 Ind. Cas. 211 (Cal.).

——S. 26—Way—User as of right — Limitation Act, S. 26.

In a suit to establish a right of way, the propriety of the English rule that the presumption from user should be that the user as of right must depend upon the circumstances, not only of each particular case, but also of each particular country, regard being had to the habits of the people of the country. It would be right to draw here the same inference from user that would be proper and legitimate in a case arising in England. Under S. 26 of the Limitation Act, the onus is upon the plaintiff to prove that the user was as of right. (1903) 8 C.W.N. 359.

8. Scope.

——S. 26—Scope—If exhaustive — Other "easement"—Right to store manure on land of another —Acquisition by prescription.

In view of the words "other easement" in S. 26 of the Easements Act, it must be held that the section is not exhaustive, and other easements not specifically mentioned in the section can be acquired: e.g., the right of storing manure on land belonging to another, being a right which is beneficial to the enjoyment of the property of the persons enjoying that right over the land of another, can be acquired in the same way as other similar right by prescription, if the user has continued for the prescribed period. Where the right claimed and enjoyed is only over a small portion of a larger area, it cannot be said that there would be total prescription off the subject-matter of the easement. 224 Ind. Cas. 286=A.I.R. 1947 Lah. 79.

——S. 26—Scope — Prescriptive right based on immemorial user — If may be claimed—Minimum period of enjoyment necessary—Value of evidence in aggregate — If to be seen.

Apart from S. 26 of the Limitation Act, a right of prescription may also be claimed and established on the basis of immemorial user justifying a presumption of grant or agreement. In order to establish immemorial user so as to justify any presumption of easement by lost grant, no particular period has been prescribed and can, therefore, be said to be essential; but where such right is based on a claim of continuous or uninterrupted user alone, proof of enjoyment for any period not exceeding 20 years—because that period is mentioned in S. 26 of the Limitation Act—will ordinarily be considered insufficient. It is the value of the evidence in the aggregate which is to be seen in order to determine finally whether the plaintiffs have established generally their claim of a right of irrigation by proof of enjoyment for such a minimum period as would establish a case of acquisition of easement by lost grant. 223 Ind. Cas. 470=50 C.W.N. 682=A.I.R. 1946 Cal. 444.

——Ss. 26 to 28—Scope.

Sections 26 to 28 provide for acquisition of ownership by possession. A.I.R. 1941 Pat. 181 =19 Pat. 852=7 B.R. 739=22 P.L.T. 986=194 Ind. Cas. 243.

——S. 26—Scope — Limitation Act, whether excludes other modes of acquiring easements.

The Limitation Act is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all but it does not exclude or interfere with other titles and modes of acquiring easements. A.I.R. 1939 Nag. 193=1939 N.L.J. 246=I.L.R. (1941) Nag. 460=183 Ind. Cas. 341.

——S. 26—Scope—Capacity or incapacity of servient owner to make grant, if relevant—Obstruction not submitted to or acquiesced in for one year

Section 26, Limitation Act allows an easement irrespective of the capacity or incapacity of the servient owner to make a grant.

Though an obstruction which is not submitted to or acquiesced in for one year is not an interruption within the meaning of S. 26, the easement becomes "absolute and indefeasible" on enjoyment of 20 years "ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

The fact that a person has built a wall projecting on a public road does not deprive him of his right of having access from his land to the road at any place he chooses. A.I.R. 1938 Pat. 423 =19 P.L.T. 511=4 B.R. 806=177 Ind. Cas. 315.

——S. 26—Scope.

Section 26 is neither prohibitory nor exhaustive and does not exclude or interfere with other modes of acquiring easements. A.I.R. 1935 Rang. 56=154 Ind. Cas. 468.

——S. 26—Scope.

A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, viz., 20 years and however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until it is so brought in question in some suit, and until it is so brought in question, the right is inchoate only and in order to establish it when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within two years of the institution of the suit. 119 Ind. Cas. 293=33 C. W.N. 517=56 Cal. 927=A.I.R. 1929 Cal. 542.

——S. 26 — Scope — Statute not exhaustive—Profits a prende.

The word 'easement' is wider than the meaning of the word in English Law and would include at least a profit a prendre. The object of the Statute was to make more easy the establishment of rights of this description, but it is remedial, and neither prohibitory nor exhaustive and it does not exclude or interfere with other modes of acquiring easements and, therefore it is open to the plaintiff to show, if he can that he is entitled to a right which may be of that nature although not actually within the strict meaning of the term.

Per Chakravarti, J.—In Bengal, where the mode of dedication of tanks is so widely known, when one finds that a tank exists from a long time past and the public have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. It is not necessary in such cases to seek the aid of S. 26. 91 Ind. Cas. 712=100 Ind. Cas. 321=53 Cal. 1016=A.I.R. 1926 Cal. 507.

——S. 26—Scope—Section not exhaustive.

Section 26 provides for the acquisition by peaceable enjoyment without interruption for a period of 20 years of a right of easement either in a water course or in any other matter, but if one is claiming a right given under that section then he has to prove that the right has been exercised for 20 years and that there has been no interruption of the right at any period further back than two years before the commencement of the suit.

The acquisition of the right of easement referred to in S. 26 of the Act is not the only method of acquiring a right of easement. The section is not exhaustive, and if a right of easement is acquired by any other method such as by a grant either proved or implied then S. 26 can have no operation to a suit brought to enforce such a grant. The bject of the statute is to make more easy the establishment of rights of easement by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act to give without, more, a title to easement. But the statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all; but it does not exclude or interfere with other titles and modes of acquiring easements. 90 Ind. Cas. 356=7 P.L.T. 260=1925 P.H.C.C. 250=A.I.R. 1925 Pat. 748.

——S. 26—Scope—Section not exhaustive.

To establish a right of easement it is not necessary for a party to rely on the provisions of S. 26 of the Act if the existence of the right could be otherwise stablished. 70 Ind. Cas. 268=36 C.L. J. 280=A.I.R. 1923 Cal. 200.

——S. 26—Scope of.

S. 26 is concerned only with the acquisition of the easement and not with the extent of the right or with the remedy by which a disturbance of the right may be vindicated, for which English Law would have to be resorted to. 39 Cal. 59=12 Ind. Cas. 60.

——S. 26—Scope—Prescriptive rights.

Per White, C. J.—The policy of the law is to give rights by prescription. (1900) 24 M. 471 (F.B.).

9. What is an easement.

——S. 26—What is an easement.

Taking a water-course through another person's property is an easement within the meaning of S. 26. 100 Ind. Cas. 498=A.I.R. 1927 Lah. 216.

——S. 26—What is an easement — Immemorial user.

The plea that the defendants had been using a particular Kul from time immemorial, does not amount to setting up a plea of easement. 80 Ind. Cas. 197=A.I.R. 1923 Lah. 605.

——S. 26—Ferry—If easement.

A ferry is not an easement within S. 26. 9 Ind. Cas. 846 (Cal.)

——S. 26—Ferry—Right to maintain — Easement —Right of easement.

The right to establish and maintain a ferry over the property of another is a right of easement and to make it absolute it should be exercised as an easement and as of right for twenty years. Acts referable to an exercise of easement are distinct from those of user, the latter alone constitute dispossession, the former do not. 1 Pat.L.T. 395 =5 Pat.L.J. 500=(1920) P. H. C. C. 297=57 Ind. Cas. 516.

10. Miscellaneous.

——S. 26—Ancient lights—Interference with convenience should be proved.

Per Rankin, C. J.—Where there has been an interference with ancient lights, the law refuses an action unless there has been a real interference with convenience or comfort of the dominant premises as regards their nature and situation. 102 Ind. Cas. 370=31 C.W.N. 419=45 C.L.J. 474 =A.I.R. 1927 Cal. 345.

——S. 26—Defence.

There is no bar of limitation to a defence unless the suit for the relief involved in the defence falls within S. 26 or 28. 30 Mad. 444, Foll. 59 Ind. Cas. 118=45 Bom. 45=A.I.R. 1921 Bom. 257.

——S. 26—Grant of easement by co-sharer.

None of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers, e.g., one co-sharer cannot grant an easement to the detriment of the other co-sharers. 100 Ind. Cas. 498=A.I.R. 1927 Lah. 216.

——S. 26—Intermittent user—Tanks.

User of an intermittent nature unaccompanied by assertion of right is very common in this country and arouses no opposition. A pond is not susceptible of actual physical possession by the legal owner and possession follows title, unless the usurper can prove long and continuous exclusion of rightful owner. 74 Ind. Cas. 282=4 L.L.J. 461=A.I.R. 1922 Lah. 59.

——S. 26—Obstruction to light and air—Injunction—Prima facie remedy.

Where the building proposed to be built by defendant will block the plaintiff's windows for the free passage of light and air to which plaintiff has acquired an easement, defendant can be restrained by injunction, from constructing building.

Any act by the defendant which controls or obstructs the light and air to which the plaintiff is entitled is prima facie an injury of a serious character. 8 Bom. 95, Foll.

Prima facie the plaintiff is entitled to an injunction. An injunction is the rule and damages the exception in cases of this nature. It cannot be held that if it was possible for the plaintiff to neutralise the effect of the defendant's buildings, by altering or re-arranging his own buildings, then compensation in money would afford adequate relief. It having been proved that the plaintiff has acquired an easement whereby he is entitled to have free access of light and air through this window, he is prima facie entitled to be maintained in his enjoyment of the said easement. 21 M.L.J. 313, Foll.

The grant of an injunction is purely a matter of discretion, a discretion which is to be exercised in a judicial manner. 67 Ind. Cas. 288=72 P.L.R. 1922=A.I.R. 1921 Lah. 372.

——S. 26—Obstruction — Filling up channel — When amounts to.

The mere filling up of a water channel will not necessarily constitute an obstruction of the plaintiff's enjoyment of his right within S. 26, if no water for irrigation was required at that time and there was no refusal by defendants to reopen it. 25 Ind. Cas. 386 (Cal.).

——S. 26—Easement — User for 19 years, 6 months.

In recokoning the period of 20 years obstruction acquiesced in for less than one year before suit must be ignored and a plaintiff who has proved enjoyment of a right for 19 years and a fraction within one year before suit, must be taken to have established his right of easement. An easement can therefore be acquired after an enjoyment of 19 years and a fraction and the 20 years period in S. 26 is accordingly curtailed by the explanation. 48 P.R. 1918=46 Ind. Cas. 17.

——S. 26—Period of user after institution of suit —Whether can be added.

A person is not entitled to add the period of user after the institution of the suit, for the purpose of acquiring by prescription a right of easement. Such user is not peaceable but disputed after the institution of the suit. A.I.R. 1936 Cal. 310=39 C.W.N. 1202=163 Ind. Cas. 56.

——S. 26—Threat to create easement.—Explanation to the section.

A mere denial of right affords a cause of action. Any person whose property is threatened with a servitude may bring a suit for a declaration that an easement is enjoyed on sufferance and not as of right. The effect of the Explanation to S. 26 of the Limitation Act is to confer an indefeasible right of easement on any person after an enjoyment of anything over nineteen years, provided he waits less than one year before challenging an interruption and the beginning of his enjoyment arose twenty years before suit, but the Explanation does not come into operation if at the time of suit there is no interruption at all. 75 Ind. Cas. 608=A.I.R. 1924 Lah. 628.

——S. 26—User as of right—Onus.

Under S. 26 of the Limitation Act, the onus is on the plaintiff to prove the user was as of right. The presumption to be drawn from user is a question of fact depending on the circumstances of the case. 8 C.W.N. 359, Foll. 19 Ind. Cas. 66 (Cal.).

——S. 27. See also EASEMENT ACT, SS. 15, 16.

——S. 27—Applicability—Transferee from Hindu Widow as representing estate—Obiter.

S. 27 of the Limitation Act does not apply to a donee or transferee from a Hindu widow in virtue

of her powers as representing the estate, as in such a case the transferee succeeds the widow in her capacity as full owner and not as upon the determination of her life interest. 41 Ind. Cas. 47 (Cal.).

——S. 28.

Synopsis.

1. Adverse possession.
See also ADVERSE POSSESSION.
2. Applicability.
3. Essentials for extinction of rights.
4. Interpretation.
5. Mortgages.
6. Possession under order under S. 145, Cr. P. Code.
7. Person in possession.
8. Revival.
9. Scope and effect.
10. Starting point of limitation.
11. Title by prescription.
12. Miscellaneous.

1. Adverse possession.

See also ADVERSE POSSESSION.

——S. 28 and Arts. 142 and 144—Adverse possession—Essentials—Claim to title by—Purchase of wakf property at sale in insolvency—Suit for declaration of title on ground of continuous, exclusive and undisturbed possession of predecessors in interest—Test to apply—Mere trespasser and purchaser for value—Distinction.

Where a person claims a declaration of title to property which is alleged to be wakf, purchased by him at a sale by the Official Assignee in insolvency, on the ground of continuous, open exclusive and undisturbed possession within twelve years of suit by his predecessors in interest and by himself, the proper test to be applied is whether the predecessors of the plaintiff for a period of 12 years or more exercised such dominion over the property in suit as to justify the inference of fact that they were in possession of the whole property. It is not necessary that he should prove affirmatively that his predecessors had actually been in physical possession of every square inch of the land; but it should be considered whether the acts of possession which have been proved would legitimately show that the predecessors of the plaintiff had enjoyed such dominion over this property in the manner in which such dominion is normally exercised, so as to acquire title under S. 28, Limitation Act. The principle that the claim of a mere trespasser to title by adverse possession will be confined to the property of which he has been in actual possession has no application to the case of a person who is not a mere trespasser, but who has purchased the property for value from a person claiming under one who was put into possession by an order of Court, whether or not such order was rightly made. 29 P.L.T. 23=50 Bom.L.R. 632=1948 A.L.J. 221 =A.I.R. 1948 P.C. 76=52 C.W.N. 382=61 L. W. 443=(1948) 2 M.L.J. 70 (P.C.).

——S. 28 and Arts. 142 and 144—Possession necessary to found a title by adverse possession under S. 28—Nature and character of.

The possession necessary to found a title by adverse possession under S. 28 of the Limitation Act is not different in character (though it may be in duration) from the possession required to prevent limitation from running under Art. 142 or 144, of the Limitation Act. 52 C. W.N. 382=29 P. L. T. 23=50 Bom. L. R. 632=1948 A.L.J. 221=A.I.R. 1948 P.C. 76= 61 L.W. 443=(1948) 2 M.L.J. 70 (P.C.).

——S. 28—Hindu widow—Adverse possession.

A title acquired under S. 28 through adverse possession by a Hindu widow who claims and holds a widow's estate enures to the estate of her deceased husband and it descends upon her death accordingly. 7 Luck. 320=10 O.W.N. 21=A.I.R. 1933 Oudh 92=141 Ind. Cas. 831.

——S. 28—Delivery of possession under decree—Entry, if effective against third party—Proof of adverse possession—Necessity of.

Delivery of possession under a decree is sufficient to operate as an entry on the property as against the parties against whom a decree is held but not against third parties though the delivery purports to be of the whole interest in the property. To establish an entry, the owner must show something further. He must show that he has exercised acts of possession over the property. On the other hand, if the plaintiffs should wish the Court to hold that they acquired a title by adverse possession, they must show that such possession was adequate in continuity, in publicity and in extent and continued so right down to the expiry of the period required to extinguish the right of the owner to the property within the terms of S. 28. 15 P.L.T. 342=A.I.R. 1934 Pat. 485= 154 Ind. Cas. 1032.

——S. 28—Adverse possession—Presumption.

Stranger in adverse possession without explanation — Possession must **prima facie** be presumed to be as full owner. A.I.R. 1942 All. 42=1941 A.W.R. 1072=(1941) A.L.J. 676=198 Ind. Cas. 496.

——S. 28—Adverse possession—Onus.

Suit claiming title to lands held by defendant's predecessors under first settlement — Plaintiff must prove that defendant's title had extinguished under S. 28, by adverse possession. A.I.R. 1942 P.C. 47=8 B.R. 831=1942 O.W.N. 508=55 M.L.W. 597=(1942) 2 M.L.J. 384=44 Bom.L.

R. 868=1942 A.W.R. 37=47 C.W.N. 38=I. L.R. (1942) Kar. (P.C.) 122=201 Ind. Cas. 499 (P.C.).

——S. 28—Adverse possession—Onus and proof.

If a tenant pays no rent, it does not follow therefrom that he is in adverse possession. 100 Ind. Cas. 73=A.I.R. 1927 Lah. 759.

——S. 28—Adverse possession—Onus.

Where a person pleads title by prescription he must prove possession for the full statutory period. Possession for a shorter period does not shift the onus on to the original owner to show that possession became adverse within the statutory period. 39 Mad. 617=31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A. L.J. 1114=20 M.L.T. 435=4 L.W. 486=18 Bom.L.R. 1007=25 C.L.J. 69=43 I.A. 192=35 Ind. Cas. 902 (P.C.).

——S. 28—Adverse possession — Where owner's right to sue subsists.

Acquisition of a good prescriptive title in the property is the corresponding effect of the right to the property being extinguished by determination of the period of limitation to any person instituting a suit. When that right is not determined a good title in the trespassers cannot follow. 115 Ind. Cas. 613=9 L.R.A. Rev. 263=A.I.R. 1928 All. 625.

——S. 28—Mere possession, if amounts to adverse possession.

A right of property which is vested in one person is not transferred by the mere lapse of time to the person actually in possession. 74 Ind. Cas. 476=50 I.A. 202=26 O.C. 231=21 A.L. J. 757=45 All. 419=33 M.L.T. 321=19 M.L. W. 283=10 O.L.J. 383=28 C.W.N. 840=39 C. L.J. 295=A.I.R. 1923 P.C. 118=45 M.L.J. 623 (P.C.).

2. Applicability.

——S. 28—Applicability.

Section 28 of the Limitation Act will not apply unless the person in possession is in adverse possession to the knowledge of the owner. 1944 O. W.N. 217=1944 A.W.R. 150=A.I.R. 1944 Oudh 250=19 Luck. 531=219 Ind. Cas. 115.

——S. 28—Applicability — Right to assessment —Suit for—Whether one for possession of property within S. 28.

Although a right to assessment may, for certain purposes, be regarded as immovable property, it is quite impossible to say that a suit to recover assessment is a suit for possession of any property. A right to recover assessment is a mere right in action. A suit for rent is a suit for rent in the form in which it is payable, which is generally in money, but may be in kind. It is certainly not a suit for possession of specific property. Consequently, a suit to levy assessment on rent free land is not a suit for possession of property within the meaning of S. 28, Limitation Act. A.I.R. 1942 Bom. 174=44 Bom.L.R. 288=I.L.R. (1942) Bom. 326=201 Ind. Cas. 120.

——S. 28—Applicability.

Grant to **khorposhdar** of rent income, only of abadi lands in village—Rights in respect of jungle and waste land forming separate block not given —Rights in respect of usufruct of jungle and of selling and cutting trees enjoyed by grantee and his successors for more than 12 years as of right to the knowlege of grantor and his successors— **Held,** S. 28 applied and rights in jungle were lost by adverse possession to successors of grantor. 5 B.R. 676=A.I.R: 1939 Pat. 587=181 Ind. Cas. 777.

——S. 28—Applicability.

Section 28 or Art. 113 does not apply to a right of defence under S. 53-A of T. P. Act. A. I.R. 1939 Cal. 163=I.L.R. (1938) 2 Cal. 328= 42 C.W.N. 630=182 Ind. Cas. 389.

——S. 28—Applicability.

It is true that by reason of the provisions of S. 28, Limitation Act, there is in special cases no difference between the extinguishment of right and the inability to enforce them through the Courts, but S. 28 applies to special cases. Ordinarily, limitation does not extinguish rights. It prohibits their enforcement through the Courts. A.I.R. 1937 Sind 273=31 S.L.R. 180=172 Ind. Cas. 520.

——S. 28—Applicability — Principle of S. 28 if can be applied to cases governed by local laws.

Section 28 does not, in terms; apply to cases under special and local laws but the principle underlying it is of general application and can be applied to cases governed by local laws. A.I.R. 1935 Lah. 787=39 P.L.R. 982=I.L.R. (1937) Lah. 517=160 Ind. Cas. 1000=36 Cr.L.J. 1161.

——S. 28—Applicability — Failure to bring suit for declaration on rejection of claim in execution.

Section 28 has no application to a suit to establish the plaintiff's right to properties covered by an adverse order passed in claim proceedings as such a suit is not one for possession. Hence the plaintiff's right to the property is not extinguished on his failure to bring a suit within one year under this article. (1935) M.W.N. 763=42 L. W. 710=A.I.R. 1935 Mad. 1015=158 Ind. Cas. 863.

——S. 28—Applicability.

Neither S. 28 nor the principle thereof can be applied to cases where, during the period of the alleged adverse possession, no suit for possession could have been instituted in a Civil Court. The language of S. 28 applies only to cases of suit for possession in respect of which the period of limitation is thereby provided, that is, by Sch. II, Lim. Act. But the Lim. Act does not apply to suits to be brought in Revenue Courts. A.I.R. 1935 Mad. 914=(1935) M.W.N. 1071=42 L.W. 558=69 M.L.J. 890=59 M. 51=161 Ind. Cas. 447.

——S. 28—Applicability and scope.

Section 28 applies to cases under the C. P. Ten. Act, under the provisions of R. 104 of the Act. Consequently, a land-lord can eject one party to an exchange, because he must be considered a trespasser as against the land-lord and not a licensee of the original tenant, whose rights have been determined by the provisions of S. 28 of the Lim. Act. A.I.R. 1934 Nag. 61=30 N.L.R. 208=148 Ind. Cas. 733.

——S. 28—Applicability.

The property in dispute was owned by the predecessors-in-interest of the plaintiffs and defendants Nos. 18 to 22 and the other half by **A**, a collateral of the aforesaid persons and defendants Nos. 1 to 17. In 1903, **A** sold his half share with other properties to the fathers of plaintiffs Nos. 1, 2 and 3. The predecessors-in-interest of defendants Nos. 1 to 17, who were collateral heirs of **A** obtained a decree in 1907 declaring that the sale was not binding on them. The possession, however, continued with plaintiffs Nos. 1 to 3. **A** died in 1919 and the estate of **A** devolved on the plaintiffs and defendants as collateral heirs. Defendants Nos. 1 to 17 applied for partition. The plaintiffs instituted a suit for a declaration in 1923:

Held, that as the sale by **A** was only to plaintiffs Nos. 1 to 3, the provisions of Art. 2 (b) read with S. 28, Lim. Act could not be availed of by the other plaintiffs who had to prove adverse possession for over 12 years. A..I.R. 1931 Lah. 439=131 Ind. Cas. 105.

——S 28—Applicability—Beneficiary under will—Cause of action accruing during administration.

Where a cause of action has accrued after the death of the testator but before administration is completed the beneficiary will be barred if the executor fails to sue within the period prescribed by law; for the estate is still the estate of the testator and not the estate of the beneficiary who may be a life-tenant under the will of the testator and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life-tenant. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

——S. 28—Applicability—Declaratory suits.

The section is limited to suits for possession and cannot be extended to suits for a declaration. 69 P.R. 1909 =103 P.W.R. 1909=2 Ind. Cas. 981.

——S. 28 and Sch. 1—Applicability—Defence.

Sch. 1 provides periods of limitation within which a "suit" must be brought. Neither Sch. 1 nor S. 28 applies to defences. 1 P.R. 1916=206 P.W.R. 1915=32 Ind. Cas. 485.

——S. 28 and Art. 144 — Applicability—Discontinuous user—Right to cut wood from trees—Adverse possession.

Plff.'s ancestor obtained leave in 1867 to plant trees on land belonging to the Government. He was to do so at his own expense and to tend them; the only right he was entitled to, was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions, **viz.**, once in 1900, and another time in 1910, the deft. who purchased the village got the proceeds of sales of such wood. The plffs. on both the occasions asserted their claim to wood or the price thereof but were unsuccessful. Within six years from the date of the last sale they brought the suit for declaration of their right to get the dry wood under the agreement of 1867. **Held**, that the plff.'s right to take and appropriate wood from trees when fallen and cut being one which could only be exercised on occasions that is, when the wood might fall or be cut from the trees and not occurring every year or at stated times, and their having been disputes as to the right between the parties on two previous occasions there could be no adverse possession. **Quaere.**—Whether S. 28 of the Limitation Act applies at all to the case like this. 40 All. 461=16 A.L.J. 345=44 Ind. Cas. 980.

——S. 28—Applicability—Land-lord and tenant—C.P. Tenancy Act, S. 104 (4).

Section 28, Limitation Act does apply in view of the provision contained in S. 104, sub-S. (4), C. P. Tenancy Act, to a case where the remedy by way of suit by the tenants is lost, having regard to Art. 1, Sch. II, Tenancy Act, and the tenancy right is extinguished with the loss of the remedial right to recover possession. 109 Ind. Cas. 403=A.I.R. 1928 Nag. 281.

——S. 28—Applicability.

Section 28, Limitation Act applies to the right in a tenancy in the Central Provinces. A. I. R. 1927 Nag. 352.

——S. 28—Applicability.

Not only the express provisions, but even the under lying principle of S. 28 of the Limitation Act does not apply to the law of tenancy in the Central Provinces. 89 Ind. Cas. 752=A.I.R. 1926 Nag. 99.

——S. 28—Scope and effect.

A right to levy assessment on rent-free land is governed by Art. 130 and under S. 28 is extinguished if no suit to enforce the right is brought within the time. 5 Cal. 949, Foll. 61 Ind. Cas. 40=45 Bom. 694=23 Bom. L.R. 314=A.I.R. 1921 Bom. 303.

——S. 28—Applicability—Minor—Sale of minor's property by unauthorised person.

A minor is entitled to bring a suit for possession within three years on attaining his majority to undo what an unauthorised person has done on his behalf and so long as the minor's right to sue for possession subsists and has not been extinguished under S. 28, Lim. Act, no adverse possession can mature against him. A.I.R. 1935 Lah. 924=160 Ind. Cas. 557.

——S. 28—Applicability — Minor — Alienation by natural guardian of minor's property—Minor attaining majority—Sale by minor—Suit by minor and vendee to set aside sale by guardian—Minor withdrawing from suit.

Certain property belonging to a minor **G** was sold in 1912 by his father, his natural guardian. On coming of

age in 1923, G sold the property to P in 1925, and G and P in April, 1926, instituted a suit for declaration that the sale of 1912 was not one for necessity, and for recovery of possession of the property. In August 1926, before the suit was decided, G withdrew from the suit with Court's permission and without any objection on the part of P:

Held, that as G had withdrawn from the suit, he had virtually elected to acquiesce in the sale by his guardian and his interest having been extinguished under Art. 44 read with S. 28, Lim. Act, P had no right to continue the suit. 34 Bom. L.R. 1512=A.I.R. 1933 Bom. 42=141 Ind. Cas. 806.

——S. 28 and Arts. 44 and 144 — Applicability—Minor suing to set aside sale by guardian.

Per **Abdur Rahim, J.**—A suit by a minor to set aside a sale by his guardian and to recover property is governed by Arts. 44 and 144 and also S. 28. (Per **Sundara Aiyar, J.**)—Whenever one of two brothers sues for possession after 3 years of his attaining majority, his title and ownership all become extinguished. 10 M.L.T. 418=(1911) 2 M.W.N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——S. 28—Applicability—Old Act (1877).

The Limitation Act, 1877, did not apply to suits under Regulation VI of 1831. So possession prior to Madras Act III of 1895 which repealed Regulation III of 1831 cannot be relied on to establish title by prescription. (1911) 1 M.W.N. 208=9 M.L.T. 430=9 Ind. Cas. 796.

——S. 28—Applicability—Personal action—In such action law of limitation merely bars remedy and not right.

A suit for possession of the office of mutawalli is an action of a personal character and is not "a suit for possession of any property". In personal actions, the law of limitation bars the remedy but not the right. Where the action for possession of the office is statute barred right to a particular **wakf** property is not necessarily extinguished under S. 28, which is limited to suits for "possession of property". But a person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more than a mutawalli's right in such property and may acquire to that extent the status of a mutawalli. The right to office and the right to possession of property are distinct jural concepts, though in the generality of cases the claim to the office of mutawalli and to the property appurtenant thereto are inseparable. This would principally depend upon the terms of the foundation or settlement. 26 Mad. 410, Rel. on. A.I.R. 1930 All. 866=129 Ind. Cas. 375.

——S. 28 — Applicability — Personal action for debt.

In the case of a personal action for a debt limitation merely bars the plaintiff from having the particular remedy by way of suit and does not extinguish the debt. Thus if the creditor has any form of lien upon property, he can exercise that lien notwithstanding that by the terms of the Limitation Act, he could not bring a suit. 66 Ind. Cas. 209=48 Cal. 817=25 C.W.N. 800=A.I.R. 1921 Cal. 67.

——S. 28—Applicability—Personal actions.

Whenever personal actions are barred, the rights themselves are not extinguished. A right to receive payment of a debt does subsist even after the remedy by action has been barred. 33 Mad. 308=20 M.L.J. 633=8 M.L.T. 321=7 Ind. Cas. 898.

——S. 28—Applicability—Personal actions—Dispossession of mortgagor.

S. 28 is limited to suits for possession and does not apply in respect of suits for debts. In respect of debts the act simply bars the remedy but does not extinguish the debts. Therefore the dispossession of the mortgagor in a simple mortgage extinguishes only the equity of redemption and not the title of the mortgagee to his debt. 44 Cal. 425=21 C.W.N. 177=27 C.L.J. 212=37 Ind. Cas. 277.

——S. 28—Applicability—Receiver in possession—Rightful owner need not sue.

Where a Magistrate appoints a Receiver in possession of immovable property, what happens in the eye of the law is that the property is placed in **custodia legis, i. e.,** in the custody of the Court for the benefit of the person who may eventually and finally succeed in establishing his title to the property. It is not necessary for the person affected by the order to institute a suit for the recovery of possession of the property. He may institute a suit merely to have his right to the property declared. If so, Art. 47 would not apply and **a fortiori** the consequences of the operation of S. 28, Limitation Act cannot follow. 10 L.W. 637, Not foll. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

——S. 28—Applicability—Suit for recovery of ornaments.

Limitation to a suit by sons for recovery of ornaments left by mother is 3 years after the mother's death, after which the right is barred. 12 Bom. L.R. 621=7 Ind. Cas. 134.

——Ss. 28 and 29 — Applicability—Restitution of conjugal rights—Limitation Act (XV of 1877), Ss. 2, 28 and Sch. II, Art 35.

The result of the expiry of the period of limitation in respect of rights to restitution of conjugal rights is that the remedy only is barred, but not extinguished under S. 28. The portion of S. 2 of the old Act of 1877 enacting "that nothing herein or in that Act contained shall be deemed to affect any title acquired or to revive any right to sue barred under that Act or any enactment thereby repealed" has not been reproduced in S. 29 of the new Act of 1908 and therefore, a suit for restitution of conjugal rights, while the Act of 1908 is in force, is maintainable though it is filed after the expiry of the period of limitation prescribed under Art. 35 of the old Act. 34 All. 412=9 A.L.J. 784=16 Ind. Cas. 124.

——S. 28 and Art. 144—Applicability—Suit by vendee or auction purchaser for possession.

A suit by a purchaser after 12 years from the date of the purchase would be time barred. The same is the case of a vendee who has obtained a decree or of an auction purchaser where merely symbolical possession has been obtained. 5 C. 584; 24 C. 715; 18 B. 37; 25 B. 275; 25 B. 358; 19 A. 499, Foll. 70 P.L.R. 1910=58 P.W.R. 1910=8 Ind. Cas. 236.

——S. 28—Applicability—S. 28 applies only to suits and not to execution of decrees. (1907) 25 M. 300=12 M.L.J. 128 (F.B.)

3. Essentials for extinction of rights.

——S. 28—Essentials for extinction of rights—Possessory title should be perfected in some body.

Section 28 does not apply unless there is some one in adverse possession of the property. Until some one in an adverse possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of the property for 12 years. His right is only extinguished at the determination of the period limited by the act to him for instituting a suit for possession of the property. The period cannot be determined unless it has commenced to run and the period will not commence to run until the owner is aware that some one else in possession is also holding adverse to him. A.I.R. 1921 Bom. 368; A.I.R. 1926 Oudh 313, Rel. on. 119 Ind. Cas. 866=6 O.W.N. 652=A.I.R. 1929 Oudh 402.

——S. 28—Essentials for extinction of rights.

Until some one is in adverse possession plaintiff's title is not extinguished though he be out of possession for over 12 years. 92 Ind. Cas. 825=29 O.C. 131=13 O.L. J. 400=A.I.R. 1926 Oudh 313.

——S. 28—Essentials for extinction of rights—Adverse title should have been perfected.

An owner of property does not lose his right to property merely because he happens not to be in possession of it for twelve years. His right under S. 28 is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of the property. 62 Ind. Cas. 101=45 Bom. 1020=23 Bom. L.R. 416=A.I.R. 1921 Bom. 368.

4. Interpretation.

——S. 28—Interpretation—'Right to such property'—Joint right.

The expression "the right to such property" in S. 28 includes the right to joint possession also. A person whose right to recover joint possession is extinguished under Art. 47 cannot therefore elude the operation of Art. 47, by framing his suit, as one for damages of his share of the produce as the right to claim damages is not separate from the right to claim possession or joint possession. A.I.R. 1921 Mad. 24, Rel. on. 122 Ind. Cas. 270=26 N.L.R. 160=13 N.L. J. 85=A. I. R. 1930 Nag. 142.

5. Mortgagee.

——S. 28—Usufructuary mortgage — Mortgagor not entitled to possession—Whether can sue trespasser—Mortgagee alone can sue.

If the mortgagor is not entitled to any kind of possession or enjoyment of the mortgaged property during the continuance of the usufructuary mortgage, the morgagor is not entitled to sue a trespasser for possession. It is the mortgagee alone who can do so, and if the mortgagee does not care to bring such suit for more than 12 years, S. 28 operates to extinguish the mortgagee's title to the property in possession of a trespasser. The mortgagor's right to sue for possession accrues for the first time when, after redemption, he is unable to take possession of part of the mortgaged property which he finds to be in possession of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser. The period of limitation for his suit 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption. A.I.R. 1935 All. 542=(1935) A.L. J. 496=1935 A.W.R. 605 =159 Ind. Cas. 151.

——S. 28—Mortgages.

In 1889, there was a mortgage of the **melwaram** interest in certain land and a lease back to the mortgagors for a term of four years. The plaintiff representing the mortgagee sued in 1921 for recovery of the mortgage money and for profits for the years 1918 to 1921. Of the defendants Nos. 1 to 5, who were representatives of the mortgagors, only the 3rd defendant had been paying any rent. As against defendant Nos. 1, 25, and 5, the suit for recovery of the money was held to be barred but the claim for profits was decreed on the ground that it was governed by Art. 131 of the Lim. Act:

Held, that in view of the provisions of S. 28, and Art. 139, the suit was barred even in respect of the claim for profits. (1935) M.W.N. 207=41 L. W. 398=A.I.R. 1935 Mad. 377=157 Ind. Cas. 569.

——S. 28—Applicability—Whether applies to suit by mortgagee to recover money due by sale or foreclosure of mortgaged property.

The application of S. 28 is confined to suits for possession. It cannot be applied to a suit by a mortgagee for the recovery of the money due to him either by sale or foreclosure of the mortgaged property. Even if the mortgagee's remedy for recovery of the mortgage money has become barred by reason of his omission to bring a suit for sale or foreclosure within the statutory period, his right as a mortgagee cannot be extinguished under S. 28. 1935 O.W.N. 40=10 Luck. 531=A.I.R. 1935 Oudh 139=153 Ind. Cas. 808.

——S. 28 — Mortgages — Subsequent mortgage barred—Conditional decree for redemption.

If a suit, is brought on the second deed of mortgage, is barred by limitation, the right of the mortgagee setting up such a deed in suit for redemption of the prior usufructuary mortgage, redemption of which is made conditional on payment of mortgage due thereunder and under subsequent deed is not extinguished and the Court can direct payment of what is due under the second or subsequent deed. 122 Ind. Cas. 411=1930 A.L.J. 750=A.I.R. 1930 All. 416.

——S. 28—Mortgage followed by sale—Suit to set aside both.

In 1905 **A's** father mortgaged his property to **B**. In 1916 there was an award made on the mortgage. In 1918 the father sold the property to **B** to liquidate the mortgage and placed **B** in possession of the property. **A**, who attained majority on 2nd February, 1921, brought a suit on 2nd November, 1924, to recover possession of the property sold by his father. Further he asked that the mortgage-deed and the award of 1916 should be set aside:

Held, that if the suit had been brought only for setting aside the mortgage, it would have been time-barred, but the suit was brought upon the alienation of 1918 in which year the possession was given to the alienee and was, therefore, within time and his prayer that mortgage-deed and award should be set aside

must be treated as surplusage. 27 Mad. 243 (F.B.), Foll. 112 Ind. Cas. 378=30 Bom. L. R. 1095=A. I. R. 1928 Bom. 383.

——S. 28 and Art. 135—Mortgagor and mortgagee—Constructive possession of prior mortgagee—Puisne mortgagee's right to possession on redemption—Limitation.

The prior mortgagee was in constructive possession through the mortgagee as a tenant. The mortgagor agreed that the puisne mortgagee should take possession on redeeming the prior mortgagee which he did more than 12 years from the date of the prior mortgage and sought to eject the mortgagor, **held**, that the possession of the mortgagor, in no way affected the right of the puisne mortgagee who had full twelve years from the date of redemption of the prior mortgage. 48 Ind. Cas. 916, Foll. 2 Lah. L.J. 419.

6. Possession under Order under S. 145, Cr.P.C.

——S. 28—Order under S. 145, Cr. P. C.

Exclusive possession by one co-sharer maintained under S. 145, Criminal P. C.—Failure to bring suit within three years by other co-sharer extinguishes his right to joint possession. A.I R. 1943 Cal. 67=I. L. R. (1942) 2 Cal. 332=46 C.W.N. 817=76 C. L. J. 342=205 Ind. Cas. 441.

——S. 28, Sch. I, Art. 47—Order S. 145, Criminal Procedure Code (Act V of 1898)—Failure to bring suit within time prescribed under Art. 47 by person against whom order is passed.

The phraseology of S. 28 and Art. 47, is clear and unambiguous. A fixed period of three years is given to a person against whom an order concerning the possession of immovable property is passed by a Criminal Court under S. 145, Criminal P. C., to bring a suit for the recovery of that property. If he fails to bring such a suit, his right to the property is, by virtue of S. 28 of the Act, extinguished. The right that is extinguished is such right as the person against whom the order was passed by the Criminal Court had in that property. It may be that he was the sole owner of the property or it may be that he had a joint share with the person in whose favour the order was passed. In either case, his omission to institute a suit within the period of three years entails the extinguishment of his right, whatever the nature of that right may have been. If he was the sole owner of the property, he loses right of ownership and, similarly, if he had a right only as a co-sharer in the property, his right as a co-sharer is extinguished. The words, "to recover the property" in Art. 47 in the context in which they occur can only mean that the suit contemplated by that article is a suit for the enforcement of such right as the person bringing the suit had in the property comprised in the order passed against him. Similarly, S. 28 is general in its terms and there is no warrant for restricting its scope to cases in which a person is the sole owner of the property and to exclude its applicability to cases in which a person is entitled, not to exclusive but only to joint possession of the property. The contrary view would lead to anomalous results. (1937) A.L. J. 225=A.I.R. 1937 All. 300=1937 A.W.R. 235=169 Ind. Cas. 125.

——S. 28—Order under S. 145, Cr.P.C.

A proceeding under S. 145, Criminal P.C., in respect of certain land between the plaintiff and defendant No. 2 was decided in favour of the latter and more than three years after this, the defendant No. 1 brought a suit against defendant No. 2 and got possession in spite of plaintiff's application under O. 21, R. 100, Civil P. C. Thereupon, the plaintiff brought a suit for declaration of title and recovery of possession. The plaintiff's main contention was that Art. 47, applies only as between original parties to a proceeding under S. 145, Criminal P. C., or those claiming under them and that it could not, therefore, be availed of by defendant No. 1 who was neither a party to the proceeding nor was a person claiming under one of the parties:

Held, (1) that S. 28, Lim. Act, was a complete answer to the plaintiff's contention;

(2) that since it was not disputed that defendant No. 2 in whose favour the proceeding under S. 145, Criminal P. C., was decided was in possession of the disputed land for more than three years and as no step was taken by the plaintiff to question the order under S. 145 and to evict defendant No. 2 in due course of law within a period of three years which was the period of limitation as provided by Art. 47, whatever title (if any) the plaintiff had to the property, was completely extinguished. 16 P.L.T. 183=A.I.R. 1935 Pat. 164=1 B. R. 550=14 Pat. 424=155 Ind. Cas. 1094.

7. Person in possession.

——S. 28—Person in possession.

Section 28 presupposes that a person, by force of limitation, has lost his remedy by a suit for possession, and it is only in regard to such person that the section declares that his right to the property is extinguished, and it cannot apply to persons who are in possession.

Where the title of a person in possession is challenged, he may set forth any defence in favour of his right to the property and the statute of limitation will not run so as to prevent him from setting forth any such relief. A.I.R. 1935 Bom. 326=37 Bom.L.R. 471=59 B. 502=159 Ind. Cas. 213.

——S. 28—Person in possession as mortgagee—Whether can claim adverse possession under invalid sale.

A mortgagee in possession, as such, cannot by merely asserting possession as owner under an invalid sale, convert his possession into adverse possession so as to prescribe for a title under the Lim. Act. A.I.R. 1935 Lah. 924=160 Ind. Cas. 557.

——S. 28—Party in possession, whether affected by limitation.

Section 28 cannot be held to apply to such persons who have never been disturbed in their possession and have had no occasion to sue for recovery of it. 32 P.L.R. 479=A.I.R. 1931 Lah. 668=132 Ind. Cas. 661.

——S. 28—Persons in possession.

S. 28 does not apply to persons who, being in actual possession which has never been disturbed have had no occasion to sue for recovery of it, as a party in possession cannot be prejudicially affected by the law of limitation. 1930 A. L. J. 1416=A.I.R. 1930 All. 858.

——S. 28—Person throughout in possession.

Section 28 operates to extinguish the right to any property of a person who does not sue for its possession within the time allowed by law. If a person is

throughout in possession of the property S. 28 does not apply. 70 Ind. Cas. 966=A.I.R. 1923 Lah. 247.

8. Revival.

——S. 28—Revival.

S dying on January 1, 1917, leaving widow—Will by S on which plaintiff having title alleged that widow fraudulently kept away the knowledge of the will from him, the existence of which he did not know till 1928—Plaintiff minor at time of S's death and living with widow in possession and managing estate setting up title in herself and obtaining mutation in her favour on January 1918—Plaintiff turned out from house in 1921—Plaintiff not regaining possession as owner till 1932—Plaintiff becoming major in 1922—Thus widow from January 4, 1918, continuing in hostile adverse possession till 1932:

Held, that plaintiff lost title under S. 28, Lim. Act, after the expiry of 12 years from January 4, 1918 and had, therefore, no title in 1932 when he regained possession unless he could avail himself of S. 18. A.I.R. 1941 Nag. 357=1941 N.L.J. 534=I.L.R. (1942) Nag. 564=197 Ind. Cas. 612.

——S. 28—Revival.

Section 28, provides that after the expiry of the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit but has failed to do so, shall cease to have any right to the property. There cannot be a revival of title of which there has been a statutory extinguishment. 16 P.L.T. 183=A.I.R. 1935 Pat. 164=1 B.R. 550=14 Pat. 424=155 Ind. Cas. 1094.

——S. 28—Revival, if can take place.

Once a right to property has been extinguished under S. 28, there can be no question of that right being revived or perfected by any action on the part of the person who lost that right. 11 O.W.N. 317=9 Luck. 475=A.I.R. 1934 Oudh 303=149 Ind. Cas. 258.

——S. 28—Revival — Perfection of — Owner regaining possession.

If a party who has been 12 years out of possession and whose suit is, therefore, barred, should again get into possession, he is not remitted to his old title. An owner cannot regain possession extrajudicially after lapse of the period of limitation prescribed for a suit to recover possession. 11 Bom. L.R. 237; 1 Boul. 70; 21 All. 204 and 6 C.L.J. 621, **Foll.** 105 Ind. Cas. 835=A.I.R. 1927 Nag. 401.

——S. 28—Revival.

After the right has been extinguished by the operation of the law of Limitation it cannot come into life again. There is no doubt that the provisions of the Limitation Act apply to suits for possession of Buddhist monasteries. 79 Ind. Cas. 273=1 Bur. L.J. 108=A.I.R. 1923 Rang. 40.

——S. 28—Revival—Agra Tenancy Act, Ss. 13 (a) (b) and 14 (1) (a) — Wrongful dispossession—Regaining of possession.

Quaere.—Whether for the application of S. 13 (a) of the tenancy act it is not necessary that the tenant should have regained possession within a year from wrongful dispossession? 31 Ind. Cas. 815=(U.P.B.R.).

——S. 28—Revival—Adverse possession — Extinguishment of title of true owner—Subsequent possession—No effect.

If the title of the true original owner has been completely extinguished by adverse possession, even if he should re-acquire possession, he is not thereby remitted to his original title. 1907 6 C.L.J. 621.

9. Scope and effect.

——S. 28—Scope and effect—Extinction of title—Failure to bring suit under O. 21, R. 103, C. P. Code, within limitation.

The title to the property of the rightful owner would be extinguished only if S. 28 of the Limitation Act can be invoked. This section speaks of a suit for possession which means a suit for recovery of possession. A suit contemplated under O. 21, R. 103, C. P. Code, is not a suit for recovery of possession within the meaning of this section. Consequently, the title of the person affected by an order passed under O. 21, R. 98 or O. 21, R. 99, C.P. Code, is not extinguished if he does not bring a suit under O. 21, R. 103 within one year as provided for in Art 11-A, Limitation Act. I.L.R. (1949) 1 Cal. 378=83 C.L.J. 373.

——S. 28—Scope and effect—Cases not provided for in schedule but falling under local or special Act—Failure to sue within time fixed by Art. 6 Punjab Limitation Act—Effect—Extinguishment of title.

S. 28, Limitation Act, does not in terms apply to suits for which a period of limitation is not provided by the schedule in that Act, but which are provided for by local or special Act. But the principles of that section are applicable also to all suits for possession, for which a period of limitation is provided by a local or special Act, such as the Punjab Limitation (Custom) Act (I of 1920). Failure to sue for possession within the time prescribed by Art. 6 of the Punjab Limitation Act has the effect of extinguishing the right and title of the person entitled to sue, and the person in possession becomes the absolute owner of the property. A.I.R. 1949 E.P. 414.

——S. 28—Scope.

The effect of S. 28 is not to vest the tenancy in the trespasser. A.I.R. 1944 Nag. 250=I.L.R. (1944) Nag. 473 (F.B.).

——S. 28—Scope.

Suit for possession referred to in S. 28, Lim. Act, is a suit for which the period of limitation is prescribed by the schedule to Lim. Act and not by the Oudh Rent Act, 1886. 1943 O.W.N. 99=1943 A.W.R. (C.C.) 25=A.I.R. 1943 Oudh 296=206 Ind. Cas. 274.

——S. 28—Scope and effect.

If a person holds land adversely for a period of more than 12 years, the title of the real owner would be extinguished under S. 28. A.I.R. 1942 Bom. 138=44 Bom. L.R. 146=200 Ind. Cas. 889.

——S. 28—Scope and effect.

Encroachment amounting to complete ouster of plaintiff—Plaintiff cannot sue for recovery of possession after more than 12 years from date of ouster in view of S. 28. A. I. R. 1942 Pat. 188=22 P. L. T. 1001=8 B.R. 302=197 Ind. Cas. 818.

——S. 28—Effect.

Municipality not filing suit for possession of encroached land for 30 years loses its right to demand removal of encroachment and possession of land. A.I.R. 1941 Pesh. 76=196 Ind. Cas. 648.

——S. 28—Scope and effect—Barred debts.

All that happens after the lapse of three years after the creation of a debt on a pro-note is that the debt cannot be enforced in a Court of law. The debt does not cease to exist nor does the relationship of creditor and debtor. A.I.R. 1940 Mad. 908=52 L.W. 221=(1940) 2 M.L.J. 251=(1940) M.W.N. 777=194 Ind. Cas. 401.

——S. 28—Scope.

The land-lord's suit for possession beyond 12 years from expiry of lease must be deemed to be barred by time, irrespective of any denial by the tenant of the land-lord's title and under S. 28, Lim. Act, his right to the property extinguished. A.I.R. 1939 Lah. 455=41 P.L.R. 457=185 Ind. Cas. 858.

——S. 28—Scope and effect—S. 28, if affects right to movable property.

Section 28, Lim. Act, extinguishes only the right to immovable property if the claim to it is not enforced within the period of limitation, but it does not affect the right to movable property. A.I.R. 1939 Bom. 404=41 Bom. L.R. 1002=I.L.R. (1939) Bom. 685=185 Ind. Cas. 366.

——S. 28—Scope and effect.

Right of owner extinguished by S. 28 vests in wrong-doer the moment it is extinguished. 67 C.L.J. 380=42 C.W.N. 913=A.I.R. 1939 Cal. 50=180 Ind. Cas. 721.

——S. 28—Effect.

If the transfer which comes under Art. 134-B is a transfer of full ownership, the right of plaintiff to property is extinguished after the lapse of statutory period by operation of S. 28. A.I.R. 1937 Cal. 305=41 C.W.N. 693=I.L.R. (1937) 2 Cal. 242=172 Ind. Cas. 315.

——S. 28—Scope and effect.

The effect of S. 28 is that if plaintiff can establish that he and those through whom he derives right have for 60 years been in possession adverse to the Crown of the property in question any right of the Crown thereto is extinguished and plaintiff entitled to succeed in his claim. 11 O.W.N. 96=39 L.W. 257=A.I.R. 1934 P.C. 23=66 M.L.J. 134=(1934) M.W.N. 165=36 Bom. L.R. 249=3 A.W.R. 101=38 C.W.N. 285=(1934) A.L.J. 153=59 C.L.J. 56=61 C. 262=61 I.A. 78=147 Ind. Cas. 545 (P.C.).

——S. 28—Scope.

Section 28 "merely extinguishes the right to property when the period is determined for suits for recovery of such property," and though the remedy is barred, the debt is not extinguished. 30 N.L.R. 142=A.I.R. 1933 Nag. 241=144 Ind. Cas. 736.

——S. 28—Scope and effect—Joint tenants—Effect of adverse possession.

The so-called right of survivorship of each of the daughters of a deceased male Hindu in respect of the property inherited by them from him is incidental to the right of joint possession and enjoyment of the estate with the others who are jointly entitled and cannot exist separately when the right of joint possession and enjoyment has been lost, e.g., by adverse possession by one of the daughters. 9 M.I.A. 530, **Foll.**

The effect of the interests of the excluded sisters being barred and their rights being thus extinguished under the limitation act is to enlarge the estate of the adverse possessor and to give her an estate of her own life and the lives of her sisters determinable on the death of the last survivor, and on the death of the adverse possessor such estate will descend to her heirs. 60 Ind. Cas. 586=44 Mad. 131=13 M.L.W. 407=A.I.R. 1921 Mad. 24=40 M.L.J. 83.

——S. 28—Scope.

The rule is now well settled that lapse of limitation, apart from S. 28, bars only the remedy and does not extinguish the title of the claimant. 1930 A.L.J. 1416 =A.I.R. 1930 All. 858.

——S. 28—Scope of.

Quaere.—Whether S.28 of the Limitation Act operates only to extinguish the interest of the dispossessed owner and not to assign that interest to the adverse possessor. 25 C.L.J. 537=36 Ind. Cas. 11.

——S. 28—Scope of.

S. 28 provides only the extinction of the rights upon the termination of the period of limitation for **a suit** and not that at the termination of the period of limitation for an **application**, any right shall be extinguished. 46 Ind. Cas. 569 (Pat.).

——S. 28—Scope of—Limitation not extinction.

The provisions of the Limitation Act should be construed strictly. Limitation is not extinction and the bar created by it does not operate to discharge a debt except in the particular circumstances of S. 28. 5 L.W. 593=40 Ind. Cas. 358.

——S. 28—Execution of decree barred for possession—Effect of—"Property," meaning of.

Held:—That though the decree against A had become incapable of execution by lapse of time, still the right established by it remained; and though that right could not be enforced against A by execution through the court, the decree-holders could enter by ousting any trespasser, A included. 15 B. 238, foll. (1910) 12 Bom. L.R. 956=35 Bom. 79=8 Ind. Cas. 639.

——S. 28—Scope and effect—Decree—Right to property declared—Execution barred—Effect.

Where the right to property has been established by a decree for possession, the mere barring of the right of execution does not under S. 28 of the Limitation Act or any other provision of law, extinguish the right. The remedy may be gone but the right remains. 11 Bom. L.R. 1093=4 Ind. Cas. 246.

——S. 28, Art. 111—Scope—Vendor's lien, extinguishment of—Vendor retaining possession.

The vendor's lien is not extinguished by S. 28 even though the right to sue to enforce the lien is barred by Art. 111. Where he retains possession of the lands and the purchase-money remains unpaid, the vendor has a right to retain possession until his lien is extinguished by payment. 2 B. 517, appr. (1902) 27 M. 28.

10. Starting point of limitation.

——S. 28—Starting point of limitation—Adverse possession—Commencement of adverse possession against minor—Limitation for minor's suit.

Where a person entering into possession of the property of a minor is under no obligation to him and enters into possession for his own benefit and in assertion of his title to that of the minor, limitation would begin to run from the date when he takes possession and his adverse possession commences from the date on which he takes possession though the minor is entitled to file a suit within 3 years from the date of his attaining majority. 46 Bom. L. R. 683=A. I. R. 1945 Bom. 63=219 Ind. Cas. 166.

——S. 28—Starting point of limitation—Transfer by mutwalli of waqf property.

In the case of the transfer of the **waqf** property by the **mutwali**, limitation under S. 28 cannot run until the alienor ceases to be a **mutwalli** by death or otherwise.

The property dedicated by the **waqif** should be substantially dedicated to charitable purposes, and if it is regarded as a private **waqf**, the ultimate benefit must be reserved for the poor or for some religious, pious or charitable purpose of a permanent character as laid down by the Mussalman Waqf Validating Act.

Held, on facts that the waqf created by **J** in 1876, was a public one and perfectly valid and that the second **waqf** of 1880 created by him after the death of his wife, was nothing but a re-affirmation of the previous **waqf** of 1876. Similarly, the **waqf** created by his son **U** in 1908 was also valid. A.I.R. 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——S. 28—Starting point of limitation—Vatan property—Alienation by the holder enures for his life-time—Suit by alienor's heirs to set aside alienation—Limitation Act, (IX of 1908) S. 28.

V and **D** joint vatandars of certain vatan lands, alienated them to defendants 1-3 in 1872. **D** died shortly after and **V** died on the 20th April 1893. Within 12 years of this date, **V**'s sons sued to recover possession of the lands from the defendants; **D**'s sons were joined as party defendants as defendants 4, 5. The plaintiffs alleged that at a partition between **V** and **D** the whole of the vatan lands has fallen to the share of **V**. The first court found the partition not proved and awarded plaintiff's claim to the extent of half the lands. On appeal, the defendants 4 and 5 claimed that on the findings of the first Court they should be awarded possession of the other half of the vatan lands. This was allowed on appeal. **Held**, (1) that time for the purposes of this suit ran from the death of **V**, the survivor of the two vatandars, (2) that the defendants 4 and 5 were entitled to a moiety in the vatan lands in right of their father **D**; (3) that in putting forward their claim they were not barred by any provisions of the Limitation Act, 1908. The fact that vatan land is attached to the office deprives it of some of the incidents which would attach to it if it were ordinary land in the possession of a Hindu family. A vatandar is entitled to alienate the vatan land for the term of his natural life, and his children although not separate in interest from him have no right to object to such alienation until after his death. (1909) 11 Bom. L.R. 1102=34 Bom. 91=4 Ind. Cas. 249.

11. Title by prescription.

——S. 28—Title by prescription.

Section 28 only extinguishes the right, and does not provide in terms in whom that right is to vest. But the title to immovable property cannot be left in the air, and on extinguishment of the true owner's title, title must follow possession and vest in the trespasser who has got a title by possession. A.I.R. 1943 Bom. 265=45 Bom. L.R. 491=209 Ind. Cas 251.

——S. 28—Title by prescription.

If the owner whose property is encroached upon suffers his right to be barred by the law of limitation, the practical effect under S. 28, Lim. Act, is the extinction of his title in favour of the party in possession. A.I.R. 1942 P.C. 64=9 B. R. 70=(1942) A.L.J. 718=1943 O.W.N. 1=47 C.W.N. 46 (2)=(1943) 1 M.L.J. 11=56 L.W. 8=45 P.L.R. 36=I.L.R. (1942) Kar. (P.C.) 166=45 Bom. L.R. 275=1943 M.W.N. 205=76 C.L.J. 451=69 I.A. 137=203 Ind. Cas. 1 (P.C.).

——S. 28—Title by prescription—Quality and extent of right acquired by adverse possessor.

Under S. 28, Lim. Act, 12 years' adverse possession of land by a wrong-doer, not only bars the remedy of the real owner and extinguishes his title, but confers a title on the person in possession. The title of the real owner who had been dispossessed cannot even revive if, at a latter date, he re-acquires possession. The quality and extent of the right acquired by the person who has established his adverse possession depends upon the intention with which the person setting up the statute has been in possession—whether with the intention of wholly ousting the real owner or with the intention of ousting him to some limited extent only. A.I.R. 1942 All. 42=1941 A.W.R. 1072=(1941) A.L.J. 676=198 Ind. Cas. 496.

——Ss. 28, 26—Title by prescription—Encroachment—Extinction of owner's title—Whether gives good title to wrong-doer.

Under S. 28, Lim. Act, the owner's title to the portion encroached upon and built over is extinguished at the end of 12 years, the period limited for instituting a suit for possession of the land; and the extinction of the owner's title operates to give a good title to the wrong-doer. A.I.R. 1941 Pat. 181=19 Pat. 852=7 B.R. 739=22 P.L.T. 986=13 R.P. 689=194 Ind. Cas. 243.

——S. 28—Title by prescription—Basis of.

A prescriptive title is not based on original right or morality but solely on expediency. 46 Ind. Cas. 964 (Lah.).

——S. 28, Sch. 1, Art. 44—Title by prescription —Guardian of minor—Alienee from guardian, right of.

Art. 44 of the Limitation Act applies to a suit by a ward for setting aside the alienations made by his guardian and the same article applies even when a prayer for possession is added in cases where the possession is with the alienee. The title to the property vests in the alienee till the alienation is set aside and becomes exclusively his on failure of the ward to sue to set aside the alienation within three years of his attaining majority by virtue of S. 28 of the Act. 41 Mad. 102=33 M.L.J. 309=40 Ind. Cas. 664.

——S. 28 — Title by prescription—Hereditary office—Saranjam—Adverse possession.

A title by prescription might be acquired against the successive holders of a saranjam. Each holder has not a fresh cause of action, though he gets the saranjam, subject to the approval of the Government. (Sir Basil Scott, Kt., C. J., and Batchelor, J). Trimbak Ramchandra v. Ghulam Zilani. 34 Bom. 329=12 Bom. L.R. 208=5 Ind. Cas. 965.

——S. 28—Joint family—Seperate property—Joint possession—Prescription.

See Limitation Act, S. 7. 5 C.W.N. 545=3 Bom. L.R. 303=24 M. 387=28 I.A. 81 (P.C.).

——S. 28—Title by prescription—Municipal street.

A Municipality is not entitled to remove varandah standing on a public street for over thirty years and no notice can be issued for its removal. 24 C.W.N. 1011=31 C.L.J. 463=58 Ind. Cas. 327.

——S. 28 and Art. 146-A. — Title by prescription — Municipal Street — Bombay Dt. Municipal Act, (1901), S. 122.

When a varandah is standing on part of a public street for more than thirty years, the Municipality cannot issue notice under S. 122 for its removal as the owner of varandah gets title to the site under it by virtue of S. 28 and Art. 146-A, Limitation Act. 22 Bom. L.R. 951 =58 Ind. Cas. 326.

——S. 28, Art. 144—Title by prescription—Grant to Municipality—Government land—Adverse possession.

Where the exclusive right of possession forever over the suit-land was transferred by Govt. to a Municipality subject only to the right reserved by the Govt. to resume the land when required for a public purpose the possession of the Municipality is not that of an agent or servant of the Govt. but one in its own right; such possession can therefore be destroyed by adverse possession by a stranger for 12 years. 9 S.L.R. 1=30 Ind. Cas. 13.

——S. 28—Title by prescription — Suit for possession.

A person acquiring indefeasible title to any property by adverse possession, is entitled to institute a suit to recover the possession of the same, if lost afterwards. 58 Ind. Cas. 380 (Pat.).

——S. 28—Title by prescription—Service Inam —Adverse possession.

Where an inam granted for service is trespassed upon by a stranger before its enfranchisement and held adversely for the statutory period the holders acquire title to it under S. 28 of the Limitation Act. (1916) 1 M.W.N. 473=3 L.W. 590=34 Ind. Cas. 898.

——S. 28—Trust property—Transferee of—Title by prescription.

Where a transferee of trust property has not acted in good faith but has paid valuable considerations he acquires good title after the lapse of the period necessary for extinguishing under S. 28 the right of the beneficiary to follow the property in his hands. 38 Mad. 1064=33 Ind.Cas. 45.

——S. 28, Art. 134—Trust property—Transferee of—Title by prescription—Trusts Act, S. 64— Transferee for consideration but not in good faith—The right to follow trust property— Extinguishment of the right.

A transferee of trust property for consideration but not in good faith acquires good title only after the period necessary under S. 28 of Limitation Act for extinguishing the right of the beneficiary to follow trust property. 26 M.L.J. 537=(1914) M.W.N. 581=24 Ind. Cas. 369.

——S. 28—Usufructuary mortgage, unregistered—Possession for 12 years—Title by prescription:—See 12 M.L.J. 410=26 M. 72.

——S. 28—Title by prescription—Obiter.

Possession held for over the statutory period under a title found to be invalid or unfounded will give the possessor a prescriptive title. 12 M.L.J. 387.

12. Miscellaneous.

——S. 28—Appellate Court—Power of.

The failure of the trial Court to appreciate the true effect of S. 28, Lim. Act, does not absolve the Appellate Court from considering the question of limitation. A.I.R. 1940 Cal. 194=70 C.L. J. 539= 189 Ind. Cas. 540.

——S. 28—Miscellaneous—Assessment of rent.

Suit for assessment of rent on mal lands has not the effect of a decree in a suit for resumption of lakheraj grant and does not create any relationship of land-lord and tenant—Nor does it convert adverse possession into permissive possession. I.L.R. (1937) 2 Cal. 234=41 C.W.N. 688.

——S. 28—Miscellaneous—Reversioner's suit—One reversioner suing in time impleading the other as a defendant—Right of the latter.

Though a suit by one reversioner to recover possession of his share from the alienee from a Hindu widow would be barred under S. 28 read with Art. 141 as being beyond 12 years from the death of the widow, yet when a suit is brought within the proper period of limitation by another reversioner and the other reversioner is made defendant in it and he in his written statement claimed possession of his share, such a claim would not be barred by limitation in spite of the fact that the written statement itself was presented after the lapse of 12 years. 34 Bom. 91, Foll. 119 Ind. Cas. 656=53 Bom. 472=31 Bom. L. R. 647=A.I.R. 1929 Bom. 345.

——S. 29.

Synopsis.

1. Scope and applicability
   See also: Lim. Act, Ss. 5, 18
2. Interpretation
3. Local or Special law
   (a) Bengal Tenancy Act
   (b) Civil P. Code
   (c) Income Tax Act
   (d) Letters Patent
   (e) Municipal Acts
   (f) Ordinance
   (g) Pro. Insol. Act
   (h) Registration Act
   (i) Revenue Acts
   (j) Other Acts.

1. Scope and applicability.

See also: Ss. 5, 18, Limitation Act.

——S. 29 (2) (b)—Scope and applicability.

The contention that S. 29 (2) (b) excludes the operation of S. 5 of that Act is not accepted. Section 29 (2) (b) is only applicable for the purpose of determining the period of limitation prescribed for a suit, appeal or application. Once that period has been determined, S. 5 comes in and gives the Court discretion to extend it for sufficient cause. (1946) 12 B.R. 62 (Rev.).

——S. 29—Exception 3—Applicability.

Exception 3 to S. 29, Lim. Act, regarding matrimonial matters refers only to suits under Indian Divorce Act. Where the suit is not one under Divorce Act in the matrimonial jurisdiction of the Court but in its Ordinary Original Civil Jurisdiction for a declaration of the nullity of the marriage performed in France under French Law between a Hindu and a Jewess, the exception does not apply and the Lim. Act is applicable. 49 C.W.N. 570=A.I.R. 1945 Cal. 484.

——S. 29—Scope and applicability.

Suit for possession of land and as raiyat is not governed by S. 29, Lim. Act. A.I.R. 1940 Cal. 113 =I.L.R. (1939) 2 Cal. 358=43 C.W.N. 1096=187 Ind. Cas. 301.

——S. 29—Scope and applicability.

Section 29 (2) (b), Lim. Act, is a negative provision and cannot be interpreted as having been intended to affect any positive provision of the local law. It is not the intention of S. 29 to restrict the power of the local Legislature to apply or exclude the application of the provisions of the Lim. Act. Clause (a) of S. 29 (2) of the Lim. Act presupposes the power of the local Legislature to exclude the operation of certain sections of the Lim. Act. If so, it is unreasonable to assume that Cl. (b) deprives the local Legislature of its power to apply certain provisions if it so desires or in any way restricts the scope of the local law which prescribes the application of certain sections of the Lim. Act. 18 N.L.J. 285=163 Ind. Cas. 623.

——S. 29—Scope and applicability—Obiter.

Court passing decree governed by special law of limitation—Decree sent for execution where that law is not applicable—Execution is governed by special law. 17 P.L.T. 57=A.I.R. 1936 Pat. 104 =2 B.R. 286=15 Pat. 356=160 Ind. Cas. 1096.

——S. 29—Scope and construction.

The amendment made in S. 29 of the Lim. Act in 1922 merely means that such sections as Ss. 19 and 20 are not to apply by virtue of the Lim. Act, and that if they are to apply, the grounds for applying them are to be found in the special or local Act itself; but that section is not to be construed as intending to cut down whatever is provided by any special or local law either by express words or by clear intention. A.I.R. 1938 Cal. 90=36 C.W.N. 838=141 Ind. Cas. 716.

——S. 29, (S. 60)—Scope and applicability—Limitation under special or local laws.

Under S. 6 of the Limitation Act, any period of limitation prescribed by special or local laws is not affected by anything contained in that Act. 12 M. 168, foll. (1903) 26 M. 638.

2. Interpretation.

——S. 29 (2) (a)—Interpretation—Words "expressly excluded" meaning explained—Words "and not afterwards" in S. 535 (2), Bengal Municipal Act (XV of 1932), if express exclusion—Applicability of S. 15 (2), Limitation Act (IX of 1908), in computing limitation under S. 535 (2), Bengal Municipal Act (XV of 1932).

The words 'expressly excluded' in S. 29 (2) (a), Lim. Act mean what they say. In order that the exclusion may be express, the particular sections of the Lim. Act which are intended to be excluded must be specifically indicated by the special or local law in question. So far as the words 'and not afterwards' in S. 535 (2), Ben. Municipal Act are concerned, the utmost that can be said is that the exclusion of those sections of Lim. Act may be easily spelt out therefrom, but they will not amount to an express exclusion. Hence S. 15 (2), Lim. Act applies in computing the special limitation under S. 535 (2), Ben. Municipal Act. A.I.R. 1942 Cal. 544= 46 C.W.N. 943=202 Ind. Cas. 762.

——S. 29 (as amended in 1922) and S. 5—Interpretation—Expression "the remaining provisions . . . apply", meaning of—S. 5, applicability of, to appeal under S. 29, Cantonments (House Accommodation) Act (VI of 1923).

The expression "the remaining provisions of this Act shall not apply" in the amended S. 29, Lim. Act simply means that they are not to apply **proprio vigore**, that is, merely by virtue of the Lim. Act itself, and that if they are to apply, the grounds for applying them must be found in the special or local Act itself. The Cantonments (House Accommodation) Act is a special Act and S. 5, Lim. Act does not apply to an appeal under S. 29, Cantonments (House Accommodation) Act. A.I.R. 1941 All. 207=(1941) A.L.J. 267=1941 O.W.N. 453=I.L.R. (1941) All. 356=1941 A.W.R. 122=194 Ind. Cas. 404.

——S. 29—Interpretation—'Special or local law'—English Acts.

The Lim. Act does not purport to revive claims which are declared as extinguished by lapse of time. It also does not purport to affect the period of limitation provided by an English statute. An English Statute does not come within the meaning of a local or special law referred to in S. 29 of the Lim. Act. A.I.R. 1931 Sind 124=25 S.L.R. 222=133 Ind. Cas. 77.

——S. 29—Interpretation.

An express exclusion means an exclusion by express words, that is, by express reference to the section and not exclusion as a result of a logical process of reasoning. 122 Ind. Cas. 398=A.I.R. 1930 Sind 93.

——S. 29—Interpretation.

The phrase, "the remaining provisions of this Act shall not apply" can only mean that the remaining provisions of the Act shall not apply unless they are expressly made applicable by the special or local Act. To hold otherwise is to hold that it is a prohibition of the future as well as the past application of those provisions by a special or local Act, which is obviously impossible. The amendment of S. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old S. 29 none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new S. 29 some of them are applicable without being expressly included unless they are expressly excluded; the rest remain, as before, applicable only when they are expressly included. 91 Ind. Cas. 563=A.I.R. 1926 Nag. 236.

3. Local or Special Law.

(a) Bengal Tenancy Act.

——Ss. 29 (1) (b) and 15 (2)—Local law—B. T. Act—Suit under S. 104-H—Notice to Secretary of State under S. 80, C. P. Code—Period of notice—Deduction of.

The effect of S. 29 (1) (b) of the Limitation Act is to make parts II and III of the Act inapplicable to a special period of limitation prescribed by a special or local law. In a suit against the Secretary of State under S. 104-H of the B. T. Act in a computing for a period of six months prescribed by clause (2) plff. is not entitled to deduct two months in respect of the notice which he is bound to give to the Secretary of State under S. 80 of the C. P. Code. 46 Cal. 199=22 C.W.N. 802=47 Ind. Cas. 502.

——Ss. 29 (b) and 15 (2)—Local law—B. T. Act, S. 104-H—Suit under—Notice to Secretary of State under S. 80 of the C. P. Code—Deduction of time.

S. 15, sub-S. (2) of the Limitation Act does not apply to a suit instituted under the terms of S. 104-H of the B. T. Act. A suit under S. 104-H must be brought in any event, within six months as specified in that section and the plff. is not entitled to exclude the time during the currency of a notice to the Secretary of State whom he has joined as a deft. 27 C.L.J. 374; 22 C.W.N. 802, Foll. 22 C.W.N. 817=28 C.L.J. 536=47 Ind. Cas. 524.

——S. 29 (b) and 18—Local law—Bengal Tenancy Act, S. 174.

S. 18 of the Limitation Act does not apply to a proceeding under S. 174 of the Bengal Tenancy Act. 18 C.L.J. 533=18 C.W.N. 31=20 Ind. Cas. 760.

——S. 29(2)—B.T. Act—S. 185—Cases falling under.

In all cases not mentioned in S. 185, Ben. Ten. Act, the Act has to be read with reference to the provisions of S. 29 (2), Lim. Act. A.I.R. 1933 Cal. 782=57 C.L.J. 377=37 C.W.N. 927=60 C. 970=148 Ind. Cas. 15 (D.B.).

——S. 29—Bengal Tenancy Act—Applicability of.

There is no conflict between S. 29 (2) (b), Limitation Act, and S. 185 (2), Ben. Ten. Act. There is an express reference in S. 29 (2) to S. 3 which itself refers to Ss. 4 to 25 and consequently Ss. 4, 9 to 18 and 22 are specifically made applicable so far as not expressly excluded, and the only reasonable way in which Cl. (b) can be read is that the remaining provisions of the Act if they are to apply are to be specially applied. They will not be applied by force of the Limitation Act itself. 9 Pat. 747=126 Ind. Cas. 299=A.I.R. 1930 Pat. 301.

(b) Civil P. Code.

——S. 29.

Special law—Civ. P. Code—Application to Civil P.C., prescribing period of limitation is special law. 1944 N.L.J. 187=A.I.R. 1944 Nag. 155=I.L.R. (1944) Nag. 250=217 Ind. Cas. 298.

——S. 29—Civ. P. Code—Application to—(As amended in 1922)—Amendment of S. 29, reasons explained.

The enactment of S. 29 of the present Lim. Act in its present form was rendered necessary not because the word "prescribed" in Part III of the Act did not mean prescribed by any law for the time being in force but because certain Courts had held that the application of the general provisions of the Lim. Act laid down in Part III to special and local Acts did "affect or alter" the periods of limitation prescribed by those Acts and the Legislature disapproved of those decisions.

The Civil P. C. is not a special and local Act, the provisions of the Code are subject to the provisions of the Lim. Act. The Civil P. C. and the Lim. Act must be read together and must be treated as complimentary to each other. Both are General Acts and are in pari materia. A.I.R. 1939 All. 403=(1939) A.L.J. 522=1939 A.W.R. 498=I.L.R. (1939) All. 647=183 Ind. Cas. 242 (F.B.)

——**Ss. 29, 19 and 20—Civil P. C., if included in** scope of S. 29, Lim. Act—Applicability of Ss. 19, 20 of Limitation Act to S. 48, Civil P. C.

Section 29 of the Lim. Act does not include the Civil P. C. in its scope. The question of the applicability of Ss. 19 and 20 of the Lim. Act to S. 48 of the Civil P.C. has to be decided without reference to what is contained in S. 29. Sections 19 and 20 do not apply to S. 48 of the Civil P. C., and to apply them would be to render the provisions of S. 48 of the Civil P. C. largely nugatory. 11 O.W.N. 1103=A.I.R. 1934 Oudh 465=10 Luck. 208=151 Ind. Cas. 541.

——**S. 29—Special law—Civ. P. Code.**

The Civil P. C. should not be taken to be a special law for purposes of S. 29. A.I.R. 1931 Oudh 351=7 Luck. 49=8 O.W.N. 842=132 Ind. Cas. 257.

(c) Income Tax Act.

——**S. 29—Income Tax Act—Time required for copies.**

On general principles and in view of S. 29, Lim. Act, the period required for obtaining the copies of the order under S. 31 or 32 of the Income-tax Act shall be excluded in computing the period of limitation for an application for reference by an assessee under S. 66 (2) (3). 122 Ind. Cas. 810=9 Pat. 172 =10 P.L.T. 769=A.I.R. 1930 Pat. 14.

——**S. 29—Income-tax proceedings.**

Provisions under S. 29, Limitation Act, apply to the proceedings under Income-tax Act. 117 Ind. Cas. 881=A. I. R. 1929 Lah. 170.

(d) Letters Patent.

——**S. 29 (2) (a)—Special or local law—Letters Patent.**

Per **Manohar Lall, J.**—The Letters Patent of the Patna High Court is neither a special nor a local law within the meaning of S. 29 (2) (a) of the Limitation Act. 26 Pat. 157=A.I.R. 1947 Pat. 329 (S.B.).

——**Ss. 29, 12, (as amended by Act X of 1922)—Letters Patent—Application for leave to appeal** under Letters Patent filed beyond 30 days—Time for taking copy of judgment, whether can be excluded.

The amended S. 29 makes S. 12 applicable to all special and local laws. By "special or local laws" is meant, special or local legislative enactments for special or local circumstances. The rules made by a High Court under its Letters Patent and by virtue of the Civil P. C., do not come under the expression "special or local law". Hence the time taken for taking out the copy of the judgment for leave to appeal under the Letters Patent cannot be excluded from the 30 days, which is the absolute period of limitation as provided by Patna High Court Rules, Chap. VII, R. 2. 15 P.L.T. 301=A.I.R. 1934 Pat. 353=151 Ind. Cas. 107.

——**S. 29—Letters Patent proceedings.**

Per **Cunliffe, J.**—The rules made by High Court under its Letters Patent or by virtue of the C. P. Code will not amount to a special or local law. High Court rules approximate closely to bye-laws which can be altered at will. They are subordinate and domestic enactments; they must be **intra vires** of the power from which they are derived and any other power **pari materia**. 8 Rang. 380=127 Ind. Cas. 161= A.I.R. 1930 Rang. 228 (F.B.).

——**S. 29—Letters Patent—Applicability of the Act.**

When the special or local law is not in itself a complete Code, the general provisions of the Limitation Act, e. g., Ss. 4, 5, 12 and so on, are ordinarily applicable to proceedings under it, inasmuch as such general provisions do not affect or alter the period prescribed by the special or local law, but only the manner in which that period is to be computed. Letters Patent being a complete Code the provisions of the Lim. Act do not apply to proceedings thereunder. 61 Ind. Cas. 327=2 Lah. 127=3 L.L. J. 415 =74 P.L.R. 1921=A.I.R. 1921 Lah. 26.

(e) Municipal Acts.

——**S. 29—Bombay Municipal Borough Act, Ss. 104, 105—Proceedings under.**

The periods of limitation prescribed for filing a suit under the Lim. Act govern the procedure in a Court of law and the powers of the Municipality acting under the provisions of Ss. 104 and 105 of Bom. Municipal Boroughs Act are not governed by the Lim. Act. A.I.R. 1939 Bom. 494=41 Bom. L.R. 1002=I.L.R. (1939) Bom. 685=185 Ind. Cas. 366.

——**S. 29—Madras Dt. Municipalities Act—Suit to recover property tax.**

A suit to recover property tax under Mad. District Municipal Act by enforcing the charge is governed by the period prescribed by S. 345 of the said Act and not by Art. 132 of the Lim. Act. 41 L.W. 457=(1935) M.W.N. 379=A.I.R. 1935 Mad. 378=160 Ind. Cas. 254.

——**S. 29—Municipal Acts.**

Under S. 167, District Municipal Act, read with Ss. 29 and 15 (2), Lim. Act, a plaintiff is entitled to add the period allowed him for notice to the six months within which he has to sue. A.I.R. 1925 Sind 322, Overruled. 122 Ind. Cas. 398=A.I.R. 1930 Sind 93.

(f) Ordinance.

——**S. 29—Emergency Powers Ordinance—Extension of time for appeal.**

In view of the terms of S. 29, Lim. Act, the time for filing an appeal prescribed by Ben. Emergency Powers Ordinance, 1931 cannot be extended under S. 5 of the Lim. Act. A.I.R. 1933 Cal. 132=37 C.W.N. 201=34 Cr. L. J. 299=60 C. 618=142 Ind. Cas. 280.

——**S. 29—Special law.**

For the purposes of S. 29, Ordinance II of 1932 is a special law.

The provision as to limitation contained in sub-s. 2 of S. 39 of the Ordinance is a specific provision the consequences of which are provided for as a matter of limitation by S. 29. A.I.R. 1933 Cal. 124=37 C.W.N. 195=60 C. 571=34 Cr. L. J. 633=143 Ind. Cas 802.

——S. 29—Emergency Powers Ordinance S. 34—Appeal from the order of spl. Judge.

In dealing with the question of an appeal from a Special Judge, S. 34 of the Emergency Powers Ordinance makes a provision to the effect that the provisions of Lim. Act are to apply as if it were an appeal under the Code from a sentence passed by Court of Sessions. A.I.R. 1933 Cal. 124=37 C.W.N. 195=34 Cr.L. J. 633=60 C. 571=143 Ind. Cas. 802.

(g) Pro. Insol. Act.

——S. 29 (2)—Pro. Insol. Act.

By reason of the express terms of S. 29 (2) (a), S. 4 applies to applications under S. 68, Prov. Insol. Act. A.I.R. 1931 Rang. 209=9 R. 150=134 Ind. Cas. 223.

——S. 29 (b)—"Special" Law — Pro. Insol. Act, 1907.

Prov. Insol. Act, 1907 is a special law under S. 29, but it is not a complete code. 34 All. 496=10 A.L J. 3=16 Ind. Cas. 149.

——Ss. 29 (b) and 12—Special law—Prov. Insol. Act, S. 22—Receiver's order—Time for getting copy of—If excluded.

In reckoning the period of 26 days under S. 22, Prov. Insol. Act, the time for getting a copy of the Receiver's order cannot be excluded. (34 M. 505; 35 A. 410; 17 Ind. Cas. 593, Foll.) 16 M.L.T. 246=(1914) M.W.N. 831=25 Ind. Cas. 610.

——S. 29—Special law—Prov. Insol. Act, S. 46—Appeals under—Applicability.

The Prov. Insol. Act though a special law within the meaning of S. 29 of the limitation Act is not a complete code in itself, and there is nothing to prevent the application thereto of the general provisions of the Limitation Act. 88 P.W.R. 1918=89 P.R. 1918=87 P.L.R. 1918=46 Ind. Cas. 588.

——S. 29 (b)—Special law—Prov. Insol. Act, Ss. 46 and 47—Appeals under—Applicability.

Recourse cannot be had to the provisions of the Limitation Act (IX of 1908) in dealing with the admissions of petitions and appeals presented after the time prescribed under the Prov. Insol. Act. 34 M. 505 Foll. Per Iyer, J.—Wherever an attempt is made to construe a special period fixed by an enactment with reference to the general provisions of the Limitation Act, the effect of such a process would be "to affect the period of limitation" fixed by that enactment as provided by S. 29 of the Limitation Act. 41 Mad. 169=33 M.L.J. 566=7 L.W. 443=44 Ind. Cas. 805.

——Ss. 29 (b) and 35 and 12—Special law—Prov. Ins. Act, S. 46 (3)—Appeal under—Exclusion of time for obtaining copies of decrees and judgment appealed against.

S. 12 (3) of the Limitation Act which provides for the exclusion of time occupied in obtaining the copies of the judgment and decree appealed against from the period allowed for filing the appeal does not apply to appeals under S. 46 of the Prov. Insol. Act. In the exceptional circumstances of the case the High Court treated the appeal as a revision petition and dealt with it as such under S. 15 of the Charter Act. 34 M. 505, Foll. 91 A; 496, not Foll. Per Sadasiva Iyer, J.—The Court has power to excuse the delay in filing this appeal under S. 5 of the Limitation Act. 39 Mad. 593=18 M.L.T. 200=30 Ind. Cas. 703.

——S. 29 (b)—Special law—Prov. Insol. Act, S. 46—Appeals under—Limitation.

The provisions of Ss. 5 and 12 (2) of the Limitation Act apply to applications and appeals under the Prov. Insol. Act as they cannot be deemed to affect or alter the periods of limitation fixed by the Prov. Insol. Act. 34 A. 496; (F.B), Foll. 9 N.L.R. 91=20 Ind. Cas. 258.

(h) Registration Act.

——S. 29—Suit under Registration Act—Limitation Act does not apply.

Under S. 29 (1) of the Lim. Act nothing in that enactment affects or alters any period of limitation specially prescribed for any suit appeal or application by any special or local law and inasmuch as Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused and as S. 77 limits the period within which suit is to be brought to 30 days the period cannot be extended under S. 14 of the Lim. Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction in the matter. A.I.R. 1926 N. 126=89 Ind. Cas. 884.

——Ss. 29 (b) and 14—Special law—Registration Act, S. 77—Suit instituted in wrong court—Extension of time.

S. 14 of the Limitation Act cannot be applied to compute the period of limitation prescribed by S. 77 of the Registration Act for a suit to enforce the registration of a document. 24 C.W.N. 4=30 C.L.J. 455=54 Ind. Cas. 705 (F.B.)

——Ss 29 and 5—Special law—Registration Act, S. 77—Suit under—General principles of Limitation Act if applicable to—Suit to compel registration time expired when Court closed—Suit filed on opening of Court—Limitation—Applicability of section.

Though S. 5 of the Limitation Act does not apply to a suit under S. 77 of the Registration Act, yet on general principles, a suit, time for filing which had expired when the Court closed and which was therefore filed on the Court reopening, is not barred. 26 M.L.J. 397=15 M.L.T. 233=23 Ind. Cas. 23.

——S. 29 (b) and 14—Special law—Registration Act, S. 77—Suit under—Period if can be extended—Proceedings instituted in wrong Court.

As Ss. 71 to 77 of the Registration Act lay down a complete procedure where registration is refused and as S. 77 limits the period within which a suit is to be brought to 30 days, the said period cannot be extended under S. 14 of the Limitation Act on the ground of prosecution of proceedings in good faith in a Court not having jurisdiction in the matter. 24 C.W.N. 29=54 Ind. Cas. 228.

——S. 29 (Ss. 6, 14)—Registration Act (III of 1877) S. 77.

A Sub-Registrar refused to register a document as the executent refused to admit execution. An appeal to the Registrar was dismissed. Within 30 days of the

dismissal of the appeal, an application for review was filed to the Registrar, and it was dismissed. Then a suit was brought to enforce registration. **Held**, that S. 14 of the Limitation Act did not apply to the case at all; and that as the suit was not brought within 30 days from the date of the dismissal of the appeal by the Registrar, it was out of time. 18 C. 368, followed. (1903) 7 C.W.N. 550=30 C. 532.

(i) Revenue Acts.

——S. 29—Revenue cases—C.P. Land Revenue Act (1917), S. 169 (1) (b).

Section 29 (b) excludes the operation of S. 14 of the Limitation Act in respect of a suit filed in accordance with an order passed under Cl. (b) of S. 169 (1) of the Central Provinces Revenue Act. 73 Ind. Cas. 1021 =6 N.L.J. 205=A.I.R. 1923 Nag. 306.

——Ss. 29 (b) and 6 — Local law — C. P. Land Revenue Act, S. 6—Minority.

S. 6 of the Limitation Act **prima facie** applies only to suits in the schedule to the Act and a suit under S. 6 of the C.P Land Rev. Act is not subject to the rule of limitation in the Limitation Act. 46 Ind. Cas. 879 (Nag.)

——Ss. 29 (b) and 15 (2)—Local law—Mad. Rev. Rec. Act (II of 64), S. 59—Suit under—General principles of Limitation Act—Applicability.

S. 15 (2) of the Limitation Act governs suit to set aside a sale under S. 59 of the Madras Act II of 1864. The question whether the general provisions of the Limitation Act should be applied to cases where a special period of limitation is prescribed by a special or local Act, would depend on whether the provisions of such Act are complete code regarding limitation for suits thereunder. 34 M. 505, Dist. 38 Mad. 92=24 M.L.J. 41=18 Ind. Cas. 617.

——S. 29—Local law—U. P. Land Revenue Act, S. 111—Applicability.

The Limitation Act has no applications to suits contemplated by S. 111 of the U P. Land Revenue Act. 4 O.L.J. 553=43 Ind. Cas. 473.

(j) Other Acts.

——S. 29—Land Acquisition Act, S. 18—Reference under.

Section 29 does not apply to an application for reference under S. 18 of the Land Acquisition Act. A.I.R. 1932 All. 598 (599)=54 A. 282=143 Ind. Cas. 111.

——S. 29—Local law—Bombay Regulation V of 1827.

S. 1 of the Bombay Regulation V of 1827 being an enactment of positive presumption was not affected by Act XIV of 1859 which was a statute of limitation. 37 Bom. 231=15 Bom. L.R. 178=19 Ind. Cas. 387.

——S. 29—Dakkan Agr. Relief Act—Suit under S. 3 (w).

On the plain wording of S. 29, Lim. Act, the benefit of S. 20 of that Act cannot be availed of by a plaintiff in a suit falling under S. 3 (w), Dekkhan Agri. Relief Act. A.I.R. 1942 Bom. 131=44 Bom. L.R. 138=200 Ind. Cas. 12.

——Ss. 29 (b) and 4—Local law—Karachi Port Trust Act—Exclusion of holidays.

The general provisions of the Limitation Act for excluding holidays in computing the period of limitation are not applicable to suits under the Karachi Port Trust Act which prescribes a special period of limitation. 11 S.L.R. 106=45 Ind. Cas. 168.

——S. 29 (b)—Local law — Santhal Parganas Regulation—Minority.

The section saves all provisions of local laws as to limitation and the Act though applicable to Santhal Parganas does not affect the three years rule under S. 25-A of Regulation III of 1872 (Santhal Parganas Regulation) the regulation does not make any exception in favour of minors and the minority provisions of the Limitation Act have reference to the periods of limitation prescribed in that Act only. 19 C.W.N. 499=28 Ind. Cas. 241.

——S. 29—U. P. Encumbered Estates Act.

Section 29 does not apply to cases under U.P. Encum. Estates Act. A.I.R. 1943 All. 291=(1943) A.L.J. 268 =I.L.R. (1943) All. 569=1943 A.W.R. (H.C.) 140 (2) =209 Ind. Cas. 541.

——S. 29—U. P. Village Panchayat Act.

Section 29 is applicable when the special or local law prescribes a period of limitation for any suit—No period of limitation is prescribed by U. P. Village Panchayat Act—Section 29, therefore, has no application in suit under that Act. 1941 O.W.N. 111=16 Luck. 512= A.I.R. 1941 Oudh 276=1941 A.W.R. (C.C.) 92=192 Ind. Cas. 840.

——S. 29—Proceedings under Workmen's Compensation Act.

The Limitation Act does not apply to proceedings under the Workmen's Compensation Act. A.I.R 1938 Cal. 348=42 C.W.N. 341=I.L.R. (1938) 2 Cal. 52= 178 Ind. Cas. 810.

——Ss. 30 and 31 and 115—Applicability—Suit by consignor for price of goods mislaid by Ry. Co.

A suit by a consignor for price of goods mislaid by the Railway Co., is not governed by Art. 30 or Art 31 but by Art. 115, as it is a case of a breach of a written contract. 26 C.W.N. 790. 44 Cal. 16=23 C.L.J. 547= 34 Ind. Cas. 130.

——S. 30—Applicability.

S. 30 of Act IX of 1908 applies not only to cases in which the period of limitation has been altered expressly but also to a case where it has been altered owing to an alteration in the description of the suit. 18 C.W.N. 770=26 Ind Cas. 943.

——S. 30—Applicability to pending proceedings.

S. 30 of the Limitation Act applies only to suits and not to applications and hence it does not apply to applications for bringing on record the legal representatives of the deceased respondents. Limitation not being a substantive law applies to pending proceedings. 34 Mad. 232=7 M.L.T. 115=20 M.L.J. 347=(1910) M.W.N. 516=5 Ind. Cas. 420.

——Ss. 30 and 31 and Art. 135—Effect of—Mortgage by conditional sale of 1830—Right of foreclosure arising in 1850—Limitation—Effect of Act of 1859 and 1877.

A mortgage by conditional sale of 1830 contained a provision that the mortgagee would be entitled to enter into possession if the mortgage-debt was not paid on a certain date in 1850. The debt was not paid on that date. No application under Reg. VII of 1836 was made for foreclosure and on 11th of July 1910, the mortgagee brought a suit for foreclosure.

Held, that the suit was barred by limitation. The cause of action arose on the mortgagor's failure to pay the mortgage money on the due date in 1850 and the mortgagee's right to possession of the property mortgaged was extinguished under S. 1, Cl. 12 of Act XIV of 1859 as soon as 12 years had elapsed from the due date and the subsequent creation of foreclosure suits could not revive the extinct right. S. 31 of the Limitation Act IX of 1908, had, therefore, no application and the suit was barred by Art. 135 of the Limitation Act. 16 C. 693, 700, Foll. 10 A.L.J. 538=15 Ind. Cas. 240.

——S. 30—Scope of.

S. 30 only applies where there is a period of limitation "prescribed" both by Act of 1877 and by Act of 1908. Where the plaintiff cannot bring his case under S. 30, the suit is barred by limitation under Art. 134 of the Act of 1908. When property is not purchased but transferred by lease. 43 Cal. 34=19 C.W.N. 1082=29 Ind. Cas. 337.

——S. 31.

Synopsis.

1. Applicability
2. Period of grace
3. Revival of barred rights
4. Scope and operation
5. Withdrawal of suit
6. Miscellaneous.

1. Applicability.

——S. 31 (1)—Applicability—Appeal pending.

The first para. of S. 31 applies to a suit which is pending in the stage of appeal in an Appellate Court 2 Ind. Cas. 632 (All.)

——S. 31—Applicability—Berar—Period of grace.

In S. 31 of the Act, the words "from the date of passing of this Act" cannot be construed in Berar to mean from the date of **application** of this Act to Berar and the act as applied to Berar gives the same chronological period of grace as was given in British India, a period which began on 7th August 1908 and ended on 8th August 1910. 9 N.L.R. 49=19 Ind. Cas. 518.

——S. 31—Applicability—Foreclosure suit—Limitation bar against subsequent mortgagee.

Per **Kotval, A.J.C.**—Where the prior mortgagee fails to implead the puisne mortgagee in his suit for foreclosure against mortgagor and the period of limitation runs out as against the puisne mortgagee, who in his suit for foreclosure against the mortgagor obtains possession by a decree, the prior mortgagee cannot on the strength of his title under the foreclosure decree obtained against the mortgagor maintained a suit against the second mortgagee for possession subject to the latter's right to redeem. The suit in effect is one to foreclose the second mortgagee on his failure to redeem the prior mortgagee and an evasion of the law of limitation under which a regular suit for foreclosure is barred and the defendant has acquired an immunity from being compelled to redeem. **Raghunath v. Sheolal,** 13 N.L.R. 69, **Foll.**

Per **Dhobley, A. J. C.**—Limitation does not affect the subsequent suit, since it is not a suit on mortgage but a suit for possession based on a cause of act on long subsequent. 44 A.L.J. 1146, **Foll.** 66 Ind Cas. 631=5 N.L.J. 157=A.I.R. 1922 Nag. 89 (F.B.).

——S. 31 (2)—Applicability—Fresh suit—C. P. C., O. 23, Rr. 1, 2.

S. 31 of the Limitation Act applies to an application for restoration of a case dismissed or withdrawn on the ground of the 12 years rule of limitation and has no application to a fresh suit. Such a suit is governed by the law of limitation in the same manner as if the first suit had not been instituted. 9 A.L.J. 378=14 Ind. Cas. 175.

——S. 31, Art. 132—Mortgage—Bond providing for payment at time of redemption of previous mortgage—Applicability of S. 31 to suits governed by Art. 132.

A executed a usufructuary mortgage and a bond after some years with the provisions that he would pay off the sum of the bond within a period; and if he failed to do so, he would pay it with interest at the time of paying the mortgage money. This sum would be paid first and the mortgage will be redeemed afterwards by paying in a lump sum. **Held,** that the bond was not a simple mortgage though it might have effected a charge, (ii) that suits governed by Art. 132 cannot get the benefit of S. 31 of the Limitation Act, (iii) that when the construction of a deed is in question rulings thereon in different language help very little. 15 O.C. 295=15 Ind. Cas. 857.

——S. 31 (2)—Applicability — Mortgages executed before and after 1882—Distinction.

For the purposes of S. 31 (2) of the Lim. Act, there is no distinction between mortgages executed before and after 1882 (T.P.A.) 16. Ind. Cas. 236, Foll; 26 Ind. Cas. 938 (Mad.)

——S. 31—Applicability—Realisation of rents and profits in lieu of interest—If receipt of interest as such.

When under the terms of a mortgage of 1850 the mortgagee was to take possession of the mortgaged property and to appropriate its rents and profits in lieu of interest and the mortgagee was dispossessed in 1889, **Held,** that the realisation of rents and profits in lieu of interest was equivalent to the receipt of interest, as such, that the limitation began to run from the year 1889 when Act XV of 1877 had come into operation and that S. 31 of Act IX of 1908 did apply and the plff.'s suit for sale of the property brought on the 10th January 1910, was not barred. 35 All. 270=11 A.L.J. 289=19 Ind. Cas. 238.

——S. 31—Applicability — Remand on appeal—Limitation Act (1887), Arts. 132 and 147.

Where in an appeal a suit for the recovery of mortgage money, the High Court held that 60 years rule of limitation was applicable under Art. 147 of the old Limitation Act and gave judgment for plff. and on appeal the Privy Council held that Art. 132 applied, that plff.'s suit was barred, and remitted the case to High Court for disposal, **Held**, that S. 31 applied to the case as the Lim. Act (1908) was passed after the P. C. had remitted the case. 32 Mad. 312=5 M.L.T. 287=4 Ind. Cas. 501.

——S. 31 (1) — Applicability — "Suit pending"— Remand on appeal for enquiry—Enquiry not commenced at date of Act.

Where a mortgage suit for foreclosure or sale was remitted by the Privy Council to be disposed of on the merits after enquiry by the Court in India and that enquiry had not been entered upon at the date of passing of the Limitation Act IX of 1908. **Held**, that the suit was pending within the meaning of S. 31 (1) of the Act IX of 1908 35 Mad. 191=39 I. A. 96=16 C.W.N. 489=(1912) M.W.N. 433=11 M.L.T. 313=9 A.L.J. 504=15 C.L.J. 466=14 Bom. L. R. 455=23 M.L.J. 16=15 Ind. Cas. 222 (P. C.)

——S. 31, Sub-Ss. (1) and (2)—Applicability —Re-opening of Appeal.

Once an appeal is restored to file under S. 31, Sub-S. 1 will apply. A plea that the limitation of 12 years applies to a particular mortgage, should be raised by a way of objection to the re-opening of second appeal under S. 31 (2) and not after the appeal is re-opened unopposed. 6 N.L.R. 20=5 Ind. Cas. 701.

2. Period of grace.

——Ss. 31 and 4 — Period of grace—Expiry on sunday—Institution on Monday if in time.

Where mortgage suit was instituted on Monday the period of grace of 2 years having expired on Sunday, the suit was in time. S. 4 of the Lim. Act can be invoked in a suit covered by S. 31 for limitation purposes. 26 M.L.T 23=21 Ind. Cas. 770.

——S. 31—Period of grace—Expiry on Sunday—Exclusion of Sundays.

Where the special period of two years prescribed by S. 31 to file a suit for foreclosure or sale expired on a Sunday and the suit was filed the next Monday. **Held**, that the suit is not barred. 34 All. 375=9 A.L.J. 439 =14 Ind. Cas. 154.

——S. 31 (1)—Period of grace—General Clauses Act, S. 10—Expiry or Sunday.

The special period of two years allowed by S. 31 (1) for instituting certain suits for foreclosure or sale is not a part of the "period of limitation prescribed" for such suits. It is only a period of grace and is not governed by S. 4 or S. 12. S. 10 of the General Clauses Act, should be applied in dealing with a plaint for sale on foot of a mortgage instituted with reference to the special period of limitation allowed by S. 31 (1) of the Limitation Act. So a suit filed on Monday when its last day fell on Sunday is not time-barred. 7 N.L.R. 176=12 Ind. Cas. 810.

——S. 31—Period of grace—Extension of.

The 'period of 2 years' grace allowed by S. 31 is not to be extended by including any time within it. 13 Bom.L.R. 284=10 Ind. Cas. 910.

——S. 31 (1)—Period of grace—Foreclosure—Suit within 2 years of the passing of the Act—Suit for foreclosure.

If a suit for foreclosure on a mortgage executed more than 12 years before suit, is filed within the period of 2 years allowed under S. 31 (i) it is within time. 16 Ind. Cas. 20 (Oudh).

——S. 31—Period of grace—Foreclosure of mortgage of 1869—Suit in May 1910.

Where a mortgage by conditional sale was executed in 1869, the period fixed being six years and the condition being that if the mortgage was not redeemed the mortgage would be deemed a sale and the mortgagee brought a foreclosure suit in May 1910. **Held**, that S. 31 of the Act applies and the suit was within time. 13 Ind. Cas. 504 (Oudh).

——S. 31—Period of grace—Mortgage of 1873, suit on Lim Act (XV of 1877), Ss. 2 (1) and 4 and Arts. 132 and 147—Mortgage before the T. P. Act—Power of sale.

A mortgage, executed when the Lim. Act of 1871 was in force and not barred when the Lim. Act of 1877 was passed, gets the benefit of the extension of the period of limitation under the latter Act. A mortgagee can also claim the benefit of S. 31 of the Lim. Act of 1908 provided he institutes his suit for sale within two years of the passing of the Act. The word 'Mortgage' includes documents executed after the passing of the T P Act, and mortgages executed prior to the passing of the Act have the power of sale incidental to them. 16 Ind. Cas. 236 (Mad.).

3. Revival of barred rights.

——S 31 and Art. 135—Revival of barred rights—Reg (XVII of 1806)—T. P. Act.

A mortgage by conditional sale was made on February 25, 1866 for a period of six years providing that if after six years, anything remained due to the mortgagees, they might take possession of the mortgaged property and realise the principal and interest that the property should not be transferred so long as any principal and interest remained due and that if it was transferred while the money due to the mortgagee was not paid, the latter might bring a suit for recovery of the principal and interest within 6 years and might also get possession "by completion of sale." Nothing was paid on foot of principal or interest on the mortgage. Proceedings under S. 8 of the Reg. XVII of 1806 were not taken by the mortgagee. Part of the mortgaged property was transferred by the mortgagor in 1867. In the year 1910 the mortgagee brought a suit for foreclosure. **Held**, that the suit was barred by limitation the cause of action having accrued in 1867. 38 All. 97=14 A.L.J. 1=32 Ind. Cas. 95.

——S. 31—Revival of barred rights—Limitation Act, 1871—Limitation Act, 1859—Limitation Act, 1877.

Nothing in the Limitation Act, 1877, could revive rights barred under the Limitation Acts of 1871 or

1859. Nor is there anything in S. 31 of the Limitation Act, 1908, to revive rights barred before the Act of 1877 came into force. 16 O.C. 157=20 Ind. Cas. 465.

——S. 31—Revival of barred rights—Right to sue on mortgage barred under Limitation Act, 1871. Limitation Act (XV of 1877), S. 2 and Art. 147.

A right to sue for the mortgage money under mortgage dated 1863 and payable in 1864 which had already been barred under Act of 1871 cannot be revived by the introduction of S 31 of the new Act of 1908. 35 All. 167=11 A.L.J. 167=18 Ind. Cas. 517.

——S. 31—Revival of barred rights—Accrual of cause of action in 1868—Reg. XVII of 1806.

S. 31 does not confer on the plaintiff a right of suit under the provisions of the Transfer of Property Act when no such suit would have been entertainable on the day the Act came into force. So a foreclosure suit in respect of a mortgage deed of 1861, providing for payment in 1868 is not protected by S. 31 when no proceedings had been taken under Reg. XVII of 1806 before 1880 and the mortgagee's rights have been lost before the T. P. Act came into force. 9 Ind. Cas. 1038 (Oudh).

4. Scope and operation.

——S. 31—Scope and operation.

Obiter.—Section 31, Lim. Act, prescribes a special period of limitation in certain cases. 47 L.W. 726= A.I.R. 1938 Mad. 683=(1938) M.W.N. 513=177 Ind. Cas. 759.

——Ss. 31, 19, 20—Mortgage of 1892—Subsequent mortgage in 1902—Renewal of earlier mortgage in 1905—Priority—Effect of renewal—Scope of S. 31—'Prescribed,' meaning of.

With reference to the special class of cases dealt with in S. 31 of the Lim. Act, 1908, that section must be interpreted as prescribing a period of limitation even for the purposes of the application of Ss. 19 and 20 of the Lim. Act. The word "prescribe" in these sections must not be understood as only meaning prescribed in the Second Schedule to the Lim. Act (before amending in 1930).

A mortgage was executed on May 24, 1892, in favour of the plaintiff. In 1902 another mortgage was executed in favour of the defendant. The mortgage in favour of the plaintiff was renewed in 1905 by a fresh bond which allowed time for payment by instalments up to 1916:

Held, that the claim under the mortgage of 1892 was enforceable or at least must be deemed to have been enforceable in 1905 when it was renewed, and the plaintiff was accordingly entitled to claim priority as against the defendant on that footing.

A renewed mortgage may operate to keep alive the rights under the old mortgage as against intermediate transferees on the analogy of part-payment. But the starting point for an action for recovery of the debt will be fixed, not merely as against the mortgagor but also as against intermediate mortgagees in accordance with the terms of the new contract. 40 M.L.W. 893=(1934) M.W.N. 1343=A.I.R. 1935 Mad. 64=68 M.L.J. 12=58 Mad. 270=153 Ind. Cas. 2 (F.B.).

——S. 31—Scope and operation—Period of suit—Hypothecation bond—Acknowledgment after 12 years but within 2 years provided in S. 31—Saves limitation.

A suit on hypothecation bond was brought long after the period of 12 years prescribed by Art. 132 had expired. Plaintiff, however, relied upon an acknowledgment of the liability made after the expiry of the said period of 12 years but within the period of 2 years provided by S. 31.

Held, that S. 31 prescribed a period of limitation and that the suit was within time. 1930 M.W.N. 930= 32 M.L.W. 502=A.I.R. 1930 Mad. 991=59 M.L.J. 881.

——S. 31 (1)—Scope and operation—Suit for foreclosure of a mortgage due on 4-7-10 if within time.

The application of the first clause of Sub-S. (1) of S. 31 of the Lim. Act is not restricted to suits already barred by limitation when the Act came into force. The words in the clause operate not only for the benefit of those persons whose claims are barred before the passing of the Act but also of those whose claims are barred within two years after the passing of the Act. Consequently a suit for foreclosure of a mortgage due on 4th July 1910 is within time. 7 N.L.R. 165=12 Ind. Cas. 799.

——S. 31—Scope and operation—Mortgage suit—Limitation.

A mortgagee can sue for a sale within two years of the passing of the Act, unless 60 years, from the date the mortgage become due, would elapse, before the expiry of two years. 2 Ind. Cas. 144 (All.).

5. Withdrawal of suit.

——S. 31 (1) and (2)—Withdrawal of suit—Fresh suit, if should be brought under S. 31 (2).

A suit in 1907 for recovery of money on a mortgage was withdrawn with liberty to bring fresh suit. After the passing of the Limitation Act of 1908 the plff. brought the said suit on the same mortgage. It was contended by the deft. that the plff. should proceed under Sub-S. (2), S. 31 of the Lim. Act. **Held**, that the plff. was entitled to bring a fresh suit under Sub-S. (1), S. 31 of the Lim. Act and was not bound to proceed under Sub-S. (2). A person who has withdrawn a suit with permission to bring a fresh one should not be compelled to resort to the procedure allowed by Sub-S. (2). 12 Ind. Cas. 323 (Oudh).

——S. 31 (1) and (2)—Withdrawal of suit—Restoration of—C. P. Code (1882), Ss. 373 and 374—Law as to withdrawal of suits before Act IX of 1908.

S. 31 does not affect Ss. 373 and 374 of the C. P. Code, 1882 but only deals with withdrawals other than those under S. 373 and enacts that a claim withdrawn on the ground of 12 years rule of limitation may be restored. 6 Ind. Cas. 700 (All.).

6. Miscellaneous.

——S. 31 (1)—Miscellaneous—Mortgage — Meaning not dependent upon the date of execution.

The question whether an instrument is a mortgage or not under S. 51 (1), Lim. Act, does not depend upon the date of its execution. (1914) M.W.N. 501= 27 M.L.J. 58=24 Ind. Cas. 24.

——Sch. I — Period prescribed under — When lapses.

The period prescribed by Sch. I of the Limitation Act lapses not on the expiry of the definite number of years prescribed therein but on the expiry of that number of years together with the period of time which is excluded from the calculation. 1949 A.L.J 291= A.I.R. 1949 A. 764=1949 A.W.R. 377=I.L.R. (1950) A. 701.

——Sch. I—Scope.

The first schedule provides periods of limitation for the institution of suits and not for putting in defences. 1 P.R. 1916=206 P.W.R. 1915=32 Ind. Cas. 485.

——Sch. I—Articles—Construction.

The language of the third column of the schedule should, in general, if not indeed always, be so interpreted as to carry out the true intention of the legislature, that is to say, to date the cause of action from the date on which the remedy is available to the party. 117 Ind. Cas. 543=56 Cal. 61=32 C.W.N. 971=A.I.R. 1928 Cal. 646.

——Sch. I—Articles — Determination of article applicable—Plaint is the basis.

The question of the applicability of any particular article of the Limitation Act to a particular suit for a particular relief must be decided on the assumption that the version as given in the plaint is correct and that the relief sought in the plaint flows from such a version. 98 Ind. Cas. 22=22 N.L.R. 147=9 N.L.J. 198=A.I.R. 1927 Nag. 10.

——Sch. I—Articles—Determination of articles applicable.

There is always one article applicable to a case and the Court has to find it though more than one may seem to be applicable and such a construction of the various articles has to be adopted as to confine each article to one exclusive category of suits. One principle in the working out of this process is the maxim **Generalia Specialibus non-derogant, specialia derogant generalibus.** 68 Ind. Cas. 734=44 Mad. 951=14 M.L.W. 116=1921 M.W.N. 465=A.I.R. 1921 Mad. 272=41 M.L.J. 163.

——Sch. I—Articles—Two articles applicable.

The more general article must be governed by that which is more specific. 96 Ind. Cas. 529=5 Pat. 759= 8 P. L. T. 124=1926 P. H. C. C. 225=A.I.R. 1926 Pat. 401.

——Sch. I—Articles—Two articles applicable.

Where the relief claimed is covered by two articles of the schedule, one being of general import and the other of special import, applying to the particular facts of any case, the latter shall govern. 93 Ind. Cas. 129=7 P.L.T. 431=4 Pat. 448=1925 P.H.C.C. 345= A.I.R. 1925 Pat. 765.

——Sch. I—Articles—Two articles applicable.

In giving effect to a statute of limitation if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable consideration, be preferred. 93 Ind. Cas. 129=7 P. L. T. 431=4 Pat. 448=1925 P.H.C.C. 345=A.I.R. 1925 Pat. 765.

——Sch. I—Articles—Two articles applicable.

If there are two Articles in the Schedule to the Limitation Act, which may possibly govern a case, the one more general and the other more special, the more particular specific article should be regarded as the one governing the case. 16 C. 25; 26 C. 564; 21 M. 141; 23 B. 725 and 26 Bom. 430, **Foll.** 73 Ind. Cas. 17=27 C.W.N. 210=37 C.L.J. 108=A.I.R. 1923 Cal. 507.

——Sch. I—Articles—Two articles applicable.

The particular article must be applied in preference to a general article wherever possible. 67 Ind. Cas. 365=55 P L.R. 1922=A.I.R. 1921 Lah. 335.

——Articles — Construction:— See **Statute** and **Arts. 178, 179.**

8 C.W.N. 476=31 C. 681 (F.B.). **See also:** 13 M.L.J. 412=26 M. 780.

——Art. 2.

Synopsis.

1. Act done under statute
2. Applicability
3. Compensation for order of demolition by Magistrate
4. Damage by bursting of fittings
5. Damage by canal
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14. Suit for compensation for illegal arrest
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16. Unauthorised sale in execution.

1. Act done under statute.

——Arts. 2 and 36—Act done under statute in improper manner out of malice and carelessness.

The intention of Art. 2 of the Lim. Act is to meet those cases where a public official or a public authority or a private person does an act, injurious or possibly injurious to another under powers conferred or honestly believed to be conferred by some Act of the legislature. Art. 2 does not apply to a case where the damages arise not from the doing of the Act or from the failure to do it, but from doing it in an improper manner out of malice and carelessness. Such a case would be governed by Art. 36. 16 O.C. 211=21 Ind. Cas. 486.

——Art. 2—Act done under statute—Compensation for.

Art. 2 provides protection to persons doing acts in pursuance of some enactment in force and the limitation which it prescribes applies to all cases when the defendant intended to act under powers given by the enactment. It is not necessary that defendant must at the time of doing the act openly assert or inform the other parties that he is acting in pursuance of a particular enactment It is enough if he shows that in doing the act he was at the time under the honest belief that his act was authorised by a statute. Art. 2 applies where compensation is claimed for damage resulting from the consequences of the act of a public body done in pursuance of statutory powers. The fact that damage resulted to plaintiff's estate from the doing of such an act after the lapse of some months, does not affect the applicability of the article. 72 P.R. 1909=112 P.W.R. 1909=108 P.L.R. 1909=2 Ind. Cas. 819.

2. Applicability.

——Art. 2—Applicability—Act done in pursuance of agreement.

Art. 2 of the Limitation Act does not contemplate an act done in pursuance of an agreement; it relates to an act done in pursuance of any enactment. 230 Ind. Cas. 301=A.I.R. 1947 Sind 69.

——Arts. 2 and 36—Applicability—Suit for compensation.

A suit for compensation for damages said to have been caused by the failure of a local body to maintain its water system in proper order is governed by Art. 36 and not by Art. 2.

(Applicability of Arts. 2 and 36 discussed). 47 P.L.R. 302=A.I.R. 1945 Lah. 324=I.L.R. (1945) Lah. 523 (F.B.).

——Art. 2—Applicability.

Where the act was performed under the powers conferred by the statute and the cause of action alleged against the Secretary of State is a failure to allot the statutory compensation, Art. 2 has no application. A.I.R. 1939 Lah. 583.

——Arts. 2 and 3—Applicability—Act done in pursuance of powers under Cattle Trespass Act.

A suit was brought against the Secretary of District Board and the District Magistrate of the place as **ex officio** Chairman by a pound-keeper for compensation. The grounds alleged were that the defendants released certain cattle, without making any payment to him on account of the feeding charges which he was entitled to receive under the rules made by the District Board, their act being illegal:

Held, that any proceedings that were taken by the Secretary, District Board, were taken under the Cattle Trespass Act and even if he had forwarded any papers for disposal to the Deputy Commissioner, he had done it under the provisions of the Cattle Trespass Act. In whatever position the Deputy Commissioner may have exercised his functions, he had done it by virtue of the powers vested in him under the Cattle Trespass Act. If any functions of the District Magistrate have been transferred to the District Board by any notification of the Local Govt., he, as Chairman of the District Board, could exercise those powers on behalf of the District Board and if those functions have not been so transferred, he could, by virtue of being District Magistrate take such action as was permissible under the Act.

Held, also that the Article applicable was Art. 2 and not 36.

Held, further that under S. 21, Cattle Trespass Act, the District Magistrate is enjoined to summon the person complained against and make an inquiry into the case; but the non-compliance with the provisions of this section did not affect the merits of this case. If the non-compliance with the provisions of S. 21 had the effect of making the order of the District Magistrate illegal, any suit for compensation on that account would clearly be governed by Art. 2. A.I.R. 1937 Lah. 748=39 P.L.R. 915=169 Ind. Cas. 922.

——Art. 2—Applicability.

It is not necessary that at the time of the doing of the act complained of, the doer of the act should expressly or publicly allege that he was doing the act under a certain statute and where a person honestly believes that he is acting under some enactment, he is protected and his case is covered by Art 2. A.I.R. 1937 Lah. 748=39 P.L.R. 915=169 Ind. Cas. 922.

——Art. 2—Applicability.

Art. 2 is the proper Article to apply when a public officer is acting **bona fide** in pursuance of his authority and a suit is instituted for damages. But Art. 2 will not protect a public officer who has acted **mala fide** under colour of his office.

Where Police Officers exceeded their lawful authority and caused hurt when they were acting **bona fide** in exercise of what they understood to be their duty under S. 144, Criminal P.C.:

Held, that if the act complained of was believed to be actually authorised by law, then no question of limitation would arise, as in that case the action itself would not be maintainable. It is when a public officer acted **bona fide** in the exercise of his lawful authority but heedlessly exceeded his authority, that a suit would lie and the limitation prescribed by Art. 2 would apply. A.I.R. 1936 Cal. 653=166 Ind. Cas. 529.

——Art. 2—Applicability.

If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong; the protection is needed when an actionable wrong has been committed and to secure the protection there must be, in the first place a **bona fide,** belief by the official that the act complained of was justified by the statute, secondly, the act must have been performed under colour of a statutory duty, and thirdly the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection. The article has no application to suits to recover statutory compensation independently of any question of tort. A.I.R. 1936 Pat. 513=17 P.L.T. 279 =15 Pat. 510=2 B.R. 776=164 Ind. Cas. 860.

——Art. 2—Applicability.

Where a suit is instituted more than ninety days from the date on which the plaintiff paid the money under protest but it is conceded that S. 81, Punjab Municipal Act, under which the Notified Area Committee purported to act in realising the amount from the plaintiff, did not authorise it to do so, Art. 2, cannot apply and the suit must be held not barred. A.I.R. 1935=Lah. 47=152 Ind. Cas. 680.

——Art. 2—Applicability.

Art. 2 has no application to a suit for damages for conversion by a Railway Company. A.I.R. 1934 Pat. 507=16 P.L.T. 61=1 B.R. 5=13 Pat. 752=151 Ind. Cas. 995.

——Art. 2—Applicability.

Where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded there would be protection in cases of good faith and **bona fide** belief.

Thus where a suit is filed for damages on the ground that the defendant, a Police Constable, who cherished a grudge against the plaintiff, made a false report at the Police Station stating that the plaintiff was leading a riotous mob, if the defendant were to satisfy the Court that at the time when he made the report, he acted honestly on some information received, he would be protected, even though the report might turn out to be absolutely false but not so to the knowledge of the defendant. (1935) A.L.J. 459=1935 A.W.R. 547=A.I.R. 1935 All. 538=57 All. 935=155 Ind. Cas. 131 (F.B.).

——Art. 2—Applicability—Good faith, necessity of.

Art. 2 requires that before its protection can be invoked, there should be good faith. Where the defendant in a suit for compensation pleads bar of limitation under Art. 2, there must be an inquiry as regards good faith before a decision can be come to as to whether Art. 2 does apply. If in the inquiry the defendant fails to prove good faith, he is not entitled to the protection of Art. 2. The case is even stronger if it appears that the defendant knowingly acted contrary to the provisions of the enactment of which he seeks to take advantage. A.I.R. 1937 Sind 281=32 Sind L.R. 106=172 Ind. Cas. 622.

——Art. 2—Applicability.

Art. 2 will govern a case only when the defendant did an act in the honest belief that he was empowered to do the act by some enactment, but if he acts knowing that he has no power under any enactment so to act, a suit for compensation for the wrongful act will fall under Art. 23. 89 Ind. Cas. 861=4 Bur. L.J. 139=3 Rang. 268=A.I.R. 1925 Rang. 311.

3. Compensation for order of demolition by Magistrate.

——Art. 2—Compensation for an order of demolition by a Magistrate at the instance of a Municipality.

A suit for damages caused by an order for demolition of certain huts passed by a Magistrate under S. 144, Cr. P.C. at the instance of a Municipality is governed by Art. 2. 18 Ind. Cas. 84 (Cal.).

4. Damage by bursting of fittings.

——Arts. 2 and 36—Damage by burstings of fittings.

A case of damage to houses by bursting of municipal fittings by its negligence is governed by Art. 36 and not Art. 2, Lim. Act. 121 Ind. Cas. 500=A.I.R. 1929 Lah. 730.

5. Damage by canal.

——Art. 2—Damage by canal.

Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged:

Held, that Art. 2 was not applicable as the act alleged was not done in pursuance of any enactment. 103 Ind.Cas. 1=10 Lah. 161=1927 M.W.N. 334=4 O.W.N. 471=31 C.W.N. 835=26 M.L.W. 134=28 P.L.R. 453=39 M.L.T. 343=A.I.R. 1927 P.C. 72 (P.C.)

——Art. 2—Damage by canal.

In the Raya branch canal, a large amount of water collected at more than one point and the Canal Officer cut the channel in various places to allow this surplus water to escape into the lower lands on the west of the distributory. In spite of this action the flood water was held up and diverted from its natural course and eventually reached the property of the plaintiff and injured it:

Held, that the action taken in dealing with the flood is covered by S. 15 of North India Canal and Drainage Act; that Art. 2 of the Limitation Act applied and that the **terminus a quo** in calculating limitation is the date of the damage and not the date of the construction of the work which caused the damage. 79 Ind. Cas. 208 =4 Lah. 428=A.I.R. 1924 Lah. 169.

——Art. 2—Damage by canal.

Where the construction of the Raya Branch Tail distributory of the upper Chenab canal caused the flood water to go to the plaintiff's property in the high floods of 1917, and thereby caused them serious damage:

Held, that action of the Canal Officers in constructing this channel came under S 6 of Act VIII of 1873 and whether that action was wise or unwise, any suit for damages consequent thereon must be brought within 90 days of the date of damage. 79 Ind. Cas. 185 =4 Lah. 432=A.I.R. 1924 Lah. 192.

6. Damage by closing of road.

——Art. 2—Damage by closing of road.

A suit for damages against a municipality for an alleged omission to complete repairs quickly and the closing of the road at both ends by its servant out of malice would fall within Art. 2 as amended by S. 326, U. P. Municipalities Act. 95 Ind. Cas. 1030=48 All. 560=24 A.L.J. 682=A.I.R. 1926 All. 538.

7. Damage by drain.

——Art. 2—Damage by drain.

Where the plaintiff sued to recover damages from a Municipal Committee on the ground that it had been

negligent in the repairing of a drain outside his house and had thereby caused the fall of a wall and of the roof:

Held, that the suit was governed by Art. 2 and Art. 31 of the Limitation Act had no application. 122 Ind. Cas. 111=31 Punj. L.R. 159=12 L.L.J. 31.

8. Interpretation.

——Art. 2—Interpretation—"Alleged to be".

The word "alleged" in Art. 2, Lim. Act cannot be taken to mean that a mere allegation by a party invoking its assistance or pleading that he had acted or omitted to act in pursuance of an enactment would attract its provisions. But when the act is found to have been done or purported to have been done in pursuance of an enactment, Art. 2 must be held to apply. It is not correct to say that the allegation by the defendants that they were acting in pursuance of an enactment must be taken to have been made by them when they were acting so as to attract Art. 2. A.I.R. 1942 Mad. 539=44 Cr.L.J. 45=(1942) 2 M.L.J. 14=1942 M.W.N. 602=I.L.R. (1942) Mad. 696=203 Ind. Cas. 45.

——Art. 2—Interpretation—'In pursuance of an enactment'—Meaning of.

The words 'in pursuance of an enactment' in Art. 2, must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment, he is protected. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. No doubt under S. 44, Cr.P.C., it is the duty of every person to make a report to the Police of the Commission of certain specified offences, but there is no such duty cast upon a citizen, much less on a Police Officer, to make such a report when no facts exist. He would certainly not be acting in pursuance of S. 144, Cr. P. C., if he concocts a purely false story and then makes a report of such a false story knowing it to be false. (1935) A.L.J. 459=A.I.R. 1935 All. 538=57 All. 935=1935 A.W.R. 547=155 Ind. Cas. 131 (F.B.).

9. Municipal Council—Breach of Contract.

——Art. 2—Municipal Council—Damages—Breach of contract.

Quaere.—If Art. 2 of the Lim. Act is applicable to a suit for damages against a Municipal Council for breach of contract to remove rubbish. 28 M.L.J. 147=(1915) M.W.N. 143=28 Ind.Cas. 45.

10. Object.

——Art. 2—Object.

The object of Art. 2 is the protection of public officials who, while **bona fide** purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act; it resembles in this respect the English Public Authorities Protection Act. A.I.R. 1936 Pat. 513=17 P.L.T. 279=15 Pat. 510=2 B.R. 776=164 Ind. Cas. 860.

11. Receiver in insolvency taking possession.

——Art. 2—Receiver in insolvency taking possession.

The action of the Receiver in insolvency in taking possession of property knowing fully well that it is not in possession of the insolvent and that it is not included in the schedule, is contrary to law and not in good faith and he will not be entitled to protection under Art. 2. He cannot even take protection under S. 1, Judicial Officers' Protection Act. A.I.R. 1937 Sind 281=32 Sind L.R. 106=172 Ind. Cas. 622.

12. Refund of octroi duty.

——Arts. 2 and 120—Refund of octroi duty.

A suit for the refund of money legally collected by a Municipality but wrongfully refused to be refunded is governed by Art. 120 and not by Art. 2. 36 All. 555=12 A.L.J. 952=25 Ind. Cas. 943.

——Arts. 2 and 62—Refund of octroi duty.

A claim for the refund of a specific sum which was illegally realised by a Municipality is in the nature of the suit for money had and received and is governed by Art. 62 and not by Art. 2. 32 All. 491=7 A.L.J. 496=6 Ind. Cas. 401.

13. Starting point.

——Art. 2—Starting point of limitation.

The limitation for suit for compensation for wrongful restraint starts under Art. 2 from the date when wrongful restraint takes place and not when injury (illness to plaintiff) results there from. If the act complained of had not given rise to a cause of action until some special damage had resulted there from, S. 24, Lim. Act, might have been of help to the plaintiffs but since the wrongful restraint complained of and found to have been committed was a tort and actionable **per se,** it could have given rise to a cause of action immediately. S. 24 of the Act, therefore, could not help the plaintiffs. A.I.R. 1942 Mad. 539=(1942) 2 M. L. J. 14=44 Cr. L. J. 45=1942 M.W.N. 602=I.L.R. (1942) Mad. 696=203 Ind. Cas. 45.

14. Suit for compensation for illegal arrest.

——Art. 2—Suit for compensation for illegal arrest.

Per **Akram, J.**—The claim for compensation for illegal arrest fell within the scope of Art. 2 which applies to cases of compensation for doing or for omitting to do an act pursuant to an enactment, **i. e.,** where the defendant acts under colour of statute. 77 C.L. J. 93=A.I.R. 1944 Cal. 4=212 Ind. Cas. 421.

——Art. 2—Suit for damages for malicious arrest.

A suit for damages for malicious arrest, where the defendant acted within his statutory authority maliciously falls under Art. 2. (1931) A.L.J. 858=A.I.R. 1932 All. 16=135 Ind. Cas. 558.

15. Suit for damages for wrongful restraint.

——Art. 2—Suit for damages for wrongful restraint.

The plaintiff instituted an action for damages against certain Police Officers for wrongful confinement and wrongful restraint. It was found that the plaintiff

was wrongfully restrained but there was no wrongful confinement and that the defendants had acted under S. 54, Criminal P. C. and S. 21, Mad. District Police Act:

Held, that the suit was governed by Art. 2 and not by Arts. 36, 19 or 120, Lim. Act. 44 Cr.L. J. 45=A.I.R. 1942 Mad. 539=(1942) 2 M.L. J. 14=1942 M.W.N. 602=I.L.R. (1942) Mad. 696=203 Ind. Cas. 45.

16. Unauthorised sale in execution.

——Art. 2—Unauthorised sale in execution.

Plaintiff's property was advertised for sale. He tendered the decretal amount to the officer of the Court empowered to receive the money in order to stop the sale. The Officer however in spite of the deposit, got the property sold. Plaintiff brought a suit against the officer for damages. **Held,** that the basis of the suit being that the deft. had refused to accept the money which he was bound to accept under C. P. Code, the suit was governed by Art. 2. 41 All. 219=16 A.L. J. 1017=48 Ind. Cas. 815.

——Art. 3—Sp. Rel. Act, S. 9.

For a suit under S. 9, Sp. Rel. Act all that has to be determined is whether the plaintiff was dispossessed and whether his suit was brought within six months from the date of dispossession, i. e, regard should be had to the terms of the S. 9, Sp. Rel. Act and Lim. Act, Art. 3. 13 Ind. Cas. 541, (Cal.)

——Art. 3—Suit by non-occupancy ryot, for recovery of possession.

By **F. B. (Prinsep, J. dissentiente).**— That the remedy in S. 9 of the Specific Relief Act is not the only remedy which the legislature has provided for a non-occupancy raiyat who has been dispossessed otherwise than in due course of law. 7 C.W.N. 218 overruled. The period of limitation applicable to the case of a non-occupancy ryot who has been dispossessed from his holding otherwise than in execution of a decree is either 6 or 12 year as provided in Art. 120 or Art. 142 of the Limitation Act. 8 C.W.N. 446; 31 C. 647, (F.B.)

——Art. 3—Suit by non-occupancy ryot for possession.

The limitation applicable to a suit to recover possession by non-occupancy ryot who has been dispossessed from his holding by his land-lord otherwise than in due course of law is 6 months from the date of dispossession. 7 C.W.N. 218.

[Overruled in 8 C.W.N. 446=31 Cal. 647 (F.B.)]

——Art. 3—Suit by Government.

A suit by the Secretary of State for India, whether it be under S. 9 of the Specific Relief Act or otherwise is governed by Art. 149 and not Art. 3 of the Limitation Act. 87 Ind. Cas. 1002=A.I.R. 1925 Sind 275.

——Art. 5—(As amended in 1938)—Applicability.

Where before January 15, 1938, a summary suit instituted more than one year after the accrual of the cause of action is barred under Art. 5, as it originally stood. The suit is not revived by the amendment of January 15, 1938, which prescribes a period of three years. A.I.R. 1939 Bom. 342=41 Bom. L.R. 518=185 Ind. Cas. 149.

——Art. 5—Applicability.

A suit on a negotiable instrument provided for under O. 37, falls under the category of suits of the nature referred to in S. 128 (2) (f), and Art. 5 of the Limitation Act of 1908 applies to such suits. 98 Ind. Cas. 78=21 S.L R. 257=A.I.R. 1927 Sind 90.

——Art. 5—Applicability.

Suit under O. 37 are not governed by Art. 5 of the present Limitation Act. 88 Ind. Cas. 400=41 C.L. J. 368=29 C.W.N. 589=52 Cal. 954=A.I.R. 1925 Cal. 781.

——Arts. 6, 7 and 8—Applicability and scope—Minor—Alienation by de facto guardian of minor's property as own property—Suit by minor for possession after majority—Limitation—Limitation Act, Arts. 142 and 144.

The plaintiff in a suit for ejectment must prove a subsisting title in him, i. e., title within 12 years of the suit, before he can succeed in the suit; limitation does not cease to run because the rightful owner of the property happens to be a minor when limitation starts. In the case of an alienation by a **de facto** guardian of a minor, purporting to transfer the property in his or her own right and not as guardian of the minor, the later can sue for recovery of the property within 12 years of the alienation or within three years after the attainment of majority whichever is later. Art. 142 and not Art. 144 applies to the suit, and in the absence of proof of subsisting title, within 12 years before suit the suit must fail on the ground of limitation. 6 P.L. J. 478, foll. A.I.R. 1950 Pat. 191.

——Arts. 6, 61, 115.

Forfeiture under a statute—See Madras Local Boards Act. 17 M.L. J. 537=31 Mad. 54.

——Art. 7.

Synopsis.

1. Applicability
2. Bisardar
3. Cook
4. Domestic servant
5. Goldsmith
6. Household servant,
7. Mechanical Engineer
8. Motor-car driver
9. Principal and surety
10. Salesman
11. Shahna
12. Wet nurse
13. Weighman
14. Village barber
15. Village carpenter.

1. Applicability.

——Arts. 7, 102—Applicability.

Arts. 7 and Art. 102 deal with different classes of wage-earners. The former deals with a lower class of wage-earner than that dealt with by Art. 102. 41M L.W. 40=(1935) M.W.N. 120=A.I.R. 1935 Mad. 128=68 M.L.J. 132=155 Ind. Cas. 591.

——Arts. 7 and 102 — Applicability—Suit for remuneration by person engaged to supervise work—"Labourer"—Meaning of.

A person who is engaged to supervise a work is not a household servant, artisan or labourer within the meaning of Art. 7 of the Limitation Act. A labourer is one who does work with his own hand. A person who is a contractor or sub-contractor and who engages to get work done but does not engage in any work himself is not a workman or labourer. Art. 7 of the Limitation Act is not, therefore, applicable to a suit by such a person for his remuneration. The only other article which can apply is Art 102 which provides 3 years limitation for a suit for wages not expressly provided for by the schedule and time begins to run from the date when the wages accrue due. 7 M. 100 and 10 B. 96, rel. on. I.L.R. (1949) Nag. 578=A.I.R. 1949 Nag. 329=1949 N.L.J. 200.

2. Bisardar.

——Art. 7—Bisardar.

Bisardar means a watchman who is paid by a share of crop which he watches. He is an outdoor servant and is certainly not an artisan, nor a labourer. A suit by him for his wages therefore will not fall within Art. 7 but will fall under Art. 102. 79 Ind. Cas. 576=29 O. C. 327=10 O.L.J. 345=A.I.R. 1924 Oudh 189.

3. Cook.

——Art. 7—Cook.

A cook though he is an expert in his art is none the less a domestic servant, and a suit by him for wages due is governed by Art. 7 of the Lim. Act. 28 Ind. Cas. 956 (Mad.)

4. Domestic servant.

——Art. 7—Domestic servant.

The suit for wages as a domestic servant must be brought within one year after the same became due but where the master instead of paying the salary to the servant then and there, gives credit in his account book and treats the servant as his creditor. Art. 7 does not apply. 106 Ind. Cas. 229=39 M.L.T. 415=27 M.L.W. 30=A.I.R. 1928 Mad. 27.

5. Goldsmith.

——Art. 7—Goldsmith.

Art 7 applies to a case when a household servant, artisan or labourer is hired on wages per day, per week or per month and it does not apply to the remeneration of a skilled workman like a goldsmith. A.I.R. 1938 Nag. 286=I.L.R. (1938) Nag. 592=177 Ind. Cas. 345.

6. Household servant.

——Art. 7—"Household servant"—Meaning of.

The term 'household servant' as used in Art. 7, must be read **ejusdem generis** with the words 'artisan or labourer' which follow it, and it cannot apply to a person employed to collect rents of houses and as male companion for a journey abroad. A.I.R. 1938 Oudh 393=10 O.W.N. 1311=8 Luck. 119=147 Ind. Cas. 227 (2).

——Art. 7—Household servant—Hotel cook.

A hotel cannot be said to be a 'household' within the meaning of Art. 7, although it may be a household in the sense that it may board and lodge people but the essential feature of a household, i.e., a family is wanting. The emphasis has to be placed on the term household in the article and not on the nature of the service rendered by the servant. Consequently, a suit for arrears of salary by a person employed as a cook in a hotel is governed by Art. 102 and not Art. 7. 45 M.L.W. 205=(1937) 1 M.L.J. 339=(1937) M.W.N. 337 (1)=A.I.R. 1937 Mad. 340=171 Ind. Cas. 72.

——Art. 7—Household servant—Motor driver provided with board and lodging by employer.

A motor driver and especially one who is provided with board and lodging by the employer, would come within the definition of a domestic servant and the expression "household servant" in India is not used in a different sense to the expression "domestic servant" in England, as he could be called upon at any time during the day or the night to drive the Motor car for the employer, the members of his family or his guests according to their reasonable requirments, and as such, he would come within the definition of a household servant. Consequently, a suit by such a person for wages is governed by Art. 7, and not by Art. 102 which is a residuary article and applies only when Art. 7 does not apply. A.I.R. 1936 Lah. 661 (662)=38 P.L.R. 296=160 Ind. Cas. 1042.

7. Mechanical engineer.

——Art. 7—Mechanical Engineer—'Artisan.'

A suit by a Mechanical Engineer, who was in charge of an engine which worked the deft.'s mill, to recover the amount of his wages would be governed by Art. 102 and not by Art. 7 of the Lim. Act. The word 'artisan' in Art. 7 means a mechanic or a workman who has acquired some manual skill and does not mean persons undertaking higher class of work involving responsibility and intellectual training. 12 S.L.R. 140=50 Ind. Cas. 37.

8. Motor-car driver.

——Art. 7—Motor-car driver.

A bus or motor-car driver is an artisan within the meaning of Art. 7 and a suit for wages by him is governed by Art. 7. A.I.R. 1936 Cal. 808=167 Ind. Cas. 294.

——Art. 7—Motor-car driver.

The word 'artisan' does not merely mean a handicraftsman, that is to say, one who makes certain things as part of his trade or calling. That is certainly one of the implication of the word "artisan" but not all its

implications. A motor driver is an artisan and when he takes up service as a motor driver, he must be deemed to have been employed as an artisan. A.I.R. 1936 Lah. 661=38 P.L.R. 296=160 Ind. Cas. 1042.

——Art. 7—Motor-car driver.

As a motor-car driver must possess some skill in manipulating the different parts of the mechanism of the car, he should be included in the category of an artisan. There is also no reason why he should be treated differently from a household servant or labourer and given the benefit of a longer period under Art. 102. 104 Ind. Cas. 520=5 Rang. 477=A.I.R. 1927 Rang. 279.

9. Principal and surety.

——Art. 7—Principal debtor and surety.

Plaintiff sued the defendants for wages due to him for work done in 1918 as field labourer to defendant No. 1. In 1919 plaintiff, made a demand for wages and defendant No. 2 stood surety promising to pay, the amount due in 1919. The trial Court held that the suit was time-barred against both. On appeal it was held that the suit was not time-barred and the claim was decreed:

Held, in revision that the claim as against the principal debtor was time-barred under Art. 7 of the Lim. Act. 64 Ind. Cas. 361=10 L.B.R. 332.

10. Salesman.

——Art. 7—Salesman.

A suit for wages by a person employed as a salesman to assist the employer in the sale of commodities, does not come within the ambit of Art. 7. Such a suit is governed by Art. 102. A.I.R. 1935 Rang. 235=157 Ind. Cas. 732.

11. Shahna.

——Art. 7—Shahna.

A shahna who is merely employed to watch crops and to see that they are not taken away, cannot be described as a labourer. Consequently, a shahna in suing for his wages comes under Art. 102. A.I.R. 1935 All. 102=(1935) A.L.J. 78=4 A.W.R. 1253=152 Ind. Cas. 932.

12. Wet nurse.

——Art. 7—Wet nurse.

A suit by a wet nurse to recover her wages is not governed by Art. 7 but is governed by Art. 102. 10 A.L.J. 395=17 Ind. Cas. 658.

13. Weighman.

——Art. 7—Weighman in shop.

A weighman employed to work at a shop is not a household servant nor is he an artisan. He cannot be treated as a mere labourer employed to do task work, that is, to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up, and may have also perhaps to calculate the price on the total quantity weighed and his work, therefore, cannot be treated as purely manual labour so as to make Art. 7 of the Act applicable. He may be regarded in fact a shop-keeper's assistant, and Art. 102 applies to a suit by him to recover his dues from his master. 90 Ind. Cas. 120=48 All. 164=23 A.L.J. 1059=6 L.R.A. Civ. 596=A.I.R. 1926 All. 172.

14. Village barber.

——Art. 7—Village barbers.

Art. 7 is confined to suits for the wages of a household servant, artisan or labourer. Village barbers are not household servants. They are not labourers in the sense in which the term 'labourer' is used in that article. It is used there with reference to a man who does work chiefly requiring bodily strength. They are not also artisans, though the modern hair-dresser who works on the heads of fashionable ladies, may be considered an artist. A.I.R. 1941 Nag. 132=1941 N.L.J. 102=194 Ind. Cas. 590.

15. Village carpenter.

——Art. 7—Village carpenters.

The word 'artisan' comprises in its category a a village carpenter. Consequently, a suit for wages by him will be governed by Art. 7 and not by Art. 102 or 56. A.I.R. 1934 Nag. 260=152 Ind.Cas. 885.

——Art. 8—Food or drink—Test.

Consumable commodities sold in a restaurant come under Art. 8, but it cannot be held that because the proprietor of a store has a restaurant department, therefore, all articles of food which he may have sold in a different department lose their character of "goods" and with it the benefit of Art. 52, merely because the man who sells them as a shop-keeper happens to be the proprietor of a restaurant. The governing factor is not the question whether the articles were consumed on the premises, or whether they were carried away for consumption elsewhere. Food and drink, the price of which would come under Art. 8, must be meals or articles of food which or either consumed on the premises or are sent out or taken away by the customer which are intended for, or capable of, immediate consumption in the state in which they are sent out, that is to say, without cooking. If from the restaurant is sent out, for instance, a case of beer, that would scarcely be drink in that sense of the word. It would be goods and the same applies to articles in tins which do not require immediate consumption. A.I.R. 1940 Rang. 17=1939 Rang. L.R. 626=186 Ind. Cas. 582.

——Art. 10.

Synopsis.

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1. Agreement to transfer.

——Art. 10—Agreement to transfer—Mutation of names in persuance of agreement.

A Mahomedan lady entered into an agreement with certain persons to transfer a share of her immovable property, to which she might become entitled, in consideration for an advance of money required for litigation. The agreement was registered on 29th January, 1918. She succeeded in establishing her claim and on 5th December, 1921, a mutation was sanctioned by which the particular share was recorded in the name of those persons. On 5th December, 1922, M brought a suit of pre-emption:

Held, that the suit was within time, limitation running from the date of the mutation. 124 Ind. Cas. 338=A.I.R. 1930 Lah. 33.

2. Applicability.

——Arts. 10 and 120—Applicability—Pre-emption on foreclosure.

Art. 10 of the Limitation Act applies to cases of pre-emption on sales and not of foreclosure. The Article applicable to pre-emption on foreclosure would be Art. 120. A.I.R. 1950 All. 647.

——Art. 10 — Applicability.

Art. 10 of the limitation Act governs suits for pre-emption of all kinds without any exception, in other words, exhausts the law of limitation in respect of pre-emption suits and one would not be justified in referring to any other Article for determining the period of limitation for any suit of pre-emption. 1950 A.L.J. 467=A.I.R. 1950 A.632.

——Arts. 10 and 95 and S. 18—Applicability—Suit for pre-emption—C.P. Tenancy Act, S. 12-A (15).

A suit brought under S. 12-A (15), C. P. Tenancy Act, is a suit for pre-emption, although the civil court can enforce the right of purchase under that provision only if the consideration for the transaction is fraudulently stated. Prima facie a suit to enforce the right of pre-emption is governed by Art. 10 of the Limitation Act except where the property is not capable of being taken possession of or there is no registered instrument evidencing the transaction which gives rise to the right of pre-emption. If the property is capable of being taken physical possession of limitation runs from the date when the purchaser takes possession of the property under the sale sought to be impeached. Art. 95 of the Limitation Act does not apply to each and every case in which fraud is but an element in the conduct of the defendant. The Article is limited in its application to cases where relief is claimed on the sole ground of fraud. If a pre-emptor is aware of his right he cannot claim the benefit of S. 18 of the Limitation Act. Under that section the person defrauded must have been kept from the knowledge of his right to institute a suit. Such cases might arise where the transaction giving rise to the right of pre-emption is given a false appearance so that the pre-emptor is kept from the knowledge that he has a right to pre-empt. I.L.R. (1950) Nag. 950=1950 N.L.J. 396.

3. Burden of proof.

——Art. 10—Burden of proof.

It is the duty of the plaintiffs-pre-emptors to satisfy the Court that their suit is in time. A.I.R. 1943 Nag. 90=1942 N.L.J. 567=I.L.R.(1943) Nag. 209=204 Ind. Cas. 20.

4. Date of physical delivery not proved.

——Art. 10—Date of physical possession not proved—Time runs from the date of registration.

The delivery of possession to vendee on the day of his purchase would be of no avail against the pre-emptor, unless the possession delivered was physical possession. The mere delivery of symbolical proprietary possession would not be sufficient.

When there is no proof that physical possession of the property was taken by the vendee on the date on which the sale-deed in his favour was executed, the period of one year within which the pre-emptor was entitled to exercise his right of pre-emption must be taken to have commenced on the date on which the deed in favour of vendee was registered. 69 Ind. Cas. 409=A.I.R. 1923 Lah. 31.

5. Date of registration.

——Art. 10—Date of registration, what is.

A deed reciting the sale of occupancy-rights was executed and registered on March 16, 1938. At the material time, the vendor, who had been originally an occupancy-tenant, had already

acquired proprietary rights in the land; and it was realised that the recital of the sale of occupancy-rights was wrong. Accordingly, on April 12, 1938, another deed reciting the sale of undivided proprietary rights in the same land, was executed and duly registered. This deed further recited that the mention of occupancy-rights in the deed of March 16, 1938, was made under a mis-conception, that the parties had intended to sell proprietary rights, and that the object of the deed of April 12, 1938, was to correct the mis-description and to substitute therefor the sale of proprietary rights:

Held, that the registration of the deed of March 16, 1938, which conveyed the sale of occupancy-rights could not be presumed to inform any one interested, that a sale of proprietary rights had taken place. The necessary publicity could only be given by the registration of the actual deed of sale of proprietary rights dated April 12, 1938, and from the point of view of publicity and notoriety it would be wholly immaterial that this deed was not the actual deed of conveyance but merely a deed correcting a mis-description of the nature of transaction mentioned in the earlier deed; therefore, the terminus a quo was the second deed dated April 12, 1938. A.I.R. 1942 Lah. 118=44 P.L.R. 99=200 Ind. Cas. 81.

6. Determining factor.

——Art. 10—Determining factor—Actual possession.

A suit for pre-emption is governed by Art. 10 where the sale is of a specified plot whether in actual possession of the vendor or in joint possession of the vendor and others, and actual possession of the property sold is given to the vendee, and the starting point for limitation is the date of possession. The determining factor in such cases is the factum of actual physical possession and not the nature of the whole property of which the plot sold is a part. 109 Ind. Cas. 382=A.I.R. 1928 Lah. 705.

7. Divided mahal.

——Art. 10—Divided mahal—Suit—Starting point.

A suit for pre-emption in respect of property in a divided **mahal** must be instituted within one year from the date of registration and not from the date of mutation. 9 Ind. Cas. 309 (All.).

8. Full title not passing.

——Art. 10—Full title not passing.

Limitation for pre-emption, runs from the date of physical possession and where no physical possession is given limitation runs from the date of mutation or under Art. 10 of the Limitation Act from the date of registration of the sale-deed. The underlying principle governing the limitation in pre-emption suits is that it runs from the date of notice. Where full title did not pass although possession was given limitation will begin to run from the date of passing of the full title. 167 P.R. 1883, Dist. 69 Ind. Cas. 715=3 Lah. 261=A.I.R. 1922 Lah. 210.

9. Lease.

——Art. 10—Lease.

A suit for pre-emption in respect of a lease must be brought within six years from the date of lease deed and not from the date of its registration. Art. 10 does not apply in the case of a lease as this transfer is not a sale. 95 Ind. Cas. 138=A.I.R. 1926 All. 549.

——Art. 10—Lease.

A suit to pre-empt perpetual lease is governed by Art. 120 and not Art. 10. 62 Ind. Cas. 884=19 A.L.J. 442=A.I.R. 1921 All. 154.

10. Mortgage by conditional sale.

——Art. 10 — Mortgage by conditional sale—Decree absolute.

A mortgage by conditional sale was executed on 3rd June 1909. A decree absolute was made on 13th June 1914 and possession given in 1915. A suit for pre-emption with respect to the property instituted within one year of the date of delivery of possession but more than one year after the date the decree was made absolute is barred, as the plff.'s right accrued at the time of the original transfer, **i. e.**, in 1909 and not in 1915. 39 All. 544=15 A.L.J. 514=40 Ind. Cas. 461.

11. Notice.

——Art. 10—Notice.

Where the Legislature expressly states that limitation begins from registration without any reference to whether the transaction was with or without notice Courts cannot go into any question of notice in dealing with the question. 76 Ind. Cas. 467=A.I.R. 1924 Mad. 57=45 M.L.J. 389.

12. Object.

——Art. 10—Object.

The object of the Legislature in enacting Art. 10 of the Limitation Act was to provide a period of one year from the date on which the person entitled to pre-empt was expected to know of the transaction sought to be pre-empted, and this knowledge is conveyed either by the delivery of possession, if the property admits of physical possession, or by the registration of the deed of sale, if it is registered; and so far as the reason of the rule is concerned, it is immaterial whether the registration is effected with or without the consent of vendor. In either case registration is equally effective as presumptive evidence of notice of the transaction to the parties concerned. 62 Ind. Cas. 797 (Lah.)

13. Oral sale.

——Art. 10—Oral sale—Mutation of names in pursuance thereof.

Where an oral sale is completed and mutation is effected in pursuance of such sale, limitation for a suit for pre-emption begins to run from that date. The fact that subsequently a registered sale-deed is executed does not give a fresh start for limitation under Art. 10 of the Limitation Act, time having once begun to run continues to run. 102 Ind. Cas. 423=9 L.L.J. 285=28 P.L.R. 192=A.I.R. 1927 Lah. 388.

——Art. 10—Oral sale—Subsequent mutation.

Art. 10 does not govern a suit based upon an oral sale followed by mutation of an undivided share of a joint holding. Art. 120 applies to the case. 124 P.W.R. 1909=92 P.L.R 1909=4 Ind. Cas. 973.

14. Permanent alienation.

——Art. 10—Permanent alienation of "protected land"—Permission of Assistant Collector obtained after alienation—Limitation—Starting point—U. P. Regulation of Agricultural Credit Act, S. 24.

Although Art. 10 of the Limitation Act was allowed by the Legislature to remain in its original form, even after the promulgation of the U. P. Regulation of Agricultural Credit Act, XIV of 1940, it must be held as a natural consequence of the provisions of this Act that the period of limitation for a suit for pre-emption must be calculated in every case of a permanent alienation of protected land only from the date on which the alienation has been sanctioned by the Assistant Collector. Of course, where the permission precedes the alienation, Art. 10 of the Limitation Act would apply in terms, but where it follows the alienation, so that what was till then only a usufructuary mortgage for the first time became a permanent alienation as a result of the permission, the period must be taken to run from the date of such permission. A.I.R. 1949 All. 471.

15. Physical possession.

——Art. 10—Physical possession.

"Physical possession" means personal and immediate possession. Undivided share in respect of which the vendor has only an actionable claim cannot be considered to be property admitting of physical possession. 24 All. 17 (P.C.), Rel. on. 111 Ind. Cas. 715=5 O.W.N. 674=A.I.R. 1928 Oudh 375.

——Art. 10—Physical possession.

The expression 'physical possession' means possession that is personal and immediate, that is, a possession perceptible to the sense and evident to everybody so far as possession can be perceived and evidenced. Formal or constructive possession or even possession by attornment of tenants is not physical possession. Entry in the Revenue Register is certainly not indicative of physical possession. 3 Bur. L.T. 24=8 Ind. Cas. 603.

——Arts. 10, 120, 144—Physical possession.

'Physical possession' in Art. 10 means 'personal and immediate possession'. The definition of 'actual possession' given by Stuart, C.J. in I. A. 311 is correct and applies with still more certainty to 'physical possession'. The vendee of a share of a zemindari tenure gets only formal possession and cannot get physical possession of the share purchased by him except by enforcing partition. A suit for pre-emption by a co-sharer, where the vendee has only obtained formal possession does not fall under Art. 10 but under Art. 120. Art. 144 does not apply to suits for pre-emption. Where a mortgagee by conditional sale of a zemindari has foreclosed, the period of limitation to a suit for pre-emption by a co-sharer begins to run from the expiry of the year of grace, after which the mortgagee's right of possession becomes mature. 14 A. 405 approved. 3 Bom.L.R. 707=5 C.W.N.888 =28 I.A. 248=24 A. 17 (P.C.)

——Arts. 10 and 120—Physical possession of whole of property by purchaser not possible.

Where a purchaser cannot take physical possession of the whole of the property sold, the third column of Art. 10 of the Limitation Act cannot be attracted and therefore that article becomes inapplicable and Art. 120 comes into play. I.L.R. (1949) Nag. 465=1949 N.L.J. 290.

——Art. 10—Physical possession.

Land in the possession of a trespasser at the date of the registration of the sale-deed is not land which does not admit of physical possession. Limitation for the purpose of pre-emption begins therefore to run from the time when the purchaser takes possession. (1888) A.W.N. 227; A.I.R. 1921 Mad. 554; A.I.R. 1926 All. 70 and 10 N.L.R. 37, Foll. 107 Ind. Cas. 194=23 N.L.R. 178=A.I.R. 1928 Nag. 89.

——Art. 10—Physical possession.

The words 'the subject of the sale does not admit of physical possession' in Art. 10 are not applicable to a case where trespasser is in possession of the land sold and the vendor is in consequence unable to put the vendee in actual possession. They refer to the nature of the property sold, i. e., whether it is such as would admit of physical possession being given of it or not. (1888) A.W.N. 227, Foll. 62 Ind. Cas. 27=13 M. L. W. 268=1921 M.W.N. 207=A.I.R. 1921 Mad. 554=40 M.L.J. 443.

——Art. 10—Physical possession.

Where the property sold is not in the possession of the vendee but in possession of a trespasser and a pre-emptor files a suit for pre-emption:

Held, Per Krishnan, J.—Limitation commences only when possession is taken, where the second part of third column of Art. 10 does not apply to the case. 20 All. 315 (F.B.) Ref.

Per Napier, J.—In such a case where possession is not taken due to the property being in the possession of a trespasser and the vendor consequently being unable to give possession to the vendee, Art. 10 does not apply but Art. 120 applies. 62 Ind. Cas. 27=13 M.L.W. 268=1921 M.W.N. 207=A.I.R. 1921 Mad. 554=40 M.L.J. 443.

——Art. 10—Physical possession.

Where land sold is in the possession of a usufructuary mortgagee it is not capable of physical possession within the meaning of Art. 10 of the Limitation Act and the limitation for a suit for pre-emption would commence under that article from the date of registration of the sale deed. 51 P.L.R. 389.

——Art. 10—Physical possession.

A zemindari property in the possession of mortgagees and incapable of physical possession at the

time of sale was transferred subject to the mortgage by a registered sale deed:

Held, that the period of limitation runs from the date when the sale deed is registered and not from the date when the vendee takes possession of the property from the mortgagees. 2 O.L.J. 109=28 Ind. Cas. 208.

——Art. 10—Physical possession—Property subject to usufructuary mortgage.

When part of property sold is already mortgaged with possession to the vendee limitation for pre-emption should be reckoned from the date of registration of the sale deed. 5 Ind. Cas. 667 (All.)

——Art. 10—Physical possession.

Property subject to usufructuary mortgage does not admit of physical possession and limitation for pre-emption based on the sale of a right of redemption of such property begins from the date of registration. 4 Ind. Cas. 754 (U.B.R.).

——Art. 10—Physical possession.

Where land in the cultivating possession of mortgagees is sold, it is not capable of physical possession within the meaning of Art. 10 and limitation for a suit for pre-emption would commence from date of registration of the sale deed. A.I.R. 1932 Lah. 98=Lah. 112=32 P.L.R. 743=135 Ind. Cas. 512.

——Art. 10—Physical possession—Equity of redemption.

Where the sale was of the equity of redemption:

Held, the property cannot be said to be capable of physical possession within the meaning of Art. 10 and limitation began to run from the date of the registration of the deed of sale. 9 All. 334, Foll. 76 Ind. Cas. 407=A.I.R. 1924 Mad. 57=45 M.L.J. 389.

——Art. 10—Physical possession not possible—Effect of.

The first part of the third column of Art. 10 does not apply where the subject-matter of the sale consists of land or other tangible immovable property, physical possession of which at the date of the sale is with the holder of an intermediate estate, e. g., mortgagee or lessee owing to which circumstance the vendor is unable to give immediate physical possession to the purchaser. 16 N.L.R. 37=52 Ind. Cas. 940 (F.B.).

——Art. 10—Physical possession.

Land in possession of a tenant is property which does not admit of physical possession by the new owner within the meaning of Art. 10, Limitation Act, and for the suit of pre-emption of such land, limitation runs from the date of registration. 49 P.R. 1908 (F.B.), Foll.

The question whether the subject of a sale does or does not admit of physical possession must be determined with reference to the date of the sale, and it is immaterial whether the property afterwards becomes susceptible of physical possession. A.I.R. 1924 Lah. 302, Foll. 105 Ind. Cas. 501=26 P.L.R. 780=A.I.R. 1927 Lah. 784.

——Art. 10—Physical possession.

Property which is in the possession of a tenant does not admit or physical possession within Art. 10. Where on the date of sale the property was in the possession of tenants:

Held, that the subject-matter of the sale did not admit of physical possession and that the second part of the article prescribes the rule of limitation applicable to this case. 73 Ind. Cas. 903=5 L.L.J. 539=A.I.R. 1924 Lah. 302.

——Art. 10—Physical possession.

Where land sold was in the possession of tenants at the date of sale:

Held, that constructive possession was taken by the vendee at the time of the sale and physical possession he took some time later when he ousted the tenants. And therefore limitation began to run from the date when physical possession was taken. 69 Ind. Cas. 418=A.I.R. 1924 Lah. 196.

——Art. 10 (2)—Physical possession.

Where a sale deed was registered on 16th September 1919 and a pre-emption suit was filed on 8th July, 1911 and it was found that a portion of the land sold was in the possession of tenants at the time of sale. Held, that the suit was barred by Art. 10 (2). 230 P.L.R. 1913=148 P.W.R. 1913=20 Ind. Cas. 475.

——Art. 10—Physical possession.

When the subject-matter of sale is in the possession of lessee, the vendee cannot take physical possession of it and limitation for a suit for pre-emption runs from the date of registration of sale deed. 8 N.L.R. 68=15 Ind. Cas. 890.

——Art. 10—Physical possession.

Where a part of the property was in the possession of the tenants on the date of the sale limitation begins from the date of the registration of the deed under Cl. 2 of S. 10. 49 P.R. 1908, Foll. 28 All. 424, not Foll. 15 C. W. N. 577=10 Ind. Cas. 475.

——Arts. 10, 120—'Physical possession'—Right of pre-emption not a purely personal right.

The term 'physical possession' as used in Art. 10 cannot apply to property which is in the possession of tenants. To a suit for pre-emption of such property, Art. 120 applies. 24 A. 17, foll. The right of pre-emption being a right incident to or arising out of the ownership of land, the successor in title of a person in whose favour such right has arisen is not debarred from suing to enforce it by the fact only that his predecessor has done so. 10 A. 148, foll. 1906 A.W.N. 73=3 A.L.J. 191=28 A. 424.

——Art. 10—Physical possession—Proof.

The arrangement between the vendor and the purchaser in a case of this kind is a matter within their own knowledge and when the vendor is to

retain the crops, it is for the vendee to show that in spite of this fact he did obtain physical possession capable of being seen by other people. A.I.R. 1943 Nag. 90=I.L.R. (1943) Nag. 209=1942 N.L.J. 567=204 Ind. Cas. 20.

——Art. 10 — Physical possession — Requirements.

When the vendor of a field is in personal and immediate possession of the property sold and when the right of such possession is in the vendor, the property is one admitting of physical possession. It makes no difference that the sale is made at a time when it is inconvenient to give physical possession. Similarly, it makes no difference that crops which are not sold are growing on the field. In judging whether the property admits of physical possession, the Courts must look to the nature of the property sold, namely, a field in possession of the vendor, and not to the existence of circumstances which make it highly probable that the delivery of possession would be delayed.

The physical possession contemplated by Art. 10, does not consist of formal statements by third parties but of physical control visible to other people, which gives notice of a change. 1942 N.L.J. 567=I.L.R. (1943) Nag. 209=A.I.R. 1943 Nag. 90=204 Ind. Cas. 20.

16. Pre-emption.

——Art. 10—Pre-emption—In respect of sale—Mistake in sale deed — See Pre-emption. 1 A.L. J. 247.

——Art. 10—Pre-emption—Suit for.

A simple lease was executed by a co-sharer to a stranger on 27-6-1910. Deft. brought a suit for pre-emption on 31-3-1911 and obtained a decree on 18-9-1911. On 31-5-1912 plff. brought a suit for pre-emption on the ground of preferential right. Held, that the suit was barred. 13 A.L.J. 383=28 Ind. Cas. 691.

——Arts. 10 and 120—Pre-emption—Suit between rival purchasers.

Where the first purchaser has sold the property within the period prescribed for filing a pre-emption suit and parted with the possession, a suit against the purchaser is governed by Art. 120 and not by Art. 10. If, however, the second purchaser has been impleaded as a defendant after the period of limitation in the suit against the first purchaser, the suit as against the second purchaser is in effect a suit for a declaration that the pre-emption is not effected by the re-sale and the second purchaser will be bound by the decree ultimately passed between the original parties. 1 O.L.J. 196=24 Ind. Cas. 116.

17. Pre-emptor if can treat sale as nullity.

——Art. 10—Pre-emptor, if can treat sale as a nullity.

A pre-emptor cannot treat a sale as a nullity on the ground that the Land Alienation Act requires certain formalities to be gone through, simply because the sale is unenforceable until sanctioned by the Deputy Commissioner. The sale, if sanctioned, is operative from the date of sale. A suit brought beyond twelve months of the sale but within twelve months of sanction is therefore barred. 16 Ind. Cas. 775, not Foll. 59 P.W.R. 1913=110 P.L.R. 1913=79 P.R. 1913=19 Ind. Cas. 239.

18. Preferential right by agreement.

——Art. 10—Preferential right by agreement.

The vendee of a house agreed to live in the house himself and that when he wanted to sell the house to offer it first to the vendor and his heirs at a certain price and to sell the house as a whole and not piecemeal. In a suit by the vendor to enforce the covenant against the vendee himself:

Held, further that the suit was not one to enforce a mere right of pre-emption but was a suit for specific performance and was governed by Art. 113 of the Limitation Act. 80 Ind. Cas. 962=17 S.L.R. 1=A.I.R. 1921 Sind 118.

19. Punjab pre-emption Act.

——Arts. 10 and 120—Punjab pre-emption Act.

The sales took place in December 1900 and mutation was effected in the same year. The plaintiffs could sue before the commencement of the Punjab Pre-emption Act within the meaning of S. 28. If the sales were effected before 11th May 1899, i,e., more than six years before the Pre-emption Act came into force the suits for pre-emption are barred under Art. 120 and plaintiffs could not avail themselves of the provisions of S. 28 of the Pre-emption Act. 91 P.W.R. 1909=98 P.L.R. 1909=4 Ind. Cas. 935.

——Arts. 10, 120—Punjab Pre-emption Act (II of 1905), S. 28, Limitation—Oral sale of undivided share of land—Further appeal—Question raised for the first time on further appeal—Sale of land on Sidhonai Canal leased by Government—Condition overriding provisions of pre-emption law.

On further appeal it was contended that (1) the suit was barred by limitation as it was brought more than one year after the sale; (2) that the land was situated in an estate as defined in Act XVII of 1887; (3) that according to clause 15 of the original lease of the land by Government to the vendor no right of pre-emption arose in respect of a sale of suit. Held, (1) That as an undivided share of joint property, viz., half a square of land, was sold, and as there was no registered sale deed but merely an oral transfer, Art. 10 did not govern the case, and since the plaintiff's cause of action arose before the passing of the Punjab Pre-emption Act, and he brought his suit within a year of the passing of it, the suit was within time under S. 28 of the Act. (2) That it could not be urged for the first time on further appeal in Act XXVII of 1887; and (3) that under the Punjab Pre-emption Act the right of pre-emption vests in respect of all sales of agricultural land and the plaintiff was not bound by the condition of the lease for such condition cannot override the provisions of an act of the legislature. 92 P.L.R. 1909=124 P.W.R. 1909=4 Ind.Cas. 973.

20. Rectification of description.

——Art. 10—Rectification of description in a deed of sale describing property wrongly—Starting point.

Where a sale-deed wrongly described certain property which was sold, but where mutation was made according to the admitted numbers, Limitation for pre-emption begins from the date of the sale deed and not from the date of the mutation. 64 P.L.R. 1916=60 P.W.R. 1916=35 Ind.Cas. 278.

21. Rival pre-emptors.

——Art. 10—Rival pre-emptors.

Pre-emption suits brought by rival pre-emptors in respect of the same sale, in which each pre-emptor is impleaded as defendant in a suit brought by the other, are governed by Art. 120 and not by Art. 10 nor by Punjab Pre-emption Act, S. 29. 186 P.W.R. 1912=80 P.R. 1912=14 Ind. Cas. 328.

22. Sale.

——Art. 10—Sale.

The term 'sale' must be construed in a wider sense as used in connection with the general law of pre-emption in India and not in a narrow sense as used in T.P. Act. A.I.R. 1939 Nag. 35=1938 N.L.J. 379=180 Ind.Cas. 963.

——Art. 10—Sale deed—Limitation when begins.

A sale deed executed on 29th of March, 1943, was presented for registration on the same day but for some reason it was registered only on the 10th of May, 1943. But the vendee had already been put in possession on 30th March, 1943, the next day after the execution of the sale-deed. On a question whether a suit for pre-emption filed on 26th April, 1944, was in time:

Held, that the suit was barred as it was not necessary nor was it required by Art. 10 of the Limitation Act that the sale should have been registered before the vendee was put in possession to enable him to claim that he was put in possession of the property under the document. 1950 A.L.J. 1=A.I.R. 1950 A. 290=1950 A.W.R. 44.

——Art. 10—Sale deed—Limitation, when begins.

Time for filing a suit for pre-emption starts to run from the date of the execution of sale deed and delivery of possession and not from the date of registration of the sale deed on a later date. (1946) A.W.R. (H.C.) 593=A.I.R. 1947 A. 252.

23. Sale deed—Limitation when begins.

——Art. 10—Sale deed—Limitation, when begins.

For the purpose of Art. 10, the limitation in every case whether the Sale deed is compulsorily registrable or not, shall begin from the date when the document is registered under S. 60, Regis. Act. A.I.R. 1945 Peah. 9=218 Ind. Cas. 367.

——Art. 10—Sale deed — Limitation, when begins.

Where a field has been sold and also the possession has been delivered, excluding the standing crop, the actual possession to be delivered after the crop is reaped, the limitation under Art. 10, for pre-emption would run from the date of delivery of possession. 1942 N.L.J. 567=A.I.R. 1943 Nag. 90=I.L.R. (1943) Nag. 209=204 Ind. Cas. 20.

24. Several registration offices.

——Art. 10—Several Registration offices—Registration not made in the place where property is situate.

At the place where the sale-deed was registered, only a very small portion of the property comprised in the deed was situated. The rest of the property was situated at a different place. After registration the registration officer at the latter place was informed of the registration and an entry was made by him in his register:

Held, that time for a pre-emption suit ran from the date of actual registration and not from the date on which the entry referred to was made. 86 Ind. Cas. 130=23 A.L.J. 104=6 L.R.A. Civ. 264=A.I.R. 1925 All. 324.

25. Suit under Oudh Laws Act.

——Art. 10—Suits for pre-emption under Oudh Laws Act.

Per Pigott, Ag. J. C.—Suits for pre-emption under Oudh Laws Act are subject to the general Law of limitation and therefore to the provisions of Art. 10. 13 O.C. 219=7 Ind. Cas. 295.

26. Suit for pre-emption.

——Art. 10—Suit for pre-emption — Starting point of limitation.

Where the document was executed as a deed of gift but it appeared that the parties really effected a sale and the person who sued for pre-emption was shown to have been aware of the passing of consideration:

Held, that he should sue within the time prescribed by Art. 10 and that S. 18 did not save limitation. 128 Ind. Cas. 257=5 Luck. 492=7 O.W.N. 1219=A.I.R. 1931 P.C. 12=53 C.L.J. 24=57 I.A. 251 (P. C.).

——Art. 10—Suit by pre-emptor — Starting point of limitation.

Under Art. 10 time runs against the pre-emptor from the date on which the purchaser takes physical possession of the whole property sold. Where under arrangement with the vendor the vendee takes possession of the property which he intends to purchase before the actual sale, the possession cannot be held to be under the sale and must be referred to the subsequent date on which the sale actually takes place and from the subsequent date the limitation prescribed by the article begins to run. 80 P.R. 1918=181 P.W.R. 1918=48 Ind. Cas. 102.

27. Suit for share in village shamilat.

——Art. 10—Suit for share in village shamilat.

A suit for pre-emption in respect of property consisting of certain specific plots and a share in the Shamilat comes under Art. 10 as the share in the Shamilat does not admit of physical possession. 68 P.R. 1918=158 P.W.R. 1918=108 P.L.R. 1918=47 Ind. Cas. 359.

28. Symbolical and physical possession.

——Art. 10—Symbolical and physical possession.

Limitation against the pre-emptor begins from the date of the physical possession of the purchaser and not symbolical possession. 69 Ind. Cas. 666=1 Pat. 578=4 P.L.T. 277=A.I.R. 1922 Pat. 601.

29. Transferee from vendee.

——Art. 10—Transferee from vendee.

If a purchaser under a sale-deed in respect of which the cause of action for the suit for pre-emption has arisen has subsequently transferred the property to another, the original cause of action for pre-emption is not thereby affected. The subsequent transferee from the original vendee must take the transfer subject to the plaintiff's right to pre-empt. If a suit is, therefore, brought against the original purchaser within limitation under Art. 10, Lim. Act, but the subsequent transferee is impleaded as a defendant subsequently after the period of limitation, the suit against the transferee is in effect merely for a declaration, and so governed by Art. 120, or as one for possession against a person who is in possession without title, and so governed by the 12 years' rule of limitation under Art. 144. 1938 A.W.R. 869=(1939) A.L.J. 35=A.I.R. 1939 All. 153=I.L.R. (1939) All. 220=180 Ind. Cas. 33.

——Art. 10—Transferee from vendee.

The period of limitation in regard to a subsequent vendee is six years and he can be impleaded in the suit even after the expiry of the period of one year. 17 P.R. 1915=186 P.L.R. 1915=28 Ind. Cas. 695.

——Art. 10—Transferee from the vendee—Joinder after one year—Starting point.

Where a vendee's transferee was joined as a party after limitation had expired as against the original vendee, though the original vendee had got by assignment the property in suit prior to the date of suit, Held, the suit was governed by Art. 120 as against the transferee, since Art. 10 applied only as against the original vendee. 25 P.R. 1903 and 106 P.R. 1907, overruled. 28 P.W.R. 1913=61 P.L.R. 1913=31 P.R. 1913=18 Ind. Cas. 70 (F.B.)

——Art. 10—Transferee from vendee—Suit against first vendee.

M sold certain property to N on 16th November 1909. N sold the property to O on 14th November 1910 but got the deeds registered on 21st November 1910. P sued N for pre-emption on 15-11-1910. O was made a party in February 1911. Held, the suit was not barred. 13 Ind. Cas. 644 (All.)

30. Undivided share.

——Art. 10—Undivided share.

An undivided share which is incapable of physical possession cannot become capable of physical possession merely because a lease of it for a fixed period has been granted. 1930 A.L.J. 375=A.I.R. 1930 All. 255.

——Art. 10—Undivided share.

The transfer of an undivided share in a field cannot be deemed to be capable of physical possession within the meaning of Art. 10. 99 Ind. Cas. 659=9 N.L.J. 205=A.I.R. 1927 Nag. 64.

——Art. 10—Undivided share—Houses and shops.

A house or a shop is capable of physical possession and therefore the rule applicable to property such as an undivided share which is not by its nature capable of physical possession cannot be applied to houses and shops over which physical possession is always possible and practicable.

Where the vendee of a shop attempted to take physical possession but found that the house was occupied by a trespasser whom he had to eject by suit:

Held, that limitation for a pre-emption suit against vendee began to run from the date of actual possession obtained by vendee under the decree. 89 Ind. Cas. 444=48 All. 12=23 A.L.J. 885=6 L.R.A. Civ. 521=A.I.R. 1926 All. 70.

——Art. 10—Undivided share—Sale of fractional share of Zemindari.

A fractional share of Zemindari situated in several Kathas is not capable of being physically taken possession of. A suit beyond one year of the date of the sale-deed is therefore barred. 17 A.L.J. 269=50 Ind. Cas. 80.

——Art. 10—Undivided share in property.

Since the sale of an undivided share of joint holding does not admit of physical possession, the claim to pre-empt the sale must be governed by the second part of Art. 10, the terminus a quo being the date of the registration of the instrument of sale. Hence the question of the transfer of possession does not arise in such a case and must be ignored. The reason why the second part of Art. 10, Lim. Act lays down that the terminus a quo is the date of the registration of the instrument of sale is no doubt that the date of registration is the date on which the public must be presumed to know that the transfer had taken place. Hence the test for determining the terminus a quo for purposes of second part of Art. 10 is not act of conveyance but the registration. A.I.R. 1942 Lah. 118=44 P.L.R. 99=200 Ind. Cas. 81.

31. Vendee already in possession.

——Art. 10—Vendee already in possession.

The plot of land sought to be pre-empted was originally held by the defendant vendee in the character of a tenant of the vendor. The vendor made a mortgage by way of conditional sale in respect of the plot in vendee's favour. On the basis of this mortgage a final decree for foreclosure was obtained against the vendors:

Held, that the vendee did not take physical possession on the plot under the foreclosure decree at all. The plot in suit was held by him in physical possession long before the foreclosure decree and in a right other than the right which arose to him under the decree. Art. 10 does not therefore apply but Art. 120 applies. 102 Ind. Cas. 22=1 L.C. 38=A.I.R. 1927 Oudh 212.

——Art. 10—Vendee already in possession—Time runs from when mutation takes place.

Where prior to the sale the vendee was already in physical possession of the property sold, as a tenant, and no physical possession could be given to him:

Held, that the subject of the sale did not admit of physical possession and that whether Art. 10 of the Limitation Act or S. 30 of the Punjab Pre-emption Act is to be applied, the date from which limitation runs is the date when the mutation was effected. 71 Ind. Cas. 823=A.I.R. 1924 Lah. 394.

32. When instrument of sale is registered.

——Art. 10—'When the instrument of sale is registered'—refers to an instrument which is not only in reality, but in terms, an instrument of sale. So Art. 10 does not apply to a case where a document is in terms an instrument of gift, though in reality it is a sale. 2 A.L.J. 350=1905 A.W.N. 88=27 A. 540. See also 1 C.L.J. 296.

33. Miscellaneous.

——Art. 10—Miscellaneous — Instrument of sale—Hiba-bil—Ewaz.

A document which is in reality though not in form a deed of sale is an instrument, of sale though it may have been styled a hiba-bil-ewaz. 27 A. 540, Dist. 12 O.C. 185=3 Ind. Cas. 590.

——Art. 11.

Synopsis.

1. Applicability
2. Attachment before judgment
3. C. P. Code (Old), S. 335
4. Claim to attached property
5. Effect of order
6. Essentials
7. Extension of time
8. Official Receiver—claim by
9. Order rejecting claim for want of jurisdiction
10. Order rejecting claim without jurisdiction
11. Order without investigation
12. Parties to suit.
13. Pre-emption suit.
14. Release of attachment
15. Scope
16. Starting point
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18. Miscellaneous.

1. Applicability.

——Art. 11—Applicability.

Art. 11 does not apply to a transferee from a successful objector, who was not a party to the objection proceedings under O.21, R. 56, Civil P.C. nor does S. 22 apply to him. Hence he can be impleaded as a party in a suit under O. 21, R. 63, even after the expiry of the period prescribed by Art. 11. A.I.R. 1940 Lah. 497=42 P.L.R. 601=192 Ind. Cas. 663.

——Art. 11—Applicability.

Objection to sale and not to attachment, preferred by a person who had no interest in the property attached at the time of attachment is not within the ambit of O. 21, R. 58, Civil P.C. and hence an order on such objection is not covered by Art. 11. A.I.R. 1935 Nag. 171=31 N.L.R. 301=158 Ind. Cas. 199.

——Art. 11—Applicability—See C. P. C., O. 21, R. 59. 13 M.L.J. 467=27 M. 67 (F.B.).

——Art. 11—Applicability. See C.P. Code (V of 1908), O. 21, R. 63. (1948) 2 M. L.J. 85=A.I.R. 1949 Mad. 114.

——Art. 11—Applicability.

The conclusiveness of an order in a claim case contemplated by O. 21, R. 63, Civil P.C. is conditional on the continuance of the execution proceedings and the attachment issuing therefrom and that consequently, where an order is made on an application under O. 21, R. 58 of the Code dismissing a claim but the sale held in execution proceedings is set aside and the attachment ipso facto comes to an end, a subsequent suit brought beyond one year by the claimant for a declaration of his title is not barred under Art. 11, Sch. 1, Lim. Act. It does not matter whether the execution proceedings come to an end within or beyond one year of the order in the claim case. 24 Pat. 462=A.I.R. 1945 Pat. 369=26 P.L.T. 245.

——Art. 11—Applicability.

Any order under O. 21, R. 63, Civil P.C., attracts the limited period of termination mentioned in Art. 11, whether it is passed under any of the preceding rules or not but that pre-supposes an order under that rule. 19 N.L.I. 308=I.L.R. (1938) Nag. 276=A.I.R. 1937 Nag. 170=168 Ind. Cas. 601,

——Art. 11—Applicability—Order passed without investigation under O. 21, R. 63, C. P. Code.

The test to see whether an order is covered by O. 21, R. 63, C.P. Code, is whether the order is against the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. If in substance and in effect it negatives the claimant's claim and refuses to recognise it, the order is one which falls under O. 21, R. 63, C. P. Code, and Art. 11 of the Limitation Act. 1931 Oudh 1 (F.B.), 1929 Pat. 116, 1929 Lah. 865 and 1912 Mad. 41 (F.B.), foll. 51 P.L.R. 90=A.I.R. 1949 E.P. 318 =50 Cr.L.J. 834.

——Art. 11—Applicability.

The mere fact that a person, by mistake, makes an application in a matter to which O. 21, R 58, clearly does not apply, in no way brings the matter within the mischief of Art. 11; in other words, if he has a right of action, the mere fact that by mistake he makes the application in no way alters the period of limitation which is rightly applicable to the particular cause of action which is the subject-matter of his action. A.I.R. 1935 Pat. 31 =150 Ind. Cas. 40.

——Art. 11—Applicability.

Settlement of sale proclamation—Mortgagee of property denying allegation that the mortgage was collusive and praying for sale subject to his mortgage — Settlement of sale proclamation notifying the mortgage with a remark that it was alleged to be collusive—Suit on the mortgage more than one year after the order is barred under Art. 11. 57 M.L.W. 352=(1944) 1 M. L. J. 438= A.I.R. 1944 Mad. 417=1944 M.W.N. 384.

——Art. 11—Applicability.

Mortgagor's property attached in execution proceedings against him—Mortgagee applying under O. 21, S. 58, Civil P.C., that his mortgage was not to be affected by subsequent sale—Court ordering mortgage to be brought to notice of bidders at auction—Order does not fall within purview of O. 21, R. 63, Civil P.C.—Article 11 does not apply. A. I. R. 1941 Mad. 77=52 M. L. W. 351=(1940) M.W.N. 889=(1940) 2 M L.J. 402.

Overruled in A.I.R. 1942 Mad. 41=198 Ind. Cas. 197 (F.B.).

——Art. 11—Applicability.

M mortgaged his property to three sets of persons and all three sets obtained decrees against him for realisation of their dues by the sale of the property. The property was sold and out of it, the previous and the second mortgagees were satisfied and the execution was filed as fully satisfied. The third mortgagee, whose mortgage was subsequent to the other two, put in an execution application in his decree and attached the sum which remained. He then applied for payment of that sum towards the satisfaction of the decree. In the meantime, one of the decree-holders in the second mortgage-decree applied for amendment of the second mortgage-decree. This was after the attachment of the balance by the third mortgagee. The second mortgage-decree was amended by raising the decretal amount. The second set of mortgagee-decree-holders, however, did not apply to have the order consigning their execution application to the record room as fully satisfied, reviewed and further they did not take out execution proceedings to satisfy the amended mortgage-decree in their favour. What they did was to put in an application in the execution proceedings of the third mortgagee asking that the money be paid to them. This application was dismissed by the executing Court on the ground that their execution was filed as fully satisfied. More than two years subsequently, one of them filed a suit for payment of the amount:

Held, that the suit was barred by time as he should have filed declaratory suit within one year of the order under Art. 11 and that the suit was not governed by Art. 62.

Held, also that the proper procedure for him was to put his own amended decree into execution. A.I.R. 1935 Lah. 642=159 Ind. Cas. 608.

——Art. 11—Applicability.

Objection by D in certificate proceedings of A, that B had no interest left in property. Objection rejected—Suit by D more than one year after such rejection, for declaration of title and confirmation of possession is barred under Art. 11, Lim. Act. A.I.R. 1939 Pat. 109=17 Pat. 446=5 B.R. 391=180 Ind. Cas. 372.

——Art. 11—Applicability—Order by Collector in execution proceedings.

Per Broomfield, J.— Art. 11, applies to any orders made under the Civil P.C. It is not limited necessarily to the orders of Courts. In view of S. 68 and the following sections of the Code and also Sch. III, the Collector may be said to act under the Code when exercising the powers conferred on him by the Code. But the Collector has no power to consider objections to an attachment. A.I.R. 1943 Bom. 12=I.L.R. (1942) Bom. 104=44 Bom.L.R. 819=204 Ind. Cas. 402.

——Art. 11—Applicability.

Where in execution of a mortgage decree the auction-purchaser obtained a decree and an order for symbolical delivery against the 1st defendant and he subsequently brought a suit against the 2nd defendant for actual possession, the previous order in execution not having been a final order cannot be considered to be passed under rule 103 of Order 21, C. P. Code. There is therefore no obligation upon him to bring a suit for possession within one year from the date of that order and a suit brought later cannot therefore be deemed to be barred by rule 103. 1930 M.W.N. 1051.

——Art. 11—Applicability—Suit under O. 21, R. 63, C. P. Code.

In every suit of the nature contemplated by R. 63 brought by the decree-holder the title of the objector has to be negatived before his right to attach and sell the property alleged to belong to the judgment-debtor is affirmed. Where the plaintiff sues for a declaration that the defendants have no title in the property the suit falls under R. 63 and is governed by Art. 11 of the Limitation Act. 1930 A.L.J. 1322.

——Art. 11—Applicability.

By invoking Art. 11 the bar of limitation cannot be got over if the title to the property is otherwise extinguised. In other words a suit though not barred by Art. 11 may be barred by some other provisions of the Lim. Act. 50 Ind. Cas. 6 (Lah.)

——Art. 11—Applicability — Application by mortgagee to sell subject to mortgage.

The mortgagee need not sue to set aside an order rejecting his application to sell the attached property subject to his mortgage. 41 Bom. 64=18 Bom. L.R. 782=36 Ind. Cas. 627.

——Arts. 11 and 15—Applicability—Attachment under O. 38, R. 8, C. P. Code—Property released.

A suit to recover property released from attachment under O. 38 R. 8 is not governed by Art. 11 or 13, such a suit not being one to set as de an order of Civil Court within Art. 13 and therefore the existence of the order releasing the attachment before judgment does not bar the suit. 41 Mad. 23=5 L.W. 704=39 Ind. Cas. 863.

——Art. 11—Applicability — Claim petition—Dismissal for default suit—Limitation.

Where a claim petition filed when the C. P. Code of 1882 was in force was dismissed for absence of the parties the order is not one under S. 281 of the C.P. Code but under the powers of the Court to dimiss miscellaneous matters and a regular suit to establish title is not governed by Art. 11 of the Lim. Act. 18 C.W.N. 770=26 Ind. Cas. 943.

——Art. 11 — Applicability — Order under—C.P.C., Ss. 278, 281, 283—Rejection of claim for failure to adduce evidence.

An order rejecting a claim for failure to produce evidence is none the less an order under S. 281 and is conclusive between the parties unless set aside within one year. 32 C. 537.

——Art. 11—Applicability—C.P.C (1882), S. 332.

A suit instituted under the last para. of S. 332 of the old code of 1882 is not governed by Arts. 11, 12, 13 or 14 of the Limitation Act of 1877. 19 C.L.J. 187=19 Ind. Cas. 968.

——Art. 11—Applicability—Claim case—Direction to sell after notifying claim.

An order on a claim petition expressing no final judgment on the right put forward but simply directing a sale after notifying the claim is one against the claimant and his suit to establish his title is governed by Art. 11. 41 Mad. 985=24 M.L.T. 197=(1918) M.W.N. 509=8 M.L.W. 292=35 M.L.J. 335=48 Ind. Cas. 270 (F.B.)

——Art. 11—Applicability—Claim investigation—Omission to pass order regarding portion of the property—Suit by objector—Limitation.

Where an executing Court by mistake or otherwise omits to give judgment on the merits in respect of some of the properties comprised in the claim preferred by an objector under O. 21, R. 58 the order cannot be treated as one coming under rule 63 regarding the properties so omitted. Therefore Art. 11 of the Lim. Act does not apply to a suit by the objector to establish his title to such properties. 42 P.R. 1900=52 P.W.R. 1909=58 P.L.R. 1909=1 Ind. Cas. 742.

——Arts. 11, 13, 120 and 142—Applicability—Suit for possession of immovable property—C.P. Code (1882), S. 332.

The Art. 11 does not govern a suit for possession of immovable property for establishment of plaintiff's title, when an adverse order is made against him under S. 332, C.P. Code (1882). The suit is governed by Art. 142. 16 C.W.N. 971=14 Ind. Cas. 92.

——Art. 11—Applicability—Resistance to possession—C.P.C., O. 21, R. 97.

Where a court dismisses an application under R. 97, O. 21, C.P.C., it cannot pass an order directing the person in whole favour the order is passed, to bring a regular suit, the person is not bound to sue within one year as Art. 11 does not apply to the suit. 1.P.R. 1919=49 Ind. Cas. 138.

——Art. 11—Applicability—Order under old Code.

An order, passed in 1905 under S. 283, C.P. Code, 1882, need not be set aside by a suit within one year of the date of the order as Art. 11 refers to orders passed under the new code only. 31 Ind. Cas. 250 (Mad.)

——Art. 11—Applicability—Objector, a benamider—Suit by benamidar.

Plaintiff against whom an order was passed under S. 335 of the C.P. Code of 1882 brought a suit to set aside the order. On deft.'s contention that he as benamidar was not entitled to sue and that the real owner was not made a co-plaintiff within one year, it was held that the plaintiff though benamidar was entitled to sue. 8 M.L.T. 377=(1910) M.W.N. 633=8 Ind. Cas. 264.

——Art. 11—Applicability—Test.

Art. 11 will apply only when the order was made upon enquiry. There may be an enquiry or investigation on the materials before the court, even though plaintiff failed to be present or to adduce evidence. 6 C.L.J. 362.

2. Attachment before judgment.

——Arts. 11, 13—Attachment before judgment—Suit by unsuccessful claimant—Limitation.

The limitation for a suit by an unsuccessful claimant in respect of property attached before judgment is not governed by either Art. 11 or Art. 13 but by Art. 120. A.I.R. 1945 Cal. 449=49 C.W.N. 111.

——Art. 11—Attachment before judgment.

Although the provisions of O. 21, R. 58, 63, Civil P.C., may be applied to claims or objections made in attachments before judgment. C. 21, R. 63, prescribes no period of limitation and the rule in

Art. 11 of the Lim. Act is expressly limited to claims or objections made to the attachment of property attached in execution of a decree. There are no special provisions for suits of this nature arising out of objections to attachment before judgment, so that Art. 120 must be held to apply to such suits. A.I.R. 1931 Pat. 580=16 P.L.T. 304=1 B.R. 42=152 Ind. Cas. 297.

——Art. 11—Attachment before judgment.

Art. 11 applies also to claims in execution in respect of property attached before judgment. A.I.R. 1921 Mad. 163, Foll. 116 Ind. Cas. 79=A.I.R. 1929 Nag. 128.

——Art. 11—Attachment before judgment.

A suit to contest an order on a claim against attachment before judgment followed by execution after decree is governed by Art. 11 and not Art. 120. 70 Ind. Cas. 917=34 M.L.T. 193=A.I.R. 1925 Mad. 49.

——Art. 11—Attachment before judgment—Claim proceedings.

Property attached before judgment is not always property attached "in execution of a decree" within the meaning of the Art. 11. O. 38, R. 11 does not mean that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Art. 11 of the Limitation Act or of O. 21, R. 57, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however there is an order in execution for the sale of the attached property, that order proceeds upon the footing that the property is to be considered as attached in execution by virtue of R. 11, and a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11. Cases not governed by Art. 11 must be governed by Art. 120. 70 Ind. Cas. 430=44 Mad. 902=14 M.L.W. 645=1021 M.W.N. 569=A. I. R. 1921 Mad. 163=41 M.L.J. 252 (F.B.)

3. C.P. Code (Old), S. 335.

——Art. 11—C. P. C., S. 335—Resistance to possession by manager of joint family—Subsequent withdrawal from prosecution of proceedings—Minor co-parceners, suit by, after one year not barred.

V, as manager of a joint Hindu family, offered obstruction to defendants taking possession of certain lands in execution of a decree. Some time after this, the minors, step-brothers of V, having separated from V and the lands to which the obstruction was offered having been allotted to the minors' share, V took no further part in the miscellaneous proceedings that followed the obstruction, and on the 6th August 1898, the court passed an order under S. 335, C.P.C., in favour of defendants. The minors brought a suit on 11-11-'03 to establish their title to the lands. Both the lower courts dismissed the suit on the ground that it was barred under Art. 11, inasmuch as it was instituted more than a year after the order under S. 335, C.P.C. Held, that the order was no bar to plaintiff's suit since V did not represent the minors when the order under S. 335, C.P.C., was made. 10 Bom. L.R. 550=32 B. 404.

——Art. 11—C.P.C., S 335—Suit by party against whom the order made—Joinder of strangers as parties after one year, to a suit filed within the year.

The limitation provided for by Art. 11 applies to suits under S. 335, C.P.C., only in so far as it is against the person in whose favour the order was made. Consequently, the fact that other persons were joined after the limitation period as parties on the representation of the person in whose favour the order was made, that he was only a benamidar for the parties so added, will not bar the suit. 18 M.L.J. 464.

——Art. 11—C. P. Code, S. 335—Claim allowed—Suit by some for partition—Same right in substance—Bar.

A suit by one against whom an order has been passed under S. 335, C.P.C., to get rid of the effect of the order must be brought within one year; and the limitation of one year cannot be escaped by merely designating the suit as one for partition. The purchaser of the right, title and interest of a member of a family having failed to get possession by reason of the court allowing a claim under S. 335, C.P.C., brought a suit which was nominally one for partition but really for the possession of that very property and containing a prayer to set aside the order under S. 335. Held, that Art. 11 barred the suit. 3 Bom.L.R. 594=26 Bom. 146.

——Art. 11—C.P.Code, (1882), Ss. 278, 281, 283—'Investigation'—Payment after one year of the decree amount by third party mortgagee—Effect of, on the claimant.

An order purporting to deal with the claim on the merits is an order passed 'on investigation.' An order under S. 281, C.P.C. (O.C.) to the effect: 'The sale seems to be collusive; claim rejected' is an order made after investigation within the meaning of S. 278 and consequently, a suit by the party against whom the order was made is governed by Art. 11. An order under S. 281, C.P.C., was made against the claimants-plaintiffs in the case. More than a year from the date of the order, the attachment was raised by payment by one of the defendants in the present suit who were mortgagees in possession. Held, that the order under S. 281, C.P.C., was conclusive againt the claimant even as between him and the defendants. Obiter: A payment of the decree amount by any of the parties to the proceeding within one year from the date of the order under Ss. 280, 281, 235, C. P. C., cannot preclude the party against whom the order was made from bringing a suit after the year. Quaere:—Whether it will make any difference if the payment is made by a stranger not a party to the proceedings. 16 M. L. J. 136=29 Mad. 225.

——Art. 11—C. P. Code, S. 335, order under—Right to present possession—Right to enforce mortgage.

The limitation of one year prescribed by Art. 11 is applicable only to a suit to establish the right

to present possession which the unsuccessful claimant under S. 335, C. P. C. may have in the properties claimed by him; a suit by such claimant to enforce his remedies as a mortgagee is not governed by that article. A mortgagee's claim to possession having been dismissed, he brought a suit for sale more than a year after the date of such dismissal. Held, that the suit was not barred. 29 C. 25.

——Art. 11—C. P. C., S. 335, order under.

Art. 11 has application only to cases where the judge passes an order under S. 335, C.P.C., and not to a case where the judge refuses to pass an order under the section, but merely refers the party to a civil suit. 27 M. 25.

4. Claim to attached property.

——Art. 11—Claim to attached property—Claim dismissed but attachment removed on satisfaction of decree—C P.C., Ss. 210, 282.

Art. 11 of the Limitation Act does not apply to a case where, though the claim to attached property is disallowed, the attachment is removed on satisfaction of decree, there being no necessity to set aside the order. 13 B. 72; 18 B. 241, followed. 31 C. 228.

——Art. 11—Claim by mortgagee.

If a mortgagee without possession chooses to prefer an objection under O. 21, R. 58, on the strength of his alleged mortgage, against attachment and sale of property in execution of a money-decree obtained by a third party against his mortgagor, and an adverse order is passed against him in the objection proceedings, such decision is conclusive against him under R. 63 unless he brings a declaratory suit within the period prescribed by Art. 11 of the Indian Limitation Act. 11 Lah. 369=31 P.L.R. 752=A.I.R. 1929 Lah. 865.

——Art. 11—Claim by mortgagee — Suit by decree-holder under O. 21, R. 63, C. P. Code.

A house was attached by plaintiff in execution of a decree but an order by the Court was passed on the objector's application proclaiming a mortgage to be a burden on the house, plaintiff made an objection to that order, and an order was passed in his favour allowing a note of his objection to the objector's application to be added to the proclamation; in a suit for a declaration that the mortgage was null and void and ineffectual against the plaintiff:

Held, that the suit comes under Art. 11. 100 Ind. Cas. 763=A.I.R. 1927 All. 420.

——Art. 11—Claim by mortgagee.

An order refusing to recognise a mortgage and continuing the attachment free from it is an adverse order of the kind contemplated in O. 21, R. 63 and must be displaced by a suit contemplated by Art. 11. 70 Ind. Cas. 432=45 Mad. 90=15 M.L.W. 190=1921 M.W.N. 764=A. I. R. 1922 Mad. 447=41 M.L.J. 594.

——Art. 11 — Claim suit — Starting point of limitation.

Application for execution — Objection — Case closed by mistake—Fresh application for attachment and fresh claim — Dismissal—Suit under O. 21, R. 63, Civil P. C.—Limitation runs from the date when the first case was closed by mistake. A.I.R. 1931 Rang. 183=131 Ind. Cas. 727.

5. Effect of order.

——Art. 11—Effect of order— Order dismissing claim by mortgagee—Suit to enforce mortgage.

Where the order of the executing Court does not say that the objector is not entitled to the right which he claims in respect to the property but merely says that his request to have the sale made subject to his mortgage cannot be granted, and the reason for the refusal is not any decision that the objector had no concern with the mortgage, in such a case there is no bar to the suit under Art. 11, Lim. Act. A.I.R. 1943 Bom. 12=44 Bom. L. R. 819=I. L. R. (1943) Bom. 104=204 Ind. Cas. 402.

——Art. 11—Effect of order— Order rejecting claim as claimant had no locus standi.

Where the Court entertains the claim and enquires into it but eventually dismisses it because the claimant has no locus standi to make the claim, the order is one passed against the claimant as contemplated by Art. 11. 5 R. R. 391=A.I.R. 1939 Pat. 109=17 Pat. 446=180 Ind. Cas. 372.

——Art. 11—Effect of order—Order dismissing objection on ground of delay.

An order dismissing an objection filed under O. 21, R. 58, Civil P. C. on the ground of unnecessary delay under the proviso to that rule is an order passed against the claimant and attracts the application of Art. 11. 35 Bom.L.R. 147=57 B. 213=A.I.R. 1933 Bom. 190=144 Ind. Cas. 993.

——Art. 11—Effect of order.

The intention of R. 63 is to include even orders of summary rejections under the proviso to R. 58. A person against whom an order of a summary rejection under the proviso to R. 58 has been passed would have his natural remedy by filing a suit for declaration in the civil Court. But if the objector fails to bring a suit, then that order is an order under R. 63 and is conlusive, and the period of limitation which would apply to such a suit is one year under Art. 11, Limitation Act. A.I.R. 1923 All. 435; 41 Mad. 985; 45 Cal. 785 and A.I.R. 1927 Lah. 680, foll. 116 Ind. Cas. 81=26 A L.J. 794=A.I.R. 1928 All. 327.

——Art. 11 — Effect of order — Dismissal of claim.

At the auction sale of certain properties in execution of a money-decree, a mortgagee of the properties applied that the sale proceeds should be kept in Court deposit being subject to his hypothecation. His application was dismissed with the order "Sale is concluded already and decree-holder set off the decree amount. Dismissed."

Held, that order did not amount to any order on the claim within the words of O. 21, R. 63. Consequently, a subsequent suit is not barred under Art. 11 of the Limitation Act. 39 M.L.J. 350, Foll. 70 Ind. Cas. 618=45 Mad. 827=16 M.L.W. 485=31 M.L.T. 441=A.I.R. 1923 Mad. 76=43 M.L.J. 467.

——Art. 11—Effect of order—Limitation.

An order dismissing an application for declaration that the property be sold subject to an encumbrance in favour of the applicant is final if not set aside within a year, both against the applicant and a judgment-debtor. The effect of the order if not set aside is to free the property from the incumbrance. 38 M.L.J. 397=11 M.L.W. 343=27 M.L.T. 312=56 Ind. Cas. 481.

——Art. 11—Effect of order.

An order under O. 21, R. 63, C.P.C., is conclusive against the party unless set aside within the time allowed by law. In a suit by the decree-holder against the objector whose objection was dismissed for ejectment of the objector on the basis of a subsequent trespass by the objector. The objector cannot take advantage of the fact that the plaint and the written statement were within one year of the order because the objector himself did not sue to set aside the order. 22 M.L.T. 232=(1917) M.W.N. 721=6 L.W. 281=41 Ind. Cas. 684.

——Art. 11—Effect of order—Execution sale—Fraud—Suit on mortgage—Defence.

Where by an order of Court, properties were sold subject to a mortgage in favour of the plaintiffs and the defendants purchased the property in ignorance of the order:

Held, that the order under O. 21, R. 63, would be conclusive against defendant only if it was shown that he was aware of the fraud of the plaintiff within a year of the date of the order and being so aware did not take steps to establish his rights within the period prescribed by Art. 11. If the defendant became aware of the fraud after the period, he could assert under S. 44 of the Evidence Act the fraudulent nature of the plaintiff's claim and the consequent invalidity of the Court's order in any proceeding instituted by plaintiff on the strength of such order. 16 Bom. L.R. 648=27 Ind. Cas. 238.

——Art. 11—Effect of order.

Any order on an objection made by a third party to attachment of property in execution of a decree is conclusive, whether that order was passed summarily or after investigation. 130 P.L.R. 1916=117 P.W.R. 1916 =66 P.R. 1916=35 Ind. Cas. 321.

——Art. 11—Effect of order—Garnishee—Defence.

It is not open to a garnishee to plead a defence which had already, in an execution enquiry been successful, except in a suit instituted within one year from the date of the adverse order. 38 Bom. 631=16 Bom. L.R. 520 =25 Ind. Cas. 375.

6. Essentials.

——Art. 11—Essentials—Property must have been attached.

The provisions of Art. 11 do not apply unless there has been an attachment in the manner prescribed by the Civil P. C., even if an order for attachment has been made and the claim or objection proceeded upon the belief that there had been an actual attachment. A.I.R. 1938 Lah. 449=34 P.L.R 443=144 Ind. Cas. 378.

——Art. 11—Essentials—Property must have been attached.

In cases where the property has been or is sought to be sold under a mortgage-decree, there can be no attachment within the meaning of O. 21, R. 58, Civil P. C. and a suit to contest an order passed on an objection to such a sale need not to be filed within one year. 33 P.L.R. 1033=A.I.R. 1933 Lah. 75=141 Ind. Cas. 252.

——Art. 11—Essentials—To establish right form of relief.

There is no limitation as regards the nature of the suit referred to in the article; no particular prayer is excluded from its scope. Thus a suit for declaration that an alienation by the judgment-debtor is fraudulent and that the property is liable for the judgment-debt is within the article. A.I.R. 1932 Lah. 516=33 P.L.R. 759=138 Ind. Cas. 412.

——Art. 11—Essentials—Mere order for attachment without actual attachment.

For purposes of Art. 11, the property to which a claim is made, or to the attachment of which there is no objection, must be property which had been **de facto** attached. Merely passing an order of attachment is not enough.

No property can be declared to be attached unless firstly order for attachment has been issued; and secondly, in execution of that order the other things prescribed by the rules in the Code have been done.

After an order of attachment had been passed, a claim was put in and rejected. There was no attachment effected at any time:

Held, that the order of rejection need not be set aside within one year, the order being a nullity. A.I.R. 1922 Mad. 447, **Reversed.** 109 Ind. Cas. 626 =51 Mad. 349=26 A.L.J. 616=55 I.A. 256=48 C.L.J. 11=32 C.W.N. 821=5 O.W.N. 579=28 M.L.W. 1=30 Bom. L.R. 1353=A.I.R. 1928 P.C. 139=55 M.L.J. 122 (P.C.).

7. Extension of time.

——Art. 11—Extension of time.

Where the judgment-debtor was not made a party to the objection proceedings but was a necessary party to a regular suit, the time taken in prosecuting claims against the judgment-debtor in obtaining the conciliator's certificate under the Deccan Agriculturists Relief Act should be deducted from computing the period of limitation. 36 Bom. 624=14 Bom. L.R. 750 =17 Ind. Cas. 87.

——Art. 11—Extension of time—Claim proceedings—Suit.

An order under O. 21, R. 63 of the C. P. Code is conclusive subject to a regular suit within one year of the order, and a party cannot claim to deduct the time taken in an unsuccessful revision petition to the High Court from the period of one year prescribed. 8 Bur. L.T. 93=8 L.B.R. 146=27 Ind. Cas. 829.

8. Official Receiver—Claim by.

——Art. 11—Official Receiver—Claim by under S. 34, Provincial Insolvency Act.

An application by an Official Receiver, to a Court which had attached the property of the insolvent at the instance of a creditor, praying that the property may be treated as prop.. y vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree, is not claim petition which falls within the class of claims and objections dealt with by O. XXI, Rr. 58 to 63 and under O. 38, R. 8 nor an application for rateable distribution under S. 73 of the C. P. Code. His claim (when the vesting in him was after attachment) is a statutory claim which he is entitled to make under S. 34 of the Provincial Insolvency Act. When the claim is disallowed and the Official Receiver brings a suit to enforce the claim neither Art. 11 nor Art. 13 of the Limitation Act apply to such a suit. The suit is clearly within time under Art. 62. 69 Ind. Cas. 326=45 Mad. 70=30 M.L.T. 77=14 M.L.W. 334=1921 M.W.N. 775=A.I.R. 1922 Mad. 189=41 M. L. J. 334.

9. Order rejecting claim for want of jurisdiction.

——Art. 11—Order rejecting claim for want of jurisdiction.

Where an objection purporting to be one under O. 21, R. 58, Civil P. C., was certainly made by the respondents whose case was one relating to possession by some sort of family arrangement to which their grandfather was a party and that they were in possession and it appeared that the objection was one to the attahment of the property, the subject-matter of the litigation and the Munsif declined jurisdiction on the ground that the petitioners had no **locus standi.**

Held, that the order was one in which the petitioner's objections were determined and that it was an order under the Civil P. C., within the meaning of Art. 11, and consequently, an action which was based on the rejection of the petition under O. 21, R. 58, was barred after one year. A.I.R. 1935 Pat. 31=150 Ind. Cas. 40.

——Art. 11—Order rejecting claim for want of jurisdiction.

Where the Court refuses to go into the claim petition and rejects it on the ground that the execution has been transferred to the Collector, there is no order against the claimant which can attract the application of Art. 11. 19 N.L.J. 308=A.I.R. 1937 Nag. 170=I.L.R. (1938) Nag. 276=168 Ind. Cas. 601.

10. Order rejecting claim without jurisdiction.

——Art. 11—Order rejecting claim without jurisdiction.

Where an objection is filed on the date of the sale but is dismissed for default subsequent to the sale, the order passed is one without jurisdiction and a suit by the objector to establish title is not governed by Art. 11. A.I.R. 1937 Cal. 390=41 C.W.N. 845=65 C.L.J. 353=172 Ind. Cas. 503.

11. Order without investigation.

——Art. 11—Order without investigation—Dismissal on preliminary point.

An order dismissing an objection under O. 21, R. 58, whether it is an order disposing of the case on the merits or whether it is an order which held that the objection was not entertainable on the preliminary ground that a certain legal provision was a bar to the maintainability of the application is a disposal of the application under O. 21, R. 58 after hearing the parties and therefore is an order contemplated in O, 21, R. 63 and Art. 11, Lim. Act. 115 Ind. Cas. 703=11 P.L.T. 28=A.I.R. 1929 Pat. 116.

——Art. 11—Order without investigation.

According to the wording of O. 21, R. 63, it is immaterial whether a claim or objection is decided after or without any investigation.

L, a decree-holder, got a buffalo belonging to **G**, the judgment debtor, attached. **D** objected to the attachment on the ground that the animal belonged to him. **L** stated that he did not wish to contest the objection and the animal was released. The animal was attached a second time, but the same objection was raised by **D** and allowed by the Court after enquiry. The plaintiff instituted a suit under R. 63 for a declaration that the animal belonged to **G**:

Held, that **L** having stated that he did not wish to contest the objection and the animal having been released from attachment, the objection must be taken to be decided and the period of limitation began to run from date of release from attachment. 104 Ind. Cas. 289=A.I.R. 1927 Lah. 680.

——Art. 11—Order without investigation.

The order contemplated by O. 21, R. 63, refers to any order passed in a removal of attachment case, which is against a party whether his claim has been investigated or not. 41 Mad. 985 (F.B.); 45 C. 785; 41 All. 623, **Foll.**; 34 C. 491, **Dist.** 76 Ind. Cas. 841=1 Rang. 481=2 Bur. L. J. 173=A.I.R. 1924 Rang. 42.

——Art. 11—Order without investigation.

The scope of R. 63 is not so confined as to exclude orders passed under R. 58 from its operation. Consequently a suit by an objector more than one year after the objection is disallowed without investigation, is barred under Art. 11 of the Limitation Schedule. 41 Mad. 985 (F.B.) **Foll.** 74 Ind. Cas. 1024=45 All. 438 =21 A.L.J. 342=4 L.R.A. Civ. 185=A.I.R. 1922 All. 435.

——Art. 11—Order without investigation.

An order refusing to investigate a claim to attached property on the ground of delay in filing it, is an order passed against the claimant within O. 21, R. 63 and Art. 11 of the Limitation Act applies to a suit to set aside such an order. 71 Ind. Cas. 404=19 N.L.R. 34 =6 N.L.J. 66=A.I.R. 1923 Nag. 187.

——Art. 11—Order without investigation.

The period of limitation for a suit to set aside an order under R. 63 of O. 21 is one year, even if that order was passed without investigation and not on the merits. 41 Mad. 985; 45 Cal. 785, **Foll.** 69 Ind. Cas. 522=A.I.R. 1923 Nag. 69.

——Art. 11—Order without investigation.

The dismissal of an objection even for default will bar a suit which is brought beyond a year of such dismissal A.I.R. 1939 Cal. 164 (F.B.).

——Art. 11—Order without investigation.

Art. 11 applies to orders under R. 103 of O. 21, C. P. C. and even orders without investigation under that rule are covered by the article. 1 Pat. L.T. 559=5 Pat. L.J. 652=58 Ind. Cas. 37.

——Art. 11—Order without investigation.

If an objection under O. 21, R. 58 C. P. Code, is dismissed without investigation Art. 11 does not apply to a suit by an objector for establishing his right to the property. 40 All. 325=16 A.L.J. 256=44 Ind. Cas. 1005.

——Art. 11—Order without investigation.

Plaintiff filed an objection to the attachment of a share in a village, in respect of which he held two registered mortgages. On the date fixed for evidence the scribe of one of the mortgage deeds was the only witness present. An adjournment was refused and the objection was thus disallowed. The plaintiff then sued for declaration more than a year after the dismissal of the objection:

Held, that as there was not really an investigation under the objection the case did not fall within the one year's limitation provided by Art. 11 and the suit was therefore within time. 16 P. R. 1918=37 P. W. R. 1918=16 P.L.R. 1918=44 Ind. Cas. 528.

——Art. 11—Order without investigation.

The article applies to a case where the person sues to establish his right to the property in respect of which a claim is preferred by him but which is dismissed for default and without investigation. The article is more comprehensive than that of the preceding Acts and the application of the article cannot be restricted to those cases only in which the claim preferred under O. 21, R. 58, has been disallowed after investigation. 45 Cal. 785=23 C.W.N. 375=44 Ind. Cas. 265.

——Art. 11—Order without investigation.

The Art. does not apply to a case where an objection against attachment of property has not been disposed of on merits. 2 Pat. L.W. 108=41 Ind. Cas. 468.

——Art. 11—Order without investigation.

The auction purchaser applied for delivery of possession of the property purchased and made the defendant a party to the application as the latter had put in a claim to the property and had applied for setting the sale aside. The application was dismissed for default on 11th August, 1913. Subsequently, the plaintiff again applied and got possession on which the defendant preferred an objection which was allowed on 12th December, 1914. Two days afterwards the plaintiff sued for declaration of title as auction purchaser:

Held, that the suit was not barred as the order on 11th August, 1913 was one merely dismissing the application for default and the plaintiff had no opportunity to establish the right and no adjudication of title could have been made in their absence. Therefore limitation began to run against him, from 12th December 1914 when the defendants' objection was allowed. 15 A.L.J. 420=39 Ind. Cas. 797.

——Art. 11—Orders without investigation—Orders on default.

The article covers orders refusing to recognise mortgages. The language of this article in the new Act is wider than that of the previous Act and covers orders made after full investigation as well as those passed on default. 31 M.L.J. 247=38 Ind. Cas. 937.

——Art. 11—Order without investigation.

Where an execution proceeding is resisted an order passed without enquiry is not one under S. 335, C.P.C., 1882, and a suit for possession of the property may be brought one year after the date of the order. 31 Ind Cas. 444 (Cal.).

——Arts. 11 and 144—Order without investigation.

Where the objections to an execution sale were summarily rejected without investigation, a suit for recovery of the property can be brought within twelve years under Art. 144, Art. 11 not being applicable to the case. 160 P.L.R. 1915=72 P.W.R. 1915=29 Ind. Cas. 731.

——Art. 11—Order without investigation.

Dismissal of an application for want of prosecution on the ground that objector did not produce evidence is an order on merits and is not an order dismissing the application for default of appearance. Therefore a suit to set aside the order beyond one year from the date of the order is barred. 20 Ind. Cas. 369 (All.).

——Art. 11—Order without investigation.

Where a person not a party to the suit complained of dispossession of a room in a house delivered in execution to the purchaser and the application of the third party was dismissed without an enquiry into the merits a suit under O. 21, R. 103 of the C. P. Code will be barred if not brought within one year under Art. 11. 8 A.L.J. 626=10 Ind. Cas. 401.

——Art. 11—Order without Investigation.

Art. 11 applies only where there has been an investigation of a claim. It does not apply to a consent order without investigation of a claim. 50 Ind. Cas. 649 (Cal.).

——Art. 11—Order without investigation.

Where the objector produced the evidence but the decree-holder failed to appear and produce the evidence and the objection was allowed ex parte the order is passed after an investigation and Art. 11 applies. 61 P.L.R. 1910=28 P.R. 1910 =19 P.W.R. 1910=5 Ind. Cas. 890.

——Art. 11—Order without investigation.

An order dismissing an application under S, 278 of the Code of Civil Procedure for default is an order passed without investigation, and Art. 11 is not applicable to the case. 17 M.L.J. 554=31 M. 5 =3 M.L.T. 106.

12. Parties to suit.

——Art. 11—Parties to suit—Where the judgment-debtor is not made party to suit.

If a claim preferred by a party under O. 21, R. 58 against the decree-holder attaching a property is

allowed and the judgment - debtor is not a party to such claim suit order is not binding on the judgment-debtor so as to compel him to bring a suit for declaration under O. 21, R. 63. If subsequently the claimant brings a suit for possession against the judgment-debtor, the judgment debtor is not precluded from setting up his title, for an order in the claim suit does not become final under O. 21, R. 63, against the judgment-debtor and is not governed by Art. 11, as against the judgment-debtor. 15 Cal. 674, Rel. on. 30 Mad. 335 (F. B.), Cons. 120 Ind. Cas. 762=10 P.L.T. 581=A.I.R. 1929 Pat. 604.

13. Pre-emption suit.

——Art. 11—Pre-emption suit—Where defendant is a benami vendee.

Where a pre-emption suit is brought against two sets of defendants on the allegation that the first set of defendants are only benami vendees and that the real vendees are the 2nd set of defendants and that the transaction was entered into with a view to defeat plaintiff's right of pre-emption, it cannot he held that the suit as against the first set of defendants is only a suit for declaration and that the suit is a pre-emption suit only as against the second set of defendant. Art. 11 of the Limitation Act applies to such suits. 63 Ind. Cas. 558 =8 O.L.J. 320=A.I.R. 1921 Oudh 252.

14. Release of attachment.

——Art. 11—Release of attachment.

Where the attachment was released within one year after the order dismissing the claim case and execution proceedings were again taken after the lapse of several years:

Held, that a title suit brought to resist the attachment was not barred by limitation. 83 Ind. Cas. 233=51 Cal. 548=39 C.L.J. 418=A.I.R. 1924 Cal. 744.

15. Scope.

——Art. 11—Scope.

Art. 11 is an exception to general rules and curtails the plaintiff's rights very considerably. 19 N.L.J. 308=A.I.R. 1937 Nag. 170=I.L.R. (1938) Nag. 270=168 Ind. Cas. 601.

——Art. 11—Scope.

A suit under Art. 11 does not fall within the language of S. 28 and the omission to bring a suit of the kind contemplated by Art. 11 will not extinguish the rights of the claimant of the judgment-debtor. (1935) M.W.N. 763=42 M.L.W. 710 =A.I.R. 1935 Mad. 1015=158 Ind. Cas. 863.

16. Starting point.

——Art. 11—Starting point.

Under Art. 11, the starting point should be taken to be the date of the final order, whether that order was passed on an appeal or in revision against the order of the lower Court. A.I.R. 1943 Mad. 633=1943 M.W.N. 455=(1943) 2 M.L.J. 41=213 Ind. Cas. 236.

——Art. 11—Starting point.

Application by decree-holder to transferring Court to recall decree from transferee Court for being executed by the transferring Court itself is a step-in-aid of execution and saves limitation under Art. 11. A.I.R. 1939 Pat. 144=17 Pat. 617=5 B.R. 465=20 P.L.T. 353=180 Ind. Cas. 311.

——Art. 11—Starting point.

If an order in execution proceedings is no adjudication upon the merits of the objection at all, the limitation for a suit does not begin to run till the date on which fresh objections were allowed after a second application for execution by the decree-holders. 67 Ind. Cas. 543=3 Lah. 7 =A.I.R. 1922 Lah. 108.

——Art. 11—Starting point.

The objector whose objection is dismissed must establish his right to the property within one year of the date of the order. 2 U.P.L.R. (All.) 198= 57 Ind. Cas. 5.

——Art. 11—Starting point—Declaratory suit—Sale to defraud a creditor.

A suit for a declaration that the property is liable to attachment and for setting aside an order allowing the objection is governed by Art. 11 and not by Art. 91 even though the result of the suit would be to set aside a sale by the judgment-debtor and even though the suit is brought after three years of the sale-deed. The cause of action for the plaintiff arises only on the date when the objection is allowed. 179 P.L.R. 1913=118 P.W.R. 1913=18 Ind. Cas. 519.

——Art. 11—Starting point.

A suit by a holder of a decree to declare an alienation as fraudulent based on an order passed under O. 21, R. 63, C. P. Code is governed by Art. 11 and should be brought within one year from the date of the order. 7 M.L.W. 280= (1918) M.W.N. 244=44 Ind. Cas. 551.

——Art. 11—Starting point.

A suit brought within one year of the date of the order though more than a year after attachment and sale of property is not barred. Art. 11 includes not only a prayer for declaration but also the consequential relief dependent on the declaration. The words "to establish the right" in O. 21, R. 63, C.P.C., are not confined to the obtaining of a mere declaration to the exclusion of all consequences of relief, which include the recovery of the value of the property sold prior to the date of the order. 40 Mad. 733=31 M.L.J. 394=(1916) 2 M.W.N. 207=4 L.W. 300=20 M.L.T. 353=36 Ind. Cas. 445.

——Arts. 11 and 13—Starting point.

Where an order of a single Judge of the High Court in claim proceedings is contested on appeal under the Letters Patent, time under Art. 11 runs only from the date of the appellate order as the proceedings in an appeal are only a continuation of the proceedings commenced by the petition and the decree in appeal is the

only subsisting decree in the suit. 39 Mad. 1196=17 M.L.T. 208=(1915) M.W.N. 211=28 Ind. Cas. 367.

17. Stranger to proceeding.

——Art. 11—Stranger to proceeding.

Where a person obtained a decree against a member of a joint Hindu family and attached the member's shares in the family and a claim preferred by the judgment-debtor's brothers on the strength of a deed of relinquishment executed by him in 1916, was allowed on April 1, 1922 and the decree-holder along with the other creditors of the judgment-debtor, instituted a suit on March 13, 1923, for a declaration that the deed of relinquishment was a collusive transaction intended to defeat the creditors:

Held, that so far as the decree-holder was concerned, the suit was governed by Art. 11 of the Lim. Act and was within time but as regards the other plaintiffs, it was governed by Art. 120 and time-barred. 33 P.L.R. 759=A.I.R. 1932 Lah. 516=138 Ind. Cas. 412.

——Art. 11—Stranger to proceeding—Applicability of article to.

Art. 11 does not apply to a person who was not a party to the proceedings in which the order sought to be set aside was made. 57 Ind. Cas. 52 (Lah.).

——Art. 11—Stranger to proceeding — Claim case.

A person divides his properties to his four grandsons in equal shares. Plaintiffs obtained a settlement of half the property from his sons. Subsequently in execution of a money decree against the sons the whole tenure was sold. After the claims preferred by the defendant's grandsons were rejected, no suit was brought to set aside the order in the claim case. In a suit by plaintiffs who were not parties to the claim case for a declaration of their occupancy right in half the property. Held, that Art. 11 was a bar to a suit by defendants and the plaintiffs were entitled to prove that at the time of the settlement the grandsons had a good title to the interest claimed by them. Further that Art. 11 does not apply as the plaintiffs were no parties to the claim proceedings. 53 Ind. Cas. 260 (Cal.).

——Art. 11—Stranger to proceeding—Judgment-debtor, if bound.

A judgment-debtor will not be bound by an order unless he is a party to it and unless the order in express terms adjudicates on his title. Where only a question of possession is decided, the title of the judgment-debtor is not affected though he be a party. 26 M. L. T. 513=(1920) M.W.N. 77=37 M.L.J. 547=54 Ind. Cas. 530.

——Art. 11—Stranger to proceeding—Suit to set aside a sale in execution of a decree obtained against third party.

Plaintiff sued for a declaration that a certain well site was not the property of her mother and guardian who had been in possession on her behalf but was a gift to her by her uncle and was not liable to be attached and sold in execution of the decree against the latter and that the sale in execution consequent on the attachment was void.

Held, that the suit was not governed by Art. 11 of the Limitation Act inasmuch as it applied only to parties to the suit or to the execution proceedings, in question and not to strangers. (1916) 2 U.B.R. 116=10 Bur. L.T. 225=36 Ind. Cas. 3.

——Art. 11-A—Stranger to proceedings—Order for symbolical possession—If must be set aside within one year.

An order for symbolical delivery need not be set aside within one year by strangers in actual possession of the land. 15 M.L.T. 163=1 L.W. 31 =24 Ind. Cas. 771. (See on appeal 30 M.L.J. 404 =2 L.W. 1184=31 Ind. Cas. 615.).

——Art. 11—Stranger to proceedings.

A judgment-debtor is not a party to the claim proceedings. The party aggrieved by the order can institute a suit against the judgment-debtor even after a year from the order. 34 Mad. 533= 8 M.L.T. 417=(1910) M.W.N. 741=8 Ind. Cas. 157.

——Art. 11—Stranger to proceedings.

Art. 11 does not apply as against a person who was not a party to the proceedings in which the order sought to be set aside was passed. 32 All. 88=7 A.L.J. 11=4 Ind. Cas. 144.

18. Miscellaneous.

——Arts. 11 and 120—Miscellaneous—Suit for declaration — Certain property is liable to attachment.

Plaintiff attached a certain house in execution of his decree against the judgment-debtor. The latter's brother filed objections on the ground that he was the sole owner of the property, the judgment-debtor having relinquished his interest by a deed of release. The objection being allowed the plaintiff brought a suit for declaration that the house was liable to attachment and sale. Held, Art. 11 governs the suit. A person by simply invoking Art. 11 cannot affect the law of limitation if his title to the property has been extinguished. 50 Ind. Cas. 6 (Lah.).

——Art. 11—Miscellaneous—Nature of claim suit—Suit by unsuccessful claimant—Continuation of claim.

A suit under O. 21, R. 63, of the C. P. Code is a mere continuation of the execution proceedings in a claim petition. A suit of this class though called original suit are in their essence mere forms of appeal allowed by the C. P. Code. 38 Mad. 535 26 M.L.J. 449=25 Ind. Cas. 11.

——Art. 11—Miscellaneous — Distinction between Arts. 11 and 29.

Art. 11 deals with a suit by a person to establish his right to or to the present possession of the property comprised in the order while Art. 29 deals with a suit for compensation for wrongful seizure of movable property under legal process. Where a plaintiff sued for the value of the property recovered in execution the suit is not barred if brought after a year of the date of the order since Art. 29 governs the suit and not Art. 11. 4 Bur. L.T. 45=9 Ind. Cas. 773.

——Art. 11—Miscellaneous—Suit for possession—Order under O. 21, R. 95, C. P. Code—Addition of parties.

A suit brought within one year on an order under S. 336 of the C.P. Code of 1882 is not barred but a party added after the expiry of one year can raise the plea of Limitation. 7 M.L.T. 306=6 Ind. Cas. 680.

——Art. 11—Miscellaneous—Two decrees.

Where there were two decrees in favour of one decree-holder against the same judgment debtor and the objection of the mortgagee was allowed as regards the second decree but it really related to the first while no regular suit was brought by the decree-holder the order operates against both the decrees until it is set aside. 122 P.W.R. 1909=89 P. L. R. 1909=4 Ind. Cas. 970.

——Art. 11 — Miscellaneous — Attachment — Objection against—Declaratory suit—Limitation when objection is not wholly adjudicated upon.

An objection under S. 283, C.P.C. (O.C.) made to the attachment of several properties effected in execution of a decree was allowed in respect of some of them and no order was passed in regard to the rest, but all the property was released from attachment. The decree-holders again attached the properties which were not dealt with by the order passed on the objection. A fresh objection was made but it was disallowed. The objector filed a suit under S. 283 of C.P.C. for a declaration of right as to those properties. The Court of First Instance dismissed the suit as barred by limitation, being of opinion that Art. 11 of the Second Schedule of the Limitation Act governed the case and limitation began to run from the date of the first order. On appeal it was held that the order not having been passed in regard to those properties the suit was not barred. Held, that the view of the appellate court was correct. 58 P.L.R. 1909=42 P.R. 1909=52 P.W.R. 1909=1 Ind. Cas. 742.

——Art. 11-A.

Synopsis.

1. Applicability
2. Application for possession dismissed
3. Claim on original title
4. Computation of time
5. Essentials
6. No resistence to purchaser
7. Order under C.P. Code (Old), S. 335
8. Order without investigation
9. Parties to suit
10. Purchaser of co-parcener's share
11. Resistance to auction-purchaser
12. Starting point of limitation
13. Subsequent dispossession
14. Suit for possession
15. Third party—Suit against

1. Applicability.

——Art. 11-A—Applicability of.

Where in execution of a decree of A against B, C purchased a house and three days before it, D sold another house to A and when C attempted to get possession he was resisted by one D but D's objection was disallowed and he brought a suit to set aside the auction sale. Held, that the suit was governed by Art. 11 of the Act. 17 Ind. Cas. 991 (All.)

——Art. 11-A.

Applicability—Application held not maintainable under O. 21, R. 100, C.P. Code. See C.P.Code, O. 21, R. 100. 85 C.L.J. 155=A.I.R. 1950 Cal. 555.

——Art. 11-A — Applicability — Presidency Small Cause Courts Act, Ch. VII—Proceedings under—If "suit"—Order of ejectment, if "decree".

Art. 11-A, Limitation Act, applies only in the case of proceedings taken under a decree; it has no application in respect of an order for ejectment passed by Presidency Small Cause Courts in proceedings under Ch. VII of the Presidency Small Cause Courts Act. Such proceedings are not a "suit," nor the order of ejectment in such proceedings "a decree" as defined in S. 2 (2), C. P. Code. 1929 Mad. 69, 51 Bom. 259; 45 Bom. 972; 51 Bom. 885, Foll. 50 Bom. L.R. 747=A.I.R. 1949 Bom. 104.

——Art. 11-A—Applicability—Suit on a mortgage—Purchaser not impleaded—Application by purchaser for re-delivery dismissed in execution proceedings—Suit by the purchaser for redemption and for delivery—Basis of suit different from title put forward in execution proceedings—Art. 11-A not a bar.

One of several mortgagors who held the mortgaged property jointly, sold an undivided one-fourth share of the property, the consideration to be paid to the mortgagee. The mortgagee filed a suit on his mortgage without impleading the purchaser, obtained a decree and bought the property in execution. The purchaser filed an execution application asking for redelivery of the property purchased by him, but it was dismissed. More than a year later, he filed a suit for redemption of the mortgage and for delivery of properties purchased by him or in the alternative for delivery of one-fourth share of the mortgaged property. That the one-fourth share of the entire mortgaged properties should be given to him after partition was sought to be made clear by an application for amendment which was dismissed. On a contention that the suit was barred by Art. 11-A of the Limitation Act:

Held, that if the title which is put forward as the basis of suit is the same as the title which is put forward in the execution proceedings as the basis for an order in his favour, then O. 21, R. 103 would be a bar, but not otherwise. Further, if the relief that is asked in the later suit is not one which the plaintiff could have got in the execution department, then the fact

that he did pursue the remedies given under the execution chapter will not bar the later suit. The basis of the suit in this cas was different from the title put forward in the execution proceedings and as the relief of partition and delivery of his one-fourth share could not be obtained in the execution department. Art. 11-A would not operate as a bar to the suit. 1946 M.W.N. 128=59 M.L.W. 351=A.I.R. 1946 Mad. 624=(1946) 1 M.L.J. 104.

——Art. 11-A—Applicability.

Before Art. 11-A applies there must have been an act of dispossession by the decree-holder or auction-purchaser. 70 C.L.J. 111=A.I.R. 1940 Cal. 16=44 C.W.N. 251=186 Ind. Cas. 98.

——Art. 11-A—Applicability.

Art. 11-A applies only to suits by a person who has been dispossessed of property in the delivery of possession in execution of a decree. Where a person had not been dispossessed of any property when the order under O. 21, R. 99, Civil P. C., was passed against him and an application which was presented by him under O. 21, R. 99, was held to be incompetent, the suit is not covered by the terms of Art. 11-A. A.I.R. 1940 Lah. 349=191 Ind. Cas. 160.

——Art. 11-A—Applicability.

A suit under O. 21, R. 103, Civil P. C., is governed by Art. 11-A. A.I.R. 1938 Cal. 577=68 C.L.J. 261=42 C.W.N. 1051=179 Ind. Cas. 40.

——Art. 11-A—Applicability.

Where the executing Court does not give delivery of property, a suit filed thereafter for possession of such property is not a suit under O. 21, R. 103 so as to make Art. 11-A, applicable. A.I.R. 1933 Cal. 246=36 C.W.N. 965=60 C. 8=143 Ind. Cas. 381.

——Art. 11-A—Applicability.

In proceedings under O. 21, R. 97, Civil P. C. the auction-purchaser was present but did not adduce evidence; the opposite party examined only one witness; there was no opposition regarding another lot and the Court passed an order:

Held, that there was an investigation or an inquiry by the Court, so as to bring it under Art. 11-A. A.I.R. 1935 Cal. 267=39 C.W.N. 164=155 Ind. Cas. 702.

——Art. 11-A—Applicability.

Where the Court dismissed the petition as regards one of the items for not having been pressed by the decree-holder, it was held that the petition was not disposed of after enquiry and the plaintiff was not limited to the period prescribed by Art. 11-A of the Lim. Act. 1933 M.W.N. 924.

——Art. 11-A—Applicability.

The Court cannot, of its own motion, make any investigation into any matter relating to resistance or obstruction to possession under O. 21, R. 97, Civil P. C., or dispossession under R. 100. An order under Rr. 98, 99 or 101 becomes conclusive only after such an investigation as follows on an application under R. 97 or R. 100. If there is no application, there can be no investigation and therefore, there can be no final order.

Where the order is made on a reply to objections, it could not be regarded as one made in pursuance of proceedings taken either under R. 97 or R. 100 of O. 21 and a suit brought more than a year after the said order would not be barred by time. A.I.R. 1931 Lah. 686=132 Ind. Cas. 844.

——Art. 11-A—Applicability.

Art. 11-A applies only to cases where a person who has been actually dispossessed of the property under O. 21, R. 100, and a suit is subsequently brought for the establishment of his title and his present right to possession. In such a case the suit has to be brought within a year from the date of the order. Where such dispossession is not proved, Art. 11-A does not apply. 117 Ind. Cas. 634=10 P.L.T. 872=A.I.R. 1929 Pat. 553.

——Art. 11-A—Applicability.

Where the basis of the claim in the suit is the same as that put forward in the miscellaneous objection proceedings to the present possession, Art. 11-A would apply, but where the basis of the claim in the suit is distinct and different and the possession claimed is not present possession but only by way of consequential relief to the decree being set aside, the Article cannot apply. 101 Ind. Cas. 40=51 Bom. 158=29 Bom. L.R. 230=A.I.R. 1927 Bom. 184.

——Art. 11-A—Applicability.

A suit not under the provisions of R. 103 of O.21 of the C.P. Code, but based on an entirely different cause of action is not governed by Art. 11-A. 90 Ind.Cas. 575=42 C.L.J. 578=30 C.W.N.163=A.I.R. 1926 Cal. 377.

2. Application for possession dismissed.

——Art. 11-A—Application for possession dismissed.

In execution of a decree the decree-holder plaintiff obtained symbolical possession against the judgment-debtors and wanted to remove certain huts which were on the land and to take khas possession; these huts were claimed by the defendants on the ground that they were on the land as tenants in their own right. The executing Court rejected the plaintiffs' application for khas possession on the finding that the defendants were on the land in their own right:

Held, that the suit fell within Art. 11-A and should be brought within one year from the date of the order. 106 Ind. Cas. 371=45 C.L.J. 588=A.I.R. 1927 Cal. 916.

——Art. 11-A—Application for possession dismissed—Where suit is brought for a lesser relief.

Where under a mortgage decree the share of the mortgagor alone was made liable, but by some

mistake or other, the sale proclamation proclaimed the whole property for sale and the sale certificate certified that the whole property had been sold and in accordance with the sale certificate the purchaser applied for delivery of possession but as there was some obstruction his petition was dismissed and the purchaser brought a suit not to recover the whole property but to recover the half-share of his mortgagor after effecting a partition:

Held, that the suit was not for the same relief and that it was not barred by Art. 11-A. 91 Ind. Cas. 961=22 M.L.W. 663=1926 M.W.N. 165=A.I.R 1926 Mad. 232.

3. Claim on original title.

——Art. 11-A—Claim on original title.

Art. 11-A can only apply if the suit as brought is one by a decree-holder or auction purchaser as such and cannot apply if the plaintiff falls back upon his original title as owner of the property in suit, treating the defendant as holding permissively. A.I.R. 1926 Cal. 377, Foll. 114 Ind.Cas. 725 =A.I.R. 1929 All. 610.

——Art. 11-A—Claim on original title.

A suit contemplated by R. 103 is not confined to a suit for possession. It may be brought either on account of his right to possession or on account of his title. A suit under R. 103 therefore though brought on strength of title is governed by Art. 11-A and must be brought within one year. (1889) P.J. 101, Foll. 120 Ind. Cas. 362=31 Bom. L.R. 765=53 Bom. 668=A.I.R. 1929 Bom. 379.

4. Computation of time.

——Art. 11-A—Computation of time.

Where an order was passed under O. 21, R. 100, on 23-12-1919 a suit under O. 21, R. 103, challenging it must be filed on 23-12-1920, which is the last day of limitation and not 24-12-1920. 90 Ind. Cas. 827 (Cal.)

5. Essentials.

——Art. 11-A—Essentials for application.

Before Art. 11-A could be invoked, it should be shown that there was a decree for possession of immovable property or that immovable property was sold in execution of a decree. The article cannot be held to bar suits for recovery of possession of immovable property after proceedings under Chap. 7, Presidency small Cause Courts Act have failed. 115 Ind. Cas. 504=1929 M.W.N. 174=29 M.L.W. 537=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——Art. 11-A—Essentials—To establish right to present possession.

Where an application made by a person under O. 21, R. 97, Civil P.C., claiming possession of the whole of the homestead—the opposite party claiming a share—is dismissed under O. 21, R. 99, a suit brought by the applicant for partition of the homestead and possession of his share after partition, is not governed by Art. 11-A, and hence such a suit brought more than one year after the order of dismissal of application under O. 21, R. 99, is not time-barred. A.I.R. 1938 Cal. 384=66 C.L.J. 537=I.L.R. (1938) 1 Cal. 685=182 Ind. Cas. 418.

6. No resistance to purchaser.

——Art. 11-A—No resistance to purchaser.

The "resistance or obstruction" contemplated by R. 97, O.21, C.P.Code, is same over act of "resistance or obstruction" to the giving of possession by some person who is present at the time. To such case alone Art. 11-A applies.

But where there was no allegation of any such "resistance" or "obstruction" and possession was given to the auction-purchaser behind the back of the person in possession, his suit for recovery of possession from auction-purchaser will not be governed by Art. 11-A. 82 Ind.Cas. 865=3 Bur. L.J. 71=A.I.R. 1924 Rang. 261.

7. Order under C.P. Code (Old), S. 335.

——Arts. 11-A, 136—Order under S. 335, C.P.C. —Suit by party claiming under a person against whom the order is passed.

Where an order is passed against a person under S. 335, C.P.Code, the purchaser from him is barred under Art. 11 if he does not sue to set aside the order within one year from its date. Art. 136 does not apply to the case. 4 Bom. L.R.513=26 B. 730.

8. Order without investigation.

——Art. 11-A—Order without investigation.

Art. 11-A of the Limitation Act has no application where, in the summary proceedings arising out of the claim in the execution case, there has been no investigation. A suit brought by the plaintiff whose application under O. 21, R.97, C.P. Code, was dismissed in his absence on his failure to appear when the case was called out, is therefore not governed by that article. 26 C.W.N. 853; 39 Ind. Cas. 797; 44 B. 515 and 41 Ind. Cas. 640, foll. 28 Pat. 828=A.I.R. 1950 Pat. 25.

——Art. 11-A—Order without investigation.

Article 11-A, refers to a suit by a person against whom an order has been made under C.P. Code (amongst others) upon an application by a person dispossessed of immovable property in the delivery of possession thereof to the decree-holder or purchaser. But the order must be one which has been passed after some investigation. Article 11-A does not apply to an order under O. 21, R. 101, C. P. Code which has been passed without any investigation. 68 Ind. Cas. 524=26 C.W.N. 853=35 C.L.J. 537=A.I.R. 1922 Cal. 229.

——Art. 11-A—Order without investigation.

If an application under O. 21, R. 100, is dismissed without investigation, the person dispossessed is not bound to bring a suit to establish his right to possession within one year under Art. 11-A. 41 Ind. Cas. 640 (Mad.)

9. Parties to suit.

——Art. 11-A—Parties to suit.

Where parties arrayed on opposite sides are parties to a suit within S. 47, C.P. Code, neither R. 103 nor Art. 11-A applies. 105 Ind. Cas. 414=39 M.L.T. 281=A.I.R 1937 Mad. 952.

10. Purchaser of co-parcener's share.

——Art. 11-A—Purchaser of co-parcener's share—Suit for partition.

Certain properties were purchased in Court sale as it belonging to the judgment-debtor who was a member of a co-parcenary and the purchaser got delivery. At the instance of other members it was held that the judgment-debtor had only a share and the properties were delivered back to the members. In a suit for partition and possession of the judgment-debtor's share instituted more than one year from the date of the order as to re-delivery:

Held, that the suit was not barred under Art. 11-A. 95 Ind. Cas. 209=49 Mad. 596=23 M.L.W. 551=A.I.R. 1926 Mad. 683=50 M.L.J. 681.

11. Resistance to auction-purchaser.

——Art. 11-A—Resistance to auction-purchaser—Suit for a lessor share.

Where the auction-purchaser claims entire possession of a house and his entire claim is resisted and the Court decides against him, a suit for possession of only a portion of the house is governed by Art. 11-A. 60 Ind. Cas. 905=19 A.L.J. 53=A.I.R. 1921 All. 92.

12. Starting point of limitation.

——Art. 11-A—Starting point of limitation,

When the High Court has refused to interfere with an order passed in a claim case, the period of limitation provided for by Art. 11-A, for a suit under O. 21, R. 103, Civil P.C., would run from the date of order in the claim case and not from the date of the High Court's order discharging the rule. A.I.R. 1944 Pat. 225=23 Pat. 14=11 B.R. 243=218 Ind. Cas. 75.

——Art. 11-A—Starting point of limitation.

The word "order" in Art. 11-A should be construed as meaning the final or subsisting order in the case. The period of one year runs under Art. 11-A from the time when the Appellate Court passed its order. But a somewhat different consideration would apply if a revision-petition presented by an unsuccessful party in a claim proceeding is rejected by the superior Court. If the High Court, in the exercise of its powers under S. 115, Civil P. C., refuses to interfere in a claim case, it merely amounts to an abstention from exercising jurisdiction and the only final order that remains subsisting is the order passed by the trial Court. It may be otherwise where the High Court interferes in revision with the original decision. A.I.R. 1938 Cal. 577=68 C.L.J. 261=42 C. W. N. 1051=179 Ind. Cas. 40.

——Art. 11-A—Starting point of limitation.

An application under O. 21, R. 100, Civil P.C. was dismissed. The applicant preferred a petition to the Judicial Commissioner's Court under S. 115, Civil P. C., which was dismissed after notice to the other side. The applicant then filed a suit under O. 21, R. 103. The trial Court held that the suit was not barred and allowed it to proceed:

Held, (1) that the period of limitation for the suit began to run under Art. 11-A, from the date of dismissal of application under O. 21, R. 100 and not from the order passed in revision, and the suit was, therefore, barred. 27 N.L.R. 251=A.I.R. 1931 Nag. 17=130 Ind. Cas. 145.

——Art. 11-A—Starting point — Application for possession by execution purchaser—Rejection—Suit.

Where an execution purchaser who is not entitled to actual physical possession applies to be placed in possession and where his application is rejected, he must sue within one year of the order rejecting his application. 16 N.L.R. 103=24 C.W.N. 1001=(1920) M.W.N. 545=12 L.W. 408=2 P.L.T. 33=58 Ind. Cas. 21 (P.C.).

——Art. 11-A—Starting point — Dismissal of objection under O. 21, R. 103, C.P.C.

A person whose objection is dismissed under O. 21, R. 103, must sue for possession within one year of the order of dismissal under Art. 11-A of the Lim. Act. 103 P.L.R. 1916=96 P.W.R. 1916=36 Ind. Cas. 211.

——Art. 11-A—Starting point.

The nephew of the decree-holder purchased the house on 22nd September 1908. The judgment-debtor had sold another house to A to the decree-holder by which the decree was set aside. On the nephew's attempting to take possession the judgment-debtor's grandson resisted the nephew. The grandson's objection was disallowed on 26th February 1910. He then filed a suit on 26th, April 1910 to set aside the execution of sale. Held, that the suit was governed by Art. 11-A. 17 Ind. Cas. 591 (All.).

13. Subsequent dispossession.

——Art. 11-A—Subsequent dispossession.

Defendant No. 1 purchased the land in suit in execution of a mortgage decree and took delivery of the same through the Court. Thereupon the plaintiff, who claimed half of each of plots Nos. 1 to 3 and the entirety of plot No. 4 made an application under O. 21, R. 100. That application was dismissed on the 8th July, 1916. As plaintiff was found to be still in possession of the disputed plots of land, the plaintiff did not bring any suit for recovery of possession within a period of one year from 8th July, 1916. His suit was instituted on the 7th March, 1918 and his cause of action was that after the date of the order passed on the application under O. 21, R. 100, defendants Nos. 1 to 5 entered into a conspiracy and forcibly cut and took away the paddy reaped by the Bhag tenants of the plaintiff and thereby dispossessed the plaintiff.

Held, that Art. 11-A did not apply. 76 Ind. Cas. 407=38 C.L.J. 150=A.I.R. 1924 Cal. 97.

——Art. 11-A—Subsequent dispossession.

Although it is undoubtedly true that a person claiming to get rid of the effect of an order under O. 21, R. 100, C.P.Code is bound to bring his suit for such a purpose within the period mentioned in Art. 11-A, he is not bound to do so when his dispossession has taken place, subsequent to the date of the order made on the application under O. 21, R. 100. Where his application under O. 21, R. 100 was dismissed on the ground that his possession had not been disturbed, as only symbolical possession was taken by his opponent. Time for a suit for recovery of possession, will in such a case run from the date of actual dispossession. 84 Ind. Cas. 876=50 Cal. 311=A.I.R. 1923 Cal. 601.

——Art. 11-A—Subsequent dispossession.

P purchased N's share of family property. D purchased the entire property of the family of which N was a member and dispossessed P who thereupon applied under O 21, R. 100, C. P. Code for possession. The application was disallowed on 26th August, 1914 and P brought the present suit for possession on 30th November, 1915:

Held, that the suit was barred by limitation not having been brought within one year as required by Art. 11-A of the Limitation Act from the date of the order disallowing the application under O. 21, R. 100, C.P.Code. 59 Ind. Cas. 772 (Cal.).

14. Suit for possession.

——Art. 11-A—Suit for possession.

A suit for possession after the execution purchaser's application for actual possession has been disallowed is barred if brought more than one year after the date the application is disallowed. 58 Ind. Cas. 21=24 C.W.N. 1001=16 N.L.R. 103=12 M.L.W. 408=1920 M.W.N. 545=2 P.L.T. 33 (P.C.).

15. Third party—Suit against.

——Art. 11-A—Third party—Suit for declaration against.

Art. 11-A applies to a decree-holder and his suit for declaration of his right against third person must be brought within a year after the order of the execution Court. 68 Ind. Cas. 241=44 All. 607=20 A.L.J. 578=A.I.R. 1922 All. 403.

——Art. 12.

Synopsis.

1. Applicability
2. Redemption suit
3. Sale requiring confirmation
4. Starting point of limitation
5. Void sale
6. Art. 12 (a)—Applicability
7. Fraudulent confirmation
8. Fraudulent decree and sale
9. Fraud
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1. Applicability.

——Art. 12—Applicability—Suit for declaration.

Art. 12 has no application to a case where the plaintiff merely asks for a declaration that, notwithstanding the sale, his interest in the property is not affected by the sale and the confirmation thereof. A.I.R. 1942 Pat. 386=23 P.L.T. 364=202 Ind. Cas. 57.

——Art. 12—Applicability—Suit for declaration.

A suit for a mere declaration that the plaintiff's interests are not affected by it, is not governed by Art. 12. 7 B.R. 770=A.I.R. 1941 Pat. 490=194 Ind. Cas. 435.

——Art. 12—Applicability—Suit for declaration.

Art. 12 provides the period of limitation for a suit to set aside a sale. It does not apply to a suit for a declaration that the plaintiff's interest in the holding has not been affected by the sale. A.I.R. 1941 Cal. 333=45 C.W.N. 277=I.L.R. (1941) Cal. 339=199 Ind. Cas. 403.

——Art. 12—Applicability—Suit for declaration —Limitation when consequential relief is also prayed for.

The Limitation Act protects bona fide purchasers at judicial sales by providing a short limit of time within which such suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequent on the annulment of the sale is sought, the protection is exceedingly small. There is no justification for refusing to construe Art. 12 (a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object of setting aside the sale. 13 C. 309 ref. to. (1900) 5 C.W.N. 10=2 Bom. L.R. 927=10 M.L.J. 368=25 B. 337=27 I.A. 216 (P.C.)

——Art. 12—Applicability—Suit to set aside sale in execution of a decree against third party.

Where plaintiff sued for a declaration that a certain property sold in execution of a decree against the guardian was not liable to sale and

that the attachment was void, the suit is not governed by Art. 12. (1916) 2 U.B.R. 116=10 Bur. L.T. 225=36 Ind. Cas. 3.

——Art. 12—Applicability of.

Where in execution of a decree of A against B C purchased a house and three days before it B sold another house to A and when C attempted to get possession, he was resisted by one D but D's objection was disallowed and he brought a suit to set aside the auction sale. Held, that the suit was governed by the Art. 11-A and not by Art. 12. 17 Ind. Cas. 591 (All.)

——Art. 12—Applicability—Suit to establish right to property sold in execution.

Where an intervenor claims a share of attached property, the court should define the respective shares of the debtor and the intervenor, and sell the debtor's definite share only. If the court omits to do so, and sells the attached property subject to the intervenor's claim, this is no valid order under Ss. 280, 281 or 282 of the Code of Civil Procedure, and the limitation of one year for a suit under S. 283 of the Code does not apply. 4 W.R 35, Foll. 1905 A.W.N. 49=2 A.L.J. 178=27 A. 464.

2. Redemption suit.

——Art. 12—Redemption suit—Property sold in Court auction.

A mortgagee got the mortgaged property sold under his decree without impleading the sons of the mortgagor who brought a suit for redemption of the mortgage more than one year after the confirmation of the sale:

Held, that a suit for redemption does not lie unless the plaintiffs ask for a decree for setting aside the auction sale which remedy is barred to them under Art. 12. 116 Ind. Cas. 548=10 P.L.T. 214=A.I.R. 1929 Pat. 323.

——Art. 12—Redemption suit.

A suit for possession of property sold in execution of a decree on the ground that the sale was a nullity need not be brought within one year of the sale. 11 C.W.N. 1078, Diss: 14 C.L.J. 530. Foll. Art. 12 does not apply to a suit for redemption where it is not necessary to set aside the decree or the sale thereunder. 35 Ind. Cas. 404 (Pat).

——Art. 12—Redemption suit.

In execution of a money decree against the mortgagor, a mortgagee in possession of the mortgaged property sold and himself became the purchaser at the court sale. More than a year after this an assignee of the mortgagor sued the mortgagee for redemption. The lower courts threw out the claim on the ground that it was barred under Art 12 of the Limitation Act, and S. 244, C.P.C. Held, (1) that the suit was not barred under Art. 12 of the Limitation Act, since under Ss. 67 and 99, T.P.A. the sale itself was invalid and could confer no right on the mortgagee purchaser, and it was therefore not incumbent on the mortgagor to bring a suit to set aside the sale; (2) that S. 244, C.P.C. (O.C.). had no application to the plaintiff who was not a party to the previous suit. 5 Bom. L.R. 952.

——Art. 12—Redemption suit.

A sale of mortgaged property in contravention of S. 99 of the T.P. Act is a voidable one and if not avoided within the time prescribed, the right to redeem is extinguished. 32 M.L.J. 525=19 M.L.T. 121=5 M.L.W. 242=32 Ind. Cas. 611.

——Art. 12—Redemption suit.

Where a mortgagee obtains a money decree against the mortgagor on account of arrears of interest due, on the mortgage amount and purchases the mortgaged property in execution of his decree, held, that the sale was only a voidable one and that the failure of the mortgagor to set it aside within the time fixed by Art. 12 of the Lim. Act extinguished his right of redemption. 14 Bom. L.R. 254=14 Ind. Cas. 780.

3. Sale requiring confirmation.

——Art. 12—Sale requiring confirmation.

For the purposes of Art. 12, in the case of a sale that requires confirmation, time begins to run from the date of the confirmation and in other cases from the date on which the sale becomes otherwise final. 13 C.L.J. 339=10 Ind. Cas. 87.

4. Starting point of limitation.

——Art. 12—Starting point of limitation.

A decree was obtained against a lady governed by Alivasanthana Law. The lady died leaving the plaintiffs, her minor children. An officer of the Court was appointed to act as their guardian and property belonging to them was sold in execution. The plaintiffs instituted a suit to set aside the sale almost at the expiry of twelve years from the date of sale:

Held, that even assuming that the circumstances connected with the appointment of a Court guardian might have entitled the minors to question the sale, they must have taken the necessary proceedings within the one year allowed by Art. 12 subject to such extension of time as they may get under S. 6, as the sale was only voidable and not a nullity. (1935) M.W.N. 964=A.I.R. 1935 Mad. 1085=158 Ind. Cas. 874.

——Art. 12—Starting point of limitation—Application converted into suit.

The permission given to convert the original application into a suit relates back to the date when the original application was filed. Merely because the court fee was paid later does not mean that the suit must be deemed to be instituted on that date.

Where, therefore, an application under O. 21, R. 100 of Civil P. C was filed on January 13, 1931 and it was later converted into an application under S. 47 on July 22, 1933, and later still converted into a plaint in a regular suit on September 29, 1933, it was held that the suit was filed on the date of the application under O. 21, R. 100, i e., on January 13, 1931 and not on September 29, 1933, the date of the permission given to convert the application into a suit. 47 Bom. L.R. 330=A.I.R. 1945 Bom. 409.

——Art. 12—Starting point.

Time under Art. 12 runs from the date of the final confirmation of the sale. So long as the sale is under consideration of the revenue authorities, it cannot be said to have been confirmed and become final and conclusive. 100 Ind. Cas. 997=45 C.L. J. 73=31 C.W.N. 299=A.I.R. 1927 Cal. 315.

5. Void sale.

——Art. 12—Void sale.

Sale in excess of area directed by mortgage-decree —Suit to recover possession—Limitation. See C. P. Code, S. 47. 52 Bom. L.R. 358=A.I.R. 1950 Bom. 346.

——Art. 12—Void or illegal sale.

Where the order for sale is illegal, it is not necessary for the plaintiff to bring a suit to set aside the sale and he is entitled to wait until the sale is either attempted to be enforced or enforced against him. A.I.R. 1943 Mad. 501 = (1943) 1 M. L. J. 386=56 M.L.W. 383=(1943) M.W.N. 445=213 Ind. Cas. 255.

——Art. 12—Void sale.

Art. 12 has no application when the transaction in question is a nullity. In that case it is unnecessary to set it aside. The plaintiff is entitled to bring a suit to set aside the decree and if he succeeds in that suit, the decree being a nullity it must follow that the sale in consequence of it was a nullity also. If the sale was a nullity, it cannot avail the auction-purchaser that he was a **bona fide** purchaser without notice of the defects in the proceedings. A.I.R. 1943 Bom. 288= 45 Bom. L.R. 553=I.L.R. (1943) Bom. 400=212 Ind. Cas. 205.

——Art. 12—Void sale.

Art. 12 does not apply to void sales. It applies only to cases where the plaintiff was a party to the proceedings in which the sale was held. The Court has no jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record and as against such persons, the sale will be a nullity. A.I.R. 1942 Oudh 120=1941 O.W.N. 1328 =17 Luck. 456=198 Ind. Cas. 107.

——Art. 12—Void sale.

Where a sale held in execution of a rent decree was valid, Art. 12 applies but if the sale is a nullity, there is no occasion to set it aside. A.I.R. 1941 Pat. 490=194 Ind. Cas. 435.

——Art. 12—Void sale.

Art. 12 would apply only if the sale is held to be binding on the plaintiffs. If the plaintiff's interest is, on the other hand, found not to have been sold or the sale is held to be void against them, this article cannot be permitted to stand in their way and they will be entitled to the relief claimed by them. A.I.R. 1939 Mad. 867=I.L.R. (1940) Mad. 123=(1939) M.W.N. 918=50 M.L.W. 472=187 Ind. Cas. 816.

——Art. 12—Void sale.

Where certain property sold was shown in the bid sheet to be the property exclusively belonging to the judgment-debtor, but at the time of the sale the title to the property sold was not in the judgment-debtor but in another;

Held, that the sale was a nullity and it was not necessary to set it aside and therefore, Art. 12 had no application. (1935) O.W.N. 800=A.I.R. 1935 P.C. 139 =42 M.L.W. 270=16 P.L.T. 589=I B R. 832=14 Pat. 611=(1935) M.W.N. 841=39 C.W.N. 1124=37 Bom. L.R. 794=37 P.L.R. 624=(1935) A.L.J. 1147=1935 A.W.R. 1326=62 I.A. 224=157 Ind. Cas. 485 (P.C.)

——Art. 12—Void sales.

Where the sale is in fact a nullity, no question of limitation under Art. 12 does arise. 113 Ind. Cas.. 725 =50 All. 686=26 A.L. J. 716=A.I.R. 1928 All. 963.

——Art. 12—Void sale.

Where the sale is a nullity, no question of limitation arises. A.I.R. 1924 Cal 638. **Foll.** 105 Ind. Cas. 193 =54 Cal. 624=A.I.R. 1927 Cal. 781.

——Art. 12—Void sale.

When the sale under the Bengal Land Revenue Sales Act, is a nullity, there is no need to set it aside, and S. 33 of the Sales Act and Art. 12 of the Limitation Act are not applicable to such a sale. 90 Ind. Cas. 40=42 C.L. J. 69=A.I.R. 1925 Cal. 1148.

——Art. 12 and Ss. 26 and 28—Void sale—Suit to set aside revenue sale- Limitation for defence that revenue sale is void—Revenue sale and Civil Court sale.

While a suit for a declaration that land was free from payment of assessment was pending, the land was sold under a decree for arrears of assessment by the Revenue Court. Plaintiff the owner of the land, however, remained in possession and obtained a decree in the same Court declaring the land free from assessment about the time of the sale by the Revenue Court. In a suit by the vendee of the auction-purchaser at the Revenue sale plaintiff pleaded as a defendant that the revenue sale was void and gave no right to the auction-purchaser:

Held, that the defence was not prohibited by the law of limitation though the owner of the land could not file a suit after a year from the sale by the Revenue Court.

Held, further, that the revenue sale was not valid under the circumstances. 22 Bom. L.R. 1082=59 Ind. Cas. 118.

——Art. 12—Void sale—Setting aside.

A suit for a declaration that the sale in execution proceedings was fraudulent and cannot affect the rights of the plaintiff in respect of the properties sold is not barred though brought more than a year after the sale. 24 Ind. Cas. 695 (All.).

——Art. 12—Void sale.

A sale in execution which is null and void for want of jurisdiction or for any other cause or where it does not affect a stranger's interest need not be set aside and a suit is not governed by Art. 12 even though it has indirectly the effect of setting it aside. 13 O.C. 297=8 Ind.Cas. 374.

6. Art. 12 (a)—Applicability.

——Art. 12 (a)—Applicability — Suit by unsuccessful claimant.

Art. 12 is not applicable to a suit by an unsuccessful claimant against a purchaser in Court sale as the plaintiff does not sue in such a case to set aside the sale nor is it necessary for him to do so. A.I.R. 1933 Lah. 10=34 P.L.R. 468=140 Ind. Cas. 534 (2).

——Art. 12 (a) —Applicability.

The period of limitation applicable to a suit for possession of property sold in execution of a decree is prescribed by Art. 12. 1 Lah. 27=55 Ind. Cas. 833.

——Art. 12 (a)—Applicability — Decree-holder purchasing without permission.

Where the decree-holder buys without permission or where he has applied and been refused the permission the sale is voidable only and not void. Art. 12 applies, and the suit must be brought within one year. 67 Ind. Cas. 914=16 M.L.W. 190=3 Pat. L.T. 529=31 M.L.T. 209=49 I.A. 312=1 Pat. 733=21 A.L.J. 23=27 C.W.N. 294=37 C.L.J. 430=25 Bom.L.R. 630=A.I.R. 1922 P.C. 336=44 M.L.J. 718 (P.C.)

——Art. 12 (a)—Applicability.

Where the debt by the father is found not to have been due or to have been incurred for purposes which were immoral or illegal, a decree obtained in respect of such a transaction would not bind the sons and the sale held in execution could not be held to be binding on them so as to necessitate a prayer for setting it aside particularly when the property was purchased by either the decree-holder himself or even by a stranger having knowledge of the circumstances in which the debt was contracted. Art. 12 has application to such a case. A.I.R. 1939 Mad. 867=I.L.R. (1940) Mad. 123=(1939) M.W.N. 918=50 M.L.W. 472=187 Ind. Cas. 816.

——Art. 12 (a)—Applicability—Execution sale.

A suit to set aside the sale must be brought within one year from confirmation of the sale under Art. 12 (a), Sch. I, Limitation Act. A. I. R. 1922 P.C. 336, Foll. 101 Ind. Cas. 89=A. I. R. 1927 Mad. 1135.

——Art. 12 (a)—Applicability.

Art. 12 applies to suits brought by parties to the decree which resulted in the sale or by parties to the proceedings in which the sale took place or by persons claiming through them and does not apply to suits brought by persons who are not bound by the sale. Nor does the article affect a defence set up by a party in possession. 67 Ind. Cas. 894 (Lah.)

——Art. 12 (a)—Applicability—Execution sale—Suit to set aside.

Art. 12 of the Limitation Act governs suits to set aside sales in execution cases after an attachment of the property in the judgment-debtor's life-time but without being properly represented by his heirs after his death, as such sales are voidable and not void, at the heir's instance. 23 O. C. 218=58 Ind. Cas. 549.

——Art. 12 (a) and S. 6—Applicability—Sale in execution of mortgage decree against minor—Suit for possession by latter alleging gross negligence of guardian ad litem—Limitation.

Where the property of a minor was sold in execution of a mortgage decree passed against him during his minority, and a suit was brought by him after attaining majority for its possession, on the ground of the guardian ad litem's negligence:

Held, that sale under a mortgage decree was a sale in execution of a decree under Art. 12 (a) of the Limitation Act that before the plaintiff could obtain the relief regarding the possession of the suit property he was bound to sue for cancellation of the sale for which limitation provided under Art. 12 (a) was one year and that, therefore, a suit instituted more than one year after the plaintiff attained majority was clearly barred by time. A.I.R. 1949 E. P. 20.

——Art. 12 (a)—Applicability—Minors.

A suit brought by the son after attaining majority for setting aside the sale of his share in Court auction in execution of a decree against the father is governed by Art. 12. 98 Ind. Cas. 31=24 M.L.W. 475=1926 M.W.N. 767=A. I. R. 1926 Mad. 1190=51 M.L.J. 845.

——Art. 12 (a)—Applicability—Minor.

Where minor is represented by a duly appointed guardian, the decree is not ab initio void and Art. 10, Limitation Act, will apply to set it aside. 92 Ind. Cas. 241=A.I.R. 1926 Nag. 267.

——Art. 12 (a)—Applicability—Minor — Where no proper appointment of guardian made.

In execution proceedings against a minor son of the judgment-debtor the application for the appointment of a guardian of the minor was not accompanied with an affidavit and the guardian did not appear and act for the minor and certain property of the minor was sold. After attaining majority the minor brought a suit to set aside the execution sale:

Held, as the application for the appointment of guardian was not made in accordance with O. 32, R. 3 (3), the minor was no party to the execution proceedings and hence the suit to set aside the sale is governed by Art. 144 and not by Art. 12. 67 Ind. Cas. 547=5 L. L. J. 44=A. I. R. 1922 Lah. 447.

——Arts. 12 (a)—Applicability and 144—Deft. a minor—Decree against—Sale of property in execution—Suit to recover property.

Where a minor deft. is not properly represented a decree passed against him is a nullity and the Court has no power to sell the minor's property in execution of that decree. If such a sale takes place the minor can recover the property from the auction-purchaser and the

Article applicable is 144 and not Art. 12. 113 P.R. 1918=48 Ind. Cas. 399.

——Art. 12 (a)—Applicability— Suit by minor.

According to Art. 12 a suit by minor to set aside his sale must be brought within one year from the date of the plff.'s majority. 30 P.W.R. 1918=40 P.L.R. 1918=43 Ind. Cas. 712.

——Art. 12 (a) — Applicability—Execution sale —Deft. minor—Notice on guardian ad litem.

A suit to set aside an execution sale, brought after one year, after the date of sale, is barred though it appeared that at the date of passing the decree the deft. was minor but became sui juris at the time of execution proceedings, notice of which was served not on him but on the guardian ad litem. 39 Mad. 1031=19 M.L.T. 93=32 Ind. Cas. 391.

——Arts. 12 (a) and 166—Applicability—Execution sale—Death of judgment-debtor—Minor representative not properly represented - Suit to set aside sale.

A judgment-debtor died after decree and during the execution proceedings his widows, one of whom a major and the other a minor, were brought on record as legal representatives. The major widow had no subsisting interest at the time of the proceedings and the minor was not represented by a proper guardian. The properties were sold for a grossly low price and purchased by a decree-holder. In a suit by the minor widow after attaining majority for the recovery of the possession of property, held, that the suit having been instituted within three years of the plff.'s majority was in time. Neither Art. 12 nor Art. 166 had any application to the case. 38 Mad. 1076=28 M.L.J. 525=29 Ind. Cas. 314.

——Arts. 12 (a) and 144—Applicability—Suit by objector.

An objector who is not a party to the decree in execution of which the sale took place and whose title to the immovable properties is not denied, can sue for possession against the auction-purchaser, under Art. 144. His suit is not governed by Art. 12. 203 P.L.R. 1911=15 P.R. 1912 =252 P.W.R. 1911=11 Ind. Cas. 76.

——Art. 12 (a)—Applicability—Suit by third party.

Where the plaintiff in a suit for possession of property sold in execution of a decree was the original owner of the property and was not a party to the decree under which the sale took place nor a representative of any of the parties and was consequently in a position to ignore the sale altogether:

Held, Art.12 has no application and the suit falls under Art. 144. Art. 91 also is not applicable, as it provides for the cancellation or setting aside of an instrument not otherwise provided for and it binds only the parties to the instrument and not strangers. (15 P. R. 1912). 71 Ind. Cas. 822= A.I.R. 1924 Lah. 396.

7. Fraudulent confirmation.

——Arts. 12 (a) and 95—Fraudulent confirmation—Suit to set aside execution sale.

A suit to set aside an execution sale based on allegations of fraud regarding the confirmation of sale, is governed not by Art. 95 but by Art. 12 of the Limitation Act. Whether a suit instituted is for setting aside a sale or not is to be decided not from the form of the relief but from a consideration of substance of the relief sought for by the plaintiff. When the sale is only voidable at the instance of the plaintiff, he cannot avoid the application of Art. 12 by seeking reliefs which though different are inconsistent with the validity of the sale. A. I. R. 1950 H.P. 1.

8. Fraudulent decree and sale.

——Art. 12 (a)—Fraudulent decree and sale.

Even a sale in execution of a fraudulent decree is operative unless it is set aside within one year, since the decree is not set aside, is valid. 20 C. W. N. 659=33 Ind Cas. 767.

9. Fraud.

——Art. 12 (a)—Fraud—Execution sale—Suit to set aside.

Where in pursuance of a compromise decree passed against one of several administrators of an estate property belonging to the estate is sold, a suit to set aside the sale must be brought within one year from the date of the sale and if fraud is alleged, within one year from the date of fraud. The sale is binding on all persons interested in the estate including the co-administrators in the absence of fraud. It is of the greatest importance that sales made under the authority of the Court should not be lightly set aside. 1 M. L. W. 1033=(1914) M.W.N. 921=17 M.L.T. 18=26 Ind. Cas. 369.

10. Hindu law.

——Art. 12(a)—Hindu law—Mitakshara—Mortgage decree against father.

Where in an execution of a decree against the father of a joint Hindu family, property has been sold the sons cannot claim to redeem without setting aside the sale within the time prescribed by Art. 12. 1 Pat. L. J. 180=2 Pat.L.W. 413=34 Ind. Cas. 288.

——Art. 12 (a)—Hindu law—Sale of property of joint family.

Obiter.—A suit for redemption of property which was sold in execution of a decree against a joint family which was effectively represented in the suit, is barred if no suit to set aside the execution sale is brought within one year of the sale. 1 Pat. L.W. 197=(1917) P.H.C.C. 113=37 Ind. Cas. 833.

11. Sale proclamation falsely drawn up.

——Arts. 12 (a), 95 and 120—Sale proclamation falsely drawn up — Remedy of auction-purchaser.

A sale proclamation falsely drawn up described the judgment-debtor to have absolute proprietary right in the property. The auction-purchaser not knowing the facts, purchased the property. On

learning the true facts, he sued for cancelling the sale and refund of the purchase money. The decree-holder pleaded among other points that the suit is barred by Art. 12. Held, the suit was within time being governed by Art. 95. 34 Mad. 143=8 M.L.T. 154=(1910) M.W.N. 286=7 Ind. Cas. 60.

12. Sale under mortgage-decree.

——Art. 12 (a)—Sale under mortgage-decree.

A sale ordered by a mortgage-decree is a sale in execution of a decree within the meaning of that expression in Art. 12 (a). A. I. R. 1942 Oudh 33=1941 O.W.N. 1079=17 Luck. 1=196 Ind. Cas. 457.

13. Sale of property wrongly.

——Art. 12 (a)—Sale of property wrongly.

Where plaintiff's property is wrongly sold in Court sale owing to his own mistake, a suit for recovery of the property from its auction-purchaser is governed by Art. 12 of the Act. 67 Ind. Cas. 857=24 Bom. L.R. 423=46 Bom. 914=A.I.R. 1923 Bom. 62.

14. Sale of wrong property.

——Art. 12 (a)—Sale of wrong property.

Where in execution of a decree for sale of the mortgaged property certain property of the judgment-debtor (other than the mortgaged property) was wrongly included in the auction-sale, and the judgment-debtor knew nothing of the sale, his suit to recover possession of the property sold in excess of the decree would not be barred by O. 21, R. 92, nor would it be barred by limitation since the sale being a nullity, as it was not justified by the decree, no question of limitation under Art. 12 would arise. 119 Ind. Cas. 852=A. I. R. 1929 All. 673.

15. Miscellaneous.

——Art. 12 (a)—Miscellaneous—One of two mortgagors not made party for want of notice—Suit by the non-impleaded for recovery of property after sale—Limitation.

See Transfer of property Act, S. 85. 11 C.W.N. 1078=6 C.L. J. 719.

16. Art. 12 (b)—Applicability.

——Art. 12 (b)—Applicability.

See Madras Estates Land Act, Ss. 8 and 149. (1946) 1 M.L.J. 291=A.I.R. 1946 Mad. 461.

——Art. 12 (b)—Applicability.

Art. 12 (b), does not apply to sales under the Madras Estates Land Act. 34 M.L.W. 94=61 M.L.J. 203=A.I.R. 1931 Mad. 724=134 Ind. Cas. 184.

——Art. 12 (b)—Applicability—Madras Estates Land Act, S. 118.

A sale under S. 118 of the Madras Estates Land Act is not a sale in pursuance of a decree or order of the Collector or other officer of revenue and consequently, a suit to set aside the sale is not governed by Art. 12 of the Limitation Act. 100 Ind. Cas. 1007=38 M.L.T. 333=A.I.R. 1927 Mad. 488=52 M.L.J. 390.

——Art. 12 (b)—Applicability—Madras Estates Land Act, S. 131.

As a sale becomes final, in the absence of any application under S. 131, Estates Land Act, within 30 days after the date of sale, a suit to set aside the sale brought more than one year after such date is barred by limitation. 76 Ind. Cas. 840=19 M.L.W. 81=33 M.L.T. 201=1924 M.W.N. 37=A.I.R. 1924 Mad. 278=45 M.L.J. 840.

17. Fraudulent confirmation of sale.

——Art. 12 (b)—Fraudulent confirmation of sale.

A suit for possession of land and the right to ask for a declaration that a sale under the Chota Nagpur Tenancy Act has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is governed by Limitation Act, Art. 95. 96 Ind. Cas. 529=5 Pat. 759=1926 P.H.C.C. 225=8 P.L.T. 124=A.I.R. 1926 Pat. 401.

18. Mad. Act VII of 1865.

——Art. 12 (b)—Mad. Act VII of 1865—Suit to set aside rent sale—Necessary party.

In a suit to set aside a rent sale under S. 39 of Act VII of 1865 (Mad.) the person at whose instance the sale was brought about is not a necessary party and the joinder of such person as party more than one year from the date of the sale, will not enable the Court to dismiss the suit as barred under Art. 12 (b) of the Lim. Act. 38 Mad. 837=26 M.L.J. 239 = 1 M.L.W. 212=(1914) M.W.N. 236=22 Ind. Cas. 826.

19. Art. 12 (c)—Abkari sale.

——Art. 12 (c)—Abkari sale—Suit to enforce mortgage on property.

A suit to enforce a mortgage on property sold under S. 28 of the Madras Abkari Act is not governed by Art. 12. 28 M. 420.

20. Applicability.

——Art. 12 (c)—Applicability—Award under Bombay Co-operative Societies Act—Sale by Collector under S. 59 (1) (b) of latter Act—Limitation for suit to set aside.

Art. 12 (c) of the limitation Act applies both to sales for arrears of Government Revenue and also to sales for any demand recoverable as such arrears, e. g., a sale by the Collector in execution of an award under S. 59 (1) (b) of the Bombay Co-operative Societies Act. The limitation for a suit to set aside such sale is one year from the date of confirmation of the sale. 48 Bom. L.R. 610=231 Ind. Cas. 131=A.I.R. 1947 Bom. 144.

——Art. 12 (c)— Applicability — Sale for Government revenue—Suit to set aside—Compromise—Subsequent suit for possession.

Where lands of the plaintiffs were sold for arrears of Government revenue and plaintiff in a suit to have the sale set aside on the ground of fraud compromised the claim with the purchaser and more than three years after date of the compromise sued for possession of the lands on a declaration of their title, held, that the suit was barred by Art. 12 (c) of the Lim. Act. 23 Ind. Cas. 240 (Cal.)

——Art. 12 (c)—Applicability—Execution sale —Collateral attack.

A sale (in this case under the Revenue Recovery Act) by the court cannot be attacked either directly or collaterally after the period of limitation. Thus irregularities in the sale cannot be availed of to ignore the sale after the period of limitation. 38 Mad. 356=13 M.L.T. 498=(1913) M.W.N. 581=25 M.L.J. 303 =19 Ind. Cas. 694.

——Arts. 12 (c), 95, 120—Applicability—Joint owner—Certificate of sale, setting aside—Fraud—Recovery of property.

Where the notice required by S. 10 of the Public Demands Recovery Act has not been served, the certificate has not the effect of a decree and a suit to set aside a sale on such a certificate is not governed by Art. 12 but by Art. 120. Where the sale is sought to be set aside on the ground of fraud, and fraud is established, the article applicable to the suit is Art. 95 and not Art 12. This is none the less so because the plaintiff may, from an entirely different stand point, be entitled to the benefit of S. 18. Where a plaintiff, one of several co-sharers, has lost his property by reason of the fraud of his co-sharers, who have purchased the property, the sale need not be formally set aside, but the plaintiff may obtain relief by getting the property reconveyed to him. Art. 95 would apply to a suit of this description. 5 C.L.J. 385=34 Cal. 241.

——Art. 12 (c) — Applicability — Sale under revenue sale law.

A suit by a minor to set aside a sale under the Revenue Sale Law is governed by Art. 12 even though the plaintiff be a minor and S. 77 of the Lim. Act, 1877 does not help the plaintiff. 13 C.W.N. 518=4 Ind. Cas. 70.

21. Art. 12 (d)—Patni sale.

——Art. 12 (d)—Patni sale—Adults—Suit by minor to set aside.

It is open to a sharer of a patni taluk to sue alone to set aside the whole auction sale of it on the ground that it is illegal, fraudulent and without jurisdiction. Where such a suit was filed more than a year after the sale by two minor co-parceners and some other adult co-sharers, held, that the suit at the instance of the two minor plaintiffs would not be barred and S. 8 of the Lim. Act, 1877 had no application to the case. 14 C.W.N. 128=11 C.L.J. 34=2 Ind. Cas. 77.

——Art. 13—Applicability—Certificate sale—Objection to—Order rejecting — Subsequent suit for declaration—Limitation.

Art. 13 of the Limitation Act applies to decisions or orders of a certificate officer under the Bihar and Orissa Public Demands Recovery Act. A suit under S. 37 of the Act for a declaration is governed by Art. 13 and not Art. 12. I.L.R. (1950) Cut. 120=A.I.R. 1950 Orissa 140=16 C.L.T. 45.

——Art. 13—Applicability.

When the Insolvency Court makes an order for sale under S. 4 (3), Provincial Insolvency Act without deciding the question of title, a suit for declaration of title to the property brought in a Civil Court is not governed by Art. 13. 36 C.W.N. 621=A.I.R. 1933 Cal. 263=143 Ind. Cas. 475.

——Arts. 13 and 11—Attachment under O. 38, R. 8, C. P. Code—Property released.

A suit to recover property released from attachment under O. 38, R. 8 is not governed by Art. 11 or 13, such a suit not being one to set aside an order of Civil Court within Art. 13 and therefore the existence of the order releasing the attachment before judgment, does not bar the suit. 41 Mad. 23=5 L.W. 704=39 Ind. Cas. 863.

——Art. 13—Decision or order, what is—Proceedings under Presy. Small Cause Courts Act, Ch. 7.

Orders passed under Chap. 7 of the Presy. Small Cause Courts Act cannot be regarded as a "decision or order" on the question of title. In a subsequent suit against an order under that chapter, there is no necessity to alter or set aside any such "decision or order." Consequently, Art. 13 has no application. The article applicable may be Art. 120 or Art. 144. 115 Ind. Cas. 504=29 M.L.W. 537=1929 M.W.N. 174=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——Art. 13—Execution of decree—Attachment of house sold—Suit by vendee—Attachment withdrawn—Suit by vendee against vendor.

The deft. sold a house to plaintiff in 1910 and himself remained in possession as plaintiff's lessee. A creditor of the deft. attached the house and then plaintiff applied to raise the attachment under O. 21. The application was rejected on the ground that the sale by deft. to plaintiff was fraudulent. Against this order plaintiff filed a suit on 15-8-16 but it was withdrawn owing to a compromise between deft. and his creditor. The attachment was also withdrawn. On 25-5-17 plaintiff filed the present suit for possession and arrears of rent. Held, the suit is not barred by time as the attachment being withdrawn there was no longer any attachment to operate against him and the deft. not being a party to the attachment proceedings, the parties were in the same position as before the attachment. 22 Bom. L.R. 1446= 59 Ind. Cas. 774.

——Art. 13—Order under S. 310-A, C.P.Code (1882).

A suit to set aside an order passed by a munsif under S. 310-A, C.P. Code, (1882), setting aside a sale in execution of a decree is governed by Art. 13 and not by Art. 120. 33 All. 182=7 A.L.J. 937=7 Ind. Cas. 503.

——Art. 13—Possession of immovable property,

Art. 13 does not govern a suit for possession of immovable property after establishment of title when an adverse order is made against plaintiff under S. 332, C.P. Code (1882), as the suit is one to establish plaintiff's right to the property. The suit is governed by Art. 142. 16 C.W.N. 971=14 Ind. Cas. 92.

——Art. 13—Starting point of limitation—Order appointing guardian.

The order appointing a guardian becomes final on the date on which it is passed and not on the date on which the security furnished is accepted and the period of limitation begins to run from the date of the order. A.I.R. 1939 Lah. 170=41 P.L.R. 592.

——Art. 13—Suit for declaration of title—Where it is unnecessary to set aside an order.

Art. 13 has no application to a suit for a declaration of title based upon a purchase which has been incidentally held invalid in execution proceedings where there is no prayer for the altering or setting aside of the order. 60 Ind. Cas. 849=2 P.L.T. 345=6 P.L.J. 85=1921 P.H.C.C. 66=A.I.R. 1921 Pat. 1 (F.B.).

——Art. 13—Suit for possession of trust property.

Where the District Judge appointed a certain person not as "mutwalli" but only as person to perform the duties of "mutwalli" and a third person brought a suit for possession of the trust property:

Held, that the suit was not governed by Art. 13 as the suit was not one to alter or set aside the decision of the District Judge. A.I.R. 1941 Oudh 529 =1941 O.W.N. 906=1941 A.W.R. 274=196 Ind. Cas. 787.

——Art. 13—Suit for refund of money distributed under S. 295, C. P. C., (Old).

An order for distribution under S. 295, C.P.C. (Old) is an order in a suit, and as such excluded from the operation of Art. 13. A suit for refund of money paid to the defendant under an order of court made under S.295, C.P.C., on the ground that the plaintiff was entitled to it in preference to the defendant, is not a suit to set aside the order of distribution, and is not governed by Art. 13. 15 B. 438, App. 3 Bom. L.R. 713=28 I.A. 203=5 C.W.N. 649=23 A. 313 (P.C.).

——Arts. 13, 14—Suit under S. 332, C.P. Code (Old) brought more than a year after the order passed under the section not barred.

On 21st November, 1900 an order was passed under S. 332 of the Civil Procedure Code, 1882 awarding possession of certain property to defendants. The plaintiffs filed this suit on the 25th August 1905, under S.332 of the Code, to recover possession of the property from defendants. The suit was dismissed as having been barred under Art. 14. Held.—(1) that the suit was not barred under Art. 14. An order passed by a judge under S. 332 of the Civil Procedure Code, 1882, is not such an act or order as is referred to in Art. 14. A judge exercising his judicial functions is a civil court within the meaning of the Limitation Act and is no an officer of Government acting in his official capacity within the meaning of Art. 14. Held, (2) that Art. 13 also did not apply to the case, because an order passed under S. 332 restoring possession which has been given in execution of a decree is an order made by the court in execution proceedings, and is not an order of a civil court in a proceeding other than a suit. 10 Bom. L.R. 749.

——Art. 14.

Synopsis.

1. "Act or order"
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1. "Act or order".

——Art. 14—"Act or order"—Preparation and submission of liquidation scheme—Sind Encumbered Estates Act, S. 17 (1).

The preparation and submission of a liquidation scheme in pursuance of S. 17 (1) of the Sind Encumbered Estates Act is a statutory duty and is neither an act nor an order within the meaning of Art. 14 of the Limitation Act. I.L.R. (1947) Kar. 168=A.I.R. 1948 Sind 14.

2. Amendment or cancellation of settlement entries.

——Art. 14—Amendment or cancellation of settlement entries.

In the matter of limitation, a suit under S. 83 of the C.P. Land Revenue Act of 1881 for the amendment of Settlement entries is governed by Art. 14 Sch. I of the Limitation Act. A suit of this nature is to be filed within one year of the date on which the assessment is offered to the proprietors after the Record of Rights is "duly made and attested". 65 Ind. Cas. 970=5 N.L.J. 199=A.I.R. 1922 Nag. 76.

——Art. 14—Amendment or cancellation of settlement entries—Settlement entry.

A suit for cancellation of a Settlement entry is governed by Art. 14, the period of limitation being one year from the date of the entry. 57 Ind. Cas. 319 (Nag.).

3. Applicability.

——Art. 14—Applicability—Suit for declaration of title to properties partitioned filed more than one year after date of order of partition.

The words 'set aside' as used in Art. 14 clearly imply that the order complained of is binding on the plaintiff unless and until it is set aside and the Article cannot have any application when it is not necessary for the plaintiff to set aside the act or order in order to obtain the relief which he claims.

Where the plaintiffs were not parties to the partition proceedings under S. 88, Estates Partition Act, and no notice of those proceedings was served upon them, nor was there any adjudication upon their claims on those proceedings, as strangers they cannot be affected in any manner by the decision of the revenue authorities for the partition of properties and there is, therefore, no order binding on them which is necessary to be set aside. Hence a suit by them for declaration of title to the properties partitioned filed more than one year after date of order of partition under S. 88 is competent and not barred under Art. 14. A.I.R. 1946 Cal. 480=49 C.W.N. 117=80 C.L.J. 252=I.L.R. (1945) 1 Cal. 466.

——Arts. 14 and 120—Applicability—Suit for possession of land resumed by Government under agreement.

Where a municipal corporation sues for possession of land resumed by Government under an agreement on the ground that it was not resumed for a public purpose, it must have the impediment of the order resuming the land removed within one year under Art. 14 of the Limitation Act. It cannot get round the act of the Government resuming the land by contending that the suit is not one for setting aside the official act but for recovery of possession. Assuming that Art. 14 does not apply, it is only the residuary Art. 120 which can apply to the suit and not Art. 142. 230 Ind. Cas. 311=A.I.R. 1947 Sind 69.

——Art. 14—Applicability—Sardeshmukhi right—Suit for recovery or dues.

Article 14 does not apply to a case where the plaintiff does not seek to set aside the order of any Govt. Officer but simply seeks recovery of his due percentage out of the villages by virtue of sardeshmukhi right. A.I.R. 1932 Bom. 319=34 Bom. L.R. 129=139 Ind. Cas. 796 (D.B.).

——Art. 14—Applicability—Suit to establish right to mortgage.

The limitation for a suit by a party against whom an order of dismissal has been made under S. 12, Punjab Redemption of Mortgages Act under any of the sections enumerated, with a view to establish his rights in respect of the mortgage is one year under Art. 14. A.I.R. 1938 Lah. 638=40 P.L.R. 886=181 Ind. Cas. 522.

——Art. 14—Applicability—Suit to establish right to mortgage.

Art. 14 has no application to a suit brought by a party in respect of the mortgage where his application under Punjab Redemption of Mortgages Act has been dismissed by the Collector without considering the merits of the dispute. A.I.R. 1938 Lah. 512=40 P.L.R. 245=181 Ind. Cas. 63.

——Art. 14—Applicability—Orders which must needs be set aside.

Art. 14 applies to acts or orders done in the exercise of powers legally exercised by the Executive and before it can be applied the order must be one which needs to be set aside. If in fact there is no provision of law for setting it aside Art. 14 cannot apply. An order in a mutation case directing mutation in the name of a particular person is not such an order and cannot be directly impugned in a civil suit though another person can show by a civil suit that he is the real owner of the property mutated and having established his claim in that suit can then go to Revenue authorities and ask that mutation be made in his name. 78 Ind. Cas. 987=A.I.R. 1924 Nag. 142.

——Art. 14—Applicability.

Where the object of the suit is to recover possession of certain villages which were resumed by Government, the order of resumption should be treated as a nullity and Art. 14 therefore does not apply. 42 Mad. 673=37 M.L.J. 71=(1919) M.W.N. 730=9 M.L.W. 587=51 Ind. Cas. 366.

——Art. 14—Applicability.

One A was in possession of a graveyard for a number of years. On the Collector's passing an order directing A to hand over the property to B, A appealed to the Commissioner without success. A brought a suit that the property belonged to him and that the Government had no right or interest and for a perpetual injunction against the Secretary of State. Held, that the suit was virtually one to set aside the Collector's order and should have been brought within one year from that order. If the order was a nullity Art. 14 would not apply. 6 S.L.R. 210=19 Ind. Cas. 565.

——Art. 14—Applicability—Order under Revenue Jurisdiction Act.

Where the order of a Collector directing the ejectment of a person is appealable under the Rev. Jurisdiction Act a suit to set aside the order will not lie where the cause of action is only on that

order. But where plaintiff is ejected a suit will lie as there is no appeal against the physical act of ejectment. Obiter.—Art. 14 does not apply to suits based upon title. 10 Ind. Cas. 223 (All.)

——Art. 14—Applicability—Order passed without jurisdiction.

An order passed without jurisdiction is a nullity and does not require to be set aside so as to make Art. 14 applicable. 10 C.L.J. 189=36 C. 726=1 Ind. Cas. 549.

——Arts. 14, 17, 18—Applicability.

Art. 14 does not apply to a suit for compensation for land acquired instituted on the refusal of the Collector to award compensation. Art. 17 obviously refers to a case in which the Collector fails to pay or deposit in court the amount awarded. Art. 18 applies only to suits for compensation for non-completion of and refusal to complete the acquisition. 11 C.W.N. 356=5 C.L.J. 669=34 C. 470.

——Art. 14—Applicability.

Art. 14 is applicable to acts done or orders passed in the exercise of powers legally exercisable by the executive, subject to conditions the fulfilment of which is denied by the party impugning the act or order or invested with no finality by the empowering enactment. An order entirely ultra vires of the Executive Government is a mere nullity and no suit is necessary to set it aside. 7 Bom. L.R. 497=29 B. 480.

——Art. 14.

Where the plaint as a whole is really with regard to the title to the land and does not seek to set aside any order of the Revenue Court. Art. 14 of Lim. Act has no application. One has to look to the real object of the suit. A.I.R. 1941 Pat. 50=7 B.R. 47=13 R.P. 260=190 Ind. Cas. 817.

4. Application for possession.

——Art. 14—Application for partition—Rejection of—Suit for declaration.

Plaintiffs applied for partition of the Shamilat property in 1908. The Revenue Officer rejected the application in 1909. In 1912 plaintiffs sued for a declaration of their title to a share in the shamilat. Held, that the suit was governed by Art. 120, and not by Art. 14. 150 P.L.R. 1916=136 P.W.R. 1916=47 P.R. 1916=34 Ind. Cas. 546.

5. Bengal Tenancy Act.

——Art. 14—Bengal Tenancy Act, S. 103—"Order of an officer of Government in his official capacity" — Order rejecting objection under S. 103, Bengal Tenancy Act, no order.

See Bengal Tenancy Act, S. 103. 11 C.W.N. 48.

——Arts. 14, 120—Bengal Tenancy Act, S. III—Settlement of rent by Settlement Officer—Suit for alteration of rent—Bengal Act I of 1895—Public Demands Recovery Act, S. 7—Certificate under—Suit to amend certificate—Nature of suit.

Where the rent payable by a tenant is fixed by Settlement Officer after inquiry and the land-lord is a ward of the Court of Wards, and a certificate is issued under S. 7 of Bengal Act I of 1895, the suit by a tenant to correct the amount of rent mentioned in the certificate and to receive the excess paid is really a suit for alteration of rent under S. 111 of Bengal Tenancy Act and is governed either by Art. 14 or Art. 120 of the Limitation Act. 28 C. 676.

6. Bombay Land Revenue Code.

——Art. 14 — Bombay Land Revenue Code—Order under Ss. 65 and 66—Possession for fifty years—No payment of revenue.

Where the plaintiffs had been in possession of the land in dispute for over fifty years without paying any assessment and the Deputy Collector acting under Ss. 65 and 66 of the Bombay Land Revenue Code ejected the plaintiffs. Held, in a suit by plaintiffs for possession that the order of the Deputy Collector was ultra vires and Art. 14 did not apply. 39 Bom. 494=17 Bom. L.R. 513 =29 Ind. Cas. 490.

——Art. 14—Bombay Land Revenue Code, S. 3.

If a Collector makes an order or commits an act of dispossession relating to private land acting under S. 3 of the Bombay Land Revenue Code, the order is a nullity and there will be no necessity to set aside such an order before proceeding to sue for recovery of possession as against the Government. 7 S.L.R. 169=24 Ind. Cas. 813.

7. C.P. Land Revenue Act.

——Arts. 14 and 120—C.P. Land Revenue Act, S. 83—Suit under.

A suit under S. 83 of the C.P. Land Revenue Act is governed not by Art. 14 but by Art. 120 of the Lim. Act. Though the section speaks of a suit as one to have an entry cancelled or amended it is a declaratory suit and the Civil Court can only declare that the entry is erroneous but cannot itself amend the record of rights. 19 C.W.N. 1303=21 C.L.J. 646=30 Ind. Cas. 61.

8. Chaukidari Chakran Lands.

——Art. 14 — Chaukidari Chakran Lands — Resumption and transfer—Presumption.

Per Mitra and Woodroffe, JJ. — When the plaintiff sues for the recovery of possession of land on the allegation that the land is Chaukidari Chakran land and lies within his zemindari and the Collector has transferred the same to him, he is bound in the first instance to prove so much of his case as has been denied or has not been admitted by the defendant. It being found that the land was not Chaukidari Chakran land and did not lie within the zemindari of the plaintiff, any transfer made by the Collector in his favour under S. 50 of the Act, is not authorised by the statute and does not confer any title on him. An order passed without jurisdiction need not be set aside and Art. 14 does not apply to such a case. An order of the Collector under S. 50 is of the nature of a vesting order and is not an order contemplated by Art. 14, and does not require to be set aside

specially at the instance of one who was not a party to it. Such a party has no cause of action until his possession has been interfered with. Art. 14 cannot be invoked against a defendant defending his possession unless the law makes the order final by reason of its not being contested within the specified time. The mere fact that the Collector has made the transfer does not raise any presumption that the land was Chaukidari Chakran land and that the Collector acted within the statute. S. 114 of the Evidence Act has no application to such a case. 21 C. 626, 24 Bom. 435, foll.

Per Pargiter, J., contra.—Under S. 114 of the Evidence Act there is a presumption that the resumption was made legally and by S. 61 of the Chaukidari Act the resumption is final. The objection that the order of the Collector was illegal as the Collector had come to a wrong decision regarding the estate in which the land lay, is not valid as it is a question merely of an error in the decision of the Collector and not a question of jurisdiction. The defendant had his remedy by a suit to set aside the order of the Collector. Under Art. 14 and S. 22 of the Limitation Act the defendant's title has ceased to exist and he cannot set it up in defence. The Civil Court had no jurisdiction to go into the question of resumption and the transfer. The burden of proof lay on the defendant to show that the transfer which was admittedly made by the Collector under the Act and which must be presumed to have been made rightly was illegal. 32 C. 1107=2 C.L.J. 107.

——Art. 14—Chaukidari Chakran Lands—Decision of Collector as to.

Where the Collector holding that the Chaukidari Act was applicable to the plff.'s estate took proceedings in 1899 with a view to transfer the chaukidari chakran lands:

Held, Per Woodroffe, J.—That it may be a question whether the article applies at all having regard to 11 Bom. 429. Per Caspersz, J.—The Collector's order being a nullity and the lands transferred not being within his jurisdiction, the suit cannot be defeated because it was instituted more than one year after the date of the order. 15 C.W.N. 300, Foll. 14 C.L.J. 151=11 Ind. Cas. 899.

9. Declaration of Government grant.

——Art. 14—Declaration of Government grant—Fact of grant should be decided before applying the article.

Where in a suit for declaration that a land was inam land and the mittadar raised a plea that it was a ryoti land:

Held, that the question whether the land was under a grant, or ryoti land should be decided first, without deciding it, it cannot be said that since the order of the Inam Commissioner was not set aside within one year under Art. 14, the defendant is barred from raising the plea. 123 Ind. Cas. 341= A.I.R. 1930 Mad. 710.

10. Dispossession.

——Art. 14—Dispossession.

Where a person is dispossessed of immovable property by a public servant, it is not the order of the public servant that has to be set aside, but the right of the party to possession that has to be determined. And the party dispossessed is entitled to bring a suit within 12 years from the date of dispossession; in other words, Art. 14 has no application as no order need be set aside in order to obtain relief. 114 Ind. Cas. 626=1928 M.W.N. 763 =A.I.R. 1928 Mad. 1246.

11. Entries in Record of rights.

——Art. 14—Entries in Record of rights—Possession on basis of.

A suit for possession on the strength of entries in Record-of-Rights which were challenged by defendant, is not one brought for the purpose of setting aside any order of the Revenue Court but it is simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to the plaintiff and Art. 14 does not therefore apply to such a case. 97 Ind. Cas. 217=5 Pat. 735=53 I.A. 176=7 P. L. T. 483=31 C.W.N. 341= A.I.R. 1926 P. C. 60 (P. C.).

——Arts. 14 and 120—Entries in Record-of-Rights—Entry whether an act or order of Govt. Officer.

A suit for amendment or cancellation of certain entries in the Record-of-Rights is not a suit to set aside any act or order of a Govt. Officer and therefore does not fall under Art. 14 but under Art. 120. 14 Ind. Cas. 50. (Cal.)

12. Essentials for application.

——Art. 14—Essentials for application.

The conditions necessary for the applicability of Art. 14 are (1) that the suit is one to set aside an order (2) which had been passed by an Officer of Govt. (3) in the exercise of powers conferred on him by the law (4) which would be effective and conclusive unless set aside by a suit, and (5) there is no other provision in the Lim. Act or any other statute, expressly governing it. A.I.R. 1934 Lah. 384=15 L. 389=36 P.L.R. 337=149 Ind. Cas. 661 (F.B.).

——Art. 14—Essentials for application.

It does not suffice for an Officer of Government to purport to act in his official capacity to bring his act or order within the purview of Art. 14, or for the subject to allege that the act was wrong or to refrain from expressly asking the Court to set aside the order to take it out of the purview of the article. If that act or order is illegal or ultra vires, Art. 14 has no application. 24 Bom. 435; 36 Bom. 325 and A.I.R. 1921 Bom. 381, Foll. 109 Ind. Cas. 545=30 Bom.L. R. 481=A. I. R. 1928 Bom. 180.

——Art. 14—Essentials for application.

An order to come under Art. 14 must be an order of at least a quasi-judicial character and not a mere executive order. 32 Cal. 1107, Ref. 104 Ind. Cas. 781=39 M.L.T. 633=A.I.R. 1927 Mad. 1167.

——Art. 14—Essentials for application.

Suit for declaration that defendants are not permanent tenants of a field and that the order of

Revenue Officer to that effect be held as incorrect is governed by Art. 120 and not by Art. 14.

Before Art. 14 can apply, the order must needs be one which must under law be set aside. 19 C.W.N. 1303 and A.I.R. 1925 Cal. 518, Rel. on. 100 Ind. Cas. 4=A.I.R. 1927 Nag. 159.

——Art. 14—Essentials for application.

The order under Art. 14 must be such an order as the officer is empowered under the law to pass and which would be effective unless set aside, and which further is an order which, under the ordinary law, is liable to be set aside by a suit in the Civil Court.

An order by a Collector refusing to put a party to a partition under the Bengal Estates Partition Act, (V of 1897) in possession of the land allotted to him is an order for which there is no provision of the law. 8 C.L.J. 470 and 29 Bom. 480, Ref. 89 Ind. Cas. 193=29 C. W. N. 839=A.I.R. 1925 Cal. 953.

13. Estates Partition Act.

——Art. 14—Estates Partition Act.

During partition proceedings under Bengal Estates Partition Act, the Deputy Collector proceeded to take action under Chap. VI of the Act. When he was making an order under S. 46 (1) (iii) one A raised an objection and claimed that tenancy created by B was tenure which affected interest of B only and was not admitted to be permenant tenure by A. The dispute was due to the definition of "assets" in S. 3 of the Act. The Deputy Collector disposed of the question without coming to decision on any real point at issue. He said that the tenancy was either a raiyati jote or a tenure admitted by all the recorded proprietors to be a permenant tenure. A thereupon brought a suit for declaration that tenancy granted by B in favour of certain persons was a tenure which affected the interests of B only and was not admitted by A to be a permenant tenure:

Held, that a mere declaratory decree could not be granted because such a decree would not serve any useful purpose whatever. Secondly, the prayer was not bona fide. The real object of the suit was to get rid of the decision of the revenue officer. As it was not open to the Civil Courts to give a direction to the revenue officers, there was no longer any case for giving a mere declaration as to the nature of the tenancy. A.I.R. 1939 Cal. 749.

——Art. 14—Estates Partition Act.

Where the suit for declaration of title was brought in the Civil Court more than one year after the order of the Deputy Collector, which was one passed apparently under S. 57 of the Estates Partition Act:

Held, that the suit not being to set aside the order of the Collector was not barred by Art. 14 of the Limitation Act. 52 C.L.J. 247=A.I.R. 1931 Cal. 29.

——Art. 14—Estates Partition Act—Partition under—Land not belonging to estate allotted—Suit to set aside—Article does not apply.

If property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings it seems incredible to suggest that the person to whom that property so allocated rightly belonged could not within 12 years from the date when his right of action accrued, bring a suit for a declaration of his title and if necessary for recovery of possession of that land in question. Further it matters not whether such claimant was an outsider; that is to say, a person who was not a party to the partition proceedings, or a person who was a party to the partition proceedings. In such a case there is no act or order of an officer of Government in the official capacity which could be regarded as bringing the period of limitation within the purview of Art. 14. 96 Ind. Cas. 632=6 Pat. 73=7 P.L.T. 779=1926 P.H.C.C. 236=A.I.R. 1926 Pat. 421.

——Art. 14—Estates Partition Act.

A suit for declaration that an allotment made by the Collector under the Bengal Estates Partition Act is not legally valid is governed not by Art. 14 but by Art. 120. 49 Ind. Cas. 965 (Cal.)

——Art. 14—Estates Partition Act—Order excluding lands from partition.

Under S. 116 of Art. VIII of 1876, the Collector can only adopt one of two courses if any objection is raised before him. He can either strike off the partition case or proceed with the partition, treating the disputed land as part of the estate under partition. He has no jurisdiction to pass an order directing the partition, the disputed land not being treated as part of the estate under partition. Such an order, if proved, is a nullity and Art. 14 of the Limitation Act does not apply to such a case. 33 C. 693.

——Art. 14 — Estates Partition Act, S. 116—Suit to set aside—Plaintiff not a co-owner.

Where a person, not a co-owner, intervenes in a proceeding under S. 116, Bengal Estates Partition Act, claiming certain lands as his own, and his claim is decided against him, a suit by him for a declaration that the lands are his own is governed by Art. 14. 6 C.W.N. 92=29 Cal. 367.

——Art. 14—Estates Partition Act, S. 176—Suit for possession.

An order passed by a Collector staying or striking off partition proceedings until the parties to the dispute have the matter in dispute between them decided by a competent court is not an order to the prejudice of any party requiring it to be set aside before suit for possession is brought. Consequently, Art. 14 has no application. 32 C. 716.

14. Execution of decree.

——Art. 14—Execution of decree—Civil Procedure Code, S. 320 et seq—Sale held by Collector, but afterwards set aside—Suit by auction-purchaser to have sale confirmed.

In execution of a decree which had been transferred to the Collector for execution under the

provisions of S. 327 of the Code of civil procedure (1882) certain immovable property was sold by auction on the 22nd of September 1891. But the judgment-debtors applied to the Collector to have the sale set aside, and on the 30th of October, 1891 the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. The order of the Collector setting aside the sale was on appeal confirmed the Commissioner on the 4th of May, 1892. After the setting aside of the sale the judgment-debtors on the 14th of December 1891, with the permission of the Collector, mortgaged the bulk of the property. The mortgage money was paid into court in discharge of the decree, and the satisfaction of the decree was entered up, and on the 21st December, 1891, the execution case was struck off. On the 12th of September 1894, the auction purchaser, who after the sale had been set aside, had withdrawn the purchase-money paid in by her, brought a suit to have the sale in her favour confirmed. Held, that inasmuch as the plaintiff's claim involved the setting aside of the collector's order of the 30th October 1891, by which the sale to the plaintiff had been set aside, the suit was barred by limitation, having regard to Art. 14. 25 B. 337 and 22 A. 168, ref. to; 8 M. 82 held not to be of effect since the ruling of the Privy Council in 25 B. 337 and 22 A. 168, ref. to. 25 B. 336 and 25 C. 179 distinguished. (1902) A.W.N. 116=24 A. 467.

15. Illegal or void orders.

——Art. 14—Illegal or void orders.

Where the Act of the Govt. in respect of which a declaration and injunction is sought is an act which is illegal or ultra vires and the declaration is sought on that ground, then in such a case neither S. 59, Revenue Recovery Act, nor Art. 14 applies but proper article applicable is Art. 120. It may be that if the ground of such a suit is not that the act of Govt. was ultra vires or illegal but a mere irregularity, which does not vitiate the main proceedings, but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceedings ultra vires, in such a case Art. 14, may apply or in a case falling under the Revenue Recovery Act even S. 59, Revenue Recovery Act may apply. A.I.R. 1934 Mad. 147=39 M.L.W. 216=(1934) M.W.N. 221=57 M. 501=66 M.L.J. 715=154 Ind. Cas. 990.

——Art. 14—Illegal or void orders.

If the order is illegal, the plaintiff is not bound to file a suit to set it aside but is entitled to wait until it is enforced against him and the attempt to enforce it against him gives him a good cause of action. 105 Ind. Cas. 694=51 Bom. 830=54 I.A. 380 =29 Bom.L.R. 1484=46 C.L.J. 393=39 M.L.T. 527 =A.I.R. 1927 P.C. 217=53 M.L.J. 475 (P.C.).

——Art. 14—Illegal or void orders.

Per Mukerji, J.—Art. 14 applies to acts or orders which require to be set aside. It does not apply where jurisdiction has been usurped, and the orders is ultra vires. An order made without jurisdiction is a nullity and need not be set aside. 83 Ind. Cas. 446=39 C.L.J. 454=A.I.R. 1924 Cal. 913.

——Art. 14—Illegal or void order—Limitation.

An order under S. 524, Cr. P.C., which directed the forfeiture of property seized on suspicion of its being stolen, and which ordered the sale-proceeds thereof to be credited to Government is ultra vires. Since, the section authorises the Government to hold the property as trustee for the real owner, a suit for possession of the property is not barred though brought after a year of the order of confiscation. 5 Pat. L.J. 321=56 Ind. Cas. 507.

——Art. 14—Illegal or void order—Suit to set aside.

A suit to set aside an order which is ultra vires of the officer passing it, is not governed by Art. 14. 36 Bom. 325=14 Bom. L.R. 332=15 Ind. Cas. 517.

——Art. 14—Illegal or void order.

Where the Collector was authorised under the Putni Regulation to make a summary investigation if the Talukdar contested the Zemindar's demand for any arrear but he determined the rent payable for the tenure in future the order is ultra vires and is not required to be set aside. Art. 14 therefore does not apply. 17 C.W.N. 374=17 Ind. Cas. 504.

——Art. 14—Illegal or void order.

An order of the Collector which declared that the lands in the possession of the plaintiff should be given to the defendant and for which there was no warrant of law is an ultra vires order, and the owner need not set it aside. Art. 14 therefore does not apply. 17 C.W.N. 55=17 Ind. Cas. 881.

——Art. 14—Illegal or void order.

Where resumption and transfer of certain lands could not take place under Chaukidari Act the order being without jurisdiction, is null and void and Art. 14 would not apply. 15 C.W.N. 300=9 Ind. Cas. 688.

16. Inam.

——Art. 14—Inam—Enfranchisement.

A claim for relief inconsistent with an order of enfranchisement of inam is governed by Art. 14 of the Limitation Act. If the order of enfranchisement is intra vires, i.e., if the inam was granted or continued by Government, and in any case in which it is shown that the inam was not granted or continued by Government, Art. 142 or 144 would apply. 123 Ind. Cas. 341=A.I.R. 1930 Mad. 710.

——Art. 14—Inam—Gadaba—Resumption—Suit for possession by Zemindar.

Art. 14 has no application to a suit by a Zemindar for possession of certain land of his on the ground that the Collector who, during his minority was in possession of his estate treated the suit property, which had been granted to another gada service, as the property of the Government, resumed the lands and re-granted them to the then occupants thereof on jeraiti pattahs. The resumption

of lands granted by zemindar for the performance of gadaba service is in the zemindar and not in the Government. 1 M.L.W. 662=25 Ind. Cas. 878.

---Arts. 14 and 131—Inam resumed—Suit for cancellation of the resumption order.

Where the Collector resumed a dasabandham inam owing to the inamdars failure to fulfil the conditions of the inam the inamdars sued after 12 years for a declaration that he was entitled to hold the land rent-free. **Held**, that the suit for cancellation of the order should have been brought within one year of the date of the order. (1915) M.W.N. 915=31 Ind. Cas. 267.

17. Land Registration Act (Bengal).

---Art. 14—Land Registration Act (Bengal)—Suit under.

A suit for declaration of title on refusal of an application for registration under the Land Registration Act is not governed by Art. 14 of the Lim. Act although the object of the suit is to apply on success to the Collector for registration of the plaintiff's name, The plaintiff need not sue to set aside the order of the Collector. 9 C.L.J. 91=3 Ind. Cas. 693.

18. Lease by Collector.

---Art. 14—Lease by Collector—Collector refusing to entertain plaint.

A suit to recover possession of lands forming a river bed leased by the Collector is barred if brought after a year of the date of the order of the Collector under S. 37 of the Bombay Land Revenue Code by which the Collector refused to entertain the plaint. Prior to the Bombay Act XII of 1912 the starting point of limitation is the date of the order. 22 Bom. L.R. 146=55 Ind. Cas. 591.

19. Main object different.

---Art. 14—Main object different.

Where the relief sought is primarily a declaration that the plaintiffs are entitled to succeed a deceased Hindu female owner as her next reversioners, and where for such a declaration the setting aside of the order of a Sub-Divisional Officer would not be necessary, Art. 14 has no application though the plaint may contain a prayer for the setting aside of the order of a Sub-Divisional Officer. 90 Ind. Cas. 691=7 P.L.T. 67=1925 P.H.C.C. 288=A.I.R. 1925 Pat. 784.

20. Money held in trust by Government.

---Art. 14—Money held in trust by Government—Order of payment to several heirs of the depositor—Suity by one.

From 1846 to 1859 the accounts of the Satara treasury showed the sum claimed by the plaintiff as payable to C, the plaintiff's ancestor. In 1857 the Collector of Satara issued a notice to C's eldest son, S and called upon him to withdraw the amount, S accordingly applied for the money, but S's younger brother asked that it should be distributed among all C's sons. In 1860 the Asst. Collector ordered that C's sons and heirs should produce the certificate of heirship. **Held**, the plaintiff's claim did not fall within Art. 14 and the case was one to which the bar of limitation could not be pleaded. 39 Bom. 572=17 Bom. L. R. 641=31 Ind. Cas. 277.

21. Noabad taluk.

---Arts. 14, 121—Noabad taluk—Incident of.

Art. 14 refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person or against another subject in the regular course, to a further judicial proceeding having for its object to quash them or set them aside. 11 B. 429, foll. The article has no application where an order is **null** and **void** and does not affect the plaintiff's interest, so that there is no occasion to set it aside. 21 C. 626; 25 C. 179 (P. C.) and. 24 A. 467 ref. to. Where subsequent to the purchase of an entire Noabad mehal at a sale for arrears of revenue by the plaintiff, the term of the taluk expired and Government resettled the taluk in favour of the defaulting proprietors and the plaintiff instituted a suit for recovery of possession of a parcel of land included in the taluk purchased:—**Held**, that the rule of limitation applicable was that embodied in Art. 121 and not in Art. 14. A Noabad taluk is not necessarily temporarily settled; it may be a permanently settled one. The re-settlement of a Noabad taluk does not necessarily mean a settlement with new talukdars; it may be an adjustment of the revenue and nothing more. 8 C.L.J. 470.

22. Order of Collector.

---Art. 14—Order of Collector—Remedy.

On a forfeiture of land by the Collector for failure to pay arrears of Govt. Revenue the aggrieved party may either appeal to the Rev. authorities or bring a suit in a Civil Court. But he must sue within one year of the order of the Collector under Art. 14. 44 Bom. 451=22 Bom. L.R. 212=57 Ind. Cas. 587.

---Art. 14—Order in Revenue Case.

S. 3 (5) of the Madras Estates Land Act suggests that the order of the Collector is a temporary one. No finality is given to the order in case a Civil Court does not settle the question. The Collector's decision will be **ipso facto** vacated whenever a Civil Court pronounces on the respective rights of the contending parties. Hence Art. 14 does not apply to a suit to set aside the order. 62 Ind. Cas. 276=13 M.L.W. 104=1921 M.W.N. 193=A.I.R. 1921 Mad. 47.

23. Punjab Redemption of Mortgages Act.

---Art. 14—Punjab Redemption of Mortgages Act—Suit to set aside any act or order.

An application was made by the mortgagor to the Collector under the provisions of S. 4, Redemption of Mortgages Act, 1913, praying that the land may be redeemed on payment of Rs. 40. Another application was made on behalf of the plaintiffs who were the representatives of the mortgagor asking the Court to stay its hands until the disposal of certain applications which the applicants stated were pending in the Revenue Court under the provisions of the Alienation of Land Act. The revenue Officer did not accede to his request and the records were consigned to the record room.

The mortgagors withdrew from the proceedings. Another suit was brought by the plaintiffs for the redemption of the mortgage. The suit was, on the face of it, filed after the expiration of one year from the date of the Collector's order:

Held, that there was no order passed by the Collector on the merits and that the Art. 14 did not apply and consequently the suit was not time-barred. A. I. R. 1936 Lah. 692=38 P. L. R. 917=165 Ind. Cas. 739.

——Art. 14—Punjab Redemption of Mortgages Act.

A mortgagor's right to redeem, which would otherwise be within limitation, is barred if the action is brought later than a year of the date of an order passed to the plaintiff's detriment by the Collector on an application under Punjab Act No. 11 of 1923. When an order passed under a special Act is declared by that Act to be conclusive, it cannot be ignored and no relief is open to the aggrieved party unless that order be set aside. An individual who takes advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits. The suit referred to in S. 12 of the Punjab Redemption of Mortgages Act is a suit to set aside an order of an officer of Government within Art. 14. 88 Ind. Cas. 945=6 Lah. 206=26 P.L.R. 383 =A.I.R. 1925 Lah. 385.

——Art. 14—Punjab Redemption of Mortgages Act.

S. 12 of Redemption of Mortgages Act II of 1913 merely points out the results which would ensue if the procedure laid down in that section is not followed. In order to ascertain the period of limitation for such a suit it is necessary that reference should be made to the provisions of the Indian Limitation Act, and the only Article in that Act under which the suit could fall is Art. 14, which provides a period of one year's limitation from the date the order complained against is passed. 75 Ind. Cas. 885=A.I.R. 1924 Lah. 690.

24. Recovery of penal assessment levied.

——Art. 14—Recovery of penal assessment levied and collected.

Where penal assessment was levied by the Government against persons in occupation of village poramboke, without the consent of Government a suit for the recovery of the sums so paid will be barred after one year from the date when the assessment is levied either under Art. 14 or Art. 26 of the Limitation Act. Such payments in order that they may be legally recoverable by suit must have been made under coercion. 13 M.L. J. 269.

25. Resumption of grant.

——Art. 14—Resumption of grant.

Where Government purports to act under powers reserved to them under the terms of a grant, though they may act erroneously in the interpretation of its terms or in finding on facts which justify the resumption, the act is **intra vires** and not **ultra vires** and the act of resumption cannot be regarded as a nullity and Art. 14 applies. 106 Ind. Cas 891=27 M.L.W. 101 =A.I.R. 1928 Mad. 282.

26. Scope.

——Art. 14—Scope.

Art. 14 applies only to those orders which require to be set aside in a regular suit before any relief inconsistent with the order could be obtained. A judicial order does not fall under Art. 14. A.I.R. 1940 Bom. 188=42 Bom. L.R. 223=188 Ind. Cas. 531.

——Art. 14—Scope of—Order without jurisdiction.

An order without jurisdiction is a nullity and need not be set aside. When private partition is established the Collector's order is without jurisdiction under S. 12 of the Act VIII of 1876 and a suit to have such order set aside is not barred under Art. 14 of the Lim. Act. 36 C. 726=10 C.L. J. 189=1 Ind. Cas. 549.

27. Sind Encumbered Estates Act.

——Art. 14—Sind Encumbered Estates Act.

Manager under the Sind Encumbered Estates Act, S. 7 (2) (c) is an officer of Government within the meaning of Art. 14. A suit to set aside any act or order of the manager in his official capacity should be brought within one year from the date of his order as provided for by Art. 14. 124 Ind. Cas. 369=A.I.R. 1930 Sind 150.

——Art. 14—Sind Encumbered Estates Act (1896), S. 38—Suit against manager.

A suit by the lessee of lands under the management by the manager of Encumbered Estates, Sind, for an injunction restraining the manager from selling the land for arrears of rent, is governed by Art. 14. 9 S.L R. 167=32 Ind. Cas. 616.

28. Suit to set aside any act or order.

——Art. 14—Suit—To set aside any act or order.

A suit to deny a right of way which has been affirmed by an order of a **mamlatdar** under the Mamlatdars' Court Act is governed by Art. 47 and not Art. 14. A.I R. 1931 Bom. 256=33 Bom. L. R. 517=135 Ind. Cas. 427.

——Art. 14—Suit—To set aside any act or order.

Where it is necessary for a person to get rid of an order made by a Govt. Officer which stands in his way before he can get a certain relief and he only asks for a declaratory decree and not expressly for the setting aside of the order, the suit should be deemed to be one to set aside an order falling within Art. 14. A.I.R. 1934 Lah. 384=15 L. 389=36 P.L.R. 337=149 Ind. Cas. 661 (F.B.).

——Art. 14—Suit—To set aside any act or order—Suit for declaration of plaintiffs' and defendants' shares in touzi.

Where the plaintiffs bring a suit for a declaration substantially to the effect that plaintiffs' share in a certain **touzi** should correspond to three annas six pies of the original estate (and not less) and that the defendants' share should correspond to one anna (and not more), the plaintiffs are not asking for setting aside any act or order of an officer of Govt. in his official capacity within the meaning of Art. 14, nor is

it necessary for them to do so. The plaintiffs will not be able to recover rents according to their share now established until they get that share entered in the register kept in the Collector's Land Registration Department but they cannot get that done by an order or precept from the Civil Court, and they may quite easily be able to get it done in the Collectorate, armed with the necessary declaration from the Civil Court. A.I.R. 1938 Pat. 524=5 B.R. 125=20 P.L.T. 136=178 Ind. Cas. 633.

——Art. 14—Suit—To set aside any act or order—Suit for possession of immovable property.

Where a suit to set aside order of mutation and for possession of immovable property is brought less than eight years after the order of mutation and within 12 years of the death of the last owner, the suit, in the absence of any provision barring the same after one year, is within time. Art. 14 has no application. A.I.R. 1939 Lab. 135=183 Ind. Cas. 853.

——Art. 14—Suit—To set aside any act or order—Suit for specific performance.

In a suit for specific performance of a contract of sale, the plaintiff alleged that the Barrage **Mukhtiarkar** had, on October 1, 1936, sold him a survey number measuring six acres at Rs. 70 per acre, and had accepted the payment of 1/10th of the price in part satisfaction of the contract, and therefore, the Barrage **mukhtiarkar** accepted a further payment of Rs. 362; thereafter, however, the Revenue Officer, Lloyd Barrage, on June 11, 1936, cancelled the sale on the ground that this land was a public grazing ground, and his appeal to the Revenue Tribunal failed. The suit was brought more than 12 months after such an order:

Held, that it was not open to the plaintiff to bring a suit for possession of the land in the form of a suit for the specific performance of a contract without asking for a relief which was a condition precedent to the grant of the relief for which he prayed. The order of the Revenue Officer cancelling the sale stood as as a barrier to his possession of the land; until that barrier was removed, he could not enter into possession and if he did not sue to set aside that order, his suit must be dismissed. The suit was governed by Art. 14, Lim. Act. A.I.R. 1944 Sind 44=I.L.R. (1943) Kar. 404 =210 Ind. Cas. 513.

——Art. 14—Suit—To set aside any act or order—Order of Assistant Collector under Sea Customs Act.

Art. 14 applies if the suit involves the setting aside of an order which must be a least of a **quasi**-judicial character and not a mere executive order. The "act" or "order" referred to in Art. 14 does not mean an act or order which is a nullity. An order of an Assistant Collector under S. 167 (17), Sea Customs Act imposing a penalty is an order made by an Officer of Govt. in his official capacity, purporting to act under the law, and it is of a **quasi**-judicial character, and within his power. A.I.R. 1940 Bom. 294=42 Bom. L.R. 532 =191 Ind. Cas. 867.

29. Summary ejectment.

——Art. 14—Summary ejectment—Real dispute about title.

Where a private owner of property claims a declaration of title to the property in his peaceful possession, alleging that it is his own property as against the Government and the Government through its officers asserts a claim to that property as the property of the Government, there is a **bona fide** dispute as to title to the property and the real point of controversy between the two is also one of title to the said property. The mere circumstance that an officer of Government upheld the claim of the Government and gave an order upholding the title of the Government and directing summary ejectment of the private individual from the disputed strip of land, does not alter the nature of the claimants' cause of action nor does it necessitate the asking of any relief other than the one of declaration of title on the part of the private owner. It is sufficient if he establishes his title as against the Government in order to entitle him to hold the property as against the Government. It is wholly superfluous for him to ask the additional relief of cancellation of the order, and therefore such a case is not governed by Art. 14. 24 Bom 435; 36 Bom. 325 and 39 Bom. 494, **Appr.** 98 Ind. Cas. 22= 22 N.L.R. 147= 9 N.L.J. 198=A.I.R. 1927 Nag. 10.

——Art. 14—Summary ejectment.

Where the conditions necessary for the exercise of the power of summary eviction conferred by S. 79-A, Bombay Land Revenue Code, do not in fact exist, the District Deputy Collector cannot be held to act in his official capacity if he evicts a person under that section. So, Limitation Act, Art. 14 does not apply to a suit for possession by the evicted person. 24 Bom. 435; 36 Bom. 325 and 30 Mad. 280, **Foll.** 61 Ind. Cas. 347=45 Bom. 920=23 Bom. L.R. 279= A.I.R. 1921 Bom. 381.

——Art. 16—Illegal assessment.

Period of limitation applicable to a suit to recover excess in assessment illegally levied by Government is one year and not six months, from the date on which the cause of action arose. A.I.R. 1923 Mad. 652, **Foll.** 86 Ind. Cas. 267=21 M.L.W. 155=A.I.R. 1925 Mad. 474.

——Art. 16—Illegal collection of water cess.

The period of limitation applicable to a suit to recover amounts alleged to have been illegally collected by the Government from the plaintiffs as water cess on their lands, is one year from the date of payment under Art. 16 and not six months from the date of the distraint of the plaintiff's paddy crop under S. 59 of the Madras Revenue Recovery Act (II of 1864) where the relief claimed is the refund of the amount illegally collected and paid under protest together with interest. 74 Ind. Cas. 281=17 M.L.W. 618=32 M.L.T. 230= 1923 M.W.N. 327=A.I.R. 1923 Mad. 665=44 M.L.J. 645.

——Art. 16—Illegal collection of water cess.

A suit for the recovery of water cess levied under S. 1 of the Madras Irrigation Cess Act, 1855, for the unauthorised use by the plaintiff of water belonging to Government and paid by him under protest is governed by Art. 16, Limitation Act. S. 59 of the Madras Revenue Recovery Act, 1864 does not apply. And even if it applies, S. 15 (2) of the Limitation Act will apply and the two months' period of notice will be deducted in computing the period of six months.

Per Krishnan, J.—The suit is one under S. 59 of the Revenue Recovery Act, 1864, and to such a suit the provisions of the Limitation Act, do not apply. 15

Ind. Cas. 328, **Foll.** 73 Ind. Cas. 106=46 Mad. 488 17 M.L.W. 683=32 M.L.T. 236=1923 M.W.N. 258= A.I.R. 1923 Mad. 652=45 M.L.J. 12.

——Art. 16—Illegal collection of water cess.

A suit for the recovery of water cess paid under protest on demand but without any proceedings by way of attachment, sale, etc., is governed by Art. 16 of the Limitation Act and not by S. 47 of the Madras Act II of 1864. 79 Ind. Cas. 884 (Mad.).

——Art. 16—Illegal collection of water cess.

Where the Government levy statutory water cess from the ryots of a Zemindar and not from the Zemindar from whom it ought to have been levied, if leviable at all, in a case where the statute does not authorise the levy, and the Zemindar remits the amount to the ryots out of the rents payable by them, the Zemindar is entitled to sue to recover from the Government the amount so illegally collected, but such suit must be brought within the period of limitation prescribed by Art. 16. 12 L.W. 334=59 Ind. Cas. 98.

——Art. 16—Illegal collection of water cess.

A suit for recovery of water cess illegally collected without any proceeding under the Revenue Recovery Act is governed by Art. 16, and not by the Revenue Recovery Act: (1913) M.W.N. 75=18 Ind. Cas. 699.

——Art. 16—Madras Irrigation Cess Act, (1865)—Madras Revenue Recovery Act, S. 59—Law governing.

A suit for refund of **tirvajasti levied** under the **Irrigation Cess Act** comes under Art. 16 and not under S. 59 of the Madras Revenue Recovery Act. 17 C.W.N. 494=15 Ind. Cas. 328.

——Art. 16—Money recoverable as arrears of revenue.

In respect of certain lands wrongly treated as "added lands", the Govt. took the estate into **khas** management and under S. 104, Bengal Ten. Act, settled and imposed rents on tenure-holders who brought a suit for recovery of rents paid:

Held, that such rents were not arrears of revenue though they may be recoverable as public demand and unless it could be shown that by some enactment they had been made to come under that description or had been made recoverable as arrears of revenue, Art. 16, could not be applied to them. A.I.R. 1937 P. C. 244=18 P.L.T. 689=41 C.W.N. 1061=66 C.L.J. 145=46 L.W. 943=I.L.R. (1937) 2 Cal. 769=(1937) M.W.N. 1299=(1937) 2 M.L.J. 834=3 B.R. 722=64 I.A. 281=169 Ind. Cas. 881 (P.C.).

——Art. 16—Suit for damages against Government—Attachment and recovery of money under Madras Act I of 1858.

The Collector under Madras Act 1 of 1858 attached plaintiff's crops for value of the labour which he was asked to contribute and which he refused. The Collector recovered the amount in accordance with the procedure prescribed by Madras Act II of 1864. In a suit for damages by the plaintiff against the Government:

Held, that the limitation applicable to it was six months under S. 59 of Madras Act II of 1864 and not one year under Art. 16, 23 Mad. 57, **Foll.** (1915) M.W.N. 154=26 Ind. Cas. 863.

——Arts. 17, 62—Suit for compensation for land acquired.

Where the Govt. acquires land and pays the money to one who is apparently entitled to it, a suit by a person who has also got interest in the land and claims the money paid by the Govt. is governed by Art. 120 and not by Art. 17 or Art. 62 A.I.R. 1935 Pat. 42.

——Arts. 18, 120—Land Acquisition Act, 1894, S. 17—Direction to vest and take possession—Collector's refusal to make award—Suit for damages—Limitation—One year from refusal.

Art. 18 of the Limitation Act of 1877 (corresponding to Art. 20 of Act IX of 1871) refers only to suits for compensation for non-completion and refusal to complete the acquisition referred to in S. 54 of Act of 1870 (S. 48 of Act I 1894). A suit by a person for damages against the Collector for refusing to make an award with respect to land which had been vested in Government by virtue of a direction under S. 17 of Act I of 1894 is not governnd by Art. 18 but by Art. 120 of the Limitation Act, and will, therefore, be within time if filed within six years from the date of the Collector informing plaintiff of the refusal to make the award. Where there is a direction under S. 17 of Act I of 1894 and the Collector refuses to make the award, the owner of the land is not entitled to the land, but only to damages against the Collector for the breach of statutory duty. 14 M.L.J. 173=27 M. 535.

——Arts. 19 and 23—Malicious prosecution—Joint tort feasors—Damages against.

A suit for damages for false imprisonment or malicious prosecution against tort feasors is governed by the one year rule under Arts. 19 and 23 of the Lim. Act. Where there is a joint tort the proper action is on the tort against the joint tort-feasors and not on a cause of action to recover special damage by reason of a conspiracy to cause damage. 40 Cal. 898=18 C.W.N. 185= 23 Ind. Cas. 25.

——Art. 19—Suit for compensation for false imprisonment.

Time begins to run for a suit for compensation for false imprisonment from the date on which the plaintiff is released from it, though on bail, and not from the date on which the warrant is set aside. Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. 5 Bom. L. R. 490=7 C.W.N. 729=30 I. A. 154=30 C. 872 (P.C.)

——Art. 20—Applicability.

A suit for declartion by a third party that money brought into Court in execution of a decree belongs to him and not to the judgment-debtor is governed by Art. 120. 38 M.L.W. 194=A.I.R. 1933 Mad. 503= (1933) M.W.N. 1106=144 Ind. Cas. 602.

——Art. 22—Applicability.

Art. 22 which applies to a suit for damages for personal injury does not apply to proceedings under the Workmen's Compensation Act. 35 Bom. L.R. 1142= A.I.R. 1934 Bom. 28=58 B. 128=149 Ind. Cas. 247.

——Arts. 22 and 36—Damages for assault.

A suit for damages or compensation for injuiry caused to a person's reputation and for mental pain

caused by an assault is governed by Art. 22 and not by Art. 36. Insult arising from an assault does not constitute a separate cause of action. Assault itself is the cause of action though damages can be awarded for the resulting insult. 5 Ind. Cas. 124 (All.).

——Art. 22—Injury—Meaning of.

The term 'injury' in Art. 22, has a wider connotation than physical hurt, and trespass to the person includes voluntary obstruction. 35 M.L.W. 392=A.I.R. 1932 Mad. 432=138 Ind. Cas. 84 (1).

——Art. 22—Injury by seduction of plaintiff's wife.

Suit for damages for an injury caused by seduction of plaintiff's wife is not governed by Art. 22. It is governed by Art. 120. A.I.R. 1936 All. 454=(1936) A.L.J. 574=1936 A.W.R. 515=58 A. 903=163 Ind. Cas. 974.

Reversing—A.I.R. 1935 All. 855=1935 A.L.J. 1003=1935 A.W.R. 956.

——Art. 22—Injury through third person.

A suit for damages resulting from injury caused to plaintiff by the defendant through the instrumentality of a third person is governed by Art. 22 and not by Art. 36 and the suit must be brought within one year from the date when the injury is committed. 84 Ind. Cas. 796=25 Bom. L.R. 1333=A. I. R. 1924 Bom. 290.

——Art. 22—Scope.

Per **Pal, J.**—The claim for compensation for false imprisonment was governed by Art. 22. A.I.R. 1944 Cal. 4=77 C.L.J. 93=212 Ind. Cas. 421.

——Art. 22—Scope.

A suit for damages for obstruction of a person in a temple when she had never been ex-communicated in due form is governed by Art. 22. 35 M.L.W. 392=A.I.R. 1932 Mad. 432=138 Ind. Cas. 84 (1).

——Art. 23—Applicability—Acquittal.

Where the Dt. Magistrate directed further inquiry after cancelling an order of discharge but the High Court set aside the order of the Dt. Magistrate holding that the order of the trying Magistrate amounted to an acquittal, limitation for a suit for damages for malicious prosecution begins from date of the order of the High Court. The second part of the article applies even in cases of acquittal. 57 Ind. Cas. 635 (Mad.)

——Art. 23—Damages resulting from a conspiracy.

A suit to recover damages resulting from a conspiracy falls within Art. 120 or 36 and not within Art. 23. 16 C.W.N. 145=13 Cr.L.J. 65=13 Ind. Cas. 721.

——Art. 23—Distinguished from Art. 2.

Art. 2 will govern a case only when the defendant did an act in the honest belief that he was empowered to do the act by some enactment but if he acts knowing that he has no power under any enactment so to act, a suit for compensation for the wrongful act will fall under Art. 23. 26 All. 482; 13 Mad. 445; 1883 P.R. 160, Ref. 89 Ind. Cas. 861=3 Rang. 268=4 Bur. L.J. 139=A.I.R. 1925 Rang. 311.

——Art. 23—Malicious prosecution—Joint tort—Damages.

A suit for damages for malicious arrest, imprisonment and prosecution against several joint tort-feasors is governed by the one year's rule of limitation under Arts. 19 and 23 of the Lim. Act. Where a suit for damages in respect of such torts would be barred by limitation as against one, it would be barred against all. 40 Cal. 898=18 C.W.N. 185=23 Ind. Cas. 25.

——Arts. 23 and 24—Malicious prosecution—Libel—Proceedings under the Bengal Disorderly Houses Act.

Proceedings under the Bengal Disorderly Houses Act do not constitute a prosecution but only a libel and a suit for damages is governed by Art. 24 and not by Art. 23. 18 C.L.J. 352=20 Ind. Cas. 768.

——Art. 23—Prosecution—Meaning of—Date of its termination—Date of order of discharge by Magistrate or date of upholding that order revision.

The word "prosecution" in Art. 23 of the Limitation Act is used in the general and not in the technical sense. It is used in a wider sense than a trial and will include criminal proceedings by way of appeal or revision before a District Magistrate, a Sessions Court or a High Court. A prosecution is terminated when it is brought to an end or is concluded.. The language implies a final termination or end. Where after an order of discharge is passed by a Magistrate the defendant files an application in revision, so long as the revision application is pending in the Court of the District Magistrate and subsequently in the Court of the Judicial Commissioner, no action for malicious prosecution would be maintainable. The prosecution terminates only on the date when a final order is passed in favour of the plaintiff by the Court of the judicial Commissioner upholding the order of discharge and dismissing the revision application. That is the date from which limitation should be calculated. If the suit is filed within one year from that date, although more than one year after the order of discharge by the Magistrate, the plaintiff's claim is within limitation. I.L.R. (1946) Nag. 358=221 Ind. Cas. 666=1946 N.L. J. 113=A.I.R. 1946 Nag. 46.

——Art. 23—Prosecution case closed on October 30, 1941—Court writing in diary "accused No. 2 is discharged under S. 253 (1), Criminal P. C., charge is framed against accused No. 1" and signing it—Accused No. 1 committed to Sessions on January 24, 1942—Suit by accused No. 2 against complainant filed on January 25, 1943, held barred by limitation.

S. 253 (1), Criminal P. C. does not require any reasons to be stated by the Magistrate for the discharge; so a mere order discharging the accused is a final order even though no reasons are given. Where the prosecution case is closed and an accused is discharged, he does not appear before the Court again and in the subsequent proceedings against the other accused, he is no longer an accused. Incidental reference to discharge of some accused and the reasons for discharge are likely to be found in the introductory paragraphs of the final order dealing with other accused but such reference does not indicate that the discharge takes effect from the date of the final order.

The prosecution case was closed on October 30, 1941, and on that date, the Magistrate wrote in his diary, "Accused No. 2 is discharged under S. 253 (1), Criminal P. C. A charge under S. 379, I. P. C., is framed against accused No. 1 . . . .". This was signed by the Magistrate. He proceeded with the enquiry against accused No. 1 and eventually, on January 24, 1942, committed accused to Sessions. Accused No. 2 filed a suit against the complainant on January 25, 1943: **Held**, that the suit was barred by limitation as accused No. 2 was discharged on 30-10-1941 and not on 24-1-1942. A.I.R. 1945 Mad. 288=(1945) 1 M.L. J. 287=1945 M.W.N. 280=58 M.L.W. 238.

——Art. 23—"Prosecution otherwise terminates" —Suit for damages for malicious prosecution— Termination of trial.

In order to maintain a suit for damages for malicious prosecution, it is not necessary that a formal order of discharge or acquittal should have been made. It is enough if the plaintiff's innocence has been pronounced by the Magistrate. For purposes of limitation time began to run in the case only from the date of the final judgment of the Magistrate pronouncing that plaintiff was innocent and not from the date on which he says in his judgment he came to that opinion. 17 M.L J. 60.

——Art. 23—Scope.

The plaintiff objected to the Rural Reconstruction Society demarcating his land and used abusive language tgwards one of the persons working on behalf of the Society. On a complaint being made, the Chairman of the Society who was also a Magistrate took cognizance of the offence as a Magistrate and prosecuted the plaintiff under S. 504, I. P. C. and ordered his arrest. The prosecution subsequently having been withdrawn, the plaintiff brought a suit for compensation for malicious prosecution and illegal arrest against the Magistrate:

Held, that in view of the frame of the suit, the claim in respect of compensation for malicious prosecution, fell under Art. 23, which was the more specific article and not under Art. 2. A.I.R. 1944 Cal. 4=77 C.L. J. 93=212 Ind. Cas. 421.

——Arts. 23, 36 and 120—Starting point—Suit for damages for maliciously presenting a petition in insolvency against the plaintiff resulting in his adjudication.

On a petition filed by the defendant on 22nd September, 1937, when already there was pending another petition by another creditor, the plaintiff was adjudicated insolvent on 5th October, 1937, and the two petitioning creditors were given their costs, both petitions being heard together. At that time the plaintiff believed that he was indebted to the defendant in respect of share transactions. When the Official Assignee investigated the affairs the claim of the defendant was found to be the result of a fraud played on the plaintiff by the defendant, and the claim was therefore denied. Ultimately the claim was tried as a suit which was unsuccessful. That decision was affirmed on appeal and leave to appeal to the Privy Council having been refused the defendant ultimately applied in London for special leave which was also refused. It was not until somewhere about the 19th November, 1943, when the result of the defendant's application to the Board was received in Madras that the plaintiff knew finally that he was not indebted to the defendant in respect of the transactions. On 24th January, 1944, the plaintiff filed an application for annulment of his insolvency and on 22nd February 1944, the order of annulment was made after notice to the defendant. Then the plaintiff filed his suit on 21st February, 1945, against the defendant for damages for maliciously and without reasonable and probable cause presenting the petition in insolvency against him, as the result of which he was adjudicated insolvent. On a question of limitation:

Held, Art. 23 of the Limitation Act is inappropriate as the word "prosecution" there relates to a case where the criminal law is set in motion. Art. 36 would be more appropriate and prescribes two years as the period of limitation. It cannot be said that that period commences from the date of the filing of the petition. Before a cause of action can arise in respect of an order of a competent Court the order must have been set aside. In the present case until the Privy Council rejected the defendant's application for special leave to appeal, the plaintiff could not have applied for annulment of the insolvency. Even if Art. 36 could be deemed inappropriate there is always available Art. 120 which provides for a period of six years which would amply cover the plaintiff's case. The suit was accordingly in time. I.L.R. (1949) Mad. 29=1948 M.W.N. 142=A.I.R. 1948 Mad. 446=61 M.L.W. 188=(1948) 1 M.L. J. 173.

——Art. 23—Starting point—When plaintiff is acquitted—Meaning of.

Limitation for suit for damages for malicious prosecution begins to run under Art. 23, from the date when the prosecution is terminated by acquittal or otherwise. If acquittal is followed by other proceedings, for example, revision or reference to High Court, the prosecution would terminate not by the acquittal but by the order passed in the subsequent proceedings. The proceedings cannot be said to have terminated when they are pending in any Appellate or Revisional Court. 1942 O. W. N. 446=A. I. R. 1942 Oudh 489=1942 A.W.R. 300 (1)=204 Ind. Cas. 429.

Overruling—A.I.R. 1935 Oudh 392=1935 O.W.N. 619=11 Luck. 237=155 Ind. Cas. 706.

——Art. 23—Starting point—When the plaintiff is acquitted—Meaning of.

If the acquittal is followed by other proceedings, the prosecution is terminated, not by the acquittal but by the order passed in the subsequent proceedings. Where, therefore, a revision petition is filed by the complainant against a discharge or acquittal of the person prosecuted and it is dismissed, the prosecution terminates only on such dismissal and not on the discharge or acquittal. Limitation for a suit for malicious prosecution, therefore, runs from the dismissal of the revision and not from the date of the discharge or acquittal. 47 M.L.W. 314=A.I.R. 1938 Mad. 349 =(1938) M.W.N. 209=(1938) 1 M.L. J. 344=I.L.R. (1938) Mad. 675=174 Ind. Cas. 428 (F.B.).

Overrules—23 M. 24.

——Art. 23—Starting point of limitation.

Under Art. 23, the period of limitation for suits for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted or prosecution is otherwise terminated. Whether case has gone upto High Court in revision it terminates when

the revision is dismissed. A.I.R. 1938 All. 49=(1937) A.L. J. 1281=I.L.R. (1938) All. 89=1937 A.W.R. 1113 =173 Ind. Cas. 669.

——Art. 23—Starting point.

Prosecution terminates by order of discharge by Magistrate—But if matter is taken up in revision by higher authority, prosecution terminates when proceedings in revision come to an end. 1930 A.L. J. 885= A.I.R. 1930 All. 326.

——Art. 23—Starting point.

The suit for malicious prosecution must be brought within one year of the date of discharge of the plaintiff. The cause of action will not be suspended merely on the ground that proceedings may be taken either by Government or by the complainant in order to get the order of discharge set aside. 67 Ind. Cas. 754=24 Bom. L.R. 507=47 Bom. 28=A.I.R. 1922 Bom. 209.

——Art. 23—Suit for damages for malicious prosecution—Limitation.

A suit for damages for malicious prosecution must be brought within a year of the termination of the proceedings in the Criminal Courts, original or appellate. 12 C.L.J. 410=6 Ind. Cas. 675.

——Arts. 23, 24, 25, 36—Suit for damages for malicious prosecution and for injury caused by false report—Distinction between:—See **Malicious Prosecution.** (1902) A.W.N. 96=24 A. 368.

——Art. 24—Applicability.

Where a suit is brought for defamation against a Police Officer in respect of statements in a report submitted in compliance of an order of a Magistrate acting under Chap. XVI, Criminal P. C. the period of limitation is governed by Art. 24 and not Art. 2, Lim. Act. A. I. R. 1937 All. 90=(1937) A.L. J. 20=1936 A. W. R. 1205=I. L. R. (1937) All. 390=167 Ind. Cas. 433.

——Arts. 24, 25, 36—Scope.

Limitation applicable for a suit for damages for malicious prosecution where, though a false accusation was made to the Police against the plaintiff and an investigation was held yet no prosecution was launched is under Art. 24 or 25 and not Art. 36. 39 P.L.R. 686 =A.I.R. 1937 Lah. 709=169 Ind. Cas. 640.

——Art. 27—Applicability.

Where the act complained of was that defendant had improperly got away from the plaintiff, a large number of camels controlled by the plaintiff, for the purposes of his contract but the real complaint was that the defendant had improperly enticed the jamadars of the plaintiff into breaking their contracts by putting the animals which they had contracted to supply to him at the disposition of the plaintiff himself:

Held, that the suit for compensation was governed by Art. 27. 96 Ind. Cas. 887=1926 M. W. N. 592=31 C.W.N. 174=A.I.R. 1926 P.C. 88 (P.C.).

——Art. 28—Applicability—Wrongful distraint of tenant's crops by land-lord—Suit for compensation by tenant—Limitation—Arts. 29 and 36.

Art. 28, Limitation Act, applies specifically to a suit for compensation for illegal, irregular or excessive distress. "Distress" in the Article has the same meaning as distraint. Where a land-lord illegally distraints the crops of his tenant, a suit for compensation for such distraint by the tenant falls under Art. 28 and must be brought within one year. Art. 36 cannot apply as it is a general article and can apply only when there is no other article specifically applicable. Nor can Art. 29 apply, as standing crops are not "movable property" within the meaning of Art. 29. A.I.R. 1940 Bom. 20; 7 C.W.N. 728, foll. 27 Pat. 680.

——Art. 28—Applicability.

Art. 28 is a specific article dealing precisely with a claim to compensation for illegal distress or distraint, for distress has the same meaning as distraint. Therefore, that article applies to claim for compensation for illegal distraint and not Art. 36, which is a general article. Seizure due to want of jurisdiction is contemplated by the provisions of Art. 28. A.I.R. 1940 Bom. 20=41 Bom. L.R. 1223=I.L.R. (1939) Bom. 721=186 Ind. Cas. 509.

——Art. 28—Principal and agent—Liability in tort of principal for acts of agent.

Held, that a suit to recover damages on account of illegal issue of warrant and the subsequent distraint was goverued as to limitation by Art. 28 and not by Art. 2. 1904 A.W.N. 95=26 A. 482=1 A.L.J. 195.

——Art. 28—Standing crops—Attachment of land and crop—Damages.

A suit for damages for the wrongful attachment of land and crops and the consequent loss or destruction of the crops is governed by Art. 39. Standing crops at the time of attachment was immovable property and the attachment of the land with the crop thereon, if illegally made, constitutes a trespass on immovable property. 31 Mad. 431; 23 M.L.J. 511; 32 Cal. 459 and 36 Cal. 141, Ref. 25 M.L.J. 447=(1913) M.W.N. 869=14 M.L.T. 225=21 Ind. Cas. 213.

——Arts. 28 and 39—Starting point.

The starting point for a suit for damages to crops belonging to the plaintiff caused by the cutting by the defendant begins on the date of the appropriation by the defendant. 14 C.W.N. 96=10 C.L.J. 226=3 Ind. Cas. 12.

——Art. 29.

Synopsis.

1. Applicability
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1. Applicability.

——Arts. 29 and 49—Applicability—Suit for recovery of property wrongfully seized from plaintiff coupled with prayer for their price—Claim for damages based onthe wrongful seizure—Damages, if to be deemed to be compensation for the wrongful seizure.

Where the property wrongfully seized from the plaintiff is alleged to be in the possession of the defendants, and the suit is for recovery of the said properties coupled with a prayer for the price of those articles, as should be asked for under O. 20, R. 10, C. P. Code, the plaintiff can take advantage of Art. 49 of the Limitation Act and could not be confronted with Art. 29. Where the goods wrongfully seized from the plaintiff had been sold and thereby passed into the hands of third parties, a suit against the defendant for the loss caused to the plaintiff by such wrongful seizure and sale, being the price of the goods so sold, would be governed by Art. 29 and it should be brought within one year from the date of seizure. Where damages are also claimed and the justification for the claim is the wrongful seizure of the articles, such damages should be deemed to be compensation for such wrongful seizure and Art. 29 would apply to such cases. 1950 M. W. N. 345=A. I. R. 1950 Mad. 734=(1950) 1 M.L. J. 799.

——Arts. 29, 48 and 49—Applicability—Attachment of tailor's sewing machine and entrustment to sureties—Vital parts of machine removed during period of custody of sureties—Subsequent raising of attachment—Suit by tailor for return of machine in original condition or for damages —Limitation.

Art. 29 of the Limitation Act only governs cases where there has been an attachment which is found to have been wrongful, because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds, and in which there are no additional factors such as mis-appropriation or theft or conversion of the attached property. Where a sewing machine, which is the sole means by which a tailor earns his livelihood, is attached before judgment and entrusted to sureties, and the attachment is afterwards raised on the application of the tailor who objects to the attachment on the ground of the machine being not liable to attachment under S. 60, C.P. Code, being the tool of an artisan, a suit by the tailor for return of the machine in the condition in which it was attached and removed from his possession, or for damages, it being found that certain vital parts of the machine have been removed from the machine while in possession of the sureties, falls for purposes of limitation, not under Art. 29, but under Art. 48 or Art. 49 of the Limitation Act. 226 Ind. Cas. 464= 1946 M. W. N. 256=A.I.R. 1946 Mad. 453=(1946) 1 M.L. J. 241.

——Art. 29—Applicability.

Art. 29 applies to a suit for compensation for wrongful seizure of movable property under legal process. It has no application to a suit for compensation for wrongful removal of attached property. 58 M.L.W. 108 (2)=I.L.R. (1945) Mad. 784=(1945) 1 M.L. J. 265 =1945 M.W.N. 160=A.I.R. 1946 Mad. 33.

——Arts. 29 and 36—Applicability—Illegal distraint of tenant's crops by land-lord—Suit by tenant for compensation—Limitation. See: Limitation Act, Art. 28. 27 Pat. 680.

——Arts. 29, 49—Applicability.

A car was bought by the appellant from one M. After it had been delivered to him by M, it was attached by one A in execution of a decree obtained against M. The appellant objected to the attachment and applied for its removal. During these proceedings, M was adjudicated an insolvent and on this event happening the bailiff of the Court, who was in possession of the motor car, delivered it over to the Receiver in insolvency. The appellant having been successful in his efforts to recover possession of the car, filed a suit for the recovery of a sum as damages which he said he suffered as a result of the wrongful seizure. He contended that the damages which he claimed were suffered after the bailiff had handed over the possession of the motor car to the Receiver in insolvency and it was not a case of damages for wrongful seizure of the motor car, but damages for wrongful detention of the car by the Receiver:

Held, that the cause of action was the seizure of the motor car by the bailiff and Art. 29 covered the case. Limitation having started, it continued and the cause of action, therefore, expired 12 months from the date of seizure. The cause of action was not a continuing one. The fact that the custody of the motor car was transferred from the bailiff to the Receiver made no difference to the case. They were both officers of the Court, and each was in possession of the property pending the final directions of the Court with regard to its ownership. Art. 29 directly covered the case and, therefore, Art. 49 could not be applied. A.I.R. 1937 Rang. 523=174 Ind. Cas. 240.

——Art. 29—Applicability.

Where certain property is sold in execution of a decree on the decree-holder giving undertaking to the objector that the price would be refunded on the success of the objector, a suit by the latter on his success in the claim suit for refund of that price is governed by Art. 83 and not by Art. 29. A.I.R. 1938 Lah. 196=39 P.L.R. 948=175 Ind. Cas. 630.

——Art. 26—Applicability—Starting point.

The defendants obtained a decree against another person and attached certain movables. The plaintiff's father objected and a half share in the movables attached was released from attachment. The plaintiff's father then instituted a suit for establishing his title to the remaining half. He failed in the first Court but obtained a decree in his favour on appeal. The properties were meanwhile sold. The plaintiff applied for recovery of their value and the proceedings terminated against him. The plaintiff thereupon instituted a suit for declaration that the sale was void and for recovery of the value of the properties:

Held, that the suit was governed by Art. 29 and the cause of action arose on the date on which the goods were seized and the suit was, therefore, time-barred. 13 N.L. J. 209=A.I.R. 1931 Nag. 47=130 Ind. Cas. 157.

——Art. 29—Applicability.

Art. 29 is applicable only to the seizure and does not govern any suits arising out of what happens later at the time of sale. 85 Ind. Cas. 24=5 L.L. J. 289=A.I.R. 1924 Lah. 136.

——Art. 29—Applicability.

A suit for compensation for wrongful seizure of movables is governed by Art. 29; but a suit for compensation for wrongful attachment of movables by the issue of a prohibitory order is governed by Art. 36 and not by Arts. 42, 46, 62 or 120. Art. 36 is a general article covering all possible acts and omissions commonly known as torts, that is, wrongs independent of contract and which are not provided for by other articles. 6 O.L.J. 394=22 O.C. 201=53 Ind. Cas. 98.

——Art. 29—Applicability.

A suit to recover money received by the deft. in the form of rent under a decree of a Court in respect of property of which the plaintiff was entitled to possession and also to rent is not covered by Art. 29, but is governed by Art. 62. 38 All. 676=14 A.L.J. 728=35 Ind. Cas. 86.

2. Arrest of ship.

——Arts. 29, 39 and 49—Arrest of ship—Trespass—Action in rem—Damages—Limitation.

In the absence of proof of malice or its equivalent a suit for simple trespass will not lie for the arrest of a ship. The arrest of the ship is a judicial act of the Court and an ordinary step in an action **in rem** assuming that an action would lie in the absence of proof of malice or its equivalent the action would be for wrongful seizure under legal process and would be barred by Art. 29 of the Lim. Act. 42 Cal. 85=28 Ind. Cas. 463.

3. Attachment before judgment.

——Art. 29—Attachment before judgment.

Art. 29 applies to all cases of attachment before judgment where specific property is seized, and the seizure is wrongful not only when the Court had no jurisdiction, but also when the attachment was obtained on insufficient grounds. Further it makes no difference whether the property attached belongs to the defendant or to a third party. 38 M.L.J. 324 and A.I.R. 1921 Cal. 774, Not foll. 53 Mad. 621=59 M.L.J. 859=31 M.L.W. 675=1930 M.W.N. 305=A.I.R. 1930 Mad. 635.

——Art. 29—Attachment before judgment.

In a suit against the plaintiff by the defendant for recovery of money, plaintiff's property was attached before judgment. The suit was decreed by the first Court but dismissed by the appellate Court. Plaintiff sued to recover compensation for loss of profits, etc:

Held, Art. 29 does not apply to the suit, for Art. 29 is applicable only to those cases in which the seizure is intrinsically wrongful or perhaps to cases where the seizure is made without jurisdiction. The proper article to be applied is Art. 49 and time for suit runs from the date of appellate decree and not from the date of attachment. 81 Ind. Cas. 1038=22 A.L.J. 977=5 L.R.A. Civ. 732=A.I.R. 1925 All. 131.

——Art. 29—Attachment before judgment.

A suit for damages on account of injury to stock caused by making an attachment before judgment is covered by Art. 36. But a suit for damages on account of the sale of the goods attached before judgment, at a low price and for injury to trade and reputation due to the attachment itself is governed by Art. 29. 38 M.L.J. 324=(1920) M.W.N. 192=27 M.L.T. 259=11 L.W. 479=55 Ind. Cas. 786.

——Art. 29—Attachment before judgment—Suit for compensation—Limitation—Terminus a quo.

The limitation applicable to a suit for damages on account of the alleged unlawful attachment before judgment of a shop belonging to the plaintiff was that prescribed by Art. 29 and that limitation began to run from the date of the attachment. 23 M. 621; 27 M. 246; 24 W.R. 298, foll. 6 B.L.R. 704, dist. **Semble**:—That such an attachment, if wrongful, is not a continuing wrong within the meaning of S. 23. 1907 A.W.N. 194=4 A.L.J. 548=29 A. 615.

4. Attachment of debt.

——Art. 29—Attachment of debt—Assignee of debt—Suit for recovery.

Attachment by decree-holder of debt due to judgment-debtor does not amount to 'wrongful seizure of immovable property' within Art. 29 as the attachment is not effected by actual or constructive seizure but only by a written order. A debt due to a judgment-debtor was attached by his decree-holder and when the debtor paid the money into Court, it was paid over to the attaching creditor. A third person claiming to be assignee of the debt before attachment sued for recovery of the money. **Held** neither Art. 29 nor Art. 36 applied. The article applicable was either 62 or 120 and time runs from the date the attaching creditor received the money from the Court. 38 Mad. 972=26 M.L.J. 166=1 L.W. 162=(1914) M.W.N. 348=22 Ind. Cas. 870 (F.B.)

——Art. 29—Attachment of debt—Payment by debtor.

Per **Sundara Aiyar, J.**—A suit to recover the amount of debt paid by the debtor on attachment by a Court is governed by Art. 62 or 120, and not by Art. 29, because debt is not movable property. (2) There is no seizure under legal process, the debtor having voluntarily paid the amount. (3) The suit is not for compensation for wrongful seizure of movable property. (4) The article applies only where the Court is able to reduce the property to possession and does so at the instance of the judgment-creditor. 31 M. 431 and 8 Bom. 17, Diss. Per **Sadasiva Aiyar, J.**—The suit is governed by Art. 29 because (1) attachment amounted to wrongful seizure, (2) the suit was for compensation for wrongful seizure of movable property. 12 M.L.T. 458=23 M.L.J. 519=(1912) M.W.N. 1179=16 Ind. Cas. 914. (On appeal 22 Ind. Cas. 870)

5. Attachment of property.

——Arts. 29 and 36—Attachment of property—Claim allowed—Suit for declaration—To ignore the claim.

A property was attached by **P** over which plaintiff's predecessor claimed a lien. The claim was allowed by the executing Court and **P** brought the present suit for a declaration that the plaintiff's predecessor

had no claim. The suit was decreed and proceeds of the attached property were rateably distributed among **P** and certain other creditors but the decree obtained by **P** was reversed in appeal and the plaintiff sued him and the other creditors to recover sums paid, in satisfaction of their claim. **Held** that the suit was not governed either by Art. 29 or by Art. 36 as there was not a seizure of money and the defts. were not guilty of any non-feasance, mis-feasance, or mal-feasance in respect of the money. 39 All. 322=15 A.L.J. 295=39 Ind. Cas. 532.

——Art. 29—Attachment of property—Suit for compensation for wrongful attachment.

See: Art. 36. 6 Bom. L.R. 704.

——Arts. 29, 42—Attachment of property—Suit for compensation for wrongful attachment or seizure.

Where the defendant caused a warrant of attachment to issue and the warrant was executed by affixing the Court seal to the outer door of the warehouse without breaking open the door and taking physical possession of the jaggery inside:

Held, that the attachment amounted to actual seizure within the meaning of S. 269, C. P. C., and that a suit for damages is governed by Art. 29 and not by Art 42. 27 M. 346.

6. Computation of limitation.

——Art. 29—Computation of limitation.

In a suit for damages for wrongful attachment, the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted. A.I.R. 1934 Rang. 329=13 R. 43=154 Ind. Cas. 153.

7. Distinction between Art. 29 and Art. 11.

——Art. 29, 11—Distinction between.

Art. 11 deals with a suit by a person to establish his right to or to the present possession of the property comprised in the order while Art. 29 deals with a suit for compensation for wrongful seizure of movable property under legal process. Where a plaintiff sued for the value of the property recovered in execution the suit is not barred if brought after a year of the date of the order since Art. 29 governs the suit and not Art. 11. 4 Bur. L.T. 45=9 Ind. Cas. 773.

8. Essentials for application.

——Art. 29—Essentials for application.

Art. 29 must be interpreted to apply only to the seizure and not to govern any suits arising out of what happens later at the time of sale. A.I.R. 1938 Lah. 196=39 P.L.R. 948=175 Ind. Cas. 630.

——Art. 29—Essentials for application.

There can be wrongful seizure only where the property is in possession of the person. No doubt constructive possession also will do, but when there is no right to possession, there can be no wrongful seizure and Art. 29 has no application. 38 All. 676, Rel. on. 4 M.L.T. 271, Dist. 123 Ind. Cas. 362=A.I.R. 1930 Mad. 349.

——Art. 29—Essentials for application.

In order to bring the case under Art. 29, it must be shown that the seizure was wrongful under legal process. Where the writ is issued by Court **prima facie** the seizure is not wrongful.

Where the writ is not without jurisdiction and the Court has jurisdiction over the subject-matter, Art. 29, is inapplicable unless the writ is executed against a person who was no party to the decree or with respcet to goods outside the scope of the writ, Art. 29 is inapplicable. 19 Mad. 80 and 55 Ind. Cas. 786, Foll.

So long as the writ is not set aside, the seizure cannot be said to be wrongful except in instances such as mentioned above. 64 Ind. Cas. 513=35 C.L.J. 480=A.I.R. 1921 Cal. 774.

9. "Legal process."

——Art. 29—"Legal process," meaning of.

The words "legal process" in Art. 29, denote procedure by some sort of Court, and the Collector acting under S. 154, Bom. Land Revenue Code, is not acting as a Court. He is really acting as a creditor. He, as the officer entitled to recover arrears of land revenue, is given power to seize the defaulter's goods. He is in a position analogous to that of a creditor who is given power under the contract to seize his debtor's goods, if his money is not paid. Legal process does not merely mean process according to law, otherwise seizure under a valid contract would be just as much seizure according to law as seizure under a statute. A.I.R. 1942 Bom. 300=44 Bom. L.R. 668=203 Ind. Cas. 611.

——Art. 29—"Legal process".

A distraint effected under Agra Tenancy Act (II of 1901) is a seizure of movable property under legal process because it is done under the special provisions of the Local Act and subject to the due observance of the procedure therein laid down. 75 Ind. Cas. 922=A.I.R. 1924 All. 828.

——Art. 29—"Legal process".

The process meant by Art. 29 refers to the process under which seizure takes place. 84 Ind. Cas. 6=20 N.L.R. 189=7 N L.J. 140=A.I.R. 1924 Nag. 248.

10. Money paid by mistake.

——Arts. 29 and 62—Money paid by mistake into Court—Suit to recover.

A suit to recover money voluntarily paid into Court by a deft. under a mistaken belief and wrongly paid out to the decree-holder is governed not by Art. 29 but by Art. 96 or 120. 49 P.W.R. 1910=6 Ind. Cas. 654.

11. Prohibitory orders.

——Arts. 29, 36—Prohibitory order—Compensation for.

A suit for compensation for wrongful attachment of movables by the issue of prohibitory order is governed by Art. 29 or 36 and not by Arts. 42, 46, 62 or 120. An attachment by a prohibitory order is not injunction within the meaning of Art. 42. 31 M. L. J. 257=35 Ind. Cas. 98.

——Arts. 29, 62 and 120—Prohibitory order—Damages.

Neither attachment of a debt nor voluntary payment of it into Court constitutes seizure of movable property under legal process. A prohibitory order under O. 21, R. 46 does not amount to seizure within Art. 29 of the Lim. Act. 38 Mad. 972=26 M.L.J. 166=1 M.L.W. 162=(1914) M.W.N. 348=22 Ind. Cas. 870.

12. Seizure.

——Art. 29, S. 23—Seizure—Wrongful seizure.

Where property of a stranger is wrongfully attached by a decree-holder in execution of a decree against his judgment-debtor, a suit by stranger for compensation for wrongful seizure is governed by Art. 29. Such a wrongful seizure is not a continuing wrong within S. 23 of the Act. Limitation runs from the date of seizure and a fresh cause of action does not arise during the course of attachment as once the property is attached, the judgment-creditor does nothing more. The judgment-creditor has no duty analogous to that of a bailee towards a stranger in respect of property attached. A.I.R. 1940 Rang. 276=1941 Rang. L.R. 1 =192 Ind. Cas. 625 (F.B.).

——Art. 29—Seizure.

Where amount deposited by Receiver appointed under O. 40, R. 1, Civil P. C., is attached and paid to a person and a suit to recover back such amount is filed, it is not governed by Art. 29, since the attachment is neither seizure within the meaning of the article nor wrongful. A.I.R. 1938 Lah. 493=40 P.L.R. 685=176 Ind. Cas. 731.

——Art. 29 and 49—Seizure—Movables illegally seized in execution of decree.

A suit to recover price of movables illegally seized in execution of decree is one for illegal seizure of property in execution and comes under Art. 29 or 49 of the Act. 14 Ind. Cas. 182 (Mad.).

——Arts. 29 and 120—Seizure—Recovery of value of movable property wrongfully seized.

A suit for recovery of the value of movable property wrongfully attached and sold is governed by Art. 29 and not by Art. 120. 4 Bur. L. T. 46=9 Ind. Cas. 774.

13. Standing crops.

——Art. 29—Standing crops—Damages for crops attached.

In the case of a suit for damages representing the value of crops which has been wrongfully attached, cut and removed, the pertinent articles are 48 and 49 and not 29 or 36, Limitation Act. 105 Ind. Cas. 763= A.I.R. 1928 Cal. 106.

——Art. 29—Standing crops—Seizure of.

Where the wrong is solely the seizure of standing crops, Art. 29 does not apply. Art. 37 may apply but a suit for damages for unlawfully distraining, cutting, and carrying away the crops is not governed by Art. 36 but is governed either by Art. 48 or 49. 17 C.W.N. 308= 17 C.L.J. 206=18 Ind. Cas. 253.

——Art. 29—Standing crops—Suit to recover compensation.

A suit to recover the value of standing crops wrongfully cut and carried away is not one to recover compensation within Art. 29 as immovable property defined in the General Clauses Act, S. 3 (25) includes standing crops and the definition of movable property given in S. 2 (13) does not govern the Lim. Act. 18 M.L.T. 532=31 Ind. Cas. 796.

——Art. 29—Standing crops—Wrongful attachment—Damages—Limitation.

Standing crops are not 'movable property' within Art. 29 and a suit for damages for the wrongful attachment of such crop is not governed by Art. 29 or any other article requiring the institution of a suit within one year. 11 N.L.R. 18=27 Ind. Cas. 935.

——Art. 29—Standing crops—Wrongful attachment—Damages.

A suit for damages for the wrongful attachment of land and crops and the consequent loss or destruction of the crops is governed by Art. 39. Standing crops at the time of attachment was immovable property and the attachment of the land with the crop thereon, if illegally made, constitutes a trespass on immovable property. 25 M.L.J. 447=(1913) M.W.N. 869=14 M.L.T. 225= 21 Ind. Cas. 213.

——Art. 29—Standing crops—Illegal attachment—Suit for damages.

Per **Sundara Aiyar, J.**—Where a suit for damages for the value of the standing crops cut during attachment is brought after a suit for declaration that the attachment is illegal has terminated, it is governed by Art. 62 or 120 and the cause of action arises on the termination of the suit, declaring the attachment illegal. Per **Sadasiva Aiyar, J.**—The suit is governed by Art. 29 or 36 and the cause of action arises from the date of attachment. 23 M.L.J. 620=(1912) M.W.N. 1222=17 Ind. Cas. 185.

——Arts. 29, 36—Standing crops—Suit for damages for illegal distraint of.

A suit for damages for illegal distraint of standing crops is governed by Art. 36 and not by Art. 29. 9 C.W.N. 376=32 C. 459.

14. Starting point of limitation.

——Art. 29—Starting point of limitation.

In a suit for damages for the unlawful attachment and seizure of certain properties, the date from which time begins to run is the date of the seizure and not the date of the attachment and consequently, it is immaterial whether the attachment is or is not a continuing wrong. 13 R. 43=A.I.R. 1934 Rang. 329=154 Ind. Cas. 153.

——Art. 29—Starting point.

Under Art. 29 time begins to run from the date of the actual seizure and not from the date the seizure is declared wrongful by a competent Court. For the seizure is wrongful **ab initio**. It does not become wrongful when declared to be so by the Court. 53 Mad. 621=59 M.L.J. 859=31 M.L.W. 675=1930 M.W.N. 305=A.I.R. 1930 Mad. 635.

15. Miscellaneous.

——Art. 29—Suit for damages for non-cultivation.

A suit for damages for non-cultivation of land is governed by Art. 29 or 36. 14 C.W.N. 96=10 C.L.J. 226=3 Ind. Cas. 12.

——Art. 29—Suit for damages for fraud:—See Art. 95. 27 Mad. 343.

——Arts. 29, 62, 120—Suit for money due on decree assigned to plaintiff—Plaintiff barred at time of receipt by deft.

Where plaintiff, an assignee decree-holder, was legally barred from collecting the money due on the decree assigned to him, and the assignors received the amount and entered satisfaction and the plaintiff brought a suit against the assignors for recovery of the amount collected by them, **held** that the proper article applicable to the case was not Art. 29 or 62 but Art. 120. (1911) 1 M.W.N. 220=9 M.L.T. 465=21 M.L.J. 705=10 Ind. Cas. 658.

——Art. 29—Suit for rateable distribution.

On the dismissal of an application for rateable distribution of the proceeds of the movable property of the judgment-debtor, a suit brought more than one year after attachment is governed by Art. 29. 10 M.L.T. 381 =12 Ind. Cas. 406.

——Art. 29—Suit for surplus sale proceeds wrongly taken out in execution.

A suit to recover the surplus proceeds of a sale held under Regulation VIII of 1819, wrongly taken out by the defendant in execution of a decree against a third party, does not come under Art. 29. 8 B. 17, diss. from. (1902) 30 C. 440=7 C.W.N. 520.

——Arts. 29, 49, 62, 120—Suit for value of property attached and sold wrongfully—Cause of action—C.P.C., S. 283.

Per **Full Bench (Sankaran Nair, J. (dissentiente).** —A suit for the value of paddy wrongfully attached by defendants in execution of a decree and sold is governed by Art. 29 and limitation begins to run from the date of the wrongful seizure. Per **Sankaran Nair, J.** —The article applicable is either Art. 62 or Art. 120, and the cause of action arises from the date of distribution of the sale proceeds among the defendants. **Per White, C. J.**—Art. 29 is not restricted in its application to claims for consequential damages. Per **Pinhey, J.**—S. 283, C.P.C., and Art. 11 of the Limitation Act do not affect the scope of the other articles of the Limitation Act. 18 M.L.J. 590=4 M.L.T. 271=31 Mad. 431 (F.B.).

——Art. 30.

Synopsis.

1. Applicability.
2. Burden of proof
3. "Carrier"
4. Injury to goods
5. Interpretation
6. Loss in transit
7. Loss of goods deposited in cloak room
8. Loss of goods
9. Mis-delivery, not non-delivery
10. Non-delivery
11. Starting point for limitation.

1. Applicability.

——Art. 30—Applicability—Plaintiff not knowing if his goods were lost or destroyed.

Art. 30 of the Limitation Act relates to a suit brought by a consignor in the form of a plaint for loss in circumstances pleaded of some specific loss having occurred on some specific date in some specific manner which the plaintiff is making the basis of his claim. It cannot apply to a case where the plaintiff does not know whether his goods were lost or destroyed. 2 D.R. 35.

2. Burden of proof.

——Art. 30—Burden of proof.

The plaintiff sued a railway company for damages for loss of part of the goods consigned to them for carriage and which where in their custody for some months. The plaintiff discovered the loss on the date on which he was permitted by the company to remove the remaining part of the consigned goods:

Held, that in the absence of other evidence, the Court was entitled to assume that the loss occurred on the date on which the plaintiff was permitted to remove the goods and not earlier. As the facts were specially within the knowledge of the railway company, S. 106 of the Evidence Act applied, and the burden was upon them to prove the date of the loss once the plaintiff adduced **prima facie** evidence in that behalf. I.L.R. (1947) Nag. 726=1947 N.L.J. 540=A.I.R. 1947 Nag. 224.

——Art 30—Burden of proof.

It is now well settled that all suits against carriers in respect of goods delivered to them for carriage fall under Art. 30 or Art. 31, according as the claim is regarded as one based upon loss of or injury to the goods or non-delivery thereof. The onus of proving that the loss took place more than a year before suit and that, therefore, the suit was barred under Art. 30, would lie on the defendants. **View of Chatterjee, J.** in 44 Cal. 16, **held not sound.** 116 Ind. Cas. 148=A.I.R. 1928 Cal. 371.

3. "Carrier."

——Arts. 30, 31—'Carrier', meaning of.

Upon the plain, unambiguous and unequivocal words of Arts. 30 and 31, the word 'carrier' is of a wider meaning than the expression 'common carrier' and it is wide enough to cover the case of a railway owned or controlled by Govt. Even though for the purposes of the Carriers Act, they are not common carriers, it would be a misuse of language to say that railways which carry goods for reward are not carriers. It would not be right to interpolate into Art. 30 the

qualifying restriction implied by the word 'common' as applied to carriers. I.L.R. (1937) 2 Cal. 614=A.I.R. 1938 Cal. 298=175 Ind. Cas. 196.

——Art. 30—Carrier—Damage to goods.

A carrier is one who conveys goods for hire or for reward. A Port Trust Board which merely stores and delivers goods to the ships calling at the port is not a carrier and a suit for compensation for damage to goods against the Port Trust is not governed by Art. 30. 4 S.L.R. 236=10 Ind. Cas. 972.

4. Injury to goods.

——Art. 30—Injury to goods.

Suit for compensation against railway company—Deterioration of goods due to continued negligence of railway servants—Continuing cause of action—Measure of damages. See Limitation Act, Ss. 23, 24 and Art. 30. 1947 N.L.J. 540=A.I.R. 1947 Nag. 224.

——Art. 30—Injury to goods—Suit for compensation against carrier.

A suit for compensation for injury to goods while in the possession of a carrier, e.g., a Railway Company falls under Art. 30. 11 S.L.R. 103=45 Ind. Cas. 173.

5. Interpretation.

——Art. 30—Interpretation.

The words "against a carrier for losing or injuring goods" obviously suggest not a mere loss of the goods to the owner which might be caused by mis-delivery, but an actual losing of goods by the carrier himself. 68 Ind. Cas. 981=20 A.L.J. 792=45 All. 43=A.I.R. 1923 All. 22.

6. Loss in transit.

——Art. 30—Loss in transit by Railway—Starting point—When shortage is ascertained.

Where a parcel consigned to railway arrived on 10th August, 1918, but the consignee ascertained shortage and loss only on 26th August, 1918, when the parcel was opened and delivery was given:

Held, that the cause of action to claim price and damages arose on 26th August, 1918, and not on the 10th August, 1918. 75 Ind. Cas. 669=A.I.R. 1923 All. 342.

7. Loss of goods deposited in cloak room.

——Arts. 30 and 31—Loss of goods deposited by passenger in cloak-room.

Arts. 30 and 31 of the Limitation Act have no application to a suit against the Railway Administration in respect of loss of goods deposited by a passenger in a cloak-room. A.I.R. 1949 Cal. 591=53 C.W.N. 406.

8. Loss of goods.

——Art. 30—Loss of goods—Suit against Railway Company—Negligence or theft by Company's servants.

A suit by consignor against a Railway Company for compensation for loss of goods owing to the loss caused by negligence of or theft by the Company's servants is governed by Art. 30. 30 C.W.N. 696=38 Ind. Cas. 502.

9. Mis-delivery, not non-delivery.

——Art. 30—Mis-delivery, not non-delivery.

A carrier does not lose goods under the article where he really mis-delivers though an actual loss does not occur to the owner. The loss referred to must be by the carrier himself. 170 P.L.R. 1913=122 P.W.R. 1913=19 Ind. Cas. 477.

10. Non-delivery.

——Arts. 30 and 31—Non-delivery due to loss of goods—Suit for compensation—Limitation.

A suit for compensation against the Railway Administration for non-delivery of goods due to their loss, is governed by Art. 30 of the Limitation Act, and the date of the loss which is the starting point of limitation should be taken to be the date on which the loss was first discovered in the absence of any evidence on the point. Art. 31 of the Act applies to all cases of non-delivery other than those due to the loss of the goods. A.I.R. 1950 Cal. 394.

——Arts. 30 and 31—Non-delivery of goods—Suit for damages.

Where in a suit against the Railway Administration for damages for non-delivery of consignment of goods, no objection is taken that the form or cause of action is incorrect or that the claim should have been for loss or injury and further upon the evidence the defendants have not established that the goods were lost by fire as alleged by them, Art. 31 and not Art. 30 of the Limitation Act applies to the suit. A.I.R. 1947 Cal. 98.

——Art. 30—Non-delivery of goods.

Where a suit fris amed as a suit to recover compensation for non-delivery of goods Art. 31 applies, and not 30; and the cause of action is the failure of the defts. to perform their contract. It is not a case of mis-feasance. 13 S.L.R. 1=51 Ind. Cas. 570.

11. Starting point for limitation.

——Art. 30—Starting point of limitation.

To a suit against carrier for compensation for injuring goods, article applicable is Art. 30, and the time begins to run from the date when the injury was actually caused and not from the date of the plaintiff's knowledge. The burden of proving when the injury was caused is upon the carrier. A.I.R. 1941 Cal. 304=199 Ind. Cas. 437.

——Art. 30—Starting point of limitation.

Under Art. 30, time begins to run when the loss or injury occurs. Consequently, where it is proved by the admission of the consignee's letter of August 5, 1931 that the loss had occurred prior to that date, a suit brought on October 15, 1932 is clearly barred. The plaintiff cannot claim that the time runs only from the date of open delivery to him by the company. A.I.R. 1935 All. 407=(1935) A.L.J. 398=1935 A.W.R. 141=157 Ind. Cas. 46.

——Art. 30—Starting point.

Where on the date on which the consignees apply for delivery, the goods are missing and where there is nothing to show that the goods were lost prior to that date, time will run only from that date. 87 Ind. Cas. 579=47 All. 549=23 A.L.J. 398 =A.I.R. 1925 All. 656.

——Art. 30—Starting point.

A case of loss of portion of consignment undelivered is equivalent to a case of short delivery and time begins to run when the loss occurs, i.e., when the short delivery which constituted the loss is made. 71 Ind. Cas. 565=4 P.L.T. 331=A.I.R. 1923 Pat. 298.

——Art. 30—Starting point.

Where a Railway Company has not proved that the goods were lost more than one year before the institution of the suit, a suit brought within one year from the date of refusal to deliver is not barred either by Art. 30 or 31. 23 M.L.J. 511=17 Ind. Cas. 419.

——Art. 31.

Synopsis.

1. Applicability
2. Carrier
3. Starting point.

1. Applicability.

(a) Non-delivery of goods
(b) Non-delivery due to conversion or mis-delivery
(c) Suit by consignor and consignee.

1 (a). Applicability—Non-delivery of goods.

——Art. 31—Applicability — Non-delivery by Railway.

A suit for non-delivery is governed by Art. 31 and not by Art. 30. A.I.R. 1925 Pat. 727, Foll. 103 Ind.Cas. 383=8 P.L.T. 767=A.I.R. 1927 Pat. 335.

——Arts. 31 and 115.

Article 31 and not Art. 115 applies to a suit for damages for non-delivery of goods against a Railway Company. 89 Ind. Cas. 672=6 P.L.T. 559= 4 Pat. 482=A.I.R. 1925 Pat. 611.

——Art. 31—Applicability—Non-delivery.

When in a suit for compensation for non-delivery of goods brought against a Railway company there is nothing to show that the plaintiff was being put off from seeking his remedy on account of any conduct of the defendant, Art. 31 applies to the case. 33 All. 543, Foll. 87 Ind. Cas. 763=6 L.R.A. Civ. 414=A.I.R. 1925 All. 780.

——Arts. 31 and 115.

A suit against a carrier for compensation for non-delivery of goods consigned to him is governed by Art. 31 and liable to be dismissed if brought after the lapse of one year from the time the goods ought to have been delivered. Article 115 of the Act applies only to suits for compensation for breach of any contract not specially provided for in the Act. 70 Ind. Cas. 857=A.I.R. 1922 Cal. 330.

——Art. 31—Suit for damages for non-delivery.

The limitation applicable to a suit by consignor of goods against a Railway Administration for damages for non-delivery is the one prescribed by Art. 31. 42 All. 390=18 A.L.J. 377=2 U.P.L.R. (All.) 84=58 Ind. Cas. 547.

——S. 31—Suit for damages for non-delivery by carrier.

A suit for damages for non-delivery of goods by a carrier is governed by Art. 31, Sch. of the Lim. Act. 42 Ind. Cas. 536 (Mad.).

——Arts. 31 and 49—Non-delivery of goods—Suits against carrier.

A suit against a carrier for non-delivery of goods is governed by Art. 31 and not by Art. 49 which will apply only when there is proof that the goods are still in the possession and custody of the carrier. 24 Ind. Cas. 676 (Mad.).

——Art. 31—Applicability—Suit against Railway Company.

A suit against a Railway Company for compensation for non-delivery of goods is governed by Art. 31. 33 All. 544=8 A.L.J. 543=10 Ind. Cas. 122.

——Arts. 31 and 115—Carrier—Non-delivery of goods—Suit for compensation—Limitation.

A suit for damages against a carrier for failure to deliver goods falls under Art. 31 and not under 115. 13 C.W.N. 851= 3 Ind. Cas. 469.

——Arts. 31, 115—Compensation—Suit against carrier—Acknowledgment—Carriers—Non-delivery—Damages.

The plaintiff delivered to defendants 200 cases of oil for carriage from Bombay to Jeddah. The steamer reached Jeddah on the 11th July, 1900, where the defendants' agents delivered only 165 cases and granted to the consignee a certificate that 35 cases were short delivered. On the 15th November, 1900, plaintiff, on receiving this certificate, made a claim in writing to the defendants in Bombay. On the 18th July, 1901, the defendants, at plaintiff's request, wrote to their Jeddah agent for the 35 cases, and handed up the letter to plaintiff for being forwarded to Jeddah. On 20th December, 1901, they again wrote to their Jeddah agent for the cases and entrusted the letter to plaintiff to be despatched to Jeddah. On the 20th January, 1902, plaintiff sued defendants for damages for non-delivery of 35 cases. Held, that the suit was governed by Art. 31 and not by Art. 115. (1902) 4 Bom. L.R. 447=26 B. 562.

——Arts. 31 and 62—Sale by Railway—Suit for surplus sales proceeds.

Where the Railway Company has sold the goods in exercise of the powers conferred by S. 56 of

the Railways Act, a suit by the consignor to recover the surplus sale proceeds from the Railway Company is governed by Art. 62 and not Art. 31. Such a suit is entirely different from a suit for compensation for non-delivery of the goods. 62 Ind.Cas. 742=44 Mad. 823=13 M.L.W. 693=1921 M.W.N. 422=30 M.L.T. 21=A.I.R. 1921 Mad. 362=41 M.L.J. 205.

1 (b). Applicability—Non-delivery due to conversion or mis-delivery.

——Arts. 31 and 30—Applicability—Suit for non-delivery of goods.

Art. 31 of the Limitation Act applies to any suit against a carrier for compensation for non-delivery or delay in delivering goods, irrespective of the cause of the non-delivery. This article should not be interpreted as excluding all cases in which goods had been lost, destroyed or mis-delivered. A carrier is not entitled to set up a loss, whether or not such loss amounts to a tort to the goods, to bring a suit within the shorter period contemplated by Art. 30 when it clearly falls within Art. 31. I.L.R. (1947) Kar. 144=A.I.R. 1948 Sind 26.

——Art. 31—Scope—Conversion by carrier.

A suit against a carrier for compensation for non-delivery of goods is governed by Art. 31 whether the non-delivery is due to conversion or any other reason and not by Art. 49. 31 N.L.R. 79 Sup.=A.I.R. 1936 Nag. 21=161 Ind. Cas. 867.

——Art. 31—Scope—Conversion by carrier.

A suit for wrongful conversion of goods cannot be called one for compensation for non-delivery but is one for damages for tort and Art. 31, does not apply to it. A.I.R. 1935 All. 156=(1935) A.L.J. 61=1935 A.W.R. 37=159 Ind. Cas. 40 (2).

——Art. 31—Cause of action.

A suit against a carrier for compensation for non-delivery of goods is governed by Art. 31 whether the non-delivery is due to conversion or to any other reason. Non-delivery may be due to many causes of which conversion is one, but the cause of action is the non-delivery of the goods, whether due to loss, theft, destruction, conversion or mis-delivery to somebody else. 90 Ind. Cas. 135=A.I.R. 1926 Nag. 57.

——Art. 31—Applicability.

Whether the suit for non-delivery of goods is laid in tort or contract, if compensation is claimed for non-delivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Art. 31. 44 Cal. 16, Not foll. 90 Ind. Cas. 374=5 Pat. 106=6 P.L.T. 565=1926 P.H.C.C. 114=A.I.R. 1925 Pat. 727.

——Art. 31—Wrongful conversion by Railway.

A suit against a carrier for compensation for non-delivery of goods is governed by Art. 31, whether the suit is laid in contract on ground of non-delivery or in tort, on the ground of wrongful conversion by the defendant. 88 Ind. Cas. 979=6 Lah. 301=26 P.L.R. 490=A.I.R. 1925 Lah. 478.

——Arts. 31, 49 and 115—Suit for specific movable property against a carrier—Non-delivery of goods—Compensation.

In a suit against a carrier plff. asked for recovery of a plank of wood not delivered to the consignee and also for a sum of money being the loss of interest. The plaint contained no allegation that the deft. was in possession of the plank in question. Held, if the suit was regarded as one for compensation for failure to deliver the plank in breach of the contract in the bill of lading, it was governed by Art. 31 and not by Art. 49 or 115 of the Lim. Act. By the amendmet of Art. 31 of the Lim. Act the Legislature clearly indicated its intention that the article should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort. Art. 49 is inapplicable to such a case, on the principle of generelia speciabilis non derogant. 39 Mad. 1=29 M.L.J. 342=(1915) M.W.N. 644=2 L.W. 805=18 M. L. T. 236=30 Ind. Cas. 840. [On appeal from 24 Ind. Cas. 676].

——Art. 31—Applicability.

Where a suit is framed as a suit to recover compensation for non-delivery of goods Art. 31 applies, and not Art. 30; and the cause of action is the failure of the defts. to perform their contract. It is not a case of mis-feasance. 13 S.L.R. 1=51 Ind. Cas. 570.

——Arts. 31 and 49—Claim by consignor—Non-delivery of goods—Effect of amendment of Art. 31 of Lim. Act of 1877.

The article applies to a claim by a consignor against a carrier for compensation for non-delivery of goods consigned. The effect of amendment of Art. 31 in the old Act is to make it applicable to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was one in contract or tort. 39 Mad. 1=(1915) M.W.N. 644=29 M.L.J. 342=2 L.W. 805=18 M.L.T. 236=30 Ind. Cas. 840 (F.B.).

——Art. 31—Mis-delivery.

Mis-delivery or delivery to a wrong person is not non-delivery within Art. 31. The case of mis-delivery is covered by Art. 115. 170 P.L.R. 1913=122 P.W.R. 1913=19 Ind. Cas. 477.

1 (c). Applicability—Suit by consignor and consignee.

——Art. 31 — Applicability — Consignor and consignee.

Article 31 applies whether the claims in suits mentioned therein arise ex-contractu or ex-delictu.

The legislature in enacting Art. 31 was not minded to discriminate between a suit brought by a consignor and a similar suit brought by a consignee. 19 Bom. 165, Appr. 39 Mad. 1, Not foll. 86 Ind. Cas. 127=29 C.W.N. 277=52 Cal. 372=A.I.R. 1925 Cal. 559.

——Art. 31—Suit by consignor and consignee.

The words of Art. 31 are wide enough to include suits brought by the consignor as well as by the consignee, and it may very well happen that the same person is both consignor and consignee. No distinction should be drawn between a case of action for compensation for non-delivery by a consignor and one by consignee. 42 All. 390; 13 C.W.N. 851, Foll. 80 Ind. Cas. 612=27 C.W.N. 806=A.I.R. 1924 Cal. 173.

——Arts. 31, 30, 115—Applicability—Suit by consignor.

Per D. Chatterjee, J.—A suit by a consignor against Railway for value of goods consigned which were neither delivered to the consignee nor returned to the consignor and which the Railway denies having received and for compensation is governed by Art. 115 and not by Art. 30 or 31. Art. 31 seems to contemplate a suit by the consignee. (Per Beachcroft, J.).—If Art. 31 applies, the suit is not barred in the absence of evidence as to when the goods should have been delivered. 44 Cal. 16=23 C.L.J. 547=34 Ind. Cas. 130.

——Art. 31 — Action by consignor against carrier.

An action by a consignor to recover the value of the goods by the carrier is governed not by Art. 31 but by Art. 115. 9 M.L.T. 169=8 Ind. Cas. 882.

2. Carrier.

——Art. 31—Carrier.

A Railway does not cease to be carriers for the purpose of the Lim. Act because they detained the consignor's goods in respect of a claim for their charges before making delivery. Where the company's claims for wharfage arise out of their rights as carriers, the plaintiff cannot plead that the company's position as carriers was at an end and that the refusal to deliver the goods was unconnected with their position as carriers when their very claims to detain the goods arose out of that position. 31 N.L.R. 79 Sup.=A.I.R. 1936 Nag. 21=161 Ind cas. 867.

——Arts. 31, 48, 49—Applicability—Liability of carrier ceasing to be that of carrier.

Though, by delaying taking delivery of goods, the liability of the carrier as a carrier cannot be continued for an indefinite period, and for the period following the arrival of the goods, and if there be no delivery, the carrier's liability is that of a bailee and not that of a carrier; it cannot be held that after the goods have arrived, the carrier becomes a bailee for the purpose of limitation and that Art. 48 or Art. 49, Sch. I, could apply to a suit against the carrier. Art. 31 applies to such cases. A.I.R. 1933 All. 466= 1933 A.L.J. 796=144 Ind. Cas. 703.

——Art. 31—Carrier.

The fact that the Govt. is a "common carrier" within the meaning of the Carriers Act (III of 1865) does not make the Secretary of State for India in Council incapable of taking advantage of Art. 31, Sch. I, as Art. 31 refers to 'carriers' and not 'common carriers,' A.I.R. 1933 All. 466 =(1933) A.L.J. 796=144 Ind cas. 703.

——Art. 31—'Carrier,' meaning of.

Although Govt. is expressly excluded from the definition of "common carrier" for the purpose of the Carriers Act, 1865, as Art. 31, does not contain the expression "common carrier" but only "carrier," the article applies to suits against a State Railway. A.I.R. 1933 All. 348=144 Ind. Cas. 1029.

——Art. 31—Applicability.

Art. 31 is not restricted in its application to common carriers. It applies to carriers who come within the above definition. 35 M.L.J. 553=8 L.W. 46=24 M.L.T. 175=45 Ind. Cas. 485.

——Arts. 31 and 115—Carrier—Railway—Non-delivery of goods.

A suit against a railway company for compensation for non-delivery of goods is governed by Art. 31 and not by Art. 115 of the Lim. Act. The application of Art. 31 is not ousted by the mere fact that the responsibility of the Railway Company is limited by an agreement of the kind contemplated by S. 72, Cl. (2) of the Railways Act. 11 N.L.R. 174=31 Ind cas. 474.

3. Starting point.

——Art. 31—"When the goods ought to be delivered"—Meaning of.

In deciding what point of time should be held to be the time "when the goods ought to be delivered" within the meaning of Art. 31, Limitation Act, it is reasonable to take into account the date when the goods are despatched, the date when the goods reach the destination, the nature of the goods and the manner in which the goods are sent. Thus, if a wagon load of goods is sent, more time should be given after the despatch and the proper time for delivery than in a case where just a few bags are sent. Again, if the goods are of a perishable nature, very little time should be given for delivery after the goods have reached their destination. It is usual for the Railway Administration to send notices after the arrival of goods at the destination with a warning that if the goods are not taken delivery of within a certain period demurrage will be charged. If and when such notice is issued the point of time after which demurrage will be chargeable may very well be taken to be the time when the goods ought to be delivered. A.I.R. 1950 Cal. 394.

——Art. 31—Applicability—Suit to recover value of machinery consigned to railway company for carriage but not delivered to consignee—Limitation—Starting point.

A merchant consigned on 21st August, 1944, to the railway company some machinery for carriage from Bezwada to Lahore. He received from the consignee a letter dated 7th November, 1944, to the effect that the goods had not reached him. The consignor sent a notice on 8th February, 1945, to the railway company complaining of the non-delivery of the goods and asking for payment of their value. To

this letter he was not vouchsafed any reply. He filed his suit on 31st October, 1945, for recovery of the value of the machinery. On a question whether the suit was in time;

Held, in view of the fact that in 1944 railways were afflicted by war conditions and congestion in transit, two months and sixteen days could not be considered to be an unreasonable period within which a railway company ought to have delivered the goods. In any event the suit was filed with one year of the receipt of information of non-delivery and hence there was no substance in the technical plea taken by the railway that the suit was barred. 1949 M.W.N. 599 = A.I.R. 1950 Mad. 30 = (1949) 2 M.L.J. 298.

——Art. 31—Non-delivery of goods by Railway—Suit for damages—Terminus a quo.

Art. 31 of the limitation Act applies to a case of non-delivery of goods by a railway, and a suit for damages must be filed within one year from the date when the goods ought to have been delivered. Where on failure of the consigned goods to reach the destination some correspondence passed between the parties and in the later letter the Chief Commercial Manager asked the plaintiff to furnish him a full description of of the package to facilitate tracing it, a suit for damages for non-delivery of goods brought more than a year after the date of that letter is barred by time. A.I.R. 1950 E. P. 160.

——Arts. 31 and 30 — Applicability — Suit by consignee for value of goods entrusted to Railway Company and lost in transit—Starting point.

A suit by a consignee for the value of goods entrusted to a Railway Company for carriage and lost in transit is governed by Art. 31 of the Limitation Act and not by Art. 30. The starting point of limitation would be the date when the Railway Company finally informs the consignee that the goods cannot be delivered. (1945) 2 M.L.J. 448 and (1949) 2 M.L.J. 298, followed. 63 L.W. 190 = A.I.R. 1950 Mad. 438 = (1950) 1 M.L.J. 210.

——Art. 31—Starting point — "When the goods ought to have been delivered"—Reasonable time for delivery—What is.

The question as to the date "when the goods ought to have been delivered" for purposes of Art. 31, Limitation Act, is essentially a question of fact. There can be no hard and fast rule that time must begin to run from the expiry of the ordinary or normal period of transit. If there is no particular date specified for delivery, it must be determined as a matter of fact, as to what is reasonable having regard to the circumstances of the contract and the conduct of the parties. Where in reply to inquiries made by the plaintiff, the Railway authorities state that the matter is being investigated and finally write that the consignment was lost or destroyed without any negligence or default on their part, the date of the final reply has to be taken as the date of refusal to deliver the goods, and limitation will run only from that date. It cannot be said in that case that the plaintiff has waited for more than a reasonable time within which the goods should have been delivered. 29 P.L.T. 477 = A.I.R. 1949 Pat. 268.

——Art. 31—Applicability—Suit against Railway—Railway writing to plaintiff suggesting that goods would be delivered—Starting point of limitation.

Art. 31 of the Limitation Act applies to a suit for compensation for non-delivery or delay in delivering goods and the time is one year from the time the goods ought to have been delivered. In a case where the Railway Company against whom the suit is filed was writing to the plaintiff in terms which would suggest that the goods were still to be delivered at some date in future, the starting point of the period when the goods ought to have been delivered must be treated as postponed at least to such a date when the Railway Administration shows that they themselves know that the goods cannot be delivered and have ceased to expect to deliver the goods. A.I.R. 1947 Cal. 98, foll. 2 D. R. 35.

——Art. 31—Loss in transit by Railway—Starting point.

Article 31 applies to a suit by a consignee for damages for the loss of goods in transit, the starting point being the date when the Railway Company finally says that the goods cannot be delivered. 77 Ind. Cas. 511 = 34 M.L.T. 303 = A.I.R. 1924 Mad. 567 = 46 M.L.J. 302.

——Art. 31—Starting point.

Where no time was fixed for the delivery of goods and the correspondence between the parties showed that the matter was being inquired into and there was no refusal to deliver up to well within a year of the suit, the suit is not time-barred. 68 Ind. Cas. 981 = 20 A.L.J. 792 = 45 All. 43 = A.I.R. 1923 All. 22.

——Art. 31—Starting point.

Where a Railway Company has not proved that the goods were lost more than one year before the institution of the suit, a suit brought within one year from the date of refusal to deliver is not barred either by Art. 30 or 31. 23 M.L.J. 511 = 17 Ind. Cas. 419.

——Art. 31—Starting point of limitation.

Plaintiff sent some goods by Railway from **F** to **Z**. The delivery of the goods was not taken by the consignee. After some correspondence between the parties, the defendant railway wrote to the plaintiff to take deilvery of the goods within 15 days from the receipt of the letter. Within this period the plaintiff sent his man to **Z** to take delivery. On reaching there, the plaintiff's man found that the goods had been sent by the railway authorites to the Lost Property Office at **H**. The plaintiff wrote to the Chief Commercial Manager who asked him to pay the railway freight from **Z** to **H** and back from **H** to **Z** and take delivery. The plaintiff refused to do so. He, therefore, filed a suit for damages for wrongful detention of the goods. The summons was served on Agent, E. I. Railway. The goods had arrived at **Z** on December 30, 1935 and the suit was filed on February 24, 1937:

Held, that the suit was within time even if Art. 31 was held applicable. The period of two months should be deducted from the period of limitation for the suit under S. 15, Cl. (2), Lim. Act. (1939) A.L. J. 154 = 1939 A.W.R. 216 = A. I. R. 1939 All. 277 = I.L.R. (1939) All. 392 = 181 Ind. Cas. 948.

——Art. 31—Starting point.

In a suit against a carrier for compensation for non-delivery of goods, time begins to run when the goods ought to be delivered, i. e., when consignee is entitled to open delivery. 106 Ind. Cas. 311 = 4 O. W. N. 909 = A.I.R. 1927 Oudh 478.

——Art. 31—Non-delivery—Starting point.

Under Art. 31 time runs from the date on which the goods ought to be delivered, and the question as to when the recovery of the plaintiff's goods became hopeless is immaterial. 88 Ind. Cas. 979=6 Lah. 301=26 P.L.R. 490=A.I.R. 1925 Lah. 478.

——Art. 31—Suit for damages for non-delivery of part of consignment against Railway — Time, when begins to run.

Art. 31 of the Limitation Act applies to a suit against a Railway Administration for damages in respect of non-delivery of a part of a consignment. Where no time for delivery is specified time under that article begins to run from after a definite refusal or declaration of inability to deliver and the cause of action arises when the consignor is made aware that there will be no further delivery of the undelivered part of the consignment. Limitation does not commence to run on the date when the short delivery was made. Transit of goods on railways, more particularly during the war period, is subject to delay and goods handed to a railway in one bulk are frequently delivered by instalments spread over a considerable period. In such delivery it cannot be said that the railway is in default of its obligations by failing to deliver the whole at one and the same time. When one consignment is loaded in several wagons, they do not always reach the destination at the same time but often one wagon travels quicker and its contents are delivered before the others arrive. When that occurs, if a suit were immediately instituted, after arrival of one of several wagons, for the balance, it would be met with a plea that a reasonable time for delivery had not expired and the action was premature. A.I.R. 1947 Cal. 98.

——Art. 31—Starting point of limitation—Suit for damages for loss of part of goods in railway transit—Time begins to run from date when railway company finally informs that lost goods cannot be delivered.

Where part of the consignment had been delivered on an earlier date and a part remained to be delivered in respect of which the railway company after making inquiries for a long time—extending over a year—finally informed the consignee that the undelivered articles were not traceable:

Held, that time to institute suit against the railway company for compensation of lost articles under S. 80, Railways Act (1890) began to run under Art. 31, Limitation Act, from after a definite refusal or declaration of inability to deliver by the railway company held responsible to deliver the lost goods. A.I.R. 1946 Mad. 133=(1945) Mad. W.N. 667=(1945) 2 Mad. L. Jour. 448=58 Mad. L.W. 592.

——Art. 31—Delivery—Starting point.

In a suit for non-delivery where no portion of the consignment has been delivered, it is sometimes necessary to take evidence on the question of when the consignment ought to have been delivered, which must in any case be regarded as a question of fact, but where a great part of a consignment has been delivered on a certain day, there is ordinarily no necessity to enter into evidence on the question of when the balance of the consignment ought to have been delivered because the time when the consignment as a whole ought to have been delivered is manifestly the time when the greater part of the consignment arrived at its destination. 103 Ind. Cas. 383=8 P.L.T. 767=A.I.R. 1927 Pat. 335.

——Art. 32.

Synopsis.

1. Applicability and scope.
2. 'Right to use'
3. Starting point.

1. Applicability and scope.
   (a) General
   (b) Common right
   (c) Easement
   (d) Perversion amounting to ouster.

1 (a). Applicability and scope—General.

——Art. 32—Applicability.

Article 32 is not applicable where the **zemindar** brings a suit for demolition of a building built by his tenant on the **abadi** site, which was no part of his tenancy but belonged to the **zemindar**. The suit is for assertion of **zemindar's** right and for preventing the tenant from taking exclusive possession. (1937) A.L.J. 515=A.I.R. 1937 All. 472=1937 R.D. 273=I.L.R. (1937) All. 623=1937 A.W.R. 473=170 Ind. Cas. 121.

——Arts. 32 and 143 — Applicability—Suit for ejectment by land-lord—Tenant diverting holding to non-agricultural purposes.

Art. 32 and not Art. 143 of the Limitation Act applies to a suit by a land-lord for ejectment of an occupancy tenant on the ground that he has diverted his holding to non-agricultural purposes. I.L.R. (1947) Nag. 286=229 Ind. Cas. 528=A.I.R. 1948 Nag. 20 (1)=1947 N.L.J. 25.

——Art. 32—Perversion.

Where the defendants who are entitled to use the land as a **sehan darwaza** and as a **sehan darwaza** only, construct structures on it, they pervert it to other purpose namely, by making certain constructions. A.I.R. 1938 All. 20=(1937) A.L.J. 1231=1938 R.D. 52=1937 A.W.R. 1093=173 Ind. Cas. 140.

——Art. 32—Scope.

Article 32 is applicable to those cases only in which the injury complained of is the perverted user of the property by the defendant, who had the right to use it for a specific purpose, and the plaintiff seeks the assistance of the Court merely to get rid of the perversion. (1937) A.L.J. 515=A.I.R. 1937 All. 472=1937 R.D. 273=1937 A.W.R. 473=I.L.R. (1937) All. 623=170 Ind. Cas. 121.

——Arts. 32 and 120—Suit for ejectment of muqarraridar on ground of perversion of land to unauthorised purpose—Article applicable.

A suit for ejectment of an occupancy tenant or a muqarraridar on the ground of perversion of land to an unauthorised purpose thereby rendering it unfit for the purpose for which it is held, is governed by Art. 32 and not by Art. 120 of the Limitation Act, and the period of limitation is two years from the date on which the perversion first becomes known to the land-lord. 26 L.L.T. 31.

——Art. 32—Applicability.

Article 32 governs cases against persons who having a right to use property for specific purposes, pervert it to other purposes. 11 L.L.J. 493=A.I.R 1929 Lah. 816.

——Art. 32—Excavation by tenant—Compensation for damage.

In a suit for mandatory injunction upon the defendants, to fill up a tank which had been excavated on a portion of the land comprising the tenancy held by some of the defendants under the plaintiffs, in breach of a condition in the Kabuliyat, for compensation and for ejectment of the defendants therefrom, the claim for compensation is independent of and not ancillary to the claim for ejectment and can be maintained although the latter claim fails. Article 32 of the Limitation Act applies to such claim for compensation and not Art. 1 of Sch. 3 of the Bengal Tenancy Act. 62 Ind. Cas. 779=25 C.W.N. 930=A.I.R. 1921 Cal. 62.

——Arts. 32 and 143— B. T. Act, S. 155—Suit for possession—Misuse of land by tenant.

Suit for possession under B. T. Act, S. 155 on the ground of tenants misuse of land or user in contravention of the lease terms governed by Art. 32 not Art. 143. 20 C.W.N. 661=33 Ind Cas. 923.

——Art. 32—Suit for removal of structure.

A suit by a land-lord for removal of a structure erected by the mortgagee of an occupancy holding upon the holding without his consent is covered by Art. 32 or by 120 if it is treated as a suit for an injunction. 8 A.L.J. 914=12 Ind. Cas. 108.

——Arts. 32, 120—Injunction—Suit for, as between co-owners.

A suit by one co-owner for an injunction restraining the other co-owners from obstructing a common way is governed by Art. 120 and not by Art. 32. (1908) 18 M.L.J. 602=4 M.L.T. 278.

1 (b). Applicability and scope—Common right.

——Art. 32—Suit for injunction to remove constructions on shamilat—Limitation.

Where the plaintiff sues for permanent injunction to have certain constructions removed on the ground that they had been built by the defendant upon two pathways, the pathways being part of the village **shamilat** of which the plaintiff as well as the defendants are some of the owners, the suit does not fall under Art. 32 but is governed by Art. 120. A.I.R. 1934 Lah. 701=35 P.L.R. 472=156 Ind. Cas. 358.

——Art. 32—Common land.

A sued for an injunction to compel **B** to remove a kotha built on a part of the village common land. This kotha was bulit more than two years before, and less than six years before the institution of the suit.

Held, that the notion that Art. 32 applies only to cases **ex contractu** was not correct, therefore the suit was barred not under Art. 120 which did not apply but under Art. 32. 121 Ind. Cas. 186=31 P.L.R. 14=A.I.R. 1930 Lah. 283.

——Art. 32—Shamilat land—Perversion of use.

One of the owners of the shamilat which comprised the pattis, reserved for specific purposes, perverted it to other purpose by using it for building purposes. Other co-owner sued for permanent injunction after four years:

Held, that in this case Art. 32 applied because of the perversion to different purpose of the shamilat land in question and hence limitation being two years the suit was time-barred. 118 Ind. Cas. 447=30 P.L.R. 399=A.I.R. 1929 Lah. 535.

——Art. 32—Perversion of use.

Where a person has a right to use the shamilat plots for grazing purposes but perverts the same to building purposes, a suit against him claiming permanent injunction for removal of the encroachment falls within Art. 32. Das v. Rama Nand. 115 Ind. Cas. 73 (Lah.)

——Art. 32—Defendent having only a right in common.

Article 32 can properly be applied only where the person proceeded against had, before the preversion in respect of which he is being sued took place, a right to "use the property for specific purposes" peculiar to himself. It is not intended to apply to a case in respect of land in which the person proceeded against had no other right than a right in common with the general public to pass over it. 112 Ind. Cas. 381=A.I.R. 1928 Lah. 794.

——Art. 32.

Where a suit was instituted for an injunction that the defendants be restrained from cultivating land on the allegation that according to the custom of the village it was reserved for the common use of all the owners in the village, and that no individual owner was entitled to do anything so as to interfere with such common use:

Held, that the suit was governed by Art. 32 and not by Art. 120. 26 Cal. 564 (F.B.), **Foll.** 89 Ind. Cas. 405=A.I.R. 1925 Lah. 653.

——Art. 32—Shamilat property—Adverse possession by member.

A suit to oust defendant from specific portion of **Shamilat Det** held by him adversely to the remaining proprietors or to remove obstruction to the enjoyment of the **Shamilat** is governed by Art. 120 and not by Art. 32. 132 P.W.R. 1912=124 P. R. 1912=2 P.L.R. 1913=15 Ind. Cas. 285.

——Art. 32—Encroachment on public road.

Suit for removing encroachment on a public road and not on the property of any particular person is governed by Art. 120 and not by Art. 32. 124 P.R. 1912; A.I.R. 1921 Lah. 242 and 2 L.L.J. 463, **Foll.** 110 Ind. Cas. 517=29 P. L. R. 308=A. I. R. 1928 Lah. 792.

——Art. 32—Cremation ground.

Where certain persons build on common burning ground, a suit to eject them is governed by Art. 32 as the defendants have a real right in the land itself, parts of which any of them can from time to time temporarily appropriate and use as a support on which to cremate a dead body. 112 Ind. Cas. 844=A.I.R. 1929 Lah. 186.

——Art. 32—Public grave-yard.

Where the defendant who had the right to bury his dead in a grave-yard, planted trees therein and converted it into a grove and the plaintiff, the proprietor of the land, sued for possession of the plot and for removal of the trees:

Held, that plaintiff could not sue for its possession, the plot being a public grave-yard, and that the claim for removal of trees was governed by Art. 32. 93 Ind.Cas. 89=13 O.L.J. 428=A.I.R. 1926 Oudh 341.

1 (c). Applicability and scope—Easement.

——Art. 32—Easement—Increase of burden on the servient tenement.

Where plaintiff's complaint was that by placing heavier and more beams for supporting a masonry roof on a wall instead of the lighter beams which previously supported the thatched roof and which had rested on the wall, the burden of an existing servitude had been increased;

Held, that Art. 32 did not apply to the case. 78 Ind. Cas. 193=46 All. 68=4 L. R. A. Civ. 510=A.I.R. 1924 All. 450.

——Art. 32—Increase of burden on the servient tenement.

Where the appellants having a right by way of easement to support a thatch against a wall belonging to the plaintiff-respondent, substituted for the thatch a masonry or semi-masonry building and supported the beams necessary for its construction upon the wall in question:

Held, that they thereby undoubtedly increased considerably the burden upon the wall, and that it was a clear case of perversion of a right, within the meaning of Art. 32 of the Limitation Act. A suit brought therefore 2 years after the plaintiff came to know of the perversion is barred. 69 Ind. Cas. 819= A.I.R. 1922 All. 320.

——Art. 32—Claim of easement—Interruption.

The defendant nearly doubled his wall and erected a second story to his house and put a double sided thatch which increased the burden on the plaintiff's land.

Held, the defendant's case being a case of easement he could acquire it only by 20 years user and Art. 32 was not applicable. 33 Ind. Cas. 90 (All.).

1 (d). Applicability and scope—Perversion amounting to ouster.

——Arts. 32, 142 and 144—Perversion of user of property—Limitation applicable—Test—Nature of relief asked for.

In the case of a perversion of the user of property, it is open to the plaintiff to bring his suit merely for the removal of the perversion. The perversion may give him a right to other reliefs also and the period of limitation for such reliefs would depend upon the nature of the reliefs which he may choose to claim. If the perversion amounts to ouster or entitled the plaintiff to possession over the property and a suit is brought for recovery of possession, the suit would not be governed by Art. 32; but if the suit is only for the removal of the perversion, it would be governed by Art. 32, Limitation Act. If the plaintiff claims other reliefs he should frame his suit accordingly and raise a specific issue as to his right to the relief which he claims and bases on the perversion of the user. I.L.R. 1950 A. 507.

——Art. 32—Perversion.

Where the act of the defendant amounts to an ouster of the plaintiff, Art. 32 has no application although the defendant may, in fact, have perverted the land to some purpose to which it was not originally intended, in addition to ousting the plaintiff from it. 21 P.L.T. 109=A.I.R. 1940 Pat. 106=6 B. R. 48=184 Ind. Cas. 493.

——Art. 32—Perversion—Ouster.

Art. 32 has no application where the defendant's act, though it might also have resulted in the perversion of the user from the original specified purpose really amounted to an ouster of the plaintiff from the property in question, and the object of the suit is not to get rid of the perversion **simpliciter**, but to have the dispute as to title settled. (1937) A.L.J. 515=A.I.R. 1937 All. 472=1937 R. D. 273=1937 A.W.R. 473= I.L.R. (1937) All. 623=170 Ind. Cas. 121.

——Art. 32—Perversion—Ouster.

Art. 32 does not apply to a case where the defendant's act, though it might also have resulted in the perverion of the user from the original specified purpose, really amounts to an ouster of the plaintiff from the property in question and the real object of the suit is not to get rid of the perversion **simpliciter,** but to have the dispute as to title settled. 34 P.L.R. 618=14 L. 267= A.I.R. 1933 Lah. 705=145 Ind. Cas. 553 (F.B.).

2. "Right to use."

——Art. 32—'Right to use'.

Art. 32, in referring to a right to use the property does not embrace a mere licence to use the property. A distinction is to be drawn between a legal right to remain in possession of the property and mere licence which is revocable at any time. A.I.R. 1934 All. 836 =153 Ind. Cas. 670.

3. Starting point.

——Art. 32—Starting point of limitation.

If the plaintiffs are dissatisfied and want redress, they ought to come within two years of their knowledge of perversion. A.I.R. 1938 All. 20=(1937) A.L.J. 1231 =1938 R. D. 52=1937 A. W. R. 1093=173 Ind. Cas. 140.

—Art. 36.

Synopsis.

1. Applicability and scope of article
2. Applicability and scope of Arts. 2 and 36
3. Claim against directors of company
4. Claim against tenants
5. Claim against trustee
6. Compensation for detention of goods or money.
7. Compensation for illegal distraint or attachment
8. Starting point.

1. Applicability and scope of article.

——Art. 36—Scope.

Art. 36 is a residuary article. A.I.R. 1935 All. 995 =1935 A.W.R. 1189=58 A. 342=159 Ind. Cas. 977.

——Art. 36—Applicability.

Art. 36 is a residuary article in respect of one class of suits. It is a general article for suits for compensation for acts and omissions amounting to torts which are not provided for elsewhere. That that article is applicable to torts only is indicated in col. I. The mal-feasance, mis-feasance or non-feasance complained of must be "independant of contract" in order to attract that article. That article applies to suit which has for its basis the commission by the defendant of some act which is in itself unlawful or the improper performance of some lawful act, e.g., with negligence or some illegal omission, but the breach must be of a duty imposed by general law of the land and not a duty created by or resting upon a special engagement in which case Art. 36 would not apply. A.I.R. 1942 Cal. 483= 46 C.W.N. 294= I.L.R. (1942) 1 Cal. 577=75 C.L. J. 1 =202 Ind. Cas. 389.

——Art. 36—Suit against Receiver for mis-feasance —Limitation.

If any loss occurs by reason of mis-feasance, mal-feasance or non-feasance on the part of a Receiver appointed under O. 40, Civil P. C. in respect of the property committed to his care or if loss results from his management or neglect of duties, he is to make good the loss not by reason of any provision of the general law of the land but because of the breach of the duties he had agreed to discharge The mis-feasance, mal feasance or non-feasance, as the case may be, on his part would not be "independant of contract".

Accordingly, Art. 36 is not applicable to a suit against the Receiver which is not for compensation but is in essence a suit for account of his management. A.I.R. 1942 Cal. 483=46 C W.N. 294=75 C.L. J. 1= I.L.R. (1942) 1 Cal. 577=202 Ind. Cas. 389.

——Arts. 36, 39—Scope—Tortious act.

The removal of the earth of a plot by persons who have no title or grant in respect of that earth given by the plaintiffs is a tortious act which comes within the scope of Art. 36 and a suit for compensation against the persons removing the earth is governed by Art. 36 and not by Art. 39. A.I.R. 1941 Oudh 172=1940 O.W N. 1318=1941 A.W.R. 22=191 Ind. Cas. 885.

——Art. 36—Scope—Suit laid in tort.

In so far as the suit is one laid in tort, the article applicable would be Art. 36. The case not based on any contractual obligation should be brought within two years from the date on which any mal-feasance, mis-feasance or non-feasance, not specially provided for was committed giving rise to a claim for compensation for damages. A.I.R. 1939 Lah. 118= 184 Ind. Cas. 130.

——Art. 36—Mis-feasance independent of contract —Slander of title.

Where a person who goes to the intending tenants of a certain building and dissuades them from taking the building on rent by making false statements as to habituality and safety to the building is actuated by malice in so representing, he is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The wrong complained of in such a case is mis-feasance independant of a contract and Art. 36 applies to such an action. A.I.R. 1938 Nag. 84=I.L.R (1938) Nag. 348 =176 Ind. Cas. 257.

——Art. 36—Scope—Tort.

Article 36 is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere. (1936) M.W.N. 196= 70 M.L.J. 255=A.I.R. 1936 Mad. 250=43 L.W. 429= 161 Ind. Cas. 538 (2).

——Art. 36—Scope—Claim for interest based on negligence.

The claim for interest based on negligence of the vendor is governed by Art. 36 and not by Art. 97 or 62. A.I.R. 1939 Lah. 564=187 Ind. Cas. 742.

——Arts. 36, 90, 120—Scope—Non-feasance.

In a case of non-feasance, the article for an action against the person, who has committed it, is Art. 36 and not Art. 120 or 90 of the Lim. Act. A.I.R. 1936 Rang. 310=164 Ind. Cas. 410.

——Art. 36—Applicability.

A suit for recovery of money due to tenants in common which has been received by one or more tenants to the exclusion of the rest is not governed by Art. 36 as the liability is not **ex delicto**. A.I.R. 1937 Pesh. 28=168 Ind. Cas. 41.

——Arts. 36, 115 and 120.

A suit by one co-sharer against another to recover his share in the profits of a ferry is governed by Art. 120 and not by Art. 36 or 115 of the Lim. Act. 1 Pat. L.J. 69=35 Ind. Cas. 430.

——Art. 36—Scope—Compensation for exclusion from civil rights.

A suit for compensation for exclusion of the plaintiffs from their civil rights if occasion arises for their exercise in the administration of the caste funds, and the benefit of being able to scrutinise the caste accounts is governed by Art. 36. 37 Bom. L.R. 417=A.I.R. 1935 Bom. 361=158 Ind. Cas. 414.

——Art. 36—Applicability—Suit for compensation for damage done to car lent for use.

Suit by a plaintiff claiming charges for repair and also interest by way of damages, where the defendant who had borrowed the plaintiff's motor car for private use damaged the same in an accident, is not governed by Art. 36 but by Art. 115. 10 O.W.N. 1105=9 Luck. 189=A.I.R. 1933 Oudh 518=145 Ind. Cas. 1001.

——Art. 36—Mis-feasance independant of contract —Suit by attaching creditor.

A suit by an attaching creditor against a third person who has removed and misappropriated the attached movables in collusion with the debtor is governed, not by Art. 48 or Art. 49 but by Art. 36. (1932) A.L.J.

241=16 R.D. 380=A.I.R. 1932 All. 256=54 A. 467=136 Ind. Cas. 809.

——Art. 36—Pledgee and pledgor — Suit to recover pledged property or value

Where a pledgee having power to sell for default, takes over in effect, as if upon a sale the pledged property to himself without the pledgor's authority or giving credit for their full value to him the pledgee is guilty of an unauthorised conversion and the pledgor is entitled to have his property back or its full value but only on payment of debt. A suit brought by the pledgor under the above circumstances within three years from the date of the alleged sale is well within time whether the suit be regarded as one for redemption governed by Art. 145 or as one for damages for breach of contract governed by Art. 115. Article 36 has no application to such a suit. 122 Ind. Cas. 37=30 M.L.W. 898=A.I.R. 1930 Mad 364.

---Art. 36—Implied contract—Injury by owner of the sub-soil to the surface.

Where the owner of the sub-soil causes injury to the surface the wrong cannot be said to be independent of a contract so as to be governed by Art. 36; for there is an implied covenant running with the land that the surface owner will have an inherent right of support from the owner of the sub-soil. 120 Ind. Cas. 626=10 P.L.T. 191=8 Pat. 776=A.I.R. 1929 Pat. 245.

——Art. 36—Goods lost by carrier—If possession of carrier is not lawful, Art. 36 applies.

To give rise to these special privileges or liabilities which attach to transactions by or with carriers, the relationship as between a carrier, and his customer has first to be established and, for the presumption of an implied contract to carry delivery of the goods so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage is the indispensible essential.

Plaintiff put the goods on the defendant's ferry boat for conveyance and himself got on to it. He found that the boat was being overloaded and feeling it unsafe to travel on it, he got down and wanted to take down his goods but the defendant refused to allow him to do so. The boat started on its journey with his goods and capsized on the way and the goods were lost. He sued to recover price of the goods:

Held, that as there was no delivery in this case the article applicable to the case was not Art. 30 or 31 but the general article, namely, Art. 36. 107 Ind.Cas. 723=A.I.R. 1928 Cal. 306.

——Art. 36—Trespass.

A suit for damages for wrongfully cutting lac producing trees and removing the trees is a suit for compensation for trespass upon immovable property within Art. 39 and for wrongfully taking specific movable property within Art. 49. 80 Ind. Cas. 769=20 N.L.R. 80=A.I.R. 1924 Nag. 125.

——Art. 36—Suit for damages for trespass.

A suit for damages for unlawfully setting fire to and destroying pepper vines is governed by Art. 39 and not 36, which applies to cases of mis-feasance not otherwise provided for. Trespass includes the mischief commited by the trespasser after entering on the land. 12 M.L.T. 538=(1912) M.W.N. 1229=23 M.L.J. 618=17 Ind. Cas. 605.

——Art. 36—Malabar Law—Redemption suit.

A Malabar mortgagor obtained a decree for redemption on 9th March 1907 and was put into possession on 8th December 1908 and carried on the execution proceedings for the recovery of damages subsequent to the decree between 8th November 1908 and 22nd June 1910 which ended unsuccessfully, the Court deciding in appeal that the proper remedy for him was to proceed by way of suit. He then brought a suit for damages both prior and subsequent to the decree. Held, that Art. 36 applied and the mortgagor had only two years from the date of damage to institute the suit. 33 M.L.J. 463=6 L.W. 696=(1917) M.W.N. 822=43 Ind. Cas. 6.

——Arts. 36, 62 and 120—Suit to recover money deposited.

Plaintiff's predecessor got a lease from Collector of certain property for carrying on a grog shop but died shortly after. By way of security for rent of the property he had deposited a sum of Rs. 250 in the Collectorate. Defendant got the lease transferred in his name and the Collector agreed to retain the money in satisfaction and discharge defendant's liability under the lease. Plaintiff brought the present suit to recover the sum. Held, that the suit was one to recover a specific sum of money which had been applied by the defendant for his own use, and was governed by Art. 120 and not by 36 or 62. 38 Ind. Cas. 525 (Pat.).

——Arts. 36, 49, 132—Mortgage—Depreciation—Security—Remedy—Limitation.

Where trees on mortgaged property are cut and carried away by third parties the only remedy of the mortgagee is a suit for damages for the depriciation of the security and the proper article of the Lim. Act applicable would be either Art. 36 or Art. 49. 3 L.W. 341=32 Ind. Cas. 901.

——Arts 36 and 89—Suit for money misappropriated by servant.

A suit for money received and misappropriated by a servant is governed by Art. 89 and not by Art. 36. It is immaterial whether the misappropriation charged is criminal or not. If there is no misappropriation that money is payable by the defendant having been received by him and not accounted for still Art. 89 applies. 28 Ind. Cas 452 (Cal.).

——Arts. 36 and 115—Damages—Person untruly representing himself to be agent of another.

A suit for compensation against a person for untruly representing himself to be the authorised agent of another and thereby inducing the plff. to deliver goods or deal with him as such agent is governed by Art. 115 and not by Art 36. 38 Mad. 275=25 M.L.J. 256=14 M.L.T. 360=(1913) M.W.N. 884=21 Ind. Cas. 65.

——Art. 36—Compensation for injury by mortgagee.

Art. 49 and not Art. 36 governs a suit by mortgagee for compensation from a third person for

injury to specific movable property mortgaged to the former. 5 Bur. L. T 156=6 L.B.R. 75=17 Ind. Cas. 906.

——Art. 36—Damages for malicious prosecution.

The limitation for a suit for damages for malicious prosecution begins from the date of the discharge as found in the records and not from any date on which the Magistrate expressed an opinion that there was no case. (1912) M.W.N. 951=16 Ind. Cas. 584.

——Art. 36—Damages resulting from a conspiracy.

A suit to recover damages resulting from a conspiracy falls within Art. 120 or 36 and not within Art. 23. 16 C.W.N. 145=13 Cr.L.J. 65=13 Ind. Cas. 721.

——Art. 36—Damages for assault.

A suit for damages or compensation for injury caused to a person's reputation and for mental pain caused by an assault, is governed by Art. 22 and not by Art. 36. The cause of action is the assault itself, though the damages can be awarded for the resulting insult. 5 Ind. Cas. 124 (All.)

——Art. 36—Things lost owing to servant's negligence.

A suit for the recovery of the price of articles lost by the negligence of the servant where the servant has acknowledged his liability is not governed by Art. 36. 7 M.L.T. 93=5 Ind. Cas. 764.

——Art. 36—Suit for damages for fraud.

See Art. 95. 27 Mad. 343.

——Art. 36—Suit against son, when claim against father is barred.

Where a suit against a father is barred under Art. 36, no suit against his son can lie for the same. 33 Mad. 308=20 M.L.J. 633=8 M.L.T. 321 =7 Ind. Cas. 898.

2. Applicability and scope of Arts. 2 and 36.

——Arts. 36 and 2—Applicability—Suit for compensation for failure of local body to maintain water supply system in proper order.

A suit for compensation for damages said to have been caused by the failure of a local body to maintain its water system in proper order is governed by Art. 36 and not by Art. 2.

(Applicability of Arts. 2 and 36 discussed.) 47 P.L.R. 302=A.I.R. 1945 Lah. 324=I.L.R. (1945) Lah. 523 (F. B.).

——Art. 36—Bursting of Municipal fittings

A case of damage to houses by bursting of Municipal fittings, by its negligence is governed by Art. 36 and not Art. 2, Lim. Act. 121 Ind. Cas. 500=A.I.R. 1929 Lah. 730.

——Art. 36—Damage by canal.

Where the canal authorities cut the bank of a canal to avoid accident to the adjoining railway and not to the canal and plaintiff's adjacent mills were damaged:

Held, that Art. 2 was not applicable as the act alleged was not done in pursuance of any enactment. 4 Lah. 428; 79 Ind. Cas. 208; and 4 Lah. 432; 79 Ind. Cas. 185, Reversed. 103 Ind. Cas. 1=1927 M. W .N. 334=4 O.W N. 471=31 C.W.N. 835=26 M.L.W. 134=28 P.L R. 453=39 M.L.T. 343=10 Lah. 161=A.I.R. 1927 P.C. 72 (P.C).

——Arts. 36 and 2—Act done under statute—Act done in improper manner out of malice and carlessness.

The intention of Art. 2 of the Lim. Act is to meet these cases where a public official or a public authority or a private person does an act, injurious or possibly injurious to another under powers conferred or honestly believed to be conferred by some Act of the legislature. Art. 2 does not apply to a case where the damages arise not from the doing of the Act or from the failure to do it, but from doing it in an improper manner out of malice and carelessness such a case would be governed by Art. 36. 16 O. C. 211=21 Ind. Cas. 426.

3. Claim against directors of company.

——Art. 36—Scope — Suit for compensation against directors of company.

A suit against the directors of a company for compensation for loss suffered in consequence of the misleading prospectus issued by the company is governed for purposes of limitation by Art. 36. 57 M. L. W. 546=(1944) 2 M. L. J. 286=1944 M.W.N. 646=I.L.R. (1945) Mad. 325=A.I.R. 1945 Mad. 5.

——Art. 36—Scope—Suit for damages against directors of company.

A suit for damages against the directors of a company on the ground that due to their misrepresentations in the prospectus of the company the plaintiff was induced to take shares and thereby sustained loss is governed by Art. 36 and not Art. 120. 57 M.L.W. 312=A.I.R. 1944 Mad. 431.

——Art. 36—Applicability—Suit against directors of Bank alleging dishonesty.

A suit by a Bank alleging that in sanctioning a loan the Directors had acted dishonestly and that their conduct was such as to render them liable for the amount lost by the Bank due to wilful breach of their obligation as directors is not governed by Art. 36 but by Art. 90. A.I.R. 1936 Lah. 271=167 Ind. Cas. 307.

——Art. 36—Mis-feasance by director of company—Limitation.

A suit for compensation against the director of a company instituted more than 2 years after the date of mis-feasance is barred and the plaintiff cannot avail of the benefit of S. 18 Lim. Act if it is not established that the knowledge of his

right was kept from him by means of fraud. A.I.R. 1938 Lah. 577=40 P.L.R. 883=178 Ind. Cas. 504.

——Art. 36—Mis-feasance "independent of contract" — Application for mis-feasance under S. 235, Companies Act.

Mis-feasance under S. 235, Companies Act is not independent of contract within the meaning of Art. 36 inasmuch the relation between a director and the company is based on contract. Limitation for an application under S.235. is therefore not governed by Art. 36. A.I.R. 1933 Sind 103= 143 Ind. Cas. 713.

——Art. 36—Suit for compensation under S. 235, Companies Act.

An application under S. 235 of the companies Act of 1918 to recover compensation from an ex-director of a company in respect of an alleged act of mis-feasance or breach of trust, is by virtue of Cl.(3) of the section governed by Art. 36, Limitation Act. A.I.R. 1923 Lah. 58, Foll. and A.I.R. 1925 All. 519, Not foll. 100 Ind. Cas. 907=8 Lah. 167= 28 P.L.R. 363=A.I.R. 1927 Lah. 433.

——Art. 36 — Mis-feasance of directors of companies.

A right to sue for mis-feasance of directors of companies arises from the date of mis-feasance and is governed either by Art. 120 or Art. 36. 128 Ind. Cas. 477=1930 M.W.N. 966=32 M.L.W. 555=A.I.R. 1931 Mad. 58=54 Mad. 153=60 M.L.J. 280.

——Art. 36 — Suit against directors of company —Mis-feasance.

A claim against the directors for mis-feasance or breach of trust is clearly not independent of contract and consequently Art. 36 of the Limitation Act does not apply to the case. The relations between the bank and its directors are in part governed by numerous articles in the articles of association which constitute part, though not the whole of a contract between the bank and its directors. The terms of the contract are to be found mainly in the articles of association but partly dehors the articles. 54 Bom. 226=32 Bom. L.R. 232=A.I.R. 1930 Bom. 572.

——Art. 36.

Whether a director whose acts are the subject of construction was a trustee or a partner or an agent to the Company or to the body of shareholders is to be determined according to the circumstances of each case.

In the particular case the Chairman of the Board of Directors was held to be acting as agent of the company and a suit against him for losses by his negligence was governed by Art. 90 and not Art. 36. 79 Ind. Cas. 740=5 Lah. 27=A.I.R. 1924 Lah. 435.

——Art. 36—Suit by liquidator of company.

A suit for recovery of compensation from an officer of company in respect of certain mis-feasance committed by him is barred against the liquidator, if it is brought by the liquidator after 2 years. 71 Ind. Cas. 899=A.I.R. 1923 Lah. 58.

4. Claim against tenants.

——Arts. 36, 115 and 120—Applicability—Suit for damages for use and occupation of shop after notice to vacate.

A suit for damages for use and occupation of a shop, after notice to vacate is governed by Art. 120 and not either by Art. 39 or Art. 115. Art. 39 can have no application because the suit is not for compensation for trespass upon immovable property. The defendant's remaining in possession of the property after the notice to quit does not constitute a trespass upon the property in the required sense. Nor would Art. 115 apply because the liability of the defendant to put the lessor into possession of the property on the determination of the lease is a statutory liability and Art. 115 does not provide for the breach of such a liability or statutory duty. Hence it is that the residuary Art. 120 applies to such a suit. 1946 A.L.J. 305 (2)=1946 A.W.R. (H.C.) 516=1946 A.L.W. 429=A.I.R. 1947 All. 31=231 Ind. Cas. 58.

——Arts. 36, 115—Mis-feasance independant of contract—Suit by land-lord against tenant for damages for unauthorised use of water.

The plaintiff who was a shrotriemdar sought to recover a sum of money from the defendant as damages for the unauthorised use of the shrotriem tank water alleging that though the defendant was, under the terms of the muchilika executed by him, entitled to take water for second crop, he took water, not for the second crop but for watering the field to facilitate ploughing for the next season:

Held, that the cause of action was really a tort and not based on a breach of contract and the suit was, therefore, governed by Art. 36 and not by Art. 115. (1936) M.W.N. 196=70 M.L.J. 255=A.I.R. 1936 Mad. 250=43 L.W. 429=161 Ind.Cas. 538 (2).

——Art. 36—Suit by land-lord for compensation for removal of trees by tenant.

Art. 48 or 49 of the Lim. Act, 1877, applies to a suit by the land-lord for compensation for removal of trees from the lands against the tenants defendants and not Art. 36. 25 Cal. 692, Foll. 10 C.L.J. 25=2 Ind. Cas. 955.

5. Claim against trustee.

——Art. 36—Trust—Loss occasioned to 'trust' —Suit against trustee to make good loss.

A suit filed against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect moneys due to the trust is governed by Art. 120 and not by Art. 36. (1939) M.W.N. 229=A.I.R. 1938 Mad. 353=47 L.W. 344= (1938) 1 M L.J. 334=I.L.R. (1938) Mad. 586=174 Ind. Cas. 459 (F.B.).

——Art. 36—Claim against trustee as in tort.

If the perquisites are received from third persons they are not wages and if the claim is for the recovery from the trustee as in tort Art. 36 and not Art. 102 will apply. 23 M.L.T. 288=45 Ind.Cas. 414.

6. Compensation for detention of goods or money.

——Art. 36—Detention of goods.

A suit for damages against defendant at whose instance plaintiff's goods were detained by customs authorities is governed by Art. 36 and not Art. 49. 106 Ind. Cas. 277=46 C.L.J. 455=A.I.R. 1928 Cal. 1.

——Art. 36.

Where Collector of Customs detained plaintiff's goods on representation made by defendant maliciously and without reasonable and probable cause:

Held, suit for damages for such detention against defendant was governed by Art. 36. 04 Ind. Cas. 444=30 C.W.N. 465=A.I.R. 1926 Cal. 757.

——Art. 36—Deterioration of fruits.

Article 36 and not Art. 49 applies to a suit for compensation for deterioration of plaintiff's oranges owing to their detention at the police station. 00 Ind. Cas. 509=42 C.L.J. 203=A.I.R. 1926 Cal. 177.

——Art. 36—Suit for wrongful detention of plff.'s money.

A suit for a compensation for detention of the plff.'s money by the Court owing to a wrongful act of the deft. is governed not by Art. 36 but by Art. 49. 7 Ind. Cas. 5 (Cal.).

7. Compensation for illegal distraint or attachment.

——Art. 36.

Applicability—Illegal distraint by land-lord of crops of tenant—Suit by later for compensation—Limitation. See Limitation Act, Art. 28. 27 Pat. 680.

——Art. 36—Wrongful attachment of crops.

In the case of a suit for damages representing the value of crops which has been wrongfully attached, cut and removed, the pertinent articles are 48 and 49 and not 29 or 36, Limitation Act. 105 Ind. Cas. 763=A.I.R. 1928 Cal. 106.

——Art. 36—Wrongful attachment of crops.

Where the defendant attached the plaintiff's share of standing crops in execution of a decree against the plaintiff's bataidar, and before the date of the order allowing the objection by the plaintiff to the attachment, the crops had become valueless, on plaintiff's suit for damages for wrongful attachment:

Held, Art. 39 and not 36, applies to this case. 65 Ind. Cas. 665=4 N.L.J. 231=18 N.L.R. 96= A.I.R. 1922 Nag. 212.

——Art. 36—Attachment before judgment.

A suit for damages on account of injury to stock caused by making an attchment before judgment is covered by Art. 36. But a suit for damages on account of the sale of the goods attached before judgment, at a low price and for injury to trade and reputation due to the attchment itself is governed by Art. 20. 38 M.L.J. 324=(1920) M.W.N. 192=27 M.L.T. 259=11 L.W. 479=55 Ind. Cas. 786.

——Art. 36—Applicability — Wrongful attachment.

A suit for compensation for wrongful seizure of movables is governed by Art. 29. But a suit for compensation for wrongful attachment of movables by the issue of a prohibitory order is governed by Art. 36 and not by Arts. 42, 46, 62 or 120. Art. 36 is a general article covering all possible acts and omissions commonly-known as torts, that is, wrongs independent of contract and which are not provided for by other articles. 6 O.L.J. 394=22 O.C. 201=53 Ind. Cas. 98.

——Arts. 36 and 29—Attachment of property—Claim allowed—Suit for declaration—To ignore the claim.

A property was attached by P over which the plff.s' predecessor claimed a lien The claim was allowed by the Executing Court and P brought the present suit for a declaration that the plff s' predecessor had no claim. The suit was decreed and proceeds of the attached property were rateably distributed among P and certain other creditors but the decree obtained by P was reversed in appeal and the plff sued him and the other creditors but the decree obtained by P was reversed in appeal and the plff. sued him and the other creditors to recover sums paid, in satisfaction of their claim. **Held,** that the suit was not governed either by Art. 29 or by Art. 36 as there was not a seizure of money and the defts. were not guilty of any non-feasance, or mis-feasance or mal-feasance in respect of the money. 39 All. 322=15 A.L.J. 295=39 Ind. Cas. 532.

——Art. 36—Wrongful attachment of movables—Prohibitory order.

A suit for compensation for wrongful attachment of movables by the issue of a prohibitory order is governed by Art. 36 and not by Arts. 42, 46, 62 or 120. An attachment by a prohibitory order is not an injunction within the meaning of Art. 42. 31 M.L.J. 257 =35 Ind. Cas. 98.

——Art. 36—Attachment of debt—Assignee of debt—Suit for recovery.

A debt due to judgment-debtor was attached by decree-holder and the attaching creditor received the money paid by the debtor into Court. A third person claming to be assignee of the debt before attachment sued for recovery of the money. **Held,** neither Art. 29 nor Art. 36 applied. The article applicable was either 62 or 120 and time runs from the date the creditor received the money from the Court. 33 Mad. 972=26 M. L. J. 166=1 L. W. 162=(1914) M. W. N. 348=22 Ind. Cas. 870 (F. B.)

——Art. 36—Seizure of standing crops.

Art. 36 may apply to a wrong consisting solely in the seizure of standing crops, but to a suit for damages for unlawfully distraining cutting or carrying away the crops, Art. 36 does not apply. The article applicable is either 48 or 49. 17 C W. N. 308=17 C. L. J. 206= 18 Ind Cas. 253.

——Art. 36—Illegal attachment—Suit for damages.

Per **Sundara Aiyar, J**—Where a suit for damages for the value of the standing crops cut during attachment is brought after a suit for declaration that the attachment is illegal has terminated. it is governed by Art. 62 or 120, and the cause of action arises on the termination of the suit declaring the attachment illegal. Per **Sadasiva Aiyar, J.**—The suit is governed by Art. 29 or 36 and the cause of action arises from the date of attachn ent. 23 M.L.J. 620=(1912) M.W.N. 1222=17 Ind. Cas. 185.

——Art. 36, 39 and 49—Distress—Compensation—Three years limitation.

Art. 36 applies to a suit for compensation for fictitious distress by a fictitious land-lord against a fictitious tenant. Per **Doss, J**—Art. 49 applies partly and Art. 39 also and the period is three years from the alleged distress. 36 Cal. 141=9 C. L. J. 109=12 C.W.N. 1090=1 Ind Cas. 788.

——Art. 36—Suit for damages for illegal distraint of crops—Limitation—Article applicable, Art. 29 or 36.

In a suit for damages for illegal distraint of crops, it is upon the defendant to prove that the crops were not standing crops, and therefore, Art. 29 and not 36 applied to the case. (1905) 9 C W.N. 376=32 Cal. 459.

——Arts 36, 29, 42, 49—Suit for damages and compensation for wrongful attachment before judgment.

A suit for damages for wrongful attachment before judgment is governed by Art. 36. (1903) 6 Bom. L. R. 704.

8. Starting point.

——Art. 36—Starting point of limitation.

Where certain persons employed in clearance work dispose of the suit by depositing it on the land of the plaintiff, their act will undubitably render the joint owners who have employed the persons, jointly and severally liable; and each act of depositing silt affords the plaintiff a separate cause of of action, the limitation in the case being governed by Art. 36. 27 S.L.R. 41=A. I. R. 1933 Sind 176=144 Ind. Cas. 452.

——Art. 36—Starting point.

If a suit is for compensation for any mal-feasance or mis-feasance independent of contract, and not otherwise provided for, the limitation will be two years, not from the date of the mal-feasance or mis-feasance, but from the time when the injury results. 120 Ind. Cas. 626=10 P.L T. 191=8 Pat. 776=A.I.R. 1929 Pat. 245.

——Art. 36—Misappropriation by administrator—Starting point.

Limitation for a suit against administrator and the surety for their liability to the estate according to the Commissioners's report, runs not from the time that the alleged misappropriation by administrator took place but from the time when the Court confirmed the Commissioner's accounts and the shortage was ascertained. A.I.R. 1924 Rang. 68. **Foll.** 98 Ind. Cas. 459=4 Rang. 358=A.I.R. 1927 Rang. 28.

——Art. 36—Mal-feasance.

Where sulphuric acid was thrown at the plaintiff and injury was caused to his eye:

Held, (Crump, J.) that if the act of mal-feasance was complete at the time when the vitriol was thrown in the plaintiff's face and the subsequent consequences were no part of the cause of action. 84 Ind. Cas. 796=25 Bom. L. R. 1333=A.I.R. 1924 Bom. 290.

——Art. 36—Compensation for mis-feasance—Cause of action—Companies Act, S. 235.

An application for the recovery of compensation for mis-feasance made under S. 235 of the Companies Act is treated as a suit by virtue of sub-S. (3) and such a suit is governed by Art. 36 of the Limitation Act, and as no new rights and liabilities are created, the cause of action does not arise on the date of the winding up order but time must run from the date of the mis-feasance for which compensation is sought. 69 Ind. Cas. 255=A.I.R. 1924 Lah. 285.

——Arts. 36, 62—Tort—Money had and received—Commencement of limitation.

The cause of action for damages for a wrong accrues at the date of the wrong. But the cause of action for money had and received is the date of the receipt of the money. 34 Ind. Cas. 173 (All.)

——Art. 36—Suit for damages for non-cultivation.

A suit for non-cultivation of land is governed by Art. 29 or 36. The starting point for a suit for damages to crops belonging to the plaintiff caused by the cutting by the deft. begins on the date of the appropriation by the deft. 14 C.W.N. 96=10 C.L. J. 226=3 Ind, Cas. 12.

——Art. 37—Continuing obstruction—Starting point.

If it is alleged by the plaintiff that the obstruction caused by closing the main sluice of a tank continued and he was prevented from removing the same by threat of violence it is a continuing wrong under Art 37 read with S. 23 of the Limitation Act. The suit would be within time if it is brought within three years of the last day to which the wrong continued. 82 Ind. Cas. 482=A.I.R. 1925 Nag. 189.

——Art. 37—Easement—Right of way—Continuing cause of action.

Where on a partition a path was set apart for the joint use of both the branches of the family and it continued to be in the uniterrupted user of both the parties for a long time until the deft. obstructed it and th plaintiff nine years after the obstruction brought a suit for an injunction, **held,** that the obstruction was in the nature of a continuing nuisance and gave a fresh starting point of limitation **de die in diem.** 2 Ind. Cas. 410 (Cal.)

——Art. 39.

Municipal Committee holding cattle fair on land of certain person for several years—Agreement to compensate owner of land held to be implied—Suit for compensation—Article 115 and not Art. 39 applied. A.I.R. 1938 Lah. 267=178 Ind. Cas. 49.

——Art. 39—Underground trespass.

A claim for damages for trespass and removal of coal from an underground colliery is covered by Arts. 39 and 49 and time begins to run from the inadvertent wrongful taking or from discovery of fraudulent taking. 101 Ind. Cas. 62=31 C.W.N. 82=A.I.R. 1927 Cal. 117.

——Art. 39—Injury to crops.

A suit for compensation for injury to crops by the closing of the main sluice of a tank is governed by Art. 39. 82 Ind. Cas. 482=A.I.R. 1925 Nag. 189.

——Art. 39—Wrongfully cutting trees.

A suit for damages for wrongfully cutting lac producing trees and removing the trees is a suit for compensation for trespass upon immovable property within Art. 39 and for wrongfully taking specific movable property within Art. 49. 80 Ind. Cas. 769=20 N.L.R. 80=A.I.R. 1924 Nag. 125.

——Art. 39—Wrongful attachment of crops.

Where the defendant attached the plaintiff's share of standing crops in execution of a decree against the plaintiff's **bataidar**; and before the date of the order allowing the objection by the plaintiff to the attachment, the crops had become valueless, on plaintiff's suit for damages for wrongful attachment:

Held, Art. 39 and not 36 applies to this case. 65 Ind. Cas. 665=18 N.L.R. 96=4 N.L.J. 231=A.I.R. 1922 Nag. 212.

——Arts. 39, 26 and 29—Wrongful attachment—Standing crop—Damages.

A suit for damages for the wrongful attachment of land and crops and the consequent loss or destruction of the crops is governed by Art. 39. Standing crops at the time of attachment was immovable property and the attachment of the land with the crop thereon if illegally made, constitutes a trespass on immovable property. 25 M.L.J. 447=(1913) M.W.N. 869=14 M.L.T. 225=21 Ind. Cas. 213.

——Art. 39—Suit for possession of land free of houses and trees—Removal of trees.

A suit for possession of land free of the house and trees wrongfully built and planted by the deft. as distinguished from a claim merely for the removal of the trees, is governed by Art. 142 of the Lim. Act. 17 O.C. 252=25 Ind. Cas. 701.

——Art. 39—Suit for damages for trespass.

A suit for damages for unlawfully setting fire to and destroying pepper vines is governed by Art. 39 and not 36, which applies to cases of mis-feasance not otherwise provided for. Trespass includes the mischief committed by the trespasser after entering on the land. 12 M.L.T. 538=(1912) M.W.N. 1229=23 M.L.J. 618=17 Ind. Cas. 605.

——Art. 39—Ejectment suit—Subsequent suit for mesne profits.

Plaintiff sued deft. for mense profits after an ejectment decree against the deft. for the period between the date of the institution of the suit and the date of the judgment. **Held**, that the suit was one for compensation for trespass upon immovable property as plaintiff must be deemed to have been entitled to possession on the date of the suit. Art. 39 and not Arts. 109 and 120 applies to the case. 34 Mad. 502=9 M.L.T. 35=(1910) M.W.N. 614=8 Ind. Cas. 162.

——Art. 39—Delivery effect of—C. P. C., S. 244.

Delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises, which may be enforced in a regular suit. The defendant who remains in actual possession notwithstanding execution must be regarded as a trespasser who commits a fresh act of dispossession and this gives a fresh cause of action. (1903) 8 C.W.N. 49.

——Art. 40—Starting point.

A claim to recover compensation in respect of infringement of copyright for a period within three years prior to the suit is not barred. 38 C.W.N. 604=A.I.R. 1934 Cal. 668=152 Ind. Cas. 835.

——Art. 40—Suit for damages for infringement of trade mark.

A suit for damages for infringement of a trade name or trade mark which is an exclusive privilege, is governed by Art. 40. 45 P.R. 1919=83 P.L.R. 1919=51 Ind. Cas. 434.

——Art. 42—Wrongful attachment of movables—Prohibitory order.

A suit for compensation for wrongful attachment of movables by the issue of a prohibitory order is governed by Art. 36 and not by Arts. 42, 46, 62, or 120. An attachment by a prohibitory order is not an injunction within the meaning of Art. 42. 31 M.L.J. 257=35 Ind. Cas. 98.

——Art. 42—Injunction—Suit for damages for obtaining perpetual injunction maliciously and without reasonable cause.

No suit lies for damages against a deft. for maliciously and without reasonable and probable cause, obtaining perpetual injunction which was subsequently dissolved on appeal. 13 W. R. 305, Doubted. 42 Cal. 550=18 C.W.N. 1189=21 C.L.J. 68=26 Ind. Cas. 296.

——Art. 42.

The present plaintiff began to construct a house on his own land. The present deft. brought a suit for declaration and took out a temporary injunction to stay further progress of the work. The suit was decreed in the Lower Court but dismissed on appeal on July 3, 1905. The present plaintiff applied on 2nd July 1908 under S. 197, C. P. Code (1881) for damages. The Court treated the application as plaint. **Held**, that the present suit being brought within 3 years from July 3, 1905 was not barred under Art. 42. 16 C.L.J. 34=16 Ind. Cas. 443.

——Art. 42.

Suit for—Procuring erroneous decision—Likelihood of breach of peace, information as to—Action, maintainability—Cause of action—Crops cut and appropriated Limitation Act (XV of 1877), Sch. II Art. 42—Injunction—Criminal Procedure Code (Act V of 1898) S. 146.

It is well settled that no action will lie against any person for procuring an erroneous decision of a Court of justice. This is so, even though the Court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. Where the defendant informed the Magistrate that there was possibility of a breach of the peace and it was not suggested that the information was untrue in fact and on the recommendation of the Police the Magistrate commenced proceedings under S. 144 of the Criminal Procedure Code, it was held that the plaintiff had no cause of action against the defendant in so far as the plaintiff might have suffered any damage by reason of his inability to cultivate the land attached by the order of the Magistrate. In so far as the crops grown by the plaintiff and cut by the defendant were concerned, the cause of action arose on the day they were appropriated by the defendants. **Quaere.**—Whether an order under S. 140 of the Code of Criminal Procedure can be treated as an injunction within the meaning of Art. 42, Sch II of Lim. Act. (1909) 10 C.L.J. 226=14 C.W.N. 96=3 Ind. Cas. 12.

——Arts. 42, 29—Injury to property attached—Suit to recover damages for injury caused by injunction.

Attachment in execution having been raised on the plaintiff claiming the property attached, the decree-holder filed a suit to establish his right to attach, and pending it obtained an injunction restraining the plaintiff from taking delivery of the property. The plaintiff having finally won obtained possession of the property and finding the property damaged sued the attaching decree-holder for damages. **Held,** that Art. 42 and not Art. 29, applied to the case, and that the cause of action arose not on the date of the attachment, but on the date when property was finally restored to him. (1901) A.W.N. 211=24 A. 146.

——Art. 42—Compensation for wrong injunction.

See Art. 29. 27 M. 346.

——Art. 44.

Synopsis.

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1. Applicability and scope.

——Art. 44—Applicability—Transfer of minor's property by unauthorised person—Limitation.

Where there is a transfer of a minor's property by an unauthorised person acting as a guardian, it is not a case falling within Art. 44 of the Limitation Act but it is a case where the limitation is twelve years from the date of the transfer or three years from the date of attainment of majority, whichever is longer. I.L.R. (1948) 2 Cal. 170=53 C.W.N. 258 (1).

——Art. 44—Scope.

The question whether or not Art. 44, shall apply, depends upon whether the transactions were by the guardian of the minors and whether these require setting aside. Article 44 has no application to cases of transfers by wholly unauthorised persons. A.I.R. 1943 Cal. 203=47 C.W.N. 288=206 Ind. Cas. 599.

——Art. 44—Alienation by unauthorised person.

Where the property of a minor has been transferred by wholly unauthorised person, the transaction is void **ab initio** and it is not necessary for the minor in order to recover possession of property transferred to have the transfer set aside. In such cases Art. 44 will have no application and the suit will be governed by Art. 144. 1929 A.L.J. 1248=A.I.R. 1929 All. 879.

——Art. 44.

When a sale is made not by a guardian but by a wholly unauthorised person, (in this case by a Mahomedan step mother) Art. 44 is inapplicable but Art. 142 applies and a suit brought within 12 years from date of sale is within time. 84 Ind. Cas. 923=6 L.L.J. 516=A.I.R. 1925 Lah. 239.

——Art. 44.

Per **M. N. Mukerji, J.**—Article 44 is not applicable to the case of an alienation by an unauthorised person. 34 All. 213, **Foll.** 83 Ind. Cas. 1040=39 C.L.J. 394=A.I.R. 1924 Cal. 1008.

——Art. 44—Applicability—Transfer not binding.

The article applies only if the transfer is binding unless it is set aside by a suit. A.I.R. 1940 Cal. 589=193 Ind. Cas. 168.

——Art. 44.

It is far from correct to say that a minor cannot repudiate a transfer except by filing a suit under Art. 44. A.I.R. 1938 Mad. 822=(1938) M.W.N. 802=(1938) 2 M.L.J. 428=182 Ind. Cas. 862.

——Art. 44—Scope—Not restricted to transfer by certificated guardian.

The words of Art. 44 are very general and have application to every case in which a ward on attaining majority impugns the transfer made by his or her guardian during his or her minority and there is absolutely no warrant for restricting the application of that article to cases of transfers made by a certificated guardian. 1929 A.L.J. 1248=A.I.R. 1929 All. 879.

——Art. 44.

In the case of an alienation by an authorised guardian the minor must sue within three years of his coming of age. 61 Ind. Cas. 384=3 L.L.J. 280=A.I.R. 1921 Lah. 25.

——Art. 44—Condition precedent.

One condition precedent for the application of Art. 44 is that the property should be property belonging to the ward and where it does not so belong, Art. 44 has no application. 7 O.W.N. 150=A.I.R. 1930 Oudh 82.

——Art. 44—Clog on redemption—Suit to set aside.

Article 44 refers to suits brought a minor to set aside the unauthorised acts of his guardian and does not apply to a case where the plaintiff tries to set aside the leases as void as clog on the equity of redemption. 115 Ind. Cas. 405=53 Bom. 360=31 Bom. L.R. 229=A.I.R. 1929 Bom. 186.

——Art. 44—Setting aside decree.

Articles 95, 44 and 91 of the 1st Schedule to the Limitation Act do not apply to a suit to have a decree set aside but the article applicable would be 120. 62 Ind. Cas. 794=4 L.L. J. 211=2 Lah. 164=79 P.L.R. 1921=A.I.R. 1922 Lah. 166.

——Art. 44—Execution sale—Property belonging to minor wrongfully attached and sold in a decree against the guardian—Setting aside.

A suit by a minor to set aside a sale in execution of decree obtained against guardian is governed by Art. 44. (1916) 2 U. B. R. 116=10 Bur. L.T. 225=36 Ind. Cas. 3.

——Arts. 44 and 91—Executor—Alienation by.

A sale by an executor of the testator's properties must be governed by the rules relating to an executor and a suit by his son, a legatee, under the will to set aside the sale is not governed by Art. 44. Nor is Art. 91 applicable as the alienation need not be set aside in order to recover possession of the property. 36 Mad. 575=12 M.L.T. 207=23 M.L. J. 306=(1912) M.W.N. 1112=17 Ind. Cas. 4.

2. Defence not barred.

——Art. 44—Scope—Defence not barred.

It is open to the minor to challenge the transfer as a defendant and Art. 44 will be no bar to such a defence. That article only bars the remedy of the plaintiff to get the mortgage-deed set aside but is not fatal to his title. A.I.R. 1940 All. 416=(1940) A.L J. 511=1940 A.W.R. 458=I. L. R. (1940) All. 580=191 Ind. Cas. 647.

——Art. 44—Defence not barred.

Where the vendee from the guardian under a voidale sale sues to recover possession of the property three years after the ward attained majority it is open to the defendant to set up the plea of the invalidity of the sale in defence though a suit by him as plaintiff to avoid the sale would be barred under Art. 44 of the Lim. Act. 42 Mad. 36=35 M. L. J. 652=48 Ind. Cas. 856.

——Art. 44—Defence if barred.

An alienation by guardian ought to be set aside by the ward by instituting a suit within the period prescribed by Art. 44 and till it is set aside the title vests in the alienee. Though Art. 44 describes the suit to be brought by the award as a suit merely to set aside the transfer by guardian, if the transferee has obtained and is in possession the ward has to add a prayer for possession and Art. 44 still applies though the suit relates to both reliefs. A person whose right to set aside an alienation is barred under Art. 44 cannot avoid it as a defendant by denouncing it in a suit for possession brought by the alience. 41 Mad. 102=33 M.L. J. 309=40 Ind. Cas. 664.

3. Aliyasanthana family.

——Arts. 44, 91 and 144—Aliyasanthana family—Alienation by ejaman—Suit to set aside.

A suit by an aliyasanthana family to recover possession of the family properties alienated by its ejaman not being a suit to set aside an instrument within Art. 91 is governed by Art. 144. 27 M. L. J. 60=24 Ind. Cas. 246.

4. Joint Hindu family.

See also Note 6.

——Art. 44—Transfer by karta of joint family.

Per Wadia, J.—Article 44 does not apply to a suit to set aside an alienation of a minor's share by the managing member of the co-parcenary. The fact that the minor's mother joined in the alienation or that she described herself as guardian does not make any difference to the position. When the family is joint, the mother cannot be the legal guardian of the property of her minor sons. A. I. R. 1943 Bom. 278=45 Bom. L.R. 462=211 Ind. Cas. 379.

——Arts. 44 and 144—Joint Hindu family—Suit by minor for possession of his share alienated by uncle.

In case of a joint Hindu family, a minor's suit for possession of his share alienated by his uncle is governed by Art. 144 and not by Art. 44. 35 P.L.R. 722=A.I.R. 1934 Lah. 601=152 Ind. Cas. 633.

——Arts. 44 and 144—Joint Hindu family—Alienation by mother acting as guardian.

There were two undivided cousins, and at a time when both of them were minors, their mothers, acting as guardians, alienated certain properties belonging to the minors. One of the minors died later on and the survivor sued to recover the property from the alienee on the ground that the alienation was beyond the power of the guardians to make. The suit was instituted within twelve years of the alienation but more than three years after the plaintiff attained majority:

Held, (i) that Art. 44 was not inapplicable merely because the two minor cousins were members of a joint Hindu family inasmuch as there were no adult co-parceners at the time of the alienation;

(ii) that the suit was governed by Art. 44 and not by Art. 144 and was time-barred even though it had been filed within twelve years of the date of the alienation;

(iii) that the suit was barred even as regards the deceased cousin's share. (1934) M.W.N. 960=40 L.W. 760=A.I.R. 1935 Mad. 1 (2)=68 M.L. J. 87=154 Ind. Cas. 616.

——Art. 44—Joint Hindu family.

Article 44 has no application where the suit relates to a transaction entered into by an elder brother to his

capacity as manager of a joint Hindu family. 116 Ind. Cas. 195=6 O. W. N. 213=4 Luck. 503= A.I.R. 1929 Oudh 284.

——**Art. 44.**

Although a person who manages the estate whether of a minor who is the sole owner of the property or of a co-parcenary, in which he has a joint interest with the minor, is entitled to be styled a manager, in matters of alienation, the position of each is different. In one of the alienation is by a manager who has no joint interest with the minor while in the other he has. It is to an alienation of the latter kind that the description **alienation by a karta** or manager would strictly apply as it is by a **person having an interest** in the joint property. 88 Ind. Cas. 268=A.I.R. 1925 Nag. 385.

——**Art. 44.**

A suit to set aside an alienation by a manager of joint Hindu family and for possession of the property is governed by Art. 144 and not by Arts. 44 or 91 of the Limitation Act. 13 A.L. J. 94; 12 N.L.R. 12, **Foll.** 68 Ind. Cas. 731=A.I.R. 1922 Lah. 386.

——**Arts. 44 and 144—Hindu Joint-family—Alienation by manager—Suit by minor member for his share.**

A suit by a minor since attained majority, to recover his share of joint-family properties transferred by the manager of the joint-family but not as guardian of the plaintiff is governed by Art. 144 and not by Art. 44. 28 C.L. J. 496=49 Ind. Cas. 118.

——**Arts. 44 and 126—Joint Hindu family—Alienation by father as guardian—Suit to set aside—Limitation.**

The fact that a Hindu father executed a sale deed as guardian of his son will not take the case out of Art. 126 and bring it under Art. 44 which applies to cases where a minor's property is transferred by his guardian. 23 M.L.T 245=(1918) M.W.N. 892=44 Ind. Cas. 605.

——**Art. 44—Joint Hindu family—Suit by minor member.**

Art. 44 does not apply to a suit by a minor member of a joint undivided Hindu family on attainment of majority to declare an alienation made by his natural guardian invalid and not binding on him. 5 L. W. 374 =40 Ind. Cas. 145.

——**Sch. I, Arts. 44 and 144—Joint Hindu family — Alienation by Manager — Minor's property.**

A suit by a member of a joint Hindu family for possession of property alienated by the manager during plaintiff's minority as the guardian of the minor, is a suit for recovery of immovable property within the meaning of Art. 144 of the Lim. Act and not under Art. 44, which applies to cases where a person acts as a guardian of a minor in respect of property which he has individual rights of ownership. 29 Ind. Cas. 199, Foll. 40 Ind. Cas. 418 (Mad.).

——**Arts. 44, 91 and 144—Joint Hindu family—Alienation by Hindu father for no benefit or necessity—Suit by minor to set aside—Limitation.**

A suit to set aside alienation by Hindu father during son's minority without any benefit or necessity is not governed by Art. 44 or 91 but by Art. 144. 17 Bom. L.R. 1137=(Note) 33 Ind. Cas. 441.

——**Arts. 44 and 144—Joint Hindu family—Minor member of a Joint Hindu family—Suit by to set aside alienation by manager—Limitation.**

A suit by a member of a joint Hindu family on attaining majority for possession of family property on the allegation that alienation by the manager was without necessity is not governed by Art. 44 or 91 but by Art. 144. This is so even though the manager describes himself as a minor's guardian in the deed of alienation. 12 N.L.R. 12=32 Ind. Cas. 242.

——**Arts. 44, 91 and 144—Joint Hindu family—Alienation—Suit after attaining majority—Limitation.**

A suit by a minor member of a joint Hindu family to set aside an alienation of his share of the joint family property can be filed within 12 years. If it is brought after three years after attaining majority but within 12 years of date of sale it is not barred by limitation. Art. 44 is not applicable as alienation could not be viewed as one made on behalf of the minor by his guardian for the minor's benefit and his undivided share is not property which can be dealt with by his guardian neither Art. 91 is applicable for it is not intended to apply to suit for possession of immovable property alienated by persons whose powers are restricted such as managers of joint families and religious endowments, Hindu widows, etc. Where a person executing a document had no authority in law to execute it the plaintiff need not sue to set it aside. An express prayer to that effect may be treated as not an essential part of his relief. 84 P.R. 1915=96 P.W.R. 1915=29 Ind. Cas. 199.

——**Arts. 44 and 144—Joint Hindu family—Suit to set aside sale—Limitation.**

A suit by a junior member to set aside a sale deed by one member of the joint Hindu family and for possession of his property is governed by Art. 144 and not by Art. 44 or 91. 13 A.L. J. 94=27 Ind. Cas. 687.

——**Art. 44—Joint Hindu family—Alienation by uncle and mother of minor—Undivided Hindu family—Setting aside.**

Where a minor and his uncle constituted a joint Hindu family and the uncle sold certain joint family property, the mother of the minor jointly executing it as guardian of the minor:

Held, that as the undivided paternal uncle was the guardian in law of the minor and not the mother, a suit to set aside this sale would not fall under Art. 44. 17 M.L.T. 138=27 Ind. Cas. 695.

5. Malabar Tarwad.

——**Art. 44—Malabar tarwad.**

A suit by the junior members of a Malabar tarwad to recover possession of immovable property alienated by the Karnavathi is governed by Art. 144 and not by Art. 91. The fact that the Karnavathi purported to execute the document not only as Karnavathi, but also as guardian of the minor plaintiffs, will not make either Art. 91 or Art. 44 applicable to the suit. 78 Ind. Cas. 564=19 M.L.W. 395=34 M.L.T. 89=A.I.R. 1924 Mad. 607=46 M.L. J. 340.

6. Guardian — Who is.

——**Art. 44—Guardian, meaning of.**

Article 44 refers to the relationship of guardian and ward. A manager, loosely described as a de facto guardian, is not a guardian at all. A.I.R. 1940 Cal. 589=193 Ind. Cas. 168.

——**Art. 44.**

The manager of a joint Hindu family consisting of himself and his minor brothers is not to be deemed their guardian within the meaning of that term in Art. 44. 36 Bom. L.R. 474=A.I.R. 1934 Bom. 234= 151 Ind. Cas. 1043.

——Art. 44—Guardian, meaning of.

Where uncle and minor nephew are members of a joint Hindu family, the uncle cannot be said to be a guardian of the nephew within the meaning of Art. 44. 35 P.L.R. 722=A.I.R. 1934 Lah. 601=152 Ind. Cas. 633.

——Art. 44.

Manager of a joint Hindu family consisting of himself and his two minor brothers is not a guardian within Art. 44. 34 All. 213 (P.C.), Foll. 87 Ind. Cas. 721=27 Bom. L.R. 495=A.I.R. 1925 Bom. 372.

——Art. 44.

Where in a suit for partition the plaintiff asked for setting aside the alienation of some properties which had been alienated by the managing member of the family on behalf of plaintiff and other members:

Held, that the mere description of the manager as guardian of the plaintiff would not at all make him a guardian within the meaning of Art. 44. 86 Ind. Cas. 234=21 M.L.W. 111=A.I.R. 1925 Mad. 793.

——Art. 44.

The word 'guardian' as used in Art. 44 is of general import and includes natural and testamentary guardians as well as guardians appointed by Court. A.I.R. 1934 Mad. 605=(1934) M.W.N. 499=67 M.L.J. 322 =40 L.W. 406=57 M. 1062=152 Ind. Cas. 546.

——Art. 44.

The natural mother of an adopted minor is not a guardian **de jure** under the Hindu Law and a suit by the minor to set aside an alienation by her is not governed by Art. 44. A.I.R. 1931 Mad. 597=(1931) M.W.N. 417=33 L.W. 664=133 Ind. Cas. 773.

——Art. 44—Indian Christians—Mother is natural guardian.

Among Indian Christians, the mother, the father being dead, is not a mere **de facto** guardian of her minor children, but is their natural guardian for many purposes, and a sale effected by her of her minor children's properties as their guardian is not void but only voidable. A suit for a declaration by the children that such a sale is not binding upon them would, therefore, fall within Art. 44 of the Sch. I of the Lim. Act. (1934) M.W.N. 499=A.I.R. 1934 Mad. 605=40 L.W. 406=67 M.L.J. 322=57 M. 1062=152 Ind. Cas. 546.

——Art. 44—Indian Christians—Guardian.

Failing the father and mother and their appointees, no other person is entitled as of right to the custody of an Indian Christian minor or to the guardianship of his property. 33 L.W. 615=(1931)M.W.N. 415=60 M.L.J. 695=A.I.R. 1931 Mad. 529=132 Ind. Cas. 120.

7. Several wards.

——Art. 44.

Alienation of property belonging to Hindu minors by their mother—Suit by minors to set aside alienation more than three years after the eldest brother attained majority.

Held, that the presumption is that the elder brother was the manager of the joint family and the suit brought more than three years after he attained the majority was time-barred under Art. 44. 44 L.W. 479 =(1936) M.W.N. 1128=A.I.R. 1936 Mad. 914=165 Ind. Cas. 656.

——Art. 44—Several wards.

Where a mother, as a guardian of her three minor sons alienated some property and a suit was instituted to set aside the alienation, three years after eldest attained majority, it was held that suit was time-barred and eldest was presumed to be manager unless contrary was proved. 1936 M.W.N. 930.

——Art. 44.

A suit to set aside a sale of a family property without necessity by a Hindu mother acting as natural guardian of her sons is barred if instituted after three years of the eldest son's attaining majority. 8 B.R. 72= A.I.R. (1935) Bom. 259=37 Bom. L. R. 225=157 Ind. Cas. 592.

——Art. 44—Testamentary guardian—Joint Hindu family—Setting aside—Limitation Act, S. 7.

It is competent to a Hindu father to appoint a testamentary guardian of the family properties during the minority of his sons. If the guardian makes an improper alienation, the minors will have to set it aside under Art. 44 of the Lim. Act. If the eldest of them is barred, then under S. 7 of the Lim. Act all are barred. 38 Bom. 94=15 Bom.L.R. 882=21 Ind. Cas. 350.

——Art. 44—Right of manager barred—Effect of.

The plaintiffs sued to recover possession of lands after setting aside the sale deed passed by their mother during their minority. The plaintiffs were brothers, members of a joint family. One of them was more that 21 years of age and manager of the joint family when he filed the suit:

Held, that he could have given a discharge and acquittance of all claims against the defendants without the concurrence of the other plaintiffs as manager of the joint Hindu family and so the entire suit was barred by limitation. 59 Ind. Cas. 759=45 Bom. 446= A.I.R. 1921 Bom. 289.

——Art. 44—Alienation by guardian—Setting aside—Minority—Majority of elder brother—Effect.

Where the mother of two Hindu minors sold their properties as guardian and more than three years after the attainment of majority by the eldest brother but within there years of his attaining majority the younger brother sued to set aside the alienation, **held**, the suit was governed by Art. 44 of the Lim. Act, but that it was barred under S. 8 of the Act. The elder brother on attaining majority could give a discharge on behalf of himself and his younger brother. 38 Mad. 118=25 M.L.J. 405 =14 M.L.T. 401=21 Ind. Cas. 410.

[On appeal from 21 M. L.J. 1041=12 Ind. Cas. 695.]

8. Suit by or against assignee or legal representative of ward.

——Art. 44.

The right to question the validity of the sale is a personal right of the minor which can be exercised by him on attaining majority. The purchasers from minor do not acquire this right by their purchase of property from him. 69 C.L.J. 188=43 C. W. N. 295= A.I.R. 1939 Cal. 460=185 Ind. Cas. 6.

——Art. 44.

Where property of minor is sold by the natural guardian and no suit is brought by the minor to set aside the sale within three years of his attaining majority, the subsequent assignee or vendee from the ex-minor cannot have any higher rights than those which his own assignor would have had, and as the right of the minor was limited to a suit within three years of the attainment of majority, a suit filed by the assignee or vendee for possession of the property transferred more than three years after the attainment of majority by the minor must fail on the ground that the right to sue has come to an end with the expiry of that period. 1939 O.W.N. 241=A.I.R. 1939 Oudh 122=180 Ind. Cas. 329.

——Art. 44—Su it by transferee from minor.

The remedy contemplated by Art. 44 is open to a ward for three years from the date of his attaining majority, and that remedy is not lost, by the mere fact that he purports to transfer his interest in the property such as it is at the date of the transfer, to a third party.

Where a minor's property was sold by the minor's guardian and the minor after attaining age transferred the same property to another and where the transferee as the principal plaintiff and the transferor as the second plaintiff sued to set aside the sale within three years of the minor attaining majority,

Held, that the suit was not barred by limitation. 86 Ind. Cas. 879=49 Bom. 309=27 Bom. L.R. 211=A.I.R. 1925 Bom. 292.

——Art. 44—Transfer by ward—Death of ward—Suit by his legal representative.

A suit by transferee from minor is governed by Art. 44. A.I.R. 1925 Bom. 292, Not Foll.

It may be that if the ward dies during his minority Art. 44 will not apply to a suit by his legal representative for recovering the property alienated by the guardian, yet if the ward dies after the attainment of majority, Art. 44 will apply. 113 Ind. Cas. 481=29 M.L.W. 169=1929 M.W.N. 124=A.I.R. 1929 Mad. 313=56 M.L.J. 332.

——Art. 44—Cause of action—Right to sue accruing on alienation—Minor dying—Starting point.

A minor's property was alienated by his mother acting as his guardian. The minor died before attaining majority and was succeeded by his mother. After the mother's death the reversionary heirs instituted a suit to set aside the sale more than three years after the minor's death,

Held, that the suit was time-barred.

Where the guardian of a minor alienates the minor's property, the cause of action arises from the date of the alienation. Section 6 only makes minority a cause for suspending limitation. Article 44 cannot therefore be construed so as to give a new cause of action from the time the minor attains majority. Hence when the minor dies before attaining majority, S. 6 (3) comes into play and the period of limitation is to be recokned from the death of the minor and the fact that the heir of the minor is a female makes no difference. A.I.R. 1930 Mad. 821=127 Ind. Cas. 801=32 M.L.W. 206=1930 M.W.N. 708=59 M.L.J. 196.

——Art. 44—Suit for possession against assignee from purchaser from guardian. The alienee is deriving title *pendente lite* will be bound by the result of the suit against the alienee; but where the purchaser from the guardian had alienated the whole or a portion of the property before the suit, the alienee from the purchaser will certainly not be bound by any adjudication which the ward may obtain against the original purchaser. If the ward seeks to dispossess the second alienee, the question of the validity of the alienation must undoubtedly be re-tried, and the policy of Art. 44 is that a question of that kind should be investigated and decided within a period of three years after the attainment of majority by the ward. It is fantastic to hold that even if the original alienee had parted with the whole property in favour of a stranger, the requirements of Art. 44 will be satisfied by obtaining a decree against the original alienee in the absence of the later purchaser and on principle, it can make no difference whether the later alienation is of the whole property or only of a part of the property. A.I.R. 1938 Mad. 677=(1938) M.W.N. 403=181 Ind. Cas. 697.

9. Suit by purchaser from guardian.

——Art. 44—Joint Hindu family—Suit by alienee of minor brother.

In case of a joint Hindu family, it is not necessary for the minor brother to set aside the alienation within three years nor is there any legal objection to his alienating the right to a share in the property which he possessed. A suit by alienee of the minor brother is not barred by Art. 44. 36 Bom. L.R. 474=A.I.R. 1934 Bom. 234=151 Ind. Cas. 1043.

——Arts. 44 and 91—Suit by purchaser.

Suit by purchaser claiming to set aside a sale by the guardian of his vendor, during the vendor's minority is governed by Art. 44 and not by Art. 91. 5 N.L.R. 50=2 Ind. Cas. 229.

10. Suit for possession.

See also NOTES 11 AND 12.

——Art. 44—Where the guardian alienates the property of the minor ward by means of a deed which is void *ab initio*, and the minor, after attaining majority, files a suit for its recovery, the suit is not governed by Art. 44 but by Art. 142. A.I.R. 1941 Oudh 172=1940 O.W.N. 1318=1941 A.W.R. (C.C.) 22=191 Ind. Cas. 885.

——Art. 44—Suit for possession.

Article 44 has nothing whatever to do with suits for possession. The only thing which becomes barred at the expiry of time prescribed by Art. 44 is the ward's right to set aside a transfer. The failure to sue within the time prescribed does not extinguish the right to the property under the provisions of S. 28. A.I.R. 1940 Cal. 589=193 Ind. Cas. 168.

——Art. 44—Suit for possession.

Article 44 contemplates a suit for possession and not a mere suit for declaration. If it is a suit for possession, it must obviously be instituted against the parties in possession. A.I.R. 1938 Mad. 677=(1938) M.W.N. 403=181 Ind. Cas. 697.

——Art. 44—A suit for possession by a minor on attaining majority against the transferee from the guardian where the latter had obtained permission from the District Judge to effect the transfer on the ground of fraud, or misrepresentation is governed by Art. 44 and not by Art. 144. (1931) A.L.J. 997=A.I.R. 1932 All. 108=53 A. 738=136 Ind. Cas. 71.

——Arts. 44 and 91—Void and valid deeds—Distinction between.

If a sale is held to be void owing to fraudulent registration, there will be no need to set it aside and a suit to recover possession of the properties by the sale-deed will not be barred, though brought by the ward about eleven years after the date of the sale. If, on the other hand, if it is not void, then such a suit has to be regarded as one for setting aside the sale-deed, in that possession cannot be obtained unless the document is set aside and such a suit should be brought within three years from the date of the sale. 32 M.L.W. 680=1930 M.W.N. 1067=A.I.R. 1931 Mad. 45=60 M.L.J. 701=129 Ind. Cas. 245=54 M. 352.

——Art. 44—Void sale.

Where a sale is void Art. 44 is inapplicable and a suit can be brought by a minor to recover possession within a period of 12 years. 107 Ind. Cas. 897=A.I.R. 1928 Nag. 262.

——Art. 44—If a sale is effected by a person who is not a minor's guardian either according to his personal law or by appointment by the Court, such a sale is a nullity and does not affect the minor's property. If, on the other hand, the sale is made by a natural guardian, who goes beyond the scope of his authority, the transaction cannot be regarded as a nullity and will bind the

minor unless he succeeds in impeaching it within the period prescribed by law. 42 Bom. 626 and 44 Bom. 742, Foll. 32 All. 392, Dissented.

A suit by a *quondam* minor to set aside an alienation of his property by his guardian is governed by Art. 44, and if he cannot establish his right to possession without first setting aside the alienation, the suit for possession is also governed by that article, and not by Art. 148. 44 Bom. 742 and 25 Bom. 337 (P.C.), Foll. 89 Ind. Cas. 602=6 Lah. 447=7 L.L.J. 556=26 P.L.R. 531=A.I.R. 1925 Lah. 619.

——Art. 44—Suit for possession—Void sale.

Where the guardian sold properties by a sale deed which was void owing to the fraud upon the Registration Act no valid title passed to the vendee and the article applicable to the suit for possession of the properties sold is not Art. 44 but Art. 144. 43 Mad. 436=11 L.W. 394=38 M.L.J. 327=56 Ind. Cas. 519.

——Arts. 44, 91, 144—Suit for possession—Alienation of stranger.

A suit for possession of immoveable property alienated by a person who is neither a guardian under Mahomedan Law, nor one appointed by Court is governed by Art. 144 and not by Art. 44 or Art. 91. 83 P.R. 1916=125 P.W.R. 1916=33 Ind. Cas. 943.

——Arts. 44 and 144—Suit for possession—Sale unregistered—Unenforceable—Limitation.

Art. 14 applies only if the sale is valid and enforceable. When the sale is not valid, purchaser is a mere tresspasser who can be ejected as such. 33 Ind. Cas. 436 (Mad.).

——Arts. 44 and 144—Suit for possession—Limitation.

Art. 44 extends the period provided in Art. 144 to three years after the cessation of disabilities in the case of suits of a particular class by minors. 10 M.L.T. 418=(1911) 2 M.W.N. 450=21 M.L.J. 1041=12 Ind. Cas. 695.

——Art. 44—Suit for possession—Void conveyance.

Art. 44 applies only to cases in which the plaintiff seeks to set aside a genuine transaction. If the transaction is void *ab initio*, it is not necessary to seek the cancellation of the conveyance. It is only when the transaction is genuine but is in excess of authority of the executant, that Art. 44 will apply. Art. 44 applies to alienations by *de facto* as well as *de jure* guardians. 13 C.L.J. 277=9 Ind. Cas. 377.

11. Transfer by certificated, natural or other de jure guardian.

——Art. 44—A deed executed by a certified guardian of a minor mortgagee releasing the sub-soil rights in the mortgaged land from the operation of the mortgage, in favour of the lessee of the mortgagor for a certain consideration is, in effect, the transfer of equity of redemption. The fact that the consideration mentioned in the deed is neither adequate nor reasonable nor for the benefit of the minor is no ground for holding that it is void. It is voidable, and a suit to set aside such deed is governed by Art. 44, Sch. I, Lim. Act. A.I.R. 1938 Pat. 337=4 B.R. 697=19 P.L.T. 594=17 Pat. 460=176 Ind. Cas. 273.

——Art. 44—The period of limitation for bringing a suit to set aside a sale-deed executed by a guardian of a minor without the permission of the District Judge is 3 years. 1937 O.W.N. 1012=A.I.R. 1937 Oudh 521=171 Ind. Cas. 187.

——Art. 44—Suit for possession—Suit to impeach sale not brought within 3 years of majority—Title of vendee—Lim. Act, S. 28.

A sale by a certificated guardian of a minor not in accordance with the Court's sanction is voidable, but it is good until it is avoided. If the minor does not, within three years after attaining majority take action for repudiating sale his right to set aside the sale and recover possession of the property is barred. A transferee from him cannot successfully sue the purchaser from the certificated guardian for recovering possession of the property after declaration of title. 52 Ind. Cas. 269 (Cal.).

——Arts. 44 and 144—Applicability—Suit by minor sons to set aside sale by their elder major brother and mother—Self-acquired property of the father devolving on the sons.

Where the self-acquired property of the father devolves upon his sons and the eldest of them, a major, alienates the property along with his mother and a suit is brought by the other sons on their attaining majority, it would be governed by Art. 44 and not by Art. 144 of the Limitation Act. 23 Luck. 58=A.I.R. 1948 Oudh 125=1947 A.W.R. (C.C.) 278=1947 O.A. (C.C.) 278=1947 O.W.N. 558.

——Art. 44—Alienation by natural guardian.

Under Hindu Law, an alienation by a natural guardian, not for necessity, is voidable and a suit to set aside such alienation will be governed by Art. 44. 24 Pat. 273=A.I.R. 1945 Pat. 298=11 Cut. L.T. 15.

——Art. 44—The minor, on attaining majority, has a right to have the sale set aside, effected by his guardian for legal necessity, and he must do so within the period fixed by Art. 44 of the Lim. Act. 69 C.L.J. 188=A.I.R. 1939 Cal. 460=43 C.W.N. 295=185 Ind. Cas. 6.

——Art. 44—A suit to set aside a sale by a *de jure* guardian of a minor of property belonging to the minor is governed by Art. 44 and not by Art. 144 and such a suit would be barred if it is instituted only after three years after plaintiff attained majority though it is filed within twelve years of the date of the sale.

A transfer by a guardian, however improper it may have been, is not a void transaction but only a voidable one and when property cannot be recovered without avoiding it, a suit to recover such property will be governed by Art. 44. (1936) M.W.N. 74=70 M.L.J. 352=A.I.R. 1936 Mad. 346=43 L.W. 611=59 M. 549=161 Ind. Cas. 797.

——Art. 44—A sale by a guardian of his ward's property is not void, but voidable, provided that the former ward can show that it was not made for necessity, that is, he is allowed to have it set aside, on making such an allegation and proving it within the time set out in Art. 44, Lim. Act. 34 Bom. L.R. 1512=A.I.R. 1933 Bom. 42=141 Ind. Cas. 806.

——Art. 44—Alienation by guardian of widow.

Alienation by guardian of widow—Renewal by widow—Suit to set aside alienation—Limitation Act. Sch. I, Art. 44, applied and suit was time-barred. 31 L.W. 336=58 M.L.J. 417=A.I.R. 1931 Mad. 274=(1930) M.W.N. 97=131 Ind. Cas. 609.

——Art. 44—Alienation by mother—Suit for possession.

Where the mother alienates her minor son's property, and the son after attaining majority sues for possession of the property sold, the suit is governed by Art. 44 and not by Art. 144. 19 P.R. 1902; A.I.R. 1921 Lah. 257; A.I.R. 1925 Lah. 619 and A.I.R. 1929 Lah. 115, Foll. 116 Ind. Cas. 893=11 L.L.J. 108.

——Art. 44—Transfer by natural guardian.

It is now well-settled that Art. 44 applies not only to setting aside the transfer of property made by a guardian appointed by a Court or by will but also to suits for setting aside a transfer of property made by a natural guardian. 118 Ind. Cas. 481=29 M.L.W. 169=1929 M.W.N. 124=A.I.R. 1929 Mad. 313=56 M.L.W. 332.

——**Art. 44—Alienation without necessity—Made by authorised person.**

An alienation by a natural guardian of the minor's property is a voidable, and not a void transaction ; and the fact that it was not for necessity does not alter the nature of the transaction. It is an unauthorized transfer by an authorized guardian and the limitation to set aside such a transfer is prescribed by Art. 44. A.I.R. 1925 Lah. 619 (2), Foll. 103 Ind. Cas. 365=9 Lah. 33=29 P.L.R. 305=A.I.R. 1928 Lah. 115.

——**Art. 44—Sale of minor's property by father.**

Where property which belongs to a minor exclusively is sold by his father as guardian and the minor after attaining majority sues to recover the property, Art. 44 applies to the suit. The mere fact that the father joins in the execution of the deed in his personal capacity and also his brother does likewise in order to remove the apprehensions of the vendee does not take away the case from Art. 44. 62 Ind. Cas. 630=13 M.L.W. 416=1921 M.W.N. 255=A.I.R. 1921 Mad. 425=40 M.L.J. 475.

——**Art. 44—Suit for possession—Property transferred by natural guardian.**

A suit for the recovery of property transferred during the minority of plaintiff by his natural guardian must under Art. 44 of the Lim. Act be brought within 3 years of attaining majority, such a transfer being voidable and not void. 24 C.W.N. 1016=32 C.L.J. 48=59 Ind. Cas. 589.

——**Art. 44—Natural guardian—Alienation by mother—Suit by minor to set aside—Limitation.**

During the minority of a person his equity of redemption was sold by his mother acting as his natural guardian, without any legal necessity. *Held*, the minor must sue to set aside the sale within three years of his attaining majority. Otherwise neither he or his next reversioner can impeach the transfer. 44 Bom. 742=22 Bom. L.R. 680=58 Ind. Cas. 257.

——**Art. 44—Natural guardian—Mother—Suit to set aside alienation—Limitation.**

A suit by a minor on attaining majority to set aside an alienation of his property by his mother as guardian is governed by Art. 44. 42 Bom. 626=20 Bom. L.R. 408=46 Ind. Cas. 22.

——**Art. 44—Natural guardian—Father—Property collaterally inherited by minor.**

A suit to set aside alienations by the father as guardian of property surrendered by widow in favour of the minor reversioner is governed by Art. 44. 34 M.L.J. 229=6 L.W. 765=(1917) M.W.N. 854=22 M.L.T. 498=42 Ind. Cas. 939.

——**Art. 44—Natural guardian—Alienation by mother.**

Per *Pratt, J. C.*—The article does not apply to alienation by Hindu widow as guardian of her minor son, in excess of her authority. The alienation is void and not voidable. (Per *Crouch, A.J.C., contra*).—The purchaser is protected by this article in the above circumstances. 10 S.L.R. 381=35 Ind. Cas. 551.

——**Art. 44—Suit for possession—Fraudulent sale by guardian—Right to recover possession—Limitation.**

A fraudulent sale by a guardian is only voidable and should be set aside within three years under Art. 44, so that if he fails to so set aside, his right to recover possession is gone. 34 Ind. Cas. 188 (Cal.).

——**Art. 44—Natural guardian—Mortgage by mother as guardian—Suit to set aside—Limitation.**

A mortgage executed by a Hindu mother of the properties of her minor son, is one by her as guardian though the document does not purport to be as such and a suit to set it aside is governed by Art. 44. 22 M.L.J. 404 ; 20 B. 286 ; 6 M.I.A. 393, Foll. 7 M.L.J. 131, Not Foll. 2 L.W. 1210=31 Ind. Cas. 811.

——**Art. 44—Suit for possession—Alienation by guardian—Suit to set aside—Limitation.**

Art. 44 of the Lim. Act and not Art. 144 applies to a suit by a ward who has attained majority, for possession of properties improperly alienated by his guardian. The sale is not void for mere inadequacy of consideration. 30 M. 393 ; 22 M.L.J. 404, Foll. 2 L.W. 365=28 Ind Cas. 704.

——**Art. 44—Natural guardian—Alienation by mother—Consideration applied for the benefit of minor—Suit by minor 3 years after majority.**

A suit by minor to set aside an alienation made by his mother acting as guardian brought more than three years after his attaining majority is barred under Art. 44 of the Act. 9 Ind. Cas. 377, Foll. 24 Ind. Cas. 110 (Cal.).

——**Art. 44—Suit for possession—Suit by minor after attaining majority for possession of land sold by guardian during minority—Sale within 12 years of suit.**

A suit by Hindu minors for possession of lands sold by heir mother as guardian during their minority, brought after 3 years of their attaining majority but within 12 years of the sale, is barred by limitation. 17 O.C. 52=23 Ind. Cas. 406.

——**Arts. 44 and 144—Natural guardian—Alienation by mother—Suit by son.**

The limitation for a suit for a declaration that a sale of the plaintiff's property by his mother as his guardian is not binding on him is three years from the date of the plaintiff's majority under Art. 44 of the Lim. Act. 23 M. 271 ; 30 M. 393 ; 14 M. 26 ; 7 M.L.J. 131, Foll. 22 M.L.J. 404=11 M.L.T. 198=(1912) M.W.N. 383=15 Ind. Cas. 365.

12. Transfer by de facto guardian.

——**Art. 44**—If an alienation is made either by a manager of a Hindu family or a *de facto* guardian of the minor's interest in the property but without legal necessity, it is not voidable but is void in its inception. If the alienation is made by a natural guardian or a guardian appointed by the Court, then only it is required to be avoided within 3 years after attaining majority. A.I.R. 1943 Bom. 187=45 Bom. L.R. 259=208 Ind. Cas. 150.

——**Art. 44**—In the case of improper or unauthorised alienations by *de facto* guardians, the minors, when they come of age, need not get the alienations set aside and Art. 44 would not apply to a suit by them for possession.

Where the eldest of three sisters as guardians of the younger sister alienated certain properties belonging to them jointly and it appeared that the eldest sister was not even the *de facto* guardian of the others and one of the younger sisters instituted a suit for partition after expiry of more than three years of her attaining majority ignoring the alienations :

Held, (i) that the plaintiff was not bound to sue to set aside the alienation made by her elder sister as the latter was neither a *de jure* or natural guardian nor a guardian *de facto* ;

(2) that even assuming that she was a *de facto* guardian, the plaintiff was not bound to set aside the alienations within three years of her attaining majority. (1936) M.W.N. 1032=71 M.L.J. 366=44 L.W. 543=A.I.R. 1936 Mad. 884=165 Ind. Cas. 287.

——**Art. 44—Alienation by de facto guardian.**

Article 44 applies to alienation by *de jure* guardians and not to those by *de facto* guardians. In the latter

case, a suit can be brought within twelve years. 33 L.W. 664=(1931) M.W.N. 417=A.I.R. 1931 Mad. 597 (2)= 133 Ind. Cas. 773.

——Art. 44—De facto guardian.

Article 44 does not apply to cases of alienations by *de facto* guardians. 108 Ind. Cas. 529=1927 M.W.N. 356=A.I.R. 1928 Mad. 226.

——Art. 44—Neither Art. 44 nor Art. 91 applies to a suit to set aside alienations by a *de facto* guardian. The suit can be brought within the ordinary period of 12 years. 99 Ind. Cas. 1050=A.I.R. 1927 Nag. 145.

——Art. 44—A person who is not a *de jure* guardian but purports to assume the guardianship of the estate of a minor (Hindu) is not in a better position than a stranger and has no authority to make any alienations, and Art. 44 does not apply to such a case. 87 Ind. Cas. 1018= A.I.R. 1926 Nag. 124.

——Arts. 44, 91 and 144—De facto guardian—Step-mother.

An alienation by the step-mother of Hindu minor is not governed by Art. 44 as she is not his lawful guardian. Art. 91 of the Limitation Act applies ordinarily only to an instrument executed by a party or his predecessor in title. 15 N.L.R. 55=51 Ind. Cas. 943.

——Art. 44—De facto guardian—Alienation by Hindu mother.

Art. 44 does not apply to the case of a *de facto* guardian, such as a mother or step-mother; wholly unauthorised to transfer. 17 Bom. L.R. 1134=33 Ind. Cas. 444.

——Arts. 44 and 91—De facto guardian—Alienation—Limitation.

An alienation by a *de facto* guardian is void and need not be set aside before recovery of possession of the property by the minor. Arts. 44 and 91 do not apply to such suits. 10 N.L.R. 133=26 Ind. Cas. 813.

——Sch. I, Art. 44—De facto guardian—Alienation by.

Art. 44 does not apply to alienation by unauthorised guardians. 38 Mad. 1125=27 M.L.J. 285=26 Ind. Cas. 179.

——Arts. 44 and 144—De facto guardian—Suit by ward for recovery of possession of properties.

It is Art. 144 of the Limitation Act and not Art. 44 that applies to suits by wards to set aside alienations by their *de facto* guardians. 180 P.L.R. 1912=234 P.W.R. 1912=16 Ind. Cas. 847.

——Art. 44—Article 44 applies to alienations of unofficial guardians. 76 Ind. Cas. 636=A.I.R. 1924 Bom. 517.

——Art. 44—Sale by the *de facto* guardian for the benefit of the minor is valid. 67 Ind. Cas. 431=A.I.R. 1922 Lah. 421.

——Art. 44—An alienation by the *de facto* and *de jure* guardian of the minor is voidable and not void and Art. 44 applies to a suit by the minor to set aside the alienation. 66 Ind. Cas. 303=17 N.L.R. 183=A.I.R. 1922 Nag. 201.

——Art. 44—De facto guardian of Indian Christian—Alienation by—Suit for possession.

An alienation by the *de facto* guardian of an Indian Christian minor is void and the minor may bring a suit for possession of the alienated property within 12 years of the date of alienation. Article 44 has no application to such a suit. 33 L.W. 615=(1931) M.W.N. 415=A.I.R. 1931 Mad. 529=60 M.L.J. 695=132 Ind. Cas. 120.

——Art. 44—Muhammadan Law—Alienation by mother—Article not applicable.

Under the Mahomedan Law a mother has no power as *de facto* guardian of her infant children to alienate or charge their immoveable property. If such an alienation is made it is not necessary for the infants to have it set aside within three years after attainment of majority under Art. 44, because the alienation must be deemed to have been effected, not by a guardian but by a wholly unauthorised person. The infant, whose property has thus been alienated, is consequently entitled to institute a suit for recovery of possession within 12 years from the date of sale, or within three years from the attainment of majority, whichever may be the later date. But where the alienation was made in lieu of debts binding upon the infants,

Held, that their suit for possession should be decreed subject to their paying the debts. 45 Cal. 878 (P.C.), Foll. 62 Ind. Cas. 428=33 C.L.J. 256=25 C.W.N. 258=A.I.R. 1921 Cal. 572.

——Art. 44—De facto guardian—Suit by widow of lunatic for possession of the property sold by his guardian.

The cause of action for a suit by the widow of a lunatic Mahomedan for possession of her husband's property sold for legal necessity by his mother as his *de facto* guardian accrues not on the date of sale of the property but on the date of the death of her husband. 15 P.R. 1913; 37 M. 514; 34 A. 213 (P.C.); 83 P.R. 1916, Foll. 59 P.R. 1917=100 P.W.R. 1917=41 Ind. Cas. 932.

——Art. 44—De facto guardian—Alienation by the mother of a Mahomedan minor—Suit to set aside—Limitation.

Art. 44 does not apply to a suit to set aside an alienation of a Mahomedan minor's property by his mother, she not being his guardian under Mahomedan Law. 1 Pat. L.J. 188=34 Ind. Cas. 85.

——Arts. 44 and 144—De facto guardian—Alienation—Suit by minor for possession—Mahomedan law.

A suit by a Mahomedan for possession of land sold during his minority by his *de facto* guardian is governed by Art. 144 and not Arts. 44 and 91. 15 P.R. 1913= 202 P.L.R. 1913=19 Ind. Cas. 235.

——Arts. 44 and 144—De facto guardian—Mahomedan minor's property—Suit for recovery of—Limitation—Property subject to mortgage.

Where property belonging to a Mahomedan minor and subject to a valid mortgage, is alienated by his elder brother acting as his *de facto* guardian the alienation is void and does not require to be set aside under Art. 44. The minor on attaining majority can sue for possession within the period prescribed by Art. 144. 34 A. 213= 16 C.W.N. 338=11 M.L.T. 145=(1912) M.W.N. 183= 9 A.L.J. 215=15 C.L.J. 270=14 Bom. L.R. 192= 15 O.C. 49=23 M.L.J. 6=39 I.A. 49=13 Ind. Cas. 976 (P.C.).

——Arts. 44 and 91—De facto guardian—Transfer by.

A Mahomedan uncle is not a guardian of his minor nephew within the meaning of Art. 44 and a sale by such a person as *de facto* guardian is void and need not be set aside either under Arts. 44 or 91 of the Limitation Act. 28 P.R. 1909=1 Ind. Cas. 545.

13. Transfer by guardian as his property.

——Art. 44—De facto guardian—Transfer as his own property.

Article 44 of Lim. Act applies only to a transfer by a guardian, and not to a transfer by one who, though a *de facto* guardian purports to transfer his ward's property in his own capacity and as his own property. A.I.R. 1939 Bom. 427=41 Bom. L.R. 867=186 Ind. Cas. 1285.

——Art. 44—Transfer by guardian in his own capacity.

Where it appears from a sale-deed that the minor's guardian executed it in her own right and not as guardian of the minor, the case cannot come under Art. 44. 1937 O.W.N. 1012=A.I.R. 1937 Oudh 521=171 Ind. Cas. 187.

——Art. 44—Alienation by guardian as his property.

Where a minor's property is sold by his guardian who professed to act as such or who can be shown to have acted in that capacity, the minor may be bound to have the deed set aside within three years after attaining minority; but where the property has been alienated by the guardian as if it were his own and the alienee treats it as the property of the alleged guardian personally and has it sold as such, Art. 14 cannot apply. Such a transfer is void *ab initio*. A.I.R. 1935 A. 417=1935 A.W.R. 555=157 Ind. Cas. 118 (2).

14. Transfer of property—Meaning of.

——Art. 44—Applicability—Agreement of sale by guardian.

Art. 44, Limitation Act, applies only to a transfer of property by a guardian of a minor. Where there is only an agreement of sale by the guardian accompanied with delivery of possession to the purchaser, the mere fact the the agreement along with the fact of possession can be availed of for resisting dispossession does not bring into existence a transfer. I.L.R. (1950) Nag. 25 =1950 N.L.J. 30.

——Art. 44—Father of Hindu minor widow executing deed of surrender—Suit by the widow after attaining majority impeaching the deed as not binding on her and for recovery of properties left by her husband—Limitation—Art. 44 not applicable—Article not applicable to transfer by de facto guardian.

Art. 44 of the Limitation Act applies to a suit by a ward who has attained majority to set aside a transfer of property by his guardian and the period of limitation is three years from the date when the ward attains majority. A deed of surrender executed by the father acting as the guardian of a Hindu minor widow is not a transfer of property. The true view under the Hindu Law is that a surrender is a voluntary act of the widow which brings about her civil death. The property devolves upon the surrenderee by operation of the Hindu Law of succession and not by an act of transfer by the widow to the surrenderee. Apart from the question whether under the Hindu Law a valid surrender could be effected on behalf of a widow who is a minor by a guardian, natural or *de facto*, a surrender does not purport to effect a transfer of the property. Art. 44 of the Limitation Act has no application to a suit by the widow for setting aside the deed. In any event the father cannot be described as a guardian of the widow within the meaning of Art. 44.

The guardian contemplated under Art. 44 is either a natural guardian or a testamentary guardian or a certified guardian; no others are contemplated by the article.

That article has no application to a transfer of property of a minor by a *de facto* guardian. 1950 M.W.N. 69= 63 L.W. 82=A.I.R. 1950 Mad. 390=(1950) 1 M.L.J. 76.

——Art. 44—Surrender—Suit to set aside.

A suit to set aside an alienation of the properties surrendered by the releasee's guardian is governed by Art. 44 of the Limitation. 34 M.L.J. 229=6 L.W. 765=(1917) M.W.N. 854=22 M.L.T. 498=42 Ind. Cas. 939.

——Arts. 44 and 91—Surrender—Suit to set aside—Limitation.

Arts. 44 and 91 govern a suit to avoid a surrender by an occupancy tenant on the ground of fraud and not S. 94 of the C.P. Tenancy Act. 5 N.L.R. 97=3 Ind. Cas. 51.

——Art. 44—Mother representing minor at partition—No transfer.

Article 44 must relate to property of which the alleged guardian is the real guardian and over which he has powers of transfer. There is no authority for applying this article to partition deed by adult co-parceners, to which the mother of minor co-parceners is a party as the partition is not a transfer by the mother as guardian within the meaning of Art. 44. 61 Ind. Cas. 762=13 M.L.W. 260=A.I.R. 1921 Mad. 553.

——Arts. 44, 10, 12, 111, 136, 137, 138, 147, 165, 166, 167, 172—"Sale" meaning of—Pleadings—Plea in meaning of invalidity of transfer, how far avails in a subsequent suit, where defendant is plaintiff.

The word "sale" in Art. 44 means the transfer for a price of the interest in the subject-matter, whatever that interest may be; and not merely the transfer of ownership. *Semble*:—Probably in Arts. 10 and 136 the transfer intended is that of ownership, but in all other provisions it includes the transfer for a price without reference to whether the interest amounts to ownership. Plaintiff's guardian, while plaintiff was a minor, brought a suit upon a mortgage and obtained a decree for possession of the mortgaged lands. She subsequently transferred the plaintiff's rights under the decree to the 1st defendant. 1st defendant brought a suit for possession of portion of the lands and the suit was dismissed on the ground that the assignment to him by the guardian was invalid. The plaintiff brought the present suit for recovery of the lands from the 1st defendant, but which did not form part of the subject-matter of the 1st defendant's prior suit. The suit was brought long after years of the attainment of majority by the plaintiff but within twelve years from the date of the original decree obtained by the guardian.

Held:—That the suit was governed by Art. 44 and was barred; that the assignment by the guardian to the 1st defendant of plaintiff's right under the decree was a "sale" within the meaning of Art. 44.

Held, also that though it might have been competent to the plaintiff to have pleaded the invalidity of the sale to 1st defendant in the suit by the latter against him. yet the finding of invalidity of the sale with reference to such a defence cannot relieve the plaintiff from the consequences of his failure to have the transfer set aside within the time limited by law in regard to property of which possession had passed to the defendant under the transfer. (1907) 17 M.L.J. 220=30 M. 393=2 M.L.T. 351.

——Art. 44—Scope—Minor being in joint possession—Suit to set aside sale and for partition—Maintainability.

Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian. It implies that the property has changed hands and does not apply to cases where the erstwhile minor is in possession of his property in spite of deeds of transfer executed by the guardian under which either possession does not pass from transferor to transferee, *e.g.*, deed of simple mortgage, or possession has not been parted with though it ought to have been delivered. A person brought a suit beyond three years of his attaining majority for partition of the house and declaration that the sale effected by his certified guardian without permission of the District Judge was void and ineffectual as against him. He claimed to be entitled to half share of the house which was so transferred and made the other co-sharer of the house as well as the vendee defendant to the suit. It was found that the plaintiff was all along in possession with the co-sharer.

Held, that Art. 44 did not apply to the case, and even

if it applied it only barred the remedy of the plaintiff to get the sale-deed set aside but was not fatal to his title which still subsisted and consequently the main relief sought, namely, partition as against the co-sharer was not affected by Art. 44. 1930 A.L.J. 1416=A.I.R. 1930 All. 858.

——Art. 45—Award—No contest or investigation—Mere confirmation of plaintiff's possession.

The "award" contemplated by Art. 45 presupposes a contest between the parties and a decision after proper investigation into the points at issue. Where there is nothing to indicate that there was any contest or a decision on any investigation, but the only object of the suit is that the plaintiffs may be confirmed in their possession of the lands, if they succeed in it, and the settlement by the revenue authorities, in so far as it determined the amount of the revenue payable in respect of the disputed property, would in no way be affected, the only result being that the plaintiffs would in that case, obtain the benefit of the settlement which a third person obtained from the Government, Art. 45 does not apply. 104 Ind. Cas. 655=55 Cal. 201=A.I.R. 1927 Cal. 902.

——Art. 45—Suit on title.

Where plaintiff's title was declared against the defendants and the Revenue authorities who had settled the land with the defendants and the plaintiff later on sued for possession.

Held, that Art. 45 does not apply as the object of the suit was not to set aside an award made by the Revenue authorities. 65 Ind. Cas. 833=49 Cal. 37=33 C.L.J. 497=A.I.R. 1922 Cal. 345.

——Art. 45—Bengal Reg. IX of 1825—Alluvial accretion—Settlement of Khas Mahal land—Suit to aside an order refusing settlement.

A suit to set aside an order of the Commissioner refusing to make a settlement of *Khas* mahal land with the plaintiff who claimed settlement of it as an accretion to his jote is governed by Art. 45 and not by Art. 14. (1908) 12 C.W.N. 910.

——Art. 45—Award, what is.

An order of the Collector under Bengal Regulation (VII of 1822) directing the entry of defendants' names as tenants with occupancy rights in the settlement record is an award. 63 Ind. Cas. 161=33 C.L.J. 317=A.I.R. 1921 Cal. 368.

——Art. 46—Award—Collector's decision.

A decision by a Collector of the title between two raiyats is not an award within the meaning of Art. 46 of the Limitation Act. 17 C.W.N. 55=17 Ind. Cas. 881.

——Art. 45—Omission of formal prayer.

The suit is not bad because there is no formal prayer to set aside the order of the Collector. 63 Ind. Cas. 161=33 C.L.J. 317=A.I.R. 1921 Cal. 368.

——Art. 46—Bengal Survey Act.

The order under S. 41 of the Bengal Survey Act has, until reversed or modified by competent authority, the force of an order of a Civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. A suit instituted 3 years after the date of the order is not barred by Art. 46 of the Limitation Act. 66 Ind. Cas. 923=34 C.L.J. 465=A.I.R. 1921 Cal. 277.

Synopsis.

——Art. 47.

1. Applicability and Scope.
2. "Claiming under such person"—Meaning of.
3. "To recover the property"—Meaning of.
4. Failure to institute suit—Effect of.
5. Fainlorder.
6. Limitation under special law.
7. Object of Article.
8. Order without jurisdiction.
9. Persons bound by order.
10. Starting point.

1. Applicability and Scope.
(a) General.
(b) Order under S. 146, Cr.P.Code.
(c) Order under S. 522, Cr.P.Code.

1. (a) Applicability and Scope—(General).

——Art. 47—Applicability—Co-sharers—Suit by one for partition and equal division by metes and bounds—Order under S. 145, Cr. P. Code, declaring joint possession of both—Effect of—Bar under Art. 47—When applies.

Panigrahi, J.—Art. 47 is restricted in its application to those cases where the party is held to be out of possession in a proceeding under S. 145, Cr.P. Code, and cannot apply to a case where the possession of two co-sharers has been confirmed by the Magistrate. There is no need for either of them in such a case to bring a suit for a declaration as to which of the two was entitled to a separate right of possession. And when one of the two co-sharers files a suit for partition and for an equal division by metes and bounds, Art. 47 does not apply.

Das, J.—Where the order under S. 145, Cr.P. Code is not in favour of the defendant, and that order shows that the defendant was not in possession of any of the items of property in dispute, the bar of limitation under Art. 47, Limitation Act, cannot be attracted. I.L.R. (1949) Cut. 611=A.I.R. 1950 Orissa 64.

——Art. 47—Applicability.

A suit for joint possession by a co-owner bound by an order passed under S. 145, Cr.P. Code, in favour of his co-owner whose exclusive possession is maintained by that order comes within Art. 47. A.I.R. 1943 Cal. 67=I.L.R. (1942) 2 Cal. 332=46 C.W.N. 817=76 C.L.J. 342=205 Ind. Cas. 441.

——Art. 47—Applicability.

Where in proceedings under S. 145, Cr.P. Code, in respect of certain land there has been no order for possession in favour of one of the parties by the Magistrate under S. 145, but the proceedings have been consigned to records on the application of the parties stating that there was no dispute between them, a suit brought by one of the parties for declaration of his title to such land is not governed by Art. 47. A.I.R. 1942 P.C. 47=1942 O.W.N. 508=55 L.W. 597=(1942) 2 M.L.J. 384=44 Bom.L.R. 868=47 C.W.N. 38=(1942) Kar. (P.C.) 122 (Sup.). =1942 A.W.R. (P.C.) 37=201 Ind. Cas. 499 (P.C.).

——Art. 47—Applicability.

Dispute as to land between landlord and tenant—Proceedings under S. 145, Cr.P. Code—Order in favour of landlord—Suit by tenant for recovery of possession—Suit is governed by Art. 47, Limitation Act. A.I.R. 1942 Pat. 287=8 B.R. 413=198 Ind. Cas. 347.

——Art. 47—Applicability.

Where, in proceedings under S. 145, Cr.P. Code between the plaintiff and the defendant, the Magistrate declares the defendant to be in possession of the property in dispute, a suit by the plaintiff for possession of his share of the property falls under Art. 47. A.I.R. 1941 Peah. 65=42 Cr.L.J. 872=196 Ind. Cas. 444.

——Art. 47—Applicability.

Article 47 read with S. 145, Cr.P. Code shows that the article applies only to those cases in which the Magistrate has declared one of the parties to be entitled to possession until evicted therefrom in due course of law or has restored possession to a party found to have been forcibly and wrongfully dispossessed within two months

of his initial order. 1936 O.W.N. 784=A.I.R. 1936 Oudh 387=1936 R.D. 416=12 Luck. 371=164 Ind. Cas. 118.

——**Art. 47**—Article 47 is applicable only to a case in which a Magistrate under S. 145, Cr.P. Code, confirms the possession of one party or of the other. 26 Mad. 410, Foll. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

——**Art. 47—Applicability.**

Section 145 (6), Cr.P. Code provides that if the Magistrate decided that one of the parties was or should be treated as being in possession of the land in dispute, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. Thus, if the successful party is evicted by means of a suit by a person other than the parties to the proceeding within the period of three years, the order of the Magistrate being rendered ineffectual, the shorter period of limitation ceases to run against the unsuccessful party, and there can be no room left for the application of Art. 47, and S. 28 will not become operative until the expiry of the limitation period laid down in the ordinary law. A.I.R. 1935 Pat. 164=16 P.L.T. 189=14 Pat. 424=1 B.R. 550=155 Ind. Cas. 1094.

——**Art. 47—Applicability.**

If the possession of the tenants ceased on account of the land being submerged and on re-appearance of the land, there was no actual possession by the *raiyats* and no dispossession by the landlord a suit for declaration is governed by Art. 47. 14 P.L.T. 113=A.I.R. 1933 Pat. 224=12 Pat. 261=149 Ind. Cas. 561.

——**Art. 47—Order passed under Mamlatdar's Courts Act respecting property.**

A suit to deny a right of way which has been affirmed by an order of a *mamlatadar* under the Malmatadar's Courts Act is governed by Art. 47. A.I.R. 1931 Bom. 256=33 Bom.L.R. 517=135 Ind. Cas. 427.

——**Art. 47—Applicability—Nature of suit.**

If the whole of the language of Art. 47 be taken into consideration, it is clear that the nature and scope of the suit intended to be comprised in the article must be one whose main object is to set aside the effect of the summary order of a Magistrate with regard to possession in the interest of public peace. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

——**Art. 47—Right accruing after order.**

Article 47 has no application to a case where at the time when the Magistrate's order was passed under S. 145, there was no existing right in the plaintiff to sue for possession of the suit properties. 19 Cal. 646, Foll. 102 Ind. Cas. 360=38 M.L.T. 226=25 M.L.W. 568=A.I.R. 1927 Mad. 586=52 M.L.J. 482.

——**Art. 47—Possession not given by Magistrate.**

Article 47 applies to cases where a person is not given possession by the Magistrate under S. 145, Cr.P. Code. 99 Ind. Cas. 532=1927 M.W.N. 35=38 M.L.T. 217=A.I.R. 1927 Mad. 304.

——**Art. 47**—Article 47 has no relation to any portion of the order of the Criminal Court which has no reference to the question of possession. 97 Ind.Cas. 73=30 C.W.N. 873=A.I.R. 1926 Cal. 1022.

——**Art. 47—Cr.P. Code, S. 145—Right of way—Three years limitation.**

A suit for a declaration of right of way over the land of the defendant need not be instituted within three years of an order under S. 145 of Cr.P. Code made in favour of the defendant as the proceedings under the latter section refer to the possession of land and involve no question of right of way. 57 Ind. Cas. 852 (Cal.).

——**Art. 47—Cr.P. Code, S. 145—No order respecting possession.**

Art. 47 of the Limitation Act is inapplicable where there was no order respecting the possession of immoveable property made under Cr.P. Code although the complaint of the plaintiffs was dismissed as they failed to prove their possession. 16 Ind. Cas. 735 (Cal.).

——**Sch. I, Art. 47—Cr.P. Code, S. 145—Suit by party bound by order under—Limitation.**

A suit by a person against whom an adverse order has been made under S. 145, Cr.P. Code for possession of properties in respect of which the order was made must be brought within 3 years of the order under Art. 47 of the Limitation Act. 137 P.W.R. 1912=84 P.R. 1912=14 Ind. Cas. 566.

——**Art. 47—Suit for declaration of plaintiff's right to dams and irrigate.**

A suit for declaration of plaintiff's right to put up dams and to irrigate lands by means of such dams is not governed by Art. 47. (1908) 35 C. 851.

——**Art. 47—Mamlatdar's Courts Act, (Bom. Act III of 1876), Ss. 18, 21—Possessory suit—Dismissal of suit—Limitation.**

A plaintiff suing in the ordinary courts on his title for the possession of land is not bound by reason of anything in Art. 47 of the Limitation Act, or S. 21 of the Mamlatdar's Courts Act, to bring his suit within three years from the previous rejection of his plaint by a *Mamlatdar* in a suit for possession of that land

Per *Jenkins, C.J.*—A suit on title being outside the jurisdiction of a *Mamlatdar*, the mere rejection of a plaint by him in such a suit cannot be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.

Per *Chandavarkar, J.*—The orders referred to in Art. 46 of the Limitation Act, read with S. 21 of the Mamlatdar's Courts Act, are orders by which a *Mamlatdar* gives immediate possession to a party or restores the use to him or issues an injunction in his favour. The three years' limitation prescribed by S. 21 of the Mamlatdar's Courts Act and Art. 47 of the Limitation Act, is prescribed for suits of the kind referred to in S. 18 of the former Act, as suits relating to orders respecting possession. For the purpose of the three years limitation applicable to a regular suit in a civil court a party is bound by only that order of the *Mamlatdar* which restores the adverse party to possession or confirms the latter in possession by means of an injunction.

Per *Batty, J.*—Neither S. 21 of the Mamlatdar's Courts Act, nor Art. 47 of the Limitation Act, attaches any effect to a bare decision by a *Mamlatdar*. There is no provision corresponding to S. 13 of the Code of Civil Procedure (O.C.) which would make the decision of the *Mamlatdar* operative as *res judicata*. The Mamlatdar's Courts Act, gives the *Mamlatdar* no power to decide upon the *rights* of the parties, and the order rejecting a suit or disallowing a claim involves no decision as to *right* of the plaintiffs to possession. Art. 47 of the Limitation Act and S. 21 of the Bombay Mamlatdar's Courts Act, relate only to orders which are binding, *i.e.*, which are enforceable. (1904) 6 Bom. L.R. 612=28 B. 601 (F.B.).

——**Art. 47, C.P. Code (1882), S. 13—Suit brought in one capacity—Subsequent suit in another capacity—Res judicata.**

The plaintiff first sued the defendant, the lessee, for possession of a house belonging to the *Mutt* as the heir of the former manager of the *Mutt* the person who leased the house to defendant. The suit was dismissed for plaintiff's failure to establish his heirship to the former manager.

Held : (1) that a second suit by the plaintiff for possession on behalf of the *Mutt* as manager is not barred under Art. 47 or *res judicata* : (2) that the order in a suit before the *mamlatdar* does not give rise to the bar of Expl. 2 to S. 13, C.P. Code (O.C.). (1903) 5 Bom.L.R. 932=28 B. 215. *See also* 28 B. 601.

——Art. 47—Mamalatdar's Courts Act, (Bombay Act 3 of 1876)—Dismissal—Non-appearance of both the parties.

Where a *mamlatdar* dismisses a possessory suit owing to non-appearance of both the parties to the suit, a regular suit to set aside that order must be brought within three years of its date under Art. 47. (1900) 2 Bom.L.R. 680=25 B. 82.

——Art. 47—Applicability—Person not party to proceedings under S. 145, Cr.P. Code.

A person who is not a party to the proceedings under S. 145, Cr.P. Code is not bound by an order passed under that section and Art. 47 cannot apply to him. A.I.R. 1941 Pesh. 65=42 Cr.L.J. 872=196 Ind. Cas. 444.

——Art. 47—Applicability—Third persons—Bar to a person not a party in a criminal proceeding whether.

Article 47 does not bar a person who was no party to the criminal proceedings in which the order was passed. 23 M.L.J. 348=17 Ind. Cas. 589.

1. (b) Applicability and Scope—Order under S. 146, Cr.P. Code.

——Art. 47—Appointment of Receiver—Effect of necessity to bring a suit for possession.

Where a Magistrate appoints a receiver in possession of immovable property, what happens in the eye of the law is that the property is placed in *custodia legis*, *i.e.*, in the custody of the Court for the benefit of the person who may eventually and finally succeed in establishing his title to the property. It is not necessary for the person affected by the order to institute a suit for the recovery of possession of the property. He may institute a suit merely to have his right to the property declared. If so, Art. 47, would not apply and a *fortiori* the consequences of the operation of S. 28, Limitation Act cannot follow. 10 L.W. 637, Not foll. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

——Art. 47—Cr.P. Code, S. 146—Appointment of Receiver—Subsequent delivery of the property and its income by the Receiver to one of the parties—Rights of other party.

In a possession dispute between the 1st defendant and defendants 2 and 3, the Magistrate acting under S. 146, Cr.P. Code, appointed a Receiver on 30th January, 1909. In March, 1913 possession of the property was delivered to 1st defendant by the Receiver together with the income thereof during the period of Receiver's possession. In April, 1913 the plaintiff who was the holder of a money decree against defendants 2 and 3, attached the income of the property handed over by the Receiver to the 1st defendant. The 1st defendant put in a claim petition which was allowed. In a suit by the decree-holder for the declaration of his right to attach the income.

Held, that the suit was barred by limitation as defendants 2 and 3 had no subsisting right in the income on the date of the attachment, their interest if any in the suit property, having become extinguished by the operation of Art. 47 and S. 280 f the Limitation Act. 38 Mad. 432, Foll. 10 L.W. 637=27 M.L.T. 53=56 Ind. Cas. 675.

——Arts. 47, 120, 142, 144—Suit for declaration of right to property attached under Cr.P. Code, S. 146.

A suit for declaration of right to property dealt with by a Magistrate under S. 145 (6) whereby he confirms the possession of either party is governed by Art. 47 : and a suit for declaration of right to property attached under S. 146, Cr.P. Code by Art. 120. A suit for lands held under attachment under S. 143, Cr.P. Code is not a suit for possession but a suit for declaration of title only and, consequently, Arts. 142 and 144 will not apply. The cause of action for a suit for a declaration of right is the alleged wrongful denial by either party of the other's right and the procuring of the attachment by the Magistrate. (1902) 26 M. 410. *See also* 28 C. 86.

——Art. 47—Cr.P. Code, S. 146.

Quaere.—Whether Art. 47, applies to an order under S. 146, Cr.P. Code. (1900) 5 C.W.N. 160=28 C. 86. *See also* 26 M. 410.

1. (c) Applicability and Scope—Order under S. 522, Cr.P. Code.

——Art. 47—Order under, S. 522, Cr.P. Code.

The operation of Art. 47 is not confined to orders under Chapter 12 of the Cr.P. Code. An order restoring possession under S. 522 is an order respecting the possession of property within the meaning of Art. 47. 86 Ind. Cas. 744=A.I.R. 1925 Mad. 799=48 M.L.J. 372.

2. "Claiming under such person"—Meaning of.

——Art. 47—Scope.

The words "claiming under such person" mentioned in Art. 47, refer to those persons who claim from the person, bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order under S. 145, Cr.P. Code. A.I.R. 1936 Pat. 629=15 Pat. 481=17 P.L.T. 726=3 B.R. 148=166 Ind. Cas. 29.

3. "To recover the property"—Meaning of.

——Art. 47—"To recover the property," meaning of.

The words "to recover the property" only mean that the suit contemplated is a suit for the enforcement of such right as the person bringing the suit had in the property comprised in the order passed against him. (1937) A.L.J. 225=A.I.R. 1937 All. 300=1937 A.W.R. 235=169 Ind. Cas. 125.

——Art. 47—To recover property—Suit for partition.

The provisions of Art. 47 are applicable to a suit for possession of an undivided share of the property in respect of the whole of which there was a final order under S. 145, Cr.P. Code. It is not contemplated by the provision contained in Art. 47 that the title of the co-sharer of any joint property must be held to be extinguished, and that there could not be any claim for joint possession or for partition in view of an order passed by a Criminal Court not having been challenged by a suit by the co-sharer. The co-sharer's rig t to get exclusive possession is barred on the expiry of the period prescribed by Art. 47 of the first schedule of the Limitation Act, but his title cannot be held to have been extinguished so as to disentitle him to get a decree for partition of joint property. 39 C.W.N. 853=163 Ind. Cas. 370.

——Art. 47—Undivided property.

An undivided share of the property with regard to which there is an order under S. 145, Cr.P. Code, cannot for the purposes of Art. 47, be regarded as a different property. 51 C.L.J. 461=128 Ind. Cas. 106=A.I.R. 1930 Cal. 612.

4. Failure to institute suit—Effect of.

——Art. 47 and S. 28—Failure of Hindu widow to institute suit within three years of Magistrate's order—Order does not bind reversioner—Reversioner's right to recover property is not affected.

Failure of a Hindu widow to institute a civil suit within three years of the Magistrate's order under S. 145, Cr.P. Code, as prescribed by Art. 47, Limitation Act, can only

operate to bar her right to file a suit subsequently. The reversioner, not being a party to the litigation, is not bound by it. Nor can he otherwise maintain the suit as his reversionary right is no better than a mere *spes successionis* till the widow's death. Section 28, Limitation Act, can therefore extinguish only the widow's rights to the property after expiry of three years but not those of the reversioner. A.I.R. 1946 Oudh 213=1946 Oudh W.N. 195=224 Ind. Cas. 537.

——Art. 47—Partition suit—Where title has been extinguished by an order under S. 145, Cr. P. Code, and Art. 47, Limitation Act.

A suit for partition which seeks for partition of property or to have a share in it, the title to which has already been extinguished by reason of no suit having been instituted to recover possession within three years of the order under S. 145, Cr.P. Code and by virtue of Art. 145 of the Schedule and of S. 28 of the Act, is another name for a suit for recovery of possession and a mere device to evade the provisions of the statute. 51 C.L.J. 461=A.I.R. 1930 Cal. 612=128 Ind. Cas. 106.

——Art. 47—Redemption suit.

Failure to file suit under O. 21, R. 103, Cr.P. Code or within three years of Criminal Court's order refusing right to present possession does not bar the suit for redemption. 105 Ind. Cas. 427=23 N.L.R. 164=A.I.R. 1928 Nag. 97.

——Art. 47—Cr.P. Code, S. 145 (6)—Acquisition of title on unsuccessful party's failure to establish title within 3 years—Limitation Act, S. 28—Previous attornment by tenant to defeated party—Suit for rent.

Where an order is passed by a Magistrate under S. 145, Cr.P. Code, putting one of the parties in possession and the unsuccessful party fails to sue to get rid of the order within three years under Art. 47 of the Limitation Act, the former acquires title to the property under S. 28 of the Act. If the party thus put in possession sues for rent the unsuccessful party in the possession proceedings should not be impleaded as a party defendant if the tenant, had, prior to the institution of the proceedings under S. 145, Cr.P. Code, attorned to the latter. 15 Ind. Cas. 24 (Mad.).

5. Final order.

——Art. 47—The " final order " in column 3 of Art. 47, must be understood to refer to the order contemplated by column 1 of the same article. 22 P.L.T. 202=7 B.R. 609=A.I.R. 1941 Pat. 372=20 Pat. 735=193 Ind. Cas. 501.

——Art. 47—The order of the High Court dismissing an appeal for want of jurisdiction cannot be the final order. 22 P.L.T. 202=7 B.R. 609=A.I.R. 1943 Pat. 372=20 Pat. 735=193 Ind. Cas. 501.

——Art. 47—Final order—Order under S. 145 (6), Cr.P. Code—Revision to High Court—Order dismissing in limine**—Order of Magistrate is the " final order ".**

Where an order of a Magistrate passed under S. 145 (6), Cr.P. Code, is not modified by the High Court in revision, it is the final order within the meaning of Art. 47 of the Limitation Act. If the application for revision is accepted, and the Magistrate's order is set aside, then his order is no longer the final order ; but until it is set aside or modified, it is. Hence when a revision against an order of a Magistrate passed under sub-S. (6) of S. 145 is dismissed by the High Court *in limine* it is the order of the Magistrate and not that of the High Court that is the final order within the meaning of Art. 47 of the Limitation Act. I.L.R. (1947) Mad. 179=227 Ind. Cas. 456=57 L.W. 289=1946 M.W.N. 359=A.I.R. 1946 Mad. 444=(1946) 1 M.L.J. 398.

——Art. 47—S. 439, Cr.P. Code, itself provides that in revision the High Court may in its discretion exercise any of the powers of an Appellate Court. If, therefore, an order passed by an Appellate Court should be regarded as the final order, there is no reason why an order passed by the High Court in exercise of its power of revision under S. 439 could not be equally regarded as the final order. Whether the High Court ultimately interferes in revision or not, its order is none the less the final order. 22 P.L.T. 202=7 B.R. 609=A.I.R. 1941 Pat. 372=20 Pat. 735=193 Ind. Cas. 501.

——Art. 47—*Quaere*:—Where the High Court summarily dismisses an application for revision, whether its order would be the final order within the meaning of Art. 47, of the Limitation Act. 22 P.L.T. 202=7 B.R. 609=A.I.R. 1941 Pat. 372=20 Pat. 735=193 Ind. Cas. 501.

——Art. 47—Final order.

Where the Sessions Judge, in exercise of his power under S. 435, makes a reference to the High Court under S. 438, with the recommendation that the order of the Magistrate be set aside, the matter remains *sub judice* so long as it is not finally determined by the High Court. The order of the High Court passed under S. 439 will be the final order in the case. 22 P.L.T. 202=7 B.R. 609=A.I.R. 1941 Pat. 372=20 Pat. 735=193 Ind. Cas. 501.

——Art. 47—Cr.P. Code, S. 145—Suit to set aside and for possession—Starting point—Revision by High Court.

The period of limitation under Art. 47 runs from the date of the order of the Magistrate under S. 145, Cr.P. Code, and not from the date on which the High Court refuses to exercise its powers of superintendence in revision against the order. 12 C.W.N. 840, Foll. 4 Pat.L.W. 136=43 Ind. Cas. 955.

——Art. 47—Order under S. 145, Cr. P. Code—Date of the final order in the case—Rule issued by High Court against Magistrate's order.

In the case of an order under S. 145, Cr.P. Code the final order " is the order of the Magistrate and no the order passed in revision by the High Court under S. 15 of the Charter Act." (1908) 12 C.W.N. 840.

6. Limitation under special law.

——Art. 47—Limitation under special law—C. P. Tenancy Act—Sch. 2, Art. 1.

Where the specific article applicable is the one contained in the Tenancy Act, while the more general article is the one contained in the Limitation Act, the former applies. 105 Ind. Cas. 431=10 N.L.J. 246=A.I.R. 1927 Nag. 402.

7. Object of Article.

——Art. 47—Object.

The policy of the article in curtailing the period of limitation for a suit for possession from the usual period of twelve years to the shorter period of three years clearly seems to be that when a judicial order under Cr. P. Code, has been passed by a Magistrate respecting the possession of immovable property, then a person bound by the order must bring his suit to recover the property comprised in such order within the shorter period. 1936 O.W.N. 784=A.I.R. 1936 Oudh 387=1936 R.D. 416=12 Luck. 371=164 Ind. Cas. 118.

8. Order without jurisdiction.

——Art. 47—Order without jurisdiction.

Where an order is made under S. 145, Cr.P. Code, awarding possession of immovable property but the order is made without jurisdiction a suit to recover possession is, as regards limitation, governed by Art. 142, and not by Art. 47 of the Limitation Act. 60 Ind. Cas. 860 (Cal.).

——Art. 47—Cr.P. Code, S. 145—Withdrawal by one party—Evidence of other party not taken—Suit for possession.

Per *Richardson, J. and Chatterjee, J.*—An order on withdrawal by a party to proceedings under S. 145 in favour of the other without recording any evidence is an order deciding the question of possession so as to be covered by Art. 47. The omission of the Magistrate to take evidence on behalf of the second party who was in possession at the date of the preliminary order under S. 145, did not make his final order under that section *ultra vires*. The defect was curable under S. 537, Cr.P. Code.

Quaere.—Whether a final order under S. 145 of the Cr.P. Code can be made by consent of the parties. 22 C.W.N. 342=18 Cr.L.J. 1024=42 Ind. Cas. 768.

——Art. 47 Sch. I,—Cr.P. Code, S. 145—Order of Magistrate declaring party entitled to possession—Suit for recovery of possession—Limitation.

Where a Magistrate in proceeding under S. 145 Cr.P. Code declared the defendants to be entitled to possession in 1903 but they instituted a suit for recovery of possession in 1909, it was held that the suit was barred by Art. 47. That article applies to suits based on title to ownership. A Magistrate's order under S. 145, Cr.P. Code is not *ultra vires* because he acted illegally or with material irregularity. 38 Mad. 432=14 M.L.T. 392=(1913) M.W.N. 871=21 Ind. Cas. 564.

9. Persons bound by order.

——Art. 47—Person bound by an order respecting possession—Order under S. 145, Cr.P. Code against husband who sets up his own rights in such proceedings—Wife if bound by such an order.

Where in proceedings under S. 145, Cr.P. Code a husband sets up his own rights and an order is passed in such proceedings, it cannot affect his wife whose rights in the land in question were not placed before the Criminal Court. In such a case the wife is not a party to the proceedings and is not a "person bound by an order respecting possession" within the meaning of Art. 47 of the Limitation Act and the Article will not apply to suit by her for possession. 1950 A.W.R. 635=A.I.R. 1950 All. 693.

——Art. 47—Order against trustee binds the trust—Trustee.

As an order made against a trustee under S. 145, Cr.P. Code binds the Trust, a suit by a subsequent trustee to set aside that order will also be governed by Art. 47. A.I.R. 1936 Mad. 188=43 L.W. 496=70 M.L.J 441=(1936) M.W.N. 457=161 Ind. Cas. 234.

——Art. 47—Order after adjudication by Civil Court.

When a person is a party to a litigation in a Civil Court and an order is made by the Magistrate with regard to the possession of immovable property as the result of the adjudication in the Civil Court, such a person cannot be properly described as a person bound by the order of the Magistrate; nor is such an order of the Magistrate one promulgated under the Cr.P. Code as required by Art. 47. 111 Ind. Cas. 152=A.I.R. 1929 Mad. 38.

——Art. 47—Joint Hindu family—Order under S. 145, Cr.P. Code, against father—Sons bound.

In proceedings taken under S. 145, an adverse order passed against a Hindu father in possession of the property bought on behalf of the joint Hindu family is binding on his undivided sons though they were not parties to the proceedings. A suit, therefore, by such undivided sons for possession of the properties—subject-matter of the proceedings—brought more than three years on such order is barred under Art. 47. 122 Ind. Cas. 171=52 Mad. 787=2 M.Cr.C. 183=1929 M.W.N. 518=30 M.L.W. 201=A.I.R. 1930 Mad. 48=57 M.L.J. 228.

——Art. 47—Section 145, Cr.P. Code, order against Manager—Effect on the sons.

An order under S. 145 was passed against *A* the manager of the family of the plaintiffs, in favour of the defendants. *A* died, and the plaintiffs dispossessed the defendants forcibly. They were convicted and the defendants were put back in possession by the Criminal Court. The plaintiffs thereupon sued for a declaration that they were the owners in possession.

Held, that whether the order under S. 145 was passed against *A* in his personal capacity or as manager of the family, the plaintiffs are bound thereby and the suit is governed by Art. 47 of the Limitation Act,

Held, further that the plaintiffs cannot claim to enlarge the time by framing the suit as one for declaration 71 Ind. Cas. 402=21 A.L.J. 102=45 All. 306=4 L.R.A. (Civ.) 113=A.I.R. 1923 All. 151.

——Art. 47—Order under S. 145, Cr.P. Code, against one member.

An order under S. 145, Cr.P. Code, against one member of a joint family is not binding on other members even when that member has made an application under that section as the head and manager of the joint family and a suit by another member, succeeding by survivorship to the member against whom the order was passed after 3 years of the order is not barred. 66 Ind. Cas. 678=8 O.L.J. 410=A.I.R. 1921 Oudh 191.

——Art. 47—Purchase under mortgage decree—Subsequent suit under the Mamlatdar's Courts Act.

A purchaser of property in Court sale under a decree obtained on a mortgage anterior to the dismissal of the mortgagor's suit against the defendants in respect of the property, is not bound by the dismissal, he deriving his title not only from the mortgagor but also from the mortgagee; consequently, Art. 47 will not apply. (1904) 6 Bom.L.R. 306.

10. Starting point.

See also NOTE 5.

——Art. 47—Starting point of limitation.

If limitation begins to run before the date of the order of attachment under S. 146, Cr.P. Code, it is clear the plaintiffs in a declaratory suit cannot have a fresh start of limitation from the date of the subsequent attachment. 14 P.L.T. 113=12 Pat. 261=A.I.R. 1933 Pat. 224=149 Ind. Cas. 561.

——Art. 47—Successive orders.

Plaintiff obtained an order from Mamlatdar restraining defendant from disturbing his possession. The District Deputy Collector in revision dismissed plaintiff's suit. This order was without jurisdiction. Then plaintiff took proceedings under S. 145, Cr.P. Code, but the Magistrate made an order against him.

Held, that plaintiff's suit brought within 3 years from Magistrate's order was within time. 62 Ind. Cas. 224=45 Bom. 1135=23 Bom.L.R. 468=A.I.R. 1921 Bom. 207.

——Art. 48.

Synopsis.

1. Applicability and Scope.
2. Specific movable property.
3. Starting point.

1. Applicability and Scope.

——Art. 48—Applicability—Official Assignee taking possession of movable property as belonging to insolvent—No step taken by alleged true owner to establish claim for 3 years—Claim if barred by limitation.

Where a person claiming to be the true owner of certain movable property, which was taken possession of by the Official Assignee on the ground that it belonged to an insolvent, does not take steps to st ! lish the claim for 3 years from the date of knowledge of the possession by the Official Assignee, his claim to the property is, even if true, barred by limitation. It is the duty of the Official Assignee to administer the estate of the insolvent for the benefit of the creditors and not to hold, any property that he takes into his possession as the property of the insolvent, on behalf of any person who might subsequently establish a claim to the property. On the contrary, he holds the property adversely to the true owner if the true owner is not the insolvent. 62 L.W. 124=A.I.R. 1949 Mad. 437=1949 M.W.N. 30=(1949) 1 M.L.J. 72.

——Arts. 48 and 49—Applicability—Relative scope—Defendant wrongfully detaining movable property to which plaintiff claims reversionary title and wrongfully refusing to produce and hand over to Receiver in spite of order of Court.

Art. 48 of the Limitation Act deals with specific movable property which falls under one of two classes; (1) property which has been lost; (2) property which has been acquired by (*a*) theft, (*b*) dishonest misappropriation or (*c*) conversion. The Article contemplates suits by plaintiffs who have right to possession, *i.e.*, where they are entitled to immediate possession. Art. 49 applies to a case where the plaintiff has no right to immediate possession at the time whien the cause of action pleaded by him arose and on which he succeeds. Art. 49 would therefore apply to a suit against a defendant who has wrongfully detained movable property to which the plaintiff has a reversionary right and which the defendant, in spite of a decree in a prior suit, has a false pretext, refused to produce and hand over to a Receiver when asked to do so. I.L.R. (1948) 1 Cal. 55=51 C.W.N. 544=A.I.R. 1948 Cal. 97=82 C.L.J. 173=229 Ind. Cas. 373.

——Arts. 48, 49 and 120—Applicability—Suit by trustee against beneficiary to recover movable property—Limitation—Starting point.

A suit by a trustee against the beneficiaries to recover certain movable properties belonging to the trust for the trust, is governed not by Art. 48 or 49, but by Art. 120 of the Limitation Act. Art. 48 has clearly no application as the defendants themselves are co-beneficiaries under the trust and the nature of their possession is the same as that of the plaintiff and it is not their case that they had acquired the movable property by any of the ways mentioned in that article. Art. 49 has no application where a claim is made in a representative capacity as in this case by a trustee against the beneficiaries. The facts of the case are governed by Art. 120 and the suit is in time if filed within six years of the refusal by the defendants to return the trust property. A.I.R. 1949 Assam 10.

——Arts. 48, 49 and 29—Applicability—Sewing machine belonging to B attached before judgment and kept in custody of sureties—Attachment subsequently raised as being illegal—B refusing to take back machine as it was found to be useless due to removal of vital parts—Suit by B for return of machine in its original condition or for damages—Limitation—Art. 48 or Art. 49 would apply and not Art. 29.

Where a suit is for compensation for wrongfully taking or detaining the property lost or acquired by theft or by dishonest misappropriation or conversion, Art. 43 would be applicable, and not Art. 29. Even if Art. 48 does not in terms apply, Art. 49, which is a residuary article, would be applicable, since that article deals with suits for specific movable property not otherwise provided for, or for compensation for wrongfully taking or injuring or for wrongfully detaining the same. The period of limitation under both Arts. 48 and 49 is three years and the time is to run from the time when the person having a right to the property first learnt in whose possession it was or when the detainer's possession became unlawful.

A obtained an attachment before judgment against *B* and attached a sewing machine belonging to *B*. The machine was then handed over to two sureties *C* and *D*. The attachment was subsequently raised as being illegal on application by *B*. At the time of taking delivery, it was found that the machine was rendered absolutely uselsss by the removal of important parts thereof and it had also become rusty and unworkable. *B* therefore refused to take delivery of the same and filed a suit against *A*, *C* and *D* for the return of the machine in the condition in which it was at the time of attachment or for damages. It was contended that the suit was barred by limitation under Art. 29, Limitation Act, as it was filed after the expiry of one year from the date of attachment.

Held, that the suit was governed by Art. 48 or Art. 49 and not by Art. 29. The suit being admittedly filed within the period prescribed by those articles was not barred by limitation. A.I.R. 1946 Mad. 453=(1946) 1 Mad.L.J. 241=(1946) Mad.L.W. 256.

——Art. 48—Applicability—Wrongful removal of attached property.

Article relates to specific movable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the property. It has no application to a suit for compensation for wrongful removal of attached property. 58 M.L.W. 108 (2)=I.L.R. (1945) Mad. 784=1945 M.W.N. 160=(1945) 1 M.L.J. 265=A.I.R. 1949 Mad. 33.

——Arts. 48, 49—Scope.

Articles 48 and 49 are intended to apply only to cases where the plaintiff had a right to possession of the movable property concerned. A.I.R. 1932 All. 256=(1932) A.L.J. 241=16 R.D. 380=54 A. 467=136 Ind. Cas. 809.

——Art. 48—Action for removal of coal from mine—Limitation.

An action for trespass to mine and removal of coal therefrom is an action for trover as far as removal of coal is concerned and is governed by Art. 48 and not by Art. 142 or Art. 144. A.I.R. 1931 Pat. 436=13 P.L.T. 73=133 Ind. Cas. 453.

——Art. 48—Conversion.

An action of trover claiming damages for the conversion by the defendants of specific moveable property, *viz.*, coal wrongfully gotten from the plaintiffs' mines and sold or otherwise disposed of by the defendants to their own use, is governed by Art. 48. Article 48 alone refers to conversion and conversion cannot be split into two classes, one dishonest and the other not dishonest. "Or" preceding conversion is equivalent "or by". 114 Ind. Cas. 604=6 O.W.N. 151=1920 A.L.J. 170=33 C.W.N. 323=10 P.L.T. 155=56 I.A. 93=29 M.L.W. 449=49 C.L.J. 415=31 Bom.L.R. 702=8 Pat. 516=A.I.R. 1929 P.C. 69=56 M.L.J. 517 (P.C.).

——Art. 48—Applicability—Conversion by Railway Company.

A suit for damages for conversion by a Railway Company is governed by Art. 48. A.I.R. 1934 Pat. 507=16 P.L.T. 61=1 B.R. 5= 13 Pat. 752=151 Ind. Cas. 995.

——Art. 48—Scope—Conversion.

Article 48 applies to all conversion, whether dishonest or not. Where the trespass is due to inadvertence or is due to inadvertence and want of reasonable care, both these views of the conversion fall within the terms of Art. 48 under which the limitation period of three years

begins to run when the person having the right to possession of the property first learns in whose possession it is. A.I.R. 1927 Cal. 117, Reversed. 123 Ind. Cas. 725=32 Bom.L.R. 654=34 C.W.N. 483=31 M.L.W. 638=51 C.L.J. 407=A.I.R. 1930 P.C. 113=58 M.L.J. 536 (P.C.).

——Art. 48—Scope of.

"Conversion" in Art. 48 means dishonest conversion, *ejusdem generis* with the words that precede it and the article, in view of the words in the third column, presupposes the existence of the property in the possession of some person. The claim for damags for trespass includes not merely damages for the unlawful entry but also damages for the mischief which the trespasser commits after entry on the land and therefore it is not covered by Art. 48. 101 Ind. Cas. 62=31 C.W.N. 82=A.I.R. 1927 Cal. 117.

——Art. 48—Wrongful removal of coal from adjacent mine.

A suit for value of coal wrongfully extracted and carried away is governed by Art. 48. 1.Pat.L.T. 84=55 Ind. Cas. 113.

——Arts. 48 and 49—Unlawful conversion—Moveable property originally lawfully obtained but subsequently converted unlawfully—Rocovery of—Limitation.

A suit for recovery of specific moveable property originally, obtained lawfully, but subsequently converted or retained unlawfully, is governed by Art. 48 and not Art. 49. 3 M.L.T. 324, Not applied. 38 Mad. 783=15 M.L.T. 221=(1914) M.W.N. 319=23 Ind. Cas. 174.

——Art. 48—Criminal charge—Absence of—Section does not apply.

A suit was brought in the Small Cause Court for the recovery of certain ornaments or their value from the defendants who were the sons of a person who kept the ornaments promising to return them. There was no allegation of a criminal charge. The suit was dismissed as barred by Art. 48, Limitation Act:

Held, that criminal charge could not be presumed from the application of Art. 48, Limitation Act, and the suit was not barred under article. 116 Ind. Cas. 785=A.I.R. 1929 All. 208.

——Art. 48—Value of crops attached.

In the case of a suit for damages representing the value of crops which has been wrongfully attached, cut and removed, the pertinent articles are 48 and 49 and not 29 or 36, Limitation Act. 105 Ind. Cas. 763=A.I.R. 1923 Cal. 106.

——Art. 48—Suit for valuables deposited.

Article 145 and not Art. 48 governs a suit for the recovery of jewels deposited with the deceased son of the defendant and alleged to be with the defendant after the son's death. 84 Ind. Cas. 1026=20 M.L.W. 755=1925 M.W.N. 143=A.I.R. 1925 Mad. 185.

——Arts. 48, 49, 145—Deposit—Demand and refusal—Limitation.

Where there is a specific article for a class of suits, that article applies and not the more general article which may also cover it in its description. 25 C. 564 at 567, foll. A suit against a depository for the recovery of jewels is governed by Art. 145 and is in time if brought within 30 years of the deposit even though more than 3 years has elapsed from the date of the demand and refusal. (1902) 26 B. 430=4 Bom.L.R. 72.

——Art. 48—Against Bank as trustee.

Where a Bank holding Government Paper held in trust for the plaintiff of which trust it had constructive notice, sold it, and parted with the sale proceeds, and the plaintiff sued the Bank for recovery of sale proceeds with interest.

Held, that the suit is either one for conversion (Art. 48) or for money had and received to the plaintiff's use (Art. 62). 67 Ind. Cas. 761=24 Bom.L.R. 513=A.I.R. 1923 Bom. 155.

——Arts. 48 and 49—Unlawful detention of share certificate—Suit for compensation for loss.

Plaintiff bought five shares of a certain spinning and weaving Company from defendant through X. A receipt for the shares was given by defendant to plaintiff who signed the receipt and gave it back to the defendant to get the share certificate from the Company and make them over to the plaintiff. The defendant got the share certificates from the Company and retained them in his own custody. Plaintiff gave notice to defendant demanding delivery which was refused on some plea of right, but was subsequently obtained on a criminal prosecution. By that time, the shares had fallen in the market, and a suit was brought for compensation for the loss.

Held, that Art. 49 governed the case and that time began to run from the date of the defendants' refusal. Art. 48 of the Limitation Act deals only with specific moveable property which is either acquired by theft or dishonest misapproriation, or conversion. No other kind of moveable property is affected by this article. 12 Bom. L.R. 513=7 Ind. Cas. 447.

——Art. 48—Compensation for trees cut.

Defendant sold standing trees to plaintiff in 1915, by registered deed for Rs. 200 and covenanted that plaintiff should be at liberty to cut them and remove the timber within one year. Plaintiff did not cut within the year. Mean while the land had been sold and was pre-empted and the pre-emptor sold the trees to third persons in 1917 who cut them and the plaintiff in 1920 sued for possession of the timber or Rs. 400.

Held, that this was a sale of moveable property and that Art. 48 or Art. 49 does apply. 73 Ind. Cas. 33=A.I.R. 1924 Lah. 71.

——Arts. 48, 49, 36—Suit by mortgagee against mortgagor's co-tenant for cutting and appropriating timber—Co-tenants.

The mere act of cutting down timber standing on the common property by the mortgagor's co-tenant (the mortgage being only of one co-tenant's share in the land) cannot constitute a wrong as between the co-tenants on the one hand and the mortgagee of the other co-tenants on the other ; a suit by the mortgagor for damages suffered by the co-tenant's appropriation of the wood is governed by Art. 49 and not by either 48 or 36. (1904) 28 M. 208.

2. "Specific movable property."

——Art. 48—Suit for money.

Money is "specific movable property" within the meaning of Art. 48 and where it has been lost, acquired by theft or dishonest misappropriation or conversion or compensation for wrongfully taking or detaining the same Art. 48 will apply. 5 All. 341; 29 All. 579; A.I.R. 1930 All. 397, Foll. 124 Ind. Cas. 180=A.I.R. 1939 All. 573.

——Art. 48—A suit for recovery of money is a suit for specific movable property. 5 All. 341 ; 29 All. 579, Foll. 1930 A.L.J. 1411=124 Ind. Cas. 33=A.I.R. 1930 All. 397.

——Arts. 48, 90, 115, 120—Suit to recover money given to defendant to be delivered to a third person.

A gave Rs. 300 to *B* in order that it might be delivered to *C*, who has, a few days previously, executed a mortgage in favour of *A*. *B* also executed a bond guaranteeing the repayment of the loan by *C*. On suit by *A* against *B* and *C* which was decided on the 15th of January, 1901,

it was discovered that *B* had never paid the money to *C*. On the 1st of December, 1904 *A* sued *B* to recover he Rs. 300 paid to him as above described.

Held, that the rule of limitation applicable was tha provided for by Art. 48 (if not by Art. 90 or 115) and the suit was time barred. (1905) 1907 A.W.N. 181 = 4 A.L.J. 671 = 29 A. 579.

——Arts. 48, 109—Suit to recover rents realised by trespasser—Zurpeshgidar realising rents after expiry of lease—Limitation—"Specific moveable property" meaning of—Suit of Small Cause nature of less than Rs. 500 in value—Order of remand, appeal from—C. P. Code (Act XIV of 1882), Ss. 586, 588, Cl. 28.

A suit brought by an owner of lands for the recovery from Zurpeshgidars of rents realised by the latter from the tenants after the expiry of the zurpeshgi lease is governed by Art. 109 and not by Art. 48. By "specific moveable property" in Art. 48 is meant property that can be specified by the delivery of the identical subject and does not cover money. 5 A. 341, diss. from.; 11 B. 183; 8 B. 19, foll. (1907) 11 C.W.N. 862.

——Art. 48—'Specific'—*See* THE ARGUMENTS IN 9 C.W.N. 443 = 32 C. 799.

3. Starting point.

——Art. 48—Suit for damages for conversion—Time, when begins to rum—Onus.

A suit for damags for conversion of specific immovable property is governed by Art. 48, whether such conversion is dishonest or not.

The time begins to run from the date of the knowledge and the burden is upon the plaintiff to prove that he first came to know of the conversion within three years of the suit. 49 C.W.N. 810 = A.I.R. 1946 Cal. 123.

——Arts. 48, 49—Starting point of limitation—Onus.

The onus is on the plaintiff to prove that he first learnt within three years of the suit that the property which he is seeking to recover was in the possession of the defendant. In other words, he has to prove that he obtained the knowledge of the defendant's possession of the property within three years of the suit, and that is all. If he proves this, then to succeed in the plea of limitation, the defendant has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit. 38 Bom.L.R. 712 = A.I.R. 1936 Bom. 322 = 60 B. 848 = 165 Ind. Cas 184.

——Art. 48—Construction—"Whose possession", meaning of.

The words "whose possession" mean the possession of some definite person who can be identified and against whom effective relief for restoration of the property in question can be obtained. 60 B. 848 = A.I.R. 1936 Bom. 222 = 38 Bom.L.R. 712 = 165 Ind. Cas. 184.

——Art. 48—Starting point of limitation.

The plain meaning of Art. 48 is that time begins to run against the owner of the property lost, from the time when he first discovered that it is in the possession of the defendant. A.I.R. 1936 Bom. 322 = 38 Bom.L.R. 712 = 60 B. 848 = 165 Ind. Cas. 184.

——Art. 48—Starting point—Diligence of plaintiff—If relevant.

On the language of Art. 48, no question arises as to whether the owner of the property of the kind mentioned in that article was or was not reasonably diligent to discover in whose possession the property he is seeking to recover in. There are a good many articles in the Limitation Act in which time begins to run from the date of the plaintiff's knowledge of a particular fact or act or when certain relevant facts first became or becomes known to him, but in none of them has the Legislature imposed a condition as to the plaintiff being reasonably diligent in discovering those facts or acquiring that particular knowledge. 60 B. 848 = A.I.R. 1936 Bom. 322 = 38 Bom.L.R. 712 = 165 Ind. Cas. 184.

——Art. 48—Starting point of limitation.

Where the plaintiff knew of the encroachment and of the removal of the coal from his place long before three years from the date of institution of the suit, the fact that the plaintiff did not know that the area from which coal was being removed was his, will be of no advantage to him and will not save the suit from being barred by limitation. The knowledge referred to in Art. 48, Limitation Act, is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation unless, of course, the knowledge of the fact was kept back from him by the fraudulent conduct of the defendant. A.I.R. 1930 Pat. 179 = 2 B.R. 374 = 161 Ind. Cas. 855.

——Arts. 48 and 49—Misappropriation—Starting point.

Materials of a house removed and misappropriated by the defendants is governed by Art. 48 and time begins to run from the date when the plaintiff first learnt in whose possession the materials are. 52 Ind. Cas. 361 (Pat.).

——Art. 48—Pledge by a Commission Agent—Jewel given to him for sale—Suit to recover—Starting point for limitation.

In a suit to recover a jewel or its value from a Commission Agent to whom it was given for sale, but which was pledged by the latter with the defendant the limitation runs from the time when the owner came to know of the jewel being in defendant's possession. 40 Mad. 678 = 30 M.L.J. 587 = 19 M.L.T. 386 = 34 Ind. Cas. 751.

——Art. 48, Sch. I—Stolen property—Suit to recover—Limitation.

A suit to recover stolen property or its value as damages, is governed by Art. 48, and time runs from the date of defendant's possession of the same to the knowledge of the plaintiff. 148 P.W.R. 1911 = 229 P.L.R. 1911 = 11 Ind. Cas. 446.

——Art. 48-A—Suit to recover shares pledged in specie.

Where the shares are lodged with the bank as security for the debt, a suit for their recovery by the pawnor in specie from either the bank or from the person to whom they have been sold is governed either by Art. 48-A or Art. 145. 55 L.W. 90 = A.I.R. 1942 Mad. 386 = 1942 M.W.N. 129 = (1942) 1 M.L.J. 274 = 206 Ind. Cas. 539.

——Art. 49.

Synopsis.

1. **Applicability and Scope.**
2. **Bailment.**
3. **Deposit.**
4. **Detention.**
5. **Starting point.**

1. Applicability and scope.

——Art. 49—Applicability—Conditions. *See* LIMITATION ACT (9 OF 1908), ARTS. 29 AND 49. (1950) 1 M.L.J. 799. A.I.R. 1950 Mad. 734.

——Art. 49—Removal of attached property—Suit for compensation—Article applicable—Arts. 48, 29 and 68.

The first defendant instituted a suit against one *K* for the recovery of Rs. 99 alleged to be due by way of rent.

He attached before judgment two brick kilns alleged to belong to *K*. As it was not possible to remove the kilns, the *amin* left them in the custody of the first and the second defendant on their entering into a security bond for a sum of Rs. 1,500. The bond was executed on 19th December, 1935. On 17th January, 1936, the plaintiff filed a petition under O. 21, R. 58 objecting to attachment on the ground that the kilns belonged to him. The attachment was cancelled and the first and the second defendants were directed to deliver the kilns to the plaintiff. The delivery was effected on 26th January, 1936. The plaintiff then discovered that all the bricks had been removed from one kiln and a quarter of the bricks from the other. He filed a suit on 25th January, 1939 for compensation for the wrongful removal of the bricks :

Held, that the suit was not on the bond, and hence Art. 68 had no application. This was not also a suit for compensation for wrongful seizure of movable property under legal process. Therefore, Art. 29 also did not apply. Article 48 also had no application. This article related to specific movable property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or detaining the property. It was a suit for compensation for wrongful removal of the bricks. Article applicable was Art. 49 which related to a suit for specific movable property or for compensation for wrongfully taking or injuring or wrongfully detaining property. The period was three years from the date of the wrongful taking which must be held to have taken place on 25th January, 1936 and that, therefore, the suit was within time. 1945 M.W.N 160=A.I.R. 1946 Mad. 33=I.L.R. (1945) Mad. 784=(1945) 1 M.L.J. 265=58 M.L.W. 108 (2).

——Art. 49—Applicability.

A suit to recover goods or the value thereof which have been ordered to be returned by the Magistrate under the Punjab Pure Food Act is governed by Art. 49 and not Art. 2. A.I.R. 1942 Pesh. 57=202 Ind. Cas. 218.

——Art. 49—' Other ', meaning of.

The word " other " in Art. 49, means specific movable property in general as distinguished from the movabl property mentioned in the previous articles. A.I.R. 1942 Pesh. 57=202 Ind. Cas. 218.

——Art. 49—Scope.

Article 49 would apply to a suit for recovery of specifi movable property which is other than the specific movable property described in Art. 48. In other words, specific movable property in Art. 49 must be the property which is not lost to the owner as a result of theft, or dishonest misappropriation, or conversion. A.I.R. 1936 Bom. 322=38 Bom. L.R. 712=60 B. 848=165 Ind. Cas. 184.

——Art. 49—Specific movable property—Fish.

The period of limitation for claims to damages for wrongful taking of fish can in no way be different from that for a suit to recover compensation for damages for cutting and carrying away or misappropriating crops or a suit to recover compensation for wrongful removal of trees after they have been cut down and Art. 49 governs the case. A.I.R. 1934 Cal. 461=61 C. 45=151 Ind. Cas. 813.

——Arts. 49, 29—Scope.

A suit for the return of the property which has been wrongfully attached and released subsequently, is governed by Art. 49 and not by Art. 29, as it is not one for compensation for wrongful seizure. A.I.R. 1935 All. 915=(1935) A.L.J. 1010=1935 A.W.R. 957=158 Ind. Cas. 1014.

——Arts. 49—Value of crops attached.

In the case of a suit for damages representing the value of crops which has been wrongfully attached, cut and removed, the pertinent articles are 48 and 49 105 Ind. Cas. 763=A.I.R. 1928 Cal. 106.

——Art. 49—Compensation for trees cut.

Although to cut down trees in breach of an occupancy tenancy agreement is not only a breach of the agreement but also a trespass to immovable property, yet when the trees have been cut down, they certainly become specific movable property, and if they are taken away and sold, the suit is one for compensation as defined by Art. 49. 25 Cal. 602, *Foll.* 94 Ind. Cas. 336=A.I.R. 1928 All. 462.

——Art. 49—A suit for damages for wrongfully cutting lac producing trees and removing the trees is a suit for compensation for trespass upon immovable property within Art. 39 and for wrongfully taking specific movable property within Art. 49. 80 Ind. Cas. 769=20 N.L.R. 80=A.I.R. 1924 Nag. 125.

——Art. 49—Declaration and possession of movables.

If, in a declaratory suit in respect of a movable property, the main relief claimed is the same as consequential relief, *i.e.*, the possession of the property and not the declaration whether declaration be necessary or merely ancillary, the suit is governed by Art. 49 and not 120. 15 Ind. Cas. 545, Foll. 70 Ind. Cas. 841=1 Bur.L.J. 85=A.I.R. 1923 Rang. 11.

——Art. 49—Partition of movables.

A suit for partition of movables of a Mohammadan falls under Art. 120 and not 49. 64 Ind. Cas. 974=44 All. 244=20 A.L.J. 71=A.I.R. 1922 All. 525.

——Arts. 49 and 62—Suit for recovery of document.

In a suit by a plaintiff claiming recovery of books of accounts, bonds, etc., and money realised by defendant from a business carried on by her deceased husband,

Held that the claim in regard to the sums realised was barred by time under Art. 62 of the Limitation Act, in regard to the books and mortgage deed under Art. 49. 85 P.R. 1919=52 Ind. Cas. 580.

——Arts. 49, 83 and 115—Suit for recovery of losses suffered on behalf of defendant's claim for commission.

Where plaintiffs as commission agents, entered into transactions with third parties on defendant's behalf and sued the latter for recovery of (1) actual bonus (2), *Adat*, (3) *Dalali*, (4) *Dharman*, (5) Stamp charge, (6) carriage hire and labour wages, (7) value of empty bags not returned, (8) redraft paid for defendant :

Held that the claim for (1), (3), (4), (5), (6) and (8) is governed by Art. 49. 26 Ind. Cas. 415 ; 39 A. 81, Foll. 149 P.W.R. (1917)=42 Ind. Cas. 72.

——Art. 49—Compensation for injury to moveable property.

A suit instituted by a mortgagee for compensation from a third person for injury done to specific moveable property mortgaged to the former is governed by Art. 49. 5 Bur.L.T. 156=6 L.B.R. 75=17 Ind. Cas. 906.

——Arts. 49 and 120—Suit for moveable property.

The old temple of the idols of the plaintiffs was blown down by a storm and the idols were placed in the temple of the defendant. The plaintiffs *Shebait* re-built the temple and wanted to bring the idols to it, but they were opposed by the defendant. The suit was therefore brought with the prayer that the idols may be taken out of the defendant's temple and placed in their new temple.

Held, that Art. 49 did not apply as the suit was not a suit for moveable property but Art. 120 would apply and that the period would run from the time when obstruction was made by the defendant to the worship of the idols being continued by the *Shebait* plaintiff. 38 Cal. 284=15 C.W.N. 36=7 Ind. Cas. 475.

——Art. 49—Distress—Compensation, suit for.

Art. 36 applies to a suit for compensation for fictitious distress by a fictitious landlord against a fictitious tenant.

Per *Doss, J.*—Art. 94 applies partly and Art. 39 also and the period is 3 years from the alleged distress. 36 Cal. 141=9 Cr.L.J. 109=1 Ind. Cas. 788.

——Arts. 49, 126—Suit to set aside sale of brit jagmani leatis—Ancestral moveable property—Suit not time-barred.

A suit to set aside a sale of *brit jagmani leatis* purchased with ancestral funds, if otherwise maintainable, would be governed by Art. 126 and not by Art. 49. Art. 126 refers to both moveable and immoveable property belonging to a joint family. (1909) 6 A.L.J. 614=3 Ind. Cas. 505.

——Art. 49—Cutting of wood on common land by one co-tenant—Misappropriation—Limitation Act, Art. 49.

The cutting of wood standing on common land by one co-tenant cannot by itself constitute a wrong, even though its appropriation by one alone would; and a suit by the other tenant or persons claiming through him will be governed by Art. 49. (1904) 28 M. 208.

——Art. 49—Suit for compensation for wrongful attachment. *See* ART. 36. 6 Bom.L.R. 704.

2. Bailment.

——Arts. 49, 115—Applicability—Bailment.

The plaintiff claimed back the value of certain ornaments on the ground that the defendant had agreed to perform the marriage of the plaintiff's daughter with his son and that the plaintiff, according to the custom of the caste, sent the ornaments for the bride but that subsequently the contract of marriage was broken by the defendant and that the plaintiff's demand for the return of the ornaments was refused by the defendant.

Held, that from the time the defendant came into possession of the ornaments to the time that the ornaments would be gifted to the bride, his possession would be that of a bailee in trust for the plaintiff. His possession was, therefore, lawful, but he was not entitled to retain possession thereof after a clear demand was made for the return of them by the plaintiff. His detention of the ornaments subsequent to the demand without the consent of the plaintiff made his possession of them wrongful and the case was governed by Art. 49 and not by Art. 115. A.I.R. 1939 Nag. 177=I.L.R. (1939) Nag. 498=1939 N.L.J. 190=183 Ind. Cas. 386.

——Art. 49—Bailment—Ornaments lent for specific use.

A handed over to *B* certain ornaments to be used in religious procession in 1924. The ornaments were stolen. *B* admitted the liability in 1924, but denied it later on and *A* filed a suit in 1928 for recovery of the ornaments.

Held, that Art. 115 applied to the case and not Art. 49 or Art. 120; that the ornaments had been taken on loan and the transaction was of the nature of the bailment as defined in S. 148, Contract Act; that the ornaments were to be returned within reasonable time according to S. 46, Contract Act, *i.e.*, when the owner demanded them after the ceremony was complete. Time therefore ran from the date when *B* should have returned the articles to *A* and suit by *A* brought three years after that date was barred by time. A.I.R. 1930 Oudh 395=7 O.W.N. 769.

——Arts. 49, 115—Where according to a contract the defendant was on demand after 6 months to return similar tiles lent to him to be approved by the plaintiff and the *panchayatdars* and if not approved, defendant was to return the identical tiles, and the demand was made some years after the fixed date, it was held, that Art. 115 and not Art. 49 was applicable to this case. 18 M.L.T. 459=(1916) 1 M.W.N. 121=31 Ind. Cas. 335.

3. Deposit.

——Arts. 49, 145—Scope.

Article 49, Limitation Act, (British India) is not so all embracing in its application as it appears. Article 145 (137 Bhopal) affords a clear exception. (1940) 188 Ind. Cas. 437 (Bhopal).

——Art. 49—Intention.

It is no part of the policy of the Limitation Act to make people determine the lawful possession of others who are looking after their property or who have their propperty on deposit. The policy of the Limitation Act is that when once that arrangement is stopped the suit should be brought within a limited time. 106 Ind. Cas. 885=32 C.W.N. 133=A.I.R. 1929 Cal. 42.

——Art. 49—Goods deposited.

When goods are deposited, the article applicable is Art. 145; and the mere fact that the depositor demands the thing and the depositee refuses to return the same does not make Art. 49, applicable to the case. Article 145, is not governed by Art. 49. 26 Bom. 430; 33 Mad. 56, Foll. 116 Ind. Cas. 468=6 Rang. 547=A.I.R. 1928 Rang. 309.

——Art. 49—Deposits.

Article 49 is not dealing with articles deposited in any sense. 72 Ind. Cas. 842=17 M.L.W. 467=32 M.L.T. 217=1923 M.W.N. 284=A.I.R. 1923 Mad. 578=44 M.L.J. 431.

——Art. 49—Detention—Deposit of moveables—Suit for recovery.

Where moveables are entrusted to any person on condition that they will be returned on the expiry of a specified periods the fact that they are detained beyond that period and no demand is made for their return, does not render the detainer's possession unlawful. The period of limitation for a suit for the return of the moveables, or, in the alternative, for their value, commences to run from the date of demand and refusal under Art. 49. 42 All. 45=17 A.L.J. 907=52 Ind. Cas. 382.

——Arts. 49 and 146—Gold entrusted to goldsmith for making ornaments—Suit to recover—Limitation.

A suit to recover gold or value entrusted to a goldsmith for making ornaments is not governed by Art. 49 but by Art. 145, even though the gold is not recoverable in specie. 20 C.W.N. 232=23 C.L.J. 145=34 Ind. Cas. 959.

——Arts. 49, 90—Scope of—Mundatum—Deposit.

A transaction by which moveable property deposited with a person is not to be specifically returned but some work is agreed to be performed in connection therewith is not a deposit in the legal sense but only a *mundatum* governed by Art. 49; if the suit is for recovery of the specific moveables or for compensation for wrongfully detaining it and by Art. 89 or 90 if the suit is one for neglect of agent to do an act for his principal. 24 M.L.J. 184=18 Ind. Cas. 921.

——Arts. 49, 145—Deposit of moveable property.

Suit to recover deposit of movable property comes

under Art. 145 and not under Art. 49, whether there has been a demand and refusal or not. 9 M. L.J. 51, Diss. 33 Mad. 56=7 M.L.T. 282=20 M.L.J. 41=5 Ind. Cas. 1.

——Art. 49—Suit by depositor for return of deposit—Demand and refusal. Art. 49 not applicable. See LIMITATION ACT, ART. 145. 20 M.L.J. 41=33 M. 56= 5 Ind. Cas. 1.

——Art. 49—Deposit—Demand and refusal. See LIMITATION ACT, ART. 48. 26 B. 430=4 Bom. L.R. 72.

4. Detention.

——Arts. 49, 115—Applicability—Wrongful detention—Cause of action arising ex delicto—Suit is governed by Art. 49 and not by Art. 115.

Article 49 contemplates a case of a cause of action arising *ex delicto* whether or not the wrongful taking or wrongful detention was preceded by a contract; the material date is the date when detention becomes wrongful. Even if the possession was at its inception under a contract, that would not preclude the application of Art. 49 because that articles comes into play only at the moment when the possession becomes unlawful or wrongful. A. I.R. 1939 Nag. 177=1939 N.L.J. 190=I.L.R. (1939) Nag. 498=183 Ind. Cas. 386.

——Art. 49—Detention of goods.

A suit for damages against a defendant at whose instance plaintiff's goods were detained by customs authorities is governed by Art. 36 and not by Art. 49. 106 Ind. Cas. 277=46 C.L.J. 455=A.I.R. 1928 Cal. 1.

——Arts. 49 and 36—Art. 36 and not Art. 49, applies to a suit for compensation for deterioration of plaintiff's oranges owing to their detention at the Police Station. 90 Ind. Cas. 509=43 C.L.J. 203 =A.I.R. 1926 Cal. 177.

——Art. 49—Default — Hire-purchase system — Suit to recover article sold—Limitation.

Non-payment of rent for a sewing machine taken on hire-purchase system does not amount to wrongful detention within Art. 49 of the Limitation Act. To constitute wrongful detention there must be some overt act or demand by the hier and refusal by the purchaser. 13 A.L.J. 81=27 Ind. Cas. 637.

——Sch. 1, Arts. 49 and 36—Deposit of money detained—Suit for compensation for detention.

Art. 49 and Art. 36 applies to a suit for compensation for the Court having unlawfully detained plaintiff's deposit of money owing to the wrong act of the defendants. 7 Ind. Cas. 5 (Cal.).

5. Starting point.

——Art. 49—Starting point of limitation.

Where the plaintiff entrusts specific movable property to the defendant on the understanding that the same would be returned to the plaintiff, limitation for a suit for the return of the property or its value starts when the defendants' possession becomes unlawful. In such a case, the defendants' possession is permissive to start with. Permissive possession cannot become unlawful unless there is at least a refusal on the part of the defendant to return the property. A.I.R. 1942 Mad. 303=(1942) 1 M.L.J. 187=55 L.W. 56=1942 M.W.N. 348=205 Ind. Cas. 307.

——Art. 49—Wrongful detention.

A mere demand by the plaintiff will not be enough. Unless the defendant openly asserts that he was not going to return the property, his possession cannot be said to be unlawful. Mere silence on demand being made does not constitute refusal. A.I.R. 1942 Mad. 303=(1941) 1 M.L.J. 187=55 L.W. 56=1942 M.W.N. 348=205 Ind. Cas. 307.

——Art. 49—Wrongful detention.

The detention of property amounts to conversion within Art. 49 only when it is adverse to the owner or other person entitled to possession, that is to say the defendant must have shown an intention to keep the property in fraud of the plaintiff. 60 B. 848=A. I.R. 1936 Bom. 322=38 Bom.L.R. 712=165 Ind. Cas. 184.

——Art. 49—Successive conversions.

Where there have been successive conversions of the same property by different persons, each of these conversions is an independent cause of action, and the barring of one of them by the statute of limitation has no effect on the other. 38 Bom.L.R. 712=A. I.R. 1936 Bom. 322=60 B. 848=165 Ind. Cas. 184.

——Art. 49—Starting point of limitation.

Time for a suit for the return of the property which has been wrongfully attached and released subsequently begins to run from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful, that is, after it is released from attachment. 1935 A.W.R. 957 =(1935) A.L.J. 1010=A.I.R. 1935 All. 915=158 Ind. Cas. 1014.

——Art. 49—Joint Hindu family—Possession lawful at first and subsequently becoming adverse—Applicability.

Article 49 is the ordinary article to apply in a case where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts. The common case is the case where the demand is made by the plaintiff, the plaintiff having a right to determine the possession of the defendant.

Plaintiff and his step-brothers formed a joint Hindu family. Plaintiff's mother and father died in 1905 and 1909 respectively. The mother left certain valuable ornaments which continued to be in the joint family even after the death of the plaintiff's father. During all the time plaintiff was living with the step-brothers. Plaintiff attained majority in 1910. Step-brothers never claimed the ornaments as their own though they were in their possession. In 1920 there was a partition and in September 1920 the plaintiff brought the suit to recover those ornaments. It was contended that the suit was time-barred.

Held, that Art. 49 applied and the suit was not time-barred, as the time began to run against him in 1920 when he claimed that step-brothers should make over the ornaments to him. 106 Ind. Cas. 885=32 C.W.N. 133=A.I.R. 1929 Cal. 42.

——Art. 49—Original possession permissive — Failure to return on demand.

Plaintiff gave two necklaces to the defendant on condition that their price would be paid if they would be approved and they would be returned if they were not approved. The defendant failed to return the necklace in question to the plaintiff, though the latter demanded them by telegram.

Held, that the defendant's possession of the necklaces became unlawful within the meaning of Art. 49 on his failure to return the same after the receipt of

the telegram. 105 Ind. Cas. 224=A. I. R. 1928 Oudh 47.

——At. 49—Demand and refusal to comply essential.

Where the original possession of property had been permissive a mere allegation on the part of the possessor, of his or her ownership of the property, does not change the character of his or her possession into an unlawful one, and the possession can become unlawful only on his or her refusal to comply with a demand for the return of the property and under Art. 49, limitation would begin to run only from date of such refusal. 85 Ind. Cas. 10=2 Rang. 555=A. I.R. 1925 Rang. 146.

——Art. 49—Government promissory notes held by defendant for plaintiff—Wrongful disposal of notes—Pledge—Subsequent demand and refusal—Wrongful detention when commences.

The defendant who held certain Government promissory notes in trust of the plaintiff pledged the same for his own purposes and later on when asked, the plaintiff refused to deliver them up.

Held, that a suit by the plaintiff to recover the notes or their value from the defendant was governed by Art. 49 and time commenced running from the date of refusal, notwithstanding that the defendant had wrongfully parted with the notes before that date. The detention of the notes became wrongful from the date of refusal to deliver them up. L.R. 6 C.P. 206 foll. (1908) 12 C.W.N. 1010.

——Art. 49—Removal of coal—Starting point.

A claim for damages for trespass and removal of coal from an underground colliery is covered by Arts. 39 and 49 and time begins to run from the inadvertent wrongful taking or from discovery of fraudulent taking. 101 Ind. Cas. 62=31 C.W.N. 82=A.I.R. 1927 Cal. 117.

——Art. 49—Attachment before Judgment.

In a suit against the plaintiff by the defendant for recovery of money, plaintiff's property was attached before judgment. The suit was decreed by the first Court but dismissed by the appellate Court. Plaintiff sued to recover compensation for loss of profits, etc.

Held, Art. 29 does not apply to the suit for Art. 29 is applicable only to those cases in which the seizure is intrinsically wrongful or perhaps to cases where the seizure is made without jurisdiction. The proper article to be applied is Art. 49 and time for suit runs from the date of appellate decree and not from the date of attachment. 81 Ind. Cas. 1038=22 A.L.J. 977=5 L.R.A. (Civ.) 732=A.I.R. 1925 All. 131.

——Art. 49—Articles left in common house—Starting point.

The three years' rule applies to a suit for recovery of articles left in the house occupied by the plaintiff along with the deceased son of the defendant and subsequently vacated by the plaintiff, the latter leaving in the house the articles in question and alleged to be in defendant's possession. The suit is not barred if brought within three years after the defendant's refusal to deliver or the defendant's denial that he was in possession of the property. 84 Ind. Cas. 1026=20 M.L.W. 758=1925 M.W.N. 143=A.I.R. 1925 Mad. 185.

——Art. 49—Illegal distraint—Starting point.

The cause of action for a suit for compensation for illegal distraint does not only arise on the date or the release of the property from distraint, but the cause of action arises on the date of the actual loss of or damage or at the latest when the plaintiff comes to know of such loss. 66 Ind. Cas. 852=A.I.R. 1922 All. 139.

——Art. 49—Conversion — Moveable property—By borrower—Suit for recovery.

In the case of property loaned to be returned when asked for no action would lie until a return has been demanded and refused. The mere fact, that the borrower has unknown to the lender, wrongfully converted, the subject of the loan would not affect limitation. Limitation would run from the date of demand and refusal and not from the date when property was converted wrongfully. (1871) 6 C.P. 206, Foll. 54 Ind. Cas. 159 (Nag.).

——Art. 49—"When the property is wrongfully taken"—Paddy taken by Police on defendant's complaint—Delivery to defendant after trial.

Where on the defendant's complaint, plaintiffs' paddy was taken by the Police, and after the termination of the trial instituted on the defendant's complaint, the paddy was handed over by the order of the Magistrate to the defendant, a suit by the plaintiffs for return of the paddy, if brought within three years from the date of the delivery to the defendant, is within time.

Held, that the cause of action for the suit by the plaintiffs against the defendant to recover the paddy or for compensation for wrongful conversion arose on the date of the delivery. Possession of the Magistrate was possession on behalf of the true owner. (1906) 16 M.L.J. 541=30 M. 12=1 M.L.T. 397.

——Arts. 51 and 31—When goods ought to be delivered.

The expression "when goods ought to be delivered" used in Art. 31 is identical with those in Art. 51. The time for delivery must be a reasonable time after the goods were made over to the carrier. 11 N.L.R. 174=31 Ind. Cas. 474.

——Art. 52.

Synopsis.

1. Applicability and scope.
2. "Goods".
3. Starting point.

1. Applicability and scope.

——Arts. 52 and 64—Applicability—Suit for price of goods sold.

A suit for recovery of the price of goods sold, is governed by Art. 52 and not by Art. 64 of the Limitation Act. For the application of Art. 64 the accounts are required to be stated in writing signed by the defendant or his agent duly authorised in this behalf. I.L.R. (1950) Nag. 464=A.I.R. 1950 Nag. 228=1950 N.L.J. 150.

——Art. 52—Scope.

Suit for recovery of price of goods supplied to Cantonment Board is governed by Art. 52 and not by S. 273 of the Cantonment Act. 1934 All. 436=56 A. 885=(1934) A.L.J. 805=3 A.W.R. 393=149 Ind. Cas. 49.

——Art. 52—Applicability.

A claim for price of medicines supplied would fall within Art. 52. (1931) A.L.J. 949=A.I.R. 1931 All. 752=133 Ind. Cas. 537.

——Art. 52—Scope.

A certain firm agreed to act as commission agent for another firm. There was a single contract, *viz.*, a contract of agency. The commission agent firm submitted accounts annually and the amount due at the end of each year was added to the account for the following year. The former firm sued to recover certain sum found due on adjustment of accounts or alternatively for an account and decree for the amount found due:

Held, that this was not a contract for goods sold and delivered. Consequently, Art. 52 had no application. A.I.R. 1941 Cal. 245=194 Ind. Cas. 727.

——Arts. 52 and 85—Scope.

Between October 25, 1934, and December 24, 1934, a person sold goods worth Rs. 357-12-6. The purchaser made payments, on account, between October 27, 1934, and October 6, 1935, amounting to Rs. 298-4-6. The seller, on June 23, 1938, brought a suit for the balance of Rs. 59-8-0 together with interest:

Held, that Art. 52 applied because the account consisted entirely of goods delivered on the one hand and payments made towards the price of those goods on the other. Article 85 had no application as there were no reciprocal demands between the parties. A.I.R. 1939 Lah. 307=42 P.L.R. 272.

——Art. 52—Goods sold on credit.

A suit to recover price of goods by a tradesman on credit for which payments were made on presentation of bill is governed by Art. 52 of the Act and the perod of limitation is three years from the date of the delivery of the goods. Article 85 does not apply to such a case. 88 Ind. Cas. 747=A.I.R. 1925 Pat. 806.

——Arts. 52, 96—Scope.

The Municipal Committee supplied electric current to the defendant. The voltage of the current supplied was 440 volts but the meter was one that reported only 220 volts. In order, therefore, to get a correct reading of the cuerrent supplied, the reading indicated by the meter should have been doubled and the Committee issued instructions to their employees to double the reading of the meter by their Inspector before sending in the bill to the defendant. By some mistake or negligence on the part of the employees of the Committee, actual bills sent were only for the single reading without doubling the reading. When the mistake was discovered, the Committee sued for the balance of the bill not charged for or paid by the defendant:

Held, that Art. 96, could not apply to a case like the present where the mistake was not the mistake of the parties in contractual relation or any money paid or property handed over because of a mistake but was due to the mistake of the employees in not following the instructions of the Committee. The case was covered by Art. 52. A.I.R. 1938 Lah. 338=40 P.L.R. 143=180 Ind. Cas. 510.

——Art. 52—Goods supplied under mistake.

Where a person, who was dealing in business with two brothers doing business independently sold and despatched to one of them certain goods at his request but entered the debit by mistake in the name of the other, and on refusal by the latter to pay, the mistake was discovered and the dealer presented a demand to the former and filed a suit for recovery of the price of the goods:

Held, that the suit was really one for price of goods sold and delivered and hence was governed by Art. 52 and not by Art. 96. 27 S.L.R. 81=A.I.R. 1933 Sind 32=142 Ind. Cas. 470.

——Arts. 52 and 115—Applicability.

D contracting with *N* to supply goods and perform duties for fixed sum—*D* breaking contract—*P* purchasing debts due to *D* from *N* for goods supplied and services rendered—*P* suing *N* for debts—Art. 115, and not Art. 52 applies. A.I.R. 1935 Lah. 222.

——Arts. 52, 115—Scope.

The defendant, in pursuance of an agreement to purchase 3 motor cars with certain accessories for a lump sum of Rs. 14,000, paid Rs. 2,000 as earnest money and took delivery of a car. He did not make any further payment and did not return the motor car which he had taken. The plaintiff sued for the balance of the price of the car which the defendant had taken and for damages for breach of contract:

Held, that as the defendant had failed to return the car which he had taken delivery of, he must be taken to have consented to pay its price, and the suit, so far as the claim for the balance of the price of that car was concerned, was not a claim for compensation for breach of contract within Art. 115, but one for price of goods sold and delivered within Art. 52. A.I.R. 1931 Lah. 309=130 Ind. Cas. 574.

——Art. 52—Price of articles.

Where the plaintiff is suing for a sum of money as representing the price of certain articles sold by him to the defendant Art. 52 and not Art. 115 of the Limitation Act applies to the case. 65 Ind. Cas. 687=2 L.L.J. 191.

——Arts. 52 and 61—Scope.

Where *A* purchases goods wrongfully in the name of *B* without the latter's knowledge who is forced to pay the price to the seller, a suit by *B* to recover from *A* the amount which has been compelled to pay is not governed by Art. 52 but Art. 61. A.I.R. 1933 Lah. 404=147 Ind. Cas. 57.

——Art. 52—Advance of grain.

A suit to recover advance of grain is governed by Art. 52 and the period, as amended by Punjab Act of 1904, is six years. 2 L.L.J. 191 and A.I.R. 1922 Lah. 271, Foll. 95 Ind. Cas. 25=8 L.L.J. 322=27 P.L.R. 700.

——Art. 52—Price of work done under contract.

A suit for the recovery of the price of work done and materials supplied on a contract to build a house comes under Art. 120; Arts. 52 and 56 are inapplicable to the case. 103 P.R. 1913=81 P.L.R. 1914=22 Ind. Cas. 576.

——Art. 52—Newspaper—Arrears of subscription.

A suit to recover arrears of subscription to a newspaper is governed by Art. 52. (1905) 7 Bom.L.R. 190.

2. "Goods."

——Arts. 52 and 96—'Goods'—'Electric energy' if included in — Claim in respect of electric energy supplied during a period of five years—Article applicable—Limit to relief.

Electric energy is 'moveable property', and therefore "goods" within the meaning of Art. 52 of the Limitation Act. A suit claiming the charges for electric energy supplied during a period of five years can only be decreed so as to cover only a period of three years prior the institution of the suit. The fact that it was owing to a mistake of the meter reader that incorrect bills were issued during the period of five years cannot attract the provisions of Art. 96 of the Limitation Act. I.L.R. (1946) A. 476= 1946 A.W.R. (H.C.) 247=1946 A.L.J. 195=1946 A.L.W. 372=A.I.R. 1946 All. 502.

——Art. 52—Goods—Test.

Articles of food do not lose their character of goods merely because the man who sells them as a shop-keeper happens to be the proprietor of a restaurant, if he sells them in a different department. A. I.R. 1940 Rang. 17=1939 Rang.L.R. 626=186 Ind. Cas. 582.

——Art. 52—Goods—Tinned articles.

If, from restaurant is sent out a case of beer, that would scarcely be drink in that sense of the word. It would be goods and the same applies to articles in tins which do not require immediate consumption. 1939 Rang.L.R. 626=186 Ind. Cas. 582=A.I.R. 1940 Rang. 17.

——Art. 52—Fruits in garden—Suit for price of.

A suit for recovery of the price of fruits standing in a garden and sold to the defendant is governed by Art. 52 of Limitation Act the word "goods" in that article being wide enough to include fruit even before it has been gathered. 66 Ind. Cas. 120 (Lah.).

3. Starting point.

——Arts. 52, 85—Starting point of limitation.

The mere supply of different goods on different dates cannot give rise to a fresh period of limitation from the date of the last supply. If no period of credit was agreed upon, Art. 42, would obviously apply and limitation would start from the date of the delivery of the goods on each occasion unless of course the case can be brought within the ambit of Art. 85. A. I.R. 1943 Mad. 13=1943 M.W.N. 561=55 L.W. 585=(1942) 2 M.L.J. 337=207 Ind. Cas. 133.

——Arts. 52, 115—Scope—Starting point.

In a suit for balance due on account of goods sold and delivered from time to time, the evidence was of sale and delivery of goods and there was no evidence that the buyer ever had any account submitted to him, or that he ever agreed to be bound by any account:

Held, that the cause of action was for the price of goods sold and delivered and not a claim for balance due at the foot on account and the mere fact that the buyer paid moneys on account of what was due from time to time, for which he was given credit could not alter the nature of the seller's cause of action. The case, therefore, fell under Art. 52 and not Art. 115.

Held, also that the starting point of time was the date of the delivery of the goods, and although the cause of action was one for the price of all the goods delivered, the Court was bound to check the various items which went to constitute that cause of action and to apply Art. 52 to deliveries which took place more than three years before the filing of the suit. A. I.R. 1940 Bom. 158=42 Bom.L.R. 227=I. L. R. (1940) Bom. 127=188 Ind. Cas. 300.

——Art. 52—Date of delivery.

Unlike a bill-of-lading a railway receipt when formally made over to a person, is a mercantile document of title to goods and gives the holder thereof the right to lawful possession of the goods and the date of delivery of receipt is the date of the delivery of the goods for the purpose of Cl. (3) in Art. 52. 38 M. 664, Foll. 108 Ind. Cas. 801=A.I.R. 1928 Nag. 181.

——Art. 52—Starting point — Tradesman's account.

The starting point of limitation under Art. 52 is the date of the delivery of goods and in the case of a tradesman's accounts the liability to pay for each item of goods delivered, either day by day or week by week is, in the case of each item, the date of the delivery of that particular item. A.I.R. 1945 All. 185=1945 A.W.R. (H.C.) 45=1945 O.W.N. (H. C.) 61=I.L.R. (1945) All. 200.

——Art. 52—Tradesman's account—Starting point —Appropriation of payments.

In the case of a trademan's account the liability to pay for each item of goods delivered, either day by day or week by week is in the case of each item the date of delivery of that particular item.

Where payments are made from time to time by the customer and there is no specification as to the items to which the payments are to be credited the trader is entitled to credit the payments to the earlier of the items but not to the entire balance due up-to date so as to save limitation for all the items. 63 Ind. Cas. 435=19 A.L.J. 555=A.I.R. 1921 All. 325.

——Art. 52—Starting point of limitation.

Where, in the case of sale of different goods by the plaintiff to the defendant on different dates, the defendant makes a payment without instructions to the plantiff to appropriate it towards a particular item and there is nothing to show that the plaintiff had given credit to the defendant towards particular item, the payment must be regarded as a payment generally towards the defendant's account irrespective of the consideration whether the item in the plaintiff's account were barred by limitation or not and the plaintiff is entitled to recover such items as are within time after crediting the payment towards previous items. A.I.R. 1943 Mad. 13=1942 M.W. N. 561=55 L.W. 585=(1942) 2 M.L.J. 337=207 Ind. Cas. 133.

——Art. 52—Starting point of limitation.

If more debts than one are due and a payment is made which is not specifically appropriated, it is a question of fact in respect of which debt the payment was made. This appropriation need not be proved by any express declaration of the debtor at the time of the payment but any expression used by him, either before or after that time, or any other circumstances from which it may be inferred that the payment was intended to be appropriated to any particular debt or debts, or was made on account of all the debts collectively will be sufficient for the purpose. If the evidence shows that the payment was made on account of all, it will prevent any of the debts being barred by statute. A.I.R. 1938 Nag. 266=1938 N.L.J. 157=I.L.R. (1939) Nag. 137=178 Ind. Cas. 50.

——Art. 53—Construction of bill—Thavanai in a bill of sale.

The word *Thavanai* was held to mean credit period and to place the suit for the price of goods sold and purchased within Art. 53 of the Limitation Act in the following circumstances: In the bill for piece-goods purchased, sent by the vendor to the vendee the following words were found at the top "debt interest at ¾ per cent. per mensem after 60 days *thavanai.*" The question arose whether it was a credit sale or a cash transaction when the plea of limitation was set up as a defence to the suit for the money due, and it was held to be a credit transaction. 85 Ind. Cas. 299=48 Mad. 275=20 M.L. W. 981=A.I.R. 1925 Mad. 161=47 M. L. J. 844.

——Art. 54—Applicability.

For Art. 54 to apply, it must be alleged that the *hundis* were not executed as promised. If the defendants wish to make this allegation, it is for them to make it in their written statement or their pleadings clearly and without any attempt to mislead the plaintiffs. A.I.R. 1936 Lah. 328=162 Ind. Cas. 302.

——Arts. 56, 120—Scope—Pleader's suit for fees.

There was no agreement between the Pleader and his client with regard to the amount of the fees. The Pleader was to submit a bill upon the conclusion of his employment in the case and was to be paid only such charges as the client considered reasonable:

Held, that the suit by the Pleader for the recovery of his fees was governed by Art. 56 and not by Art. 120. A.I.R. 1942 Cal. 444=75 C. L. J. 7=201 Ind. Cas. 650.

——Arts. 56 and 7—Suit by goldsmith.

A suit by a goldsmith to recover the price of his labour in making ornaments falls under Art. 56 and not under Art. 7. A.I.R. 1938 Nag. 286=I.L. R. (1938) Nag. 592=177 Ind. Cas. 345.

——Art. 56—Suit by Contractor against District Board—U. P. Local Boards Act, S. 192.

Where a contractor with a District Board was unable to complete the contract within the stipulated time and he was relieved of his obligations on the apparent understanding that he was to be paid for the work done, and he sued for the same.

Held, S. 191 (1), U.P. Local Boards Act did not apply as it was not a contract by the Board and that Art. 56 applied to the case. 109 Ind. Cas. 639=3 Luck. 584=5 O.W.N. 350=A. I. R. 1928 Oudh 297.

——Art. 56—Contract—Price of work done

A suit for the recovery of the price of work done and materials supplied on a contract to build a house comes under Arts. 120; Arts. 52 and 56 are inapplicable to the case. 103 P.R. 1913=81 P.L.R. 1914=22 Ind. Cas. 576.

——Art. 56—Contract—Ruling Prince.

A suit by contractor engaged in British India by an agent of a Ruling Prince, against the agent for work done by him, is governed by Art. 56. 43 P. R. 1910=70 P.W.R. 1909=4 Ind. Cas. 902.

——Art. 56—Suit for price of work done by plaintiff for the defendant at plaintiff's request—Principal and agent—Contractor employed by agent to do work for principal. *See* CONTRACT ACT, S. 230 (3). 14 P.L.R. 1909=43 P.R. 1910=4 Ind. Cas. 902.

——Art. 56—Starting point of limitation—Building contract.

According to an agreement between the contractor and the Military Department, the work was to be finished in ten months and during the progress of the work, payments were to be made to the contractor by way of advances to be adjusted at the time of the preparation of the final bills. The balance was to be paid to him after the final bills had been prepared by the Military Department. These bills had to be prepared after final measurements made in the presence of the contractor after the completion of the work. The contractor was also to do such extra work in connection with the construction of the buildings as the Military Engineering authorities should call upon him to do or execute. There was also an arbitration clause in contracts making it incumbent on the parties to refer their disputes to arbitration. Soon after he had completed the work, the contractor requested the Officers of the Engineering Department concerned to measure his work in his presence and to prepare the final bills. He even sent his engineer, but no steps were taken to measure the work in his presence. In fact almost up to date of the suit negotiations continued between the parties as to the correct amount claimable by the plaintiff on account of the work done by him. No reference was made by either party to arbitration and when the contractor filed a suit, even then the other party did not ask for stay of suit and that the dispute be referred to the arbitration:

Held, (*i*) that since the negotiations for settlement of claim continued up to the date of the suit, no question of limitation under the circumstances arose with regard to the contractor's claim. A.I.R. 1935 Lah. 775=160 Ind. Cas. 739.

——Art. 57.

Synopsis.

1. Applicability and Scope.
2. Money lent on pledge.
3. Mutual, open and current account.
4. Starting point.

1. Applicability and scope.

——Art. 57 and S. 20—Customer of Bank overdrawing account on different occasions—Limitation for recovery—Repayment by customer—If saves limitation in respect of general balance of account.

When the customer of a bank draws a cheque on it, knowing that the funds at his credit are insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan. Each such transaction is an independent loan, limitation for the recovery of which is determined by Art. 57 of the Limitation Act. Regarded in this light, each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay and which would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of the general balance of account. The fact that part of the floating balance is secured would not make a difference in this respect. 26 Pat. 231=1948 (Comp. C. 127=A.I.R. 1948 Pat. 18.

——Art. 57—On demand, mearing of.

Under Art. 57, when no time is fixed a loan is payable on demand—that is, forthwith—so when money is lent and charged upon land, and no time is fixed, it is payable on demand—that is, forthwith—as the words "on demand" used in this sense mean "forthwith and without demand". A.I.R. 1941 Sind 158=I.L.R. (1941) Kar. 124=196 Ind. Cas. 565.

——Arts. 57 and 60—Distinction—'On demand'—Meaning — Thavanai account—Money payable on demand—Limitation.

Art. 57 applies to ordinary loans where no time is fixed for payment *i.e.*, to suits for money payable "on demand" in the legal sense of the term. Art. 60 applies to cases of money deposited under an agreement that it shall be repayable "on demand" in the popular sense of the terms *i.e.*, after demand is made; when after expiry of *thavanai* contract no fresh contract is entered into, the money held is like a deposit in the banker's hands which is ordinarily payable 'on demand' in the legal sense and therefore Art. 60 applies. 13 Bur. L.T. 21=10 L. B.R. 161=57 Ind. Cas. 908.

——Arts. 57, 58—Scope.

A suit in which a lender transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee does not come within the ambit of Art. 58 but is governed by Art. 57, which is a general article applicable to a suit for the recovery of money payable for the money lent; and the *terminus a quo* is the date on which the loan is made. Where loan was made on 30th August, 1923, when the money was received by the borrower, the suit brought within three years from that date, must be held to be within time. A.I.R. 1938 P.C. 66=1938 O. W. N. 203=(1938) A. L. J. 148=47 L. W. 234=4 B. R. 305=42 C. W. N. 514=19 P. L. T. 222=I. L. R. (1938) All. 326=(1938) 1 M. L. J. 785=(1938) M. W. N. 573=67 C. L. J. 176=1938 A. W. R. 30=40 Bom. L. R. 752=32 S. L. R. 388=65 I. A. 132 =172 Ind. Cas. 978.

——Art. 57—Claim for personal decree under mortgage—Limitation.

Where, under a mortgage, a mortgagee was to remain in possession for a fixed period, a personal covenant to pay the mortgage money is necessarily implied and the period of limitation to recover the same falls under Art. 57. A.I.R. 1936 Pesh. 43 =160 Ind. Cas. 986.

——Arts. 57. 115—Money lent.

The plaintiffs were dealers in timber and the defendant did the business of sawing wood. According to the plaint, between certain dates, a certain sum of money was advanced to the defendant and the defendant sawed a certain quantity of timber from one date to another mentioned in the plaint and that thereby he did work worth a certain amount. Deducting the value of the work done, the plaintiffs claimed the balance of their money lent:

Held, that Art. 57 governed the suit and not Art. 115, and that the case was similar to that of a party advancing money to another and the borrower repaying the money lent from time to time. A. I.R. 1934 All. 122=3 A.W.R. 190=147 Ind. Cas. 295.

——Arts. 57 and 115—Thavanai account—Relation of parties to.

The relationship between the parties to a *Thavanai* account is that of lender and borrower. The money is to be paid at a fixed period after two months and unless the lender demands it, the loan is taken to be extended for next two months. Art. 57 and not Arts. 60 and 115 applies to a suit brought on *thavanai* account. 8 L.B.R. 526=10 Bur. L. T. 53=36 Ind. Cas. 497.

——Arts. 57, 68 and 80—Suit on hundi—Hundi inadmissible — Claim on original consideration—Limitation.

A suit upon two hundis payable in thirty days from the date of execution was brought more than three years from the date of the hundis, but within three years from the expiry of one month within which the hundis were payable. The hundis not being properly stamped were inadmissible in evidence and plaintiff claimed a decree on the original consideration:

Held, that the suit not having been brought within three years from the date of payment of the original transaction, was barred by limitation as the hundis could not be used for extending the time for payment. 7 Cal. 256, approved. 29 C.L.J. 508=51 Ind. Cas. 945.

——Art. 57—Advance in kind and cash—Suit to recover—Applicability.

A suit to recover money on account of advance made in grain and cash is not governed by Art. 57. 103 P.W.R. 1916=37 Ind. Cas. 300.

——Art. 57—Creditor having debtor's funds for payment.

No question of limitation arises where a creditor has funds belonging to the debtor at his disposal to pay himself out of it. 2 O.L.J. 620=32 Ind. Cas. 729.

——Art. 57—Suit for—Money advanced as price —Questions for decision.

Where no time is expressly fixed for delivery of the goods in a suit for the money advanced the Court must find whether by reason of trade, custom or other usage, any particular period can be laid down as the date of delivery failing which, some reasonable time should be fixed after the advance of his money for delivery, having regard to all circumstances. 13 A.L.J. 394=28 Ind. Cas. 969.

——Art. 57—'Deposit'—Meaning of.

On 31st March, 1902, one *M* sold property to *G* for a part of debt due to plaintiff the vendee undertook pay the the said debt to plaintiff. On 18th February, 1908 plaintiff sued *G's* widow for the sum. Defendant pleaded that the money having been left with *G* as a deposit, the suit was barred by limitation:

Held, that the suit was not barred as it was a suit for money payable for money lent and Art. 57 of the Limitation Act read with the Punjab Act I of 1904, applied. The test to see whether there was a deposit, was whether *M* remained liable to plaintiff and so retained some sort of dominion over the purchase money in *G's* hands. It being not so, the case was merely one of transfer from one person to another of liability for debt. 59 P.R. 1910=101 P.W.R. 1910=108 P.L.R. 1910=7 Ind. Cas. 467.

——Arts. 57, 62, 89 and 120—Suit against the sons of the agent for money appropriated by the agent and thrown into his estate—Sons benefited.

A suit by the principal against the sons and representatives of the agent for money received by the

agent and not accounted for and which had benefited the estate of the sons is governed by Art. 120 and not by Arts. 57, 62 or 89. (1909) 6 A.L.J. 667=2 Ind. Cas. 118=31 A. 429.

2. Money lent on pledge.

——Art. 57—Money lent—Loan on pledge.

A suit for the recovery of money secured by a pledge is really a suit for money lent and advanced. If the suit is one to recover the unpaid balance of a loan, the fact that movable property has been pledged does not change the nature of the suit and Art. 57 applies. A.I.R. 1935 Bom. 213=37 Bom. L.R. 165=156 Ind. Cas. 531.

——Art. 57—Pawnor and pawnee.

Neither the fact that the pawnee had no power to sell the goods pledged to him, nor the express stipulation that the recovery of the debt should be made out of the proceeds of sale to be held by the pawnor takes away or suspends pawnee's right to sue for the debt under the contract of loan. The suit for the same must be brought under Art. 57 and time runs from the date of the loan. 104 Ind. Cas. 641=A.I.R. 1927 Nag. 346.

——Arts. 57, 115 and 120—Loan—Pledge—Limitation.

A suit to recover the balance of money remaining due after the sale of the articles pledged as its security is merely a suit for money lent and the period of limitation applicable to such a suit is three years from the time the loan is made under Art. 57. 7 Bom. L.R. 739=30 Bom. 218.

——Arts. 57. 120—Pledge of moveables—Right of pledgee — Maintainability of suit for sale—Limitation—Personal remedy—Right of hypothecatee—Contract Act, S. 176.

Held (Per *Subrahmania Aiyar* and *Benson, JJ.*). —That a pledgee of moveable property may, notwithstanding that he may have the right to sell the property under pledge under S. 176 of the Contract Act sue to recover the amount due under the pledge by sale of the pledged property. Art. 120 of the Limitation Act governs such a suit for sale, while Art. 57 will apply to a suit to recover the money personally from the debtor. 11 M. 153, not foll. 21 C. 21 and 17 A. 284, foll.

Per *Davies, J. contra.*—A suit at the instance of a pledgee, to recover the debt by sale of the pledged property is not maintainable. A suit for sale of the pledged property will be barred if a suit for recovery of the debt personally from the pledgee be barred under Art. 57, as the right to sell is only accessory to the right to recover the debt. 11 M. 153, foll. An hypothecatee is entitled to sue for recovery of the debt by sale of the hypothecated property. (1902) 13 M.L.J. 445=27 M. 528 (F.B.).

——Art. 57—Pawnor and pawnee—Suit to recover balance after sale of articles pawned—Limitation. *See* CONTRACT ACT, S. 176. 1902 A.W.N. 43=24 A. 251.

3. Mutual, open and current account.

——Arts. 57 and 85—Applicability — Mutual accounting ceasing to be such.

Where though an account started as a mutual one, it continues on a different footing and changes its nature, Art. 85 has no application and the proper article applicable is Art. 57. A.I.R. 1937 Rang. 340=1937 Rang. L.R. 254=172 Ind. Cas. 837.

——Arts. 57 and 85—Money lent.

The defendant borrowed money from the plaintiff from time to time, made payments to him occasionally and struck balance in his favour. The transactions created obligations on one side only, those on the other being merely complete or partial discharge of such obligations. On the account as it stood there were no independent obligations and there were and could be no reciprocal demands between the parties:

Held, that the account was not mutual account within Art. 85 and the suit being one for recovery of money payable for money lent, was governed by Art. 57. A.I.R. 1931 Lah. 241=12 L. 420=32 P.L.R. 954=134 Ind. Cas. 513.

——Art. 57—Book accounts.

Plaintiff sued defendant for a sum of Rs. 1,600 due as principal and interest on book accounts. It was alleged that defendant had struck a balance in favour of the plaintiff for Rs. 756-14-0 and that he had since taken a further sum of Rs. 57 and these items together with interest accrued due amounted to a total of Rs. 1,600. The accounts on record were not mutual, open and current and there were no reciprocal demands between the parties:

Held, that Art. 85 does not apply but that the article applicable is either 57 or 64. 4 L.L.J. 65 =A.I.R. 1922 Lah. 204.

——Arts. 57, 64 and 85—Running accounts closed —Money advanced subsequently—Suit to recover —Limitation.

Where running and open accounts were closed and balance struck and an overpayment was made, to the defendant subsequently a suit to recover the latter was held, to be one on a closed account and was governed by Art. 57 or 64 and not by Art. 85. 148 P.W.R. 1916=7 P.L.R. 1917=35 Ind. Cas. 577.

4. Starting point.

——Art. 57—Money paid by cheque—Limitation —When time begins to run.

Limitation to recover money paid by cheque runs from the date of the receipt of the money by the payee and not from the date of delivery of the cheque. 38 Bom. 293=16 Bom. L.R. 121=23 Ind. Cas. 779.

——Art. 58—Scope.

Art. 58 applies to a case in which the lender draws his own cheque and gives it to the borrower. It does not govern a suit in which he transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. 67 C.L.J. 176=1938 O.W.N. 203=(1938) A.L.J. 148=A.I.R. 1938 P.C. 66=47 L.W. 234=4 B.R. 305=42 C.W.N. 514=19 P.L.T. 222=I.L.R. (1938) All. 326=(1938) 1 M.L.J. 785=(1938) M. W.N. 573=65 I. A. 132=1938 A.W.R. 30=40 Bom. L.R. 752=32 S.L.R. 388=172 Ind. Cas. 978 (P.C.).

——Art. 58—Starting point of limitation.

The period of three years prescribed by Art. 58 begins to run from the date on which the cheque is paid, and cheque is paid when it is cashed by the

lender's bankers. It is only then that the lender's money passes into the hands of the borrower, and the loan is made by the former to the latter, the mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period begin to run against the lender when the cheque received by the borrower is given by him to his own bank and the amount is credited to him by the bank. 1938 O.W.N. 203=(1938) A.L.J. 148=A.I.R. 1938 P.C. 66=47 L.W. 234 =4 B.R. 305=42 C.W.N. 514=19 P.L.T. 222 =I.L.R. (1938) All. 326=(1938) 1 M.L.J. 785 =(1938) M.W.N. 573=67 C.L.J. 176=1938 A.W. R. 30=40 Bom. L.R. 752=32 S.L.R. 388=65 I.A. 132=172 Ind. Cas. 978 (P.C.).

——Art. 58—Starting point—Hundis, transfer of —Loan—Due date.

The mere transfer of *hundis* for the purpose of making a loan of their value when realized does not amount to a loan until money has been realized by the transferee. Consequently, where hundis were transferred which were mature after a time the starting point of limitation for a suit to recover the loan is the date of the realization of the money and not the date of transfer. L.R. 3 C. P. 300 applied. 2 A.L.J. 579=(1905) A.W.N. 181=28 A. 54.

——Art. 59—Applicability.

There is no reason to distinguish between money lent and payable on demand governed by Art. 57 or 59 and money lent and charged upon land and governed by Art. 132. A.I.R. 1941 Sind 158=I.L. R. (1941) Kar. 124=196 Ind. Cas. 565.

——Art. 59—Loan payable on demand and secured by a mortgage.

Limitation in the case of money lent under an agreement that it shall be payable on demand runs from the time when the loan is made and it would be anomalous if limitation ran from a different time in a case where the money was lent on an agreement that it should be payable on demand but is also secured by a mortgage-deed. It is not necessary in such cases that an actual demand should be made for limitation to commence. 21 Mad. 139, Foll. 111 Ind. Cas. 132=6 Rang. 297=A. I. R. 1928 Rang. 189.

——Arts. 59 and 60—Deposit and loan—Distinction.

Distinction between deposit and loan explained. A.I.R. 1940 P.C. 132=6 B.R. 852=1940 O.W. N. 778=1940 A.W.R. 138=44 C.W.N. 1041=52 L.W. 388=(1940) A.L.J. 612=(1940) M.W.N. 1000=I.L.R. (1940) Kar. (P.C.) 277 (Sup.)=42 Bom. L.R. 971=72 C.L.J. 435=189 Ind. Cas. 444 (P.C.).

——Arts. 59 and 60—Applicability.

Where money is deposited with a banker and is payable on demand, a suit for recovery of the same is governed by Art. 60 and not by Art. 59. A.I. R. 1936 Lah. 718=17 L. 481=38 P.L.R. 1025= 165 Ind. Cas. 699.

——Arts. 59, 60—Limitation — Suit to recover money deposited on current account—Loan—Deposit—Acknowledgment.

Semble.—It is far from easy to say to what class of cases the Legislature meant Art. 60 to apply. It may apply to the transactions between a banker and his customers known as "fixed deposits" or it may apply only to deposits of money made with a private person. But it is not intended to apply to a transaction which is regarded by the law as a loan. A suit to recover money deposited with a banker on a current account is governed as to limitation by Art. 60. 1907 A.W.N. 263=4 A.L.J. 628=29 A. 773.

——Arts. 59 and 116—Applicability — Registered bond.

In the case of a registered bond, the article of the Limitation Act which is applicable is not Art. 59 but Art. 116. A.I.R. 1934 Rang. 227=151 Ind. Cas. 426.

——Art. 59—Overdraft.

An overdraft in the hands of a banker is merely a loan and Art. 59 applies to such overdraft. 102 Ind. Cas. 408=29 Bom. L.R. 423=A.I.R. 1927 Bom. 362.

——Arts. 59, 132—"On demand".

A sum payable "on demand" is repayable forthwith and the words "on demand" are superfluous; in each case the question whether or not the parties intended that the words "on demand" should be treated as an integral or operative part of the agreement depends upon the true construction of the agreement. 11 R. 328=A.I.R. 1933 Rang. 188= 147 Ind. Cas. 281.

——Art. 60.

Synopsis.

1. Applicability and scope.
2. Banker and customer.
3. Construction—"So payable".
4. Demand.
5. Deposit.
6. Deposit and loan.
7. Fixed deposit.
8. Implied agreement.
9. Registered agreement.
10. Starting point.
11. Suit without demand.

1. Applicability and scope.

——Art. 60—Applicability.

Before Art. 60 of the Limitation Act can apply not only must the transaction be a deposit but there must be in addition an agreement that it shall be payable on demand. I.L.R. (1950) Nag. 562=1950 Comp. Cas. 225=A.I.R. 1951 Nag. 255.

——Art. 60—Applicability—'Banker'—' Deposit'—Meaning of.

The word "banker" as used in Art. 60 of the Limitation Act does not necessarily mean a "professional" banker and it applies equally to a trader who acts as a banker in relation to a particular customer or customers. The word "deposit" is not defined in the Act and it does not appear that that word has been used in a technical sense, that is the return of the goods or money in specie. Such a meaning would be contrary to the ordinary usage of the language. Therefore, Art. 60 should be deemed to apply to a case where one man places money in the hands of another on the term that an equivalent sum has to be paid back on demand. I.L. R. (1948) Nag. 340=1948 N.L.J. 513=A.I.R. 1948 Nag. 377.

——Art. 60—Claim for refund of money deposited is governed by Art. 60. A.I.R. 1944 All. 241

=(1944) A.L.J. 339=1944 A.W.R. (H.C.) 175 =1944 O.W.N. (H.C.) 252=I.L.R. (1944) All. 554.

——Art. 60—A suit for the recovery of the surrender value of an insurance policy is governed by Art. 60. 1942 N.L.J. 380=A.I.R. 1943 Nag. 9 =I.L.R. (1943) Nag. 253=203 Ind. Cas. 193.

——Art. 60—A suit for recovery of a deposit with a banker which is not a fixed term is governed by Art. 60. A.I.R. 1938 Rang. 335=1938 Rang. L. R. 468=179 Ind. Cas. 428.

——Art. 60—Essentials.

To bring the transaction under Art. 60, Limitation Act, it is necessary to show not only that there was a deposit, but that the deposit was under an agreement that it shall be payable on demand. 111 Ind. Cas. 210=51 Mad. 549=29 M.L.W. 460=A. I.R. 1928 Mad. 509.

——Art. 60—Breach of agreement to sell—Suit for recovery of deposit.

In a certain contract for the sale of property the vendor was to satisfy certain conditions before completion of the contract, but no time was specified for it. The vendor mortgaged the property to another and afterwards it was sold in satisfaction of that mortgage. The purchaser then sued for recovery of deposit money:

Held, that the purchaser need not have sued within a reasonable time. It was Art. 97 and not 60 nor 115, that governed such a case, and time was to be counted since when the property was sold in satisfaction of the mortgage, because it was then that the contract, having become impossible of performance, ended. 117 Ind. Cas. 700=33 C.W.N. 115 =56 Cal. 455=A.I.R. 1929 Cal. 216.

——Art. 60—Balance out of deposits.

Plaintiff sued the defendant for money which plaintiff's father used to deposit every now and then with the defendant and used to withdraw, when necessary, through himself or through others or get money paid to others; and there was also demand on a certain date:

Held, that the suit was governed by Art. 60. 98 Ind. Cas. 554=A.I.R. 1927 Pat. 91.

——Art. 60—Deposit with right to lend—'Banker' —Scope of Art. 59.

The defendants Nos. 1 and 2 were to hold the money deposited by plaintiff for sole custody and by way of deposit: they were at liberty, if they thought it safe and on their own responsibility and risk, to lend the money to others and that, in case they did so, they were to pay a certain sum to the plaintiff as interest on the money so lent, presumably after realizing such interest from the debtors:

Held, that Art. 60 and not 59 applies to suit for recovery of money. Article 60 is not limited in its application to claims against bankers only. 39 Mad. 1081, Foll. 66 Ind. Cas. 752=25 C.W. N. 981=A.I.R. 1921 Cal. 644.

——Arts. 60 and 145—Suit for delivery of gold mohurs or value—Recovery of pictures.

The petitioner bailed some gold mohurs and deposited a few pictures with one *C*. On demand being made delivery was refused:

***Held*, that so far as the mohurs were concerned** the suit was one for money deposited and Art. 60 governed the suit. 41 All. 643=17 A.L.J. 888= 1 U.P.L.R. (A.) 95=55 Ind. Cas. 45.

——Arts. 60, 89 and 106—Money advanced for joint purchase—Suit to recover—Applicability.

A suit to recover money paid to defendant to be used in a joint purchase of property, is governed by Art. 89 and not 60 or 106, as the defendant was acting only as the agent of the plaintiff. 33 Ind. Cas. 438 (Lah.).

——Arts. 60 and 59—Distinction between deposit —Money lent.

Where money was deposited with a bank on condition that interest would be payable and the banker would pay the money on demand, Art. 60 of the Limitation Act applied and not Art. 59. Art. 59 deals with the case of money *lent* under an agreement that it shall be payable on demand. Art. 60 refers to the case of money *deposited* under an agreement that it shall be payable on demand. 37 All. 292=13 A.L.J. 402=28 Ind. Cas. 949.

——Arts. 60, 66, 115 and 120—Money deposited payable on happening of an event—Period of limitation for suit to recover—Applicability of Arts. 60, 66 and 115.

A suit for the recovery of money deposited with another and repayable on the happening of a future event and brought after the happening of the event, is a suit for "compensation for the breach of any contract not in writing registered" within Art. 115 and is barred if not instituted within 3 years from the date on which the event happened. Neither Article 60, nor 66 nor 120 governs such a suit. (1914) M.W.N. 264=22 Ind. Cas. 60.

——Arts. 60, 64—Agreement to receive money and to pay lender's agents—"Deposit."

Where the agreement was that *B* should receive money from time to time from *A* and pay *A's* servants as much as they wanted and return the balance, and a balance was actually struck, a suit brought by *A* against *B* for the balance is not necessarily governed by Art. 64, and in the absence of a finding that *B* was only *A's* agent, Art. 60 may apply. (1900) 28 C. 393.

2. Banker and customer.

[*See also* A.I.R. 1948 Nag. 377, under Note 1].

——Arts. 60 and 59—Where money is deposited with a banker and is payable on demand, a suit for the recovery of the same is governed by Art. 60 and not by Art. 59. 38 P.L.R. 1025=A.I.R. 1936 Lah. 718=17 L. 481=165 Ind. Cas. 699.

——Arts. 60 and 59—In the document which was the basis of the suit, promissory note executed by the defendants to the plaintiff, a *Nattukottai Chetty*, the first defendant, stated as follows: "We have credited to your account Rs. 4,500 on the 6th. Rs. 500 on the 27th. amounting in all to Rs. 5,000. As agreed between us the said amount of Rs. 5,000 is credited for 12 months' *thavanai*, the rate of interest being one anna less the current new rate. So, the said amount of Rs. 5,000 and interest will be paid to your order in twelve months' *thavanai*:"

Held, (*i*) that if there was no evidence whatever as to the terms upon which a transaction of this nature was made with a *Nattukottai Chetty*, there was

a presumption that the *Chetty* is in the position of a banker and the person transacting business with him was in the position of a customer and that account was on the demand basis:

(*ii*) that the true construction of the document was that the plaintiff was depositing with the 1st defendant as banker a sum of Rs. 5,000 for a fixed period of one year, thereafter that deposit to be repaid to the plaintiff and it was thereby agreed that after the year the deposit with interest was payable on demand, and that the case was covered by Art. 60 and not by Art. 59.

(*iii*) consequently, as no demand was made earlier than three years from the date of the suit note, the suit note was executed at a time within the period of limitation and, therefore, it was executed in payment of a non-barred pre-existing debt and being so executed by a manager of a joint Hindu family, it was binding on the joint Hindu family and judgments should be given, not only against the manager but against the sons, brother and nephews as well. 41 L.W. 536=(1935) M.W.N. 559=A.I.R. 1935 Mad. 734=157 Ind. Cas. 274.

——Arts. 60 and 57—Where the dealings between the plaintiff and the defendants started by deposit by plaintiff and subsequently there were many items of deposits and withdrawals by the plaintiff in his own handwriting:

Held, that the defendants acted as the bankers of the plaintiff, and that the transaction in question commenced, and continued to the end as between customer and banker. To such a case, Art. 57 did not apply but Art. 60 applied. A.I.R. 1934 Lah. 42=37 P.L.R. 56=151 Ind. Cas. 712=15 L. 242 (D.B.).

——Art. 60—Banker and Customer.

In order to create the relation of banker to his customer there is no necessity that the banker should carry on only the trade of a banker. It suffices, if with regard to the particular transaction, he was a banker as regards the particular customer. 102 Ind. Cas. 408=29 Bom. L.R. 423=A.I.R. 1927 Bom. 362.

——Art. 60—Banker—Who is.

Under Art. 60 it is not necessary to prove that the borrower was carrying on business only as banker. A man might become a banker or place himself in the position of banker, with regard to a particular customer, and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower is in the position of a banker to the lender, then the money so lent could be considered as a deposit. 93 Ind. Cas. 215=28 Bom. L.R. 73=A.I.R. 1926 Bom. 168.

3. Construction—"So payable".

——Art. 60—Construction — "So payable," meaning of.

The words "so payable," in Art. 60 mean payable on demand. A.I.R. 1936 Rang. 338=164 Ind. Cas. 412.

——Art. 60—Oral demand.

Under Art. 60 an oral demand is sufficient. A.I.R. 1941 Mad. 841=(1941) 2 M.L.J. 558=200 Ind. Cas. 357.

——Art. 60—Waiver of demand.

In the case of a deposit made with the banker, the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by the banker of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum. A.I.R. 1940 Pat. 129=6 B.R. 153=185 Ind.C ·Cas. 339.

——Art. 60—Demand, what is—Essentials of, stated.

The demand contemplated by Art. 60, must be a legal demand. It must be made by a person capable of giving a valid discharge in the event of payment being made. If the deposit is payable to more persons than one, the demand must be made by them all or at least by one of them duly authorised by the others and in a position to give a legal discharge on behalf of himself and the others. In the same way, the demand must be a demand made directly on the party with whom the deposit lies in his capacity as depositee. The starting point of limitation under Art. 60 is the date when the demand is made. Such a demand must be an unqualified demand for the whole sum due. A claim to deposit not addressed to depositees but put forward in written statement in a suit in which both the claimant and the depositee are co-defendants is not a demand of the nature contemplated by Art. 60. A.I.R. 1939 Sind 173=I.L.R. (1939) Kar. 602=182 Ind. Cas. 718.

——Art. 60—Claim in insolvency—If "demand".

Where a banker with whom money is deposited on current account is adjudged insolvent, tender of proof of debt by creditor and claim made by him in insolvency is not a demand within the meaning of Art. 60. A.I.R. 1938 Rang. 335=1938 Rang. L.R. 468 =179 Ind. Cas. 428.

——Art. 60—Demand—Demand for partial payment.

The demand contemplated by Art. 60 is clearly a demand for the re-payment of the whole amount of the deposit due, and not a demand for partial payment. A.I.R. 1938 Rang. 335=1938 Rang. L. R. 468=179 Ind. Cas. 428.

——Art. 60—Demand, meaning of.

A demand contemplated by Art. 60 is an unqualified demand for the whole sum due. 63 M.L.J. 232=(1932) M.W.N. 918=A.I.R. 1932 Mad. 685 =36 L.W. 514=139 Ind. Cas. 164.

——Art. 60—Demand.

Demands properly so called should be distinguished from requests for money on account. 63 Ind. Cas. 759=25 C.W.N. 981=A.I.R. 1921 Cal. 644.

5. Deposit.

——Art. 60—Deposit—Onus.

The burden of proving that a particular transaction was one of deposit is on the person alleging the same and the answer to the question whether that burden has or has not been discharged must depend on the facts and circumstances of each case. A.I.R. 1939 All. 378=1939 A.W.R. 304=184 Ind. Cas. 559.

——Art. 60—Interest on deposit.

The ordinary rule is that the cause of action for recovery of principal and of interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, two periods of limitation are not applicable. Thus, in

a case falling under Art. 60, that article applies to the principal as well as to the interest. A.I.R. 1940 Pat. 129=6 B.R. 153=185 Ind. Cas. 339.

——Art. 60—Deposit—Effect of family settlement.

Certain amount stood as deposit in the name of *A* with a banker firm. There was a dispute regarding this amount which was settled by a family settlement whereby a portion of the money was to go to *A* and was payable to the banker firm and the rest of the money was to go to *B*. *A* subsequently sued the firm and *B*, for recovering the amount of the deposit still standing in his name:

Held, that the nature of the deposit did not change after the family settlement and it still remained as a deposit payable on demand to *A*. The suit was, therefore, governed by Art. 60. (1937) M.W.N. 1 M.L.J. 56=176 Ind. Cas. 617.

——Art. 60—Deposit — Insolvency of depositee and subsequent annulment of adjudication—Effect of.

Where a deposit is made with a person who is subsequently adjudged insolvent and later on the adjudication is annulled and the property is handed back to him, the deposit does not lose its character as such and assume that of a mere loan. 1938 Rang. L.R. 468=A.I.R. 1938 Rang. 335=179 Ind. Cas. 428.

——Art. 60—When the defendant admits the deposit of money and issue of Pass Book and the plaintiff has been operating on account, a suit by plaintiff for balance of amount due on deposit is governed by Art. 60. 1936 M.W.N. 948.

——Art. 60—Deposit—Tests.

For the purposes of Art. 60, in ordinary and popular language, the money of a customer standing to his credit in the accounts of a banker is money deposited although for certain other purposes, the term 'deposit' is limited to goods which are placed in the custody of a person with a view to their being returned in specie. For determining if the money has been deposited within the meaning of Art. 60, it ought to be seen whether what happened between the parties was of the nature of that sort of current account which a customer keeps with his banker. The use of any specific form of words in the *hathchitha* to state in express terms that the money was money deposited is not necessary if the course of business between the parties establishes that in fact it was so. A.I.R. 1936 Pat. 539=3 B.R. 59=15 Pat. 709=18 P.L.T. 79=165 Ind. Cas. 593.

——Art. 60—Deposit — Construction of transaction.

The plaintiff deposited in 1899, with defendants, a firm consisting of her brothers, a certain sum of money which had been given to her by her father's family as *stridanam* for investment in the firm. A suit was filed by the plaintiff for recovery of the amount in 1925:

Held, that the transaction was in the nature of a trust and attracted application of Art. 120. But assuming there was no trust, the money was clearly deposited under an agreement that it should be payable on demand within the meaning of Art. 60 and in either view the suit was within time. 63 M.L.J. 232=A.I.R. 1932 Mad. 685=(1932) M.W.N. 915=36 L.W. 514=139 Ind. Cas. 164.

——Art. 60—Deposit.

The mord "deposit" in Art. 60 covers all payments of the customer's moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands. 102 Ind. Cas. 408 =29 Bom. L.R. 423=A.I.R. 1927 Bom. 362.

——Art. 60—Deposit with banker — Suit for recovery—Limitation.

Where the deposit is in the nature of a banking deposit the depositee stands in a fiduciary relation to the depositor, and a suit to recover it, is governed by Art. 60. 1 U.P.L.R. (H.C.) 13=52 Ind. Cas. 25.

——Art. 60—Deposit repayable on demand—Money deposited on the understanding that it was to be paid on demand after a certain time.

Money deposited on the understanding that it was to be paid on demand after a certain period does not cease to be a deposit within Art. 60 of the Limitation Act. Where money is deposited with a firm in the name of a *maral B*, the *maral* man *B* is neither the trustee in respect of the money nor has he any right to operate on it. The firm remains and is liable to *A* alone. 24 M.L.T. 264 =(1918) M.W.N. 564=8 L.W. 221=47 Ind. Cas. 948.

——Arts. 60 and 145—Deposit — Returnable on demand.

A suit to recover money left by plaintiff with defendant to be repaid on demand and to be kept in deposit till then, is governed by Art. 60. S. 10 or Art. 145 of the Limitation Act do not apply. Art. 145 cannot be applied to a deposit of money except in the case of coins which are ear-marked and where it is the intention of the parties that the identical coins should be returned to the depositor. 65 P.L.R. 1918=4 P.R. 1919=166 P.W.R. 1918 =47 Ind. Cas. 592.

——Art. 60—Deposit—Third persons.

Where money has been given to the defendant by a third person on behalf of the plaintiff, a suit to recover the money from the defendant is governed by Art. 60 as it amounts to a deposit. 19 B. 352 and 28 Ind. Cas. 688, Followed. (1916) 1 M.W.N. 206 =19 M.L.T. 237=34 Ind. Cas. 347.

——Arts. 60 and 59—Deposit, meaning of—Non-banker trader—Nature of relationship.

Money in the hands of a trader, who is not a banker, will be a deposit within Art. 60 if the circumstances point to the conclusion. 39 Mad. 1081 =30 M.L.J. 245=19 M.L.T. 129=(1916) 1 M.W.N. 186=3 L.W. 168=32 Ind. Cas. 965.

——Art. 60—Deposit for investment—Limitation.

A person entrusted his nephew who was carrying a money lending business with some money for investment and the latter accordingly first deposited the amount with the third party but subsequently withdrew it and invested it in his own firm. There was no evidence as to the exact terms on which the money was handed over.

Held, the presumption in the circumstances was that the money was deposited on terms that it should be payable on demand and as such the claim for its recovery was governed by Art. 60 of the Limitation Act. 28 M.L.J. 372=17 M.L.T. 266=28 Ind. Cas. 688.

——Art. 60—Deposit — Meaning of—Demand.

Deposit is not confined to dealings with bankers

and has no technical meaning. Limitation for recovery of a deposit of money with a private money-lender runs from the date of demand. Absence of express words for payment on demand is insufficient to take a case out of Art. 60. (1913) M. W. N. 218=19 Ind. Cas. 3.

——Art. 60—A transaction by which a sum of money is lodged with a person as dowry for a young girl of four years under circumstances which indicate that all the parties intended that the money was to remain with the lodgee for an indefinitely long period is a deposit and the article applicable is Art. 60 of the Limitation Act. (1903) 5 Bom. L. R. 511.

——Arts. 60 and 63—Deposit with trustee—Thavanai — Suit for recovery of principal and interest.

A suit to recover a deposit with a Nattukottai Chetty on *Thavanai* terms, is governed by Art. 60, both as regards principal and interest. The next reversioner of a Hindu can successfully bring a suit against the trustee to recover a certain sum with interest deposited with him for the deceased widow's maintenance, by the family members of the deceased, even if the widow did not claim any more. Because the widow's silence amounts to acquiescence in the interest being treated as part of her husband's estate. This suit is governed by Art. 60 of Limitation Act, as the interest is an increment to the deposit according to the agreement of the parties. 43 Mad. 629=11 L.W. 418=(1920) M.W.N. 248=38 M.L.J. 437=58 Ind. Cas. 639.

——Art. 60—Deposit — Thavanai — Limitation.

In the absence of evidence as to the terms of the loan, deposits made with *Nattukottai Chettiers* who are Indian Bankers on *thavanai* are deposits payable on demand and suits for their recovery are governed by Art. 60 of the Limitation Act. On the facts of the case held that the money was payable at the end of *thavanai* period and was not a deposit payable on demand. 10 L.W. 67=52 Ind. Cas. 456.

——Arts. 60 and 115 — Deposit — Thavanai — Suit for recovery of money — Nattukottai Chetties.

The article applicable to *thavanai* transactions, if they realy mean that the deposit amount is to be repaid whenever demanded, is Art. 60. But if the money is to be repaid at the end of the *thavanai* period which is current when the demand is made, they are governed by the residuary Art. 115. 1918 M.W.N. 242=7 L.W. 330=43 Ind. Cas. 972.

——Arts. 60 and 115—Deposit — Thavanai.

A certain amount was deposited at two months *thavanai* interest. The terms of the deposit showed that interest was to be calculated at *Thavanai* interest at two months rest. It was repayable either on demand or after the current *Thavanai* year. In the former case Art. 60, Limitation Act, applied. In the latter Art. 115 applied. 6 L.W. 687=(1917) M. W.N. 858=42 Ind. Cas. 573.

——Arts. 60, 115 and 57 — Deposit — Thavanai account — Meaning of—Limitation.

The relationship between the parties to a *Thavanai* account is that of lender and borrower. The money is to be paid at a fixed period after two months and unless the lender demands it the loan is taken to be extended for next two months. It was held that Art. 57 and not Arts. 60 and 115 applied to a suit brought on *Thavanai* account. 8 L.B.R. 526=10 Bur.L.T. 53=36 Ind. Cas. 497.

6. Deposit and loan.

——Art. 60—Deposit — Trust — When created —Deposit in confidence and not as loan—Nature of—Liability to account.

Where one person deposits money with another in confidence, and not because the latter was in need of money and therefore borrowed it from the former the deposit is one made in trust and the depositee stands in a fiduciary relation to the depositor and is liable to render an account to the depositor. I. L. R. (1947) Bom. 162=48 Bom.L.R. 795=A. I. R. 1947 Bom. 255.

——Art. 60—Deposit and loan.

When *A* hands over money to *B* and it is agreed between them that *A* should take back from *B* as much money as might be required by him from time to time and that he should receive payment according to his needs from time to time and there is no agreement that the whole money would be payable within a certain period, there is no obligation on *B* to seek out *A* and repay him; he is to keep the money until asked for it. The transaction in such a case is a deposit and not a loan. A.I.R. 1944 Nag. 101= 1944 N.L.J. 83=I.L.R. (1944) Nag. 462=212 Ind. Cas. 76.

——Art. 60—Deposit and loan—Distinction.

The terms, "a loan" and "a deposit payable on demand" are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker, it does not necessarily involve the erection of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would, therefore, be a normal condition of the obligation of the depositee to repay.

One *R* was a minor when his father died and relied very much on *A* subsequently. He had claims against certain firms of which his father had been a partner, and he recovered certain amounts from them from time to time with the help of *A* and handed them over to *A* who put them into his bank account and credit them to *R*. The evidence showed that whenever *A* paid any of these moneys to *R*, it was because *R* had asked for them. There was nothing in the evidence to suggest that *A* ever "sought out" *R* to repay him:

Held, that this was not a case disclosing any duty on the bailee of the moneys to seek out his bailor and repay him, but only a duty to repay if and when the bailor requested repayment. These bailments being deposits, the suit by *R* to recover the amounts on *A's* failure to pay them on demand was governed by Art. 60, Limitation Act and not by Arts. 59 or 57. A.I.R. 1940 P.C. 132=1940 A.W.R. 138= 1940 O.W.N. 778=44 C.W.N. 1041=6 B.R. 852= 52 L.W. 388=(1940) A.L.J. 612=72 C.L.J. 435 =(1940) M.W.N. 1000=I.L.R.(1940) Kar. (P. C.) 277 Sup.=42 Bom.L.R. 971=189 Ind. Cas. 444 (P.C.).

——Art. 60—Desposit or loan—Test.

The true test to determine whether a particular transacton is one of loan or one of deposit is to ascertain whether the money paid or deposited was in the nature of an advance of loan so as to create the relationship of creditor and debtor between the parties or was merely a deposit without bringing into existence such a relationship. A.I.R. 1939 All. 376 =1939 A.W.R. 304=184 Ind. Cas. 559.

——Art. 60—Deposit—Construction.

Where a certain amount is deposited with a firm and a memorandum evidencing the depoist addressed to the firm and executed by the depositor, is to the effect: "The sum of Rs. 1,000 that you have deposited (*jama kiya hai*) with me will be handed over to you whenever you demand the same and I will pay you interest at the rate of 12 annas per cent. per mensem", the transaction is one of deposit and not of a loan. A suit for the recovery of the amount is governed by Art. 60. The fact that there is an undertaking to pay interest does not convert the transaction into a loan. A.I.R. 1939 All. 378= 1939 A.W.R. 304=184 Ind. Cas. 559.

——Art. 60—Deposit and loan—Distinction.

The distinction between a loan and a deposit is that in the case of a loan, it is ordinarily the duty of debtor to seek out the creditor and to re-pay the money according to the agreement. In the case of a deposit, it is the duty of the depositor to go for the money to the banker or the depositee and to make a demand for it. A.I.R. 1937 Lah. 81=39 P.L.R. 377=171 Ind. Cas. 506.

——Art. 60—Deposit and loan—Distinction.

The two terms "loan" and "deposit payable on demand" are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker, it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit, not for a fixed term, does not impose an immediate obligation on the depositee to seek out the depositor and re-pay him. He is to keep the money till asked for. A demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to repay. A.I.R. 1936 P.C. 171=44 L. W., 23=40 C.W.N. 997=(1936) M.W.N. 660=17 P. L.T. 513=38 Bom.L.R. 739=2 B.R. 588=63 C.L. J. 541=(1936) A.L.J. 986=17 L. 557=1936 A. W.R. 931=71 M.L.J. 712=38 P.L.R. 1006=63 I. A. 275=162 Ind. Cas. 454 (P.C.).

——Art. 60—Deposit and loan—Distinction between.

It is not clear what the Legislature meant by the word "deposited" in Art. 60 but there must be some difference between "money lent" and "money deposited" and one can only assume that a plaintiff relying upon Art. 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money "a deposit," and "not a loan". Ordinarily when A hands over money to B on the understanding that it is not a gift, but was to be re-paid when demanded, that would be considered in law "a loan"; and when the plaintiff seeks to prove that the money so handed over was a deposit, the onus would lie upon him to prove that there are additional circumstances which turned the "loan" into a "deposit',' there is no distinction in the Act between the money lent and money deposited with regard to the agreement to re-pay. So that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what that something further must be. It has sometimes been suggested that facts must be proved which create a sort of fiduciary relationship between the lender and the borrower. It cannot be said that that is always necessary. 73 Ind. Cas. 978=25 Bom.L.R. 503=A.I.R. 1924 Bom. 28.

——Art. 60—A suit to recover money alleged to have been deposited by the mother of the plaintiffs with the defendant is governed by Art. 60, and not Art. 59, the transaction being a deposit and not a loan in the ordinary sense of the term. (1932) A. L.J. 261=140 Ind. Cas. 96.

——Art. 60—Deposit, what is—Relationship of Banker and customer essential.

Where a partner opened a separate account in his daughter's name in partnership books, and the account had been made up every year and interest added to it and the balance carried forward to the new years and there were payments of small sums of money from time to time and a withdrawal of Rs. 100,

Held, that the account was not merely a loan to the firm but comes within the definition of a deposit under Art. 60 being moneys of a customer in the hands of his banker payable on demand, Really there is no distinction between a deposit and a loan because they are both moneys lent by customer to the bank, but it is necessary for the purpose of considering whether Art. 60 applies to see whether the relationship of customer and banker arose between these parties. 102 Ind. Cas. 145=29 Bom. L.R. 427=A. I.R. 1927 Bom. 433.

——Art. 60—Deposit or loan—Duty of Court.

If the plaintiff's witness took a mistaken view as to the nature of the transaction and misdescribed it as a loan, that would not, in law, prevent the Judge from determining whether the money in question represented a deposit or a loan, nor would it alter the legal rights of the parties. A.I.R. 1939 Pat. 261 =20 P.L.T. 84=5 B.R. 836=182 Ind. Cas. 831.

7. Fixed Deposit.

——Art. 60—Fixed deposit.

The plaintiff, after the death of her father, obtained a succession certificate and brought a suit to recover her shares in the deposit alleged to have been made by her father with the defendant. It was contended that the money which was in dispute represented a loan and not a deposit and reliance was placed on the statement made by one of the witnesses for the plaintiff in a previous suit to the effect that the plaintiff's father had lent the money to the defendant. The trial Court held that the money was deposited for a fixed period:

Held, that after the expiry of the fixed period, the amount deposited must be deemed to be payable on demand to the depositor and therefore, the claim for such money was governed by Art. 60. A. I. R. 1939 Pat. 261=20 P. L. T. 34=5 B.R. 836=182 Ind. Cas. 831.

——Art. 60—Where an amount of Rs. 800 was deposited and it was stipulated in the document evidencing the deposit that the money would not be

withdrawn for three years and that after three years it could be withdrawn by the six persons jointly, that interest would be paid periodically in the meantime and that if an amount up to Rs. 100 be required for the minor, it would be withdrawn by these specified depositors:

Held, that the transaction was a deposit on the stipulation that it shall carry interest at a specified rate and shall be payable to the depositors on demand and with a further stipulation that a demand shall not be made within three years and Art. 60 applied to the transaction. A.I.R. 1937 Lah. 81 =39 P.L.R. 377=171 Ind. Cas. 506.

——Arts. 60, 66 and 115—Fixed Deposit.

Where a deposit is for a fixed period, the money is payable at the specified time *viz.*, at the expiry of that fixed period and the articles applicable is not Art. 60, but either Art. 66 or Art. 115. A.I.R. 1936 Rang. 338=164 Ind. Cas. 412.

——Art. 60—Fixed Deposit.

The money invested in fixed deposit in a bank is not money payable on demand but money payable at a specified time and consequently Art. 60 cannot apply to a suit to recover the same. 1930 A.L.J. 1157 =128 Ind. Cas. 772=A.I.R. 1931 A. 59.

8. Implied agreement.

——Art. 60—Implied agreement.

The agreement that the money shall be payable on demand within Art. 60 need not be an express agreement. It can be an implied agreement, and often is implied from the circumstances of the deposit. A.I.R. 1939 Rang. 42=180 Ind. Cas. 300 (D.B.).

——Art. 60—Implied agreement to repay on demand.

Where it is alleged that the plaintiff deposited certain amounts with the defendant and on his refusal to re-pay them when demanded, filed a suit, on the finding that there was a deposit with the defendant, in the absence of anything to the contrary, an implied agreement to repay on demand must be presumed and the suit is governed by Art. 60. A.I.R. 1934 Lah. 179=35 P.L.R. 91=147 Ind. Cas. 338. *See also* (1913) M.W.N. 218 under Note 5.

——Art. 60—Implied agreement.

In order to make Art. 60 applicable, it is necessary that the agreement to pay the amount due on demand must be "expressed", and its provisions are not attracted even if the agreement is to be "implied" from the course of dealings between the parties or the other circumstances of the case. 15 L. 242=A.I.R. 1934 Lah. 42=37 P.L.R. 56=151 Ind. Cas. 712.

9. Registered agreement.

——Arts. 60 and 116—Limitation.

Where the claim for refund of money deposited is based on a registered agreement, the limitation of three years from the date when the demand is made under Art. 60 may be extended to six years under Art. 116 from the date of such demand. A.I.R. 1944 All. 241=(1944) A.L.J. 339=1944 A.W.R. (H.C.) 175=1944 O.W.N. (H.C.) 252=I.L.R. (1944) All. 554.

——Art. 60—Under a registered agreement it was agreed that *M* should deposit Rs. 600 with *A* and that *A* should pay an annuity of Rs. 36 to *M* for life. On the death of *M*, the annuity of Rs. 36 was to discontinue but *A* was to refund the deposit to *M's* heirs. In case *A* failed to make the refund, he was to continue to pay Rs. 36 to *M's* heirs so long as the refund was not made. On *M's* death, neither the refund was made nor was the annuity paid. His heirs, therefore, brought a suit for refund of the deposit and for annuity for a period of 12 years prior to the suit. The claim for refund of deposit was held to be barred by limitation under Arts. 60 and 116:

Held, that as the claim for the refund of the deposit was barred and the annuity could not be claimed separately, the plaintiffs had no right to claim the annuity. A.I.R. 1944 All. 241=(1944) A.L.J. 339=1944 A.W.R. (H.C.) 175=I.L.R. (1944) All. 554=1944 O.W.N. (H.C.) 252.

10. Starting point.

——Art. 60—The period of limitation prescribed in Art. 60 is three years and not six years, and the *terminus a quo* is not the date of the last balance but the date "when the demand is made." A.I.R. 1934 Lah. 42=15 L. 242=37 P.L.R. 56=151 Ind. Cas. 712.

11. Suit without demand.

——Art. 60—On the finding that there was a deposit with the defendant, in the absence of anything to the contrary, an implied agreement to repay on demand must be presumed and the suit to cover the deposit is governed by Art. 60. Even if no demand has been made, the plaintiff should not be non-suited on that ground as the bringing of the suit would itself constitute a demand, and the only thing that the Court can normally do is not to allow the plaintiff his costs because of the absence of demand. 35 P.L.R. 91=A.I.R. 1934 Lah. 179 =147 Ind. Cas. 338.

——Art. 60—Under Art 60, the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand, is three years from the date when the demand is made. The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made in which case no question of limitation arises. A.I.R. 1933 Pat. 701=147 Ind. Cas. 1094.

——Art. 61.

Synopsis.

1. Applicability and scope.
2. Contribution.
3. Guardian and Ward.
4. Landlord and Tenant.
5. Principal and Agent.
6. Vendor and purchaser.
7. Starting point.

1. Applicability and Scope.

——Arts. 61 and 120—Applicability—Suit to recover money advanced for minor's necessaries.

Art. 61 applies to a suit under S. 68, Contract Act. A suit, therefore, to recover money paid for minor's necessaries is governed by Art. 61 and not by Art. 120. A.I.R. 1940 Mad. 106=50 L.W. 323=(1939) M.W.N. 798=I.L.R. (1940) Mad. 27=190 Ind. Cas. 101.

——Arts. 61 and 120 — Applicability — Contract Act, S. 70.

Suit for recovery of money under S. 70, Contract Act falls either under Art. 61 or Art. 120 but not under Act 96. A.I.R. 1938 Lah. 99=I.L.R. (1937) Lah. 623=40 P.L.R. 300=175 Ind. Cas. 588.

——Arts. 61 and 120—Payment by third person—Suit for compensation under S. 70 of the Contract Act—Article applicable.

Art. 61 can be applied to cases under S. 70 of the Contract Act where the payments made by the plaintiff produced an immediate benefit to the defendant as in cases of Government revenue or of decree amounts, but the article will not apply when the benefit will only arise at a subsequent stage and plaintiff's cause of action will not be complete till the subsequent stage is reached. To such cases Art. 120 applies. 45 Ind. Cas. 786 (Mad.).

——Arts. 61 and 120—Plea of set-off in defence—Limitation..

Certain property was held jointly by plaintiff and defendant. In a suit for mesne profits by the plaintiff against the defendant, the defendant claimed to set off certain amount due from the plaintiff to him, towards the costs of certain constructions made by him The claim to set off was made by the defendant within six years of the commencement of such constructions:

Held, that Art. 120 was applicable to such a claim and not Art. 61, as the defendant's claim was not for money that the plaintiff should have paid to a third party, but for money spent by the defendant on behalf of and for the benefit of the plaintiff. A.I.R. 1937 Oudh 394=1937 O.W.N. 831=13 Luck. 323=168 Ind. Cas. 472.

——Art. 61—Scope.

Where a person has two causes of action, one when a contract is broken and another arising when he pays money which defendant is legally bound to pay and he sues on the second, the suit is governed by Art. 61, though the suit for damages arising out of the first cause of action is barred. 20 N.L.J. 73=A.I.R. 1937 Nag. 152=I.L.R. (1940) Nag. 437=169 Ind. Cas. 298.

——Arts. 61, 96 and 120—Scope.

In February 1919, *R* and *N* borrowed Rs. 5,000 on a promissory note from *J* and *M*. A few months later *J* realised Rs. 5,000 on account of this promissory note from *R* and *N* by means of a draft on them. In 1925, *J* and *M* instituted a suit for recovery of Rs. 7,700 alleged to be due from *R* and *N* on the basis of the promissory note. The defence of the defendants was that the promissory note had been discharged by the payment in 1919. The case of *J* and *M* was that the payment on account of the draft in 1919, was on another account. This, however, was found by the Court to be false and it was held that the payment had been made on account of the promissory note. It was also held that *J* had no authority to receive payment on behalf of *M*. Consequently, the suit by *J* was dismissed to the extent of half the claim. It was decreed in favour of *M* for half the amount in suit. The decree by the trial Court was on 10th April, 1926. An appeal was preferred by *R* and *N* and on 11th December, 1928, it was remanded and finally the High Court dismissed the appeal on 29th January, 1931. In consequence, the decree which had been awarded against *R* and *N* was executed by the decree-holder *M* and Rs. 1,200 was recovered by him in February, June, July and October, 1932. A suit was then instituted by *R* and *N* for recovery of Rs. 1,200 from *J* on the ground that the payment of the share of *M* due under the promissory note to *J* had been found to be illegal by the Courts and the plaintiffs had been made to pay Rs. 1,200 twice over and were, therefore entitled to a decree against him for that amount:

Held, that if Art. 96 did not apply to the case, then probably it was Art. 120 that would apply. It was doubtful if the case was covered by Art. 61; but in either case time would begin to run either from the payment of Rs. 1,200 or from the date of the decree of the High Court, which was passed on 29th January, 1931, and under neither of the articles was the period of limitation less than three years and consequently the suit was within time. A.I.R. 1936 Lah. 747=168 Ind. Cas. 446.

——Art. 61—Applicability — Suit for money spent by Receiver in instituting suit to recover amounts due to estate.

When a Receiver or Manager is appointed by the Court, he is appointed on behalf of all persons interested in the property. Consequently, the expenses incurred by the Receiver of an estate in instituting a suit to recover money due to the estate are incurred for and on behalf of the person who owns the estate and they come within the meaning of 'money payable to the plaintiff for money paid for the defendant" within the meaning of Art. 61. A suit for recovery of such amounts is governed by Art. 61. The fact that the Receiver was also benefited by the suit does not make it any way the less a suit on behalf of the owner of the estate. (1935) M.W.N. 598=A.I.R. 1935 Mad. 594=69 M.L.J. 539=42 L.W. 680=157 Ind. Cas. 746.

——Arts. 61, 52 and 83—Scope.

The plaintiffs instituted a suit against the defendants alleging that the latter had purchased certain goods; that the defendants wrongly got the transaction entered in the plaintiff's name: and that in consequence had suffered a decree to be passed for the price of the goods against the plaintiffs. As the decree was the result of the defendant's wrongful action, the plaintiffs claimed to be entitled to realise from the defendants the amount of the decree, for which they had become liable:

Held, that the suit was not governed by Art. 52 or Art. 83 of the Limitation Act, but by Art. 61 A.I.R. 1933 Lah. 404=147 Ind. Cas. 57.

——Art. 61—Applicability — Redemption by purchaser—Purchase set aside — Suit for reimbursement.

A suit for reimbursement by a purchaser, whose purchase has been set aside as a sham transaction, of

the sum of money he had paid for the redemption of an undisclosed mortgage on the property is governed by Art. 61. 128 Ind. Cas. 907=32 Bom.L. R. 1376=A.I.R. 1931 Bom. 39.

——Art. 61—Supurdar—Money expended to protect property—Claim for.

There was a dispute between *A* and *B*, and *C* was put in charge of the property as a supurdar pending the determination of the right of *A* and *B*. After these rights were determined and *C* had restored possession, *C* was sued for their wages by two watchman whom he had appointed to watch the standing crop. *C* paid up the decrees and instituted a suit against *A* and *B* for recovery of the money he had to pay to the watchmen,

Held, that the suit was governed by Art. 61 or Art. 120 and not by Art. 102. *C* was entitled to be reimbursed by *A* and *B*. The cause of action in favour of *C* arose when he paid up the decrees, and suit by him within three years of payment was in time. A.I.R. 1930 Oudh 420=7 O.W.N. 760= 128 Ind. Cas. 66.

——Art. 61—Puisne mortgagee paying prior mortgagee.

Where the subsequent mortgagee himself pays the amount of the prior mortgage which the mortgagor is bound by law to pay, the case is governed by Art. 61 being money payable to the plaintiff for money paid for the defendant. A suit brought more than three years after such payment is barred. 1930 A. L.J. 57=A.I.R. 1929 All. 943.

——Art. 61—A suit by a puisne mortgagee against the mortgagor to recover personally from him the amount paid by the puisne mortgagee to discharge a decree on a prior mortgage is governed by Art. 61 of the Limitation Act. 63 Ind. Cas. 604= 44 All. 67=19 A.L.J. 840=A.I.R. 1922 All. 153.

——Art. 61—Suit to recover deposit under O. 21, R. 89, C. P. Code.

Until a sale is confirmed it does not transfer the interest of the judgment-debtor to the auction- purchaser and, therefore, a deposit under O. 21, R. 89 by a purchaser an equity of redemption after sale has been effected in execution of a mortgage-decree saves the right of redemption from coming to an end. A suit therefore to recover such amount deposited from the mortgagors is not covered by Art. 61, Limitation Act. 116 Ind. Cas. 297=51 All. 606= 1929 A.L.J. 419=A.I.R. 1929 All. 309.

——Art. 61—Money decree satisfied by another—Suit for reimbursement.

The discharge of a money-decree, which might be realized in execution by the sale of immovable properties of the judgment-debtor does not give a person making the payment a charge. The claim is personal claim and Art. 61, Limitation Act is applicable when the case cannot be brought under Art. 132. 110 Ind. Cas. 613=[illegible]28 M.W.N. 393=28 M.L.W. 182=51 Mad. 815=A.I.R. 1928 Mad. 820=55 M.L.J. 436.

——Art. 61—Mortgage debt paid by another.

Where a person having no interest in the property pays money to liquidate a mortgage decree against the property, his claim to recover the amount is governed by Art. 61. 78 Ind. Cas. 738=A. I. R. 1925 Oudh 132.

——Arts. 61 and 132—

L purchased an oil-well subject to a mortgage in favour *of* B and right of pre-emption in favour of *N*. He made payments to the mortgagee *B* in part satisfaction of the mortgage-decree on the oil-well, such payments being necessary to save the oil-well,

Held, that *L* had a charge for the amounts paid, as against *N* who exercised his right of pre-emption as well as against person claiming through *N*,

Held, further that Art. 132 applied and not Art. 61. 79 Ind. Cas. 766=1 Rang. 714=A.I.R. 1924 Rang. 204.

——Arts. 61 and 120—Fine for mis-use of land by another—Suit to recover.

Where the defendant used the plaintiff's land without his permission for non-agricultural purposes and in consequence thereof the plaintiff had to pay fine to Government and the plaintiff sued the defendant for recovery thereof,

Held, that the suit is governed by Art. 120 and not 61. A.I.R. 1922 Bom. 257.

——Arts. 61 and 81—Surety.

Where in a suit for recovery of money paid by plaintiffs on defendant's behalf the plaintiffs come into Court asserting that they had been obliged to pay the money as sureties and their whole cause of action is that they had been treated as sureties for defendant, Article 81 and not Art. 61 will apply 67 Ind. Cas. 365=35 P.L.R. 1922=A.I.R. 1921 Lah. 335.

——Art. 61—A was bound under an award to clear a certain canal and was entitled to recover a part of the expenditure from *B* at the beginning of the work. The suit by *A* to recover the amount from *B* is governed by Art. 61 as the clearance expenses were money paid by *A* for *B*. 60 Ind. Cas. 971= 14 S.L.R. 219.

——Art. 61—Husband and wife — Divorced wife Arrears of maintenance.

A claim by a divorced Mahomedan wife to recover arrears of maintenance for the child is governed by Art. 61. 21 Bom.L.R. 713=51 Ind Cas. 968.

——Arts. 61, 81 and 120—Execution of bond in discharge of decree.

If a third person executes a bond in discharge of a decree against *A*, the cause of action for him to recover the amount of the bond from *A* arises on the date of execution of the bond, and not on the date on which he actually pays off the decree-holder under the bond. Such a suit would be governed by Art. 120 and not Art. 61 or 81 and the period of limitation is to be computed from the date of the bond. 146 P.L.R. 1909=4 Ind. Cas. 1041.

——Arts. 61 and 131 — Cash allowance—Tasdik —Arrears of cash allowance, suit to recover—Periodically recurring right.

The plaintiff the manager of a temple, sued the managers of another temple to recover from them the arrears for six years of a cash allowance (tasdik) due to the plaintiff's temple from year to year from the defendant's temple. The defendants admitted the plaintiff's claim but pleaded the bar of limitation with respect to two out of the six years. The lower Courts, held that Art. 131 applied to the case and decreed the plaintiff's claim in full. On appeal

Held, that the claim was governed by Art. 131, and it was rightly decreed. The important question in all these cases is, who is the person sued and what is it that is sued for? If what is sued for is

the establishment of a title to the right itself, then Art. 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-sharer of the plaintiff, who has actually received payment from that person. Art. 131 applies in that case to the person originally liable to pay and Art. 62 applies to the co-sharer who has received the payment. A cash allowance of the nature such as we have in the present case is according to Hindu Law, *nibhanda* or immovable property. Where is is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of right to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharers and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, minus his share on behalf of the rest, as money had and received for their uses, though as to him, with reference to the aggregate of rights, it is *nibhanda* or immoveable property in the nature of a periodically recurring right. (1910) 12 Bom.L.R. 157=34 B. 349=5 Ind. Cas. 869.

——Arts. 61 and 83—Limitation — Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor — Suit to recover money paid under compromise.

U. S. borrowed money on a bond from *U. R.* The sole obligor of the bond was *U. S.* but the money was in fact borrowed for the use of, and was paid to one, *M*. From time to time the original bond was renewed, and ultimately *U.R.* sued upon the last bond and obtained a decree for a large sum of money against the heirs of *U.S.* The defendants appealed to the High Court, but pending the appeal entered into a compromise with the plaintiff on the 2nd of January 1900, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. On the 5th of November 1902 the heirs of *U. S.* paid to the plaintiff decree-holder in pursuance of this compromise Rs. 40,000 and on the 17th of July, 1903 they instituted a suit against *M* to recover the amount so paid, and their costs.

Held, that on the facts *U.S.* was not a surety for M, but the principal debtor, although the money was borrowed for *M's* benefit; that the payment made on the 5th of November, 1902, in pursuance of the compromise referred to above was not gratuitous, and that the heirs of *U. S.* were entitled to recover from *M* the sum of Rs. 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred. 1907 A.W.N. 214=4 A.L.J. 501=29 A. 627.

2. Contribution.

——Art. 61—Applicability.

Suit by *sadar lambardar* against some co-sharers of *patti*—Satisfaction of decree by one co-sharer only—Suit by such co-sharer against others including co-sharers not impleaded in former suit, for contribution on principle of subrogation or re-imbursement brought within 3 years of payments made by plaintiff co-sharer—Suit held, was governed by Art. 61, Limitation Act and was within time. A.I.R. 1942 Nag. 111=1942 N.L.J. 267=I.L.R. (1942) Nag. 393=201 Ind. Cas. 472.

——Arts. 61 and 120—Suits for contribution.

A claim for contribution in respect of a share of the amount spent by the plaintiff for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by him and the defendant is not governed by Art. 61 but by Art. 120. (1940) 2 M. L. J. 494=A.I.R. 1941 Mad. 96=52 L.W. 508=(1940) M.W.N. 982=193 Ind. Cas. 823.

——Art. 61—Article 61 is applicable to a suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners. 72 Ind. Cas. 385=5 L.L.J. 310=A.I.R. 1924 Lah. 112.

——Arts. 61 and 115—Where plaintiff and defendant were jointly interested in redeeming a mortgage and plaintiff himself filed a suit for redemption and redeemed the mortgage and then sued the defendant for his share of the costs of the litigation and the redemption money,

Held, that in the absence of a finding of a contract to pay at the conclusion of a litigation, defendant's liability to pay cannot be postponed till the conclusion of the litigation. The suit for the recovery of a share of costs and money due for redemption is barred under Art. 61 or 115 if brought more than three years after payment. 70 Ind. Cas. 289=A.I.R. 1922 Cal. 79.

——Art. 61—Starting point — Words "money is paid" mean actual and not notional payment.

The expression "when the money is paid" means actual payment and not merely a notional payment which a renewal implies. Thus, where a member of a Hindu joint family renews a promissory note for a family debt and pays it off ultimately, the limitation for a suit for contribution from the rest of the family begins to run from the date when the debt is paid off and not from the date of the renewal. A I. R. 1946 All. 142=(1945) All. L.J. 488=(1945) O.W.N. (H.C.) 318.

——Arts. 61 and 99—Starting point of limitation.

Where a co-sharer pays off arrears of rent or revenue to avert sale of the estate, the payment in excess of his share will be considered to be for others and the limitation for a suit to recover the same personally from others runs from the date of payment. A.I.R. 1936 Mad. 782=44 L.W. 135=(1936) M. W. N. 658.

——Art. 61—Contribution.

Under Art. 61 the period for recovery of a sum paid by the plaintiff for the use of the defendant is three years from the date when the money is paid. Therefore in a suit for contribution by a co-mortgagee against his co-mortgagee, plaintiff has to establish the date when payment was made by him towards the mortgage and thereby to satisfy the Court that his claim for recovery of that amount was within limitation. 99 Ind. Cas. 271=3 O. W. N. 968.

——Arts. 61 and 120—Plaintiffs and defendants were joint owners of a tank in a Municipality. As the tank was in an insanitary condition, the Munici-

pality ordered the tank to be filled up. Plaintiffs filled up the tank,

Held, that the liability of the defendants to contribute did not arise in successive fragments as plaintiffs paid money to the contractor from day to day; the liability arose when the tank was filled up and the contemplated benefit conferred. In such circumstances Art. 120 and not Art. 61 was applicable, and the time ran against the plaintiffs from the date of completion of the work. 62 Ind. Cas. 615=25 C. W. N. 813=A.I.R. 1921 Cal. 93.

——Art. 61—Joint liability — Excess payment by plaintiff—Suit for contribution.

Where, of two persons under a joint liability to pay a sum of money to a third, one of them paid more than what was legally due for his share and brought a suit for contribution in respect of the excess payment, the suit is governed by Art. 61. Limitation began to run from the date of the last payment made by the plaintiff and any later payment made by the defendant towards the joint liability would not enure for the benefit of the plaintiff or save limitation. 25 M.L.T. 295=9 L.W. 82=(1919) M.W.N. 429=52 Ind. Cas. 243.

——Art. 61 — Limitation — Starting point — Deposit—Appropriation.

Limitation under Art. 61 for contribution begins from the date of appropriation by the Court and not from the date of deposit of costs agreed to be borne equally between the plaintiff and defendant in a litigation. 48 Ind. Cas. 336 (Oudh.)

——Arts. 61 and 99—Joint decree—Payment by third party against plaintiff and defendant—Suit for contribution.

A payment, under Art. 61 must be made by the plaintiff and not by a third party. Where a third party pays off a joint decree against the plaintiff and the defendant and afterwards realises the whole amount from the plaintiff by sale of his properties in execution of the decree obtained against him, the limitation for a suit for contribution against the defendant commences on the date of the realisation of the third party's decree against the plaintiff by sale of his properties. 18 C.W.N. 480=20 Ind. Cas. 24.

——Arts. 61 and 99—Suit for contribution—"When the money is paid".

Art. 99 mentions a special kind of suits of which the general class is comprised in Art. 61. Each time a joint debtor pays more than his share of the debt, a case of contribution arises, and a suit in respect of each payment by plaintiff is governed by Art. 61. The words 'when the money is paid' in Art. 61, do not mean when the whole debt is paid. 13 O.C. 23 =5 Ind. Cas. 440.

——Art. 61—Co-sharer's suit for contribution—Starting point of limitation—Date of last payment.

The article applicable to a co-sharer's suit for contribution when he has paid the whole of the rent due on the land is Art. 61 and the starting point is the date of the last payment in respect of which contribution is asked for. (1902) 6 C.W.N. 903.

3. Guardian and Ward.

——Art. 61 and 120—Applicability.

Certificated guardian spending money out of his own pocket for benefit of minor—Minor attaining majority and Court ordering guardian to deliver possession of property to minor—Amount spent by guardian for benefit of minor still due—Suit for recovery of that amount—Article 61 held, not applicable and Art. 120 applied. A.I.R. 1939 Bom. 394=41 Bom. L.R. 585=184 Ind. Cas. 611.

——Art. 61—Starting point — De facto guardian —Suit.

Where a *de facto* guardian spends money for the ward and sues for the same, he is only in the position of a person advancing monies on behalf of another and therefore, Art. 61 applies to the case. There is no valid reason for holding that limitation must commence from the date of the ward's attaining majority. The time runs from the date of payment by the plaintiff. A.I.R. 1935 Lah. 437=37 P.L.R. 246=17 L. 78=159 Ind. Cas. 203 (D.B.).

——Art. 61—Guardian and ward—Suit for recovery of money spent for ward's marriage.

For a suit by guardian for recovery of money from ward spent on his marriage, time runs from the date of marriage and not from termination of guardianship. 50 Ind. Cas. 306 (Lah.).

4. Landlord and Tenant.

——Arts. 61 and 120—Landlord and tenant—Payment by landlord — Suit to recover from tenant—Madras Local Boards Act, S. 73.

Under S. 73 of the Local Boards Act, the tenant is liable to the landlord only for the amount of cess actually paid by the landlord to the Government. The tenant is not himself liable to the Government for the cess. Suit by landlord paying the cess to Government against the tenant for recovery of the amount so paid is governed by Art. 120 of the Limitation Act and not by Art. 61. 9 L.W. 287 =(1919) M.W.N. 365=52 Ind. Cas. 468.

——Art. 61—Landlord and tenant—Suit to recover cess paid by landlord from tenant—Statutory liability.

A suit by a landlord to recover from the tenant a moiety of the road cess paid by him under the Local Boards Act, is governed by Art. 61. The Limitation Act does not make any difference between common law and statutory liability. 6 L.W. 227=22 M.L.T. 146=33 M.L.J. 369=(1917) M.W.N. 710=42 Ind. Cas. 502.

——Art. 61—Landlord and tenant—Suit by plaintiff for recovery of revenue paid by him in respect of property of which he has been dispossessed.

A suit to recover revenue paid by plaintiff while in possession of immoveable property, but of which he subsequently relinquished possession is governed by Art. 61 and the period commences from the date on which the last payment was made. 42 All. 61=17 A.L.J. 1025=1 U.P.L.R. (H.C.) 194=52 Ind. Cas. 632.

——Art. 61—Payment into Court—Landlord and Tenant.

Under Art. 61 payment means payment to the person to whom it is to be made or into Court on behalf of such a person and in such case limitation runs from the date when the amount is accepted by the Court and not on which it is deposited in Court.

A suit by tenant depositing the amount of a rent decree against the co-tenants and preventing the sale of tenancy, against the co-tenants, for contribution joining the landlord as a defendant in the suit with a prayer that a decree may be made against him for the refund of the amount which he might have received from the co-tenants as rent payable by them is governed, in so far as the landlord is concerned, not by Art. 61, but by Art. 120. 36 Ind. Cas. 392 (Cal.)

5. Principal and Agent.

——Arts. 61 and 85—Suit by agent against principal.

When a commission agent purchases goods for his principal and on the principal refusing to accept some of the goods, the agent resells them, a suit for damages is not governed by Art. 61 but Art. 85. 34 Bom. L.R. 1268=A.I.R. 1932 Bom. 593=140 Ind. Cas. 624.

——Arts. 61 and 83—Principal and agent.

A suit by an agent to recovery money due to him from the principal on transactions entered into on behalf of the latter is governed by Art. 83 and not by Art. 61 of the Limitation Act. 31 P.L.R. 666.

——Art. 61—Principal and agent—Unauthorised borrowing by agent—Payment of principal's creditors—Suit to recover amount.

Where an agent borrows moneys without the principal's authority and pays the same to the principal's creditors the transaction falls within Art. 61 and a suit for the recovery of the amount paid is barred, if brought more than three years after the date of payment. 10 L.W. 33=52 Ind. Cas. 414.

——Art. 61—Principal and Agent—Liability.

In a suit for contribution the cause of action for principal and agent is not the same. It comes in operation only when the plaintiff was compelled to discharge and actually discharged not only his share of liability but also the defendant's liability. In such suit the nature of defendant's obligation to the plaintiff is different from that of his obligation to the principal and though the defendant might have a valid defence against the latter the same defence may not be available to him against the former. (1910) M. W. N. 839=9 M.L.T. 212=8 Ind. Cas. 1102.

——Art. 61—Principal and agent.

The article is not limited to cases of legal disabilities and covers cases of recoupment between principal and agent. Under the Article an agent appointed under a power of attorney must bring a suit within three years to recover moneys spent by him in the business of agency. 34 Mad. 167=(1910) M. W. N. 316=8 M.L.T. 194=20 M.L.J. 989=7 Ind. Cas. 399.

6. Vendor and Purchaser.

——Arts. 61 and 83—Scope — Vendor and purchaser — Direction to pay prior mortgage—Default—Suit against vendee—Limitation.

The plaintiffs sold certain lands to the defendants' predecessors in 1921, directing the latter to pay certain mortgages. The latter did not pay and a decree for redemption was passed in June, 1930. In December, 1930, the plaintiffs sued the defendants for a decree on the security of the property sold, and against the other property of the defendants for the amount they had to pay to the mortgagees. The claim was as unpaid vendors and also because plaintiffs had to pay:

Held, (*i*) that the claim, so far as it related to enforce the charge on the properties sold, was governed by Art. 132;

(*ii*) that so far as it related to the personal relief and relief against other properties of the defendants, it was governed either by Art. 118, read with Art. 83, under which the plaintiffs could bring their suit within six years from the date when they actually sustained the loss, or Art. 61 under which they could sue within three years from the date of the payment and in any case the suit was not barred. A.I.R. 1933 Lah. 109=34 P.L.R. 156=14 L. 380=141 Ind. Cas. 435.

——Art. 61—Starting point—Vendee undertaking to pay creditor—Failure to pay.

Part of the consideration in case of purchase of a property was a sum of money to be paid by the vendee to the creditor of the vendor. The vendee failed to pay. On being sued by the creditor for the debt the vendor had to pay double the amount principal and interest included. In a suit by the vendor for compensation.

Held, the plaintiff's cause of action accrued to him on the date he was obliged to pay to his creditor the sum of money which the defendant was himself under an obligation to pay. 70 Ind. Cas. 582 =A.I.R. 1922 All. 409.

——Art. 61—Rent and taxes paid by vendor.

In the absence of a contract to the contrary the liability of a vendee of property or the transferee of a lease to pay rents and charges arises only on the date of sale or transfer of the lease and not the date of contract of transfer. There is no distinction between the sale of immovable property and the transfer of a lease in this respect but where the transferee enters into possession on the date of contract, he is bound to pay the charges of such property in his possession, and if the transferor pays the same, he can recover them from the transferee. Section 69, Contract Act applies to such a case. The article of Limitation Act applicable to such a suit is Art. 61 and time runs from the date of payment. A.I.R. 1927 Mad. 1060.

——Art. 61—Land Revenue—Vendor and purchaser.

Where a registered sale-deed provided that the purchaser should pay the revenue on the land sold, but the vendor paid the revenue on behalf of the purchaser, and sued him for revenue paid.

Held, that Art. 61 should apply and not Art. 116. 94 Ind. Cas. 1046=1926 M.W.N. 291=A.I.R. 1926 Mad. 633=51 M.L.J. 159.

7. Starting point.

See also NOTES 2 TO 6.

——Art. 61—The plaintiff's cause of action, in cases where he seeks to recover the money paid by him for the defendant arises only when he has made the payment. A.I.R. 1933 Lah. 404=147 Ind. Cas. 57.

——Art. 61—Starting point of limitation—Money deposited in Court.

For the purposes of Art. 61, in a case where money is deposited in Court, limitation under the

article runs from the date of appropriation and not from that of deposit. Where deposit is made on a particular date but there is no appropriation and it is subsequently found to be insufficient and invalid, limitation does not run from date of deposit. A.I.R. 1932 Oudh 222=8 Luck. 79= 9 O.W.N. 414= 138 Ind. Cas. 137.

——Art. 61—Starting point of limitation — Payment need not be accepted.

Under Art. 61, time begins to run from when the money was paid and extends to a period of three years. There is nothing in Art. 61 which requires that the payments on behalf of another should be accepted or adopted by the person on whose behalf they are made. 33 P.L.R. 1090=A.I.R. 1931 Lah. 344=135 Ind. Cas. 177.

——Art. 61—Consideration left with mortgagee—Default of mortgagee—Starting point.

Where a mortgagor leaves a specific portion of the consideration money with the mortgagee to pay off certain creditors, and the mortgagee, fails to make such payments, in consequence of which the mortgagor to save his property, makes the payments himself, he can sue for damages. In the absence of proof that he has suffered any more damage, he is not entitled to any more than the amounts paid by him. A suit to recover such damages must be brought within the period prescribed by Art. 61 of the Limitation Act, and time commences to run from the date of actual payment and not from the date of mortgage. 63 Ind. Cas. 87 (All.).

——Arts. 61 and 120—Cause of action — Taking over liability.

Quaere.—Where *A* takes over the liability of a debt due to *C* by *B*, does the period of limitation for a suit by *A* for the recovery of the money from *B* commence from the date of payment of the debt by *A* to *C* from the date of *A's* taking over the liability? 204 P.L.R. 1911=231 P.W.R. 1911= 11 Ind. Cas. 60.

——Art. 61—Decree-holder and judgment-debtor —Suit to recover loss sustained by J.D.—D. H's failing to certify payment.

Where a D. H. failed to certify to Court the payment made towards the decree out of Court and the J. D. was compelled to pay the amount to a third party, *held*, that the J.D. could bring a suit for damages within 3 years from the date of payment. 21 M.L.J. 518=10 Ind. Cas. 462.

——Art. 61—Payment by third person—Money payable under compromise.

Suit by plaintiff to recover money from defendants is governed by Art. 61, where the defendant was liable to pay the money under a compromise but the plaintiff paid it off for the defendants. Time runs from the date on which the plaintiff paid the money. 7 A.L.J. 585=6 Ind. Cas. 878.

——Arts. 61 and 69—Suit to recover money paid for another—Suit on a pronote.

The plaintiffs borrowed on 14-11-1898 money on a hundi drawn by them, and paid the money to the defendants. The hundi was due 57 days after date, *i.e.*, 10th January, 1899 or, adding the days of grace, 13th January, 1899. The defendants having failed, the plaintiffs on the 24th December 1898 paid the money to the drawer of the hundi, which fell due on 13-1-1899 as above stated; the hundi, however, was not endorsed to the plaintiffs. This suit was filed on 4-1-1902 against the defendants to recover the money paid on their behalf. *Held*—That the suit was barred under Art. 61, as it was for money paid on 24-12-1898 on behalf of the defendants; and that Art. 69 of the Act had no application to the case. (1903) 5 Bom.L.R. 725.

——Arts. 61 and 69—"Money paid."

"Money paid' in Article 61 or 69 includes "money voluntarily or involuntarily paid." (1900) 13 M.L. J. 83=26 Mad. 686. (F.B.).

——Art. 62.

Synopsis.

1. Applicability and Scope.
2. Claim against benamidar.
3. Claim against legal representative.
4. Joint interest.
5. Money had and received for plaintiff's use.
6. Refund of consideration.
7. Overpayment.
8. Principal and Agent.
9. Starting point.
10. Tax illegally collected.
11. Wrongful appropriation.

1. Applicability and Scope.

——Art. 62—Article 62 is applicable to cases where the defendant has received money which, in justice and equity, belongs to the plaintiff but in circumstances where the receipt by the defendant would be regarded in law as a receipt to the plaintiff's use. Where the receipt by the defendant is on his own account and is not or cannot be regarded to be on behalf of the plaintiff, this article would have no application. A.I.R. 1942 Mad. 386=1942 M.W.N. 129=55 L.W. 90=(1942) 1 M.L.J. 274=206 Ind. Cas. 539.

——Art. 62—Applicability — Test.

A test for the applicability of Art. 62 is whether when the money was paid it was recoverable immediately by the plaintiff. A.I.R. 1942 Sind. 37=I.L. R. (1941) Kar. 495=199 Ind. Cas. 438.

——Art. 62—Suit to recover surrender value of Insurance policy.

For the applicability of Art. 62, the money for the recovery of which the suit is instituted must, at the time of its receipt by the defendant, belong to the plaintiff. This could hardly be applied to a surrender value of an insurance policy which grows from year to year and does not even begin to accrue until a certain number of premia have been paid. It cannot be said to be money belonging to the insured when it is received by the company. A.I.R. 1943 Nag. 9= 1942 N.L.J. 380=I.L.R. (1943) Nag. 253=203 Ind. Cas. 193.

——Art. 62—Money recovered by transferee of decree.

If a man receives money which, at the time he receives it, he is legally entitled to receive, he cannot be said to be receiving it for the use of some one else who may subsequently be declared to be entitled to the money by some judicial decision.

Where a decree-holder is adjudged insolvent after he has assigned his decree and the assignment is annulled and the Official Receiver files a suit to recover from the assignee whatever money he has actually collected in execution of the decree which

has been assigned to him, the suit is governed by Art. 62 even in respect of the money recovered between the date of the assignment and the date of annulment. No distinction can be made between the period from the date of assignment to the date of annulment and the period subsequent to that order. (1938) M.W.N. 290=(1938) 1 M.L.J. 682=47 L.W. 557=A.I.R. 1938 Mad. 532=178 Ind. Cas. 448.

——**Art. 62**—Article 62 governs cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff, and is not applicable to cases where the defendant is asked to account for properties and moneys when the person managing or collecting them is entitled to just allowances. A.I.R. 1938 Lah. 139=182 Ind. Cas. 426.

——**Art. 62**—Article 62 cannot be appropriately applied to a case where the plaintiff is not entitled to the money when it was received by the defendant, but contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. (1933) M.W.N. 368=64 M.L.J. 574=37 L.W. 631=A.I.R. 1933 Mad. 524=143 Ind. Cas. 496.

——**Art. 62**—Article 62 only applies when the defendant has received money as distinct from profits into his hands. It has no application where a suit is to recover profits. A.I.R. 1941 Nag. 181=I.L.R. (1942) Nag. 92=1941 N.L.J. 184=201 Ind. Cas. 220.

——**Art. 62**—Article 62 applies to suits to recover money actually received and not to a suit where plaintiff's only possible case is that the money ought to have been received and invested on his behalf and he claims payment of the value of his share out of some other fund. 39 Bom.L.R. 277=A.I.R. 1937 Bom. 217=169 Ind. Cas. 232.

——**Art. 62**—Article 62 can have no application where the suit is not only for recovery of money but also for recovery of plaintiff's share in immovable property. A.I.R. 1934 Bom. 491=36 Bom.L.R. 1068=154 Ind. Cas. 680.

——**Art. 62—Condition for applicability—Legal relationship essential.**

Although privity of contract is not necessary for teh purposes of Art. 62, there must be some privity of a legally recognizable nature such as some knowledge of particular facts in the man who received the money or some mistake or ignorance of facts on the part of the man who paid the money or some relation of trust and confidence between them on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the plaintiff and defendant. 41 Mad. 923, Foll. 118 Ind. Cas. 444=A.I.R. 1929 Lah. 290.

——**Art. 62—Money should be due to plaintiff on the date of receipt—Legal relationship.**

The phrase "when the money is received" in the third column of Art. 62 of the Limitation Act shows that Art. 62 applies only to those cases in which on the date of the receipt of the money by the defendant, the receipt is by him, for the plaintiff's use, and does not apply to cases in which the money received by the defendant becomes by subsequent events, money received for the plaintiff's use; in an action for money had and received, there must be, as shown by the English decisions, some privity of a legally recognizable nature between the plaintiff and the defendant. 101 Ind. Cas. 322=A.I.R. 1927 All. 437.

——**Art. 62**—Suit by decree-holder to recover his share of the amount received by the Court for rateable distribution comes under S. 73 (2), Civil P. Code and is governed by Art. 62. 1944 N.L.J. 391=A.I.R. 1944 Nag. 313.

——**Art. 62**—Suit for recovery of money voluntarily paid to Official Liquidator to save property wrongly attached and for damages is governed by Art. 62. 11 O.W.N. 398=A.I.R. 1934 Oudh 158=9 Luck. 577=148 Ind. Cas. 448.

——**Art. 62 and S. 18—Fraud—Effect of.**

Art. 62 applies to a suit for the recovery of money payable by the defendant to the plaintiff for money received for his use. When knowledge of the plaintiff's right to sue has been kept from him by the fraud of the defendant, limitation will, under S. 18, run only from the date when the plaintiff, first became aware of the fraud. 40 Ind. Cas. 37 (All.).

——**Art. 62**—Suit to recover deposit. See S. 10. 1 A.L.J. 422.

——**Art. 62—Official Receiver, suit by.**

An application by an Official Receiver, to a Court which had attached the property of the insolvent at the instance of a creditor, praying that the property may be treated as property vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree, is not claim petition which falls within the class of claims under the C. P. Code. His claim (when the vesting in him was after attachment) is a statutory claim which he is entitled to make under S. 34 of the Provincial Insolvency Act, when the claim is disallowed and the Official Receiver brings a suit to enforce the claim neither Art. 11 nor Art. 13 of the Limitation Act apply to such a suit. The suit is clearly within time under Art. 62. 69 Ind. Cas. 326=45 Mad. 70=30 M.L.T. 77=14 M.L.W. 334=1921 M.W.N. 775=A.I.R. 1922 Mad. 189=41 M.L.J. 334.

——**Art. 62—Sale of goods by Railway—Suit to recover surplus sale proceeds.**

Where the Railway Company has sold the goods in exercise of the powers conferred by S. 56 of the Railways Act, a suit by the consignor to recover the surplus sale proceeds from the Railway Company is governed by Art. 62 and not Art. 31. Such a suit is entirely different from a suit for compensation for non-delivery of the goods. 62 Ind. Cas. 742=44 Mad. 823=13 M.L.W. 693=1921 M.W.N. 422=30 M.L.T. 21=A.I.R. 1921 Mad. 362=41 M. L. J. 205.

——**Arts. 62, 48 and 49—Suit for value of goods delivered—Limitation.**

An action for the value of goods delivered is one in detinue or conversion and is governed by Art. 48 or 49 and not by Art. 62. 33 Ind. Cas. 661 (Mad.)

——**Arts. 62 and 85—Mutual dealings.**

Where there are transactions between two merchants on each side creating independent obligations on the other, and the balance is shifted from one side to the other, the account is a mutual, open and current account. The proper article to apply to such a case is Art. 85 and not Art. 62. 121 Ind. Cas. 581=53 Bom. 652=31 Bom. L.R. 1187=A.I.R. 1930 Bom. 5.

——Arts. 62 and 87—Assignment of mortgage of immoveable property by unregistered instrument —Receipt of mortgage amount by assignor in fraud of assignee—Suit by assignee for the money within three years of the receipt of the money.

By an agreement in writing, but not registered, dated 21st August 1895, defendant assigned his mortgage right to plaintiff. In 1898 the mortgagor sued to redeem them, and a decree was passed, in which the court refused to recognise the plaintiff's title, as the agreement was unregistered. The defendant received the money. Within three years from the date of such receipt plaintiff sued for the money. *Held*, that the suit was not barred. The defendant by receiving the mortgage amount from the mortgagor, in fraud of plaintiff's right, received it for plaintiff's use. The suit was governed by Art. 62 and was not barred as it had been instituted within three years of the receipt of the money by defendant. (1901) 25 M. 396.

——**Arts. 62 and 96**—If the facts of a particular case fall within both Art. 62 and Art. 96, the latter must be applied as it is the more specific and less general of the two articles. A.I.R. 1941 Mad. 742 =1941 M.W.N. 484=200 Ind. Cas. 722.

——**Arts. 62 and 97—Patni sale — Sale set aside by suit—Affirmance on appeal—Suit for compensation by purchaser.**

A *patni* taluk was sold for arrears of rent due to the Zemindar and purchased by plaintiff who paid the purchase money into Court for payment to the Zemindar and others entitled. In a suit by *darpatnidars*, the sale was set aside on 24-8-1905, and the decree was affirmed on appeal on 3-8-1906. The plaintiff who had been a party to the suit was not indemnified as provided by S. 14 of Beng. Regn. 8 of 1819. On 28-8-1906 plaintiff surrendered possession to the *darpatnidars*. On 14-9-1908 plaintiff sued for recovery of so much of the purchase money as had been paid to the Zemindar. *Held*, that the proper Article applicable to the suit was Art. 62; that even if Art. 97 applied as the Lower Courts thought, limitation began to run against plaintiff from 24-8-1905, the date of the decision in the First Court; that the affirmance of the decree on appeal did not give a cause of action; and that the suit was therefore barred by limitation. 46 Cal. 670=17 A.L.J. 514 =36 M.L.J. 557=23 C.W.N. 721=21 Bom. L.R 632=(1919) M.W.N. 258=30 C.L.J. 71=26 M. L. T. 131=10 L.W. 416=50 Ind. Cas. 444 (P.C.).

——**Arts. 62, 109 and 120**—A suit for recovery of rent realised by the defendant but to which the plaintiff was entitled falls either under Art. 62 or Art. 120 but not under Art. 109. 18 P.L.T. 162=A. I. R. 1937 Pat. 237=3 B.R. 434=16 Pat. 184=168 Ind. Cas. 502.

——**Arts. 62, 110 and 116**—Suit for rent against assignee of registered lease—Article applicable. *See* LIMITATION ACT, ARTS. 116, 110 AND 62. 54 C.W.N. 673=A.I.R. 1951 Cal 251.

——**Arts. 62 and 116—Suit to enforce covenant of idemnity.**

A suit to enforce covenant of indemnity in a mortgage deed is not governed by Art. 62 but by Art. 116. (1932) A.L.J. 317=A.I.R. 1932 All. 358= 16 R. D. 373=136 Ind. Cas. 829.

——**Arts. 62, 116 and 120—Suit for recovery of money under S. 68, Transfer of Property Act.**

Limitation for a suit for recovery of money under S. 68, T. P. Act is governed by Art. 116 or Art. 120, Limitation Act, and not by Art. 62. A.I.R. 1936 Rang. 80=161 Ind. Cas. 461.

——**Arts. 62, 111 and 116—Failure of defendant to pay.**

The plaintiff had to satisfy a mortgage. The defendant undertook by writing registered to pay the mortgage amount to the mortgagee and to procure an indemnity or freedom of the mortgaged property from all liability and the plaintiff sold to him in consideration of that contract and of the promise to pay a house and kotha. The defendant did not fulfil his undertaking and consequently the mortgagee sued for and obtained a preliminary decree. The plaintiff induced the mortgagee to accept a renewal of the mortgage and include in the consideration thereof the decretal debt and thus discharge him from the liability and sued defendant for compensation for breach of the contract.

Held, that the suit was governed by Art. 116 and not Art. 111 or Art. 62. 97 Ind. Cas. 185=9 N. L. J. 107=A.I.R. 1926 Nag. 429.

——**Art. 62**—Applicability — Suit for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site purchased in the name of the defendant by the defendant and the plaintiff's father. *See* LIMITATION ACT (9 OF 1908), ARTS. 120 AND 62. (1950) 2 M. L. J. 611.

——**Arts. 62 and 120—Scope and applicability of —Suit by company to recover money due to it which had been realised by one who had obtained a decree against it—Realisation pending winding up of the company—Starting point—Time spent by liquidators in prosecution of application under S. 227 of the Companies Act—Exclusion of.**

A suit by a company for the recovery of money due to it, but which had been realised by a decree-holder against the company during the pendency of an application for the winding up of the company is governed by Art. 120 of the Limitation Act. Art. 62 of the Act is clearly not applicable. Art. 62 provides for a case where money payable to the plaintiff is paid to the defendant and is recoverable on that account. It contemplates cases of payment to servants and agents. And as there is no other article specifically applicable to such a suit, Art. 120 is the only article applicable. As the company could not have claimed refund of the amount realised by the decree-holder before the order for winding up, the cause of action arises only on that date and not on the date of payment to the decree-holder. Further the time spent by the liquidator in prosecuting an application under S. 227 of the Companies Act, can be excluded in computing the period of limitation for the suit. I. L. R. (1947) A. 203=228 Ind. Cas. 609=1947 A. L. J. 319=1947 O.W.N. (H.C.) 29=A.I.R. 1948 All. 75=1947 Comp. C. 87=1947 A.W.R. (H.C.) 210=1947 A.L.W. 56.

——**Arts. 62 and 120—Applicability — Decree in favour of several persons—Realisation of amount by some—Suit by others for recovery of share—Limitation — Suspension of limitation — General principles—S. 15.**

Art. 120 of the Limitation Act can apply only when

the case does not come under any of the other articles dealing with the specific cases. On 16th August, 1926, defendants 1 to 3 obtained a decree for a sum of Rs. 6,000 against a third person. On 16th December, 1928, defendant No. 4 assigned to the plaintiff a half share in the decree, to which he claimed to be entitled. On 15th April, 1929, defendants 1 to 3 filed a suit against defendant No. 4 and plaintiff for specific performance of a contract of sale of the half share of the plaintiff in the money decree, and it was decreed on 2nd January, 1930, and defendants 1 to 3 were declared to be entitled to the entire amount of the decree. In execution of the decree the property of the judgment-debtor was put up for sale and sold on 26th January, 1932. On 21st July, 1931, defendants 1 to 3 realised the full amount of Rs. 6 000 in full satisfaction of the decree. Meanwhile, in appeal, the decree for specific performance was reversed on 2nd October, 1935, by the High Court which dismissed the suit of defendants 1 to 3 and held that plaintiff was entitled to a half share in the decree as a purchaser of the half share of defendant No. 4. On 19th November, 1935, the plaintiff sued to recover Rs. 39,991-9-0 from defendants 1 to 3, towards the half share of defendant No 4 in the decree. Defendants 1 to 3 raised the plea of limitation among other pleas.

Held, (1) that Art. 62 and not Art. 120 of the Limitation Act applied to the case;

(2) that S. 15 of the Limitation Act did not apply to the case, so as to entitle the plaintiff to exclude any time;

(3) that, however, the Courts did recognise general principles of suspension of limitation or right of action, and that as in the present case, the plaintiff could not institute a suit till 2nd October, 1935, when the High Court reversed the decree of the original Court in the suit for specific performance, because the decree of the original Court stood in his way, although there was no specific order of the Civil Court debarring him from suing, the right of action must be held to have been suspended from 21st July, 1932 (when defendants 1 to 3 realised the decree amount) till the date of reversal of the decree in the suit for specific performance; and

(4) that therefore the suit was in time. I. L. R. (1946) A. 633=228 Ind. Cas. 493=1947 A. L. J. 170=1947 A.L.W. 218=1947 A.W.R. (H.C.) 214=A.I.R. 1947 A. 256.

——Arts. 62 and 120—Money stolen—Suit for recovery.

A person who has suffered from the tortious act of another can always waive the tort and if money has been stolen from him, he can sue for the recovery of money on the basis that the money has been received to his use. Hence the suit must be framed as one for money had and received, in which case it is governed by Art. 62, as this article expressly relates to suits for money had and received. Of course if he likes, he may sue for the recovery of damages by way of compensation but here again the period of limitation will be three years. Article 120 has no application to such a suit. (1941) 1 M.L.J. 27=1941 M.W.N. 24=A.I.R. 1941 Mad. 391=I.L.R. (1941) Mad. 414=53 L.W. 54=200 Ind. Cas. 338.

——Arts. 62 and 120 — Decree-holder obtaining declaration that no one should be allowed to withdraw amount deposited to his credit by judgment-debtor—Another decree-holder of same judgment-debtor withdrawing part of deposit—Suit by former against latter for recovery of amount—Article 62 inapplicable—Article 120 applied. A.I.R. 1939 Cal. 413=69 C.L.J. 108=182 Ind. Cas. 860.

——Arts. 62 and 120—Subscription — Suit for recovery.

A suit for recovery for subscription falls under Art. 120 and not under Art. 62. (1933) M.W.N. 368=64 M.L.J. 574=37 L.W. 631=A.I.R. 1933 Mad. 524=143 Ind. Cas. 496.

——Arts. 62 and 120—Counter-claim by the defendant in a suit for rent for money paid by him as premium under S. 8, Bom. Rent (War Restrictions) Act, 1918, is governed by Art. 62 and not by Art. 120. 33 Bom.L.R. 1563=A.I.R. 1932 Bom. 86=135 Ind. Cas. 801.

——Arts. 62 and 120—Applicability — Mortgagor's suit for amounts received by mortgagee.

Article 62 contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. Where a mortgagor receives a certain sum from Insurance Company, the property mortgaged being destroyed by fire, a suit for accounts by mortgagor is governed by Art. 120 and not by Art. 62 inasmuch as the mortgagee has a lien on the moneys he received and is entitled to retain those moneys until his mortgage is satisfied. A.I.R. 1930 Rang. 197=127 Ind. Cas. 477.

——Arts. 62 and 120—Money paid for another.

Sale of patni in a rent decree—Surplus withdrawn by a creditor of one patnidar—Sale subsequently set aside—Zamindar made to pay whole purchase money—Suit lies by zamindar against the creditor—Suit is governed by Art. 120 and not Art. 62. 110 Ind. Cas. 49=47 C.L.J. 359=A.I.R. 1928 Cal. 296.

——Arts. 62 and 120—Undertaking to pay lawful charges during management.

Article 62 does not apply to transactions, in which the defendant is not under a mere duty to hand over the money which he received, but has other duties as well in respect of it. Where, therefore, under a partition deed it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly and as manager it was the duty of the senior co-parcener not merely to account for the money received, but to pay the kist and the other expenses as well, as to maintain the minor:

Held, that Art. 62 does not extend to such transaction; the article applicable is Art. 120. 40 Mad. 291, Foll. 61 Ind. Cas. 762=13 M.L.W. 260=A.I.R. 1921 Mad. 553.

——Arts. 62 and 120 — Mortgage money—Land acquisition—Substitution of proceeds—Suit for by mortgagee.

Where mortgaged property is acquired compulsorily and the mortgagee sues to recover the compensation allowed for the mortgagor the suit is governed by Art. 120 and not by Art. 62. 22 O.C. 342=2 U.P.L.R. (O.C.) 25=54 Ind. Cas. 535.

——Arts. 62 and 120—Suit to enforce equitable claim.

Suit to enforce equitable claim is governed, not by Art. 62 but by Art. 120. 1941 N.L.J. 665.

——Arts. 62 and 120—Equitable claim.

An equitable claim against trustee for account does not fall under Art. 62, but falls under Art. 120. A.I.R. 1931 P.C. 9=60 M.L.J. 1=35 C.W.N. 145=33 L.W. 30=8 R. 645=33 Bom.L.R. 168

=58 I.A. 1=(1931) M.W.N. 137=54 C.L.J. 175 =130 Ind. Cas. 609 (P.C.).

——Arts. 62 and 123—Arrears of maintenance.

A suit for arrears of rent granted under a will in lieu of maintenance is not governed by Art. 62 but by Art. 123. A.I.R. 1931 Cal. 670=35 C.W.N. 307 =132 Ind. Cas. 684.

——Arts. 62 and 127—Partition suit—Income of joint family property accruing during period between preliminary and final decree is joint family property—Such income not divided by final decree —Suit to enforce share in it—Article applicable is 127 and not 62. A.I.R. 1935 Nag. 137=31 N.L.R. 304=156 Ind. Cas. 672.

——Arts. 62 and 127—Suit against Hindu joint family manager for partition and accounts.

Where a plaintiff sued for partition and account of profits of joint family property in the hands of the Karta, Art. 127, and not Art. 62, applied. 18 M. 418, foll. (1909) 14 C.W.N. 221=3 Ind. Cas. 9.

——Arts. 62, 110, 120 and 131—Reliefs for establishment of periodically recurring right and for arrears as a consequence of such right claimed in one suit—Article 131 applies to first relief—Articles 110 or 62 or failing any such article, Art. 120 may apply to the second relief. 1936 A.W.R. 1025=A.I.R. 1937 All. 57=(1936) A.L.J. 1384=I L.R. (1937) All 140=166 Ind. Cas. 823.

——Arts. 62 and 131—Suit to recover arrears under periodically recurring right is governed by Art. 62 and not Art. 131. A.I.R. 1931 Bom. 189=33 Bom.L.R. 127=55 B. 193=131 Ind. Cas. 465.

——Arts. 62 and 132—Money charged on immoveable property.

A suit to recover from a *benamidar* money charged on immoveable property is governed by Art. 132 and not Art. 62. 37 P.R. 1909=50 P.W.R. 1909=38 P. L.R. 1909=1 Ind. Cas. 732.

2. Claim against benamidar.

——Arts. 62 and 120—Applicability — Claim against a benamidar in respect of moneys received and held by him for the benefit of the real owner —Art. 120 applies.

It is now settled law that Art. 62 of the Limitation Act cannot be applied where the claim is on an equitable basis. On 29th September, 1933, *K*, father of plaintiff, conveyed immovable property to the defendant *benami*. On the 25th January, 1937, the defendant sold the property to one *A* for Rs. 750. On the 30th December, 1938, *K* died. On the 5th October, 1942, the present suit was instituted by the plaintiff to recover from the defendant the Rs. 750 which he had received from *A*. On the question whether the suit was within time.

Held, the plaintiff's claim against the defendant was an equitable one being a claim against a benamidar, a person in the position of a trustee, in respect of moneys received and held by him for the benefit of the real owner and as such the case fell within Act. 120 of the Limitation Act. I.L.R. (1946) Mad. 306 =225 Ind. Cas. 164=1946 M.W.N. 117=59 L.W. 109=A.I.R. 1946 Mad. 248=(1946) 1 M.L.J. 140.

——Art. 62—Benami transaction—Money received by benamidar.

The money which the *benamidar* realises in the decree in his favour is money had and received for the beneficial owners. The mere fact that the defendant (the benamidar) could recover rent for a longer period by reason of his minority does not affect the question. Where the money could not have been realised for the full period claim if the suit had been brought by true owner;

Held, since the defendant chose to bring a suit for rent which was in reality payable to the plaintiff and could obtain a decree for that rent by reason of his minority that does not disentitle the plaintiff from getting the money which has in fact been received by the defendant for the use of the plaintiff. 74 Ind. Cas. 939=45 All. 410=21 A.L.J. 345=4 L.R.A. (Civ.) 519=A.I.R. 1923 All. 532.

——Arts. 62 and 115—Benamidar — Suit for moneys realised by—Limitation.

Plaintiff alleged that a mortgage was executed *benami* in the name of the defendant on the understanding that the latter should have nothing to do with it and that the plaintiff should conduct all necessary proceedings in the name of the defendant and that after the amount is collected and got into the hands of the defendant he should hold it at the plaintiff's disposal. *Held*, that Art. 115 of the Limitation Act did not apply to a suit for the money. The defendant was not entrusted with the money for any specific purpose and that there was an express trust; and the suit was not against the agent, Art. 62 of the Limitation Act applied to the case. (1915) M.W.N. 215=28 Ind. Cas. 495.

——Art. 62—Suit against benamidar for recovery of money—Rent received by benamidar.

Rent received by a benamidar is money payable by the benamidar to the real owner; and Art. 62 applies to a suit by the real owner against the benamidar and not Art. 120. 21 M. 373; 25 A. 62, foll. 17 M.L.J. 224=30 M. 298=2 M.L.T. 332.

3. Claim against legal representative.

——Art. 62—Running account — Suit to recover amount from sons of deceased—*Karpardaz* brought within three years from his death—No liability to pay over sums received by *karpardaz* directly on receipt—Article 62 not applied. A.I.R. 1942 Pat. 181 =8 B.R. 268=23 P.L.T. 457=7 C.L.T. 87 =197 Ind. Cas. 674.

——Art. 62—Legal representatives.

Read in the light of S. 2, Art. 62 would include a claim against the legal representatives for money received for the plaintiffs used by them or their father through whom they derived their liability to be sued. A.I.R. 1922 Cal. 499, Foll. 71 Ind. Cas. 916=5 P.L.T. 355=2 Pat.L.R. (Civ.) 205=A.I.R. 1923 Pat. 259.

——Art. 62—A suit to recover frfom the defendant as son and legal representative of the plaintiff's late pleader, a certain sum of money received or alleged to have been received by the plaintiff's pleader out of Court for paymnt to the plaintiffs is governed by Art. 62. 67 Ind. Cas. 943=35 C.L.J. 330= A.I.R. 1922 Cal. 499.

——Arts. 62, 89 and 120—Pleader drawing money from court for client —Action against pleader's representative — Limitation — Starting point.

The article of limitation applicable to a suit to recover money collected by a pleader for his client from the representative of the pleader after his

death is not Art. 62, because the defendant was not the person who received the money, nor Art. 89, because the defendant cannot be said to be plaintiff's agent, but Art. 120. The starting point of limitation as against the defendant is the pleader's death; but it it was the date of receipt of money by the pleader, the suit was still in time having been brought within six years of that date. 1902 A.W.N. 191=25 A. 55.

4. Joint interest.

——Arts. 62, 89 and 120—Co-owners—Suit for accounts.

A suit for account by one co-owner against another who has received more than his share of the income of the property is not governed by Art. 62 but either by Art. 120 or Art. 89. Whether one or the other applies depends upon the circumstances of each case. A.I.R. 1943 Bom. 216=45 Bom.L.R. 424=208 Ind. Cas. 340.

——Arts. 62 and 120—Suit by co-owner for partition—Decree not executed—Suit for share of subsequent mesne profits—Article 62 not applicable as none of the co-owners was entitled in respect of undivided land to any specific part—Article 120 applied. A.I.R. 1931 Rang. 150=131 Ind. Cas. 511.

——Arts. 62, 89 and 120 — Suit for accounts by one co-tenant against another.

An action for accounts by one co-tenant against the other not being an action for money had or received is not governed by Art. 62 or Art. 89 but by Art. 120. A.I.R. 1940 Cal. 363=I.L.R. (1940) 1 Cal. 110=189 Ind. Cas. 642.

——Art. 62—Tenants in common—Money received by one—If money had and received.

Money due to tenants in common which has been received by one or more tenants to the exclusion of the rest is not money had and received within the meaning of Art. 62. A.I.R. 1937 Pesh. 28=168 Ind. Cas. 41.

——Arts. 62 and 120—Suit to recover excess collection by a co-tenant.

Where there has been no division of shares between tenants, they must be regarded as tenants-in-common and where one tenant-in-common sues another tenant-in-common for the recovery of money received by him in excess of his share, the suit is governed by Art. 120 and not by Art. 62. 40 Mad. 291, Foll. 115 Ind. Cas. 99=4 Luck. 265=5 O. W. N. 1122=A.I.R. 1929 Oudh 83.

——Arts. 62 and 89—Co-sharers — To recover share of rent.

Where by virtue of an arrangement some of the co-sharers have been realizing rent of joint immovable property for division among other co-sharers, the relationship between the latter and the former is that of an agent and principal; and a suit for realisation of the share of rent by the co-sharer is governed by Art. 89 and not Art. 62. 111 Ind. Cas. 635=10 L. L. J. 355=A.I.R. 1928 Lah. 688.

——Arts. 62 and 120—Co-sharers — To recover share of rent.

Article 120 and not Art. 62 or 48 or 49 or 109 applies to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly. 66 Ind. Cas. 876 =34 C.L.J. 508=A.I.R. 1921 Cal. 77.

——Art. 62—Suit by lessor against co-lessor.

Where one lease is executed in favour of two persons reserving separate rents for their separate fields and one of the lessors recovers rent due, a suit by the other lessor for the recovery of his share against the co-lessor is governed by Art. 62 as the rent received by the lessor was received to the use of the plaintiff. 16 N.L.R. 182=59 Ind. Cas. 455.

——Art. 62—Joint creditors — Collection of debt by one—Suit for recovery of share.

When after partition one brother is recovering outstandings originally due to the joint family there must be an implied contract of agency between one brother and the other and a suit by the other brother for rendition of accounts and recovery of his share of the joint outstandings is governed not by Art. 62 or Art. 120, but by Art. 89. 116 Ind. Cas. 327=30 P.L.R. 275=A.I.R. 1929 Lah. 407.

——Art. 62—Collection by one—Suit for share by another.

Where certain money bonds remained joint property even after the partition in a Hindu joint family and one of them was realised by the defendants who were some of the separated members, five years before the plaintiffs, the other members, filed a suit for their share of the money realised.

Held, that Art. 62 and not Art. 127 applied as the latter does not apply to a family which has separated prior to the suit and that the suit was barred by limitation. 75 Ind. Cas. 953=A.I.R. 1924 All. 812.

——Arts. 62 and 89—Joint dealings.

Where two divided families have joint dealings managed by the eldest member, a suit for account against the manager is governed by Art. 89 and not by 62. 32 M.L.T. 86=27 C.W.N. 725=A.I.R. 1923 P.C. 31 (P.C.).

——Arts. 62 and 89—Collection of debt by a tenant-in-common—Suit for recovery of share by another.

Where at a partition immovable property is divided, but the debts due to the family are kept joint in the name of one of the members to be realised by him and divided among all the members, all the members become tenants-in-common with respect to the debts. The member realising the debts must be considered as the agent and a suit by the members for the recovery of their share of the debts after their realisation would be governed by Art. 89 and not Art. 62.

Time would not begin to run until a demand was made and refused, or the member realising the debts showed his intention to hold the fund which he had collected against the other members. 59 Ind. Cas. 357=45 Bom. 313=A.I.R. 1921 Bom. 384.

——Arts. 62 and 95—Article 62 and not Art. 95 applies where one member of a family which has become divided collects a debt due to the family and keeps the amount and another member files a suit to recover his share. 6 Mad. 402; 25 M.L.J. 531; 32 Mad. 191 and 37 Mad. 381, Foll. 69 Ind. Cas. 274=1921 M.W.N. 539=A.I.R. 1921 Mad. 283= 41 M.L.J. 274.

——Arts. 62 and 120—Co-sharers—Suit for accounts—Jaghir — Suit by a sharer.

A suit for account brought by a sharer against co

owner of a *Jaghir* who has been appointed by the Government as the manager in which capacity he is entitled to collect the rents and revenue of the Jaghir and bound to account finally for the collections and disbursements, is governed by Art. 120 and not by Art. 62. 40 Mad. 291=30 M.L.J. 341=19 M. L. T. 134=(1916) 1 M.W.N. 188=3 L.W. 192=32 Ind. Cas. 899.

——Art. 62—Co-sharers — Applicability of suit —Suit for money realised by co-sharer.

Art. 62 applies to all cases where the claim is made against the defendant for money received by him which *ex aigno et bono* he has to refund to plaintiff.

Where one of two brothers realised a joint debt without the knowledge of the other, Art. 62 applies to a suit by the other for his share. 14 M.L.T. 325=(1913) M.W.N. 836=25 M.L.J 531=21 Ind. Cas. 394.

——Arts. 62 and 127—Co-sharers — Suits for recovery of a share of moneys—Realisation of joint debt after separation—Applicability of.

A claim to recover the share of one member of the family of a joint debt already realised by another member of the family is governed by Art. 62 and not Art. 127 when the family was not joint at the date of the realization of the joint debt. 15 O.C. 397=16 Ind. Cas. 882.

——Arts. 62, 49 and 120—Co-sharers — Suit by Karnavan against junior member for money realised by latter.

For a suit by a *karnavan* of a *Malabar Tarwad*, against a junior member thereof for money due to the *tarwad* which had been received by the latter, Art. 62 will apply. Art. 49 will not apply, as money cannot be said to be specific moveable property and Art. 120 will apply only if no other article is applicable. 37 Mad. 381=11 M.L.T. 325=(1912) M. W. N. 516=22 M.L.J. 485=14 Ind. Cas. 254.

——Art. 62—Co-sharers—Profits.

In a suit for an account of the profits of joint property managed by one co-sharer where the sum due to the plaintiffs can only be ascertained after taking account not only of the rent received but of the expenses incurred in the management, there is no particular sum "had and received" on plaintiff's behalf by the manager within the meaning of Art. 62. 13 Bom. L.R. 1014=12 Ind. Cas. 586.

——Art. 62—Co-sharers — Debts realised by one member.

If a member receives all debts of the family after partition, a suit by another member for his share in the debts is governed by Art. 62. (1911) 2 M. W. N. 467=12 Ind. Cas. 704.

——Arts. 62 and 120—Co-sharers — Land Acquisition—Suit for recovery of compensation money.

A suit for a share of a compensation money for the house acquired by the Government within 3 years of the date of final award is not time-barred. 2 Lah. L.J. 353.

——Art. 62—Co-sharers — Debt realised by one member.

A suit by a member of a joint Hindu family to recover back his share of a joint debt realised by another member after division in status is governed by Art. 62 and not by Art. 127 of the second schedule of the Limitation Act. 32 Mad. 191=5 M.L.T. 49 =19 M.L.J. 94=1 Ind. Cas. 408.

——Art. 62—Money recovered by one heir — Others suing for their share.

On the death of a Mahomedan his son, the defendant No. 1 obtained a certificate under the Succession Certificate Act for collection of debts due to the estate of the deceased. It was alleged on behalf of the plaintiffs, also the sons of the deceased that the defendant No. 1 realised all the debts due to the estate of the deceased but has not accounted for the moneys so realised and has not, paid to the plaintiffs their share of the same. The plaintiffs therefore prayed for an account of these moneys and for recovery of their share thereof.

It was found that the moneys in question were last collected by the defendant No. 1 in December, 1909, and suit was not instituted till the 19th July, 1916.

Held, that Art. 62 applied and the suit was time-barred. 74 Ind. Cas. 1010=27 C.W.N. 941=50 Cal. 610=A.I.R. 1924 Cal. 142.

——Sch. I, Art. 62—Co-heirs.

Art. 62 of the Limitation Act does not apply to a claim for a share of the cash forming part of the estate to be divided between co-heirs. 21 C. 157 P. C. Foll. 92 P. R. 1917=40 Ind. Cas. 374.

——Arts. 62 and 120—Co-heirs—Debt received by one of the heirs—Suit by other heirs to recover share.

A suit by an heir of a deceased person to recover his share or the debt due to the deceased which had been realised by another heir holding Succession Certificate is governed by Art. 62 and not by Art. 110. 37 All. 434=13 A.L.J. 686=29 Ind. Cas. 347.

——Art. 62—Decree in favour of some heirs — Property purchased by them under the decree—Right of other heirs to realise their shares.

On the death of a certain Mahomedan leaving his wife and some others as his heirs, the heirs excepting his widow sued on a mortgage debt due to the deceased, making his widow a defendant to the suit. They obtained a decree and in execution purchased the properties themselves; a subsequent suit by the widow against his other heirs to recover her share of the debts was held to be governed by Art. 62. 37 All. 233=13 A.L.J. 255=27 Ind. Cas. 712.

——Art. 62—Suit for recovery of money collected by heir.

Where a person was appointed to sell the stock-in-trade of a deceased, to realise debts due to him, and pay debts due to others by the deceased and he accordingly realized certain assets and paid certain debts, in a suit by the plaintiff, a sister of the deceased to recover her share of the inheritance. *Held*, that the plaintiff was only entitled to recover the money as money had and received by the defendant for her use and as the suit was instituted more than three years after the last item was received, it was barred by Art. 62 of the Limitation Act. 37 All. 40=12 A.L.J. 1256=27 Ind. Cas. 533.

5. Money had and received for plaintiff's use.

——Art. 62—When money is payable forthwith to plaintiff.

Article 62 applies to suits falling under the category well known in English Law as "suits for money had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff. 40 Mad. 291, Foll. 120

Ind. Cas. 902=7 Rang. 540=A.I.R. 1930 Rang. 21.

——Art. 62—Money received by another—Principle.

The form of suit indicated by this article is applicable where the defendant has received money which, in justice and equity, belongs to the plaintiff, under such circumstances as in law renders the receipt of it a receipt by the defendant to the use of the plaintiff. In the words of Sir Lawrence Jenkins, the article most clearly approaches the formula of "money had and received by the defendant for the plaintiff's use if read as a description and apart from the technical qualifications imported in English law and procedure." A.I.R. 1918 P.C. 151; 32 Cal. 527; 2 Cal. 393; 37 Mad. 381, Foll. 68 Ind. Cas. 94=49 Cal. 886=36 C.L.J. 295=A.I.R. 1922 Cal. 157.

——Art. 62—Money had and received — Meaning of.

Oldfield, J.:—The action for money had and received is still to be regarded, as it was originally based on an implied or fictional promise. But such promise could not be deduced from the *aequum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in which the defendant having no privity with the plaintiff when the money was received need not be supposed to have given and had no duty to give any such promise. Per *Sadasiva Aiyar, J.*:—The scope of the action for money had and received ought not to be extended. While privity of contract between the parties is not necessary to sustain such an action there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in one man who received the money and some mistake of ignorance of fact on the part of the man who paid the money or some relation, trust and confidence between the person who received the money and person claiming the money or a portion thereof on which the Court could fasten as creating the relation of principal and agent though by fiction between the plaintiff and the defendant. 41 Mad. 923=35 M.L.J. 581=(1918) M. W. N. 796=48 Ind. Cas. 756.

——Art. 62—Plaintiff's use.

Art. 62 applies to every case where defendant at the time, of receipt, in fact or by presumption or fiction of law, receives money to plaintiff's use and is not confined to cases where defendant intended to receive the money for such use. 85 P. R. 1919=52 Ind. Cas. 580.

——Sch. 1, Art. 62—Money had and received for plaintiff's use.

The article applies to a suit for money payable by the defendant to plaintiff for money received by defendant for plaintiff's use though with no promise at the time to repay, as it is repayable to the latter in justice, equity and good conscience. 40 Ind. Cas. 173 (Cal.).

——Art. 62—Money had and received —Implied trust.

The article applies to cases where money is received or retained under circumstances which create an implied trust in favour of another. (1913) M. W. N. 218=19 Ind. Cas. 3.

——Art. 62—Plaintiff's use, money received for.

Art, 62 applies whenever a person actually or constructively receives money for another. 16 P.L.R. 1913=36 P. R. 1913=17 Ind. Cas. 311.

——Art. 62—Unregistered association — Suit for return of subscription.

Where an association consists of more than 20 persons but is not registered and the members bring a suit for the return of subscription money paid to the promoter after conversion of the property of the association into cash into which the said money is changed such suit is governed by Art. 120 and not by Art. 62 for such money is not received by the promoter for the use of the members. 120 Ind. Cas. 902=7 Rang. 540=A.I.R. 1930 Rang. 21.

——Art. 62—Mutawalli.

A mutawalli or custodian of the endowed property of the temple may, in a general way, be described as a "trustee"—a person in a position of trust with respect to the administration of the temple properties—but no property is vested in him upon trust for any specific purpose. Therefore his position is not that of the express trustee referred to in S. 10, Limitation Act. Whatever sums, therefore, he has received for and on behalf of the idol installed in the temple can be treated only as sums received to the use of the idol, and a suit to recover the money so received is governed by Art. 62. A.I.R. 1922 P.C. 123, Foll. 108 Ind. Cas. 452=50 All. 265=25 A.L.J. 1047 =A.I.R. 1928 All. 134.

——Art. 62—Shebait.

Where the defendants collected rent and profits for the benefit of an idol in a Hindu temple which was a religious endowment and of which defendants were shebaits, and the money received by defendants belonged to the idol and was payable to him,

Held, that to suit for accounts against a shebait Art. 62 applied. A.I.R. 1928 All. 134, Foll. 114 Ind. Cas. 734=1929 A.L.J. 229=A.I.R. 1928 All. 689.

——Art. 62—Uncertified payment.

Where there is a mortgage decree, a payment made out of Court after the preliminary decree and before the final decree should be brought into account when the final decree is passed. But if this is not done that money becomes money in the hands of the mortgagee to the use of the mortgagor. 104 Ind. Cas. 419=25 A.L.J. 823=A.I.R. 1927 All. 710.

——Art. 62—Suit against Bank.

Where a Bank holding Government Paper held in trust for the plaintiff of which trust it had constructive notice, sold it and parted with the sale proceeds, and the plaintiff sued the Bank for recovery of the sale proceeds with interest.

Held, that the suit is either one for conversion (Art. 48), or for money had and received to the plaintiff's use (Art. 62). 67 Ind. Cas. 761=24 Bom. L.R. 513=A.I.R. 1923 Bom. 155.

——Arts. 62 and 97—Art. 62 is intended to apply to cases which in English law are described as suits for money had and received. Where after the sale of a putni under Bengal Regulation 8 of 1819 is cancelled by the Trial Court but pending an appeal by the zamindar, the purchaser of the putni pays rent to the zamindar to prevent a further sale under the Regulation and the appeal by the zamindar is subsequently dismissed, Art. 62 applies to a suit by the purchaser of the putni against the zamindar for the sum paid as rent to him. Article 97 does not apply because at the time the money was paid

there was no existing consideration. 60 Ind. Cas. 698=64 Ind. Cas. 315=33 C.L.J. 366=26 C.W.N. 271=A.I.R. 1921 Cal. 596.

——Art. 62—Money had and received.

A sum due for rent by mortgagee to the mortgagor is not money had and received. 41 Mad. 488=22 M.L.T. 543=(1918) M.W.N. 98=34 M.L.J. 193=8 L. W. 118=43 Ind. Cas. 625.

——Art. 62—Plaintiff's use—Limitation for recovery of money paid.

A payment of money made to a person with a view to its reaching the party entitled to it, is a payment for the use of the latter, and limitation for a suit to recover the money is three years from date of payment. 17 Ind. Cas. 351, Foll. 20 C.W.N. 983 =1 Pat. L.J. 374=2 Pat. L.W. 401=37 Ind. Cas. 30.

——Art. 62—Plaintiff's use—"Received for use of" —Explained.

The test of what is "receiving for use of" is not the intention of the defendant to receive it as such or otherwise. If money to which another is entitled is received without any valuable consideration, that is receiving for the use of that other. A suit to recover money paid to a defendant under S. 73 of the C.P.C., is a suit for money paid to him for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art. 120. 37 M. 381, Foll. 39 Mad. 62=16 M.L.T. 509=27 M.L.J. 640=I.L.W. 952=26 Ind. Cas. 219.

——Art. 62—Money had and received—Suit for, when lies—Evidence Act, S. 91.

If money is paid for consideration which wholly fails, the person paying the amount can recover it as money had and received. If money is advanced under a document inadmissible in evidence a suit for money had and received may be maintained. In such a case, there is no distinction between cases when the document is taken for an antecedent debt and when it is taken for money paid at the time. 16 Ind. Cas. 33 (All.).

——Art. 62—Plaintiff's use, money received for.

Only when the money realised by the defendant, has been actually or constructively received by them for plaintiff's use the case comes under Art. 62. Art. 120 and not Art. 62 applies where plaintiff was legally barred from collecting the money due on a decree assigned to him, and the assignors decree-holders received the amount and entered satisfaction, as the money received by them was not received for the plaintiff's use. (1911) 1 M.W.N. 220=9 M. L. T. 465=21 M.L.J. 705=10 Ind. Cas. 658.

——Art. 62—Plaintiff's use, money received for —Right to sue—Quasi contract—Money deposited in Court and withdrawn illegally.

Money deposited in Court *in usum-jushabentis* and withdrawn by a person not entitled to it may properly be held to be received for the use of the person entitled. 33 All. 450=8 A.L.J. 230=10 Ind. Cas. 730.

——Arts. 62 and 2—Money realised by the defendant over and above the amount due—Money had and received—Taxes imposed without jurisdiction—Legality of. 7 A.L.J. 496=32 A. 491=6 Ind. Cas. 401.

——Arts. 62, 120—Suit for money had and received —Invalid assignment of debt—Money received by assignee from debtor—Suit by assignor.

A suit by an assignor for recovery of money received by an assignee of mortgage-bond from the mortgagor under an assignment *ab initio* void is a suit for "money had and received" and is governed by Art. 62 and not by Art. 120. (1907) 17 M. L. J. 452=30 Mad. 459.

——Art. 62—'Money received for the plaintiff's use'.

It is not necessary for the application of Art. 62 that the defendant should have intended to receive it at the time for the plaintiff. 5 C. 597 diss. from. In all cases where the defendant has received the money used for which *exoe quo et bono* he ought to refund, even though he might have received it wrongfully, Art. 62 applies. Consequently a suit for recovery of money received by defendant as co-mortgagee is governed by Art. 62. (1905) 1 C. L. J. 167=32 C. 527.

6. Refund of consideration.

(a) General.
(b) Execution sale.
(c) Void contract.

6. (a) Refund of consideration—(General).

——Arts. 62, 97 and 116—T. P. Act, S. 55—Suit by vendee for refund of purchase-money on failure to obtain possession.

Provisions of Art. 62, Limitation Act, might have been applied, before the enactment of S. 55, T. P. Act, to cases where there was no covenant and the suit was merely on the allegation that the vendor has purported to transfer some property to which he had no title. That would have been in the analogy of the English Law an action for money had and received. Now that S. 55 has imported into all transfers, unless the parties agree to the contrary, a covenant warranting the title of the vendor, it would seem that a suit to recover the consideration would be on the basis of that specific covenant and time would begin to run from the date of the deed after it had been established that there never had been any title. In the case, however, where there is an express covenant, that covenant must be construed according to the intention of the parties and no general rule can be laid down about the date when the cause of action arises. Such suits, however, would be on the basis of a covenant and the provisions of Art. 97 would apply if there was no registered deed and the provisions of Art. 116 if there was a registered deed. (1945) A.L.J. 473=1945 A.W.R. (H.C.) 310=1945 O.W.N. (H. C.) 295=A.I.R. 1946 All. 159 =224 Ind. Cas. 52.

——Arts. 62 and 97—Sale by father of minor son's property—Indemnity bond by third party—Purchaser's possession disturbed by decree of Court—Indemnifier, held liable to indemnify for whole amount agreed—Father, held liable under S. 65, Contract Act to return of consideration received—Suit, held was not governed by Art. 62, Limitation Act, but by Art. 97. 1944 M.W.N. 350=(1943) 2 M.L.J. 645 =I.L.R. (1944) Mad. 663=A.I.R. 1944 Mad. 211 =216 Ind. Cas. 120.

——Art. 62—Money paid as consideration or part consideration in a contract of sale is not money paid for the use of the payer, except perhaps when the contract is of such a nature that it is void in law *ab initio*. Article 62, therefore, does not apply to suit for the refund of such consideration. A. I. R. 1942 Sind 37=I.L.R. (1941) Kar. 495=199 Ind. Cas. 438.

——Arts. 62, 97 and 116—The plaintiff sued for possession of land on the basis of 4 mortgage deeds but alleged that he had cancelled the fourth mortgage which was executed in 1919 while he was a minor as it was not for his benefit. It was held that he was entitled to possession on the basis of the first three mortgages but not on the fourth mortgage as plaintiff himself had cancelled it by notice. In 1925, he brought another suit to recover from the defendants certain sums which he said had been advanced out of his estate when the mortgage deed was written:

Held, that the second suit was not one for breach of contract and was governed either by Art. 62 or by Art. 97 according as to whether the contract was void or voidable and that Art. 116 was inapplicable. 34 P.L.R. 96=A.I.R. 1933 Lah. 581=145 Ind. Cas. 186.

——Arts. 62 and 97—Starting point of limitation.

Where a sale is void *ab initio* and possession is not given to the purchaser, a suit to recover the purchase-money would be governed by Art. 62. Where, however, the title is imperfect and possession is not handed over and it is subsequently discovered that the contract of sale became void, Art. 97 would apply to a suit to recover the purchase-money on an existing consideration which afterwards failed, from the time when the purchaser endeavoured to obtain possession of the property and being opposed, found himself unable to obtain possession; but where possession has been handed over by the vendor to the vendee, the cause of action would not arise till the vendee is dispossessed. 33 Bom. L.R. 1092=A.I.R. 1932 Bom. 36=55 B. 565=134 Ind. Cas. 1157.

——Art .62—Refund of purchase money.

If there is covenant express or implied indemnifying party suffering against loss caused by defect in title of executant of document, Art. 116 applies, otherwise Art. 62 or Art. 97. A.I.R. 1930 All. 785.

——Arts. 62 and 97—Vendor failing to make out clear title.

When after payment of the purchase money to the vendor, the vendor was unable to give title and the purchaser found himself unable to obtain possession,

Held, that from the time when he found himself unable to obtain possession, he had a right to sue for his purchase-money upon a failure of consideration and that the case fell within Art. 97 and that in any case it must fall either within Art. 97, or 62. 19 Cal. 123 (P.C.) and 30 All. 402 and 38 Mad. 1171, Foll. 103 Ind. Cas. 165=25 A L.J. 841=A.I.R. 1927 All. 734.

——Arts. 62, 97 and 116—An action for breach of duty declared by S. 108 of the Transfer of Property Act is regulated by Art. 116 of the Limitation Act if the lease is in writing registered, the obligation being deemed to be embodied in the contract and not by Art. 62 or Art. 97. 101 Ind. Cas. 707=6 Pat. 606=8 P.L.T. 590=A.I.R. 1927 Pat. 248.

——Arts. 62 and 97—A sale-deed contained a clause that if the minor nephew of the vendor on attaining majority raised any objection to the sale of his share the vendor would make over to the vendee an equal area out of his own land. Mutation of the minor's share of the land was refused in 1907 on objection by the minor's mother; plaintiff sued for declaration that he was owner of the whole land purchased by him. His suit was dismissed, so far as the minor's share was concerned in 1911. In 1917 the minor, having attained majority mortgaged his share to one *G*, who dispossessed the plaintiff from the land in 1919. Plaintiff brought a suit to enforce the indemnity clause contained in his deed of sale in the alternative for Rs. 1,000, being the value of the minor's share:

As regards the claim for recovery of the purchase money, it was governed either by Art. 62 or 97 of the Limitation Act. If the claim was governed by Art. 62, it was barred by time inasmuch as limitation began to run from the date of the sale. If the claim was governed by Article 97, it was equally barred by time, inasmuch as limitation began to run when the plaintiff's title was first denied in 1907 or at the latest when it was declared in 1911 that he had no title. 62 Ind. Cas. 953 (Lah.).

——Arts. 62 and 97—Refund—Rent.

A suit instituted by a purchaser to recover the rent paid to the landlord after the sale is set aside, after three years from the day of last payment of rent is barred by limitation under Art. 62 or 97. The suit in the case to recover rent paid or purchase-money, did not lie against the landlord. 24 C. W. N. 617=58 Ind. Cas. 741.

——Arts. 62 and 97—Refund—Purchase money—Suit by dispossessed vendee.

A suit by a dispossessed vendee for return of the purchase-money is governed by Art. 97 and not by Art. 62. When the money received by the defendant is not in fact or law received for the plaintiff's use. Art. 62 would not apply nor would the fact that subsequent events had the effect of making the money received for plaintiff's use, render that article applicable. 55 Ind. Cas. 93 (Nag.).

——Arts. 62 and 97—Refund—Premium — Suit for recovery of premium—Lessee not put in possession of portion of the premises by lessor.

A suit by a lessee for a refund of a part of the premium paid for a lease, proportionate to the portion of the land of which possession could not be obtained by him, is governed by Art. 62. 49 Ind. Cas. 258 (Cal.).

——Arts. 62, 97 and 116—Refund — Purchase money—Failure of title—Suit for refund of purchase money.

It is only where a sale is void *ab initio* that Art. 62 can apply to a suit by the vendee for refund of the purchase-money. If, however, the vendee has actually obtained and held possession of the property, Art. 97 may be applied even if the sale turns out to be void *ab initio*, for otherwise, the claim for refund might be barred although the vendee had been given no occasion to sue. The same article is applicable where there is a subsequent failure of consideration. Where the vendor has no title to convey, the article applicable to a suit for refund of the purchase-money is Art. 116, and time begins to run from the date of the execution of fraud. 47 Ind. Cas. 886 (Nag.).

——Arts. 62 and 97—Refund—Purchase money—Vendor and purchaser—Deprivation of possession—Suit by vendee—Limitation.

Where a vendee sues to recover the purchase-money paid by him on being deprived of the possession of the land sold to him by the vendor, limitation begins to run from the date on which the vendee is dispossessed from the land and the suit is governed by Art. 97 and not by Art. 62. 44 Ind. Cas. 719 (Cal.).

——Arts. 62 and 97—Refund — Earnest money—Sale of land.

Where the plaintiff failed to enforce specific performance of a contract to sell land, a suit for the recovery of advance paid by him is governed by Art. 97 and not by Art. 62. 6 L. W. 44=(1917) M.W.N. 447=40 Ind. Cas. 893.

——Arts. 62 and 97—Contract to sell — Suit for spceific performance of contract or return of purchase money.

A contract to sell a village was made on the 27th of April 1908 and part of the consideration was paid as earnest money at once and the balance was paid on the 18th of June 1908. The sale was not completed. The plaintiff sued for specific performance and in the alternative for the return of the purchase-money in April 1913, *Held*, that the suit was time-barred. 32 Ind. Cas. 49 (All.).

——Arts. 62, 97 and 116—Declaration of title — Possession not obtained by vendee—Failure of consideration—Cause of action.

Plaintiffs, purchasers of certain property from recorded owners, had mutation of names effected in 1906. In 1907 certain persons in possession brought a suit for setting aside the sale-deed and a declaration of their rights. The suit was decreed. *Held*, that the consideration failed either in the very beginning when the plaintiffs could not get the possession of the property or very soon afterwards, and a suit brought more than three years after that date was barred either by Art. 62 or 97 of the Limitation Act. *Held* also that Art. 116 of the Limitation Act did not apply. 13 A.L.J. 669=30 Ind. Cas. 410.

——Sch. 1, Arts. 62, 97 and 116—Damages—Covenant for title, breach of—T. P. Act, S. 55 (2).

A breach of a covenant for title under S. 55 (2) of the T. P. Act is a breach of a contract in writing registered within Art. 116 of the Limitation Act. A suit for compensation for such breach is governed by Art. 116 and not by Arts. 62 or 97. (25 M. 587; 15 M.L.J. 396; 11 Ind. Cas. 337; 21 M. 8; 21 M. 242; 23 Ind. Cas. 570, Foll.) 38 Mad. 1171=1 L. W. 849=27 M.L.J. 517=16 M.L.T. 397=25 Ind. Cas. 618.

——Arts. 62 and 97—Refund—Purchase money—Sale voidable at the instance of third parties—Suit to recover consideration moneys—Cause of action, when arises.

Where under a sale, voidable only at the instance of third parties, possession is taken, the cause of action for a suit to recover consideration money, arises only when the possession is disturbed. 38 Mad. 887=15 M.L.T. 240=(1914) M.W.N. 376=23 Ind. Cas. 570.

——Arts. 62 and 97—Refund—Purchase money—Purchaser deprived of possession by paramount title—Suit for.

Where a purchaser, who was put in possession of the property purchased, is subsequently dispossessed by a person with paramount title, a suit by the former for refund of the purchase money is governed Art. 97 and not Art. 62 of the Act. 37 Bom. 538=15 Bom.L.R. 559=20 Ind. Cas. 254.

——Art. 62—Money had and received for plaintiff's use.

Where the mortgagee in execution of a mortgage decree had purchased a portion of an entire estate and subsequently the entire estate is sold for arrears of Government Revenue, a suit by him to recover the money representing the portion purchased by him from the mortgagor to whom the entire surplus has been paid is governed by Art. 62. 17 Ind. Cas. 351 (Cal.).

6. (b) Refund of consideration—Execution sale.

——Arts. 62 and 120—Applicability — Suit by auction-purchaser for refund of purchaser money—Judgment-debtor having no saleable interest in property—Allegation of fraud against decree-holder—Limitation—Starting point. *See* C. P. Code, O. 21, R. 91. I.L.R. (1948) 1 Cal. 479.

——Arts. 62 and 97—Applicability—Court sale—Rateable distribution of purchase money—Subsequent decision in suit by third party that judgment-debtor had no title to property sold—Suit by purchaser for refund—Limitation. *See* Limitation Act, Art. 120. 228 Ind. Cas. 479=A.I.R. 1947 Lah. 129.

——Arts. 62 and 97—Failure of consideration in execution sales—Limitation.

Where an execution sale is confined and the objections to the sale are consequently allowed and also confirmed in revision, a suit by the auction-purchaser for recovery of the purchase price on failure of consideration for sale does not fall under Art. 62 but under Art. 97 and the cause of action arises either from the date of the order allowing the objections or from the date of the order in revision confirming the objections. A.I.R. 1941 Pesh. 41=194 Ind. Cas. 565.

——Arts. 62, 97 and 120—A suit by auction-purchaser for refund of purchaser money on its being found that the judgment-debtor had no saleable interest in the property is governed by three years' rule of limitation either under Art 62 or Art. 97 and not by Art. 120. 1937 O.W.N. 83=A.I.R. 1937 Oudh 286=13 Luck. 138=166 Ind. Cas. 705.

——Art. 62—Defendants Nos. 5 to 10 sold in execution of a decree obtained by them against defendants Nos. 3 and 4 certain properties which were purchased by the plaintiff on September 25, 1918. A stranger brought a suit for recovery of possession on the ground that the properties had already been sold to him and the sale was set aside in this suit. The plaintiff, thereupon, on April 30, 1920, applied unsuccessfully for refund of the purchase-money which had been paid to the decree-holders in July 1919, and finally instituted a suit on July 6, 1925, for recovering the said money:

Held, that the suit being one for money had and received fell within Art. 62 and was time barred. (1935) M.W.N. 338=68 M.L.J. 630=41 M.L.W. 305=A.I.R. 1935 Mad. 354=159 Ind. Cas. 750.

——Arts. 62, 97 and 120—Refund of purchase money—Execution sale—Deposit by auction purchaser — Application by judgment-debtor to set aside surplus sale—Proceeds taken away by another decree-holder—Subsequent reversal of sale.

A suit brought by an auction purchaser to recover money from defendant who had after the sale and the deposit of the money in Court and before the sale was set aside on appeal, attached that sum in execution of his decree against the judgment-debtor as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, is governed by Art. 120 (*i.e.*) six years from the date when the sale was set aside by the Appellate Court. Arts. 62 and 97 contemplate a suit brought by one of the contracting parties against the other to recover the money which has been paid at the sale which owing to default on part of the vendor has become infructuous. 16 M. 361, Foll. 40 Cal. 187=15 Ind. Cas. 707.

——Arts. 62 and 97—Refund—Purchase money—Execution sale.

Either Art. 62 or Art. 97 governs a suit for recovery of the price paid at an execution sale for property to which the judgment-debtor has no title. 14 O.C. 74=10 Ind. Cas. 716.

——Art. 62—Suit by purchaser—Judgment debtor having no saleable interest.

Suit by auction purchaser for the recovery of purchase money when a third person sets up his title to the property and the judgment-debtor is found to have no saleable interest in it is governed by Art. 62 as there is no consideration at all for the purchase money. 37 Cal. 67=13 C.W.N. 1080 =10 C.L.J. 558=2 Ind. Cas. 559.

6. (c) Refund of consideration—Void contract.

——Arts. 62, 97 and 116—Applicability — Suit for refund of consideration—Sale void ab initio.

Art. 62 of the Limitation Act is only meant to apply to suits for "money had and received" and not to a suit for a refund of consideration on the ground that a sale is void *ab initio*. To such a suit Art. 97 or Art. 116 of the Act would apply according to circumstances present. Where the sale was embodied in a registered instrument, the more appropriate article would be Art. 116. I.L.R. (1950), Nag. 467=A.I.R. 1950 Nag. 229=1950 N.L.J. 145.

——Art. 62—No doubt, in the case of a voidable contract, the transaction is good till it is avoided and that in the case of a void contract, the transaction is bad from its very inception but this distinction does not warrant the contention that when the contract is void at its very inception, then the price paid by the purchaser is retained by the seller for the use of the purchaser in the terms of Art. 62 as even in cases of void contract where actual possession of the property sold is handed over by the seller to the purchaser, the purchaser is entitled to the full use of the property even though the seller has no title in it while the seller receives the money on his own account and for his own use and not for the use of the purchaser who is actually in enjoyment of the property sold. A.I.R. 1945 Lah. 164=47 P.L.R. 122 =221 Ind. Cas. 524.

——Art. 62—Where money is paid under a void agreement in the absence of any special circumstances, the date on which the money is received is the date of the discovery of the void nature of the transaction and limitation for suit to recover the money must be deemed to begin to run from that date. A.I.R. 1943 All. 294=1943 A.W.R. 122=(1943) A. L.J. 250=I.L.R. (1943) All. 604=209 Ind. Cas. 10.

——Art. 62—Where a transaction is void ab initio and a suit is brought for recovering the amount for consideration for that transaction, it must fall within the purview of Art. 62. A.I.R. 1943 All. 294= (1943) A.L.J. 250=1943 A.W.R. 122=I.L.R. (1943) All. 604=209 Ind. Cas. 10.

——Arts. 62, 97—Money paid under void contract —Commencement of limitation.

In the generality of cases, limitation in the case of a void transaction would run from the date of the deed, but exception is possible in cases where there are special circumstances showing that an agreement was discovered to be void at a later date. 1936 O.W. N. 489=A.I.R. 1936 Oudh 280=12 Luck. 185=162 Ind. Cas. 362.

——Arts. 62 and 116—Registered contract—Void ab initio—Applicability of the relevant articles.

If the sale is by a registered document containing covenants as to title and quiet enjoyment and if possession has passed to the vendee the suit by purchaser for return of purchase money is governed by Art. 116 whether the sale deed is void or voidable. Cases of this nature fall under Art. 62, if the transaction is void *ab initio* and under Art. 97 if the consideration has failed wholly or partially and are covered by Art. 116 where the document containing covenant of title happens to be registered which has the effect of extending three years to six years. 118 Ind. Cas. 203=A.I.R. 1930 Sind 12.

——Art. 62—Refund of consideration—Void agreement—Starting point.

The period of limitation for a suit for refund of advance paid under a void agreement is three years from the date which the agreement is discovered to be void and ordinarily the time from which limitation will start is the date of the agreement in the absence of special circumstances. Where the agreement is one forbidden by law, the plaintiff must be deemed to have been aware of the fact when he entered into it. 88 Ind. Cas. 557=1925 M.W.N. 400=A.I.R. 1925 Mad. 885=48 M.L.J. 598.

——Art. 62—Void agreement—Starting point.

Article 62 of the Limitation Act governs a suit for refund of consideration for the mortgage of occupancy land because the contract is *ab initio* void. Such suit must therefore be brought within three years of the date of the deed. 81 Ind. Cas. 873= A.I.R. 1925 Nag. 130.

——Art. 62—Refund — Money paid under void agreement—Suit for, recovery of.

A suit for recovery of money advanced under a void agreement is governed by Art. 62 of the Limitation Act and must be instituted within two years from the daee of the execution of the agreement. 5 O.L.J. 277=47 Ind. Cas. 214.

——Arts. 62 and 97—Refund — Purchase money where sale void ab initio.

If a contract of sale between two parties is void *ab initio* and is not merely voidable, then a suit brought by the vendee against the vendor for refund of the purchase money is governed by Art. 62 and not Art. 97. 44 P.R. 1918=126 P.L.R. 1918=46 Ind. Cas. 26.

——Art. 62—Payment under an invalid mortgage.

A suit for money had and received under a supposed right of mortgage, ultimately found to be invalid, is governed by Art. 62 and should be brought within three years from the date of the mortgage deed. 40 Bom. 614=18 Bom.L.R. 773=36 Ind. Cas. 564.

——Art. 62—Refund—Consideration—Void mortgage.

Where a mortgage is *ab initio void* as affecting the unrecognised sub-division of a *bhag*, a claim for the refund of the money arises on the date of the mortgage and must be brought within 3 years of the mortgage as money had and received. 40 Bom. 614 =18 Bom. L.R. 773=36 Ind. Cas. 564.

——Art. 62—Money had and received—Mortgage void.

The mortgage of an unrecognised sub-division of a *Bhagdari* holding is void, the consideration fails *ab initio* and the money advanced by the plaintiff was money received by the defendant for plaintiff's use under Art. 62. The cause of action for the suit for recovery of the money arises on the date of mortgage. 39 Bom. 358=17 Bom. L.R. 259=28 Ind. Cas. 442.

7. Overpayment.

——Art. 62—A suit for overcharges against a Railway Company must be instituted within three years under Art. 62, Limitation Act. A.I.R. 1939 Nag. 141=1939 N.L.J. 124=185 Ind. Cas. 241.

——Art. 62—Overpayments—Suit for recovery of overpayments to contractor—Nature.

Under Article 62 a suit for the recovery of overpayments, made to a building contractor is a suit for moneys payable by the defendant to the plaintiff for moneys received by the defendant for plaintiff's use. 88 P.L.R. 1914=67 P.W.R. 1914=22 Ind. Cas. 592.

——Art. 62—Payment under mistake.

Article 96 should be preferred to Art. 62 in a suit to recovery money paid by the plaintiff to the defendant by mistake in excess of the amount legally due. 93 Ind. Cas. 129=4 Pat. 448=7 P.L.T. 431 =1925 P.H.C.C. 345=A.I.R. 1925 Pat. 765.

——Art. 62—Overpayment—Suit by purchaser to recover money paid twice over by mistake.

A suit by a purchaser to recover money paid by him twice over, by mistake, is governed by Art. 62 of the Act and time runs from the date when the defendant received the money. 35 Mad. 45=(1910) M.W.N. 827=9 M.L.T. 467=8 Ind. Cas. 1087.

——Art. 62—Payment under protest — Bombay Land Revenue Code, S. 153—Starting point.

Although the fact that a demand for increased payment might give rise to a cause of action to enable the plaintiffs to seek for a declaration that that particular demand was unauthorised, it does not affect their right to file a suit in which the relief claimed is on a different cause of action arising from the payment under protest made by them on the demand under S. 153 of the Bombay Land Revenue Code. 89 Ind. Cas. 65=27 Bom. L.R. 645=A.I.R. 1925 Bom. 435.

8. Principal and Agent.

——Arts. 62 and 89—Applicability—Suit to recover specified sum of money against legal representatives of deceased agent.

A suit for recovery of a specified sum of money against the legal representatives of a deceased agent is governed by Art. 62 and not by Art. 89 of the Limitation Act. 35 C.L.J. 330 and A.I.R. 1923 Pat. 259, foll. A.I.R. 1950 Dacca 13 (2).

——Art. 62—Plaintiff deshmukh of villages entitled to fees and emoluments out of revenue—Defendants, *gumastas* appointed or recognised by *Peshwas*, making collection for plaintiff—Plaintiff having no power to remove or appoint defendants—Defendants making collection but not making payment to plaintiff—Suit by plaintiff to recover collection—Suit, held governed by Art. 62 and plaintiff could recover collections only for three years prior to suit:

Held, also Art. 62 of the Limitation Act, is not confined to suits against agents. A.I.R. 1939 Bom. 126=41 Bom. L.R. 215=I.L.R. (1939) Bom. 154= 181 Ind. Cas. 375.

——Art. 62—Suit for accounts.

A suit for accounts between principal and the agent is not governed by Art. 62. (1933) A.L.J. 1009 =A.I.R. 1933 All. 642=55 A. 814=147 Ind. Cas. 529 (2).

——Arts. 62 and 90—The defendant acted as agent of the plaintiff in the matter of the realisation of certain debts due to the plaintiff. The plaintiff sued alleging that the defendant had collected various sums of money from her debtors but had withheld the moneys from her. The suit was dismissed on the ground that it fell within Art. 62:

Held, that it was by no means clear that the plaintiff's case did not come within the purview of Art. 90 and that the lower Court erred in dismissing the suit without investigating the facts fully. A.I.R. 1931 Cal. 738=133 Ind. Cas. 177.

——Art. 62—Principal and agent.

One *B* and *Co.*, were managing agents for two companies, *J* and *U*. It was no part of the business of any of these two companies to lend money or to act as bankers. There was at one time more money in *J Co.*, and this money *B* and *Co.* employed to continue the business of the *U Co.* The directors of either company were ignorant of this transaction,

Held, that the *U Co.* is liable for the money so employed either for having received the money through their agents rightfully and applied to their purposes or for having received it wrongfully by secret and deceitful misapplication by their own agents. In the latter case the money is recoverable from them as money had and received to the use of the true owner and time begins to run from the date of actual payment. 49 All. 520=25 A.L.J. 277=A. I. R. 1927 All. 161 (F.B.).

——Arts. 62 and 90—Principal and agent—Agent carrying on business as principal.

Account of profits when an agent started a similar business in consequence of which his services were dispensed with and a suit was brought for the profits received by the agent, *Held*, that the defendant having carried on the same business as that of his principal, was bound to account for all the profits to the principals but the suit having been brought more than three years after the transaction, was barred by limi-

tation. 41 All. 635=17 A.L.J. 805=52 Ind. Cas. 373.

——Art. 62—Principal and agent—Termination of agency—Suit to recover money from agent collected by him subsequently.

A suit to recover money received by an agent after the termination of his agency must be brought within three years from the time of the receipt as money had and received under Art. 62. 13 A.L.J. 494=29 Ind. Cas. 986.

——Arts. 62, 89 and 120—Principal and agent—Misappropriation by agent — Suit by principal — Cause of action against the agent and his legal representatives, if same.

A suit to recover money alleged to have been misappropriated by defendant's father while acting as plaintiff's agent is barred if brought more than three years after the termination of the agency. The cause of action against the legal representative is the same as against the deceased agent, if the suit would be barred against the agent, it is also barred against the representatives. Art. 120 is not applicable to a suit brought against the representatives of a deceased agent. Art. 89 applies to a suit against an agent for acts committed during the continuance of his agency. The article applicable in respect of money payable by an agent after the termination of his agency would be Art. 62. 16 M.L.T. 614=(1915) M.W.N. 23=27 Ind. Cas. 807.

9. Starting point.

See also NOTE 6.

——Arts. 62, 109—Mesne profits—Starting point.

Plaintiff, after he got a decree for possession in 1929, instituted a suit for mesne profits in 1932, for the period from 1916 to 1929. No claim was made for profits within three years of the suit:

Held, that the period of limitation was not suspended till the decree in 1929, as there is no provision in the Act suspending limitation in circumstances similar to those existing in the present case. The defendant had wrongfully received the rents and profits of properties from the year 1916 and time began to run against the plaintiffs from the date when he actually received the rents and profits. When the suit was actually brought, three years had elapsed since the receipt of the last profits claimed. Consequently, the plaintiff's claim was barred. A. I. R. 1937 All. 481=1937 R. D. 302=I.L.R. (1937) All. 628=(1937) A.L.J. 979=1937 A.W.R. 539=170 Ind. Cas. 657.

——Arts. 62, 123 and 89—Defendant undertaking to distribute sale proceeds among heirs of deceased—Suit by one of heirs for his share—Article applicable—Time, when runs.

Where the estate of a deceased Muhammadan was sold in accordance with the wishes of the majority of the heirs and the sale proceeds were kept with the defendant who had undertaken to distribute it amongst the heirs according to their shares, a suit by the plaintiff for his share cannot be regarded either as one for the administration of the estate or as a suit against a person legally charged with the duty of distributing a portion of it under Art. 123 or as a suit by principal against agent under Art. 89. To such a suit article applicable is Art. 62 and the time begins to run when the defendant had received the money. There is nothing in Art. 62 which even implies that the knowledge is a factor so as to render a suit brought within three years of the knowledge of the fact that the money was in the hands of the defendant in time. 1945 M.W.N. 671=(1945) 2 M.L.J. 422=58 M.L.W. 555=A.I.R. 1946 Mad. 116=224 Ind. Cas. 21.

——Art. 62—Money paid under judgment—Cause of action—When accrues.

The money paid under a decree obtained in the Revenue Court which is subsequently held to have been superseded and modified by a decree of the Civil Court can be recovered but the cause of action accrues, not on the date when the decree of the Revenue Court is superseded or modified but on the date when the money is actually recovered from the plaintiff. 1937 A.W.R. 539=A.I.R. 1937 All. 481=1937 R. D. 302=I.L.R. (1937) All. 628=(1937) A.L.J. 979=170 Ind. Cas. 657.

——Art. 62—Starting point of limitation.

Where certain money was paid by a person to another for depositing as security to obtain a contract, but the contract was not obtained and the money was not returned and in a suit for such amount, the defendant admitted liability to pay the same but said that he was willing to pay it to the person who will be found to be entitled for the same in a suit for dissolution of partnership among the parties:

Held, that the original agreement, under which the plaintiff paid the money to the defendant for deposit, was superseded by a subsequent agreement arrived at during the pendency of the suit and that limitation ran only from such date. 1935 A.W.R. 500=156 Ind. Cas. 970.

——Art. 62—Where one party to a compromise agrees to pay off a certain creditor but another party pays off on the failure of the former to filfil the term, then the cause of action to the latter arises when he actually pays the amount. Limitation runs from the date of the payment and not from the date of the breach of the agreement. A.I.R. 1935 Lah. 307=156 Ind. Cas. 836.

——Arts. 62 and 116—Money paid by mortgagor on default of mortgagee.

Where a mortgagee bound to pay off a prior incumbrance, fails and the mortgagor being compelled, pays it off and sues the mortgagee for reimbursement, the suit is governed by Art. 62. Time would begin to run from the date on which the plaintiff paid of the prior encumbrance. 5 O.L.J. 263=47 Ind. Cas. 161.

——Art. 62—Starting point—Suit for money—Deposit of money in execution under a mistaken belief of liability—Suit to recover the same.

The plaintiff, believing that the property sold in execution of a decree against himself and the defendant belonging to him deposited the decretal amount on the 20th February, 1901. Then he applied for release of the property from attachment. It turned out that the property belonged to the defendants and the amount deposited was made over to the decree-holder on the 13th December, 1903. The plaintiff then brought the present suit for recovery of the amount.

Held, that time would begin to run against the defendant from the date the money was made over to the decree-holder. 1906 A.W.N. 288=3 A.L.J. 667.

——Art. 62—Starting point—Mukhi appointment of—Right to nominate, claimed by villa-

gers, but liability to pay his salary not denied—Suit by the chief who has paid the salary against the villagers.

Where the inhabitants of a village were by custom bound to pay the salary of a mukhi and never denied their liability, but only claimed to nominate him, the cause of action of any person who had paid the mukhi not so nominated to be reimbursed by the villagers arose when it was finally decided that the villagers had no right to nominate. (1902) 4 Bom. L.R. 264.

——Arts. 62, 97—Vendor and purchaser—Sale—Failure of title—Limitation.

More than six years after the date of a sale by one who was not in possession, the purchaser brought a suit against the vendor and the person in possession claiming a decree for possession of the property or damages from the vendor if the property did not belong to him.

Held (*Whitworth, J.*, dissenting) that the covenant for title, if it failed, failed on the date of the sale and that the suit was barred by Art. 62.

Per *Whitworth, J.*:—Art. 97 governs the case and the starting point in such cases is the date of the loss of possession or loss of expectation of possession. Time did not begin to run till it was found in suit that the vendor had not the title. (1901) 3 Bom.L.R. 190=25 B. 593.

10. Tax illegally collected.

——Art. 62—Tax wrongfully levied.

Art. 62 is intended to apply to all actions for money had and received to the use of the plaintiff whether they be actions which may be deemed strictly to be based on implied contracts or whether they be merely to enforce an equitable claim to the return of the money had and received, *e.g.*, professional tax wrongfully levied by the defendant municipality. A.I.R. 1943 Mad. 191=55 L.W. 783=(1942) 2 M.L.J. 663=1942 M.W.N. 714=I.L.R. (1943) Mad. 521=207 Ind. Cas. 391.

——Art. 62—A suit to recover a certain amount of Municipal tax on the ground that it was illegally levied is governed by Art. 62 and not by Art. 96. A.I.R. 1940 Bom. 252=42 Bom.L.R. 491=189 Ind. Cas. 678.

——Art. 62—Period of limitation for suit for refund of profession tax illegally collected is 3 years. 1932 M.W.N. 1089.

——Arts. 62 and 120—Money had and received.

A claim for refund of money illegally realised by municipality is in the nature of a claim for money had and received and not a claim for compensation or damages. Such a claim is governed by Art. 62. 123 P.R. 1886 and 65 P.R. 1886, not approved. 32 All.491=7 A.L.J. 496=6 Ind. Cas. 401.

11. Wrongful appropriation.

——Arts. 62 and 89—Wrongful appropriation.

J sued the son of one *H* for an account of the produce of certain fields for some years. He alleged that *H* retained the produce of the fields during these years on his behalf.

Held, that Art. 62 or Art. 89 would govern the suit. 112 Ind. Cas. 126=A.I.R. 1928 Nag. 256.

——Art. 62—A suit to recover offerings of a shrine from their wrongful appropriator is governed by Art. 62. 41 Mad. 923; A.I.R. 1923 All. 532 and A.I.R. 1922 Cal. 157, Appl. 92 Ind. Cas. 731 =A.I.R. 1926 Lah. 228.

——Art. 62—Mortgage—Suit to recover rents due to the mortgagee but collected and wrongly appropriated by mortgagor.

A suit to recover rents due to the mortgagee but collected and appropriated by the mortgagor is governed by Art. 62 and is not barred, though rents for more than six years had accrued. 34 Ind. Cas. 173 (All.).

——Art. 62—Arrears of Jagir income—Suit to recover—Wrongfully recovered by defts.—Limitation.

A suit to recover from the defendants six years' arrears of jagir income, wrongfully received and appropriated by them, is governed by Art. 62, so that only the income for the 3 years immediately preceding could be recovered. 46 P.W.R. 1914=140 P. L.R. 1914=23 Ind. Cas. 445.

——Art. 62—Wrong payment.

Where, after assignment of certain G. P. notes, the creditors of the assignor attached those G. P. notes and in consequence the assignee instituted a suit to establish his rights, and obtained a decree in his favour in 1904 which was confirmed on appeal and which he had executed and where he obtained possession of the G. P. notes in 1905, and where the notes contained endorsement of payment of interest up to 1905 to the person in whose name the notes stood to *C*; a suit to recover the interest from *C*, is governed by Art. 62 and time is not extended by the fact of the pendency of appeal since the litigation was not really between the assignee and *C* though *C* might have been a party thereto. 16 P.L.R. 1913=36 P.R. 1913=17 Ind. Cas. 311.

——Art. 63—Scope.

Where there was no independent contract to pay interest, the interest is a mere accessory to the principal and if the principal is irrecoverable, so is the interest thereon. This principle, however, has no application if there is a special contract to pay interest at a specified rate. A.I.R. 1942 Pesh. 85=204 Ind. Cas. 509.

——Art. 63—Interest on mortgage money.

Where a deed of further charge provided that the interest will be paid year by year; in case of default it will be added to the principal and compound interest will be charged; that the mortgagee might realise the interest every year by suit or might have it added to the principal and that at the time of redemption or foreclosure of a previous mortgage the total interest due would be deemed to be a separate time which the mortgagee would be entitled to recover from the person and other property of the mortgagees.

Held, that the deed gave the plaintiff an option either to sue for his interest year by year or to allow it to be compounded and to sue for it at the time of redemption or foreclosure of the previous mortgage, and therefore, the claim for interest at the time of a suit for foreclosure would not be barred by limitation, nor was a suit for the interest due along with a suit for foreclosure premature. 66 Ind. Cas. 687=8 O. L.J. 418=A.I.R. 1921 Oudh 193.

——Arts. 63 and 60—Thavanai deposit—Suit for recovery of—Limitation.

Art. 63 of the Limitation Act is applicable only when interest is payable in cash and the starting point under that article is when the interest becomes due and payable. In cases of deposits on *Thavanai* where

the agreement is that the interest is not to be paid until demanded but should be added to the principal as an increment, the whole amount being treated as a fresh deposit at the end of each *Thavanai* the proper article applicable to a suit for the recovery of the same is Art. 60 and not Art. 63. 43 Mad. 629=(1920) M. W.N. 248=38 M.L.J. 437=11 L.W. 418.

——Art. 63—Limitation—Interest—Suit for.

Where the agreement was to pay interest yearly, a suit for interest beyond 3 years is barred. 20 O. C. 152=40 Ind. Cas. 229.

——Art. 64.

Synopsis.

1. Applicability of article.
2. Accounts stated.
3. Acknowledgment and Account stated—distinction.
4. Principal and Agent.
5. Reopening of accounts settled.
6. "Signed by defendant".
7. Starting point.

1. Applicability of article.

——Art. 64—Applicability.

A suit to recover the amount secured by a balance struck after going into accounts which implies a promise to pay is governed by Art. 64. A.I.R. 1932 Lah. 273=33 P.L.R. 213=138 Ind. Cas. 542.

——Art. 64—Partnership—Suit on accounts reciting defendant's credits and debits.

Plaintiffs and defendants were partners in certain transactions and all accounts relating to these transactions were entered either in the books of the commission agents or in those of defendants. After examining the accounts on 3rd August, 1920 an entry was made in the books of the plaintiffs in two columns. On the credit side was shown the plaintiff's share of the profits. On the debit side was shown the plaintiff's share of loss incurred. This was followed by a writing in defendant's own hand to the effect that the above mentioned accounts were correct as having been arrived at as the plaintiff's share of the profit after division.

On 15th June, 1925 the plaintiffs instituted a suit against the defendants for recovery of the sum due on foot of this entry.

Held, that the suit was within time, the Article applicable being 64 and Art. 106 had no application to the case. A.I.R. 1922 Lah. 425, Foll. 108 Ind. Cas. 600=29 P.L.R. 219=A.I.R. 1928 Lah. 459.

——Art. 64—Effect of adjustment of accounts.

Where an account stated comprises items on both sides and a balance is deducted thereon it being always in favour of one party and not shifting on one party or the other that balance represents the amount of liability for future and is recoverable within three years from the statement of account although some of the earlier items in the account may have been already time-barred. 106 Ind. Cas. 53=A.I.R. 1928 Nag. 127.

——Art. 64—Stamped and signed Hatchita.

A suit on a *Hatchita* stamped and signed by the debtor, containing a statement of adjustment of accounts and consisting in itself a distinct and unqualified promise to pay the amount found due on adjustment is governed by Art. 115 and not by Art. 64. In every case where Art. 64 is made applicable there need not be always a reciprocity of demands. 76 Ind. Cas. 603=A.I.R. 1923 Cal. 578.

——Art. 64—Money due on book accounts.

Plaintiff sued defendant for a sum Rs. 1,600 due as principal and interest on book accounts. It was alleged that defendant had struck a balance in favour of the plaintiff for Rs. 756-14-0 and that he had since taken a further sum of Rs. 57 and these items together with interest accrued due amounted to a total of Rs. 1,600.

The accounts on record were not mutual, open and current and there were no reciprocal demands between the parties.

Held, that Art. 85 does not apply but that the Article applicable is either 57 or 64. 4 L.L.J. 69=A.I.R. 1922 Lah. 204.

——Art. 64—Essentials for applicability.

A settlement in order to constitute a fresh cause of action in law must be a settlement of a mutual, current and open account, *i.e.*, a settlement in which both parties coming together set of their mutual rights and liabilities and arrive at a particular figures as the result of such set-off. Also, under Art. 64, the settlement must be in writing and signed by the defendant or his duly authorized agent. 86 Ind. Cas. 942=A.I.R. 1925 Mad. 1147.

——Art. 64—Applicability—Account kept in terms of grain.

Even if it were conceded that in order to bring a suit within the purview of Art. 64, it is not necessary to show that there have been cross or reciprocal demands between the parties, the article can only apply where the money found to be due is a definite sum entered in this account books and not where account is kept in terms of grain. 82 Ind. Cas. 91=A.I.R. 1923 Lah. 645.

——Art. 64—Where there was a current account and a mutual one, and the plaintiffs had claims against the defendants for money advanced *plus* interest and the defendants could set-off, against those claims, their shares of any profits made in the transaction in which the parties had a common interest, but the account was not open and current at the time of the suit and the account had been closed and had been settled by the striking of a balance.

Held, the article applicable is Art. 64 which applies to a suit for money payable for money found to be due on accounts stated. 68 Ind. Cas. 815=A.I.R. 1922 Lah. 182.

——Arts. 64, 120—Accounts stated by father—Divided son's liability—Hindu Law—Son's obligation.

An action on an account stated by a Hindu father against his divided sons who took his property on his death is governed by Art. 64. 23 A. 206; 1901 A.W.N. 34, diss. (1902) A.W.N. 199=25 A. 67.

2. Accounts stated.

(a) Effect of.
(b) Essentials.
(c) Time barred items.

2. (a) Accounts stated—Effect of.

——Art. 64—Accounts stated—Effect of.

An "account stated" does not extinguish the original debts on which the account is based. Therefore, it is open to the creditor to base his suit for the recovery of debts either on the "account stated" or on the original contract.

The Limitation Act does purport to deal with causes of action. 63 Ind. Cas. 280 (Pat.).

2. (b) Accounts stated—Essentials.

——Art. 64—Hatchita.

Where *hatchita* is executed against the amounts borrowed from time to time as shown in account books and the parties have agreed to this setting off and have accepted the balance as correct, a suit for money due on *hatchita* is a suit for money found to be due on accounts stated within the meaning of Art. 64. A.I.R. 1941 Cal. 595=197 Ind. Cas. 321.

——Art. 64—Account stated.

Plaintiff brought a suit for recovery of Rs. 246 based on an account stated between the parties on a certain date. It was alleged that the defendant used to have money dealings with the plaintiff and that on the date mentioned he went through the account and signed an acknowledgment of his liability to the extent of Rs. 200 in the plaintiff's *lekha bahi* and affixed a one anna stamp to the entry. The original debt was of Rs. 200:

Held, that the account in question was an account stated within the meaning of Art. 64 since the original debt being of Rs. 200 only and the balances struck being of the same amount, there must have been intermediate payments by the defendant. 1939 O.W.N. 176=11 R. D. 215=14 Luck. 478=A.I.R. 1939 Oudh 120=179 Ind. Cas. 931.

——Art. 64—In order to bring the case under Art. 64, there should be something in the nature of a fresh contract. A mere statement of the balance which is due on a particular date cannot be called an account stated within this article. 1938 A.W.R. 517=A.I.R. 1938 All. 504=(1938) A.L.J. 773=I.L.R. (1938) All. 741=177 Ind. Cas. 815.

——Art. 64—Account stated—Endorsement on pro-note.

On settlement of account in respect of a debt on a promissory note, a certain amount was found due on a particular date, on calculation of interest at a reduced rate. An endorsement to that effect was made on the back of the pro-note and was signed by the debtor:

Held, that the endorsement amounted to an account stated between the parties and a suit for recovery of the amount alleged to be due was governed by Art. 64. The suit was not one based on the pro-note and the cause of action for it arose on the settlement of the accounts as shown by the endorsement. A.I.R. 1936 Cal. 470=64 C.L.J. 75=166 Ind. Cas. 543.

——Art. 64—Account stated.

A document containing an entry signed by a creditor that on making account on a particular day in respect of the old *Sarkat* and after deducting repayments, a certain amount is found due including the interest, and also an entry signed by the debtor admitting the amount to be due, cannot be regarded as, "account stated". A.I.R. 1935 Nag. 221=159 Ind. Cas. 447 (2).

——Art. 64—'Account stated', meaning of.

There can, in law, be a settlement of account as between banker and customer, and that this is the law, is constantly assumed and acted upon in practice: but in such cases the dealings are purely financial on each side and consist of money credits and debits, in the course of which one side may never be able to sue the other for a demand or claim because he is always in debt to the other, though, if sued for the whole debt, he could avail himself of payments he has made in partial reduction of the debt on running account, though merely by way of set-off or counter-claim. The customer in such cases may have had a continuous overdraft, and be in this respect in the same position as the banker on the account in question. But it would be an unfortunate restraint on legitimate and ordinary business relations if the law were to say that an account could not be mutually stated and agreed to between parties in such relationship. The same conclusion governs the meaning of the term "account stated" in Art. 64.

The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto* go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. A.I.R. 1934 P.C. 147=40 L.W. 71=11 O.W.N. 1003=36 Bom.L.R. 723=67 M.L.J. 110=38 C.W.N. 961=59 C.L.J. 535=61 I.A. 273=(1934) M.W.N. 786=(1934) A.L.J. 623=56 A. 376=4 A.W.R. 174=150 Ind. Cas. 6 (P.C.).

——Art. 64—"Account stated", meaning of.

The words "accounts stated" in Art. 64 refer to a bilateral and not a unilateral transaction, and contemplates mutual accounts, *i.e.*, an account stated by one party and an account stated by the other party, that is, two accounts and not merely an account stated by a single party.

For an account stated under Art. 64, the account must be stated within the period of limitation, and the onus of proof is upon the plaintiff to show that his case is within the period of limitation on account of an acknowledgment and consequently, to show that the acknowledgment was within the period of limitation. (1932) A.L.J. 279=A.I.R. 1932 All. 461=54 A. 506=140 Ind. Cas. 783.

——Arts. 64, 85—Account stated.

The accounts between the plaintiffs and the defendants ran from July, 11, 1913, to February 5, 1914. On March 31, 1914, a balance of Rs. 823 odd was struck and this was followed by two items on each side. Interest ran on this amount and a second balance for Rs. 900 was struck on March 29, 1921. A suit was filed on April, 3, 1925 to recover this amount of Rs. 900 with interest:

Held, that the suit was not one on a mutual, open and current account within the meaning of Art. 85, Limitation Act but a suit on an account stated within Art. 64 and was, therefore, not time-barred. (1931) 130 Ind. Cas. 570.

——Art. 64—'Account stated', meaning of.

The expression 'account stated' in Art. 64 has a technical meaning. The signing of a balance after going into the accounts cannot amount to an 'account stated' where there are not sufficient materials on the record to show that the items for which credit was given to the defendant were due to the defendant from the plaintiff. A.I.R. 1931 All. 375=131 Ind. Cas. 867.

——Art. 64—Adjustment recorded in account books.

Credit account of one *D* with *K* was adjusted; balance was struck and the same was signed by *D*. In a suit by *K* for the recovery of the payment,

Held, the balance struck and accepted at the conclusion of the accounts was novation of contract and

implies a promise to pay and therefore gave a fresh period of limitation under Art. 64. 115 Ind. Cas. 764=10 Lah. 745=30 P.L.R. 240=A.I.R. 1929 Lah. 263.

——Art. 64—Accounts stated—Chithas—Separate debts.

Chithas having no reciprocal debits and credits but consisting of only one-sided debts taken by the defendants from the plaintiff cannot be said to be "accounts stated" within Art. 64. Each of the items is, a separate debt in itself and each of them will be barred on different dates. 120 Ind. Cas. 470=10 P. L.T. 169=8 Pat. 706=A.I.R. 1929 Pat. 258.

——Art. 64—The entry in the plaintiff's *bahi* signed by the defendants ran as follows:—"We have struck a debit balance against ourselves of Rs. 4,017-5-0 on account of advances and losses of every kind; interest to pay at the rate of Re. 0-7-6 per cent.;

Held, the entry is an account rendered adjusting the relations of the parties and is a promise to pay, and the suit therefore falls under Art. 64, the time under which is enlarged to 6 years by Punjab Limitation Act. Article 106 does not apply to the suit as this suit is not for an account, *i.e.*, an unascertained share of the profits of a dissolved partnership. 69 Ind. Cas. 502=3 Lah. 326=A.I.R. 1922 Lah. 425.

——Art. 64—What constitutes.

An account stated implies cross demands and it is the mutual surrender of these cross-demands that creates the new contract when an account is stated between the parties. In the absence of any cross demands there is nothing to take the settlement of account out of the ordinary rule. 60 Ind. Cas. 514 =6 P.L.J. 121=2 P.L.T. 308=A.I.R. 1921 Pat. 29.

——Art. 64—Entry of balance—Contract Act, S. 25—Promise to pay.

An entry of balance not containing a promise to pay within S. 25 of the contract Act cannot be relied upon to recover a time-barred debt entered therein. 9 C.L.J. 263=25 Ind. Cas. 89.

——Art. 64—"Account stated"—Meaning of—Limitation.

A mere statement of the balance which is due on a particular date cannot be called an account stated within Art. 64. An account stated is one where several cross items are set off, one against the other and the balance is struck off in favour of one of the parties, the law implying a new promise by the other party to pay the balance in consideration not merely of past debt, but also of the extinguishment of the old debts on each side and hence it is not necessary that it should be made within the period of limitation. 5 Pat.L.J. 371=1 Pat.L.T. 190=56 Ind. Cas. 379.

——Art. 64—Reciprocal demand.

Under Art. 64, it is not necessary to show that there were reciprocal demands between the parties. 26 M. 186.

2. (c) Accounts stated—Time barred items.

——Art. 64—Account stated — Time barred items.

Although the account is not of mutual claims but, on the one side, of sums advanced and interest payable and, on the other side, of repayments made, it can be an "account stated". In either case there is a contract for good consideration to pay the balance stated as due; it is not material that some of the items brought into the account were statute-barred. A.I.R. 1946 Nag. 112=I.L.R. (1946) Nag. 21 =(1945) Nag. L. J. 464.

——Art. 64—Account stated — Time barred items.

An acknowledgment which forms the basis of an account stated so as to form the basis of a suit must be an acknowledgment within time. It is true that an account stated may contain some time-barred items and yet the account stated may form the basis of a suit. But where all the items are time-barred the principle cannot be applied. A.I.R. 1942 Nag. 92 =1942 N.L.J. 248=I.L.R. (1942) Nag. 369=201 Ind. Cas. 550.

——Art. 64—"Account stated"—Some of debts time barred.

An 'account stated' is an account which contains entries on both sides and in which the parties have agreed that the items on one side should be set aside the items on the other side and the balance should be paid. The items on the smaller side are set-off and deemed to be paid by the items of the larger side from which arises a promise for good consideration to pay the balance. *A* stated account is a promise for good consideration to pay the balance even though some of the debts were barred by limitation. A.I.R. 1941 Cal. 595=197 Ind. Cas. 321.

——Art. 64—(—57 Bhopal)—"Account stated"—Essentials of—Some of items statute barred.

A document forming the basis of a suit, evidencing an account stated between the parties, need not contain the whole account in detail; a mere reference to an outstanding account which was settled mutually by striking a balance and by the admission of the debtor as to its correctness should be quite enough for the purpose. When an account has been settled, it is immaterial that some of the items were statute-barred.

In suits based on a stated account under Art. 64, Lim. Act (—Art. 57, Bhopal Lim. Act) it is always open to the defendant to challenge the document on various grounds such as fraud, undue influence, and want of proper knowledge. If he succeeds in establishing that the accounts were never understood by him and hence were never settled, the substratum of the plaintiff's suit will disappear. But on the other hand if it is proved that the parties went though the accounts and the defendant having fully understood every item of it on either side, had freely accepted his liability thereunder, the transaction would take the form of a new agreement legally known as account stated which is neither a simple acknowledgment of liability nor can it be called a new contract for want of an express promise to pay as contemplated by S. 25 (3), Contract Act. Therefore, the question of time-barred items, which came under consideration before a settlement was reached, does not arise. Just as a time-barred debt may be revived by an express promise to pay, in the same manner in settling an outstanding account, the debtor may accept liability as to the balance found due in respect of even time-barred items, and consequently, give rise to a new cause of action from the date of such acceptance. In the circumstances, it becomes possible to go behind such a mutual settlement so long as its integrity is beyond reproach. (1940) 189 Ind. Cas. 802 (Bhopal).

——Art. 64—Account stated—Some of items statute barred.

Where an account has been settled, it is immaterial that some of the items were statute-barred and if it is left in doubt whether all the items were so

barred, it would be for the defendants to upset, if they could, the validity of the settled accounts.

Where the accounts between the parties used to be periodically adjusted and so, in support of his case, the plaintiff has filed certain accounts of the previous years also in the course of the trial, it is for the defendant to prove, that the dues brought forward from the previous years' accounts were time-barred and in any case, the mere fact that some of the items are statute-barred can be of no avail to him where the suit has been brought on account stated. 3 B.R. 308=A.I.R. 1937 Pat. 348=167 Ind. Cas. 652.

——Art. 64—Account stated—Essentials—Time barred items.

Article 64 applies even when the account was between a creditor and a debtor and consisted of loan on one side and repayments on the other. The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross-items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the other *pro tanto*, go on to agree that the balance only is payable. Such a transaction is in truth bilateral and creates a new debt and a new cause of action. When an account is settled in this way, it will not matter even if some of the items were statute-barred. 37 P.L.R. 126=A.I.R. 1935 Lah. 877=159 Ind. Cas. 677.

——Art. 64—Account stated — Time-barred items.

Where an account has been settled, it is immaterial that some of the items were statute-barred.

Quaere—Whether the same principle would be applied if all the items were statute-barred. A.I.R. 1934 P.C. 147=40 L.W. 71=11 O.W.N. 1003=36 Bom.L.R. 723=67 M.L.J. 110=38 C.W.N. 961=59 C.L.J. 535=4 A.W.R. 174=(1934) M.W.N. 786=(1934) A.L.J. 623=61 I.A. 273=56 A. 376=150 Ind. Cas. 6 (P.C.).

3. Acknowledgment and Account stated—Distinction.

——Art. 64, S. 19—Account stated—Distinction between acknowledgment and account stated—Bhopal Lim. Act, Art. 57.

A line of distinction can be easily drawn between acknowledgment pure and simple on one hand, and 'account stated' within the true meaning of Art. 64 (—Art. 57, Bhopal Lim. Act) on the other. Acknowledgment is a wider term including account stated within its sphere, but differing therefrom in respect of the applicability of the provisions of S. 19, Lim. Act. Such an acknowledgment as is outside the scope of account stated is effectual only if made within the period of limitation, whereas an account stated is independent of this condition and takes effect in virtue of the provisions of Art. 64. Thus it becomes clear that S. 19, Lim. Act would continue to govern numerous, cases of acknowledgments for purposes of saving limitation, and its provisions would not become nugatory by the exclusion of such cases as properly fall within the accepted definition of account stated. (1940) 189 Ind. Cas. 802 (Bhopal).

——Art. 64—Statement of account—Mere acknowledgment.

A mere acknowledgment is not a statement of account. An endorsement expressed as follows:—"Will pay early next August" is not an agreement in writing as contemplated by Art. 64. It is nothing more than a proposal. 1 U.P.L.R. (J.C.) 13=52 Ind. Cas. 262.

——Art. 64—Acknowledgment signed by debtor in account book of creditor.

A mere acknowledgment signed by a debtor in the account book of his creditor showing a balance standing against the debtor on an account which is not a mutual account, is neither an account stated, to which Art. 64 applies, nor is it evidence of a new contract which can be basis of a suit. 15 A. 148=22 B. 513, foll. (1901) A.W.N. 150=23 A. 502.

4. Principal and Agent.

——Art. 64—Principal and agent—Statement of account—Limitation—Starting point.

On termination of any agency, the agent submitted a statement of account to the principal stating that a certain amount was due from him to the principal and that the principal could have it from him on demand at any time. But there was no simultaneous agreement in writing between the parties that the amount so due was kept in deposit with agent and was made payable at future date:

Held, that for the recovery of such amount, the limitation was three years under Art. 64, from the date when the accounts were submitted by the agent in writing to the principal. A.I.R. 1937 Cal. 535=174 Ind. Cas. 154.

——Art. 64—Principal and agent.

Even in a suit by commission agent, where the accounts were stated and balance struck, Art. 64 applies and not Art. 85. 100 Ind. Cas. 874=A.I.R. 1928 Lah. 51.

——Arts. 64 and 83—A suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook as commission agents on behalf of the defendants is governed by Art. 83 and not by Art. 64. 92 Ind. Cas. 595=7 L.L.J. 596=27 P.L.R. 32=A.I.R. 1926 Lah. 152.

5. Reopening of accounts settled.

——Art. 64—Settled account—When to be reopened—Onus—Pleadings — Specific averment —Estoppel.

When accounts have been settled they are *prima facie* to be taken as a settlement of all valid items of debit and credit existing between the parties at the time of settlement, but the parties will not be concluded by such presumption as to matters which were not contemplated by them or which were not in fact included in the settlement, though they existed at the time, provided there is no element of estoppel or no obligatory agreement between the parties as upon a settlement and mutual compromises. The onus is always on the party having liberty to surcharge and falsify on the ground of mistakes and omissions. An account which has been settled may be rectified, if mistake is established, and it does not matter whether the error in the accounting was caused by accident or design, nor is it necessary that an error or mistake should be mutual. Ordinarily when the plaintiff impeaches accounts which have been settled, on the ground of errors, such errors ought to be specially stated. Where the plaintiff did not make specific averment of errors but asked for relief only upon the

general ground that items of joint family property had been excluded from partition, but no objection was taken by the defendants to the frame of the suit, and after the preliminary question of the liability of the defendant to render account had been decided in favour of the plaintiff, the parties went into an elaborate examination of the accounts without objection and it did not appear that the defendant was in any way prejudiced by the omission in the plaint: *Held*—that the objection that the errors were not specified in the plaint could not prevail. 9 C.L.J. 133=13 C.W.N. 309=3 Ind. Cas. 241.

——Art. 64—Settlement of accounts—No fraud or undue influence used in settlement—Promissory note for the amount found due—Re-opening of accounts, not allowed.

Where two persons have mutual dealings and accounts, and one of them of his own free-will and accord and without any fraud practised or undue influence exerted by the other, waives his right to an examination of the accounts for the purpose of ascertaining the balance due, and agrees to treat a gross sum as due from him, and executes a promissory note for the amount, the promissory note must be treated either as a result of a settled account or as a settlement by compromise, and in neither case can it be reopened. (1908) 10 Bom.L.R. 281=32 B. 353.

——Art. 64—Accounts settled—When can be re-opened—Requisites of—Acquiescence.

The requisites for making an account settled depends on the circumstances of each case and the mode of dealing between the parties. Although acquiescence in accounts furnished may not, by itself, amount to settlement, when accounts have been delivered with opportunity for inspection, where they have been duly examined and no exception has been taken, and where they have been acquiesced in, they cannot be opened unless upon distinct and specific averment of errors proved or of fraud, mistake or collusion proved. If a settled account is impeached for errors, particular errors must be stated and proved, and the same rule holds even where the account is settled "errors excepted." (1907) 6 C.L.J. 580=12 C.W.N. 28.

——Art. 64—Settled, when can be re-opened—Surcharge and falsification — General words of release—What passes.

B and *S*, partners, had the partnership accounts strictly adjusted and Rs. 39,465-7-0 was found due to *B*. By a deed of assignment *B* in consideration of Rs. 34,000 assigned and released his share in the firm to *S*. By common mistake Government promissory notes for Rs. 7,000 were omitted from the accounts. On discovery of the mistake *B* sued for a share of the notes. *Held*:—Either the whole account may be re-opened or leave may be given to *B* to surcharge and falsify. The latter is the more proper course on the facts of this case. General words of release in a deed can only operate to pass what the parties had in contemplation and not something with which they had no intention of dealing. 4 A.L. 610 and 14 Ch. D. 829, foll. 11 C.W.N. 776.

6. "Signed by the defendant."

——Arts. 64, 85—Account stated.

Plaintiff sued on account of dealings had by defendant with plaintiff. The plaint was based on a settlement of account. The actual page of the account bearing alleged settlement entry was proved to be all in the handwriting of the defendant. The heading showed that it was the account of the defendant, and that also was in the handwriting of the defendant. Then followed a series of entries all in the handwriting of the defendant and a mere pencilled totalling and striking of the balance. There was nothing in the way of an authentication of this balance or an express indication that the writer accepted it as binding upon himself and authenticated it as accepted by the person whose name appeared at the head of the account:

Held, that the writing of the name at the head of the accounts could not possibly be regarded as an authentication of the balance finally struck approximately one year later, and hence Art. 64 did not apply.

Held, further, that Art. 85, however, applied to the case as there were a number of credit entries showing counter-claims for the defendant in the same account and the balance shifting and at times against the plaintiff. (1940) 2 M.L.J. 334=(1940) M.W.N. 882=A.I.R. 1940 Mad. 887=192 Ind. Cas. 350.

——Arts. 64, 35—Signed.

The plaintiff sent cotton for sale to the defendants who were a firm of commission agents and the defendants made payments to the plaintiff on this account from time to time. Eventually, the defendant's *munim* gave to the plaintiff a document in his own hands containing a copy of the account and a statement at the end that a certain sum was due to the plaintiff. Below this entry there was the seal of the defendant's firm and the name of this firm appeared at the top in the handwriting of the *munim*:

Held, (1) that there was no mutuality in the accounts but there was an account stated and the suit was governed by Art. 64 and not by Art. 85 (2) that the affixing of the seal of the defendants firm was a sufficient signing within the meaning of Art. 64. 14 L. 14=A.I.R. 1933 Lah. 12=34 P.L.R. 381=140 Ind. Cas. 187.

——Arts. 64 and 85—'Stated account'—Mere striking of balance in accounts not signed by deft.—"Settlement of accounts" whether always a "stated account"—Account not running up to date of suit—Applicability of Art. 85.

Mere striking of the balance due on a certain date in the unsigned account-books will not furnish a cause of action on an account stated under Art. 64. 10 M. 199, Foll. Settlement of a mutual open and current account is possible within Art. 85 without there being a stated account. Art. 85 applies though on the date of the suit there was no running account. 32 M.L.J. 536=5 L.W. 364=38 Ind. Cas. 227.

——Art. 64—Account settled—Signature, necessity of.

An account to be a settled account need not be signed, provided it is submitted to the party sought to be made liable on it and he has by words or conduct acquiesced in its correctness. (1940) 7 Bom. L.R. 151.

7. Starting points.

——Art. 64—Account stated—Commencement of limitation.

The defendants who were dealers in grain and other articles used to send their goods to the shop of

the plaintiffs for sale and the latter, after deducting the commission and other charges, credit the balance of the price to the defendants in the account. On 15th February, 1921, the defendants struck a balance in favour of the plaintiffs for Rs. 2,071-1-9, and interest on the items borrowed by their firm was entered from time to time in the account which resulted in the balance. After the striking of the balance, there were only four items on the credit side aggregating Rs. 847-10-6 and the same number of items on the debit side amounting to Rs. 775-1-0. A suit for balance due on accounts was filed on 31st March, 1925:

Held, that when the defendants struck the balance on 15th February, 1921, in favour of the plaintiffs and they also agreed to pay interest on the sum found due by them, the account between the parties became an account stated within the meaning of Art. 64, and the period of six years commenced to run from the date of the striking of the balance. The plaintiffs were entitled to bring their suit within six years from the date of the balance and the mere fact that subsequently there were four items on each side of the account did not have the effect of converting that account into a mutual open and current account and of reducing the period of limitation from six years to three years. 32 P.L.R. 65=A.I.R. 1931 Lah. 233=131 Ind. Cas. 292.

——Art. 64—Accounts stated—Surety liable for any amount on any account—Stipulation, if account stated—Starting point of limitation.

The plaintiff Bank agreed to allow the defendant an overdraft to the extent of Rs. 1,000 on a surety of a person to the extent of that amount. The surety agreement which was executed, was in the following terms: "in consideration of your allowing from time to time an overdraft in current account upto a maximum of Rs. 1,000 only to.....I hereby agree to hold myself responsible for the due repayment of the same or any unpaid portion thereof together with interest and I undertake to pay you the amount which may become due to you under this guarantee upon your demand. I further undertake to pay on demand any money for which he may become liable alone or jointly with any other person or persons to you on any account whatsoever and for interest, commission or other Bank's charges to the extent mentioned above exclusive of interest." The Bank continued to make advances to defendant from time to time and in June, 1929, the amount due was Rs. 1,867-4-0. For the advances of cash over Rs. 1,000 the defendant's 1st party provided a security. The suit was instituted on 24th July, 1930. It was admitted that with the exception of Rs. 100 which the Bank advanced on 27th July, 1927, there were no advances from the bank to defendant within three years of the institution of the suit. On 30th January, 1929, however, the Bank sent a statement of account to defendant showing the amount then due from him. Defendant signed the statement and returned it. A copy of the account was also sent to the surety who, however, declined to sign it. On 20th January, 1930, the Bank again sent a statement of the account to defendant. A copy was again sent to tthe surety who again declined to sign it:

Held, that the surety undertook not only to guarantee the overdraft to the extent of Rs. 1,000 but by the second paragraph, he agreed to hold himself liable for the dues of defendant "on any account whatsoever" to the extent of Rs. 1,000 and interest thereon and commission of the Bank's charges in respect thereof; there was an account stated as between the Bank and defendant which implied a liability on the part of the latter to pay the Bank the amount ascertained to be due to them. The second part of the letter of guarantee covered this liability and the defendant was therefore liable to the plaintff to the extent of Rs. 1,000 of the sum so ascertained, together with interest and commission or the Bank's charges in respect of it. The starting point of limitation for a suit to enforce this liability was not earlier than the date on which the account was stated under Art. 64. The suit was, therefore, in time. A.I.R. 1936 Pat. 444=2 B.R. 404=162 Ind. Cas. 178.

——Art. 64—Starting point of limitation.

For money payable to the plaintiffs, for money found to be due from the defendant, the limitation, is three years from the date when the accounts are stated in writing signed by the defendant. A.I.R. 1937 Cal. 535=174 Ind. Cas. 154.

——Art. 65.

Synopsis.

1. **Applicability of Article.**
2. **Starting point.**

1. Applicability of Article.

——Art. 65.—Applicability.

Drawee of *hundi,* discharging *hundi* and suing drawer for money—Cause of action arises when the discharge is obtained and not on the date of the acceptance of *hundi*—Article 115 and not Art. 65 applied. A.I.R. 1936 Lah. 668=38 P.L.R. 276=163 Ind. Cas. 928.

——Arts. 65, 182—Applicability.

Person to whom certain attached movables were entrusted executing surety bond and agreeing to produce property whenever called upon to produce by the Court—On failure, he and his heirs to be bound by any orders of Court—Application by decreeholder more than three years after date of decree for execution against surety:

Held, that the application was governed by Art. 182 and not Art. 65. (Cause of action when arose stated) 37 L. W. 127=(1932) M.W.N. 1296=A I.R. 1933 Mad. 219=142 Ind. Cas. 368.

——Art. 65—Applicability.

Art. 65 applies only where there is an agreement between the parties to pay the loss immediately on its being ascertained and in the absence of any specified time or specified contingency that article would not apply. 33 Bom.L.R. 1200=A.I.R. 1932 Bom. 25=136 Ind. Cas. 481.

——Art. 65—Registered bond—Bond debt—Debt due at once if default made—Creditor's option.

Where a debt incurred on a registered simple bond was to be paid within seven years, but on default to pay interest consecutively for two years it was to become payable at once and a default was made.

Held, that the bond was not a 'single' bond of that there was no 'specified day of payment' that therefore the article that applies for a suit on the bond is not Art. 66 but Art. 80. Where such a condition exists the question is not one of waiver but of pure contract and the creditor is entitled to adopt either of the two alternative expressly contemplated by the bond. The original promise to pay the debt within seven years, gave another remedy to the creditor to enforce at the end of that period. The failure to sue

within time from the default does not bar the second remedy. 16 O.C. 45, Foll. 70 Ind. Cas. 85=9 O. L.J. 416=26 O.C. 121=A.I.R. 1923 Oudh 19.

——Art. 65—Debt payable in kind.

A claim for recovery of a debt payable in kind falls under Art. 65 or 115 and not under Art. 120. 65 Ind. Cas. 691=4 L.L.J. 268=A.I.R. 1922 Lah. 271.

——Art. 65—The limitation for a suit for recovery of a debt in kind payable in kind is three years and not six, and a claim for such debt cannot be combined with that for the money so as to make the longer period of limitation govern the whole claim by virtue of a mere conversion or valuation in cash entered in the plaintiff's account book. 41 P. R. 1918, Foll. 4 L.L.J. 64=A.I.R. 1922 Lah. 122.

——Arts. 65 and 115—Letter of guarantee—Article applicable.

Art. 115 governed a suit by a creditor against a surety on a letter of guarantee executed by the latter in respect of a debt payable on demand on a promissory note and not Art. 65, and limitation runs from date of execution of the guarantee notwithstanding a stipulation in the guarantee that the creditor may look for re-payment to the surety if the principal debtor makes default. Art. 115 also applies to a case of liability on a simple debt due and is not limited to cases of damages for breach of contract. 25 C. L.J. 91=21 C.W.N. 479=39 Ind. Cas. 205.

——Arts. 65, 66 and 68—Mutual relation.

These articles of Lim. Act are not separate, arbitrary rules but concrete examples of two general rules., *viz.*, (1) A plff. can file a suit to recover simple debt within three years only; (2) the date on which he has the right and is in a position to file a suit is the starting point of limitation. 9 S.L.R. 90=31 Ind. Cas. 479.

——Arts. 65, 115 and 120—Suit for—Compensation for breach of contract.

A suit may properly be described as one for compensation for breach of contract within Art. 115 although it may be a suit for recovery of a specified sum of money due under the contract. 6 B. 75 and 6 C. 94, Foll. 12 C.L.J. 423=8 Ind. Cas. 788.

——Arts. 65 and 115—Suit for recovery of grain.

A suit for the recovery of grain advanced with interest in kind or its value is governed by Art. 65 or 115 and not by Art. 52 or 57 of the Act. 41 P.R. 1918=49 Ind. Cas. 231.

2. Starting point.

——Art. 65—Settlement of liquidated damages—Starting point.

In suit for damages for breach of a contract where parties have settled the amount of liquidated damages, prior to the date of the performance of the contract, limitation runs from the time originally fixed for its performance and not from the date of the settlement regarding the liquidated damages. 99 Ind. Cas. 591=A.I.R. 1927 Lah. 122.

——Art. 65—Further charge—Redemption of prior charge—Starting point.

Where money under a further charge was payable at the time of redemption of the prior mortgage and the mortgage was redeemed under a compromise leaving the right to recover the money under the charge unaffected, a suit for recovery of the money can be brought within three years of the redemption. 3 O. L.J. 714, Foll. 99 Ind. Cas. 466=3 O.W.N. 976 =A.I.R. 1927 Oudh 53.

——Art. 65—Starting point.

A co-sharer sold lands to the plaintiff pending partition proceedings, and agreed in the sale-deed itself that in the event of his not getting the land to his share in the said partition proceedings, he would pay compensation to the plaintiff. The vendor was allotted at the partition a less area than the area sold and the plaintiff sued for compensation.

Held, that Art. 65 along with Art. 116 applied to the case and that time began to run against plaintiff from the date when the vendors were finally allotted a less area. 72 Ind. Cas. 897=A.I.R. 1923 Lah. 23.

——Art. 65—Where defendant agreed to give half of certain lands to plaintiff who was to help him in recovering the same from third persons, and the plaintiff sued the defendant, thereon after the recovery of the lands.

Held, limitation ran from the date of refusal of defendant to give the plaintiff half the land recovered. 71 Ind. Cas. 40=A.I.R. 1923 Nag. 47.

——Art. 65—Subsequent deed executed in favour of mortgagee.

Where a subsequent deed is executed by the mortgagor in favour of the mortgagee agreeing that he would pay the amount under subsequent deed when the mortgage was redeemed, the subsequent deed was held to be a simple deed and not a deed of further charge and that the mortgagee would be entitled to a simple money decree in respect of it and the cause of action arose under Art. 65 on the date when the mortgage was redeemed in whole or in part. 3 O. L.J. 714=38 Ind. Cas. 480.

——Art. 65—Surety—When time runs against.

Time runs against the surety from the date of the loan; Art. 65 applies. (1911) 1 M.W.N. 41=9 M.L.T. 215=21 M.L.J. 457=9 Ind. Cas. 204.

——Art. 66.

Synopsis.

1. Applicability of Article.
2. Starting point.

1. Applicability of Article.

——Arts. 66, 80—Single bond.

The plaintiff instituted a suit on September 1, 1936, for recovery of money on foot of a bond, dated September 2, 1926. The bond provided that the loan would be repaid within seven years from the date of execution of the bond. There was also a stipulation that interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for the recovery of the entire debt with interest. No interest was paid by the defendant in any year:

Held, that the bond such as one in question was a single bond notwithstanding the fact that there was what is called a default clause. Nor was it an instalment bond. The option given to the creditor was purely for the benefit of the creditor and did not make the money become payable. It merely gave the creditor a right, if he chose to exercise it, to have the money made payable. Neither of the Arts. 66,

74 and 75, were applicable to such a case. In such a case the period of limitation for instituting a suit for the amount due under the bond, ran from the date specified for payment as prescribed by Art. 66 and that it did not run from the date of the first default in payment of interest, nor did the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80. 1941 O.W.N. 361=1941 A.W.R. 108=A.I.R. 1941 Oudh 210=16 Luck. 464=193 Ind. Cas. 481 (F.B.).

Overrules—(1) A.I.R. 1925 Oudh 502=85 Ind. Cas. 280 and (2) A.I.R. 1936 Oudh 279=162 Ind. Cas. 459=12 Luck. 211.

——Art. 66—Suit against legal representative of executant.

Article 66 makes no reference to the person against whom the suit is brought. To attract the application of the article, all that is necessary to show is that the suit is based "on a single bond where a date is specified for payment," whoever may be the person against whom the bond is sought to be enforced. It is perfectly immaterial whether the defendants are the original obligors or their legal representatives, so long as the suit is on the bond itself. 1937 A.W.R. 396=(1937) A.L.J. 403=A.I.R. 1937 All. 559=168 Ind. Cas. 359.

——Arts. 66, 67—Applicability.

Neither Art. 66 nor Art. 67 applies to a suit for a personal decree under a registered mortgage-decree. 37 Bom.L.R. 170=A.I.R. 1935 Bom. 203=59 B. 634=156 Ind. Cas. 286.

——Art. 66—Personal covenant in mortgage.

Where upon a sale of the mortgaged property under a mortgage decree obtained in a suit on a registered mortgage-deed, there is a deficiency, the period of limitation to recover the same under a personal covenant in the said deed is six years under Art. 116 and not 3 years under Art. 66. 116 Ind. Cas. 817 =52 Mad. 105=29 M.L.W. 143=A.I.R. 1929 Mad. 53=56 M.L.J. 10 (F.B.).

——Art. 66—Personal decree against mortgagor.

Where in a suit based upon a registered mortgage executed by the manager of a joint Hindu family, the mortgage prays for an alternative relief that in case the mortgaged property be not liable for payment of the mortgage debt, he should be given a personal decree the limitation for such a relief is governed by Art. 116 and not by Art. 66. 113 Ind. Cas. 489=5 O.W.N. 836=4 Luck. 107=A.I.R. 1928 Oudh 465.

——Art. 66—A suit on a personal covenant in a mortgage deed is governed by Art. 116 and not by Art. 66 and the period of limitation is 6 years and not 3 years. 44 I.A. 65, Appl. 28 M.L.W. 624=1928 M.W.N. 873=A.I.R. 1928 Mad. 1124=55 M.L.J. 506.

——Arts. 66 and 116—Article 66 applies to claims based on a single bond. A single bond means a bond merely for payment of a certain sum of money without any condition in or annexed to it. A mortgage-deed which contains a covenant making the mortgagor personally liable cannot be considered to be a single bond within the meaning of Art. 66. Claim based on such a mortgage-deed is governed by Art. 116 and not by Art. 66. 113 Ind. Cas. 489=5 O.W.N. 836=4 Luck. 107=A.I.R. 1928 Oudh 465.

——Arts. 66 and 132—Suit for deficiency.

Where a mortgagee sues on a personal covenant for any deficiency in the realization of the mortgage debt out of the mortgaged properties, the claim is barred in three years, it being governed by Art. 66 and not Art. 132. A.I.R. 1926 P.C. 56, Foll. 4 O.W.N. 1049=A.I.R. 1927 Oudh 567.

——Art. 66—Personal decree—Mortgage bond.

A personal decree for the balance of mortgage money not realised by the sale of the hypothecation can be allowed within six years from the expiry of the term provided for payment in the mortgage bond. 17 A.L.J. 14=50 Ind. Cas. 640.

——Art. 66—In pursuance of a mortgage-decree, mortgaged property was sold, but the net proceeds of the sale were found to be insufficient to pay the amount due under the decree. Steps were taken to get a decree prepared under O. 34, R. 6, for the balance of the amount decreed to be recoverable from the judgment-debtor otherwise than out of the property sold. The suit on mortgage was within time for the relief on personal covenant.

Held, that the proceeding was merely working out the mortgage-decree and no question of limitation arose. And even if governed by the Limitation Act the decree was merely supplemental and if the suit was in time there can be no plea of limitation. 114 Ind. Cas. 769=5 O.W.N. 1094=4 Luck. 237=A.I.R. 1929 Oudh 59.

——Art. 66—Principal and surety.

Where a bond which was executed on by 2 persons one as debtor and the other as surety,

Held, that the Article applicable was Art. 66 the suit being certainly one on a single bond executed by 2 persons with a day specified for payment and that the suit was in time as the period of 3 years under Art. 66 is extended to 6 years by the Punjab Loans Limitation Act. 76 Ind. Cas. 150=A.I.R. 1924 Lah. 534.

——Arts. 66 and 115 and 120—Deposit of money—Repayable at fixed date.

Where money is deposited with a person for certain expenses and the balance is repayable with interest at a fixed date, it is a loan repayable at a fixed date; and is governed by Art. 66 and if not, by Art. 115, and not by Art. 120. 37 Mad. 175=24 Ind. Cas. 852.

——Arts. 66 and 116—Mortgage bond, money due under—In substance a suit for compensation for breach of contract.

A suit in the form of a suit for money due under an invalid mortgage bond is in substance a suit for compensation for breach of contract and if the compensation for breach of contract and if the bond is registered Art. 116 applies, giving six years limitation. 38 Bom. 177=16 Bom.L.R. 20=23 Ind. Cas. 353.

——Arts. 66 and 115—Contract in writing registered.

A suit, for the recovery of money deposited with another and repayable on the happening of a future event, and brought after the happening of the event, for "compensation for the breach of any contract not in writing registered" within the meaning of Art. 115, is barred if not instituted within three years from the date on which the event happened. Neither Art. 60, nor 66 or 120 governs such a suit. (1914) M.W.N. 264=22 Ind. Cas. 60.

2. Starting point.

——Arts. 66 and 80—Suit on simple money bond with option to creditor to sue within the term of years fixed—Starting point of limitation.

Where a simple money bond gives an option to the creditor to sue for the whole amount due under the bond within the period of ten years' term fixed in it on default of payment of interest, it does not make it obligatory on the part of the creditor to enforce it. Whether the bond falls under Art. 66 or Art. 80, the starting point of limitation is the date when the term fixed in the bond expires. 1950 A. L.J. 666.

——Art. 66—Starting point of limitation.

Where the bond provides that the loan would be repaid within 7 years from the date of execution of the bond and that interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for recovery of the entire debt with interest, the limitation starts from the date specified for payment under Art. 66. 1941 A.W.R. 108=16 Luck. 464=A.I.R. 1941 Oudh 210=1941 O.W.N. 361=193 Ind. Cas. 481 (F.B.).

Overrules—(1) A.I.R. 1925 Oudh 502=85 Ind. Cas. 280 and (2) A.I.R. 1936 Oudh 279=162 Ind. Cas. 459.

——Arts. 66, 68—Single bond—Starting point of limitation.

Where a simple money bond provides that if the monthly interest is not paid or if the principal money lent is not paid at the end of the year, in either case the creditor may sue, even though there is a breach of the condition for payment of interest, still that is a matter over which a creditor has a right of waiver and limitation will only start from the period stipulated in the bond for payment. In such cases, the clause regarding the right to sue on breach of condition regarding interest is exclusively for the benefit of the creditor. The two Articles 66 and 68 must be read together in the case of the bond in suit and limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together are tantamount to Art. 132 and the expression "when the money sued for becomes due" would apply to either Art. 66 or Art. 68. 1935 A.W.R. 252=A.I.R. 1935 All. 405=(1935) A.L.J. 341=157 Ind. Cas. 409.

——Art. 66—Starting point of limitation.

A simple money bond executed on April 1, 1931, provided that interest should be payable six monthly and that the whole sum with interest should be paid within one year. The suit on the bond was brought within three years from the due date for payment, *i.e.*, April 1, 1932:

Held, that Art. 66, applied to the case. It was open to the debtor to make a payment before the end of the period of one year fixed because the bond stated that it was payable on demand, that is, on demand of the creditor. Until the creditor made a demand, the bond was not payable. This clause, therefore, gave the creditor an option and it did not give any option to the debtor. Consequently, the suit was not time-barred. (1935) A.L.J. 381=1935 A.W. R. 205=A.I.R. 1935 All. 443=154 Ind. Cas. 521.

——Arts. 66, 80 and 116—Mortgage bond—Money repayable within fixed period—Payment of interest in instalments—Whole amount realisable on default.

A mortgage bond provided that money was to be repaid in five years, that interest was to be paid every six months that in case of non-payment of interest for four six monthly periods, the creditor would have power to realise the whole amount in a lump sum within the fixed period. On such default taking place a suit instituted within six years of the expiry of the period fixed for repayment but beyond six years of the non-payment of two years interest, was not time barred. 2 U.P.L.R. (All.) 102=18 All.L.J. 476 =58 Ind. Cas. 278.

——Art. 66—Bond — Payable within three years and interest payable monthly — Default—Article applicable.

Where a bond provided that the money was of interest, creditor would have option payable within three years from date of bond and that the interest was payable monthly but on the default of payment to sue forthwith or await the stipulated period, *held*, that a suit to recover principal and interest brought within three years of the stipulated date for clearing the bond, was not barred by limitation and Art. 66 applied to such a case, the creditor being presumed to have exercised the option given in the bond. 15 A.L. J. 313=39 Ind. Cas. 574.

——Art. 66—Fixed deposit.

When a deposit is for a fixed period, the money is payable at the specified time, *viz.*, the expiry of that period and the article applicable is either Art. 66 or Art. 115. A.I.R. 1936 Rang. 338=164 Ind. Cas. 412.

——Art. 66—The day specified.

Where a mortgage-deed, dated February 13, 1894, recited a previous mortgage under which the mortgaged land was in the mortgagee's possession and contained a clause that the mortgagor would redeem the second mortgage at the same time when he would redeem the first mortgage:

Held, that the previous mortgage did not merge in the new transaction, and that the condition that he would pay the mortgage money at the same time when he would discharge the prior mortgage, did not amount to specifying a day for payment within the meaning of Art. 66, and that, therefore, the period of limitation for a suit to enforce the second mortgage expired on the expiry of twelve years from February 13, 1849. A.I.R. 1933 Lah. 84=34 P. L.R. 37=140 Ind. Cas. 855.

——Art. 67—Void mortgage.

Where a house was mortgaged while under attachment, a suit by mortgagee to enforce the personal security is governed by Art. 67, the mortgage being void altogether. Art. 97 does not apply to such a case. 27 P.L.R. 801=A.I.R. 1927 Lah. 101.

——Art. 67—Balances struck in accounts—Punjab Act 1 of 1904.

Balances struck mentioning that interest is payable at the Saucara rate are bonds and not mere acknowledgments and period of limitation for suit on basis of balances is six years. 84 Ind. Cas. 524=5 Lah. 406=6 L.L.J. 595=A.I.R. 1925 Lah. 75.

——Art. 67—Book entry—Suit for recovery of money due on.

A book entry containing a promise to pay at a certain rate of interest and attested by witnesses is a bond and a suit for recovery of the money due thereon, comes under Art. 67. 56 Ind. Cas. 117 (Lah.).

——Arts. 67 and 66—Starting of limitation on a condition of happening.

When a condition is made in the bond that payment is to be made on the happening of certain future event, time begins to run from that date.

Neither Art. 66 nor 67 applies to such a bond. 30 P.W.R. 1916=32 Ind. Cas. 575.

——Art. 67—Security bond—Failure to produce judgment-debtor in Court—Consideration—Bond enforceable—Limitation—Security bond, hypothecating movable property, if to be attested and registered.

Where a security bond prescribes that the defendant would pay Rs. 500, if upon the dismissal of an application for insolvency he failed to produce the judgment-debtor when required by the Court.

Held. that the covenant was perfectly legal and enforceable by suit. Such a suit brought within three years from the date of the failure to produce was not barred by limitation. 16 A. 33, followed. A mortgage of movable property does not require to be attested and registered. (1910) 12 C.L.J. 419=7 Ind. Cas. 917.

——Arts. 68, 29, 48 and 49—Suit held governed by Art. 49 and not by Arts. 68, 29 or 48.

In the year 1935, *D* instituted a suit against *K* for the recovery of Rs. 99 alleged to be due by way of rent, *D* applied for the attachment before judgment of two brick kilns which he alleged belonged to *K*. The application was granted and the attachment effected. As it was not possible to remove the kilns, the amin left them in the custody of *D* on his entering into a security bond for the sum of Rs. 1,500. The bond was executed on 19th December, 1935. On 17th January, 1936, *P* filed a petition under O. 21, R. 58, obtaining to the attachment on the ground that the kilns belonged to him. On 25th January, 1936, *P* filed an interlocutory application asking the Court to direct delivery of the kilns to him. The Court passed an order cancelling the attachment and directing *D* to deliver the kilns to *P*. The delivery was effected on 26th January, 1936. *P* then discovered that all the bricks had been removed from one kiln and a quarter of the bricks from the other kiln. On 4th March, 1936, the Court dismissed *D's* suit and allowed *P's* petition under O. 21, R. 58. On 25th January, 1939, P filed a suit against *D* for recovery of the loss of the bricks removed by *D*:

Held, that the suit was governed not by Arts. 68, 29 or 48 but by Art. 49 and was within time being within 3 years from 26th January, 1936. A.I.R. 1946 Mad. 33=I.L.R. (1945) Mad. 784=58 Mad. L.W. 108=(1945) Mad.W.N. 160=(1945) 1 Mad. L.J. 265.

——Art. 68—Applicability.

Article applies to a suit on bond and not to a suit for compensation for removal of the attached property. 58 M.L.W. 108 (2)=(1945) 1 M.L.J. 265 =1945 M.W.N. 160=A.I.R. 1946 Mad. 33=I.L.R. (1945) Mad. 784.

——Art. 68—Bond subject to condition.

Where the bond provides that the loan would be repaid within 7 years from the date of execution of the bond and that the interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for recovery of the entire debt with interest, it cannot be said to be a bond subject to a condition within the meaning of Art. 68. A.I.R. 1941 Oudh 210=1941 A.W.R. 108=1941 O.W.N. 361=16 Luck. 464=193 Ind. Cas. 481 (F.B.).

Overrules—A.I.R. 1925 Oudh 502=85 Ind. Cas. 280.

——Art. 68—Suit for refund of purchase-money by auction-purchaser.

Where an auction purchaser loses portion of the property purchased by him under a decree passed in a suit by a third party, his suit for recovery of purchase money is governed by 3 years' rule either under Art. 68 or Art. 97 and Art. 120 does not apply. 1937 O.W.N. 83=A.I.R. 1937 Oudh 286=13 Luck. 138=166 Ind. Cas. 705.

——Art. 68—Applicability—Surety bonds.

Article 68 applies to suit on a surety bond. A.I.R. 1943 Pat. 218=22 Pat. 114=9 B.R. 260=206 Ind. Cas. 126.

——Art. 68—Guardianship—Surety bond—Suit by assignee.

In the case of bonds by sureties under the Guardians and Wards Act, the proper procedure is to get an order to pay against the guardian and if he fails to comply with the order, to sue the sureties in respect of the breach. The suit will be governed by Art. 68 except where immovable property is charged. 42 Mad. 302=36 M.L.J. 114=25 M.L.T. 229=(1919) M.W.N. 468=9 L.W. 278=49 Ind. Cas. 587.

——Art. 68—Probate and Administration Act (5 of 1881), S. 78—Surety's liability.

A suit to enforce a surety's liability under an administration bond is barred under Art. 68 of the Limitation Act if not brought within three years of the breach of a condition mentioned in the bond. 8 Bur.L.T. 59=8 L.B.R. 99=26 Ind. Cas. 505.

——Art. 68—Suit to recover money on a bond.

The suit to recover money on a bond having been brought after three years from the date of breach of its condition is barred by limitation. 5 L.W. 706=40 Ind. Cas. 235.

——Art. 68—Agreement for the performance of specified act—Damages.

An agreement for the performance of a specified act and in the event of non-performance to pay a sum of money by way of damages does not amount to a bond does not come within Art. 68. 171 P. L.R. 1915=107 P.W.R. 1915=30 Ind. Cas. 429.

——Arts. 68, 80—Conditional bond—Limitation starting point.

Bonds can be divided into two classes, single and double, or unconditional and conditional.

(Nature of such bonds pointed out.)

A bond by which a debt was secured contained "accounts have been made and Rs. 9,091-0-3 is due from us to you.....The following agreement has taken place between you and us that if we pay you Rs. 7,000 by 23rd May, 1930, and if we pay this amount by the date fixed, you will give up the balance, Rs. 2,091-0-3 and pass a receipt in full satisfaction of the bond, but if we do not pay you Rs. 7,000 by the date fixed, we shall be liable to pay the whole of the amount of Rs. 9,091-0-3, and we shall pay you compound interest at 10 annas per cent. per mensem on this amount from the date of the bond":

Held, upon construction that the bond provided that, if on or before 23, May, 1930, the person under obligation should pay Rs. 7,000, then the bond would become void, that is to say, no further sum was due to, and no further remedy remained in the creditor. That being so, this was not a single bond, and either Art. 68 or Art. 80, applied.

Held, further that whether Art. 68 or Art. 80 applied, the date when limitation began was 24th May, 1930. A.I.R. 1938 Nag. 13=I.L.R. (1938) Nag. 399=173 Ind. Cas. 463.

——Art. 68—Administration bond—Starting point of limitation.

The suit by an assignee of the administration bond is a suit on a bond subject to condition within the meaning of Art. 68. The condition of the bond is broken at the latest on the death of the administrator and a suit brought by the person to whom the bond is assigned under S. 292, Succession Act, beyond three years of such death is barred by time. 7 B.R. 660=72 C.L.J. 497=53 L.W. 212=1941 O.W.N. 4=43 Bom.L.R. 346=45 C.W.N. 429=43 P.L.R. 138=(1941) 1 M.L.J. 88=A.I.R. 1941 P.C. 6=(1941) M.W.N. 321=I.L.R. (1941) Bom. 202 =I.L.R. (1941) Kar. (P.C.) 11 Sup.=67 I.A. 416=193 Ind. Cas. 225 (P.C.).

——Art. 68—Administration bond—Specific breach—Starting point.

Where an administration bond contains several conditions, a breach of each one of the conditions gives rise to a course of action and should therefore be taken to be the starting point of limitation in the case of a suit based on that particular breach. Ordinarily, the administrator's work may be said to be completed when he files his final accounts showing how he has dealt with the estate and these accounts have been accepted by the Court; limitation will then begin to run. But it very often happens that there is litigation pending against the administrator and, in such a case the administrator (and consequently his surety or sureties) cannot be absolved until the close of each litigation. 33 All. 414, Diss; 8 L.B.R. 99 and 17 M.L.T. 61, Foll. 76 Ind.Cas. 802= 1 Rang. 463=A.I.R. 1924 Rang. 68.

——Art. 68—A suit on an administration bond is governed by Art. 68, but so long as the administration is incomplete, any breach of the bond gives a fresh starting point for limitation. 4 U.B.R. 22= A.I.R. 1921 U.B. 25.

——Art. 68—Suit on administration bond—Limitation—Starting point.

Art. 68 does not apply to a suit on administration surety bond as the bond is not a bond subject to a condition, *i.e.*, a bond which becomes enforceable only when the specified condition is broken. The right to sue on administration surety bond accrues when the administrator either does not comply with any of the conditions of the bond or puts it out of his power to comply with them. 12 Bur.L.T. 225=56 Ind. Cas. 968.

——Art. 68—Suit by assignee of administration bond—Limitation.

A suit by the assignees of an administration bond executed by a Hindu widow in connection with a grant to her of the Letters of Administration to the estate of her deceased husband, for an account of the administration is governed by Art. 68 and therefore is barred if brought more than 3 years after the conditions of the bond were broken. If the bond contains successive covenants, each breach gives a cause of action but the date of the last breach is the starting point. 17 M.L.T. 61=27 Ind. Cas. 849.

——Arts. 69 and 80—Promissory note payable on demand—Contemporaneous agreement postponing date of payment.

In a suit upon a promissory note executed by the defendant in favour of the plaintiff bank, it appeared that the bank used to fix a period for payment and that the defendant in his application for the loan in a printed form added 'six months' period and the officer of the Bank accepted the application. *Held*, that the application form, and endorsement thereon, were admissible for fixing the date of payment and that the suit was governed by Art. 69 or 80, the starting point of the limitation being six months after the date of the note. 38 M.L.J. 70=27 M.L.T. 81=(1920) M.W.N. 75=11 L.W. 28=56 Ind. Cas. 384.

——Art. 72—Suit on pro-note — Subsequent deed by maker assigning decree to payee to satisfy loan by realization — Hundis.

The defendant had executed a pro-note to plaintiff. Subsequently the maker executed a deed assigning thereby some decrees standing in his favour to the payee (plaintiff) and binding himself at the same time to make good to the plaintiff separately the debt which may be left after deducting the amount actually recovered under the decree. The pro-note was not discharged or returned. *Held*, that the provision in the bond as to realization of the decree debt and the payment of the balance, if any, did not affect the right of the plaintiff to sue on the pro-note or create an independent right of suit in plaintiff's favour, and that if the claim on the pro-note be barred, the plaintiff was out of Court. (1906) 29 M. 205.

——Art. 73—Applicability.

Even though the sons may be under a pious obligation to pay their father's debt, a suit on a promissory note executed by the father brought after his death is governed by Art. 73 and not by Art. 120, Limitation Act. 41 Bom.L.R. 896=A.I.R. 1939 Bom. 464=186 Ind. Cas. 66.

——Art. 73—Applicability.

Where a suit based on a promissory note accompanied by a security bond of the same date hypothecating immovable property for the debt was filed three years after execution of the promissory note:

Held, that the suit was within time by virtue of the security bond, but it was not open to the plaintiff to claim more interest than what was legally recoverable under the promissory note despite the security bond which was intended to be limited to the amount due on account of the principal and interest on the pro-note which could be legally recovered. A.I.R. 1932 Oudh 286=9 O.W.N. 912=140 Ind. Cas. 460.

——Arts. 73 and 120—Applicability.

A suit on a promissory note executed by a Hindu father against his sons after his death, the liability sought to be imposed being in respect of the pious obligation of the son to pay his father's debts, is governed by Art. 73, and not by Art. 120. The cause of action against the father and the son is really the same, there is no fresh cause of action against the son on the father's death. 33 Bom.L.R. 1234= A.I.R. 1931 Bom. 542=135 Ind. Cas. 804.

——Art. 73—Exclusion of time.

So long as there was no legal impediment to the filing of the suit earlier, no time can be excluded under S. 14 and the third column of Art. 73 operates. 100 Ind. Cas. 776=50 Mad. 417=25 M.L.W. 426 =1927 M.W.N. 160=39 M.L.T. 116=A. I. R. 1927 Mad. 597=52 M.L.J. 396.

——Art. 73—Starting point—Promissory note payable at sight.

A promissory note that is payable on demand or at sight is governed by Art. 73 of Limitation Act and time runs from the date of the execution of the promissory note. 84 Ind. Cas. 475=40 C.L.J. 84 =A.I.R. 1924 Cal. 1065.

——Art. 74.

Synopsis.

1. Applicability of Article.
2. Instalment bond with default clause.
3. Starting point.
4. Waiver.

1. Applicability of Article.

——Arts. 74, 75—Applicability.

Where the bond provides that the loan would be repaid within 7 years from the date of the execution of the bond and that the interest would be paid year by year and that if it was not so paid, the creditor would be entitled to sue for the recovery of the entire debt with interst, the bond is not an instalment bond within the meaning of Art. 74 or Art. 75. A.I.R. 1941 Oudh 210=1941 O.W.N. 361=1941 A.W.R. 108=16 Luck. 464=193 Ind. Cas. 481 (F.B.).

Overrules: A.I.R. 1925 Oudh 502=85 Ind. Cas. 280.

——Arts. 74, 75—Distinction.

There is a well-defined distinction between Art. 74 and 75. Article 74 applies to an instalment bond which does not contain any default clause and therefore, in such cases, the plaintiff is entitled, by the very terms of his bond, to sue only for such instalment as remains unpaid. No question of waiver of default can ever arise in such a case. But where the document provides that in the case of a default (which may be due to non-payment of one instalment or more than one instalment as provided in the bond) the obligee has the right to sue for the whole of the sum then remaining due, it is obvious that the promisor has a right *co instanti* to pay the full amount and the obligee, a corresponding right to receive and recover it. 18 Pat. 459=A.I.R. 1939 Pat. 433=20 P.L.T. 443=5 B.R. 965=183 Ind. Cas. 523 (F.B.).

——Art. 74—Instalment bond.

Where a bond provided that the principal sum should be re-paid in certain instalments and interest at a certain rate was also provided for,

Held, that a suit to enforce the terms of the bond was governed by Art. 74 of the Limitation Act. 121 Ind. Cas. 891=4 Luck. 480=7 O.W.N. 230=A.I.R. 1927 Oudh 539.

——Arts. 74 and 75—Where it was stipulated in a bond that the principal sum borrowed thereunder would be paid back within a period of certain years and the entire principal amount was divided into a number of instalments, each instalment to be payable annually and interest at a particular rate was also provided for,

Held, that it is bound payable by instalments and the proper article applicable to it is Art. 74 and not Art. 75. A.I.R. 1925 Oudh 502, Foll. 100 Ind. Cas. 655=4 O.W.N. 207=4 Luck. 480=A.I.R. 1927 Oudh 539.

——Arts. 74, 75 and 80—Penalty attached to two consecutive defaults.

Art. 74, and not 75 applies when the penalty of the whole bond falling due is not attached to a single default but to two consecutive defaults. Art. 80 which deals with bond as a whole does not apply because the specific excludes the general. 95 P.L.R. 1909=107 P.W.R. 1909=4 Ind. Cas. 956.

2. Instalment bond with default clause.

——Arts. 74 and 75—Instalment bond with default clause—Default in payment of one instalment—Creditor if bound to sue for the whole amount—Limitation.

In a suit on an instalment bond with a default clause Art. 75 will only operate if the plaintiff elects to enforce the default clause which it is always open to him to waive or forego. In such cases his right to recover the instalments as on an ordinary instalment bond within three years prescribed by Art. 74 of the Limitation Act remains unaffected.

Reading the two articles together, Art. 75 is no bar to a suit on the instalment bond itself either after or before the expiry of the instalment period for the recovery of the instalments which the debtor has contracted to pay and which have not become themselves time-barred under Art. 74. The two remedies are co-existent and open to the creditor and he has his choice either to wait and sue for the instalments in default under Art. 74, or to enforce the default clause in a suit contemplated by Art. 75. A suit falling under Art. 75 may be dismissed on the debtor proving waiver by the creditor of the default which entitles the creditor to file such a suit, in which case the creditor can still fall back on his right to sue for instalments within the time limits prescribed by Art. 74. He has also the other alternative of suing to enforce the default clause for a subsequent default which he had not waived within the period prescribed by Art. 75. 1949 M.W.N. 325=A.I.R. 1949 Mad. 592=62 L.W. 100=(1949) 1 M.L.J. 112.

——Art. 74—Where according to the stipulation in mortgage-deed the whole debt becomes due on default in payment of instalment, a suit to enforce personal remedy with 6 years from the date fixed for the last instalment would be maintainable under S. 74 or S. 75 or S. 116. 1941 N.L.J. 649.

——Arts. 74, 75—Applicability — Instalment bond with default provision.

In the ordinary way when a debt is payable by instalments and there is no default provision, a new cause of action arises upon each default, and the plaintiff can recover in respect of instalments falling due within three years before suit, (*vide* Art. 74). But if there is a default provision, Art. 74 cannot be relied upon, and under Art. 75, if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time-barred, that is, he cannot recover even those instalments which fell due within three years of suit. But facts should be so interpreted, if possible, as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier default. A.I.R. 1941 Oudh 485=1941 A.W.R. 256=1941 O.W.N. 861=194 Ind. Cas. 744.

——Arts. 74, 75—Applicability — Instalment bond with default clause.

It cannot be said that Art. 74 provides a period of limitation for promissory notes or bonds payable by instalments both in those cases in which there is a default clause and in those in which default clause is absent, and that if the creditor chose to sue on the default clause for the full amount, then and then only Art. 75 came into operation. In the case of an

instalment bond with default clause, the plaintiff's claim to recover some only of the instalments provided by a registered instalment bond after two defaults had occurred, is hit by Art. 75. A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=5 B. R. 965=183 Ind. Cas. 523 (F.B.).

——Art. 74—Instalment bond with default clause—Creditor's right to sue on each default.

A certain bond stipulated that the amount shall be paid by yearly instalments. It was further agreed that in case of default in paying three successive instalments, the whole amount shall become recoverable in a lump sum with interest:

Held, that the default clause did not take away the right of the creditor to bring his suit for instalments as they fell due before the expiry of three years. A.I.R. 1938 Pesh. 31=176 Ind. Cas. 340.

——Arts. 74, 75—Applicability.

The bond gave the creditor the option to demand payment of three instalments if default was made together with interest thereon from time to time. It also gave the creditor the option to bring a suit for the whole amount due under the bond if the creditor chose to exercise his right to call in the whole amount:

Held, that in these circumstances it was open to the creditor to sue at any time for all those instalments which had become payable within three years of the institution of the suit. In view of the wording of the bond, the case fell within the purview of Art. 74 and not Art. 75. A.I.R. 1937 Lah. 1=39 P.L.R. 110=169 Ind. Cas. 929.

Reversing: A.I.R. 1936 Lah. 570=164 Ind. Cas. 59.

——Arts. 74, 75—Instalment bond — Default clause — Limitation.

On September 5, 1927, the defendants executed an unregistered instalment bond for Rs. 540 stipulating to pay the amount with interest at the rate of 1 per cent. per mensem by instalments of Rs. 25 a month within one year and nine months. It was further provided that in case the instalments or the interest were not paid for any two successive months, the creditor would be authorised to realise the entire amount in a lump sum either within the stipulated period or after it from the person and property of the debtors. The 20 instalments of Rs. 25 (together with the last instalment of Rs. 40), would, if paid, have sufficed to discharge the entire amount due on the bond. The period of 21 months would have expired on June 5, 1929. Before, the expiry of that date the creditor served a registered notice on the defendants dated May 21, 1928, claiming that on account of more than two successive defaults, the whole amount of principal and interest had become due and was payable and should be paid within a week of the receipt of the notice. Later, on June 5, 1929, when the period of 21 months had expired, a fresh notice was served by the creditor on the defendants on April 11, 1930, demanding payment of the whole amount with interest. On July 25, 1931, the suit was instituted for recovery of the entire amount of principal and interest due on the bond:

Held, by the Full Bench (*Mukherji, J.*, contra.)—By serving the notice of demand on the defendant, the creditor exercised his option and made the amount payable on that date and the claim having been brought more than three years after two consecutive defaults, was barred by time.

Per *Mukherji, J.*—The suit should succeed in respect of eleven instalments which are within three years of the institution of the suit. The notice does not adversely affect the present suit which is based on a stipulation other than the penalty clause. It was not a suit for the enforcement of the penalty clause. When the notice was given, it was the intention of the plaintiff to enforce the penalty clause. But he never brought the suit to enforce the penalty clause and there is nothing in the law to prevent him from not enforcing it if he so chooses. A.I.R. 1934 All. 661=(1934) A.L.J. 1035=3 A.W.R. 845=57 A. 108=151 Ind. Cas. 585 (F.B.).

3. Starting point.

——Arts. 74, 75—Starting point of limitation.

Where an ordinary money instalment bond with a default clause provides that if any instalment is not paid, the whole sum would be due, the limitation for claim to recover money due under the bond runs from the date of the first default which is unwaived. A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=5 B.R. 965=183 Ind. Cas. 523 (F.B.).

Overruling—(1931) 11 Pat.L.T. 866=132 Ind. Cas. 112.

——Art. 74—Starting point of limitation.

Where under an instalment bond, the money was to be repaid in ten instalments and the first two instalments were paid but nothing was paid thereafter and the plaintiff sued for the fourth and subsequent instalments within three years of non-payment of the fourth instalment though after three years of the first default:

Held, that the suit was not timebarred as the cause of action was non-payment of the fourth instalment. 1937 O.W.N. 336=A.I.R. 1937 Oudh 288=167 Ind. Cas. 293.

——Arts. 74, 75—Instalment bond with default clause—Starting point of limitation.

A bond after setting out that the principal was repayable by yearly instalments of Rs. 100 after the expiry of three years, that is, at the commencement of the fourth year, went on to provide that interest was payable monthly. Thereafter came the condition, that if according to above conditions principal and interest were not paid, then the plaintiff could sue for the whole amount at once:

Held, that the whole amount became payable at once only if there was a default as regards the payment of principal and interest and that the cause of action in respect of the whole amount did not arise at the time of the first default of payment of interest. A.I.R. 1935 Lah. 557=37 P.L.R. 242=157 Ind. Cas. 828 (D.B.).

Reversing—A.I.R. 1933 Lah. 548=142 Ind. Cas. 851.

——Art. 74—Starting point—Default clause—Option of creditor—When it comes to an end.

Where an instalment bond provided for full payment in case of default and the creditor sued for whole only when the last instalment fell due.

Held, that the claim for nine instalments was barred.

The plaintiff has an option till the last instalment falls due to claim the whole amount including the last instalment. But where the last instalment fell due the option was gone. Where the option is given to obligee to claim the whole amount on default of payment of an instalment without reference to subse-

quent instalments, the provision cannot be held to extend the period of limitation to three years from the date the last instalment fell due. On the making of a demand the whole amount becomes due and time would begin to run from the date of the demand. If no demand is made the option given to the plaintiff is gone and time begins to run in respect of each instalment as it becomes due. That which was optional on the part of the plaintiff would not affect right of the defendant. He might well consider the action as accruing from the time that the plaintiff had a right to maintain it. (1843) 4 Q.B. 419, Foll. 77 Ind. Cas. 48=1923 M.W.N. 699=A.I.R. 1924 Mad. 310.

——**Art. 74**—Where in a suit, mortgagee was empowered to sue on default of payment of the first instalment of interest.

Held, limitation began to run from the first default. 66 Ind. Cas. 171=44 All. 360=20 A.L.J. 140=A.I.R. 1922 All. 37.

——**Arts. 74 and 75—Starting point—Instalment bond.**

The starting of limitation is tested by the question "has the payee or obligee a right to file a suit forthwith for the principal remaining due, if he so chooses?" In the case of bonds and pro-note payable by instalments providing that whole becomes due if default is made in payment of one instalment, limitation runs from the time the default is made unless a waiver on the creditor's part is made out expressly or impliedly when it will run after fresh default. If there has been a waiver of right to immediate payment, limitation cannot run at once. 9 S.L.R. 90=31 Ind. Cas. 479.

——**Art. 74—Two starting points.**

Where a simple money bond gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for repayment or to sue earlier if the interest for the first six months was not paid, the plaintiff's claim cannot be barred because he chose to stick to the longer term. 16 O.C. 45=19 Ind. Cas. 738.

4. Waiver.

——**Art. 74 or 75—Waiver, what is.**

It is no doubt true that it cannot be laid down as a general rule that wherever a person omits to claim a particular amount it must be held to constitute a waiver. It is not necessary for a creditor to adduce affirmative evidence in support of waiver. In fact generally it is to be inferred from all the surrounding circumstances.

When the plaintiff does not take any action to recover the first instalment within three years or to sue for the whole amount of the bond on the basis of that default, it may be presumed that he waived his right in respect of it. 1936 O.W.N. 665=A.I.R. 1936 Oudh 384=164 Ind. Cas. 431.

——**Arts. 74 and 75—Instalment bond with default clause—Waiver.**

An instalment bond provided that on any one default the creditor would be entitled to the full amount with interest or miscellaneous amounts in payments of full amount due with interest. There was default but the debtor voluntarily made miscellaneous payments which were accepted by the creditor who though actually sued for the balance urged that he was entitled to sue for the whole amount. The defence was that the creditor had waived such a right and was only entitled to the balance, together with interest from the last default:

Held, that unless and until the creditor took some action to enforce either of those penalties, it must be held that as the debtor continued to make payments as if he were acting under the original arrangement and the creditor continued to receive those payments, the creditor was undoubtedly acting as if the arrangement still subsisted, and must be held to have waived his right to renounce the agreement until he gave notice of that renunciation by taking the proceeding that resulted in the suit and that he was entitled only to the balance with interest from the date of the last default. A.I.R. 1934 All. 697=3 A.W.R. 828=153 Ind. Cas. 553.

——**Arts. 74, 75—Instalment bond—Default—Waiver.**

Where a bond payable by instalments provides that if default is made in the payment of one or more instalments, the whole amount would become due, and default is made, if there is nothing to show that the creditor has waived the benefit of the default clause during the period allowed by Limitation Act for a suit for the whole amount, he cannot subsequently sue for the instalments counting limitation from the day on which these instalments would have fallen due had there been no default clause.

Allowing the claim to recover the whole debt at once to be barred by time does not amount to a waiver of that claim. 14 N.L.J. 141=A.I.R. 1932 Nag. 1=28 N.L.R. 44=135 Ind. Cas. 414 (F.B.).

——**Art. 74—Waiver.**

Where the decree-holder accepts the payment of instalments even after the whole decretal amount has become payable by default, his act amounts to a waiver on his part. A.I.R. 1929 All. 881.

——**Art. 74—Instalment decree.**

In order to constitute waiver of the right to enforce a default clause of an instalment decree payment must be made towards the specific instalments in arrears. A mere acceptance of an amount towards a decree after defaults does not amount to waiver of the default clause. 113 Ind. Cas. 541=A.I.R. 1929 Lah. 390.

——**Art. 75.**

See also ART. 74.

Synopsis.

1. Applicability and Scope.
2. Default—Meaning of.
3. Instalment mortgage bond.
4. Starting point.
5. Waiver.
6. Miscellaneous.

1. Applicability and Scope.

——**Art. 75—Instalment bond—Default clause—Effect—Option of waiver—When to be exercised.**

Where an instalment bond with a default clause provides that on default in payment of any instalment the agreement for payment by instalments shall be cancelled or invalidated, then on the happening of a default, the whole unpaid balance of the debt becomes payable, and unless the obligor sues within three years of such default, his remedy gets barred, and he has no longer any option to waive the default and treat each subsequent default as providing a cause

of action, though he can of course rely on any payment made within limitation. 13 Cal. 73, appl. and foll. A.I.R. 1949 Pat. 447=30 P.L.T. 11.

——Art. 75—Instalment bond with default clause—Option of creditor—Limitation.

The proper article of the Lim. Act applicable to a case of an instalment bond providing that in case of default being made in the payment of one or more instalments, the whole money shall become due is Art. 75 and limitation begins to run from the date of default irrespective of the fact that the creditor was also given the option of suing only for the instalment in respect of which default had been made. 1943 A.L.J. 238=1943 A.W.R. 128.

——Art. 75 and S. 20—Instalment bond.

Default clause authorising creditor to sue for whole amount not unequivocal—Application of Art. 75 doubtful—First instalment defaulted—Part payment with endorsement made towards first instalment before expiry of limitation in respect thereof—Effect of—Subsequent default in instalments and suit for amount due at date of suit and not for whole balance—Waiver of default clause, held question of fact—Creditor, held entitled to recover amount due at date of suit—Payment, held extended limitation in respect of first instalment under S. 20. 1943 A.W.R. 15=A.I.R. 1943 All. 172=(1943) A.L.J. 28=I.L.R. (1943) All. 210=207 Ind. Cas. 53.

——Art. 75—Option of suing for whole sum on default of six monthly instalments—Waiver—Limitation.

In a case of an instalment bond payable in monthly instalments with a default clause giving an option to the creditor to sue for the whole amount on failure of six instalments, under the provisions of Art. 75 the creditor can institute that suit within three years of the 6th default, and in that suit he can claim not only the instalment still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit but also the six instalments which constitute his cause of action. The principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults and accompanied by a waiver of the option which accrues to the plaintiff on the earlier default. In effect the plaintiff is in any case entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining in the future at the date of the suit. A.I.R. 1941 Oudh 485=1941 A.W.R. 256 =1941 O.W.N. 861=194 Ind. Cas. 744.

——Art. 75—Instalment bond with default clause—Waiver of option—Practice in Oudh.

An instalment bond provided that in case of default the creditor would have an option to recover the whole amount. In a suit on the basis of it, the plaintiff pleaded payment of the instalments which were time-barred but claimed to recover the whole balance on default in the payment of some of the subsequent instalments which fell due up to the date of the suit, basing his cause of action on those defaults. It was established that the plea of the payment of the first two instalments was false but that he had accepted the payment in part after the default of those instalments:

Held, that the general current of decisions in Oudh is clearly in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first default when he bases his suit on subsequent defaults which are within limitation. 1940 O.W.N. 1081=A.I.R. 1941 Oudh 74=1940 A.W.R. 451=16 Luck. 280=191 Ind. Cas. 220.

——Art. 75—Instalment bond—Default clause that in default of three instalments whole amount could be recovered by suit—Default in instalments—Suit brought more than three years after default and interest on whole amount from date of bond claimed—No waiver pleaded—Art. 75 applied—Waiver could not be inferred—Suit brought for whole amount could not be treated as one for instalments. A.I.R. 1937 Lah. 863=176 Ind. Cas. 308.

——Art. 75—Chit fund—Instalment bond with condition to pay entire sum on default—Limitation.

The defendant's predecessor who had auctioned a ticket in a chit fund executed a bond undertaking to pay the future instalments within one month of their respective dates with the further provision that if default was made, all the amounts that are to be paid in future would be paid irrespective of due date. Default was made and the entire amount became payable on 23rd June, 1922. A suit was filed on the bond on 3rd January, 1927, and it was contended that provision relating to default was a provision in favour of the creditor which he was at liberty to waive and the cause of action arises at the end of each period when the money becomes due:

Held, overruling this contention that the suit was clearly time barred having been brought more than three years after 23rd January, 1922. 68 M.L.J. 244=(1935) M.W.N. 336=A.I.R. 1935 Mad. 303 =41 L.W. 442=156 Ind. Cas. 443.

——Art. 75—Instalment bond with default clause—Limitation.

Where a suit for the whole amount is barred under Art. 75, the creditor cannot sue for instalments which would under the primary terms of the bond, have fallen due after the default. A.I.R. 1934 Nag. 180=30 N.L.R. 314=151 Ind. Cas. 97.

——Arts. 75 and 74—Default clause—No waiver.

Where there has been no waiver of the benefit of the provisions of a default clause made by the creditor and owing to a default, the whole amount has become due and a suit is brought to recover either the whole of that amount or only a portion of it after the expiry of three years from date of the default (or six years if the deed be a registered one) then the whole claim is barred by time and the creditor cannot be allowed to say that he should get a portion of that amount because his suit should be treated as one falling under Art. 74. But waiver is to be pleaded and proved by the creditor. (1934) A.L.J. 1056=A.I.R. 1934 All. 1039=4 A.W.R. 966=57 A. 561=153 Ind. Cas. 205.

——Art. 75—Instalment bond—Default clause—Waiver.

A bond payable in six annual instalments gave option to the promisee to realise the whole amount in default of any one instalment. The first two instalments were paid. The third was not paid. The promisee filed suit when all the instalments were due for the fourth, fifth and sixth instalments and no suit was filed in respect of the third instalment.

Held, that the right to realize amount by instalments as originally acted upon could not be lost by his failure to exercise option given by the forfeiture clause and the suit was not time-barred. A.I.R. 1933 Lah. 849 (1)=149 Ind. Cas. 861 (1).

——Art. 75—Instalment — Default clause — Waiver.

Where, in a simple bond it was provided that the debt was to be paid in four years and interest half-yearly and in case of default in payment of interest for any period on the principal, the creditor had the power of realizing the entire amount in any way he liked:

Held, that the covenant in the bond, entitling the creditor to sue for the amount due on the bond before the stipulated period of four years was for the benefit of the creditor, and it was open to him to waive that option and time did not begin to run from the date of the first default. A.I.R. 1933 All. 235 =(1933) A.L.J. 550=55 All. 283=149 Ind. Cas. 181.

——Art. 75—Instalment bond—Whole amount falling due on default—Option to creditor — Time from the exercise of option.

Where an instalment bond provided for monthly payment of interest and in case of default in payment of instalments, the creditor was at liberty to recover the whole amount, principal and interest, without waiting for the whole period, the option is in the nature of a liberty reserved to the creditor and it is open to him to avail himself or not of that option. The creditor is therefore entitled to wait until the last instalment falls due. 11 Pat.L.T. 866.

——Art. 75—Applicability—Default clause—Creditor given option.

In an instalment bond with a condition of exigibility on one default the question as to when time begins to run really depends upon the construction of the document and the contract between the parties. When the contract confers on the creditor an option to treat or not to treat the default as enabling him to sue for the whole amount, Art. 75 has no application. 33 C.W.N. 275=A.I.R. 1929 Cal. 399.

——Art. 75 and S. 20—Instalment bond with default clause.

An action was instituted to recover money on a bond payable by instalments with the proviso that default in payment of one or more instalments shall render the whole debt due forthwith. The plaint recited the payment of first two instalments and a default of the third. The suit was within time if the first two instalments, were really paid.

Held, that S. 20 had no concern with the case and that Art. 75 was applicable and that therefore oral evidence was admissible to prove the payment of the first two instalments. 35 P.R. 1913, Not foll. 89 Ind. Cas. 294=6 Lah. 163=26 P.L.R. 328=A.I.R. 1925 Lah. 394.

——Art. 75—Applicability.

Article 75 of the Limitation Act will not only prevent a suit to recover the whole sum due under a bond but also a suit for later instalments which individually are not time-barred. The Article contemplates that, in the absence of waiver, an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation. 86 Ind. Cas. 918=12 O.L.J. 112=A.I.R. 1925 Oudh 373.

——Art. 75—Applicability — Default for three consecutive instalments.

Art. 75 applies to a simple money bond providing for the repayment of money in instalments and also providing that in default of payment of principal for three consecutive instalments or interest for three consecutive months the promisee could recover the entire amount. 5 L.W. 514=38 Ind. Cas. 302.

——Arts. 75 and 116—Applicability—Payment by instalments—Article applicable.

Art. 116 applies to a suit on a registered bond providing for payment of money by instalments and the whole amount becoming due on default of one instalment and the time begins to run from the date of the default. 30 A. 400. 1 Ind. Cas. 570 (All.)

——Art. 75—Bond—Instalments—Power to sue for whole amount on default of payment—Limitation.

A bond payable by instalments contained a provision that in default of the payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments. *Held,* that this provision did not mean that the creditor should be compelled to sue for the whole on default of payment of one instalment nor did limitation in respect of the whole debt commence to run from the date of the first default. 31 C. 294; and 221 C. 542, diss. from. 1908 A.W.N. 36= 5 A.L.J. 72=30 A. 123.

——Art. 75—Bond — Instalments—Waiver of right to recover whole amount on non-payment of instalment—Limitation.

Where money secured by a bond is payable by instalments, with a condition that the whole amount secured will become due upon non-payment of any instalment. The creditor is not bound to enforce this condition, but he may accept payment of instalments after due date—thereby impliedly waiving his right to sue for the whole amount due—and he may sue upon a subsequent default in payment of any future instalment. 1907 A.W.N. 139=4 A.L.J. 336=29 A. 431.

——Arts. 75, 66—Instalment bond, suit on. 1906 A.W.N. 198=3 A.L.J. 463.

——Art. 75—Punjab Loans Limitation Act (1904).

In Punjab a suit on a bond payable by instalments and containing a clause that on default on two instalments the whole should be due is governed by Art. 16 of the Punjab Loans Limitation Act (1904) and not Art. 75 of the Limitation Act of 1908. 3 L.L.J. 522=A.I.R. 1921 Lah. 280.

——Art. 75—Scope—Instalment bond with exigibility clause—Waiver.

The Limitation Act does not lay down substantive law and so the exception made in Art. 75, in favour of the creditor who waives, cannot be construed as conferring a right which does not exist under the ordinary law. The article refers to cases in which the creditor is entitled to exercise the privilege and it cannot apply when under the ordinary law, or by reason of a special contract, he is precluded from doing so.

An instalment bond contained an exigibility clause under which the whole amount was to be payable at once in the event of any two instalments remaining unpaid. Two defaults occurred and accordingly the plaintiffs became entitled to sue for the whole. Instead of doing so, they sued for the defaulted instalment and obtained a decree. Further defaults having occurred, they subsequently sued for the whole due relying on the exigibility clause. The defendants contended that the suit was barred under Art. 75, and O. 2, R. 2, Civil P. C.:

Held, that the person in default should not be allowed to take advantage of his own wrong. The exigibility provisions in instalment bonds are pri-

marily for the benefit of the creditor and unless the bond specially takes away the privilege to waive the benefit of exigibility clause, it must be taken to exist. It would, therefore, be wrong to turn what was intended to be a benefit into a handicap. A.I.R. 1942 Nag. 138=1942 N.L.J. 296=I.L.R. (1943) Nag. 630=203 Ind. Cas. 250.

2. Default—Meaning of.

——Art. 75—Default—Non-receipt of offered payment.

Art. 75 applies to a case of default in which a provision as to waiver may be material. If the plaintiff does not receive the offered payment, there is no default. Where there is no default there can be no waiver. 38 Mad. 374=((1913) M.W.N. 676=25 M.L.J. 264=21 Ind. Cas. 24.

——Art. 75—Default—Meaning.

Where a defendant has expressed his willingness to pay, there is no "default". 24 Ind. Cas. 507 (Mad.).

3. Instalment mortgage bond.

——Arts. 75 and 132—Instalment bond and mortgage instalment bond—Limitation.

There is an essential difference between an ordinary instalment bond and a mortgage bond payable by instalments. The latter is governed by Art. 132 and the former by Art. 75. A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=5 B.R. 965=183 Ind. Cas. 523 (F.B.).

Overruling—(1931) 11 P.L.T. 886=132 Ind. Cas. 112.

——Art. 75—Instalment mortgage bond—Option to sue for entire sum on default—Limitation — Successive causes of action — Waiver — Power to elect.

Where a mortgage bond provides that the amount due thereunder should be paid in certain instalments and contains a further clause that if any of the instalments due is not paid in time, the mortgagee would be at liberty to call in the entire money, the mortgagee has successive or recurring causes of action and it is left to his option to avail himself of any one of these causes of action and base his suit upon any of them. Article 132 will not bar his suit if acting on the terms of the bond, he refrains from bringing a suit on there being a default in payment of any of the instalments and prefers to sue on the expiry of the due date.

This principle applies not only where the parties expressly agree that it will rest with the mortgagee to decide whether he should sue as soon as there is default or on the expiry of the due date fixed, for the payment of the entire money, but also to cases in which on a construction of the deed it appears that the intention of the parties was to enter into such a contract. Such an intention can be implied in certain cases even without the use of any express words. A..I.R. 1931 Pat. 285=12 P.L.T. 755=11 Pat. 112=134 Ind. Cas. 609.

——Art. 75—Mortgage with default clause—Limitation.

Where a mortgage bond provided that the mortgagors should pay the amount after one year, that they should pay half yearly interest, failing which the same was to be added to the principal and there was a further clause that if there was default, the mortgagee might realise the entire amount:

Held, that the mortgage term was not cut down and that limitation commenced to run only afer the expiry of one year. A.I.R. 1931 All. 203=1931 A.L.J. 29=133 Ind. Cas. 311.

——Art. 75—Default in paying instalments converting bond to be payable on demand.

Where in a mortgage-deed the mortgagor promises to pay interest at the end of every month and the deed further provides that in case of default to pay such interest, the mortgagor shall return the principal as well as interest before the expiry of the mortgage period, whenever the creditor would demand the same, the cause of action arises on the day on which default in paying monthly interest is made and time runs from that day and not when the mortgage period expires. 116 Ind. Cas. 581=A.I.R. 1929 Sind 140.

——Art. 75—Where mortgagee is given an option.

Where a mortgage bond provided that in default of payment of instalments of interest, the mortgagee can recover the whole amount when required.

Held, that the stipulation in question gave only the mortgagee an option which is open to him to exercise or not as he chooses; and the time will not run against him unless he exercises the option. 107 Ind. Cas. 650=A.I.R. 1928 Mad. 637.

——Art. 75—Mortgage bond—Principal to be repaid in two years—Interest to be paid monthly—Default in payment of interest entitling mortgagee to recover whole amount on demand — Limitation starts when demand is made. 99 Ind. Cas. 871=A.I.R. 1927 Sind 151.

——Art. 75—Under the terms of a mortgage deed the debt is to be paid by instalments of Rs. 100 each; on default of any one instalment the whole amount is to become due at once. In the year 1903-4 the mortgagors paid only Rs. 44 and in 1913 the mortgagees sued to recover the first two instalments and got a decree. In 1917 the mortgagees sued for the balance.

Held, that the suit was barred by limitation. 72 Ind. Cas. 290=25 Bom. L. R. 203=A.I.R. 1923 Bom. 201.

——Arts. 75 and 132—Limitation—Starting point—Mortgage—Instalment bond—Payment of whole in default.

A mortgage bond provided that interest shall be paid every six months and the principal on a fixed date and that on default, both the interest and principal shall immediately become due.

Held, that this created a right in the mortgagee to recover the whole amount at his option in case of default and since there was nothing to show that he exercised any such option, time begins to run only from the date fixed for payment of the principal amount. 24 Cal. 281, Not Foll. The words "whenever you require" in a mortgage bond are not equivalent to forthwith. 25 M.L.T. 154=(1919) M.W.N. 82=9 L.W. 479=51 Ind. Cas. 724.

——Arts. 75 and 132—Hypothecation—Instalments—Option to creditor to sue for whole with enhanced interest on default—Limitation.

A Hypothecation bond provided for payment by instalments and also contained default clause which gave the creditor an option requiring payment of the whole amount of the mortgage money at an enhanced rate of interest upon the failure of the debtor to pay any one of the instalments and the opinion was not exercised by the creditor; *held*, that the suit was

governed by Art. 132 and not by Art. 75, that the contract for payment by instalments would subsist and that no enhanced rate of interest will be allowed if no demand was made. (1918) M.W.N. 586=48 Ind. Cas. 191.

——Art. 75—Starting point—Provision for periodical payment of interest and for suit for recovery of entire amount on default—Alternative provision fixing dates for payment of whole amount.

When there are alternative contracts provided for in a mortgage bond, it is open to the mortgagee to forego one and sue to enforce the other. This option cannot be taken away by statute unless the grant of such an option is illegal or opposed to law. The option is for the benefit of the mortgagee and if he waives it, limitation will not run against him in spite of that waiver. 20 O.C. 132=4 O.L.J. 341=40 Ind. Cas. 232.

——Art. 75—Applicability—Instalment bond—Mortgage bond—Waiver.

Where the terms of a mortgage deed provided for payment of the mortgage money by instalments with a condition superadded that non-payment of three instalments on the due dates should empower the mortgagee to recover the whole money due at certain interest .

Held, that time and amount being the essence of the contract, non-payment of or deficiency in the payment of three instalments would, in the absence of proof of waiver on his part, enable the mortgagee to enforce the covenant. 3 O.L.J. 623=37 Ind. Cas. 442.

——Arts. 75 and 132—Instalment bond—Money due on default—Limitation.

A mortgage of the year 1890 was payable by yearly instalments of Rs. 625 in ten years. Interest was payable monthly.. In case of default of payment of interest or principal the mortgagor was to be at liberty to recover the whole amount. There was a further provision that if the mortgagee did not realise the whole amount, interest would go on running, up to the date of realisation.

Held, (*Richards, C.J., and Tudball, J.*) that as soon as default was made in payment of any instalment the money became due within Art. 132 of the Limitation Act and the suit having been brought more than twelve years after that date was barred by limitation. 30 M. 426; (1891) 2 Q.B.D. 509; 24 C. 281; Foll.

Held, (per *Banerjee, J.*)—Having regard to the terms of the bond that in case no money was paid, interest was to run to the date of payment and the money secured by the bond did not become due until the expiration of ten years from the date of the bond. Where a creditor is authorised to wait for the full period stipulated for the repayment the money does not become due, within Art. 132 of the Limitation Act until that period expires. 37 All. 400=13 A. L.J. 510=28 Ind. Cas. 910 (F.B.).

——Arts. 75 and 132—Applicability—Mutual relation of articles.

The principle of Art. 75 cannot be extended to cases under Art. 132. 2 Ind. Cas. 653 (Cal.).

4. Starting point.

See also NOTE 1.

——Art. 75—Instalment bond—Clause enabling lender to sue on default for instalment or whole amount—Further clause giving lender option to sue for whole amount after last instalment became due—Limitation—Starting point.

In the case of an instalment bond, if it is provided that in the event of a default in payment of one instalment the creditor can bring his suit for realising the entire amount of the bond, the whole amount must be considered *to become due* within the meaning of Col. 1, Art. 75 of the Limitation Act and Art. 75 will be applicable to a suit based on such a bond. Neither Art. 74 nor Art. 80 can have any application. By virtue of the provisions of Col. 3 of Art. 75 time will begin to run from the date of the first default which makes the whole money due, and if waiver is proved the date of a fresh default. Time will begin to run from the date of default no matter whether the creditor has been given the option of suing only for the instalment in respect of which a default has been committed. A stipulation in the bond that the creditor will also have the right to realise by filing a suit in Court the total amount due from the executant on account of principal and interest after the expiry of time for all the instalments that is at the time when the last instalment falls due cannot arrest the running of time when once it has begun to run on account of the fact that Art. 75 governs the case. Such a stipulation is nothing short of a contract or agreement between the parties for altering the statutory period of limitation, namely, three years as prescribed by Art. 75. Parties cannot by contract alter the statutory period of limitation nor can they alter the statutory '*starting point*' of limitation. Such a covenant must be deemed to be void under S. 23 of the Contract Act. I.L.R. (1946) A. 711=A.I.R. 1947 A. 38=225 Ind. Cas. 122=1946 A.W.R. (H.C.). 418=1946 A.L.W. 324.

——Art. 75—Instalment bond providing for right to realise whole amount when default is made in payment of one instalment—Option to creditor to sue for instalment in arrear or at the end of period fixed—Effect—Failure to sue within three years of default—If a waiver of right.

In a case governed by Art. 75 of the Limitation Act, limitation for the whole amount of the bond begins to run when the first default is made unless the obligee waives the benefit of the provision. The mere fact that a suit is not brought within the time allowed (three years) would not amount to waiver of the right. Where in a bond provision is made for realisation of whole amount when default is made in payment of one instalment, the giving of an option to the creditor to sue on the default of one instalment or when the time fixed for payment of all the instalments has expired, cannot take the case out of the purview of Art. 75. Where there is no waiver, the suit should be brought within three years of the default in payment of the first instalment. 22 Luck. 33=228 Ind. Cas. 87=A.I.R. 1947 Oudh 128=1946 O.A. (C.C.) 232=1946 A.W.R. (C.C.) 232=1946 O.W.N. 347.

——Arts. 75, 74 and 116—Instalment mortgage-deed —Stipulation that whole debt would be due on default of instalment—Suit to enforce personal remedy, instituted within 6 years from the date fixed for payment of the last instalment is within time under Art. 74 or 75 and 116. 1941 N.L.J. 649.

——Art. 75—Instalment bond with default clause.

If a creditor keeps quiet and does not prefer any suit to enforce his right of realizing the whole amount under an instalment bond with a default clause, time begins to run against him from the date of first default. (1940) 187 Ind. Cas. 221 (F.B.) (Bhopal).

——Art. 75—Starting point.

The limitation under Art. 75 is three years from the date of default, unless the payee or pledgee waives the benefit of the provision. A.I.R. 1938 Mad. 836=(1938) M.W.N. 671=(1938) 2 M.L.J. 251=180 Ind. Cas. 570.

——Art. 75—Deed—Starting point of limitation.

Bond—Debt payable in yearly instalments —On three successive defaults whole debt recoverable—Suit for each instalment falling due is within limitation if filed before expiry of three years from the due date of instalment. A.I.R. 1938 Pesh. 31=176 Ind. Cas. 340.

——Art. 75—Suit for future instalments.

Where the suit for the whole amount has become barred by time, no suit for instalments which, under the primary terms of the bond, would have fallen due after the default, lies. (1935) 159 Ind. Cas. 96 (Nag.)

——Art. 75—Creditor's option.

A compromise decree provided that the decree-holder should get a certain sum in full payment of his decree, that the judgment-debtor should pay a sum of money orthwith and the balance in monthly instalments from October, 1924, and in default of payment of four instalments the decree-holder would realize the whole of the decretal amount with interest at a higher rate ; the last clause of the agreement was that the house belonging to the judgment-debtor should remain charged for the decretal amount and that the decree-holder should in default of payment realise the same by sale of the house with interest from the date of default of any payment. The initial payment was made and also the first two instalments and thereafter payment ceased. On the 10th of December, 1928, an application for execution of the decree was made. It was argued that under the terms of the compromise the whole debt became due in April, 1925, and that application was more than 3 years after that date.

Held, that when all the clauses of the agreement were read together, the intention of the parties was to leave it at the option of the decree-holder either to enforce the payment of the whole of the decretal amount at once or to continue to abide by the instalments and that he was entitled to recover the instalments which were due for 3 years before the application. A.I.R. 1930 Pat. 615=11 Pat.L.T. 609.

——Art. 75—Option given to creditor—Cause of action—Demand.

It is a well established principle of law that a person cannot be compelled to take advantage of a forfeiture clause and Article 75 itself provides that an obligee can waive benefit of the provision giving him the right to recover the whole of the money in the event of default.

Where the bond provideds that in case of default being made in the payment of two instalments the whole amount would become due only if a demand for such amount were made and there is also a stipulation to the effect that even after the whole amount has become payable the creditor would have the option of recovering either the whole of the amount or only the instalments and arrears, the language of the document clearly shows that the intention of the parties was that unless and until plaintiff made a demand the whole of the money should not be payable by the defendant to him. The cause of action therefore arises in such case on the expiration of each of the periods fixed for the payment of instalments. 8 Bom. 561, Foll. 121 Ind. Cas. 80=A.I.R. 1930 Lah. 124.

——Art. 75—Starting point—Instalment bond—Waiver.

Where the plaintiff instituted a suit on an instalment bond and having waived his right to recover the whole amount claimed certain instalments.

Held, that the suit was governed by Art. 75 and not Art. 80 of the Limitation Act.

Held also that the cause of action accrued on each default and that if the suit was brought within three years of that date the suit will not be barred. 1930 A.L.J. 495=A.I.R. 1929 All. 812.

——Art. 75—Optional right to enforce payment may be waived—Waiver must depend upon definite act or performance—Where there is no waiver limitation runs from the date of first default. 33 C.W.N. 250=A.I.R. 1929 Cal. 292.

——Art. 75—Liberty to claim whole amount on default of one kist.

In instalment bonds, a stipulation that on default of one kist the plaintiffs would be at liberty to claim the whole sum has the same effect as the stipulation that in such an event the whole sum shall become due. Such stipulation does not give the creditor a right to wait until after the period of limitation had expired, and limitation would commence to run from the first default under Art 75 96 Ind. Cas. 594=53 Cal. 277=A.I.R. 1926 Cal. 789.

——Art. 75—Instalment bond allowing recovery of full amount on failure !to pay two instalments—Cause of action arises on the date fixed for payment of the second of the two instalments and Art. 75 applied. 92 Ind. Cas. 530=A.I.R. 1925 Nag. 298.

——Art. 75—Suit in respect of instalments not barred.

A suit on an instalment bond which enables the creditor to claim the entire amount on default of any one of the instalments is not time-barred in respect of the instalments which fell due within the period of limitation, although the suit is filed after the expiry of the period of limitation from the date on which the earliest instalment n respect of which default was made fell due. 90 Ind. iCas. 249=1925 P.H.C.C. 215=4 Pat. 820=A.I.R. 1925 Pat. 557.

——Art. 75—Parties stipulating that each default should constitute separate cause of action.

The covenant in the mortgage deed as to re-payments was to the effect that the mortgage money with interest would be paid by monthly instalments of not less than Rs. 20 plus interest the payment being made on the 1st day of November, 1899, and on the first day of every succeeding month provided that the entire advance together with interest thereon would be fully liquidated within ten years from the date of the mortgage. It was also agreed that defaults in payment of monthly instalments and interest as agreed should constitute separate causes of action.

Held, by providing that default in the payment of each monthly instalment should constitute a separate cause of action the parties clearly intended that prompt payments should be made and that the period of limitation should run from the date of default unless the payee waived the benefit of the provisions of prompt payment in case of default. Mere forbearance to sue would not stop limitation from beginning to run. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——Art. 75—When the whole money is to be paid on the non-payment of two or three instalments the cause of action arises on the default of two instalments. 69 Ind. Cas. 237=A.I.R. 1922 Nag. 184.

——Art. 75—Instalments bond.

Where the money due under an instalment bond is payable in three annual instalments and on default of payment of one of them the whole of the money due was to be immediately payable a suit by the creditor for recovery of the money more than three years after the date of the first default is barred by limitation under Article 75 of the Limitation Act. 13 C.W.N. 1010 ; 36 Cal. 394, Foll. 65 Ind. Cas. 257 (Cal.)

——Art. 75—Interest payable annually and principal after a definite time.

Where a mortgage-deed provides for the payment of interest annually and of the principal at the end of 10 years, and contains a condition that on default in payment of interest for any year, the mortgagee has the option

of suing for the whole of the mortgage-money he is not bound to sue as soon as there is default in any year. He can wait for the full period of 10 years and if he chooses to do so, time will run only from the expiry of that period even as regards the claim for the personal relief. 63 Ind. Cas. 477=19 A.L.J. 406=A.I.R. 1921 All. 104.

——Art. 75—Instalment bond—Default—Whole amount payable—Demand.

The provision for demand in instalment bonds is to anticipate the due date and to enable the creditor to call in all the instalments without reference to the dates fixed for their receipt. When the instalments had ceased to run there could be no question of demand or of exercising a right of option. When all the instalments have ceased to run, a suit brought more than three years after the last instalment but within three years from demand made afterwards is barred. (1918) M.W.N. 586, Foll. 10 L.W. 64=(1919) M.W.N. 550=50 Ind. Cas. 916.

——Art. 75—Default—Limitation.

An instalment bond provided for the money to be paid by five instalments and on default in payment of any of the instalments, the creditor would have the power to recover the entire amount in a lump sum. The bond was executed in 1909 and there was default in the first instalment. Plaintiff waited till the term provided in the bond had fully expired, and sued for all the instalments, except the first two, which had become barred. *Held*, that under the terms of the bond, the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default and that therefore, his suit with regard to the last three instalments was not barred. 41 All. 104=16 A.L.J. 929=47 Ind. Cas. 926.

——Arts. 75 and 116—Limitation—Starting point—Bond—Interest to be paid every year—Money to be paid within a fixed period.

Where a bond provided payment of money with interest within a fixed period and further provided that in case interest was not fixed, the creditor could recover the entire principal and interest from the debtor. Limitation would not run from the date when default was made in the payment of interest if the creditor waived such default. Where a contract gives party an express option to sue on one occasion or another he cannot be compelled to sue on the first occasion. 4 O.L.J. 402=41 Ind. Cas. 423.

——Art. 75—Limitation—Starting point—Time runs from default.

Where a bond provided that the creditor was at liberty to sue immediately for the whole amount on default of payment of monthly interest, *Held*, that limitation began to run from the date of such default. 9 S.L.R. 90=31 Ind. Cas. 479.

——Arts. 75 and 120—Limitation—Starting point—Recovery of instalments—Period of limitation.

The period of limitation for the recovery of the instalments begins from the date on which each instalment becomes due, even where it is provided that on failure to pay three instalments the whole shall become payable Art. 74 applies to such a case. 24 Ind. Cas. 507 (Mad.).

——Art. 75—Instalment bond—Limitation.

Where an instalment bond contained a condition that in default of payments on due dates, the whole amount with interest shall be payable, the creditor is not compelled to sue for the whole amount in deault of any one instalment but can sue for any instalment due within 3 years. 23 Ind. Cas. 830 (All.).

——Art. 75—Default—Limitation.

Where an instalment bond provided that on default of payment of any instalment the whole amount was immediately payable and a creditor brought a suit for the recovery of the whole amount more than 6 years after the date of the first default, and alleged in the plaint that the cause of action arose on the date of that default, *he ld* that the suit was barred by time. 35 All. 455=11 A.L.J. 664=20 Ind. Cas. 933.

——Arts. 75 and 116—Instalment bond—Default—Limitation.

Where a suit for the recovery of the amount on a registered instalment bond is brought after 6 years from the date of the first default without any allegation of waiver of the first default in the plaint, the suit must be dismissed as barred. 11 A.L.J. 89=18 Ind. Cas. 690.

——Art. 75—Instalment bond—Default—Limitation.

An instalment bond provided that in case of defaul, in payment of any instalment the whole amount of the bond should be paid at once. None of the instalments were paid. The creditor more than 3 years from the date of the first default, brought a suit to recover some o the instalments ; *Held*, that in the absence of the waiver, the suit was barred by limitation. 15 Ind.Cas. 856 (All.).

——Art. 75—Instalment bond—Default in payment of instalment—Limitation.

The period of limitation for a suit for recovery of overdue instalments upon a simple money bond providing for recovery of all the instalments on default of any one or all instalments, is in the absence of a waiver, three years from the date of the first instalment. 14 O.C. 129=11 Ind. Cas. 526.

——Arts. 75 and 132—Limitation—Starting point—Default to pay.

Where money was payable in instalments and by agreement the creditor could claim whole amount on default of any one instalment, time runs from the date of first default. 2 Ind. Cas. 653 (Cal.).

——Art. 75—Limitation—Starting point.

In the case of instalment bonds providing for the whole debt to become due on default of one instalment, limitation begins to run from the date of the default of first instalment unless there has been a waiver by acceptance of an overdue instalment. 31 C. 297, Foll. 36 Cal. 394=9 C.L.J. 226=13 C.W.N. 1004=1 Ind. Cas. 49.

——Art. 75—Starting point—Instalment bond—Default—Waiver.

Where an instalment bond provided that the creditor "on the debtor's failure to pay any one of the said instalments, shall be at liberty to realize the amount covered by all the instalments immediately". *Held*, That limitation began to run from the time when the plaintiff first had the right to sue, unless it is proved that he waived his right to demand the whole on default by agreeing subsequently to accept the overdue instalments. Mere abstinence from suing after the right to sue accrued does not amount to a waiver. 13 C..L.R. 243, dissented from. (1904) 31 C. 297.

5. Waiver.

(a) Effect of.
(b) Plea of.
(c) Right of payee.
(d) Surety and waiver.
(e) What amounts to.

5. (a) Waiver—Effect of.

——Art. 75—Waiver—Effect.

Where the obligee is given the right to sue for the whole amount on the occurrence of default in payment of any instalment, it is open to him to waive the benefit of that provision on the occurrence of default in payment of an instalment and yet to avail himself of that provision when a similar default takes place in the payment of a subsequent instalment. 1936 O.W.N. 665=A.I.R. 1936 Oudh 384=164 Ind. Cas. 431.

——Art. 75—Effect of—Waiver.

Where the plaintiffs waive the benefit of the provision as to recovery of the whole amount, they will not be able to sue in future for the whole amounts at once but they are entitled to sue for instalments as they fall due under Art. 75, the cause of action accruing on each default. The general Art. 80 does not apply in such a case. 121 Ind. Cas. 272=A.I.R. 1929 All. 812.

——Art. 75—Subsequent default.

A mortgagee who in the past has waived his right on the occurrence of a default, is not bound to give notice before enforcing his penalty on a subsequent default that the waiver will not be repeated. 69 Ind. Cas. 706=3 Lah. 285=A.I.R. 1922 Lah. 416.

5. (b) Waiver—Plea of.

——Art. 75—Instalment bond with default clause—Waiver of default—Special pleading—Necessity—If can be raised in appeal—Waiver—What would constitute.

In a suit on a promissory note payable by instalments, which provides for the whole amount becoming due on default in the payment of anyone instalment, the starting point of limitation is the date of the first default unless there is a plea of waiver by the promisee. The failure to raise a plea of a waiver, would disentitle the plaintiff from raising it in appeal because, waiver, is a mixed question of fact and law, and unless facts establishing waiver have been pleaded and proved the legal effect of waiver cannot come into operation or be considered.

Mere failure to sue or inaction by the creditor is not a 'waiver' of the default. Something else must be established to show that the promisee has waived his rights. 22 Luck. 299=231 Ind. Cas. 27=1947 O.W.N. 162=1947 O.A. (C.C.) 154=1947 A.W.R. (CC.) 154=A.I.R. 1947 Oudh 235.

——Art. 75—Waiver—Specific pleading is necessary—It cannot be presumed—Plea of recovery of instalments—Plaintiff cannot in revision plead waiver.

In a case falling under Art. 75 the plaintiff trying to get over the bar of limitation by pleading waiver has to make his pleading specifically on the point and support it by cogent evidence. Waiver cannot be presumed.

Where a plaintiff has pleaded repayment of the first two instalments and stated that it was on account of the repayment of the first two instalments that his cause of action did not accrue at the end of the second instalment but accrued when the fourth instalment was defaulted, but hs failed to substantiate his case that the first two instalments were paid he cannot turn round for the first time in revision and urge that the failure to realise the first two instalments should be treated as waiver on his part and that the default took place when the fourth instalment was not paid. This would be allowing him to make out a new case altogether and one which was not pleaded. A.I.R. 1946 Nag. 117=I.L.R. (1945) Nag. 955=(1945) Nag.L.J. 473.

——Art. 75—Benefit of—Waiver—Obligee, when can claim.

In order to claim the benefit of Art. 75, it is necessary for the obligee to show that he has waived the benefit of the provision entitling him to sue an earlier default and that he bases his claim on the subsequent default in respect of which there is no waiver. No hard and fast rule can be laid down as to what would or would not constitute waiver. A.I.R. 1932 Oudh 176=9 O.W.N. 250=137 Ind. Cas. 223.

——Art. 75—Waiver—Inconsistent plea.

In an instalment bond with the condition of exigibility on one default a plaintiff alleged that cause of action arose on the date of the first default and that the limitation was saved by payments of interest on subsequent dates, which the plaintiff failed to prove.

Held, that the plaintiff cannot be allowed to set up a plea of waiver. A.I.R. 1926 P.C. 85, Foll; 33 C.W.N. 250=A.I.R. 1929 Cal. 292.

5. (c) Waiver—Right of payee.

——Art. 75—"Waiver"—Reason of the provision as to.

The provision as to waiver in Art. 75 of the Act is enacted only in favour of the promisee and it is open to him to waive its benefit. 24 Ind. Cas. 507 (Mad.)

——Art. 75—Waiver—Option of obligee.

Under the article it is open to the obligee to waive the benefit of the provision to recover the amount in the case of a first default. Each case is to be governed by the article applicable to it. 15 A.L.J. 313, Applied. 89 Ind. Cas. 383=23 A.L.J. 896=6 L.R.A. Civ. 532=A.I.R. 1926 All. 142.

——Art. 75—No right apart from Art. 75.

Article 75 is the only one which recognises the right of the payee to waive his right to sue on the expiration of the first term of payment. The right of waiver does not apply in other cases. 85 Ind. Cas. 280=27 O.C. 318=A.I.R. 1925 Oudh 502.

5. (d) Surety and waiver.

——Art. 75—Surety and waiver.

The advantage of the waiver described in Art. 75, can be taken by the creditor against the principal debtor because they are parties to the transaction *viz.*, the payment of the sum and the acceptance thereof. The underlying principle is that the debtor is shown an indulgence and he cannot turn round and say that the creditor's remedy has become barred because he was kind to him. But the same cannot be said of the surety. It is his interest that the debt is cleared as soon as possible, and if he is no party to the payment which extends limitation, the cause of action to sue him for the whole money due under the bond arises on the date of the first default. A I.R. 1935 Pesh. 179=160 Ind. Cas. 134.

5. (e)—Waiver—What amounts to.

——Art. 75—Waiver of benefit—What amounts to—Waiver not proved—Right of creditor to recover instalments within limitation.

The following points can be taken to be well established; (*a*) that the exigibility clause in an instalment bond is for the benefit of the creditor and he has a right to waive that benefit even in the absence of a fresh agreement, a fresh consideration or a fresh bilateral arrangement; (*b*) that a mere inaction on the part of the creditor such as an abstinence to sue or a mere receipt of payment, does not amount to a waiver. What is required is some overt act on the part of the creditor, communicated to the debtor, by which a Court of fact can conclude that the creditor has waived the benefit; (*c*) that the payment by the debtor and the acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment would amount to a waiver of that default and of the benefit arising out of that default; (*d*) that a waiver is a mixed question of law and fact. It has to be properly pleaded and proved. A choice left to the creditor in the default clause itself is inconsequential; and (*e*) that in the absence of proof of waiver the creditor cannot fall back on the primary terms of the bond regarding payment and claim to recover on that basis instalments which are still within limitation. I.L.R. (1947) Nag. 947=A.I.R. 1948 Nag. 225.

——Art. 75—Waiver"—What is.

Waiver must obviously be a mixed question of law and fact in each case. Mere failure to sue or inaction by the creditor is not a waiver of the default; something

else must be established to show that the promisee has waived his rights. For instance his acceptance of an over due instalment would amount to waiver of his rights which accrued to him on that default and the starting point of limitation would be from the next default if not waived. But an acceptance of a portion of the instalment which was overdue or the acceptance of the interest only on the overdue instalment cannot be held to be a waiver of the default. A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=5 B.R. 965=183 Ind. Cas. 523 (F.B.).

——Art. 75—Waiver—Bond payable by instalments—Suit for last instalment alleging payment of previous instalments—Payment of previous instalment not proved—Effect.

The amount of the bond, Rs. 250, was payable by yearly instalments of Rs. 50 commencing from the end of May 1929. The plaintiff's case was that the first three instalments and Rs. 26 out of the fourth instalment were paid by the defendant and he sued for recovery of Rs. 89, that is Rs. 24 about the instalment that fell due on May 31, 1932, Rs. 50 the instalment of May 31, 1933 and Rs. 15 interest. The defendant denied the alleged payments:

Held that even if it be supposed that no instalment other than the first two was paid by the defendant, waiver under Art. 75 was evidenced by the fact that the applicant based his cause of action on the default made about the fourth and fifth instalments and the only effect of the fact that the plaintiff pleaded payment of the first instalment and was unable to prove it was that it was not possible to say that the plaintiff waived the benefit of the provision in respect of the first instalment. The suit, therefore was within time. A.I.R. 1938 Oudh 42=1937 O.W.N. 1073=171 Ind. Cas. 602.

——Art. 75—Waiver, what is.

The words "waives the benefit" in Art. 75 do not mean the same thing as availing oneself of the equitable doctrine of waiver for which either fresh consideration, a fresh agreement or something amounting to an estoppel is necessary. That doctrine is invoked against a creditor, whereas the waiver of the benefit spoken of in Art. 75 is something exercised for the benefit of the creditor and not against him. The waiver therefore may be a purely one sided act and need not be for consideration proceeding from the debtor. The waiver may be by expression of an intention to waive the benefit either by communication to the debtor or by any other overt act. Waiver is a mixed question of law and fact and depends on the circumstances of each case. A mere inaction or omission to sue within the prescribed period cannot amount automatically to a waiver within the meaning of the third column of this Article. (1934) A.L.J. 1056=A.I.R. 1934 All. 1039=4 A.W.R. 966=57 A. 561=153 Ind. Cas. 205.

——Art. 75—Waiver, what is.

Where a creditor had the right to recover the whole sum with interest if there was default on any instalment, or he could waive this right and sue for each instalment as it fell due and no instalment being paid he sued for the whole sum:

Held, that as the creditor sued for the whole amount there was no waiver and time ran under Article 75 from the date when default was made. A.I.R. 1934 Lah. 283 (1)=149 Ind. Cas. 972 (1).

——Art. 75—An instalment bond provided that the defendant would pay to the plaintiff a certain amount every year and on default being made in the payment of any three instalments the whole amount would be recoverable at once. No payment was made at all under the bond. Plaintiff brought a suit to recover the amounts of the 7th, 8th and 9th instalments.

Held, that the plaintiff had waived his right to recover the whole amount at once which first accrued to him in default of the first three instalments, and therefore the suit to recover the 7th, 8th and 9th instalments was in time. 97 Ind. Cas. 554=22 N.L.R. 126=A.I.R. 1927 Nag. 28.

——Art. 75—Waiver—Creditor accepting overdue instalment—When amounts to waiver—Suit for recovery of balance—Limitation.

Where a debtor agrees to pay the debt instalments and stipulates that in case of default in paying any one instalment the whole amount would fall due, the acceptance of an overdue instalment amounts to a waiver of the right to claim the entire debt provided that it can be definitely proved that the payment has been made towards the liquidation of that particular instalment and *ex necessitate* the whole sum due is paid. But a payment towards the reduction of the debt generally can on no account be considered a waiver because it is not an acceptance of a specified instalment. Consequently where a creditor waives his right to take advantage of the forfeiture clause with regard to the first three instalments and brings his suit for the recovery of the whole of thebalance within three years from the date when the fourth instalment falls due, his suit is within time. A.I.R. 1935 Pesh. 179=160 Ind. Cas. 134.

——Art. 75—Waiver—Proof.

In the case of instalment bonds payment and acceptance of overdue instalments cannot by themselves prove waiver, and the question whether there was waiver or not will depend on the attending circumstances of the act claimed as a waiver in each particular case. A.I.R. 1933 Nag. 70=144 Ind. Cas. 211.

——Art. 75—Waiver, what is.

According to an agreement between the parties, the defendant was to pay to the plaintiff towards his debt, in instalments of Rs. 17 a month and in case of default, the whole balance was to become payable. The first payment was made on May 20, 1920 a week after due date. In all 19 payments were made at irregular intervals and there were gaps in June, 1930, October, 1930, December 1930, February 1931 and May 1931. No payments were made after June 24, 1931. The plaintiff brought a suit for balance on January 24, 1933.

Held, that it is not possible to lay down any hard and fast rule as to what would or would not constitute a waiver In the present case the only reasonable view was that the plaintiff waived, for a considerable time his right to sue for the whole balance due to him. If the 19 instalments were considered to have been accepted by the plaintiff in payment of the amounts falling due in the first 19 months after June 12, 1929, the cause of action accrued five months prior to July, 1931. Alternatively, the cause of action my be taken to have accrued in the month of June, 1930, that being the first "gap". In either case, however, the suit being instituted on January, 1933, was within time. 11 O.W.N. 1191=A.I.R. 1934 Oudh 455=151 Ind. Cas. 852.

——Art. 75—Mere payment of defaulted instalments in lump.

Where under the decree defendant is to pay the decree-holder by monthly instalments of Rs. 50 and the whole amount to be realised on default of any six instalments and there was default of six instalments upto August, 1916, and on April 9, 1917, a payment of Rs. 5, 500 was made, and on January 19, 1918, that is to say, eight months afterwards, a payment of Rs. 400 was made, *i.e.*, eight times the instalments due under the decree.

Held, these circumstances are not alone sufficient to infer that the parties came to an arrangement that there should be an agreement for a new period of limitation. 72 Ind. Cas. 275=25 Bom.L.R. 153=A.I.R. 1923 Bom. 207.

——Art. 75—Acceptance of overdue payments.

Where an instalment decree provided for payment of yearly instalment on the 16th February of every year

beginning from 15th February, 1912, and the plaintiff accepted payments made later than the due dates.

Held, that from the moment of his acceptance the plaintiff was barred from enforcing the right which was his by reason of the defendant's default and that the defendant became barred from pleading that limitation ran from 15th February, 1912. 59 Ind. Cas. 607=14 S.L.R. 128.

——Arts. 75 and 132—Waiver—Meaning.

In instalment mortgage bond where on default of any two consecutive instalments the whole debt was payable, limitation would commence running in respect of the whole from the time of two defaults. Acceptance of part of overdue instalment is not waiver. 33 Ind. Cas. 606 (Cal.)

——Art. 75—Waiver—Meaning—Acceptance of overdue instalments.

Where an instalment bond provides that the whole amount of the bond would be payable in case of default of any instalment, the acceptance of a portion of an overdue instalment does not constitute waiver and limitation runs from the date of default of the first instalment. 20 Ind. Cas. 156 (Cal.).

——Art. 75—Waiver—Acceptance of overdue instalment.

If the creditor does not enforce the stipulation for payment of the entire amount on default of any instalment he must be taken to have waived the benefit of it and time will run only from the date of each fresh default under Art. 75. Waiver is a question of fact the proof of which cannot be defined to any particular mode of proof and when a man does not take advantage of a stipulation in his favour, that is very strong evidence of waiver. It is not necessary to a waiver under Art. 75 that there must be an acceptance of an overdue payment of instalment. 36 Mad. 66=10 M.L.T. 258=12 Ind. Cas. 57.

——Art. 75—Waiver—Meaning—Overdue instalment—Acceptance of.

Acceptance of an overdue instalment may constitute a waiver, though omission to sue may not. But it does not prevent him from suing for whole debt, if a default is made at any subsequent instalment. 15 C.W.N. 10=13 C.L.J. 206=6 Ind. Cas. 138.

——Art. 75—Waiver—Acceptance of overdue instalment.

The waiver by a creditor must be express. Mere abstinence from suing does not amount to waiver. An acceptance of an overdue instalment may be evidence of waiver. 32 Mad. 284=5 M.L.T. 351=19 M.L.J. 372=4 Ind. Cas. 38.

——Art. 75—Waiver—Suit on instalment bond—Entire debt payable on demand—Acceptance of overdue instalment.

A bond was payable by instalments in default, all to be payable at once. Plaintiff alleged that the first two instalments were paid but not subsequent instalments and he sued for the rest of the money. *Held*, that Art. 75 of the Limitation Act applies and limitation runs from date of default or where the payee has waived the provision as to a default incurring liability to pay the whole at once, then from the time of the next default. Although the first two instalments were paid a little after due time, their acceptance should be held to constitute waiver. The third instalment fell due within six years of date of institution so the suit was within time. 2 Lah. L.J. 314.

——Art. 75—Part payment and acceptance of part of an overdue instalment—No waiver. 8 C.W.N. 66=31 C. 83.

——Art. 75—Payment should be of the specific instalment in arrear.

Where money is made payable by instalments but it is provided that on default in payment of any instalment the creditor is entitled to recover the entire amount and also to charge interest acceptance of any payments by the creditor subsequent to the default may be evidence of his waiver of the benefit of the clause entitling him to charge interest, but the payment must be on account of the specific instalment in arrear and not a mere payment in reduction of the whole debt, *i.e.*, a mere payment on account generally will not suffice. 43 All. 38=A.I.R. 1921 All. 318.

——Art. 75—Mere laches.

Mere laches on the part of the mortgagee in not selling the mortgaged property or instituting a suit for the recovery of the amount due to him within the period of limitation, is not tantamount to waiver and then mortgagee has to prove express waiver. 5 Cal. 97, Foll. 116 Ind. Cas. 581=A.I.R. 1929 Sind. 140.

——Art. 75—Mere abstinence from enforcing a right at the time when the cause of action arose does not amount to waiver. 87 Ind. Cas. 162=47 All. 552=23 A.L.J. 424=6 L.R.A. Civ. 265=A.I.R. 1925 All. 499.

——Art. 75—Where whole amount due on default.

An unregistered bond provided for the payment of a debt in twelve monthly instalments these instalments including re-payment of the principal as well as of interest. The bond also authorise the plaintiff to sue for the unpaid balance either on default in payment of one of the instalments or on the expiry of one year fixed for payment of the entire debt.

Held, that omission to sue for the whole of the balance does not operate as a waiver and that Art. 75 of the Limitation Act applies to the case and that the default was made when the first instalment was not paid in full. 79 Ind. Cas. 848=11 O.L.J. 513=A.I.R. 1925 Oudh 34.

——Art. 75—Mere inaction.

If a creditor simply sleeps on his rights and does nothing for three years it cannot be said that he had agreed to waive the right which accrued to him when the default occurred 82 Ind. Cas. 203=A.I.R. 1924 Bom. 301.

——Art. 75—Where defendant executed a registered bond to plaintiff in 1911 providing for 12 regular half-yearly payments and that in default of any one instalment the whole was due with interest and notwithstanding no instalment was paid, the plaintiff sued in 1921 for recovery of principal only stating that as defendant was poor he did not claim interest.

Held, that the plaintiff cannot be deemed from the facts of his not suing for interest, to have waived the defaults and that the suit was barred. 66 Ind. Cas. 655=A.I.R. 1922 All. 113.

——Art. 75—Waiver—Forbearance to sue.

A mere forbearance to sue for the whole amount of a bound payable by instalments, is not a waiver within Art. 75. 47 Ind. Cas. 943. (Cal.).

——Art. 75—Waiver—What is—Instalment bond—Consent not to sue if waiver.

Waiver is consent to dispense with or forego something to which a person is entitled. When the plaintiff consented not to sue for the whole amount as he was entitled to do under the bond for default on the first two occasions but refused to consent on the third. *Held*, that this amounted to a waiver of the payment of the two earlier instalments. 19 C.W.N. 1172=31 Ind. Cas. 672.

——Art. 75—Waiver—Failure to sue.

Where an instalment bond provides that the total amount would become due on default and a default is made, *Held*, that it is governed by Art. 75 unless the creditor waived his right to enforce the default provision. Failure to sue is not a waiver so as to affect limitation. 8 S.L.R. 63=25 Ind. Cas. 938.

——Art. 75—Waiver—Meaning.

Mere abstention from suing does not constitute waiver within the terms of Art. 75. 2 Ind. Cas. 653 (Cal.).

——Art. 75—Waiver—Meaning—Omission to sue.

A mere omission to sue does not constitute waiver within Art. 75 of the Act but where the money is paid in, only a few days later and a large sum was paid and accepted in the following year, it is sufficient to establish waiver. 20 Ind. Cas. 329 (Cal.).

——Arts. 75, 116—Waiver—Meaning.

Mere omission to sue is not a waiver within Art. 75 of the Act. 15 C. 502, Foll; 13 C.L.R. 243; 11 C.W.N. 903, Diss. from. A waiver is affected not only by acceptance of a subsequent instalment, but in various ways and may be inferred from various circumstances. But it must always depend on some definite act of forbearance on the party of plaintiff. 13 C.W.N. 1010=4 Ind. Cas. 17.

——Art. 75—Waiver—Mere abstinence from suing, if waiver—Receipt of overdue instalment.

In instalment bonds with a provision for the whole debt becoming due on the failure of payment of a certain instalment, limitation begins to run from the date of the non-payment of that instalment unless there has been a waiver by the payee by the acceptance of an overdue instalment. Mere abstinence from suing, that is, merely allowing the default to pass unnoticed does not amount to waiver within the meaning of Art. 75; but subsequently acceptance of an overdue instalment operates as a waiver. 36 Cal. 394=13 C.W.N. 1004=9 C.L.J. 226=1 Ind.Cas. 49.

——Art. 75—Instalment bond—Whole amount to, become due on default of any one payment—Waiver, what constitutes—Mere omission to sue not constituting. 13 C.W.N. 1004=9 C.L.J. 226=36 C. 394=1 Ind. Cas. 49.

——Arts. 75 and 116—Instalment bond registered—Cause of action—Default—Waiver.

Where in an instalment bond it was stipulated that in default of payment of one instalment the whole amount of the bond shall fall due—*Held*, that mere omission to sue is not such a waiver as is contemplated by Art. 15 C. 502, foll. 11 C.W.N. 903, dissented from. Such a waiver is not limited to the case of a subsequent acceptance of an overdue instalment, but may be effected in a variety of ways and may be inferred from various circumstances. It must however, depend on some definite act or forbearance. (1909) 13 C.W.N. 1010=4 Ind. Cas. 17.

——Art. 75—Waiver—Award—Payment in instalments—Deduction of time.

Under an award in a business dispute, the defendant passed an instalment bond in plaintiffs favour. The bond, besides providing for monthly instalments, provided for the recovery of principal and interest, on default of three instalments. The defendant paid the instalments till May. The instalments for May and June were returned by the plaintiff. In August he sued to set aside award which was upheld on 26th February, 1908 and by the Appellate Court by 19th January, 1910. During the appeal, the plaintiff's Vakil applied for the decree of the unpaid instalments, but it was rejected. After the appeal the plaintiff, sued for the recovery of instalments due. Defendant pleaded Art. 75 as bar. *Held* there was no default on the part of the defendent, that there was waiver on the part of the plaintiff and that the plaintiff could not deduct under section 14 the period of previous litigation and also that the defendants could not plead the bar of limitation and that the plaintiffs were entitled to interest on the instalments due as there was no true legal tender of those instalments. 23 M.L.J. 335=(1912) M.W.N. 967=17 Ind. Cas. 513.

6. Miscellaneous.

——Art. 75—Applicability—Indul-talab bond.

There is no justification for giving a different meaning to the expression '*Indul-talab*' from the one in which it is commonly used in bonds. It is well settled that whenever a bond is expressed as payable on demand the performance of the obligation is due from the instant at which the obligation arises. (1944) A.L.J. 251=A.I.R. 1944 All. 197=1944 O.W.N. 83=1944 A.W.R. 123=I.L.R. (1944) All. 274.

——Art. 75—Chit—Subscription—Default—Instalment bond—Cause of action.

A claim for the whole amount due for subscription payable to a *chit fund* on default of any instalment, can be based only on the bond and not on the orginal cause of action. The expression 'on demand' is not merely a technical one, meaning payable at once but denotes a condition precedent to the right to claim the whole amount. (1919) M.W.N. 185=37 M.L.J. 613=9 L.W. 427=50 Ind. Cas. 87.

——Art. 75—Option of limitation—C. P. Code, O. 2, R. 2.

Per *Ramesam, J.*—In cases in which the bond contains words like "when required" or "when you require"or "if you choose" or "the mortgagee will be at liberty to sue", it is easy to hold that there is strictly an option given to the plaintiff and in such cases there should be an overt act toshow intention to take advantage of the default clause but when the bond contains no such words, it cannot be assumed that the plaintiff has such option. 37 All. 400 (F.B.) and 24 Cal. 281, Appr.: 39 Mad. 981 and 9 M.L.T. 36, Diss. from. 112 Ind. Cas. 270=1922 M.W.N. 204=A.I.R. 1928 Mad. 705.

——Art. 78—Payment by cheque or hundi—Dishonour—Limitation—Acknowledgment.

In a suit for recovery of money due on accounts, defendant sent to *plaintiff* a *hundi* and cheque which were dishonoured on presentation. *Held*, that Art. 78 of the Limitation Act did not apply to the case. 46 Cal. 168=27 C.L.J. 392=45 Ind. Cas. 241.

——Arts. 80 and 73—Applicability—Promissory note—Simultaneous agreement by debtor to pay the debt before the discharge of an existing usufructuary mortgage executed by him or in default on the date of the redemption of the mortgage—Limitation for suit on the promissory note.

On the same date as the suit promissory notes the debtors executed agreements reciting that if the debtor do not discharge the debt relating to the promissory notes before discharging the debt due under the usufructuary mortgage executed by the debtors previously in favour of the creditor, the debtors shall pay the promissory notes along with the debt due under mortgage document, cause the payment endorsed thereon, take back the same and take delivery of possession of the lands under mortgage. In a suit on the promissory notes filed beyond three years of their execution.

Held, the agreements and the promissory notes must be considered as part and parcel of the same transaction and the agreements have the effect of postponing the time for the payment of the amount due under the promissory notes, namely, to the date of redemption of the usufructuary mortgage. The agreements have the effect of bringing the promissory notes under Art. 80 of the Limitation Act and a suit filed within three years the discharge of the mortgage will be in time. Art. 73 does not apply to the case. 1950 M.W.N. 118=A.I.R. 1950 Mad. 749=(1950) 1 M.L.J. 161.

——Art. 80—Applicability.

Where the bond provides that the loan would be repaid within 7 years from the date of the execution of the bond and that the interest would be paid year by year and that if it was not so paid the creditor would be entitled to sue for the recovery of the entire debt with interest. Art. 80 can have no application. A.I.R. 1941 Oudh 210=1941 A.W.R. 108=(1941) O.W.N. 361=16 Luck.464=193 Ind. Cas. 481 (F.B.).

Overrules—A.I.R. 1925 Oudh 502 and A.I.R. 1936 Oudh 279=162 Ind. Cas. 459=12 Luck. 211=85 Ind. Cas. 280.

——Arts. 80 and 68—Bond executed on July 1, 1930—Part-payment made on November 25, 1930—Writing endorsing payment containing promise to pay balance within four years—Bond fell due on November 25, 1934—Suit to recover balance filed on July 1, 1937, held, not barred.

A bond for a certain amount executed on July1, 1930, provided that the creditor should realize the principal and interest from the debtor by a suit within four years. On November 25,1930, the debtor paid a certain amount towards principal and also paid the interest accrued till then. As to the balance of principal the debtor by an endorsement on the bond promised to pay the same within four years. On July 1, 1937, the creditor filed a suit for recovery of balance of the principal.

Held that by reason of the endorsement the creditor could not sue within the period of four years and the bond, therefore, having fallen due on November 25, 1934, the suit was within time whether it fell under Article 80 or Art. 68. 41 P.L.R. 352=A.I.R. 1939 Lah. 236.

——Art. 80—Bond payable in two years with default clause—Limitation.

Where a bond payable in two years contained a clause providing that the creditor could sue for the full amount either on the failure to pay the monthly interest or on failure to pay the principal amount and no interest had been paid.

Held that the clause gave an option exclusively in favour of the creditor, who was entitled to the benefit of the investment of the full term originally provided and need not sue until that term expired even if there is a default in the payment of interest. A.I.R. 1935 Lah. 948=8 R.L. 659 (1)=160 Ind. Cas. 1068.

——Art. 80—Instalment bond—Principal payable in instalments after three years—Interest payable monthly—If principal and interest not paid creditor entitled to sue for whole amount at once.

Held cause of action for suing for whole amount did not arise on default to pay monthly interest but on default to pay principal and interest. A.I.R. 1935 Lah. 557=37 P.L.R. 242=157 Ind. Cas. 828.

Reversing—A.I.R. 1933 Lah. 548=142 Ind. Cas. 851.

——Art. 80—Administration—Specific breach—Starting point.

Where an administration bond contains several conditions, a breach of each one of the conditions gives rise to a cause of action and should therefore be taken to be the starting point of limitation in the case of a suit based on that particular breach. Ordinarily, the administrator's, work may be said to be completed when he files his final accounts showing how he has dealt with the estate, and these accounts have been accepted by the Court; limitation will then begin to run. But it very often happens that there is litigation pending against the administrator and, in such a case the administrator (and consequently his surety or sureties) cannot be absolved until the close of each litigation. 33 All. 414, Diss; 8 L.B.R. 99 and 17 M.L.T. 61, Foll. 76 Ind. Cas. 802=1 Rang. 463=A.I.R. 1924 Rang. 68.

——Art. 80—Mortgage-deed—Failure to pay instalments—Mortgage suit barred—Personal remedy.

The trial Court relying on a clause in the mortgage-deed which entitled the mortgagee to sue for the whole amount of principal and interest, on default of payment of annual interest, held that the claim to enforce the charge was barred by time under Art. 132 of the Limitation Act but it was however of opinion that the personal remedy based on the bond was not barred. It accordingly granted the plaintiff a simple money decree. The lower Appellate Court holding that the personal remedy also was barred, dismissed the whole suit,

Held, although the relief for recovery of money otherwise than by enforcing the charge would be governed by another article with a different period fixed, yet it would be startling thing to find that the time for recovery of the amount due by sale of the property has begun to run, while that for recovering it as a simple debt has not yet started; and that the bond does not fall either under Art.66 or Art. 68 or Art. 75, but falls under Art. 80 read with Art. 116, and that the time began to run against the mortgagee for both the reliefs claimed from the date of the first default, when the money became payable. 19 A.L.J. 406; 15 A.L.J. 315; 3 All. 600 (F.B.) Diss. 69 Ind. Cas. 981=20 A.L.J. 819=45 All. 27=4 L.R.A. Civ. 3 =A.I.R. 1923 All. 1 (F.B.).

——Art. 80—Registered bond—Whole debt due on default of instalments—Creditor's option—Alternative remedy.

Where a debt incurred on a registered simple bond was to be paid within seven years but on default to pay interest consecutively for two years it was to become payable at once and a default was made.

Held, that the bond was not a single bond of that there was no 'specified day of payment' that therefore the articles that applies for a suit on the bond is not Art. 66 but Art. 80. Where such a condition exists the question is not one of waiver but of a pure contract and the creditor is entitled to adopt either of the two alternative expressly contemplated by the bond. The original promise to pay the debt within seven years, gave another remedy to the creditor to enforce at the end of that period. The failure to sue within time from the default does not bar the second remedy. 16 O.C. 45, Doubted but Foll. 70 Ind. Cas. 85=9 O.L.J. 416=26 O.C. 121=A.I.R. 1923 Oudh 19.

——Art. 80—Promissory note—Period of payment—Postponed—Limitation.

The executant of a promissory note on 13-6-1913 to a Bank wrote a letter asking the bank that the period of payment be postponed for one year. *Held*, that the promissory note became payable on the 13th June,1914 and a suit within three years of this date was not barred by limitation. 42 All. 55=17 A.L.J. 950=1 U.P.L.R. (H.C.) 132=52 Ind. Cas. 235.

——Art. 80—Writing fixing time for payment of money on a promissory note.

A promissory note payable on demand was accompanied by a writing fixing a period for payment, *held*, that the suit by the payee was governed by Art. 80 and time began to run on the expiry of the time fixed. 39 Mad. 129 =30 M.L.J. 51=19 M.L.T. 62=(1916) 1 M.W.N. 93=3 L.W. 38=32 Ind. Cas. 869 (F.B.).

——Arts. 80, 66 and 67—Bond providing for repayment on happening of certain contingency—Starting point.

Where a bond provided that the money due upon it would be paid at the time of payment of a certain sum of money due on two mortgage-deeds executed previously, the starting point of limitation is the date of such payment and Art. 80 of the Limitation Act governs the case. 30 P.W.R. 1916=32 Ind. Cas. 575.

——Art. 81—Applicability.

Where in a suit for recovery of money paid by plaintiffs on defendant's behalf the plaintiff come into Court asserting that they had been obligated to pay the money as sureties and their whole cause of action is that they had been treated as sureties for defendant, Art. 81 and not Art. 61 will apply. 67 Ind. Cas. 365=55 P.L.R. 1922=A.I.R. 1921 Lah. 335.

——Art. 81—Mode of payment—Contract Act, S. 114.

Payment must be in cash or by transfer of property. 97 Ind. Cas. 185=9 N.L.J. 107=A.I.R. 1926 Nag. 429.

——Art. 81—Payment—Meaning of.

The word "pays" in Art. 81 has the same meaning as in the Contract Act S. 145, and means payment in money or its equivalent and not in the incurring of a fresh obligation *e.g.*, by executing a pronote or bond, etc. 15 N.L.R. 78=50 Ind. Cas. 611.

——Art. 81—Starting point—Date of payment uncertain.

After a suit by creditor against surety was decided against surety, the surety applied for review after depositing decretal amount in Court. Review was dismissed and the creditor withdrew the money deposited. In a suit by surety against the debtor,

Held, that the time ran not from the date of deposit and in the particular case the date of dismissal of review not being known, the date of withdrawal was the starting point. 82 Ind. Cas. 1011=5 L.R.A. Civ. 694=A.I.R. 1925 All. 164.

——Art. 81—Starting point—Payment into Court.

Under Art. 81 of the Limitation Act time begins to run from the time when the surety pays the creditor and the principal debtor remains liable to be sued for three years only after this payment has been made. Payment may be made in more ways than one and if moneys in Court deposit are placed to the credit of the decree-holder, limitation against the principal debtor starts from that date and not from the date when the creditor actually draws out the money. 60 Ind. Cas. 23=(1920) 3 U.B.R. 261.

—Art. 83.

Synopsis.

1. **Applicability.**
2. **Contract of indemnity.**
3. **Cause of action.**
4. **Principal and Agent.**
5. **Registered contract.**
6. **Starting point of limitation.**
7. **Suit by vendor against vendee.**
8. **Miscellaneous.**

1. Applicability.

——Arts. 83 and 90—Applicability—Embezzlement by municipal employee—Suit by municipal committee against surety.

Art. 83, and not Art. 90, of the Limitation Act applies to a suit by a municipal committee to recover a sum of money embezzled by its employee against his surety, and the suit has to be brought within three years from the date "when the plaintiff is actually damnified". A suit brought more than three years after the Municipal Committee had knowledge of the embezzlement by its employee is, therefore, barred by limitation. I.L.R. (1948). Nag. 350=1948 N.L.J. 594=A.I.R. 1949 Nag. 48

——Art. 83—Applicability.

A suit for recovery of expenses incurred by the Receiver of an estate in instituting a suit to recover money due to the estate is governed, not by Art. 83 but by Art 61. A.I.R. 1935 Mad. 594=(1935) M.W.N. 598=69 M.L.J. 539=42 L.W. 680=157 Ind. Cas. 746.

——Art. 83—Applicability.

Held, on facts that the suit being in its nature a mortgage suit, Art. 132 applied and not Art 83 or 120. 38 L.W. 818=(1933) M.W.N. 486=A.I.R. 1934 Mad. 1 =66 M.L.J. 4=57 M. 218=149 Ind. Cas. 379.

——Art. 83—Applicability.

Firm *M* got 10 bags of *Unab* attached in execution of their decree against *H. A*, plaintiff, filed objections against this attachment stating that the 10 bags of *Unab* belonged to him and were not the property of *H*, judgment-debtor. These objections were dismissed. *A* instituted a declaratory suit to the effect that the 10 bags of *Unab* belonged to him and were not liable to attachment and sale in the decree of *M* against *H. A* presented an application for the issue of a temporary injunction to the defendants forbidding them from getting the 10 bags of *Unab* sold. On the same day an order was issued to the defendants not to have the 10 bags of *Unab* auctioned. The firm *M* undertook indemnify *A* after the auction-sale for any damages suffered by him if it was proved that the bags belonged to *A*. The property was sold by auction by *M*. *A's* suit was subsequently decreed in his favour and it was declared that the bags belonged to him. *A* brought a suit against firm *M* to recover the price of the bags and damages for wrongful seizure:

Held, that the suit was not one for damages for wrongful seizure. The cause of action for the suit was the undertaking given by firm *M* and not wrongful seizure and the suit was governed by Art. 83 and not by Art. 29. A.I.R. 1938 Lah. 156=36 P.L.R. 948=175 Ind. Cas. 630.

——Art. 83—Applicability—Charge upon immovables.

Where a registered contract to indemnify contains a provision for a charge on immovable property. Art. 132 applies and not Art. 83 or Art. 116. 66 Ind. Cas. 554 =14 M.L.W. 99=1921 M.W.N. 472=A.I.R. 1921 Mad. 514.

——Art. 83—Applicability—Indemnification not amounting to contract.

The article does not apply unless the obligation of the principal to indemnify amounts to a contract. If it does not amount, time runs from the date of payment of damages for the agent. 34 Mad. 167=(1910) M.W.N. 316=8 M.L.T. 194=20 M.L.J. 989=7 Ind. Cas. 399.

2. Contract of indemnity.

——Art. 83—Scope—Contract of indemnity.

Where *A* purchase goods wrongfully in the name of *B* without the latter's knowledge who is forced to pay the price to the seller, a suit by *B* to recover from *A* the amount which he has been compelled to pay is not governed by Art. 83 as there is no contract of indemnity between *A* and *B*. A.I.R. 1933 Lah. 404=147 Ind. Cas. 57.

——Art. 83—Contract of indemnity.

The contract to indemnify within Art. 83 need not be by express stipulation and may be either imposed by statute or implied or inferred by virtue of the jural relations of the parties. 33 Bom.L.R. 1200=A.I.R. 1932 Bom. 25=136 Ind. Cas. 481.

——Art. 83—Express contract of indemnity.

Where the plaintiff's case was that there was an express contract by the defendant to indemnify him.

Held, that the suit was governed by the special Art. 83 and not the general Art. 61 of the Limitation Act. 15 P.L.R. 1915, Foll. 104 Ind. Cas. 418=9 L.L.J. 165 =28 P.L.R. 138=A.I.R. 1927 Lah. 231.

——Art. 83—Contract of indemnity—Money entrusted for payment.

Money left by *A* with *B* for payment to *C*—Money not paid and damages caused—*B* is liable and can be sued within three years of the damage. 95 Ind. Cas. 913=24 A.L.J. 550=A.I.R. 1926 All. 605.

——Art. 83—Contract of indemnity.

Purchaser of equity of redemption subject to a prior mortgage, paying only for the equity, impliedly covenants to indemnify the vendor against the mortgage debt. Art. 83 applies to such an implied contract. 16 C.W.N. 1040=16 Ind. Cas. 73.

——Arts. 83 and 116—Contract of indemnity—Vendee to discharge debts of vendor.

The question whether a promise by the vendee to pay off the debt due from the vendor is a contract of indemnity within Art. 83, purely depends on the wording of the document in each case. Where the property was worth more than the debt and the discharge of the debt was the only consideration for the transfer, the contract to pay the debt is a contract to indemnity. Where, however, the vendor leaves part of the consideration in the vendee's hand to pay off the debts of the vendor, the vendor may sue the vendee if he fails to pay the debts after they become due and the words of such a covenant would not amount to a contract of indemnity proper. A contract of indemnity may be one of a sale or a gift. 5 L.W. 228=38 Ind. Cas. 188.

——Art. 83—Contract of indemnity—Contract to pay rent, if assessed.

Where a vendor of land held free of rent makes a covenant in a sale-deed to pay rent if assessed and decreed against the vendee, a suit by the vendee to recover money paid as rent is a claim on a contract to indemnify and is governed by Art. 83 of the Act. 15 O.C. 25=13 Ind. Cas. 979.

——Art. 83—Contract of indemnity—Indemnity—What is.

Where in a deed of sale the vendors said "we are in enjoyment of the house as its owners; and if any one were to obstruct you in your enjoyment of the house, we would remove the obstruction so as to put you to no trouble."

Held, that it did not amount to a contract of indemnity and Art. 83 did not apply. (1902) 4 Bom.L.R. 571=26 B. 750.

3. Cause of action.

——Art. 83—Right of indemnity—Cause of action.

Where there is an undertaking by the vendee or other transferee to pay off a mortgage debt existing on the property, the covenant is not merely one to pay the purchase-money in a particular manner to the vendor's nominee, but one to relieve the vendor from the liability of the mortgage, and in that sense, there is a contract of indemnity which may be express or implied. In such cases a cause of action arises when the plaintiff-vendor is actually damnified by the sale of the property in the suit by the mortgagee, and under Art. 83, the plaintiff has three years from the time when he is so damnified. A.I.R. 1939 Pat. 194=17 Pat. 751=5 B.R. 588=181 Ind. Cas. 459.

——Art. 83—Right of indemnity—Cause of action when arises.

The defendants mortgaged certain items of property to one *P*. Subsequently they purported to transfer certain items not covered by mortgage to *D* reserving of a part of the consideration to be paid to *P* and discharge the mortgage. They then sold a part of the property mortgaged to *P* to the plaintiff free from encumbrances and it was stipulated that the amount reserved would be paid by *D* but that in the case he failed to pay, the plaintiff would have the right to recover the amount, which he will be compelled to pay, from *D*. On *D*'s failure to pay, the plaintiff paid it:

Held, that the payment made by the plaintiff was one made on behalf of the defendants (mortgagors) and the right of action by virtue of the right of indemnity arose on the date of payment by the plaintiff and Art. 83 applied. (1936) M.W.N. 350=A.I.R. 1936 Mad. 655=44 L.W. 458=167 Ind. Cas. 157.

——Art. 83—Suit for indemnity—Cause of action,

A owed *B* a certain sum of money. As *A* was not able to pay *C* executed a promissory note to *B* for the said amount and after the amount due under the note was paid by *C* to *B*. *C* instituted a suit against *A* for recovering the amount thus paid:

Held, that the suit was not governed either by Art. 61 or Art. 65. Whether *C* was to be regarded as an agent of *B* or to have acted at the request of *B*, the suit was really based on *A*'s liability to indemnify *C*, the proper article applicable was Art. 83 and the cause of action arose when *C* paid. 43 L.W. 503=(1936) M.W.N. 422=A.I.R. 1936 Mad. 334=70 M.L.J. 537=163 Ind. Cas. 177.

——Art. 83—Cause of action.

Under a contract of indemnity the cause of action arises when the damage which the indemnity is intended to cover is suffered. A.I.R. 1935 Lah. 974=38 P.L.R. 126=159 Ind. Cas. 853 (1).

——Arts. 83, 113, 116—Suit on covenant—Exchange deed—Indemnity clause, suit on—No suit for specific performance—Cause of action—*See* Art. 181. 18 M.L.J. 477=31 M. 452=5 M.L.T. 211.

——Art. 83—Indemnity—Breach—Cause of action.

Where there is a covenant in the nature of an indemnity *i.e.* to discharge debts on property, the covenantor becomes liable only when the plaintiff actually suffers damages *e. g.*, by loss of possession etc., and a suit brought within 3 years of that date is in time. 38 M.L.J. 470=57 Ind. Cas. 982.

4. Principal and agent.

——Art. 83—Principal and agent—Suit by agent against principal for indemnity.

The liability of a principal under S. 222, Contract Act, to indemnity the agent is one under a contract within the meaning of Art. 83. Article 83, therefore, applies to a suit to recover money spent by an agent acting within his authority on behalf of the principal. Time runs from the date when the payment is made by the agent. A.I.R. 1944 Cal. 302=48 C.W.N. 317.

——Art. 83—Principal and agent.

A suit by a commission agent to recover loss on the transactions entered into on behalf of his constituents is governed by Art. 83. A.I.R. 1932 Bom. 25=33 Bom.L.R. 1200=136 Ind. Cas. 481.

——Art. 83—Principal and agent.

A suit by an agent to recover money due to him from the principal on transactions entered into on behalf of the latter is governed by Art. 83 and not by Art. 61 of the Limitation Act. 31 P.L.R. 666.

——Art. 83—Principal and agent.

Suit by an agent to recover money due to him from the principal on transactions entered into on behalf of the latter is governed by Art. 83 and not by Art. 61. 34 Mad. 167, Not foll; 23 P.R. 1915, Foll. 115 Ind. Cas. 767=30 P.L.R. 35.

——Art. 83—Principal and agent.

A suit recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook a commission agents on behalf of the defendants is governed, by Art. 83 and not by Art. 64. 92 Ind. Cas. 595=7 L.L.J. 596=27 P.L.R. 32=A.I.R. 1926 Lah. 152.

——Art. 83—Principal and agent—Suit for value of goods supplied by commission agent—Limitation.

A suit for the recovery of the money due on account of the value of goods supplied by the plaintiff as commission agent to the defendant is governed by Art. 83. 139 P.W.R. 1918=59 P.L.R. 1918=46 Ind. Cas. 541.

——Art. 83—Principal and agent—Right to be recouped—Loss by an agent.

A suit by an agent to enforce his right to be recouped by his principal in respect of losses sustained during the agency is governed by Art. 83 of the Act, the right being the direct consequence of the agency contract. 35 P.W.R. 1915=23 P.R. 1915=100 P.L.R. 1915=26 Ind. Cas. 415.

——Art. 83—Principal and agent—Starting point.

A suit by an agent to recover the amount due from his client must be brought within the period of limitation prescribed by Art. 83 of Sch. 1, Limitation Act. Limitation in such a case operates from the date of the payment on behalf of the principal. 23 P.R. 1915; 59 P.L.R. 1918; A.I.R. 1921 Lah. 167; A.I.R. 1923 Lah. 473; A.I.R. 1926 Lah. 152 and A.I.R. 1927 Lah. 826, Foll. 112 Ind. Cas. 719=A.I.R. 1928 Lah. 424.

——Art. 83—Principal and agent—Starting point.

Where a commission agent buys goods for principal and they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by Art. 83, Limitation Act in such a case operates from the date of payment made on behalf of the principal and not from the date of the sale. 23 P.R. 1915; 58 P.L.R. 1918; A.I.R. 1921 Lah. 167 and A.I.R. 1923 Lah. 473, Foll. 106 Ind. Cas. 40=29 P.L.R. 61=9 L.L.J. 493=A.I.R. 1927 Lah. 826.

——Art. 83—Principal and agent—Starting point.

Where a commission agent buys goods for a principal but through the latter's default in paying for the same they are re-sold by the agent at a loss, a suit by the agent to recover the amount of the said loss with interest and other incidental expenses must be brought within the period of limitation prescribed by the Art. 83, Limitation Act, in such a case operates from the date of the payment made on behalf of the principal and not from the date of the sale. 3 L.L.J. 65, Rel. 73 Ind. Cas. 143=A.I.R. 1923 Lah. 473.

——Art. 83—Principal and agent—Starting point.

Plaintiffs who were commission agents purchased two kothas of gram at the request of defendants and paid the price out their own pocket. Subsequently they sold them at a loss and filed a suit for the recovery of the loss together with interest and certain incidental expenses.

Held, that the suit is governed by Art. 83 (23 P.R. 1915, Foll.) and the period of limitation should be calculated from the date of payment by the agent and not from the date of his selling the goods. In the absence of a contract to the contrary the agent is damnified when he makes the payment. 34 Mad. 167, Foll. 66 Ind. Cas. 900=3 L.L.J. 65=A.I.R. 1921 Lah. 167.

5. Registered contract.

——Arts. 83, 116—Suit on registered contract of indemnity.

Where the vendor agrees to indemnify the vendee in case any loss was caused to the vendee in any suit brought in respect of the property of the sale-deed, the mere filing of a suit would not give a cause of action to the vendee to recover damages on this agreement. Even if a third person succeeded in that suit, until the vendee is dispossessed, he would have no cause of action to bring a suit for damages for breach of this agreement. A suit to recover damages in such a case when the sale-deed is registered would be governed by Art. 83 read with Art. 116. 33 Bom.L.R. 1092=55 B. 565=A.I.R. 1932 Bom. 36=134 Ind. Cas. 1157.

——Arts. 83, 116—Suit on registered contract of indemnity.

Claim on a registered indemnity bond is governed by Art. 116 and not by Art. 83. 50 Ind. Cas. 673 (Mad.).

——Art. 83—Registered contract.

A suit for compensation for the breach of a contract to indemnify falls within the purview of Art. 83 and when such a contract is in writing and registered, Art. 116 becomes applicable and by virtue of it the period is extended to six years. *Obiter* in 116 All. 3, Diss from. 64 Ind. Cas. 431=2 Lah. 316=3 L.L.J. 542=104 P.L.R. 1921=A.I.R. 1921 Lah. 260.

6. Starting point of limitation.

——Art. 83—Starting point of limitation.

Cause of action for a claim against promisor accrues to the promisee when the latter is actually damnified and his suit is governed by Art. 83. 42 Bom.L.R. 175 =A.I.R. 1940 Bom. 161=188 Ind. Cas. 663.

——Art. 83—Applicability—Starting point.

Where claim was fully satisfied by agreement or decree of Court but the satisfaction was subsequently annulled by another Court:

Held, that a fresh cause of action accrued in favour of plaintiff when the first suit brought by him was finally decided. Article 83 applied and the time began to run when plaintiff was actually damnified. 40 Bom.L.R. 1169=A.I.R. 1939 Bom. 26=I.L.R. (1939) Bom. 9 =179 Ind. Cas. 441.

——Art. 83—Starting point.

Where the claim is upon a contract to indemnify, then time would begin to run from the date when the plaintiff is actually damnified. A.I.R. 1936 All. 870 =1936 A.W.R. 1197=166 Ind. Cas. 908.

——Art. 83—Starting point of limitation.

Under Art. 83, time begins to run when plaintiff is actually damnified. A.I.R. 1932 Bom. 25=33 Bom. L.R. 1200=136 Ind. Cas. 481.

——Art. 83—Purchaser from widow suing for refund—Starting point of limitation.

Where an alienation was made by a purchaser from a widow, pending declaratory suit by reversioner, and in the sale-deed alienor expressly stipulated for refund of purchase-money with damages, and the Reversioners got the declaration sought for and after the death of the widow they sued and got possession.

Held, that Art. 97 did not apply and that limitation did not commence to run till the vendee were actually dispossessed and from the date of dispossession that suit was admittedly within time. 106 Ind. Cas. 804=9 L.L.J. 468=A.I.R. 1927 Lah. 570.

7. Suit by vendor against vendee.

——Art. 83—Suit by vendor for loss caused by default of vendee.

A suit brought by the vendor against the vendee on the default being made by the vendee in paying off the creditors of the vendor, for the loss occasioned by such default is one for recovery of damages for breach of a contract of indemnity and as such, is governed by Art. 83, which must be read with Art. 116, where the sale-deed is registered document. The limitation runs from the date when the vendor is actually damnified. 43 P.L.R. 548=A.I.R. 1940 Lah. 321=I.L.R. (1941) Lah. 353=192 Ind. Cas. 841.

——Art. 83—Suit by vendor for loss caused by vendee's dafault—Limitation.

Where there is an undertaking by the vendee to pay off a mortgage debt, there is an implied contract of indemnity, and the case, therefore, comes under Art. 83, when the vendor is actually damnified by the loss of his property by the failure of the vendee to pay it off. The limitation for suit for damages starts from the date of such loss and not from the date of the sale. A.I.R. 1938 All. 297=(1938) A.L.J. 455=1938 A.W.R. 354 =I.L.R. (1938) All. 500=175 Ind. Cas. 241 (F.B.).

——Art. 83—Suit by vendor for loss caused by vendee's default.

The plaintiff executed a sale-deed in favour of the defendants, the deed containing a covenant that they would pay a sum out of the sale price to a mortgagee of some other property. The defendants did not pay and the mortgagee realised a certain amount from plaintiff who thereupon filed a suit:

Held, that as the plaintiff has actually been damnified in consequence of a breach of agreement by the vendee to a sale-deed the suit will come under Art. 83. 1935 R.D. 75=(1935) A.L.J. 255=A.I.R. 1935 All. 463 =1935 A.W.R. 199=154 Ind. Cas. 305 (2).

——Art. 83—Suit by transferor against transferee—Limitation.

J, the father of the plaintiffs, sold a decree to the defendant-respondent on March 1, 1923, for a sum of Rs. 2,500. The entire consideration was left with the defendant for payment to one *C* who held a decree against *J*, the vendor. The defendant did not pay the amount left in deposit with him to *C* and *J* borrowed money from a third person by executing a mortgage-deed on December 10, 1926, for discharging the decree of *C*. The plaintiffs sued on December 9, 1929, for recovery of the amount left in deposit with the defendant for payment to *C*:

Held, that the suit by a vendor in such cases is not for the return of the unpaid purchase-money that the vendee failed to pay, but is to enforce the implied contract of indemnity the breach of which was committed by the vendee by failing to pay to the third party for whose payment the vendor had left a portion of the purchase-money with the vendee, and the suit would come within the purview of Art. 83. A.I.R. 1933 All. 386=(1933) A.L.J. 787=55 A. 490=143 Ind. Cas. 821.

——Art. 83—Suit by vendor against vendee—Starting point of limitation.

In a suit by a transferor against the transferee for the latters default to pay the money left with him for payment to a creditor to the transferor starts from the time when the transferor is damnified *i.e.*, when he pays the money to his creditor. A.I.R. 1933 All. 386=(1933) A.L.J. 787=55 A. 490=143 Ind. Cas. 821.

——Art. 83—Suit by vendor for loss caused by vendee's default—Limitation—Starting point.

Under a registered sale-deed executed on February 28, 1919, by *A* to *B* a certain amount was reserved with *B* to be paid within a year. The sale-deed further provided that if the vendees were to part with the property before the period fixed, they had to pay to the vendor the above sum with interest out of the sale price realised by them. If this condition was violated the original vendor had the right to realise the money from the property sold or enforce his claim personally against the vendee's or the vendees transferees and their successors-in-interest. *B* sold the property to *C* reserving the amount payable to *A*. *C* did not pay. *A* sued *B* and obtained a decree and *B* paid Rs. 500 to *A* in settlement on December 19, 1926. *B's* heirs sued *C* in 1927, for recovering the amount they had paid to *A*:

Held, that Art. 116 read with Art. 83 governed the suit, and the starting point was when the plaintiffs were actually damnified, that is, when they paid off *A*. A.I.R. 1933 Lah. 793=34 P.L.R. 734=14 L. 646=144 Ind. Cas. 362.

——Art. 83—Suit by vendor for loss caused by vendee's default—Starting point of limitation.

Where a portion of the purchase-money is left with the purchaser to be paid over to a mortgagee and in consequence of the failure of the purchaser so to do, the seller is obliged to pay the amount due to the mortgagee, a suit for damages against the purchaser is in time if brought within three years from the date of payment to the mortgagee. 12 P.L.T. 211=10 Pat. 451 =A.I.R. 1931 Pat. 271=132 Ind. Cas. 104.

8. Miscellaneous.

——Art. 83—Miscellaneous—Commission agent—When damnified.

When a commission agent allocates the cross-contracts to himself, it might be said that he is damnified on the day when the cross-contracts were entered into. If, on the other hand, he enters into cross-contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which cross-contracts were entered into. 33 Bom.L.R. 1200 =A.I.R. 1932 Bom. 25=136 Ind. Cas. 481.

——Arts. 84, 113 and 115—Applicability—Claim for recovery of Advocate's fees—Suit in which advocate was engaged ending in compromise—Scope of Art. 84—Claim after three years by advocate for his fees—Claim if barred by limitation.

An advocate was engaged by an estate to defend a case against the owner of the estate, and a memo. dated 18th November, 1935, mentioned the settlement of his fees. As money was not paid to the advocate, correspondence passed between the advocate and the party as a result of which, in 1937, the estate intimated paying up of arrears in the last week of April of that year. The suit had been compromised in 1936 itself. The estate then went under the management of the Court of Wards, and the advocate preferred a claim for his fees in 1941, which was held to be time-barred. In second appeal,

Held, that Art. 84 of the Limitation Act was clearly applicable and the only question was as to the date from which the three years' period commenced to run. It could not be said that as execution proceedings were still pending the suit had not terminated. Though the word "suit" may include execution proceedings as well as an appeal also, this meaning cannot be imported into Art. 84 where the word "suit" seems to be used in its ordinary and not technical sense in which a layman would understand it. Further, from the correspondence between the parties, there was no room for holding that the matter of the suit continued, for the purpose of the present claim, after the compromise in the suit. Hence the claim was barred by limitation. Neither Art. 113 nor Art. 115 had any application to such a claim. 60 L.W. 166=1947 M.W.N. 151=A.I.R. 1947 Mad. 457=(1947) 1 M.L.J. 173.

——Art. 84—Pleader's suit for fees—Starting point of limitation.

Suit for fee by *Vakil* based on contract—Client terminating *Vakil's* services and engaging another lawyer without repudiating contract—Suit filed within three years of determination of defendant's suit held to be within time. 1936 M.W.N. 395.

——Art. 84—Pleader's suit for fees.

Section 225, Madras Local Boards Acts does not apply to cases where the President of a Board engages a Vakil on behalf of the Board and there is a claim by him for fees but the ordinary law of limitation, namely three years, applies. If the Board is to sue as plaintiff it may be necessary for the President to obtain the sanction

——**Art. 85—Applicability and scope.**

Under Art. 85, the account between the parties must be mutual, open and current indicating reciprocal demands between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party : it is not essential that the balance should in fact have been in favour of the defendants at some stage.

Per *Crump, J.*— The words "where there have been reciprocal demands between the parties" in Art. 85 taken literally may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition but are not intended to postulate that there should have been reciprocal demands in fact. 76 Ind. Cas. 115=47 Bom. 128=24 Bom.L.R. 1284 =A.I.R. 1923 Bom. 82.

——**Art. 85—Applicability and scope—Mutuality and reciprocity.**

The test of applying Art. 85 is mutuality and reciprocity ; therefore where there are entries on one side showing cash advances, price of cloth sold, payment made to third person on behalf of the defendants for things supplied and commission charged, for purchases made by plaintiff for defendants and on the other side there are entries showing that the plaintiff firm received various kinds of grains from the defendant and having sold them in the market credited the proceeds to the defendants, the suit comes under Art. 85 of the Limitation Act. 71 Ind. Cas. 259=A.I.R. 1922 Lah. 338.

——**Art. 85—Applicability—Where there are no reciprocal demands.**

Plaintiff sued defendant for a sum of Rs. 1,600 due as principal and interest on book accounts. It was alleged that defendant had struck a balance in favour of the plaintiff for Rs. 756-14-0 and that he had since taken a further sum of Rs. 57 and these items together with interest accrued due amounted to a total of Rs. 1,600.

The accounts on record were not mutual, open and current and there were no reciprocal demands between the parties,

Held, that Art. 85 does not apply but that the Article applicable is either 57 or 64. 4 L.L.J. 69=A.I.R. 1922 Lah. 204.

——**Art. 85—Applicability and scope.**

Where the balance claimed is due on a mutual, open and current account and there have been reciprocal demands between the parties the suit is governed by Art. 85 of the First Schedule of the Limitation Act and not by Art. 57 of the Punjab Loans Limitation Act. In order to bring the case within the latter article the plaintiffs have to make out that the claim, was for money payable for money lent. A mere striking of balance is no evidence of a new contract. 62 Ind. Cas. 898=4 L.L.J. 217= A.I.R. 1922 Lah. 188.

——**Art. 85—Applicability and scope.**

The test for the application of Art. 85 appears to be whether the dealings are mutual, that is to say, entered in an account consisting of mutual items of debit and credit and not whether they might give rise to independent obligations of reciprocal demands, or whether the balance might shift from one side to the other. Art. 85 contemplates mutual dealings, and it was intended that if there was a continuous account of mutual dealings, then for the purposes of a suit that period of limitation should be computed from the close of the year in which the last item admitted or proved was entered in the account. 63 Ind. Cas. 950=23 Bom.L.R. 540=A.I.R. 1921 Bom. 451.

——**Art. 85—Applicability and scope.**

Although an account may be current and open, to render the Article applicable, however, it is also necessary that each party must have a demand against the other. It is not necessary that any demand should actually have been made. Both parties must, however, have been capable of making a demand. 67 Ind. Cas. 933=3 L.L. J. 362=A.I.R. 1921 Lah. 256.

——**Arts. 85 and 88—Applicability—Mutual, open and current account.**

Where in the dealings between the parties something outside the mere entrusting of goods for sale is found such as for example advances from time to time by the plaintiff to the defendant and credit for the goods sold on defendants behalf, these elements are quite sufficient to bring the case under Art. 85 for the balance due on a mutual, open and current account and Art. 88 has no application. Where plaintiff advanced different sums at different time to the defendant which advances were treated under an agreement as a consolidated debt commencing from date of agreement and a pro-note was executed by the defendant the same day about the consolidated items, *held*, that a suit on the basis of the dealings fell under Art. 85 and not under Art. 88. (1915) M.W.N. 519=29 Ind. Cas. 462.

——**Art. 85—Applicability—Balance not struck—Accounts not stated.**

Where in an account no balance was struck nor account stated, the account is a current one. If the dealings were such as to create independent obligations in favour of one party against the other, the account is a mutual one. To such a case Art. 85 applies. 22 Bom. 606; 6 C.L.J. 158; (1896) 16 A.W.N. 186, Foll. 32 All.11=6 A.L.J. 921= 4 Ind. Cas. 261.

——**Art. 85—Applicability and scope.**

In the case of the plaintiff alone being the banker, advancing and receiving part-payments, without mutual accounts or demands but with a balance in his favour, Art. 85 of Schedule 1 of the Limitation Act is not applicable. 37 Ind. Cas. 300=103 P.W.R. 1916.

2. Essential for mutuality.

——**Art. 85—Essential for mutuality.**

Mutual accounts are accounts which show reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of credits and debits. A.I.R. 1930 Lah. 711=126 Ind. Cas. 65.

——**Art. 85—Essentials for mutuality.**

To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. 34 Mad. 513, Foll. 7 O.W.N. 420=A.I.R. 1930 Oudh 287.

——**Art. 85—Essential for mutuality —Lending or borrowing.**

An account in which one party only borrows or lends is not a mutual account. It is not necessary that the balance should actually shift from one side to the other. An account which he is settled is not an open account. All that is necessary is that from the nature of the transactions it is capable of so shifting. 102 Ind. Cas. 225=29 Bom.L.R. 375=A.I.R. 1927 Bom. 225.

——**Art. 85—Accounts—Current and mutual—Essentials of mutuality.**

Where an account does not indicate transactions creating independent obligations on both sides but there is sometimes a credit in favour of the defendant and that only for a few days.

Held, the account is not a mutual account, and in a suit on such an account the plaintiff is not entitled to the benefit of Art. 85 of Schedule 1 to the Limitation Act.

An account current is an open or running account between two or more parties, or an account which contains

items between the parties from which the balance due to one of them is, or can be ascertained from which it follows that such an account comes under the term of open account in so far as it is running, unsettled or unclosed. Mutual, accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits.

The tests of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of the other. An account which consists of entries of payments made by one party in reduction of a debt to another and of payments made by the latter on behalf of the former, is not a mututal account. 66 Ind. Cas. 30=3 Pat.L.T. 492=A.I.R. 1922 Pat. 364.

——Art. 85—Essential of mutuality—Each Party must have paid and received.

"To constitute mutual account it is not sufficient that one of the two parties should have received money and paid it on account of the other. The reason of that distinction is that in the case of proceedings at law, where each of the two parties has received and paid on account of the other what would have to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account but also to enter into evidence of his own receipts and payments, a position of the case, which to say the least, would be difficult to be dealt with at law. Where one party has merely received and paid moneys on account of the other it becomes a simple case, but it is otherwise where each party has received and paid." (1852) 9 Hare 471, Foll.

Thus where an account and the agreement upon which it was based provided for a loan by the plaintiffs to the defendants to be discharged by the proceeds of goods transmitted by the defendants to the plaintiffs the account is an account for the money paid and received by the plaintiffs and not an open mutual and current account. 120 Ind. Cas. 714=56 Cal. 575=A.I.R. 1929 Cal. 641.

——Art. 85—Essential for mutuality—Independent obligations on each side is necessary.

The plaintiffs sued the defendants on accounts claiming Rs. 1,450. The suit was instituted on the 30th of August, 1918. The accounts showed a balance struck of Rs. 361-6 in favour of the plaintiffs on the 20th May, 1913. Thereafter the accounts continued for another year and ended with a total in favour of the plaintiffs of Rs. 832-9. No second balance was struck formally. Interest at 1 per cent. per mensem was claimed bringing the amount in suit up to Rs. 1,450.

Held, that the article applicable was Art. 57 for which the period is six years under the Punjab Loans Limitation Act of 1904, the balance being an acknowledgment starting fresh period of limitation under S. 19 of Act 9 of 1908. An account is mutual when there are transactions on each side creating independent obligations on the other, and, where the transactions create obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual. 79 Ind. Cas. 998=A.I.R. 1923 Lah. 636.

——Art. 85—Essential for mutuality—Test—Intention of parties and possibility of balance on both sides.

The fact that the balance was always in fact in favour of the same party does not prevent the account from being mutual, open and current. The test is the intention of the parties and indeed it is quite probable that there may be times at which the balance stood in favour of the defendant though the accounts were never made up at any such time. 65 Ind. Cas. 881=A.I.R. 1923 Nag. 108.

3. Master and servant.

——Art. 85—Master and servant—Salary credited in accounts—Drawings.

In order that accounts might be mutual there must be transactions on each side creating independent obligation on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. 6 M.H.C.R. 142; (1852) 9 Hare, 471, Foll.

The defendant was in the employment of the plaintiff. A ledger account was kept in his house in which were debited against him certain sums he drew periodically in advance, credit being given to him periodically on account of the salary due to him,

Held, that such account cannot be called a mutual account. 103 Ind. Cas. 48=39 M.L.T. 365=A.I.R. 1927 Mad. 819.

——Art. 85—Master and servant—Advance of salary from time to time.

The defendant was in the employment of the plaintiff and drew advance against his salary from time to time. His salary was fixed by the year. The plaintiff sued to recover the excess drawn by the defendant over the salary due to him,

Held, that Art. 85 applied and limitation began to run from the end of the year in which the last item is entered in the accounts. 87 Ind. Cas. 832=A.I.R. 1925 Nag. 295.

4. "Mutual, open, and current account".

——Art. 85—Mutual account—Meaning of.

It is well settled that in order to constitute a mutual account falling under Art. 85, Limitation Act, there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. 12 B.R. 789=227 Ind. Cas. 36=A.I.R. 1947 Pat. 273.

——Art. 85—Mutual account—What is—Suit by Bank to recover balance.

Where the customer of a Bank is allowed to overdraw his current account, and the account is sometimes in credit and sometimes in debit, it is a mutual account and a suit by the Bank to recover the balance due to it is governed by Art. 85. 58 M.L.W. 361=(1945) 2 M.L.J. 120=1945 M.W.N. 415=A.I.R. 1945 Mad. 467.

——Arts. 85, 57, 96—Mutual, open and current accounts.

The defendants who were merchants in a considerable way of business at various places and were anxious to extend and enlarge the premises at their headquarters approached the plaintiff bank with whom they had dealt for several years, and asked for an overdraft. The agent of the bank consented to their overdrawing the current account to the extent of Rs. 30,000 on condition of their mortgaging the land on which their business premises stood together with the existing buildings and any other buildings which they might subsequently construct on it. The bond stipulated for the payment of interest at 9 per cent. per annum to be compounded at the end of every six months. It further stipulated, that payments were to be made in instalments, and that the whole of the amount should be paid on or before December 31, 1931. The last advance made to the defendants was made as far as January 26, 1931. An action was brought on November, 1937, on the mortgage. It appeared that the sums actually advanced to the defendants amounted to Rs. 35,000 or Rs. 5,025 in excess of the overdraft for which he has asked. The suit for Rs. 30,000 on the mortgage was decreed.

Held, that the claim for the sum of Rs. 5,025 was barred by limitation. When the defendant drew a cheque on

the bank knowing that the funds to their credit were not sufficient to meet it but expecting the bank nevertheless to honour, it, they impliedly applied to the bank for an overdraft of a loan. If the suit had been instituted within a period of three years from the date on which the earliest of the various sums amounting in all to this Rs. 5,025-15-9 had been paid out by the bank, the suit would undoubtedly have had to be decreed.

Held, also that the bank knew that the defendants had not mortgaged their property for more than Rs. 30,000. But inspite of this, it honoured the cheques in excess of that amount. The action could not, therefore, be regarded as one for the recovery of money paid under a mistake so as to be governed by Art. 96 and Art. 57.

Held, further that from the statement of account it appeared that various sums were paid by the bank to the defendants or to persons who presented cheques drawn on the bank by the defendants between certain period. During the period only two payments were made by the defendants to the Bank, both of them being credited towards the amount due as interest on the overdraft. In these circumstances, it was impossible to say that there were in fact mutual dealings between the parties. 8 B.R. 218=A.I.R. 1942 Pat. 201=197 Ind. Cas. 449.

——Art. 85—Mutual, open and current account—Test.

For mutual accounts there should be reciprocity of dealings between the parties. Accounts having items on one side only are not mutual accounts, though such accounts are made up of debts and credits. The absence of a shifting balance is not fatal to the conception of mutuality. The phrase "reciprocal demands" in Art. 85, does not import that either party has made an actual demand in fact. But the dealings must be of such a nature that they might lead to reciprocal demands. Once a mutual, open and current account is started and there are reciprocal demands, it so continues so long as the amount remains open and current. If the account is closed then that account is finished and turned into a settled account as the case may be. Also if the account ceases to be current, clearly from that moment any other account between the parties would have to depend for its nature on its own qualities, not on the qualities of the old account. The fact that after a certain date the account was one-sided cannot turn a mutual, open and current account into a non-mutual, open and current account. A.I.R. 1939 Nag. 113=1939 N.L.J. 109=I.L.R. (1941) Nag. 222=184 Ind. Cas. 139.

——Art. 85—Mutual, current and open account—Test.

The real test in finding out whether a case is governed by Art. 85 is to find out whether the balance was shifting in favour of one party or the other. If that is the case and it is possible that one day the plaintiff can say that defendant owes him a certain amount and on another day the defendant can say that the plaintiff is indebted to him, then clearly it is a case of mutual, current open account. For determining the question of mutuality, it is not necessary that there must be a large number of transactions between the parties. There should be two sets of transactions. In one set one party should hold the position of a creditor and the other a debtor and in the other set the position should be reversed.

Consequently where a person deposits a certain amount in current account with a bank and he makes an overdraft of a larger amount which is allowed on account of his current account and executes a promissory note and a receipt in lieu of the overdraft, the transaction comes within the purview of Art. 85. A.I.R. 1940 All. 209=1940 A.W.R. 55=(1941) A.L.J. 51=I.L.R. 1930 All. 147=190 Ind. Cas. 356.

——Art. 85—Mutual accounts—What constitutes.

To constitute a mutual account, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. The test of mutuality is that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. If the balance is always in favour of one party then the case is one in which there are not separate mutual dealings. On the other hand the mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual. It is sufficient for an account to be mutual if the dealings are such that the balance might have been in favour of either party ; it is not essential that the balance should in fact have been in favour of the defendants at some stage. Article 85, applies where the nature of the business between the parties is such as to give rise to reciprocal demands. While the criterion of a shifting balance is not conclusive to show that on account did not start, as, or did not continue as, a mutual one, yet where an account has started as a mutual one, and thereafter one side is always indebted to the other and the course of dealing between the parties consists merely of partial repayments of that indebtedness and incidental and passing small transactions creating independent obligations on one side, but insignificant in account, and never such as would by their nature, be likely to result in that party being able to be in a position to make a demand on the other, then the account ceases to return to its character of mutuality.

Therefore, an account between the parties for a sufficient length of time merely showing repayments on account by defendant to the plaintiff to reduce indebtedness is not a mutual account at all. A.I.R. 1938 Rang. 270=177 Ind. Cas. 442.

——Art. 85—Mutual account—What is.

To constitute a mutual account, it is sufficient if there be only one set of transactions, but that set should create alternately debts and credits which are to be set off against one another. Two independent sets of transactions are not necessary. If, however, an account starts with deposit to the credit of the customer and then consists of a series of alternate credits and debts, and then for a long period, consists merely in the debt in favour of the bank being reduced by payments by the customer, the account cannot be called a mutual one. Although the account started as a mutual one, it continues on a different footing and changes its nature, and to such an account which has long ceased to be a mutual one, Art. 85 does not apply and the article applicable would be Art. 57. A.I.R. 1937 Rang. 340=1937 Rang. L.R. 254=172 Ind. Cas. 837.

——Art. 85—Mutual, open and current account—What constitutes.

Transactions to be one of mutual, open and running accounts within the meaning of Art. 85 must disclose reciprocal demands. Reciprocal demands involve transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. A.I.R. 1936 Cal. 382=64 C.L.J. 513=166 Ind. Cas. 900.

——Art. 85—Current, open and mutual account—Test.

An open account is one which is continuous or current uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. An account current is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is, or can be ascertained. Such an account comes under the term of an open account, in so far as it is running, unsettled or unclosed. Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only, though made up of debits and credits.

Where the account between the parties was open and current, but there was no occasion when the balance stood in favour of the defendant, and it was clear from the nature of the dealings between the parties that there was no possibility of the balance standing in favour of the defendant :

Held, that although it was a open and current account, it could not be said to be mutual. A.I.R. 1935 All. 53=(1935) A.L.J. 33=4 A.W.R. 1335=155 Ind. Cas. 44.

——Art. 85—Mutual, open and current account—Test.

The question whether the dealings can be described as mutual, open and current depends upon the general nature of the account and not upon some casual entries. There may be some casual entries which do not imply a regular course of reciprocal dealings, and, on the other hand, cases may also be conceived where though the items giving rise to reciprocal demands are very few, yet the account possesses the essential attribute of mutuality.

There were sales of oil by the plaintiff creating obligations on the defendant's part. Payments were made from time to time by the defendants in discharge of the amount due by them. There were, however, two items that represented sales made by the defendants to the plaintiff's but though the dealings extended over several years, there was not a single items of sale by the defendant still the accounts were practically closed:

Held, that the accounts were not mutual. A.I.R. 1935 Mad. 982=158 Ind. Cas. 429.

——Art. 85—Mutual, open and current account—Tests.

Where the accounts show that the defendant firm was depositing money with the plaintiff Bank from time to time and the plaintiff Bank was allowing the defendant firm to draw money in excess of the deposits with the result that the balance was frequently shifting in favour of one or the other party and the pro-note which was taken by way of security for overdraft indicated that the overdrawing was not merely accidental, but it was understood between the parties that the defendants would be at liberty to borrow money from the plaintiff for the purposes of their own business by overdrawing on their account and the deposits made by the defendants were on the other hand often in excess of their liabilities, they cannot be looked upon as mere payments in discharge of the loans. If there are transactions creating independent obligations on both sides and each party can say to the other 'I have an account with you' and make a demand, thereon, there is a mutual, open and current account. 36 P.L.R. 325=15 L. 652=A.I.R. 1934 Lah. 358=152 Ind. Cas. 626.

——Art. 85—Mutual, open and current account—Meaning of.

Article 85 refers to a suit to recover the balance on a mutual, open and current account between the parties and time begins to run from the close of the year in which the last item admitted or proved is entered in the accounts. Whether an account is mutual, open and current so as to attract the application of Art.85 is a pure question of fact and depends on the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual, there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. The test to determine if an account is mutual, open and current is to see whether the dealings between the parties are of such a nature that the balance might shift sometimes in favour of one party and sometimes in favour of the other. An account current means a running account, that is, an account which is continued and not stopped or closed. If the account it running that is, if it is unclosed, then it is open and current. Mere cessation of the dealings between the parties does not mean that the account is closed. The real question in each case would be what is the intention of the parties, and that must inferred from the surrounding circumstances.

In order to bring a case under Art. 85, it is necessary for the plaintiff to show that he is suing for the balance due on a mutual and open account. The account must be open down to the suit but if at the time the suit is brought the account was closed, Art. 85, will not apply. 35 Bom. L.R. 929=58 B. 200=A.I.R. 1933 Bom. 450=145 Ind. Cas. 630.

——Art. 85—'Mutual, open and current account.'

There can be no mutual account unless each party has a right of action against the other party and has a right to demand the fulfilment of certain obligations. A.I.R. 1932 All. 38=132 Ind. Cas. 420.

——Art. 85—Mutual, open and current account—Tests—Advances of money by plaintiffs and supply of tea by defendant to plaintiffs for sale—Accounts, whether mutual—Reciprocal demands, meaning of—Refusal to supply, effect of.

The applicability of Art. 85 does not depend upon the question whether the relationship between the defendant and the plaintiffs for this purpose should be described as that of principal and agent or must be described as that of consignee and consignor.

For an account to be mutual open and current, there must be cross claims arising out of a course of dealing which evidences or is referable to an intention to set off. The phrase "reciprocal demands" does not import that either party has made an actual demand in fact but it involves transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side those on the other being merely complete or partial discharges of such obligations.

The type of case where each party has received and paid on account of the other, is by no means the only type of case coming within Art. 85. Perhaps the simplest and commonest case of all is that of two merchants each supplying goods to the other.

The defendant, being in need of finance in connection with a tea business hypothecated to the plaintiff's the entire tea crop for the season 1920, and the produce thereof and agreed to send and transmit the said tea as soon as it was manufactured in order that it might be sold in Calcutta by the plaintiffs by public auction and for such price as the plaintiffs might consider reasonable. The plaintiffs alleged that, pursuant to this deed, they advanced moneys to the defendant and received from him consignments of tea proceeds of which after sale they credited to the defendant ; and that these dealings were carried on, on a mutual open and current account with the defendant, commencing from February 3, 1920, and ending on June 10, 1921. The suit was instituted in 1924, for the balance due:

Held, (1) that the plaintiff's liability to account to the defendant for the proceeds of the tea sold by them was as independent obligation and the circumstance that they were expected and intended to apply such sums as would be necessary in liquidation of their advances did not mean that this was an account in which the obligations were all on one side as distinct from an account in which there are cross-claims or reciprocal demands, and the suit was, therefore, governed by Art. 85;

(ii) that the fact that the plaintiffs had in September, 1920, refused to continue to make further advances did not take the case out of Art. 85, and the suit was not time barred.

Per *C. C. Ghose, J.*—For a mutual account, there must be a mutual credit founded on a subsisting debt on the other side or an express or an implied agreement for a set off of mutual debts. Where for instance, the dealings on either side are so independent of each other that neither party in giving credit to the other, relies on the debt

which he has against him, there are no mutual dealings; in other words, each party must be able to say to the other some time or other during the period of account. "I have an account against you" *i.e.*, not merely a shifting balance by reciprocity of dealing and the right to mutual demand which form the essential ingredients of a mutual, open and current account. An account is open when the balance is not struck or though struck, is not accepted or acknowledged to be correct by the parties concerned and an account is current when it has been going on as a continuous account between the parties. A running or continued account between two or more parties is an account current. A shiting balance may be a test of mutuality but its absence is not a conducive proof against mutuality. 34 C.W.N. 1175=52 C.L.J. 314=58 C. 649=A.I.R. 1931 Cal. 359=133 Ind. Cas. 801.

——Art. 85—Mutual, open and current account—Tests.

It is of the essence of mutuality that each party to the account must extend credit to the other on the faith of admitted indebtedness, and it is necesary to show that the indebtedness of each party was the result of a course of dealing in which credit was extended on the faith of the indebtedness to him. A.I.R. 1931 Lah. 241=12 L. 420=32 P.L.R. 954=134 Ind. Cas. 513.

——Art. 85—Mutual, open and current account—Test.

The question whether an account can be held to be a mutual, open and current account with reciprocal demand between the parties as contemplated by Art. 85, must depend upon the nature of the account in each case; it is not possible to lay down any hard and fast rule of general application. A.I.R. 1931 Lah. 233=32 P.L.R. 65=131 Ind. Cas. 292.

——Art. 85—Mutual account, what is.

Where there are transactions between two merchants on each side creating independent obligations on the other, and the balance is shifted from one side to the other, the account is a mutual, open and current account. The proper article to apply to such a case is Art. 85 and not Art. 62. 121 Ind. Cas. 581=53 Bom. 652=31 Bom.L.R. 1187 =A.I.R. 1930 Bom. 5.

——Art. 85—Mutual, open, current account.

The plaintiff was lending moneys to the defendant and debiting the same the defendant, in his accounts. The defendant was making purchases on behalf of the plaintiff and advancing moneys for these purchases. These amounts were credited by the plaintiff to the defendant in his accounts. The balance was sometimes in favour of the plaintiff and sometimes in favour of the defendant,

Held, that the account was a mutual, open, current account within the meaning of the Art. 85 of the Limi ta tion Act. 112 Ind. Cas. 715=1929 A.L.J. 73.

——Art. 85—Mutual account—Test and essentials of.

An account is mutual within the meaning of Art. 85 when there are transactions on each side creating independent obligations on the other. But where the tranactions create obligations only on one side, those on the other being merely complete or partial discharges of such obligations the account is not mutual. A.I.R. 1923 Lah. 636, Foll. 111 Ind. Cas. 791 (Lah.).

——Art. 85—Mutual, open, current account.

In an account where credit and debit entries are carried over from time to time, from year to year from transaction to transaction, the account is a mutual, current and open account within Art. 85. 102 Ind. Cas. 225=29 Bom. L.R. 375=A.I.R. 1927 Bom. 225.

——Art. 85—Mutual open, current account.

Is it well-settled that an open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise consisting of a series of transactions. A current account has been held to be an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. Mutual accounts are accounts which show reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits. 73 Ind. Cas. 916=A.I.R. 1923 Lah. 347.

——Art. 85—"Mutual, open, current account"—Price paid from time to time.

According to the allegations in the plaint business was conducted between the parties on condition that the defendants purchased grain from the plaintiffs' gumasta and paid the price thereof from time to time. The plaint alleged that the casue of action arose on various dates, these dates being the dates on which the different items were debited in the account,

Held, this is not mutual account even if there may have been occasionally a balance in the defendants' favour. 72 Ind. Cas. 135=1 Pat. L.R. 283=4 P.L.T. 424=A.I.R. 1923 Pat. 242.

——Art. 85—Mutual, open and current account—Mere totalling up of entries does not close the account.

The agent for both the parties lent money on behalf of one firm to himself as agent for the other firm. Each of those loans gave rise to a right of set-off or claim against the borrower, and as both plaintiff and defendant were on occasions the lenders, these transactions gave rise to reciprocal demands from time to time. The accounts were never settled.

Held, the fact that the agent for his own convenience totalled up the position and made entries of the result in each firm's books did not close the account. It was continuous and was therefore, an open and current account, and having regard to the mutual loans, it was also a mutual account. 68 Ind. Cas. 928=11 L.B.R. 369=1 Bur. L.J. 240=A.I.R. 1923 Rang. 18.

——Art. 85—"Mutual, open, current account"—Striking of balance—Mere delay in suing—Character not changed.

The plaintiffs sued to recover the balance due on cross-transactions in which each side supplied the other with goods in kind. There were mutual dealings and though balances were struck from time to time these were merely acknowledgments and not agreements to pay.

Held, the case is one not of a stated account but of a mutual, open and current account, where there have been reciprocal demands between the parties. The case is, therefore, governed by Art. 85 and not by Arts. 64 or 57. The mere fact that the plaintiffs have allowed a considerable time to elapse before suing cannot in any way change the nature of the account; nor can it be held that an account becomes closed whenever a balance is struck. 66 Ind. Cas. 387=A.I.R. 1922 Lah. 316.

——Art. 85—Mutual, open and current account.

Where in respect of transactions between the parties no balance was struck and payments were made by one party not in respect of any particular transaction but in respect of the account generally and hundies were drawn from time to time by one party at a time when the albance was decidedly in the other party's favour,

Held, that the transactions constituted a case of mutual, open and current account with reciprocal demands within the meaning of Art. 85 of the Limitation Act. A.I.R. 1922 Oudh 124.

——Art. 85—"Open, mutual and current account."

Where *A* sends goods to *B* for sale on commission, receives advances thereof from time to time and sett

the sum due by him at periodical settlement of accounts, *Held*, that a suit for accounts by *A* against *B* after the dealings had stopped is not a suit on an "open, mutual and current account" within Art. 85 of the Act. 5 L.W. 375=37 Ind. Cas. 875.

——Art. 85—"Mutual, current and open account" what is.

To constitue a "mutual, current and open account" the account must not only be mutual, current and open but there should also be reciprocal demands between the parties. 6 T.R. 189, Foll. Per *White, C.J., Oldfield, J., dissenting.*—An advance by one person to another for carrying on business with him does not cease to be an item of debit against the other in the mutual open and current account by the fact of execution of a promissory note for the advance received. 24 Ind. Cas. 128 (Mad.).

——Arts. 85 and 64—Punjab Loans Limitation Act—Acknowledgment—Novation Mutual open current account.

Plaintiff and defendant had dealings early in 1904, and balances were struck in May, July and November, 1905. Entries had to be made sometimes to defendant's debit and sometimes to their credit. The last balance wound up with the words *Baqi Dlone*. *Held*, that the words were simply equivalent to the English phrase "balance due" and that an acknowledgment did not amount to a promise to pay and Art. 85 and not Art. 64 was applicable to the claim. The mere fact that accounts were kept by one side alone was not a sufficient reason for holding that the account was not an open, mutual and current account within the meaning of Art. 85. 16 P.R. 1916=178 P.L.R. 1915=118 P.W.R. 1915=30 Ind. Cas. 491.

——Art. 85—Mutual, open and current account—Advance of money—Consigning goods on commission—Obligation, nature of.

Where the plaintiff advanced money and the latter consigned goods for sale on commission there were independent obligations and mutual account within Art. 85 of the Limitation Act. 14 M.L.T. 498=21 Ind. 773.

——Art. 85—Mutual open and current accounts—Test.

The test to find out a mutual, open and current account is whether there were mutual demands and not merely payments by one party to the other on account of a debt due by the former to the latter. Mere shifting of balances sometimes in favour of one party sometimes in favour of another affords no real test of mutuality though it is an important consideration. 23 M.L.J. 516=17 Ind. Cas. 48.

——Art. 85—Open.

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions. (1907) 6 C.L.J. 158.

——Art. 85—"Mutual and current account".

To show that an account was mutual, it is necessary to prove not only that one of the parties has received money and paid on account of the other, but also that each of the two parties has received and paid on the other's account. Each party should be able to say against the other "I have an account against you". 5 Cal. 759; 6 C.L.J. 158, Foll. 8 Bur. L.T. 116=8 L.B.R. 149=27 Ind. Cas. 879.

——Art. 85—Mutual, open and current account—Bahi—Balance struck and carried forward—Reciprocal demands.

Plaintiff sued for money due on a *bahi* account. Plaintiff had supplied defendants with money and with various articles the values of which were given in the account and debited against defendants. There were mutual demands between the parties on balances struck upto a certain date. The account was not closed even on that date but the balance was carried forward. *Held*, the accounts between the parties were mutual open and current and the suit was governed by Art. 85 of the Limitation Act. 17 P.W.R. 1920=54 Ind. Cas. 453.

——Art. 85—"Mutual open and current account"—Meaning of.

An open account is one which is continuous or current, uninterrupted or unclosed by settlement or, otherwise, consisting of a series of transactions. An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is, or can be ascertained. Mutual accounts are such as consist of reciprocity of dealing between the parties, and do not embrace those having items on one side only, though made up of debits and credits. An account under which one party has merely received and paid moneys on account of the other is not a mutual account, properly so called. Each party must receive and pay on account of the other. A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality, but its absence is not conclusive proof against mutuality. The mere circumstance that on one solitary occasion there was a sum to the credit of the defendants in the books of the plaintiffs, does not make the account between the parties a mutual account in which there has been reciprocal demands between the parties. 5 C. 759; 6 C.L.R. 112, Foll. (1907) 6 C.L.J. 158.

——Art. 85—Mutual, open and current—Reciprocity of dealing.

The reciprocity of dealing and the right to mutual demand form the essential ingredients of a mutual, open and current account. (1904) 7 Bom. L.R. 151.

5. Plea of.

——Art. 85—Mutual, open and current account, what is—Plea, if can be raised for first time at stage of argument.

In a suit for rent by the lessor against the lessee, the mere fact that the items of rent are not entered in a separate account book cannot be held sufficient to show that there was a mutual, open and current account between the parties.

Plea of "mutual, open and current" account being one of fact cannot be raised for the first time at the stage of arguments. 33 P.L.R. 323=A.I.R. 1933 Lah. 61=14 Lah. 137=142 Ind. Cas. 754.

6. Principal and agent.

——Art. 85—Principal and agent.

Suit by agent against principal for the balance due on account:

Held, that Art. 85 applied. (1932) 34 Bom. L.R. 1410

——Art. 85—Suit by agent against principal for damages.

Where a commission agent purchases goods for his principal, and on the principal refusing to accept some of the goods the agent resells them, a suit for damages is governed by Art. 85 and not by Art. 61. 34 Bom. L.R. 1268=A.I.R. 1932 Bom. 593=140 Ind. Cas. 624.

——Act. 85—Principal and agent.

The phraseology of Art. 85 is wide and comprehensive and does not exclude from its purview the case of a principal and agent between whom a mutual, open and current account has existed. A.I.R. 1930 Lah. 712=125 Ind. Cas. 623.

——**Art. 85—Principal and agent.**

Where the accounts between a principal and his agent commenced with principal's payment as margin money but all the subsequent items showed only money spent by agent on behalf of principal, the account could not be called mutual account with reciprocity of dealings and so Art. 85 would not govern the case. A.I.R. 1923 Lah. 347, Foll. 115 Ind. Cas. 767=30 P.L.R. 35.

——**Art. 85—Principal and agent.**

Even in a suit by commission agent, where the accounts were stated and balance struck, Art. 64 applies and not Art. 85. 100 Ind. Cas. 874=A.I.R. 1928 Lah. 51.

——**Art. 85—Principal and agent.**

Where a commission agent who as such, received goods from the defendants and also discounted defendants hundies sues the defendant on a lengthy account showing a shifting balance, sometimes in favour of the plaintiff and sometimes in favour of the defendant, his suit is on mutual, open and current account and so is governed by Art. 85. 92 Ind. Cas. 674=A.I.R. 1926 Lah. 283.

7. Settlement account.

——**Art. 85—Settlement of account.**

Where an account stated comprises items on both sides and a balance is deducted thereon it being always in favour of one party and not shifting on one party or the other that balance represents the amount of liability for future and is recoverable within three years from the statement of account although some of the earlier items in the account may have been already time-barred. 106 Ind. Cas. 53=A.I.R. 1928 Nag. 127.

——**Art. 85—Settlement of accounts—Acquiescence.**

Words or conduct may amount to acquiescence as to the correctness of an account and may even operate as a settlement. 7 Bom. L.R. 151, Foll. 102 Ind. Cas. 225=29 Bom. L.R. 375=A.I.R. 1927 Bom. 225.

——**Art. 85—Settlement of account—Adding new dealings.**

An open account is one which is continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. Where, therefore, an account has been deliberately interrupted and closed the mere adding later on, in order to avoid limitation at the end of the new dealings the old balance will not make it an open account. A.I.R. 1923 Lah. 347, Foll. 100 Ind. Cas. 815=28 P.L.R. 146=A.I.R. 1927 Lah. 848.

——**Art. 85—Settlement of account.**

Where there was a current account and a mutual one, and the plaintiffs had claims against the defendants for money advanced plus interest and the defendants could set off, against those claims, their share of any profits made in the transaction in which the parties had a common interest, but the account was not open and current at the time of the suit and the account had been closed and had been settled by the striking of a balance,

Held, the article applicable is Art. 64 which applies to a suit for money payable for money found to be due on accounts stated. 68 Ind. Cas. 815=A.I.R. 1922 Lah. 182.

8. Shifting balance.

——**Art. 85—Mutual account—Test—Shifting balance.**

For the purpose of determining whether an account is a mutual one, the fact that there were oscillating balances in favour of the two parties is not decisive. Although a shifting balance is test of mutuality, its absence is not conclusive proof against mutuality. The test is, not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept. 26 Pat. 231=A.I.R. 1948 Pat. 18=1948 Com. Cas. 127.

——**Art. 85—Mutual, current and open account—Shifting balance, necessity of.**

Where, instead of paying cash in or towards the discharge of his account, the debtor sells certain items of property to the creditor in partial discharge of the moneys due to the creditor, the credit of those items in creditor's account cannot render the account between the parties a mutual, current and open accounts in the absence of anything to show that the sale of the items by the debtor was an independent transaction or created an independent obligation and that there was at some point of time any balance due to the debtor. A.I.R. 1943 Mad. 13=1942 M.W.N. 561=55 L.W. 585=(1942) 2 M.L.J. 337=207 Ind. Cas. 133.

——**Art. 85—Shifting balance.**

An absence of a shifting balance is not decisive in case of mutual, open and current accounts. A.I.R. 1939 Lah. 356=41 P.L.R. 809=185 Ind. Cas. 805.

——**Art. 85—Applicability—Shifting balance.**

Where, in a case, independent obligations are created between the parties and although the annual balance is struck, the account is not closed and parties continue to deal with each other on the old footing, the mere fact that during the last few years the balance was always in favour of one party will not take the transaction out of the category of Art. 85, Lim. Act. 1938 A.W.R. 517=A.I.R. 1938 All. 504=(1938) A.L.J. 773=I.L.R. (1938) All. 741=177 Ind. Cas. 815.

——**Art. 85—Mutual, open and current account—Test—Shifting balance.**

Where the plaintiffs held a mortgage from the defendant and the defendant sent tea to the plaintiffs to be sold on the understanding that the amounts realised through the plaintiff's agency were to be utilised in paying off the plaintiff's mortgage :

Held, that the account was not a mutual, open and current account :

Held, further, that a shifting balance is not necessarily a conclusive test. It is necessary to show that the dealings were of such a nature that they might lead to such a shifting balance. 15 N.L.J. 105=A.I.R. 1933 Nag. 50=29 N.L.R. 20=142 Ind. Cas. 123.

——**Art. 85—Shifting balance.**

Mutual accounts are such as consist of reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits. Although a shifting balance, sometimes in favour of one side and sometimes in favour of the other, is a test of mutuality, its absence is not conclusive proof against mutuality.

Where a man lends money in one capacity, and in another capacity acts as an agent for the borrower and the two accounts are put together, there is a mutuality of dealing between the parties, although the money may have been lent for the express purposes of enabling the borrower to provide business as commission agent to the lender. In such a case Art. 85 applies. 15 Ind. Cas. 336 ; A.I.R. 1922 All. 188 ; 1 I.A. 346 and A.I.R. 1921 Bom. 451, Foll. 108 Ind. Cas. 694=50 All. 645=26 A.L.J. 353=A.I.R. 1928 All. 236.

——**Art. 85—Reciprocity—Shifting balance—Absence of.**

A mutual, open and current account between the parties is such as consists in reciprocity of dealings between them and not merely of items on one side though made up of debits and credits. In such an account each should be able to say to the other. " I have an account against you ". Although a shifting balance is a test of

mutuality its absence is not a conclusive proof against mutuality. A.I.R. 1924 Pat. 107, Foll.

The parties were dealing under an agreement under which the plaintiff was acting under instructions from the defendant and was purchasing and selling shellac on account of the defendants, sometimes the transactions resulting in profits and at other times in loss ; at one time the accounts stood in favour of the defendant, at another time in favour of the plaintiff, and the last item was entered on 25th April, 1920. The plaintiff brought a suit for the recovery of the amount from the defendant on 3rd April, 1923.

Held, that the account between the parties was a mutual open and current account, and so Art. 85, Limitation Act, was applicable and thus the suit was within time. 107 Ind. Cas. 533=7 Pat. 238=A.I.R. 1928 Pat. 221.

——Art. 85—Shifting balance.

Mutual accounts are such as consist in reciprocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits. Although a shifting balance is a test of mutuality its absence is not a conclusive proof against mutuality. 5 Cal. 750 and 6 C.L.J. 158, Foll. 74 Ind. Cas. 831=4 Pat. L.T. 571=A.I.R. 1924 Pat. 107.

——Art. 85—Reciprocity of transactions—Shifting balance—What is necessary to prove.

In order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Where there is a case of shifting balance, sometimes in favour of one side, sometimes in favour of the other, it is a test of mutuality, but its absence is not conclusive proof against mutuality. If there is a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other ; if the balance is always in favour of one party in the very nature of the transactions, then the case is one where there are not separate mutual dealings.

In order to prove a mutual and open account curren it is sufficient to prove mutual dealings between the parties consisting of sales made, or services performed, by each party, to or, for the other, creating mutual duties or reciprocal demands. Where there was an obligation, on the one hand, to pay salary and an obligation on the other hand, to account for and pay over to the principal the amounts that may yearly be found due on balance to the principal,

Held, this is mutual account. 71 Ind. Cas. 466=17 M.L.W. 243=1923 M.W.N. 81=A.I.R. 1923 Mad. 278=44 M.L.J. 184.

——Art. 85—Shifting balance.

The plaintiffs' firm made advances of money to the defendants. The defendants were dealers in grain and used to send their grain to the plaintiffs' shop. Plaintiffs sold it as commission agents and, after deducting their commission and other charges, credited the amount remaining to the defendants in the account,

Held, that the accounts came within Art. 85. 114 M.L.T. 498, Foll.

An account is mutual when there are transactions on each side creating independent obligations on the other and where the transactions cfeate obligations on one side only, those on the other being merely complete or partial discharges of such obligations, the account is not mutual.

The absence of a shifting balance was not conclusive against the mutuality of the account. 17 Mad. 293 and 22 Bom. 606, Foll. 59 Ind. Cas. 669=31 P.L.R. 1921=A.I.R. 1921 Lah. 369.

——Art. 85—Shifting balance.

To bring a case within Art. 85, there must be independent obligations between the parties. The existence of a shifting balance though important evidence of mutuality is not conclusive ; there must be transactions on each side creating independent obligations on the other. 34 Mad. 513=21 M.L.J. 391=8 M.L.T. 412=(1911) 1 M.W.N. 1=8 Ind. Cas. 141.

——Art. 85—Shifting balance—Balance always in favour of one party.

Per *Abdur Rahim, J.*—It is not sufficient that the account is open and current or that the entries show debit and credit ; there must be reciprocal demands. Accounts are not open and current when the opposite party is not allowed to show that they were not kept in the ordinary course of business. (Per *Phillips, J.*).—It makes no difference that the expenditure and receipts are kept in separate books, nor that the balance is always found to be in favour of one party. 10 M.L.T. 409=22 M.L.J. 14=(1911) 2 M.W.N. 440=12 Ind. Cas. 673.

——Art. 85—Shifting balance—Accounts seen every year.

Open, mutual and current account with reciprocal demands in which there is sometimes a balance against one party and sometimes against the other and a formal balance struck within 3 years from the close of such an account, is the one contemplated by Art. 85 though the parties may be taking account and finding balance every year to see how the accounts stands. 99 P.W.R. 1910=75 P.R. 1910=124 P.L.R. 1910=7 Ind. Cas. 715.

9. Starting point of limitation.

——Arts. 85, 89, 120, 62—Starting point of limitation.

A suit was brought to recover certain amount from the sons of a deceased *karpardaz* who has said to have retained that sum wrongfully out of moneys collected by him on various dates, within three years from the date of the death of the *karpardaz*. The Courts found that in fact there was no liability on the part of the deceased *karpardaz* to pay over sum received to the estate directly on receipt. There was running account, and the arrangement was that he should retain sufficient funds in his hands out of the collection for cost of litigation on behalf of the plaintiff for whom he held a general power-of-attorney :

Held, that Art. 62 did not govern the case. The date of receipt of the sums could in no circumstances operate as the starting point of limitation. The liability to pay the sum claimed first arose at the time of the *karpardaz's* death. Whether the suit be against him or his sons, there was no question of limitation running before that date. Limitation could run only from the date of death and, therefore, the suit was within time whatever article of the Limitation Act might be held applicable, whether Arts. 85, 89 or 120, since the suit was within three years of the *karpardaz's* death. 7 C.L.T. 87=8 B.R. 268=A.I.R. 1942 Pat. 181=23 P.L.T. 457=197 Ind. Cas. 674.

——Art. 85—Mutual, open and current account, what is—Dealings between banker and borrower—Starting point.

Where a depositor borrows money from a bank by means of overdrafts, and occasionally deposits money, which is applied to the overdrafts, the transaction is not a mutual account, and the statute of limitation runs from the date of each loan notwithstanding the fact that the transaction opens with a credit to the depositor.

Mtual, open and curr nt account means a course of dealing where each party furnishes credit to the other on the reliance that on settlement the accounts will be allowed so that one will reduce the balance due on the

other. A suit to recover the balance due on such an account is governed by Art. 85. 8 B.R. 218=A.I.R. 1942 Pat. 201=197 Ind. Cas. 449.

——Art. 85—Mutual, open and current account, what is—Starting point of limitation.

Where, between the parties, there is a dual contractual relationship: (i) that of borrower and creditor and, (ii) that of principal and agent and in these dealings, the plaintiff as creditor has demands against the defendant, while the defendant as the principal has independent demands against the plaintiff as his agent, and the items relating to all the dealings are entered in one account, such an account is clearly a mutual, current and open account and a suit for recovery of the amount due on it may be brought within three years from the close of the year in which the last item admitted or proved is entered in the account. A.I.R. 1939 Lah. 356=41 P.L.R. 809=185 Ind. Cas. 805.

——Art. 85—Starting point of limitation—Mutual, open and current account—Limitation.

Plaintiffs and defendants agreed that the former should purchase grain for the latter and store it in their godown, that defendants should pay interest on the outlay, make a deposit to cover losses and that defendants should be entitled to any profits made upon the resale of the grain by plaintiffs. *Held*, that the transaction was a mutual, open and current account and limitation began to run at the close of the year in which the last item was entered in the account. 15 Ind. Cas. 336 (All.).

——Art. 85—Starting point of limitation—Mutual, open and current account.

When the account is a running account showing what balance is due from either party at different times but is never finally settled, limitation begins to run only from the date of its being closed. 115 P.W.R. 1909=128 P.L.R. 1909=4 Ind. Cas. 960.

——Art. 85—Starting point of limitation—Running account—Limitation Act (15 of 1887), Sch. II, Art. 85—Suit for balance on running account—Jurisdiction of single bench of Chief Court—Small cause of below Rs. 5,000—Question of fact—Regularity of an account to be basis of a claim—Benami transaction—Transaction by agent on behalf of principal.

Where an account between a principal and his agent shows what balance is due from either party at different times but is never finally settled, it is a running account and limitation begins to run from the date of its being closed under Art. 85. 128 P.L.R. 1909=115 P.W.R. 1909=4 Ind. Cas. 960.

——Art. 85—Starting point of limitation.

Where the dealings between the parties are such as to create independent obligations in favour of one party against the other the account between them is a mutual account. 22 B. 106, Foll. Art. 85 applies to a case of this nature giving rise to reciprocal demands, and mitation begins to run from the close of the year in which the last item was entered in the account. [1896] A.W.N. 86, Rel. on. (1909) 6 A.L.J. 921=4 Ind. Cas. 261=32 A. 11.

10. Miscellaneous.

——Art. 85—Right to sue, when accrues.

In the case of an open, mutual and current account a creditor is entitled to sue upon an acknowledgment duly made and entered in the books provided he brings his suit within time calculated from the date of that entry. The right to sue upon such an acknowledgment is not postponed from time to time by the payment of a few annas by the debtor into his account. A.I.R. 1943 Sind 86=I.L.R. (1942) Kar. 442=204 Ind. Cas. 481.

——Art. 85—Miscellaneous—Balance due on current account—Last item within time but advanced more than 3 years of preceding item.

Where the last item in a mutual open and current account was advanced to defendants within 3 years but that item was advanced more than 3 years after the close of the year in which the last preceding item was entered, the suit is barred by limitation in respect of the previous account. 1 Lah. 12=64 P.L.R. 1920=35 P.W.R. 1920=55 Ind. Cas. 872.

——Art. 86—Starting point.

Fire insurance—Clause making company not liable after 12 months from date of loss—Clause does not offend against Art. 86. Period of investigation by Company, cannot be excluded. 11 R. 475=A.I.R. 1934 Rang. 15=149 Ind. Cas. 15.

——Art. 89.

Synopsis.

1. **Applicability.**
2. **Death of agent.**
3. **Death of principal.**
4. **Demand and refusal.**
5. **Joint Hindu family.**
6. **Movable property.**
7. **Starting point of limitation.**

See also LIMITATION ACT, ART. 89—TERMINATION OF AGENCY.

8. **Termination of agency.**

See also LIMITATION ACT, ART. 89—STARTING POINT OF LIMITATION.

1. Applicability.

——Art. 89—Applicability—Current account in bank—Overdraft by customer—Limitation applicable—"Mutual, open and current account". I.L.R. (1946) Mad. 325=(1945) 2 M.L.J. 120=58 M.L.W. 361=1945 M.W.N. 415=A.I.R. 1945 Mad. 467.

——Arts. 89 and 120—Applicability—Suit under S. 79 of the Lunacy Act against the manager of lunatic's estate.

A lunatic for whose estate the District Judge appoints a manager, cannot be said to be the principal of the manager of his estate within the meaning of Art. 89 of the Limitation Act. Therefore, that article cannot apply to a suit under S. 79 of the Lunacy Act against the manager and as there is no other specific article applicable to such a case, the residuary Art. 120 will apply. 23 Luck. 65=A.I.R. 1949 Oudh 51=1947 A.W.R. (C.C.) 273=1947 O.A. (C.C.) 273=1947 O.W.N. 530.

——Art. 89—Applicability.

Suit for money recovered under a registered power-of-attorney—Claim based on power—Article 116 and not Art. 89 is applicable. A.I.R. 1944 Cal. 106=I.L.R. (1943) 1 Cal. 578=212 Ind. Cas. 483.

——Art. 89—Co-owner's suit for accounts.

To a suit for accounts by one co-owner against another who has received more than his share of the income o the property, article applicable is either Art. 89 or Art. 120, but not Art. 62. The question whether Art. 89 or Art. 120 applies depends upon the facts of each case. A.I.R. 1943 Bom. 216=45 Bom. L.R. 424=208 Ind. Cas. 340.

——Art. 89—Applicability—Suit for accounts by ward against guardian.

A suit by a ward against his guardian for rendition of accounts is governed by Art. 120 and not by Art. 89. A.I.R. 1943 Pat. 218=22 Pat. 114=9 B.R. 260=206 Ind. Cas. 126.

——**Art. 89—Applicability.**

A suit for accounts against a Receiver appointed under O. 40, C. P. Code, is not governed by Art. 89 but by Art. 120. A.I.R. 1942 Cal. 483=75 C.L.J. 1=46 C.W.N. 294=I.L.R. (1942) 1 Cal. 577=202 Ind. Cas. 389.

——**Art. 89—Applicability.**

A suit for accounts and recovery of shares pledged as security for the loan by the wife of the deceased debtor is governed, not by Art. 89 but by Art. 120. A.I.R. 1942 Mad. 386=55 M.L.W. 90=1942 M.W.N. 129=(1942) 1 M.L.J. 274=206 Ind. Cas. 539.

——**Art. 89—Applicability—Suit to recover profits wrongfully withheld.**

When a person has been placed in rightful possession as custodian (*supratdar*) and he rightfully receives the profits in that capacity, but wrongfully withholds them, a suit for their recovery is not governed by Art. 89 but by Art. 120. A.I.R. 1941 Nag. 181=I.L.R. (1942) Nag. 92= 1941 N.L.J. 184=201 Ind. Cas. 220.

——**Art. 89—Applicability—Principal and agent.**

Suit by principal to enforce charge created in his favour by agent to secure money that might be found due from agent falls under Art. 132 and not under Art. 89 or 116. A.I.R. 1941 Cal. 257=72 C.L.J. 480=44 C.W.N. 793=195 Ind. Cas. 151.

——**Art. 89—Applicability—Suit for accounts by one co-tenant against another.**

An action for accounts by one co-tenant against the other not being an action for money had or received is governed by Art. 120 and not by Art. 62 or Art. 89. A.I.R. 1940 Cal. 363=I.L.R. (1940) 1 Cal. 110=189 Ind. Cas. 642.

——**Art. 89—Applicability.**

Three sisters succeeding to residue of father's *Zamindari* under will—Eldest appointed manager for collecting accounts and profits and distributing them between them—Suit by one sister against her for accounts of profits is governed by Art. 89 and not by 62. A.I.R. 1939 All. 442=(1939) A.L.J. 428=1939 A.W.R. 456=1939 R.D. 382=I.L.R. (1939) All. 594=183 Ind. Cas. 584.

——**Art. 89—Applicability.**

Three firms *S*, *M* and *R* had dealings with each other. The two firms, *S* and *M* were carrying on business together through their agents. Firm *R* owed the other two firms jointly certain amount and executed two promissory notes, both in favour of the *M* firm as the firm *S* was in a chaos at the time. With respect to the latter note certain securities were given to the *M* firm so that it might collect whatever was realisable out of those securities and appropriate the amount towards the debt due to the two firms. Firm *M* collected certain amount in respect of the second pro-note. Firm *S* brought a suit for accounts in respect of the collections :

Held, that the relationship between *S* and *M* firms was akin to that of a trustee liable to account though no specific trust was created for the purpose and the suit, therefore, was not governed by Art. 89 but by Art. 120. A.I.R. 1939 Mad. 671=49 M.L.W. 608=(1939) M.W.N. 360=189 Ind. Cas. 31.

——**Arts. 89, 90—Applicability—Agent serving principal under salary chit for period of three years—To facilitiate business, agent also given power-of-attorney not for limited period—On expiry of first, another salary chit executed changing only salary and commission. Suit for accounts by principal, on termination of agency—Allegation of excess of authority in some transactions—Article applicable was 89 and not 90—Period of agency under two salary chits, held to be single agency.** A.I.R. 1938 Mad. 38=183 Ind. Cas. 82.

——**Art. 89—Applicability—Suit by co-sharer for his share of profits.**

A suit between two co-sharers for a share of profits realised by the co-sharer in possession is governed by Art. 120 and not by Art. 89. A.I.R. 1936 All. 706=1936 R.D. 298=(1936) A.L.J. 984=1936 A.W.R. 700=165 Ind. Cas. 266.

——**Art. 89—Applicability—Article 89 applies to suits between principal and agent.** 1933 A.L.J. 1009=A.I.R. 1933 All. 642=55 A. 814=147 Ind. Cas. 529 (2).

——**Art. 89—Applicability—Suit for accounts of dissolved partnership.**

Where, after the dissolution of a partnership, an agreement was entered into between the partners to the effect that two of them were to collect the outstandings of the partnership as trustees and to deposit the amount in a bank after paying off the partnership liabilities and that all the partners should share the balance equally and one of the partners sued for rendition of accounts of the moneys realised under the agreement:

Held, that the agreement created a modified form of relationship of principal and agent between the parties quite apart from that of the original agreement of partnership that had been dissolved and the suit was, therefore, governed by Art. 89 and not by Art. 106. A.I.R. 1931 Lah. 300=134 Ind. Cas. 527.

——**Art. 89—Applicability—Suit for accounts by principal against agent—Limitation.**

A suit by a principal against his agent for accounts is not a suit for compensation for breach of contract within Art. 116, and is governed by Art. 89.

The plaintiff and the defendant, who were brothers, and another brother, as members of a joint family, owned a village. In 1896 they executed a registered deed of partition by which they agreed that each brother should be in management of the village for two years in turn and should settle the account for his management in July of each year and pay the amounts due to the other brothers. The defendant was in management under that arrangement for *Faslis* 1326 and 1327. The plaintiff sued for what was due to him for those *Faslis*. The defendant in his written statement claimed to set off what was due to him from the plaintiff for the plaintiff's period of management, *Faslis* 1324 and 1325. The District Judge found that the defendant's claim for those two earlier *Faslis* was barred, as it should be taken to be governed by Art. 89. On appeal it was held that the defendant's claim in respect of those two *Faslis* was in time as it could be brought under Art. 116, as well as Art. 89 :

Held, that as both the parties had chosen to sue for accounts, though they could have sued for compensation for breach of contract, the defendant's claim was governed by Art. 89 and was barred. 62 M.L.J. 45=A.I.R. 1931 Mad. 185=(1930) M.W.N. 1199=33 M.L.W. 1=54 M. 654=131 Ind. Cas. 165.

——**Art. 89—Applicability.**

When an agent agrees to submit yearly accounts to his principal, a suit for account against the agent is governed by Art. 89. 1930 M.W.N. 1199=33 M.L.W. 1=131 Ind. Cas. 165=54 Mad. 654=A.I.R. 1931 Mad. 185=62 M.L.J. 45.

——**Art. 89—Applicability—Tenants-in-common.**

When by an oral agreement one tenant-in-common is left in possession as the agent of the other tenants-in-common, if one of them sues him for an account, the suit is governed by Art. 89. 1930 M.W.N. 1199=33 M.L.W. 1=131 Ind. Cas. 165=54 Mad. 654=A.I.R. 1931 Mad. 185=62 M.L.J. 45.

——**Art. 89—Applicability—Co-sharers—Rent received on behalf of other sharers.**

Where by virtue of an arrangement some of the co-

sharers have been realizing rent of joint immovable property for division among other co-sharers, the relationship between the latter and the former is that of an agent and principal; and a suit for realization of the share of rent by the co-sharer is governed by Art. 89 and not Art. 62. 111 Ind. Cas. 635=10 L.L.J. 355=A.I.R. 1928 Lah. 688.

——Art. 89—Applicability—No demand or refusal.

In a suit by the principal against agent for rents and profits of the suit property, if there was no demand and refusal of accounts, the agent is liable to account for all the amounts received on behalf of the plaintiff. It is immaterial in such a case whether Art. 89 applies on the ground of agency, or Art. 120 applies on the ground of absence of specific contract of agency. 114 Ind. Cas. 364=A.I.R. 1928 Mad. 1236.

——Art. 89—Applicability—No contract of agency.

Where there was no specific contract of agency between the parties Art. 120 should be applied and not Art. 89. A.I.R. 1922 Mad. 150 (F.B.), Foll. 114 Ind. Cas. 364=A.I.R. 1928 Mad. 1236.

——Art. 89—Applicability—Suit for accounts—Where misappropriation is alleged.

To a suit by principal, for an account of the management of certain properties of his estate the proper article applicable is Art. 89 even when what is charged includes misappropriation. 41 Mad. 1, Rel. on. 109 Ind. Cas. 532=A.I.R. 1928 Mad. 906.

——Art. 89—Applicability—Produce of fields.

J sued the son of one *H* for an account of the produce of certain fields for some years. He alleged that *H* retained the produce of the fields during these years on his behalf.

Held, that Art. 62 or Art. 89 would govern the suit. 112 Ind. Cas. 126=A.I.R. 1928 Nag. 256.

——Art. 89—Applicability.

The plaintiff engaged the defendant as his agent to look after certain villages and collect the rents, rendering an account to the plaintiff between the parties. There were written agreements between the parties. After some years, the defendant was dismissed.

Held, a suit by the plaintiff for accounts was governed by Art. 89 and not Art. 115 of the Lim. Act. 89 Ind. Cas. 275=4 Pat. 289=7 P.L.T. 111=A.I.R. 1925 Pat. 494.

——Arts. 89 and 11—Applicability—Suit for—Money left with vendee for payment to creditors.

A suit by vendor to recover from the vendee the money left in his hands to be paid to creditors which he has failed to pay must be regarded as a suit for account in spite of the plaintiff's asking for a decree for a definite sum. 11 A.L.J. 152=18 Ind. Cas. 336.

——Arts. 89 and 62—Applicability—Joint property—Partition—Portion kept joint—Suit to recover share and for accounts.

Where at a partition between the members of a joint Hindu family, a portion of the family property is left undivided with the senior member of the family with a view to its being realised and the proceeds divided, a suit for accounts and recovery of his share in such property by a member of the family is governed by Art. 89 and not by Art. 62. 22 Bom. L.R. 1289=A.I.R. 1921 Bom. 384.

——Arts. 89, 115 and 64—Applicability—Adjusted account—Suit for money due on.

Where the accounts of an agent have been taken and adjusted and a specific sum is found due from agent to principal, the principal can sue forthwith under Art. 64 or 115 of the Limitation Act and not under Art. 89 which contemplates suits in which accounts have to be taken. 25 C.L.J. 335=21 C.W.N. 591=40 Ind. Cas. 359.

——Arts. 89 and 132—Applicability—Principal and agent—Kabuliyat by agent—Dismissal and re-appointment—Defalcation after reappointment.

A *Kabuliyat* was executed by the agent hypothecating certain immoveable property to be answerable for any defalcation made by him or any damages suffered by the principal through his negligence. The agent was dismissed the next year but was reappointed the year after. *Held*, that the agent's position at the year of re-appointment was not governed by the *Kabuliyat* but by the ordinary rules applicable between the principal and agent and Art. 89 of the Limitation Act applied to the suit. 21 C.L.J. 458=29 Ind. Cas. 748.

——Arts. 89 and 36—Applicability—Suit for money misappropriated.

A suit for money received and misappropriated by a servant is governed by Art. 89 and not by Art. 36. It is immaterial in a civil action whether the misappropriation charged is criminal or not. If there is no misappropriation but money is payable by the defendant to the plaintiff for money received by the defendant and not accounted for, Art. 89 still applies. 28 Ind. Cas. 452 (Cal.).

——Arts. 89, 115, 116, 132—Applicability—Suit against gumasta for accounts—Hypothecation of immoveable property to secure agent's liability—Limitation—Registered contract—Stipulation to furnish periodical accounts.

Ordinarily speaking a suit by a principal against his agent for an account is governed by Art. 89 and the period is three years from and after the demand for and refusal of such document or the termination of the agency. 14 C.W.N. 122=5 Ind. Cas. 59. *Also* 14 C.W.N. 121.

——Arts. 89, 132—Applicability and scope.

The fact that the agent had executed a *kabuliyat* whereby he had hypothecated certain immoveable properties to secure his liability would not alter the nature of the suit so as to make Art. 132 applicable. 14 C.W.N. 122=5 Ind. Cas. 59.

——Art. 89—Applicability—Suit against—Collection agent.

Suit against a collection agent for account in the absence of an express contract to render account every year comes under Art. 89. If the agency terminates within three years from the date of suit and accounts were not demanded during period of agency, no portion of the suit is barred. 14 C.W.N. 121=5 Ind. Cas. 58.

——Art. 89, 90 and 116—Applicability—Suit to recover money misappropriated.

A suit to recover certain sums of money misappropriated by an agent comes under Art. 116, if the agency was created under a registered instrument. But if the agent is only sued for damages for want of due care and diligence, the suit comes under Arts. 89 and 90. 13 C.W.N. 212=4 Ind. Cas, 556.

——Arts. 89, 116—Applicability and scope.

To ascertain whether Art. 89 or 116 applies, it is necessary to see what is the relief which the plaintiff claims. The expression "moveable property" in Art. 89 includes money. 27 A. 27; 8 C.W.N. 113; 1 C.L.J. 147; 1 C.L.J. 232. A suit not merely for an account, but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his account, falls within Art. 132 and the period of limitation is twelve years from the time when the money sued for becomes due. (1908) 7 C.L.J. 279=35 C. 298=12 C.W.N. 820.

——Arts. 89, 115—Applicability—Suit against agent for account.

A suit by a principal against his agent for money received and not accounted for, is governed by Art. 89 and is barred after three years of the date of termination of the agency. An agent's contract to account, is specially provided for in Art. 89 and cannot be included in Art. 115 of the Act. 14 C. 147 ; 5 Ind. Cas. 59 ; 24 A. 27, Foll. 39 Mad. 376=28 M.L.J. 140=26 Ind. Cas. 740.

——Art. 89—Applicability—Suit for money paid to make a joint purchase.

A suit to recover money paid to defendant to be used in a joint purchase of property, is governed by Art. 89 and not Art. 60 or 106, as the defendant was acting only as the agent of the plaintiff. 33 Ind. Cas. 438 (Lah.).

——Arts. 89, 120—Applicability—Principal and agent—Suit for accounts.

A suit by a principal against his agent for an account and for payment of money found due upon an account being taken is governed by Art. 89. 1 C..L.J. 232= 32 C. 719. *Also* suit for accounts by Zemindar against Naib—Principal and agent. (1903) 8 C.W.N. 113. *Also* The period of limitation is three years and it would run from the date of the termination of the agency. But so far as it seeks to obtain from the agent account papers, the suit is governed by Art. 120, and the period is six years and it would run from the date when such papers are to be submitted to the principal under the contract between the parties. (1901) 1 C.L.J. 147.

2. Death of agent.

——Arts. 89 and 120—Death of agent—Suit against legal representatives of deceased agent—Demand and refusal to account during agent's lifetime.

The Limitation Act classifies suits according to their "description" and a suit of the description referred to in Art. 89 may be brought against the legal representatives of the agent as well as against the agent himself. Where there was demand and refusal to account during the agent's life-time, the cause of action arises on the date of the demand and refusal, and a suit brought against the legal representatives of the deceased agent more than three years from that date would be clearly barred under Art. 89 of the Limitation Act. Limitation once having commenced to run will not cease to run by reason of the death of the agent. Art. 120 of the Limitation Act is inapplicable where there are other articles in the Act applicable to a case. 50 M. 249 ; 35 C.L.J. 330 and I.L.R. (1943) Nag. 470, Foll. A.I.R. 1950 Dacca 13 (2).

——Art. 89—Death of agent.

Where the plaintiff states quite clearly in her plaint that the village shares and the fields in suit were managed by the defendants' father who acted as her *wahiwatdar* and that he used to recover the village profits on her behalf and used to let out the recover the rents of the fields and asks that the defendants be called upon to render accounts, the relationship of principal and agent obtains between the plaintiff and the deceased father of the defendants and the suit is governed by Art. 89 and if brought more than three years of the death of the agent (which terminates the agency) is barred by limitation. A.I.R. 1943 Nag. 227=1943 N.L.J. 308=I.L.R. (1943) Nag. 470=208 Ind. Cas. 404.

——Art. 89—Death of agent.

Where a person engaged a pleader of several suits and after the death of the pleader sued the pleader's legal representatives for an account of moneys advanced to the pleader in connexion with the suit,

Held, that the suit was barred by limitation is respect of suits disposed of more than three years before the date of suit, as the death of the pleader did not give a fresh cause of action against his legal representatives. 16 M.L.T. 614, Foll. 99 Ind. Cas. 456=50 Mad. 249= 24 M.L.W. 818=1927 M.W.N. 32=38 M.L.T. 26= A.I.R. 1927 Mad. 157=51 M.L.J. 804.

——Art. 89—Death of agent—Cause of action during agent's lifetime.

Where the cause of action arises before agent's death in a suit against his legal representatives, limitation has no fresh starting point after the agent's death. Articles 89 and 120 apply to such cases. 84 Ind. Cas. 276= 35 M.L.T. 84=1924 M.W.N. 517=A.I.R. 1924 Mad. 840=47 M.L.J. 483.

——Art. 89—Death of agent—Suit against legal representatives of agent.

Articles 89 and 90 of the Limitation Act which relate to suits by a principal against his agent do not apply to suits against representatives of a deceased agent. Where there is a continuous and comprehensive agency, time begins to run from the time the agent refuses to render accounts. 71 Ind. Cas. 916=5 P.L.T. 355= 2 Pat. L. R. (Civ.) 205=A.I.R. 1923 Pat. 259.

——Art. 89—Death of agent—Suit against heirs of agent—Onus.

The burden will lie upon the plaintiff to establish with regard to each specific sum that he is entitled to recover it. Art. 89 is not applicable to a suit brought, not against the agent, but his representatives. Nor does this article indicate even by implication that a suit can be maintained against the representatives of a deceased agent. The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar, after a certain period to a suit to enforce an existing right. 33 A. 356, Rel. 17 C.W.N. 5=16 C.L.J. 282=16 Ind. Cas. 742.

——Arts. 89 and 115—Death of agent—Suit for accounts against heirs of agent—Limitation.

A suit by a principal against his agent falls within Art. 89 ; but if after the termination of agency by the death of the agent, an action for accounts is brought against his heirs it is governed by Art. 115. If there is a contract in writing registered, Art. 116 applies. The plaintiff can obtain accounts for only such period as falls within three years of the institution of the suit, if Art. 115, applies. 16 C.W.N. 1042=16 C.L.J. 288= 16 Ind. Cas. 414.

——Arts. 62, 89 and 120—Death of agent—Suit for rendition of accounts against heirs of an agent.

A suit for rendition of accounts against the heirs of an agent in respect of rents and profits received during the agent's life-time and for realisation of the amount due from his estate, is governed by Art. 120 and not by Arts. 62 or 89, and time runs from the date of agent's death. 96 P.R. 1886 ; 10 C. 860 ; 31 A. 429, Foll. 1 P.R. 1912=33 P.W.R. 1912=59 P.L.R. 1912= 13 Ind. Cas. 930.

3. Death of principal.

——Arts. 89, 90—Death of principal—Claim for accounts — Article applicable — Termination of agency—Application of article against legal representative.

Where although different items were mentioned in the different schedules to the plaint as forming items with regard to which the plaintiff asked for relief, the foundation of the entire claim was a claim for accounts :

Held, that the suit was governed by Art. 89 and not Art. 90, and that the plaintiff could not alter the frame of the suit in appellate stage to establish that Art. 90 and not Art. 89 applies.

Where an agent is appointed by a certain person and thereafter that person dies and the agent continues to hold service under the sons of the person who had made the appointment and had died, the agency that was

created terminates at the death of the principal, and with regard to that period, a suit for accounts would lie until the expiry of a period of three years from that date and so far as the service of the agent after the death of the said principal is concerned, it should be regarded as an agency held under the heirs of the said principal. The two periods should have to be separately considered, and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, suit for accounts must be regarded as barred.

The omission of any mention of legal representatives in the words under "Description of suit" in Art. 89, does not mean that the article is not intended to apply to a suit against the legal representatives. A.I.R. 1935 Cal. 817=40 C.W.N. 245.

——Art. 89—Death of principal—Provincial Small Cause Courts Act (1887), Sch. II, Art. 31—Suit for accounts by successor-in-interest of the principal—Suit is not cognisable by Small Cause Court.

The plaintiffs' father purchased certain property and entrusted the management of the same to the defendant, the maternal uncle of the plaintiffs. The father advanced certain sums of money from time to time to the defendant in order that the same might be lent to the tenants. The father died in September, 1918. The defendant refused to render an account of the monies that he received and realised sometime in 1921. Plaintiffs then filed the suit,

Held, the suit was one for accounts by the legal representatives of the principal against agent, and Art. 89 of the Limitation Act applied. 85 Ind. Cas. 704= 6 L.R.A. (Civ.) 273=A.I.R. 1925 All. 682.

——Art. 89—Death of principal—Suit for—Accounts by heirs of deceased principal.

The period of limitation for a principal to sue his agent is, under Art. 89, three years from the date the accounts were demanded or from the conclusion of the agency. The heirs of a deceased principal are entitled to demand an account for a period of three years, whether the principal has demanded or not. 44 Cal. 1=20 M.L.T. 430=21 C.W.N. 97=24 A.L.J. 1199=18 Bom. L.R. 1022=31 M.L.J. 836=24 C.L.J. 509=(1916) 2 M.W.N. 565=5 L.W. 452=36 Ind. Cas. 1 (P.C.).

——Art. 89—Death of principal—Co-sharer—Management by one on behalf of another—Suit by heirs of principal.

A co-sharer managing a property on behalf of his co-sharer also is an agent of the latter after which if the property continues to be managed, the manager would be the agent of the representatives of the deceased co-sharer. A suit for account against the manager by the representatives is governed by Art. 89. The commencement of the limitation will be the termination of the agency where there is no demand for any account or where demands have been going on, as long as the management continued. But if a demand was made which met with no attention, limitation will run from the date of demand. 40 Cal. 108=17 C.L.J. 103=18 Ind. Cas. 735.

On appeal 44 Cal. 1=38 Ind. Cas. 1 (P.C.).

——Arts. 89, 115 and 132—Death of principal—Agent continuing—Old agency, if subsists—Suit for accounts by heirs.

A suit by the principal against his agent for recovery of sums to be found due upon adjustment of accounts by sale of immoveable properties hypothecated by the agent is a suit to enforce a charge on immoveable property within Art. 132 of the Limitation Act. 35 C. 298 ; foll. 14 C.W.N. 122, not foll. Where on the death of the principal, the agent continued in the service of his successors in interest, a new agency not governed by the original contract is created. Where, under such new arrangement the parties agreed that accounts should be submitted from year to year, a suit against the agent would not be governed by Art. 115 but by Art. 89 of the Limitation Act. 11 C.L.J. 43, foll. 43 Cal. 248=19 C.W.N. 1070=22 C.L.J. 552=30 Ind. Cas. 697.

——Arts. 89 and 120—Death of principal—Suits for accounts by principal's representative.

Art. 89 and not Art. 120 governs a suit for accounts brought by a representative of the deceased principal against the agent for transactions up to the time of the principal's death and as under S. 201 of the Contract Act, an agency is terminated by the death of the principal, limitation for such a suit begins to run from the date of the principal's death. 32 C. 719, foll. 9 C.L.J. 107=3 Ind. Cas. 684.

4. Demand and refusal.

——Art. 89—Demand and refusal—Demand, what is—Demand on one of several promisors.

A demand upon one of several joint and several promisors will not operate as a demand upon the others. Hence, the proof of a debt in the insolvency of one of several joint and several promisors will not affect the rights of the creditor against the others and will not set time running against them. (1935) M.W.N. 688= 42 M.L.W. 687=A.I.R. 1935 Mad. 1055.

——Art. 89—'Refusal' meaning of.

Under Art. 89, the refusal need not always be express and may be inferred from circumstances. Even a failure to comply with a definite demand may, sometimes, amount to a refusal. 58 C.L.J. 172=A.I.R. 1933 Cal. 204=141 Ind. Cas. 225.

——Art. 89—Refusal, what is.

It is the agent's duty to keep proper accounts of his dealings and a demand by a principal accompanied by non-compliance or evasion or procrastination on the part of the agent would amount to a refusal within the meaning of Art. 89, Limitation Act. 123 Ind. Cas. 228=A.I.R. 1930 Sind 142.

——Art. 89—Refusal.

The expression 'putting off' is equivalent to postponement, and postponement is by no means tantamount to refusal ; on the contrary it implies an admission that an account is due and will be rendered. 43 I.C. 670, Foll. 80 Ind. Cas. 956=3 Pat. 546=5 P.L.T. 303=1924 P.H.C.C. 189=A.I.R. 1924 Pat. 664.

——Art. 89—Demand and refusal—Refusal by implication.

If there has been a demand for accounts and the agent has not responded to the call, there is by implication a refusal within Art. 89. So also where the agent has submitted accounts but has failed to respond to the principal's demand to explain them. 43 Cal. 248= 19 C.W.N. 1070=22 C.L.J. 552=30 Ind. Cas. 697.

——Art. 89—Demand and refusal—Termination of agency.

Where *A* received money from *B* for and on behalf of *C* in 1902 and in May 1903 disputed *C's* right to receive the money, but in June, 1903, received a second payment from *B* for and on behalf of *C*,

Held that *A's* conduct amounted to a continuance of the agency and that a suit by *C* against *A* for recovery of the amounts received by the latter, brought in 1907 was not barred. 12 Bom.L.R. 951=8 Ind. Cas. 637.

——Arts. 89 and 115—Demand and Refusal—Omission to render accounts if refusal.

Art. 89 of the Limitation Act applies to a suit for accounts by a principal against his agent, although there is an agreement by the agent to render account

every year. The mere failure of the agent to render accounts on demand does not amount to refusal within Art. 89 of the Act. The question whether the failure of the agent to render accounts amounts to refusal depends upon the circumstances of each case. 30 C.L.J. 90=53 Ind. Cas. 675.

——Art. 89—Demand and refusal—Suit for accounts—Agent, Manager of properties—No demand—Right of Principal.

An Agent was appointed on 24th May, 1896, for the management of lands and in 1897 the principal transferred the property to his wife and two years later, the wife retransferred it to the husband. The Agent continued to manage it as if no transfer had been effected and the agency was finally terminated in 1910. The present suit was instituted on 22nd March, 1911, in respect of accounts.

Held that Art. 89 applied and in the absence of any demand and refusal during the continuance of the agency, the plaintiff was entitled to the accounts claimed. 20 C.W.N. 356=21 C.L.J. 462=29 Ind. Cas. 848.

——Art. 89—Demand and refusal—Neglect to comply with demand—Cause of action.

Where there is a demand for account and refusal, cause of action accrues from the time of refusal and not from the date of determination of agency. A neglect to comply with the demand for account is tantamount to refusal. 11 C.L.J. 43=5 Ind. Cas. 186.

——Art. 89—Demand and refusal—Refusal to render accounts—Postponement—Limitation.

The refusal contemplated in Art. 89, is a definite refusal and there must be definite evidence that a definite demand was made upon a definite date and refused. It is insufficient to say that demands were made from time to time and the plaintiffs, were "put off" by the defendants. "Put off" means postponement and the postponement is by no means tantamount to refusal. 43 Ind. Cas. 570 (Pat.).

——Arts. 89 and 120—Suit for accounts—Demand and refusal.

Art. 120 is a residuary article applicable only where no other article covers the suit. Express demand and refusal are necessary to start limitation under Art. 89. 208 P.W.R. 1912=14 Ind. Cas. 19.

——Art. 89—Demand and refusal—Refusal—Meaning of.

The refusal of an agent to render accounts mentioned in Art. 89 must be an express refusal on a definite date and not a mere refusal to be inferred from the omission on his part to fulfil a promise which he has made to render accounts in answer to a demand made by the principal. 1 P.R. 1912=33 P.W.R. 1912=59 P.L.R. 1912=13 Ind. Cas. 930.

5. Joint Hindu family.

——Art. 89—Joint Hindu family—Misappropriation by manager.

A claim by a member of a Hindu joint family against the manager of the joint property in respect of certain family outstandings alleged to have been collected and misappropriated by the latter is governed by Art. 89. A.I.R. 1925 Mad. 922, Reversed. 121 Ind. Cas. 205=51 C.L.J. 136=31 M.L.W. 176=32 Bom.L.R. 499=1930 M.W.N. 60=A.I.R. 1930 P.C. 18=58 M.L.J. 245 (P.C.).

——Art. 89—Joint Hindu family—One member collecting outstandings after partition.

When after partition one brother is recovering outstandings originally due to the joint family there must be an implied contract of agency between one brother and the other and a suit by the other brother for rendition of accounts and recovery of his share of the joint outstandings is governed not by Art. 62 or Art, 120, but by Art. 89. 116 Ind. Cas. 327=30 P.L.R. 275=A.I.R. 1929 Lah. 407.

——Art. 89—Joint Hindu family—Property not included in partition.

Where in a partition suit a property which was held under a mortgage by the family was not included in the division and subsequently one member recovered the rent and the mortgage-debt and purchased certain property and in a suit by one member to recover his share of the property and the money recovered.

Held, that the claim of the plaintiffs with regard to the rent and the recoveries of the mortgage debt was not barred by limitation, as it was governed by Art. 89 and not by Art. 62. 22 Bom.L.R. 1289 and A.I.R. 1925 Bom. 148, Foll.

Held, further that even if Art. 89 did not apply the suit would be deemed to be one for account which would be governed by Art. 120. A.I.R. 1922 Mad. 150 (F.B.), Foll. 113 Ind. Cas. 173=30 Bom.L.R. 912=A.I.R. 1928 Bom. 365.

——Art. 89—Joint Hindu family.

Where two divided families have joint dealings managed by the eldest member, a suit for account against the manager is governed by Art. 89 and not by 62. 32 M.L.T. 86=27 C.W.N. 725=A.I.R. 1923 P.C. 31 (P.C.).

——Art. 89—Joint Hindu family—Partition—Suit for mesne profits received by one member.

Where the members of a joint Hindu family become divided in status but the properties have not been actually divided and apportioned among them, and subsequently one of them brings a suit for partition by metes and bounds claiming also an account being taken of the movable properties outstanding and collections made by the various members in respect of the properties.

Held, that the proper article to apply is Art. 120. The period of limitation will run from the demand of the share by the plaintiff or refusal by defendant. If the facts be that the rents and profits were received with the consent of all concerned, by the various members in possession pending final settlement by division, each of such persons might be considered as agent for himself and his co-owners. In such a case Art. 89 will apply. 71 Ind. Cas. 177=1922 M.W.N. 215=15 M.L.W. 595=30 M.L.T. 279=45 Mad. 648=A.I.R. 1922 Mad. 150=42 M.L.J. 507 (F.B.).

——Art. 89—Joint Hindu family—Partition—Securities realised but not divided—Suit by others to recover their shares.

Where at a partition immovable property is divided, but the debts due to the family are kept joint in the name of one of the members to be realised by him and divided among all the members, all the members become tenants-in-common with respect to the debts. The member realising the debts must be considered as the agent and a suit by the members for the recovery of their share of the debts after their realisation would be governed by Art. 89 and not Art. 62.

Time would not begin to run until a demand was made and refused, or the member realising the debts showed his intention to hold the fund which he had collected against the other members. 59 Ind. Cas. 357=45 Bom. 313=A.I.R. 1921 Bom. 384.

6. Movable property.

——Art. 89—Scope—Movable property, meaning of.

The term movable property includes money. Therefore, Art. 89 applies in a case where money was received

by the agent on behalf of the principal and was not accounted for. That being so, the period of limitation is to run from the time when the account was demanded and refused or from the time the agency terminated. The article is not limited only to suits for accounts. 38 C.W.N. 211=A.I.R. 1934 Cal. 238=60 Cal. 1347=149 Ind. Cas. 996.

——Art. 89—Omission to render accounts—Movable property includes money.

Where the defendant employed to collect rent by the plaintiff from December, 1907 to October, 1915, was asked to submit accounts up to 12th April, 1914, on or before 13th May, 1914, but failed to submit them and a suit was filed against him on 27th August, 1948, for accounts for the whole period from 1907 to 1915,

Held, the conduct of the defendant in not complying with the demand to submit accounts amounted to refusal. The claim therefore so far as it related to accounts up to 12th April, 1914, was barred by limitation as the suit was instituted after three years from 12th May, 1914, the date of refusal. But the suit was in time for the accounts from the 13th April, 1914 to the 11th October, 1915. The article applicable is Art. 89 and not Art. 115 or 116 which apply only where there is no specific provision. The term 'movable property' includes money. 68 Ind. Cas. 562=49 Cal. 250=26 C.W.N. 61=35 C.L.J. 111=A.I.R. 1922 Cal. 355.

——Art. 89—Moveable property—Money.

The expression 'moveable property' in Art. 89 includes money. 25 C.L.J. 335=21 C.W.N. 591=40 Ind. Cas. 359.

——Art. 89—Moveable property—Money.

Money is moveable property within Art. 89 of the Act. 39 Mad. 376=28 M.L.J. 140=26 Ind. Cas. 740.

——Art. 89—'Moveable property'—Money.

The words 'moveable property' in Art. 89 includes money. (1901) 3 Bom.L.R. 576=24 A. 27=28 I.A. 227 (P.C.).

7. Starting point of limitation.

See also LIMITATION ACT, ART. 89—TERMINATION OF AGENCY.

——Art. 89—Starting point under—Suit to recover money collected by agent under general power. 223 Ind. Cas. 531=1945 M.W.N. 735=58 M.L.W. 650=A.I.R. 1946 Mad. 122=(1945) 2 M.L.J. 484.

——Arts. 89 and 145—Starting point of limitation—Principal providing his agent with petrol pump, tank, and accessories for selling petrol during the continuance of the agency—If "deposit" within meaning of Art. 145—Claim for return of the property.

Where a petrol pump and tank is provided by the principal to the agent for the sale of petrol to be returned on the termination of the agency, the cause of action for return of the pump, tank and accessories arises on the termination of the agency, and Art. 89 of the Limitation Act applies and a suit instituted beyond three years after the cause of action arose will be barred. Art. 145 cannot have any application to such a case even if it is assumed that the delivery of the pump, tank, etc., was a 'deposit'. The cause of action and the right to sue first arose when the business between the parties ceased or the agency terminated and not on the date when they were delivered to the agent. I.L.R. (1948) Mad. 296=A.I.R. 1948 Mad. 76 (2)=1947 M.W.N. 357=(1947) 1 M.L.J. 360.

——Arts. 89, 123 and 62—Starting point of limitation—Defendant undertaking to distribute sale-proceeds amongst heirs of deceased—Suit by one of heirs for his share—Article applicable—Time, when runs.

Where the estate of a deceased Muhammadan was sold in accordance with the wishes of the majority of the heirs and the sale proceeds were kept with the defendant for distribution to the heirs according to their respective shares, a suit for the recovery of his share by one of the heirs cannot be regarded as a suit by principal against agent within the meaning of Art. 89. It also cannot be regarded as a suit against person legally charged with administration of the estate with a duty of distributing any portion of it under Art. 123. The suit is governed by Art. 62 and time runs from the date when the defendant received the money and not from the time of the plaintiff's knowledge that the defendant had received the money. 58 M.L.W. 555=1945 M.W.N. 671=(1945) 2 M.L.J. 422=A.I.R. 1946 Mad. 116=224 Ind. Cas. 21.

——Art. 89—Power-of-attorney in wide terms for collecting outstandings—Absence of evidence that it was meant to collect a particular outstanding—Outstanding collected—Suit for recovery—Limitation—Start of.

Where the power-of-attorney executed by the plaintiff in favour of the defendant for collection of the outstandings from a third party was couched in very wide terms amounting to a general power-of-attorney to manage the business of the plaintiff and represent him in suits, in the absence of evidence that it was executed only for the specific purpose of enabling the defendant to collect the suit amount due to the plaintiff and nothing more, the agency cannot be said to terminate on the collection of that amount. When, therefore, the amount in question is collected on 14th January, 1937, a suit filed for its recovery in 1941 after the defendant's failure and refusal to pay it, is in time. 1945 M.W.N. 735=(1945) 2 M.L.J. 484=58 M.L.W. 650=A.I.R. 1946 Mad. 122.

——Art. 89—Suit against agent on basis of revocation of agency—Time, when begins to run.

Limitation begins to run when a cause of action accrues. It is obvious that it would be the right of the agent to claim that no cause of action on the basis of revocation could arise against him until the termination of his authority as agent. In so far as the cause of action is the revocation of the agency, he could not be sued until he had received notice of such revocation. It follows, therefore, that the period of limitation would begin to run on that date and would extend for a period of 3 years. A.I.R. 1939 All. 738=(1939) A.L.J. 961=1939 A.W.R. 735=185 Ind. Cas. 233.

——Art. 89—Starting point of limitation.

Family arrangement—*Hundi* issued in defendant's favour for payment of third person's debts—Balance to be paid to third person. In such a case the obligation of the defendant is equitable. If he is regarded as agent of such third person, for paying off his creditors the suit for accounts will fall under Art. 89, if not under Art. 120. In both cases time runs from the date of defendant's denial of such third person's claim or infringement of such right in any other manner. A.I.R. 1936 Mad. 876=(1937) M.W.N. 368=169 Ind. Cas. 362.

——Art. 89—Suit for rendition of accounts by principal against agent—Starting point of limitation.

Where there are two or more principles who are "joint and several", period of limitation for a suit against the agent for rendition of accounts does not begin to run from the death of the deceased principal as against the surviving principal. The surviving principal may file such suit within 3 years of the termination of agency as against him. A.I.R. 1936 Cal. 650=41 C.W.N. 27=64 C.L.J. 587=166 Ind. Cas. 608.

——Art. 89—Suit against agent—Starting point of limitation.

An agency for the sale of goods terminates when the

goods are sold and does not continue until accounts are rendered by the agent and a suit for accounts against the agent which is instituted more than three years after the date of the sale is barred under Art. 89, even though the agent has not rendered accounts. 40 M.L.W. 533= A.I.R. 1934 Mad. 691=(1934) M.W.N. 1250=152 Ind. Cas. 266.

——Art. 89—Starting point of limitation.

In a suit for accounts between principal and agent, the period begins to run from the date on which accounts are demanded and refused during the continuance of the agency, or from the date on which the agency terminates. Article 62 does not apply to the case. 54 A. 814=(1933) A.L.J. 1009=A.I.R. 1933 All. 642=147 Ind. Cas. 529 (2).

——Art. 89—Starting point of limitation.

Article 89 applies to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account. Whether an account was demanded and refused or not depends on the circumstances of each case, and there is no reason why a refusal may not be inferred or implied from the facts of the case. A.I.R. 1933 Bom. 450=35 Bom.L.R. 929=58 B. 200=145 Ind. Cas. 630.

——Art. 89—Starting point.

The period in Art. 89 runs either from the termination of the agency or from an earlier date when accounts are demanded and refused. It is difficult to believe, that the Legislature could have intended a later date to serve as the starting point, in cases where an account is demanded of an agent, who promises to render it later on, but fails to keep his promise. 123 Ind. Cas. 228=A.I.R. 1930 Sind 142.

——Art. 89—Starting point of limitation—Minors —Agency for a transaction.

Where an agency does not terminate with the death of the principal but terminates with the completion of a transaction which has occurred in the life-time of principal, the *terminus a quo* for limitation under Art. 89 begins from the completion of the transaction and the minor claiming through the principal, an amount credited to the name of the principal in a firm account cannot, ask the help of S. 6. A.I.R. 1929 Lah. 883.

——Art. 89—Starting point—Termination of agency by closing the transactions.

Plaintiff had certain transactions in cotton, wheat, etc., with three different firms, which acted as his agents for the purpose. The last date of the transactions was 19th May, 1918. Thereafter no transaction took places but accounts were not rendered. Subsequently the three firms were merged in the defendant firm ; and the latter firm was sued for accounts by the plaintiff as the representative of the three firms in 1924,

Held, that the period of limitation began to run from the date of the last transaction and hence the suit was out of time. 110 Ind. Cas. 575=A.I.R. 1928 Lah. 833.

——Art. 89—Starting point—Where date is fixed for settling accounts.

In a suit for accounts by the principal against the agent when a date is fixed between them for settling of accounts, limitation begins to run from the date fixed and not from the date of the transaction last entered into by the agent on behalf of the principal. 91 Ind. Cas. 487= A.I.R. 1926 Lah. 200.

——Art. 89—Starting point of limitation—Joint principals.

In the case of joint principals, time runs from the date of demand by all the principals and a refusal thereon and a demand by one only and a refusal thereon does not start limitation as against him. 75 Ind. Cas. 1022=4 P.L.T. 531=1923 P.H.C.C. 177=2 Pat. 585=A.I.R. 1923 Pat. 464.

——Art. 89—Starting point of limitation—Purchase on behalf of another.

Where in a case the plaintiff sued to recover properties in the name of defendants as being purchased for them in trust it was sought to be argued that the parties may be looked upon as principal and agent and when there was a demand and refusal to account, the limitation started.

Held, the starting point was when the agency terminated and in the absence of a specific plea as to agency in the first Court, the same could not be entertained in appeal. 66 Ind. Cas. 858=30 M.L.T. 238=45 Mad. 415=1922 M.W.N. 117=A.I.R. 1922 Mad. 57=16 M.L.W. 886=42 M.L.J. 119.

——Art. 89—Starting point of limitation—Administrator—Limit for account against.

In a suit for accounts against the administrator, the limitation runs from the date when the plaintiff is entitled to put an end to the administration on attaining majority and not from the date on which he does in fact put an end to it. 2 P.L.J. 642=4 P.L.W. 337=1918 P.H.C.C. 170=40 Ind. Cas. 860.

8. Termination of agency.

See also LIMITATION ACT, ART. 89—STARTING POINT OF LIMITATION.

——Art. 89—Principal and agent—Termination of agency.

Many transactions of shellac were entered into by the agent, from June, 1928 to December of the same year, on behalf of his principal. In December, 1928, the agent was asked not to enter any fresh transactions and was served on 17th May, 1933, with notice of a formal demand to settle accounts. A suit for accounts was filed by the principal on 31st May, 1933 :

Held, that the agency terminated in December, 1928; and the article which governed the case was Art. 89, irrespective of the demand for accounts and that the period started from the termination of agency and the suit was barred. (1937) A.L.J. 264=A.I.R. 1937 All. 363=1937 A.W.R. 163=169 Ind. Cas. 135.

——Art. 89—Termination of agency—Suit for accounts against heirs of agent—Limitation—Article applicable.

The plaintiff appointed the defendants' father as an agent under a power-of-attorney for realising a decree and for conducting all proceedings that might arise out of disputes between the plaintiff and a third party in respect of the decree. A suit was instituted by that third party for a declaration of his right to a share in the decree and for an injunction restraining the plaintiff and the defendants' father from realising the decree amount. The injunction was granted and the defendants' father was appointed a Receiver by the Court for collecting the decree amount. The defendants' father died in August, 1925, and the plaintiff instituted a suit for account against the defendants in August, 1928. The defendants contended that the suit was time-barred :

Held, that (1) the defendants' father's agency was not terminated by reason of the injunction nor by the appointment of the defendants' father as a Receiver ; (2) the relinquishment of the receivership by the father did not amount to a relinquishment of the agency ; (3) that the agency was not revoked by the fact that in the suit by the third party plaintiff took steps to conduct the defence himself, and the suit was not therefore time-barred.

Quaere.—Whether a suit for accounts by the principal against the agent's heirs is governed by Art. 89 of the Limitation Act. (1936) M.W.N. 932=A.I.R. 1936 Mad. 980=166 Ind. Cas. 360.

——Art. 89—Suit by principal against agent—Limitation—Termination of agency.

For the purpose of limitation an agency determines when the agent ceases to represent his principal and does not continue until the agent renders account to the principal and gets his salary chit back.

Where a suit by a principal against the agent was filed after the expiry of three years from the date when the agent left the place of business for which he was appointed agent, after handing over charge to his successor :

Held, that the suit was time-barred under Art. 89, even though the agent has not rendered accounts and taken the salary chit back. A.I.R. 1935 Mad. 707=(1935) M.W.N. 967=42 M.L.W. 342=158 Ind. Cas. 573.

——Art. 89—Suit for accounts against agent—Limitation — Starting point — Termination of agency.

Under Art. 89 which relates to a suit by a principal against his agent for property received by the latter and not accounted for, the period of three years runs from the date when the account is, during the continuance of the agency, demanded and refused or where no such demand is made, when the agency terminates.

An agency does not terminate until revocation of the authority of the agent or renunciation of the business of the agency by the agent or completion of the business of the agency. The business of agency cannot also be said to have been completed when no accounts have been rendered and the amounts outstanding have not been paid to the principal. (1931) A.L.J. 225=A.I.R. 1931 All. 372=132 Ind. Cas. 43.

——Art. 89—Termination of agency.

The agency terminates when the business of the agency has been completed, and the mere liability to render an account is not a continuance of the relation between the agent and the principal. When an agent is instructed to buy and sell goods on behalf of his principal, on agent's carrying out principal's instructions the business of his agency terminates. 39 Mad. 376, Foll. 96 Ind. Cas. 79=21 S.L.R. 336=A.I.R. 1926 Sind 264.

——Art. 89—Termination of agency—Death of parties.

Under the provisions of S. 201 of the Contract Act, an agency is terminated by either the principal or agent dying, and therefore a suit against the agent for accounts for the period during which he acted as agent under the deceased must be brought within three years of the death as laid down in Art. 89 of the Limitation Act. 43 Cal. 248 and A.I.R. 1916 P.C. 148, Foll.

The case does not come under S. 209 of the Contract Act or Art. 120 of Limitation Act as there is no question in it of suing the defendant for any act done by him after the death of his late principal, which he might have done as a trustee. 65 Ind. Cas. 219=26 C.W.N. 320=A.I.R. 1922 Cal. 53.

——Art. 89—Termination of agency—Question of fact.

The question when an agency terminates, is a question of fact. 41 Mad. 1=45 Ind. Cas. 430.

——Art. 89—Termination of agency—Winnings of a lottery—Limitation.

In a suit for money received by defendant as agent for plaintiff on account of plaintiff's winnings in a lottery, the agency continues so long as the money is held by the defendant for the plaintiff, and the right to sue arises under Art. 89 when the money is demanded and payment is refused. 12 Bur.L.T. 9=51 Ind. Cas. 530.

——Art. 89—Termination of agency.

The facts of a case should determine the question of the termination of an agency.

Quaere.—Whether an agency continues for purposes of the agent's accounting to the principal even after the cessation of all dealings between them. 5 L.W. 375=37 Ind. Cas. 875.

——Art. 89—Termination of agency—Agency—Termination—Salary chit.

The question where an agency terminates within Art. 89 is one of fact. It cannot be treated as a question of law and disposed of without evidence. It is not a matter of law that on the expiry of the term mentioned in the salary chit the agency comes to end *ipso facto*. A salary chit means only that the agency shall not terminate before the expiry of the term fixed by it or that agency shall last for the term fixed after which it may be continued. It does not mean that after the expiry of the period there is a new agency but only that the original agency continues. 31 M.L.J. 685=(1916) 2 M.W.N. 360=4 L.W. 452=36 Ind. Cas. 804. *Also* 31 M.L.J. 687=36 Ind. Cas. 812.

——Art. 89—Termination of agency—Subsequent resumption of work—Suit—Limitation.

Where an agent throws up the agency and leaves the place of business the agency is terminated within Art. 89, Limitation Act. The mere fact that he subsequently goes back to the place, and does some business, cannot prevent the running of time as regards the first agency, unless there is an acknowledgment of liability to account. 30 Ind. Cas. 691 (Mad.). *See also* 28 M.L.J. 140=26 Ind. Cas. 740.

——Art. 89—Principal and agent—Account between—Agent's liability to account—Demand and refusal—Termination of the agency.

D received from *G* a sum of money as the agent of *N* on the 4th November, 1902. In May, 1902 disputes arose between *D* and *N* in which *D* defined *G's* right to the money. But on the 30th June, 1903, *D* again received from *G* another sum of money as the agent of *N*. There was not, after that date, any demand and refusal or termination of the agency. *N* filed a suit against *D* in 1907 to recover the money from *D*.

Held that the claim was not barred ; for enough *D* asserted his own right in 1903, the adverse claim was not continued and acted upon ; and when in June, 1903, he again received the money for and on behalf of *N* his conduct plainly amounted in law to a continuance of the agency and fiduciary relationship and his liability to account in respect of it. An agent's liability to his principal is to render an account of the sums received by him ; the account is one and indivisible ; and he cannot plead limitation as to any particular item as against his principal. 12 Bom.L.R. 951=8 Ind. Cas. 637.

——Art. 90.

Synopsis.

1. Agent.
2. Applicability.
3. Interpretation.
4. Starting point.

1. Agent.

——Art. 90—Clerk in Bank—Agent.

The clerk in a bank in charge of savings bank accounts, through whom alone money could be withdrawn, and who alone could report to the official concerned what a particular depositor desirous of withdrawing money has to his credit money in excess of what he desires to withdraw so far as he acts within the scope of his authority, is an agent of the bank. 124 Ind. Cas. 180=A.I.R. 1930 All. 573.

——Art. 90—Director of company—Agent.

Whether a Director whose acts are the subject of construction was a trustee or a partner or an agent to the Company or to the body of share-holders is to be determined according to the circumstances of each case. 79 Ind. Cas. 740=5 Lah. 27=A.I.R. 1924 Lah. 435.

——Art. 90—Director of Bank—Agent.

The Director who was acting as a Chairman of the local Board of Directors was in the circumstances of this case held to be an agent of the bank and a suit against him for neglect and misconduct was held to be governed by Art. 90. 79 Ind. Cas. 740=5 Lah. 27=A.I.R. 1924 Lah. 435.

2. Applicability.

——Art. 90—Applicability.

Where the master alleges that certain defalcations had been discovered after the servant left the service but the precise date or dates on which they came to his knowledge is not stated the limitation article applicable would not be Art. 90. A.I.R. 1941 Nag. 70=1940 N.L.J. 635=192 Ind. Cas. 891.

——Art. 90—Applicability.

Suit against Advocate for neglect and misconduct in not joining certain person as a party to appeal—Plaintiff aware of neglect but not knowing of legal consequences—Ignorance of their legal consequences cannot extend time—Article applicable is Art. 90. A.I.R. 1938 Rang. 258=1938 Rang.L.R. 457=176 Ind. Cas. 608 (F.B.).

——Art. 90—Applicability.

A suit by a Bank alleging that in sanctioning a loan the Directors had acted dishonestly and that their conduct was such as to render them liable for the amount lost by the Bank due to wilful breach of their obligation as Directors, is governed by Art. 90, and not by Art. 36. A.I.R. 1936 Lah. 271=167 Ind. Cas. 307.

——Art. 90—Applicability.

Where a Director of a Bank acts in a transaction as its agent, a suit against him in respect of the transaction is one by a principal against an agent and is governed by Art. 90. A.I.R. 1936 Lah. 268=38 P.L.R. 526=17 L. 262=162 Ind. Cas. 204.

——Art. 90—Suit against agent for monies realised.

It was held that it was not clear that the suit by the plaintiff against the defendant for collecting monies on her behalf and withholding them did not fall under Art. 90. A.I.R. 1931 Cal. 738=58 C. 923=133 Ind. Cas. 177.

——Art. 90—Applicability.

Article 90 is residuary article with regard to actions between principal and agent and should be held to be applicable only if no other article can possibly be regarded as applying to the facts of the particular case. 109 Ind. Cas. 332=A.I.R. 1928 Mad. 906.

——Art. 90—Applicability—Suit by Municipality.

A suit by Municipality against its executive Officer for less sustained by it owing to disregard of directions amounting to negligence or over-confidence in the honesty of others is governed by Art.90. 80 Ind. Cas. 241=46 All. 175=22 A.L.J. 26=5 L.R.A. (Civ.) 113=A.I.R. 1924 All. 467.

——Art. 90—Applicability—Agent failing to pay money to third person—Suit by third person against principal.

A suit against a person for default to pay money to plaintiff's creditor by reason whereof the creditor has obtained a decree against the plaintiff is governed by Art. 90, Limitation Act. 21 M.L.J. 453=9 M.L.T. 268=9 Ind. Cas. 54.

3. Interpretation.

——Art. 90—Knowledge of neglect or misconduct—What is.

The knowledge contemplated in Art. 90 of the Limitation Act is knowledge of the facts constituting the neglect or misconduct not knowledge of the legal consequences of such facts. I.L.R. (1950) Cut. 174=A.I.R. 1950 Orissa 241.

——Art. 90—Interpretation — Misconduct—What amounts to.

A *Bajana Sabha* through its Secretary instituted a suit against its former Secretary for recovery of Rs. 840, and odd, this amount being made up of several items, one of which was an item of receipt not entered in the account and the remaining items, six in number, being items of expenditure falsely entered in the account. The claim was based on the allegation that the agent, *i.e.*, the Secretary had shown certain sums of money as having been spent on behalf of the *Sabha* when as a matter of fact they were not spent at all on behalf of the *Sabha* :

Held, that the claim amounted to an allegation of misconduct, and the suit, therefore, was governed by Art. 90. (1938) M.W.N. 1133=48 M.L.W. 775=A.I.R. 1939 Mad. 114=180 Ind. Cas. 390.

——Art. 90—Interpretation—'Neglect' or mis-conduct'.

The expression "neglect'" or "misconduct" appearing in the third column of Art. 90 has special reference to what is termed negligence or misconduct of the agent in the conduct of the agency and does not cover every failure of duty on the part of the agent. 109 Ind. Cas. 332=A.I.R. 1928 Mad. 906.

4. Starting point of limitation.

——Art. 90—Starting point of limitation.

Where the directors of a branch office of a Bank had been guilty of misconduct in sanctioning a loan fraudulently and in violation of the rules and the Company filed a suit against them for compensation :

Held, that the suit was governed by Art. 90, and the period started from the date when the Head Office came to know of such misconduct. A.I.R. 1935 Lah. 705=160 Ind. Cas. 759.

——Art. 90—Starting point of limitation.

Under Art. 90, limitation begins to run from the time when the plaintiff came to know of the negligent act and not from the time when the plaintiff first realised or concluded that the act was negligent. A.I.R. 1932 Rang. 1 (2)=9 R. 575=135 Ind. Cas. 648.

——Art. 90—Person entrusted with money—Money entrusted for specific purpose—Retention—Starting point.

Where various sums of money are entrusted from time to time to a person with specific directions that he should dispose off particular sum in particular manner, the position of person so entrusted is that of an agent, intermediary or middleman. If such person abuses his position and retains the money, it being a suit by the principal against an agent for neglect or misconduct, the suit for recovery of such sums as he wrongfully retains in hand is covered by Art. 90, and time begins to run from the date of the matter comes to the knowledge of the principal. A.I.R. 1930 All. 397=124 Ind. Cas. 33=1930 A.L.J. 1411.

——Art. 90—Starting point—Agent making secret profit—Suit by principal.

In a suit by principal against the agent for recovery of money earned by agent as secret profit, the limitation begins to run from the date the principal comes to know that defendant has made secret profits. 103 Ind. Cas. 221=25 A.L.J. 418=A.I.R. 1927 All. 436.

——**Art. 90—Starting point of limitation—Principal and agent—Suit for neglect or misconduct—When becomes known.**

A suit for recovery of unauthorised payments made by the agent on account of the principal is governed by Art. 90. Time runs not from the date on which agency terminated or the accounts were made over to the principal but when the neglect or misconduct by the agent comes to the knowledge of the principal, a reasonable time being allowed for examination of the accounts. 9 Bur. L.T. 130=36 Ind. Cas. 418.

——**Art. 90—Starting point of limitation—Suit against agent for misconduct.**

Limitation under Art. 90 for the Principal's suit against the agent for his misconduct will run from the day the account books are got from the agent, as it is then that the principal will come to know of the agent's misconduct. 7 Bur.L.T. 199=25 Ind. Cas. 136.

——**Art. 90—Suit against agent for neglect of duty—Starting point for limitation.**

In a suit against an agent for neglect of duties, time under Art. 90, begins to run when the Principal comes to know of the neglect, and not when he thinks that there is sufficient cause for a good case against his agent. 25 Ind. Cas. 706 (Cal.).

——**Art. 90—Starting point of limitation—Suit for neglect of agent—Neglect to collect rent.**

A suit to recover time-barred rent from the rent-collecting agent and his surety according to a mutual agreement is governed by Art. 90 and time runs from the fact that some rent has become time-barred through the agent's negligence was first reported to the office of the Principal. 7 A.L.J. 724=6 Ind. Cas. 456.

——**Art. 91.**

Synopsis.

1. **Alienation by co-parcener.**
2. **Alienation by guardian or manager.**
3. **Alienation by Hindu widow.**
4. **Applicability and scope.**
5. **Burden of proof.**
6. **Decree.**
7. **Distinction between void and voidable contract.**
8. **Effect of bar under.**
9. **Interpretation.**
10. **Plea of limitation in defence.**
11. **Starting point of limitation.**

See also LIMITATION ACT, ART. 91—BURDEN OF PROOF.

12. **Void document.**
13. **Will.**
14. **Miscellaneous.**

1. Alienation by coparcener.

——**Art. 91—Joint Hindu family—Alienation by Co-parcener—Where the deed is void ab initio.**

Article 91 does not apply where the plaintiff is not suing to cancel or set aside a sale-deed of joint family property, executed by other members of his family but for a declaration that the sale-deed is void *ab initio*. The article applicable is 120 and the period of 6 years begins from the time when the plaintiff came to know of the sale-deed. 77 Ind. Cas. 329=10 O.L.J. 360=27 O.C. 140=A.I.R. 1924 Oudh 120.

——**Arts. 91, 120, 144—Gift by a Hindu co-parcener—Suit for declaration and possession by other co-parceners—No prayer for setting aside the gift—Hindu law—Powers of a co-parcener to alienate.**

A Hindu co-parcener made a gift of his undivided share in favour of the defendant. The donee made an application for mutation of his name which was recorded. He together with other co-parceners applied for ejectment of certain tenants. He then brought a suit for profits. The co-parceners of the donor thereupon sued for profits as they and their uncle were owners, and in the alternative for possession. The suit was brought more than three years after the date of gift.

Held, that in as much as a Hindu co-parcener has no right to alienate any portion of the family property without the consent of other co-parceners it was not necessary for the plaintiffs to sue to have the deed of gift set aside. Articles 91 and 120 had therefore no application but Art. 144 was the article which applied to the case. 7 A.L.J. 783=6 Ind. Cas. 841.

——**Art. 91—Alienation by co-parcener—Declaration.**

Art. 91 does not apply to a suit by one member of a joint family for a declaration that a mortgage by others without the plaintiffs consent is invalid and not binding on the family property. 13 Ind. Cas. 547 (Bom.).

2. Alienation by guardian or manager.

——**Art. 91—Minors—Alienation by guardian.**

Neither Art. 44 nor Art. 91 applies to a suit to set aside alienations by a *de facto* guardian. The suit can be brought within the ordinary period of 12 years. 99 Ind. Cas. 1050=A.I.R. 1927 Nag. 145.

——**Art. 91—Alienation by a manager—Suit to set aside.**

A suit to set aside an alienation by a manager of joint Hindu family and for possession of the property is governed by Art. 144 and not by Arts. 44 or 91 of the Limitation Act. 13 A.L.J. 94; 12 N.L.R. 12, Foll. 68 Ind. Cas. 731=A.I.R. 1922 Lah. 386.

——**Art. 91—Alienation by guardian.**

A suit to set aside alienation by Hindu father during son's minority without any benefit is not governed by Art. 44 or 91 but by Art. 144. 17 Bom. L.R. 1137 (Note)=33 Ind. Cas. 441.

——**Art. 91—Alienation by guardian.**

Alienation by an unauthorised guardian is void and need not be set aside. 83 P.R. 1916=125 P.W.R. 1916=33 Ind. Cas. 943.

——**Art. 91—Alienation by guardian.**

An alienation by *de facto* guardian not for necessary purposes, need not be set aside. 38 Mad. 1125=27 M.L.J. 285=26 Ind. Cas. 179.

——**Art. 91—Alienation by guardian.**

Art. 91 does not apply when the sale by a *de facto* guardian is void. 10 N.L.R. 133=26 Ind. Cas. 813.

——**Arts. 91, 141—Alienation by guardian—Suit by minor to recover possessions of property transferred by guardian—Cancellation of the document ancillary—Decree for possession conditional upon restoring what was for minor's benefit—Practice.**

The natural guardian of the minor sold certain immoveable property belonging to the minor. The minor brought a suit to recover possession of that property. It is found that the minor had benefited to a certain extent by the sale. A decree was accordingly made in his favour for possession, subject to the condition of his restoring the amount by which he had benefited. Upon second appeal the suit was dismissed as barred by limitation, the article applied being Art. 91.

Held, that the article applicable was Art. 141, and not Art. 91, the substantive relief being the recovery of possession and the cancellation of the instrument being ancillary, and that the suit was not barred by limitation

Held, further, that the principle applicable in respect of such a transaction is to make a decree for the property transferred by the guardian. 32 A. 392=7 A.L.J. 337.

——Art. 91—Alienation by guardian—Permanent lease by guardian in excess of powers—Sale by minor on attaining majority—Suit for possession by purchaser.

The certificated guardian of a minor granted, without previously obtaining the permission of the Court, a perpetual lease of certain immovable property forming part of the minor's estate on the 28th of March, 1890. The minor came of age on the 7th of December, 1901, and on 21st of October, 1902 sold the property, the subject of the lease mentioned above. On the 22nd of July, 1903 the purchaser sued for possession of the property purchased by him asking for cancellation of the lease, if necessary,

Held, that it was not necessary for the plaintff to ask for cancellation of the lease as a condition precedent to his obtaining a decree for possession and that the suit was not barred by limitation. 1905 A.W.N. 176= 2 A.L.J. 507=28 All. 30.

3. Alienation by Hindu widow.

——Art. 91—Alienation by widow—Void sale—Suit to set aside.

Where the alienation was by a Hindu widow of an unrecognised portion of a *bhag* and the reversioner sued to have the same set aside after the life-time of the widow, *Held*, that the alienation being void *ab initio* limitation commenced from the date of the sale-deed and the suit was barred whether Art. 91 or Art. 120 applied to the case. 32 Bom. L.R. 1013=54 Bom. 837=127 Ind. Cas. 897=A.I.R. 1930 Bom. 545.

——Art. 91—Alienation by widow.

In the case of reversioner it is not essential for him to set aside any alienation by the widow; but he can sue to enforce his right as reversioner without setting aside the alienation within the period prescribed by the Limitation Act after the death of the widow. 33 Cal. 257; 31 Bom. 1 and 34 Cal. 329, Foll. 84 Ind. Cas. 374= 26 Bom. L.R. 829=48 Bom. 654=A.I.R. 1925 Bom. 9.

——Art. 91—Alienation by widow.

Adopted son may enforce his right to property alienated by widow; (adoptive mother) prior to adoption, without setting aside the transfer. 84 Ind. Cas. 374= 26 Bom. L.R. 829=48 Bom. 654=A.I.R. 1925 Bom. 9.

——Art. 91—Hindu widow—Alienation—Reversioner—Suit by reversioner to recover property.

Where the plaintiff sues to recover possession of property from the defendant who relies on an alienation in his favour made by the widow of a preceding owner and the alienation is not justified by any necessity recognized by Hindu Law, it is not open to the defendant to rely on Art. 91 as a bar to the suit. (1906) 8 Bom. L.R. 675=31 Bom. 1.

——Arts. 91, 141—Alienation by Hindu widow—Reversioner's suit for possession of property alienated by widow for no legal necessity.

Art. 91 does not apply to a suit brought by a reversioner on the widow's death for recovery of property, alleged to have been alienated by a Hindu widow by a deed of sale during her life-time without legal necessity. Per *Pargiter, J.*—Such sales are void; whereas a lease by the widow is merely voidable at the heir's option. Per *Woodroff, J.*—Art. 91 governs all cases where a person seeks to recover property against an instrument executed by himself or one under whom he claims, but not to cases where the instrument is not that of the plaintiff or any person through whom he claims, as in the instance of a reversioner seeking recovery of porperty alienated without necessity or consent by a Hindu widow. In such cases the alienation is only good to the extent of the life interest and terminates *ipso facto* at her death. (1905) 1 C.L.J. 408=9 C.W.N. 636=33 Cal. 257.

——Arts. 91, 120, 135—Alienation by Hindu widow—Dedication of property by widow to Sheba Void as against reversioners—Suit for declaration.

A suit by the reversioners for a declaration that a dedication of property by a widow with her mother-in-law for the sheba of certain idols is void is governed by Art. 120 and not by Art. 91 the instrument being void against the plaintiff and as such not one which the plaintiffs need set aside. The reversioners not being entitled to succeed immediately on the death of the widow, her mother-in-law being alive, Art. 135 did not apply. (1904) 32 C. 473.

4. Applicability and scope.

——Art. 91—Applicability.

A suit for declaration that a deed was null and void is governed by Art. 120 and not by Art. 91. A.I.R. 1945 All. 367=1945 O.W.N. (H.C.) 145=(1945) A.L.J. 196= 1945 A.W.R. (H.C.) 141=I.L.R. (1945) All. 494.

——Art. 91—Applicability and scope—Suit for setting aside partition by minor co-parcener after attaining majority.

Partition during minority of a co-parcener—Suit for setting aside the partition, filed on attaining majority—Proceedings are governed by Art. 91. 1943 A.W.R. 40= A.I.R. 1943 All. 197=(1943) A.L.J. 82=207 Ind. Cas. 99.

——Art. 91—Applicability—Suit for possession.

Where, in a suit for recovery of possession, there is an obstacle in the way of granting relief in the shape of gift or settlement, the plaintiff cannot get any relief until such instrument is set aside; and if it is too late for setting aside the document, the suit for possession should also fail.

In a suit where there is not only a prayer for cancellation of a document, but also for confirmation of possession of the properties covered by the deed, the position must be recognised that if the defendant is put in possession by virtue of an instrument which is not void on the face of it, a suit for possession even without a prayer for cancellation of the document would not take it out of the operation of Art. 91. In such a case, the *prima facie* title remains with the defendant, and until that title is defeated or displaced, the possession of the defendant cannot be disturbed. Where, therefore, the suit is barred under Art. 91, the suit for possession also fails and Art. 142 does not apply to such a suit. A.I.R. 1937 Cal. 500= 65 C.L.J. 34=172 Ind. Cas. 755.

——Art. 91—Applicability and scope.

Where a person seeks to recover property against an instrument executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument and the 3 years' rule enacted by Art. 91, applies to a suit brought by such person. But where an instrument of alienation is executed by a person who is not the full owner of the property but has only conditional authority to dispose of it that article would not apply. 1935 R.D. 461=1935 A.W.R. 1113 =A.I.R. 1935 All. 1018=158 Ind. Cas. 434.

——Art. 91—Applicability — Suit to set aside voidable transfer and for possession—Limitation.

When a person sues to obtain possession of property which has been transferred by the person through whom he claims, the suit must be brought within the period allowed by Art. 91, so long as the transfer is voidable and not ab initio void.

When the transfer has been made by some person who had no title to make it and the transfer is, therefore, void; then the claim to have such transfer set aside will be merely ancillary or incidental to the main claim, which will be one for possession, but when the plaintiff's own predecessor has made a transfer, which is voidable and not void, the claim to have such transfer set aside cannot be regarded as merely ancillary to the plaintiff's claim for possession. Where the transfers, so far as the plea of undue influence is concerned; are voidable under S. 19-A Contract Act the plaintiff cannot evade the limitation prescribed by Art. 91 by merely framing his suit as though it were a suit for possession and nothing else. (1934) A.L.J. 817=A.I.R. 1934 All. 507=3 A. W.R. 302=152 Ind. Cas. 146.

——Art. 91—Applicability.

Article 91 can have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims, and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But it does apply to a case in which it is not possible for the plaintiff to get any relief until the instrument is set aside. A.I.R. 1933 Cal. 812= 57 C.L.J. 399=37 C.W.N. 1141=146 Ind. Cas. 1010.

——Art. 91—Applicability.

Where in a suit for possession, the defence set up a mortgage-deed and a deed of gift both of which had been held to be sham transactions and fictitious:

Held, that the suit was not governed by Art. 91 inasmuch as the deeds being inoperative relief for cancellation of the deeds was merely ancillary. 9 O.W.N. 958=A.I.R. 1933 Oudh 72=140 Ind. Cas. 709.

——Art. 91—Applicability.

Where the plaintiff sued for possession of property impeaching a sale and the property was found to be the self-acquired property of the vendor:

Held, that it was necessary for the plaintiff to obtain a cancellation of the sale-deed before he could claim possession of the land and, therefore Art. 91 would apply to such a suit though the main prayer in the suit was a decree for possession of the land. A.I.R. 1933 Lah. 399=34 P L.R. 412=142 Ind. Cas. 586.

——Art. 91—Applicability.

Lease by agent of principal's property as his own — Suit by Principal—Principal not bound to get the transaction set aside and Art. 91, therefore, not applicable. 1931 M.W.N. 856.

——Art. 91—Applicability.

The plaintiff, who was a person of weak intellect executed in 1914 a deed purporting to be a deed of gift in favour of the defendant, his elder brother conveying to the defendant his half share in the family property. The defendant agreed to give a cash allowance to the plaintiff while he was living with the defendant. The plaintiff left the defendant's house in 1923, and instituted a suit to set aside the deed. The defendant had meanwhile conveyed some of the properties to third persons:

Held, that the suit was governed by Art. 91 and had to be instituted within three years from the date when the facts entitling the plaintiff to have the instrument cancelled came to his knowledge. 7 O.W.N. 1129=A.I.R. 1931 Oudh 34=130 Ind. Cas. 119.

——Art. 91—Applicability — Where the document is void.

Where a guardian sells immovable property belonging to a minor without the sanction of the Court and subsequently executes a second sale with the permission of the Court the later transferee can sue for possession outright and need not expressly sue to have the first sale set aside. To such a case Art. 120 and not Art. 91 of the Limitation Act, will apply. 34 C.W.N. 948= 130 Ind. Cas. 273=58 Cal. 128=A.I.R. 1931 Cal. 131.

——Art. 91—Applicability and scope — Where plaintiff is not a party to the instrument.

Article 91 applies to parties to the instrument which is sought to be cancelled and set aside, and has no application to a case where an alienation by an unauthorized person is attacked by the next reversioner or the successor-in-office of a mahant of a religious institution. 11 L.L.J. 493=A.I. R. 1929 Lah. 816.

——Art. 91—Applicability and scope — Where the deed was a sham transaction.

A suit for a declaration that a transaction embodied in a particular deed was from the very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of Art. 91, Sch. 2; Limitation Act. A.I. R. 1924 Bom. 174 and 35 Cal. 551, Foll. 109 Ind. Cas. 54=50 All. 510=26 A.L.J. 289=A. I.R. 1928 All. 267.

——Art. 91—Applicability and scope.

A suit to set aside a document which is voidable is governed by Art. 91. 41 M.L.J. 474 and 15 Cal. 58 (P.C.), Rel. on. 99 Ind. Cas. 571= 38 M.L.T. (H.C.) 1=25 M.L.W. 550=A.I. R. 1927 Mad. 255=52 M.L.J. 20.

——Art. 91 — Applicability and scope—Sale by administrator.

A suit to set aside a sale by administrator under S. 90, Probate and Administration Act; is governed by Art. 91 of the Limitation Act. 103 Ind. Cas. 264=5 Rang. 266=A.I.R. 1927 Rang. 186

——Art. 91—Applicability and scope—Where plaintiff is not a party to the instrument.

Where the plaintiff in a suit for possession of property sold in execution of a decree was the original owner of the property and was not a party to the decree under which the sale took place nor a representative of any of the parties and was consequently in a position to ignore the sale altogether,

Held, Art. 12 has no application and the suit falls under Art. 144. Art. 91 also is not applicable, as it provides for the cancellation or setting aside of an instrument not otherwise provided for and it binds only the parties to the instrument and not strangers. 71 Ind. Cas. 822=A.I.R. 1924 Lah. 396.

——Art. 91—Applicability and scope.

A person who is entitled to possession of property need not as a preliminary to that set aside a document which may have been executed by somebody else in order to defeat his title. 78

Ind. Cas. 705=3 Pat. 575=5 Pat.L.T. 581=2 Pat.L.R. 306=A.I.R. 1924 Pat. 551.

——Art. 91—Applicability and scope — Malabar Tarwad—To set aside sale by karnavan.

A suit by the junior member of a Malabar tarwad to recover possession of immovable property alienated by the Karnavathi is governed by Art. 144 and not by Art. 91. The fact that the Karnavathi purported to execute the document not only as Karnavathi, but also as guardian of the minor plaintiffs, will not make either Art. 91 or Art 44 applicable to the suit. 78 Ind. Cas. 564=19 M.L.W. 395=34 M.L.T. 89=A.I.R. 1924 Mad. 607=46 M.L.J. 340.

——Art. 91—Applicability and scope.

Article 91 can only be applied when the plaintiff has been himself or through his predecessor-in-interest a party to the instrument assailed. 74 Ind. Cas. 164=1 Bur.L.J. 106=A.I.R. 1923 Rang. 82.

——Art. 91—Applicability and scope—Landlord and tenant—Suit against transferee — Transfer voidable.

To a suit by the landlord against the transferee of a tenant in C. P. who has taken possession of a holding in execution of a decree on a mortgage voidable at the instance of the landlord. Article 91 of the Limitation Act (1908), first Schedule, is inapplicable. The transfer is binding on the tenant and cannot be cancelled by the landlord though it can be declared void as against him. 76 Ind. Cas. 884=18 N.L.R. 11=A.I.R. 1922 Nag. 60.

——Art. 91—Applicability and scope.

Article 91 is restricted to a suit between the parties to the instrument or their successors-in-interest and a plaintiff is not bound to set aside an instrument not executed by himself or by his predecessor-in-title. 64 Ind. Cas. 775=17 N.L.R. 169=A.I.R. 1921 Nag. 74.

——Art. 91—Applicability and scope—Co-sharers—Lease by Lambardar—Suit to set aside.

The position of a Lambardar with reference to his co-sharer in the matter of letting out vacant land cannot well be put higher than that of a manager of the joint property of a Hindu family, and therefore a suit by a co-sharer for a declaration that a lease granted by a Lambardar is invalid against him is within time if brought within 12 years of the date on which the execution of the lease became known to the co-sharer on the principle that a suit for declaration of a right cannot be held to be barred so long as the right to the property in respect of which declaration is sought is a subsisting right. 64 Ind. Cas. 775=17 N.L.R. 169=A.I.R. 1921 Nag. 74.

——Art. 91—Applicability and scope — Execution of deed under mistake—Cancellation.

Where the plaintiff sues for possession and for cancellation of a deed of sale alleging that they executed the sale believing they were executing a totally different document, is governed not by Art. 91 but by 144. 23 C.W.N. 93=29 C.L.J. 55=49 Ind. Cas. 76.

——Art. 91—Applicability and scope—Document—When to be set aside.

Where there exists a document which if valid and binding on a party, would defeat his right in recovering possession of any property he must sue under Art. 91 for the cancellation of the document within three years. 38 Bom. 449=15 Bom. L.R. 1044=22 Ind. Cas. 195.

——Arts 91 and 144—Applicability and scope — Alienation by third party—Suit for possession and cancellation of document—Limitation.

The plaintiff sued for possession of a property basing title under a grant executed in his favour. In the plaint he also prayed for the cancellation of a document executed by his grantor in favour of the defendant subsequent to his own. **Held,** that the suit was not one for the cancellation and was governed by Art. 144 and not by Art. 91. 14 A.L.J. 464=32 Ind. Cas. 930.

——Art. 91—Applicability and scope—Fraudulent alienation—Setting aside of.

A plaintiff can sue to set aside a sale-deed on the ground of fraud, if an interest **in praesanti** is not conferred thereby within 3 years from the time of defendant's attempt to take possession unlawfully. 31 Ind. Cas. 106 (Mad.).

——Ars. 91 and 120—Applicability and scope — Suit by manager—Suit to have Karnavan's alienation declared invalid.

A suit for a declaration that a Karnavan's alienation is invalid if brought 10 years after the cause of action arose is barred, whether Art. 91 or Art. 120 applies. 16 M.L.T. 241=(1914) M.W.N. 689=25 Ind. Cas. 755.

——Arts. 91 and 144—Applicability and scope—Alienation by manager—Alienation by ejaman of aliasantana family—Suit for recovery of possession.

A suit for recovery of possession of properties alienated by the **ejaman** of an aliyasantana family is not a suit to "set aside an instrument within Art. 91 of the Act, and is governed by Art. 144 of the Act. 14 M. 206; 14 M. 101, Foll. 27 M.L.J. 60=24 Ind. Cas. 246.

——Art. 91—Applicability and scope—Award — Setting aside of.

In order that a person, who was a party to a submission and award may sue on the original cause of action, he must first have the award set aside; if the award is not a nullity but is only voidable at the instance of the party, the suit to set aside the award must be brought within the period of three years under Art. 91 of the Limitation Act. 5 S.L.R. 240=15 Ind. Cas. 819.

——Art. 91—Applicability and scope—Suit for redemption—Mortgage by misrepresentation.

Where in a suit for redemption of a Mortgage, the mortgagee pleaded that the property had been sold but the plaintiff contended that it was only a mortgage and that his signature was obtained on that representation. **Held,** that for such a suit Art. 148 applied and not Arts. 91 or 142 and that plaintiff was entitled to prove the fraud played upon him. 4 Bur.L.T. 265=13 Ind. Cas. 375.

——Art. 91—Applicability and scope—Alienation by third party.

The article applies to set aside a document executed by the plaintiff himself or by a person under whom the plaintiff claims and against which plaintiff seeks to recover the property but it does not apply where the person alienating is not a full owner of the property but holds only a condi-

tional authority to alienate the property. 32 All. 392=7 A.L.J. 337=5 Ind. Cas. 585.

——Art. 91—Applicability and scope —Alienation by third party—Suit to eject a tenant—If a mortgage by tenant to be declared void.

A landlord need not have a mortgage created by a tenant declared null and void within the period fixed by Art. 91, before he can sue to eject a tenant. 8 N.L.R. 29=13 Ind. Cas. 982.

——Art. 91—Applicability and scope—Fraudulent alienation.

A vendor seeking to recover the property sold on the ground that sale was effected by fraud must first get the sale avoided within the period prescribed by Art. 91, because the transaction is not void ab initio but only voidable. 5 M.L.T. 99=32 Mad. 72=1 Ind. Cas. 719.

——Art. 91—Applicability and scope — Suit for cancellation of a deed—Suit for a declaration that the transaction evidenced by the deed was fictitious.

A suit for a declaration that a transaction embodied in a particular deed was from its very inception a sham transaction is to be distinguished from a suit for cancellation of the deed. The former kind of suit does not fall within the purview of Art. 91. 1908 A.W.N. 156=5 A.L.J. 421=30 A. 375.

——Art. 91—Applicability and scope — Specific Relief Act, S. 39—Bond—Cancellation.

Art. 91 of the Limitation Act, 1877; applies to a suit brought under the provisions of S. 39 of the Specific Relief Act, 1877 to have a bond adjudged void and to have it delivered up and cancelled. (1903) 5 Bom.L.R. 533=27 B. 560.

——Art. 91—Applicability and scope — Mahomedan Law—Setting aside settlement—Cause of action.

The cause of action for the heir of a deceased Mahomedan to set aside the wakfnama of the deceased arises upon the death of the settlor and not from the date of the settlement, where the heir had no interest in property settled nor any right to have it cancelled or set aside during the lifetime of the settlor. (1903) 7 C.W.N. 916=30 C. 666.

——Arts. 91 and 120—Applicability—Suit by Oudh landlord to eject tenant—Tenant claiming permanent right under a document—Civil Court having no jurisdiction to give a decree for possession—Nature of suit for declaration that a document is not binding and to cancel it.

Where a suit is brought in a Civil Court for possession of a land against a defendant who claims title to it under a document on the ground that the document is not binding on the plaintiff, and the civil Court is prohibited by statute from passing a decree for possession, it can give relief to plaintiff under S. 39 or S. 42 of the Specific Relief Act by cancelling the document and declaring its invalidity. In such case the prayer for cancellation, etc.; is really the principal prayer; and the prayer for possession is only ancillary. The article governing such a case is Art. 91 or 120. (1902) 4 Bom.L.R. 832=6 C.W.N. 849=25 A. 1=29 I.A. 203 (P.C.).

——Art. 91—Applicability and scope — Suit for possession of land—Setting aside a document under which defendant claims, necessary.

Where in order to sustain a suit for possession, the cancellation of a document under which the defendant claims is necessary, the article applicable is Art. 91. 15 C. 158; 14 I.A. 148, Foll. (1902) 6 C.W.N. 863.

——Art. 91—Applicability and scope—Suit to enforce and not to set aside an award.

In a suit for partition of properties dealt with by an award, the plaintiffs alleged that a clause in it restraining partition was invalid in law and that another portion of it was a subsequent illegal addition to the award as originally made, and in other respects his claim was in terms of the award and not in contravention of it.

Held, that the suit was not to set aside an award; but to enforce it so far as it was legally valid, and that Art. 91 had no application to the case. (1901) 11 M.L.J. 149=23 A. 383=3 Bom.L.R. 311=5 C.W.N. 585=28 I.A. 111 (P.C.).

5. Burden of proof.

——Art. 91—Starting point — Deed by father-in-law and daughter-in-law — Suit by latter to set aside — Date of knowledge of nature and consequences of deed—Burden of proof—Pardanashin—Deed by.

Where the ground for setting aside an instrument or deed is that the plaintiff did not appreciate the true nature and the legal consequences thereof, limitation for the suit begins to run from the date when the plaintiff became aware of the true nature and legal consequences of the instrument. In the case of a deed executed by a Hindu father-in-law and his widowed daughter-in-law, a pardanashin lady, it is for the father-in-law to prove the date when she in fact came to understand the true nature of the transaction. It is for him to show that it was explained to her by him and it is not enough for him to show merely that she did have an opportunity of reading it and that the terms were not complex or obscure. The father-in-law is under a duty to explain fully the nature and effect of the deed to his daughter-in-law living in his house and under his protection. 75 I.A. 108=I.L.R. (1948) Bom. 148=1948 A.L.J. 241=52 C.W.N. 701=1948 M.W.N. 449=61 L.W. 495=A.I.R. 1948 P.C. 111=50 Bom.L.R. 495=29 P.L.T. 251 (P.C.).

——Arts. 91 and 120—Applicability—Private sale prior to attachment before judgment—Transaction found to be fraudulent and to defeat attachment—Suit to declare sale deed void—Limitation—Starting point—Onus of proof.

The plaintiff obtained a money decree against the defendant and obtained an order for attachment before judgment on 2nd December, 1936. But the 3rd defendant had on 4th November, 1936; i.e., earlier to the attachment; sold the property attached to the 1st defendant who in his turn sold it to the 2nd defendant in 1942. The plaintiff filed the present suit in 1942 for a declaration that the sale deeds in favour of the defendants were vitiated by fraud and want of consideration, etc. It was found as a fact that the sales were fraudulent and intended to defeat the

threatened attachment. On a contention that the suit was barred by limitation,

Held, that the view of the lower Court that time began to run not from the date of the first sale but from the time of the plaintiff's knowledge of it, which admittedly was within three years of the institution of the suit was not erroneous.

The burden of proof is on the defendant to show that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation and the fact that the plaintiff knew some facts such as would raise a bare suspicion is not enough evidence to discharge the onus. 1950 M.W.N. 791 =(1950) 2 M.L.J. 653=A.I.R. 1951 Mad. 388.

——Arts. 91 and 120—Applicability — Suit under S. 53, T. P. Act; to declare transfer invalid as being fraudulent—Limitation—Onus.

A suit filed by a creditor under S. 53, T. P. Act, for a declaration that a transfer by way of sale by his debtor was intended to defeat or delay his creditors including the plaintiff, and; as such; was not binding on the plaintiff and the other creditors, is governed for purposes of limitation; by Art. 120 and not Art. 120 and not Art. 91 of the Limitation Act.

Limitation cannot start against the plaintiff unless and until he is fixed with the knowledge of the fraudulent nature of the transfer impeached by him. The burden is on the defendant to show that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation. The fact that the plaintiff had some hints and clues which might raise his suspicion would not be enough. Nor can it be said that the right to sue accrues only when he decides to exercise the option given to him by S. 53, T. P. Act. I.L.R. (1947) Bom. 807=49 Bom.L.R. 875= A.I.R. 1948 Bom. 265.

——Art. 91—Burden of proof.

Where a lady brings a suit to set aside a certain deed executed by her under misrepresentation and undue influence of a person in a fiduciary position with her, the burden to prove; that her suit is out of time and that she had definite knowledge of the facts which constituted fraud of misrepresentation at a date beyond the statutory period, is heavily on such person. A.I.R. 1938 Rang. 264 =178 Ind. Cas. 83.

——Art. 91—Burden of proof.

The onus is not on the defendant to prove that the plaintiff's knowledge arose more than 3 years before suit. 2 N.L.R. 98, Dissented from. 68 Ind. Cas. 352=1921 M.W.N. 722=A.I.R. 1921 Mad. 394=41 M.L.J. 474.

6. Decree.

——Art. 91—Applicability — Setting aside a consent decree.

A suit to set aside a consent decree where fraud is not alleged or proved is maintainable and is not governed either by Art. 91 or Art. 95 but by Art. 120. 61 C.L.J. 193=39 C.W.N. 938=62 C. 642=164 Ind. Cas. 561.

——Art. 91—Decree — Where it is based on an award.

An award is an instrument within the meaning of Art. 91 and the plaintiff cannot impeach the decree incorporating the award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. 100 Ind. Cas. 596=28 P.L.R. 106=9 L.L.J. 191 =A.I.R. 1927 Lah 172.

——Art. 91—Decree.

Where a person is prima facie, bound by a decree; he cannot by suing ostensibly for possession ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiffs' way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree. 88 Ind. Cas. 141=87 Ind. Cas. 849=4 Pat. 510=6 P. L.T. 634=A.I.R. 1925 Pat. 625.

——Arts. 91 and 95—Decree.

Arts. 95, 44 and 91 of the first Schedule to the Limitation Act do not apply to a suit to have a decree set aside but the article applicable would be 120. 62 Ind. Cas. 794=79 P.L.R. 1921= 2 Lah. 164=4 L. L. J. 211=A.I.R. 1922 Lah. 166.

——Art. 91—Fraudulent alienation — Fraudulent decree—Suit to set aside.

A sale in execution of a fraudulent decree is not void, but voidable; such a sale cannot be set aside without setting aside the decree. 20 C.W.N. 659 =33 Ind. Cas. 767.

7. Distinction between void and voidable contract.

——Art. 91—Ancillary relief on void contract.

There is a wide difference between an agreement which is voidable and one which is void. A voidable contract is a good contract so long as it is not avoided by the person who has the right to avoid the same, while a void contract is no contract in law and in the eye of the law, it does not exist. When a party seeks to avoid a voidable contract and get a certain ancillary relief, it follows that if his claim for avoidance of the contract is barred by limitation, he cannot get the ancillary reliefs while if the contract is void, it is not necessary to have the contract set aside and the rights of the parties can be determined independently of the deed. So even if the claim for the cancellation of the deed or for declaration that it is void is barred by limitation, the rights of the parties can still be determined independently of the deed. (1945) A.L.J. 196=1945 O.W.N. (H.C.) 145=I. L. R. (1945) All. 494=A.I.R. 1945 All. 367=1945 A.W.R. (H.C.) 141.

8. Effect of bar under.

——Art. 91—Effect of bar under—Suit for possession.

A suit for possession of property is not barred merely because the period for the cancellation of the instrument has run out. 170 P.W.R. 1911= 251 P.L.R. 1911=12 Ind. Cas. 140.

——Art. 91—Effect of bar under—Suit for possession—Avoidance of instrument—Cause of action.

Though a person suing for possession of immoveable property whose right to possession is blocked by an instrument must set it aside under Art. 91 of the Limitation Act time does not begin to run, until the necessity to sue for possession accrues. A person who has had no occasion to sue

for possession of property cannot have his right to property extinguished by the lapse of three years under Art. 91. 55 Ind. Cas. 407 (Nag.).

9. Interpretation.

——**Art. 91—"Instrument," meaning of.**

The instrument to be cancelled or set aside which is referred to in Art. 91, is that instrument which the plaintiff himself has actually asked to have cancelled or set aside and not one which he ought to have set aside. A.I.R. 1939 Rang. 278 =1940 Rang.L.R. 35=184 Ind. Cas. 171.

——**Art. 91—Interpretation—'Plaintiff'.**

The word 'plaintiff' in Art. 91 has to be read with the definition in S. 2 so as to include any person from or through whom a plaintiff derives his right to sue. 32 Bom.L.R. 1013=A.I.R. 1930 Bom. 545.

10. Plea of limitation in defence.

——**Art. 91—Act does not apply to defendant—Suit to set aside lease barred under Art. 91—Still defendant can urge that lease was obtained by undue influence and misrepresentation.**

The Indian Limitation Act is not applicable to the case of defendant, and the party in possession is not affected by it. It refers only to the remedy of the plaintiff and not even to his rights and even though the remedy may be barred the right may still exist.

Consequently, a defendant is not precluded from urging by way of defence that the lease was obtained by the plaintiff by undue influence and misrepresentation although a suit by him to have the instrument set aside or cancelled is time barred under Art. 91. A.I.R. 1946 Oudh 129=1946 Oudh W.N. 1=21 Luck. 194=1946 A.W.R. (C. C.) 12.

——**Art. 91—Defence—Limitation.**

Where the executant of a contract has not had an opportunity to cancel the contract after the removal of undue influence, it is open to his representatives to raise this defence of undue influence within three years after the contract. 59 C.L.J. 387=A.I.R. 1934 Cal. 762=152 Ind. Cas. 561.

——**Art. 91—Document not set aside may be pleaded in defence.**

If a party's remedy to have an instrument voided as plaintiff is time-barred, it does not follow that his right of pleading by way of equitable defence, if sued; that the instrument should not be enforced; is equally barred. Delay is of course an equitable reply to an equitable defence, but it cannot amount to a statutory bar. The fact that the defendant had not chosen to sue to have the instrument set aside within three years cannot preclude him from pleading in defence that the instrument was brought about by undue influence and could not be enforced. (1906) 17 M.L.J. 19 =30 M. 169=2 M.L.T. 4 (F.B.).

11. Starting point of limitation.

See also LIMITATION ACT, ART. 91—BURDEN OF PROOF.

——**Art. 91—Suit to avoid settlement deed induced by undue influence—Time, when begins to run.**

Under Art. 91 of the Limitation Act, the time for setting aside a settlement deed induced by undue influence runs from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to the plaintiff, and not from the date of the removal of the undue influence. I.L.R. (1946) Nag. 433=1946 N.L.J. 406=A.I.R. 1946 Nag. 377=1947 I.T.R. 150.

——**Art. 91—Applicability — Undue influence — Starting point of limitation.**

If a deed of gift is a void transaction, no question of cancelling or setting it aside would arise, but if it is only a voidable transaction, that is; a transaction valid until rescinded, then the necessity to set it aside is obvious before possession of the property can be claimed.

From the mere fact that the transaction of gift was induced by undue influence, it does not necessarily follow that it was not made 'voluntarily' within the meaning of S. 122, T. P. Act and was void. Where a person wished to make a gift and acted voluntarily in making it but the transaction was induced by undue influence, the gift is not void but only voidable and requires to be set aside before the properties conveyed by it could be claimed by the donor or by anyone claiming through him. Art. 91, Limitation Act; applies to such a case and where the donor was fully aware of the character of the transaction when he executed the deed, limitation for setting aside the gift deed would run from the date of the gift deed, as; under Art. 91, time runs from the date of the knowledge and not from that of the removal of the undue influence. 49 C.W.N. 303=I.L.R. (1945) Kar. (P.C.) 115 (Sup.)=47 Bom.L.R. 274=A.I.R. 1945 P.C. 54=58 M.L.W. 176=(1945) 1 M.L.J. 253=1945 M.W.N. 217=(1945) A.L.J. 280=I.L.R. (1945) Bom. 440=11 B.R. 470=72 Ind. App. 21=220 Ind. Cas. 28 (P.C.).

——**Art. 91—Starting point of limitation.**

A suit to recover possession of property gifted by the plaintiff to the donee under a deed of gift which is alleged to have been obtained by undue influence and executed in ignorance of the real nature of the document and its contents must be brought within three years from the date when the plaintiff became aware of the true character of the deed and the transaction and not from the date when the plaintiff escapes from the influence by which he was dominated. A.I.R. 1938 All. 451=(1938) A. L. J. 502=1938 A.W.R. 375=176 Ind. Cas. 874.

——**Art. 91—Suit to set aside document on ground of undue influence — Limitation—Starting point—Prayer for possession, effect of.**

Under Art. 91; a suit to cancel or set aside an instrument must be brought within three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him and in a case of undue influence, the mere plea of undue influence supposes knowledge.

The fact that the suit is one for possession will not bring the suit within the twelve years' rule in a case of undue influence as an action for possession cannot succeed in such a case unless the plaintiff gets the instrument cancelled. (1931) A.L.J. 909=A.I.R. 1932 All. 63=135 Ind. Cas. 232.

——**Art. 91—Suit to set aside gift executed under undue influence—Starting point of limitation.**

Where the evidence showed that the donee had misused his position as a brother and as one in a position of domination to cause his weak-minded brother to execute a gift deed of his entire property, held, that the transfer was vitiated by undue influence and that the deed could be set aside within three years from the date when the true facts became known to the plaintiff. 7 O. W.N. 1129=A.I.R. 1931 Oudh 34.

——Art. 91—Undue influence—Starting point.

Where a suit is brought to get a deed cancelled on the ground of fraud and undue influence, the fact must be considered to have been known to the executant from the date of the deed and if brought more than three years from that date the suit cannot be maintained. 15 Cal. 58 (P.C.), Foll. 114 Ind. Cas. 806=5 O.W.N. 1062=10 L.R.A. (Rev.) 230=4 Luck. 270=A.I.R. 1929 Oudh 67.

——Art. 91—Undue influence—Starting point.

A deed of gift obtained by undue influence is not void but only voidable. Cause of action to set aside the deed does not arise only on the cessation of the undue influence, and the period begins when the facts entitling the plaintiff to set aside the gift becomes known to him. 68 Ind. Cas. 352=1921 M. W. N. 722=A. I. R. 1921 Mad. 394=41 M.L.J. 474.

——Art. 91—Starting point of limitation—Contract under undue influence—Cause of action—Suit by beneficiary.

Where a person is induced to execute certain transfers by undue influence the cause of action to set aside those transfers under Art. 91 arises only where the undue influence ceases and plaintiff has full knowledge of all the matters. (1907) M. W.N. 906=7 L.W. 28=43 Ind. Cas. 164.

——Art. 91—Starting point of limitation.

The terminus a quo for a suit under Art. 91 is the time "when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him."

A person dedicated certain property for the construction of a mosque and appointed himself a permanent mutawalli. He reserved for himself a perpetual connection with the mosque as its President. He instituted a suit for avoiding the document and for declaration of his rights to manage the affairs of the mosque:

Held, that the suit was governed by Art. 91. Such a suit when instituted within three years of the time at which he admittedly occupied the office of the President, was within time inasmuch as so long as he held the position of President and had an active hand in the management of the affairs of the mosque, no occasion had arisen for him to institute any suit to avoid that document. A.I.R. 1938 Lah. 869=180 Ind. Cas. 799.

——Art. 91—Starting point of limitation.

When in a suit for possession it is necessary to have a sale-deed set aside before the plaintiff can succeed, the suit must be filed within three years from the date when the plaintiff comes to know of the fact entitling him to set aside the deed. A.I.R. 1938 Pat. 69=4 B.R. 293=19 P.L.T. 362=173 Ind. Cas. 479.

——Art. 91—Starting point of limitation.

The period of three years permitted by Art. 91 begins to run not from the date on which the plaintiff, seeking to cancel or set aside the instrument escaped from the influence by which, according to him, he was dominated; but from the discovery by the plaintiff of the true nature of the deed which he had signed. 11 O.W.N. 784=A. I.R. 1934 P.C. 130=38 C.W.N. 806=67 M.L. J. 7=40 M. L. W. 5=36 Bom.L.R. 652= 1934 A.L.J. 585=59 C.L.J. 454=(1934) M. W.N. 647=9 Luck. 178=61 I.A. 224=3 A.W. R. 865=149 Ind. Cas. 480 (P.C.).

——Art. 91—Starting point.

The time from which the period begins to run in a suit to cancel an instrument is from the date when the facts entitling the plaintiff to have the instrument cancelled become known to him. 106 Ind. Cas. 903=4 O.W.N. 1116=A.I.R. 1927 Oudh 629.

——Art. 91—Knowledge — Starting point.

Where plaintiff and his guardian were perfectly aware of facts entitling them to set aside an award plaintiff must prove that he attained majority within 3 years of the suit. Limitation starts from date of the award and not the date when the Court refused to file it. 89 Ind. Cas. 773=30 C.W.N. 529=5 Rang. 186=52 I.A. 265=6 L. R.P.C. 160=A.I.R. 1925 P.C. 216 (P.C.).

——Art. 91—Return of purchase money—Starting point.

Cause of action for declaration by a vendee that the deed of conveyance is either void or voidable at his instance and that he is therefore entitled to the return of the purchase price arises when he comes to know of the alleged defects in his vendor's title. His claim in respect of the relief is statute-barred under Art. 91, if filed more than three years after such knowledge. 126 Ind. Cas. 737=A.I.R. 1930 Sind 66.

——Art. 91—Starting point.

Article 91 of the Indian Limitation Act provides a period of three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. 28 Mad. 349, Foll. 78 Ind. Cas. 222=46 All. 260 =22 A.L.J. 149=5 L.R.A. Civ. 104=A.I.R. 1924 All. 370.

——Art. 91—Starting point — Where knowledge is on the date of the deed.

Where the plaintiff transferred certain properties to a person whom he described as being his adopted son and subsequently brought a suit against that person for a declaration that the deed is void on the ground that there was no adoption at all,

Held, that Art. 91 applied, that the essential fact which entitled the plaintiff to have the instrument cancelled was the fact that no adoption took place, that this fact was known to the plaintiff on the date of the deed itself, and that time ran against plaintiff from the date of the deed. 69 Ind. Cas. 971=20 A.L.J. 945=45 All. 169=A. I.R. 1923 All. 58.

——Arts. 91 and 120—Starting point—Cancellation of a document—Limitation.

A suit for declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual being intended only to defraud his creditor at the time and that the defendant has no right under it, is governed by Art. 91 or 120 and limitation runs from the date of the execution of that document. 37 All. 640=13 A. L.J. 913=29 Ind. Cas. 968.

——Art. 91 — Starting point of limitation—Suit for cancellation of document—Limitation.

A suit for declaration that a certain unconditional deed of gift is ineffectual and inoperative, owing to non-fulfilment of material stipulations must be brought within three years from the date of execution of the deed. 5 Ind. Cas. 407 (All.).

——Art. 91—Starting point of limitation.

In a suit for cancellation of an instrument, limitation runs from the time the facts entitling the plaintiff to have the instrument, cancelled become known to him. 6 A.L.J. 561=2 Ind. Cas. 625.

——Art. 91—Starting point of limitation.

The article applies to a suit to set aside an instrument on the ground of undue influence. A suit for possession of immoveable property where the relief is inconsistent with a registered sale-deed executed by plaintiff's predecessors-in-title is governed by the article, as it is necessary that the document should be set aside. The cessation of undue influence is not the time when the starting point of limitation begins. A mere unilateral repudiation in pais by a plaintiff will not effect a rescission of a contract or deed; rescission must be made by a decree of a court declaring that the contract or transaction is void. 38 Mad. 321= 24 M.L.J. 592=13 M.L.T. 469=(1913) M.W. N. 453=19 Ind. Cas. 596.

——Art. 91—Starting point of limitation — Suit to cancel a registered instrument under S. 39, Sp. Rel. Act.

Where an instrument cannot take effect until it is registered, to cancel such an instrument under S. 39, Sp. Rel. Act, the limitation commences to run under Art. 91 from the date of its registration and not from the date of its execution. 4 O.L. J. 108=39 Ind. Cas. 456.

——Art. 91—Starting point of limitation — Cancellation of a document—Suit for.

The word "entitled" in Art. 91 of the Lim. Act means entitled by law, i.e. under S. 39 of the Sp. Rel. Act. In a suit for cancellation of a document time will begin to run from the time when the plaintiff becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding. 47 Ind. Cas. 505 (Mad.).

——Art. 91—Facts entitling the plaintiff to have the instrument set aside — Starting point — Suit brought within three years from the apprehension of injury.

A suit for setting aside an instrument brought within three years from the date of the defendant's setting up a title in pursuance of the instrument is within time even though more than 3 years have elapsed from the date of the instrument itself. The causes of action arose at the date when the plaintiff apprehended injury. (1904) 15 M.L.J. 228=28 M. 349.

——Arts. 91, 141—Suit by reversioner for khas possession—Lease by widow—Setting aside ancillary—Starting point of limitation.

A suit by a reversioner for khas possession of properties let on izara lease by a widow for which the setting aside of the lease is necessary, is governed by Art. 91 and time begins to run against him only from the date of the widow's death and not before, as the reversioner's suit during lifetime of the widow would be premature. Art. 141 has no application. 7 C.W.N. 864=30 C. 990.

——Art. 91—Deed by pardanashin lady — Suit to set aside—Starting point of limitation.

Where a pardanashin lady sues to set aside a deed of release granted by her, the starting point of limitation is the date when she became aware of the facts entitling her to that relief and the article applicable is Art. 91. (1902) 4 Bom.L.R. 146.

——Art. 91—Cancellation of sham document—Limitation, starting point of.

Where the executant of a sham document continued in possession after execution of the document, but was only subsequently dispossessed, the period of limitation for a suit to cancel the document will run from the date of dispossession and not from the date of execution of the document. (1900) 25 B. 78=2 Bom.L.R. 638.

12. Void document.

——Art. 91—Applicability — Transaction void ab initio—Gift by pardanashin lady without knowing nature of transaction or bargain—Suit to declare inoperative—Limitation.

It is well established that Art. 91, Limitation Act, only applies to suits for cancellation or setting aside of an instrument which is voidable and has no application to the case of an instrument which is challenged as void ab initio. A deed of gift executed by a pardanashin lady without understanding the nature of the transaction at all is ab initio void and not merely voidable. A suit for a declaration that the deed is invalid and that the donee under it acquired no title is not governed by Art. 91. A.I.R. 1950 Pat. 247.

——Arts. 91, 142 and 120—Void document—Possession claimed under void transfer.

Where possession is claimed of certain property which had been transferred under a document which is void, then even though a relief may be added for the setting aside of the document, that relief is merely ancillary to the main relief for possession and it is not necessary to have the document set aside before the plaintiff is entitled to claim possession and in these circumstances. Art. 91, Limitation Act would have no application to the case. The plaintiff is entitled to bring his suit within 12 years. (1945) A.L.J. 196=1945 O.W.N. (H.C.) 145=A.I.R. 1945 All. 367=I.L.R. (1945) All. 494=1945 A.W.R. (H.C.) 141.

——Arts. 91, 92, 93 and 95—Void document—Limitation.

Obiter.—Where a document is wholly void ab initio, it is not necessary to get it cancelled or set aside and therefore question of limitation for a suit does not arise. 6 B.R. 262=20 P.L.T. 957=A.I.R. 1940 Pat. 201=185 Ind. Cas. 816.

——Art. 91—Void document — Suit for possession by avoiding void document.

Where a deed of relinquishment by a pardanashin lady is a void document, it is not necessary to avoid it or to get it cancelled. Article 91 has no application to a case where a suit is brought by her for possession and partition upon declaration that an instrument under which the defendant claims is void. A.I.R. 1939 All. 348=(1939) A.L.J. 642=(1939) A.W.R. 889=182 Ind. Cas. 801 (2).

——Art. 91—Scope — Void document.

Article 91 is no bar to a suit for a declaration that the plaintiff was the owner of property on the ground the sale-deed executed in respect of that property was only fictitious and that no title passed to the vendee under it. 1939 A.L.J. 389=1939 A.W.R. (H.C.) 400.

——Art. 91—Scope — Void document — Suit for possession alleging sale to be sham.

Where the allegations in the plaint, that the sale was a sham transaction or a mere paper transaction, are correct; a suit for possession of the property based on those allegations must be governed by Art. 144 and not by Art. 91. A.I.R. 1939 Lah. 544=I.L.R. (1940) Lah. 546=41 P.L.R. 657=185 Ind. Cas. 343.

——Art. 91—Void deed.

Where a mortgagee under a power of sale, sells the property to one who is benami for himself the sale is void as there was really no two persons for the contract. Art. 91 does not apply to the case as the sale need not be set aside. 113 Ind. Cas. 313=30 Bom.L.R. 1519=A.I.R. 1929 Bom. 24.

——Art. 91—Void document—Misrepresentation.

Where it is established that the plaintiff or his transferor was induced by defendant's misrepresentation to execute a deed of gift of the property in question and he executed the same believing it to be a document of a different kind altogether, the transaction is void and not voidable only and Art. 91 has no application to plaintiff's application for recovery of the property. 23 C.W.N. 93; 35 Cal. 1551, Foll., 121 Ind. Cas. 404=49 C.L.J. 540=A.I.R. 1929 Cal. 606.

——Art. 91—Void document — Cancellation if necessary—Where document is a sham transaction.

Where a plaintiff sued for declaration of his title and injunction alleging in the plaint that the settlement deed under which the defendant claimed was a sham and fictitious document under which no property was intended to pass, he is not obliged to get the document set aside, before becoming entitled to the other reliefs. 120 Ind. Cas. 378=30 M.L.W. 796=A.I.R. 1929 Mad. 478.

——Art. 91—Void document—Sham transaction.

Obiter.—Where a deed is null and void, there is no necessity for the party to come to Court promptly and have the deed actually cancelled or set aside. Where, however, a deed is good but is voidable and can be avoided at the option of the party aggrieved, he must come to Court within three years to have it set aside. 109 Ind. Cas. 54=50 All. 510=26 A.L.J. 289=A.I.R. 1928 All. 267.

——Art. 91 — Void document — Muhammadan Law—Gift without possession — Starting point.

Where a deed of gift is executed by a person governed by the Muhammadan law and the possession of the property comprised in the gift has not been delivered the gift would be void ab initio and no question of limitation will arise in such circumstances. The right of the plaintiff to impeach such a gift can only accrue from the moment when by receipt of possession the gift becomes operative by law. 6 All. 207, Foll. 78 Ind. Cas. 222=46 All. 260=22 A.L.J. 149=5 L.R.A. Civ. 104=A.I.R. 1924 All. 370.

——Art. 91—Document void.

Article 91 applies to a suit to cancel or set aside an instrument not otherwise provided for. It

does not apply to a suit for possession and a declaration that an instrument under which the defendant claims is void. 72 Ind. Cas. 748=A.I.R. 1924 Pat. 284.

——Art. 91—Document void — Article does not apply—If voidable, article applies.

Where a suit is brought for a declaration that certain instrument is absolutely void and inoperative as having been obtained by fraud and that plaintiff is entitled to the properties covered by the deed, the relief as to the declaration of the deed as void, is superfluous and Art. 95 does not apply to the suit; but Art. 120 applies.

Per Richardson, J.—If a plaintiff comes into Court to have a particular written instrument set aside or cancelled, then, prima facie Art. 91 is applicable whether the ground on which the claim is made is fraud or some other ground. 15 C. 58 (P.C.) and 25 Bom. 337 (P.C.) Foll.

A distinction however can be drawn between void and voidable instruments. Art. 91 does not apply to instruments which are void ab initio so as not to require setting aside. When the instrument is voidable it is presumably valid, and binding on the plaintiff, until it is set aside, and any further relief which may be sought depends on the removal of the instrument from the plaintiff's path. In such a case Art. 91 applies. But if the facts alleged by the plaintiff raise a case that the instrument, whether executed by the plaintiff himself or by some third party through whom he claims, is null and void ab initio, then Art. 91 ceases to be applicable and the circumstances may entitle the plaintiff to the benefit of the longer period of limitation allowed by some other article such as Art. 120 or Art. 144.

Where the plaintiff raises the plea known to English lawyers as non est factum, if he should succeed in establishing that plea, then the instrument in question would be altogether void. It would not require setting aside and the prayer to set it aside would be merely superfluous, so that Art. 91 would be inapplicable. 70 Ind. Cas. 525=26 C.W.N. 479=A.I.R. 1921 Cal. 786.

——Art. 91—Void document.

Article 91 has no application to a case of this description, where a suit is brought for possession and partition upon declaration that an instrument under which the defendant claims is void. Case-law referred. 17 Bom. 341 (P.C.) Foll. 69 Ind. Cas. 476=34 C.L.J. 563=26 C.W.N. 517=A.I.R. 1921 Cal. 131.

——Art. 91—Void document — Minor, document by.

Art. 91 of the Limitation Act does not apply to a suit for possession, where the plaintiff alleges and proves that a sale deed is void because it was executed by him while minor, but does not claim impressly to have it cancelled or set aside. 42 Bom. 638=20 Bom.L.R. 802=47 Ind. Cas. 581 (F.B.).

——Art. 91—Void document — Suit for cancellation of deed of exchange.

A person suing for recovery of property which he has transferred to another under a deed of exchange which is not binding on him need not have the deed cancelled. 17 Bom.L.R. 1137 (Note) =33 Ind. Cas. 441.

——Art. 91—Void document — Alienation by Hindu widow—Sham—Suit to recover possession —Limitation.

A suit by a reversioner to recover possession of property alienated by a Hindu widow is not governed by Art. 91 of the Limitation Act, when the impeached alienation is found to be sham. The only object of Art. 91 is to compel a plaintiff to remove out of his way some real existing obstacle but where there is no real obstacle, the article has no scope for operation. 40 Bom. 51=17 Bom. L.R. 698=30 Ind. Cas. 909.

——Art. 91—Void document.

Art. 91 has no application where the deed is ab initio void. 23 C.W.N. 93=29 C.L.J. 55=49 Ind. Cas. 75.

——Art. 91—Void document—Alienation of debutter property of.

When properties belong to idols, the conveyance of those properties by the Court of Wards on behalf of a disqualified proprietor is a nulity and Art. 91 does not apply. 19 C.W.N. 1193=28 Ind. Cas. 818.

——Art. 91—Void document—Fictitious deed.

Art. 91 of the Limitation Act is applicable only where the transaction is not void ab initio but voidable. When the sale deed is fictitious having been executed under undue influence it should be ignored altogether even if it has been acted upon, and a part of the consideration has nominally passed and so Art. 91 does not apply. 34 P.W.R. 1916.

——Art. 91—Void document — Lease not binding on plaintiff.

Lessee in possession whether could be ejected without setting aside the lease. If the lease is not binding on plaintiff he is entitled to recover the property without setting aside the lease. 1 C.W.N. 433; 33 C. 257; 34 C. 329 (P.C.) Foll. 18 M.L.T. 504=2 L.W. 1178=(1915) M.W.N. 962=31 Ind. Cas. 590.

——Arts. 91 and 124—Void document.

A void transfer does not require to be set aside. Sales void ab initio do not become valid under the Act if not set aside within the limitation period therefor, by suit. A suit to recover a temple from 2 persons who were appointed by agreement of the existing trustees to manage the temple till the disputes between themselves were settled, is governed by Art. 124 and not by Art. 91. The

document vesting the management on those two persons need not be set aside within 3 years under Art. 91. 39 Mad. 456=28 M.L.J. 571=29 Ind. Cas. 1.

——Art. 91—Void document—Bogus deed.

When a document is of a bogus character, Art. 91 of the Act is inapplicable. 58 Ind. Cas. 380 (Pat.).

——Arts. 91 and 142—Void document — Imperfect document.

Where a document is a nullity, it need not be set aside and a suit for possession of the land is maintainable even after 3 years from the execution of the deed. A document, the executant of which signed only at the first page, but did not sign the other page, having found that it did not set out the terms agreed on, is a nullity. To get possession of property covered by it, the deed need not be set aside. A suit to recover possession of immoveable property by setting aside a document on the ground of fraud, but which document does not require to be set aside or cancelled, is governed by Art. 142 and not by Art. 91. (1902) 30 C. 433.

13. Will.

——Art. 91—Will.

A suit for cancellation of will is governed by Art. 120 and not Art. 91. 23 Cal. 1 (P.C.) Foll. 96 Ind. Cas. 835=A.I.R. 1926 Lah. 635.

——Art. 91—Alienation by third party — Will—Denial of.

A suit by a person denying the genuineness or the validity of the will is not governed by Art. 91. 114 P.W.R. 1911=12 Ind. Cas. 49.

——Arts. 91, 92, 93 and 120—Alienation by third party—Will.

A suit to declare an unregistered will as forged and beyond the powers of the testator to make, is governed by Art. 120 and time runs from the time the plaintiff comes to know of the existence of the will. Art. 91 does not apply to wills. 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

14. Miscellaneous.

——Art. 91—Comparison with Art. 126.

The language of Art. 91 is almost identical which the description of a suit contemplated by Art. 126 and though the objectives of the suits specified in these articles were different, the nature of the relief is the same. 90 Ind. Cas. 184 =2 O.W.N. 650=A.I.R. 1925 Oudh 678.

——Arts. 91 and 41—Miscellaneous — Possession of widow — Belief by adopted son and widow that it was mere life—Estate — Intention to acquire absolute estate wanting.

If both the adopted son and the widow believed that the estate in possession of the widow was a mere life-estate, and the adopted son took no steps to disturb her; her possession is not adverse to the son. 38 Bom. 227=16 Bom.L.R. 111= 24 Ind. Cas. 716.

——Art. 91—Miscellaneous — Sale in execution —Non-joinder of proper heir—Fresh suit by the proper heir at a late period.

The son who was the real heir was not joined as the representative of his father in a suit, and a decree was passed against the father's estate, the uncle being made the representative defendant. The son brought a suit after a very long period.

Held, the suit was barred. 25 B. 337 (P.C.), Foll. 10 Ind. Cas. 344 (All.).

——Arts. 91, 142 and 144—Miscellaneous — Immovable property suit to recover possession of —Cause of action—Limitation — Regulation 2 of 1803, Regulation 2 of 1805—Act 14 of 1859.

H, a Hindu widow, adopted G as her son under a power given to her by her husband. G died childless in 1834 and his widow B succeeded to his estate as his heiress. By an Anumatipatra executed by G shortly before his death, he empowed his widow B with the consent of to adopt a son and directed that the name of H, should continue to stand registered and that she should have control of the estate as long as she lived. In 1837, H executed a putni lease in favour of the defendants' predecessor, in respect of the lands in suit together with other lands. In 1856, the plaintiff's father was adopted by B and he thereupon became the heir of his adoptive father G; he attained majority in 1856 and died in 1880. H died in 1848. In a suit brought by the plaintiff in the year 1897 to recover possession of the disputed lands, on the ground that the putni was not binding upon him.

Held, that the suit was barred by limitation. H had no estate in the property in question. On the most favourable view for the appellant, she granted the putni as manager of the estate for B, the then legal owner. If the putni was void the period of limitation ran from the date on which it was granted. But if it was voidable only by B's successor, the right of action arose on his adoption (i.e., of the plaintiff's father) and time would begin to run against him from the date when he attained his majority. Under either Reg. 2 of 1803, or Act 14 of 1859, time ran from the date when the cause of action arose. (1905) 1 C.L.J. 319=2 A.L.J. 794=15 M.L.J. 267=9 C.W.N. 673=32 C. 662=32 I.A. 80 (P.C.).

——Arts. 92 and 93—Scope.

A plaintiff seeking to recover possession of property and knowing the existence of an instrument

that would be fatal on the merits to the claim is not bound to seek as part of his remedy to set aside that instrument on peril of finding that a mere allegation in the defence of the existence of that instrument is fatal.

Where the plaintiff claims possession of certain property as the widow of the deceased proprietor of the property against various persons whose substantial defence is that they are entitled under the terms of a will, and the plaintiff claims quite apart from the will, there is no obligation on the plaintiff to join to her claim another claim for a relief which she does not seek for and does not need. Arts. 92 and 93 do not apply to the case. The proper period of limitation in the case is the period that relates to the cause of action as actually brought and being a suit for possession, Art. 144 would apply in the circumstances. A.I.R. 1935 Mad. 709=42 M.L.W. 535=(1935) M. W. N. 1154=158 Ind. Cas. 121.

——Art. 92—Applicability—Where the relief cognizable by Civil Court is to set aside document as forged.

Plaintiff, an ex-proprietary tenant, sued for a declaration that she had an ex-proprietary right in respect of the lands specified and that a registered deed of relinquishment, dated the 19th January; 1918 was forged and was null and void and ineffectual as against her. The suit was brought more than three 'years' after 19th January, 1918,

Held, so far as the relief concerning the document was concerned, the suit was one for a declaration that the registered document was forged and as such that relief clearly was barred under Art. 92. Assuming that the relief asking for a declaration that the document was forged was not to such an extent the principal relief in the case that the period of limitation provided for that relief would govern the whole suit, still; so far as the declaration of plaintiff's right was concerned it was clearly a matter which must be determined in the Revenue Court by virtue of S. 167, Agra Tenancy Act. 102 Ind. Cas. 287=8 L. R. A. (Rev.) 133=A.I.R. 1927 All. 826.

——Art. 92—Will, unregistered—Applicability.

Art. 92 does not apply to the case of a will which is neither 'issued' nor 'registered.' 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

——Arts. 93, 95 and 120—Suits to declare that kat kobala document is not binding on reversion.

A suit for declaration that a kat kobala document shall not bind reversion is not within Arts. 93 and 95 of the Act. Art. 120 applies and if the plaintiff is in possession, limitation begins only when some act is done in the document sought to be not binding. 47 Ind. Cas. 2 (Cal.).

——Arts. 93, 120 and 126—C. P. Code, O. 2, Rr. 1 and 2—Forged document if should be set aside.

A party challenging a document as a forgery is not bound to set it aside by suit. 4 L.W. 441 =(1916) 2 M.W.N. 325=37 Ind. Cas. 642.

——Art. 93—Applicability.

Art. 93 does not apply to a suit to declare an unregistered will when no attempt to enforce the will against plaintiff has been made. 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

——Art. 93—Applicability to wills.

Art. 93 does not apply when no attempt to enforce the will against the plaintiff has been made. 82 P.L.R. 1909=88 P.W.R. 1909=4 Ind. Cas. 923.

——Art. 93—Will—Attempt to enforce—What is.

Mere mention of Will in written statement without anything done to obtain a decision on its binding character is not an attempt to enforce it. 62 Ind. Cas. 531=A.I.R. 1921 Mad. 545=40 M. L.J. 348.

——Art. 93—Attempt to enforce a forged instrument—Meaning of — Application by a widow for succession certificate as heir to her deceased husband if an attempt.

"Attempt to enforce a forged instrument against the plaintiff" within Art. 93 is done only when a person institutes proceedings in which the genuiness of the document is directly put in issue and to which the person against whom it is sought to be enforced is a necessary party. An attempt to register a document is not an attempt to enforce it against other person's rights. 17 Bom.L.R. 635, Foll. A widow as such applied for a succession certificate to collect the debts due to her deceased husband and only incidentally mentioned a will of her deceased husband, but did not base her right as a legatee. In a suit by the reversioners of the husband to declare the will forged. **Held,** that the mention of the will in the petition was not an attempt within Art. 93. 32 Ind. Cas. 99 (Mad.).

——Art. 93—Suit to declare the forgery of instrument attempted to be enforced against the plaintiff —Attempt to have a lease recorded under—Record of Rights Act (Bom. Act 4 of 1903).

Defendant applied in 1908, to the Mamlatdar to record under the Record of Rights Act, a lease under which he claimed to be entitled to a rent of 400 cocoanuts from the plaintiff. Plaintiff, having complained that the lease was a forgery, the Collector, ordered that lease should be recorded. On the strength of that record the defendant sued in the Mamlatdar's Court to enforce the terms of the lease and recovered cocoanuts due under it. The plaintiff sued, within three years of the recovery of the cocoanuts, to recover back the value of the cocoanuts, on the ground that the alleged lease was a forgery. **Held,** that the suit was not barred under Art. 93 of the Limitation Act for the words "attempt to enforce" would in their

ordinary and natural meaning, be applicable to an attempt to recover rent under the lease. The attempt to have the lease recorded under the Record of Rights Act, in 1908, could not be put higher than an unsuccessful attempt to have a document registered in the case in which registration was necessary and that such an attempt was not an attempt to enforce the lease. 40 Bom. 22=17 Bom.L.R. 635=30 Ind. Cas. 399.

——Arts. 93, 142 and 144—Suit for possessions of lands—Forged document.

A suit for possession of lands where the plaintiff alleges that the defendant is in possession in virtue of a forged document alleged to have been executed by a third person is not governed by Art. 93. (1904) 28 M. 338.

——Art. 95.

Synopsis.

1. Applicability and scope.
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1. Applicability and scope.

——Arts. 95 and 120—Applicability—Relief on the ground of negligence. See HINDU LAW — ALIYASANTHANA JOINT FAMILY. (1947) 2 M.L.J. 177=A.I.R. 1948 Mad. 129.

——Art. 95—Applicability and scope—Suit challenging adoption—Decree on ground of fraud — Limitation.

A suit by a distant reversioner that an adoption was invalid and that he was not bound by a compromise decree, passed in a suit by a nearer reversioner challenging that adoption, is competent and is governed for purposes of limitation by Art. 95 of the Limitation Act. 1944 M.W.N. 582= 57 L.W. 500=(1944) 2 M.L.J. 214=I. L. R. (1945) Mad. 450=A.I.R. 1945 Mad. 33.

——Art. 95—Applicability—Partition suit.

Art. 95 does not apply to a suit to enforce partition of property excluded from previous partition of joint family properties by fraud of other members because it is applicable only when the relief is claimed solely on the ground of fraud. The foundation of the plaintiff's suit is his right to enforce a partition of his property which was excluded from partition and not the fraud of the other members which made such exclusion possible. Fraud or no fraud, that property continued to be the joint property even after the partition of the remaining joint family property, and the plaintiff who was excluded from it, is entitled to recover his share in it without the original partition being reopened. A.I.R. 1943 Bom. 419= 45 Bom.L.R. 825=214 Ind. Cas. 273.

——Arts. 95 and 96 — Applicability and scope—Partition.

Suit for partition — Subsequent suit for items left out by mistake of fraud:

Held, that the proper article to apply to such a case would be Art. 142 or Art. 144 and not Art. 95 or Art. 96. A.I.R. 1931 Sind 27=130 Ind. Cas. 552.

——Art. 95 — Applicability and scope—Suit for relief on ground of fraud—Fraud contemplated.

The fraud contemplated by Art. 95, is fraud practised upon a party to the decree or a party to the transaction in which the fraud was committed. But when the parties to a decree choose not to challenge it, they are bound by it, and the decree cannot be said to be void. A stranger who is intended to be defrauded by it cannot seek to have the decree set aside, but all that he can sue for is to have it declared that his interest cannot be affected by such a collusive decree. A suit for such a declaration does not come within the purview of Art. 95, but is governed by Art. 120 and the time begins to run either when the awards are made or when the decrees are passed on these awards. A.I.R. 1943 Bom. 283=45 Bom.L.R. 526=211 Ind. Cas. 230.

——Art. 95—Applicability and scope.

Suit by mortgagee of tenure to set aside sale for arrears of rent—Allegation of fraud, held unnecessary and that suit was for possession and Art. 138 and not Art. 95 applied. 3 B.R. 296=A.I.R. 1937 Pat. 331=167 Ind. Cas. 481.

——Art. 95—Applicability and scope.

Article 95, applies to a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud. This, it is clear, applies and must apply to a case where the plaintiff has sustained loss or damage on account of the fraud of the defendant. A.I.R. 1936 Bom. 322=38 Bom. L.R. 712=60 B. 848=165 Ind. Cas. 184.

——Art. 95—Applicability and scope—Suit for relief on ground of fraud

Where it is sought to set aside a sale held in execution on the ground of fraud, Art. 95, is to be applied in preference to Art. 120 for purposes of limitation. A.I.R. 1933 Pat. 473=14 P.L.T. 441=149 Ind. Cas. 129.

——Art. 95—Applicability and scope.

Suit to set aside consent decree on ground of fraud is governed by Art. 95. A.I.R. 1933 Sind 53=145 Ind. Cas. 777.

——Arts. 95, 91 and 120—Applicability and scope—Suit to set aside consent decree not tainted by fraud.

A suit to set aside a consent decree where fraud

is not alleged or proved is maintainable and is not governed either by Art. 91 or Art. 95 but by Art. 120. 61 C.L.J. 193=39 C.W.N. 938=62 C. 642=164 Ind. Cas. 561.

——Art. 95—Applicability — Decree jeopardising title for the first time.

Where title of a person is jeopardised for the first time by a decree in a suit such a person is entitled to institute a suit for declaration that he is not bound by that decree and the article applicable to such a suit is 120 and the time begins to run from the date of the invasion of the title. 123 Ind. Cas. 830=A.I.R. 1930 All. 420.

——Art. 95 — Applicability and scope — Suit by heirs.

Per **Das, C. J.**—Ordinarily a decree obtained against a person binds the heirs and if the decree was obtained by fraud, the heirs must sue within the period prescribed by Art. 95 of the Limitation Act. 88 Ind. Cas. 141=87 Ind. Cas. 849 =4 Pat. 510=6 P.L.T. 634=A.I.R. 1925 Pat. 625.

——Art. 95—Applicability and scope—Sale under Tenancy Act — Chota Nagpur Tenancy Act, S. 231.

A suit for possession of land and the right to ask for a declaration that a sale under the Chota Nagpur Tenancy Act has been fraudulently confirmed is clearly not a suit under the Chota Nagpur Tenancy Act. It is governed by Limitation Act, Art. 95. It is true that the Act in some cases takes away the right to sue for setting aside a sale, but nowhere grants that right although to some extent it limits it. 96 Ind. Cas. 529=5 Pat. 759=8 P.L.T. 124=1926 P.H.C.C. 225= A.I.R. 1926 Pat. 401.

——Art. 95 — Applicability and scope — Fraud not proved.

The plaintiff sued for sale of a mortgaged property on foot of a registered mortgage. The property however, being a cultivatory holding and thus not being liable to sale, in his replication the plaintiff desired a money-decree. There was a further plea of the plaintiff that the defendant had fraudulently represented the property to be alienable property; but no fraud was found to have been proved.

Held, that the suit would have been governed by Art. 95, Sch. 1 of the Limitation Act only if the alleged fraud had been established, the proper Article applicable to the suit was Art. 116, Sch. 1 of the Limitation Act. 67 Ind. Cas. 595 =9 O.L.J. 171=A.I.R. 1922 Oudh 113.

——Art. 95—Applicability and scope — Hindu family—Debt due to family, collected by one member after partition.

Article 62 and not Art. 95 applies where one member of a family which has become divided collects a debt due to the family and keeps the amount and another member files a suit to recover his share. 6 Mad. 402; 25 M.L.J. 531; 32 Mad. 191 and 37 Mad. 381, Foll. 69 Ind. Cas. 274= 1921 M.W.N. 539=A.I.R. 1921 Mad. 283=41 M.L.J. 274.

——Art. 95—No fraud—If article applicable.

The article has no application when on the face of the plaint no equitable relief is claimed on the ground of fraud. 37 Bom. 158=15 Bom.L.R. 192=19 Ind. Cas. 406.

——Art. 95—Applicability and scope—Suit to set aside compromise.

A suit to set aside a compromise entered into between the plaintiffs and the transferors of the defendants, is governed by the Art. 95 of the Act. 22 C.W.N. 860=46 Ind. Cas. 867.

——Art. 95—Applicability and scope — Fraudulent — Rev. sale—Declaration of invalidity—Suit for.

The limitation applicable to a suit brought by a part—Proprietor of an estate to declare that the Rev. sale was brought about by fraud, and that her right was not affected thereby, is that prescribed in Art. 95 of Sch. II of the Act (1877). 13 C.W.N. 518=4 Ind. Cas. 70.

——Arts. 95, 96 and 116—Applicability and scope —Mortgage with possession — Suit for refund of money advanced by mortgagee.

The plaintiff sued for recovery of money from the defendant together with damages, alleging that the registered mortgage-deed executed in his favour by the defendant cannot be enforced, as the land was found to be already mortgaged with possession to another person. He also alleged that the defendant had practiced fraud.

Held, that the suit came under Art. 116 and neither Art. 95 nor Art. 96 governed the suit. The plaintiffs allegation as to fraud does not bar the applicability of Art. 116. 106 P.L.R. 1916= 130 P.W.R. 1916=36 Ind. Cas. 262.

——Arts. 95 and 97—Applicability and scope— Fraud by decree-holder.

A purchaser at a court auction can recover the whole or part of his purchase money, by a suit, on the ground of fraud committed by the decree-holder in concealing from him the existence of an incumbrance at the time of the sale. Such suits are governed by Art. 95 of the Act and not by Art. 97 as they cannot be treated as one for the recovery of the whole or portion of the purchase money on the ground of failure of consideration money. 16 Ind. Cas. 215 (Mad.).

——Art. 95—Applicability and scope — Fraudulent mortgage—Suit for money advanced under.

Where a mortgage under a usufructuary mortgage dated 1907, came to know in 1912 that the

mortgagor had no power to mortgage the property and had fraudulently concealed the fact from the mortgagee and thereupon in 1914 he brought a suit for recovery of the money due to him with interest by way of damages.

Held, that the suit fell under Art. 95 and was not barred. 3 O.L.J. 593=37 Ind. Cas. 351.

——Arts. 95, 97 and Arts. 116 and 120—Fraudulent usufructuary mortgage — Right of plaintiff mortgagee—Applicability and scope.

Where defendant fraudulently gets his Sir land mortgaged with possession to the plaintiff the plaintiff is entitled to a simple money decree for the sum advanced with such interest as the Court might find due. The claims falls under Arts. 95 and 97 and not under Arts. 116 and 120. 13 O.C. 148=6 Ind. Cas. 1013.

——Arts. 95 and 144 — Applicability and scope—Fraudulent decree—Suit for possession — Limitation.

A suit for recovery of possession of immoveable property on the ground that the decree on the basis of which the defendants dispossessed the plaintiff was obtained by fraud is governed by Art. 95 and not by Art. 144 of the Limitation Act. 49 Ind. Cas. 953 (Pat.).

2. Decree—What is.

——Art. 95—Decree, what is.

For the purposes of Art. 95, the certificate under the Bengal Public Demands Recovery Act 1913, cannot be a decree. A.I.R. 1931 Cal. 69=34 C.W.N. 801=129 Ind. Cas. 871.

——Art. 95—Decree, what is—Certificate of sale under Public Demands Recovery Act.

Where the plaintiff sued to recover possession first in their capacity as executors and secondly as **shebaits** and it appeared that the defendants were in possession under a certificate of sale under the Public Demands Recovery Act to which the plaintiffs were not parties,

Held, that the case being one where there was no decree in the way of plaintiffs the suit was governed by Art. 95 of the Limitation Act. 34 C.W.N. 801=A.I.R. 1931 Cal. 69.

3. Interpretation.

——Art. 95—"Fraud"—Applicability of article.

The fraud referred to in Art. 95, need not be of the same nature as that in decree obtained by fraud, nor is the article applicable to suit where the cause of action is not in essence fraud. (1908) 35 C. 877.

——Arts. 95 and 120—"Fraud"—Suit by reversioner for declaration that decree is not binding upon reversioner or upon properties in his possession.

The fraud contemplated by Art. 95 is a fraud practised upon a party to the decree or a party to the transaction in which the fraud was committed. A person entitled to succeed as reversionary heir is not bound to sue for a declaration that a mortgage or a decree based upon it is invalid. It is quite open to him to wait until the succession falls in, and if thereafter anything be done constituting an actual injury to his vested right, **e.g.**; an attachment or sale, then to pursue his remedy. Where it is alleged that the mortgage-decree obtained by the first defendant in the case was obtained in collusion with the mother of the last owner of the properties (the holder of the life estate) the debt itself being purely fictitious and a declaration was sought for:—

Held, that the suit was governed by Art. 120 and not Art. 95, and that the cause of action arose on the date of the attachment of the property when in plaintiff's (reversioner's) hands. (1907) 17 M.L.J. 288=30 Mad. 402.

——Art. 95—"Knowledge"—Suspicion.

Mere suspicion is not knowledge within the meaning of this article. 37 Cal. 81=14 C.W.N. 101=3 Ind. Cas. 316.

——Art. 95—'Other relief' is not ejusdem generis with 'decree.'

Where the allegations of the plaintiff a bank, clearly amount to an averment of fraud perpetrated by certain persons in collusion with its official duty it was to bring it to the notice of the other officials of the bank that the sums sought to be drawn by them exceeded the amount to the credit of the depositor concerned and who for his own ends concealed that information inducing the other officials of the bank to part with the money which they would not have otherwise paid, the case is governed by Art. 95, the mention of decree in the first part of the article not detracting in any way from the generality of the latter part thereof. 3 Cal. 504, Expl. and foll. 124 Ind. Cas. 180=A.I.R. 1930 All. 573.

——Arts. 95, 29 and 36—"Other relief" not relief ejusdem generis—Suit for damages.

The words "other relief" in Art. 95 do not merely mean relief **ejesdem generis** with setting aside a decree obtained by fraud, but includes reliefs such as compensation for damages caused by fraud. Where the defendant in collusion with an Amin of the Court fraudulently and without the authority of the court had the court seal placed on the outer door of a warehouse in order to deceive the plaintiffs into the belief that the property of the ware-house had passed to, and remained in the custody of the court, and thereby prevented the plaintiff from taking possession of the perishable goods therein and arresting its deterioration and wastage.

Held, that in the suit by the plaintiff against the defendants for compensation, fraud was the gist

of the action and that Art. 95 governed the case; and not 29 or 36. (1903) 27 M. 343.

4. Onus.

——Art. 95—Onus — Suit for relief on ground of fraud—Duty of plaintiff.

The suit was instituted under Art. 95 to set aside a decree obtained by fraud or for relief on the ground of fraud:

Held, that the plaintiff must show that the decree was obtained by fraud. He must show that the summons was fraudulently suppressed and by fraud of the defendant he was kept ignorant of the decree. It is not enough to show mere non-service of summons. A.I.R. 1935 Cal. 95=60 C.L.J. 120=154 Ind. Cas. 414.

——Art. 95—Onus of proof.

When a plaintiff sues to cancel or set aside an instrument setting out the facts which entitle him to have that instrument cancelled or set aside and alleging that those facts became known to him at a certain time, it is incumbent on a defendant who pleads that the suit is barred by time to allege and prove a knowledge prior to the period from which time begins to run. 2 N.L.R. 98, Foll. 89 Ind. Cas. 625=A.I.R. 1925 Nag. 398.

——Art. 95—Sale in collusion between putnidar and benamidar of dhurputnidar (sub-lessee)—Onus—Estoppel.

A dhurputni or under-lease was purchased by A in the name of B benami. The putnidar in collusion with B, the benamidar, obtained a collusive judgment for arrears of rent, brought the holding to sale and purchased it himself. A, the real owner, brought a suit for recovery of possession of the holding from the putnidar purchaser, but after the lapse of three years from the date when he became aware of the fraud.

Held:—That nothing that happened between the putnidar and the benamidar could affect the right of the true owner unless he was estopped from denying the authority of his benamidar to deal with the property: that in the circumstances of this case there was no such estoppel.

Held also:—That the suit was not barred, it not being necessary for the real owner to set the sale aside; and that he was entitled to possession and mesne profits from the date of dispossession. The onus lay upon the defendants to show that the plaintiff cannot succeed without setting aside the decree. (1907) 17 M.L.J. 358=4 A.L.J. 467=9 Bom.L.R. 743=11 C.W.N. 817=34 C. 711=2 M.L.T. 397=6 C.L.J. 17=34 I.A. 138 (P.C.).

——Arts. 95, 62 and 97—Suit for damages for fraud—Onus—Proof of fraud — Suit by assignor against assignee for fraudulent assignment.

In a suit for damages for fraud when it is doubtful at what precise time the fraud became known to the plaintiff, the onus is on the defendant to show that the suit is out of time. A suit for damages by an assignee of a debt against the assignor for having fraudulently assigned the debt when it was not really due to the latter (the assignor) is governed by Art. 95 and not by Art. 62 or 97. The assignee is not bound to assume the truth of the debtor's case or to the non-existence of the debt assigned as soon as the debtor files his written statement in the suit against him on the assigned debt; and time for a suit for damages by the assignee against the assignor for fraudulent assignment, was held to have run in the case from the date of the judgment of the Munsif in the prior suit declaring that the debt was not due to the assignor. (1907) 18 M.L.J. 19=4 M.L.T. 80=31 M. 230.

5. Setting aside.

——Art. 95—Sale under fraudulent decree—Suit for possession—Limitation.

When a person is prima facie bound by a fraudulent decree, he cannot, by suing ostensibly simply for possession, ignore that decree and thereby evade the operation of Art. 95 and where there is such a decree standing in the way of the plaintiff obtaining relief which is inconsistent with that decree, he must first of all bring his suit within the period prescribed by Art. 95 in order to get the decree out of the way.

The am mukhtar of a Hindu widow who was managing certain properties which the widow had dedicated to an idol purposely withheld payment of road cess and purchased the property benami in the name of his brother-in-law in 1912. The widow died in 1916 leaving a will under which the plaintiff's father was appointed shebait of the debutter property. In 1920 the plaintiffs obtained probate and they instituted a suit in 1923 in their capacity as executors of the widow's will and also as shebaits of the property for a declaration of title to the land sold:

Held, that the suit was in substance one in ejectment and not one where the plaintiffs were in substance seeking to set aside some transaction into which either they or their predecessor had been fraudulently induced to enter. The fraud in this case was merely a part of the operation by which the defendants had endeavoured to keep the plaintiffs out of the property which really belonged to them and, therefore, neither part 1 nor part 2 of Art. 95 was applicable to the case. 34 C.W.N. 801=A.I.R. 1931 Cal. 69=129 Ind. Cas. 871.

——Arts. 95, 44 and 91—Applicability and scope—Setting aside of decree.

Arts. 95, 44 and 91 of the first Schedule to the Limitation Act do not apply to a suit to have a decree set aside but the article applicable would be 120. 62 Ind. Cas. 794=2 Lah. 164=4 L.L.J. 211=79 P.L.R. 1921=A.I.R. 1922 Lah. 166.

——Art. 95—Fraudulent decree — Sale under—Setting aside of.

A sale in execution of a fraudulent decree is not void, but voidable. Such a sale cannot be set aside without setting aside the decree. 20 C. W.N. 659=33 Ind. Cas. 767.

——Art. 95—Suit to set aside decree and for possession.

A suit for declaration of plaintiff, raiyats right and for possession after setting aside an ex parte decree is governed by Art. 95, Sch. 1 of the Limitation Act and not by Sch. 3, Art. 3, Bengal Tenancy Act as the setting aside of the ex parte decree is the essential feature of the case. 19 Ind. Cas. 980 (Cal.)

——Art. 95—Suit to set aside decree—Fraud.

Where a decree is passed, it is binding on both the parties whether obtained by fraud or otherwise. Decrees obtained by fraud are not nullity nor are they transactions between parties, they must be set aside before relief is asked for, in another suit. Art. 95 of the Limitation Act applies and is conclusive. 12 M.L.T. 196=(1911) M.W.N. 805=23 M.L.J. 187=16 Ind. Cas 843.

——Art. 95—Setting aside — Collusive decree in compromise—Suit for possession.

A suit for redemption brought by a reversioner after compromise decree had been passed in a suit by the widow on the ground that the compromise was collusive and fraudulent is not barred by Art. 95 of Limitation Act as it was not necessary to sue for the cancellation of the compromise decree. 11 A.L.J. 574=21 Ind. Cas. 605.

6. Starting point.

——Arts. 95 and 120—Applicability — Relief on ground of fraud — Starting point of limitation—Knowledge and suspicion—Difference between.

A suit for relief against the consequences of fraud is governed by the specific Art. 95 and not by the general Art. 120 of the Limitation Act. Under Art. 95 limitation begins to run from the date of actual knowledge. The knowledge of fraud means the knowledge of circumstances on which any reasonable man concludes that a fraud has been committed. It may be his conclusion or knowledge further corroborated by additional circumstances known to him subsequently. He cannot however say that he had no knowledge of fraud till the last piece of evidence came to light or till the persons committing the fraud admitted the same. What is required for limitation to start is actual knowledge and not merely suspicion. The difference between a suspicion and a knowledge is the difference in the degree of certainty which a person feels specially when the knowledge relates to something intangible and is necessarily based on inferences. I.L.R. (1947) Nag. 985=A.I.R. 1948 Nag. 150=1948 N.L.J. 65.

——Art. 95—Suit to set aside decree — Starting point of limitation.

Decree against major treating him as minor is not a nullity—Suit to set aside such decree should be brought within three years of the decree under Art. 95. Time runs from date of decree unless the plaintiff has been fraudulently kept out a knowledge of the decree. 21 P.L.T. 269=6 B.R. 839=(1940) 189 Ind. Cas. 535.

——Art. 95—Starting point of limitation.

A suit for a relief on the ground of fraud is governed by Art. 95 and time begins to run from the date of the knowledge of the fraud. A. I. R. 1935 All. 995=1935 A.W.R. 1189=58 A. 342 =159 Ind. Cas. 977.

——Art. 95—Suit for possession challenging decree on ground of c llusicn on part of guardian ad litem—Limitation—Starting point.

A suit by a person for possession of certain property on the ground that a decree obtained against him during his minority is not binding on him as it was obtained by collusion with the agent of guardian ad litem who had failed to produce material evidence is governed by Art. 95 and the limitation starts from the date of knowledge of the fraud. A.I.R. 1935 Lah. 961.

——Art. 95—Starting point.

Where a suit is brought to get a deed cancelled on the ground of fraud and undue influence, the fact must be considered to have been known to the executant from the date of the deed and if brought more than three years from that date the suit cannot be maintained. 15 Cal. 58 (P.C.), Foll. 114 Ind. Cas. 806=4 Luck. 270=5 O.W.N. 1062=10 L.R.A. (Rev.) 230=A.I.R. 1929 Oudh 67.

——Art. 95—Starting point of limitation—Fraudulent compromise decree—Limitation for suit to set aside.

Under Art 95 of the Limitation Act, the period of limitation for a suit for setting aside a fraudulent compromise decree, is three years from the date of knowledge of such decree. 37 Ind. Cas. 797 (Pat.).

——Art. 95—Starting point of limitation—Sale—Fraud—Limitation.

Where one is induced to purchase property from another having not title there to the period of limitation is 3 years from the discovery of fraud by the plaintiff. 96 P.W.R. 1913=135 P.L.R. 1913 =19 Ind. Cas. 5.

——Art. 95—Starting point of limitation—Ex parte decree.

A suit to set aside ex parte decree after 3 years of the knowledge of fraud, is barred. 47 P.L.R. 1910=8 Ind. Cas. 232.

——Art. 95—Secret commission or bribe to agent paid after transaction completed—Fraud—Rescission of contract—Placing parties back in former position—Starting point, if date of suspicion.

Limitation under Art. 95 ran not from the date when the fraud was first suspected by the plaintiff but when he came to know of it as a fact. A bribe is not the less a bribe because its payment is postponed. Where it was proved that in the course of negotiations resulting, in a lease of plaintiff's land to defendant, the defendant entered into an arrangement with the plaintiff's agent under which the latter expected to be paid an amount by way of bribe or secret commission and the amount was paid after the lease was given:

Held—That it was immaterial to consider what effect the expectation of the payment had on the mind of the agent and whether he was actually influenced thereby to recommend an arrangement which he would not otherwise have recommended. (1878) L. R. Q.B.D. 549; (1899) 1 Q.B. 369, applied. A contract so induced by fraud is only voidable and the remedy by rescission is open only so long as the parties can be restored to the relative positions which they originally occupied. L. R. 3 A.C. 831 (1878), relied on. (1909) 14 C. W.N. 101=37 C. 81=3 Ind. Cas. 316.

——Art. 95—Suit by shebait—Starting point.

Art. 95 is the article applicable to a suit by a shebait to set aside for fraud a decree obtained against his predecessor, and, if the suit is brought within three years of the appointment of plaintiff as shebait, is in time. (1906) 4 C.L.J. 472.

7. Miscellaneous.

——Art. 95—Miscellaneous.

Suit to set aside **ex parte** decree alleged to have been obtained by fraud—Finding that plaintiff was over 21 at time of suit—Appeal—Court misunderstanding this and holding suit barred as brought three years after attaining majority—**Held**, appellate judgment could not stand. A.I.R. 1937 Lah. 903=171 Ind. Cas. 205.

——Art. 96.

Synopsis.

1. Applicability and scope.
2. Starting point.

1. Applicability and scope.

——Arts. 96 and 62—Applicability.

When the property sold is handed over to the purchaser and later on it is discovered that the transaction is void and the purchaser is evicted from the property, purchaser's suit for recovery of purchase price does not fall under Art. 96 or Art. 62. 47 P.L.R. 122=A.I.R. 1945 Lah. 164=221 Ind. Cas. 524.

——Art. 96—Applicability.

Article 96 does not apply to a suit to enforce partition of property excluded from previous partition of joint family properties by fraud of other members as the plaintiff does not ask for any relief on the ground of mistake. That article is intended to apply only to cases where the plaintiff seeks to be relieved of a mistake committed in the course of contractual transactions, such as a suit for rectification of deeds or rescission of contracts. Moreover, Art. 96 does not apply to a suit for possession of immovable property. A.I.R. 1943 Bom. 419=45 Bom.L.R. 825=214 Ind. Cas. 273.

——Art. 96—Applicability.

Article 96 cannot be applied to a case in which the plaintiff himself has not been the victim of any mistake. A.I.R. 1941 Mad. 742=1941 M.W.N. 484=200 Ind. Cas. 722.

——Arts. 96 and 162—Applicability.

If the facts of a particular case fall within both Art. 62 and Art. 96, Art. 96 must be applied as it is the more specific and the less general of the two articles. A.I.R. 1941 Mad. 742=1941 M.W.N. 484=200 Ind. Cas. 722.

——Art. 96—Applicability.

Article 96 applies when the cause of action is founded on mistake. But generally a mistake of law which is applicable to all citizens is not and cannot itself form the basis of a cause of action. A.I.R. 1940 Bom. 252=42 Bom.L.R. 491=189 Ind. Cas. 678.

——Art. 96—Applicability and scope.

Where, in a suit upon a mortgage for recovery of money, it is found that the number of a particular item of property was wrongly mentioned in the deed, even if the relief rectified is barred under Art. 96, Limitation Act, the mortgage-deed can be rectified. 47 L.W. 661=(1938) 1 M.L.J. 806=(1938) M.W.N. 499=A.I.R. 1938 Mad. 589=176 Ind. Cas. 875.

——Arts. 96, 61 and 120—Applicability.

Suit for recovery of money under S. 70, Contract Act falls either under Art. 61 or Art. 120, but not under Art. 96. 40 P.L.R. 300=A.I.R. 1938 Lah. 99=I.L.R. (1937) Lah. 623=175 Ind. Cas. 588.

——Arts. 96 and 120—Suit for rectification of instrument—Article applicable.

A suit for rectification of an instrument on the ground of mutual mistake is provided by S. 31, Specific Relief Act. Such a suit would lie unless it is barred under the provisions of law, e.g. S. 47, C. P. Code. Such a suit is governed by Art. 96 and not by Art. 120 of the Limitation Act. 39 C.W.N. 966=164 Ind. Cas. 651.

——Arts. 96 and 120—Applicability and scope.

R and N borrowing Rs. 5,000 on pro-note from J and M—J realising amount by draft from R and N—Suit by J and M against R and N for recovery of Rs. 7,700 on basis of pro-note—Payment by defendant alleged to be on another account—Court holding payment to be on account of pro-note but suit decreed in favour of M only for half amount—Decree passed on April 10, 1926—Appeal by M in 1932 and recovering Rs. 1,200—Suit by R and N in April, 1933 against J for Rs. 1,200—Suit held was governed by Art. 96 or 120 and was within time. A.I.R. 1936 Lah. 747=168 Ind. Cas. 446.

——Arts. 96 and 62—Applicability and scope—Price of goods supplied under mistake.

A suit for price of goods supplied to the defendant mistaking him for a different person is not governed by Art. 96 but by Art. 62. A.I.R. 1933 Sind 32=27 S.L.R. 81=142 Ind. Cas. 476.

——Arts. 96, 127, 144—Applicability and scope.

A suit for re-adjustment of shares allotted in a previous partition on the basis of mistake is governed by Art. 96 and not by Art. 127 or Art. 144. 34 M.L.W. 262=61 M.L.J. 430=A.I.R. 1931 Mad. 707=54 M. 883=135 Ind. Cas. 9.

——Art. 96—Applicability — Family settlement.

Art. 96 is inapplicable where the party seeking relief by a mistake accepted less than what he was entitled to, at a family settlement. An unequal division of an estate if accepted by the claimants of the deceased through mistake cannot be upheld and can be relieved against within the period prescribed by Art. 141. 55 Ind. Cas. 422 (Nag.).

——Art. 96—Applicability—Hundi presented to wrong person.

Presentment of hundi to wrong person who accepted by mistake — Drawee discovering mistake long afterwards — Notice to holder delayed beyond reasonable time—Drawee is disentitled to sue. 91 Ind. Cas. 342=50 Bom. 49=27 Bom. L.R. 1229=A.I.R. 1926 Bom. 66.

——Art. 96—Applicability — Mistake in decree—Rectification—Applicability.

Article 96 applies only to suits for relief on the ground of mistake other than that made in a decree but not to a suit to set aside a decree on the ground of mistake. 11 Ind. Cas. 537 (Oudh).

——Art. 96—Mistake in decree.

It cannot be broadly laid down that any error in a decree made by a Court may be challenged by a separate suit. Plaintiff sued for arrears of rent. He claimed ejectment in the course of the trial and the decree gave it. Defendant sued to set aside the decree on the ground of mistake on being unsuccessful in an application for review. Held, that the suit was not maintainable. (1906) 10 C.W.N. 1024.

——Art. 96—Applicability—Mistake in partition.

Where plaintiffs were allotted an area at a partition which fell short of what the plaintiffs were entitled to and the plaintiffs sued for a possession of an area equal to such shortage from a field which was omitted from the partition,

Held that no relief on the ground of mistake such as is contemplated by Art. 96 is claimed and hence the Article does not apply. Art. 96 is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of contractual transactions, and it is doubtful whether a suit for possession of immovable property or for a declaratory decree with respect to such property comes within the article. 69 Ind. Cas. 501=A.I.R. 1924 Lah. 324.

——Art. 96—Applicability—Mistake of law.

Where a mistake is a pure mistake of law in British India and not a mistake bearing upon the private or special right of the person and where such mistake results in the payment by one person to another making it inequitable that the payee should retain the money, such a mistake is no ground of relief within S. 72, Contract Act, or Limitation Act, Art. 96. 114 Ind. Cas. 353=28 M.L.W. 591=1928 M.W.N. 385=A.I.R. 1929 Mad. 177=56 M.L.J. 269.

——Arts. 96 and 120—Applicability—Money paid into Court under mistake.

A suit to recover money voluntarily paid into Court by a defendant under the wrong belief that the defendant is liable to pay it on account of costs and wrongly received by the plaintiff from the said Court, falls either under Art. 96 or 120 and not any of the Arts. 29, 62, Limitation Act, 1877. 40 P.W.R. 1910=6 Ind. Cas. 654.

——Art. 96—Applicability—Mutual mistake.

Art. 96 is limited in its application to cases of mistake committed in transaction arising in the course of relations which are more or less contractual in character and the Article in any event has no application to a case where there is no question of mistake on the part of the plaintiff. 101 Ind. Cas. 82=31 C.W.N. 82=A.I.R. 1927 Cal. 117.

——Art. 96—Not applicable to suit by assignee of reversioner to recover immoveable property. See ART. 141. 8 C.W.N. 802.

2. Starting point.

——Art. 96—Applicability — Mistake in the sale held in execution—Claim by auction-purchaser for return of the purchase money—Limitation.

In execution of an award in favour of a Co-operative Society a house was brought to sale. A reversioner of the last male holder of the property put in a claim petition which was dismissed. He filed a suit and succeeded in it on 31st March, 1938. An appeal to the District Court was dismissed on 4th April, 1941; and the widow of the last male holder obtained possession from the auction-purchaser on 7th April, 1943. The auction-purchaser filed a suit on 23rd January, 1944, for the return of the purchase money. On a question of limitation,

Held, (i) Art. 96 and not Art. 97 of the Limitation Act applied to the case. (ii) Time began to run from 31st March, 1938, the date of the decree of the trial Court and not of the appellate decree. 1946 M.W.N. 625=59 L.W. 523=A.I.R. 1947 Mad. 90=230 Ind. Cas. 233=(1946) 2 M.L.J. 231.

——Art. 96—Suit to set aside execution sale — Starting point of limitation.

Where the auction-purchaser files a suit claiming refund of money paid to the decree-holder, putting forward as the basis of his claim a discovery which he has made that the property which he purchased was one in which the judgment-debtor had no interest, by a decision in favour of a claimant of such property, the suit is governed by Art. 96. It is necessary in such cases, that the plaintiff should assert; though not explicitly, that there was mistake, and limitation runs from the date of the final adjudication in favour of the claimant. A.I.R. 1941 Mad. 742 =1941 M.W.N. 484=200 Ind. Cas. 722.

——Art. 96—Starting point of limitation.

Limitation for a suit for rectification of deed on ground of mutual mistake runs from the date of the notice of the mistake. A.I.R. 1940 Bom. 321=42 Bom. L.R. 605=I.L.R. (1940) Bom. 605=192 Ind. Cas. 109.

——Art. 96—Money paid under void agreement—Starting point.

The period of limitation for a suit for refund of advance paid under a void agreement is three years from the date when the agreement is discovered to be void and ordinarily the time from which limitation will start is the date of the agreement in the absence of special circumstances. When the agreement is one forbidden by law, the plaintiff must be deemed to have been aware of the fact when he entered into it. 88 Ind. Cas. 557 1925 M.W.N. 400=A.I.R. 1925 Mad. 885=48 M.L.J. 598.

——Art. 96—Mistake or concealment of fact—Starting point.

A sold bales of cloth to *B*. *B* sold the same to *C* and *C* to *D*. *D* found that the bales contained less number of pieces than paid for. Intermediate sellers and purchasers did not know that the contents were short.

Held, that *D's* suit against *C* for price of shortage will be governed by Art. 96 and time began to run when *D* knew the mistake; because in all cases where something turns upon a mistake or concealment of fact by the fraud or deceit of the other side, the time from which limitation must be taken to run is always the time when it was brought to the plaintiff's knowledge that there had been a mistake or a fraud. 91 Ind. Cas. 151=48 Mad. 925=22 M.L.W. 341 =1925 M.W.N. 688=A.I.R. 1925 Mad. 1255=49 M.L.J. 228.

——Art. 96—Money paid under mistake—Starting point.

Article 96 should be preferred to Art. 62 in a suit to recover money paid by the plaintiff to the defendant by mistake in excess of the amount legally due. In cases where the relief is based on mistake the period of limitation should run from the time when the mistake was first discovered even if some other article in the Limitation Act, should be wide enough to include the cause of action. 93 Ind. Cas. 129= 7 P.L.T. 431=4 Pat. 448=1925 P.H.C.C. 345= A.I.R. 1925 Pat. 765.

——Art. 96—Mistake of fact—Pre-emption money —Payment by mistake to one of several vendees—Suit for recovery—Starting point.

The plaintiff impleaded in the pre-emption suit one of the vendees, who realised the entire pre-emption money, under a mistake of fact that he alone was the vendee, and the pre-emptor's claim for mutation after formal possession was resisted by the rest of the vendees on the ground that they were not impleaded in the pre-emption suit; on the suit of the pre-emptor for the possession of the property released in favour of the vendees not impleaded in the pre-emption suit or in the alternative for the proportionate refund of the consideration,

Held, the cause of action arose when the pre-emptor's claim for mutation was resisted, *i.e.*, when the consideration failed or when the mistake of fact was discovered. A.I.R. 1922 All. 475.

——Art. 96—Applicability—Starting point.

Where in a partition a mortgage supposed by mistake by the parties to be alive and valid was assigned to plaintiff: and plaintiff sued on the mortgage but both the Trial Court and the appellate Court held that the money had already been paid off,

Held, that Art. 96 applied to plaintiff's suit for recovering the loss.

But time began to run from the decree of the Trial Court and not that of the appellate Court. 46 Cal. 670 (P.C.), Foll. 61 Ind. Cas. 34=45 Bom. 582 =23 Bom. L.R. 69=A.I.R. 1921 Bom. 184.

——Art. 96—Mistake in lease—Suit for rectification—Limitation.

A suit for amendment or rectification of a mistake in a lease by both the parties must be brought within three years from the date of his knowledges of the mistake. 48 Ind. Cas. 972 (Cal.).

——Art. 96—Starting point—Suit by creditor for setting aside discharge.

A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by Art. 96. Where the mistake is as to the belief of a party that a third person is liable the mistake must be taken as discovered when the third person repudiates his liability and communicates such repudiation either to the party or to his partner. Where a right of action is in two or more partners and one of them discovers the mistake by reason of which a contract (in respect of which relief has been sought) has been entered into by another of the partners on behalf of the partnership, the period of limitation prescribed by Art. 96 will begin to run from the date of such discovery notwithstanding that the latter partner chooses to persist in his mistake even after the mistake is pointed out to him by the other. (1903) 14 M.L.J. 443.

——Art. 96—Starting point—Mukhi, appointment of—Right to nominate, claimed by villagers; but liability to pay his salary not denied—Suit by the chief who has paid the salary against the villagers.

Where the inhabitants of a village were by custom bound to pay the salary of a mukhi and never denied their liability, but only claimed to nominate him, the cause of action of any person who had paid the mukhi not so nominated to be reimbursed by the villagers arose when it was finally decided that the villagers had no right to nominate. (1902) 4 Bom. L.R. 264.

——Art. 97.

Synopsis.

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1. Applicability and scope.

——Arts. 97, 115 and 62—Applicability.

Certain property under the management of the Court of Wards was put up for sale by auction on November 21, 1937. The highest bid was made by *P* who put down a sum of Rs. 1,000 in part payment of the price. Under the terms of the sale, the payment of the full amount was to be completed by a certain date failing which the money put down in part payment was to be forfeited. *P* failed to comply with this term and the property was put up for sale by auction on January 30, 1938. *P* was again the highest bidder and this time he put down a sum of Rs. 2,250 in part payment. Again he failed to complete the payment by the proper date but this time he obtained an extension of the period originally fixed for completion of the contract of sale. In the end, however, he failed to complete his part of the bargain and the sale fell through. On March 31, 1941, *P* brought a suit against the Court of Wards and the auctioneers through whom the property was sold for return of money paid by him towards the purchase price:

Held, that Art. 97 could not be applied as the money paid in advance under a contract of sale could not be regarded as money paid upon an existing contract as opposed to any other kind of consideration.

It would be safer to give a wide construction to the word "compensation" in Art. 115 rather than to put a somewhat artificial construction upon the word "received" in Art. 62, though it was quite possible that the view that Art. 62 applies with effect from the date when the nature of money in the defendant's hands changes, was the correct view. Whichever view be adopted, any claim of *P* for the return of money paid on November 21 was barred. *P* knew before the second sale took place that his payment had been treated as forfeited and that he was in a position to sue for the return of his money, the first sale having obviously fallen through. So far as the second payment was concerned, *P* could have no cause of action for the return of his money until the time for completing the payment was out and the Court of Wards had definitely refused either to confirm the sale or to return the money and this would bring the suit within limitation. 47 P.L.R. 174=A.I.R. 1945 Lah. 210.

——Art. 97—Applicability and scope.

Article 97 can apply only to cases in which there is a consideration existing at one stage but fails, subsequently. 1943 A.W.R. 122=A.I.R. 1943 All. 294=(1943) A.L.J. 250=I.L.R. (1943) All. 604=209 Ind. Cas. 10.

——Art. 97—Applicability and scope.

Article 97 does not make the cause of failure of consideration material to its application and, it should be applied in cases when the failure of consideration is attributable to omission on the part of plaintiff. This article governs the suit by buyer for return of part consideration in a contract of sale which he had improperly declined to complete. A.I.R. 1942 Sind 37=I.L.R. (1941) Kar. 495=199 Ind. Cas. 438.

——Art. 97—Applicability—Starting point of limitation.

By a document dated June 16, 1933, a Muhammadan transferred some land to his wife in lieu of the amount of dower money due to her. He promised in the document to get a mutation attested in her favour. He however failed to get the document registered and to have a mutation duly attested. He died in 1934. On May 15, 1936, a mutation was entered to give effect to the document of June 16, 1923. On December 6, 1926, the document was shown to the Revenue Officer, the step-sons of the widow objected to the attestation of the mutation and it was, therefore, rejected. On October 18, 1938, the widow brought a suit against her step sons for possession of the land, and asked in the alternative for recovery of Rs. 2,000, her dower money.

Held, that the transfer of the land to the woman was perfectly valid to begin with and hence Art. 97, applied to the suit as the husband might have regis-

tered the document and got a mutation attested. The cause of action accrued to the plaintiff when the mutation was rejected. The suit was, therefore, within time. A.I.R. 1941 Pesh. 57=195 Ind. Cas. 844.

——Art. 97—Applicability and scope.

Claim for damages based on negligence of the vendor is not governed by Art. 97, but by Art. 36. A.I.R. 1939 Lah. 564=187 Ind. Cas. 742.

——Art. 97—Applicability and scope—Suit for refund of money wrongly paid—Article applicable—Limitation, when begins to run.

The plaintiffs who were the representatives in interest of the mortgagors advanced Rs. 400 to defendants who succeeded to a share of the mortgagee rights, in order to redeem the mortgage. The money was received and defendants executed a deed of reconveyance of the mortgaged property in consideration of the payment of the mortgage money made to them. *L* who had acquired an interest in the mortgagees' interest sued for foreclosure. The plaintiffs pleaded that they had already paid Rs. 400 to defendants and had redeemed the mortgage. This plea was not accepted and it was held that the payment had been wrongly made to the defendants. The decree for foreclosure was passed on September 27, 1928, and in consequence of this decree, the plaintiffs had to pay a sum of Rs. 471-11-3 to *L* on February 22, 1929, for the purpose of redeeming the mortgage. Plaintiffs filed a suit for recovering the sum of Rs. 400 with interest which had been wrongly paid to defendants:

Held, that Art. 97, applied and the period of three years ran from September 27, 1928, which was the date of the foreclosure decree. As soon as it had been decided by the foreclosure decree that the defendants wrongly received the money, it would have been open to the plaintiffs to institute a suit to recover the money wrongly paid even before they had been compelled to make a second payment of the money to *L*. Article 116 did not apply as the suit was not framed as a suit for compensation for the breach of any covenant. Nor did Art. 120 apply to the case. A.I.R. 1935 Oudh 378=11 Luck. 110=1935 O.W.N. 549=155 Ind. Cas. 299.

——Arts. 97 and 116—Applicability and scope.

The difference between Art. 116 and Art. 97 has nothing whatever to do with the form of the contract. It has rather to do with the question of the date of the failure of consideration and it is quite immaterial in discussing whether Art. 97 or Art. 116 applies, to ascertain whether the contract was effected by means of a registered instrument or not. A.I.R. 1934 Pat. 148=13 Pat. 192=150 Ind. Cas. 975.

——Art. 97—Applicability and scope.

Article 97, applies when the plaintiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible further inability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that on the happening of such circumstances, the defendant will pay back the money which he has already received.

Where the plaintiffs have sought by way of damages, for the recovery of Rs. 1,500 paid on deposit with interest but that which gave them a right to call for that payment is the allegation that there was a contract to place the plaintiffs in possession, that it was a good and valid contract which the defendants had broken (the contract to put them in possession) and, therefore, they are entitled to a return of the money. Article 97, does not apply. A.I.R. 1934 Pat. 148=13 Pat. 192=150 Ind. Cas. 975.

——Art. 97—Applicability and scope—Refund of consideration.

A suit for refund of consideration is not one for breach of contract and is governed either by Art. 62 or by Art. 97 according as to whether the contract is void or voidable and Art. 116 is not applicable. 34 P.L.R. 96=A.I.R. 1933 Lah. 581=145 Ind. Cas. 186

——Art. 97—Applicability and scope — Suit for refund of purchase money.

Where a person is entitled to sue for specific performance he can also sue for refund of purchase money whether it has been paid in cash or set off against debts due by the seller. The starting point in such cases is from the date of payment or set-off and Art. 97 applies to the case. 70 Ind. Cas. 121=11 L.B.R. 437=1 Bur.L.J. 198=A.I.R. 1923 Rang. 87.

——Art. 97—Applicability.

Art. 97 properly applies to a case for recovery of money paid under an existing consideration which has subsequently failed. (1917) M.W.N. 585=6 L.W. 401=33 M.L.J. 577=42 Ind. Cas. 519.

——Arts. 97, 115 and 120—Applicability—Suit for declaration that decree has been adjusted—Limitation—Cause of action.

Where a decree has been adjusted out of Court a suit for declaring that the decree has been satisfied and not capable of execution is maintainable, the cause of action arising from the date of adjustment or payment and the suit is governed by Arts. 97, 115, and 120 of the Limitation Act. 190 P.W.R. 1913=330 P.L.R. 1913=21 Ind. Cas. 557.

2. Presentation of appeal.

——Art. 97—Presentation of appeal.

Under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal and, therefore, the time from which the period of limitation ought to be counted is the date of the decree of the first Court. A.I.R. 1918 P.C. 151, Foll. 109 Ind. Cas. 457=A.I.R. 1928 Nag. 134.

——Art. 97—Suspension of limitation—Presentation of appeal.

Per *Spencer and Devadoss, JJ.*—When an appeal to superior Court only results in the decree appealed against being confirmed, in India there is no interruption in running of time calculated from the date of the original decree. 74 Ind. Cas. 416=17 M.L.W. 254=A.I.R. 1923 Mad. 392.

——Art. 97—Presentation of appeal.

Where owing to the defective title of the vendor the vendee is dispossessed under a decree, the limitation for suit for damages for breach of covenant begins from the date of the decree, although there is appeal and second appeal from the decree. 60 Ind. Cas. 235=11 M.L.W. 537=27 M.L.T. 304=39 M.L.J. 449.

3. Refund—Limitation.

(a) Defect in title.

——Arts. 97, 116—Suit for compensation—Starting point of limitation.

A suit for compensation for breach of covenant of of title in respect of a registered sale-deed is governed by Art. 97 read with Art. 116. In such a case the vendee has six years to sue from date of decree of the first Court wherein the defect in the title of the vendor was found, and the running of limitation is not postponed till the date of the final decree. (1932) M.W.N. 1111=A.I.R. 1933 Mad. 382=144 Ind. Cas. 726.

——Art. 97—Defect in title — Starting point of limitation.

The plaintiff purchased a decree. It was set aside for fraud in a fresh suit. The decree setting it aside was reversed by the District Judge in appeal but was confirmed by the High Court in second appeal. A suit for refund of the price on the ground of failure of consideration was filed more than six years after the first Court's decree setting aside the decree which had been purchased, but within three years of the High Court's judgment:

Held, that time began to run only from the date of the decree of the High Court and the suit was not time-barred. A.I.R. 1931 All. 651=53 A. 914 =133 Ind. Cas. 415.

——Art. 97—Defect in title—Refund of purchase-money.

If there is covenant express or implied indemnifying party suffering against loss caused by defect in title of the executant of document Art. 116 applies, otherwise, Art. 97. Such covenant may be express or implied. A.I.R. 1930 All. 785.

——Art. 97—Defect in title — Relinquishment of rights—Failure of deed to take effect—Claim for refund of price.

The plaintiff paid a sum of money to the defendants for the consideration of the defendant relinquishing certain rights. The deed of relinquishment subsequently failed because the defendants' sons sued for a declaration that the deed was invalid and succeeded. A suit having been brought for recovery of money paid,

Held, that the suit was governed by Art. 62 or 97 and not by Art. 116 of the Limitation Act. 1930 A.L.J. 1112=A.I.R. 1930 All. 785.

——Art. 97—No title in vendor—Starting point.

A plaintiff purchased some property. There had been a previous deed of gift but the deed of transfer recited that it was a nullity, which meant that the vendor was able to give a good title, but it turned out that he was not. The plaintiff filed a suit for possession and succeeded in the lower Court but on appeal he lost his suit.

Held, that Art. 97 applied and that the three years' period began to run from the date of the failure of the suit. 19 Cal. 123 (P.C.). Foll. 103 Ind. Cas. 385=A.I.R. 1927 All. 756.

——Art. 97—Failure of title in vendor—Starting point.

When after payment of the purchase money to the vendor, the vendor was unable to give title and the purchaser found himself unable to obtain possession.

Held, that from the time when he found himself unable to obtain possession, he had a right to sue for his purchase-money upon a failure of consideration and that the case fell within Art. 97 and that in any case it must fall either within Art. 97 or 62. 19 Cal. 123 (P.C.) and 30 All. 402 and 38 Mad. 1171, Foll. 103 Ind. Cas. 165=25 A.L.J. 841 =A.I.R. 1927 All. 734.

——Art. 97—Defect in title — Sale of land—Suit for recovery of purchase money—Limitation.

Where the plaintiff vendee compromises an adverse claim to the property sold by payment of money, the cause of action for refund of the purchase-money as on failure of consideration arises on the date of payment. 38 M. 887, Foll. 50 Ind. Cas. 815 (Mad.).

——Art. 97—Defect in title—Misrepresentative—Registered sale.

A claim for damages based on misrepresentation by a vendor that he had a title to convey must be brought within three years from the time when the want of title was established by a decree of Court. 50 Ind. Cas. 673 (Mad.).

——Art. 97—Defect in title—Sale of land—Vendor not entitled to a portion of the land sold—Vendee's suit for damages in respect of such portion—Starting point of limitation.

Plaintiff purchased a house from defendants 1 and 2 in 1880. To recover possession of the same he had to file a suit against defendants in 1892 in which it was decided that plaintiff's vendors were entitled to two thirds of the house sold. The plaintiff was thereafter put into possession of that portion only of the house. In 1899 be filed another suit in which he claimed damages from defendants 1 and 2 on account of his being deprived of the one-third of the house.—*Held*, that, viewing the claim as one to recover money upon an existing consideration that afterwards failed, the plaintiff's suit was barred, since limitation commenced to run from the time when the plaintiff endeavoured to obtain possession of the property and, being opposed, found himself unable to obtain possession. (1902) 4 Bom. L.R. 571=26 B. 750.

(b) Dispossession of vendee.

——Art. 97—Dispossession of vendee.

Indemnity bond—Sale by father of minor son—Indemnity bond by third person promising to indemnify the purchaser in case the son on attaining majority were to dispute sale—Some years after attaining majority son instituting suit challenging alienation—Suit decreed—Possession delivered to plaintiff—Suit by vendee against sons of indemnifier (he being dead) on indemnity bond:

Held, that Art. 97 and not Art. 62, applied and the cause of action arose only on the disturbance of possession. (1943) 2 M.L.J. 645=A.I.R. 1944 Mad. 211=1944 M.W.N. 350=I.L.R. (1944) Mad. 663=216 Ind. Cas. 120.

——Arts. 97 and 116—Dispossession of vendee.

A house was sold with its site on November 15, 1920, without apprising the vendee of the fact that the permission of both the co-sharers of the village in which the site stood was essential as the house

stood in joint *patti* of the village. The vendee pulled down the house and erected another. The *lambardar* of the *patti* in which the house stood sued for possession of the site in 1925 and got a decree. Vendee consequently brought a suit in 1928 claiming return of price and reimbursement of the money spent in building the new house and the costs which he had incurred in defending his title:

Held, that the cause of action did not begin to run from the date of the sale but from the date when it became clear that the sale was voidable at the instance of the *lambardar*.

Held further that the suit was governed not by Art. 97 but by Art. 116 and was not, therefore, time-barred. A.I.R. 1932 Nag. 3=137 Ind. Cas. 61.

——Art. 97—Dispossession of vendee—Refund of consideration.

A sold certain property to *B* under a registered sale-deed in July 1920, and put *B* in possession. In 1923 *B's* sub-purchaser were dispossessed by a person claiming adverse title. In a suit by *B* against his sub-purchasers it was decided in September, 1926, that *A* had no title. *B* sued *A* for refund of the purchase-money in 1926:

Held, (*i*) that the suit was governed by Art. 116, and was not time-barred as it was instituted within six years of the date of the decree passed in September, 1926;

(*ii*) that even if the cause of action arose on the date of dispossession, the suit was not barred. 25 S.L.R. 173=A.I.R. 1931 Sind 141=133 Ind. Cas. 76.

——Art. 97—Dispossession of vendee — Starting point—Breach of covenant for title.

Held, that assuming Art. 97 will apply to a suit by a vendee for recovering damages on the breach of covenant for title, limitation will commence to run from the date of the total failure of consideration, namely, the date on which the plaintiff was actually dispossessed by the third person. 124 Ind. Cas. 185 =1930 A.L.J. 653=A.I.R. 1930 All. 771.

——Art. 97—Dispossession of vendee — Sale set aside on condition of payment—Suit for balance—Starting point.

Plaintiffs purchased a certain property from a Hindu father and the sale was subsequently cancelled in a suit by the sons to set it aside on their depositing a certain sum in Court. Plaintiffs sued the sons of vendor, for the balance of the purchase-money.

Held, that the suit is not barred by the principles of *res judicata* as money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued. And that the decree in the son's suit became operative only at the date of deposit and the period of limitation under Art. 97 would run from that date and not from the date of the passing of the decree. 39 All. 485, Foll. 100 Ind. Cas. 745 =A.I.R. 1927 All. 421.

——Art. 97—Dispossession of vendee.

Where an alienation was made by a purchaser from a widow pending declaratory suit against the alienation by the reversioners, and in the sale-deed the alienor expressly stipulated for refund of purchase-money and damages and the reversioners got the declaration sought for and long afterwards when the widow died, they sued and recovered possession of the properties.

Held, that Art. 97 did not apply and that limitation did not commence to run till the vendees were actually dispossessed and from the date of dispossession the suit was admittedly within time. 105 Ind. Cas. 804=9 L.L.J. 468=A.I.R. 1927 Lah. 570.

——Art. 97—Dispossession of vendee.

Where the transferee of a service inam who is dispossessed by the vendor's successor-in-office, sues for recovery of the purchase money, Art. 97 applies to the suit, such transfer not being *ab initio* void but being valid during the continuance in office of the vendor. 86 Ind. Cas. 755=22 M.L.W. 126=1925 M.W.N. 101=A.I.R. 1925 Mad. 749=48 M.L.J. 217.

——Art. 97—Dispossession from part of property.

Under a compromise which was incorporated in a decree of Court, the plaintiffs were to become the owners of certain parcels of property on payment of a sum of money to the defendant. They paid this money but on the 24th July, 1919, they were dispossessed from part of the property; the plaintiffs sued to recover the money they paid for the property in suit alleging that the existing consideration failed within the meaning of Art. 97 of the Indian Limitation Act.

Held, that the plaintiffs being in possession of some portion of the property transferred to them by the defendant under the compromise, there was no failure of consideration within Art. 97. 80 Ind. Cas. 81=11 O.L.J. 323=27 O.C. 348=A.I.R. 1924 Oudh 377.

——Art. 97—Failure of title in vendor—Dispossession—Starting point.

Where actual possession of the property purchased had been given and been enjoyed for a number of years, and thereafter the sale is set aside by a decree for want of title in the vendor, and the purchaser is dispossessed, the starting point of limitation for a suit for refund of the purchase-money must be (at all events in the case of a sale not *ab initio* voidable) the date of dispossession and not the date of the decree. 70 Ind. Cas. 787=16 M.L.W. 684= 1922 M.W.N. 634=32 M.L.T. 3=46 Mad. 40= A.I.R. 1923 Mad. 46=43 M.L.J. 721.

——Art. 97—Dispossession of vendee — Starting point.

A sale-deed contained a clause that if the minor nephew of the vendor on attaining majority raised any objection to the sale of his share the vendor would make over to the vendee an equal area out of his own land. Mutation of the minor's share of the land was refused in 1907; plaintiff sued for declaration that he was owner of the whole land purchased by him. His suit was dismissed, so far as the minor's share was concerned, in 1911. In 1917 the minor, having attained majority mortgaged his share to one *G*. who dispossessed the plaintiff from the land in 1919. Plaintiff brought a suit to enforce the indemnity clause contained in his deed of sale in the alternative for Rs. 1,000 being the value of the minor's share.

As regards the claim for recovery of the purchase-money, it was governed either by Art. 62 or 97 of the Limitation Act. If the claim was governed by Art. 62 it was barred by time inasmuch as limitation

began to run from the date of the sale. If the claim was governed by Art. 97, it was equally barred by time, inasmuch as limitation began to run when the plaintiff's title was first denied in 1907 or at the latest when it was declared in 1911 that he had no title. 62 Ind. Cas. 953 (Lah.).

——Art. 97—Vendee subsequently ousted by third party—Applicability—Starting point.

Plaintiffs bought land under a registered deed and were put in possession. The land was leased to a tenant who subsequently set up his own title to the land and his claim was also embodied in a final decree of the Court. Plaintiffs then filed a suit against their vendor for the recovery of the purchase-money, etc.,

Held, that Art. 116 and not 97 applied and time began to run only when the tenant obtained the decree supporting his own title to the land.

A distinction should be made between cases where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, and other cases where the sale is only voidable on the objection of third parties and possession is taken under the sale. It is only in the first class of cases that the starting point of limitation will be the date of a sale. Case-law discussed. 61 Ind. Cas. 70=45 Bom. 955=23 Bom. L.R. 325=A.I.R. 1921 Bom. 252.

——Art. 97—Dispossession of vendee — Starting point—Failure of consideration.

Consideration for a sale fails from the moment the vendee with defective title is dispossessed by a true owner. 135 P.L.R. 1913=96 P.W.R. 1918=19 Ind. Cas. 5.

——Arts. 97 and 62—Dispossession of vendee — Suit for recovery of purchase money—Limitation.

A vendee's possession under purchase is an existing consideration so long as such possession lasts and limitation commences only from the time when he is dispossessed. Art. 97 and not 62 applies for recovery of the purchase-money. 55 Ind. Cas. 93 (Nag.).

——Art. 97—Dispossession of vendee — Suit to recover purchase money.

Where under a contract of sale the vendee was given possession of the property sold and on being subsequently dispossessed sued to recover damages for the loss sustained by dispossession. *Held*, that as possession had been given under the contract of sale, the sale was not void *ab initio* and the plaintiff could recover his purchase-money in a suit under Art. 97. 31 M. 452; 14 M.L.T 524; 38 M. 887; 24 M. 27, 26 A. 519; 31 A. 68, foll. 19 M.L.T. 163=32 Ind. Cas. 176.

——Arts. 97 and 116—Dispossession of vendee—Covenant for title—Covenant for quiet enjoyment—Breach—Sale of land—Suit for damages—Limitation.

Owing to a defeat in the title of the vendor, the original sale having been by a widow, a suit was brought against the vendee and a decree was obtained on 30th March, 1911 and this decree was upheld by the High Court finally on 7th October 1914. The vendee had been dispossessed in execution of the decree of the 1st Court on 29th November, 1911; and he brought his suit for damages for breach of covenants on 16th October, 1917. *Held*, that the cause of action for breach of the covenant for title arose on the date of the decree of the 1st Court on 30th March, 1911. 46 Cal. 670, foll. The breach of the covenant for quiet enjoyment was broken only on the date of dispossession of the vendee and the suit viewed as one for damages for breach of that covenant was not barred. 11 L.W. 537=27 M.L.T. 304=60 Ind. Cas. 235=39 M.L.J. 449.

——Arts. 97, 116—Breach of covenant—Dispossession of the vendee—Return of sale consideration—Registered sale-deed.

A sale deed set out that the porperty sold was unencumbered and there was a covenant that if the vendee was dispossessed from any portion of the property, the vendors would repay a proportionate part of the sale price. The vendee was dispossessed from a portion of the property by a prior incumbrancer. *Held*, that Art. 116 and not 97, governed the suit and the suit could be brought within 6 years from the date of possession. 5 A.L.J. 410; 26 B. 750. (1908) 5 A.L.J. 484=1908 A.W.N. 185=30 A. 405 (N.).

——Art. 97—Sales mutual—Dispossession of one by creditor of other—Suit for money.

Two persons mutually conveyed land to each other, the one being consideration for the other. One of them the plaintiff, was disposed of the lands conveyed to him in execution of a decree obtained against the other party by reason of that other party having been in possession somehow of the properties conveyed to plaintiff. *Held*, the plaintiff was entitled to recover the loss sustained by him as money paid upon an existing consideration which afterwards failed. (1905) 8 Bom.L.R. 283.

——Art. 97—Dispossession of vendee—Suit on covenant in sale deed for repayment of consideration money after ouster of vendee — Terminus a quo.

A suit by the vendee of immoveable property upon a covenant in the sale-deed to indemnify him in the event of disturbance of possession is not barred by limitation if brought within three years of the disturbance or ouster though long after 3 years from the date of a decree for possession in virtue of which the possession was disturbed. 1904 A.W.N. 92=26 A. 519=1 A.L.J. 231.

(c) Excess payment.

——Art. 97—Applicability.

A suit by the judgment-debtor to recover the amount realised by the decree-holder in excess is governed by Art. 115 or 120 and not by Art. 97. 33 P.L.R. 1084=A.I.R. 1933 Lah. 112=140 Ind. Cas. 472.

——Art. 97—Excess payment.

After a preliminary decree on a mortgage a Mahomedan mortgagee died. The judgment-debtor agreed with one of his co-heirs and paying a certain sum of money obtained a discharge. The other heirs got a final decree and it was held that out of the sum paid, the amount representing the payee's share, should be considered as having been paid towards the satisfaction of the decree. In execution money was paid. After five years the judgment-debtor applied for refund of the amount paid in excess of the decretal amount. *Held*, that the application was barred, as time began to run from the date of decree, the cause of action being to recover the sum paid in excess as on failure of consideration. 15 A.L.J. 57=38 Ind. Cas. 601.

(d) Execution sale—Failure of consideration.

——Art. 97—Applicability. See EXECUTION SALE. (1949) 1 M.L.J. 449=A.I.R. 1949 Mad. 638.

——Art. 97—Applicability — Court sale—Rateable distribution of purchase money—Declaration in suit by third party that judgment-debtor had no saleable interest—Suit by purchaser for refund of money paid out—Limitation. *See* LIMITATION ACT, ART. 120. 228 Ind. Cas. 479=A.I.R. 1947 Lah. 129.

——Art. 97—Failure of consideration in execution sale.

Where an execution sale is confirmed and the objections to the sale are subsequently allowed and also confirmed in revision, a suit by the auction-purchaser for recovery of the purchase price on failure of consideration for sale, falls under Art. 97, and not under Art. 62, and the cause of action arises either from the date of the order allowing the objetcions or from the date of the order in revision confirming the objections. A.I.R. 1941 Pesh. 41=194 Ind. Cas. 565.

——Art. 97—Execution sale—Failure of consideration—Suit by auction-purchaser for refund of consideration.

Where an auction-purchaser loses a portion of the property in consequence of a suit by a third party, his suit for refund of purchase-money is governed either by Art. 97 or by Art. 68 and not by Art. 120. 1937 O.W.N. 83=A.I.R. 1937 Oudh 286=13 Luck. 138=166 Ind. Cas. 705.

——Art. 97—Execution sale—Failure of consideration—Refund of consideration.

A suit by an auction-purchaser for refund of purchase money it being found that the judgment-debtor had no saleable interest in the property, is governed by either Art. 62 or Art. 97 and not Art. 120. 1937 O.W.N. 83=A.I.R. 1937 Oudh 286=13 Luck. 138=166 Ind. Cas. 705.

——Art. 97—Execution sale—Failure of consideration—Mortgage — Decree and sale—Suit to set aside—Suit to recover consideration.

In a suit on mortgage, mortgagor admitted the loan and decree was passed. The property was sold in execution and was ultimately purchased by mortgagee. A suit was then filed by a person claiming the property and alleging that the mortgage was not binding on him. His suit was decreed and the mortgagee was dispossessed. The mortgagee then sued for the amount of consideration.

Held, that cause of action arose on the day the suit challenging the mortgage was decreed and the mortgagee was dispossessed. 101 Ind. Cas. 414=5 Rang. 283=54 I.A. 145=29 Bom.L.R. 863=31 C.W.N. 830=4 O.W.N. 517=1927 M.W.N. 489=26 M.L.W. 429=25 A.L.J. 918=46 C.L.J. 344=9 P.L.T. 21=A.I.R. 1927 P.C. 99=52 M.L.J. 579 (P.C.).

——Art. 97—Execution sale—Failure of consideration—Auction-purchaser's suit — Suit to recover purchase-money on setting aside sale.

Where after an auction sale the judgment-debtor is declared to have no saleable interest in the property sold by a decree of Court, limitation for a suit to recover purchase-money begins from the date of such a decree and not from the date when purchaser was deprived of the possession of property purchased. 40 Cal. 187 and 46 cal. 676 (P.C.) Foll

Quaere, whether Limitation Act, Art. 97 applies to such a suit. 91 Ind. Cas. 768=30 C.W.N. 79=A.I.R. 1926 Cal. 297.

——Art. 97—Execution sale—Failure of consideration—Dispossession—Patni sale—Setting aside — Suit by dispossessed purchaser for recovery of money limitation.

The purchaser at a patni sale paid the money into Court, and the decree holder drew it out of Court. The sale was subsequently set aside in a suit and the decree was affirmed on appeal. On the consequent dispossession of the purchaser, the purchaser sued for recovery of the money from the decree-holder. *Held*, that the suit was governed by Art. 62 rather than Art. 97 and the starting point of limitation was the decree of the first Court. 17 A.L.J. 514=46 C. 670=36 M.L.J. 557=23 C.W.N. 721=21 Bom.L.R. 632=(1919) M.W.N. 258=30 C.L.J. 71=26 M.L.T. 131=10 L.W. 414=50 Ind. Cas. 444 (P.C.).

——Art. 97—Suit for refund of purchase money —Rent Recovery Act—Sale set aside:—See MADRAS ACTS—RENT RECOVERY ACT. 17 M.L.J. 298.

(e) Failure of agreement to perform.

——Art. 97—Consideration fails, meaning of — Limitation—Starting point.

Where it is agreed between the creditor and the manager of an estate who was in the habit of borrowing money from the creditor that the balance due to creditor should be treated as an advance for the supply of tea from the estate for a period of three years to the creditor but the agreement is subsequently repudiated and the creditor claims the amount agreed to be treated as advance, the creditor is not entitled to recover the money till the consideration failed by reason of the repudiation of the agreement, and a suit brought within three years of the date of repudiation is in time. A.I.R. 1938 Mad. 966=(1938) M.W.N. 1023=48 M.L.W. 666=(1938) 2 M.L.J. 688=182 Ind. Cas. 929.

——Art. 97—Contract of sale becoming impossible of performance—Starting point.

In a certain contract for the sale of property the vendor was to satisfy certain conditions before completion of the contract, but no time was specified for it. The vendor mortgaged the property to another and afterwards it was sold in satisfaction of that mortgage. The purchaser then sued for recovery of deposit money.

Held, that the purchaser need not have sued within a reasonable time. It was Art. 97 and not 60 nor 115, that governed such a case, and time was to be counted since when the property was sold in satisfaction of the mortgage because it was, then that the contract, having become impossible of performance ended. 117 Ind. Cas. 700=33 C.W.N. 115=56 Cal. 455=A.I.R. 1929 Cal. 216.

——Art. 97—Failure agreement to perform.

In September, 1908, defendant No. 1 contracted with the plaintiff for a certain price to procure from defendant No. 2 a reconveyance of certain property to the plaintiff. In November, 1908, defendant No. 2 conveyed the property to *V*. In January, 1912, the plaintiff sued to recover the consideration money from defendant No. 1. *Held*, that even applying Art. 97 to the case, the suit was time-barred. 41 Bom. 31=18 Bom.L.R. 806=36 Ind. Cas. 613.

——Art. 97—Contract—Sale of land—Consideration—Date of failure—Limitation.

The plaintiff paid off the liabilities of the defendants on certain mortgaged lands under contracts whereby the defendants agreed to convey to him within a month the mortgaged properties. Plaintiff brought two suits alleging that the defendants did not execute the sale deeds within the stipulated time, and claimed rescission of the said contracts and a refund of the earnest money with interest. Both courts in India held that time was not essence of the contract and dismissed the suits. The plaintiff subsequently brought two suits for specific performance of the said contracts, or, in the alternative, for a refund interest. The High Court held that specific performance could not be decreed, because the terms of the contracts could not be ascertained but decreed a refund with interest, holding that Art. 97 applied to the case and that the consideration failed from the date of the judgment, pronouncing that the contracts were not legally enforceable and consequently the claim for refund was not barred by limitation. *Held*, that the decision of the High Court was right. 31 All. 68=36 I.A. 44=9 C.L.J. 512=11 Bom.L.R. 525 =19 M.L.J. 295=6 M.L.T. 89=1 Ind. Cas. 890 (P. C.).

——Art. 97—Agreement to sell—Suit for specific performance—Agreement declared unenforceable—Alternative claim for refund of consideration paid thereunder.

The defendants, against whom a decree for foreclosure was outstanding, agreed to sell certain immoveable property to the plaintiff and the plaintiff paid into Court as part of the consideration the amount due by the defendants under the foreclosure decree. The defendants neither executed a conveyance of the property which they had agreed to sell nor did they return to the plaintiff the money. Plaintiff thereupon sued the defendant, claiming in the alternative either a decree for the specific performance of the agreement to sell or a refund of the money paid by him as part of the consideration for the sale agreed upon. The court of first instance gave the plaintiff a decree for specific performance. On appeal by the defendants it was *held* by the High Court (1) that the terms of the agreement to sell not having been satifactorily proved, no decree for specific permormance could be but (2) that the plaintiff was entitled to get back the money which he had paid under the agreement; (3), that the plaintiff's alternative claim for a refund on failure of consideration was governed by Art. 97, and was not barred by limitation, inasmuch as limitation began to run from the date of the decree declaring the agreenment to sell to be unenforceable. 11 A. 47 foll. (1901) 1903 A.W.N. 117=25 A. 618.

(f) Failure of vendee to get possession.

——Arts. 97, 62 and 116—T. P. Act; S. 55—Suit for refund of purchase-money by vendee.

(Applicability of Arts. 97, 62 and 116 to a suit by vendee for the refund of consideration on failure to obtain possession, considered.) (1945) A.L.J. 473=1945 A.W.R. (H.C.) 310=A.I.R. 1946 All. 150=224 Ind. Cas. 52.

——Art. 97—Failure of venlee to get possession—Suit for refund of purchase-money—Starting point

A vendee who had paid the full consideration for the land purchased by him, failed to get possession of the whole land as the whole of it did not belong to the vendor:

Held, that his suit for refund of money in respect of such land was governed by Art. 97 and the time began to run from the date he found it unable to get possession. A.I.R. 1935 Lah. 685=160 Ind. Cas. 574.

——Art. 97—Failure of vendee to get possession—Suit for refund of purchase-money.

A suit for refund of purchase-money with damages against the Municipal which did not complete the sale and did not deliver the possession is governed by Art. 97. 58 C.L.J. 235=A.I.R. 1934 Cal. 148 =150 Ind. Cas. 89.

——Art. 97—Failure of vendée to get possession—Suit for refund of purchase-money against Receiver in insolvency—Limitation—Starting point.

A suit instituted by a person for refund of the amount paid by him to the Receiver as part of the purchase-money of the insolvent's estate, as the Insolvency Court did not sanction the sale, is governed by Art. 97, the cause of action arising on failure of consideration which happened when the plaintiff did not get the property promised to him. A. I. R. 1934 All. 547=(1934) A.L.J. 864=4 A.W.R. 558=148 Ind. Cas. 629.

——Art. 97—Failure of vendee to get possession—Suit for refund of purchase-money of—Limitation, starting point.

On September 18, 1926, defendant sold six shops to plaintiff for Rs. 10,000. One of the shops had been, before the date of the sale-deed, mortgaged by conditional sale to *P*. After the sale, the plaintiff did not get possession over the shop in dispute and then on December 22, 1926, he filed a suit against the defendant and *P* for possession of the shop. During the pendency of that suit, the defendant in the year 1927 filed a suit for cancellation of the sale-deed of September 1926. Both the suits were decided by the trial Court on one and the same date, *viz*., on May 12, 1927. That Court decreed the suit for cancellation of the sale-deed and dismissed the suit for possession of the shop in dispute. The plaintiff filed an appeal in the High Court against the decree in the suit filed by the defendant but preferred no appeal against the decree in the suit filed by him for possession of the shop. The result was that the decree dismissing his suit became final. The High Court, on April 22, 1931, allowed the appeal of the plaintiff and dismissed the suit for cancellation of the sale-deed. The plaintiff on April 7, 1933, filed a suit for refund of the sale-price:

Held, that the claim for refund of the sale-price was governed by Art. 97. The consideration of the shop failed either in September 1926, or at any rate on May 12, 1927, when the plaintiff's claim for possession was dismissed, and not when the High Court dismissed the suit for cancellation of sale-deed. The period of limitation of refund of the sale consideration, therefore commenced to run from May 12, 1927, and as the suit was not filed within three years of that date, it was barred by limitation. A.I.R. 1937 All. 689=(1937) A.L.J. 812=1937 A.W.R. 696 =171 Ind. Cas. 923.

——Art. 97—Failure of vendee to get possession—Refund of consideration.

A mortgaged his property to *B*. After *B's* death. *A* paid the mortgage money to *B's* sons and obtained a deed of redemption. *A* sued for possession and in that suit it was decided that *B* had gifted the property to his nephews. *A* sued *B's* sons for refund of the amount paid to them. *B's* sons had further agreed that if *A* failed to get possession they would recoup him:

Held, (*i*) that the suit was really one for recovery of money paid upon an existing consideration which afterwards failed and was governed by Art. 97, under which the plaintiff could sue within three years from the date of the failure of the consideration;

(*ii*) even if Art. 97 did not apply the suit would come within Art. 116. 32 P.L.R. 457=A.I.R. 1931 Lah. 448=13 L. 1=135 Ind. Cas. 63.

——Art. 97—Failure of vendee to get possession—Suit for specific performance—Subsequent suit for money paid on a consideration that failed.

A agreed to sell to *B* lands belonging to himself and his son. *B* sued for specific performance and got a conveyance executed. *B* sued for possession afterwards when it was found that the sale did not bind the son's interest, and *B* was given the value of defendant's share instead of a decree for partition. He then sued to recover the balance of the price paid. *Held*, that the suit was not barred by limitation as the failure of consideration must be taken to have occurred when it was found in the suit for possession that *B* was not entitled to get the son's share. Art. 97 applied to the case. (1899) 24 M. 27=10 M. L. J. 217.

——Arts. 97 and 118—Failure of vendee to get possession—Vendor and purchaser — Breach of covenant—Refund of consideration.

The defendant sold to the plaintiff half a village, on 16th September 1899. In respect of 1|6 of that share one Nangi was recorded in possession in view of maintenance. The plaintiff purchased with knowledge of her rights and obtained a relinquishment from her. The courts, in spite of the relinquishment, refused to record the name of the plaintiff. The plaintiff brought a suit for possession against Nangi, but that suit was dismissed on 23rd November, 1900. The plaintiff brought the present suit for recovery of proportionate amount of sale consideration and damages on 9th July, 1904. Among other covenants there was one to the following effect. *Agar kistwaich se mushtare ko kabzana mile to woh nalish karke kabza le le aur main zemmedar harja aur kharcka ka hounga*. *Held*, that that was a covenant for title and defendant was liable to refund the proportionate amount of sale consideration. *Held*, further, that the suit was for compensation for breach of covenant and the suit was not governed by Art. 97 but by Art. 116. (1908) 5 A.L.J. 480=1908 A. W. N. 185=30 A. 402.

——Art. 97—Failure of vendee to get possession—Suit on failure of consideration to recover money paid.

The purchasers of a house were resisted in obtaining possession by certain persons, relatives of the vendor. On the 21st May, 1896 they instituted a suit for possession of the property, impleading the vendor and the person who had resisted them. The suit was finally disposed of on the 28th September, 1898, and it was decided that the plaintiffs, vendor was owner of one-fourth of the property sold. On the 27th September 1899 the plaintiffs sued the representatives of their vendor to recover the whole of the consideration they had paid together with interest and costs of the previous suit. *Held*, that the suit was barred by limitation under Art. 97. 1901 A.W.N. 24.

(g) Lease.

——Arts. 97, 115—Lease — Suit by lessee for refund of nazrana on lessor's failure to execute lease—Limitation—Starting point.

The plaintiff instituted a suit to recover two sums of Rs. 75 paid by him to the other party on October 26, 1926, and January 1, 1927. His case was that he made these payments by way of premium or *nazrana* because the defendant had promised to execute in his favour a lease of a certain holding. He claimed that the sums should be returned on the ground that the defendant had released from his promise and refused to execute the lease. The suit was originally instituted in the Court of Small Causes on October 26, 1929. That Court decided that it had no jurisdiction and returned the plaint for presentation to the proper Court on May 21, 1930. It was presented on June 11, 1930;

Held, that the claim was governed either by Art. 97 or by Art. 115.

Held, further that as the second payment was made on January 1, 1927, the breach of the promise occurred after that date and the cause of action arose from the breach. As the plaintiff was entitled to the benefit of the provisions of S. 14, his claim for both the sums was clearly within time. 1935 R. D. 345=A.I.R. 1935 All. 759=(1935) A.L.J. 966=1935 A. W. R. 818=155 Ind. Cas. 1092.

——Arts. 97 and 116—Lease—Suit for recovery of advance, by lessee on lessor's failure to deliver possession—Starting point of limitation.

A leased some property to *B* for a period of 7 years from July 1, 1920 to June 30, 1927, and *B* gave an advance which, under terms of the lease, was to be adjusted towards the last years' rent, but *B* was not given possession:

Held, that limitation for a suit by *B* for return of the advance in the absence of an agreement to take delivery of the land on a later date, would run from the time that the lessor failed to give possession to his lessee and that the suit filed on June 27, 1927 was barred whether Art. 97 or 116 applied. 35 L.W. 68=(1932) M.W.N. 51=A.I.R. 1932 Mad. 225=138 Ind. Cas. 119.

——Art. 97—Lease.

Action for breach of duty declared by S. 108 of Transfer of Property Act, is regulated by Art. 116 and not by Art. 97. 101 Ind. Cas. 707=6 Pat. 606 =8 P.L.T. 590=A.I.R. 1927 Pat. 248.

——Art. 97—Lease.

Per *Spencer, J.*—Lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Art. 116 to sue for damages for breach of the title for quiet enjoyment; but if from the inception the vendor had no title to convey and the vendee never gets possession, the starting point of limitation is the date of the sale. Where under a

sale-deed the purchaser paid certain sums of money to the secured creditors of the vendor and when the vendor failed to make good title, he sued for recovery of the sums so paid, more than 3 years after payment and after losing possession.

Held, that whether Art. 97 or 62 applied the suit was barred. 74 Ind. Cas. 416=17 M.L.W. 254= A.I.R. 1923 Mad. 392.

——Art. 97—Dispossession—Lease — When time begins to run.

A lessee was successfully sued and evicted by a third party. The lessee brought a suit for return of premium for failure of consideration. *Held*, that the period of limitation ran against him from the time of the actual eviction. 5 A.L.J. 484; 30 A. 402=5 A. L. J. 480; 26 A. 519, Foll. 10 Ind. Cas. 486 (Cal.).

(h) Mortgage.

——Art. 97—Applicability—Mortgage.

Mortgagee fraudulently purchasing the mortgaged property after the death of mortgagor from the guardian of the minor sons—Sale set aside—Suit by mortgagee on mortgage bond—Suit held could not be based on mortgage bond—Mortgagee is, however, entitled to a money decree—Limitation governed by Art. 97—Time ran from failure of consideration—Failure held occurred when mortgage was dispossessed—Suit held within time. A.I.R. 1942 Pat. 247=8 B.R. 230 =197 Ind. Cas. 498.

——Art. 97—Applicability—Mortgage.

The plaintiff lent a sum of money to a husband and wife and was subsequently put in possession of certain land belonging to the debtor by an oral transaction. There was no mortgage. The plaintiff retained possession for seven years utilising the usufruct in payment of interest, until he was dispossessed as the land was sold in execution of a decree against the debtor. The lender instituted a suit for recovering the loan:

Held, (1) that the oral transaction was ineffective to create any interest in the land.

(2) that the suit fell under Art. 97. Possession of the land was consideration which existed till the lender was deprived of possession and hence time began to run only from date of dispossession. A.I.R. 1937 Rang. 148=169 Ind. Cas. 945.

——Art. 97—Mortgage—Mortgage not acted upon—Suit to recover debt.

Where it appeared that the mortgage-deed had never been given effect to and the mortgagee sued to recover his debt,

Held, that Arts. 116 and 132 applied and limitation commenced from the date of first default.

Held, further that Art. 97 could not be applied to the case so as to compute the period of limitation from the date when the mortgage was declared ineffective by Court. A.I.R. 1930 Lah. 993=129 Ind. Cas. 201.

——Arts. 97 and 116—Mortgage—Suit for refund of mortgage money.

Where a mortgagee was dispossed under a decree obtained by certain persons on the ground that the mortgagors were members of joint Hindu family and had no authority to make the mortgage, a suit by the mortgagee to recover money secured by the mortgage and certain other sums, falls under Art. 97 and not Art. 116. 13 O.C. 155=6 Ind. Cas. 1016.

——Arts. 97 and 116—Mortgage—Defect in title—Mortgagee unable to obtain possession—Suit for money.

A suit by a mortgagee who could not obtain possession, of the mortgaged property by reason of a defect in the mortgagor's title is governed by Art. 97 and Art. 116 of the Limitation Act. 55 Ind. Cas. 413 (L.).

——Art. 97—Mortgage—Suit on mortgage decree in respect of part of consideration—Failure of rest of consideration—Second suit for personal decree—Cause of action—Date of first decree.

A husband, acting on behalf of his wife, obtained a loan on a mortgage executed by her to the creditor. The amount secured included also a sum of money appropriated by the husband for his own use, though he had represented to the creditor that the wife consented to offer the mortgaged property as security for that amount also. The mortgagee brought a suit against the wife and on the wife pleading that she did not undertake to pay the sum appropriated by the husband for his own use, the Court passed a decree excluding that sum. *Held*, that a suit by the creditor against the husband's representatives, the husband having died, is governed by Art. 97 and that limitation began to run from the date of the decree in the suit against the wife. 11 A. 47, foll. 1906 A.W.N. 88=8 A.L.J. 228=28 A. 466.

(i) Payment twice over.

——Arts. 97 and 115—Applicability — Payment twice over—Implied contract — Breach — Suit for damages — Limitation — Starting point—Suit by judgment-debtor against decree-holder for amount of uncertified payment not taken into consideration in execution—Starting point.

A suit by a judgment-debtor against his decree-holder to recover from him the amount of an uncertified payment made by him, after the decree-holder has recovered the amount twice over in execution is a suit for damages for breach of an implied contract by the decree-holder to get the payment certified and not to execute the decree. Art. 97 or Art. 115 will apply to such a suit and in either case, the starting point of limitation is the date when the decree-holder again applies for execution for the full decree debt ignoring the payment made but uncertified, as that constitutes the breach of the implied contract. The suit unless filed within three years of that date, will therefore be out of time and barred.

S. 24, Limitation Act, is not applicable to such a case, assuming that the section applies to suits on contract. The breach of contract *per se* gives a cause of action and time begins to run from that date, *i.e.*, the date of application for execution, ignoring the payment, and not from the date when second payment, is made or is exacted in pursuance of the order on the execution petition. A.I.R. 1951 Pat. 348.

——Art. 97—Payment twice over—Agreement to record satisfaction—Suit on failure—Starting point.

Where mortgagor judgment-debtor paid decretal debt to the co-parceners of decree-holder who represented that on partition the decree fell to their share, and where the decree-holder opposed the application to certify payment and the judgment-debtor paid the amount again to set aside the sale.

Held, that judgment-debtor's cause of action for refund accrued on refusal of Court to record satisfaction. 46 Cal. 670, Foll. 86 Ind. Cas. 378=A.I.R. 1925 Mad. 1049.

——Art. 97—Payment twice over — Money paid for releasing debt.

Where the debtor of an insolvent paid money to the auction-purchaser of the debt and subsequently the Receiver in Insolvency recovered the amount over again form him, and he thereupon brought a suit against the auction-purchaser to whom he had paid the money,

Held, that the suit is governed by either Art. 97 or 120 and not by Art. 29 or 62, Art. 29 not being applicable as there is no wrongful seizure of movable porperty under legal process. 62 Ind. Cas. 929 =4 L.L.J. 164=A.I.R. 1922 Lah. 103.

(j) Void transaction.

——Arts. 97, 116 and 62—Applicability—Suit for refund of consideration—Sale void *ab initio*. See LIMITATION ACT, ARTS. 62, 97 AND 116. 1950 N.L.J. 145=A.I.R. 1950 Nag. 229.

——Art. 97—Applicability—Void contract.

No distinction arises so far as the application of Art. 97 is concerned, between a void contract and a voidable contract. Where the property sold is handed over to the purchaser and later on it is discovered that the transaction is void and the purchaser is evicted from the property, purchaser's suit for recovery of purchase price falls under Art. 97 and not under Art. 96 or Art. 62; the *terminus a quo* for limitation is the date of dispossession of the purchaser from the property sold. A.I.R. 1945 Lah. 164=47 P.L.R. 122=221 Ind. Cas. 524.

——Art. 97—Void transaction—Refund of consideration.

Money paid as consideration or part consideration in a contract of sale is not money paid for the use of the payer except perhaps when the contract is of such a nature that it is void in law *ab initio*. Article 62, does not apply for the refund of such consideration but Atr. 97. A.I.R. 1942 Sind 37=I.L.R. (1941) Kar. 495=199 Ind. Cas. 438.

——Art. 97—Suit for money paid on a void transfer with delivery of possession—Limitation—Starting point.

Certain occupancy-tenants effected a mortgage in favour of one of the landlords and put him in possession. A suit was brought by other landlords and the mortgage was set aside as having been made without their consent. This decree was executed and the mortgagors were formally put in possession. In spite of this, the mortgagees remained in possession. Alleging that they had been subsequently dispossessed, they sued for the money lent:

Held, that in a suit of this nature it was for the plaintiffs to show that they had been dispossessed within three years of the date of the suit and as they had failed to prove the date of dispossession, the suit was time-barred.

Obiter—In a case of this nature time begins to run under Art. 97, from the date on which the plaintiffs ceased to be in possession as mortgagees and the fact that they remained on as trespassers will not affect the running of time. A.I.R. 1933 Lah. 83=34 P.L.R. 104=140 Ind. Cas. 760.

——Art. 97—Void transaction—Suit for refund of money on agreement to sell—Limitation.

Article 97 does not apply to a case where there has been no sale or in any case where the sale is void *ab initio*. The article does not govern a suit on an agreement to pay money made by the guardian of certain minors who agreed to convey the minor's property but who was found unfit to be a guardian and was removed from guardianship. A. I.R. 1933 Sind 379=27 S.L.R. 422=147 Ind. Cas. 94.

——Art. 97—Applicability—Void transaction.

A suit for reimbursement by the purchaser of certain property of the amount paid for the redemption of an undisclosed mortgage, after the purchase in his favour was found to be sham and nominal, is not governed by Art. 97. It cannot be said to be "for money paid upon an existing consideration which afterwards fails", because *ex hypothesi* no consideration was eve. intended for the transaction. 128 Ind. Cas. 907=32 Bom.L.R. 1376=A.I.R. 1931 Bom. 39.

——Art. 97—Void transaction.

Where a house was mortgaged while under attachment, a suit by mortgagee to enforce the personal security is governed by Art. 67, the mortgage being void altogether, Article 97 does not apply to such a case. 27 P.L.R. 801=A.I.R. 1927 Lah. 101.

——Art. 97—Void transaction.

Even though a mortgage is void, if the mortgagee got possession, it should be held that he had an existing consideration for his mortgage and it would only fail when the motrgagee was finally dispossessed. 89 Ind. Cas. 332=A.I.R. 1925 Oudh 19.

——Art. 97—Void transaction.

It is a reasonable construction of the word "in discovered to be void" in S. 65 to hold that they apply to a case where an agreement which was not *prima facie* void in its entirely, though it might be void in part is declared by the Courts to be void and any money paid under such an agreement is money paid under an existing consideration which afterwards fails and in such a case time runs only from the date of the failure of the consideration. 93 Ind. Cas. 119=4 Bur.L.J. 197=A.I.R. 1926 Rang. 7.

——Art. 97—Void transaction—Alternative personal relief.

Where the manager of a Hindu joint family mortgages the family property for purposes not recognised by the law, the mortgage is void *in toto* and *ab initio*. There is no question of the security failing at a subsequent date. Therefore where in a suit on such mortgage the plaintiff prays for an alternative relief that if the property is not liable, he must be given a personal decree against the assets of the mortgagor, Art. 116 and not Art. 97 applies. 27 Cal. 762, Foll. 61 Ind. Cas. 205=8 O. L.J. 81=A.I.R. 1921 Oudh 47.

(k) Miscellaneous.

——Art. 97—Suit for recovery of payment male in consideration of voidable transfer.

A's suit against *B* for the recovery of a certain sum of money was withdrawn and dismissed on October 1, 1921. On the date of dismissal, *B* executed a mortgage in *C's* favour and *C* made an entry in the *bahi* of *A*, acknowledgnig the sum due by *B* to *A*. As there was subsequently trouble over the mutation, *C* instituted a suit against *B* and on its dismissal in appeal on June 26, 1923, *A* instituted a suit against *B*:

Held, that Art. 97 governed the case and having been filed within three years from June 26, 1923, the suit was in time. 13 L. 188=A.I.R. 1932 Lah. 382=33 P.L.R. 440=137 Ind. Cas. 828.

——Art. 97—Earnest money.

Limitation for suit for return of earnest money runs from the dismissal of suit for specific performance of a contract. 25 All. 618 ; 31 All. 68, foll. 71 Ind. Cas. 86 = 21 A.L.J. 265 = 45 All. 378 = 4 L.R.A. Civ. 176 = A.I.R. 1923 All. 321.

——Art. 97—Agent collecting money—Release of property for money received—Pres. Towns Ins. Act, S. 56.

Where under a power of attorney the agent managed his two principals' affairs and all their properties for recovering moneys due to them and executed three years before his being adjudged insolvent a release of his rights in certain properties in satisfaction of the debts he had collected on his principals' behalf. *Held* that under Art. 97 three years ought to be calculated from the date when the release deed became inoperative under S. 56, Pres. Towns Ins. Act. (1916) 2 M.W.N. 254 = 4 L.W. 364 = 37 Ind. Cas. 505.

——Arts. 97 & 115—Contract—Construction of a well—Breach.

Defendants entered into a contract for the construction of a well and received an advance of Rs. 1,000. The well was completed but the Revenue authorities however disapproved of the well. Plaintiff sued for refund of the advance. *Held*, on the facts, it was a suit for compensation for breach of contract and not on failure of consideration. So Art. 115 and not Art. 97 should be applied 66 P.L.R. 1911 = 202 P.W.R. 1911 = 9 Ind. Cas. 237.

——Art. 98—Applicability.

Suit against legal representative of guardian of minor's property for amount taken by guardian from minor and not repaid by him. *See* LIMITATION ACT, S. 10 AND ART. 98. I.L.R. (1948) Nag. 794 = A.I.R. 1949 Nag. 235.

——Art. 98—Scope—Breach of trust by father—Suit against daughter.

Article 98 deals with the loss occasioned by a breach of trust. If the original act constituted a breach of trust, then the act of abstracting the money from the trust estate and handing it over to another at once occasions a loss to the estate and gives rise to an immediate cause of action against the trustee for the breach. Article 98 does no more than carry this liability on to his estate after his death. It does not contemplate any different cause of action.

A trustee committed a breach of trust. A suit was brought against his daughter for the breach. She herself was not a trustee. She had not committed any wrongful act. The defalcated money was not in her possession. There was nothing in her hands which could be said to represent it.

Held, that Art. 98 applied. The suit against her was clearly one to make good the loss occasioned by her father's breach of trust out of his general estate. A.I.R. 1938 Nag. 30 = I.L.R. (1940) N. 94 = 176 Ind. Cas. 57.

——Art. 98—General estate—Joint family property—Survivorship—Son's liability.

The joint family property of the father and the sons which passes to the sons by survivorship on the death of the father is not the general estate of the deceased father under Art. 98. The sons are not liable to pay a debt of the father which was barred against him. 33 Mad. 308 = 20 M.L.J. 633 = 9 M.L.T. 321 = 7 Ind. Cas. 898.

——Art. 99—Applicability—Suit for contribution—Joint personal decree.

Article 99 applies to a suit for contribution in respect of a joint personal decree. It does not apply to a case where the liability is not personal but attaches to immovable property, *e.g.*, to a suit for contribution in respect of liability attaching to immovable property. A.I.R. 1943 Pat. 305 = 22 Pat. 187 = 10 B.R. 367 = 211 Ind. Cas. 334.

——Art. 99—Suit for contribution—Joint decree—Payment by one of the joint-debtors.

A, *B*, *C* and *D*, four brothers who formed a joint Hindu family, owed a certain sum of money to *E*. *E* sued *A* and *B* for recovery of the amount and obtained a decree on June 4, 1913 against the family which was represented by its manager. Subsequently, there was a partition and in 1924, *A* was arrested in execution of the decree and he executed a simple mortgage on July 4, 1924 in lieu of the amount due under the decree. He then instituted a suit against *B*, *C* and *D* on July 4, 1927, for contribution :

Held (i) that Art. 99 applied to the case ; the cause of action for the suit for contribution arose only on July 4, 1924 and the suit was not barred by limitation ;

(ii) the undertaking by *A* of the sole responsibility for payment by executing the mortgage was tantamount to payment and the suit was not premature. (1931) A.L.J. 651 = A.I.R. 1931 All. 652 = 134 Ind. Cas. 452.

——Art. 99—Applicability—Joint decree.

Where the plaintiff had paid the whole amount of a joint decree against him and the defendant and files a suit for contribution.

Held, that Art. 99, applied. 83 Ind. Cas. 875 = 22 A.L.J. 737 = 5 L.R.A. (Civ.) 534 = A.I.R. 1924 All. 843.

——Art. 99—Applicability—Claim for contribution in partition suit.

Where, in a suit by a member for partition of family property, the plaintiff prays that the balance of the family debt which had been realised from the plaintiff should be contributed by the defendants in proportion of their shares, the claim for contribution is a part of the accounts to be taken between the parties on the partition claim and will not be governed by Art. 99. A.I.R. 1939 Mad. 70 = 48 L.W. 485 = (1939) M.W.N. 1092 = 184 Ind. Cas. 17.

——Art. 99—Applicability—Usufruct insufficient—Sui to recover payment from darpatnidar.

Suit to recover payment from *darpatnidar*, if usufruct property is insufficient is not governed by Art. 99. A.I.R. 1931 Cal. 493 = 35 C.W.N. 678 = 134 Ind. Cas. 75.

——Art. 99—Applicability—Co-sharer paying revenue.

One co-sharer paying the Government revenue for whole estate in order to save the estate from being sold is entitled to contribution but there is no charge created in his favour over the property of the defaulting co-sharer. Article 99, Limitation Act, and not Art. 132 will consequently be applicable. The case bears no analogy to the " salvage lien " as the very essence of salvage service is that it must be voluntary. 111 Ind. Cas. 84 = 7 Pat. 613 = 9 P.L.T. 573 = A.I.R. 1928 Pat. 641.

——Sch. I, Art. 99—Applicability—Suit to enforce a charge under S. 82, T.P. Act—Limitation—Personal decree.

Art. 99 of the Limitation Act applies only to a suit for a personal decree under a charge created by S. 82 of the Transfer of Property Act, but not to a suit to enforce the charge itself. 38 All. 708 = 8 A.L.J. 854 = 11 Ind. Cas. 145.

——Art. 99—Applicability.

The article prescribes limitation only for cases when the whole amount due has been paid and is not applicable to cases where part only is paid. (1904) A.W.N. 74 = 26 A. 407 = 1 A.L.J. 148.

——Arts. 99, 120, 132—Applicability and Scope—Revenue payment of—Charge.

Article 120 does not apply to a suit for contribution in a case where the amount was realized by sequestration or sale of the property of the person seeking contribution. Per *Bhashyam Aiyangar* and *Moore, JJ.*—Where moneys have been received in excess of plaintiff's share of revenue from time to time under Art. 99 a suit for contribution will be barred as regards such portion of the excess as has been recovered more than 3 years before suit. Art. 99 applies to cases of suits brought for contribution by a co-sharer of an estate registered in the joint names of several. If the estate is registered in the name of one and the others are interested, Art. 61 will apply. Per *Bhashyam Aiyangar, J.*—A suit for the enforcement of a charge is governed by the 12 years' period provided by Art. 132. (1902) 13 M.L.J. 83 = 26 M. 686 (F.B.).

——Art. 99—Contribution—Nature of the right.

Whether the party seeking contribution has voluntarily made payment or is compelled to pay by coercive process, *e.g.*, execution of decree, a right to contribution arises when the person has paid in excess of his share for the joint liability of all. 57 Ind. Cas. 884 (Cal.).

——Arts. 99 and 61—"Paid"—Meaning of.

Quaere.—Whether money realised by sale of the plaintiff's property in execution of a joint decree against the plaintiff and the defendant is 'money paid' within Arts. 61 and 99. 18 C.W.N. 4020 = 20 Ind. Cas. 24.

——Art. 99—Starting point of limitation—Date of payment.

It is not safe to lay down any rigid formula for the purpose of determining the date of payment, as the question of payment being a question of fact, must be determined with reference to the circumstances of each case.

One *M* had a joint decree for rent against the plaintiff and defendants, and in execution of that decree, he obtained from the executing Court an order for the attachment of a sum which had been deposited into X Court by a judgment-debtor of the plaintiff, to the credit of the latter. Subsequently, on August 20, 1932, the executing Court, by its order, directed to transfer the money to the credit of the decree-holder and to send the payment of order to X Court. On September 3, 1932, the payment order was made over by X Court to the decree holder. The plaintiff brought a suit for contribution against defendants within three years from September 3, but beyond limitation from August 20:

Held, that the suit was not barred by limitation. The payment by the plaintiff to the decree-holder must be deemed to have been made on September 3, and time began to run from that date. A.I.R. 1940 Pat. 151 = 6 B.R. 96 = 185 Ind. Cas. 73.

——Art. 99—Starting point of limitation.

Where a co-sharer pays off arrears of rent or revenue to avert sale of the estate, the payment in excess of his share will be considered to be for others and the limitation to recover the same personally from others runs from the date of payment. A.I.R. 1936 Mad. 782 = (1936) M.W.N. 658 = 44 L.W. 135.

——Arts. 99 and 120—Suit for contribution by co-mortgagee—Starting point.

The plaintiffs and the defendant were mortgagees under a deed of May 29, 1908. The mortgage was executed for Rs. 1,000 on which plaintiffs were mortgagees of half of the property and the defendant was mortgagee of the remaining half. The plaintiffs and the defendant sub-mortgaged their mortgagee rights for Rs. 1,000, bearing interest at 12 annas per cent. per mensem on May 24, 1909. The plaintiffs' case was that they paid the amount due from them, Rs. 551-4-0, to the mortgagee on August 31, 1911, and that the defendant paid nothing on account of his share. It was further alleged that the representative of the mortgagee brought a suit on May 22, 1933, for sale of the mortgagee rights against the plaintiffs and the defendant as their liability was joint and obtained a joint decree against them, that in execution of the decree the mortgagee purchased the mortgage rights for Rs. 800 and got possession of the same through Court, on January 19, 1928, and that as the plaintiffs lost possession owing to the defendant's default, they were entitled to claim Rs. 500 with interest at one per cent. per mensem from the defendant. The plaintiffs filed their suit on January 9, 1931, and the suit was framed as one for contribution :

Held, that the suit was barred by time, that Art. 120 did not govern the suit and that even if Art. 99 applied, limitation would run from the date of sale and not from the date of dispossession. 10 O.W.N. 919 = A.I.R. 1933 Oudh 478 = 147 Ind. Cas. 1042.

——Art. 99—Starting point—Payment by one co-judgment-debtor—Suit for contribution.

Where payment is made by a co-judgment-debtor in Court and the payment is appropriated by Court in full satisfaction of a decree it is deemed to have accepted the payment on behalf of the decree-holder, it being looked upon as his agent or quasi-agent ; and, therefore, the limitation for a suit for contribution by such judgment-debtor against the other co-judgment-debtor begins to run from the date of acceptance of deposit in Court.

The criterion must always be whether or not the deposit made in excess of what is due by the person making the deposit, did or did not remain under the control of the person making it. 114 Ind. Cas. 134 = 56 Cal. 192 = 32 C.W.N. 1030 = 49 C.L.J. 5 = A.I.R. 1928 Cal. 361.

——Art. 99—Redemption by co-mortgagor—Contribution—Limitation.

A co-mortgagor redeeming a mortgage becomes assignee of the original security and therefore the limitation for his suit for contribution is the same as that for a suit by a mortgagee on his mortgage. 57 Ind. Cas. 868 (Cal.).

——Arts. 99, 61—Starting point—Putni Regulation 8 of 1891, S. 9—Purchase by one of the defaulters, effect of.

For a suit for contribution for payment by a defaulter-purchaser of a putni, against the former owners of the putni, the cause of action does not arise till the sale is set aside, and limitation begins to run only after the sale is set aside. (1905) 3 C.L.J. 93.

——Art. 102—Scope.

Article 102 applies only to suits for wages as such brought by the person entitled to the wages. A suit brought by persons not entitled to the wages cannot therefore be regarded as a suit for wages as such within the meaning of Art. 102. A.I.R. 1930 Oudh 420 = 7 O.W.N. 760 = 128 Ind. Cas. 66.

——Arts. 102 and 7—Applicability.

Suit for remuneration by person engaged to supervise work. *See* LIMITATION ACT, ARTS. 7 AND 102. 1949 N.L.J. 200 = A.I.R. 1949 Nag. 329.

——Art. 102—Applicability—Servant of Crown—Suit for arrears of pay—Limitation—Arts. 115, 120 and 131.

A suit by a servant of the Crown to recover arrears of pay is governed by Art. 102 and not by Art. 115 or 120. The word "wages" in Art. 102 covers salary also; it is intended to cover all claims for wages, pay or salary, not otherwise expressly provided for in any other article of the schedule. Art. 131 will not also apply, because a claim to recover arrears of pay is manifestly not one to establish a periodically recurring right. 49 Bom. L.R. 697 = 1947 M.W.N. 575 = 1947 F.L.J. 56 = A.I.R. 1947 F.C. 23 = 52 C.W.N. (F.R.) 2 = (1947) 2 M.L.J. 389 (F.C.).

——**Art. 102—Scope—Village barber, suit by.**

A suit by a village barber for remuneration for services rendered, is governed by Art. 102 and not by Art. 7. The mere fact that a village barber who may not be as highly skilled a person as a village carpenter or a village blacksmith gets a longer period of limitation would not justify the Court in straining the meaning of the words employed in Art. 7. A.I.R. 1941 Nag. 132 = 1941 N.L.J. 102. 194 Ind. Cas. 580.

——**Art. 102—Scope—Cook in hotel, suit by.**

A suit for arrears of salary by a person employed as a cook in a hotel is governed by Art. 102. 45 L.W. 205 = A.I.R. 1937 Mad. 340 = (1937) 1 M.L.J. 329 = (1937) M.W.N. 227 (1) = 171 Ind. Cas. 72.

——**Art. 102—Suit for arrears of *tastik* allowance—Limitation.**

A suit by a *pattali* (subordinate *archaka*) of a temple for *tasnik* allowance is not a suit for enforcing a periodically recurring right within Art. 134 but a suit for wages falling within Art. 102, and the fact that the allowance is paid out of funds provided by the Government by way of deduction from the land revenue cannot affect the question of limitation. A.I.R. 1936 Mad. 149 = (1936) M.W.N. 156 (2) = 70 M. L. J. 220 = 43 L.W. 431 = 161 Ind. Cas. 475.

——**Art. 102—Scope—Suit by motor driver.**

Article 102 which is a residuary article applies only where Art. 7 does not apply. Consequently, a suit by a motor driver and especially one who is provided with board and lodging by the employer is not governed by Art. 102 but by Art. 7. A.I.R. 1936 Lah. 661 = 38 P.L.R. 296 = 160 Ind. Cas. 1042.

——**Art. 102—Motor driver—A motor car driver is an artisan for purposes of Art. 7.**

A motor car driver should be included in the category of an artisan. There is also no reason why he should be treated differently from a household servant or labourer and given the benefit of a longer period under Art. 102. 104 Ind. Cas. 520 = 5 Rang. 477 = A.I.R. 1927 Rang. 279.

——**Art. 102—Scope—Suit by salesman.**

A suit for wages by a person employed as a salesman to assist the employer in the sale of commodities is governed by Art. 102 and not by Art. 7. A.I.R. 1935 Rang. 235 = 157 Ind. Cas. 732.

——**Art. 102—Scope.**

A suit by a *shahna* (person employed to watch crops) for his wages is governed by Art. 102. A.I.R. 1935 All. 102 = (1935) A.L.J. 78 = 4 A.W.R. 1253 = 152 Ind. Cas. 932.

——**Art. 102—Weighman in shop.**

A weighman employed to work at a shop is not a household servant nor is he an artisan. He cannot be treated as a mere labourer employed to do task work, that is to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. His work cannot be treated as purely manual labour so as to make Art. 7 of the Act applicable. He may be regarded in fact a shopkeeper's assistant and Art. 102 applies to a suit by him to recover his dues from his master. 90 Ind. Cas. 120 = 48 All. 164 = 23 A.L.J. 1059 = 6 L.R.A. (Civ.) 596 = A.I.R. 1926 All. 172.

——**Art. 102—Bisardar.**

Bisardar means a watchman who is paid by a share of crop which he watches. He is an outdoor servant and is certainly not an artizan, nor a labourer. A suit by him for his wages therefore, will not fall within Art. 7 but will fall under Art. 102. 79 Ind. Cas. 576 = 26 O.C. 327 = 10 O.L.J. 345 = A.I.R. 1924 Oudh 189.

——**Art. 102—'Wages'—Meaning of—Salary.**

Article 102 applies to a suit for the recovery of salary due to an employee for service rendered to his master. The word "wages" in Art. 102 is not restricted to wages of manual labourer. 48 C.W.N. 317 = I.L.R. (1944) 2 Cal. 283 = A.I.R. 1955 Cal. 302 (1).

——**Art. 102—'Wages' meaning of.**

Perquisites or emoluments received by an *archaka* of a temple are wages within the meaning of Art. 102. A.I.R. 1935 Mad. 128 = 41 L.W. 40 = (1935) M.W.N. 120 = 68 M.L.J. 132 = 155 Ind. Cas. 591.

——**Arts. 102 and 115—Broker—Commission—Suit for—Wages, meaning of.**

A suit for commission by a broker against the principal is one for money under a contract and is governed by Art. 115 and not by Art. 102. 'Wages' in Art. 102 is in general, used for remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals. 39 All. 81 = 14 A.L.J. 873 = 36 Ind. Cas. 371.

——**Art. 102—Set-off of claim for wages—Starting point of limitation.**

Suit to recover money from dismissed employee—Defendant claiming set-off in respect of arrears of pay—Plaint admitting arrears—Plaint filed within 3 years of dismissal—Written statement within 3 years of plaint :

Held, that the claim for the arrears of pay could not be said to have been barred at the date of the written statement, which was filed within 3 years from the date of the filing of the plaint. A.I.R. 1936 Cal. 277 = 167 Ind. Cas. 265.

——**Art. 102—Monthly wages—Starting point of limitation.**

Article 102 lays down that wages not otherwise expressly provided for in the schedule must be taken to be subject to a time which begins to run from the time when the wages accrue due. Where the wages are monthly wages, they accrue and become due on the final day of the month. (1935) A.L.J. 379 = A.I.R. 1935 All. 716 = 1935 A.W.R. 365 = 154 Ind. Cas. 713.

——**Art. 103—Applicability—Registered deed—Dower debt converted into mortgage-deed.**

A registered deed executed by Mahommedan husband long after the marriage, promising to pay dowry then still due from him, on demand and hypothecating certain immovable properties as security for its due payment, converts the dower debt into a mortgage-debt, and to a suit on such deed for the amount of the dowry, six years' rule of limitation is applicable. 99 Ind. Cas. 553 = A.I.R. 1927 All. 268.

——**Arts. 103, 104 and 116**—Article 116 applies to suits for recovery of dower debt when there is a registered dower deed, although Arts. 103 and 104 would apply when there is no such registered instrument and time runs from the date of death of the lady. 44 Cal. 759 (P.C.), foll. 36 Cal. 184, Not foll. 73 Ind. Cas. 17 = 37 C.L.J. 108 = 27 C.W.N. 210 = A.I.R. 1923 Cal. 507.

——**Arts. 103, 104 and 116—Articles 103 and 104 are Controlled by Art. 116 of the Limitation Act.**

Where the dower is payable under a registered instrument executed by the husband in favour of the wife, the suit, whether it is brought by the wife during her lifetime or whether it is brought by her heirs after her death, is a suit for compensation for breach of contract in writing, registered within the meaning of Art. 116. A suit for dower under a registered instrument brought by the heirs within 6 years of the wife's death is within time. (1916) 44 Cal. 759 (P.C.), foll. 70 Ind. Cas. 169 = 36 C.L.J. 379 = 50 Cal. 253 = A.I.R. 1923 Cal. 152.

——Art. 103—Starting point of limitation.
Where a Muhammadan husband has deliberately and fraudulently witheld from the wife all knowledge of the divorce, in other words, the wife did not know of her right to claim dower by reason of the fraudulent conduct of the husband, time for instituting a suit for dower by the wife would only begin to run against her when the fraud has become known to her. A.I.R. 1943 Lah. 215 = 45 P.L.R. 231 = I.L.R. (1944) Lah. 186 = 209 Ind. Cas. 157.
Reversing A.I.R. 1941 Lah. 166 = 198 Ind. Cas. 326.

——Art. 103—Starting point of limitation.
A suit for dower is governed by Art. 103 and the period of limitation is three years from the date when dower becomes payable. A.I.R. 1933 Pesh. 31 = 142 Ind. Cas. 833.

——Art. 103—Starting point.
The existence of a demand on the wife's part and of a refusal to pay on the husband's is the starting point of limitation for a suit by a Mahomedan wife to recover the amount of her prompt dower. 78 Ind. Cas. 106 = A.I.R. 1925 Oudh 267.

——Art. 104—Starting point of limitation.
A suit brought by a Muhammadan wife for deferred dower is in time if it is within three years from the date when *talak* pronounced in her absence by her husband was communicated to her though it may be more than 3 years from the date of pronouncement. (1931) M.W.N. 570 = A.I.R. 1931 Mad. 647 = 133 Ind. Cas. 375.

——Art. 104—Possession in lieu of dower—Dispossession more than 3 years after husband's death—Suit for dower.
The husband died in 1895. In 1906 she was forcibly dispossessed whereupon she brought a suit in 1907 for the recovery of the balance of her dower debt. It being contended that the suit was barred by Art. 104, Sch. II of the L.A. 1877, *held*, that the limitation ran from dispossession and not from death of the husband. 8 A.L.J. 578 = 33 All. 568 = 10 Ind. Cas. 282.

——Arts. 105 and 108—Applicability.
A suit for surplus profits is a part of the redemption suit and based on the same cause of action and ought to be tried in the redemption suit. An order by the Judge that it should be tried separately does not alter its nature nor that of the cause of action on which it is based, and limitation is governed by Art. 148 and not by Art. 105. 103 Ind. Cas. 290 = 10 N.L.J. 142 = A.I.R. 1927 Nag. 302.

——Art. 105—Article 105 of the Limitation Act applies to cases where the mortgagor has not to bring a suit for redemption but has to sue only for recovery of the surplus collections. 64 Ind. Cas. 75 = 26 C.W.N. 123 = A.I.R. 1922 Cal. 189.

——Art. 105—Suit by mortgagor for loss.
A mortgagor can under Art. 105 sue the mortgagee for loss occasioned to the trees on the mortgaged property, within three years from redemption by deposit in Court or otherwise. 6 O.L.J. 53 = 50 Ind. Cas. 152.

——Art. 105—Suit for balance of collections by mortgage.
A usufructuary mortgage provided that after deducting interest from the collections the balance should be paid to mortgagor annually. After redemption without intervention of court on payment of the principal money, a suit was brought for the recovery of the balance of collections after deducting interest. *Held*, that the Art. applicable is Art. 105. 20 O.C. 25 = 38 Ind. Cas. 610.

——Art. 105—Mesne profits and interest on the mortgaged property.
The limitation applicable for the recovery of mesne profits and interest is governed by Art. 105. 2 O.L.J. 620 = 32 Ind. Cas. 729.

——Art. 105—Redemption suit—Applicability of article.
Art. 105, Sch. II of the Limitation Act of 1877 has no application to a redemption suit. The Lim. Act 1871 provided 3 years as the period for recovering surplus profits and it ceased to have any effect on 1st October, 1877 as the L.A. of 1877 came into operation on 1st October, 1877. 10 Ind. Cas. 402 (All.).

——Arts. 105 and 109—Right of mortgagor to sue for surplus profits—Starting point—Revival of barred right.
A suit by a mortgagor after the satisfaction of the mortgage to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters the mortgaged property and falls under Art. 105 and not Art. 109. Nothing contained in the Lim. Act of 1877 could revive right barred under the earlier Act. 33 All. 244 = 7 A.L.J. 1201 = 8 Ind. Cas. 689.

——Art. 105—Applicability.
Art. 105 applies to a case where the mortgagor gets possession otherwise than by means of a suit for redemption. (1907) 1908 A.W.N. 96 = 5 A.L.J. 192 = 30 A. 225.

——Art. 106.

Synopsis.

1. Applicability and Scope.
2. Continuance of partnership.
3. Partnership not dissolved.
4. Starting point.
5. Suit for accounts.
6. Suit for general account barred—Effect of.

1 Applicability and Scope.

——Art. 106—Scope—Administration suit.
Administration suit by Muhammadan heir against the co-heirs does not fall under Art. 106. 1941 A.W.R. 1 = 1941 M.W.N. 729 = A.I.R. 1940 P.C. 215 = 7 B.R. 210 = 53 L.W. 1 = 43 P.L.R. 63 = 45 C.W.N. 226 = I.L.R. (1940) Kar. (P.C.) 410 (Sup.) = 67 I.A. 406 = (1941) 1 M.L.J. 594 = I.L.R. (1941) Bom. 8 = 43 Bom. L.R. 388 = 73 C.L.J. 214 = 1941 O.W.N. 734 = 191 Ind. Cas. 113 (P.C.).

——Art. 106—Applicability—Settlement of accounts on dissolution.
On a dissolution of partnership the partners may settle the accounts of the partnership between themselves. If that has been done, there is no longer any question of a suit for dissolution and accounts under Art. 106. A.I.R. 1938 Mad. 133 = (1937) 2 M.L.J. 511 = 46 L.W. 910 = (1937) M.W.N. 1285 = 176 Ind. Cas. 639.

——Art. 106—Settlement after dissolution.
There was a partnership between the plaintiffs and the defendants in a contract which ran from September, 1919 to March, 1920. The accounts of the parties were not finally adjusted until the year 1924 and at that date, a settlement was arrived at between all the partners. The plaintiffs sued in 1927 for the amount due under the settlement. It was contended that inasmuch as this settlement was arrived at more than three years from what is said to be a dissolution of partnership, *viz.*, the determination of joint adventure, there was no consider tion for it.
Held, that the fact that the partners could only have asked for an account under Art. 106 within three years of March, 1920, has no bearing at all upon the question when in fact they have come together and have agreed to an account between themselves, and have made mutual promises to abide by such settlement. There is ample consideration in such a case for the promise given by each partner in the mutual promises made by the other

partners. A.I.R. 1933 P.C. 120 = 37 C.W.N. 580 = 64 M.L.J. 596 = (1933) M.W.N. 406 = 37 L.W. 746 = (1933) A.L.J. 545 = 35 Bom. L.R. 745 = 57 C.L.J. 273 = 142 Ind. Cas. 549 (P.C.).

——Arts. 106 and 116—Applicability.

Under a registered document one *K*, defendant No. 1 and one *S* entered into partnership in the year 1918. The 1st defendant made alienation of some of his interest in the year 1919. The present suit was instituted in July, 1925, for directing accounts of partnership. *S* having died in 1920, his legal representatives were made defendants. The suit was dismissed, as having been brought after more than three years since the death of *S* as barred under Art. 106. In appeal it was contended, that under S. 3 (10) of Contract Act, he could sue for dissolution of partnership within six years from the date of alienation by defendant No. 1 and the article applicable was 120.

Held, that the suit was really for taking accounts of dissolved partnership and hence barred under Art. 106. The suit being essentially one for accounts of dissolved partnership was not a suit "for compensation for the breach of a contract in writing registered" within the meaning of Art. 116. A.I.R. 1934 Mad. 162 = 39 L.W. 164 = (1934) M.W.N. 22 = 66 M.L.J. 625 = 57 M. 378 = 151 Ind. Cas. 81.

——Art. 106—Suit for declaration that property attached does not solely belong to judgment-debtor.

A suit for a declaration that property attached as belonging to a partner is not solely his but the plaintiff has a share therein and that the defendant is not entitled to have it attached and sold in execution of a decree obtained against the partner as if it belonged to him exclusively, is not governed, for purposes of limitation, by Art. 106. The cause of action for such a suit arises when the property is attached. A.I.R. 1933 All. 926 = 148 Ind. Cas. 515.

——Arts. 106, 120—Scope—Action between partner and his sub-partner.

Article 106 is intended to deal with suits between partners *inter se* and does not apply to actions between a principal partner and his sub-partner. 38 L.W. 858 = 65 M.L.J. 789 = A.I.R. 1934 Mad. 12 = (1933) M.W.N. 1382 = 57 M. 347 = 148 Ind. Cas. 204.

——Arts. 106 and 120—Scope.

Article 106 governs a suit for accounts and share of profits in respect of a partnership that had already been dissolved. It is not open to a party to bring a suit saying that a partnership still subsists when it has, in fact, been dissolved and then to claim the benefit of Art. 120 which applies to a suit for a dissolution and taking accounts of a partnership which is subsisting. A.I.R. 1933 Mad. 353 (2) = 37 L.W. 288 = (1933) M.W.N. 689 = 144 Ind. Cas. 573.

——Art. 106—Applicability.

Where *B* and *D* had jointly taken a contract for the sale of liquor and subsequently *K* and *A* became sub-partners with *B* in his share, and *K* alleged in his suit that he had advanced a certain amount of money to *B* in connection with his sub-partnership and that he had been repaid part of it by *B* who had made an entry in *K*'s account book acknowledging that a certain sum remained due by him as a loan and verbally agreed to pay interest on that amount :

Held, for purposes of limitation, the suit was governed by Art. 106, and that as the acknowledgments relied on were not acknowledgments of the existence of the liability relating to the cause of action on which the suit was brought, the acknowledgments did not save limitation. A.I.R. 1932 Lah. 519 = 33 P.L.R. 713 = 138 Ind. Cas. 375.

——Arts. 106 and 89—Suit for accounts.

Partnership dissolved—Agreement that certain partner shall collect outstandings—Suit for account of moneys realised—Article 89 and not Art. 106 applies. A.I.R. 1931 Lah. 300 = 134 Ind. Cas. 527.

——Arts. 106 and 89—Money paid for joint purchase—Suit to recover.

A suit to recover money paid to defendant to be used in a joint purchase of property, is governed by Art. 89 and not 60 or 106 as the defendant was acting only as the agent of the plaintiff. 33 Ind. Cas. 438 (Lah.).

——Art. 106—Previous partnership—Accounts of—Enquiry into.

No suit can lie for settlement of three different partnerships consisting of different partners. But Limitation offers no bar to a Court instituting an enquiry into the financial relations of the partners *inter se* at the commencement of the partnership which the Court is engaged in winding up and for this purpose it may be necessary to go into the accounts of a previous partnership between the parties. Thus where a partner is neither seeking any relief against the heirs of a deceased partner, nor does he ask for accounts of partnerships dissolved by their deaths being taken for the purpose of making their heirs liable, but is only asking for dissolution and settlement of accounts of the partnership, the statute of limitation is no bar. 118 Ind. Cas. 741 = A.I.R. 1929 Sind 230.

——Art. 106—Death of partner.

S and *H*, both Muhammadan ladies, instituted a suit in 1924 for partition and possession of their share in certain immovable properties which *E*, husband of *S* and father of *H*, was said to have died possessed of. The suit properties were included in a partnership business. *E* died in 1898. From that time the properties remained under the management of those who directed the partnership business and treated as partnership property by other members of the firm. In 1917 *G*, the son of *E* also died.

Held, that the suit for partition of property which is partnership property of *E* is incompetent as framed.

Held, further, that even the suit for settlement of account of the partnership, dissolved by the death of *E* and subsequently by the death of *G*, is statute-barred. A.I.R. 1929 Sind 182.

——Arts. 106 and 64—Suit on account stated.

An entry in the books of the plaintiff in two columns of debit and credit showing his share of profits and losses and verified by the defendant (who was plaintiff's partner) and certified by him to be correct is an "account stated" within Art. 64. Article 106 does not apply to the case. 108 Ind. Cas. 600 = 29 P.L.R. 219 = A.I.R. 1928 Lah. 459.

——Arts. 106 and 120—Dissolution—Suit for declaration and for account and share of profits.

A suit for declaration that plaintiff retired from a partnership on a certain date, that the partnership was dissolved at the time so far as he was concerned, and for accounts and share of profits, found due to him on such accounts being taken is governed by Art. 106 and not by Art. 120. 22 C.W.N. 104 = 27 C.L.J. 403 = 43 Ind. Cas. 893.

——Art. 106—Dissolution of partnership—Suit for division of immovable property forming partnership asset—Limitation.

A suit for division of immovable property forming part of partnership assets, after the dissolution of the partnership is governed by Article 106 of the Limitation Act. 11 Ind. Cas. 288 (All.).

——Art. 106—Suit for price of articles delivered to a partner.

Suit for price of articles delivered to a partner during the course of partnership and for the partnership business is governed by Art. 106 and time begins to run from the stopping of business. 163 P.L.R. 1911 = 214 P.L.R. 1911 = 10 Ind. Cas. 250.

——Art. 106—Suit for accounts after dissolution.

Art. 106 governs a suit for accounts after dissolution of a partnership. 87 P.L.R. 1909 = 4 Ind. Cas. 929.

——Art. 106—Suit for partnership account and share of partnership assets.

A suit by the heir of a deceased partner against the surviving partner for an account and share of the deceased in the partnership assets, including the good will and trade marks of the partnership business, comes within the class of suits dealt with under Art. 106. The fact that there were unrealized assets outstanding at the death of the deceased partner which were still outstanding at the date of the suit would not alter the nature of the suit. (1905) 9 C.W.N. 537.

——Art. 106—Suit for account and partition among partners. *See* 11 M.L.J. 353 = 25 M. 149.

——Art. 106—Suit for partition—Suit for a share in dissolved partnership—*See* C.P.C., O. 2, R. 2. 5 A.L. 278 = 30 A. 279.

2 Continuance of partnership.

——Art. 106—Applicability—Fresh partnership coming into existence.

There was a partition between several members of the joint Hindu family representing different branches of the family. Subsequent to the partition, two members *R* and *D*, each of whom was a head of a separate branch entered into a partnership and started a firm with their separate funds for the benefit of both and their sons. *D* died in April, 1930. It was in evidence that subsequent to *D*'s death the partnership was continued by the sons of each of the partners. *R* also died and the sons of *D* later on brought a suit in 1937 against the sons of *R* for dissolution of the partnership and rendition of accounts. The sons of *R* admitted that the business went on as before even after the death of *D* and it ceased as the result of the suit :

Held, that the only inference that could be drawn from the conduct of the parties was that a fresh partnership came into existence between the plaintiffs on the one hand and the defendants on the other upon the death of *D* and the suit was not barred under Art. 106. A.I.R. 1939 All. 217 = 1939 A.W.R. 146 = 181 Ind. Cas. 695.

——Art. 106—If the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership, an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. 80 Ind. Cas. 378 = 34 M.L.T. 273 = A.I.R. 1924 Mad. 708 = 46 M.L.J. 503.

——Art. 106—Contract continuing partnership—Not barred.

The principle underlying S. 253 (10) of the Contract Act is that where the parties to a contract agree expressly or by necessary implication to continue the partnership as if no dissolution has taken place upon the death of one of the original partners the suit for accounts and dissolution would not be barred under Art. 106 of the Limitation Act, even though brought more than 3 years after the death of the original partner. 101 P.R. 1914, foll. 68 Ind. Cas. 722 = 5 L.L.J. 55 = A.I.R. 1922 Lah. 349.

——Art. 106—Dissolution of—Partnership—Taking of acccounts—Limitation.

When a partnership is determined by death of a partner and the surviving partners continue to carry on the business, the statute of limitation is no bar for taking the accounts of the new partnership by going into the accounts of the old partnership, which have been carried on into the new partnership without interruption or settlement. 101 P.R. 1914 = 218 P.L.R. 1915 = 27 Ind. Cas. 69.

——Art. 106—Ss. 7, 8—Suit by joint claimants, one being a minor—Bar of limitation saved as against all—When surviving partners continue business, Limitation Act no bar to take the accounts of the new partnership by going into the old account—Joint right—Right to give a discharge to promissor.

In 1885 five persons became partners. In 1890 one of them, *P* died. The others continued the business without taking accounts or admitting *P*'s heirs into the partnership. In 1891 another, *C* died. The others continued the business without taking accounts or admitting *C*'s heirs as co-partners. In 1898 *C*'s heirs sued for an account and a share in the profits. One of the heirs was still a minor at the date of suit. It was contended that the suit was barred by limitation. *Held*, that the suit is governed by Art. 106; the starting point is *C*'s death, for the suit cannot be regarded as one for the profits of the original partnership, for it was terminated by *P*'s death and then a new partnership came into existence. (2) Though *C*'s death dissolved the new partnership, the bar of limitation is saved by Ss. 7 and 8 as the third plaintiff was and continued to be a minor. (3) S. 8 saves the bar in the case of all the plaintiffs, for they all claimed jointly, and none of them could give, or could at any time have given, the partners of *C* a valid discharge without the concurrence of the third plaintiff. (4) Even if, as decided by 20 M. 461, one of two or more joint promisees can give a valid discharge, that decision is inapplicable to the case of the co-heirs of a single promisee. (5) Also, though in a Hindu family, the manager can give a discharge without the concurrence of the minors, and so time will run as against them also, under the Mohamedan Law there is no manager, and so this principle is inapplicable. (1901) 25 M. 26.

3 Partnership not dissolved.

——Art. 106—Applicability.

Article 106 can apply only to a case when a partnership has been dissolved. A.I.R. 1934 Bom. 491 = 36 Bom. L.R. 1068 = 154 Ind. Cas. 680.

——Arts. 106 and 120—Dissolution not proved.

Where according to the agreement the partners have not got the partnership dissolved previoulsy and inasmuch as the partnership is not deemed to be dissolved by the expulsion of a partner and the intention to dissolve cannot be otherwise inferred from the circumstances Art. 120 and not Art. 106 applies and it is for the defendants to show that the partnership was previously dissolved. 120 Ind. Cas. 613 = A.I.R. 1930 Lah. 378.

——Art. 106—Applicability.

Article 106 applies only to a dissolved partnership as limitation cannot apply as between partners so long as the partnership continues. 66 Ind. Cas. 811 = 25 C.W.N. 847 = A.I.R. 1921 Cal. 538.

——Art. 106—Continuance of partnership.

Where a partnership was entered into for doing certain specified work and " such other work " as the parties might undertake, and the specified work came to end at a particular time, *held* that the partnership was not dissolved when the specified work came to an end but continued up to date of suit. 162 P.W.R. 1917 = 42 Ind. Cas. 459.

——Art. 106—Suit for partnership account—Presumption of dissolution of partnership—Cessation of annual accounts—Rendering of final account showing division of capital and revenue.

In a suit brought in 1902 for partnership account and to recover the plaintiff's share in the properties of a business carried on by them and the defendants. *Held*, (affirming the decision of the High Court) that when annual accounts of the partnership business which had been rendered year by year from 1868 to 1891, ceased in the latter year and, on 12th April, 1891, a final account showing the division of both capital and revenue was made out, the defendants afterwards carrying on the business without any interference from the plaintiffs, the presumption was in favour of the dissolution of the partnership as at the definite date of the year when the account was thus closed. And their Lordships were of opinion that these facts taken with the other acts and conduct of the other parties, and the whole circumstances of the case which greatly strengthened the presumption, made the inference in favour of the dissolution having occurred at the above date substantially conclusive. The suit, therefore, not having been brought within three years from the date, was barred by Article 106. 36 Mad. 185 = 11 A.L.J. 556 = 18 C.L.J. 13 = 15 Bom. L.R. 634 = 14 M.L.T. 7 = 17 C.W.N. 1006 = (1913) M.W.N. 571 = 25 M.L.J. 128 = 19 Ind. Cas. 513 (P.C.).

4 Starting point.

——Art. 106—Death of partner—Suit against sons for debts—Limitation.

Where, on the death of a partner, the partnership is dissolved in order to make his sons liable for the debts due from him as a member of the partnership, a suit ought to be instituted within three years of the death of the partner. A.I.R. 1936 Lah. 514 = 167 Ind. Cas. 759.

——Art. 106—Starting point.

The giving of a pronote cannot be held to be a settlement of partnership affairs, where it it is intended merely to prevent a previous pronote from being time-barred. Where a suit is brought within three years from the date of death of one partner, the suit cannot be treated as out of time on the footing that such a pronote was taken from one partner more than three years prior to suit. A.I.R. 1930 Sind 148 = 126 Ind. Cas. 746.

——Art. 106—Dissolution—Time of.

The business of a firm began to fail in 1906 and finally closed in 1908 the only work done subsequently consisted of realising assets, paying debts due to the creditors and recovering rents from tenants. *Held*, that the partnership came to an end in 1908 and that the suit for dissolution and the prayer for accounts brought more than three years thereafter was barred under Art. 106. 49 P.W.R. 1916 = 32 Ind. Cas. 853.

——Arts. 106 and 120—Suit for an account—Starting point of time.

In a suit for account of a partnership, time begins to run from the date of the dissolution of the partnership and where there has been a previous settlement then from date of the last settlement. 16 C.W.N. 299 = 15 C.L.J. 204 = 13 Ind. Cas. 23.

——Art. 106—Death of partner—Suit for accounts—Limitation.

A suit for accounts cannot be brought three years after the death of a partner in respect of the partnership of which he was a member. There can be no question of granting dissolution of a firm already dissolved. But the Court may enquire into the financial relations of partners *inter se* and for the purpose it may go into the accounts of a previous partnership. 3 S.L.R. 108 = 4 Ind. Cas. 600.

——Art. 106—Actual dissolution—Starting point.

For a suit for accounts in partnership profits limitation runs from the date of actual dissolution of the partnership and it does not cease to run by virtue of an agreement that the partnership was to last till a certain date with a month over in which to collect outstandings and settle accounts. 34 Bom. 515 = 11 Bom. L.R. 1354 = 4 Ind. Cas. 837.

——Art. 106—Starting point of limitation.

In a partnership agreement it was stated that the partnership was to continue up to a certain date but prior to that date the partnership was dissolved. *Held*, that the period of limitation under Art. 103 for taking partnership account of a share in partnership profits ran from the actual date of dissolution and not from the date mentioned in the agreement. *Held*, further, that where a suit for general partnership accounts and share in partnership profits is itself barred, the plaintiff cannot be allowed to proceed against any and every partnership asset which may have been realized by the defendant after dissolution and within the period of limitation. (1909) 11 Bom. L.R. 1354 = 4 Ind. Cas. 837 = 34 Bom. 515.

5 Suit for accounts.

——Art. 106—Suit for accounts, what is.

A suit for recovery of money found due to the plaintiff by the defendant as declared by a prior judgment between the parties in a suit for accounts of a dissolved partnership is not governed by Art. 106. 67 M.L.J. 413 = (1934) M.W.N. 539 = A.I.R. 1934 Mad. 665 = 40 L.W. 792 = 156 Ind. Cas. 264.

——Art. 106—Suit for accounts, what is.

The entry in the plaintiff's *bahi* signed by the defendants ran as follows :—" We have struck a debit balance against ourselves of Rs. 4,017-5-0 on account of advances and losses of every kind ; interest to pay at the rate of Re. 0-7-6 per cent."

Held, the entry is an account rendered adjusting the relations of the parties and is a promise to pay and the suit therefore falls under Art. 64, the time under which is enlarged to six years by Punjab Limitation Act. Article 106 does not apply to the suit as this suit is not for an account, *i.e.*, an unascertained share of the profits of a dissolved partnership. 69 Ind. Cas. 502 = 3 Lah. 326 = A.I.R. 1922 Lah. 425.

——Art. 106—Joint business by brothers—Suit for accounts by heirs of one.

A suit by the heirs of one of two brothers who carried on joint business is one for an account and a share of the profits of a dissolved partnership and is governed by Art. 106 of the Limitation Act. 38 Mad. 1099 = 32 Ind. Cas. 1002.

6 Suit for general account barred—Effect of.

——Art. 106—Suits for accounts barred—Another suit for share of assets received by ex-partner.

A partnership was dissolved in 1910 by the death of one partner and a suit by the plaintiff in 1913 for partnership accounts of profits was dismissed on the ground of being barred by Limitation. A second suit was lodged by the plaintiff for his share of assets alleged to have been received by the defendants as debts due to the old firm,

Held, in all cases where, after the dissolution and complete winding up of a partnership, an asset which had not been taken into account fell in, it ought to be divided between the ex-partners or their representatives according to their shares in the former partnership. If on the other hand no accounts have been taken and there is no contest, that the partners have squared up, then the proper remedy, where such an item falls in, is to have the accounts of the partnership taken ; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove and cannot prove that upon the due taking of the accounts he would be entitled to that share. 74 Ind. Cas. 621 = 45 Mad. 378 = 1922 M.W.N. 386 = 30 M.L.T. 283

= 26 C.W.N. 977 = 16 M.L.W. 200 = 49 I.A. 181 = 24 Bom. L.R. 1197 = 36 C.L.J. 308 = 20 A.L.J. 862 = A.I.R. 1922 P.C. 115 = 43 M.L.J. 305 (P.C.).

——Art. 106—Dissolution of Partnership—Movable and immovable property—Claim for account—When barred.

If the assets of a partnership consists of a movable or immovable property, a claim, for a general account is governed by Art. 106 and if the claim is barred as regards moveable part of the property, it is barred as regards immovables also. If a suit for general partnership account is barred a claim in respect of any assets of the partnership that may have been acquired within 3 years of the suit is also barred. 97 P.R. 1910 = 11 P.L.R. 1911 = 142 P.W.R. 1910 = 8 Ind. Cas. 999.

——Art. 106—Suit for general account barred.

A suit for share of assets realized within three years before suit not barred. (1904) 28 M. 344.

——Art. 108—Applicability—Trees cut down by lessee.

Art. 108 of the Act applies only to suits by a landlord for recovery of the value of trees cut down by the lessee. 25 Ind. Cas. 704 (Mad.).

——Art. 109.

Synopsis.

1. Applicability of Article.
2. Co-sharers, co-owners or co-heirs—Suit by.
3. Starting point.
4. " Wrongfully received "—Meaning of.

1 Applicability of Article.

——Arts. 109 and 120—Applicability.

Suit for mesne profits. *See* LIMITATION ACT (9 OF 1908), S. 15 AND ARTS. 109 AND 120. (1948) 2 M.L.J. 314 = A.I.R. 1949 Mad. 279.

——Arts. 109 and 120—Suit for recovery of profits wrongfully withheld.

Where a person has been placed in rightful possession as custodian (*supurdar*) and he rightfully receives the profits in that capacity, but wrongfu'ly withholds them, a suit for recovery of such profits is not governed by Art. 109 but by Art. 120. A.I.R. 1941 Nag. 181 = I.L.R. (1942) Nag. 92 = 1941 N.L.J. 184 = 201 Ind. Cas. 220.

——Arts. 109 and 116—Suit by mortgagee for possession and compensation—Limitation—Starting point.

Where the mortgagor, by registered mortgage deed of September 3, 1927, contracted to deliver the possession of the mortgaged property to the mortgagee on July 1, 1928, and to pay certain rent for the period upto the delivery of possession, but no possession was delivered as stipulated and the mortgagee brought a suit in 1936 for recovery of possession and compensation :

Held, that Art. 116 and and not Art. 109, applied and the suit brought more than six years after the breach of the contract was barred by limitation. A.I R. 1941 Oudh 1 = 16 Luck. 203 = 1940 O.W.N. (H.C.) 875 = 1940 R.D. 424 = 1940 A.W.R. (C.C.) 393 = 190 Ind. Cas. 721.

——Arts. 109 and 120—Applicability.

In the year 1917, a person executed a mortgage with possession of certain properties in favour of the plaintiff. Without taking the possession the property was leased to the mortgagor for the term of the mortgage at a rent which represented the interest on the mortgage amount. In 1920 the defendant who had obtained a money-decree against the mortgagor executed his decree and attached the mortgaged property. In these execution proceedings a Receiver was appointed by the Revenue Court and the possession was delivered to him in 1927. In 1928, the properties were leased out by the Receiver for a term of one year which was continued from time to time. In 1929 the plaintiff instituted a suit against the mortgagor, the defendant and the lessees, asking that it might be declared that the land was not liable to attachment at the instance of the defendant and asking for possession of the land by ejectment of the Receiver. There was, however, no claim for damages in respect of the possession taken by the Receiver. The suit went up to the Privy Council where it was decreed in 1933 and the plaintiff was declared to be entitled to possession. On August 2, 1933, however, the plaintiff brought another suit against the defendant alone and the case made against him by the amended plaint was that the defendant who had obtained a decree against the mortgagor in the Revenue Courts had obtained the attachment of the property without caring to find out whether the properties were attachable or not and without reserving the right of the plaintiff as mortgagee. The plaintiff alleged that this was an illegal act for which the defendant was liable to pay to the plaintiff " the sum equivalent to the price of the produce as damages which should have accrued to the plaintiff from the land in dispute. " Certain sums were mentioned in the plaint as due upon this basis for the period 1927 to 1933, according to the record of crops kept by the village accountant or *patwari*.

Held, that the suit was governed by Art. 109 and not by Art. 120 and that the plaintiff was entitled to claim profits only for three years prior to the institution of the suit. A.I.R. 1939 P.C. 178 = 5 B.R. 847 = 43 C.W.N. 897 = 50 L.W. 389 = 1939 O.W.N. 688 = (1939) A.W.R. 148 = 1939 R.D. 449 = 41 Bom. L.R. 1071 = 182 Ind. Cas. 548 (P.C.).

——Arts. 109 and 149—Applicability—Suit by Railway company.

Suit by Railway Company for ejectment of licensee after expiry of license and for mesne profits is governed by Art. 149 and not by Art. 109 or 116 where company is merely the managing agent of Government. A.I.R. 1936 Pat. 362 = 17 P.L.T. 206 = 2 B.R. 620 = 163 Ind. Cas. 525.

——Art. 109—Applicability.

Article 109 is confined in its application to profit of immovable property which belonged to the plaintiff and which has been wrongfully received by the defendant. A suit for recovery of rent realised by the defendant but to which the plaintiff was entitled falls either under Art. 62 or Art. 120. 18 P.L.T. 162 =A.I.R. 1937 Pat. 237 = 3 B.R. 434 = 16 Pat. 184= 168 Ind. Cas. 502.

——Art. 109—Auction-purchaser.

A suit brought by an auction-purchaser for recovery of rent against another previous auction-purchaser of the same land and his lessee is governed by Art. 109. Time began to run from the date of receipt of rent and a suit brought nearly 4 years thereafter is barred. 86 Ind. Cas. 398 = 5 L.R.A. (Civ.) 688=A.I.R. 1925 All. 52.

——Art. 109—Application for ascertainment.

Applications for ascertainment of profits are not suits but proceedings in suit and where mesne profits are decreed, the plaintiff is entitled to mesne profits for 3 years from date of suit. 68 Ind. Cas. 903=2 P.L.T. 648 = A.I.R. 1921 Pat. 430.

——Arts. 109 and 62—Suit for mesne profits by usufructuary mortgagee against mortgagor in wrongful possession —Limitation.

Art. 109 governs a suit by a usufructuary mortgagee for mesne profits against the mortgagor who is in wrongful possession of the mortgaged property. 15 A.L.J. 33 = 39 All. 300 = 39 Ind. Cas. 663.

——Art. 109—Mesne profits—Period for which allowed.

A court cannot award mesne profits for more than three years as provided in Article 109 of the Act. 19 C.W.N. 1167 = 26 Ind. Cas. 890.

——Art. 109—Mesne profits—Suit for.
The period of limitation for a suit for mesne profits is that provided by Art. 109 of the Limitation Act. 5 Bur. L.T. 33 = 14 Ind. Cas. 801.

——Arts. 109 and 127—Profits—Suit for—Applicability to Muhammadans.
Art. 127 is not applicable to Muhammadans and profits can only be recovered under Art. 109 for three years. (1912) M.W.N. 45 = 13 Ind. Cas. 791.

2 Co-sharers, Co-owners, or Co-heirs—Suit by.

——Art. 109—Co-sharer's suit for his share of produce of joint land.
Suit by a co-sharer for his proportionate share of the net produce of the common land cultivated by the defendant co-sharer is not governed by Art. 109 but by Art. 120. A.I.R. 1941 Pat. 90 = 21 P.L.T. 854 = 7 B.R. 425 = 20 Pat. 162 = 192 Ind. Cas. 456.

——Art. 109—Co-sharers.
Suit for recovery of money due to tenants in common which has been received by one or more tenants to the exclusion of the rest is not governed by Art. 109 as the profits cannot be said to be wrongfully received, the parties being co-sharers. A.I.R. 1937 Pesh. 28 = 168 Ind. Cas. 41.

——Art. 109—Co-owners—Suit by co-owner for share of profits.
A suit by a co-owner for his share of profits received by other co-sharers is not within the ambit of Art. 109 and the assertion of the exclusive title by defendants makes no manner of difference. (1935) M.W.N. 107 = 41 L.W. 138 = 68 M.L.J. 487 = A.I.R. 1935 Mad. 731 = 156 Ind. Cas. 640.

——Arts. 109 and 120—Suit for share of profits by co-sharer.
A suit by one co-sharer against another co-sharer (who is in exclusive possession of the joint property) for his share of the rents of the joint property is governed. not by Art. 109, but by Art. 120. A.I.R. 1933 Lah. 951 = 35 P.L.R. 208 = 147 Ind. Cas. 909.

——Art. 109—Scope.
Suit by co-owner for partition—Decree not executed—Suit for share of subsequent mesne profits—Possession of defendant as co-owner—Article 109 inapplicable—Article 120 applied. A.I.R. 1931 Rang. 150 = 131 Ind. Cas. 511.

——Art. 109—Co-sharers.
Article 120 and not Art. 62 or 48 or 49 or 109 applies to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly. 66 Ind. Cas. 876 = 34 C.L.J. 508 = A.I.R. 1921 Cal. 77.

——Arts. 109 and 120—Co-heirs—Suit for rent and profits.
Where the profits in question are not mesne profits at all, that is to say, not profits wrongly received by the defendants but are the rents and profits of land to which both the plaintiff and defendants as co-heirs have a claim the article applicable is Art. 120 and not Art. 109. A.I.R. 1939 Rang. 365 = 1940 Rang. L.R. 136 = 186 Ind. Cas. 210.

——Arts. 109 and 120—Suit for profits of immovable property against co-heir.
Article 109 does not apply to an action claiming profits of immovable property against a person who is in occupation of land as a co-heir but Art. 120 applies to such a suit as no special time is prescribed by any other article. A.I.R. 1938 Rang. 416 = 178 Ind. Cas. 475.

3 Starting point.

See also NOTE 4.

——Arts. 109, 120—Right to sue for rents and profits, when accrues, discussed. A.I.R. 1942 Mad. 487 = I.L.R. (1942) Mad. 562 = 55 L.W. 264 = (1942) 1 M.L.J. 472 = 202 Ind. Cas. 514.

——Art. 109—Starting point.
Under Art. 109, the starting point is the date from when the profits are received. A.I.R. 1936 Rang. 80 = 161 Ind. Cas. 461.

——Art. 109—Suit for mesne profits—Cause of action.
The plaintiff purchased a house in execution of a decree on May 27, 1917. Objections were raised and it was held that he was entitled only to a 1/3rd share. The plaintiff instituted a suit and obtained a decree declaring his right to the full house. After getting possession of the house, plaintiff sued on June 8, 1929, for mesne profits from May 27, 1917, to January 3, 1920 :

Held, that the suit was governed by Art. 109 of the Lim. Act and not by Art. 120 ; the cause of action arose when the mesne profits were received by the defendants and not when the plaintiff's right was declared ; and the suit was time-barred. A.I.R. 1933 Lah. 615 = 34 P.L.R. 1085 = 146 Ind. Cas. 939.

——Art. 109—Starting point—When dispute pending.
Even where a claim to mesne profits is in dispute the starting point for a suit for mesne profits would be the date when the profits are received. The limitation cannot start instead from the date of an adjudication of the rights between the parties. In such cases the practice is for the plaintiff to institute a suit for mesne profits before the time expires and let it be stayed pending the disposal of the former litigation. 102 Ind. Cas. 96 = 49 All. 565 = 25 A.L.J. 425 = A.I.R. 1927 All. 446.

——Art. 109—Article 109 of the Limitation Act does not admit of any consideration as to when the cause of action may have accrued to the plaintiff, and claims of profits wrongfully received beyond three years before the suit cannot be recovered. 89 Ind. Cas. 1000 = 29 C.W.N. 973 = 43 C.L.J. 155 = A.I.R. 1926 Cal. 65.

——Art. 109—Recovery of mesne profits—Limitation.
Mesne profits can be claimed only against the person who is in actual possession and limitation for its recovery is three years from the date when the cause of action for its recovery arises. 79 Ind. Cas. 687 = 10 P.W.R. 1923 = A.I.R. 1924 Lah. 738.

——Art. 109—Suit for mesne profits—Starting point.
In a suit for mesne profits the actual receipt of the profits is the starting point for limitation. 10 N.L.R. 76 = 24 Ind. Cas. 866.

——Arts. 109 and 181—Suit dismissed—Claim for mesne profits—Defendant.
An application for mesne profits by defendant, a suit against whom is dismissed, should be made within three years from the date when possession was given to him and not from the date on which the suit was dismissed. 11 C.L.J. 541 = 6 Ind. Cas. 125.

——Arts. 109 and 120—When the profits are received—Meaning of.
The words " when the profits are received " in Art. 109 means when the profits actually received. So in a suit by a plaintiff for mesne profits for the period during which the defendant had been receiving owing to an illegal *patni* sale which was afterwards set aside by the plaintiff time would run from the time when the profits were received by the defendant and not when the plaintiff recovered possession. 13 C.W.N. 15 = 1 Ind. Cas. 157.

——Art. 109—Suit for—Limitation.

Mesne profits, unless shown to fall due otherwise, must be regarded as accruing due from day to day; consequently, all mesne profits due for the period antecedent to the three years previous to the institution of the suit are barred. 22 W.R. 126, not foll. (1903) 32 C. 118. But *see* 33 C. 23 = 32 I.A. 181 (P.C.).

4 "Wrongfully received"—Meaning of.

——Arts. 109 and 120—Applicability—Alienation by insolvent—Setting aside at instance of Official Receiver on ground of alienation being fictitious and nominal and that title never passed—Application by Receiver for rents and profits from alienee—Limitation—Position of alience—Constructive trustee.

Art. 109 of the Limitation Act only applies to suits and does not apply and cannot be made applicable to proceedings other than suits by mere analogy. The Act has to be construed and applied strictly. Hence Art. 109 does not apply to an application by the Official Receiver against an alienee from the insolvent for mesne profits of the property during the time he was in possession from the date of alienation to his date of dispossession by the Receiver in pursuance of decision in his favour holding that the alienation was nominal and fictitious and that title never passed from the insolvent to the alienee and setting aside the alienation. In such a case the alienee cannot be said to have been in wrongful possession within the meaning of Art. 109. He was in possession with the consent of the insolvent and as title never passed to him he became a constructive trustee. The claim of the Receiver against him is not really one for rents or profits, but one for accounts against a constructive trustee. In that view Art. 120 and not Art. 109 of the Limitation Act would apply. The right to sue does not arise until there has been an infringement or at least an unequivocal threat to infringe the right asserted in the suit. It is from that date only that the period of 6 years under Art. 120 would commence. 58 I.A. 1, foll.; 59 Mad. 1029 (F.B.), not foll. 52 Bom. L.R. 606 = A.I.R. 1950 Bom. 399.

——Art. 109—Mesne profits—Application for, by Official Receiver.

In an application under S. 54, Prov. Insol. Act, by the Official Receiver for setting aside the alienations as being fraudulent transactions, he also asked for mesne profits and interest. The District Judge dismissed the application but it was allowed by the High Court on appeal. No decision was, however, given on the question of mesne profits and interest. The Official Receiver subsequently applied for the recovery of mesne profits and interest :

Held, that the claim for mesne profits was governed by Art. 109 and the mesne profits could be recovered only for the period of three years immediately preceding the subsequent application. 58 M.L.W. 665 = (1945) 2 M.L.J. 557 = 1945 M.W.N. 772 = A.I.R. 1946 Mad. 207.

——Art. 109—Suit by Receiver to recover mesne profits—Limitation—Starting point.

Article 109 does not provide that the starting point of time for the recovery of mesne profits wrongfully received shall be the date when the cause of action to recover those profits arose ; the starting point is the date when the profits were received. The effect of the order setting aside the sale of the insolvent is to render the sale null and void from its inception. The receipt of the profits from the property sold is always wrongful, and the limitation for the suit by Receiver for recovery of mesne profits runs from the date of the receipt of profits and not from the date on which the sale was set aside. A.I.R. 1938 Bom. 158 = 40 Bom. L.R. 100 = I.L.R. (1938) Bom. 107 = 173 Ind. Cas. 806.

——Art. 109 and Madras Estates Land Act (1 of 1908). S. 3 (5)—Persons recognised as "landholder" under S. 3 (5)—Position and rights of—Receipt of rents and profits by him—If wrongful—Suit to recover such rents and profits by person ultimately found to be entitled to them—Limitation.

Where pending the ultimate decision by the Civil Courts of a litigation relating to an estate, one of the parties is recognised by the Collector under S. 3 (5) of the Madras Estates Land Act as a "landholder" he becomes clothed with full statutory authority to collect the rents and profits during the whole period of his possession and as such his receipt of rents and profits cannot be said to be wrongful. Hence, Art. 109 of the Limitation Act would be inapplicable to a suit to recover the rents and profits so received by the statutory landholder by the person who is ultimately found to be entitled to the estate. The latter's right of action to recover such rents and profits would accrue only after the order of the Collection under S. 3 (5) of the Estates Land Act is cancelled as a result of the ultimate decision of the Civil Courts. He could not competently have sued the statutory landholder for an account of rents and profits each time that rents or profits were received. 75 I.A. 101 = I.L.R. (1949) Mad. 1 = 62 L.W. 879 = A.I.R. 1948 P.C. 175 = 1948 M.W.N. 429 = (1948) 2 M.L.J. 52 (P.C.).

——Art. 109—Reversioners suing transferees from widow as trespassers—Decree on the footing that possession of trespassers after widow's death was wrongful—Subsequent suit for mesne profits—Limitation.

Where the reversioners, electing to avoid the transfers effected by the widow, instituted a suit treating the transferees in possession as trespassers and a decree was passed in their favour on the footing that the defendants' possession after the death of the widow was wrongful against the plaintiffs and it was admitted that if the plaintiff had chosen to include a claim for mesne profits since the date of the widow's death in that suit, there was nothing to debar them from doing so :

Held, that the mesne profits claimed in a subsequent suit against the defendants were profits which had been wrongfully received by the defendants within the meaning of Art. 109. 1935 O.W.N. 985 = 1935 R.D. 451 = A.I.R. 1935 Oudh 515 = 11 Luck. 435 = 157 Ind. Cas. 960.

——Art. 109—Where an auction-purchaser of lands at a sale held in execution of a mortgage-decree sues the usufructuary mortgagee *pendente lite* who has collected rents from the tenants for the recovery of the amount so collected.

Held, that Art. 109 applies. The words 'wrongfully received' in Art. 109 include receipt of profits that cannot be legally substantiated. 66 Ind. Cas. 879 = 26 C.W.N. 386 = A.I.R. 1932 Cal. 235.

——Art. 109—Mesne profits—Suit for.

A suit for mesne profits, where the possession of the suit property was obtained by the defendant under the purchase at the Court auction sale, is governed by Art. 109 and not by Art. 120, Lim. Act. A.I.R. 1942 All. 358 = 1942 A.L.J. 411 = I.L.R. (1942) All. 671 = 1942 A.W.R. (H.C.) 278 = 203 Ind. Cas. 223.

——Art. 109—Suit for mesne profits—Patni taluk sold under Reg. 8 of 1819—Sale set aside.

Art. 109 of the Lim. Act (15 of 1877) is applicable to a suit for mesne profits where the possession of the property in suit, *viz.*, a *patni* taluk, was obtained by the defendant, under a sale held under Reg. 8 of 1819, which was subsequently set aside. The mesne profits can only be claimed for 3 years prior to suit. 22 C.W.N. 263 = 27 C.L.J. 257 = 43 Ind. Cas. 781.

——Arts. 109 and 120—Wrongfully received—Meaning of—Possession obtained under decree—Reversal in appeal—Suit for possession and mesne profits—Restitution.

A suit for the recovery of profits of immovable property by a person who was dispossessed in execution of a decree which was reversed in appeal and who was subsequently restored to possession, is governed by Art. 109. The words "wrongfully received" in the article include receipt of profits under a claim or title that cannot be legally substantiated. An appeal is only a continuation of the original proceedings and the appellate judgment dates back to and stands in the place of the original judgment for all legal purposes. Possession taken by a person pending an appeal is subject to the result of the appeal and must be deemed to have been without legal title if the original decree or order is reversed and is in this sense wrongful as against the person dispossessed. 17 M.L.T. 168 = 2 L.W. 169 = 28 Ind. Cas. 85.

——Arts. 109, 120—Applicability of—Mesne profits—Suit for—"When the profits are received"—Meaning of.

Where the defendants wrongfully received profits which were actually receivable by the plaintiff but for an illegal patni sale which was afterwards set aside, the period of limitation is three years from the time when the profits were received. The clause "when the profits are received" in the third column of Art. 109 means "when the profits are actually received." 8 C.L.J. 181 = 13 C.W.N. 15 = 35 C. 996 = 1 Ind. Cas. 157.

——Arts. 109, 120—'Wrongfully received'—Decree afterwards set aside on appeal—Does it include execution proceedings afterwards set aside on appeal for fraud?

The word 'wrongfully' means 'wrongfully in law'. Possession obtained under orders of a court in proceedings in execution of a decree, although such proceedings are afterwards set aside on appeal as tainted with fraud, is not wrongful within the meaning of Art. 109. Art. 120 applies to a suit for mesne profits against the person who was so in possession obtained in execution. (1905) 3 C.L.J. 182.

——Art. 110.

Synopsis.

1. Applicability and scope.
2. Registered deed.
3. Starting point.

1 Applicability and scope.

——Arts. 110 and 115—Applicability—Tenant holding over and continuing in possession—Suit against by landlord for an amount as rent or as damages for use and occupation—Limitation.

A tenancy by sufferance after the termination of an agricultural lease is converted into a tenancy of holding over by the receipt of rents for faslis subsequent to the termination of the lease. In such a case the possession of the person holding over would be that of a tenant and the claim against him for the same could only be on the basis of rent. The Article of the Limitation Act applicable would therefore be 110. Even assuming that the defendant was in permissive possession of the land and was not a trespasser and the action against him is one for damages for use and occupation such an action is governed by Art. 115 and not by Art. 120.

It is not correct to any that the breach of a statutory duty to surrender possession on expiry of lease is the basis for an action for damages for use and occupation.

The liability is referable to possession and enjoyment of the property by the ex-tenant and by reason of his enjoyment of the property the law implies an obligation to pay compensation. An action for damages for use and occupation against a tenant who continues in possession after the expiry of the lease is really based on an implied contract and not either on tort or on a statutory obligation and the only Article of the Limitation Act applicable to such an action is Art. 115. 1948 M.W.N. 761 = A.I.R. 1949 Mad. 421 = (1948) 2 M.L.J. 542.

——Arts. 110, 115 and 120—Suit for damages for use and occupation against tenant holding over—Article applicable. *See* U. P. TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (X OF 1937), S. 5 (1) (*a*). 1946 A.L.W. 452.

——Arts. 110, 115 and 116—Scope.

Article 110 will affect Art. 115 but not Art. 116; in other words, Art. 115 will apply where there is no special provision (such as Art. 110), but Art. 116 will apply whether there is special provision or not. A.I.R. 1937 Cal. 587 = 41 C.W.N. 1001 = 68 C.L.J. 539 = I.L.R. (1937) 2 Cal. 631 = 173 Ind. Cas. 540.

——Arts. 110 and 115—Suit for rent based on kabuliyat.

Where the plaintiff's suit is based on a *kabuliyat* and the claim is for arrears of rent, the suit is governed by Art. 110 and not by Art. 115. A.I.R. 1942 Cal. 222 = I.L.R. (1941) 2 Cal. 335 = 45 C.W.N 787 = 199 Ind. Cas. 788.

——Arts. 110 and 120—Suit for damages on basis of rent.

When a purchaser under a revenue sale who has an option to annul an under-tenure under S. 37, Beng. Land. Rev. Sales Act, 1859, annuls the under-tenure without receiving any rent from the holder of it, and sues the holder for damages calculating the same on the basis of rent, it is a suit for damages and not for rent and is governed by Art. 120 and not by Art. 110. A.I.R. 1939 Cal. 468 = 69 C.L.J. 220 = 43 C.W.N. 469.

——Art. 110—Suit for arrears of kattubadi—Limitation.

A suit for arrears of *kattubadi* is a suit for arrears of rent for the purposes of limitation and is governed by Art. 110. It is immaterial for the purposes of limitation whether the *inamdar* is a grantee of the *melvaram* only or of both the *varams*. A.I.R. 1936 Mad. 147 = (1936) M.W.N. 129 = 43 L.W. 522 = 161 Ind. Cas. 336.

——Art. 110—Arrears of rent.

Article 110 applies to a suit purely for recovery of arrears of rent and a claim for more than three years would be barred by time. 1936 A.W.R. 1025 = A.I.R. 1937 All. 57 = (1936) A.L.J. 1384 = I.L.R. (1937) All. 140 = 166 Ind. Cas. 823.

——Art. 110—Rent—Fees charged by Municipality for issuing permission for use of Municipal land.

The fee charged by a Municipality for issuing a permission for use of Municipal land under the provisions of S. 90, Bombay Municipal Boroughs Act, is not rent within the meaning of Art. 110, and a suit for recovery of such fees is governed by Art. 120 as there is no other Article within which it can be brought. A.I.R. 1936 Sind 184 = 30 S.L.R. 148 = 165 Ind. Cas. 369.

——Art. 110—Rent—Money due on settlement by auction of date and toddy palm trees.

Money due on settlement by auction of date and toddy palm trees under which the settlement holders got the right to take the juice from the trees for the season does not amount to rent. Suit to realise such amount is governed by Art. 110. A.I.R. 1936 Pat. 403 = 3 B.R. 173 = 17 P.L.T. 363 = 15 Pat. 626 = 166 Ind. Cas. 488.

——Art. 110—Jodi and Road cess.

Article 110 applies to a suit to recover arrear of jodi and road cess claimed by the Zamindar against the defendant who holds the suit land on service inam under him subject to payment of jodi as well. 21 Mad. 243 and 22 Mad. 11, foll. 74 Ind. Cas. 968 = 1923 M.W.N. 524 = A.I.R. 1924 Mad. 73.

——Arts. 110 and 116—Expiry of Kanom —Limitation for rent.

The limitation for a suit for rent after the expiration of a *kanom* is according to Art. 116 and not Art. 110. (1916) 2 M.W.N. 117 = 37 Ind. Cas. 83.

——Art. 110—Co-sharer occupying property—Suit for rent.

Suit for rent by a co-owner against his co-sharer who occupied the property after the term fixed for such period is governed by Art. 120 and not by 110 or 115. 39 Mad. 54 = 33 Ind. Cas. 705.

——Arts. 110 and 132—Applicability.

Plaintiff got on 8-4-1896 usufructuary mortgage of some properties and leased them to the mortgagors on the same day and on 1-9-1903 he again got usufructuary mortgage of the same properties and simple mortgage of some other properties. In 1912 plaintiff sued on both mortgages for sale of the properties. *Held*, that the document of 1903 made the properties liable for the interest that the suit was governed by Art. 132 and not Art. 110 and that he was entitled to interest. 2 L.W. 853 = 30 Ind. Cas. 818.

——Arts. 110 and 116—Arrears of Royalty and Commission.

A suit to recover arrears of royalty and commission is not one for rent within Art. 110 and is governed by Art. 116. 17 C.L.J. 372 = 19 Ind. Cas. 865.

——Art. 110—Suit by assignee of rent for arrears due—Bengal T. A. (1885), Sch. III, Art. 2 (b).

Suit by assignee of rent to recover the arrear from the tenant comes under Art. 110, Limitation Act and not under Art. 2 (*b*) Bengal Tenancy Act. 2 Ind. Cas. 989 (Cal.).

——Arts 110 and 120—Revenue public, Assignment of—Assignee's rights—Revenue Recovery Act, Ss. 2 and 42.

An arrangement by which the Government directs its ryot to pay to certain trustees of a mutt first crop assessment on the land instead of itself paying each to the said trustees is not an assignment by Government of the public revenue to the trustees. The trustees on default by the ryot in paying the assessment should bring the matter to the notice of the revenue authorities, and it would be competent to the latter to realize the arrear under Art. 2 of 1864 (Madras) and pay it over to the trustees, but the latter will not be entitled to sue in their own name for the amount. Ss. 2 and 42 of the Revenue Recovery Act are applicable only to the public revenue and not to realization of sums due to an institution like the plaintiff's mutt. If the trustees are entitled under the arrangement to sue, in their own names their claim is only a personal one against the holders of the fund for the time being. Where the trustees are not constituted *inamdars* but are entitled under the arrangement to sue in their own names for the first crop assessment, their claim is not one for rent within the meaning of the Rent Recovery Act or Art. 110 of the Limitation Act. Such a claim falls under Art. 120 of the Limitation Act. Where the trustees obtained a decree personally for their claim against the representatives of the original ryot, who agreed with Government to pay over first crop assessment to the trustees, the latter are not entitled also to a decree personally against the transferees who were possessed of the land. (1902) 13 M.L.J. 248 = 26 M. 730.

——Arts. 110, 120—Land Revenue Code (Bombay)—Rent—Revenue.

Art. 110 governs only cases where the parties stand in the contractual relation of landlord and tenant, and there is a contractual liability to pay rent. The claim of an inamdar or assignee from Government to recover the assessment from the occupant of the land is not rent and Art. 120 applies to the case. So held by Ranade, J. and Whitworth, J., Crowe, J., *dissenting*. (1900) 3 Bom. L.R. 135 = 25 B. 556.

2 Registered deed.

——Arts. 110 and 116—Applicability—Registered deed.

A suit for recovery of arrears of rent due under a registered mortgage-deed is governed by Art. 116 and not by Art. 110. 53 C.L.J. 522 = A.I.R. 1931 Cal. 790 = 133 Ind. Cas. 102 (1).

——Arts. 110 and 116—Registered Kabuliyat.

Suit to recover rent reserved in registered Kabuliyat is governed by Art. 116 and not 110 of the Limitation Act. 1 P.L.J. 37 = 2 P.L.W. 446 = 34 Ind. Cas. 754.

——Arts. 110 and 116—Suit for arrears of rent—Registered lease.

Art. 116 of the Lim. Act and not Art. 110 applies to a suit for arrears of rent due on a registered lease. 37 Bom. 656 = 15 Bom. L.R. 836 = 21 Ind. Cas. 315.

——Arts. 110 and 116—Suit for rent—Registered lease.

Suit for rent on a registered lease comes under Art. 110 and not Art. 116. 34 All. 464 = 10 A.L.J. 1 = 16 Ind. Cas. 146.

——Arts. 110 and 116—Suit for rent dismissed as barred—Registered lease brought to notice of Court later.

Where a suit for arrears of rent is dismissed as barred, and it is later found that the suit was based upon a registered lease the same can be let in evidence for purposes of saving limitation. 11 Ind. Cas. 6 (Cal.).

——Arts. 110 and 116—Suit for rent on registered lease and claim against partner of lessee.

A suit for rent based on registered lease and also a claim against a partner or assignee of such lessee comes under Art. 116. The assignees's liability is based on the covenant for rent. 7 M.L.T. 419 = 20 M.L.J. 555 = 6 Ind. Cas. 766.

——Arts. 110 and 116—Registered lease—Holding over—Claim for rent—Limitation.

Where after a registered lease has been determined and the tenant holds over, the claim for rent for the period of holding over is not a claim for compensation for the breach of a contract in writing registered. (1910) M.W.N. 186 = 11 Cr.L.J. 180 = 6 Ind. Cas. 754.

——Arts. 110, 116—Royalty, suit for.

A suit for recovery of royalty upon a registered document is governed by Art. 116 and not Art. 110. 19 C. 489, foll. (1908) 12 C.W.N. 724.

——Arts. 110, 116—Suit to recover rent on a registered lease.

A suit to recover rent based upon a registered lease is governed as to limitation not by Art. 116 but by Art. 110. 15 C. 22, dissented from. 1903 A.W.R. 210 = 26 A. 138.

3 Starting point.

——Art. 110—Starting point of limitation.

According to the terms of the *kabuliyat* by which the *patni* was created, the rent was payable in monthly instalments. The *patni* was sold on May 15, 1933, for arrears of rent for the year 1339, B.S. It was, however, set aside on June 1, 1936 and the *patnidar* obtained possession of the *patni* immediately after the sale was set aside on June 1, 1936. A suit for arrears of rent for the year 1339 B. S. was filed on August 9, 1937, against the *patnidar* :

Held, that the suit having been brought within three years from the date when the *patni* sale was set aside and the *patnidar* was restored to possession was not barred by limitation. A.I.R. 1942 Cal. 222 = I.L.R. (1941) 2 Cal. 335 = 45 C.W.N. 787 = 199 Ind. Cas. 788.

——Art. 110—Royalty for mining—Time for payment not stipulated—Proper time for payment.

Where money has to be paid under a contract and the contract does not specify when such money is payable,

then the money must be paid within a reasonable time. Where the contract states the royalty at a known rate is to be payable in the absence of any direction as to when it is payable, the Court is bound to hold that it became payable within a reasonable time of the coal being abstracted.

Having regard to the nature of the debt and the amount, held that a reasonable time to pay this royalty would be three months or so. 21 P.L.T. 442 = A.I.R. 1940 Pat. 609 = 6 B.R. 889 = 188 Ind. Cas. 411.

——Art. 110—Fraud.

N brought a suit for rent against *M* and got an *ex parte* decree. In execution, he purchased the entire holding; subsequently the decree was set aside on the ground that the summons had been fraudulently suppressed. *N* then brought a suit for recovery of rents from *M* since the date of sale. It was contended by *N* that although the claim for rent for more than 3 years before institution of suit was barred by limitation, he could not sue *M* for rent because of his purchase and hence his claim for rent from the date of the purchase onward could not be barred by limitation as cause of action arose after the *ex parte* decree and the sale in *N*'s favour were set aside.

Held, that *N* could not take advantage of his own fraud and since the cause of action was not suspended *N*'s claim for rent for more than 3 years before institution of suit was barred by limitation. 3 Cal. 817 ; 23 Cal. 205, foll. 122 Ind. Cas. 241 = 8 Pat. 851 = A.I.R. 1930 Pat. 54.

——Art. 110—Starting point—Landlord and tenant the same person.

When there is no one competent to sue, there can be no cause of action, and consequently limitation cannot run, because there is no one against whom it can run. Although under Art. 110 the time from which period begins to run is " when the arrears become due ", that is usually the end of each *fasli* year, but a quite different time may in certain circumstances be the time from which limitation begins to run.

Where the landlord and tenant were the same person till plaintiff was appointed a Receiver of the landlord's interest, the arrears became due as soon as there was some one to whom they were payable, who was capable of enforcing the obligation by suit. In such a case arrears for more than three years can be had. 12 M.I.A. 244 and 27 Mad. 143, foll. 72 Ind. Cas. 5 = 46 Mad 579 = 17 M.L.W. 344 = 32 M.L.T. 174 = 1923 M.W.N. 252 = A I R. 1923 Mad. 461 = 44 M.L.J. 318.

——Arts. 110 and 116—Suit for recovery of rent by assignee of landlord—B.T. Act, Sch. III, Part 1 (2).

A suit by an assignee from the landlord for arrears of rent comes under Art. 110 and not Cl. 2 of Part I of the Sch. III of the B.T. Act. Though the tenant holds under a registered lease a suit for recovery of the rent recovered by the lease does not fall under Art. 116 of the Lim. Act. A registered patni lease provided that the rent should be paid in four instalments on four specified days in the year, *held*, that the period of limitation runs from the date on which each instalment fell due and not from the last day of the agricultural year. 1 Pat. L.J. 506 = 3 P.L.W. 179 = 38 Ind. Cas. 102.

——Art. 110—Suit for rent—Limitation—If runs from end of fasli.

In a suit by the landlord for rent, time for purposes of limitation runs not from the end of the fasli but from the date the rent becomes due under the terms of the tenancy. 37 Mad. 540 = 12 M.L.T. 437 = (1912) M.W.N. 960 = 16 Ind. Cas. 934.

——Art. 110—Rent suit—Limitation, if runs from issue of patta.

The right to each instalment of rent accrues on the date fixed for the payment of the instalment according to the contract between the parties, or according to the usage and not when a patta is tendered. Limitation would run from that date. 22 M.L.J. 451 = 11 M.L.T. 212 = (1912) M.W.N. 441 = 15 Ind. Cas. 393.

——Art. 110—Arrears of Jama—Ascertainment of Jama—C.P. Land Revenue Act (1881) S. 65 (A) (4) (d).

Where the amount of *The kajama* has to be fixed by Deputy Commissioner under S. 65 (A) (4) (*d*) no arrears of *jama* become due within Art. 110, Lim. Act, until the amount is finally ascertained by concluding the dispute regarding the *jama*, when the landlord has proceeded to have the proper rate of rent ascertained, time runs from the date on which the rent is finally determined and not from the close of the year for which the rent is payable. 7 N.L.R. 169 = 12 Ind. Cas. 804.

——Art. 110—Rent—Ascertainment of—Limitation.

Certain proceedings by tenants against their landlord were pending before High Court in the meantime the landlord tendered a *patta* for certain *fasli* which the tenants refused to accept. Thereafter, the High Court pronounced its judgment. The *patta* tendered was not according to the judgment of the High Court therefore, the landlord could not sue upon it, nor could he tender a fresh *patta* as the *fasli* in question had expired. The landlord then sued under S. 9 to enforce acceptance of the *patta* which he had tendered and within three years from the date this case was decreed, sued for rent for the said *fasli* ; *held*, that time runs from the date of adjudication of the landlord's suit as it was only then that the rent for the *fasli* was ascertained and recoverable by landlord. 20 M.L.J. 927 = 9 M.L.T. 82 = (1910) M.W.N. 831 = 8 Ind. Cas. 1091.

——Art. 110—" Ascertained rent "—Suit for enforcement of acceptance of patta—Decision by High Court declaring terms of patta rather permanently in a prior regular suit by tenant—Termination of summary suits.

A landholder tendered the patta for Fasli 1311, on the last date of the fasli ; and on the tenant's refusal to accept it instituted a summary suit for enforcement of acceptance of patta. During the pendency of the summary proceedings the High Court declared on 7-8-02 the terms of the patta in certain regular proceedings instituted by the tenants subject of course to variation if circumstances justifying it arise. The summary suits were disposed of finally and formally in terms of the High Court judgment only on 24-5-04. The present suits for rent were instituted just on the date of the expiry of the three years period from 24-5-04. *Held* that the rent for Fasli 1311 in respect of which summary proceedings were pending became ascertained only on the date of the formal determination of the summary suits and not on the date of the High Court judgment. 27 M. 143, followed. 20 M.L.J. 927 = 1910 M.W.N. 831 = 9 M.L.T. 82 = 8 Ind. Cas. 1091 = 36 Mad. 438.

——Art. 110—" Ascertained rent "—Meaning of—Civil litigation pending.

So long as proceedings are pending before civil courts the rate of rent is in suspense and therefore no arrears can be said to have been due within the meaning of the Limitation Act. 20 M.L.J. 821 = 7 M.L.T. 429 = 6 Ind. Cas. 209 = 1910 M.W.N. 227.

——Art. 110—Rent payable on a certain date—Tender of patta on a subsqeuent date—Effort of starting point of Limitation—Madras Rent Recovery Act.

Rent may become due at any particular time before the close of the fasli. Where the rent is ascertained (*i.e.*), when there is no dispute as to the amount or rent time for a suit to recover it will run from the date on which it was so due. The fact that the landlord did not tender the pattah till after a subsequent date cannot operate to *postpone* the starting point of limitation, when the fault was ascertained and was payable, 27 M. 143, commented on. (1906) 16 M.L.J. 486 = 29 M. 556 = 1 M.L.T. 315.

——Art. 110—Starting point—Sum of money payable on a certain date.

Although a sum of money may be payable on a specified date, the limitation for the recovery thereof need not necessarily run from the same date. (1906) 11 C.W.N 57 = 5 C.L.J. 19.

——Art. 110—"When the arrear becomes due."

The point of time at which rent may become due within the meaning of Art. 110 though usually, is not necessarily always the close of the period in respect of which it is to be paid. Legislation or custom or express contract, or the special circumstances of any case may make rent become due at a different point of time. *Semble* :—In the Limitation Act having regard to the object of the Act, falling due of rent should mean the falling due of an ascertained rent which the tenant is under an obligation to pay and which the landlord can claim and if necessary sue for. (1903) 8 C.W.N. 162 = 14 M.L.J. 1 = 6 Bom. L.R. 241 = 27 M. 143 = 31 I.A. 17 (P.C.).

——Arts. 111, 116—Applicability.

Sale and mortgage of lands by *A* in favour of *B*—Sale consideration left with *B* to be paid to *A*'s creditor for debts due under mortgage and handnotes—Default by *B*—Handnotes paid by *A*—Same lands subsequently sold in execution of decree against *A*—Suit for possession and recovery of consideration —Suit held governed by Art. 111, read with Art. 116 and time-barred—Time, held began to run when handnotes were paid by *A*. 7 B.R. 587 = A.I.R. 1941 Pat. 452 = 193 Ind. Cas. 172.

——Arts. 111, 116—Applicability.

Sale by *A* to *B* on February 5, 1924—*Kabala* reciting payment of full consideration—Suit by *A* on April 25, 1924, for declaration the sale-deed was fraudulent and that no consideration passed—Suit dismissed also holding that part of consideration passed—Suit by *A* on August 28, 1928, for enforcement of statutory charge for unpaid purchase-money—Decree for sale of property for unpaid purchase-money—Only portion of amount realised —Application under O. 34, r. 6, Civil P.C. for balance —Suit, held governed by Art. 111 and not Art. 116 and hence application barred. 15 Pat. 753 = 3 B.R. 191 = A.I.R. 1937 Pat. 44 = 18 P.L.T. 176 = 166 Ind. Cas. 599.

——Art. 111—Applicability.

Article 111, does not apply to a case where no time was fixed for completing the sale and the purchase-money was not payable till some date after conveyance of the property. A.I.R. 1934 Lah. 296=154 Ind. Cas. 432 (2).

——Art. 111—Applicability.

Article 111, is applicable only in two cases, and in no other. One is where the suit is to recover unpaid purchase-money after the completion of the sale. Then the suit has to be instituted within a period of three years from the date of the completion of the sale. The other is the case where the title is accepted after the time fixed for completion, when the suit should be instituted within three years from the date of the acceptance. A.I.R. 1934 Oudh 240 = 11 O.W.N. 691 = 10 Luck. 26 = 149 Ind. Cas. 529.

——Arts. 111 and 120—Applicability.

Suit by *de facto* guardian—Money left with vendee to be paid to minors on attaining majority—Suit by guardian as reversioner for the money—Article 120 and not Art. 111 applied. A.I.R. 1933 Lah. 860 = 35 P.L.R. 161 = 15 L. 35 = 147 Ind. Cas. 269.

——Arts. 111, 116—Scope—Sale of part of property by registered deed—Prior mortgage of whole property by vendor—Part of purchase-money reserved with vendee to pay off mortgage—Purchaser's default in payment—Sale of property in execution of mortgagee's decree—Suit by vendor for recovery of amount—Limitation—Starting point.

Article 111 governs suits for unpaid purchase-money payable to or to the order of the vendor under an agreement to sell and is independent of rights arising by the deed of sale because the *terminus a quo* is the date fixed for completing the sale or the date of acceptance of the title whichever is later. But where the contract to sell is embodied in a registered sale-deed the unpaid vendor can rely upon Art. 116.

The plaintiff's father sold to the defendant on April 28, 1919, a portion of the property which had been mortgaged by the vendor to a third party prior to the sale. A certain amount was reserved with the purchaser for redemption of the mortgage. The purchaser paid the balance and took possession of the property but he did not pay the amount of the mortgage to the third party who brought a suit in 1924 impleading the mortgagor-vendor, and purchaser-defendant and having obtained a decree, sold the whole of the mortgaged property in execution on October 29, 1926 including the portion sold to the purchaser-defendant. The vendor instituted a suit for the amount reserved with the purchaser with interest on December 4, 1926 :

Held, that inasmuch as the purchaser had, under a registered instrument undertaken to satisfy the mortgage-debt of the vendor with part of the purchase-money, there was implied in that agreement, an agreement to indemnify the vendors against payment by the purchaser, that such agreement was broken only when the vendor's property was sold in execution of the decree of the creditor, and that consequently limitation for the case began to run when the property was sold on October 29, 1926 ; that the suit was governed by Art. 116, that, therefore, the suit was not barred. 37 L.W. 503 = 64 M.L.J. 526 = (1933) M.W.N. 370 = A.I.R. 1933 Mad. 424 = 56 L.W. 724 = 144 Ind. Cas. 550.

——Arts. 111 and 116.

Vendor and purchaser—Price reserved with vendee for payment of vendor's creditors—Failure to pay—Suit by vendor for refund—Article 116 and not Art. 111 applied. (1931) A.L.J. 985 = A.I.R. 1931 All. 419= 131 Ind. Cas. 686 (2).

——Art. 111—Undertaking to pay debts.

Some portion of the purchase-money was left by the vendor with the vendee to be paid to his (vendor's) creditor. The vendee failed to pay. Thereupon the creditor sued the vendor, attached and purchased this debt due from the vendee. He then sued the vendee to recover the debt from him basing his claim on the debt purchased by him.

Held, that by his purchase of the debt the creditor stepped into the shoes of the vendor and obtained his right to recover the debt on account of breach of contract to pay the same to the creditor as agreed in the sale-deed. His suit therefore would be governed by Art. 116 and not by Art. 111, although he based it on the debt purchased by him. 34 All. 459, foll. 118 Ind. Cas. 445 = A.I.R. 1929 Lah. 395.

——Art. 111—Compromise in suit.

Under a compromise in a suit for partition of joint property in order to adjust the difference between the prices of the properties which fell to the share of the two contesting parties a certain sum was to be paid by *D* to *B*. The amount was to be paid after one month. *B* brought a suit to recover the amount. *D* contended that the suit was time barred according to Art. 111.

Held, that it was not a case of sale and amount in suit could not be described as purchase-money. Therefore Art. 111 did not apply but the case was governed by Art. 120. 111 Ind. Cas. 29 = A.I.R. 1928 Lah. 662.

——Arts. 111 and 116.

Suit for compensation for breach of contract in writing registered to pay off mortgage is governed by Art. 116 and not Art. 111 or Art. 62. 97 Ind. Cas. 185 = 9 N.L.J. 107 = A.I.R. 1926 Nag. 429.

——**Arts. 111, 132—Suit by vendor to enforce charge for unpaid balance of purchase-money—Transfer of Property Act, S. 55 (4) (b).**

Held, that a suit for the enforcement of the payment of purchase-money by sale of the purchased property is a suit to enforce a statutory charge differing from the lien which an unpaid vendor in equity possessed for the recovery of the balance of his purchase-money, and that the article applicable is Art. 132 and not Art. 111. 31 C. 57 ; 21 A. 154 and 29 M. 305, foll. 1891 A.W.N. 1 p. 130 overruled. (1908) A.W.N. 71 = 5 A.L.J. 243 = 30 A. 172 (F.B.).

——**Art. 111**—Not applicable for enforcement of vendor's statutory lien—T.P.A., S. 55. *See* ART. 132. 29 M. 305.

——**Art. 111—Suit to recover unpaid purchase-money and to enforce vendor's lien.**

A suit to recover unpaid purchase-money and enforce the vendor's lien is governed by Art. 111. 21 M. 141, foll. (1900) 24 M. 233.

[Overruled in part by 29 M. 305. The difference of view as to the applicability of the Article to enforce a charge has now been set at rest by the express limitation of the Article in the new Act to personal remedy—Ed.].

——**Arts. 112 and 120**—Applicability—Company—Winding up—Suit by liquidator to recover unpaid call without approaching Court and asking it to make a call — Limitation — Enforcement of statutory liability — Procedure — Limitation. *See* COMPANIES ACT, Ss. 156 AND 186. 52 Bom. L. R. 559 = A.I.R. 1950 Bom. 386.

——**Art. 112—Company in liquidation—Liability of member to pay calls barred under Article.**

A member of a company in liquidation is liable in respect of unpaid calls even though the calls were made by the company before it went into liquidation and the suit of the company for its realisation had become barred by time under Art. 112. A.I.R. 1934 Lah. 1015 = 36 P.L.R. 282 = 155 Ind. Cas. 16.

——**Art. 112—Liquidation.**

A member of a company in liquidation is liable to official liquidators in respect of unapid calls even though as against the company the realization of such calls may have become barred by limitation. 38 All. 347, foll.

Liquidation gives the official liquidators a cause of action which the company may not itself have possessed. Just as a claim, if brought by the company, might be held to be barred by limitation, but not, if brought by the official liquidators, in the same manner a claim which might be held to be barred by the C.P. Code if brought by the company can be preferred by the official liquidators under the provisions of the Companies Act. 113 Ind. Cas. 91 = 50 All. 476 = 26 A.L.J. 256 = A.I.R. 1928 All. 272.

——**Art. 112—Starting point of limitation.**

Where the shares of a company are forfeited by virtue of its articles of association a suit brought within 3 years from the time of forfeiture is within time. A.I.R. 1940 Nag. 235 = 1940 N.L.J. 306 = I.L.R. (1942) Nag. 114 = 190 Ind. Cas. 639.

——**Art. 112—Starting point of limitation.**

Where a company forfeited the shares of a member more than three years after the calls on the shares had become payable and instituted a suit against the member for the money payable in respect of the forfeited shares :

Held, that the forfeiture of the shares could not revive claims to share money which had become barred under Art. 112 at the time of forfeiture, and the suit was not maintainable. 10 O.W.N. 457 = 8 Luck. 723 = A.I.R. 1933 Oudh 285 = 146 Ind. Cas. 825.

——**Art. 112—Starting point of limitation.**

A certain company known as the City Brick Co., issued a number of shares and mortgaged them to the plaintiff. By a resolution of the City Brick Co., the unpaid calls were made payable on August 1, 1921, but the shareholders took no notice of the calls. The plaintiff sued on his mortgage and obtained a decree on April 17, 1924. Meanwhile, on July 27, 1924, the City Brick Co., went into liquidation. The plaintiff bought the unpaid calls at the sale in execution of the mortgage decree on August 14, 1924, and then sued the shareholders making the Liquidator of the City Brick Co., also a party to the suit :

Held, that Art. 112 applied and that the suit was time-barred ; limitation as regards the shareholders, *viz*., the defendants began, to run from and after August 31, 1921. A.I.R. 1932 Cal. 382 = 54 C.L.J. 588 = 137 Ind. Cas. 380.

——**Art. 113.**

Synopsis.

1. **Applicability of Article.**
2. **Starting point.**
3. **Suit to enforce award.**
4. **Miscellaneous.**

1 Applicability of Article.

——**Art. 113—Applicability.**

Claim for recovery of advocate's fees. *See* LIMITATION Act (9 of 1908), ARTS. 84, 113 AND 115. (1947) 1 M.L.J. 173 = A.I.R. 1947 Mad. 457.

——**Art. 113—Applicability.**

To the suit for specific performance of contract Art. 113 applies. A.I.R. 1940 Lah. 225 = 42 P.L.R. 194 = 189 Ind. Cas. 418. *See also* 9 Ind. Cas. 243 (Oudh).

——**Art. 113—Suit for possession by holder of perpetual lease—Limitation.**

In cases, where a lease may be made by an oral agreement accompanied by delivery of possession, if possession has not been delivered to the lessee, the lease is not effective and there is no demise or transfer ; consequently the right to possession is not vested in the lessee. In order to make it effective, it is necessary that the lessee should obtain possession over the property leased. In such a case a suit for possession would be one for specific performance of an agreement to lease. In all other cases, where a lease is made by a registered instrument, it effects an actual demise and the right to possession becomes vested in the lessee. One of the rights of such lessee is to obtain and remain in possession over the property leased. This right may be enforced by the lessee as well as by any transferee of his, in whom the lessee's right is vested from time to time. Such a lessee has a right to enforce his right to obtain and remain in possession which he has acquired under the lease against the lessor by a suit and also a right to bring a suit for ejectment against a third person who happens to be in possession of the property leased and against whom the lessor does not choose to take any action. The rights acquired by the lessee under the perpetual lease are real rights which may be enforced by a suit for possession and not by a suit for specific performance, and to such a suit Art. 113, does not apply. I.L.R. (1938) All. 664 = (1938) A.L.J. 561 = A.I.R. 1938 All. 429 = 1938 A.W.R. 365 = 176 Ind. Cas. 523.

[Reversing A.I.R. 1935 All. 569 = 1935 R.D. 262 = 1935 A.W.R. 721.]

——**Art. 113—Counter-claim for specific performance in suit for ejectment.**

In the *mofussil* Court, a counter-claim for specific performance in a suit for ejectment is incompetent ; any such claim must be enforced by separate suit within the time prescribed by Art. 113.

Where, in a suit for ejectment, the defendant who claims specific performance of a verbal contract in possession has delayed enforcing his rights until, at a

date subsequent to the raising of the ejectment-action, his right to institute the counter-action became barred by limitation, he would be no better off than he would have been with the limitation bar in operation when the ejectment action was instituted. (1933) M.W.N. 10 = A.I.R. 1933 P.C. 29 = 64 M.L.J. 103 = 37 C.W.N. 265 = 35 Bom. L.R. 223 = (1933) A.L.J. 611 = 37 L.W. 253 = 57 C.L.J. 264 = 60 C. 980 = 60 I.A. 297 = 141 Ind. Cas. 209 (P.C.).

——Arts. 113 and 116—Vendor's suit for specific performance on covenant in sale-deed.

Where the purchaser of a property agrees to release it from a mortgage over it and he fails to so release it, the cause of action for a suit by the vendor against the purchaser arises either on the date of which the covenant was undertaken to be fulfilled or in any case not later than the date when the vendor called upon the purchaser to fulfil it. Such a suit is governed by Art. 116, and if for specific performance, by Art. 113. 60 C. 761 = A.I.R. 1933 Cal. 641 = 146 Ind. Cas. 863.

——Art. 113—Purchaser's suit after possession.

Quaere.—Where an intended transferee of immovable property has taken possession of the property but the requisite legal documents have not been executed, is the position of the transferee affected by the fact that the period or the time during which the transferee would be entitled to claim specific performance had passed by reason of the provisions of Art. 113, Limitation Act. 123 Ind. Cas. 799 = 11 P.L.T. 478 = A.I.R. 1930 Pat. 53.

——Art. 113—Possession and specific performance.

Vendee whose suit for specific performance is barred by Art. 113, cannot recover possession of the property sold because a suit for possession, *i.e.*, to enforce his right under the contract with reference to property is essentially one for specific performance of a contract to which Art. 113 applies. A.I.R. 1922 P.C. 345, foll. 116 Ind. Cas. 70 = A.I.R. 1929 Nag. 298.

——Arts. 113 and 144—Compromise-deed.

A compromise-deed stated that the parties had agreed to exchange certain properties but that the exchange would take place on a future date. The suit was brought to enforce the terms of the compromise.

Held, the suit was therefore for specific performance of a contract to hand over the ownership rights in the property and not for possession of property in which ownership right had completely passed by the compromise. So the suit was governed by Art. 113 and not by Art. 144. 72 Ind. Cas. 1040 = A.I.R. 1923 Lah. 672.

——Art. 113—Specific performance—Suit for, barred.

The terms of the contract of 1888 were as follows : "On looking into the accounts the amount found due to the said Saravana Pillai was Rs. 99,568-15-6. Saravana Pillai consented to receive this sum of rupees, etc., and sell the aforesaid villages to Sri Maharajulangaru." The suit for possession by Sri Maharajulangaru was instituted in 1900.

Held, the suit becomes one for the specific performance of a contract which is barred by Art. 113. 68 Ind. Cas. 172 = 45 Mad. 641 = 16 M.L.W. 169 = 31 M.L.T. 146 = 49 I.A. 336 = 27 C.W.N. 408 = 21 A.L.J. 297 = 37 C.L.J. 426 = 25 Bom. L.R. 640 = A.I.R. 1922 P.C. 345 = 44 M.L.J. 740 (P.C.).

——Arts. 113 and 144—Contract, meaning of—Suit for possession—Chaukidar's lands transferred to Zamindar—Patnidar's suit to enforce his rights—Limitation—Bengal Act (VI of 1870), S. 51.

"Contract", primarily means a transaction which creates personal obligations but it may, though less exactly refer to transactions creating real rights. It is in this latter sense that the term is used in Bengal Act VI of 1870, S. 51. A suit by a *patnidar* for settlement and possession of *chaukidari chakran* lands transferred to the *zamindar* is governed by Art. 144 and not by Art. 113. 46 Cal. 173 = 16 A.L.J. 964 = 25 M.L.T. 8 = 29 C.L.J. 193 = 45 I.A. 162 = 1 U.P.L.R. (P.C.) 23 = 21 Bom. L.R. 506 = 10 L.W. 83 = 35 M.L.J. 528 = 23 C.W.N. 198 = 48 Ind. Cas. 262 (P.C.).

——Arts. 113 and 144—Agreement to lease—Interest in immovable property.

The agreement to grant or renew a lease is not immoveable property and a suit for specific performance is governed by Art. 113 and not Art. 144 of the Act. 7 Bur. L.T. 268 = 8 L.B.R. 64 = 24 Ind. Cas. 911.

——Art. 113—Contract to resell.

A suit for specific performance of a contract to resell is governed by Art. 113 and Limitation runs from the date of refusal. 29 Ind. Cas. 898. (Mad.).

——Arts. 113 and 144—Suit by heir for possession.

Suit by one heir for possession of his share by partition of the property, in joint possession, of all the heirs, under an agreement entered into 5 years before suit, is governed by Art. 144 and time runs from the time the agreement is impeached by one heir. 20 P.R. 1913 = 101 P.W.R. 1913 = 185 P.L.R. 1913 = 19 Ind. Cas. 411.

——Art. 113—Mortgage by conditional sale—Agreement as to foreclosure—Suit for possession in terms of agreement—Limitation.

Where certain occupancy tenants mortgaged their holding to one of the village proprietors who on a general partition of the estate agreed that on foreclosure of the mortgage he should give up the land and receive a proportionate amount in respect of his share, a suit to recover one's share under the above agreement, though possession of immoveable property was involved in it, is one for specific performance of the agreement governed for purposes of limitation by Article 113 of the Limitation Act. 138 P.W.R. 1911 = 217 P.L.R. 1911 = 11 Ind. Cas. 299.

——Arts. 113 and 116, 83 and 110—Contract to pay money.

A suit for failure to pay money according to contract is a suit for compensation for breach of contract and not one for specific performance and is therefore governed by Art. 116 read with Art. 83 and not by Art. 113. 5 M.L.T. 211 = 4 Ind. Cas. 1121.

——Arts. 113, 144—Lessor and lessee—Contract of lease—Suit for specific performance—Suit for possession of immovable property.

Where the lessors contracted to give possession to the lessees but did not do so and the lessee brought a suit for possession more than three years afterwards. *Held*, that the suit was one for specific performance of the contract and was governed by Art. 113 and not Art. 144 and the suit was barred by time. 1908 A.W.N. 245 = 5 A.L.J. 529.

——Arts. 113, 116, 83—Suit on covenant—Exchange deed—Indemnity clause, suit on—No suit for specific performance—Cause of action.

A registered exchange deed provided as follows : "There is no dispute in respect of the said lands. If disputes should arise, the respective party shall be answerable to the extent of his private property. *Held*, that a suit on the covenant by one of the parties, on dispossession is governed by Art. 116 and not by Art. 113 ; and that the cause of action arose on the date of the dispossession, the covenant being a special covenant to indemnify, though in the absence of the special contract, the covenant will be a covenant for title, in which case the cause of action would have arisen on the date of the deed. (1908) 18 M.L.J. 477 = 31 M. 452 = 5 M.L.T. 211.

——Art. 113—Suit by putnidar against zamindar for posession of lands granted on putni.

A suit by a putnidar for possession of land granted by a zamindar on putni in 1854 and subsequently resumed by Government and made over to the zamindar only in 1899 is governed by Art. 113. (1907) 34 C. 564.

——Art. 113—Suit for recovery of immovable property based upon a compromise—Compromise not itself a document of title.

Certain revenue court suits were referred to arbitration and an award was made to the effect that the "plaintiff's claim in all the suits be dismissed with costs and that the defendant bear his own costs". The award, however went on to declare that, according to the terms of a compromise, arranged between the parties, the parties should transfer the one to the other different portions of the property which was in dispute. No steps were actually taken to complete the transfer thus recited as having been agreed to between the parties, but one of the parties brought a suit to recover the properties agreed to be transferred to him. *Held*, that the limitation applicable was that prescribed by S. 113 as the suit was not one for possession of property to which Art. 144 would apply. 1904 A.W.N. 72=26 A. 497.

——Arts. 113, 144. *See* 17 M.L.J. 505=30 M. 486 = 2 M.L.T. 443.

2. Starting point.

——Art. 113—Scope of—"Date fixed"—Meaning—Agreement to sell pending suit—Starting point for suit to enforce specific performance of.

When the date is fixed, under the first part of column 3 of Art. 113, Limitation Act, limitation begins to run forthwith as the date is certain. But where no such time is fixed and where the party against whom the limitation runs is not in a position to know of the occurrence of the contingency contemplated by the contract, time begins to run only when he has notice of the refusal of the performance. The words "date fixed" are comprehensive to include a date which can be ascertained with reference to an event certain to happen.

An agreement to sell certain property pending a suit was in these terms: "As regards the balance of Rs. 2,400 since a suit has been pending concerning the same property. I shall receive it before the Sub-Registrar upon executing a sale-deed the moment the suit is disposed of? On a question as to the starting point of limitation for a suit to enforce specific performance of the agreement.

Held,: The parties under the document contemplated a date which may be ascertained with reference to an event certain to happen that is disposal of the suit pending at the time of the agreement and that would be the starting point. 63 L.W. 605 = 1950 M.W.N. 412 = A.I.R. 1950 Mad. 820 = (1950) 2 M.L.J. 163.

——Art. 113—Starting point of limitation—'Fixed', significance of.

The period of limitation for a suit for specific performance of a contract, which is governed by Art. 113 commences from the date fixed in the contract itself which is to be specifically enforced, whether the contract be oral or in writing. The force of the word 'fixed' implies that it should be fixed definitely and should not be left to be gathered from surrounding circumstances of the case. A.I.R. 1933 All. 410 = (1933) A.L.J. 300 = 145 Ind. Cas. 586.

——Art. 113—Starting point.

Where there is no time specified for the performance of a contract for sale, time would run from the date of refusal by the vendor to convey. Article applicable is Art. 113, Limitation Act. 49 C.W.N. 371 = A.I.R. 1945 Cal. 355.

——Art. 113—Starting point of limitation—Contract of sale.

A contract of sale was entered into on July 18, 1934, and the vendor promised to execute the sale-deed when both of his brothers who were residing elsewhere returned to the village in May-June, 1935:

Held, that this was too indefinite to be regarded as fixing a "date" for the performance of the contract and the period of limitation must be computed from the date of refusal to perform, *i.e.*, the date of the reply notice sent by the vendor wherein he denied the contract. A.I.R. 1944 Mad. 218 = 56 L.W. 679 = 1943 M.W.N. 718 = (1943) 2 M.L.J. 584 = I.L.R. (1944) Mad. 742 = 215 Ind. Cas. 310.

——Art. 113—Applicability—Starting point of limitation.

The question as to whether the first part of Art. 113 is or is not applicable, must depend to a great extent on the language of the agreement.

By an agreement between *A* and *B*, *B* agreed to finance the litigation of *A* in respect of certain property in return for a part worth about one lac of Rupees of the recovered property, knowing well that the litigation would cost about Rs. 9,000. It was also provided that if an appeal was preferred to the Privy Council, *B* would get a greater share. *A* was a man of weak intellect and was in the habit of drinking. *B* instituted a suit for the specific performance of the contract more than three years after the date of the decree but within three years of the refusal to perform the contract:

Held, that *B* was entitled to get his share after the decree which undoubtedly meant when the decree became unassailable. The decree had not become unassailable. It was liable to be challenged in an appeal to the High Court, and on the decision of such an appeal, by an appeal to his Majesty in Council. The date of the decree could not, therefore, be regarded as the date on which *B* became entitled to his share. It must be, therefore, held that no date for the specific performance of the contract was fixed within the purview of Article 113. The second part of Art. 113 would, therefore, be applicable to the facts of the present case and the suit was within time. A.I.R. 1938 Lah. 23 = 181 Ind. Cas. 728.

——Art. 113—Suit to enforce agreement to partition—Limitation—Starting point.

Where a deed of agreement to partition states that the partition should be effected within six months from the date of the agreements by getting the properties divided according to share by calling certain gentlemen and get the partition deed executed and registered, the suit to specifically enforce the agreement is governed by Art. 113, and time runs after the lapse of six months from the date of the agreement. 61 C.L.J. 551 = 163 Ind. Cas. 663.

——Art. 113—Applicability—Starting point of limitation.

A suit to enforce the rights arising under a contract comes under Art. 113. If no time is fixed for the purpose of enforcing the obligation in the contract, limitation runs from the date of refusal of the defendant to perform his part of the contract. 39 C.W.N. 716 = 163 Ind. Cas. 347.

——Art. 113—Specific performance—Starting point.

If the suit is for specific performance of the contract of sale, then it would be governed by Art. 113, Limitation Act and time would begin to run from the date when there was failure to perform it. A.I.R. 1936 All. 870 = 1936 A.W.R. 1197 = 166 Ind. Cas. 908.

——Arts. 113 and 114—Applicability.

Where a partition deed provided that if any inequality was discovered in the shares allotted by the deed, the person who had excess land in his possession was to

make good the deficit in the other side by giving sufficient portion of land from a certain field adjourning the latter's share, and a suit for possession was filed on the strength of this provision :

Held, that the mere discovery of an inequality could not have the effect in law of putting an end to the separate ownership created by the partition deed and making the sharers co-owners in respect of the land from which the excess was to be made good so as to render the possession of the defendant a mere co-owner's possession ; the provision was a mere covenant and the suit for possession, a suit for specific performance of the covenant ; and the suit was therefore governed by Art. 113 and not by Art. 114 or Art. 120. (1935) M.W.N. 540 = A.I.R. 1935 Mad. 559 = 42 L.W. 208 = 156 Ind. Cas. 879.

——Art. 113—Specific performance—Prior purchaser vigilant about her rights—Delay of nine years in filing suit—Whether can be excused.

Where it cannot be said that the plaintiff has slept over her rights for she obtained possession of the land at the time when the contract was entered into, and since that time, has been in possession and enjoyed the usufruct thereof and the real right of action had accrued only some time before institution of proceedings :

Held, that a lapse of time of nine years was not fatal to an action for specific performance of an execute contract. A.I.R. 1934 Rang. 310 = 154 Ind. Cas. 80.

——Art. 113—Sale of property—Agreement to reconvey—Denial of agreement.

Where a person sells a property and takes a separate agreement to re-sell it to him and subsequently, on his demanding the re-sale, the purchaser denies the agreement, the denial amounts to a refusal to perform the agreement within the meaning of Art. 113, Limitation Act. 36 Bom. L.R. 290 = A.I.R. 1934 Bom. 171 = 151 Ind. Cas. 536.

——Art. 113—Performance is refused.

Where there is no date fixed for the performance of the contract, time will run against the plaintiff from the date of the refusal of a demand by the plaintiff for performance. A.I.R. 1934 Bom. 491 = 36 Bom. L.R. 1068 = 154 Ind. Cas. 680.

——Art. 113—Agreement to convey specific area of land—Limitation—Starting point.

Where the parties entered into a compromise in 1918 under which the defendant agreed to give a certain area of land to the plaintiff and the plaintiff sued in 1929 for recovery of the land ;

Held, that the suit was one to enforce an executory contract, falling within Art. 113 and as there was no date fixed for performance, and no proof of demand and refusal more than three years before the suit, the suit was not time-barred. 32 P.L.R. 761 = A.I.R. 1932 Lah. 24=135 Ind. Cas. 233.

——Art. 113—Starting point of limitation—Refusal must be unconditional.

The *terminus a quo* under Art. 113 in a case where no date for the performance of the contract is fixed, is the date when the plaintiff has notice of the refusal of performance and refusal for the purposes of this rule means unconditional refusal. 33 P.L.R. 562 = A.I.R. 1932 Lah. 36 = 139 Ind. Cas. 121.

——Art. 113—Second part of the article applies only when the first does not apply.

If a case ostensibly falls within the contents of Col. 3, Art. 113, Cl. 2 should not be resorted to.

G purchased certain land in auction from Government, and deposited the earnest money. As he had no money to pay the remaining instalments, he sold the land to *D* who was to pay the remaining instalments. *G* agreed that when he would acquire full proprietary rights in the land, he would execute a sale-deed in favour of *D*. *D* also could not pay all the instalments and transferred his rights to *L* and agreed to transfer the land to *L* after *G* transferred the same to him. The remaining instalments were paid by *L* and *G* got the full proprietary rights on 13th June, 1920 and *L* brought a suit for specific performance on 19th July, 1924.

Held, that under the Punjab Colonization Act *G* did not get full proprietary rights as a matter of course from the payment of the last instalment and the first portion of Art. 113 had no application. The second portion of Art. 113 therefore applied and time began to run *L* had notice that the performance of the agreement had been refused. A.I.R. 1930 Lah. 1020=31 P.L.R. 636.

——Art. 113—Performance depending on two contingencies.

The first part of Col. 3, Art. 113, does not apply to a loosely worded agreement in which the promisor undertake to execute a sale-deed, not on the happening of a particular event but after payment of the last instalment in the Government Treasury and after the acquisition of proprietary rights—events which cannot have happened simultaneously. 119 Ind. Cas. 491 = 11 Lah. 69 = 31 P.L.R. 352 = A.I.R. 1930 Lah. 34.

——Art. 113—Refusal to perform.

In order to bring a case in the second part of Col. 3, Art. 113, it is necessary to establish not only that the promisor refused to perform the contract but that the promisee had knowledge of such refusal more than three years prior to the suit for specific performance of a contract. 119 Ind. Cas. 491 = 11 Lah. 69 = 31 P.L.R. 352 = A.I.R. 1930 Lah. 34.

——Art. 113—Where an agreement stated that another lease would be executed, but in the contract no date was fixed for the execution of the second deed,

Held, the three years period of imitation for specific performance began to run against the plaintiff when the first had notice that the defendant refused to execute it. 102 Ind. Cas. 305 = A.I.R. 1927 Nag. 353.

——Art. 113—Where a date is not fixed for specific performance, time does not commence to run till specific performance has been demanded and refused. 79 Ind. Cas. 278 = 1 Bur.L.J. 171 = A.I.R. 1923 Rang. 44.

——Art. 113—Redemption of mortgage.

Where a usufructuary mortgage provided that redemption was to be effected within two years and that on the failure to do so, the mortgagee had the right to take the land out-right.

Held, that though the clause as to forfeiture should, under the law in force prior to the T.P. Act, be construed strictly and given effect to if the mortgagors failed to redeem yet where the mortgagees prevented redemption in spite of mortgagor's readiness to redeem, that would give the mortgagors a cause of action. Regarded as a suit for specific performance of the convenant to allow redemption in two years, the period of limitation would be three years from the date on which redemption was refused. 76 Ind. Cas. 624 = 2 Bur. L.J. 119 = A.I.R. 1923 Rang. 232.

——Art. 113. Where in pursuance of a contract to sell the vendor gives the vendee possession of the property, limitation agdainst the vendee will only commence to run from the date when the vendee became aware that the vendor refused to complete the contract. 72 Ind. Cas. 6 = 11 L.B.R. 462 = A.I.R. 1923 Rang. 125.

——Art. 113. The defendant through her attorney agreed to convey six of the well-sites received for 1902 and three of the well-sites to be received for 1903 and in pursuance of this agreement the defendant conveyed

to the plaintiff six specified well sites of those issued in 1902, but failed to convey three of those received for the year 1903,

Held, if specific performance could properly be sued for the suit would be governed by Art. 113 but time could run from the date on which the planitiff had notice that performance was refused. 4 UB.R. 41 = 4 U.B.R. 38 = 4 U.B.R. 35 = A.I.R. 1921 U.B. 16.

——Art. 113—Starting point of limitation—Contract for sale of immovable property—No time fixed—Purchase of property in execution sale with notice—Suit for specific performance—Limitation.

In a suit for specific performance of a contract of sale in which no time was fixed for execution of the conveyance the plaintiff impleaded as additional defendant an execution purchaser of the property with notice of the contract. The auction-purchaser was added at a time more than 3 years from the date of the refusal by the vendor to perform his contract. It was not alleged or proved that the auction-purchaser had refused performance of the contract more than three years before he was impleaded. *Held*, that the suit was instituted within time under Article 113 of the Limitation Act. 38 M.L.J. 29 = 11 L.W. 35 = (1920) M.W.N. 122 = 55 Ind. Cas. 533.

——Art. 113—Agreement to lease.

Where a person who has agreed to execute a lease fails to do so and the promisee does not demand execution within three years from the completion of the agreement a suit for specific performance is barred. (1920) P.H.C.C. 17 = 4 P.L.J. 447 = 52 Ind. Cas. 452.

——Arts. 113 and 149—Contract to re-exchange—Suit on..

Where the parties to a deed of exchange expressly agree that, in the event of obstruction to the other partly in enjoyment of the property exchanged each should return to the other what is taken, the covenant is in the nature of a condition subsequent. A suit based on the covenant is governed by Art. 149 and not by Art. 113 of the Limitation Act. The defendant in such a suit cannot avail himself of the plea of a *bona fide* purchase from one of the parties to the exchange as the transferee cannot get a larger estate than the transferor. 42 Mad. 690 = 51 Ind. Cas. 939.

——Art. 113—Starting point of limitation.

The time for limitation in a suit for specific performance begins to run from the date the cause of action arises, that is, from the date fixed for the performance of the contract and not from the date of payment of consideration or taking possession. 4 P.L.W. 192 = 44 Ind. Cas. 244.

——Art. 113—Starting point of limitation—Right to claim specific performance vesting in third party.

In cases when the right to sue for specific performance vests in a third party to whom the ascertainment of the date on which performance becomes due, need not necessarily be known, the doctrine *certum est quod atem reddi potest* will not apply and time begins to run from the date of refusal of performance. 41 Mad. 18 = 33 M.L.J. 35 = 6 L.W. 192 = 41 Ind. Cas. 807.

——Art. 113—Starting point of limitation.

A suit for specific performance of a contract is to be brought within 3 years from the date when the performance is refused. 43 Cal. 790 = 23 C.L.J. 26 = 20 C.W.N. 370 = 35 Ind. Cas. 305.

——Art. 113—Starting point of limitations—Transfer of Property Act, S. 54.

A vendee who has paid up the purchase-money can bring a suit to have a registered deed executed for completing his title under S. 54 of the T.P. Act unless it is barred by Art. 113 of the Limitation Act. Where the date for the performance is not fixed, time under Art. 113 runs from date of refusal. 33 Ind. Cas. 761 (L.B.).

——Art. 113—Notice of refusal—Specific performance of unregistered sale.

The limitation for a suit for specific performance of a contract to sell (the sale-deed being unregistered) is three years from the time when the vendee knows that vendor refuses to sell. 9 Bur.L.T. 45 = 32 Ind. Cas. 536.

——Art. 113—Notice of refusal—Performance of contract of sale.

Time under Art. 113 of the Act for specific performance of contract of sale begins to run from the date when plaintiff comes to known of the refusal to execute the document and when no sale is specified. 9 Bur.L.T. 816 = 32 Ind. Cas. 573.

——Art. 113—Starting point of limitation.

When there is no date fixed for performance of a contract time begins to run from the date when the performance is demanded by one party and refused by the other. (1912) M.W.N. 1004 = 17 Ind. Cas. 399.

——Art. 113—Starting point of limitation—Suit for specific performance—No time fixed for performance.

In suits for specific performance where no time it fixed for performance, limitation commences from the time where performance was asked for and refused. 11 Ind. Cas. 25 (Sind).

——Art. 113—Starting point of limitation.

In a suit for specific performance of a covenant, time begins from the date when performance is refused. 36 Cal. 675 = 9 C.L.J. 523 = 1 Ind. Cas. 626.

3. Suit to enforce award.

——Art. 113—Applicability.

Article 113 does not apply to a claim under an award which is not a declaratory one. 36 Bom.L.R. 174 = A.I.R. 1934 Bom. 140 = 151 Ind. Cas. 156.

——Arts. 113 and 120—Suit to enforce award.

Suits to enforce awards are governed by Arts. 120 and not by Art. 115 or Art. 113. 117 Ind. Cas. 153 = 23 S.L.R. 417 = A.I.R. 1929 Sind 168.

——Arts. 113 and 148.

Limitation for a suit to enforce an award depends on the nature of the relief sought ; if the award is to the effect that the defendants shall hold the land as usufructuary mortgagees for a definite sum, and the plaintiffs sue for redemption, the Article applicable is Art. 148. 70 Ind. Cas. 517 = 4 U.B.R. 124 = A.I.R. 1923 Rang. 108.

——Art. 113—Suit to enforce award—Limitation.

The word 'Contract' in Art. 113 of the Limitation Act does not include 'award.' 51 Ind. Cas. 999 (Cal.).

——Arts. 113, 115 and 144—Suit to enforce award—Limitation.

An award does not embody a contract and a suit to enforce it is not governed by Arts. 113, 115 and 116 of the Limitation Act. The limitation applicable to the enforcement of the relief given by the award being dependent upon the nature of the relief. A suit for possession of immovable property in the basis of an award is governed by Art. 144. 4 O.L.J. 487 = 42 Ind. Cas. 116.

——Arts. 113, 115 and 176—Suit to enforce award.

Art. 176 of the Limitation Act does not apply to a regular suit for the recovery of money due under an award or for specific performance of an award ; the period of limitation for such a suit would be six years under Art. 120. 40 Ind. Cas. 821 (U.B.).

——Art. 113—Suit to enforce award—Suit for money due in terms of award.

A suit to recover a balance of money due under the terms of an award is not really a suit for " the specific performance of a contract " within Art. 113 of the Limitation Act, when the Court orders the payment of the

balance it is only directing payment for compensatio for non-compliance with the terms of the award. 16 All. 3 and 5 All. 263, not oll. 265 P.W.R. 1912 = 259 P.L.R. 1912 = 32 P.R. 1913 = 16 Ind. Cas. 804.

——**Arts. 113, 116 and 120—Suit to enforce award—Suit to recover money under an award—Nature.**

On a reference, the arbitrator gave an award on January 12th, 1904, providing that the defendant should pay Rs. 350 to the plaintiff by June 27th and in case of default the plaintiff should recover the same with interest. The defendant made default and the plaintiff sued in 1909 to recover the sum with interest. *Held*, that the suit was not one for specific performance of a contract and was not governed by Art. 113, but Art. 116 or 120 and was within time. 34 All. 43 = 8 A.L.J. 1138 = 11 Ind. Cas. 705.

——**Art. 113—'Contract'—Suit upon an award.**

A suit based on an award for recovery of immovable property is not a suit for specific performance of a contract and Art. 113 does not apply to such a suit. (1906) 4 C.L.J. 162: 33 Cal. 881.

Nor a suit to enforce an award. 23 M. 593, foll. (1901) A.W.N. 83 = 23 A. 285.

4. Miscellaneous.

——**Art. 113—Absence of demand—Effect—Suit premature as limitation not commenced—Effect.**

Where a suit is premature because no demand was made prior to institution, the plaint cannot be returned. The Court will have to consider whether costs should be disallowed 11 Ind. Cas. 25 (Sind).

——**Art. 115.**

Synopsis.

1. Applicability and scope.
2. Bailment.
3. Claim for use and occupation.
4. Company.
5. Compensation—Meaning of.
6. Continuing breach.
6 (*a*) Deposit.
7. Implied contract.
8. 'Registered'—Meaning of.
9. Starting point.
10. Successive breachers.
11. Suit against carriers.
12. Suit between tenants-in-common or co-sharers.
13. Suit for accounts.
14. Suit for specific sum.
15. Thavanai contract.
16. Work done

1. Applicability and scope.

——**Arts. 115 and 120—Applicability—Suit for money on basis of ekrarnama.**

A suit for money on the basis of the terms of an ekrarnama on an allegation that the defendant failed to perform the obligations imposed by the ekrarnama, is governed by Art. 115, and not by Art. 120 S. 10, of the Limitation Act. A.I.R. 1948 Cal. 207.

——**Arts. 115 and 120—Applicability.**

Suit by Government servant for arrears of pay. *See* LIMITATION ACT, ART. 102. (1947) 2 M.L.J. 389 =A.I.R. 1947 F.C. 23 (F.C.).

——**Art. 115—Applicability—Suit by member against District Council for travelling allowance—Travelling Allowance Rules, R. 79 (i) (xvii)—C.P. Local Self-Government Act, S. 73 (2).**

R. 79 (i) (*xvii*) of the Travelling Allowance Rules of the District Council, merely empowers the Council to ay members a certain travelling allowance if and when it so desires. There is, therefore, no statutory obligation to pay under that rule. The obligation arises out of the further step which the District Council takes to implement its powers. The District Council says, in effect, by its resolution that if members undertake certain journeys then in the exercise of the powers conferred on the Council, it will pay them certain sums of money. When journeys are undertaken there is an implied contract to pay. That contract is not in writing registered and so Art. 115 of the Limitation Act applies to a suit by a member against the District Council to recover travelling allowance which the latter has undertaken to pay by its resolution. S. 73 (2) of the C.P. Local Self-Government Act does not apply to a breach of contract, and is, therefore, inapplicable to the suit. I.L.R. (1946) Nag. 392 = 224 Ind. Cas. 12 = 1946 N.L.J. 358 = A.I.R. 1947 Nag. 153.

——**Arts. 115 and 120—Suit for recovery of Provident Fund money—Limitation.**

A suit for recovery of the amount standing to the credit of the plaintiff in the Provident Fund of Calcutta Corporation is governed for purposes of limitation, not by Art. 115, but by Art. 120. I.L.R. (1944) 1 Cal. 463 = A.I.R. 1945 Cal. 144.

——**Art. 115-A**—Suit for arrears of rent under a *kabuliyat* is not governed by Art. 115 but by Art. 110. A.I.R. 1942 Cal. 222 = I.L.R. (1941) 2 Cal. 335 = 45 C.W.N. 787 = 199 Ind. Cas. 788.

——**Arts. 115 and 52.**

In a suit, for balance due on account of goods sold and delivered from time to time, the evidence was of sale and delivery of goods and there was no evidence that the buyer ever had any acccount submitted to him or that he ever agreed to be bound by any account ;

Held, that the case did not fall under Art. 115 but under Art. 52. A.I.R. 1940 Bom. 158 = 42 Bom.L.R. 227 = I.L.R. (1940) Bom. 127 = 188 Ind. Cas. 300.

——**Arts. 115 and 49**—Cause of action arising *ex delicto* —Article 49 and not Art. 115 applies. A.I.R. 1939 Nag. 177 = 1939 N.L.J. 190 = I.L.R. (1939) Nag. 498 = 183 Ind. Cas. 386.

——**Art. 115**—When the gold is purchased from the defendant himself and is left with him for preparation in ornament, a suit for breach of contract in respect of it is governed by Art. 115. (1937) 20 N.L.J. 198.

——**Arts. 115 and 120—Suit for recovery of dues under Bihar and Orissa Municipal Act—Limitation.**

Article 115 and not Art. 120 applies to a suit by a Municipality governed by Bihar and Orissa Municipal Act, for recovery of dues from the defendant, who is given the right to collect the tolls in a market under a settlement for two years, where the sum sought to be recovered is due to the plaintiff under a contract by which the defendant had bound himself to pay a certain amount annually and there had been a breach of this contract by the defendant. 18 P.L.T. 252 = A.I.R. 1937 Pat. 360 = 3 B.R. 361 = 16 Pat. 302 = 169 Ind. Cas. 364.

——**Art. 115**—Suit for maintenance—Suit for maintenance by even a Hindu under contracts is governed by Art. 115, Limitation Act. 16 P.L.T. 789 = A.I.R. 1936 Pat. 158 = 2 B.R. 333 (2) = 161 Ind. Cas. 478.

——**Arts. 115 and 116**—Articles 115 and 116 are not controlled by S. 24, Limitation Act. A.I.R. 1936 Rang. 510 = 166 Ind. Cas. 48.

——**Arts. 115 and 36**—Suit by landlord against tenant for unauthorised use of water—Art. 36 and not article 115, applicable. (1936) M.W.N. 196 = 70 M.L.J. 255 = A.I.R. 1936 Mad. 250 = 43 M.L.W. 429 = 161 Ind. Cas. 538 (2).

——**Arts. 115 and 52**—Article 115 is a general provision applicable to all actions *ex contractu* not otherwise specifically provided for.

D contracted with *N* to supply goods and render services to *N* for a certain sum. After the contract was broken, *P* purchased the debts due to *D* from on account of goods supplied and services rendered by *D* to *N*. *P* sued *N* for the debts.

Held, that Art. 115 and not Art. 52 applied. A.I.R. 1935 Lah. 222.

——**Arts. 115 and 57**—Plaintiff advancing money to defendant—Defendant doing work for plaintiff—Suit for balance of moneylent—Article 57 and not Art. 115 applies. 3 A.W.R. 190 = A.I.R. 1934 All. 126 = 157 Ind. Cas. 295.

——**Arts. 115 and 120—Suit on basis of compromise merged in decree—Limitation.**

Article 115, applies either to a case of express or implied contract and not a contract in writing registered, that is to say, it may be an express contract or an oral contract or a written contract so long as it is not registered and it also does apply to a case of implied contract. The fact that a compromise between the parties has merged in a decree, nonetheless makes it a contract within the meaning of Art. 115. Consequently, a suit for compensation based on a contract contained in a compromise which has merged in a decree is governed by Art. 115 and not Art. 120. A.I.R. 1934 Pat. 7 = 12 Pat. 792 = 15 P.L.T. 197 = 148 Ind. Cas. 375.

——**Arts. 115, 116—Breach of contract.**

Articles 115 and 116 apply to cases where compensation, or damages, is asked for in respect of a breach of contract. These sections apply when the plaintiff alleges that there was a good and valid contract and that the defendant has broken the terms of the contract. In a case where Arts. 115 or 116 would apply, the very basis of the suit is that the contract has been broken, is no longer in existence, and damages are sought. A.I.R. 1934 Pat. 148 = 13 Pat. 192 = 150 Ind. Cas. 975.

——**Arts. 115 and 120—Suit by judgment-debtor against decree-holder for over-realisation.**

A suit by a judgment-debtor to recover the amount realised by the decree-holder in excess is governed by Art. 115 or Art. 120 and not by Art. 97. 33 P.L.R. 1084 = A.I.R. 1933 Lah. 112 = 140 Ind. Cas. 472.

——**Art. 115—Promise to pay barred debt.**

Where the customer of a Bank who had an overdrawn floating account with the Bank sent a letter to a Bank after the expiry of the period of limitation for a suit to recover the balance, to the following effect. "I promise to pay the balance as soon as I am able to arrange within a period of six months."

Held, (i) that there was a promise to pay a barred debt within the meaning of S. 25, Contract Act.

(ii) that a suit to recover money on the basis of this promise was governed by Art. 115. 33 P.L.R. 42 = A.I.R. 1932 Lah. 212 = 13 L. 448 = 135 Ind. Cas. 673.

——**Art. 115—Scope.**

Article 115 is a residuary article for actions *ex contractu* and can only be applied when no other article of the Limitation Act Schedule is appropriate.

As long as there is a contract between the parties which is not in writing and which can be covered by Art. 115, Art. 120 cannot be applied. 7 O.W.N. 769 = A.I.R. 1930 Oudh 395.

——**Art. 115—Contract for sale—contract becoming impossible—Limitation Act, Arts. 60 and 115.**

In a certain contract for the sale of property the vendor was to satisfy certain conditions before completion of the contract, but no time was specified for it. The vendor mortgaged the property to another and afterwards it was sold in satisfaction of that mortgage. The purchaser then sued for recovery of deposit money.

Held, that the purchaser need not have sued within a reasonable time. It was Art. 97 and not 60 nor 115, that governed such a case, and time was to be counted since when the property was sold in satisfaction of the mortgage, because it was then that the contract, having become impossible of performance, ended. 117 Ind. Cas. 700 = 33 C.W.N. 115 = 56 Cal. 455 = A.I.R. 1929 Cal. 216.

——**Art. 115—Suits to enforce award.**

Suits to enforce awards are governed by Art. 120 and not by Art. 115 or Art. 113. 117 Ind. Cas. 153 = 23 S.L.R. 417 = A.I.R. 1929 Sind 168.

——**Arts. 115, 116 and 120—Acceptance of award—Suit for money due under award.**

Suits for recovery of a balance of money due under the terms of an award would be governed by Art. 115 or Art. 116 of the Limitation Act according to the nature of the document only if the parties sign the arbitrator's award in token of acceptance and merge the award into a contract between themselves. Where reliance is placed on the arbitrator's award alone, the article that would apply is Art. 120 of the Limitation Act. 265 P.W.R. 1912 = 259 P.L.R. 1912 = 32 P.R. 1913 = 16 Ind. Cas. 804.

——**Art. 115—Trust created by will.**

A will of 1887 provided that certain properties should be given to *B* and his mother by way of maintenance and if those properties were sold, they should receive Rs. 40 in lieu of the income. In 1908, the executors entered into an agreement with the beneficiaries by which the properties were sold and the maintenance amount was agreed to be paid. In 1919 *B*'s mother died and *B* brought the suit for maintenance.

Held, the suit was in time; it was in substance based upon a trust created in his favour by the will and that it was governed by Art. 120 or 123 and not Art. 115 30 P.L.R. 689 = A.I.R. 1929 Lah. 834.

——**Art. 115**—Action for debts—Article 115 applies to an action for debt just as much as Art. 116 does or may do. 110 Ind. Cas. 33 = 52 Bom. 477 = 30 Bom. L.R. 549 = A.I.R. 1928 Bom. 252.

——**Art. 115**—Mutual open and current account—Article 85 and not Art. 115 applies. 107 Ind. Cas. 533 = 7 Pat. 238 = A.I.R. 1928 Pat. 221.

——**Art. 115—Suit for contribution.**

Where one of several co-mortgagors redeems the property and files a suit for contribution and interest against this co-mortgagors he would be allowed interest only for a period of three years. 92 Ind. Cas. 559 = 12 O.L.J. 313 = 2 O.W.N. 413 = A.I.R. 1925 Oudh 613.

——**Art. 115—Price of produce not paid.**

Suit to recover the amount payable in default of payment of produce is one for compensation for breach of the agreement to pay a share of produce and falls within the purview of Art. 115. 72 Ind. Cas. 480 = 5 L.L.J. 366 = A.I.R. 1924 Lah. 149.

——**Art. 115—Suit on Hatchita.**

A suit on a Hatchita stamped and signed by the debtor, containing a statement of adjustment of accounts and consisting in itself a distinct and unqualified promise to pay the amount found due on adjustment is governed by Art. 115 and not by Art. 64. In every case where Art. 64 is made applicable there need not be always a reciprocity of demands. 76 Ind. Cas. 603 = A.I.R. 1923 Cal. 578.

——**Art. 115—Debt payable in kind.**

A claim for recovery of a debt payable in kind falls under Article 65 or 115 and not under Art. 120. 65 Ind. Cas. 691 = 4 L.L.J. 268 = A.I.R. 1922 Lah. 271.

——Arts. 115, 128 and 131—Application of.

In a suit by a widow of one who was adopted by the defendant's step-mother simultaneously with adoption of the defendant by the step-mother's co-wife for maintenance by virtue of a decree passed on compromise it was held :—(1) that as simultaneous adoptions are void, the plaintiff did not belong to the family of the original owner and that she could not plead limitation allowed by Art. 128. 23 C. 645, foll. (2) That her case was governed by Art. 115 because she had a compromise decree. (3) That she can proceed by way of execution of the compromise decree. (4) that Article 131 does not apply. 26 Ind. Cas. 939 (Cal.).

——Arts. 115 and 116—Mortgagee suing for money—Contract.

Where a mortgagee's right to sue for money is a right arising from a contract between the parties Arts. 115 and 116 will apply, but when it is an equitable right Art. 120 will apply . 1913 U.B.R. 1=20 Ind. Cas. 360.

——Arts. 115 and 68—Advance under contract—Suit to recover.

A obtained a sum of Rs. 200 as advance from *B* contracting to supply camels to *B*. In default *A* was to return the amount of the advance as well as Rs. 200 more as penalty. *B* sued *A* for recovery of advance. penalty, and interest, more than 3 years after the default but within six years therefrom, *Held*, that the suit for the recovery of Rs. 200 advanced was governed not by Art. 115 of the Limitation Act, 1877, but by Art. 68. Consequently the suit for this sum was within time under the Punjab Loans Limitation Act, 1904. The suit was barred under Art. 115 for the penalty of Rs. 200 for the breach of the contract. 6 P.L.R. 1912=219 P.W.R. 1911=12 Ind. Cas. 616.

——Art. 115—Covenant for quiet enjoyment.

A suit, for breach of covenant for quiet enjoyment, should be brought within 3 years of the breach. 7 M.L.T. 229=6 Ind. Cas. 290.

——Arts. 115, 120 and 132—Malikana, suit for—Suit not to enforce the charge upon the land.

A suit for recovery of *malikana*, the plaintiff not seeking to enforce the charge upon the land for which it is payable, is governed by Art. 115 and not by Art. 132. (1905) 33 C. 998.

——Arts. 115, 116 and 36—Mortgagor and mortgagee.

Suit for compensation for loss of mortgaged property by reason of mortgagee allowing sale for arrears of revenue—Transfer of Property Act, Ss. 76, 92—Suit for loss by mortgagee cutting trees—Knowledge no factor. 19 M.L.J. 498=6 M.L.T. 239=3 Ind. Cas. 433=33 Mad. 71.

——Art. 115—*See* ART. 145. 8 C.W.N. 500=31 C. 519.

2. Bailment.

——Art. 115—Suit against Government as carriers—Limitation.

Section 2, of the Carriers Act defines "common carrier" as a person other than the Government engaged in the business of transporting for hire property from place to place. Therefore in a suit against Government for Carriage Art. 115 of the Limitation Act is the appropriate article and not Art. 30. I.L.R. (1941) 2 Cal. 160.

——Art. 115—Compensation for breach of contract.

The defendant borrowed from plaintiff his car, and while it was in defendant's use met with an accident, which resulted in considerable damage to the car. The plaintiff spent a certain sum for its repairs, and instituted a suit for recovery of the amount spent.

Held, the case was one of bailment which arose out of a contract and that the defendant being liable for damages in breach of contract by reason of his failure to carry out the obligation imposed on him by S. 151, Contract Act, the case was governed by Art. 115 of Sch. 1, Limitation Act, and not by Art. 36. A.I.R. 1933 Oudh 518=10 O.W.N. 1105=9 Luck. 189=145 Ind. Cas. 1001.

——Art. 115—Bailment.

A handed over to *B* certain ornaments to be used in religious procession in 1924. The ornaments were stolen. *B* admitted the liability in 1924, but denied it later on and *A* filed a suit in 1928 for recovery of the ornaments.

Held, that Art. 115 applied to the case and not Art. 49 or Art. 120 ; that the ornaments had been taken on loan and the transaction was of the nature of the bailment as defined in S. 148, Contract Act ; that the ornaments were to be returned within reasonable time according to S. 46, Contract Act, *i.e.*, when the owner demanded them after the ceremony was complete. Time therefore ran from the date when *B* should have returned the articles to *A* and suit by *A* brought three years after that date was barred by time. A.I.R. 1930 Oudh 395=7 O.W.N. 769=126 Ind. Cas. 682.

3. Claim for use and occupation.

——Art. 115—Applicability.

Suit for damages for use and occupation of shop after notice to vacate. *See* LIMITATION ACT, ARTS. 39, 115 and 120. 1946 A.L.J. 305 (2)=A.I.R. 1947 All. 31.

——Arts. 115 and 120—Suit for assessment of fair and equitable rent and compensation for use and occupation.

A suit instituted for the assessment of fair and equitable rent and for the recovery of compensation for use and occupation of the land is governed by Art. 120 and not by Art. 115 where the defendants are perfectly willing to pay reasonable rent according to contract and do not agree with the plaintiff only as to the figure at which a reasonable rent should be fixed. A.I.R. 1940 Cal. 400=190 Ind. Cas. 631.

——Art. 115—Claim for use and occupation.

A claim for compensation for use and occupation of land comes under Art. 115. In a suit for rent based on a lease, the landlord cannot recover compesnation if the claim on the lease fails owing to its cancellation. 7 M.L.T. 419=20 M.L.J. 555=6 Ind. Cas. 766.

4. Company.

——Arts. 115, 116 and 120—Application by liquidator for damages against directors.

An application by a Liquidator under S. 235, Companies Act, for damages for misfeasance or breach of contract by Directors is neither governed by Art. 115 nor by Art. 116, but by Art. 120. A.I.R. 1937 Pat. 293=3 B.R. 477=168 Ind. Cas. 786.

——Arts. 115 and 116—Application under S. 235, Companies Act.

An application under S. 235, Companies Act, is not governed by Art. 116 but by Art. 115. A.I.R. 1933 Sind 103=143 Ind. Cas. 713.

——Art. 115—Company—Suit against director for misfeasance.

Article 115 of the Limitation Act will not apply where part of the contract was in writing registered, *i.e.*, contained in the articles of association. Article 115 is not strictly applicable to a misfeasance in the nature of a breach of trust, nor is Art. 116, as "breach of contract" is not the sole liability sued on nor is it the usual nomenclature for a breach of trust whether specific or quasi. 54 Bom. 226=32 Bom. L.R. 232= A.I.R. 1930 Bom. 572.

——Art. 115—Suit for unpaid calls—Limitation—Starting point.

Where, on the failure of a shareholder to pay the calls due by him, the directors forfeited his share and the

company subsequently went into liquidation and within 3 years of the date of forfeiture, the Liquidator of the Company sued for recovery of the amounts due as unpaid calls with interest thereon till date of suit :

Held, that the suit was within time being governed by Art. 115 under which limitation arose only after 3 years of date of forfeiture. (1932) A.L.J. 354=54 A. 541=A.I.R. 1932 All. 342=140 Ind. Cas. 502.

——Art. 115—Call after forfeiture.

Article 28 of Table A imposes, on forfeiture, a new obligation or a new debt, and as the shareholder thenceforth ceases to be a member of the company, his liability to pay future calls is gone, and all that is left is this new liability to pay the company " all moneys which at the date of forfeiture were presently payable by him to the company in respect of the shares." Such a person is liable with regard to unpaid calls, not as a contributory, either as a present or a past member of the company. but as a debtor to the company. This gives the company a fresh cause of action and the period of limitation for a suit to enforce this new obligation begins to run from the time the shares are forfeited and the proper article applicable is Art. 115, Limitation Act. 110 Ind. Cas. 33=30 Bom. L.R. 549=52 Bom. 477=A.I.R. 1928 Bom. 252.

——Art. 115—Call after forfeiture.

One of the company articles provided that any member, whose shares might be forfeited, would notwithstanding be liable to pay all calls and instalments owing at the time of forfeiture. The defendant a shareholder did not pay calls and therefore his shares were forfeited and the company filed a suit to recover according to the article

Held, that the article in question embodied a special contract, the cause of action arose when the company forfeited the shares, and, therefore the suit to recover what was due from the defendant on his shares was within time, if filed within 3 years of the date of forfeiture. 88 Ind. Cas. 96=49 Bom. 715=27 Bom. L.R. 574=A.I.R. 1925 Bom. 321.

——Arts. 115 and 116—Suit for dividends.

The relation between the shareholder and the Company on a declaration of a dividend by the Company is not a contractual relation as contemplated by Artts. 115 and 116 in respect of the dividend. 42 Mad. 33, Overruled. 94 Ind. Cas. 515=49 Mad. 468=1926 M.W.N. 450=24 M.L.W. 102=A.I.R. 1926 Mad. 615=50 M.L.J. 520 (F.B.).

5. Compensation—Meaning of.

——Arts, 115 and 116—'Compensation' meaning of.

The word " compensation " in Art. 115 as well as in Art. 116 denotes a sum of money payable to a person on account of loss or damage caused to him by a breach of contract. A.I.R. 1935 Lah. 222.

——Art. 115—Suit to recover damages caused by the breach of contract.

Article 115 is a general provision applying to all actions *ex contractu* not specially provided for otherwise. The word " compensation " in that Article as well as in Art. 116 has the same meaning as it has in S. 73, Contract Act, and denotes a sum of money payable to a person on account of loss or damage caused to him by the breach of a contract. A.I.R. 1922 Lah. 198 (F.B.), foll.

A suit to recover one-third of the cost of constructing a shop which the defendant the joint owner of the site had agreed to pay and failed to do so, is governed by Art. 115 and not Art. 61. 107 Ind. Cas. 493=A.I.R. 1928 Lah. 442.

——Art. 115—Compensation and damages—Meaning of.

The expression compensation is not ordinarily used as an equivalent to damages, although compensation may often have to be measured by the same rule as damages in an action for a breach. The term compensation signifies that which is given in recompense, an equivalent rendered ; damages, on the other hand constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another. Its primary signification is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. 73 Ind. Cas. 17=37 C.L.J. 108=27 C.W.N. 210=A.I.R. 1923 Cal. 507.

——Art. 115—Articles supplied and work done—Compensation.

The word " compensation " in Art. 115 as well as in Art. 116 has the same meaning as it has in S. 73 of the Indian Contract Act, and denotes a sum of money payable to a person on account of the loss or damage caused to him by the breach of a contract. A suit therefore to recover a specified sum of money on a contract is a suit for compensation within Art. 115.

Where the plaint, in a suit for the recovery of a certain sum of money alleged to be due to the plaintiff for material supplied and work done, makes no mention of the price of the materials as distinct from the price of the work, and contains no reference whatsoever to two claims and there is only one individual claim, and that is for the balance of the money due to the plaintiff on the basis of a contract.

Held, the claim as laid in the plaint is an indivisible one ; it cannot be split up into two portions. It must, therefore, be held that it falls neither under Art. 52 nor under Art. 56 but is governed by Art. 115. 66 Ind. Cal. 490=2 Lah. 336=A.I.R. 1922 Lah. 198 (F.B.).

6. Continuing breach.

——Art. 115—Undertaking to pay off mortgage.

Where the vendee agreed to pay off a usufructuary mortgage on the property but no time was fixed for the payment of the money,

Held, that the vendee's failure to pay off the mortgage on the date on which the sale-deed in his favour was executed, constituted breach of covenant on his part, that the breach took place once and for all and that there was no continuing breach which would give successive causes of action to the plaintiff (the vendor) to sue. 34 All. 429, foll. 87 Ind. Cas. 804=6 L.R.A. (Civ.) 222=A.I.R. 1925 All. 488.

——Arts. 115 and 116—Continuing breach—Continuing covenant—Breach of cause of action—Indemnity clauses.

A case in a deed of sale was as follows : " should disputes of any kind arise at any time touching the said land on the part of anybody we will clear them all with your own funds, and allow the sale to continue to you uninterruptedly without any kind of loss to you,"—*Held*, that this was an indemnity clause and should be construed as a continuing covenant. A suit for indemnification will be in time if brought within 6 years of the date on which it is held by a Court of law that neither the purchaser nor his vendor had the rights given to him by the sale-deed. 35 M.L.J. 124=24 M.L.T. 104=8 L.W. 142=47 Ind. Cas. 924.

——Arts. 115 and 116—Continuing breach—Test—Nature of remedy available to a tenant for a breach.

The nature of the remedy available to a tenant under a covenant or contract for quiet enjoyment depends upon the nature of the breach and the test as to whether a breach is continuous or not is ; if the plaintiff, can sue only for the damage actually occurred to him up to the date of suit the breach is continuing and if he can sue for the whole of the damage occurred and prospective the breach is single and final, *e.g.*, a breach of a covenant for title. 40 M. 910=19 M.L.T. 318=3 L.W. 443=(1916) 1 M.W.N. 343=30 M.L.J. 575=35 Ind. Cas. 254.

6. (a) Deposit.

——Arts. 115 and 66—Fixed deposit.

Where deposit is for a fixed period, the money is payable at the specified time, *viz.*, the expiry of that period and the article applicable is either Art. 66 or Art. 115. A.I.R. 1936 Rang. 338=164 Ind. Cas. 412.

——Art. 115—Recovery of deposits.

The period of limitation for a suit to recover money deposited by the plaintiff with the defendant on the understanding that it will be returned on the happening of a certain event is three years beginning from the date on which the event happened and the article applicable in such a case is either 62 or 115. 5 Cal. 830 ; 37 Mad. 175 and 33 M.L.J. 577, Foll. ; 12 Cal. 113, not Foll. 108 Ind. Cas. 49.

——Art. 115—Deposit—Suit to recover.

A suit to recover deposit money payable by lessees on execution of the lease is governed by Art. 115, I.L.A. 1 L.W. 858=25 Ind. Cas. 812.

7. Implied contract.

——Art. 115—Implied contract.

A Municipality passed a resolution whereby a licence of a market for one year was granted to the licensee who agreed to pay a certain sum for the period of licence. No contract or document under seal in compliance with S. 64, Bihar and Orissa Municipal Act, was made by the Municipality, and the licensee therefore went into possession of the market under the resolution. After a period of seven months he offered to surrender his rights which surrender was accepted. The Municipality sued the licensee for the compensation for the period during which licensee was in possession, more than three years after the breach of the agreement :

Held, that the licensee was under an implied obligation to pay compensation for the period during which he was in possession and therefore Art. 115, applied and the suit was barred. 17 Pat. 277=A.I.R. 1938 Pat. 429=19 P.L.T. 653=4 B.R. 801=177 Ind. Cas. 272.

——Art. 115—From the fact that a Municipal Committee continues to hold a cattle fair every year on the land of another, an inference can be drawn that there is an implied contract between the owner of the land and the Commitee that the latter should pay to the owner and that the owner should allow the Committee to hold the fair.

Consequently, where the owner files a suit against the Committee for compensation not received, the suit will be governed by Art. 115. A.I.R. 1938 Lah. 267=178 Ind. Cas. 49.

——Art. 115—Applicability.

Uncertified payment towards decree—Execution ignoring payment—Suit for amount uncertified against decree-holder—Limitation—Starting point—Breach of implied contract—Contract Act, S. 73. *See* LIMITATION ACT, ARTS. 97 AND 115. A.I.R. 1951 Pat. 348.

——Arts. 115 and 120—Implied contract—Uncertified payment—Execution—Damage—Cause of action.

A decree-holder, who receives payment of money out of Court from the judgment-debtor and fails to certify and applies for execution commits a breach of the implied promise to certify. Every application for execution or realisation of money by the decree-holder gives a fresh cause of action and the suit for damages is governed by Art. 115 and not by Art. 120. (1919) M.W.N. 3=36 M.L.J. 175=48 Ind. Cas. 810.

——Art. 115—Implied Contract—Suit against agent not authorised to represent.

"Implied Contract" in Art. 115 is used in the sense in which it is understood in English Law and not as used in the Contract Act. When an agent untruly represents himself to be authorised and deals with the plaintiff, a suit for damages against the agent is governed by Art. 115. 38 Mad. 275=25 M.L.J. 256=14 M.L.T. 360=(1913) M.W.N. 884=21 Ind. Cas. 65.

——Arts. 115, 116 and 120—Covenant for title—Suit for damages.

Where in 1896, by a sale, a person got possession of the property but was evicted in 1905 by the *Jenmi* on which he sued the vendor in 1909 for damages and refund of purchase-money. *Held*, that the implied covenant of title was broken at the sale in 1896 and since the covenant did not admit of continuing breach the claim based on that covenant for title was time-barred. The claim based on failure of consideration was within time since the contract of sale was not void and the consideration failed on the date of dispossession 14 M.L.J. 524=(1913) M.W.N. 1029=1 L.W. 110 =21 Ind. Cas. 740.

8. "Registered"—Meaning of.

——Art. 115—Articles of association—"Registered".

Per *Marten, C.J.*—The word "registered" in Arts. 115 and 116 of the Limitation Act includes articles of association registered under the Indian Companies Act and is not confined to registration under the Indian Registration Act. 42 Mad. 33, Foll. 54 Bom. 226 =32 Bom. L.R. 232=A.I.R. 1930 Bom. 572.

9. Starting point.

——Art. 115—Starting point.

A joint family firm consisted of father and sons, plaintiff had *thavani* account with the firm. There was a partition subsequent to which the father died. There was no evidence as to novation of the original contract. On the son's refusal to pay, the plaintiff instituted a suit for the amount due under the account :

Held, that limitation began to run from the date of refusal and not from the date of partition. A.I.R. 1941 Rang. 129=195 Ind. Cas. 737.

——Art. 115—A suit for damages for breach of contract is governed by Art. 115 and the *terminus a quo* is the date on which the alleged contract was broken. A.I.R. 1939 Lah. 118=12 L. 167=184 Ind. Cas. 130.

——Art. 115—Suit for damages for breach of contract in failing to supply according to specification.

A certain company *A* informed a firm *B* that they wanted to erect a weaving shed and asked them to send a complete specification for the same. Firm *B* sent specifications containing 3 estimates of different machines with a single covering letter which gave the total price of all the machinery and stated that one-third of such total price should be paid in advance with the order. The order was placed and the delivery taken. It was, however, found that some machinery was not of the same make as ordered. Company *A* filed a suit against firm *B* for damages for breach of contract. Almost all the machinery including the subject-matter of the suit was delivered more than three years before the date of the suit but a part of an engine was delivered within three years. The trail Court dismissed the suit as time-barred on the ground that the order was an order for separate pieces of machinery and time ran from the delivery of each machine :

Held, that the suit was within time. Article 115 applied. The clause about payment showed conclusively that the order was regarded as a single whole and time ran only from the date of the last delivery. A.I.R. 1938 Lah. 277=182 Ind. Cas. 438.

——Art. 115—Suit by drawee of hundi against drawer.

Where a person owes money to another for which he executes a *hundi* drawn on a third person in favour of the creditor and the drawee accepts and obtains discharge subsequently by executing a document in favour of the creditor, the limitation for suit against the debtor, for money paid by the drawee is three years,

and the cause of action arises when the discharge is obtained and not on the date of the acceptance of the *hundi*.

To the above suit, Art. 115 is more appropriate than Art. 65. A.I.R. 1936 Lah. 668=38 P.L.R. 276 =163 Ind. Cas. 928.

——Art. 115—Starting point of limitation.

In a suit for compensation for a breach of contract, the breach of contract *per se* gives rise to a cause of action and time begins to run from date of breach and not from date of actual loss or damage. A.I.R. 1936 Rang. 510=166 Ind. Cas. 48.

——Art. 115—Novation.

Where originally the relationship between plaintiff and the defendant was that of a creditor and surety but that relation is superseded by an agreement by which the surety unconditionally undertakes to pay the amount the surety becomes the debtor and a suit against him within three years of the agreement should be decreed even though the agreement has been entered into on failure of the principal debtor to pay. 1935 A.W.R. 492=156 Ind. Cas. 964.

——Arts. 115 and 116—Suit for compensation against person pretending to be agent.

Where a Muhammadan son, who is not his father's authorised agent, mortgages his father's land and holds himself out to be an agent, S. 235 and not S. 230 of Contract Act applies to the case. Limitation for a suit for compensation commences from the date on which the father obtains a decree in a suit for possession of the mortgaged property. A.I.R. 1934 Pesh. 49=151 Ind. Cas. 58.

——Art. 115—Lease deed—Suit for damages for the years 1920, 1921 and 1922—Term of lease expired on March 3, 1922 and the suit was filed on April 30, 1925 :

Held, the contract was hit by Art. 115. 58 C. 930 =A.I.R. 1932 Cal. 85=133 Ind. Cas. 179.

——Art. 115—Suit against surety—Limitation.

A took a loan from *B* on September 10, 1920, and signed a *hahi* entry. No date for repayment was fixed. On the same date, *C* wrote a letter to *B* saying that he will pay the amount borrowed by *A* in case *A* did not pay the same, *B* insitituted a suit against *A* and *C* in 1925 :

Held, that the suit so far as *C* was concerned, was governed by Art. 115, Limitation Act and as the loan was payable at once, on the date of the loan, the cause of action against *C* began to run from the same date and the suit was barred against *C* even though the time as against *A* might be six years under the Punjab Loans Limitation Act. A.I.R. 1931 Lah. 691=33 P.L.R. 59=13 L. 240=132 Ind. Cas. 590.

——Arts. 115, 65 and 120—Suit upon letter of guarantee—Limitations as against surety, commencement of.

Art. 115 governs a suit by a creditor against a surety on a letter of guarantee executed by the later in respect of a debt payable on demand on a promissory note and not Art. 65 and limitation runs from date of execution of the guarantee notwithstanding a stipulation in the guarantee that the creditor may look for repayment to the surety if the principal debtor makes default. Art. 115 also applies to a case of liability on a simple debt due and is not limited to cases of damages for breach of contract. 25 C.L.J. 91=21 C.W.N. 479= 39 Ind. Cas. 205.

——Art. 115—Pledgor and pledgee—Unauthorised conversion of pledged property.

Where a pledgee having power to sell for default takes over in effect as if upon a sale the pledged property to himself without the pledgor's authority, or giving credit for their full value to him the pledgee is guilty of an unauthorised conversion and the pledgor is entitled to have his property back or its full value but only on payment of debt. A suit brought by the pledgor under the above circumstances within three years from the date of the alleged sale is well within time whether the suit be regarded as one for redemption governed by Art. 145 or as one for damages for breach of contract governed by Art. 115. Article 36 has no application to such a suit. 122 Ind. Cas. 37=30 M.L.W. 898 =A.I.R. 1930 Mad. 364.

——Art. 115—Starting point—Instalment contract.

A firm entered into a contract in respect of ten cases of mulls. The terms of the contract were as follows : "We sold to you the goods as below at Karachi godown. You shall have to take delivery of the goods against payment, on arrival of the railway receipt and invoice at Delhi, afterwards interest and demurrage will be charged from you. December shipment 3 lots two months' grace."

Held, that the contract was indivisible and due date was on arrival of the last shipment. Claim for damages made within three years of last shipment was in time. The goods were not to be delivered in three instalments. The term "December shipment, three lots, two months grace," did not imply that the contract goods were to be delivered in three instalments but merely that they were to be shipped in three lots commencing December. A.I.R. 1928 Lah. 20, Foll. A.I.R. 1930 Lah. 193.

——Art. 115—Undertaking to pay debts—Default—Starting point.

Where the terms of the conditions in the sale-deed were merely that the mortgage was to be paid off, and did not require the vendee to pay it off at some future time or to pay it off whenever he pleased but provided that he was responsible for future interest and was to pay it off before the property was endangered, the presumption is that he was to pay it off immediately or, if not immediately, at any rate as soon as was reasonably possible. The vendee, therefore, broke his contract when he undertook to pay the mortgage, or within a very short but reasonable period therefrom. 107 Ind. Cas. 679=26 A.L.J. 53=A.I.R. 1929 All. 121.

——Art. 115—Contract for several lots.

Where the contract for the supply of several lots of goods is an entire and not an instalment contract, limitation in respect of all lots would run from the date when the last lot was due to arrive. 94 Ind. Cas. 629 =8 L.L.J. 101=27 P.L.R. 239=A.I.R. 1927 Lah. 92.

——Art. 115—Goods of various shipments.

No cause of action for a suit for non-delivery of goods of various shipments accrues to the plaintiff until the last day of arrival of the last shipment and limitation for such a suit begins from that day. A.I.R. 1925 Lah. 513, Foll. 94 Ind. Cas. 2=A.I.R. 1926 Lah. 404.

——Art. 115—When able to perform contract.

Where *A* agreed to sell to *B*, 3 oil wells out of the 12 oil wells which he expected to get from Government in 1903, and the Government granted him (*A*) 3 wells in 1904 and the rest in 1912.

Held, in a suit by *B*, for breach of contract to sell the 3 oil wells, that limitation began to run from the date when the defendant was in a position to statisfy the bargain in 1904 and could not be in abeyance until the whole of the 12 sites were allotted by Government to the defendant. 63 Ind. Cas. 914=24 Bom. L.R. 682=30 M.L.T. 28=48 I.A. 214=49 Cal. 832 =4 U.B.R. 30=1921 M.W.N. 396=A.I.R. 1922 P.C. 249 (P.C.).

——Arts. 115 and 61—Co-defendants.

Where plaintiff and defendant were jointly interested redeeming a mortgage and plaintiff himself filed

a suit for redemption and redeemed the mortgage and then sued the defendant for his share of the costs of the litigation and the redemption money.

Held, that in the absence of finding of a contract to pay at the conclusion of a litigation, defendant's liability to pay cannot be postponed till the conclusion of the litigation. The suit for the recovery of a share of costs and money due for the redemption is barred under Art. 61 or 115 if brought more than three years after payment. 70 Ind. Cas. 289=A.I.R. 1922 Cal. 79.

——Art. 115—Sale of family properties by manager—Subsequent sale by junior member of his share—Obstruction by prior purchaser—Suit by latter for recovery of price and expenses of litigation.

A purchaser from a junior member of a joint Hindu family of his share in family properties attempted to take possession thereof, but was resisted by a prior purchaser of these properties from the manager. He then instituted a suit for the recovery of the share purchased by him and the litigation was unsuccessfully carried up to the High Court. A petition filed by him for review was also dismissed. The purchaser then instituted a suit for the recovery of the sale price and of the costs incurred of the unsuccessful litigation. *Held*, that the suit was not barred by limitation as the consideration for the sale failed on the date of the High Court's decision. The cause of action for the suit, arose only on that date and the plaintiff was entitled to the costs of his litigation except the costs of his review petition. 42 Mad. 507=36 M.L.J. 157=25 M.L.T. 291=9 L.W. 379=(1919) M.W.N. 432=49 Ind. Cas. 729.

——Arts. 115 and 120—Demand and refusal—Suit for return of goods delivered with interest.

In a suit to recover a quantity of wheat, plaintiff alleged that defendant had signed a balance in plaintiff's favour of 8 *Manis* of wheat with interest payable in kind at the rate of 50 per cent. per annum, in his favour. *Held*, that Art. 115 applied in which case limitation began to run when payment was demanded and refused or Article 120 would apply and in either cases the suit was not barred. 49 Ind. Cas. 231, not Foll. 56 Ind. Cas. 162=A.I.R. 1922 Lah. 271.

——Arts. 115 and 116—Demand and Refusal—Lease—Non-delivery of portion of demised land—Cause of action—Limitation.

An action by a lessee for damages caused by the lessor's failure to deliver to him a portion of the demised premises should be brought within 6 years or 3 years as the case may be either from the time of the lease or from the date when possession was demanded and denied and it is governed by Arts. 116 and 115 of the Limitation Act. 40 Mad. 910=19 M.L.T. 318=3 L.W. 443=(1916) 1 M.W.N. 343=30 M.L.J. 575=35 Ind. Cas. 254.

——Arts. 115, 145 and 49—Demand and refusal.

When the plaintiff made over to a goldsmith gold ornaments to be melted and made into new ornaments without fixing the time within which the work was to be finished and failed to get the ornaments on repeated demands, limitation for suit to recover them begins to run from the date on which the goldsmith wrongfully refused to do the work, whatever may be the particular article of the limitation Act is applicable to the case, *viz.*, Art. 49 or 115 or 145. 20 C.W.N. 232=23 C.L.J. 145= 34 Ind. Cas. 959.

——Art. 115—Breach of contract—Onus contract of betrothal.

The onus of proving that the betrothal contract was broken within three years of bringing the suit is on the plaintiff in a suit for damages. 50 Ind. Cas. 735 (Lah.).

10. Successive breaches.

——Art. 115—"Successive breaches", meaning of.

The term "successive breaches" in Art. 115, refers only to cases in which there is a promise to pay periodically, as for instance, payment of rent, annuities, interest, maintenance, etc. A.I.R. 1941 Pat. 452=7 B.R. 587=193 Ind. Cas. 172.

——Art. 115—Successive breaches—Detention of money.

The limitation applicable to a claim for damages for non-payment of *malikana* is that provided by Art. 115 of the Lim. Act and the plaintiffs are entitled to damages upon each annual sum in arrear only for three years antecedent to the suit. 15 C.L.J. 658=15 Ind. Cas. 911.

——Art. 115—Successive breaches—Limitation—Cause of action.

Where a bond contains successive covenants, each breach gives a separate cause of action, but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last of the conditions is fulfilled. 17 M.L.T. 61=27 Ind. Cas. 849.

11. Suit against carriers.

——Arts. 115 and 31—Suit for non-delivery against Rly.—Railways Act, S. 72 (2).

A suit against a Rly. Co. for compensation for non-delivery of goods is governed by Art. 31 not by Art. 115, 26 B. 562 ; 108 P.R. 106 ; 13 C.W.N. 851 ; 33 A. 544, Foll. Art. 31 applies notwithstanding that the responsibility of the Rly. Co., is limited by an agreement contemplated by S. 72 (2) of the Railways Act. 11 N.L.R. 174=31 Ind. Cas. 474.

——Art. 115—Mis-delivery.

The case of mis-delivery falls within Art. 115. 170 P.L.R. 1913=122 P.W.R. 1913=19 Ind. Cas. 477.

——Arts. 115, 31—Acknowledgement—Carriers—Non-delivery—Damages. (1902) 4 Bom. L.R. 447=26 B. 562.

12. Suit between tenants in common or co-sharers.

——Art. 115—A suit for recovery of money due to tenants in common which has been received by one or more tenants to the exclusion of the rest is not governed by Art. 115 as the liability is not *ex ccontractu*. A.I.R. 1937 Pesh. 28=168 Ind. Cas. 41.

——Art. 115—Co-sharers—Suit for profits.

A suit by some co-sharers in a ferry against other co-sharers for profits is not governed by Art. 36 or 115 but by Art. 120. 1 Pat. L.J. 69=35 Ind. Cas. 430.

——Art. 115—Holding over—Suit for rent.

Suit for rent by a co-owner against his co-sharer who occupied the property after the term fixed for such period is governed by Art. 120 and not by 110 or 115. 39 Mad. 54=33 Ind. Cas. 705.

13. Suit for accounts.

——Arts. 115 and 120—A suit for accounts against a Receiver appointed under O. 40, Civil P.C., is not governed by Art. 115 but by Art. 120. A.I.R. 1942 Cal. 483=75 C.L.J. 1=46 C.W.N. 294=I.L.R. (1942) 1 Cal. 577=202 Ind. Cas. 389.

——Arts. 115 and 120—Suit for accounts.

Where there is no question of breach of contract or compensation payable for such breach, but parties were to look into the accounts of each other to equalize the profit, each trading independently of the other, and a suit is brought to take such an account, and ascertain who owes whom, and give a decree for the amount payable.

Held, that the suit cannot be treated as a suit for compensation and it does not fall under Art. 115. The general Art. 120 would therefore apply. 11 C.L.J. 43 and 14 C.W.N. 122, Not Foll. A.I.R. 1927 Mad. 775.

——Art. 115—Principal and agent.

A suit by the principal against his agent for accounts is governed by Art. 89 and not Art. 115. 89 Ind. Cas. 275=4 Pat. 289=7 P.L.T. 111=A.I.R. 1925 Pat. 494.

——Arts. 115 and 120—Implied contract—Lambardar—Obligation to account.

A suit by the proprietors of a village for an account of the profits of the village management against the *lambardar* is governed by Art. 115 and not by Art. 120. A *lambardar* who collects rents and manages the village on behalf of the proprietors is an agent, and as such, bound by an implied contract to render an account at the end of each agricultural year. 4 Pat. L.J. 304=51 Ind. Cas. 733.

——Arts. 115 and 116—Contract to render accounts.

A contract to render accounts year by year if registered, comes under Art. 116 and if unregistered comes under Art. 115. 11 C.L.J. 43=5 Ind. Cas. 186.

——Arts. 115 and 116—Suit against agent on contract.

Suit against an agent when there is a contract to give account at the end of each year, is governed by Art. 115. If such a contract is registered, Art. 116 applies. 14 C.W.N. 122=5 Ind. Cas. 59.

——Arts. 115 and 89—Suit by common manager for account.

A suit for account by the present common manager appointed under S. 93, Bengal T.A. against former common manager is governed by Art. 89 and not by Art. 115. 2 Ind. Cas. 597 (Cal.).

14. Suit for specific sum.

——Art. 115—Suit for specific sum.

A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract within Art. 115. 33 P.L.R. 42=A.I.R. 1932 Lah. 212=13 L. 448=135 Ind. Cas. 673.

——Arts. 115, 65, 120—Money due under agreement—Specific sum of money.

A suit may properly be described as one for compensation for breach of contract within the meaning of Art. 115 although it may be a suit for recovery of a specific sum of money. 12 C.L.J. 423=8 Ind. Cas. 788.

15. Thavanai contract.

——Arts. 115 and 60—Thavanai contract—Applicability of section.

A certain amount was deposited at two months *thavanai* interest. (1) the terms of the deposit showed that interest was to be calculated at *thavanai* interest at two months' rests. (2) It was repayable either on demand or after the current thavanai year. *Held*, that in the former case Art. 60, Limitation Act, applied and that in the latter Art. 115 applied. 6 L.W. 687=(1917) M.W.N. 858=42 Ind. Cas. 573.

——Art. 115—Thavani contract—Incidents of.

The relationship between the parties to a *thavanai* account is that of lender and borrower. The money is to be paid at a fixed period after two months and unless the lender demands it, the loan is taken to be extended for next two months. It was held that Art. 57 and not Arts. 60 and 115 applies to a suit brought on *thavanai* account. 8 L.B.R. 526=10 Bur. L.T. 53=36 Ind. Cas. 497.

16. Work done.

——Art. 115—Applicability—Claim for recovery of advocate's fees. *See* LIMITATION ACT (IX OF 1908), ARTS. 84, 113 AND 115. (1947) 1 M.L.J. 173 A.I.R. 1947 Mad. 457.

——Art. 115—Counsel's fee.

Counsel's suit for remuneration against clinet is governed by Art. 115, and not by Art. 120. (1941) 43 P.L.R. 97.

——Art. 115—Breach of building contract—Limitation, starting point.

A contract for the construction of a building was given to the plaintiff but before the completion of the work the contract was given to another person. The plaintiff sued for the value of the work already done.

Held, that Art. 115 applied and the period of three years began from the date of the breach of contract. A.I.R. 1934 Lah. 475=155 Ind. Cas. 238=35 P.L.R. 529.

——Art. 115—Suit by medical practitioner for fees.

Limitation Act does not contain any special article for a suit by a medical practitioner for recovery of his fees for attendance on a patient and the residuary Art. 115 would therefore apply to such suits.

If there was an implied contract for payment of fee on each day of visit, cause of action would arise on each day and at any rate, where there has been a demand and refusal, time will begin to run from the date of refusal. A.I.R. 1931 All. 752 (2)=(1931) A.L.J. 949=133 Ind. Cas. 537.

——Art. 116.

Synopsis.

1. **Applicability of article.**
2. **Action for debt.**
3. **Breach of covenant of indemnity.**
4. **Breach of covenant of title and quiet enjoyment.**
5. **Breach of undertaking to pay debt.**
6. **Company.**
7. **Interpretation.**
8. **Mortgagor's personal liability.**
9. **Principal and Agent.**
10. **Registered lease.**
11. **Starting point.**
12. **Suit for rent.**

1. Applicability of article.

——Art. 116—Suit for money recovered under power-of-attorney—Power registered — Claim based on the power—Art. 116 and not Art. 89, held applied.

S and other co-sharers executed a power-of-attorney in favour of *B* (who was also a co-sharer) by a registered instrument. The terms of the power-of-attorney were: "We hereby authorise our said attorney to withdraw and receive payment.....and pay and make over to us in proportion to our respective shares as above set forth such amount out of the said sum of Rs. 10,000 as is due thereto within a week of the encashment of the said cheque." A cheque of Rs. 10,000 was received by *B* on the basis of this power-of-attorney but *S* not having been paid, brought a suit against *B*.

Held, that Art. 116 applied and not Art. 89. A.I.R. 1944 Cal. 106=I.L.R. (1943) 1 Cal. 578=212 Ind. Cas. 483.

——Art. 116—*M* depositing certain amount with *A* and receiving annuity for life—On *M's* death, *A* to return deposit to *M's* heirs or pay annuity to them until such return—On *M's* death claim by heirs for refund of deposit found barred—Annuity also, held time-barred. (1944) A.L.J. 339=A.I.R. 1944 All. 241=1944 A.W.R. 175=1944 O.W.N. 252=I.L.R. (1944) All. 554.

——**Art. 116**—When the purchase-money or a substantial portion of it is not payable until one year after the conveyance of the property and no time is fixed for completing the sale, Art. 116 does not apply. A.I.R. 1934 Lah. 206=154 Ind. Cas. 432 (1).

——**Art. 116—Contract in writing and registered—Sale-deed—Implied term that consideration should be paid at time of registration.**

Article 116 applies not merely to a suit for compensation for breach of contract in the narrow sense of the word 'compensation' but also to a suit for money payable under the terms of the contract, and it is applicable in all cases in which the contract is in writing and registered, notwithstanding that there may be an article directly applicable to the class of contract in question.

In a suit for outstanding amount on a sale-deed, it appeared that no money had passed to or on behalf of the vendor from the vendee when the deed was executed. It was provided therein that Rs. 5,000 consideration was recovered but only Rs. 3,300 were actually paid before the Sub-Registrar. But promise to pay the balance was taken to be consideration, receipt of which was acknowledged ;

Held, that according to S. 55 (1) (*b*), T. P. Act, there was an implied term that consideration should be paid at the time of registration and Art. 116, applied even to the case of an implied covenant. Article 116, therefore, governed the case. A.I.R. 1937 Nag. 246=172 Ind. Cas. 680=I.L.R. (1938) Nag. 45.

——**Art. 116—Breach of contract—Covenant to pay before Sub-Registrar—Tender and refusal.**

In a sale-deed, the vendee covenanted to pay the purchase-money before the Registrar, and the same on being tendered was refused by the vendor, *held*, that Art. 116 does not govern an action for recovery of money and that the action cannot be sustained as on a breach of contract in writing registered. 9 M.L.T. 136=8 Ind. Cas. 804.

——**Art. 116—Unpaid purchase-money.**

A company agreed to sell to a certain firm or their nominees or assigns certain immovable property, and a sale-deed was executed by the company as vendors the conveyance being made by the directions of the firm to *A* as their nominee. The amount of consideration was agreed to be paid three months after registration of sale-deed. On default of payment, the company instituted a suit against the partners in the firm and purchaser *A* for the amount and interest and in default of payment, for sale of the property, with a personal decree against the defendants for any deficiency :

Held, that *A's* liability arose in virtue of the conveyance, upon a contract in writing registered within the meaning of Art. 116, Limitation Act, and that the six years' period allowed by Art. 116, applied, and the suit was in time. (1933) M.W.N. 461=A.I.R. 1933 P.C. 143=64 M.L.J. 655=37 L.W. 784=37 C.W.N. 633 =(1933) A.L.J. 541=35 Bom. L.R. 753=11 R. 186= 57 C.L.J. 308=60 I.A. 183=142 Ind. Cas. 788 (P.C.).

——**Art. 116—Suit to enforce payment of unpaid purchase-money.**

Article 116 applies not merely to suit for compensation for breach of contract in the narrow sense of the word 'compensation', but also to a suit for money payable under the terms of the contract and it is applicable in all cases in which the contract is in writing and registered, notwithstanding that there may be an article directly applicable to the class of contract in question.

If the vendee's promise to pay the purchase-money is set out in the registered conveyance which is accepted by him, the contract between the parties can be regarded as embodied in the conveyance, even though it is not actually executed by the vendee and a suit by the vendor for a personal decree on the failure of the defendant to pay the balance of consideration in such a case is governed by Art. 116. 9 R. 56=A.I.R. 1931 Rang. 139=134 Ind. Cas. 737.

——**Art. 116—No covenant but only sale-deed.**

Where, when land is sold, there is no contract in writing for paying the purchase-money, but only a registered sale-deed which recited that the price had been paid : *Held* that Art. 116 did not apply. (1960) 24 M. 233.

——**Art. 116—Applicability.**

Where there is a definite contract to account at the end of each year, the appropriate article would be 115 as the contract would be broken by the failure of the agent to account at the end of each year. In either case if the contract be registered, Art. 116 applies and the period is 6 years. 14 C.W.N. 122=5 Ind. Cas. 59.

——**Arts. 116 and 149**—A suit by Railway Company for ejectment of licensee after expiry of licence and for mense profits is governed by Art. 149 and not by Art. 109 or 116 where the Company is merely the managing agent of Government. 17 P.L.T. 206=A.I.R. 1936 Pat. 362=2 B.R. 620=163 Ind. Cas. 525.

——**Arts. 116 and 97**—Suit for refund of money wrongly paid—Money paid to redeem mortgage—Suit for foreclosure by person having mortgage interest—Payment, held to be wrongly made—Decree for foreclosure—Suit for refund Article 116, held not applicable —Article 97 held, applied. A.I.R. 1935 Oudh. 378= 1935 O.W.N. 549=11 Luck. 110=155 Ind. Cas. 299.

——**Arts. 116 and 106**—Partnership entered for a term of 60 years in 1919—Deed registered—One of the partners dying in 1920—The other partner alienating his interest in 1919—Suit by remaining partner for amounts, within 6 years of alienation but after 3 years of death in 1920—Partnership, held dissolved in 1920—Suit not governed by Art. 116 but by Art. 106. A.I.R. 1934 Mad. 162=(1934) M.W.N. 22=66 M.L.J. 625 =57 M. 378=39 L.W. 164=151 Ind. Cas. 81.

——**Art. 116—Suit for recovery of arrears of maintenance—Security bond executed in favour of woman—Suit not based on bond—Limitation.**

Where a suit for recovery of arrears of maintenance with interest is filed by the representatives of the woman in whose favour a security bond hypothecating certain properties was also executed, but the suit is not based on the registered contract, the suit remains one for money on account of arrears of maintenance and not one to enforce the charge created by the security bond, and the period of limitation for the suit is only three years. A.I.R. 1934 Pat. 244=146 Ind. Cas. 1032.

——**Arts. 116 and 59—Registered bond.**

In the case of a registered bond, the article which is applicable is not Art. 59 but Art. 116. A.I.R. 1934 Rang. 227=151 Ind. Cas. 426.

——**Art. 116**—An action for damages for breach of covenant based on a sale-deed which is registered should be brought within a period of six years. A.I.R. 1929 Mad. 77.

——**Art. 116**—Article 116 applies to a suit for damages for the breach of a registered contract of sale. 100 Ind. Cas. 40=25 M.L.W. 11=A.I.R. 1927 Mad. 273.

——**Art. 116**—Where a registered sale-deed provided that the purchaser should pay the revenue on the land sold, but the vendor paid the revenue on behalf of the purchaser, and sued him for revenue paid.

Held, that Art. 61 should apply and not Art. 116. 94 Ind. Cas. 1046=1926 M.W.N. 291=A.I.R. 1926 Mad. 633=51 M.L.J. 159.

——Arts. 116, 62 and 97—Suit by vendee for consideration for land for which possession is not given.

A suit by vendee for refund of proportionate consideration of the sale-deed where he does not obtain possession of part of the land conveyed by the sale-deed is governed by Art. 116 and not by Art. 62 or Art. 97. A.I.R. 1933 Mad. 126=(1933) M.W.N. 649=64 M.L.J. 336=37 L.W. 497=140 Ind. Cas. 805.

——Arts. 116 and 109—Breach of contract—Usufructuary mortgage—Possession not delivered—Suit for profits and possession.

The claim for profits owing to non-delivery of possession agreed to be delivered to plaintiff, a usufructuary mortgagee, is in substance one for compensation for breach of a contract in writing registered and is governed by Art. 116 and not by Art. 109. 31 Ind. Cas. 804 (All.).

——Art. 116—Transfer for maintenance subject to debts.

Certain lands were transferred by a registered deed in writing in favour of a person for life in lieu of maintenance and he was made to bear the liability of certain payments.

Held, that the deed of transfer contained an implied acceptance of the transferee to make the payment though it was in a unilateral document and such deed was a complete contract in writing between the transferor and the transferee within the meaning of Art. 116. 118 Ind. Cas. 417=6 O.W.N. 431=A.I.R. 1929 Oudh 311.

——Art. 116—When the purchaser of a property agrees to release it from a mortgage over it and he fails to so release it, the cause of action for a suit by the vendor against the purchaser arises either on the date on which the covenant was undertaken to be fulfilled or in any case not later than the date when the vendor called upon the purchaser to fulfil it. Such a suit is governed by Art. 116 and if for specific performance by Art. 113. A.I.R. 1933 Cal. 641=60 C. 761=146 Ind. Cas. 863.

——Art. 116—Breach of contract.

Where a usufructuary mortgagee agreed to pay a fixed amount after deducting interest from income of the property, the payments which were to be made were not of the nature of rent payable by a tenant to landlord under the Bengal Tenancy Act and a suit for the recovery of which will not be barred by the special provision of the B.T. Act. Such payments would be regarded as being due under a registered agreement under Art. 116. 1 Pat. L.W. 795=(1918) P.H.C.C. 24=40 Ind. Cas. 594.

——Art. 116—Dower-debt—Converted into mortgage debt.

A registered deed executed by Mohammedan husband long after the marriage, promising to pay dower then still due from him, on demand and hypothecating certain immovable properties as security for its due payment, converts the dower debt into a mortgage debt; and to a suit on such deed for the amount of dower, six years rule of limitation is applicable. 99 Ind. Cas. 553=A.I.R. 1927 All. 268.

——Art. 116—Article 116 applies to suits for recovery of dower debt when there is a registered dower deed although Arts. 103 and 104 would apply when there is no such registered instrument and time runs from the date of death of the lady. 44 Cal. 759 (P.C.), Foll. 36 Cal. 184, Not Foll. 73 Ind. Cas. 17=27 C.W.N. 210=37 C.L.J. 108=A.I.R. 1923 Cal. 507.

——Arts. 116 and 61—Repairs to a common well—Suit for contribution—Limitation.

The plaintiff spent a sum of money for the repairs of a well he owned jointly with a defendant under a registered deed which provided that the necessary repairs were to be made by both the owners. Five years after the repairs he sued to recover from the defendant his contribution to the repairs; *Held*, that the suit was barred since it was governed by Art. 61 and not by Art. 116. 44 Bom. 591=22 Bom. L.R. 777=57 Ind. Cas. 532.

——Arts. 116, 120 and 132—Mortgage on loan of paddy—Limitation.

A suit on a mortgage executed for a loan not of money but of paddy is governed by Art. 116 or Art. 120 and not by Art. 132 of the Limitation Act. 44 Ind. Cas. 518 (Cal.).

——Arts. 116, 120 and 132—Mortgage on loan of paddy.

A mortgage having been made to secure a loan of paddy repayable with interest as paddy, a suit to enforce the said mortgage falls under the provisions of Art. 116 or 120 and not under those of Art. 132, which applies only to payment of money charged on immovable property. 24 C.L.J. 348=37 Ind. Cas. 805.

——Art. 116—Suit for refund—Fraudulent mortgage.

Where defendant fraudulently gets his *Sir* land mortgaged with possession to the plaintiff, the plaintiff is entitled to a simple money decree for the sum advanced with such interest as the Court might find due. The claim falls under Arts. 95 and 97 and not under Arts. 116 and 120. 13 O.C. 148=6 Ind. Cas. 1013.

——Arts. 116, 75—Instalment bond registered—Waiver on default—Suit for instalments due within 6 years before date.

Where in an instalment bond it was provided that on default in the payment of one kist the creditor would be able to realise the entire amount due under the bond: *Held*, that it was open to the creditor, if default were made, to sue at once for the whole amount or if he so elected, to waive the benefit of the proviso. Default was made in October, 1897, and the present suit was brought in 1906 for the instalments for six years before suit. *Held*, that the plaintiff was entitled to a decree Art. 116 being applicable to the suit which was brought on a registered bond. Per **MACLEAN, C.J.**, *Semble*—If the question were *res integra* it would perhaps be that the Court holds that Art. 75 is applicable to the case instead of Art. 116. (1906) 11 C.W.N. 903.

——Arts. 116, 49—Recovery of property under registered deed of release.

Held, on the construction of a registered deed of release that a suit by the person in whose favour the release was made for the recovery of properties was governed by Art. 116 and not by Art. 49. (1903) 9 C.W.N. 679.

——Arts. 116, 62, 97—Registered—Karar allowing plaintiff to cut trees for 6 years—Failure of consideration—Article applicable. *See* LIMITATION ACT, ART. 62. 29 M. 353.

——Art. 116—*See* ART. 110. (1903) A.W.N. 210=26 A. 138.

——Art. 116—*See* 13 M.L.J. 438.

2. Action for debt.

——Art. 116—Registered simple bond specifying day of repayment—Limitation.

Where the bond on which the suit is brought is registered and specifies a day on which the debtor would repay the loan, the period of limitation will be six years from the day on which the debtor had contracted to repay and the appropriate article applicable is Art. 116. A.I.R. 1940 Pat. 74=6 B.R. 400=186 Ind. Cas. 850.

——Arts. 116 and 120—Cause of action for a dividend duly declared and made payable but in part improperly withheld is an action in debt and is governed by Art. 116 or else by Art. 120, and, therefore, the

claim for dividends falls under Art. 116 since the whole contract arises under the Articles of the Company. A.I.R. 1940 Bom. 97=42 Bom. L.R. 57=I.L.R (1940) Bom. 165=[illegible] Ind. Cas. 589 (F.B.).

——**Arts. 116 and 375—Action for debt.**

Art. 115 applies to an action for debt just as much as Art. 116 does or vice-versa. 110 Ind. Cas. 33=52 Bom. 477=30 Bom. L.R. 549=A.I.R. 1928 Bom. 252.

——**Art. 116—Suit on bond—Unregistered and registered bonds.**

Where a money bond was executed and subsequently on the same day a registered deed was executed which provided for payment of the debt in a particular manner and default was made. *Held*, that the two documents formed part of one and the same transaction and that a suit to recover the amount after default was governed by Art. 116 of the Limitation Act. (1917) M.W.N. 879 =6 L.W. 712=42 Ind. Cas. 609.

——**Art. 116—Suit on bond.**

A suit for recovery of a money due on a Registered bond is governed by Art. 116 as it is more or less a suit for compensation for breach of a contract in writing registered and time begins to run from the date when the contract is broken or where there are successive breaches from the date of breach in respect of which the suit is instituted, or where it is continuing breach from the date when it ceases. 15 C.L.J. 17=17 C.W.N. 369= 13 Ind. Cas. 440.

3. Breach of covenant of indemnity.

See also NOTE 4.

——Art. 116—Applicability—Suit for damages on indemnity clause in registered sale-deed—Article if would apply in the case of a void sale.

Where a vendee brings a suit for damages on being dispossessed on the strength of an indemnity clause in a registered sale-deed, and the suit is not for return of the purchase money, Art. 116 would apply. The article can be invoked even if the sale-deed was absolutely void, the only condition being that he is suing, for the enforcement of the indemnity clause contained in the sale-deed. 1949 A.W.R. 480=A.I.R. 1949 A. 480= 1950 A.L.J. 17.

——**Art. 116**—Where a mortgage-deed contained a provision that if, in consequence of a dispute raised by a third person, any loss is occasioned to the mortgagee, the person and other property of the executant will be liable to make good the loss and a third person having obtained a declaratory decree that the property could not be sold in execution of the decree obtained upon the mortgage, the mortgagee instituted a suit for breach of the covenant of indemnity contained in the mortgage :

Held, that the suit was not governed by Art. 62 but by Art. 116 and the cause of action arose when it was declared that the plaintiff was not entitled to have the house sold in execution of his decree. (1932) A.L.J, 317=A.I.R. 1932 All. 358=16 R.D. 373=136 Ind. Cas. 829.

——**Art. 116**—Where the vendor agrees to indemnify the vendee in case any loss was caused to the vendee in any suit brought in respect of property comprised in the sale-deed, the mere filing of a suit would not give a cause of action to the vendee to recover damages on this agreement. Even if a third person succeeded in that suit, until the vendee is disposessed, he would have no cause of action to bring a suit for damages for breach of this agreement. A suit to recover damages in such a case when a sale-deed is registered would be governed by Art. 83 read with Art. 116. 33 Bom. L.R. 1092=55 B. 565=A.I.R. 1932 Bom. 36= 134 Ind. Cas. 1157.

——**Art. 116—Express covenant.**

A purchased from *B* by an Indenture certain property subject to an incumbrance of Rs. 16,000 buy a deed of charge of mortgage in favour of *K*. There was a stipulation that *B* would keep *A* harmless and would indemnify him in respect of any charge save and except the charge in favour of *K*. Eventually after the sale was completed, it was found that the amount due to the mortgagee was Rs. 21,000. This amount *A* had to pay and he sued *B* for the difference between Rs. 16,000 and the sum he actually paid.

Held, that *A* took the property subject to the liability of the mortgage of *K*, that on a construction of the document, he was bound to discharge the incumbrance of *K* entirely and not merely to pay the sum mentioned in it, and in absence of any express covenant to the effect that *B* would be bound to pay any excess due on the mortgage ; *A* was not entitled to the amount claimed by him.

Held, further that it was not a covenant which could be implied from the sale-deed and therefore Art. 116 did not apply. 51 C.L.J. 538=57 Cal. 683=A.I.R. 1930 Cal. 568.

——Art. 116—Applicability—Indemnity covenant.

If there is covenant express or implied indemnifying party suffering against loss caused by defect in title of executant of document, Art. 116 applies, otherwise Art. 62 or Art. 97. A.I.R. 1930 All. 785.

——**Art. 116**—Suit for damages based on a clause of indemnity or on a covenant for title and quiet possession contained in a registered sale-deed is governed by Art. 116. A.I.R. 1921 Lah. 260, Foll. 120 Ind. Cas. 424 =A.I.R. 1929 Lah. 388.

——Art. 116—Covenant of indemnity—Starting point.

Vendee from a pre-emptor is entitled to take benefit of an express covenant to indemnify in a sale-deed and especially the original vendor cannot contend to the contrary.

To csuch a case for a suit for compensation for loss of possession Art. 116, Limitation Act, applies and time runs from date of dispossession. 30 All. 402, Foll 119 Ind. Cas. 243=51 All. 651=1929 A.L.J. 433= A.I.R. 1929 All. 293.

——**Art. 116**—Where the surety is liable under registered contract the limitation is six years under Art. 116. 95 Ind. Cas. 707=A.I.R. 1926 Nag. 449.

——Art. 116—Sale by co-sharer.

A co-sharer sold lands to the plaintiff pending partition proceedings, and agreed in the sale-deed itself that in the event of his not getting the land to his share in the said partition proceedings, he would pay compensation to the plaintiff. The vendor was allotted at the partition a less area than the area sold and the plaintiff sued for compensation.

Held, that Art. 65 along with Art. 116 applied to the case and that time began to run against plaintiff from the date when the vendors were finally allotted a less area. 72 Ind. Cas. 897=A.I.R. 1923 Lah. 23.

——**Art. 116**—A suit for compensation for the breach of a contract to indemnify falls within the purview of Art. 83 and when such a contract is in writing and registered, Art. 116 becomes applicable and by virtue of it the period is extended to six years. (*Obiter*) in 16 All. 3, Diss. from. 64 Ind. Cas. 431=2 Lah. 316= 3 L.L.J. 542=104 P.L.R. 1921=A.I.R. 1921 Lah. 260.

——**Arts. 116 and 132**—Where a registered contract to indemnify contains a provision for a charge on immovable property, Art. 132 applies and not Art. 83 or Art. 116. 66 Ind. Cas. 554=14 M.L.W. 99=1921 M.W.N. 472=A.I.R. 1921 Mad. 514.

——Art. 116—Breach of contract—Sale—Covenant to make good loss—Breach—Limitation.

Held in a suit by a vendee for damages that the suit was not barred by Limitation inasmuch as the plaintiffs were not suing upon a mere covenant of title, but upon a covenant of indemnity as set forth in the sale-deed and the cause of action arose on the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. 40 All. 605=16 A.L.J. 706=48 Ind. Cas. 18.

——Art. 116—Suit for compensation for breach of a contract in sale-deed.

A deed of sale of immovable property, duly registered contained a covenant to the effect that in the event of a claim being advanced by a co-sharer, or in the event of the purchaser losing any part of the property in any other way he would be entitled to a refund of the consideration and to damages. The purchaser, failing to get possession of part of the property purchased, sued for possession or in the alternative for a refund of a proportionate part of the consideration money and damages. *Held* that as regards the latter relief the suit was governed by Art. 116 and not by Art. 97. (1908) A.W.N. 185=30 A. 402=5 A.L.J. 480.

4. Breach of covenant of title and quiet enjoyment.

See also NOTE 3.

——Art. 116—Applicability—Breach of covenant of title and quiet enjoyment in registered sale-deed Suit for damages—Limitation—Starting point—Vendor having power to dispose of only on conditions—Transfer valid only for lifetime — Dispossesion after death of vendor—Suit for damages—Limitation applicable—Starting point. *See* BOMBAY COURT OF WARDS ACT, S. 40, PROVISO, THIRDLY. 52 Bom. L.R. 614=A.I.R. 1950 Bom. 401.

——Arts. 116, 97 and 62—Transfer of property—Title of vendor defective—Suit for return of consideration—When Art. 62 or 97 or 116 applies, explained.

The provisions of Art. 62 might have been applied before the enactment of S. 55, T. P. Act, to cases where there was no covenant and the suit was merely on the allegation that the vendor had purported to transfer some property to which he had no title. That would have been on the analogy of the English law an action for money had and received. But since S. 55 has imported into all transfers, unless the parties agree to the contrary, a covenant warranting the title of the vendor, a suit to recover the consideration would be on the basis of that specific covenant and time would begin to run from the date of the deed after it had been established that there never had been any title. In the case, however, where there is an express covenant that covenant must be construed according to the intention of the parties and no general rule can be laid down about the date when the cause of action arises. Such suits, however, would be on the basis of a covenant and the provisions of Art. 97 would apply if there be no registered deed and the provisions of Art. 116 if there be a registered deed. A.I.R. 1946 All. 159=1945 Oudh W.N. (H.C.) 295=1945 All. L.J. 473=224 Ind. Cas. 52.

——Art. 116—Suit for refund of consideration—Starting point of limitation.

So long as the person whose rights have been infringed remains in possession of the property, limitation does not begin to run against him. Accordingly so long as a vendee to whom his vendor has conveyed a defective title remains in possession, he need not bring a suit for refund of sale-consideration. It is only when actual dispossession takes place that limitation begins to run. A.I.R. 1944 All. 243=(1944) A.L.J. 341=1944 A.W.R. 165=I.L.R. (1944) All. 612=1944 O.W.N. 85.

——Art. 116—Damages for breach of covenant of title—Starting point.

When a sale is void *ab initio* as against the rightful owner and the vendee has been put in possession of the property by the vendor, the limitation to claim damages for breach of covenant of title and quiet enjoyment contained in the sale-deed runs from the date of dispossession of the vendee by the rightful owner. A.I.R. 1941 Nag. 169=1941 N.L.J. 84.

——Art. 116—Damages for dispossession of part of land sold.

A suit for damages by the vendee against the vendor for being dispossessed of the part of the land sold under a registered deed of sale is governed by Art. 116 and not by Art. 97. A.I.R. 1939 All. 170=(1938) A.L.J. 1136=1938 A.W.R. 803=180 Ind. Cas. 342.

——Art. 116—Suit for refund of consideration—Starting point.

If the vendor's title is defective from the inception and immediately after the conveyance, the possession is demanded by the vendee and is not given, the date of the sale-deed is the starting point of limitation, for a suit for damages for breach of covenant of title and failure to give possession and if the suit is brought after six years from the date of the deed, it will be barred under Art. 116. A.I.R. 1937 Rang. 39=167 Ind. Cas. 809.

——Art. 116—Refund of consideration—Starting point of limitation.

Art. 116 applies to a suit brought by a vendee who had purchased under a sale-deed from a vendor with a defective title and was subsequently dispossessed by the person with superior title, to recover damages for breach of the implied covenant for title and S. 55, sub-S. (2) of the T.P. Act. The date of dispossession should form the starting point of limitation for the suit, where the suit is regarded as a suit for compensation for breach of contract, or as a suit to which Art. 97 would apply, to recover money paid upon an existing consideration which has afterwards failed. If the suit is regarded as governed by Art. 116, then no loss or damage can be said to have been caused by the mere passing of a decree for proprietary possession in favour of a third party. It is possible that the decree for possession may never be executed. By reason of negligence or some other reason, the decree-holder may fail to execute it until it has become barred by limitation. In such a case the purchaser may retain possession of the property sold to him and may not suffer any loss although his title has been found defective. Hence the mere passing of the decree cannot be held to constitute a cause of action, and the cause of action does not accrue until the purchaser has been dispossessed in execution if the decree. If, on the other hand, the suit is regarded as governed by Art. 97, it cannot be held that consideration has totally failed so long as the buyer remains in possession and is in a position to enjoy the profits. Unless and until the vendees are ejected in execution of the decree against them, they are legally entitled to remain in possession and to recover rents from the tenants. 1936 O.W.N. 143=A.I.R. 1936 Oudh. 141=11 Luck. 725=160 Ind. Cas. 454.

——Art. 116—Refund of consideration.

Article 116 is applicable to a suit for compensation by a vendee who has been deprived of the property purchased by him in consequence of a defect in the title of the vendor. 1935 A.W.R. 768=(1935) A.L.J. 929=A.I.R. 1935 All. 786=58 A. 90=156 Ind. Cas. 177.

——Art. 116—Suit for refund of consideration—Starting point.

The sons impugned the sale-deed executed by their father on the ground that the property which it purported to convey belonged to the joint family of which the plaintiffs and the vendors were members and that there was no legal necessity for the alienation. The suit was

decreed by the first Court on January 31, 1924. Delivery of possession was taken by the successful plaintiffs on February 27, 1924. Part of the land included in the sale was under the cultivation of the vendees who did not vacate it. Disputes arose between the sons of defendant No. 1 and the vendees, which led to proceedings under S. 145, Criminal P.C. These proceedings resulted in favour of the vendees, and the sons had to institute another suit for possession in respect of the plots which had remained in possession of the vendees in spite of the symbolical delivery of possession. From the decree obtained by the sons in the Court of first instance, the vendees had appealed to the District Judge who dismissed it on January 19, 1926. A second appeal to the High Court was dismissed on October 31, 1928. A Letters Patent Appeal was likewise dismissed on June 2, 1930. Relying on the covenant in the sale-deed, which contained a clause, " if by reason of the act of us, the executants, or the omission of us, the executants or our heirs, any sort of defect is found in respect of the share sold and it is interfered with, the vendees shall have the power to recover the whole of their sale consideration," the vendees sued for return of the consideration money :

Held, that the proper article, applicable was Art. 116 and that the plaintiff's cause of action was complete when the first Court found that the vendors had no power to sell and the vendees were dispossessed. Subsequent affirmance of the decree of the trial Court could not give a fresh starting point. The fact that the vendees managed to retain actual psossession of part of the land included in the vended property in spite of delivery of possession could not save limitation. A.I.R. 1935 All. 786=1955 A.W.R. 768=(1935) A.L.J. 929 =58 A. 90=156 Ind. Cas. 177.

——Art. 116—Suit for damages for breach of covenant of title—Limitation.

The plaintiff purchased a property from the defendant in 1920 and was put in possession. Subsequently, a mortgagee whose mortgage had not been disclosed to the plaintiff brought a suit on his mortgage, obtained a decree and in execution of the decree, the plaintiff was dispossessed in 1930. The plaintiff sued immediately after his dispossession for compensation for the loss sustained by him :

Held, that as the plaintiff had been put in possession of the property, the cause of action for the suit arose only when he was dispossessed and the suit was not time-barred. (1935) M.W.N. 375=68 M.L.J. 588=41 L.W. 728=A.I.R. 1935 Mad. 636=156 Ind. Cas. 843 (2).

——Art. 116—Refund of consideration—Limitation.

The plaintiff alleged that in pursuance of a sale-deed, he was placed in possession and he granted a five years' oral lease to another person who remained in possession until he was ejected by the defendant. The plaintiff then brought a suit against the defendant and his brother for a declaration of his title to the property and for possession with effect from the date on which the lease he had granted was to expire. It was held finally in this case that the field belonged to the defendant and his brother jointly and that as plaintiff had already paid more than half the consideration for the whole field, he was entitled to possession of half a share without further payment. Then plaintiff brought a suit against the defendant for recovery of the amount he had paid in excess of the value of half a share and interest thereon :

Held, that Art. 116, governed the case and that the plaintiff had two causes of action, one arising when the lessee was ejected and the other arising when it was decided that the defendant was entitled only to half a share and that the suit was in time. A.I.R. 1934 Nag. 16=30 N.L.R. 138=148 Ind. Cas. 480.

——Art. 116—Refund of consideration—Limitation—Starting point.

The guardian of certain minors sold some house property to *P* in 1913, and the sale-deed stipulated that " if any defect were proved in the minor's title resulting in loss of the price paid or in apprehension of such loss or in the purchaser being deprived of the whole or part of the property " the purchaser would be at liberty to realise the price with damages, costs, interests, etc., from the other property of the minors or their representatives. In 1914, certain persons instituted a suit for a declaration that the sale was null and void and the minors had no saleable interest in the property sold and obtained a decree to this effect in 1916. This decree was ultimately upheld by the High Court on May 2, 1925. *P* became insolvent in October, 1925 and on May 1, 1928, the Official Receiver instituted a suit against the vendors for refund of price with interest on the allegation that their proprietary rightt had been proved defective by the High Court's judgmens dated May 2, 1925 :

Held, that Art. 116 applied to the case, and that as the cause of action arose on the date of the original decree and not on that of the High Court decree, the suit was barred. Under the Indian Law and procedure, an original decree is not suspended by presentation of an appeal nor is its dismissal interrupted where the decree on appeal is an order of dismissal. 35 P.L.R. 179= A.I.R. 1934 Lah. 305 (2)=148 Ind. Cas. 825.

——Arts. 116, 62 and 97—Refund of consideration.

A suit for refund of consideration is not one for breach of contract and is governed either by Art. 62 or by Art. 97 according as to whether the contract is void or voidable and Art. 116 is not applicable. 34 P..L.R. 96=A.I.R. 1933 Lah. 581=145 Ind. Cas. 186.

——Art. 116—Refund of consideration—Limitation—Starting point.

The plaintiff got from the defendants a sale-deed of certain property purchased by them in an execution sale on a decree in a different suit but in pursuance of which they had not got lawful delivery. The judgment-debtor in the decree in which the sale was held pleaded adverse possession. There was a provision in the sale-deed to the effect that the defendants would put in an application for delivery and give delivery to the plaintiff. The plaintiff filed a suit for recovery of the property or return of purchase-money:

Held, that the suit was governed by Art. 116 and that no time wsa fixed within which delivery was to be given, and although it is true that the plaintiff might, at any time, after the execution of the sale-deed, have sued to enforce delivery under it, so that time would begin to run for such a suit from the date of contract.

Held, also, that the cause of action for refund of the purchase-money would not simultaneously arise, but would only become available when the vendors became incaapable of carrying out their undertaking. Before that occasion arose, the vendees could not have sued alleging a breach of the contract of title, for the return of the purchase-money. A.I.R. 1933 Mad. 153= 143 Ind. Cas. 504.

——Art. 116—Covenant for title.

The provisions of Art. 116 will apply where there is a breach of covenant of indemnity against loss caused by defect in titles. The covenant need not be express. It may be implied as in case of a sale under S. 52 (2), T. P. Act, for the refund of purchase-money. If there is no such covenant Art. 62 or 97, Limitation Act will apply. A.I.R. 1930 All. 785.

——Art. 116.

If a statute says that a certain covenant should necessarily be implied in a certain contract and that contract itself is in writing and registered, Art. 116 applies, and if the contract is under S. 55, T. P. Act, and the vendee

Is put in possession and dispossessed the time begins to run from the date of dispossession. A.I.R. 1930 A. 771 = 1930 A.L.J. 653 = 52 A. 604.

——Art. 116.

Claim for damages by a vendee on the ground that his vendor's title is defective is governed by Art. 116. A.I.R. 1930 Sind 66 = 126 Ind. Cas. 737.

——Art. 116—Breach of—Suit for refund of purchase-money.

To a suit for refund of purchase-money which is in substance a suit based on a registered document and can be regarded as a suit for compensation for breach of a contract Art. 116 must apply although such a suit may fall under some other provision of Limitation Act and time begins to run only when it is found that there is no good title. A.I.R. 1921 Bom. 252 = 38 Mad. 887 = A.I.R. 1916 P.C. 182, *Foll.* 117 In. Cas. 654 = 8 Pat. 432 = A.I.R. 1929 Pat. 388.

——Art. 116—suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale-deed executed after coming into force of the Transfer of Property Act is governed by Art. 116. 38 Mad. 1171, *Foll.* 91 Ind. Cas. 514 = 22 M.L.W. 704 = A.I.R. 1926 Mad. 255 = 49 M.L.J. 668.

——Art. 116—Breach of covenant—No title *ab initio*—Starting point.

The starting point for limitation in a suit by a vendee to recover damages from his vendor upon breach of covenant for possession is, where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, to date of the sale-deed or at the latest the date when the vendor first denies vendees right to possession. 100 Ind. Cas. 40 = 25 M.L.W. 11 = A.I.R. 1927 Mad. 273.

——Art. 116—An action for damages for breach of a covenant for title contained in a registered instrument is governed by Art. 116. 11 N.L.R. 186, *Foll.* 88 Ind. Cas. 699 = 22 N.L.R. 49 = A.I.R. 1926 Nag. 109.

——Art. 116—Where the defendant covenanted that he had a good title to the property sold, and in return for the sale-deed received a certain price, but the plaintiff was obstructed in obtaining possession of the property and therefore sued defendant for retrun of the purchase-money.

Held, that the suit was governed by Art. 116 and the cause of action arose on the date of sale. 89 Ind. Cas. 59 = 49 Bom. 596 = 27 Bom. L.R. 637 = A.I.R. 1925 Bom. 440.

——Art. 116—A suit for the refund of the purchase-money may be regarded as a suit for damages for breach of covenant of title. The Article applicable to such a suit, where the conveyance is registered, is Art. 116. If a contract, in the sense of the Article, is in writing, the writing represents the implied as well as the express covenants breach of which is governed by the Art. 19 C.W.N. 102, *Diss.*; 38 Mad. 1171, *Foll.* 80 Ind. Cas. 623 = 27 C.W.N. 1025 = A.I.R. 1924 Cal. 148.

——Art. 116—Where a *jajmani brit* was found to be not saleable.

Held, that a suit for possession of the *brit* or the refund of consideration in the alternative is governed by Art. 116 when the sale-deed of the *brit* was a registered one. 72 Ind. Cas. 653 = A.I.R. 1924 Pat. 321.

——Art. 116—The provision in a sale-deed by which the vendor undertook, in case of dispute, to settle it out of his own expense and carry out the sale without obstruction, amounts to a covenant for quiet enjoyment or at least a covenant for title and a breach of the covenant gives the plaintiff six years to sue from the date when the covenant is broken. 68 Ind. Cas. 190 = 1922 M.W.N. 420 = A.I.R. 1923 Mad. 28 = 43 M.L.J. 64.

——Art. 116—Breach of covenant—No title *ab initio*—Starting point.

Per SPENCER J.—Lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Art. 116 to sue for damages for breach of the title for quiet enjoyment; but if from the inception the vendor had no title to convey and the vendee never gets possession, the staring point of limitation is the date of the sale. Suit by *A* as vendee of *B* who was himself vendee of *C* against *C* for money paid which *C* was bound to pay to his secured creditors is not one for damages or for return of the purchase-money, as there is no privity of contract between the parties. 74 Ind. Cas. 416 = 17 M.L.W. 254 = A.I.R. 1923 Mad. 392.

——Art. 116—Breach of covenant—Subsequent dispossession.

Plaintiffs brought land under a registered-deed and were put in possession. The land was leased to a tenant who subsequently set up his own title to the land and his claim was also embodied in a final decree of the Court. Plaintiffs then filed a suit against their vendor for the recovery of the purchase money, etc.

Held, that Art. 116 and not Art. 97 applied and time began to run only when the tenant obtained the decree supporting his own title to the land.

A distinction should be made between cases where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, and other cases where the sale is only voidable on the objection of third parties and possession is take under the sale. It is only in the first class of cases that the starting point of limitation will be the date of sale. Case-law discussed. 61 Ind. Cas. 70 = 45 Bom. 955 = 23 Bom. L.R. 325 = A.I.R. 1921 Bom. 252.

——Art. 116—Covenant for title—Breach—Damages—Limitation.

There is an implied covenant for title and possession in all registered conveyances under S. 55 (2) of the T.P. Act and a breach of that covenant comes within Art. 116 of the Limitation Act. 52 Ind. Cas. 269 (Cal.).

——Art. 116—Covenant for title—Sale.

A suit for damages for breach of an implied covenant for the title in a registered sale is governed by Art. 116. 50 Ind. Cas. 673 (Mad.).

——Art. 116—Covenant for title—Breach of damages—Starting point.

A suit for damages for breach of covenant for title in a registered deed is governed by Art. 116. Such a breach is entire and complete at the time of the execution of the sale and limitation begins to run from that date. 11 N.L.R. 186 = 31 Ind. Cas. 877.

——Art. 116—Covenant for title—Breach of—Starting point.

Obiter.—The cause of action for a suit for damages for breach of covenant for title arises on the execution of the conveyance. 29 M.L.J. 454 = 2 L.W. 918 = (1916) M.W.N. 7 = 31 Ind. Cas. 179.

——Art. 116—Covenant for title—Deficiency in extent of land sold—Limitation.

A suit for damages for breach of covenant for title in regard to a small portion of the land sold is governed by Article 116 of Schedule II of the Limitation Act; the plaintiff, in such a suit has simply to show that he was not put in possession of it. (1911) 1 M.W.N. 361 = 11 Ind Cas. 337.

——Art. 116—Covenant implied in law—"Contract in writing registered."

The expression "shall be deemed to contract" in Cl. (2) of S. 55 of the Transfer of Property Act makes the covenant implied by that clause part and parcel of the transaction of sale and it is to be deemed to be embodied in the written document of sale; and a suit to enforce such covenant may be brought within six years of the date of sale, *i.e.*, date of breach, under Art. 116 of the Limitation Act. 21 M. 8 and 25 M. 587, *foll.* (1904) 15 M.L.J. 396.

5. Breach of undertaking to pay debt.

——Art. 116—Registered sale-deed—Vendee failing to pay mortgage-debt of vendor as undertaken in deed—Mortgagee obtaining final decree for sale—Vendor paying off decree—Cause of action against vendee—When arises.

Where under a registered sale-deed the vendee, undertakes to pay an outstanding mortgage-debt of the vendor out of the consideration money left in his hands but fails to liquidate that debt, he commits a breach of contract in writing registered and the vendor has a cause of action against him. If the mortgagee obtains a final decree for sale and the vendor pays the decretal sum, the vendors' cause of action against the vendee arises not on the date of the contract itself, but at the earliest on the date of the final decree for sale or on the date when the vendor was made to pay the decretal sum, that is to say, when he was damnified. A.I.R. 1950 Pat. 21.

——Art. 116—Breach of covenant by purchaser with vendor to pay off mortgage—Limitation—Starting point. *See* CONTRACT ACT, S. 73. 1948 N.L.J. 463 = A.I.R. 1948 Nag. 401.

——Art. 116—Registered sale-deed—Vendee charged with discharging mortgage debt out of sale price—Default by vendee—Sale of property in execution of decree on mortgage—Deficiency—Mortgagor compelled to pay under personal covenant—Suit for damages against vendee—Limitation.

Where a mortgagor sells mortgaged property under a registered sale-deed, reserving part of the consideration for the sale with the vendee for discharging the mortgage debt, but the latter fails to discharge and redeem the mortgage and the mortgagee sues on the mortgage and brings the property to sale and after sale, obtains a personal decree against the mortgagor for the deficiency, if the mortgagor who is compelled to pay the balance to the mortgagee brings a suit against the vendee for damages for breach of contract, Art. 116 of the Limitation Act applies to the case, and the suit if brought within 6 years of the date when the plaintiff made the payment, is not barred by limitation. 223 Ind. Cas. 248 = 12 B.R. 356 = A.I.R. 1947 Pat. 11.

——Art. 116—*P* who had obtained a mortgage decree against *A* assigned the decree to *D* for certain amount a portion of which was left with *D* to be paid *X* who was creditor of *P*. This amount was not to be paid to *X* until *D* had realised the decree. *D* realised the decretal amount but refused to pay *X* who then brought a suit to recover the amount:

Held, that the suit was neither one for specific performance of a contract not for indemnity but was a suit for compensation for breach of contract and was, therefore, governed by Art. 116. A.I.R. 1940 Pat. 155 = 6 B.R. 92 = 185 Ind. Cas. 63.

——Arts. 116 and 83—A suit brought by the vendor against the vendee on the default being made by the vendee in paying off the creditors of the vendor, for the loss occasioned by such default is one for recovery of damages for breach of a contract of indemnity and as such, is governed by Art. 83 read with Art. 116 when the sale-deed is a registered one and the limitation begins to run from the time the vendor is actually damnified. A.I.R. 1940 Lah. 321 = I.L.R. (1941) Lah. 353 = 43 P.L.R. 548 = 192 Ind. Cas. 841.

——Art. 116—Limitation—Starting point.

Plaintiff executed *ijara* deed in favour of defendant whereby the defendant agreed to pay off the mortgages effected by the plaintiff. The deed was registered. There was not an express or implied agreement to indemnify the plaintiff. The defendant failed to pay off the mortgages. The mortgage decrees were passed and the plaintiff's property was sold in execution thereof. The plaintiff instituted a suit against the defendant to recover damages more than six years from the date of which he was made party to the mortgage suit:

Held, that Art. 116 applied and time began to run from the date on which the plaintiff was made party to the mortgage suit, *i.e.*, the contract was broken and not from the date of the sale of the property, *i.e.*, actual damage suffered. Suit, therefore, was time-barred under Art. 116, whether read with Art. 115 or Art. 83. 19 P.L.T. 198 = 17 Pat. 338 = A.I.R. 1938 Pat. 275 = 4 B.R. 694 = 176 Ind. Cas. 269.

——Arts. 116 and 111—A suit by a mortgagor or his assignee against the vendee for return of the money left with him for payment to the mortgagee and which he had failed to pay is, governed by Art. 116 and not by Art. 111. A.I.R. 1934 Oudh 240 = 11 O.W.N. 691 = 10 Luck. 26 = 149 Ind. Cas. 529.

——Arts. 116, 83 and 132—Vendor and purchaser—Direction to pay prior mortgage—Default—Suit against vendee—Suit regarding personal claim governed by Art. 116 read with Art. 83 and regarding charge by Art. 132. A.I.R. 1933 Lah. 109 = 34 P.L.R. 156 = 14 L. 380 = 141 Ind. Cas. 435.

——Arts. 116 and 83—A suit by a vendor against the vendee on the latter's default to pay the money to a third party left with him for that purpose is governed by Art. 116 read with Art. 83 when the sale-deed is a registered document and the starting point of limitation is when the plaintiff vendor is damnified, *i.e.*, when he pays off such third party. 34 P.L.R. 734 = A.I.R. 1933 Lah. 793 = 14 L. 646 = 144 Ind. Cas. 362.

——Arts. 116, 120, 61—Suit by transferor against transferee—Limitation—Starting point.

A mortgaged certain property to *B* for Rs. 750 on June 11, 1921, directing *B* to pay Rs. 400 out of mortgage amount to *A's* creditors. *B* did not pay. *A* being threatened by the creditors with suits, paid them the amounts on June 12, 1922, and June 14, 1923, and instituted a suit against *B* on June 14, 1927, for recovering the amounts paid:

Held (*i*) that the suit was not one 'for money payable to the plaintiff for money paid for the defendant' within the meaning of Art. 61 and was not governed by the said article;

(*ii*) that it was governed by Art. 120, even if Art. 116 did not apply and the suit was in any case not time-barred. 53 A 702 = A.I.R. 1931 All. 549 (2) = 1931 A.L.J. 533 = 133 Ind. Cas. 615.

——Arts 116 and 111—Vendor and purchaser—Price reserved with vendee for payment of vendor's creditors——Failure to pay—Suit by vendor for refund—Limitation.

The plaintiff sold a certain property to the defendant on July 12, 1926, under a registered sale-deed leaving a portion of the consideration for payment of certain unsecured creditors of the plaintiff. The defendant did not pay and the plaintiff instituted a suit on October 4, 1929, for recovery of the unpaid purchase-money with interest:

Held, (1) that the suit was not one for personal payment of the unpaid purchase-money but one for breach of a covenant in writing registered and was governed, not by

Art. 111 but by Art. 116. A.I.R. 1931 All. 419 = (1931) A.L.J. 985 = 131 Ind Cas. 686 (2).

——Art. 116—Unpaid purchase-money—Limitation—Starting point.

Where a vendee, under a registered deed of sale executed in 1912, agreed to pay a portion of the price to a third person and, on his failure to pay accordingly, that third person brought a suit against the vendor and realised the amount from the vendor in 1921 in execution of his decree, and the vendor instituted a suit against the vendee for recovery of the amount in 1924 :

Held, that the cause of action for the suit arose under Art. 116, only in 1921, when the vendor suffered loss and the contract became impossible of performance and the suit was not time-barred. 33 Bom. L.R. 136 = A.I.R. 1931 Bom. 365 = 133 Ind. Cas. 267.

——Art. 116—Breach of contract—Undertaking to pay debt.

Article 116 applies not only to a suit for a specified sum of money due on a registered bond but also to a suit where the vendee having agreed to apply a portion of the purchase-money to the payment of a previous debt due by the vendor fails to apply it in that way and a suit is brought to recover that amount from him. Such a suit is not barred if it is brought within six years of the breach of contract sued upon. The period of limitation in such a case does not run from the date of the execution of the sale-deed but from the date on which the contract is deemed to have been broken, *viz.*, the date when either there was a repudiation of the liability under it or when the contract had been impossible of performance on account of vendor's debt having been satisfied. 122 Ind. Cas. 244 = 8 Pat. 860 = A.I.R 1930 Pat. 46.

——Art. 116—Undertaking to pay debt.

Some portion of the purchase-money was left by the vendor with the vendee to be paid to his (vendor's) creditor and this provision was entered in registered sale-deed that was executed. The vendee did not pay whereupon the creditor, suing the vendor, attached and purchsed this debt due from the vendee. He then sued the vendee to recover the debt from him basing his claim on the debt purchased by him in the execution proceedings.

Held, that by his purchase of the debt the creditor stepped into the shoes of the vendor and obtained his right to recover the debt on account of breach of contract to pay the same to the creditor as stipulated in the registered deed of sale. His suit therefor would be governed by Art. 116 and not by Art. 111 although he based it on the debt purchased by him. 34 All. 459, *Foll.* 118 Ind. Cas. 445 = A.I.R. 1929 Lah. 395.

——Art. 116—Undertaking to pay off mortgage.

The plaintiffs had to satisfy a mortgage. The defendant undertook by writing registered to pay the mortgage amount to the mortgagee and to procure an indemnity, or freedom of the mortgaged property from all liability and the plaintiff sold to him in consideration of that contract and of the promise to pay, a house and kotha. The defendant did not fulfil his undertaking and consequently the mortgagee sued for an obtained a preliminary decree. The plaintiff induced the mortgagee to accept a renewal of the mortgage and include in the consideration thereof the decretal debt and thus discharge him from the liability and sued defendant for compensation for breach of the contract.

Held, that the suit was governed by Art. 116 and not Art. 111 or Art. 62. 97 Ind. Cas. 185 = 9 N.L.J. 107 = A.I.R. 1926 Nag. 429.

——Art. 116—A suit brought more than six years after the sale-deed, for recovery of damages for failure to pay the amount left in the hands of the vendee for clearing a prior mortgage is barred by time. 87 Ind. Cas. 804 = 6 L.R.A. (Civ.) 222 = A.I.R. 1925 All. 488.

——Art. 116—Mortgagee covenanting to pay prior mortgagee—No time limit fixed—Mortgagor's suit for breach of covenant—Cause of action arises only on mortgagor being damnified, *e.g.*, by the property being sold in execution of a decree obtained by the prior mortgagee. 60 Ind. Cas. 829 = 19 A.L.J. 81 = A.I.R. 1921 All. 133.

——Art. 116—Breach of contract—Vendee to pay mortgagee of vendor—Accrual of cause of action.

A suit by a vendor against vendee for breach of covenant by the latter to pay mortgagee of the vendor out of the sale price the cause of action arises on the date of sale and a suit brought more than six years after that, is barred by limitation, though the vendor was sued against subsequently by the mortgagee. 34 All. 429 = 9 A.L.J. 534 = 14 Ind. Cas. 244.

——Art. 116—Breach of contract.

In order that the creditor may bring an action of indemnity against a purchaser from his debtor on the ground that he has undertaken to pay off the debt from the purchase-money, the cause of action must have arisen within 3 years of the suit. 9 Ind. Cas. 988 (Cal.).

6. Company.

See also NOTE 7 (*d*).

——Art. 116—Suit for recovery of dividends—Starting point.

In a suit to recover dividends, time runs under Art. 116 from the date of the breach of contract and not from the date of knowledge of the breach. The breach occurs in each year when the Income-tax Authorities inform the company that no income-tax is payable by the company for that year. A.I.R. 1940 Bom. 97 = 43 Bom. L.R. 57 = I.L.R. (1940) Bom. 165 = 187 Ind. Cas. 389 (F.B.).

——Art. 116—Memorandum and Articles of Company—Suit against Director for misfeasance.

Article 116 of the Limitation Act does not apply to a claim against the Directors of a Company for misfeasance because the whole of the contract governing the relationship of the company and the Directors is not in writing registered by part only, that which is contained in the articles of association. When at various times the Director was re-appointed to his office there must have been something in the nature of an offer by him to serve further and an acceptance by the company or *vice versa* either express or implied of which circusmtance shows that the whole contract is not in the articles. 54 Bom. 226 = 32 Bom. L.R. 232 = A.I.R. 1930 Bom. 572.

——Art. 116—Suit against share-holder.

By the mere fact that the articles of association of a company have to be registered under the Indian Companies Act, an action against a share-holder who becomes a share-holder by accepting the articles is not covered by Art. 116. 110 Ind. Cas. 33 = 52 Bom. 477 = 30 Bom. L.R. 549 = A.I.R. 1928 Bom. 252.

——Art. 116—Purchaser of shares.

Purchaser at Court auction sale of some shares in a Company, whose transfer is not recognised is not a share-holder and therefore he cannot take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art. 116. 79 Ind. Cas. 947 = 34 M.L.T. 289 = 19 M.L.W. 623 = A.I.R. 1924 -Mad. 721 = 47 M.L.J. 563.

7. Interpretation

(a) 'Compensation'.

(b) 'Compensation of breach of contract'.

(c) 'Contract'.

(d) 'Writing registered'.

7. (a) Interpretation—Compensation.

——Art. 116—' Compensation.'

The word "compensation" in Art. 116 need not be restricted to a claim for unliquidated damages, and can be held to include a claim for a sum certain. 44 Cal. 759 (P.C.), *Foll.* 89 Ind. Cas. 59 = 27 Bom. L.R. 637 = 49 Bom. 596 = A.I.R. 1925 Bom. 440.

——Art. 116—' Compensation.'

The expression compenastion is not ordinarily, used as an equivalent to damages, although compensation may often have to be measured by the same rule as damages in an action for a breach. The term compensation signifies that which is given in recompense, an equivalent rendered ; damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another. Its primary signification is equivalance, and the secondary and more common meaning is something given or obtained as an equivalent. 73 Ind. Cas. 17 = 37 C.L.J. 108 = 27 C.W.N. 210 = A.I.R. 1923 Cal. 507.

7. (b) Interpretation—" Compensation for breach of contract."

——Art. 116—' Compensation for breach of contract,' meaning of.

The words "compensation for breach of contract" in Art. 116 must be widely construed and where the suit is in substance a suit based on a registered document and it can be regarded as a suit for compensation for breach of a contract, then Art. 116 must apply although the suit may come within some other article of the Limitation Act. A.I.R. 1934 Nag. 16 = 30 N.L.R. 138 = 148 Ind. Cas. 480.

7. (c) Interpretation—' Contract '.

——Art. 116—Interpretation—' Contract '.

The word "contract" in Art. 116 includes an implied contract also. 119 Ind. Cas. 243 = 51 All. 651 = 1929 A.L.J. 433 = A.I.R. 1929 All. 293.

—Art. 116—Implied Contract.

Per COYAJEE J.—The words "express or implied" contained in Art. 115 are also intended to be read into Art. 116. 89 Ind. Cas. 59 = 27 Bom. L.R. 637 = 49 Bom. 596 = A.I.R. 1925 Bom. 440.

——Art. 116—Contract signed by one and accepted by another.

Article 116 is not limited to agreements signed by both the parties. If there is a valid contract evidenced by a registered document which though signed by only one party is complete because it has been accepted by the other, and breach of that contract has been committed, Art. 116 would be equally applicable to such a case. 109 Ind. Cas. 409 = 50 All. 661 = 26 A.L.J. 426 = A.I.R. 1928 All. 313.

——Art. 116—Suit on bond—Bond signed by debtor only.

Art. 116 of the Limitation Act is applicable to cases of suits for recovery of money on contract not signed by both parties. 22 C.L.J. 311 = 20 C.W.N. 408 = 31 Ind. Cas. 394.

——Art. 116—Breach of covenant by lessee—Registered puttah executed by lessor only.

A suit to recover damages for breach of covenant contained in a lease, the terms of which were embodied in a registered puttah executed by the lessor only, is governed by Art. 116. (1908) 12 C.W.N. 628 = 35 C. 683.

——Art. 116—Contract in writing registered—Signature of both parties, if necessary.

Where there had been no *kabuliat*, but only a *patta* signed by the plaintiff alone but admittedly acted upon by the defendant also :— *Held*, that a suit for breach of contract fell within Art. 116. It was not the less a suit upon a contract in writing registered, because the contract was signed not by both the parties, but by only one of them. 19 M. 52, *foll.* (1908) 9 C.L.J. 1=1 Ind. Cas. 438.

——Art. 116—Recital that consideration is received no contract in writing to pay—Receipt for money containing terms of sale signed by vendor and not by purchaser.

Held (1) That the recital in a deed of sale that consideration is received is not a 'contract in writing' to pay within the meanining of Art. 116. (2) Where a sale-deed contains the contract of sale which has preceded the conveyance, Art. 116 may apply, though the sale-deed contains an acknowledgment that the consideration has been paid, it if has not been paid, as a matter of fact. 24 M. 233, *foll.* (3) *Semble.*—A receipt for money, containing the terms of sale, signed by the vendor only and registered and acknowledging payment of a sum a money on account of the purchase price and providing that the balance should be paid on a certain date, is a 'contract in writing registered' within the meaning of Art. 116. (1901) 25 M. 55 = 11 M.L.J. 318.

——Art. 116—Contract 'in writing registered' signed by one party thereto.

B sued *A* on a pro-note, and during the litigation there was a compromise by which *A* undertook to execute a mortgagee in favour of *B*, and in consideration of it *B* undertook to withdraw an appeal then pending. *B*, however, proceeded with the appeal, got a decree and executed it and recovered the amount of the decree. *A* now sued to recover the amount, stating the date of the recovery of money of *B* as the date on which his cause of action arose. It was contended that the suit as framed will not lie the decree is set aside, and that it was barred. *Held* (1) the allegations in the plaint clearly showed that the plaintiff claimed damages for breach of contract, though the suit is not framed as one for damages. The written statement shows that the defendant understood the claim to be one for damages. So there is a sufficient disclosure of the cause of action. (2) The suit is governed by Art. 116, as the undertaking in the mortgage was an agreement in writing registered. The fact that the instrument was signed by *A* only and not by both did not take the case out of the operation of the article. 25 M. 50.

——Art. 116—Contract in writing—Signature.

Art. 116 will ordinarily apply only to contracts in writing signed by both the parties to it. It may also apply as against the party who has not signed the registered instrument is his assent to it appears from the agreement itself. (1901) 3 Bom L.R. 667.

——Art. 116—Breach of contract—Contract—Meaning.

The word "contract" in Art. 116 does not include an award. 6 S.L.R. 148 = 19 Ind. Cas. 376.

7. (d) Inrerpretation—" Writing registered."

—Art. 116—Interpretation—" Writing registered ", meaning of.

" Writing registered " in Art. 116 includes a document registered with the Registrar of Joint Stock Companies under the Companies Act. In the General Clauses Act, " registered " is defined as meaning registered in British India under the law for the time being in force for the registration of documents. The Companies Act, though no doubt not primarily concerned with the registration of documents, is nevertheless the law in force relating to the registration of certain documents affecting companies. A.I.R. 1940 Bom. 97 = 42 Bom. L.R. 57 = I.L.R. (1940) Bom. 165 = 187 Ind. Cas. 389 (F.B.).

——Art. 116—Memorandum and articles of Company—Registration.

Per MUKERJI J.—Registration with the Registrar of Companies is as much a registration within Art. 116 as registration under Act 16 of 1908. 88 Ind. Cas. 785 = 47 All. 669 = 28 A.L.J. 473 = 6 L.R.A. (Civ.) 425 = A.I.R. 1925 All. 519.

——Art. 116—Breach of contract—Suit by share-holder against registered company for dividend—Registered—Meaning of—Gen. Clauses Act, S. 3 (45).

A suit by a share-holder against a registered Company to cover dividends is governed by Art. 116 of the Limitation Act. Registered in Art, 116 of the Limitation Act must be read as defined in the General Clauses Act of 1897, S. 3, Cl. 45 and includes documents registered under any special law such as the Company's Act or the Copyright Act as well as the Indian Registration Act. 42 Mad. 33 = 35 M.L.J. 253 = 24 M.L.T. 246 = 8 L.W. 354 = 48 Ind. Cas. 903.

——Art. 116—' Registered ' meaning of.

The registration referred to in Art. 116, is not registration of Companies but registration under Act 15 of 1908. Consequently, registration of a company under the Companies Act is not equivalent to registration of the Articles of Association within the meaning of Art. 116 and hence an application under S. 235, Companies Act is not governed by Art. 116 but by Art. 115. A.I.R. 1933 Sind 103 = 143 Ind. Cas. 713.

——Art. 116—Registration.

The deposit of the memorandum and articles of Association of a Limited Company with the Registrar of Joint Stock Companies under the direction of the Act is not registration as contemplated by Art. 116. 42 Mad. 33, *Overruled.* 94 Ind. Cas. 515 = 49 Mad. 468 = 1926 M.W.N. 450 = 24 M.L.W. 102 = A.I.R. 1926 Mad. 615 = 50 M.L.J. 520 (F.B.).

——Art. 116—Registration of mortgage-deed by fraud.

Where a registration of a mortgage-deed is obtained by fraud to which mortgagor and mortgagee are parties, the deed cannot be treated as a registered mortgage-deed. Nor can be deed be treated as a registered document under Art. 116 so as to give effect to the personal covenant as contained in a registered document.

The jurisdiction conferred on the Sub-Registrar by S. 29, Registration Act, is limited to receiving and registering "every document other than a document referred to in S. 28" and once it is found that the document was the document referred to in S. 28, then the result is that if a Registrar had been aware of the facts, he would have refused registration. The same consequences must follow as if registration had in fact been refused, that is to say, the entire document is on the footing of an unregistered document. Not only does it not affect any immovable property (S. 49), but it must be considered unregistered for the purposes of limitation (Art. 116 of the Schedule to the Limitation Act). 20 P.L.T. 285 = A.I.R. 1939 Pat. 502 = 5 B.R. 597 = 18 Pat. 429 = 181 Ind. Cas. 482.

8. Mortgagor's personal liability.

——Art. 116—Suit to enforce personal covenant in registered mortgage.

A suit for the enforcement of a personal covenant, express or implied, in a registered mortgage-deed is governed by Art. 116. A.I.R. 1946 Lah. 97 = 47 Pun. L.R. 358 = I.L.R. (1945) Lah. 355 = 224 Ind. Cas. 135 (F.B.).

——Art. 116—Limitation.

A suit on the basis of a personal covenant contained in a registered mortgage-deed or *zarpeshgi* lease is governed by 6 years' limitation. (1944) A.L.J. 276 = 1944 A.W.R. (H.C.) 183 = A.I.R. 1944 All. 276 = 1944 O.W.N. 210 = I.L.R. (1944) All. 574 = 218 nd. Cas. 33.

——Art. 116.

Where a registered mortgage-deed contains a personal covenant to pay, the enforcement of the covenant is governed by Art. 116. A.I.R. 1940 P.C. 204 = 52 L.W. 777 = 7 B.R. 218 = 1941 M.W.N. 1 = I.L.R. (1940) Kar. (P.C.) 419 (Sup.) = 1941 O.W.N. 513 = 1940 A.W.R. 158 = (1941) A.L.J. 316 = 43 Bom. L.R. 465 = 73 C.L.J. 121 = 67 I.A. 431 = 191 Ind. Cas. 94 (P.C.).

——Art. 116—Limitation—Article applicable.

Where a mortgage-deed containing a personal covenant to pay the mortgage-money is registered the article applicable to a claim, based on the personal covenant to recover the balance due to the mortgagee after the sale of the mortgaged property is Art. 116 which provides a period of six years from the due date, and not Arts. 66 and 67 of the Act. 37 Bom. L.R. 170 = A.I.R. 1935 Bom. 203 = 59 B. 634 = 156 Ind. Cas. 286.

——Art. 116—Where a mortgage deed containing a personal covenant to pay the mortgage-money is registered, the article applicable to a claim based on a personal covenant to recover the balance of the mortgage amount after the sale of the mortgaged property is Art. 116 which provides a period of six years from the due date. A.I.R. 1934 Lah. 765 = 16 L. 137 = 37 P.L.R. 482 = 153 Ind. Cas. 1064.

——Art. 116—The article applicable to a claim based on the personal covenant to recover the balance due to the mortgagee after the sale of the mortgaged property is Art. 116 which provides a period of six years from the due date and not Art. 66 or Art. 67. 13 Pat. 228 = A.I.R. 1934 Pat. 578 = 15 P.L.T. 811 = 153 Ind. Cas. 120.

——Art. 116—An application for a personal decree under O. 34, R. 6, Civil P.C., is governed by Art. 116 under which the period of limitation prescribed is six years and not by Art. 66. A.I.R. 1933 Cal. 268 = 36 C.W.N. 117 = 143 Ind. Cas. 472.

——Arts. 116 and 66—A suit to enforce a personal covenant contained in a registered mortgage bond is governed by Art. 116 and not Art. 66. 53 C.L.J. 520 = 35 C.W.N. 1030 = A.I.R. 1931 Cal. 801 (1) = 133 Ind. Cas. 101.

——Art. 116—Personal liability of motgagor—Article applicable.

The personal remedy can be enforced on the basis of a registered deed within six years under Art. 116, Limitation Act. 123 Ind. Cas. 321 = 1929 A.L.J. 1294 = A.I.R. 1930 All. 69 (F.B.).

——Art. 116—Where a mortgagee seeks for a personal remedy against the mortgagor, the period of limitation applicable to such case should be that provided for in Art. 116 and not in Art. 66, Limitation Act. 114 Ind. Cas. 813 = 5 O.W.N. 1128.

——Art. 116—Personal liability of mortgagor—Personal covenant in deed.

Where upon a sale of the mortgaged property under a mortgage-decree obtained in a suit on a registered mortgage-deed, there is a deficiency, the period of limitation to recover the same under a personal covenant in the said deed is six years under Art. 116. 26 All. 138 and 34 All. 464, *Not foll.* 116 Ind. Cas. 817 = 52 Mad. 105 = 29 M.L.W. 143 = A.I.R. 1929 Mad. 53 = 56 M.L.J. 10 (F.B.).

——Art. 116—A suit on a personal covenant in a registered mortgage document is governed by Art. 116 and the six years rule applies to such cases. 34 Cal. 672; 17 C.W.N. 369; 11 Mad. 56; 21 Mad. 242; 13 All. 200; 30 All. 388; 34 All. 246; 38 Bom. 177; 12 Cal. 389; A.I.R. 1916 P.C. 182 and 20 Cal. 79, *Foll.*

114 Ind. Cas. 340 = 1928 M.W.N. 873 = 28 M.L.W. 624 = A.I.R. 1928 Mad. 1124 = 55 M.L.J. 506.

——**Art. 116**—A suit on a personal covenant in a mortgage-deed is governed by Art. 116 and not by Art. 66 and the period of limitation is six years and not three years. 28 M.W.N. 873 = 28 M.L.W. 624 = A.I.R. 1928 Mad. 1124 = 55 M.L.J. 506.

——**Arts. 116 and 66**—Article 66 applies to claims based on a single bond. A single bond means a bond merely for payment of a certain sum of money without any condition in or annexed to it. A mortgage-deed which contains a covenant making the mortgagor personally liable cannot be considered to be a single bond within the meaning of Art. 66. Claim based on such a mortgage-deed is governed by Art. 116 and not by Art. 66. 113 Ind. Cas. 489 = 5 O.W.N. 836 = 4 Luck. 107 = A.I.R. 2198 Oudh 465.

——**Art. 116—Suit for recovery of money under S. 68, Transfer of Property Act.**

Limitation for a suit for recovery of money under S.68, T.P. Act, is governed by Art. 116 or Art. 120 and not Art. 62. A.I.R. 1936 Rang. 80=161 Ind. Cas. 461.

——**Arts. 116, 120—Suit for personal decree under registered mortgage.**

A suit for personal relief against a mortgagor under S. 68, T.P. Act, is governed by 6 years' limitation under Art. 116 or Art. 120 which starts from the time when the cause of action arises. A.I.R. 1934 Oudh 415 = 11 O.W.N. 1198 = 151 Ind. Cas. 448.

——Art. 116—A suit for recovery of money on the personal covenant contained in a registered deed of mortgage is governed by Art. 66 or Art. 59 and not by Art. 116, as the deed becomes an unregistered deed and there is no breach of a contract in writing and registered as contemplated by Art. 116. A.I.R. 1937 Cal. 347 = 41 C.W.N. 783 = 171 Ind. Cas. 965.

——**Art. 116—Right to personal decree for principal barred—Interest six years prior to institution of suit, recovery of.**

If the stipulation for payment of interest in a mortgage deed does not constitute an independent agreement, and is no more than a part of the contract for the payment of the principal, the mortgagee cannot get a personal decree for the recovery of the interest, even for the period of six years preceding the suit, in a case where his suit for enforcement of the personal remedy in, respect of the principal was barred by time at the time of the institution of the suit. There being one contract from which the liability for the principal and interest arises, the cause of action arising from the breach of contract is not divisible or severable and the time for the recovery of both principal and interest must be deemed to begin to run from the date when the breach took place. If the covenant for payment of interest is an independent and separate agreement, the breach of such covenant will give rise to separate cause of action, independently altogether of the cause of action arising on a breach of the covenant for the payment of the principal. A suit instituted within six years of such breach will obviously be within time, in view of the language of Art. 116 and cannot be held to be barred by limitation merely because an action for compensation for breach of another independent covenant has become time-barred. The mortgagee is entitled to a personal decree for recovery of such interest even though he has no subsisting right to get a personal decree for the recovery of the principal. But this is subject to the proviso that the mortgagee is not entitled to any relief in respect of interest falling due after the mortgage debt itself has become irrevocable, because in that event, his suit for sale itself will be liable to dismissal as barred by time and no occasion will arise for him to apply for a personal decree under O. 34, R. 6, Civil P.C.

(Conflict between view taken in A.I.R. 1928 Lah. 653 ; 111 Ind. Cas. 808 and that taken in A.I.R. 1936 Lah. 387 ; 163 Ind. Cas. 100 held more apparent than real). 47 P.L.R. 358 = A.I.R. 1946 Lah. 97 = I.L.R. (1945) Lah. 385 = 224 Ind. Cas. 135 (F.B.).

——**Art. 116—Suit for personal decree—Limitation—Starting point—'On demand'—Interpretation of.**

When a mortgage bond provides that the mortgage money shall be payable on demand, it becomes repayable at once and limitation starts from the date of the bond and the position is not altered when the words used are "when required by you" or "whenever domanded," for, these expressions only mean "on demand." There must be something more in a mortgage deed than this to justify the Court in holding that the cause of action on the bond only arises when a demand has, in fact, been made. To construe the words "when required by you" as meaning more than "on demand" would be putting a forced construction on the words. Hence, a claim for supplemnetal (personal) decree in a suit for sale is barred by time where the bond provides that the money shall be paid whenever demanded and the suit is brought more than 6 years from the date of the bond but within that period from the notice of demand. 58 M.L.W. 144 = 1945 M.W.N. 174 = (1945) 1 M.L.J. 233 = A.I.R. 1945 Mad. 157 = I.L.R. (1945) Mad. 758 = 220 Ind. Cas. 500 (F.B.).

[*Overrules*—A.I.R. 1919 Mad. 462 = 50 Ind. Cas. 87.]

——**Art. 116—Personal liability of mortgagor—Money payable on demand.**

Where a suit is instiuted more than six years after the making of the mortgage, and the mortgage money is payable on demand a personal decree is barred. 116 Ind. Cas. 488 = 51 All. 473 = 1929 A.L.J. 110 = A.I.R. 1929 All. 139.

——**Art. 116—Limitation—Starting point.**

Where the mortgage-deed contains a personal covenant to pay a mortgage debt and is registered, the period of limitation for personal decree is six years under Art. 116 from the date when the mortgage debt becomes payable unless the period is extended by an acknowledgment either under S. 19, or in a manner contemplated by S. 20. A.I.R. 1944 Mad. 65 = 56 L.W. 649 = (1943) 2 M.L.J. 501 = 1943 M.W.N. 698 = I.L.R. (1944) Mad. 572 = 211 Ind. Cas. 630.

——**Art. 116**—Instalment mortgage-deed—Stipulation of whole debt to become due on default of first instalment—Suit to enforce personal remedy within 6 years from the date fixed for payment of the last instalment is within time under Art. 74 or Arts. 75 and 115. 1941 N.L.J. 649.

——**Arts. 116—Instalment mortage bond—Limitation——Starting point.**

The amount on registered mortage bonds was made payable by several annual instalments. The bond contained a clause that in case of default in any one instalment, the whole balance then due would be recoverable. The mortgage suit was brought within six years from the expiry of the period of repayment stipulated in the mortgage bond but more than three years after the date of the last default :

Held, that the fact that the mortgage bonds in suit were registered documents would be sufficient to attract the operation of Art. 116, rather than of Art. 75, though in terms Art. 75 seemed to be the most appropriate one. The claim, therefore, to a personal decree under O. 34, R. 6, Civil P.C. for the unsatisfied balance due

on the mortgage would not be barred at the date the suits were brought inasmuch as it was within six years from the date of the alleged breach of the bond. A.I.R. 1939 Cal. 26 = 63 C.L.J. 109 = 43 C.W.N. 38 = 181 Ind. Cas. 141.

——**Art. 116—Suit for compensation for breach of covenant in mortgage-deed.**

A registered mortgage bond provided that the amount secured by it should be paid by instalments and that in case of default the mortgagee would be entitled to take possession; further, that should there be any loss in the recovery of the amount due or in delivery of possession of the mortgaged land, the mortgagee would have power to realise the amount secured by the bond with interest at 1 per cent. from the date of the cause of action till repayment, either from the person or from the property, movable or immovable, of the debtor, or from the property mortgaged. *Held*, that a suit based upon the foregoing covenant to recover the mortgage-money upon failure of the mortgagor to pay instalments was in substance a suit for compensation for breach of contract, to which the limitation prescribed by Art. 116 applied. 1908 A.W.N. 160 = 5 A.L.J. 486 = 30 A. 400.

——**Art. 116—Limitation—Starting point.**

Where suit is brought against the sons after the father's death, the mortgagee can obtain a mortgage-decree for antecedent debts and a money-decree for the cash advance against the sons which may be enforced by sale of the entire joint family property, unless the suit against the sons for a money-decree is barred by limitation. The period of limitation in such a case for the personal liability of the father under the registered mortgage-deed is six years under Art. 116. Therefore, in any case, the period of limitation against the sons would also be six years from the date of the mortgage-deed. 40 Bom. L.R. 381 = A.I.R. 1938 Bom. 295 = 175 Ind. Cas. 939.

——**Art. 116—Limitation—Starting point.**

When there is a suit on a registered mortgage which ultimately results in the sale of the property, and the proceeds of the sale are insufficient to cover the mortgage-debt and costs, a personal decree for the balance remaining due can be passed against the mortgagor under a personal covenant in the registered mortgage bond if a suit is filed more than three but less than six years from the date upon which the mortgage money first fell due. Article 116 governs such a suit and not Art. 66. 1938 Rang. L.R. 35 = A.I.R. 1937 Rang. 484 = 172 Ind. Cas. 75 (F.B.).

——**Art. 116**—When the only remedy expressly given is that of a foreclosure, there is no covenant of personal liability. But where the mortgage-deed does not contain a condition of foreclosure the contract to repay the borrowed money and the contract that certain property should be charged as security for the repayment can be regarded as separate contracts. In such a case the period of limitation would run from the date of execution and a suit for the recovery of money will have to be brought within three years. 18 N.L.J. 291 = 163 Ind. Cas. 961.

——**Art. 116**—Under the terms of a mortgage deed, the principal sum was to be paid in eight years and the stipulated interest every month. It was also provided that if interest for one full year remained unpaid, the mortgagee would be at liberty to recover principal and interest and compound interest without waiting for the expiry of the stipulated period. Interest not being paid there was default at the end of the year. The mortgagee instituted a suit for the recovery of the amount due within six years from the date of the expiry of the stipulated period and obtained a decree. The property was brought to sale but as the sale proceeds were not sufficient, the mortgagee applied for a simple money-decree, for the balance under O. 34, R. 6, Civil P.C.

Held, that time began to run on the deed after the expiry of the stipulated period and not after the expiry of one year within which the mortgagor made continued default in payment of interest; that Art. 116, read with Art. 80 governed the case and the suit was in time. (1934) A.L.J. 261 = A.I.R. 1934 All. 397 = 3 A.W.R. 431 = 56 A. 954 = 148 Ind. Cas. 951 (F.B.).

——**Art. 116—Provision in mortgage-deed entitling mortgagee to realise in case of dispossession from person and other properties of mortgagor—Cause of action, when arises.**

In a *rehan* deed, besides a personal covenant to repay, there was a clause regarding dispossession which gave the mortgagees the right to realise from the mortgaged property, from the persons of the mortgagors and from their other properties movable and immovable, if they were dispossessed from the whole or any portion of the *rehan* property. The mortgagee instituted his suit on June 26, 1925, the casue of action being dispossession on March 24, previous:

Held, that the dispossession was as much is cause of action in a registered deed giving rise to limitation under Art. 116 as the cause of action of failure to pay on the due date and hence the limitation was six years from the date of dispossession. 13 Pat. 228 = A.I.R. 1934 Pat. 578 = 15 P.L.T. 811 = 153 Ind. Cas. 120.

——**Art. 116—Limitation—Starting point.**

A registered mortgage-deed provided that the mortgage-money would be paid in four years and that the property would be redeemed and that the mortgagee would be entitled to recover the amount any time after four years from the date of mortgage:

Held, that the limitation for personal remedy against the mortgagor would be six years from the date on which the amount would become payable and not six years from the date of mortgage. 34 P.L.R. 171=A.I.R. 1933 Lah. 329 = 144 Ind. Cas. 738.

——**Art. 116**—Possessory mortgage—Possession not delivered—Defect in title—Suit for mortgage money or in alternative for possession and substituted security:

Held, that time for limitation began to run under Art. 116 or 120 of the Limitation Act from the very inception of the mortgage. 7 O.W.N. 1045 = A.I.R. 1931 Oudh 5 = 6 Luck. 374 = 129 Ind. Cas. 168.

——**Art. 116**—In a suit on mortgage the limitation begins to run from the date of the first default and claim to the relief against the mortgagor is to be brought within six years under Art. 116 although the claim to realization of debt from the property can be brought within 12 years under Art. 132. The mere fact that there is longer period for one relief does not in himself extend the limitation for the other relief.

Where therefore a mortgage suit is brought six years after the first default is made the claim for personal decree is barred. A.I.R. 1930 Lah. 993 = 129 Ind. Cas. 201.

——**Art. 116—Personal liability of mortgagor—Inalienable property.**

The plaintiff sued for sale of a mortgaged property on foot of a registered mortgage. The property however, being a cultivatory holding and thus not being liable to sale. In his replication the plaintiff desired a money decree. There was a further plea of the plaintiff that the defendant had fraudulently represented the property to be alienable property; but no fraud was found to have been proved.

Held, that the suit would have been governed by Art. 95, Sch. I of the Limitation Act only if the alleged fraud had been established, the proper Article applicable

to the suit was Art. 116, Sch. I of the Limitation Act. 67 Ind. Cas. 595 = 9 O.L.J. 171 = A.I.R. 1922 Oudh 113.

——**Art. 116—Personal liability of mortgagor—Joint family property.**

Where in a suit based upon a registered mortgage executed by the manager of a joint Hindu family, the mortgagee prays for an alternative relief that in case the mortgaged property be not liable for payment of the mortgage debt, he should be given a personal decree, the limitation for such a relief is governed by Art. 116 and not by Art. 66. 113 Ind. Cas. 489 = 4 Luck. 107 = 5 O.W.N. 836 = A.I.R. 1928 Oudh 465.

——**Art. 116**—A mortgage by the *Karta* if not made for purposes laid down in the Hindu Law is void from its inception and creates no charge against the joint family property and even against the interest of the actual mortgagor ; the cause of action for a relief by way of a money decree against the executant arises immediately after he breaks his promise which he made for the repayment of the loan, *i.e.*, from the day the money under the agreement becomes due and a suit for such a money decree is governed by Art. 116 and not Art. 97 of the Act. 69 Ind. Cas. 786 = 25 O.C. 164 = 10 O.L.J. 180 = A.I.R. 1922 Oudh 257.

——**Art. 116**—Where the manager of Hindu joint family mortgages the family property for purposes not recognised by the law, the mortgage is void *in toto* and *ab initio*. There is no question of the security failing at a subsequent date. Therefore where in a suit on such mortgage the plaintiff prays for an alternative relief that if the property is not liable, he must be given a personal decree against the assets of the mortgagor, Art. 116 and not Art. 97 applies. 27 Cal. 762, Foll. 61 Ind. Cas. 205 = 8 O.L.J. 81 = A.I.R. 1921 Oudh 47.

——**Art. 116—Personal liability of mortgagor—Mortgage suit barred.**

The Trial Court relying on a clause in the mortgage deed which entitled the mortgagee to sue for the whole amount of principal and interest, on default of payment of annual interest, held that the claim to enforce the charge was barred by time under Art. 132 of the Limitation Act, but it was however of opinion that the personal remedy based on the bond was not barred. It accordingly granted the plaintiff a simple money-decree. The lower Appellate Court holding that the personal remedy also was barred, dismissed the whole suit,

Held, although the relief for recovery of money otherwise than by enforcing the charge would be, governed by another article with a different period fixed, yet as the bond was not a single bond within the meaning of Art. 66. the time began to run against the mortgagee for both the reliefs claimed from the date of the first default, when the money became payable. 19 A.L.J. 406 ; 15 A.L.J. 313 ; 3 All. 600 (F.B.), Diss. 69 Ind. Cas. 981 = 45 All. 27 = 4 L.R.A. (Civ.) 3 = 20 A.L.J. 819 = A.I.R. 1923 All. 1 (F.B.).

——**Art. 116—Personal liability of mortgagor—Mortgage void *ab initio*.**

A mortgage-deed of 1906 provided that in case of default in payment of interest, the mortgagee was to take possession of the property. In 1908, there was a default but the mortgagor refused to give possession. The mortgagee brought a suit in 1917 in which, on the death of the original mortgagors, his sons were brought on record. The sons objected that the property was ancestral and that there was neither legal necessity nor antecedent debt and the suit was consequently dismissed in 1918. The present suit was brought in 1920 by mortgagee to recover his money.

Held, that Art. 116 applied and that the mortgage deed was invalid and void *ab initio*. The cause of action arose when the mortgagor refused to give possession in 1908 and not in 1918 and the suit was barred by limitation as well as by O. 2, R. 2, C.P. Code, as when he has refused possession, he could sue for possession and also for money under S. 68 (*c*), T.P. Act. 49 I.A. 9, Foll. 77 Ind. Cas. 340 = 10 O.L.J. 376 = A.I.R. 1924 Oudh 147.

——**Art. 116**—Where in a mortgage-deed, the mortgagor convenanted to pay the debt in six months and failed to pay the same, a suit was instituted nearly ten years after the debt became payable, and a personal decree was passed therein,

Held, that the cause of action on the personal covenant accrued when there was a failure to pay the debt, *i.e.*, six months from the date of the mortgage and that the claim had become barred under Art. 66. 95 Ind. Cas. 839 = 24 A.L.J. 615 = 28 Bom. L.R. 931 = 53 I.A. 134 = 43 C.L.J. 545 = 24 M.L.W. 50 = 1926 M.W.N. 535 = 3 O.W.N. 591 = 7 P.L.T. 501 = 26 Pat. 585 = 31 C.W.N. 25 = A.I.R. 1926 P.C. 56 = 51 M.L.J. 82 (P.C.).

——**Art. 116—Suit on personal covenant—Starting point.**

Time for suit on a personal covenant to repay the debt in a mortgage runs from the expiry of the term fixed for redemption. But where the mortgagee enjoys the usufruct in lieu of interest, time runs from the last year when he enjoys such usufruct. 63 Ind. Cas. 234 = 45 Bom. 1206 = 23 Bom. L.R. 529 = A.I.R. 1921 Bom. 437.

——**Art. 116—What is not—Personal covenant.**

A stipulation for the recovery of the consideration if the usufructuary mortgagee should fail to get possession or be dispossessed is not a personal covenant in the bond or under S. 68 (*c*) of the Transfer of Property Act by reason of the mortgagor's failure to deliver or secure the possession of the property but is to enforce the charge upon the immovable property under the covenants in the bond itself. Such a suit is governed by Art. 132 of the Limitation Act.

A claim for interest in such a suit is not a claim for damages and Art. 132 and not Art. 116 applies to such a claim. But where the claim is interest at enhanced rate covenanted for in case of dispossession, Art. 116 applies. 63 Ind. Cas. 297 = 2 P.L.T. 229 = A.I.R. 1921 Pat. 403.

——**Art. 116—Personal liability of mortgagor—Registration at wrong place.**

Where there are two or more covenants, in a document, the invalidity of one does not affect the validity of the other. Thus though a mortgage deed may be invalid as having been registered in a wrong place and so being in fraud of the registration law, the general personal covenant to re-pay contained therein can nevertheless be enforced, and is governed by Art. 116 of the Limitation Act in accordance with the ruling of Privy Council in 29 Cal. 654. 73 Ind. Cas. 188 = 17 M.L.W. 695 = 32 M.L.T. 222 = 1923 M.W.N. 166 = 46 Mad. 435 = A.I.R. 1923 Mad. 447 = 44 M.L.J. 373.

——**Art. 116—Personal liability of mortgagor—Representative of mortgagor—Suit against.**

The claim for a personal decree against the mortgagor is governed by Art. 116 if mortgage is registered. 15 C.P.L.R. 29, foll. Where the mortgagee's remedy against the mortgagor personally is barred, it is also barred against the surety or his representatives. 95 Ind. Cas. 707 = A.I.R. 1926 Nag. 449.

——**Art. 116—Personal liability of mortgagor—Starting point.**

The period of limitation for a personal relief on a registered deed of mortgage is six years from the date of the accrual of the cause of action on the deed. 6 O.W.N. 974.

——Art. 116—Whole amount falling due on default of instalment.

Where in a mortgage-deed the mortgagor promises to pay interest at the end of every month and the deed further provides that in case of default to pay such interest, the mortgagor shall return the principal as well as interest before the expiry of the mortgage period whenever the creditor would demand the same, the cause of action arises on the day on which default in paying monthly interest is made and time runs from that day and not when the mortgage period expires. A.I.R. 1927 Sind 151, *not appr.* 39 Mad. 981 ; A.I.R. 1926 Mad. 160, *not foll* ; A.I.R. 1928 Mad. 705, *appr.* 116 Ind. Cas. 581 = A.I.R. 1929 Sind 140.

——Art. 116—Eviction of mortgagee—Starting point.

When a mortgagee is deprived of the security under a decree of a Civil Court, he is entitled to proceed personally against the mortgagor and the time for such a suit runs from the date the mortgagee was evicted from the land. 89 Ind. Cas. 56 = 3 Rang. 60 = A.I.R. 1925 Rang. 223.

9. Principal and Agent.

——Art. 116—Suit by principal against agent under registered service kabuliyat to recover specific sums of money misappropriated.

Where, by a registered service *kabuliyat*, the agent undertook after the termination of his service and after the accounts were checked, to repay the amount found to have been misappropriated within a month of the ascertainment of the amount :

Held, that the suit by the principal for recovery of specific sums of money said to have been misappropriated by the agent was governed by Art. 116. A.I.R. 1941 Cal. 257 = 72 C.L.J. 480 = 44 C.W.N. 793 = 195 Ind. Cas. 151.

——Art. 116—Suit by principal to enforce charge created in his favour by agent to secure money that might be found due from agent falls under Art. 132 and not under Art. 89 or 116. A.I.R. 1941 Cal. 257 = 72 C.L.J. 480 = 44 C.W.N. 793 = 195 Ind. Cas. 151.

——Art. 116—Suit for accounts.

A suit by a principal against his agent for accounts is not a suit for compensation for breach of contract within Art. 116 and hence is not governed by that article but by Art. 89. (1930) M.W.N. 1199 = 33 L.W. 1 = A.I.R. 1931 Mad. 185 (2) = 54 M. 654 = 62 M.L.J. 45 = 131 Ind. Cas. 165.

——Art. 116—Suit for accounts.

A suit against the heirs of an agent who undertook to render accounts every six months is governed by Art. 116 which provides for a suit for compensation for breach of a contract registered. 16 Ind. Cas. 414, Foll. 39 All. 355 = 15 A.L.J. 265 = 39 Ind. Cas. 626.

——Art. 116—Joint agents—Death of one—Suit for accounts against survivor.

The death of one of two joint agents does not terminate the agency so far as the other is concerned inasmuch as the presumption is that the agency is joint and several. A suit for accounts against the survivor on foot of a registered *kabuliyat* executed by the agents is governed by Art. 116 of the Lim. Act. 17 C.L.J. 201 = 16 Ind. Cas. 852.

——Art. 116—Breach of contract.

The Article does not apply where an agent under a power of attorney sues his principal for moneys spent by him in the course of agency, as the power of attorney does not contain a promise by the principal to pay for advances made by the agent. 34 Mad. 167 = (1910) M.W.N. 316 = 8 M.L.T. 194 = 20 M.L.J. 989 = 7 Ind. Cas. 399.

10. Registered Lease.

See also NOTE 12.

——Arts. 116, 110 and 62—Suit for rent against assignee of registered lease—Article applicable.

A suit for rent against the assignee of a lease created by a registered deed is governed by Art. 116 and not Art. 110 of the Limitation Act. The liability of the assignee to pay rent is on the basis of the privity of estate which is created by the assignment. The way in which the liability arises by reason of the privity of estate is that the covenant to pay a certain sum fixed as rent is a covenant running with the land. By reason of the privity of estate the assignee becomes liable for this covenant running with the land. The covenant has no existence except by the registered contract. When, therefore, the lessor sues the assignee for the rent, he is in substance suing him on the basis of the covenant created by the registered deed. It follows therefore that Art. 116 of the Limitation Act would apply.

Art. 62 of the Limitation Act has no application to the claim in the suit in so far as it is for the arrears of rent which fall due after the date of the assignment. As at the date of assignment these amounts were not due at all, there is no scope for an argument that the assignee may be considered to have received these amounts for the lessor's use. 54 C.W.N. 673 = A.I.R. 1951 Cal. 251.

——Art. 116—Registered patni lease—Suit for rent—Limitation.

A suit to recover rent due on a registered *patni* lease is governed by Art. 116 and the period of limitation is six years unless some special or local law has laid down a different period. A.I.R. 1942 Pat. 83 = 8 B.R. 24 = 196 Ind. Cas. 466.

——Art. 116—Suit for rent.

Where there is a lease in writing and registered, a suit for rent based on such a lease will be governed by Art. 116 and not by any special provision that may exist in terms for suit for arrears of rent but where there is no registered lease, the suit will be treated as a suit for rent coming within the special provision and not under Art. 115. A.I.R. 1937 Cal. 587 = 41 C.W.N. 1001 = I.L.R. (1936) 2 Cal. 631 = 68 C.L.J. 539 = 173 Ind. Cas. 540.

——Art. 116—Lease of agricultural land for non-agricultural purposes—Limitation.

Where a lease, comprising agricultural and non-agricultural lands, the latter forming considerable part of the tenancy, for collection of rent from the tenants, is in writing and registered, the lease of the agricultural land not being for agricultural purposes, limitation prescribed by Sch. III, Ben. Ten. Act, will not apply to a suit on the lease for recovery of rent. The suit will be governed by Art. 116. A.I.R. 1937 Cal. 587 = 41 C.W.N. 1001 = I.L.R. (1937) 2 Cal. 631 = 68 C.L.J. 539 = 173 Ind. Cas. 540.

——Art. 116—*Quaere.*—Where the lease is a lease coming under the purview of the Act, and is in writing and registered, the limitation applicable to a suit for rent on the basis of such lease will be that under Art. 116 and not Art. 2 of Sch. III of Ben. Ten. Act. A.I.R. 1937 Cal. 587 = 48 C.W.N. 1001 = I.L.R. (1937) 2 Cal. 631 = 68 C.L.J. 539 = 173 Ind. Cas. 540.

——Art. 116—A suit for recovery of rent by a landlord under the Madras Estates Land Act is governed by the three years' period of limitation prescribed by Art. 8, Sch. A of the Act. It makes no difference whether the landlord is suing on a registered-deed or not. 100 Ind. Cas. 241 = A.I.R. 1927 Mad. 439.

——Art. 116—Suit for recovery of rents and profits—Limitation.

A suit for rent by a landlord in respect of an *anubhavam* tenure evidenced by a registered document is governed by Art. 116 and not by Art. 131. A.I.R. 1935 Mad. 682 = (1935) M.W.N. 866 = 42 L.W. 596 = 158 Ind. Cas. 228.

——Art. 116—Suit for rent—Zarpeshgijara—Registered document.

A suit to recover the rent payable to the plaintiff under a registered *zuripeshgi lease* is governed by Art. 116 of the Lim. Act and the period is not 3 years as provided in the B. T. Act. 4 Pat. L.W. 146 = 44 Ind. Cas. 153.

——Art. 116—Suit for rent—Registered lease.

Art. 116 and not Art. 110 is applicable to a suit for arrears of rent on a registered lease. 44 Cal. 759 = 1 Pat. L.J. 262 = 15 A.L.J. 217 = 25 C.L.J. 279 = 32 M.L.J. 357 = 21 M.L.T. 262 = 21 C.W.N. 577 = (1917) M.W.N. 363 = 5 L.W. 654 = 19 Bom. L.R. 450 = 44 I.A. 65 = 39 Ind. Cas. 156 (P.C.).

——Arts. 116 and 110—Suit for rent.

A suit to recover "rent" reserved in a registered *kabuliyat* is governed by Art. 116 and not Art. 110 of the Limitation Act. 1 Pat. L.J. 37 = 2 P.L.W. 446 = 34 Ind. Cas. 754.

——Art. 116—Suit for rent—Document registered.

A suit for rent under a registered document is governed by Art. 116. (1914) M.W.N. 323 = 23 Ind. Cas. 753.

——Art. 116—Perpetual lease—Lessee to pay nazrana and yearly rent—Covenant that should land or portion thereof go out of lessee's possession, the nazrana with interest would be returned—Lessee coming to know of defective title of lessor but continuing in possession—Suit for return of nazrana within six years, after dispossession but beyond six years after knowledge of lessor's defective title—Limitation applicable.

A perpetual lease provided for payment by the lessee of *nazrana* amounting to Rs. 160 and also for payment of Rs. 6 per annum as rent. The lessor covenanted that should the land or any portion thereof go out of the lessee's possession, he would make good the loss from other land or the lessee could recover from him the *nazrana* paid with interest thereon from the date of his dispossession. The lease was registered. Mutation was effected in the lessee's name shortly after the execution of the lease and the lessee then became aware of the fact that his lessor had title only in part of the land leased. There were other co-sharers, and the lessor's share was only $\frac{1}{8}$th. The lessee however took no action in the matter at that time as his possession was not then challenged. He was eventually dispossessed after he had been in possession for about ten years. He then brought the suit suing the lessor for return of the *nazrana* of Rs. 160 plus Rs. 10 interest. The suit was based on the personal covenant in the lease that the lessor would return the *nazrana* with interest, should the lessee be dispossessed. It was the lessee's contention that the cause of action arose under the lease on his dispossession and not before, when he came to know of the defective title of the lessor as was contended by the opposite party :

Held, that the suit was clearly founded upon the covenant in the lease to return the *nazrana*, should the lessee be dispossessed and, therefore, Art. 116, Lim. Act applied. Hence the period of limitation was six years for compensation for the breach of a contract in writing registered, this period running from the date when the contract was broken. On the finding of the trial Court that the lessee was aware of the defect in his lessor's title from the first it could not be held that the period would run from the date when he became aware of it. But even if the statement in the plaint that he came to know of the defect only at the time of mutation be accepted, time would not be held to run from them. The contract was broken when the appellant was dispossessed and hence the suit having been brought within six years from the breach was within time and the Courts below were not right in holding that Art. 62 applied and that the suit was barred by time because it had been brought more than three years after the execution of the lease. A.I.R. 1942 Oudh 82 = 1941 O.W.N. 1182 = 1941 A.W.R. (Rev.) 1002 = 17 Luck. 289 = 196 Ind. Cas. 888.

——Arts. 116 and 97—*Sajadanashin* entering the agreement to lease property at *khanka* and receiving *nazrana*. Subsequent appointment of Receiver. Dispossession of lessee due to defective title of lessor ; Suit for damages for return of *nazrana* :

Held, that the Art applicable is Art. 116 even though a suit may apparently fall within Art. 97. A.I.R. 1940 Pat. 81 = 18 Pat. 654 = 6 B.R. 385 = 186 Ind. Cas. 674.

——Art. 116—Refund of consideration—Limitation.

Where a lease is void, the lessor having no right to make the grant under S. 65, Contract Act, the lessee is entitled to the return of the money paid to the lessor and the suit for refund of the money is governed by Art. 116 and not by Art. 65 or Art. 97. A.I.R. 1936 Pat. 452 = 2 B.R. 729 = 164 Ind. Cas. 277.

——Art. 116—Lease.

A suit by lessee for damages by way of compensation for breach of the term of the lease, namely, the implied term for quiet possession is governed by Art. 116. 98 Ind. Cas. 584 = 7 Lah. 423 = 27 P.L.R. 663 = A.I.R. 1927 Lah. 1.

——Art. 116—An action breach of duty declared by S. 108 of the Transfer of Property Act is regulated by Art. 116 of the Limitation Act if the lease is in writing registered, the obligation being deemed to be embodied in the contract, and not by Art. 62 or Art. 97. 101 Ind. Cas. 707 = 8 P.L.T. 590 = 6 Pat. 606 = A.I.R. 1927 Pat. 248.

——Art. 116—A registered instrument of lease operates also as an executory contract to deliver possession of the property to the lessee, such contract being deemed to be embodied in the lease ; and a suit for damages for breach of such contract is within Art. 116. The question of the date from which limitation runs must be decided by reference to the Article under which the suit would have fallen if the contract had not been registered. 78 Ind. Cas. 248 = A.I.R. 1924 Nag. 220.

——Art. 116—Breach of contract—Suit for possession under a contract of lease—Claim of mesne profits.

A suit for possession under a contract of lease and for mesne profits is substantially one for damages for breach of contract and is governed by Art. 116. 32 Ind. Cas. 245 (Mad.).

——Art. 116—Applicability—Leases for building purposes.

The provisions of Art. 116 of the Limitation Act as to registered contracts, apply to leases for building purposes and for establishing godowns not being leases for agricultural or horticultural purposes. 11 Ind. Cas. 6 (Cal.).

——Art. 116—Lease to put lessee in possession—Mere execution of lease not delivery of possession—Suit for damages.

By a registered document dated, 11th November, 1893, defendant leased certain villages to plaintiff for a term of seven years and eight months. On 5th December, 1893, plaintiff asked for possession, but did not get it. On 11th November, 1892, he sued for possession or in the alternative for damages for non-delivery of possession. *Held*, the claim for damages was not barred, it being governed by Art. 116. Both in the case of a sale and a lease, the registered instrument by

which such sale or lease is effected not only operates as a grant, but, in the absence of a contract to the contrary, is also construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature permits ; and the breach of such an obligation is a breach of a contract in writing registered within the meaning of the article referred to. (1901) 12 M.L.J. 249 = 25 M. 587.

——**Arts. 116, 132—Usufructuary mortgage—Lease to mortgagor—Lease for one year—Registered deed of lease—Charge for rent—Holding over.**

Where no interest is stipulated for in a mortgage bond, no interest is recoverable. A usufructuary mortgagee leased the mortgaged lands to the mortgagor for one year and the registered rent deed executed by the mortgagor have a charge upon the lands for arrears of rent. The mortgagor paid no rent, but held over after the lapse of the period. In a suit by the mortgagee for the mortgage money ; and arrears of rent : *Held*, that the rent was not recoverable as interest due on the mortgage ; that the rent, except as to one year, was not payable under a registered instrument ; that the clause conferring a charge for arrears was not a term of the lease and would not apply to the period of holding over ; that the mortgagee not having assented to the holding over, the holding over was not on the terms of the original lease, and that since neither Art. 116 nor Art. 132 applied to the case, arrears were recoverable only for three years. (1901) 11 M.L.J. 186.

——**Art. 116—Suits for compensation for breach of contract in writing and registered—Suit for rent, difference between.** 5 C.L.J. 19 = 11 C.W.N. 57.

11. Starting point

See also NOTES 3, 4, 5, 8 AND 10.

——**Art. 116—Usufructuary mortgage—Breach of covenant to deliver possession—Claim for damages.**

In a mortgage suit, where the plaintiff claimed damages for breach of the covenant to deliver the possession, it was found that the breach occurred once for all at the time when the mortgagee was first entitled to recover possession of the property ; that is, at the time when the mortgage deed was executed more than six years ago :

Held, that the claim for damages was barred. (1945) A.L.J. 242 = A.I.R. 1945 All. 202 = 1945 A.W.R. (H.C.). 197 = I.L.R. (1945) All. 676 = 221 Ind. Cas. 454 = 46 Cri. L.J. 743 (F.B.).

——**Art. 116—Breach of contract.**

Where the mortgagor, by registered mortgage-deed of September 3, 1927, contracted to deliver possession of the mortgaged property to the mortgagee on July 1, 1928 and to pay certain rent for the period up to the delivery of possession but no possession was delivered as stipulated and the mortgagee brought a suit in 1936 for recovery of possession and compensation :

Held, that Art. 116 and not Art. 109 applied and the suit brought more than 6 years after the breach of the contract was barred by limitation. A.I.R. 1941 Oudh 1 = 1940 O.W.N. 875 = 1940 R.D. 424 = 1940 A.W.R. (C.C.) 393 = 16 Luck. 203 = 190 Ind. Cas. 721.

——**Art. 116—Suit for damages for breach of covenant of title—Limitation—Starting point.**

Under Art. 116, in the case of a suit for damages for breach of covenant of title contained in a registered deed, where the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner, limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner.

Per **Jackson, J.C.—The expression "covenant for title" does not, as is too often assumed, mean merely** covenant for right to convey but includes covenant for quiet enjoyment. 28 N.L.R. 31 = A.I.R. 1932 Nag. 5 = 14 N.L.J. 125 = 136 Ind. Cas. 225 (F.B.).

——**Art. 116**—The gist of an action for the violation of a contract is the breach of such contract and not any resulting or collateral damage which may be occasioned thereby ; and consequently, the limitation runs in such cases from the time when the contract is broken and not from the time at which any damage arising therefrom is sustained by the plaintiff. A.I.R. 1938 Pat. 275 = 19 P.L.T. 198 = 17 Pat. 338 = 4 B.R. 694 = 176 Ind. Cas. 269.

——**Art. 116**—Where certain property is mortgaged twice and according to the terms of the two deeds, there is a stipulation to the effect that for three years the mortgagor would not be entitled to exercise his right of redemption and the mortgagee not entitled to demand redemption during that period and the three years' period was to commence from the date of the second deed, the time begins to run after three years from the date of the second mortgage. A.I.R. 1937 Rang. 484 = 1938 Rang. L.R. 35 = 172 Ind. Cas. 75 (F.B.).

——**Art. 116**—If the suit is brought merely for compensation for breach of contract, then time would begin to run from the date of the breach. A.I.R. 1936 All. 870 = 1936 A.W.R. 1197 = 116 Ind. Cas. 908.

——**Art. 116**—In the case of compensation for breach of contract under Art. 116, Limitation Act, time would begin to run from the time when the contract was broken or in case of successive breaches from the date when the last breach occurred or, in the case of a continuing breach, when it ceased. A.I.R. 1936 All. 870 = 1936 A.W.R. 1197 = (1937) All. L.R. 109 = 166 Ind. Cas. 903.

——**Art. 116**—Where no time is mentioned, it means the undertaking is an undertaking to pay upon demand and no cause of action arises until demand is made and when demand is made and ignored, then if the person to whom the money should be paid sues the person with whom the contract has been made, loss occurs and damges are recovered, the cause of action is not the breach but the loss itself, and, therefore, the statute in this case runs from the time when the money was paid. 29 N.L.J.298 ; A.I.R. 1933 Nag. 379 = 149 Ind. Cas. 1200.

——**Art. 116—No date fixed for payment.**

Under Art. 116 time begins to run from the date of breach of contract under a registered instrument. Where no time is fixed for payment, its run from the date of the deed itself and a suit brought more than six years after the date is barred by time. A.I.R. 1929 All. 775.

——**Art. 116—Breach of contract—Time when begins to run.**

Where a lease-hold which had been mortgaged for a term by the plaintiff to the defendant was sold in execution of a decree for non-payment of rent to the superior landlord which the defendant had contracted to pay, limitation for the plaintiff's suit if any for compensation for breach of contract, begins to run from the time of the breach, which should be taken as the date of the execution sale and not from the date of the expiry for the term of the mortgage. 34 Ind. Cas. 51 (Cal.).

——**Art. 116—Starting point of limitation—Registered document.**

The question whether the limitation for the recovery of money under Art. 116 begins to run from the date of the registration of deed is very doubtful. 33 Ind. Cas. 111 (All.).

——Arts. 116, 97—Usufructuary mortgage—Part of mortgaged property in possession of a third party—Suit to recover possession from third party—Subsequent suit against mortgagor for damages—Limitation—"Terminus a quo".

A usufructuary mortgagee of property comprising a zemindari and an indigo factory, failed to get possession of the indigo factory, which was in the possession of a third party. The mortgagee sued the party in possession for recovery of the indigo factory, making the mortgagor a *pro forma* defendant, but was defeated on the finding that the mortgagor had no power to mortgagee the factory. The mortgagee then instituted a suit against the representative of the mortgagor claiming (1) compensation for non-delivery of possession of the indigo factory; (2) costs incurred in the former litigation; and (3) damages in respect of the produce of indigo for a certain year. *Held*, that this suit was governed as to limitation by Art. 116 and not by Art. 97 and that time began, not from the date of the final decree in the suit to recover the indigo factory from the person in possession thereof, but from the date of the mortgage. 1907 A.W.N. 108 = 4 A.L.J. 249.

12. Suit for rent.

See also NOTE 10.

——Art. 116—Applicability—Mukarari kabuliyat—Mukarariidar entitled to collect rent from occupancy raiyats and to cultivate land in a village—Suit for arrears of rent against mukarariidar—Limitation. *See* BIHAR TENANCY ACT, SCH. III, ART. 2. 26 Pat. 269 = A.I.R. 1948 Pat. 328.

——Art. 116—Applicability—Suit to recover rents due from a tenant holding over under kano, tenure, after expiry of the period. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT, S. 5 (2). (1947) 1 M.L.J. 32 = A.I.R. 1947 Mad. 274.

——Art. 116—Suit for arrears of rent under C.P. Tenancy Act.

Under S. 104, C.P. Tenancy Act, the special article of limitation provided by itself shall apply in all cases which come within its purview, and the provisions of the Limitation Act shall not apply with the exception of Ss. 6, 7, 19 and 20. Consequently, where a suit for arrears of rent falls under Art. 2 to Sch. II, C.P. Tenancy Act, and also under Art. 116, Lim. Act. Art. 2 is to be applied even if the instrument is a registered one. A.I.R. 1930 Nag. 180 = I.L.R. (1936) Nag. 5 = 165 Ind. Cas. 122.

——Art. 116—Suit for recovery of rent and profits.

The plaintiffs brought a suit claiming village profits for six years. They had been given a right under a registered agreement executed by the defendants to sue them for their shares of profits which would be collected by the defendants if the plaintiffs' share were not paid to them:

Held, that the suit was on the basis of a registered agreement and therefore, it was not time-barred. A.I.R. 1935 All. 945 = 1935 R.D. 433 = 1935 A.W.R. 1063 = (1935) A.L.J. 1116 = 159 Ind. Cas. 446.

——Arts. 116 and 110—A suit for arrears of rent due under a registered mortgage—deed is governed by Art. 116 and not by Art. 110. 53 C.L.J. 522 = A.I.R. 1931 Cal. 790 = 133 Ind. Cas. 102 (1) (D.B.).

——Art. 116—Suit for rent—Registered kanom deed.

A suit to recover arrears of rent under a registered *kanom* deed is governed by Article 116. 11 L.W. 328 = 56 Ind. Cas. 241.

——Art. 116—Suit for rent—Rent payable in instalments every fasli—Starting point.

Where rent for a particular *fasli* is payable in instalments the cause of action for rent due for that *fasli* accrues only from the date on which the last instalment becomes due. 40 Ind. Cas. 590 (Mad.).

——Art. 116—Suit for rent by jenmi against Kanomdar's assignee.

Art. 116 does not apply to a suit for rent by a *jenmi* against the *Kanomdar's* assignee. 26 M.L.J. 283 = 24 Ind. Cas. 481.

——Art. 116—Suit for rent—Kanom—No interest in the mortgage deed—Execution of separate unregistered document—Rent, if a charge.

Defendant executed a *kanom* to plaintiff containing no provision for payment of interest. Another document stipulated for payment of a two years' rent. After the expiration of two years, defendant held over the land with plaintiff's consent; *Held*, that rent was not chargeable on the property. Plaintiff was not entitled to a decree on the footing that it was interest due on the mortgage. Defendant's obligation to pay rent after the lapse of 2 years not being under a registered instrument; Art. 116 of the Limitation Act did not apply. Plaintiff's right to rent was barred after three years. 16 Ind. Cas. 560 (Mad.).

——Art. 117—Scope.

Article 117 deals only with the period of limitation. It does not create a right to sue. It is, however, recognised in India that a foreign judgment itself forms a cause of action and a suit can, therefore, be based on it. 41 Bom. L.R. 1084 = A.I.R. 1939 Bom. 522 = I.L.R. (1939) Bom. 639 = 186 Ind. Cas. 393.

——Art. 117—Suit on foreign judgment—Law applicable.

Where decrees are capable of being transmitted from a Native State in alliance with His Majesty to British India for execution, the law prevailing in British India is considered the law governing the right of execution. In considering whether a suit is time-barred under Art. 117, the fact that the decree is executable in a Court in a Native State is not relevant. In the same way, whether the decree is not enforceable because it is barred by the law of limitation prevailing in the Native State is equally not relevant to be considered in the suit brought on the judgment of a Court in a Native State in British India. 41 Bom. L.R. 1084 = A.I.R. 1939 Bom. 522 = I.L.R. (1939) Bom. 639 = 186 Ind. Cas. 393.

——Art. 117—Foreign judgment—A call order by a liquidation Court in an Indiam State.

A call order passed by a liquidation Court in Baroda is not a foreign judgment and a suit it on in British India, therefore, is governed by Art. 120 and not by Art. 117. A.I.R. 1935 Lah. 975 = 17 L. 341 = 38 P.L.R. 662 = 160 Ind. Cas. 346.

——Art. 117—Foreign judgment, what is—Order passed by foreign Court calling upon contributories to pay share amount.

An order passed by a Court in a native state calling upon the contributories to pay Rs. 20 per share by a certain date and authorising the Liquidators to file suits against contributories residing outside the jurisdiction of the State is a foreign judgment, and a suit against a contributory outside the state is governed by Art. 47. A.I.R. 1935 Lah. 553.

——Art. 117—"Judgment," meaning of—Starting point of limitation.

The words used in Art. 117 are "the date of the judgment." It does not say "the judgment of the trial Court." There is not justification for holding that the words used in Art. 117 should mean judgment of the trial Court alone; The term 'judgment' in Art. 117 means a decree, and if there is the decree of the Appeal Court, it is that decree which is the starting point for counting the period of limitation. A.I.R. 1939 Bom. 522 = I.L.R. (1939) Bom. 639 = 41 Bom. L.R. 1084 = 186 Ind. Cas. 393.

——Art. 117—Starting point of limitation.

Where, in a foreign state, there is a suit and in that suit a judgment is given and from that judgment appeal is made, and the appeal is dismissed, time for instituting a suit on the foreign judgment in British India runs, under Art. 117, from the date of the judgment of the Appellate Court and not from the date of the judgment of the Court of first instance.

Where an appeal has been preferred and decided, the judgment of the lower Court is superseded by the judgment of the Appellate Court and is finality is destroyed. (1933) M.W.N. 453 = A.I.R. 1933 Mad. 511 = 38 L.W. 85 = 65 M.L.J. 572 = 56 M. 951 = 144 Ind. Cas. 853.

——Art. 117—Starting point of limitation.

Limitation for a suit upon a foreign judgment begins to return from the date of judgment of the Court of first instance and not from the date of judgment of the final Appellate Court. 35 L.W. 763 = A.I.R. 1932 Mad. 661 = 62 M.L.J. 566 = 138 Ind. Cas. 648.

——Art. 117—Suit on foreign judgment—Part payment—Extension of time.

Plaintiff filing suit on promissory note in Federated Malay States and obtaining decree on July 21, 1930—Various payments made in discharge of decree, last being on June 12, 1938—Suit by plaintiff in British India on February 28, 1940, to enforce foreign judgment :

Held, that the suit was barred by limitation under Art. 117. Payments in discharge of decree of foreign Court did not save limitation. (1944) 1 M.L.J. 440 = 57 L.W. 355 = A.I.R. 1944 Mad. 437 = 1944 M.W.N. 494.

——Art. 118.

Synopsis.

1. Applicability and scope.
2. Interpretation—" Becomes known to plaintiff."
3. Proof of knowledge of adoption.
4. Starting point.
5. Miscellaneous.

1. Applicability and scope.

——Art. 118—Applicability.

Article 118 applies only to a suit under S. 42, Specific Relief Act, for a declaratory decree that an adoption is invalid or did not take place. It is not applicable to a suit for possession of immovable property. A.I.R. 1939 Lah. 135 = 183 Ind. Cas. 853.

——Art. 118—Applicability.

Article 118 does not apply to a suit to recover possession which inovlves the decision of an issue as to the validity or invalidity of defendant's adoption. 35 P.L.R. 338 = 1935 Lah. 213 (2) = 149 Ind. Cas. 434.

——Art. 118—Suit for possession.

Article 118 has no application in suit where the relief sought is possession of property and validity of factum of adoption is incidentally in issue. 78 Ind. Cas. 284 = A.I.R. 1924 Nag. 319.

——Arts. 118 and 119—A suit for possession is not subject to the limitation prescribed by Arts. 118 and 119 even though the defendant is in possession under an adoption or the plaintiff's title is based upon an adoption. The articles apply only to a suit for declaratory relief pure and simple and not to a suit for possession. 78 Ind. Cas. 987 = A.I.R. 1924 Nag. 142.

——Art. 118—*Per* Macleod C.J. and Fawcett, J. (Shaj J., contra.)—In view of the decision of the Privy Council in (1906) 28 All. 727 ; 33 I.A. 156 (P.C.) the decision in *Shrinivasa* v. *Hanmant* is not good law and suits for possession where the plaintiff cannot succeed except by displacing and alleged adoption are not governed by Art. 118 of the Limitation Act. 67 Ind. Cas. 134 = 24 Bom. L.R. 158 = 46 Bom. 776 = A.I.R. 1922 Bom. 223 (F.B.).

——Art. 118—Applicability of—Suit for possession.

A suit for possession of property where the plaintiff objects as to the validity of an adoption is not governed by Art. 118. 56 Ind. Cas. 620 (Nag.).

——Art. 118—Applicability.

Where a claim is not merely for a declaration that the defendant's adoption is invalid, it is not barred by Art. 118. 75 Ind. Cas. 14 = 20 A.L.J. 814 = 45 All. 1 = A.I.R. 1923 All. 25.

——Art. 118—Scope.

Article 118 governs any suit to obtain a declaration, not merely that an alleged adoption is invalid but also that it never took place. The period of limitation is six years from the date on which the alleged adoption became known to the plaintiff. 69 Ind. Cas. 971 = 20 A.L.J. 945 = 45 All. 169 = A.I.R. 1923 All. 58.

——Art. 118—Adoption not recognised—Suit for possession after 6 years.

Where adoption is not recognised by the personal law of the alleged adoptor a suit for possession after 6 years of the alleged adoption is not barred. 178 P.W.R. 1911 = 196 P.L.R. 1911 = 11 Ind. Cas. 96.

——Arts. 118 and 141—Suit for recovery of possession from adopted son—Limitation.

Art. 141 and not Art. 118 of the Limitation Act applies to a suit for the possession of property when the defendant holds under a title by adoption. 15 Bom. L.R. 535, not foll. 5 Pat. L.J. 164.

——Art. 118—Suit for declaration and possession—Suit for declaration barred—Claim to possession—Whether can succeed.

A claim to possession when defending on a declaration that an adoption is invalid, cannot succeed if a suit for latter is barred by time. 34 All. 8 = 8 A.L.J. 1101 = 11 Ind. Cas. 476.

——Art. 118—Setting aside alienation by adoptee.

A suit for a declaration by reversioners that an alienation by the adoptee of a widow was not binding on them, is substantially a suit to have it declared that a certain adoption was invalid and is governed by Art. 118. A.I.R. 1929 Lah. 579.

——Art. 118—Suit for declaration.

Where an action is in truth and substance a suit for declaration that a particular adoption was invalid, and it is found that the fact that a claim was being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that by himself had attained majority nearly nine years before the suit was commenced, *Held*, that the suit was barred by Art. 118. 107 Ind. Cas. 488 = 4 O.W.N. 832 = 1927 M.W.N. 742 = 46 C.L.J. 280 = 29 Bom. L.R. 1386 = 32 C.W.N. 153 = A.I.R. 1927 P.C. 229 = 53 M.L.J. 301 (P.C.).

——Art. 118—Suit by aurasa son.

Cases relating to reversioners are not applicable to the case of a suit by an *aurasa* son contesting the adoption by his father. The mere fact that the father who made the illegal adoption was alive for more than six yeras after the adoption would not bar right of a son born a year or two after the adoption to question it.

Article 118 would not apply to a case like this for the cause of action begins from the time when the alleged adoption becomes known to the plaintiff. He, being a minor could not be fixed with the knowledge of the adoption from the date of his birth. 98 Ind. Cas. 435 = 1926 M.W.N. 736 = 24 M.L.W. 601 = A.I.R. 1926 Mad. 1123 = 51 M.L.J. 557.

——**Art. 118—Setting aside gift to adoptee.**

If the suit for a declaratory decree in respect of the factum of adoption is barred by time, the plaintiff cannot preclude the operation of Art. 118 by suing for a declaration that the gift made by the lady in favour of the adopted son should not bind him. 121 Ind. Cas. 296 = 31 P.L.R. 222 = A.I.R. 1930 Lah. 438.

——**Art. 118**—A suit by reversioner that gift to an alleged adopted person does not bind his reversionary interest is not by Art. 118. A.I.R. 1924 P.C. 137, Foll. Plaintiff in such suit can treat the adoption as nullity and contest only the gift. 96 Ind. Cas. 749 = 8 Lah. 48 = A.I.R. 1926 Lah. 655.

——**Art. 118**—*A* one of the widows of one *K* deceased, executed a release deed in favour of *B* and *A* and *B* together executed a sale-deed and a mortgagee-deed in favour of *C*. The plaintiffs, the reversioners of *K* instituted suits to declare that the release, the mortgage and the sale were not binding upon them. The plea of *B* was that he was adopted son of *K* and that the suits were barred by limitation, as being brought six years after the alleged adoption. It was found that soon after *K's* death there were disputes between *B* on the one side and the two widows of *K* on the other as to the lands of *K*. The two widows contended that *B* was not the adopted son of their husband and that the pattah should be transferred to their names and not in the name of *B*. Then orders were issued and *B* was asked to establish his right to the lands within three months from that date as otherwise pattah would be issued to the widows, more than seven years passed; but no such suit was filed by *B* and pattahs were actually issued to the widows of *K*.

Held, that under the circumstances the plaintiffs were justified in absolutely ignoring the position of *B* as the adopted son of *K* and instituting suits only for a declaration that the suit transactions were not binding on them and the failure of the plaintiffs to institute a suit within six years after the adoption of *B* became known to them under Art. 118 of the Limitation Act cannot be a bar to their present suit. 102 Ind. Cas. 885 = 26 M.L.W. 802 = 39 M.L.T. 129 = 1927 M.W.N. 690 = A.I.R. 1927 Mad. 674 = 52 M.L.J. 711.

——**Art. 118—Suit for possession by Reversioners.**

Reversioners suing for possession of property from an alleged adopted son and his transferees are not bound to bring a suit for declaration that the alleegd adoption had in fact not taken place. They are entitled to wait till the lady died and then bring a suit for recovery of possession and therefore a suit brought within 12 years of the death of the widow cannot be held to be barred by the six years' rule. 87 Ind. Cas. 938 = 46 All. 637 = 22 A.L.J. 690 = A.I.R. 1925 All. 79.

——**Arts. 118 and 141**—The particular limitation prescribed in Art. 118 applies to suits falling under Sp. Rel Act, S. 42, Ill. (*f*). The date from which time begins to run is a subjective or personal date; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff shoud not be guilty of laches the measure of laches being fixed by the statute as six, years. But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued and even till the limit of 12 years from the accruer has passed. In such case the article applicable is 141 and not 118.

Plaintiff was cousin to the former owner of the suit property by name *D*. *D* married *M*. Plaintiff averred that after *D's* death in the year 1880. *M* adopted *N*, who was her daughter's son; that *N* married *B* and died himself in 1895, that upon his death *B* took the ordinary Hindu woman's estate and died in 1903, and that upon her death, plaintiff's title acorued, and he brought his suit for possession on 1st July 1912. Defendant admitted some show of adoption of *N* but denied that it was legal or valid; and he set up his own adoption by *M* in 1901.

Held, the adoption of the defendant was void, and the plaintiff was entitled to brush it aside and sue for possession within 12 years from the death of the widow. 79 Ind. Cas. 971 = 11 O.L.J. 181 = 28 C.W.N. 666 = 22 A.L.J. 508 = 26 Bom. L.R. 509 = 1924 M.W.N. 414=5 L.R. (P.C.) 97=20 M.L.W. 109 = 51 I.A. 220 = 48 Bom. 411 = 34 M.L.T. 111 = A.I.R. 1924 P.C. 137 = 46 M.L.J. 598 (P.C.).

——**Art. 118**—A suit for a declaration that the adoption of *B* by the widow of *C* under a registered deed was null and invalid and for a further declaration that the plaintiff was a reversioner of *B* is governed by Art. 118, even when the adoption is alleged to be void *ab initio*. Had the plaintiff been suing for possession on the ground that he was the reversioner of *B* and had he further alleged that the adoption of *B* was invalid under the Hindu Law, Art. 118 would not have been applicable and the plaintiff would have had twelve years within which to sue. 75 Ind. Cas. 676 = A.I.R. 1923 All. 361.

——**Art. 118**—Adoption taken place in fact invalid under custom—Suit to set aside barred—Suit for declaration against transaction which is valid because of adoption, is also barred. 5 L.L.J. 63 = A.I.R. 1921 Lah. 389.

——**Arts. 118, 120 and 125—Suit by reversioner to declare alienation invalid—Declaration for invalidity of adopting being barred—(*Per* Wallis, C.J.).**

A reversioner who has allowed his right to question the validity of an adoption by the widow to be barred, cannot sue for a declaration of the invalidity of an alienation made by the widow and adopted son. (*Per* **Coutts Trotter J.,** Contra.) 36 Ind. Cas. 255 (Mad.).

——**Art. 118—Death of adopted son leaving widow—Adopting mother making a second adoption during widow's lifetime—suit by reversioner of the first adopted son.**

In 1895 the first adopted son died a minor, leaving behind him a widow who died in 1903. In 1899 *M* the adopting mother got the vatan lands entered in her name in the revenue records; and in 1901 she adopted *C*, as son to her husband and placed him in possession of the whole estate. The plaintiff claiming as the nearest reversionary heir to the first adopted son filed a suit in 1912 to recover possession of the property from. *Held*, (1) that suit was barred under Art. 118 of the Limitation Act. (2) that even though *C's* adoption was invalid under Hindu law and *M's* power of adoption already exhausted the law of limitation would effectively defeat the plaintiff's claim. 3 W.R.P.C. 15; 20 C. 483, *Foll.* The effect of not challenging in time, the adoption was that C became validity adopted so far as plaintiff was concerned. 41 Bom. 728 = 19 Bom. L.R. 724 = 41 Ind. Cas. 845.

——**Art. 118—Adoption—Suit to set aside—Knowledge—Suit by remove reversioner.**

A suit to set aside an adoption by a remote reversioner is barred if it is brought more than six years after the knowledge of the same by the nearest reversioner. 24 M. 405; 29 M 390, Foll. *Quarre.*—If the same rule applies when the nearest reversioner is guilty of fraud? 2 L.W. 337 = 28 Ind. Cas. 632.

——**Art. 118—Adoption invalid—Reversioner, suit for possession by—Limitation.**

A suit for possession by a reversioner more than six years after the date of his knowledge of an adoption by the widow is barred under Art. 118 of the Act. 24B.

260, foll. 24 B. 260, (F.B.), is still good law after 28 A. 727 and 39 C. 418 (P.C.). 37 Bom. 513 = 15 Bom. L.R. 533 = 20 Ind. Cas. 162.

——Art. 118—Adoption invalid—Suit for recovery of possession on death of limited owner—Suit for declaration if necessary.

The omission to bring, within the period prescribed by Art. 118 of the Limitation Act, a suit for a declaration that an alleged adoption is invalid is no bar to a suit by the reversioner for possession of the property on the death of the limited owner. 28 All. 727;33 I.A. 156, Foll. 39 Cal. 418 = 6 P.W.R. 1912 = (1912) M.W.N. 77 = 11 M.L.T. 76 = 9 A.L.J. 137 = 15 C.L.J. 172 = 12 P.L.R. 1912 = 22 M.L.J. 240 = 14 Bom. L.R. 182 = 16 C.W.N. 458 = 126 P.R. 1912 = 39 I.A. 19 = 13 Ind. Cas. 344 (P.C.).

——Arts. 118 and 144—Suit for possession by reversion against person claiming by adoption—Applicability.

A suit for possession by a reversioner against a person in possession by virtue of his alleged adoption by the deceased holder is governed by Article 144 and not by Article 118 of the Limitation Act of 1877 or 1908. 44 P.R. 1911 = 198 P.L.R. 1911 = 85 P.W.R. 1911 = 11 Ind. Cas. 11.

——Arts. 118 and 144—Suit for declaration of invalidity of adoption and possession.

A suit for possession of immovable property and for a declaration of the invalidity of an adoption is governed by Art. 144 and not by Art. 118. 95 P.W.R. 1911 = 109 P.L.R. 1911 = 10 Ind. Cas. 338.

——Arts. 118 and 141—Suit for declaration of invalidity of adoption and for possession.

Where recovery of possession of a property is sought along with a declaration of the invalidity of an adoption. Art. 141 applies. 15 C.W.N. 524 = 15 C.L.J. 97 = 7 Ind. Cas. 427.

——Arts, 118, 119 and 144—Applicability.

Articles 118, 119 specially provide for the case of an adopted son and where these articles do not apply Art. 144 applies. 33 Bom. 88 = 10 Bom. L.R. 1029 = 1 Ind. Cas. 647.

——Art. 118—Suit for declaration by collaterals that a deed of adoption by a widow in favour of her daughter's son not binding upon reversionary rights.

The collaterals sued, on the 17th October, 1903, for a declaration that a deed executed by a widow on the 4th March, 1902, by which she purported to adopt her daughter's son, did not affect their reversionary interest. There was no adoption in fact or expression of intention to adopt before February, 1900. *Held*, that the suit was within limitation under Art. 118. 1 P.L.R. 1909 = 68 P.R. 1909 = 58 P.W.R. 1909 = 2 Ind. Cas. 975.

——Arts. 118 and 141—Suit for possession—Plea of adoption.

A suit by a reversioner entitled to possession of immovable property on the death of a Hindu female is governed by Art. 141 and not by Art. 118, even though it is necessary for the plaintiff, in order to succeed, to get over the plea of an alleged adoption of the defendant by the last male holder. *Held*, also, that the course of decisions in the Madras Presidency to the contrary has been over-ruled by the ruling of their Lorships of the P.C. (1907) 17 M.L.J. 182 = 30 M. 308 = 2 M.L.T. 178. [Also (1907) 17 M.L.J. 282.

——Arts. 118 and 141—Suit to recover immovable property on the death of a Hindu widow—Adoption, validity of, collateraly involved—Limitation—Conflict of decisions.

A suit by reversioners for the recovery of immovable property on the death of a Hindu widow is governed by Art. 141 and not by Art. 118 even though a question as to the validity of an *anumatipatra* executed in favour of the widow and of an adoption made under it be involved in such suit, there being no finding that the reversioners were aware of the adoption relied on. 27 C. 242, foll. (1904) 9 C.W.N. 222.

——Art. 118—Suit to declare an adoption invalid.

A person seeking a declaration that an adoption is invalid must bring his suit within 6 years of the date on which he came to know of the adoption ; the fact that the person making the adoption was alive within 6 years before suit cannot save the bar of limitation. (1903) 5 Bom. L.R. 588 = 27 B. 614.

——Art. 118—Suit questioning adoption—Claim to property—Knowledge on the part of plaintiff.

Art. 118 contemplates a suit questioning an adoption independently of any claim to property; the terms of the Article in no way suggest or imply that there must be some other cause of action than the alleged adoption. To constitute knowledge, under the Article, there must be knowledge, not necessarily at first hand of that which is alleged to be the adoption, of the facts and circumstances which are said to constitute the adoption and serve as some basis for the allegation : there must be some foundation in fact and how far that condition is satisfied is a question of degree, only to be solved by reference to the facts of each case. 5 Bom. L.R. 584.

——Art. 118—Plaintiff claiming not as heir, but under a family arrangement—Defendant claiming as adopted son—Applicability of article.

Where, on the death of a Hindu widow, the plaintiffs were entitled to the property not as her husband's heirs, but as remaindermen under a family arrangement to which the widow was party, a suit brought within the statutory period after her death but more than six years after her adopted son had set up his claim as adopted son : *Held*, that Art. 118 was applicable and the suit was barred. (1902) 4 Bom. L.R. 893.

——Arts. 118, 119 and 141—Applicability—Suit to set aside or establish an adoption—Suit for bare declaration—Suit for recovery of possession.

Held, by the Full Bench (BHASHYAM AIYANGAR, J., dissenting) that where a plaintiff cannot obtain a decree without getting a decision that an adoption is invalid or never in fact took place, or that an adoption is valid, his claim will be governed by Arts. 118 and 119 ; though he may also seek for recovery of possession of immovable property. Art. 141 does not apply to a case where the plaintiff cannot succeed without impugning or establishing an adoption. *Per* BHASHYAM AIYANGAR, J. —Articles 118 and 119 apply only to declaratory suits sanctioned by S. 42 of the Specific Relief Act. 13 M.L.J. 27 = 26 M. 291 (F.B.).

——Arts. 118 and 141—Applicability of Art. 118 to suit for immovable property—Finding on adoption necessary for the determination of the case.

The shorter period of limitation under Art. 118 governs a claim for recovery of possession of immovable property wherever the claim to the property could not be established setting aside without an alleged adoption. 24 B. 260 (F.B.) foll. *Per* PARSONS J.—If the question were *res integra*, I should have thought there was obligation on the part of the reversioners to have sued to have it declared that an adoption which was merely alleged to have taken place had never taken place, because the mere parol assertion of a status could not give rise to a cause of action or create a status that had no existence at all. *Per* RANADE, J.—Quaere : If in a succession certificate proceeding after the death of the admitted owner, the alleged adoption is found against, whether the reversioners were bound to bring a suit to have the adoption declared against ? (1900) 25 B. 26 = 2 Bom. L.R. 495.

——Arts. 118 and 144—Suit for partition—Failure to sue to set aside adoption.

A suit for partition and possession of the plaintiff's share of the family properties is not barred simply because the plaintiff failed to sue for declaration that alleged adoption of one of the family members was invalid or never took place. The plaintiff is entitled to show that it never took place or was invalid. 18 Ind. Cas. 493 (Mad.).

2. Interpretation—"Becomes known to plaintiff."

——Art. 118—"Becomes known to plaintiff."

The words "becomes known to plaintiff" in Art. 118 must be understood in their natural meaning, and the word "plaintiff" cannot include a reversioner who stands in the same grade as another and who claims as heir of the last male owner in common with such other. 22 A. 33, foll. (1902) 13 M.L.J. 359. But *see* 29 M. 390.

3. Proof of knowledge of adoption.

——Art. 118—Knowledge of adoption—Proof—Duty of Court.

Where, in a suit for a declaration that the defendant's adoption was invalid, the defendant has been alleging adoption, and has also been asserting that the alleged adoption was within the knowledge of the plaintiff, the Court must decide as to whether the alleged adoption came to the knowledge of the plaintiff within the period fixed in Art. 118, or before it, whether the adoption in fact took place or not. A.I.R. 1943 Pat. 68 = 9 B.R. 196 = 8 C.L.T. 96 = 205 Ind. Cas. 133.

——Art. 118—Suit for declaration—Knowledge—Proof of:

Where both the plaintiff and his mother live together in the same house, his mother's knowledge as to the date of a certain adoption is also his knowledge, for a suit under Art. 118 of the Limitation Act. 29 Ind. Cas. 785 (Mad.).

——Art. 118—Adoption—Suit to set aside—Limitation—Knowledge—Proof.

If in a suit by a Hindu reversioner to set aside an adoption by the widow the plaintiff has to show when he became aware of the adoption, it is discharged if the plaintiff swears as to when he became aware of the adoption in the absence of evidence to the contrary. 9 M.L.T. 303 = (1911) 1 M.W.N. 192 = 9 Ind. Cas. 163.

4. Starting point.

——Art. 118—Starting point of limitation.

A *Brahman* died leaving a widow and three daughters. The widow who had taken possession of his land for her life executed a deed adopting a boy as heir to her husband. The deed was registered and the *patwari* entered the mutation in accordance with the deed. This mutation was sanctioned by the Collector. The collaterals of the husband had brought a suit to contest the adoption. Six years after this suit, one of the daughters instituted a suit for a declaration that the adoption and gift in favour of the alleged adoptee would not affect her rights as daughters:

Held, that whether Art. 3 of the Punjab Limitation (Custom) Act or Art. 118, Limitation Act be applicable, it was clear that the suit was barred. In either case, the starting point of limitation was the date on which the plaintiff had knowledge of the alienation. A.I.R. 1938 Lah. 193 = 40 P.L.R. 660 = 180 Ind. Cas. 626.

——Art. 118—Starting point of limitation.

Where the plaintiff had no knowledge of the deed of adoption of 1917 until the date when the gift was mutated in 1925, the period of six years should count from the latter date. A.I.R. 1934 Lah. 274 (2) = 15 L. 645 = 36 P.L.R. 315 = 149 Ind. Cas. 986.

——Art. 118—Starting point of limitation.

Where, in a suit for declaration that an alleged, adoption of the defendant was invalid and that it never took place in fact, it was found that there was a gift in favour of the adopted son and the adoption as well as the gift were openly declared at the time of the mutation of the year 1908 and the adoption was held invalid only owing to absence of certain ceremonies required under special custom:

Held, that the suit being one for declaration was governed by Art. 3, Punjab Limitation (Custom) Act, 1920, corresponding to Art. 118, Limitation Act, and before deciding the question of limitation, it was necessary to determine the date on which the alleged adoption became known to the plaintiff. A.I.R. 1931 Lah. 456 = 131 Ind. Cas. 631.

——Art. 118—Starting point.

The nearest reversioner can impeach the invalidity of an adoption on behalf of the whole body of reversioners and time runs from the time the adoption comes to the knowledge of the next reversioner and no fraud or inaction on his part would stop time running against them. 41 Mad. 659 (F.B.), *Foll.* 60 Ind. Cas. 98 = 12 M.L.W. 499 = 1920 M.W.N. 783 = 44 Mad. 218 = 29 M.L.T. 43 = A.I.R. 1921 Mad. 380 = 39 M.L.J. 621.

——Art. 118—Gift to adopted son—Challenge by reversioner.

Where an adoption remains unchallegened, and the right to impeach it becomes time-barred, a gift made subsequently in favour of the adopted son does not give the reversioners a fresh cause of action, for it does not involve any further denial of their rights than was involved in the adoption itself. 56, Ind. Cas. 931 (Lah.).

5. Miscellaneous

——Art. 118—Burden of proof—Invalidity of adoption.

Where the plaintiff asks for a declaration that an alleged adoption is invalid, the budern is on him to make out a *prima facie* case that the adoption challenged by him is invalid in law, or never took place in fact. A.I.R. 1943 Pat. 68 = 9 B.R. 196 = 8 C.L.T. 96 = 205 Ind. Cas. 133.

——Art. 118—Suit for possession—Omission to sue for declaration—Limitation Act (9 of 1871), Art. 129—Difference in law.

Under the Limitation Act of 1871 it was imperative that a suit for the recovery of immovable property which involved the displacement of an adoption should be filed within 12 years from the date of the adoption or at the option of the plaintiff from the death of the adoptive father. Where therefore a widow did not bring such a suit within the period of limitation, a reversioner or any other member interested to dispute the validity of the adoption cannot file a suit. A right of suit once barred cannot be revived by the passing of a new Act. (1914) M.W.N. 903 = 27 Ind. Cas. 109.

——Arts. 118 and 119—Immunity for twelve years under old Act—No acquisition of title *See* 10 C.W.N. 1065 = 28 A. 727 = 16 M.L.J. 440 = 33 I.A. 156 (P.C.).

——Art. 119.

Synopsis

1. **Applicability of article.**
2. **Interference with rights of adopted son—What amounts to.**

1. Applicability of article

——Art. 119—Applicability.

Article 119 applies only to declaratory suits under S. 42, Specific Relief Act. 36 Bom L.R. 185 = A.I.R. 1934 Bom. 110 = 58 B. 280 = 149 Ind. Cas. 674.

——Art. 119—Suit to declare adoption valid—Limitation.

Where an adoption is challenged and the rights of the adopted son are interfered with, the latter is bound

to bring his suit to establish his adption within 6 years under Art. 119. 5 O.L.J. 414 = 47 Ind. Cas. 639.

——Arts. 119 and 144—Adoption denied—Suit for possession.

Where in a suit by an alleged adopted son, the adoption is denied the suit is governed by Art. 144 and not Art. 119 of the Limitation Act. (71 P.R. 1901 ; 20 P.R. 1902 ; 68 P.R. 1903 ; 3 P.R. 1904 ; 1 P.R. 1907, overruled). (39 C. 418 (P.C.) ; 30 M. 308 ; 28 A. 727 (P.C.) Foll.) ; (13 C. 308 (P.C.) 20 C. 487 (P.C.) 22 C. 609; 20 M, 40 ; 24 B. 260 (F.B.) ; 37 B. 573 ; 26 M. 291, Diss. from). 104 P.W.R. 1914 = 203 P.L.R. 1914 = 81 P.R. 1914 = 25 Ind. Cas. 429.

——Art. 119—Applicability—Suit for possession.

Art. 119 does not apply to a suit for possession. 5 M.L.T. 262 = 4 Ind. Cas. 1167.

——Art. 119—"Valid"—Scope of Article.

Art. 119 applies to all suits in which either the *factum* or the validity of an adoption is denied. (1907) 9 Bom. L.R. 1054 = 32 B. 7.

——Arts. 119 and 118.

Art. 119 applies to a suit "to obtain a declaration that an adoption is valid" ; and not to suits for a declaration that an alleged adoption did take place. Cf. Art. 118, wherein the words "or never in fact took place" are found. Art. 119 is to be applied only where the question is not as to the *factum* but as to the validity of the adoption. The interference mentioned in Art. 119, as a condition of its application should be such as would amount to an absolute denial of the status of adopted son and his unconditional exclusion from the enjoyment of his rights and the Article can have no application to a case where the facts suggest that the interference had the mere effect of postponing the right of the adopted son to succeed. (1903) 5 Bom. L.R. 708 = 28 B. 94.

——Art. 119—Suit to declare that an adoption did in fact take place—Applicability of Article.

Per ASTON J.—Art. 119 does not apply to a case where an adopted son sues for a declaration that an adoption did in fact take place. (1902) 4 Bom. L.R. 516 = 26 B. 720.

——Art. 119—Suit for possession—Claim as adopted son, and also based on adverse possession—Applicability of Article to cases where suit can succeed on other title and adoption need not necessarily be set up.

In cases where the plaintiff has no title except an adoption of disputed validity, Art. 119 will apply. Where, however, the plaintiff has another ground which would suffice whether the adoption were or were not proved, then he is clearly entitled to recover on that other ground, and his suit cannot be rejected merely because it might be barred if he had to rely on the adoption alone. (1902) 4 Bom. L.R. 516 = 26 B. 720.

——Arts. 119 and 144—Suit by adopted son for possession of property—Interference with rights of adopted son.

A suit by an adopted son to recover possession of properties of his adoptive father is governed by Art. 144 and not by Art. 119. *Held*, also that the interference alluded to in Art. 119 must be an interference caused by the defendant to such a suit as the article contemplates, and not an interference caused by some third person. 17 A. 167 ; 8 A. 644 ; 10 A. 485 ; 13 B. 160 ; 14 C. 401 ; 24 A. 195 ; and the dissentient judgment of BHASHYAM AIYANGAR J. in 26 M. 291 foll. 24 B. 260 and the judgment of the majority in 26 M. 291 diss. from. 1903 A.W.N. 163 = 26 A. 40.

——Art. 119—Adoption—Suit for possession of property as adopted son—Denial of adoption more than six years before suit—Limitation.

Held, that Art. 119 did not apply to a suit by an adopted son for possession of immovable property, and that the suit was not barred, even though his adoption had been denied by the defendant and his right as adopted son had been interfered with more than six years before the institution of his suit. 8 A 644 ; 9 A. 253 ; 10 A 485 ; 17 A. 167 ; 14 C. 401 ; 25 C. 354 ; 13 B. 160 ; 21 B. 159 ; and 21 B. 376 foll. (1890) A.W.N. 241 ; 20 M. 40 ; and 24 B. 260 diss. from. (1901) 1902 A.W.N. 10 = 24 A. 195.

2. Interference with rights of adopted son—What amounts to

——Art. 119—'Interference'—What amounts to.

The interference mentioned in Art. 119 is obviously an interference, which must amount to an absolute denial of the status of adoption held by plaintiff and an unconditional exclusion of him from the enjoyment of his rights in virtue of that status. Mere denial of status does not amount to interference. 74 Ind. Cas. 970 = 1 Rang. 186 = A.I.R. 1924 Rang. 34.

——Arts. 119 and 144—Interference—Proof.

Under Art. 119 of the Limitation Act to establish interference with the rights of the adopted son, something incompatible with the recognition of the adoption must be proved.

A son was adopted in the life-time of a natural son. On the former's death, the latter succeeded to his estate, allowing maintenance to the former's widow, who brought a suit to recover it. The succession by the natural son was not an interference so as to attract the operation of Art. 119. The erroneous belief shared by the adopted son's widow, of the right of the natural son to succeed to her late husband, does not give rise to an estoppel and hence the suit is not barred by limitation or estoppel. 22 Bom. L.R. 974 = 58 Ind. Cas. 394.

——Arts. 119 and 142—Gift by adoptive mother—Invalid against adopted son—Possession taken by donee under gift—Interference with adopted son's rights—Suit for possession more than six years after—Limitation.

A deed of gift by the adoptive mother in favour of her daughter, in pursuance of an alleged testamentary direction by the donor's husband is, in the absence of such direction, invalid as against the adopted son ; and possession taken by the daughter under such gift is a direct interference with the rights of the adopted son. A suit brought by the adopted son more than 6 years after such possession by the daughter will be barred under Art. 119 and is not governed by Art. 142. (1902) 13 M.L.J. 144.

——Art. 119—Interference with adopted son's rights—Interference with regard to other properties—Starting point of limitation.

The interference by the defendant which is the starting point for limitation under Art. 119, need not relate directly to property sought to be recovered in the suit. Where therefore the defendant interfered with plaintiff's right as adopted son with respect to certain property and more than six years after such interference the plaintiff sought to recover by virtue of his adoption certain property from the defendant : *Held*, that the suit was barred by Art. 119. (1902) 13 M.L.J. 145.

——Art. 120.

Synopsis.

1. Applicability and Scope.
2. Accounts.
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4. Avoidance of document.
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1. Applicability and scope.
(*a*) General.
(*b*) Residuary provision.

1. (*a*) Applicability and scope—(General).

——Art. 120—Applicability—Claim in respect of charges for care and custody of goods under S. 44, Sale of Goods Act.

The liability of a buyer for reasonable charges for care and custody of the goods arises under S. 44, Sale of Goods Act. As the liability arises under the statute apart from any contract between the parties, the article applicable is the residuary Art. 120, and not Art. 110 or 115, of the Limitation Act. I.L.R. (1951) Nag. 40 = 1950 N.L.J. 363.

——Art. 120—Suit for recovery of cess.

A suit by a landholder under S. 88, Madras Local Boards Act to recover cess from the intermediate landholder is not a suit for rent nor a suit on a contract but is a suit to enforce a liability created by statute and is governed by Art. 120. I.L.R. (1937) Mad. 498 = 45 L.W. 74 = (1937) M.W.N. 7 = (1937) 1 M.L.J. 91 = A.I.R. 1937 Mad. 217 = 167 Ind. Cas. 490 (F.B.).

——Art. 120—Suit for recovery of cess by inamdar.

A suit by *inamdar* to recover half of land cess paid by him is governed by Art. 120. A.I.R. 1939 Mad. 877 = 50 M.L.W. 466 = (1939) 2 M.L.J. 579 = (1939) M.W.N. 1185 = I.L.R. (1940) Mad. 50 = 188 Ind. Cas. 13.

——Art. 120—Road Cess—Madras Local Boards Act, S. 73.

Under S. 73 every landholder is entitled to recover from his intermediate landholder the whole of the road cess, paid in respect of the land, less half the tax assessable on the amount of the poruppu. The period of limitation for this is six years, under Art. 120 of the Limitation Act. 9 M.L.W. 286, Foll. 90 Ind. Cas. 973 = 22 M.L.W. 258 = A.I.R. 1925 Mad. 1282 = 49 M.L.J. 462.

——Art. 120—Suit for mortgage money against persons other than mortgagor—Limitation—Starting point—T.P. Act, S. 68 (1) (c).

Under S. 68 (1) (*c*) of the T.P. Act, a suit for the mortgage money is maintainable against any person who is liable to repay the mortgage-money, whether he is the mortgagor or not. Art. 120 of the Limitation Act applies to such a suit and the starting point of limitation under that article is the date when the right to sue accrues. Such accrual would take place only when the mortgagee was deprived of his security. I.L.R. (1945) 2 Cal. 473 = A.I.R. 1949 Cal. 530.

——Art. 120—Suit under S. 68, Transfer of Property Act.

Limitation for a suit for recovery of money under S. 68, T.P. Act is governed by Art. 116 or Art. 120 A.I.R. 1936 Rang. 80 = 161 Ind. Cas. 461.

——Art. 120—Suit for money decree against mortgagor.

A suit based on a mortgage for a money decree against the mortgagor brought within 6 years from the date of deed is not time-barred. 86 Ind. Cas. 693 = 120 O.L.J. 114 = A.I.R. 1925 Oudh 394.

——Art. 120—Personal remedy against mortgagor.

When a mortgagee is deprived of the security under a decree of a Civil Court, he is entitled to proceed personally against the mortgagor and the time for such a suit runs from the date the mortgagee was evicted from the land. 89 Ind. Cas. 56 = 3 Rang. 60 = A.I.R. 1925 Rang. 223.

——Art. 120—Claim for recovery of purchase price under S. 93, Punjab Land Revenue Act.

There is no specific article of the Limitation Act that would govern a claim for recovery of purchase price under the statutory provisions of S. 93, Punjab Land Revenue Act and the only article that can be made applicable is Art. 120, Limitation Act. A.I.R. 1945 Lah. 164 = 47 P.L.R. 122 = 221 Ind. Cas. 524.

——Art. 120—A suit by vendor against the vendee for recovery of interest paid by the former to the mortgagee on account of delay on the part of the vendee to pay the mortgage money is governed by Art. 120. (1932) A.L.J. 556 = A.I.R. 1932 All. 454 = 142 Ind. Cas. 83.

——Art. 120—Sale of goods—Goods left in vendor's possession as security for price—Re-sale—Suit for personal decree for balance—Limitation—Starting point.

Where the goods sold are allowed to remain in the custody of the vendor as security for the unpaid price of the goods and the vendor sues the vendee for a personal decree against him for the balance due to him after re-sale of the goods, the suit is not governed by Art. 120 but by the three years rule of limitation so far as the personal liability of the defendant is concerned.

In such a case where the contract is for outright sale and there is no stipulation that the accounts should be settled after the goods have been re-sold in the market by the purchaser, time for instituting a suit for the price runs from the date of the initial purchase. A.I.R. 1931 All. 229 = (1931) A.L.J. 363 = 132 Ind. Cas. 422.

——Art. 120—Suit for recovery of payment from *darpatnidar* if usufruct of property is insufficient is not governed by Art. 120. 35 C.W.N. 678 = A.I.R. 1931 Cal. 493 = 134 Ind. Cas. 75.

——Art. 120—Misappropriation—By agent.

Where one person acts as agent of two principals and uses money belonging to one principal for benefit of the other principal, there is no advancing of loan by one principal, to the other the borrower and the lender being the same person. A suit to recover such money by the principal to whom it belonged is covered by Art. 120 and time begins to run from the time when demand is made by that principal. 98 Ind. Cas. 1010 = A.I.R. 1927 All. 173.

——Art. 120—Misappropriation—By agent.

Where an agent sells goods entrusted to him by his principal and retains the proceeds which the principal has an equitable right to follow in his hands, the period of limitation applicable will be a period of six years. 10 Cal. 860 (P.C.), Foll. 106 Ind. Cas. 35 = 1 L.C. 587 = A.I.R. 1927 Oudh 574.

——Art. 120—Mortgage—Suit on dower-debt.

A registered deed executed by Mahommedan husband long after the marriage promising to pay dower then still due from him, on demand and hypothecating

certain immovable properties as security for its due payment, converts the dower debt into a mortgage debt ; and to a suit on such deed for the amount of the dower, six years rule of limitation is applicable. 99 Ind. Cas. 553 = A.I.R. 1927 All. 268.

——**Art. 120—Dissolution of marriage.**

Art. 120 of the first Schedule applies to a suit for a dissolution of marriage or for a declaration that a divorce had taken place between the parties. 65 Ind. Cas. 452 = 8 O.L.J. 650 = A.I.R. 1922 Oudh 109.

——**Art. 120—Matters referred to arbitrator—Suit after his death.**

Per SESHAGIRI AIYAR, J.—A suit instituted after the death of the arbitrator in regard to matters referred to and not disposed of by him is governed by the residuary Art. 120. 33 M.L.J. 46 = 41 Ind. Cas. 581.

——**Art. 120—Restitution of conjugal rights—Suit for.**

A suit for restitution of conjugal rights, if the wife was not of full age and of sound mind at the time the restitution was demanded and refused, is governed by Art. 120. (1906) 11 C.W.N. 437 = 34 Cal. 79.

——**Art. 120—Suit for arrears of assessment—Art. 120.**

A suit by *inamdar* for arrears of assessment due from the *khctedar* is governed by Art. 120. 25 B. 556 and 5 Bom. L.R. 700 foll. (1904) 6 Bom. L.R. 423.

——**Art. 120**—Inapplicability of to suit for surplus sale-proceeds after sale for arrears of revenue. *See* 31 C. 745.

——**Art. 120**—Suit for sale of pledge. *See* 27 M. 528 = 13 M.L.J. 445 (F.B.).

——**Arts. 120 and 32—Encroachment on public road.**

Suit for removing encroachment on a public road and not on the property of any particular person is governed by Art. 120 and not by Art. 32. 124 P.R. 1912 ; A.I.R. 1921 Lah. 242 and 2 L.L.J. 463, foll. 110 Ind. Cas. 517 = 29 P.L.R. 308 = A.I.R. 1928 Lah. 792.

——**Arts. 120 and 32—Removal of trees—Suit for.**

Suit for removal of trees planted on agricultural land is governed by Art. 32 and not by Art. 120. 7 O.L.J. 301 = 23 O.C. 163 = 57 Ind. Cas. 476.

——**Art. 120—Removal of trees—Suit for—Limitation.**

A suit by the landlord for the removal of trees wrongfully planted by a person is governed by Art. 120 of the Limitation Act. The suit must be confined to trees planted within six years immediately preceding its institution. 6 O.L.J. 329 = 52 Ind. Cas. 858.

——**Arts. 120, 52 and 56—Suit for recovery of money due on contract to supply labour and materials.**

A suit for the recovery of the price of work done and materials supplied on a contract to build a house comes under Art. 120 ; Arts. 52 and 56 are inapplicable to the case. 103 P.R. 1913 = 81 P.L.R. 1914 = 22 Ind. Cas. 576.

——**Arts. 120, 59 and 60—Debtor taking possession of the estate of his creditor as executor—Death of such executor—Appointment of new administrator—New cause of action.**

A debtor taking possession of the estate of his creditor as executor, is accountable for the amount of his debts to the estate as assets. On the appointment of a new administrator after the death of such debtor executor, a new cause of action arises rendering the estate of the said debtor-executor accountable both as regards his own said debt as also regarding the general estate of the said deceased creditor remaining in his hands at the time of his death, and a suit by the new administrator to recover from the executor of the deceased debtor's estate, the property and effects of the deceased creditor —to wich Art. 120, applies—would not be barred within six years of the death of such debtor-executor. (1903) 7 C.W.N. 476,

——**Arts. 120 and 61.**—A suit to recover money paid for minor's necessaries is not governed by Art. 120, but by Art. 61. A.I.R. 1940 Mad. 106=50 L.W. 323=(1939) M.W.N. 798 = I.L.R. (1940) Mad. 27 = 190 Ind. Cas. 101.

——**Arts. 120 and 61.**

The plaintiff was a certified guardian of the defendant during her minortity. He had to spend moneys from time to time, for the benefit of the minor, and when the income was short, he spent out of his pocket in the hope that in good years he might be able to realise a better income and reimburse himself. The defendant, on attaining majority, made an application to the District Court that her property should be ordered to be restored to her by the plaintiff. That application was opposed by the plaintiff on the ground that he should be allowed to remain in possession until the amount which he had spent out of his pocket was paid out of the income of the property. The Judge however, passed an order on April 5, 1935, that the plaintiff should hand over possession of the property to the defendant. Accordingly, the plaintiff delivered possession of the property on April 10, 1935, and filed a suit on July 13, 1935 to recover the amount which he had spent out of his own pocket for the benefit of the minor :

Held, that the suit was governed by Art. 120 and not by Art. 61. The cause of action accrued to the plaintiff on April 10, 1935, when he handed over possession of the property to the defendant. The suit was therefore, within time. A.I.R. 1939 Bom. 394 = 41 Bom. L.R. 585 = 184 Ind. Cas. 611.

——**Art. 120**—Applicability—Conditons. *See* Limitation Act, Arts. 62 and 120. 223 Ind. Cas. 493=A.I.R. 1947 A. 256.

——**Arts. 120 and 62—Money lost by theft—Suit by victim for recovery lies on basis thatmoney has been received for victim's use—Suit falls under Art. 62 and not Art. 120.**

A person who has suffered from tortious act of another can always waive the tort and if money has been stolen from him he can sue for recovery of money on the basis that money has been received for his use and consequently suit must be framed as one for money had and received, in which case it is governed by Art. 62 and not Art. 120. Of course if he likes he may sue for recovery of damages by way of compensation, but here again period of limitation will be three years. A.I.R. 1941 Mad. 391 = (1941) 1 M.L.J. 27 = 53 M.L.W. 54 = 1941 M.W.N. 24 = I.L.R. 1941 Mad. Mad. 414.

——**Art. 20—Equitable claim.**

Suit to enforce equitable claim is governed by Art. 120 and not by Art. 62. 1941 N.L.J. 665.

——**Arts. 120 and 62.**—A declaration was obtained by a decree holder that no one should be allowed to withdraw any sum out of the decretal amount deposited in the Court to his credit by the judgment-debtor. Another person subsequently alleging to be the holder of a decree against the same judgment-debtor attached and withdrew a part of the deposit. The first decree-holder, therefore, brought a suit for the recovery of this amount from the second decree-holder.

Held, that at the time when the second decree-holder withdrew the amount in question, he did not do so for the plaintiff's use. In fact he set up an adverse title to the claim of the plaintiff. His case was that the money did not belong to the plaintiff but to the judgment-debtor. Article 62 did not, therefore, apply to the suit. The suit was governed by Art. 120. A.I.R. 1939 Cal. 413 = 69 C.L.J. 108 = 182 Ind. Cas. 860.

——**Arts. 120, 62 and 109.**—A suit for recovery of rent realised by the defendant but to which the plaintiff was entitled, falls either under Art. 62 or Art. 120 but not under Art. 109. 18 P.L.T. 162 = A.I.R. 1937 Pat.

237 = 3 B.R. 434 = 16 Pat. 184 = 168 Ind. Cas. 502 (D.B.).

——**Arts. 120 and 62.**—One *E* died instestate on January 1896 leaving some next of kin. Letters of administration were obtained to her estate by her daughter. That daughter died on April 4, 1905, and her son the defendant obtained probate of her will. His mother had put aside a sum of money said to be some Rs. 17,413-8-0 as share of one of the brothers of *E* whose whereabouts were unknown. The defendant deposited this money in a Bank on interest. The present plaintiff obtained letters of administration *de bonis son* on December 21, 1938, to the estate of *E*. The defendant paid over to her the sum of Rs. 17,413-8-0 as the share of the brother. The plaintiff applied on an originating summons seeking to make the defendant account for all interest obtained or which may be deemed to have been earned by this sum of Rs. 17,000 since 1905 and for an inquiry as to what moneys came into his hands.

Held, that Art. 120 and not Art. 62 applied. A.I.R. 1935 Cal. 511 = 62 C. 120 = 157 Ind. Cas. 936.

——**Arts. 120 and 62—Suit for recovery of subscription.**

Where a person promised a certain sum of money as personal contribution for the purpose of construction of a bridge by the plaintiff and also collected a certain sum for the same purpose and the plaintiff sued him for these amounts :

Held, that Art. 120, and not Art. 62 governed the case as it was open to the plaintiff to claim the amount only after the work was begun and some steps were taken towards the construction of the bridge. (1933) M.W.N. 368 = 64 N.L.J. 574 = 37 L.W. 631 = A.I.R. 1933 Mad. 524 = 143 Ind. Cas. 496 (D.B.).

——**Arts. 120 and 62—Counter-claim for premium in suit for rent.**

In a suit for rent counter-claim by the defendant for money paid by him as premium is governed by Art. 62 and not Art. 120, Limitation Act since such payment is illegal under S. 8, Bombay Rent (War Restrictions) Act. 33 Bom. L.R. 1563 = A.I.R. 1932 Bom. 86 = 135 Ind, Cas. 801.

——**Arts. 120 and 62**—Pleader drawing money from court for client—Action against pleader's representative—Limitation—Starting point. *See* Art. 62. 1902 A.W.N. 191 = 25 A. 55.

——**Arts. 120, 115 and 65—Debt payable in kind.**

A claim for recovery of a debt payable in kind falls under Art. 65 or 115 and not under Art. 120. 65 Ind. Cas. 691 = 4 L.L.J. 268 = A.I.R. 1922 Lah. 271.

——**Arts. 120 and 68—Administration bond.**

A suit to enforce the bond by a person to whom it is assigned under S. 292, Succession Act is a suit upon bond within the meaning of Art. 68. A.I.R. 1941 P.C. 6 = 53 L.W. 212 = 1941 O.W.N. 4 = 43 B.L.R. 346 = 72 C.L.J. 497 = 43 P.L.R. 138 = (1941) 1 M.L.J. 88 = 1941 M.W.N. 321 = 1941 Bom. 202 = 1941 Kar. (P.C.) 11 Sup. = 67 I.A. 416 = 193 Ind. Cas. 225 (P.C.).

[Overruling A.I.R. 1936 Bom. 363 = 60 Bom. 1027 = 165 Ind. Cas. 672.]

——**Art. 120—Suit on surety bond.**

The condition of the surety bond was broken in 1931 during the minority of the ward and the suit on the bond was instituted in 1937 :

Held, that the suit was barred by limitation. A.I.R. 1943 Pat. 218 = 22 Pat. 114 = 9 B.R. 260 = 206 Ind. Cas. 126.

——**Arts. 120 and 84—Solicitor's costs—Lien for suit to enforce.**

Consent decree—Enforcement of solicitor's lien for costs by separate suit—Article 120 and not Art. 84 is applicable. 34 Bom. L.R. 670 = A.I.R. 1932 Bom 378 = 138 Ind. Cas. 832.

——**Arts. 120 and 110—Suit for recovery of perpetually fixed annual amount—Limitation.**

A suit for recovery of perpetually fixed annual amount where the relationship of landlord and tenant does not exist between the parties and the amount claimed is not by way of rent, is governed by Art. 120 and not Art. 110. 1945 M.W.N. 17 = (1944) 2 M.L.J. 250 = A.I.R. 1945 Mad. 20 = 57 L.W. 531.

——**Arts. 120 and 115—Provident Fund money—Suit for recovery—Limitation.**

A suit for recovery of the amount standing to the credit of the plaintiff in the Provident Fund of Calcutta Corporation is governed by Art. 120 and not by Art. 115. I.L.R. (1944) 1 Cal. 463 = A.I.R. 1945 Cal. 144.

——**Arts. 120, 115 and 97—Suit for money due by defendant for money received by him.**

A suit by a judgment-debtor to recover the amount realised by the decree-holder in excess is governed by Art. 120 or Art. 115 and not by Art. 97. 33 P.L.R. 1084 = A.I.R. 1933 Lah. 112 = 140 Ind. Cas. 472.

——**Arts. 120 and 111—Compromise—Amount due under.**

Under a compromise in a suit for partition of joint property, in order to adjust the difference between the prices of the properties which fell to the share of the two contesting parties, a certain sum was to be paid by *D* to *B*. The amount was to be paid after one month. *B* brought a suit to recover the amount. *D* contended that the suit was time-barred according to Art. 111.

Held, that it was not a case of sale and amount in suit could not be described as purchase money. Therefore Art. 111 did not apply but the case was governed by Art. 120. 111 Ind. Cas. 29 = A.I.R. 1928 Lah. 662.

——**Arts. 120 and 123**—Art. 123 applies to an application for recovering an annuity payable under a will and not Art. 120. A.I.R. 1940 Pat. 254 = 6 B.R. 224 = 185 Ind. Cas. 626.

——**Arts. 120 and 131—Periodically recurring right—Recovery of arrears.**

Both reliefs for establishment of a periodically recurring right as well as for recovery of the arrears as a consequence of such right claimed in one and the same suit—Article 131 applies to the first relief—Article 110 or 62 or failing any such article, Article 120 may apply to the second relief. A.I.R. 1937 All. 57 = (1936) A.L.J. 1384 = 1936 A.W.R. 1025 = I.L.R. (1937) All. 140 = 166 Ind. Cas. 823.

——**Arts. 120 and 131—Claim to Yeomiah allowance.**

As the right to receive *Yeomiah* allowance is a perpetual right and not a recurring one, a suit by a *mutawalli* in which the plaintiff claims to be perpetually entitled to receive the same, must be governed by Art. 120 and Art. 131 has no application to such suits. (1920) M.W.N. 394 = 12 L.W. 100 = 39 M.L.J. 492 = 58 Ind. Cas. 788.

——**Arts. 120 and 132—Suit in the nature of mortgage suit.**

Held, on facts that the suit being in its nature a mortgage suit the article applicable was Art. 132 and not Art. 83 or 120. (1933) M.W.N. 486 = 38 L.W. 818 = A.I.R. 1934 Mad. 1 = 66 M.L.J. 4 = 57 M. 218 = 149 Ind. Cas. 379.

——**Arts. 120 and 132—Hypothecation—Suit to enforce.**

A suit to enforce the hypothecation of property to secure the payment of grain falls under Art. 132 not Art. 120 or Art. 116. 24 C.L.J. 348, Not foll. 65 Ind. Cas. 697 = 5 N.L.J. 224 = 18 N.L.R. 111 = A.I.R. 1922 Nag. 23.

——Arts. 120 and 132—Turn of worship.

A turn of worship at a temple is not immovable property and so not within Art. 132 but Art. 120. 46 Cal. 455 = 22 C.W.N. 994 = 47 Ind. Cas. 25.

——Arts. 120 and 148—Redemption suit.

Where a mortgagor sued for redemption of the mortgage after sale of the equity of redemption contrary to the provisions of O. 34, R. 14, C.P.C. and purchased by the mortgagee decree-holder. *Held*, Per SANDERSON, C.J.—A suit appropriately framed for that purpose would be governed by Art. 120 of the Limitation Act. 47 Cal. 377 = 24 C.W.N. 229 = 31 C.L.J. 98 = 55 Ind. Cas. 157 (F.B.).

——Art. 120—Redemption suit—Agreement for redemption only after payment of principal and interest.

In a redemption suit based upon a mortgage deed providing for redemption only on payment in full of principal and interest due, the mortgagee can get interest up to the date of redemption and his claim for interest cannot be limited to six years as in Art. 120. 73 P.L.R. 1914 = 41 P.W.R. 1914 = 22 Ind. Cas. 528.

——Art. 120—Order under Land Registration Act (B.C.) refusing to register. *See* Art. 144. 11 C.W.N. 186 = 4 C.L.J. 568.

——Art. 120—U.P. Acts—Tenancy Act. S 199 (a)—Defendant referred to a civil suit—Suspension of ordinary period of limitation and substitution of the one provided by Act. *See* U.P. Acts—Tenancy Act, S. 199 (*a*). 30 A. 44 = 1907 A.W.N. 282 = 4 A.L.J. 713.

1. (b) Applicability and Scope—Residuary provision.

——Art. 120—Applicability.

Where a specific article is applicable the residuary Art. 120 does not apply. 58 M.L.W. 555 = 1945 M.W.N. 671 = (1945) 2 M.L.J. 422 = A.I.R. 1946 Mad. 116 = 224 Ind. Cas. 21.

——Art. 120—Where the statute, by an express article deals with a specific case, that article must prevail over the general provisions. A.I.R. 1940 Bom. 20 = 41 Bom. L.R. 1223 = I.L.R. (1939) Bom. 721 = 186 Ind. Cas. 509.

——Art. 120—Scope—General and special articles.

A general article does not govern a case when there is a particular article covering it. 13 N.L.J. 209 = A.I.R. 1931 Nag. 47 = 130 Ind. Cas. 157.

——Art. 120—Art 120 is applicable only when a case cannot fall under any other article of the Act. 108 Ind. Cas. 49.

——Art. 120—Art. 120 should not be invoked if there is any other article in the schedule, which upon reasonable interpretation of the language seems to cover the particular suit with which the Court is dealing. 7 O.W.N. 769 = A.I.R. 1930 Oudh 395.

——Art. 120—Art. 120 is a residuary article and applies only when no other specific article governs the case. 92 Ind. Cas. 994 = A.I.R. 1926 Lah. 242.

——Art. 120—Art. 120 should never be invoked if there is any other article in the schedule which upon a reasonable interpretation of its language seems to cover the particular suit with which the court is dealing. 75 Ind. Cas. 922 = A.I.R. 1924 All. 828.

——Art. 120—The provision of Art. 120 by its very terms can come into operation when there is no other article of the schedule that can be invoked as laying down a period of limitation for a particular suit. 69 Ind. Cas. 971 = 20 A.L.J. 945 = 45 All. 169 = A.I.R. 1923 All. 58.

——Art. 120—Residuary provision.

Art. 120, is a residudary provision which can only be applied where there is no other article specially applicable to the case. 9 Bur. L.T. 130 = 36 Ind. Cas. 418.

——Art. 120—Applicability.

Art. 120 applies only when no other article is applicable to a suit. 50 Ind. Cas. 6 (Lah.).

——Art. 120—Applicability.

Art. 120 of the Act will apply only where no other article is applicable. 37 Mad. 381 = 11 M.L.T. 325 = (1912) M.W.N. 516 = 22 M.L.J. 485 = 14 Ind. Cas. 254.

——Art. 120—An article of the Limitation Act, which fully applies to a particular case should not be thrown aside because it might create hardship in other cases. (1907) 6 C.L.J. 535.

——Art. 120—When to be applied.

The court ought not to regard a case as coming under Art. 120, unless clearly satisfied that it does not come under one of the many articles dealing with specific cases. (1905) 32 C. 527 = 1 C.L.J. 167.

2. Accounts.

——Art. 120—Applicability.

Suit under S. 79 of the Lunacy Act against the manager of a lunatic's estate. *See* LIMITATION ACT (9 of 1908), ARTS. 89 AND 120—APPLICABILITY. 1947 O.A. (C.C.) 273 = A.I.R. 1949 Oudh 51.

——Art. 120—Applicability—Recovery by a divided brother from third parties of partible family property together with mesne profits—Suit by the other brother for his share of the property and profits and for an account—Claim for an account—Maintainability—Limitation—Starting point.

Sometime after a decree for partition between two brothers, one of them filed suits against a third party (to which the other brother was made a defendant) in respect of family property which was admittedly partible between the brothers but which owing to circumstances beyond their control could not be included in the suit for partition and there was a joint decree for possession with a direction for mesne profits being determined subsequently. Applications for ascertainment of mesne profits were duly made and decrees passed and the amounts were realised by the plaintiff in those suits. In a suit by the representatives of the other brother for partition by metes and bounds of the properties so recovered and for recovery of a half share therein and for an account of the moneys expended in connection with the later suits, and also for recovery of a half share of the mesne profits recovered in the later suits, it was contended that the relief in respect of accounts was not maintainable and that in any event the suit was barred by time.

Held, after the decree for partition the two brothers must be deemed to be in the position of tenants-in-common in respect of the lands recovered and the moneys collected by one of them represent the income of the lands and the brothers would be entitled to equal moieties of such income. The legal position is exactly similar to that in a case where one co-owner or tenant-in-common is in possession and enjoyment of the entire common property nd has received the rents and profits from it. In such a case, the other co-owner or tenant-in-common would be entitled to ask for an account from the other in possession and enjoyment and recover a half share of the net income, that is to say, the income realised less all legal and permissible deductions and allowances. It is only on taking account that the net income, if any, in which the co-sharers will each be entitled to a moiety can be ascertained. To a suit for such an account the proper article applicable is article 120 and limitation would start to run from the

date of the earliest denial by the defendant of the plaintiff's title. 63 L.W. 845 = (1950) 2 M.L.J. 459 = A.I.R. 1951 Mad. 234.

——**Art. 120—Suit for accounts by one co-tenant against another.**

An action for accounts by one co-tenant against the other not being an action for money had or received is governed by Art. 120, not by Art. 62 or Art. 89. A.I.R. 1940 Cal. 363 = I.L.R. (1940) 1 Cal. 110 = 189 Ind. Cas. 642.

——**Art. 120—Suit for accounts between co-tenants.**

Money due to tenants-in-common which has been received by one or more tenants to exclusion of the rest is not money had and received within the meaning of Art. 62. Moreover, as the liability is neither *ex contractu* nor *ex delicto*, Arts. 115 and 36 have no application. Again Art. 109 cannot be applied as the profits are not wrongfully received, the parties being co-sharers ; consequently, a co-sharer's suit for accounts against other co-sharers falls within Art. 120. A.I.R. 1937 Pesh. 28 = 168 Ind. Cas. 41.

——**Art. 120—Co-tenant's right to claim accounts—Starting point of limitation.**

There is nothing in Art. 120, warranting the view that where a defendant is, as a matter of fact, a co-tenant of property with the plaintiff, he can bar the latter's subsisting right to ask him for accounts by merely denying that the plaintiff is a co-tenant. So long as the defendant is a co-tenant with the plaintiff, the latter has a right to ask for accounts. His right accrues continually as income comes into the co-tenant's hands. But his right is countinually barred by Art. 120 when the account sought is more than six years old. A.I.R. 1938 Lah. 139 = 182 Ind. Cas. 426.

——**Art. 120—Co-owners—Suit for accounts.**

A suit for accounts by one co-owner against another who has received more than his share of the income of the property is governed either by Art. 120 or Art. 89. Whether one or the other article applies depends upon the circumstances of each case. A.I.R. 1943 Bom. 216 = 45 Bom. L.R. 424 = 208 Ind. Cas. 340.

——**Art. 120—Denial of claim to account—Defendant must specify date.**

In a case governed by Art. 120, the plea of limitation must fail when the defendant is unable to specify the particular date at which the claim to an account was denied by him. In such a case, account of the whole period should be taken and recovery ordered. A.I.R. 1943 Bom. 216 = 45 Bom. L.R. 424 = 208 Ind. Cas. 340.

——**Art. 120—Suit for accounts by one co-owner against another—Starting point of limitation.**

A suit for accounts by one co-owner against another co-owner in sole possession of property belonging to the co-owners is governed by Art. 120, and the right to sue accrues only when there is a demand for accounts and a refusal to render them. Where there has been no demand for accounts and refusal to render the same, the plaintiff is entitled to an account from the defendant for the entire period during which the defendant was in sole possession of the property. A.I.R. 1941 Sind 50 = I.L.R. (1940) Kar. 534 = 194 Ind. Cas. 137.

——**Art. 120—Suit by ward against guardian for rendition of accounts.**

Art. 89 only applies if the suit is by a principal against his agent. It does not apply to a suit by a ward against a guardian for rendition of accounts. Guardian is not an agent of the ward, and the relationship between them is not of principal and agent but is in the nature of a fiduciary relationship. To such a suit, article applicable is 120 and not 89. A.I.R. 1943 Pat. 218 = 22 Pat. 114 = 9 B.R. 260 = 206 Ind. Cas. 126.

——**Art. 120—Suit for accounts by ward—Power of Court to prescribe limitation.**

A Court has no authority whatever to lay down a period of limitation different from that prescribed by the Limitation Act within which the suit is to be filed by a ward against the guardian for accounts and to impose a penalty on the ward if the suit is not filed within the period named by it. A.I.R. 1940 Rang. 246 = 191 Ind. Cas. 108.

——**Art. 120—Accounts—Suit against Receiver.**

A suit for accounts against a Receiver appointed under O. 40, Civil P.C. is governed by Art. 120. A.I.R. 1942 Cal. 483 = I.L.R. (1942) 1 Cal. 577 = 75 C.L.J. 1 = 46 C.W.N. 294 = 202 Ind. Cas. 389.

——**Art. 120—Suit by pawnor against pawnee.**

A executed a pro-note in favour of bank for the loan advanced to him by the bank and lodged certain shares which he had been holding in the bank as security for the loan under the pro-note. After *A*'s death, the bank sold the shares and the money due to the bank was adjusted, the balance being kept in the suspense account to be paid to *A* or his heirs. No notice of the sale was given and *A*'s wife instituted a suit for accounts against the bank in respect of the bank shares which stood in the name of her husband and for payment of balance to her after debiting her with any liability incurred by her husband touching the shares :

Held, that when the shares were being placed with the bank by way of security, the plaintiff's husband's position could not be of a principal and the bank's position that of an agent. The bank was not being asked to do anything by the plaintiff's husband on his behalf. He was depositing the shares with the bank by way of security. He was, therefore, a pawnor and the bank a pawnee. When the bank sold the shares to realise their debt, they were not acting in the capacity of an agent but in that of a creditor entitled to recover his money by sale of the security under the terms of his contract. That they failed to give any notice to the owner of the shares before the sale does not in any way help them. They committed a grave irregularity in having failed to give a notice as required by S. 176, Contract Act, and cannot, by their action abridge the period of limitation or contend that it should be held to have started on the date of the sale of which the plaintiff had no knowledge. The contract of pledge could not be, in the absence of a reasonable notice to sell held to terminate the pledge or the relationship of pawnor and pawnee with the consequence that the money in the hands of the bank could not be held to have been received for the plaintiff's use at any rate when the sale was not recognised to be valid by the owner of the articles pledged by him. Article 89 could thus have no application. The defendant bank may not have been trustees for a specific purpose and S. 10 may not apply but in their capacity as bailees, they were liable to render accounts to the plaintiff for the shares delivered to them by her husband. A suit for accounts must be in such circumstances, not being provided for by any other article, held to be governed by Art. 120. 55 L.W. 90 = A.I.R. 1942 Mad. 386 = 1942 M.W.N. 129 = (1942) 1 M.L.J. 274 = 206 Ind. Cas. 539.

——**Art. 120—Dispute as to property—Agreement between parties that one of them may collect rents and account to the rightful claimant—Suit for account by successful party.**

Held, that the effect of the agreement was to constitute the defendant's husband a receiver of the income and the period of limitation applicable to the suit was that prescribed in the residuary Art. 120 and the right to sue arose only on the date of the decision upholding the validity of the will, namely, August 26, 1920. A.I.R. 1936 Mad. 170 = 161 Ind. Cas. 843.

——Art. 120—Suit for accounts of trust funds.

The claim for an account of the corpus of the trust funds which became vested in the trustee falls within the ambit of S. 10 and is not barred by limitation; but a claim for an account of the interest which the trustee ought to have earned for the trust funds but failed to earn is governed by Art. 120. A.I.R. 1940 Rang. 207 = 1940 Rang. L.R. 273 = 195 Ind. Cas. 61.

——Art. 120—Suit by one firm against another for accounts—Relationship between two akin to that of trustee liable to account though no specific trust created—Suit, held governed not by Art. 89 but by Art. 120. 49 L.W. 608 = A.I.R. 1939 Mad 671 = (1939) M.W.N. 360 = 189 Ind. Cas. 31.

——Art. 120—Account against trustee—Suit for.

The Article applicable to an equitable claim against a trustee, liable to account, for an account and ascertainment of what may be due, is Art. 120 and not Art. 62 and limitation does not begin to run until the "right to sue" accrues, *i.e.*, until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant. Consequently the plea of limitation fails when the defendant is unable to specify the particular date at which the claim to an account was denied by him. 11 I.A. 59 and 59 M.L.J. 621 (P.C.), *foll.* 35 C.W.N. 145 = A.I.R. 1931 P.C. 9 = 60 M.L.J. 1 (P.C.).

——Art. 120—Suit against trustee de son tort.

A suit for accounts against the trustee *de son tort* is governed by Art. 120. A.I.R. 1941 All. 1 = (1940) A.L.J. 705 = I.L.R. (1940) All. 815 = 1940 A.W.R. (H.C.) 607 = 193 Ind. Cas. 697.

——Art. 120—Art. 120 applies to a suit for accounts against a trustee *de son tort*. 84 Ind. Cas. 631 = 22 A.L.J. 866 = 5 L.R.A. Civ. 697 = 47 All. 17 = A.I.R. 1924 All. 884.

——Art. 120—Suit by widow of deceased co-parcener for accounts against surviving co-parcener.

A suit for rendition of accounts was instituted by a widow of a deceased co-parcener against one of the surviving co-parceners. The suit was not one for possession of any specific sum, for the amount recoverable could not be exactly known as the person in possession was entitled to deduct his expenses of management:

Held, that Art. 120 applied and not Arts. 48, 49 or 62. A.I.R. 1938 Lah. 139 = 182 Ind. Cas. 426.

——Art. 120—Suit for accounts without prayer for dissolution of partnership.

When the agreement of partnership expressly lays an obligation on certain partners as managing partners to render accounts at the close of each year, a suit by other partners for accounts without a prayer for dissolution of partnership can be maintained and such a suit for purposes of limitation is governed by Art. 120. 16 N.L.J. 10 = 29 N.L.R. 34 = A.I.R. 1933 Nag. 127 = 141 Ind. Cas. 277 (2).

——Arts. 120 and 106—A suit for accounts in respect of a partnership which has already been dissolved is governed by Art. 106 and not by Art. 120. A.I.R. 1933 Mad. 353 = 37 M.L.W. 288 = 1933 M.W.N. 689 = 144 Ind. Cas. 573.

——Art. 120—Suit for partition of estate of deceased Muhammedan—Demand for accounts of income from manager for more than six years—Maintainability.

Where, in a suit for partition of the estate of a deceased Muhammedan, his widow asked for accounts and profits of her share from the brother's son of the deceased who was managing the estate for a period of ten years:

Held, that the right to sue for partition, being a continuing one, arose when there was a demand and a refusal for accounts and profits, and that the plaintiff's right to demand on account of the income could not be held to be barred under Art. 120, though the period for which it was demanded was more than six years. A.I.R. 1933 Mad. 200 = 142 Ind. Cas. 708.

——Arts. 120 and 89—Principal and agent.

Where there was no specific contract of agency between the parties Art. 120 should be applied and not Art. 89. A.I.R. 1922 Mad. 150 (F.B.), *foll.* 114 Ind. Cas. 364 = A.I.R. 1928 Mad. 1236.

——Arts. 120 and 89—Suit against agent—Contract Act, Ss. 201 and 209.

Under the provisions of S. 201 of the Contract Act, an agency is terminated by either the principal or agent dying, and therefore a suit against the agent for accounts for the period during which he acted as agent under the deceased must be brought within three years of the death as laid down in Art. 89. 43 Cal. 248 and A.I.R. 1916 P.C. 148, *foll.*

The case does not come under S. 209 of the Contract Act or Art. 120 as there is no question in it of suing the defendant for any act done by him after the death of his late principal which he might have done as a trustee. 65 Ind. Cas. 219 = 26 C.W.N. 320 = A.I.R. 1922 Cal. 53.

——Art. 120—Starting point—Suit for accounts.

Where the cause of action arises before agent's death in a suit against his legal representatives, limitation has no fresh starting point after the agent's death—Articles 89 and 120 apply to such cases. 84 Ind. Cas. 276 = 35 M.L.T. 84 = 1924 M.W.N. 517 = A.I.R. 1924 Mad. 840 = 47 M.L.J. 483.

——Art. 120—Accounts.

Where there is no question of breach of contract or compensation payable for such breach, but parties were to look into the accounts of each other to equalize the profit, each trading independently of other, and a suit is brought to take such an account and ascertain who owes whom, and give a decree for the amount payable,

Held, that the suit cannot be treated as a suit for compensation and it does not fall under Art. 115. The general Art. 120 would, therefore apply. 11 C.L.J. 43 and 14 C.W.N. 122, *not foll.* A.I.R. 1927 Mad. 775.

——Art. 120—Claim founded on decree.

Per *Spencer, Offg. C.J.*,—Article 120 is the proper article, for suits to enforce obligations, arising out of decrees. But the fact must not be lost sight of that Art. 120 is a residuary article and can only be applied when no other article is found suitable. Hence, where the claim is founded on a decree on a compromise, unless it is shown that Art. 64 will not apply to the claim, as set out in the plaint, the plaintiff cannot get six years, under Art. 120.

Per *Srinivasa Aiyangar, J.*—Though the claim may be for accounts, yet where the claim has merged in a compromise decree, Art. 64 cannot apply because it is an article for the recovery of the money, on accounts stated between the parties and Art. 115 cannot apply, because the suit is not merely on a contract between the parties. In the absence of any other appropriate article to be applied to such a suit the proper article to be applied is Art. 120. 27 Mad. 243, *foll.* 91 Ind. Cas. 338 = 22 M.L.W. 195 = A.I.R. 1925 Mad. 1260.

——Art. 120—Duty to account incidental to management.

Article 62 does not apply to transactions, in which the defendant is not under a mere duty to hand over the money which he received, but has other duties as well in respect of it. Where, therefore, under a partition deed it was arranged that the senior co-parcener and the minor should enjoy their share of the property jointly and as manager it was the duty of the senior co-parcener

not merely to account for the money received, but to pay the kist and the other expenses as well as to maintain the minor

Held that Art. 62 does not extend to such transaction; the article applicable is Art. 120, 40 Mad. 291, *Foll.* 61 Ind. Cas. 762 = 13 M.L.W. 260 = A.I.R. 1921 Mad. 553.

——Art. 120—Suit for account.

In a transaction for sale the original purchaser got an unregistered deed executed by the owner in his favour. The purchaser then entered into a contract with a third person on certain conditions evidencing the arrangement by an exchange of letters. The third person got the property from the buyer and the owner by a document reciting that the transaction between the purchaser and the owner was dissolved and disregarded the conditions of sharing profits on the ground of the buyer's failure to abide by the contract within time. A suit for declaration by the buyer that he was absolute owner was brought but was dismissed for default of presence. The purchaser applied for restoration and amendment of plaint with an alternative prayer of compelling the third person to execute the document of arrangement. The suit was withdrawn with permission to bring a fresh one upon which a new one was instituted. *Held* (1) the partnership was created without condition or contingent on *kararnama*, (2) that that was dissolved as the pleadings, in the declaratory suit repudiated the contract. (3) the third and final suit being after more than six years from the date of dissolution of the partnership was barred under Art. 120, Lim. Act, (4) that the buyer could not bring the present suit claiming relief as partner according to O. 2, R. 2, C. P. Code as the cause of action in both the present and the previous suits was based on the contract of partnership and he had brought the previous one for establishing his right. 58 Ind. Cas. 969 (Mad.).

——Art. 120—Suit for accounts.

A suit against a *karta* of a joint Hindu family for an account is governed by Art. 120 of Lim. Act. 32 C.L.J. 25 = 58 Ind. Cas. 877.

——Art. 120—Suit for accounts against executor.

A suit by a beneficiary to recover money misappropriated by an executor or administrator must be brought within six years of the termination of administration. Also an action for account against an executor or administrator is barred within six years of the termination of administration. 7 M.L.T. 123 = 5 Ind. Cas. 832.

——Art. 120—Executor, suit against, for accounts. *See* S. 10. 10 Bom. L.R. 117 = 32 Bom. 364.

3. Avoidance of decree.

[*See* also NOTE 11 (*e*)].

——Art. 120—Suit by minor on ground of guardian's negligence.

Obiter, Per *Diavle, J.*—There is an obvious difference between avoiding a decree and being entitled to ignore it, *i.e.*, to treat it as a nullity. In the former case, the question of limitation arises. No article of the Limitation Act specially deals with the negligence of a guardian or a manager. The court must therefore fall back upon the residuary article, Art. 120, which describes a period of six years from the time "when the right to sue accrues." 16 P.L.T. 484 = 14 Pat. 824 = A.I.R. 1936 Pat. 231 = 2 B.R. 423 = 162 Ind. Cas. 235.

——Art. 120—Suit by Court of Wards.

Obiter, Per *Mohammad Noor, J.*—A suit to set aside a decree on ground of gross neglect of the guardian is governed by Art. 120. Time runs when the Court of Wards becomes aware of the negligence of the guardian. A.I.R. 1936 Pat. 231 = 16 P.L.T. 484 = 14 Pat. 824 = 2 B.R. 423 = 162 Ind. Cas. 235.

——Art. 120—Setting aside decree—Misconduct of guardian.

Where in a suit falling under Art. 120, the cause of action is not merely the passing of an adverse decree against the minor, but in addition to it the fact that such a decree was passed by reason of the misconduct or gross negligence of his guardian *ad litem*, limitation should not begin to run the moment the decree was passed, but only when gross negligence of the guardian which alone would entitle the minor to have the decree set aside became known to him. 120 Ind. Cas. 880 = 30 M.L.W. 911 = A.I.R. 1930 Mad. 173 = 58 M.L.J. 349.

——Arts. 120, 91 and 95—Suit to set aside a consent decree where fraud is not alleged.

A suit to set aside a consent decree where fraud is not alleged or proved is maintainable and is governed by Art. 120 and not Art. 91 or 95. 61 C.L.J. 193 = 39 C.W.N. 938 = (1935) 62 C. 642 = 164 Ind. Cas. 561.

——Art. 120—Suit to set aside decree.

Reference to arbitration against minor in suit—No leave of Court under O. 32, R. 7—Decree against minor on award—Suit for setting aside decree is governed by Art. 120—Right to sue accrues when the plaintiff got knowledge of decree. 33 Bom. L.R. 1033 = A.I.R. 1931 Bom. 500 = 134 Ind. Cas. 1221.

——Art. 120—Voidable decree.

A decree which is voidable can only be set aside by a regular suit or by bringing an application for review to the Court that passed the decree. The period prescribed is given by Art. 120 ; where a decree is voidable it is voidable from the very date on which it is passed and consequently limitation for a suit to set aside such a decree upon the ground that it is voidable begins to run from the date of the decree itself. 83 Ind. Cas. 782 = 46 All. 575 = 22 A.L.J. 521 = 5 L.R.A. Civ. 785 = A.I.R. 1924 All. 625.

——Art. 120—Arts. 95, 44 and 91 of the 1st Schedule to the Limitation Act do not apply to a suit to have a decree set aside but the article applicable would be 120. 62 Ind Cas. 794 = 4 L.L.J. 211 = 2 Lah. 164 = 79 P.L.R. 1921 = A.I.R. 1922 Lah. 166.

4. Avoidance of document.

[*See* also NOTE 11 (*d*)]

——Arts. 120 and 91—Suit for possession and cancellation of instrument.

Where the relief sought for by the plaintiff is for possession and the cancellation of an instrument is only subsidiary to the main relief, Art. 91 does not apply but Art. 120 governs the case. 1935 A.W.R. 1113 = 1935 R.D. 461 = A.I.R. 1935 All. 1018 = 158 Ind. Cas. 434.

——Art. 120—Applicability—Wording of plaint to escape Art. 91.

Litigants should not be encouraged to claim the benefit of the general Article 120 by going out of their way to word their plaint so as to escape the application of Article 91. 37 All. 640 = 13 A.L.J. 913 = 29 Ind. Cas. 968.

——Art. 120—Suit to avoid fraudulent transfer—Limitation—Starting point.

Under Art. 120, the period of limitation for a suit by a creditor to avoid a transfer under S. 53, T.P. Act begins to run only from the date on which the plaintiff comes to know of the transfer in question.

The right of a creditor to institute a suit to avoid a transfer under S. 53, T.P. Act, is an individual right, though, when it is exercised, it enures for the benefit of the general body of the creditors, and the inaction of one creditor to sue after becoming aware of the transfer cannot bar another creditor from instituting

a suit within six years from the date on which he became aware of the transfer. 31 P.L.R. 1014 = A.I.R. 1931 Lah. 70 = 12 L. 262 = 130 Ind. Cas. 778.

——**Art. 120—Fraudulent transfer—Suit to set aside—Starting point.**

Per *Venkatasubba Rao, J.*—A suit under S. 53, Transfer of Property Act, to contest an alienation by a debtor is governed by Art. 120 of the Limitation Act and the starting point of limitation is the date on which the plaintiff decides to exercise his option of avoiding the transfer and not the date of transfer.

Madhavan Nair, J. dissenting.—The starting point for limitation is not the date on which the creditor exercises the option to avoid the transfer nor the date of transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him. 92 Ind. Cas. 405 = 22 M.L.W. 592 = A.I.R. 1926 Mad. 66.

——**Art. 120—Fraudulent transfer—Starting point.**

A suit by a creditor to avoid an alienation by his debtor as being fraudulent comes within Art. 120 of the Lim. Act. The cause of action for such a suit does not arise on the date of alienation but on the date the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. S. 53 of the T.P. Act does not expressly give a right to sue but only an option to sue and the cause of action arises when the option is exercised. 17 Bom. 341, *Foll.* 7 L.W. 280 = (1918) M.W.N. 244 = 44 Ind. Cas. 551.

——**Arts. 120, 91 and 95—Avoidance of document—Fraudulent transfer.**

A suit by a creditor to set aside a fraudulent transfer is governed by Article 120 and not by Art. 91 or 95. 2 L.W. 479 = (1915) M.W.N. 337 = 29 Ind. Cas. 62.

——**Art. 120—Avoidance of document—Lease by mortgagor.**

A perpetual lease of the mortgaged property by mortgagor is permanently injurious to the property and it renders the security insufficient within S. 68 and a suit by mortgagee to avoid the lease is governed by Limitation Act, Art. 120. Limitation runs if not from the date of the lease certainly from the date when the mortgagee acquires knowledge of the lease. 100 Ind. Cas. 728 = 4 O.W.N. 228 = A.I.R. 1927 Oudh 148.

——**Art. 120—Cancellation of a Will.**

A suit for cancellation of Will is governed by Art. 120 and not Art. 91. 23 Cal. 1 (P.C.), *Foll.* 96 Ind. Cas. 835 = A.I.R. 1926 Lah. 635.

——**Art. 120—Suit to set aside will—Limitation—Punjab Limitation Act (1 of 1900).**

A declaratory suit for setting aside a will, is governed by Art. 120 of the Limitation Act. The Punjab Limitation (Ancestral Land Alienation) Act (1 of 1900) does not apply to such suits. 30 P.L.R. 1915 = 200 P.W.R. 1915 = 27 Ind. Cas. 574.

——**Art. 120—Avoidance of will.**

A suit to declare an unregistered will as forged and beyond the power of the testator to make, is governed by Art. 120 and time runs from the time the plaintiff comes to know of the existence of the will. Art. 91 does not apply to wills. Art. 92 does not apply to the case of a will which is neither "issued" nor "registered" Art. 93 does not apply when no attempt to enforce the will against plaintiff has been made. 82 P.L. R. 1909 = 88 P.W.R. 1909 = 4 Ind. Cas. 923.

——**Arts. 120 and 144—Suit by heir—Sale of property by administrator.**

A sale by the administrator of the estate of the deceased of such estate without leave of the Court is void and can be impeached by the heirs within 12 years from the date of the sale. 9 L.B.R. 186 = 12 Bur. L.T. 27 = 50 Ind. Cas. 324.

——**Arts. 120 and 125—Suit by adopted son to set aside alienations by maternal grandmother—Cause of action.**

A suit by adopted son to set aside alienations by his maternal grandmother is governed by Art. 120 of the Act and the cause of action for the suit arises from the date of the plaintiff's adoption. 38 Mad. 396 = (1913) M.W.N. 588 = 14 M.L.T. 89 = 25 M.L.J. 219 = 20 Ind. Cas. 625. *CF.* 42 Mad. 659 = 40 Ind. Cas. 202 (F.B.).

——**Arts. 120 and 134—Avoidance of document—Suit for possession of mutt property alienated by head of mutt.**

A suit for possession of mutt properties alienated by its head is governed by Art. 134 or 144 according as the head is a trustee or a life tenant; and time runs from the date of the alienation or when possession begins to be adverse. Possession adverse to the institution is equally adverse to the plaintiffs, suing on its behalf. 41 Mad. 1124 = 33 M.L.J. 357 = 22 M.L.T. 218 = 6 L.W. 666 = 42 Ind. Cas. 366.

——**Art. 120—Suit under Ss. 39, 42, Specific Relief Act.**

The articles applicable to suits under S. 39 of the Specific Relief Act is either 91 or 120, Sch.II, Limitation Act. (1902) 25 A. 1 = 29 I.A. 203 = 4 Bom. L.R. 832 = 6 C.W.N. 849 (P.C.).

5. Award.

——**Arts. 120 and 144—Applicability—Award in arbitration—If can create interest in immovable property—Suit for possession based on award—Limitation.**

A suit for possession of immovable property based upon an award creating an interest in such property is governed by Art. 144 and not by Art. 120 of the Limitation Act, even though neither party had sought to enforce the award by suit or summary procedure.

The question whether an award in arbitration would create an interest in property depends upon the terms of the award and upon the authority of the arbitrator making the award. If the arbitrator had the necessary authority, and by the terms of the award an interest is created, then such award is capable of creating an interest in property. I.L.R. (1948) Bom. 309 = 49 Bom. L.R. 731 = A.I.R. 1948 Bom. 101 (F.B.).

——**Arts. 120 and 144—Applicability—Award creating title to immovable property—Suit for possession of such property—Limitation—Award—Binding character of.**

It is the relief claimed by the plaintiff and not the basis on which the claim is made that really determines the question of limitation.

A suit to recover possession of immovable property on the basis of title created by an award in arbitration, is essentially a suit for possession of immovable property governed by Art. 144, Limitation Act. It is not a suit to enforce an award and hence Art. 120 does not apply. An award must have its full legal effect and it is binding on the parties as much as a decree of Court, and the binding character of the award is not shaken by reason merely of the fact that no steps were taken to make the award a decree of Court or that the steps taken proved infructuous. I.L.R. (1948) Bom. 610 = A.I.R. 1949 Bom. 64 = 50 Bom. L.R. 604.

——**Art. 120—Award—Suit on.**

It cannot be said that all suits, irrespective of their nature, which are based on an award must be governed by Art. 120. A.I.R. 1929 Rang. 275.

——**Art. 120—Suit to enforce awards are governed by Art. 120 and not by Art. 115 or Art. 113. 117 Ind. Cas. 153 = 23 S.L.R. 417 = A.I.R. 1929 Sind 168.**

——**Art. 120—A suit to enforce an award is governed by Art. 120. 59 Ind. Cas. 755 = 45 Bom. 329 = A.I.R. 1921 Bom. 389.**

——**Art. 120**—A suit to enforce the payment of money directed to be made under an award as payable in instalments and charged by the award on immovable property is in effect, to enforce a payment which the award directs to be made at certain dates and the time from which limitation begins to run is the date of the instalments defaulted and not the date of the award. 111 Ind. Cas. 881 = 30 Bom. L.R. 675 = A.I.R. 1928 Bom. 264.

——**Art. 120**—A suit to enforce an award comes under Art. 120. 91 Ind. Cas. 1032 = 49 Bom. 693 = A.I.R. 1925 Bom. 519.

——**Arts. 120, 113 and 115—Suit on award—Limitation.**

A suit based on an award is governed by Art. 120 and not by 113 or 115 whether the award is signed by the parties or not. 102 P.R. 1915 = 190 P.W.R. 1915 = 32 Ind. Cas. 88.

——**Art. 120—Suit on award.**

A suit based on an award cannot be considered to be a suit on a contract and is governed by Art. 120. 31 Ind. Cas. 816 (Mad.).

——**Art. 120—Suit on award—Compensation for breach of the award.**

A suit to recover compensation for breach of the award is governed by Art. 120. 6 S.L.R. 148 = 19 Ind. Cas. 376.

——**Art. 120—Award—Execution—Limitation—Starting point.**

An award becomes enforceable as a decree when it has been filed and it is only then that the question of execution can arise. Hence, the limitation for execution of award does not run from the date of award. (1935) 62 C. 833 = 61 C.L.J. 515.

6. Claim suit.

——**Art. 120—Objection to attachment before judgment—Claim suit.**

Claim suits arising out of objections to attachments before judgment are for purposes of limitation governed by Art. 120. A.I.R. 1934 Pat. 580 = 1 B.R. 42 = 16 P.L.T. 304 = 152 Ind. Cas. 297.

——**Arts. 120 and 11—Objection of son of judgment-debtor allowed—Claim suit by decree-holder.**

Where an objection by the son of the judgment-debtor was allowed on the ground that there was no attachment and the decree-holder filed a suit to have it declared that the transfer in favour of the objector was fraudulent :

Held, the suit was governed by Art. 120 and not by Art. 11. A.I.R. 1933 Lah. 449 = 34 P.L.R. 443 144 Ind Cas. 378.

——**Art. 120—Claim suit by person not party to execution proceedings.**

A claim suit by a person not a party to execution proceedings is governed by Art. 120. 33 P.L.R. 759 = A.I.R. 1932 Lah. 516 = 138 Ind. Cas. 412.

——**Art. 120—No decision on merits—Declaratory suit.**

Rejection of claim under O. 21, R.58 without decision on merits—Suit for declaration of title is not governed by Art. 120, Limitation Act. (1930) A.L.J. 1322 = 130 Ind. Cas. 200.

——**Arts. 120 and 11—Suit to contest order on claim.**

A suit to contest an order on a claim against attachment before judgment followed by execution after decree is governed by Art. 11 and not Art. 120. 79 Ind. Cas. 917 = 34 M.L.T. 193 = A.I.R. 1925 Mad. 49.

——**Art. 120**—Where there is an order in execution for the sale of the attached property, that order proceeds upon the footing that the property is to be considered as attached in execution by virtue of O. 38, R. 11, C.P.Code and a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11. Cases not governed by Art. 11 must be governed by Art. 120. 70 Ind. Cas. 439 = 44 Mad. 902 = 14 M.L.W. 645 = 1921 M.W.N. 569 = A.I.R. 1921 Mad. 163 = 41 M.L.J. 252 (F.B.).

7. Claim to Office.

——**Arts. 120 and 125—Claim to office.**

Where a person is admittedly the lawful holder of an office and he is enjoying his emoluments, he must in law be regarded as being in possession of the office itself, especially where no one else is performing the duties of the office. He has the right to bring a suit at any time when the performance of his duties is interfered with. He is not, however, bound to take action whenever there is interference with the performance of his duties, if it does not suit him. He can abide his time. Every time there is interference with the performance of his duties, there is a fresh wrong which would give rise to a fresh cause of action. Hence to such a case, Art. 120 or 124, has no application. (1940) M.W.N. 1232 = A.I.R. 1941 Mad. 81 = 52 L.W. 919 = (1940) 2 M.L.J. 990 = I.L.R. (1941) Mad. 275 = 192 Ind. Cas. 870 (F.B.).

——**Art. 120—Removal of mutwalli.**

Article 120 applies to a suit to remove an unauthorised *mutwalli*. (1939) 41 P.L.R. 166.

——**Art. 120—Suit for removal from office—Mutwalli—Ouster.**

A suit for declaration that a *mutwalli* or imam should be ousted owing to change in his religious views is governed by Art. 120 ; the period begins to run from the date of change in views. 53 P.R. 1909 = 2 Ind. Cas. 107.

——**Art. 120—Suit for declaration that person is not shebait.**

A suit for a declaration that a certain person is not a *shebait* and that a *neogpatra* executed in favour of such person by a former *shebait*, is invalid, will be governed by Art. 120, if and when it is proved that the *shebaitship* was not hereditary. 68 C.L.J. 230 = A.I.R. 1938 Cal. 709 = 42 C.W.N. 1138 = 177 Ind. Cas. 898.

——**Art. 120—Suit to recover non-hereditary office and declaration.**

Suit by plaintiff to recover office which is not hereditary and to have it declared that he was the lawful trustee or manager of a religious endowment is one which is governed by Art. 120. 1936 M.W.N. 1159.

——**Art. 120—Suit to recover possession of temples and properties endowed to them from person managing them—Limitation.**

Where in a suit to recover possession of the temples of the villages and the properties endowed to them against the defendant who was in possession and management of the temples and the properties, defendant set up a right in himself and claimed them adversely to the villagers :

Held, that the defendant was in possession of an office within the meaning of the explanation in Col.3, Art. 124, Lim. Act, and that the office not being a hereditary one, the suit was governed by Art. 120. A.I.R. 1935 Mad. 449 = (1935) M.W.N. 503.

——**Arts. 120 and 124—Hereditary office.**

If the real claimant to a hereditary office allows his rights to the office to get barred by limitation, those who are next in succession to him should also be deemed to have lost their rights.

A suit for declaration of title to a hereditary office is governed by Art. 124 and not by Art. 120. (1931) M.W.N. 8 = A.I.R. 1931 Mad. 505 = 133 Ind. Cas. 193.

——Art. 120—Claim to office—Mutwallishiip.

The office of mutwallishiip not being a hereditary one, a suit to oust a person from his office as mutwalli is regulated by Art. 120 of the Act, and if no suit has been brought to oust him by reason of his having held the office for over six years he would acquire an indefeasible right to hold the office of Mutwalli and would acquire a complete title for the purposes of litigation or anything connected with the endowment. 99 Ind. Cas. 205 = 44 C.L.J. 339 = 31 C.W.N. 184 = A.I.R. 1927 Cal. 130.

——Art. 120—Claim to office—Succession by nomination.

Where succession to a religious office is by nomination by the holder in office of his successor, it is not a hereditary succession within Art. 124.

The only article applicable to cases of succession after nomination is Art. 120. Article 144 also is not applicable as the claim to possession is also barred if the claim to office is barred under Art. 120. 97 Ind. Cas. 437 = A.I.R. 1926 Mad. 1012 = 51 M.L.J. 258.

——Arts. 120 and 124—A claim to an office and property attached to it is governed by Art. 124 if the office is hereditary and by Art. 120 if the office is not hereditary. 60 Ind. Cas. 165 = 32 C.L.J. 151.

——Art. 120—Claim to office—Declaration of right to manage dharmasala.

A claim for a declaration that after the owner's death, plaintiffs were entitled to be managers and supervisors of a *dharmasala* belonging to the owner, is barred by time if brought after 6 years. 125 P.W.R. 1917 = 11 P.R. 1918 = 41 Ind. Cas. 636.

——Art. 120—Suit for removal from office—Starting point.

A suit to remove a *Pandarasannadhi* from office falls under Art. 120 and time runs from the time he took charge of his office and not from the time of his appointment as *Chinnapatam*. 32 M.L.J. 271 = 40 Ind. Cas. 627.

——Arts. 120 and 124—Claim to office—Mutawalli.

A claim to office and to property appurtenant thereto, may be barred by limitation. If the office is not hereditary Art. 120 is applicable. If it is hereditary, Art. 124 governs it. 14 M. 153 ; 21 M. 278 ; 23 M. 271 ; 6 C.L.J. 621, *Foll.* 37 Cal. 263 = 14 C.W.N. 497 = 11 C.L.J. 304 = 3 Ind. Cas. 419.

8. Companies.

——Art. 120—Applicability

Application for rectification of register of company. *See* COMPANIES ACT (8 OF 1913), S. 38. (1949) 2 M.L.J. 88 = I.L.R. (1950) Mad. 339.

——Art. 120—Suit by liquidator to recover unpaid call amounts.

The period of limitation applicable to a suit brought by a Liquidator of a public company to recover the unpaid amount of calls from a share-holder is six years from the date of default under Art. 120. A.I.R. 1935 Lah. 335 = 38 P.L.R. 587 = 16 L. 1055 = 156 Ind. Cas. 951.

——Arts. 120 and 117—Call order by liquidation Court in Baroda—Suit on it—Limitation.

Under S. 199, Companies Act, all orders made by a liquidation Court though they are not decrees may be enforced in the same manner in which the decrees of such Court made in any suit pending therein may be enforced. Consequently, a call order passed by a liquidation Court in Baroda is not a foreign judgment and a suit on it in British India, therefore, is governed by Art. 120 and not by Art. 117. 38 P.L.R. 662 = A.I.R. 1935 Lah. 975 = 17 L. 341 = 160 Ind. Cas. 346.

——Art. 120—Applicability.

Suit by company to recover money due to it which had been realized by one who had obtained a decree against it—Realisation pending winding up—Starting point. *See* LIMITATION ACT (9 OF 1908), ARTS. 62 AND 120. 1947 A.L.W. 56 = A.I.R. 1948 A. 75.

——Arts. 120 and 36—Suit for damages against directors for misrepresentation in prospectus.

A suit for damages against the directors of a company on the ground that due to their misrepresentations in the prospectus of the company, the plaintiff was indeed to take shares and thereby sustained loss is not governed by Art. 120 but by Art. 36. 57 L.W. 312 = A.I.R. 1944 Mad. 431.

——Arts. 120, 115 and 116—Application by Liquidator for damages against director—Limitation.

An application by a liquidator under S. 235, Companies Act, for damages for misfeasance or for breach of contract by directors, is governed for purposes of limitation by Art. 120 and not by Art. 115 or 116 of the Limitation Act. A.I.R. 1937 Pat. 293 = 3 B.R. 477 = 168 Ind. Cas. 786.

——Art. 120—Misfeasance.

Voluntary liquidation of company—Subsequent compulsory winding up order—Official Liquidator appointed—Application by Official Liquidator against managing directors charging them with misfeasance—Article 120 is applicable. (1933) A.L.J. 1203 = A.I.R. 1933 All. 789 = 3 A.W.R. 201 = 55 A. 912 = 145 Ind. Cas. 893 (F.B.).

——Art. 120—Company—Misfeasance of director.

Article 120 is the appropriate article for a suit against directors for misapplication of the company's funds in *ultra vires* transactions. Time runs from the earliest date "when the specific injury actually arose" within S. 24 of the Limitation Act.

Held, that in the particular case it commenced from he date on which the balance sheet showing the losses ascertained was laid before the company at its general meeting. 54 Bom. 226 = 32 Bom. L.R. 232 = A.I.R. 1930 Bom. 572.

——Art. 120—Misfeasance of Directors of Companies.

A right to sue for misfeasance of directors of companies arises from the date of misfeasance and is governed by Art. 36 or Art. 120. 128 Ind. Cas. 477 = 1930 M.W.N. 966 = 32 L.W. 555 = A.I.R. 1931 Mad. 58 = 54 Mad. 153 = 60 M.L.J. 280.

——Art. 120—Damages against delinquent directors.

Article 120 is the only article applicable to an application under S. 235 of the Companies Act ; and time begins to run only after the appointment of the liquidator. 88 Ind. Cas. 785 = 23 A.L.J. 473 = 6 L.R.A. Civ. 425 = 47 All. 669 = A.I.R. 1925 All. 519.

——Art. 120—Suit for dividends.

A suit by share-holder of a Limited Company for recovery of arrears of dividend is a claim for debt and is governed by Art. 120. It is not a claim arising out of contract within the meaning of Art. 115. 42 Mad. 33, *Overruled.* 94 Ind. Cas. 515 = 49 Mad. 468 = 1926 M.W.N. 450 = 24 M.L.W. 102 = A.I.R. 1926 Mad. 615 = 50 M.L.J. 520 (F.B.).

9. Compensation and Damages.

——Arts. 120, 115 and 39—Applicability—Suit for compensation for use and occupation after notice to vacate.

Where a party has lawfully entered into possession of a property, his remaining upon it after the determination of the lease and notice to quit does not constitute a trespass upon the property in the required sense. A suit for compensation therefore against that party for use and occupation of the property even after the

notice to quit, is not governed either by Art. 39 or Art. 115. The case clearly falls within the scope of Art. 120. 1946 A.W.R. (H.C.) 516 = 1946 A.L.J. 305 (2) = A.I.R. 1947 A. 31.

——**Arts. 120, 110 and 115—Suit for compensation for use and occupation against ex-tenant.**

A suit to recover compensation for use and occupation from an ex-tenant who remains in possession after the determination of the tenancy without the consent of the landlord is governed by the residuary Art. 120, Limitation Act. Neither Art. 110 nor Art. 115 applies to such a suit. A.I.R. 1946 All. 447 = 224 Ind. Cas. 201 = 1946 A.W.R. (H.C.) 198 = 1946 A.W.R. (Rev.) B. 118.

——**Arts. 120 and 115—Suit for compensation for use and occupation.**

In a suit instituted for the assessment of fair and equitable rent and for the recovery of compensation for the use and occupation of the land, where the defendants are perfectly willing to pay reasonable rent according to contract and do not agree with the plaintiff only as to the figure at which a reasonable rent should be fixed it cannot be said that they are guilty of any breach of an implied contract. Article 115 does not, therefore, apply to such a suit which is governed by Art. 120. A.I.R. 1940 Cal. 400 = 190 Ind. Cas. 631.

——**Art. 120—Compensation for use and occupation.**

Limitation for a suit for a fair and equitable sum for the use and occupation of land, is six years. (1938) 67 C.L.J. 74 = 41 C.W.N. 1090.

——**Arts. 120 and 110—Suit for damages on the basis of rent.**

When a purchaser under a revenue sale who has an option to annul an under-tenure under S.37, Bengal Land Revenue Sales Act, 1859, annuls the under-tenure without receiving any rent from the holder of it, and sues the holder for damages calculating the same on the basis of rent, it is a suit for damages and not for rent and is governed by Art. 120 and not by Art. 110. 69 C.L.J. 220 = A.I.R. 1939 Cal. 468 = 43 C.W.N. 469.

——**Arts. 120 and 2—Act performed under powers given by statute, but compensation provided by statute not awarded—Suit for compensation is governed by Art. 120, and not Art. 2.**

Where it is admitted that the act was performed under the powers given by the statute and the cause of action, alleged against the Secretary of State is a failure to allot the statutory compensation provided, then Art. 120, and not Art. 2 applies. A.I.R. 1939 Lah. 583.

——**Arts. 120 and 115—Suit for compensation.**

Municipal Committee holding cattle fair on land of certain person for several years—Agreement to compensate owner of land held to be implied—Suit for compensation—Article 115 and not Art. 120 held, applied. A.I.R. 1938 Lah. 267 = 178 Ind. Cas. 49.

——**Art. 120—Suit under S. 70, Contract Act.**

R and *N* borrowed Rs. 5,000 on a promissory note from *J* and *M*. *J* alone realised Rs. 5,000 on account of this promissory note from the debtors by means of a draft on them. *J* and *M* then sued *R* and *N* for recovery of Rs. 7,700 on the basis of the promissory note. The defence was that the promissory note had been discharged by the payment and this defence was upheld. It was held, however, that *J* had no authority to receive payment on behalf of *M*. Consequently, the suit by *J* was dismissed to the extent of half the claim, while the suit, so far as *M* was concerned, was decreed for half the amount in suit. *M* executed his decree to the extent of Rs. 1,200. Thereupon a suit was instituted by *R* to recover the sum of Rs. 1,200 from *J* on the ground that he had been made to pay Rs. 1,200 twice over by reason of his action and was, therefore, entitled to a decree against him for that amount.

Held, that the case fell under S. 70, Contract Act, and, therefore, either Art. 61 or Art. 120, applied but not Art. 96. The appropriate Article however, in the present case was Article 120. I.L.R. (1937) Lah. 623 = A.I.R. 1938 Lah. 99 = 40 P.L.R. 300 = 175 Ind. Cas. 588.

——**Arts. 120 and 22**—A suit for damages for enticement of the plaintiff's wife is governed by Art. 120 and not by Art. 22. A.I.R. 1936 All. 454 = 1936 A.W.R. 515 = (1936) A.L.J. 574 = 58 A. 903 = 163 Ind. Cas. 974.

Reversing A.I.R. 1935 All. 855 = 156 Ind. Cas. 556.

——**Art. 120—Compensation—Suit to enforce payment—Land Acquisition (Mines) Act, Ss 5 and 6.**

Lawful imposition of restriction under Ss. 5 and 6, Land Acquisition (Mines) Act—Persons interested become entitled to compensation—Cause of action arises on public authority refusing to pay—Article 120, Limitation Act, applies to suit to enforce payment. A.I.R. 1936 Pat. 513 = 2 B.R. 776 = 17 P.L.T. 279 = 15 Pat. 510 = 164 Ind. Cas. 860.

——**Art. 120—Suit for compensation for land acquired.**

Where the Government acquires land and pays the money to one who is apparently entitled to it, a suit by a person who has also got interest in the land claiming the money paid by the Government is governed by Art. 120. A.I.R. 1935 Pat. 42.

——**Art. 120**—Land Acquisition Act—Compensation suit for—When Collector refuses to make award Art. 120 applies. (1907) 11 C.W.N. 356 = 5 C.L.J. 669 = 34 C. 470.

——**Art. 120—Suit for compensation on basis of compromise merged in decree—Limitation.**

A suit for compensation based on a contract contained in a compromise which has merged in a decree is not governed by Art. 120 but by Art. 115. 12 Pat. 792 = A.I.R. 1934 Pat. 7 = 15 P.L.T. 197 = 148 Ind. Cas. 375.

——**Art. 120—Applicability—Suit to recover damages for breach of covenant of title.**

Quaere.—Whether Art. 120 would not be the proper article applicable to a suit to recover damages for breach of covenant of title. 124 Ind. Cas. 185 = 1930 A.L.J. 658 = A.I.R. 1930 All. 771.

——**Art 120**—Suit for damages against Collector for refusing to make award. 14 M.L.J. 173 = 27 M. 535.

——**Art. 120—Damages—Interest.**

Under Art. 120 damages for more than six years previous to the institution of the suit cannot be awarded. (1901) 5 C.W.N. 356.

10. Debts of father.

——**Arts. 120 and 147—Hindu father executing mortgage of joint family property to secure antecedent debt—Mortgage executed not as manager of joint family nor for family necessity—Suit upon mortgage against sons after father's death—Suit is not barred by three years or six years period of limitation—Suit brought within sixty years of due date is within time.**

Where the debt due by a Hindu father is a simple money debt, the liability of the sons by reason of the pious obligation to pay the debt incurred by the father, not being illegal or immoral, is co-terminus or co-extensive with the liability of the father. The debt would be barred so far as the father is concerned if more than three years have elapsed. The recovery of the debt so far as it is sought to be recovered from the sons would be barred if the suit in respect thereof is filed beyond that period of three years or taking it to be a suit to recover monies due by the son to the creditor by reason of the pious obligation to discharge the debts

of the father not being illegal or immoral it would be covered by Art. 120, Limitation Act.

In the case of a debt which is secured by a mortgage but is a present advance and not an antecedent debt the position of the sons is not all different as far as the recovery of the debt from their right, title and interest in other joint family properties is concerned, from what obtains in the case of a simple money debt incurred by the father. A decree obtained against the right, title and interest of the father in such a mortgage suit filed against the father during his lifetime can be executed even against the right, title and interest of the sons in the joint family property and the property would be liable to be sold in execution of that decree, unless the sons were successful in proving before the Court that the debt was not binding on them by reason of its being illegal or immoral. Where, however, no such decree is obtained, the creditor would be entitled, by reason of the pious obligation of the sons to pay the father's debts not being illegal or immoral, to proceed against the sons but he cannot succeed against them unless he filed a suit against them either within the six years period or three years period as held by the Allahabad and Madras High Courts.

Where, however, the alienation made by the father of the joint family property is for securing an antecedent debt, the sons under the pious obligation to pay the father's debts, have, by virtue of the debt being an antecedent debt, their right, title and interest in the joint family property also alienated by the very terms of the indenture of mortgage executed by the father. In the case of such antecedent debts, it is not open to the sons to contend that the father did not contract these debts as the manager of the joint family or for the purpose of family necessity. The alienation made by the father being deemed in law to be an alienation not only of the father's right, title and interest in the property but also of the sons, the subject-matter of the mortgage is the whole of the joint family property including the right, title and interest of the sons therein and the same is the subject-matter of the suit filed by the mortgagee for the realisation of that mortgage. It makes not the slightest difference to the position that when the suit is filed by the mortgagee the father is dead and that according to the strict position, in Hindu Law the right, title and interest of the father in the property has survived over to the other members of the joint family, *viz.*, the sons.

Where, therefore, a mortgagee files a suit upon an English mortgage executed by the father before 1st April, 1930, to secure an antecedent debt, not as manager of the joint family nor for the purposes of family necessity, against the sons after the father's death, the suit is not barred, if it is filed within sixty years of the due date under Art. 147. A.I.R. 1946 Bom. 499 = 48 Bom. L.R. 327 = 227 Ind. Cas. 135.

——Arts. 120 and 73—Suit to enforce—Promissory note.

Even though the sons may be under a pious obligation to pay their father's debt, a suit on a promissory note executed by the father brought after his death is not governed by Art. 120 but by Art. 73. 41 Bom. L.R. 896 = A.I.R. 1939 Bom. 464 = 186 Ind. Cas. 66.

——Art. 120—Suit on promissory note executed by father.

A suit on a promissory note executed by a Hindu father against his sons after his death, the liability to be imposed being in respect of the pious obligation of the son to pay his father's debts, is not governed by Art. 120 but by Art. 73. 33 Bom. L.R. 1234 = A.I.R. 1931 Bom. 542 = 135 Ind. Cas. 804.

——Arts. 120 and 132—Debt of father—Suit against sons—Limitation.

A suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adults and some minors, at the time of the mortgage, is governed by Art. 120 of the Limitation Act, and not by Art. 132, as there is no charge on immovable property enforceable against the sons. 42 Cal. 1068 = 21 C.L.J. 543 = 19 C.W.N. 849 = 29 Ind. Cas. 629 (F.B.).

——Arts. 120, 57, 62 and 89—Debts of father—Suit for recovery of, against sons.

To recover debts from son, the limitation is 6 years from the death of the father according to Art. 120. The articles 57, 62, 89 do not apply. 31 All. 429 = 6 A.L.J. 667 = 2 Ind. Cas. 118.

——Art. 120—Debt—Son's obligation to pay father's debts. 3 A.L.J. 274 = 1906 A.W.N. 117 = 28 A. 508.

——Art. 120—Suit against Hindu son for recovery of judgment-debt against father.

A suit based on the original cause of action against a Hindu son for recovery of a judgment-debt due from his deceased father is governed by Art. 120. (1907) 17 M.L.J. 281.

——Arts. 120 and 122—Son's liability to pay the judgment-debt of father—Suit against son.

A suit by the creditor to enforce as against the son the debt created by a judgment against the father is not "a suit upon a judgment." It is governed by Art. 120 and not by Art. 122. (1903) 14 M.L.J. 84 = 27 M. 243 (F.B.).

——Arts. 120, 182 and 183—Decree against Hindu father—Decree-holder can proceed at once against property in hands of his sons—He need not apply under Art. 120—In such cases either Art. 182 or 183 will directly apply. 2 Pat. 445 = A.I.R. 1932 Pat. 261 = 13 P.L.T. 719 = 139 Ind. Cas. 397.

11. Declaratory suit.

(a) Article applicable.
(b) Cause of action and starting point of limitation.
(c) Entry in Revenue Records.
(d) Setting aside alienation.
(e) Setting aside decree or order.

11. (a) Declaratory Suit—Article applicable

——Art. 120—Applicability—Suit for declaration of right to share in Toda Giras allowance—Limitation. *See* LIMITATION ACT, ART. 131. 49 Bom. L.R. 318 = A.I.R. 1947 Bom. 451.

——Art. 120—Applicability—Suit for declaration for setting aside mere assertion.

A suit for a declaration will not lie for setting aside a mere assertion. A mere declaration by a trustee that he proposes to hold the property as full owner is not an overt act which would start limitation running against the beneficiaries of a trust. I.L.R. (1946) Lah. 300 = A.I.R. 1947 Lah. 117 = 231 Ind. Cas. 421.

——Art. 120—Applicability—Representative suit on behalf of community for declaration.

Art. 120 of the Limitation Act does not apply to a representative suit on behalf of a community under O. 1, R. 8, C.P. Code, for a declaration that a certain property is wakf. It cannot be said that the community as such was even aware before the institution of the suit that their title was in jeopardy, although some members there of learnt about the assertion of adverse title by the defendant who was in possession of the property as *mutwalli*, as that does not mean that the assertion was

to the knowledge of the entire community. I.L.R. (1946) Nag. 518 = 1946 N.L.J. 511 = A.I.R. 1946 Nag. 401.

——**Arts. 120 and 14—Dismissal of public servant.**

A suit by a public servant for a declaration that an order of his dismissal is void and inoperative is governed by Art. 120 and not by Art. 14. A.I.R. 1943 Oudh 368 = 1943 O.W.N. 118 = 19 Luck. 163 = 207 Ind. Cas. 178.

——**Art. 120—Suit for mere declaration of title to land and not for possession.**

Where a suit is one for mere declaration of the plaintiff's title to certain land and is neither in form nor in substance a suit for possession of the land, Arts. 142 and 144, Limitation Act do not apply to such a suit. Such a suit is governed by Art. 120. A.I.R. 1942 P.C. 47 = 8 B.R. 831 = 1942 O.W.N. 508 = 55 L.W. 597 = (1942) 2 M.L.J. 384 = 44 Bom. L.R. 868 = 47 C.W.N. 38 = I.L.R. (1942) Kar. (P.C.) 122 (Sup.)=1942 A.W.R. 37 = 201 Ind. Cas. 499 (P.C.).

——**Arts. 120 and 131**—Suit by *mutawalli* for declaration that he is entitled to receive *Yeomiah* allowance attached to office of *mutawalli* is one to establish a periodically recurring right alleged to be attached to the office and is governed by Art. 131 and not by Art. 120. A.I.R. 1941 Mad. 428 = I.L.R. (1941) Mad. 587 = 53 L.W. 325 = 1941 M.W.N. 232 = (1941) 1 M.L.J. 374 = 199 Ind. Cas. 693.

——**Arts. 120 and 14—Suit for declaration that plaintiff was nearest heir of deceased *watandar* in preference to defendant.**

Upon the death of a representative *watandar*, the revenue authorities, after making inquiry, ordered that a certain person should be recognised as a representative *watandar* in the place of the deceased. Plaintiff brought a suit for declaration that he was the nearest heir of the deceased *watandar* in preference to the person appointed by the revenue authorities :

Held, that the suit was governed by Art. 120 and not by Art. 14 as the suit was not for setting aside the orders of the revenue authorities but one for a mere declaration. 40 Bom. L.R. 1288 = A.I.R. 1939 Bom. 56 = I.L.R. (1939) Bom. 123 = 179 Ind. Cas. 984.

——**Art. 120**—For a mere relief for a declaration, the article applicable would be Art. 120. A.I.R. 1939 Oudh 257=1939 O.W.N. 825=1939 A.W.R. 160=1939 R.D. 542=14 Luck. 723=183 Ind. Cas. 821.

——**Art. 120—Suit for declaration—Limitation.**

In the partition proceedings started in the year 1902, the plaintiffs' title to the land in dispute was denied at that time. The plaintiffs had never actually been in physical possession of the property in dispute :

Held, that the suit for declaration instituted on August 19, 1935, was clearly barred by time under Art. 120. A.I.R. 1938 Lah. 671 = 40 P.L.R. 940 = 181 Ind. Cas. 262.

——**Art. 20—Suit for declaration that certain land was graveyard and injunction.**

Certain Muhammadan residents sued on behalf of all the Muhammadan residents of the *Mohalla* for a declaration that certain property is a graveyard and for an injunction directing the defendants to remove the buildings erected by them on portions thereof :

Held, that as the acts of the defendants amounted to ouster of the plaintiffs from the use of the common land which was reserved for specific purpose, *i.e.*, for graveyard, the suit was governed by Art. 120. A.I.R. 1938 Lah. 254 = 178 Ind. Cas. 125.

——**Art. 120**—Where the suit is one for a bare declaration of the right to impose full assessment without consequential relief, Art. 120 does not apply. A.I.R. 1937 Mad. 303 = (1937) M.W.N. 189 = 173 Ind. Cas. 307.

——**Art. 120**—In a suit by a *zamindar* against Government for a declaration that an enfranchisement by the Government is not valid and binding on the *zamindar*, the period to be applied is not twelve years, and in general, Art. 120, Limitation Act, will apply to such suits. A.I.R. 1936 Mad. 313 = 68 M.L.J. 409 = 41 L.W. 689 =58 M. 141 = 162 Ind. Cas. 661.

—**Arts. 120 and 142—Suit for declaration—Article applicable.**

Where the suit is clearly one for declaration of the plaintiff's title and is neither in substance nor in form a suit for possession of immovable property and there is no suggestion of the plaintiff's dispossession or discontinuance of possession by the defendant, it is governed by Art. 120 and Art. 142 does not apply. 1936 O.W.N. 784 = A.I.R. 1936 Oudh 387 = 1936 R.D. 416 = 12 Luck. 371 = 164 Ind. Cas. 118.

——**Arts. 120 and 127—Plaintiff excluded from enjoyment of rights as coparcener—Suit for declaration and perpetual injunction—Limitation.**

The proper relief to be granted to a person who is excluded from the enjoyment of his rights as a coparcener by the other members of the family is a declaration of his rights and a decree for joint possession. A suit filed by one member for declaration that he is a member of a joint Hindu family and for a perpetual injunction against the defendants that they should not obstruct his participating in the management of the business is not one to enforce a right to share in joint family property. It is purely a declaratory suit with a consequential relief in the form of an injunction and hence Art. 120 applies and not Art. 127. A.I.R. 1935 Pesh. 95 = 157 Ind. Cas. 345.

——**Art. 120—Right to take procession over certain route.**

The plaintiffs, three *Nadars*, claimed for themselves individually and for their castemen the right to take marriage processions over a certain route composed of public streets in their village. The defendants were other castemen of the village who denied the right. An order had been passed in 1900 under S. 147, Criminal P.C., directing that no organised procession of *Shanars* or Christians should pass along the route until declaration of the right to do so was made by a Civil Court. The question was whether the Limitation Act applied to the suit and whether it was barred :

Held, that the Limitation Act was applicable to the suit. It is true that the right to use public streets, including the right to go in procession, is a natural right inherent in every member of the public, and cannot be prescribed against or lost as other rights may be prescribed against or lost. But that is not to say that where a suit has to be brought in order to obtain a declaration that such a right exists, the Limitation Act has no application. The appropriate article, governing the suit was Art. 120 and the suit was barred. (1935) M.W.N. 634 = 42 L.W. 599 = A.I.R. 1935 Mad. 967 = 69 M.L.J. 739 = 59 M. 75 = 161 Ind. Cas. 653.

——**Arts. 120 and 144—Grant of *inam* lands—Partition between *vahivatdars*—Sale by one *vahivatdar* of his share—Suit by heirs of other *vahivatdar* for declaration and injunction against alienee—Limitation.**

Certain lands were granted to a shrine of Jivanram Swamy, the family of the plaintiffs being the *vahivatdars*. The original grant which was a very ancient one, was continued by the British Government under *sanads* issued by the Inam Commission. The *sanad* was given to one *G* who had two sons *R* and *H*, of whom *R* was the father of the plaintiffs. *H* sold the suit property to *D* on June 7, 1914, and died childless

in 1919. On June 7, 1926, the heirs of *R* (plaintiffs) sued for a declaration that they are the managers and owners of the suit property and as such have the right to collect the income of the property and for an injunction directing *D* not to collect the income from the occupancy tenants :

Held, that the suit was not one simply for declaration and an injunction and Art. 120, did not apply, but that the suit was governed by Art. 144 and limitation having begun to run from June 7, 1914, the suit brought within 12 years of that date was in time. 34 Bom. L.R. 1469 = A.I.R. 1933 Bom. 26 = 141 Ind. Cas 103.

——**Art. 120—Property in *custodia legis*.**

A suit for declaration of title to property which is in *custodia legis* is governed by Art. 120. A.I.R. 1933 Bom. 276 = 35 Bom. L.R. 440 = 145 Ind. Cas. 190.

——**Art. 120—Applicability—Suit for declaration and possession of wakf property.**

A suit for a declaration that the plaintiffs are the Mutawallis of the trust property or a suit for possession of the office of the mutawalli are both governed by Art. 120. A.I.R. 1930 All. 866 = 129 Ind. Cas. 375.

——**Arts. 120 and 144—Suit for land in lieu of maintenance.**

A suit by a junior member of a family governed by rule of primogeniture for a plot of land in lieu of maintenance on the strength of family custom is governed either by Art. 120 or 144, the choice between the two provisions of law depending upon the question whether the suit is treated as one for declaration or for possession. Therefore when on the evidence it is proved that the defendant has been giving grain to the plaintiffs by way of maintenance and that the allowance was stpoped two years before the suit, the suit is clearly in time.

Articles 129 and 131 do not apply to such a case. 121 Ind. Cas. 428 = 11 Lah. 99 = A.I.R. 1929 Lah. 872.

——**Art. 120—Declaratory suit.**

Article 120 applies to all declaratory suits. 20 All. 35, *Foll.* 121 Ind. Cas. 209 = 1929 A.L.J. 794 = A.I.R. 1929 All. 529.

——**Art. 120**—A suit for declaration must be brought within six years of the cause of action unless there has been a fresh invasion of the plaintiff's right giving him a fresh cause of action. 31 All. 9 = 10 A.L.J. 413 = 11 A.L.J. 877 and 36 All. 492, *Foll.* 115 Ind. Cas. 629 (All.).

——**Art. 120—Right to emerged land.**

The land in suit had emerged out of the river Ganges which lay to the north of the village of Dhanapur of which the defendants were the owners. To the west of it, was a village called Arazi Dayara Dhanapur of which the plaintiffs were the mortgagees. The plaintiffs sued for a declaration that they were the owners of the village Arazi Dayara Dhanapur, that the land in suit had accreted to that village and therefore formed an accession to the village ; it was found that the plaintiffs were only mortgagees of village, that in spite of objections by the plaintiffs the village had been settled only with the defendants, by the Revenue authorities, and that the plaintiffs were never in possession of the lands at any time.

Held, that there was no law under which the land could be regarded as an accession to the village Arazi Dayara and that the suit having been brought more than six years after the cause of action for the declaration arose, was barred by time. 75 Ind. Cas. 35 = 21 A.L.J. 409 = 45 All. 461 = 4 L.R.A. (Civ.) 206 = A.I.R. 1923 All. 500.

——**Art. 120**—A suit for declaration of title to immovable property must be brought within six years from the date when the right to sue accrues. 65 Ind. Cas. 8 = 33 C.L.J. 592 = 26 C.W.N. 206 = A.I.R. 1922 Cal. 8.

——**Art. 120—Declaratory suit—Attached property.**

Where after dispossession of the real owner, the property was attached by the Magistrate under S. 146, Cr. P. Code.

Held, as the property was in legal custody for the benefit of the true owner a suit for recovery of possession was to be treated as one for declaration of title under S. 42 of the Specific Relief Act, and Art. 120, Limitation Act, was applicable and not 142. 65 Ind. Cas. 200 = 49 Cal. 544 = 26 C.W.N. 432 = A.I.R. 1922 Cal. 419.

——**Art. 120—Declaratory suit—Charge-holder.**

Where a third party has advanced money to the mortgagor to pay off the mortgage on the understanding that a further mortgage would be executed by the mortgagor, the third party has no legal title to the property and no charge to enforce within the meaning of Art. 132. He is only entitled to a declaration of his right to get a mortgage. His suit is governed by Art. 120. 60 Ind. Cas. 903 = 45 Bom. 597 = 23 Bom L.R. 84 = A.I.R. 1921 Bom. 182.

——**Art. 120—Declaratory suit—Application to withdraw sale proceeds refused.**

No question of limitation arises when after the application to withdraw the surplus sale proceeds has been refused a declaratory suit is brought. 47 Cal. 331 = 24 C.W.N. 294 = 31 C.L.J. 372 = 55 Ind. Cas. 639.

——**Art. 120—Declaration of title.**

A declaratory suit in respect of title to immovable property comes under this article. 36 Ind. Cas. 292 (Cal.).

——**Art. 120—Declaration of right of supervision.**

A suit for declaration that a Temple Committee has a right of supervision is governed by Art. 120 and if it is time-barred, rendering of accounts cannot be asked for. 4 L.W. 186 = 31 M.L.J. 857 = 35 Ind. Cas. 646.

——**Art. 120—Declaration of title—Consequential relief.**

Art. 120 applies to suits for declaratory relief but not to suits for declaration of title in which consequential reliefs are also joined. Where the land is in the possession of the plaintiff, time does not begin to run against him under Art. 120 of the Limitation Act, when an adverse entry is made against him in the Record of Rights but only when an actual claim is made by the defendant upon the strength of the entry. 23 C.L.J. 561 = 34 Ind. Cas. 702.

——**Art. 120—Declaration of title—Suit for—Dispossession—What amounts to.**

A proprietor who is prevented from collecting rent on account of a rival proprietor invoking the aid of a court of justice is as effectually dispossessed as if driven by force and Art. 120 of the Limitation Act has no application to such a case. 26 Ind. Cas. 368 (Cal.).

——**Art. 120—Suit to have Municipal election declared void and contrary to law.**

Where an election which ought to have been held under the rules framed in 1910 under the Act of 1890, was not so held, the special provision as to limitation made in those rules for a declaratory suit is inapplicable to a suit for a declaration that the election so held was void. Such a suit is governed by Article 120 of the Limitation Act. 35 All. 308 = 11 A.L.J. 349 = 20 Ind. Cas. 490.

——**Arts. 120, 142 and 144—Declaration of title and possession—Attachment of property under S. 146, Cr.P. Code—Delivery of symbolical possession to defendant.**

Property was attached under S. 146, Cr.P. Code on 7-3-1899. It remained under attachment till 26-2-1903, when the defendant No. 18 applied to the Magistrate to be put in possession as purchaser in execution of a decree against the defendant No. 1 the opponent of the plaintiff in the possession proceedings. Thereupon the Magistrate put him in possession. The plaintiff brought this suit for possession and for declaration of title on 28-2-1906 : *Held*, that Art. 120 of the Limitation Act, 1877, was not applicable to the suit and it was not barred although brought more than six years after the date of attachment. It was governed by Art. 142 or 144 of the Limitation Act. 16 C.W.N. 1073 = 16 Ind. Cas. 620.

—Art. 120—Applicability—Relief as to title auxiliary.

Where a claim for a declaration is merely auxiliary to the claim for some other relief and where the declaration appears necessary in order to give the plaintiff suitable and adequate relief upon his main claim the suit will be governed as regards limitation, merely by the article of the Limitation Act applicable in respect of the main relief claimed and not by Art. 120. 15 Ind. Cas. 545 (All.).

—Arts. 120 and 144—Declaration of title and possession.

Art. 144 applies to a case where the transferee of a portion of joint family property, from one of the coparceners, is in possession of it. Arts. 91 and 120 do not apply. 7 A.L.J. 783 = 6 Ind. Cas. 841.

—Art. 120—Declaration of title—Plaintiff in possession.

Where an application to register the applicant's name was refused but the applicant, was admittedly in possession, a suit by him for a declaration of title to the property is governed by Art. 120 of the Second Schedule to the Act. 1 Ind. Cas. 810 (Cal.).

——Arts. 120 and 131—Right to receive Tasdik-Declaration, suit for—Limitation.

A suit for a declaration that the plaintiff as Dharmakarta of a certain religious institution is entitled to receive direct from Government a certain Tasdik amount payable annually is governed by Art. 120 and not by Art. 131. Where the right to sue for such declaration accrued to the plaintiff more than 6 years before suit, he will be only entitled to a declaratory decree for that portion of the amount which appertains to the six years prior to suit. The adjudication of plaintiff's right will, however, be sufficient for the Government to act upon even in regard to the other years. (1903) 13 M.L.J. 267.

——Art. 120—Suit for declaration. *See* 4 C.L.J. 568= 11 C.W.N. 186.

11. (*b*). Declaratory suit—Cause of action and starting point of limitation.

——Art. 120—Collection by zamindar of rent on pre-settlement inam land not liable to pay rent—Suit for declaration that inamdar was entitled to enjoy land free of rent—Cause of action.

The collection by a Zamindar of rent from an inamdar (entitled to enjoy the land free of rent) however long continued will be wrongful and every time the Zamindar demanded rent which was not legally payable by the inamdar, the demand gave rise to a fresh cause of action to the inamdar. (1948) 2 M.L.J. 631 = A.I.R. 1949 Mad. 542.

——Art. 120—Starting point—Cause of action—Mere denial or hostile assertion—Effect—Right of plaintiff to wait till real and effective infringement.

There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe the right by the defendant against whom the suit is instituted. Mere denials and hostile assertions short of infringement or ouster (*e.g.*, in the case of a holder of a village office, ejectment from the lands held by him), though they may each give a cause of action, would not force the plaintiff to bring the suit in the sense that failure to file the suit then would entail a bar of the remedy. So long as the substantive right itself is not lost, each successive denial will furnish a cause of action for a declaration, but the party is not bound, on peril of losing his remedy, to take every denial or infringement seriously and to rush to Court. He is at liberty to wait till the real and effective interference and then file his suit basing his cause of action on that interference. I.L.R. (1948) Cut. 540.

——Art. 120—Declaratory suit—Cause of action—Fresh invasion of title.

A fresh invasion of title would constitute a new cause of action from which limitation would commence to run for a suit for a declaration of title by a person in possession of the property. 230 Ind. Cas. 451 = A.I.R. 1947 Pesh. 15.

——Art. 120—Suit for declaration of nullity of marriage—Right to sue—When accrues.

A suit for a declaration that a marriage between a Hindu having a living Hindu wife and a Jewess domiciled in England, contracted under French law in France is null and void is governed by Art. 120. The right to sue accrues on the date of the marriage or at all events when the defendant claimed his marital rights. 49 C.W.N. 570 = A.I.R. 1945 Cal. 484.

——Art. 120—Suit for declaration that property was incorrectly described in document and that plaintiff acquired title under the same—Limitation—Starting point.

The plaintiff purchased certain properties which had been mortgaged to him and subsequently instituted a suit for declaration of his title to the properties purchased by him which was decreed. Thereafter the plaintiff sued for a declaration that the properties which were the subject-matter of the aforesaid transaction including the decree in the title suit were those as described in the plaint and that their description in the mortgage deed, the sale-deed and the plaint and the decree in the title suit was not correct and that plaintiff acquired title to it by the sale deed and the decree in the title suit. It was found that there was no mistake or misapprehension in the minds of either party as to the identity of the property which was to form the subject-matter of the transaction. The language used in describing in the property in the several instruments was plain but the description was somewhat unmeaning :

Held, that the suit was governed by Art. 120 and the right to sue accrued when the plaintiff became aware of the mistake. A.I.R. 1943 Cal. 460 = 76 C.L.J. 183 = 209 Ind. Cas. 71.

——Art. 120—Declaratory suit—Accrual of right to sue—Knowledge of plaintiff—If material.

Unless the plaintiff knew that there was any infringement of his right, it cannot be said that any right to sue accured to him. Consequently, it cannot be said that limitation for a suit for declaration of right began to run when the right to sue accrued whether the plaintiff had knowledge of it or not. A.I.R. 1942 Oudh 374 = 1942 O.W.N. 225 = 17 Luck. 805 = 199 Ind. Cas. 776.

——Art. 120—Suit for declaration of ownership.

After the introduction of the British rule, various surveys were made of the Amod *taluqa* in Broach. But, in all of them, in Thakor's lands, which consisted of contiguous blocks of lands in 22 villages in the District were kept intact and the Thakor was admitted to be the sole owner and full proprietor of the whole area of the lands in his possession subject only to the payment of the *jama* and the *peshkush*. At no time was it suggested that the roads, tanks and other waste lands in these areas belonged to the Government and the Thakor's proprietary rights over them were not disputed. After

the passing of the Gujarat Taluqdars' Act In 1888, a regular detailed survey of all the lands of the Thakor's estate was made and concluded in about 1914. Sometime after that, the revenue authorities took steps to cancel the entries in the survey records relating to waste areas in his estate. The Thakor made several representations to the Government, which appointed a committee and finally decided by a Government resolution of the revenue department dated August 25, 1926, that Government did not admit the Thakor's claim to the proprietary rights over the roads and tanks in his estate. The Thakor subsequently brought a suit in 1927, for a declaration that he was the full and absolute proprietor of all the roads, tanks and other waste and unoccupied areas within the limits of his estate :

Held, that the cause of action for the suit by Thakor for declaration of his ownership in roads and tanks arose on the date of the Government resolution of 1926, and the suit, therefore, filed in 1927, was in time. 43 Bom. L.R. 167 = A.I.R. 1941 Bom. 161 = I.L.R. (1941) Bom. 226 = 195 Ind. Cas. 640.

——**Art. 120—Suit for declaration of title—Cause of action, when arises.**

The plaintiff filed a suit for a declaration of his title to certain property which was in his possession. The cause of action which was alleged in the plaint was nothing more than an assertion that the defendant was intending to transfer the property and that he had declined to admit the plaintiff's title :

Held, that it could not be said that this was an invasion of the plaintiffs' right or even that it amounted to a clear and unequivocal threat to invade that right. In the circumstances there was no valid cause of action for the suit. A.I.R. 1940 All. 424 = (1940) A.L.J. 459 =1940 A.W.R. 381 = 191 Ind. Cas. 573.

——**Art. 120—Limitation—Starting point.**

A suit brought by some of the members of the family for declaration that *waqf* created by other members is invalid in law is governed by Art. 120. If the plaintiff's title has not been extinguished by adverse possession, they would be entitled to bring a suit for declaration and their suit would be in time if brought within six years of the denial of their title. A.I.R. 1940 Cal. 501 = I.L.R. (1940) 2 Cal. 464 = 44 C.W.N. 974 = 192 Ind. Cas. 693.

——**Art. 120—Cause of action, when arises—Plaintiff in possession.**

Where, in a suit for a declaration of the plaintiff's occupancy rights, the plaintiff has been found to be in possession, any denial of plaintiff's title can furnish a fresh cause of action. A.I.R. 1940 Lah. 154 = 42 P.L.R. 180 = 189 Ind. Cas. 449.

——**Art. 120—When a person is in possession, it is not necessary for him to bring a declaratory suit at once and each occasion on which his title is challenged furnishes a fresh cause of action. A suit filed within six years from last of such occasions, would, therefore, be well within time.** A.I.R. 1939 Lah. 428 = I.L.R. (1940) Lah. 180=42 P.L.R. 702=184 Ind. Cas. 703.

——**Art. 120—Article 120 gives a period of six years from the date when the right to sue accrues and not from the date on which there is a final refusal to recognise the right.** (1939) M.W.N. 298 = (1939) 1 M.L.J. 476 = 49 M.L.W. 595 = A.I.R. 1939 Mad. 570 = 186 Ind. Cas. 343.

——**Art. 120—Order of withdrawal of suit—Cause of action, when arises.**

Where the plaintiff, in a suit, prays that an order of withdrawal of the suit passed in a suit be declared void and the plaintiff be entitled to prosecute that suit, the cause of action arises on the date of withdrawal of the suit from which date the plaintiff would get six years under Art. 120. A.I.R. 1938 Cal. 874 = 67 C.L.J. 320 = 182 Ind. Cas. 201.

——**Art. 120—Successive attacks at intervals, on title—Right to sue, when accrues.**

A fresh attack on title or invasion of right gives rise to a new right to use for declaration. If there be successive attacks at intervals time would run from each of these attacks and if the last attack which is made the basis of the suit be within six years of the suit the suit will be in time. When the plaintiff remains in possession though frequent successive threats and attacks on his title are made by the defendant his title is not extinguished and so long as his title subsists he has the right to sue for declaration and his suit would be considered to be within time if he makes a threat or attack made within six years, the foundation of his suit. 43 C.W.N. 57 = A.I.R. 1938 Cal. 804 = 69 C.L.J. 51 = I.L.R. (1939) 1 Cal. 349 = 180 Ind. Cas. 278.

——**Art. 120—Successive denials of title.**

There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit. A party surely has a right to elect as to when he may bring a suit for vindicating his right, when there are several or successive denials. If a person's right is called in question, he may ignore that particular attack or challenge ; but that does not mean that a fresh attack does not give rise to fresh cause of action. There may be an ineffectual threat, a *brutum fulmen*. True, a mere continuation of a prior cause of action does not give rise to a fresh right—for instance, where property is attached, the procuring of the attachment is the wrongful denial and the cause of action arises when the attachment is effected ; in such a case, it is wrong to hold that there has been a "continuing wrong" so as to give a fresh starting point during the whole period the attachment subsists. But from this it does not follow that an owner can never ignore an attack against his title, however casual or trivial, without his right to sue being imperilled in respect of a subsequent invasion. It is for the plaintiff to decide at his option on which act he chooses to found his cause of action, and when he does so, it is with reference to the particular infringement he alleges, that the limitation should be reckoned. A.I.R. 1938 Mad. 193 = (1938) M.W.N. 244 = 47 L.W. 438 = (1938) 2 M.L.J. 434 = 181 Ind. Cas. 688.

——**Art. 120—Declaratory suit—Partition proceedings—Fresh cause of action.**

Proceedings for partition of *shamilat* land of certain village started in 1922. In that year a mutation was entered to the effect that the partition should be in accordance with the land revenue but this mutation was rejected by the revenue authorities in May 1923. Thereafter the mode of partition was sanctioned in accordance with areas of *khewat* holdings, in September 1923, but the proceedings then dragged on and the final partition order was not made till July 1932. The Revenue Officer did not refer either party under the provisions of S. 117, Land Revenue Act to the Civil Courts for the decision of the question of title. The plaintiff who was all along in possession, brought a suit within six years from the final order of July 1932, for a declaration that the partition should have been made according to the revenue assessed on the holdings :

Held, that the possession of the plaintff was threatened or disturbed by the final order of 1932 and this order, therefore, gave him a fresh cause of action. The suit was, therefore, in time. A.I.R. 1938 Lah. 318 = 182 Ind. Cas. 310.

——Art. 120—Declaration of title—Partition—Cause of action.

When a co-sharer in a land shown in Revenue records as being joint for many years past, applied for partition and the plaintiff claiming the land as his sole property was referred to a Civil Court for declaration of his title, the suit is not time-barred as the cause of action arose only when the defendant applied for partition. 163 P.L.R. 1914 = 99 P.W.R. 1914 = 23 Ind. Cas. 458.

——Art. 120—Declaratory suit.

Limitation for a suit for a declaration that a pre-decree compromise is binding on the decree-holder does not start from the time of dismissal of judgment-debtor's application in execution proceedings under O. 21, R. 2, for recording satisfaction on the basis of the pre-decree compromise. It starts from the date of the decree-holder's application for execution of the decree, since the judgment-debtor cannot be said to have any cause of action until the repudiation of the compromise by the decree-holder by applying for execution of his decree. A.I.R. 1937 Lah. 537 = 39 P.L.R. 29 = I.L.R. (1937) Lah. 209 = 171 Ind. Cas. 189.

——Art. 120—Execution against property of minors—Their objection successful—Right to sue, when accrues.

Decree on a pro-note by guardian—Objection in execution by minors successful—Declaratory suit for right to execute decree against property of minors—Suit more than 6 years after the eldest minor attained majority—Right to sue accrues when minor defendants take steps to release their property from plaintiff's execution and not when the eldest attained majority. 1936 M.W.N. 560.

——Art. 120—Declaratory suit—Right to sue—When accrues.

If a plaintiff is in possession or enjoyment of the property in suit, he is not obliged to sue for a declaration of title on the first or on each succeeding denial of his title by the defendant ; he may look upon such denials with complacency or at his option may institute a suit to falsify the assertions of the other side. But when his rights are actually jeopardised by the action or assertion of the defendant, he must take proceedings within six years from the date of such action or assertion. A.I.R. 1935 Lah. 827 = 16 L. 659 = 37 P.L.R. 846 = 157 Ind Cas. 75.

——Art. 120—When a suit is for declaration and injunction, the period of limitation is six years from the date of the invasion of the plaintiff's right. 1 B.R. 570 = A.I.R. 1935 Pat. 33 = 13 Pat. 517 = 156 Ind. Cas. 136.

——Art. 120—Fresh cause of action.

A fresh cause of action may arise to the plaintiff and he may bring a suit even though a prior cause of action had arisen to him beyond the period of six years limitation laid down by Art. 120, Limitation Act. A.I.R. 1934 All. 539 = 18 R.D. 349 = 150 Ind. Cas. 814.

——Art. 120—Declaratory suit—Cause of action.

Where an owner is in possession property, he acquires a cause of action on each occasion on which his rights are denied.

In 1917, the plaintiff applied for correction of *khewat* by entry of his name in the defendant's place. The application was dismissed. In 1926 he again applied for correction of *khewat*. The application was again refused. He then filed a suit in the Civil Court for a declaration that he was the owner of the property in 1928 within six years from 1926 but beyond six years from the denial in 1917.

Held, that the suit was within time under Art. 120, as the plaintiff had a cause of action on denial of his rights in 1926. 17 R.D. 846 = A.I.R. 1933 All. 663 = 145 Ind. Cas. 728.

——Art. 120—Cause of action—When accrues.

Under Art. 120, the right to sue accrues only when the defendant infringes or at least has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in suit.

Although a suit for declaration of title to certain lands may be barred under Art. 120, the bar affects only the remedy or relief by way of a declaration and does not extinguish the right and title of the true owner to the property. 35 Bom. L.R. 440 = A.I.R. 1933 Bom. 276 = 145 Ind. Cas. 190.

——Art. 120—Declaratory suit—Denial of title—Cause of action—When accrues.

Denial of title does not necessarily mean that the plaintiff must bring his declaratory suit from the time of his first denial of title, in cases where the plaintiff is in possession of the property ; where the plaintiff is not in possession of the property nor is the defendant in possession of the property, the same principle applies. A.I.R. 1933 Lah. 53 = 145 Ind. Cas. 241.

——Art. 120—Declaratory suit—Right to sue—When accrues.

Where, within twelve years of the death of a widow a person obtains possession of the property, his right to sue for a declaration arises only when the defendant applies under O. 21, R. 100 to be restored to possession inasmuch as there can be no right to sue until there is an accrual of the right asserted in the suit, and further, its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. 14 P.L.T. 258 = A.I.R. 1933 Pat. 250 = 12 Pat. 727 = 149 Ind. Cas. 809.

——Art. 120—The right of a *zemindar* to sue for a declaration that the defendants are not entitled to mineral rights in a particular village and for an injunction restraining them from working coal accrues from the date when the *zemindar's* right in that village was first invaded. The fact that the defendants were in possession of other villages also and had begun to work coal in those villages more than six years before the suit is immaterial. A.I.R. 1931 P.C. 89 = 53 C.L.J. 333=35 C.W.N. 521 = (1931) M.W.N. 435 = 33 L.W. 707 = 33 Bom. L.R. 885 = 61 M.L.J. 9 = 58 C. 1187 = 58 I.A. 125 = 131 Ind. Cas. 753 (P.C.).

——Art. 120—Declaratory suit—Cause of action.

All occupancy rights sold to landlords–*N* still recorded as occupancy tenant through mistake—Application by landlords to correct records rejected—Later on some landlord recorded as occupancy tenants applying for partition which was ordered—*N* and other landlords being sued for declaration that all occupancy rights were extinguished—Cause of action held to have accrued on rejection of the first application but that being a fresh invasion of rights when partition was ordered limitation began to run from the latter date. 122 Ind. Cas. 225 = 11 L.L.J. 530 = A.I.R. 1930 Lah. 284.

——Art. 120—Declaratory suit—Plaintiff in possession—Cause of action.

If a plaintiff is in possession or enjoyment of the property in suit he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defendant. He may look upon each denial with complacency or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardized by the action or assertion of the defendant, then he must take proceedings within six years from the date of such actions or assertions. 119 Ind. Cas. 258 = 9 Lah. 428 = A.I.R. 1928 Lah. 516.

——Art. 120—Suit for declaration of title to land—Limitation—Denial of title in the written statement—If gives fresh cause of action.

A suit for declaration must be brought within six years of the cause of action unless there has been a fresh invasion of the plaintiff's right giving him a fresh cause of action. The fact that in the written statement the defendant denies the title of the plaintiff does not give rise to a fresh cause of action. 115 Ind. Cas. 629 (All.).

——Art. 120—Mortgage of temple property—Declaratory suit—Allegation of fraud—Starting point.

Where, in a suit for declaration that a mortgage of temple property executed by the defendant representing the property to be his was not binding on the plaintiff, who represented the worshippers of a temple, the plaint alleged a breach of trust which consisted in the defendant dealing with properties, as his own, which really belonged to the temple:

Held, that the suit was governed by Art. 120 and that there was an allegation of fraud and time began to run from the time the plaintiff came to know of the fraud. 112 Ind. Cas. 22 = 1928 M.W.N. 415 = 28 M.L.W. 224 = A.I.R. 1928 Mad. 837.

——Art. 120—Partition—Cause of action.

For a declaratory suit challenging the title of defendant co-sharer under partition, the cause of action arises for the first time, the revenue officer sanctions the mode of partition. The mere fact that the partition proceedings are held up by litigation does not mean that, when the Revenue Officer proceeded finally to carry out what he had decided to carry out there is a fresh cause of action. Nor does the rejection of a fresh application to Revenue Officer give a new cause of action. 79 P.R. 1917, *Foll.* 110 Ind. Cas. 866 (Lah.).

——Art. 120—Dispute as to the title of deceased to certain properties—Compromise between plaintiffs and defendants (adverse claimants) allotting a portion to defendants—Application in 1914 for correction of entries. Objection by defendants that the portion allotted under compromise had not been given to them—Parties referred to Civil suit—Subsequent notice of ejectment by plaintiffs infructuous—Suit for declaration in 1923 barred. 99 Ind. Cas. 988 = 27 P.L.R. 147.

——Art. 120—Denial of title—Fresh cause of action.

In a suit for declaration of title based on the defendant's denial of the same limitation runs from the date of the first denial. Subsequent denials are merely a reiteration of the earlier denial and do not amount to a fresh invasion giving rise to fresh cause of action. 91 Ind. Cas. 605 (Lah.).

——Art. 120—Notice of ejectment—Fresh invasion of title.

Defendant issued a notice of ejectment in 1912 to the plaintiff. Plaintiff brought a suit in the Revenue Court to contest the notice but was defeated. Thereupon proceedings in execution of the notice took place; but the proceedings were purely formal, and in fact the plaintiff retained physical possession of the land in suit. A further notice of ejectment was issued against him.

Held, that the fresh notice constituted a fresh invasion of his title, and therefore limitation against him for his suit for declaration of his title began to run from the the date of the fresh notice. 89 Ind. Cas. 299 = 6 Lah. 132 = 26 P.L.R. 326 = A.I.R. 1925 Lah. 391.

——Art. 120—Ejectment order—Starting point of limitation.

Limitation for a suit for a declaration that the plaintiff is an under-proprietor runs from the ejectment order and not from decree in rent suit against, him, on the ground that he was a tenant, especially when he is in possession in spite of the decree and order. 74 Ind. Cas. 340 = 9 O.L.J. 618 = A.I.R. 1923 Oudh 27.

——Art. 120—Starting point—Setting up of title.

The suit for a declaration that defendant was a sub tenant and not a partner should be brought within 6 years from the time defendant sets up that position. 74 Ind. Cas. 195 = 9 O.L.J. 540 = A.I.R. 1923 Oudh 101.

——Art. 120—Fresh invasion of rights.

Where the defendant's denial of plaintiff's title in 1895 gave him a cause of action to sue for a declaration, but he remained in joint possession of the undivided portion of the *shamilat* and his enjoyment thereof was not interfered with :

Held, when fresh proceedings for partition began and the defendant again denied plaintiff's title to a share, there was a fresh invasion of the plaintiff's title which gave him a fresh cause of action.

The suit of the plaintiff therefore is not barred by limitation under Art. 120 of the Limitation Act. 67 Ind. Cas. 990 = 3 Lah. 43 = 97 P.L.R. 1922 = A.I.R. 1922 Lah. 94.

——Art. 120—Overt act of interference—Starting point.

In a suit for declaration that certain lands were a graveyard it was found that portions of the land were, from time to time cultivated, that in the settlement of 1904–05 no part of the land was shown as a graveyard, a portion being entered as cultivated and the rest as waste. In 1915 there was an active interference when certain masons who entred upon the land in order to repair the old tombs were obstructed.

Held, that the suit was in time, being brought within 6 years after 1915. The plaintiffs might very well have disregarded the fact that parts of the land were cultivated so long as their rights were not actively interfered with. The obstruction of repairs to the tomb was an overt act which interfered with the plaintiff's right of user. Therefore time did not begin to run against the plaintiffs until 1915. 65 Ind. Cas 647 = 4 U.P.R. Lah. 46.

——Art. 120—Where two separate and independent attacks are made upon the title of a person who is in possession of the property, time for a suit by the latter

for declaration of his title runs from the subsequent attack on his title. 36 All. 492, *Foll.* 62 Ind. Cas. 695 = 19 A.L.J. 23 = A.I.R. 1921 All. 40.

——**Art. 120—Declaration of title—Cause of action—Wrongful interference with mines.**

A fresh cause of action for a declaration that the mineral rights in certain lands are vested in the plaintiff arises whether any particular portion of minerals is removed. 5 Pat. L.J. 273 = (1920) Pat. 146=1 Pat. L.T. 360 = 56 Ind. Cas. 184.

——**Art. 120—Declaration of title—Surplus sale proceeds—Assignee under the Bengal Land Revenue Sales Act—Starting point.**

If S. 120 applied in such suits, time would begin to run when his right to surplus sale proceeds is denied. 24 C.W.N. 294 = 55 Ind. Cas. 639 = 31 C.L.J. 372 = 47 Cal. 331.

——**Art. 120—Suit for declaration that defendant is not son of A—Limitation.**

A suit to obtain a declaration that a person set up as the son and heir of a deceased is not the rightful heir falls under Art. 120 of the Limitaiton Act and the period begins to run from the time when to the knowledge of the plaintiff the title of son and heir to the deceased is set up. 54 Ind. Cas. 300 (Nag.).

——**Art. 120—Declaration of title—Cause of action—Assertion of hostile title.**

Where a person is in possession of property it is not obligatory upon him to file a suit for a declaration of his title unless the denial of his title by the opposite party has the effect of disturbing the possession or doing him other injury not capable of being remedied, otherwise than by a suit for a declaration. The mere fact that a revenue court refused to partition a joint *khewat* till the shares of the contending parties were determined by the Civil Court, does not necessarily vest the opposite party with an adverse title if the possession of the person against whom the order is passed, remains undisturbed. 53 Ind. Cas. 1005 (Oudh).

——**Art. 120—Declaration of title—Cause of action.**

In a suit for declaration that the property mortgaged to defendant is plaintiff's property and the mortgagor had no right to it, the fact of the mortgage having been made did not affect the plaintiff so long as no effort was made to enforce the mortgage against the property. The cause of action accrued to the plaintiff on the date on which the defendant attempted to sell the property and the suit instituted with six years of that date was not time-barred. 17 A.L.J. 972 = 52 Ind. Cas. 646.

——**Art. 120—Declaration of title—Plaintiff in possession—Successive denials of title—Fresh cause of action.**

A person in possession is entitled to pass by an invasion of his right to the property, and is not by his forbearance debarred from a future suit on a fresh assertion on the part of the defendant which amounts to a denial or repudiation of his title and gives him an independent cause of action. 43 Ind. Cas. 175 (All.)

——**Art. 120—Declaration of title—Cause of action—Invasion of a right.**

Every fresh invasion of a person's right to his property, not being a mere reiteration of a former denial of title, gives him a fresh cause of action. 79 P.R. 1917= 140 P.W.R. 1917 = 42 Ind. Cas. 346.

——**Art. 120—Declaration of title—Cause of action.**

A notice of ejectment, issued by the plaintiff against the defendant was cancelled by the Revenue Court. The plaintiff unsuccessfully appealed to the Commissioner and the Board of Revenue. After the order of the Board of Revenue, he filed a declaratory suit. Defendants contended that the suit was barred by limitation alleging that time commenced from the date of the Government order and not from date of order of the Board of Revenue. *Held*, that the defendant's plea was not valid and that so long as it is open to a person against whom an adverse order had been passed to get it set aside on appeal, and he is taking the necessary steps towards it, he cannot be driven to bring a regular suit for a declaration of his rights. The right to sue accrues only after the adverse order is made final. 4 O.L.J. 12 = 20 O.C. 126 = 39 Ind. Cas. 428.

——**Art. 120—Declaration of title—Suit against pre-emptor—Vendor's widow—Cause of action.**

K obtained a pre-emption decree against *G* and got possession when the widow's name was substituted for *G's*, in the village records. The tenants of the land who had obtained mortgage with possession under *K* sued for and got a delaration of their title as mortgagors but when the plaintiff who claimed through *K* failed to get a mutation of names, he brought a suit for a declaration of his proprietary right 3 years after the death of *G* but more than 6 years after the date of *K's* obtaining possession. *Held*, the suit was not barred by the six years' rule of limitation. 35 Ind. Cas. 241 (All.).

——**Art. 120—Declaration of title—Knowledge of some of the members of a community.**

The cause of action for a declaratory suit based on a denial of title arises only on the knowledge of such denial. 1 L.W. 134, *foll.* The knowledge of some only of the community does not affect the right of the others. 29 M.L.J. 574 = 18 M.L.T. 327 = (1915) M.W.N. 701 = 2 L.W. 813 = 30 Ind. Cas. 669.

——**Art. 120—Declaration of title—Limitation.**

A suit for declaration of a right to a property cannot be barred so long as the right is a subsisting one. A suit for a declaration that a lease by a *Lambardar* is invalid against the plaintiff can be brought within 12 years of the execution thereof. 20 C. 906; 8 O.C. 303, *foll.* 20 Ind. Cas. 147 (Oudh).

——**Arts. 120 and 91—Suit for declaration that defendant is benamidar for plaintiff.**

A suit for a declaration that defendant's name as lessee in the lease is only *benami* for the plaintiff is governed by Art. 120 and not by Art. 91. The cause o

action arises when the plaintiff's position as lessee is challenged by the defendant. 35 All. 149 = 11 A.L.J. 106 = 18 Ind. Cas. 698.

——Art. 120—Declaration of title and restitution, suit for—Wrong attachment and sale—Time when begins to run.

A suit by a person whose property, had been wrongfully attached and sold, for a declaration that the attachment is illegal and for restitution is governed by Art. 120, time commencing from the date of sale and not from the date of attachment as only the sale passes title to the purchases and gives a fresh cause of action apart from attachment. 36 Mad. 383 = (1911) 2 M.W.N. 531 = 10 M.L.T. 504 = 22 M.L.J. 108 = 13 Ind. Cas. 96.

——Art. 120—Declaration of title—Devaswam's property—Cause of action.

A suit for declaration of right to *Devaswam's* property after 6 years from grant of a *patta* is barred. 8 M.L.T. 249 = (1910) M.W.N. 594 = 8 Ind. Cas. 357.

——Art. 120—Cause of action—Fresh invasion of right—Scope.

Though a person allows to pass by an invasion of a right to property, he is not debarred from a future suit for a future invasion. 88 P.W.R. 1910 = 122 P.L.R. 1910 = 7 Ind. Cas. 528.

—Arts. 120, 91, 92 and 93—Suit to declare will forgery.

A suit to declare an unregistered will as forged and beyond the power of the testator to make it is governed by Art. 120 and the period of six years is not calculated from the date the will purports to bear but from the time the plaintiff comes to know of the existence of the will. 82 P.L.R. 1909 = 88 P.W.R. 1909 = 4 Ind. Cas. 923.

11 (*c*). Declaratory suit : Entry in Revenue Records.

——Arts. 120 and 144—Applicability—Suit for declaration of title and confirmation of possession—Adverse entry in Record of Rights. *See* LIMITATION ACT, ARTS. 144 AND 120. A.I.R. 1949 Assam 75.

——Art. 120—Correction of entry in *jamabandi*—Limitation—Starting point.

A suit by the plaintiff for correction of an entry in the *jamabandi* paper is governed by Art. 120, Limitation Act. The cause of action accrues when the entry is made in the *jamabandi* for the first time. The opposition by the opposite party to an attempt by the plaintiff to change the entry in his favour does not amount to a fresh invasion of the plaintiffs' right so as to give the plaintiff a new cause of action from the date when his attempt to enter a correction in the *jamabandi* failed. There must be some attempt on the part of the opposite party to oust the plaintiff in possession in order to give the plaintiff a fresh cause of action.

Nor does the preparation of a new *jamabandi* give the plaintiff a fresh cause of action. A.I.R. 1943 Pesh. 83 = 210 Ind. Cas. 385.

——Art. 120—Suit for declaration of right—Fresh cause of action arises on each invasion of right.

A suit for a declaration of right cannot be held to be time-barred so long as the plaintiff has a subsisting title to the property. In such a case, each invasion of right gives a fresh cause of action, and the mere act of forbearance of a previous action on the part of a person in possession cannot debar him from instituting a suit later on, when a fresh invasion is made against his title which gives him an independent cause of action. The mere making of an adverse entry in the village records cannot be said to have actually disturbed the plaintiff's title if he still continued to be in possession.

An entry adverse to the plaintiff was made in 1929 in the *khewat* when it was prepared. The plaintiff applied for its correction in 1935, when he came to know of it. His application was rejected and he then brought a suit for a declaration of his right within six years from the date of the rejection of his application :

Held, that even if the adverse entry made in 1929 gave the plaintiff a cause of action, he got a fresh cause of action in 1935, when his application for correction was rejected and the suit was not, therefore, barred by limitation. A.I.R. 1942 Oudh 374 = 1942 O.W.N. 225 = 17 Luck. 805 = 199 Ind. Cas. 776.

——Art. 120—Suit for declaration that plaintiff is under-proprietor and not occupancy-tenant.

Where the plaintiff brought a suit for declaration that he was under-proprietor and not occupancy-tenant and it was found that he had long been recorded as occupancy-tenant and was ejected subsequently in execution of a decree for arrears of rent :

Held, that so long as the entry in the revenue records did not injure the plaintiff, he need not have come to Court at all and therefore, his suit instituted within six years of the injury which the entry, *i.e.*, the order of ejectment, created and which was his cause of action was not out of time. A.I.R. 1942 Oudh 346 = 1942 O.W.N. 217 = 1942 A.W.R. 74 and 166 = 18 Luck. 38 = 200 Ind. Cas. 45.

——Art. 120—Previous to the plaintiff's suit for declaration of title, the defendant had filed a suit for profits on the basis of a previous mutation entry in his favour. The filing of this suit, according to the plaintiffs, constituted his cause of action for bringing his suit for a declaration that he was the owner in possession of the property in dispute and the defendant had no right therein. It was found that the mutation entry on the basis of which the defendant had filed her suit for profits was made only for her consolation with the consent of the plaintiff and that in spite of this entry in her favour, the plaintiff continued in possession :

Held, that the plaintiff nowhere alleged in the plaint that his cause of action was the alleged wrong entry of mutation in favour of the defendant. Having regard to the finding that the mutation entry was made for consolation only, the entry was certainly not a wrong entry and did not occasion any injury to the plaintiff so as to furnish him with any cause of action for a suit

for declaration. The plaintiff was admittedly in possession of the property in dispute all along in spite of the mutation entry in the name of the defendant. No cloud was cast upon the plaintiff's title by the said entry. The plaintiff was not bound to institute the suit for declaration on the basis of the alleged wrong entry. The plaintiff was not disturbed by the mutation entry at all and it was not until the defendant actually asserted a title by means of filing a suit for profits that it became obligatory upon him to institute the present suit for declaration. Hence the limitation for the suit ran from the date of the defendant's suit for profits and not from the date of the mutation order in favour of the defendant. 1942 O.W.N. 744 = 205 Ind. Cas. 520.

——Art. 120—Rent decree gives fresh cause of action.

So long as nobody interferes with a man's possession and enjoyment of his share in a property, the fact that his share is inaccurately recorded in the revenue papers does not affect his title to it. Although the settlement entry gives plaintiffs a cause of action the decree for rent gives them a fresh cause of action, and a suit brought within six years of the decree is within time. When plaintiff has got a right, every invasion of that right gives him a fresh casue of action. A.I.R. 1940 Oudh 283 = 1940 O.W.N. 327 = 1940 R.D. 101 = 15 Luck. 487 = 187 Ind. Cas. 155.

——Art. 120—Entry in Record of Rights, whether affects tenure—Fresh right to sue, if accrues to purchaser from date of purchase.

The Record of Rights affects not merely the rights of the tenure-holder for the time being but the tenure itself. In other words, whoever would take the tenure, by whatever process it may be, must hold it subject to the statutory limitations imposed by the Record of Rights. The purchaser of the tenure takes it subject to the limitation imposed by the Record of Rights, and no fresh right accrues to him on the date of the purchase to sue for a declaration that the Record of Rights is wrong. The suit is barred under Art. 120. 20 P.L.T. 303 = 5 B.R. 641 = A.I.R. 1939 Pat. 548 = 181 Ind. Cas. 651.

——Art. 120—Suit for declaration that defendant does not hold *jote* in *mukarrari* right and rent is liable to enhancement—Limitation—Starting point.

Where an entry in the Record of Rights shows that the defendant is holding a *mukarrari* right on a fixed rent by virtue of a certain deed a suit for declaration that the defendant does not hold the *jote* in *mukarrari* right and that the rent of the *jote* is liable to enhancement, is a suit for declaration that the entry in the Record of Rights is wrong and the limitation applicable to such a suit is one under Art. 120, and not Art. 131 and the time begins to run from the date of the final publication of the Record of Rights. 20 P.L.T. 303 = 5 B.R. 641 = A.I.R. 1939 Pat. 548 = 181 Ind. Cas. 651.

——Arts. 120 and 14—Suit for declaration in terms of lease—Cause of action.

Defendant granted an oral lease to the plaintiff for certain agricultural property for 33 years with the proviso regarding its cancellation under certain conditions at the expiry of 20 years. A mutation was entered thereon and attested on April 8, 1929, but the mutation showed the lease as simply being one for 20 years. This was done on the ground that the officer attesting the mutation considered the lease to be contrary to the provisions of the Land Alienation Act. In 1932, the plaintiffs applied for a correction of mutation giving the correct terms of the lease. This application was rejected and its rejection was eventually confirmed by the Revenue Commissioner on May 26, 1933. The plaintiffs then instituted a suit on February 22, 1936, claiming a declaration in the terms of the original lease. It was contended by the plaintiff that Art. 14 applied :

Held, that the article applicable was Art. 120, and the cause of action arose on the date of the mutation of 1929, and not from the subsequent proceedings instituted by the plaintiffs before the Revenue Authorities. A.I.R. 1937 Pesh. 94 = 171 Ind. Cas. 267.

——Art. 120—Suit for correction of Record of Rights and declaration comes under Art. 120. A.I.R. 1937 Cal. 745 = 42 C.W.N. 96 = 173 Ind. Cas. 945.

——Art. 120—Claim not based on any fresh invasion of right—Limitation for suit.

Where the plaintiff's claim is based on the wrong entry in the Settlement Court, and not on any fresh invasion of his rights made subsequently and the only fresh thing relied on since the making of the settlement entry is the fact of the plaintiff having become a purchaser which cannot affect the running of limitation against him, the suit is governed by Art. 120. 1937 O.W.N. 207 = 1937 R.D. 105 (2) = A.I.R. 1937 Oudh 291 = 13 Luck. 143 = 166 Ind. Cas. 774.

——Art. 120—Fresh invasion of right.

A suit for a declaration of right cannot be held to be time-barred so long as the plaintiff has a subsisting title to the property. In such a case each invasion of right gives a fresh cause of action. The mere fact of forbearance on a previous occasion on the part of a person in possession cannot debar him from instituting a suit later on when a fresh invasion is made against his title which gives him an independent cause of action. The mere making of an adverse entry in the village records cannot be said to have actually disturbed the plaintiff's title if he still continued to be in possession. 1936 O.W.N. 784 = A.I.R. 1936 Oudh 387 = 1936 R.D. 416 = 12 Luck. 371 = 164 Ind. Cas. 118.

——Art. 120—Suit for declaration and correction of revenue entries—Limitation—Starting point.

A declaratory suit in respect of an entry made in Record of Rights filed under S. 42, Specific Relief Act read with S. 45, Punjab Land Revenue Act is governed by Art. 120 In all such cases, the cause of action accrues when the plaintiff feels aggrieved and not from the date of entry. A.I.R. 1936 Lah. 37 = 38 P.L.R. 748 = 165 Ind. Cas. 626.

——Art. 120—Suit for declaration of title and that Settlement Record is erroneous—Starting point of limitation.

A suit for a declaration of a title and that the Settlement Record is erroneous and fraudulent, without any claim for possession is governed by Art. 120, and the time starts from the final publication of the Records of Rights. 2 B.R. 327 = A.I.R. 1936 Pat. 129 = 161 Ind. Cas. 465.

——Art. 120—Wrong entry in Record of Rights—Starting point of limitation.

Where the plaintiffs filed a suit for declaration of their exclusive title to a property and also prayed for a declaration that the revisional survey entries with regard to that property were wrong and it was found that the plaintiffs were in exclusive possession of the property, but the suit was not filed within six years of the correction of the survey Record of Rights :

Held, that the suit was not for a correction of the Record of Rights, but for a declaration that the plaintiffs have got an exclusive title in respect of the property and was not barred by time. A.I.R. 1936 Pat. 312 = 2 B.R. 594 = 163 Ind. Cas. 408 (1).

——Art. 120—Cloud cast upon plaintiff's title by dismissal of application for correction of *jamabandi*—Suit for declaration—Limitation.

The plaintiff alleged that he had been all along in possession of the land in suit but that owing to his application for correction of *jamabandi* having been dismissed, a cloud had been cast upon his title which he sought to remove by a suit for declaration of his title :

Held, that limitation for the suit began from the date of the order of the Revenue Court. 11 O.W.N. 1297 = 18 R.D. 560 = A.I.R. 1935 Oudh 181 = 153 Ind. Cas. 965.

——**Art. 120**—Gift by father of family property—Mutation in favour of donee—Donee selling gifted portion—Vendee applying for partition—Coparceners objecting—Revenue authorities directing coparceners to establish their right in Civil Court :

Held, that since there was no obligation on the coparceners to have gift set aside, they could treat the gift as nullity. But having been forced to go to Court merely as a result of partition proceeding, and the authorities having directed them to go to the Civil Court, this was a cause of action and under Art. 120, time ran from this date. A.I.R. 1935 Lah. 827 = 16 L. 659 = 37 P.L.R. 846 = 157 Ind. Cas. 75.

——**Art. 120—Suit for declaration relating to entry in Record of Rights—Starting point of limitation.**

If a suit is not for recovery of possession of a declaration of title or that the entry in Record of Rights is wrong, but for a declaration relating to an entry in Record of Rights. Art. 120, Limitation Act, applies and time runs when the entry injures the plaintiff. 58 C.L.J. 120 = A.I.R. 1934 Cal. 192 = 150 Ind. Cas. 617.

——**Art. 120—Suit for declaration that defendant had no connection with property of plaintiff's father—Fraud practised by defendant—Cause of action for suit, when arises.**

B, the eldest son of *P*, disappeared at the time of the earthquake in 1905. Some time before 1911, the defendant whose resemblance to the dead *B* attracted *P's* attention took *B's* place in the family. *P* died in 1911, and his land was recorded by mutation of revenue papers as the property of *B* (as the defendant was called) and the plaintiffs. The defendant was also appointed under the name of *B* to be *lambardar* in succession to *P*. In 1915, dissensions arose in the family and the plaintiffs prosecuted the defendant alleging that he had fraudulently led them to accept him as their dead brother. He was acquitted and he left the village. In 1925, the plaintiffs instituted a suit for a declaration to the effect that the defendant was not *B* and had no connection with the property and family of *P* and that the plaintiffs alone were entitled to succeed to their father's properties :

Held, that Art. 120, applied and the suit was barred being based on the allegation of fraud practised in 1911. Even if the mutation of 1911 and the appointment of himself as *lambardar* were the result of fraudulent representations by the defendant, the fraud admittedly became known to the plaintiffs in 1915, and a suit based on this cause of action was certainly barred by limitation :

Held, also, that on the evidence, there was no justification to assume abandonment by the defendant so as to give rise to a cause of action on a latter date when the plaintiffs' claim to the whole land was denied by the defendant in his replies to the Revenue Officer's interrogatories. A.I.R. 1934 Lah. 574 = 148 Ind. Cas. 776.

——**Art. 120—Mutation in defendants' names with plaintiff's consent—Assertion of title—Suit for declaration—Limitation, when begins to run.**

Where mutation entries in favour of certain persons were alleged to have been made with plaintiff's consent and the plaintiff had no grievance against the defendants until they asserted title on that basis, and on this wrong assertion as cause of action plaintiff sued for declaration :

Held, that limitation for the suit would begin to run from the date of the assertion of title by the defendants. A.I.R. 1933 Oudh 283 = 10 O.W.N. 366 = 144 Ind. Cas. 316.

——**Art. 120—Suit for correction of entry—Limitation.**

A suit for correction of an entry in the Record of Rights when instituted within six years of the publication of the Record of Rights, must be held to be in time. A.I.R. 1933 Pat. 698 = 148 Ind. Cas. 193.

——**Art. 120—Adverse entry—Suit for declaration by co-sharer in possession—Starting point of limitation.**

A suit for declaration by a person in possession that he is the owner of the land and that the defendant who is also shown as a co-sharer in the revenue records has no right in it is not barred by time if brought within 6 years from an attempt to oust him from possession, even though it be more than six years from the date of the entry in the revenue records in favour of the defendant. A.I.R. 1932 Lah. 81 = 32 P.L.R. 731 = 135 Ind. Cas. 501.

——**Art. 120—Starting point—Publication of Record of Rights.**

Held, that in respect of a suit filed under S. 111-B (1) (*d*) of the B.T. Act time begins to run from the date of the final publication of the Record of Rights and not from the date of the final publication of the certificate. 34 C.W.N. 621 = 130 Ind. Cas. 225 = A.I.R. 1930 Cal. 767.

——**Art 120—Entry in Record of Rights—Suit to declare it erroneous—B.T. Act, S. 104-H.**

A suit for a declaration that the entry in Record of Rights that a person is tenure-holder is erroneous and that he should be declared a raiyat is within the proviso to S. 111-A of the Bengal Tenancy Act and the period of limitation applicable to such suits is that provided by Art. 120 and not by S. 104-H. 15 C.W.N. 896, *Appr.* 120 Ind. Cas. 56 = 30 M.L.W. 600 = 56 I.A. 388 = 51 C.L.J. 1= 34 C.W.N. 1 = 32 Bom. L.R. 114 = A.I.R. 1929 P.C. 286 = 57 M.L.J. 849 (P.C.).

——**Art. 120—Entry in *Khewat*.**

A mere entry of names in the *khewat* does not debar the person, against whom the entry is made, for all time to come from suing for a declaration, if once six years are allowed to expire. Any fresh act which can amount to a fresh invasion of the owner's right or a fresh attempt to cast a cloud on his title would create a new cause of action in his favour, and his suit for declaration cannot be dismissed on the mere ground that the cause of action first accrued more than six years ago when an adverse entry was made against him. 121 Ind. Cas. 209 = 1929 A.L.J. 794 = A.I.R. 1929 All. 529.

——**Art. 120—Declaratory suit—Landlord and tenant—Commencement of limitation.**

Where the tenants brought a suit seeking for a declaration that certain lands were held by them rent free under the defendant as the defendant landlord had wrongly got these lands recorded in the Record of Rights as liable to pay rent and then fraudulently got rent assessed for them under S. 105, Ben. Ten. Act, and also for confirmation of their possession and for an injunction restraining the defendant from executing any decree for rent which he might obtain in certain rent suits which he had brought against them.

Held, that the latter two reliefs being unnecessary and premature respectively the suit was governed by Art. 120,

Held, further that as the plaintiffs did not specifically ask for the correction of any entry in the Record of Rights the time began to run against them from the date of the institution of the rent suits, by the landlord. 23 C.L.J. 561, *Foll.* 120 Ind. Cas. 104 = 49 C.L.J. 281 = A.I.R. 1929 Cal. 417.

——**Art. 120**—Where a defendant asserted a hostile title as a permanent tenant against the plaintiff six years ago and the same was substantiated by the orders of the revenue authorities, the plaintiff's suit for declaration that defendant was only an annual tenant and not owner as alleged to have been asserted by him is governed by and as such is barred being brought more than six years from Revenue Court's order. 31 All. 9, *Foll.* 118 Ind. Art. 120 Cas. 62 = A.I.R. 1929 Nag. 124.

——**Art. 120—Starting point—Declaratory suit—Order cancelling mutation.**

In the revenue papers an entry was made against the plaintiffs, who were sharers in a shamilat, without their knowledge. But notwithstanding the entry they continued in the enjoyment of their rights. Mutation was then effected recognising the plaintiffs as full owners of the shamilat, whereupon the defendants taking, advantage of the previous adverse entry took the matter to the Financial Commissioner and succeeded in having the entry cancelled. Plaintiffs then sued for declaration of their title.

Held, that limitation for the suit will begin not from the previous adverse entry but from the time when mutation in their favour was cancelled. 119 Ind. Cas. 232 = 10 L.L.J. 546= 30 P.L.R. 48 = A.I.R. 1929 Lah. 379.

——Art. 120—**Starting point—Knowledge of facts—Entry in records.**

Per MUKERJI and ASHWORTH JJ. Where no fact has been alleged or proved which establishes that previous to the filing of the application for partition the fact had been brought to the notice of the plaintiffs that there was a wrong entry in the khewhat, and that advantage of that wrong entry was likely to be taken by the defendants,

Held, that the right to sue on the alleged wrong entry in the khewat accrued to the plaintiffs on the filing of the application for partition and not earlier. 114 Ind. Cas. 177= 50 All. 559 =9 L.R.A. (Rev.) 49= 26 A.L.J. 217 = A.I.R. 1928 All. 172 (F.B.).

——**Art. 120.**

Where the owner is in possession of the property, it is not obligatory on him to file a suit for a declaration of his title because of an adverse entry in the *khewat* unless and until his title to the property is denied by the defendant, and the denial has the effect of disturbing the possession or doing him some other injury that is not capable of being remedied otherwise than by a suit for a declaration. A cause of action for such a suit accrues when his right is subsequently denied on the basis of the incorrect entry, and although such a suit is filed after the expiry of six years from the date of knowledge of the adverse entry, it is not barred if it is filed within six years from such denial. 17 A.L.J. 588 and 53 I.C. 1005, *foll.* 102 Ind. Cas. 172 = A.I.R. 1926 All. 597.

——**Art. 120**—Where on the strength of a wrong entry in the revenue papers, the defendant sued the plaintiff's tenants for rent and plaintiff brings a suit for his title to the land being declared, more than six years of the wrong entry but within six years of the defendant's instituting the suit.

Held, that the defendant's suit for rent constitutes a fresh invasion of the plaintiff's right and gives him fresh cause of action and that therefore plaintiff's declaratory suit is not barred. 98 Ind. Cas. 811 = A.I.R. 1927 All. 148.

——**Art. 120**—Where a plaintiff's case is that a cloud is thrown upon his title by reason of an entry in the revenue registers made at his own instance and he seeks by a declaratory suit for the removal of that cloud, limitation for such a suit runs from the date on which an entry in the revenue registers was first made. 3 O.L.J. 226, *foll.*

No fresh cause of action accrues if a subsequent application by the plaintiff for correction of the khewat is rejected by the Revenue Court. 31 All. 9, *foll.* 98 Ind. Cas. 750 = 3 O.W.N. 896 = A.I.R. 1927 Oudh 21.

—**Arts. 120 and 144**—Where in a suit for a declaration of title and confirmation of possession the plaintiff does not allege that his possession has been disturbed or threatened by the defendants and the cause of action was for the declaration that the entry in the Record of Rights was erroneous, Art. 120 and not Art. 144 applies. 97 Ind. Cas. 635 = A.I.R. 1927 Cal. 30.

——**Art. 120**—Denial of plaintiff's title in proceedings in the Revenue Court for correction of entries in the Record of Rights gives a fresh cause of action for a suit for a declaration of title to property, based on such entries. 10 A.L.J. 413 and 17 A.L.J. 588, *foll.*; 31 All. 9, *Diss. from.* 100 Ind. Cas. 45 = A.I.R. 1927 All. 296.

——**Art. 120**—In a suit for declaration that an entry in the Record of Rights is wrong, limitation runs from the date of the final publication of the Record of Rights. 97 Ind. Cas. 635 = A.I.R. 1927 Cal. 30.

——**Art. 120**—An application for partition is an act of invasion which gives a new cause of action for a suit for declaration that the defendant is not entitled to demand partition and entries in revenue records showing co-ownership of plaintiff and defendant do not affect limitation. 14 P.R. 1907 and 98 P.R. 1919, *foll.* 100 Ind. Cas. 732 = 8 Lah. 22 = 28 P.L.R. 490 = A.I.R. 1927 Lah. 119.

——Art. 120—Starting point—Fraud—Entry in records.

A suit for declaration that an entry in the Record-of-Rights that the defendants are ryots with permanent rights of occupancy is wrong is not barred by reason of the fact that the defendants had, in a previous suit more than six years of the institution of the suit for declaration, set up rights of permanent occupancy in the written statement as against the plaintiffs and to their knowledge, the cause of action based on the entry in Record-of-Rights being an independent one from the one based on such denial. 101 Ind. Cas 85=25 M.L.W. 367=A.I.R. 1927 Mad. 568=52 M.L.J. 323.

——Art. 120—Where the defendant, in whose name the entries in question stand has neither paid any revenue nor received any rent, limitation for declaration of plaintiff's title and correction of revenue entries starts from date of the overt act threatening plaintiff's rights. 93 Ind. Cas. 358=27 P.L.R. 150.

——Art. 120—In a suit for declaration that a certain tenure held by defendants under plaintiffs is not permanently settled, limitation begins from the date of final publication of the Record-of-Rights and not from the date when the certificate of publication was signed. 86 Ind. Cas. 6=41 C.L.J. 31=A.I.R. 1925 Cal. 518.

——Art. 120—Declaratory suit—Cause of action.

Where the plaintiffs who are in possession bring a declaratory suit that they have a raiyati right and not under-raiyati rights, either of the events namely a decision of the dispute during the preparation of the Record-of-Rights or the final publication of the Record-of-Rights would give them a cause of action. 68 Ind. Cas. 489=A.I.R. 1923 Cal. 307.

——Art. 120—Change of registry refused.

Where plaintiff's father applied in 1903 for change of Revenue registry to his name and the Settlement Officer ordered that the registry should stand as it did by asking for this identical relief in 1917, which was denied to his father in 1903, the plaintiff does not acquire a fresh cause of action against the defendants. 21 All. 9, Foll. 67 Ind. Cas. 600=15 M.L.W. 478=1922 M.W.N. 260=30 M.L.T. 266=A.I.R. 1922 Mad. 194=42 M.L.J. 457.

——Art. 120—Entry in records.

The mere entry in the village papers would not of itself give the plaintiff a cause of action, and, this entry in the village papers made in the year 1901, not having been brought to the notice of the plaintiff until the month of January, 1918, when the verification of the settlement entries was going on in the District, no right to sue can on these facts be deemed to have accrued to the plaintiff in the year 1309. 66 Ind. Cas. 148=20 A.L.J. 231=A.I.R. 1922 All. 114.

——Art. 120—Order refusing mutation.

Where the Assistant Collector refused mutation on 26th November, 1912, and this order was reversed by the Collector on 3rd February, 1913, which in its turn was reversed by the Commissioner on 3rd May, 1913, and the plaintiffs thereupon brought a suit on 2nd April, 1919, for declaration of their title.

Held, that though the first denial by the defendants of plaintiffs title gave them a cause of action, the order passed by the Commissioner in the matter, which amounted to a fresh invasion of plaintiffs' right gave them a fresh cause of action. The suit being brought within six years of that date is within time. 65 Ind. Cas. 124=6 P.W.R. 1922=33 P.L.R. 1922=A.I.R. 1922 Lah. 125.

——Art. 120—Declaration of title—Entry in revenue registers—Cause of action.

A man is not bound to sue for a declaration of his title merely because some casual denial of his title is made, *e.g.* by an entry unfavourable to him in the revenue registers which in no way effects him in the enjoyment of his rights of property. His failure to sue on the cause of action within 6 years of the accrual thereof will not bar a subsequent suit by him on a fresh cause of action. 23 O.C. 46=7 O.L.J. 74=2 U.P.L.R. (J.C.) 91=55 Ind. Cas. 393.

——Art. 120—Declaration of title—Entry in Khewat.

Where a person continues in possession of his property in spite of a contrary entry appearing in the *Khewat* no question of limitation or adverse possession can arise in a suit filed by him for declaration of his title. 6 O.L.J. 523=54 Ind. Cas. 317.

——Art. 120—Declaration of title—New cause of action—Limitation.

A suit for declaration of title to lands by a proprietor in possession is not barred if brought within 6 years of an attempted dispossession although the plaintiff had a right to sue the defendant who had been recorded as owner in the revenue record more than six years before suit. 98 P.R. 1919=53 Ind. Cas. 595.

——Art. 120—Entry in record-of-rights—Suit for declaration—Prayer for confirmation of possession—Limitation.

To a suit to declare an entry in the Record-of-Rights to be incorrect Art. 120 of the Lim. Act applies and time commences from the date of the final publication and not from the signing of the certificate or final publication of the Record-of-Rights. Where in a suit the plaintiff added a prayer for confirmation of possession without alleging disturbance of possession.

Held, that the suit was one for declaration of possession and Art. 120 applied to the suit. 23 C.W.N. 883=53 Ind. Cas. 968.

——Art. 120—Declaration of title—Partition proceedings—Entry in settlement.

In 1887 defendants were recorded in the Settlement papers as owners and in 1914 they applied for partition.

Held, that the remaining co-sharers had a fresh cause of action in 1914 consequent on the partition, to sue for a declaration of their title and that the entry in the Settlement was erroneous. 17 A.L.J. 588=50 Ind. Cas. 767.

——Art. 120—Declaration of title—Omission of plaintiff's name from Settlement Records—Limitation.

Where the plaintiffs brought a suit for a declaration of title, their names having been omitted from the Settlement Records,

Held, that limitation commenced to run against the plaintiffs, not from the date of the omission of their names from the Records, but from the date when their title was challenged by the defendants. 46 Ind. Cas. 796 (Cal.).

——Art. 120—Declaration of title—Cause of action—Successive wrong entries in Record-of-Rights—Fresh invasion of rights.

Held, on the facts that the scope of the suit being limited to the second Record-of-Rights the limitation

under Art. 120 ran from the final publication in 1906. The previous publication of 1888-1889 did not extinguish the right of the plaintiff who continued to be in possession in spite of the adverse entry and the entry of 1906 constituted a fresh invasion of his rights. 4 Pat. L.W. 303=3 Pat. L.J. 361=(1918) P.H.C.C. 225=45 Ind. Cas. 432.

——Art. 120—Declaration of title—Plaintiff in possession—Cause of action—Adverse entry—Revenue papers.

A suit for declaration of title to immoveable property by persons in possession as proprietors is not barred if brought within six years from the time when the defendant last attempted to oust them from the land, although a right to sue the defendant who had been recorded as sole owner of the property in the Revenue papers for a declaration had already accrued and become barred. 83 P.L.R 1916.

——Art. 120—Declaration of title—Adverse entry in revenue records—Cause of action.

A declaratory suit by a plaintiff in possession of the property is not barred simply because an adverse entry in the revenue records had been made more than six years of the date of suit to the knowledge of the plaintiff. 73 P.W.R. 1918=72 P.L.R. 1918=44 Ind. Cas. 912.

——Art. 120—Declaration of title—Cause of action—Record-of-Rights—Final Publication.

Limitation for a suit for declaration that the disputed land is Zarait land, for Khas possession thereof, and for a declaration that an entry in the Record-of-Rights recording the defendants as occupancy Raiyat is incorrect, runs from the date of the final publication of the entry in the Record-of-Rights. 2 Pat. L.W. 183=42 Ind. Cas. 397.

——Art. 120—Declaration of title—Entry in Record-of-Rights.

Suit for a declaration that an entry in the Record-of-Rights is wrong within six years from the date on which plaintiff's title is effectively challenged is within time though more than six years have elapsed since the publication of the Record, provided plaintiff's enjoyment of the property has not been effected. 2 Pat. L.W. 22=2 Pat. L.J. 557=41 Ind. Cas. 199.

——Art. 120—Declaration of title—Cause of action—Suit for declaration that the defendants are not under proprietors.

When a Revenue Court held in a suit that the defendants are not ordinary tenants and in the next suit between the same parties held they were under—proprietors, it was held that the cause of action for a civil suit to declare that they were not under-proprietors, arose not with previous decision but with the entry of the denfendant's names as under-proprietors under the subsequent order of the Court. 23 Ind. Cas. 231 (Oudh).

——Art. 120—Declaration of title—Fresh cause of action—Entry in village paper.

Where a person was wrongfully entered as owner six years before suit but transferred the property as such owner within 6 years a declaratory suit by the rightful owner is not barred by limitation, as the transfer within six years previously gave a fresh cause of action to the suit. 11 A.L.J. 877=21 Ind. Cas. 609.

——Art. 120—Declaration of title—Entry in Record-of-Rights—Limitation—Starting point.

A suit for declaration of title and for a declaration that the entry in the Record-of-Rights is wrong is governed by Art. 120, the starting point being the date of publication of the Record-of-Rights. 20 Ind. Cas. 262 (Cal.).

——Art. 120—Declaration of title—Wrong entry in Revenue Record—Cause of action.

A tenant mortgaged his occupancy holding with possession in 1877. In 1880 his name was expugned from the Revenue papers and that of the mortgagee was recorded. In 1907 he applied to the Settlement Officer for correction but the application was dismissed; the tenant brought a suit for a declaration that he was the mortgagor. The suit was barred by time as the cause of action accrued in 1880. 19 Ind. Cas. 751 (All.).

——Art. 120—Declaration of title—Cause of action—Wrong entry at Settlement.

A suit for declaration of title must be brought within 6 years of the date when the plaintiff has first notice of a wrong entry made at a settlement. 18 Ind. Cas. 463 (All.).

——Art. 120—Declaration of title—Fresh cause of action.

In 1909 the Commissioner directed in appeal the correction of the record made at the Settlement in 1901. The order gave the plaintiff a fresh cause of action for declaration of their right. The suit being within 6 years, was within time. 10 A.L.J. 413=17 Ind. Cas. 675.

——Art. 120—Declaration of title—Cause of action.

In an application to the Revenue Court for partition the defendant alleged the plaintiff owned only 1/3 share. Plaintiff contended that he had 1/2 and he was referred to Civil Court. Immediately he filed a suit for declaration. The cause of action being the order of the Revenue Court, the defendant contended that the suit was barred by limitation as the Revenue Records of such long date as 1872 showed only 1/3 share to his name. The court found that the plaintiff was in possession of 1/2 share all along.

Held that the suit was within time as it was not necessary for the plaintiff before the Revenue Court's order to bring the declaratory suit. 10 Ind. Cas. 11 (Oudh).

——Art. 120—Rent suit—Continuing cause of action.

Suit for declaration that the rent payable actually is greater than that recorded in Record-of-Rights, has no continuing cause of action as the right to sue arises only once, when the right to higher rent was denied, hence such a suit brought six years after the publication of Record-of-Rights is barred. 5 Ind. Cas. 115 (Cal.).

——Art. 120—Declaration of title—Every fresh invasion of right gives fresh cause of action.

Where plaintiffs were recorded as tenants in the Settlement Records, but no rent was demanded from them for a number of years and in 1907 the defendant got a decree for rent against plaintiffs; whereupon plaintiffs brought a suit for declaration that they were the proprietors of the plaint-land.

Held that the suit was within time as having been brought within 6 years from the date of the decree for rent; and that where there was a right, every invasion of that right gave a fresh cause of action. 12 O.C. 320=4 Ind. Cas. 159.

——Art. 120—Declaration of title—Successive denials of title—Fresh cause of action.

Where the name of the defendant is entered in Revenue papers and the plaintiff's title is denied, Article 120, Schedule II of the Limitation Act is applicable to a suit for declaration of title to property and the period begins to run from the date of the cause of action which accrues on the day the title is denied. Subsequent denial is a mere continuation of the denial of title and does not give fresh start to limitation. 31 All. 9=(1908) A.W.N. 252=5 A.L.J. 637=1 Ind. Cas. 557.

——Art. 120—Declaration of title—Fresh cause of action.

Where a defendant's name was originally entered in the *Khewat* in spite of plaintiff's objection on the 5th of May, 1899, and then the defendant instituted a suit on the 5th May, 1903, for profits and on 27th July, 1905, plaintiff brought a suit for declaration of his title it was **held** that the suit was not barred and a fresh cause of action arose on the Defendant's suit to obtain profits. 31 All. 10 (Note)=5 A.L.J. 638 (Note)=1 Ind. Cas. 556.

——Art. 120—Suit for declaration of title—Cause of action—Limitation.

The plaintiff sued in 1904 asking for a declaration that they were entitled to certain property mentioned in the plaint. Their cause of action was that the name of the defendant had in the year 1895 been entered in the revenue papers in respect of the property in suit.

Held, that the suit was barred by limitation and the fact that the defendant had, in 1903, registered the plaintiffs in an attempt to obtain correction of the *Khewat* did not give the plaintiffs a fresh cause of action. 20 A. 35, Foll. 1908 A.W.N. 252=1 Ind. Cas. 557=5 A.L.J. 637=31 A. 9.

——Art. 120—Declaration—Registry of land—Denial of title—Cause of action. *See* BOMBAY KHOTI SETTLEMENT ACT, SS. 20, 21. 3 Bom. L.R 181.

11. (d) Declaratory Suit—Setting aside alienation.

See Also NOTE 4.

——Art. 120—Applicability—Fraudulent sale—Suit to declare sale-deed void—Limitation—Starting point. *See* LIMITATON ACT (9 OF 1908), ARTS. 91 AND 120. (1950) 2 M.L.J. 653=A.I.R. 1951 Mad. 388.

——Art. 120—Suit for declaration in respect of alienation alleged to be invalid—Cause of action—Date of alienation or date of knowledge.

Quaere.—Whether the cause of action for getting a declaration in a suit under Art. 120, Limitation Act, in respect of an alienation accrues when the document is executed or whether time does not begin to run from the date of knowledge of the plaintiff of the alienation. A.I.R. 1950 Pat. 447.

——Art. 120—Applicability—Suit under S. 53, T.P. Act, to declare sale by debtor fraudulent and invalid—Limitation for—Starting point. *See* LIMITATION ACT, ARTS. 91 AND 120. 49 Bom. L.R. 675=A.I.R. 1948 Bom. 265.

——Art. 120—Suit by creditor—Limitation—Starting point.

A suit by a creditor to declare the invalidity as against him of a fraudulent transfer executed but by his debtor is governed, not by Art. 91 but by Art. 120 and the right to sue accrues only when the creditor has clear and definite knowledge of the facts which constitute fraud and of its effect upon his interests. 8 O.W.N. 593=7 Luck. 131=A.I.R. 1931 Oudh 333=132 Ind. Cas. 51.

——Art. 120—A suit for a declaration that a sale is fraudulent is governed by Art. 120 of the Act. 74 Ind. Cas. 164=1 Bur. L.J. 106=A.I.R. 1923 Rang. 82.

——Art. 120—Applicability—Suit by Official Receiver for declaration that mortgage executed by insolvent was sham and nominal—Starting point of limitation—Knowledge of plaintiff—Inference from facts.

A suit filed by the Official Receiver for a declaration that the mortgage executed by the insolvent was sham and nominal is governed by Art. 120 of the Limitation Act. Where in such a suit an alternative claim is made under S. 53 of the Transfer of Property Act, the latter claim will also be governed by the same article. In such cases, time begins to run from the date of the plaintiff's knowledge of the fraudulent nature of the transfer. Where the plaintiff is the Official Receiver, though he represents the body of creditors, it is his knowledge that should be taken into consideration rather than the knowledge of this or that creditor which might or might not have reached the Official Receiver. Mere knowledge of the existence of a document transferring the property of the debtor is not enough. There should be knowledge of facts which would invariably lead to definite inference that the transfer was made with an intent to defeat or delay creditors. I.L.R. (1946) Mad. 777=225 Ind. Cas. 487=59 L.W. 52=1946 M.W.N. 86=A.I.R. 1946 Mad. 236=(1946) 1 M.L.J. 113.

——Art. 120—Suit challenging transfer by insolvent—Starting point of limitation.

The period of limitation for a suit by the Receiver to challenge a transaction by the insolvent is 6 years under Art. 120 from the time the insolvency proceedings started. A.I.R. 1938 Nag. 546=I.L.R. (1940) Nag. 293=1938 N.L.J. 279=181 Ind.Cas. 297.

——Art. 120—Execution of mortgage decree against Hindu father—Suit by sons to declare mortgage invalid—Limitation.

It is open to a Hindu son to sue for a declaration that a mortgage executed by his father is bad as not being for legal necessity, as soon as the mortgage is executed ; but he is not bound to do so, when the mortgagee does not go into possession of the property but merely gets a document of mortgage. When the mortgagee after obtaining a decree on his mortgage, starts execution proceedings, a cause of action accures to the son ; it is only then that the joint family property is threatened by the execution proceedings launched by the mortgagee. A suit filed within 6 years of the starting of execution proceedings will be in time, though beyond 6 years of the date of alienation. 48 Bom.L.R. 594=230 Ind. Cas. 17=A.I.R. 1947 Bom. 82.

——Art. 120—Declaratory suit—Setting aside alienation—Vendee never in possession.

Where a suit was brought by certain Hindus for setting aside a sale-deed executed by their father and where the property was in the possession of the mortgagee even at the time of the institution of the suit and the vendee had never obtained possession, the suit is to be regarded as merely a declaratory suit and Art. 120 and not 126 applies for alienee did not get possession. 119 Ind. Cas. 90=1929 A.L.J. 1131=A.I.R. 1929 All. 750.

——Art. 120—Alienee never in possession.

Article 126 is based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession no limitation can arise under Art. 126. In such cases, the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit in under Art. 120. 106 Ind. Cas. 377=25 A.L.J. 734=A.I.R. 1927 All. 702.

——Art. 120—Sale by joint family member—Declaratory suit—Limitation, when commences.

Article 91 does not apply where the plaintiff is not suing to cancel or set aside a sale-deed of joint family property, executed by other members of his family but for a declaration that the sale-deed is void *ab initio*. The Article applicable is 120 and the period of 6 years begins from the time when the plaintiff came to know of the sale-deed. 77 Ind. Cas. 329=10 O.L.J. 360=27 O.C. 140=A.I.R. 1924 Oudh 120.

——Art. 120—Alienation—Father—Setting aside—Limitation.

A suit by a Hindu to declare that a sale of ancestral land by his father does not bind him is governed by Art. 120 of the Limitation Act of 1877, where both the alienation and the alienor's death occurred before the passing of the Punjab Limitation Act (5 of 1900.) 15 P.W.R. 1916=34 Ind. Cas. 253.

——Art. 120—Suit challenging transfer of occupancy tenancy.

To a suit by a landlord challenging any transfer of an occupancy right in contravention of the provisions of the Punjab Tenancy Act, Art. 120 applies and consequently a suit should be brought within six years from the date of the sale. 39 P.L.R. 771=A.I.R. 1937 Lah. 824=170 Ind. Cas. 77.

——Art. 120—Mortgage by mutwalli—Suit by worshippers for declaration that property is waqf—Limitation.

Certain worshippers of a mosque sued for a declaration to the effect that the property in dispute is '*waqf*' property, that defendant No. 1 is not its owner and had no right to mortgage it and that the decree obtained by defendant No. 2 against defendant No. 1 on the basis of the mortgage was null and void and the property could not be sold in execution of the said decree. The mortgage was executed in 1920 and the properties were put up for sale in 1923 :

Held, that the suit was governed by Art. 120 and the right to sue accrued only in 1923 and time did not begin to run from the date of the mortgage. 34 P.L.R. 598=A.I.R. 1933 Lah. 270=143 Ind. Cas. 725.

——Art. 120—Sale in contravention of Bengal Tenancy Act.

A suit for declaration that a sale held in contravention of S. 158 (*b*) of the B.T. Act, is illegal and inoperative is governed by Art. 120. 60 Ind. Cas. 529=3 U.P.L.R. (Pat.) 27.

——Art. 120—Alienation of temple property—Cause of action.

The temple lands in possession of the temple servants were recorded in the Sanad under Summary Settlements Act, S. 7 as their private lands (Jat-inam) and one of the servants alienated some portion of the lands in 1903 but the vendee did not take possession till 1916. Plaintiff sued on behalf of the managing Committee of Gaukars for a declaration that the lands belonged to the Devasthan.

Held, the cause of action arose within the meaning of Art. 120 only when the defendant attempted to alienate the lands and not by the mere grant of the Sanad. But the article did not apply in the case as plaintiff claimed possession. 75 Ind. Cas. 617=24 Bom. L.R. 902=A.I.R. 1922 Bom. 438.

——Art. 120—Avoidance of alienation—Accrual of right to sue.

The right to sue for a declaration that an alienation of property is invalid falls under Art. 120 and time runs from the completion of the document and not when the plaintiff comes to know the transfer. 38 Mad. 1064=33 Ind. Cas. 45.

——Arts. 120 and 134—Declaratory suit that sale by a trustee is invalid.

A suit for declaration that a sale by a trustee is invalid is governed by Art. 120, as it is not a suit for recovery of possession. (1914) M.W.N. 581=26 M.L.J. 537=24 Ind. Cas. 369.

——Art. 120—Suit for declaration that sale and redemption of share not binding—Specific Relief Act (1 of 1877), S. 42.

A suit for a declaration that the sale of one *pangu* of *melwaram* right and redemption of another *pangu of melwaram* right are not binding on the plaintiffs is governed by Art. 120. Where defendants are not in possession, the plaintiff is not entitled to further relief in the nature of possession, and his suit for a declaration of his tight is not barred by S. 42 of the Specific Relief Act. Where property is in the possession of *kudiwaramdars* and the *melwaram* is enjoyed by periodical division of the produce, it does not necessarily follow that the owners of the *melwaram* must pray for a further physical division of the property by metes and bounds. 20 M.L.J. 709=7 M.L.T. 253=1910 M.W.N. 550=5 Ind. Cas. 343.

——Art. 120—Avoidance of alienation.

A suit for a declaration of the invalidity of and alienation of the equity of redemption is governed by Art. 120. 29 P.L.R. 1913=108 P.R. 1912=17 Ind. Cas. 864.

——Art. 120—Avoidance of alienation—Cause of action—Knowledge if material—Alienation by karnavan of tarward.

The cause of action for suit for declaration that an alienation by a *karnavan* is not binding on the junior members of the *tarward* accrues on the date, the document of alienation was completed and not when the plaintiffs became aware of the alienation. In the absence of fraudulent concealment, the knowledge or ignorance of the plaintiff is immaterial. 33 Mad. 31=5 Ind. Cas. 698.

——Art. 120—Transfer by tenant—Setting aside.

A suit by a landlord under Central Provinces Tenancy Act for a declaration of the void character of a transfer made by the tenant is governed by Art. 120, and time begins to run from the date when the landlord becomes aware of the transfer. 5 N.L.R. 28=1 Ind. Cas. 906.

——Arts. 120 and 144—Declaratory suits—Specific Relief Act, S. 42.

A suit for the declaration of title to immoveable property against persons who, by their fraudulent

and unauthorised dealings with the same (*e.g.* mortgage sale in execution of mortgage decree, and purchase thereunder) had cast a cloud upon the plaintiff's title, was instituted more than six years after the date of the confirmation of the sale under the mortgage decree. **Held:** (1) that the provisons of the Limitation Act are applicable to such a case ; (2) that Art. 144 does not apply to a suit for declaration of title to immoveable property under S. 42 of the Specific Relief Act ; that Art. 120 applies to such a case ; (3) that the title of an auction-purchaser originates when the sale takes place, and in any event it is matured when the sale is confirmed, and a plaintiff seeking for a declaration that the auction sale has not affected his rights, is bound sue within six years from the date thereof. (1904) 1 C. L.J. 73.

——Art. 120—Sale by widow—Suit by daughters to set it aside—Withdrawn without leave to sue—Fresh cause of action to sons of such daughters.

A widow sold certain lands. Her daughters sued to set it aside and withdrew it in 1892, without leave to sue again. The daughters' sons sued in 1895, for a declaration of the invalidity of the sale. **Held,** that such withdrawal on the ground that the alienation was valid, without permission to bring a fresh suit, was a confirmation of the alienation of 1874, and gave a fresh cause of action, and that the suit was not barred. (1901) 25 M. 731.

11. (e) Declaratory suit—Setting aside decree or order.

See also NOTE 3.

——Arts. 120 and 91—Applicability—Suit for declaration that decree passed on invalid award is void—Relief based on fraud, misconduct or mistake—Limitation—Starting point.

A decree based on an invalid award being a nullity need not be set aside. A suit for a declaration that the decree is null and void is governed not by Art. 91 but by Art. 120 of the Limitation Act. In all cases where fraud, misconduct, mistake, *etc.*, form the basis on which relief is sought, the period of limitation would start not from the date of the decree but from the date of the plaintiff's knowledge as to its existence. 1949 A.M.L.J. 90=A.I.R. 1949 Ajmer 8.

——Art. 120—Suit to set aside fraudulent decree—Starting point.

A suit for declaration by a person who is not party to the decree to the effect that the decree is tainted by fraud and that he is not bound by it is not governed by Art. 95 but by Art. 120, and the limitation begins to run from the date of the decree. A.I.R. 1943 Bom. 283=45 Bom. L.R. 526=211 Ind. Cas. 230.

——Art. 120—Suit by minor for setting aside decree against him.

In a suit by a minor for declaration that a decree against him is not binding on him due to gross negligence of his guardian, the period of limitation will commence to run under Art. 120, not from the date of the decree sought to be set aside but from the date when the negligence of the guardian, which alone would entitle the plaintiff to have the decree set aside, became known to him. (1936) M.W.N. 351 =A.I.R. 1936 Mad. 804=170 Ind. Cas. 379.

——Art. 120—Declaratory suit—Setting aside decree.

Where title of a person is jeopardized for the first time by a decree in a suit, such a person is entitled to institute a suit for declaration that he is not bound by that decree and the article applicable to such a suit is 120 and the time begins to run from the date of the invasion of the title. 123 Ind. Cas. 830= A.I.R. 1930 All. 420.

——Art. 120—Declaration of title—Decree—Setting aside—Fraud.

A plaintiff after bringing a suit for a declaration as to his title within limitation by pleading an assertion of the defendant of a conflicting title within six years cannot impeach a decree in favour of the defendant on the ground of fraud which was passed more than six years before the date of filing the declaratory suit. 22 O.C. 171=6 O.L.J. 646=1 U.P.L.R. (J.C.) 77= 53 Ind. Cas. 572.

——Arts. 120 and 144—Order of Collector—Suit for declaration and possession.

Alluvial lands—Disposal by Collector, Bombay Land Revenue Code—Suit for declaration that order is null and void and for possession against Collector and his grantee—Suit is governed by Art. 120 and not by Art. 144. 33 Bom. L.R. 772=A.I.R. 1931 Bom. 369=55 B. 447=134 Ind. Cas. 716.

——Art. 120—Declaratory suit—Setting aside order.

Orders passed under Chap. 7 of the Presidency Small Cause Court Act, cannot be ragarded as a "decision or order" on the question of title. In a subsequent suit against an order under that Chapter there is no necessity to alter or set a side any such "decision or order." Consequently, Art. 13, Limitation Act, has no application. The article applicable may be Art. 120 or Art. 144. A.I.R. 1927 Mad. 321 and 7 W.R. 199 (F.B.), Foll. 115 Ind. Cas. 504=1929 M.W.N. 174=29 M.L.W. 537=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——Art. 120—Setting aside Government orders.

Suit for declaration that defendants are not permanent tenants of a field and that the order of Revenue Officer to that effect be held as incorrect is governed by Art. 120 and not by Art. 14.

Before Art. 14 can apply, the order must needs by one which must under law be set aside. 100 Ind. Cas. 4=A.I.R. 1927 Nag. 159.

——Art. 120--In 1903 the Government Officials marked off the lands in suit and issued to the plaintiff a rough potta, showing the lands to which Government admitted his right to obtain a grant subject to certain conditions. Plaintiff preferred objections to the exclusion from the rough pottah of the land in suit. His objections were definitely rejected in 1905. Thereupon plaintiff brought a suit to set aside the order and to obtain a declaration of his right in 1913:

Held, that Art. 120 applied and the suit was barred 80 Ind. Cas. 835=26 Bom L.R. 639=20 M.L.W. 49=51 I.A. 257=1924 M.W.N. 572=35 M.L.T. 128=47 Mad. 572=29 C.W.N. 365=A.I.R. 1924 P. C. 150=47 M L.J. 35 (P.C.).

——Art. 120—Settlement—Decision of Settlement Officer—Suit to set aside or modify decision—Limitation.

See BOMBAY ACT (1 OF 1880), S. 21. 3 Bom. L.R. 420.

12. Deposit.

——Art. 120—Amount deposited by sister for investment in brother's firm—Suit for recovery—Article 120 is applicable. 63 M.L.J. 232=(1932) M.W.N. 918= A.I.R. 1932 Mad. 685=36 L.W. 514=139 Ind. Cas. 164 (D.B.).

——Art. 120—Deposit of moveables.

A deposited his jewellery with his friend *B*. At the time of *B*'s marriage to be used by him for the purpose of the wedding on condition that it would be returned whenever *A* asked for it;

Held, that the transaction was a deposit and not a loan and the mere fact that *B* was allowed to use the jewellery did not take the transaction out of the category of deposit as that expression is used in Art. 145 and Art. 120 has no application. A.I.R. 1930 Lah. 913=31 P.L.R. 907.

——Arts. 120, 36 and 62—Return of deposit.

Deceased had obtained a lease of premises from the Collector for conducting a grog shop and deposited Rs. 250 as security for rent. On his death defendant got the lease, and as a result of the arrangement between him and the Collector, the sum of Rs. 250 was made liable for his loan. The plaintiff, the universal legatee of the deceased brought suit for the amount. The proper article applicable was 120, being a suit to recover specific sum of money belonging to him and enjoyed by the defendant, the cause of action occurred on defendant's refusal to pay. 38 Ind. Cas. 525 (Pat.).

——Art. 120—Return of Deposit.

A suit for the recovery of money deposited with another and repayable on the happening of a future event, and brought after the happening, of the event, is a suit for "Compensation for the breach of any contract not in writing registered" within the meaning of Art. 115, Sch. II of the Limitation Act, and is barred if not instituted within 3 years from the date on which the event happened. Neither Article 60, nor 66 or 120 governs such a suit. (1914) M.W.N. 264= 22 Ind. Cas. 60.

——Art. 120—Return of deposit—Suit to recover money deposited as security for payment of rent.

Suit for money deposited with a lessor as security to ensure payment of rent payable under a contract of lease is governed by Art. 120. 13 O.C. 286=8 Ind. Cas. 370

13. Ejectment.

——Art. 120—Suit for eviction.

When it is proved that an order was passed by the Survey and Settlement Officer under S. 11, Madras Survey Boundaries Act, and it is shown that the procedure prescribed under the Act was duly observed, bar under S. 13 will operate. But where the order is one which should be deemed to have been passed under R. 3 (1) (*a*) of the Board's Standing Order No. 31 of Clause (7), S. 13 will not apply. In such a case a suit for eviction of the defendant will be governed by Art. 120. A.I.R. 1938 Mad. 668=147 Ind. Cas. 501.

——Arts. 120 and 144—Suit for ejectment of non-proprietor—Limitation.

A suit by the proprietor for ejectment of a non-proprietor in Punjab from the site occupied by him is in its essence a suit for possession and is governed by Art. 144 and not by Art. 120. A.I.R. 1932 Lah. 47 =33 P.L.R. 298=134 Ind. Cas. 419.

——Arts. 120 and 144—Ejectment—Plaint mentioning that entry in Record-of-Rights is incorrect—If would make it suit for correction.

The mere mention in the plaint that an entry in the Record-of-Rights is incorrect would not convert it into a suit for correction of the Record-of-Rights. 42 Ind. Cas. 471 (Pat.).

——Art. 120—Ejectment—Landlord and tenant.

A suit by a landlord to dispossess a purchaser of occupancy rights in the land in suit, is governed by Art. 120 and not Art. 144, and may be brought within 6 years from the date of sale. 1 P.R. 1916 (Rev.)= 3 P.W.R. 1916 (Rev.)=34. Ind. Cas. 523.

——Art. 120—Ejectment—Cause of action—Assertion title by tenant.

An assertion of title by tenant which would imply that he is not liable to ejectment would not become effective against the landholder until such time as it was put forward as a substantial defence in ejectment proceedings before the Revenue Court. 2 O.L.J. 131=28 Ind. Cas. 307.

——Arts. 120, 142 and 144—Ejectment—Encroachment on public way—Shamilat.

A suit to oust the defendant from a specific portion of the *shamilat deh* occupied by him adversely to the rest of the proprietors or to remove an obstruction to the enjoyment of the *shamilat* is governed by Art. 120 of the Lim. Act. Arts. 32, 142, 144 or 146 (*a*) does not apply to such a suit. 124 P.R. 1912=2 P.L.R. 1912=132 P.W.R. 1912=15 Ind. Cas. 285.

——Arts. 120 and 144—Ejectment—Punjab Tenancy Act (1877), S. 6.

A suit for dispossession of the vendee of occupancy rights under S. 6 of the Punjab Tenancy Act, when the sale is made without the landlord's written consent is governed by Art. 144 and not by Art. 120. The period of limitation is 12 years. 3 P.R. 1910 (Rev.)= 6 Ind. Cas. 942.

——Art. 120—Ejectment—Notice — Cancellation of.

Where a notice of ejectment issued by a landlord to his tenants had to be cancelled on the ground that several notices had to be issued instead of one but not because the tenants had any proprietary or under-proprietary rights, the mere allegation by the tenants in the proceedings for cancellation of notices on the ground that they had under proprietary rights does not *per se* set time running against the landlord; there must be an actual decision adverse to him on the point. 12 O.C. 15=1 Ind. Cas. 325.

14. Injunction.

——Arts. 120 and 142—Injunction and possessions —Suit for.

Whether Art. 120 or Art. 142 would come into operation depends upon the nature of the relief claimed.

Gallery of plaintiff's house enclosed—Plaintiff's suit under S. 54, Specific Relief Act coupled with claim for possession of land below the gallery to which defendant asserting title—Suit is not governed by Art 120 but by Art. 142. A.I.R. 1939 Nag. 197=1939 N.L.J. 297=I.L.R. (1939) Nag. 580=186 Ind. Cas. 155.

——Arts. 120 and 144—Co-owners—Injunction.

To suits between co-owners or co-tenants *inter se*, where the title of one is denied by the other, Art. 144 or Art. 120 would apply, according as the relief claimed is one for possession or injunction. A.I.R. 1939 Lah. 315=42 P.L.R. 276.

——Arts. 120 and 32—Suit for permanent injunction to remove constructions on shamilat—Limitation.

Where the plaintiff sues for permanent injunction to have certain constructions removed on the ground that they had been built by the defendant upon two pathways, the pathways being part of the village *shamilat* of which the plaintiff as well as the defendants are some of the owners, the suit is governed by Art. 120 and not by Art. 32. A.I.R. 1934 Lah. 701=35 P.L.R. 472=156 Ind. Cas. 358.

——Arts. 120 and 32—Suit for injunction for removal of obstruction by defendant.

Where the plaintiff brought a suit for an injunction restraining the defendant from preventing him from using the field, owned jointly by the plaintiff and the defendant as a pathway and directing the defendant to keep it open as a path for him and his carts:

Held, that in suits of this kind, the real causes of action was the ouster of the plaintiff from property jointly owned by him and defendant and reserved for their common use for a specific purpose and not the perverted user of such property by the defendant and that Art. 120 and not Art. 32 applied to the case. 34 P.L.R. 618=A.I.R. 1933 Lah. 705=14 L. 267=145 Ind. Cas. 553 (F.B.).

——Art. 120—Starting point—Sale in execution.

For a suit by third party transferee of tenure under Ss. 12 and 13, Ben. Ten. Act, for restraining sale of tenure in execution of decrees not binding upon him, the limitation begins to run when the landlord applies for the sale of the tenure and not when the decree was obtained. 59 M.L.J. 607=34 C.W.N. 821=57 I.A. 214=52 C.L.J. 272=126 Ind. Cas. 422=58 Cal. 301=A.I.R. 1930 P.C. 193 (P.C.).

——Arts. 120 and 32—Injunction.

A sued for an injunction to compel *B* to remove a kotha built on a part of the village common land. This kotha was built more than two years before, and less than six years before the institution of the suit,

Held, that the notion that Art. 32 applies only to cases *ex contractu* was not correct; therefore the suit was barred not under Art. 120 which did not apply but under Art. 32. A.I.R. 1925 Lah. 653, Appr. 121 Ind. Cas. 186=31 P.L.R. 14=A.I.R. 1930 Lah. 283.

——Art. 120—Discharging water over land of another—Cause of action.

In a case where a person discharges water over the land of another a fresh cause of action accrues from day to day and a suit brought more than six years after the construction of parnala by the person is not barred. 2 L.L.J. 463, Foll. 109 Ind. Cas. 638=10 L. L.J. 395=A.I.R. 1929 Lah. 88.

——Art. 120—Party wall.

If one of two neighbouring owners raises a party wall, the other owner giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands and therefore neither party can be allowed to commit a trespass on the party wall so, *e.g.*, by opening windows therein. A suit for injunction directing the defendant to close the windows so opened is governed by Art. 120 and must be brought within 6 years of the opening of the windows. 87 Ind. Cas. 977=27 Bom. L.R. 503=49 Bom. 586=A.I.R. 1925 Bom. 373.

——Arts. 120 and 32—Land reserved for common use.

Where a suit was instituted for an injunction that the defendants be restrained from cultivating land on the allegation that according to the custom of the village it was reserved for the common use of all the owners in the village, and that no individual owner was entitled to do anything so as to interfere with such common use,

Held, that the suit was governed by Art. 32 and not by Art. 120. 26 Cal. (F.B.), Foll. 89 Ind. Cas. 405=A.I.R. 1925 Lah. 653.

——Art. 120—Encroachment.

In a suit for perpetual injunction directing defendants to remove an encrochment made on common land, it is for the plaintiff to prove that the encroachment was made within six years before suit and a mere surmise by the Court that the encroachment was 'recent' is insufficient for holding that it took place within six years. 151 P.L.R. 1912, Foll. 88 Ind. Cas. 176=7 L.L.J. 228=26 P.L.R. 283=A.I.R. 1925 Lah. 455.

——Arts. 120 and 32—Injunction—Construction on occupancy land.

Where plaintiff sued defendant for demolition of certain constructions made by defendant on his (defendant's) occupancy lands without plaintiff's permission and for injunction and where the plaintiff did not allege in the plaint that he had actual possession of lands or that he had lost possession and where he had not availed himself of his right under the local Tenancy Act to eject the defendant,

Held, that it was not a suit for possession at all and that Art. 144 could not apply and that if the defendant's action had perverted the property to a purpose for which he had no right to use it, the claim fell within Art. 32 but that in any event Art. 120 only applied both as regards the relief for demolition of construction and for injunction. 78 Ind. Cas. 849=A.I.R. 1924 All. 814.

——Art. 120—Beams.

Where defendant put up beams against plaintiff's wall more than 6 years ago a suit for removal of the beams is barred by limitation. 76 Ind. Cas. 585=A.I.R. 1923 All. 452.

——Arts. 120 and 144—Sheds.

Where the plaintiff's claiming to be joint owners of a certain courtyard, alleged that the defendants had erected certain *chhappers* or thatched sheds in front of their house and asked for a perpetual injunction to issue to them directing them to remove the said *chhappers* and to restore the courtyard to its former condition.

Held, that the suit was essentially a suit for the issue of an injunction and although the injunction would have had the effect of restoring the courtyard to a state in which the plaintiff's might have been able to have a more extensive use of it than they actually had, the suit would not be covered by Art. 144 but Art. 120 would apply. 60 Ind. Cas. 20=3 L.L.J. 128=A.I.R. 1921 Lah. 242.

——Art. 120—Suit for injunction—Cause of action.

Art. 120 is the residuary article and can be said to provide the limitation for a suit for injunction but the *terminus a quo* is the date when the right to sue accrues. A suit for an injunction to prevent

the discharge of water on to the plaintiff's roof is governed by Art. 120 and the starting point is the date when the water was last discharged on to the plaintiff's roof. 2 U.P.L.R. (Lah.) 116=2 Lah. L. J. 468=56 Ind. Cas. 1003.

——Art. 120—Suit for injunction—Trespass on land—Pillar driven into plaintiff's land—Suit for a mandatory injunction to remove the pillar.

A suit for a mandatory injunction to remove the stair-case which overhung the land in dipute, and also the pillar on which it rested on that land, is governed by Art. 120. 42. Bom. 333=20 Bom. L.R. 327=45 Ind. Cas. 592.

——Art. 120—Suit for injunction—Encroachments on reserved land—Burden of proof—Specific Relief Act (1 of 1877), S. 54.

In a suit for perpetual injunction directing the defendants to restore certain encroached lands to its original condition, it is for the plaintiff's to prove that the encroachments were made within six years prior to the suit. The Court cannot act merely on the surmise that the encroachments are recent. 77 P.W.R. 1912=151 P.L.R. 1912=13 Ind. Cas. 661.

——Art. 120—Injunction, suit for by lessor against lessee for enforcement of a right under a covenant.

A suit for an injunction to restrain the defendants (lessees) from interfering with the plaintiff's (lessor's) rights under a covenant in the lease is governed by Art. 120. Neither Art. 112 nor 145 nor 144 applies. 13 M. 445, Foll. 1904 A.W.N. 69=26 A. 391.

——Art. 120—Suit to restrain a nuisance—Opening of burning and burial grounds. *See* MADRAS CITY MUNICIPAL ACT OF 1884, SS. 392, 433 AND 458. 25 M. 118.

15. Movable Property.

See ALSO NOTES 12, 16, 25, 27 AND 29.

——Art. 120—Suit to establish right to inherit movable property.

A suit to establish a right to inherit the property of a deceased person even though movable is governed by Art. 120. A.I.R. 1940 Lah. 475=I.L.R. (1941) Lah. 843=191 Ind. Cas. 676.

—— Art. 120—Pledge—Cause of action, when arises.

The right to sue on the security in default of payment is simultaneous with the right to sue on the loan, for, if the loan is payable on demand, the right to sue in default of payment also accrues at the same time. The suit is governed by Art. 120. A.I.R. 1935 Bom. 213=37 Bom. L.R. 165=156 Ind. Cas. 531.

——Arts. 120 and 132—Loan on security of moveable property—Suit to enforce payment by sale—Limitation.

Where a plaintiff who had lent money on the security of eight buffaloes, sought by his suit to enforce the payment of the money charged on the buffaloes and did not seek to get a personal decree against the debtor,

Held, that the suit was barred by limitation being governed by Art. 120. 40 All. 512=16 A.L.J. 449=46 Ind. Cas. 373.

——Art. 120—Suit for moveables—Sale proceeds of immoveable property—Moveable property substituted for—Limitation.

A claim for the proceeds of what was once immoveable property but has been substituted by moveable property is not a claim for immoveable property or any interest therein or any profits arising out of land and is governed by Art. 120. 3 Pat. L.J. 522=46 Ind. Cas. 627.

——Arts. 120 and 132—Suit for moveables—Mortgage decree, if moveable property.

A mortgage decree for sales is moveable property, and a suit to enforce the hypothecation of such a decree is governed by Art. 120 of the Act. 23 C. 750; 9 A 108, Foll. Where however the decree has been converted into immoveable property, the mortgagee of such decree is entitled to the benefit of not only the new security, but of Art. 132 of the Act. 39 All. 74=14 A.L.J. 1025=37 Ind. Cas. 4.

——Art. 120—Suit for moveables—Share of moveables on death of widow—Contest between two brothers—Limitation.

A suit between two brothers for recovery of moveables left by the widow of third brother is governed by Art. 120 of the Limitation Act. 13 P.L.R. 1914=24 P.W.R. 1914=34 P.R. 1914=21 Ind. Cas. 919.

——Art. 120—Suit for moveables.

A suit for the recovery of moveable property wrongly sold in execution of a decree is not governed by Art. 120. 4 Bur. L.T. 46=9 Ind. Cas. 774.

16. Partition.

——Art. 120—Suit for partition by mortgagee.

Two out of three undivided members of a joint Hindu family mortgaged their share in the joint property in 1879. In 1882, one of them sold his share to the mortgagee. The vendor died in 1896, and the other mortgagor in 1898. Both of them left no male issue. In 1937, the successor-in-title of the mortgagee filed a suit for partition of the joint family property and to have allotted to him a share purchased by the mortgagee from one of the coparceners and also sought to enforce the mortgage :

Held, that neither Art. 144 nor Art. 142 applied, the only Article applicable being Art. 120 and the suit therefore was time-barred. A.I.R. 1939 Bom. 322=41 Bom. L.R. 631=184 Ind. Cas. 23.

——Art. 120—Partial partition—Family business left undivided with some other property :

Held, that the suit for partition and for accounts of such undivided family business can lie and is governed by Art 120 and not by Art. 106. 45 M.L.W. 749= A.I.R. 1937 Mad. 599=(1938) 1 M.L.J. 574=173 Ind. Cas. 194.

——Arts. 120 and 113—Partition deed—Provision that if shares were found unequal, excess must be made good from certain plot—Suit for deficit—Neither Art. 120 nor Art. 144 but Art. 113 applied. 42 L.W. 208=(1935) M.W.N. 540=A.I.R. 1935 Mad. 559=156 Ind. Cas. 879.

——Art. 120—Partition—Khudkasht or Sir Lands.

A Civil Court can enquire into the question as to whether the *khudkasht* or *sir* lands are or are not the sole property of a person or whether they are joint property, though it cannot decide whether there should be a partition or not, the question of title may have to be decided for other purposes for partition. Even as regards the question of partition the Civil Courts are not precluded from giving a declaratory decree as to what are the pre-existing titles of the parties, though of course they can give no direction whatever as whether there should be a partition or

how a partition should proceed. So far then as a suit is a suit for ascertaining what the titles of the parties respectively are over the lands in the *mahal*, the suit cannot be time-barred merely because the Revenue Officer declined more than six years before the institution of the suit to proceed with a partition until the question of title had been decided in a Civil Court. 71 Ind. Cas. 205=19 N.L.R. 11=A.I.R. 1923 Nag. 86.

——Art. 120—Partition—By metes and bounds.

Where the members of a joint Hindu family become divided in status but the properties have not been actually divided and apportioned among them, and subsequently one of them brings a suit for partition by metes and bounds claiming also an account being taken of the movable properties outstanding and collections made by the various members in respect of the properties.

Held, that the proper article to apply is Art. 120. The period of limitation will run from the demand of the share by the plaintiff or refusal by defendant. If the facts be that the rents and profits were received with the consent of all concerned, by the various members in possession pending final settlement by division, each of such persons might be considered as agent for himself and his co-owners. In such a case Art. 89 will apply. 71 Ind. Cas. 177=45 Mad. 648=1922 M.W.N. 215=15 M.L.W. 595=30 M.L.T. 279=A.I.R. 1922 Mad. 150=42 M.L.J. 507 (F.B.).

——Art. 120—Partition of moveables.

A suit for partition of movables of a Mahammadan falls under Art. 120 and not 49. 64 Ind. Cas. 974=44 All. 244=20 A.L.J. 71=A.I.R. 1922 All. 525.

——Arts. 120 and 144—Suit for partition of immoveables and moveables.

Art. 120 is not applicable to a suit for partition though the subject-matter consists of moveable and immoveable property. A suit for partition of immoveables is governed by Art. 144 and the fact that the plaintiff's withholding of the moveables will affect his share of the immoveables does not affect the matter (1910) 20 M.L.J. 964=34 Mad. 74=(1910) M.W.N. 256=8 M.L.T. 97=6 Ind. Cas. 579.

——Art. 120—Suit for partition of moveables and immovables—Period of limitation is the same for moveables and immoveables. (1903) 6 Bom. L.R. 1=31 C. 262 =14 M.L.J. 8=31 I.A. 10 (P.C.).

——Arts. 120 and 144—Entry in revenue records—Suit for share.

Where several persons hold property jointly an objection by one of them to the accuracy of an entry in the revenue papers must be regarded as an objection made on behalf of all. A suit by such co-sharer in a Civil Court to have his share properly determined is not one for the correction of the entry but one for partition of the share which actually belongs to him and of which he is in possession. 7 O.L.J. 237=2 U.P.L. R. (J.C.) 74=55 Ind. Cas. 412.

17. Partnership.

——Arts. 120, 61 and 106.—Where partnership results in a loss and a principal partner having had to bear his share *of it, sues his Sub-partner or the recovery of* the portion which the latter is bound to contribute under the special contract between them, the suit is not governed by Art. 106 or Art. 61, but by Art. 120. 65 M.L.J. 789=38 L.W. 858=A.I.R. 1934 Mad. 12=(1938) M.W.N. 1382= 57 Mad. 347=148 Ind. Cas. 204.

——Arts. 120—Suit for dissolution of partnership.

A suit for taking accounts is one for dissolution of an existing partnership and is governed by Art. 120 and 113 and not by Art. 62. A.I.R. 1934 Bom. 491= 36 Bom. L.R. 1068=154 Ind. Cas. 680.

——Art. 120—Dissolution of partnership.

A dissolution of a partnership is not a rescission of a contract and as there appears to be no article specifically dealing with a suit for dissolution, Art. 120. Limitation Act would apply. 110 Ind. Cas. 349=6 Rang. 198=A.I.R. 1928 Rang. 160.

——Arts. 120, 106 and 116—Partnership entered for a term of 60 years in 1919—Deed registered—One of the partners dying in 1920—The other partner alienating his interest in 1919—Suit by remaining partner for amounts within 6 years of alienation but after 3 years of death in 1920—Partnership, held, dissolved in 1920—Suit not governed by Art. 120 or Art. 116 but by Art. 106. 39 L.W. 164=A.I.R. 1934 Mad. 162=57 M. 378=(1934) M.W.N.22= 66 M.L.J. 625=151 Ind. Cas. 81.

——Arts. 120 and 106—Suit by expelled partner for dissolution of partnership for accounts and share of profits—Art. 120 applicable and not Art. 106. 12 C.W.N. 455.

——Arts. 120, 150 and 62—Hindu joint family—Partnership—Claim against family for moneys advanced—Limitation—Barred debt.

A suit by a partnership consisting of some of the members of a joint Hindu family against the family for advances made to it out of the partnership funds is governed by Art. 120 if not, by Arts. 57, 61, 62 or 115 of the Act. The claim cannot be enforced in an action for partition after it has become barred either by way of equitable set off or as an item in the account of dealings between the family and the partnership or by treating the liability of the family as assets. 34 M.L.J. 32=44 Ind. Cas. 428.

18. Possession.

——Arts. 120 and 144—Applicability—Decree against manager of Hindu joint family—Execution sale of joint family property—Suit by purchaser for possession—Limitation.

Art. 144 and not Art. 120 of the Limitation Act, applies to a suit for possession by an auction-purchaser of a particular joint family property described with boundaries in his sale certificate, sold in enforcement of a decree obtained by a creditor against, *inter alias* the manager of the family. I.L.R. (1946) Bom. 109=224 Ind. Cas. 206=47 Bom. L.R. 1102=A.I.R. 1946 Bom. 192.

——Arts. 120 and 144—Suit for possession by auction-purchaser of mortgaged land leased subsequently.

In a suit by mortgagee-auction-purchaser for the possession of certain land which was leased out by the mortgagor, after its mortgage, it is not necessary for the plaintiff to sue for pray for cancellation of the lease and the case is not governed by Art. 120 but by Art. 144. 1936 O.W.N. 399=1936 R.D. 168=12 Luck. 161=A.I.R. 1937 Oudh 146=162 Ind. Cas. 225.

——Arts. 120 and 91—Sale by guardian of immovable property of this ward without sanction of Court—Subsequent sale with sanction, to another—Suit by subsequent purchaser for possession against purchaser:

Held, that the subsequent purchaser was entitled to see for possession without being required to have the previous sale set aside. Hence the suit was governed by Art. 120 and not Art. 91 of Limitation Act. 34 C.W.N. 948=A.I.R. 1931 Cal. 131=58 C. 128=130 Ind. Cas. 273.

——Art. 120—Suit for joint possession.

A transferee of the undivided interest of one of several co-owners does not get right to immediate possession, but if he wants separate possession of his purchase, he must sue for partition. If co-owners want common enjoyment of such property before partition they must sue for joint possession and to such s its Art. 120 applies. 111 Ind. Cas. 76=10 N.L.J. 174=A.I.R. 1928 Nag. 96.

——Arts. 120 and 142—Suit for possession of immovable property.

Where the suit is on the face of it one for recovery of possession of immovable property who had taken unlawful possession thereof and had planted new trees thereon :

Held, that the suit is governed by Art. 142 of the Limitation Act. A prayer for removal of the recently planted trees is merely ancillary to the claim for possession will not take the case out of Art. 142 and make Art. 120 applicable. 66 Ind. Cas. 799=9 O.L.J. 17=A.I.R. 1922 Oudh 47.

——Arts. 120 and 144—Non occupancy ryot, suit by for recovery of possession—Specific Relief Act, S. 9:

Held, by F.B. (*Prinsep, J.*, dissentiente):—that the remedy in S. 9 of the Specific Relief Act is not the only remedy which the Legislature has provided for a non-occupancy raiyat who has been dispossessed otherwise than in due course of law. 7 C.W.N. 218, Overruled. The period of limitation applicable to the case of a non-occupancy ryot who has been dispossessed from his holding otherwise than in execution of a decree is other 6 or 12 years as provided in Art. 120 or Art. 142 of the Limitation Act. (1904) 8 C.W.N. 446=31 C. 647 (F.B.).

——Arts. 120 and 144—Suit for confirmation of possession.

A suit even though framed for confirmation of possession, may be treated as one for recovery of possession if plaintiff's title to recover possession has not been barred by limitation but where the plaintiff in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him possession even though he proves his title and the suit has been instituted within the limitation prescribed for suits for recovery of possession. 44 Ind. Cas. 996 (Cal.).

19. Pre-emption.

——Art. 120—Applicability—Pre-emption on foreclosure. *See* LIMITATION ACT (9 of 1920), ARTS. 10 AND 120. A.I.R. 1950 All. 647.

——Arts. 120 and 10—Applicability—Suit for pre-emption under Ss. 177 and 183, Berar Land Revenue Code.

Art. 120, and not Art. 10 of the Limitation Act applies to a suit for pre-emption under Ss. 177 and 183 of the Berar Land Revenue Code. I.L.R. (1949) Nag. 465=1949 N.L.J. 290.

——Arts. 120 and 144—Subsequent transferee, limitation against.

If a suit is brought against the original vendee within the time allowed under Art. 10, but the subsequent transferee (to whom the property has been sold by the original vendee) is impleaded as a defendant after the period of limitation, the suit against the latter is governed either by Art. 120 or Art. 144. 1938 A.W.R. 869=A.I.R. 1939 All. 158=(1939) A.L.J. 35=I.L.R. (1939) All. 220=180 Ind. Cas. 33.

——Art. 120—Suit by pre-emptor against another pre-emptor.

Where a pre-emptor institutes a suit against another pre-emptor, claiming his superior right of pre-emption and that the decree obtained by such other pre-emptor is based on fraud, the article applicable is Art. 120. A.I.R. 1936 Lah. 503=164 Ind. Cas. 366.

——Arts. 120 and 10—Suit for Pre-emption—Punjab Pre-emption Act (2 of 1905) Ss. 25 and 29—Suits by rivals in Pre-emption against one another.

In suits by rival pre-emptors against one another in respect of the same sale, the period of limitation is that prescribed by Art. 120 and not Art. 10 nor even that in Section 29 of the Punjab Pre-emption Act because the last contemplates only a suit by a pre-emptor against the original vendee. 186 P.W.R. 1912=80 P.R. 1912=14 Ind. Cas. 328.

——Art. 120—Pre-emption.

Vendee already holding possession as tenant prior to foreclosure under conditional mortgage—Art. 10 does not apply—Case is governed by Art. 120. 102 Ind. Cas. 22=1 L.C. 38=A.I.R. 1927 Oudh 212.

——Arts. 120 and 10—A suit for pre-emption in respect of a lease must be brought within six years from the date of lease deed and not from the date of its registration. Art. 10 does not apply in the case of a lease as this transfer is not a sale. 95 Ind. Cas. 138=A.I.R. 1926 All. 549.

——Art. 120—Suit for pre-emption—Limitation—Starting point.

In a pre-emption suit the limitation runs from the date of registration and not from the date of execution of the deed of sale and the article applicable is 120. Section 47 of the Registration Act does not apply to the case. 68 Ind. Cas. 715=A.I.R. 1922 Nag. 200.

——Art. 120—C. P. Tenancy Act (1898), S. 41.

In a suit for pre-emption under S. 41 (5) where the tenant had merely given notice but had not actually sold his holding.

Held, that Art. 120 applied to the case. 65 Ind. Cas. 959=A.I.R. 1922 Nag. 14.

——Arts. 120 and 10—Pre-emption of perpetual lease.

A suit to pre-empt. perpetual lease is governed by Art. 120 and not Art. 10. 62 Ind. Cas. 884=19 A.L.J. 442=A.I.R. 1921 All. 154.

——Arts. 120 and 10—Pre-emption—Property not in possesson of Vendee.

Where the property sold is not in the possession of the vendee but in possession of the trespasser and a pre-emptor files a suit for pre-emption,

Held, per *Krishnan, J.*—Limitation commences only when possession is taken, where the second part of third column of Art. 10 does not apply to the case.

Per *Napier J.*—In such a case where possession is not taken due to the property being in the possession of a trespasser and the vendor consequently being unable to give possession to the vendee, Art. 10

does not apply but Art. 120 applies. 62 Ind. Cas. 27=13 M.L.W. 268=1921 M.W.N. 207=A.I.R. 1921 Mad. 554=40 M.L.J. 443.

——**Art. 120**—Suit for pre-emption where vendee has got only formal possession. *See* LIMITATION ACT, ART. 10. 3 Bom. L.R. 767=5 C.W.N. 888=24 A. 17=28 I.A. 248 (P.C.).

——**Art. 120—Suit for pre-emption—Suit by othidar.**

A suit by othidar for pre-emption is governed by Art. 120 and time runs from the date he comes to know of the sale and its terms and not from the date of sale. 38 Mad. 67=12 M.L.T. 535=23 M.L.J. 607=(1912) M.W.N. 1217=17 Ind. Cas. 337.

——**Art. 120—Suit for pre-emption.**

The limitation applicable to the case of a second vendee in a pre-emption suit is the one in Art. 120 of the Act. 16 I.C. 70, foll. 49 P.R. 1914=252 P.L.R. 1914=160 P.W.R. 1914=25 Ind. Cas. 443.

——**Art. 120—Suit for pre-emption—Punjab Pre-emption Act.**

In a suit for pre-emption, if the sale had been effected more than six years before the Punjab Pre-emption Act (2 of 1905) came into force, the suit is barred under Art. 120 of the Limitation Act, and the plaintiffs could not avail themselves of the special extension of time for one year given by S. 28 of the Punjab Pre-emption Act. 98 P.L.R. 1909=91 P.W.R. 1909=4 Ind. Cas. 935.

20. Profits.

See also NOTE 27.

——**Art. 120**—Applicability—Application by Official Receiver under S. 4, Provincial Insolvency Act, for rents of property in possession of alienee from date of alienation by debtor and ouster by Receiver under decision setting aside alienation as nominal and fictitious—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 109 AND 120. 52 Bom. L.R. 606=A.I.R. 1950 Bom. 399.

——**Art. 120**—Fraudulent transaction set aside—Application by Receiver for mesne profits and interest from transferee—Application under S. 54 of Provincial Insolvency Act (1920)—Transfers by insolvent prior to Adjudication set aside—Application by Receiver for mesne profits and interest from transferee:

Held, that the claim for interest was governed by Art. 120 and the Official Receiver could recover interest only for six years preceding his subsequent application. A.I.R. 1946 Mad. 207=58 L.W. 665=(1945) 2 M.L.J. 557=1945 M.W.N. 772.

——**Art. 120—Mesne profits—Suit for recovery by auction-purchaser.**

A suit for mesne profits where the possession of the suit property was obtained by the defendant under the purchase at the Court auction is not governed by Art. 120 but by Art. 109. A.I.R. 1942 All. 358=1942 A.W.R. 278=(1942) A.L.J. 411=I.L.R. (1942) All. 671=203 Ind. Cas. 223.

——**Arts. 120 and 109—Mesne profits, suit for—Possession in execution of a decree subsequently set aside—Right to sue for mesne profits, when accrues.**

Art. 120 applies to a suit for mesne profits of land held in such possession, and the plaintiff is within time if he brings his suit within six years from the date on which his right to sue accrued. The right to sue in such a case accrued when the execution proceedings in which the defendant obtained possession are set aside as fraudulent. The suit being in time, there is no law against the plaintiff recovering mesne profits for the whole period during which he was kept out of possession. (1905) 3 C.L.J. 182.

——**Art. 120—Suit to recover profits wrongfully withheld.**

Where a person has been placed in rightful possession as custodian (*supratdar*) and he rightfully received the profits in that capacity but wrongfully withheld them, a suit to recover profits is not governed by Art. 109 or Art. 89 but by Art. 120. A.I.R. 1941 Nag. 181 =I.L.R. (1942) Nag. 92=1941 N.L.J. 184=201 Ind. Cas. 220.

——**Art. 120—Suit for share of profits—Co-sharers.**

The suit by the other co-sharers for recovery of their proportionate share of the net produce of the common land cultivated by the defendant co-sharer in exclusive possession is governed by Art. 120 and not by Art. 109, Limitation Act. A.I.R. 1941 Pat. 90=21 P.L.T. 854=7 B.R. 425=20 Pat. 162=192 Ind. Cas. 456.

——**Art. 120—Suit for share of profits—Co-sharers.**

A suit between two co-sharers for a share of profits realised by the co-sharer in possession is governed by Art. 120 and not by Art. 89. 1936 R.D. 298=A.I.R. 1936 All. 706=(1936) A.L.J. 984=1936 A.W.R. 703=165 Ind. Cas. 266.

——**Arts. 120 and 109**—A suit by one co-sharer against another co-sharer (who is in exclusive possession of the joint property) is governed by Art. 120 and not by Art. 109. A.I.R 1933 Lah. 951=35 P.L.R. 208=147 Ind. Cas. 909.

——**Art. 120—Co-sharer.**

Where a co-sharer who had been given symbolical possession in execution of a decree for joint possession under S. 264 of C.P. Code, 1882. (O. 21, R. 36 of Code of 1908) sued for partition and separate possession.

Held, that he should be allowed mesne profits for a period of six years only prior to the suit. 29 C.W.N. 270=A.I.R. 1925 P.C. 93 (P.C.).

——**Art. 120—Share of rents collected by co-sharer.**

Art. 120 and not Art. 62 or 48 or 49 or 109 applies to a suit by one co-sharer against another for a share of the rent collected by the latter, the rent being due in respect of land held by the co-sharers not separately but jointly. 66 Ind. Cas. 876=34 C.L.J. 508=A.I.R. 1921 Cal. 77.

——**Art. 120—Suit for profits—Village profits—Burden of proof.**

A suit by a co-sharer to recover his share of the village profits from the managing co-sharer is governed by Art. 120. 10 C.P. L.R. 98, foll. 13 N.L.R. 127=41 Ind. Cas. 848.

——**Arts. 120, 36 and 115—Suit for profits—Action as between co-sharers for profits of ferry.**

A suit by one co-sharer for recovery of the profits of a ferry from another co-sharer is governed by Art. 120, Sch. I of the Act, and not by Art. 36 or

45 of Sch. I of the said Act. 1 Pat. L J. 69=35 Ind. Cas. 430.

——Art. 120—Suit for profits—Punjab Tenancy Act, S. 77 (3) (k).

A suit by a co-sharer in a holding under S. 77 (3)(*k*) of the Punjab Tenancy Act for a share of the profits comes under Art. 120 of the Limitation Act. 5 P.R. (Rev.) 1915=7 P.W R. 1915 (Rev.)=32 Ind. Cas. 102.

——Art. 120—Suit between co-owners.

Neither of the conditions assumed by the first column of Art. 109 can properly apply as between co-owners inasmuch as in the case of co-owners the property cannot be said to belong to the plaintiffs alone nor could the profits received by the other co-owners be held to have been wrongfully received by them. The article applicable to a suit by a co-owner for his share of the profits received by the other co-owners is, therefore, Art 120 and not Art. 109. 41 L.W. 138=(1935) M.W.N. 107=68 M.L.J. 487=A.I.R. 1935 Mad. 731=156 Ind. Cas. 640.

——Art. 120—Suit between co-owners.

The first respondent sued the first appellant in 1923 for divorce, partition of properties and mesne profits, and a decree was passed for divorce and a third share in the properties and a sixth share in the mesne profits. Subsequently, a suit was instituted in 1930 for a third share of the rents and profits, for 7 years from 1923, in respect of the one-third share which had been decreed in the previous suit. The properties in respect of which mesne profits were claimed were originally joint properties in possession of the appellant and no partition had actually been effected according to the terms of the decree in the previous suit till date of the present suit :

Held, that the suit was governed by Art. 120 and it did not come under Art. 109, as the possession of the appellant at the date of suit was that of a co-owner ; nor did the case fall under Art. 62 as none of the co-owners are entitled in respect of undivided land, to any specific part. A.I.R. 1931 Rang. 150=131 Ind. Cas. 511.

——Art. 120—Suit by Hindu sons to declare alienation by father invalid—Sons declared entitled to certain share—Subsequent suit by sons for share of profits—Limitation.

Where, in a suit by the sons of a Hindu to set aside an alienation made by the father, the sons obtained a declaratory decree that they were entitled to three-fourths of the property purchased by the alienee and that the latter was entitled only to one-fourth share and the sons subsequently instituted a suit against the alienee for profits from the date of the preliminary decree in the previous suit :

Held, that the alienee's possession after decree was not necessarily wrongful inasmuch as he could, as a co-owner, be lawfully in possession on behalf of himself and the other co-owners and the suit was not, therefore, governed by Art. 109 but by Art. 120. (1936) M.W.N. 410=43 L.W. 706=A.I.R. 1936 Mad. 654=162 Ind. Cas. 771.

——Art. 120—Suit for rents and profits by co-heirs.

Where the profits in question are not mesne profits at all, that is to say, not profits wrongly received by the defendants but are rents and profits of land to which both the plaintiffs and defendants as co-heirs have a claim, the article applicable is Art. 120 and not Art. 109. A.I.R. 1939 Rang. 365=I.L.R. 1940 (Rang.) 136=186 Ind. Cas. 210.

——Art. 120—Suit for profits of immovable property by co-heir.

Art. 120 applies to an action claiming profits of immovable property against a person who is in occupation of land as a co-heir. A.I.R. 1938 Rang. 416=178 Ind. Cas. 475.

——Art. 120—Suit by co-heir.

Suit for share against co-heirs in possession and management of estate consisting of immovables and business—Article 120 governs the case as regards business. A.I.R. 1936 Rang. 407=166 Ind. Cas. 504.

——Art. 120—Suit by person who is not a co-sharer within the meaning of Agra Tenancy Act entitled to enjoy profits only without having the rights of possession, partition or transfer, for his share of profits is governed by Art. 120, Limitation Act. (1932) A.L.J. 177=16 R.D. 190=A.I.R. 1932 All. 272=135 Ind. Cas. 836.

——Arts. 120 and 109—Reversioners suing transferees from widow as trespassers—Decree on the footing that possession of trespassers after widow's death was wrongful—Subsequent suit for mesne profits—Art. 109 and not Art. 120 applied as defendants could not be said to be in receipt of profits as co-sharers. 1935 O.W.N. 985=1935 R.D. 451=A.I.R. 1935 Oudh 515=11 Luck. 435=157 Ind. Cas. 960.

——Arts. 120 and 109—Co-tenants.

Where a person prevents his co-tenants from obtaining from the field such profits as it is capable of yielding and takes possession of the whole field as his own he is liable to account for the mesne profits. Article applicable to such a suit is Art. 120 and not Art. 109. 32 Cal. 837=A.I.R. 1922 Mad. 150 (F.B.), Foll. 105 Ind. Cas. 777=A.I.R. 1928 Nag. 65.

——Art. 120—Profits—Received by agent.

In a suit by the principal against agent for rents and profits of the suit property, if there was no demand and refusal of accounts, the agent is liable to account for all the amounts received on behalf of the plaintiff. It is immaterial in such a case whether Art. 89 applies on the ground of agency, on Art. 120 applies on the ground of absence of specific contract of agency. 114 Ind. Cas. 364=A.I.R. 1928 Mad. 1236.

——Arts. 120 and 109—Profits of intestate's property.

To a suit for subsequent profits on the share of the claimant which do not form part of the property of the intestate, Art. 109 will not apply but Art. 120 applies. 76 Ind. Cas. 855=1 Rang. 405=A.I.R. 1924 Rang. 155.

——Art. 120—Profits of business.

Where the business was wound in 1895 and at least by 1897, the plaintiff knew perfectly well exactly how he stood in the matter.

Held, that Art. 120 applies and the time for suit for the recovery of the balance became barred at the latest after six years from 1897. 75 Ind. Cas. 848=18 M.L.W. 99=1923 M.W.N. 867=A.I.R. 1923 Mad. 679=45 M.L.J. 233.

——Art. 120—Land attached under Cr. P. Code—Profits withdrawn by one party.

Certain lands which were the subject of dispute between the owners of contiguous plots of land were

attached under S. 146 of the Cr. P. Code and pending suits for establishment of the rights of the parties, the defendants withdrew the profits of the land deposited in Court. The suit was ultimately compromised and plaintiff become entitled thereunder to the land in dispute. A suit for refund of the profits withdrawn by defendants was held to be governed by Art. 120 and not Art. 62. 72 Ind. Cas. 1041=50 Cal. 475=A.I.R. 1923 Cal. 379.

——Art. 120—Suit for mesne profits—When title subsisting—Declaratory suit barred—Limitation Act, Art. 120.

Where the right to property is not extinguished and the title is subsisting though a suit for declaration thereof may be barred, the owner's right and remedy in respect of the rents and profits derived from the property remain unaffected and Art. 120 is applicable to a suit for their recovery, the right to sue accruing from time to time as the profits are received. The profit for 6 years preceding the suit is recoverable. 21 C. 157, foll. (1902) 26 M. 410.

21. Refund.

——Arts. 120 and 62—Applicability—Suit by auction-purchaser for refund of purchase-money—Judgment-debtor having no saleable interest in property—Allegation of fraud against decree-holder—Limitation—Starting point. *See* C. P. CODE, O. 21, R. 91. I.L.R. (1948) 1 Cal. 479.

——Art. 120—Suit for refund—Suit by auction-purchaser—Judgment-debtor having no saleable interest.

A suit by an auction-purchaser to recover the purchase-money under S. 315 C.P.C., 1882, on the ground that the judgment-debtor had no saleable interest in the property sold is governed by Art. 120. 35 All. 419=11 A.L.J. 606=19 Ind. Cas. 986.

——Arts. 120 and 62—Suit for refund by auction-purchaser—Judgment-debtor having no saleable interest.

Art. 120 applies to a suit by the auction-purchaser for the recovery of the purchase-money on the discovery of the absence of interest in the judgment-debtor and not Art. 62. 12 M.L.T. 431=23 M.L.J. 487=(1912) M.W.N. 1130=17 Ind. Cas. 437.

——Art. 120—Applicability—Execution sale—Sale price rateably distributed—Suit by third party—Declaration that property sold was not judgment-debtor's—Suit by purchaser for refund from creditors who were paid—Limitation—Arts. 62 and 97.

Where a purchaser at a Court sale deposits money which is paid out to the creditors of the judgment-debtor rateably, and subsequently in a suit by a third party the property purchased at the Court sale is declared not to belong to the judgment-debtor, a suit by the auction-purchaser for recovery of the money deposited by him in Court from the creditors who were paid rateably is governed by Art. 120 of the Limitation Act. Neither Art. 62 nor Art. 97 applies to such a case. These two articles contemplate only a suit for recovery of money by one contracting party from another either as money had and received or on failure of consideration. 228 Ind. Cas. 479.

——Arts. 120, 62 and 97—Execution sale—Rights of purchaser—Refund of purchase-money—Auction-purchaser, subsequently, losing property, wholly or partially, under decree by third party—Suit by such auction-purchaser for refund of purchase-money against decree-holder is maintainable.

Where an auction-purchaser loses portion of the property purchased by him under a decree passed in a suit by a third party, his suit for recovery of purchase-money is governed by three years' rule either under Art. 62 or Art. 97; and Art. 120 does not apply. A.I.R. 1937 Oudh 286=1937 O.W.N. 83.

——Arts. 120 and 62—A conveying property to B benami—Subsequent sale by B to C—Suit by A for recovery of consideration money received by B—Suit is governed by Art. 120 and not by Art. 62.

A conveyed certain property to *B* benami. *B* subsequently sold the property to one *C*. A brought a suit for recovery of the amount of consideration received by *B*:

Held, that the claim of *A* against *B* was an equitable one, being a claim in respect of moneys received and held by the benamidar, a person in the position of a trustee, for the benefit of the real owner, and the suit was governed by Art. 120 and not by Art. 62. A.I.R. 1946 Mad. 248=59 Mad. L.W. 109=(1946) 1 Mad. L.J. 140=(1946) Mad. W.N. 117.

Overruling—A.I.R. 1916 Mad. 521=1915 M.W.N. 215=28 Ind. Cas. 495.

——Arts. 120 and 97—Refund of money wrongly paid.

Suit for refund of money wrongly paid—Money paid to redeem mortgage—Suit for foreclosure by person having mortgagee interest—Payment held to be wrongly made—Decree for foreclosure—Suit for refund—Article 97 and not Art. 120 applied. A.I.R. 1935 Oudh 378=1935 O.W.N. 549=11 Luck. 110=155 Ind. Cas. 299.

——Art. 120—Refund—Of subscription.

Where an association consists more than 20 persons but it is not registered and the members bring a suit for the return of subscription money paid to the promoter after conversion of the property of the association into cash into which the said money is changed such suit is governed by Art. 120 and not by Art. 62 for such money is not received by the promoter for the use of the members. 120 Ind. Cas. 902=7 Rang. 540=A.I.R. 1930 Rang. 21.

——Art. 120—Refund of purchase-money.

Plaintiff sued for specific performance of a contract of mortgage with possession in default of redemption within three years. The defendants filed a cross-suit for possession of the land (the mortgage being oral.) A decree was passed for possession in defendant's suit and plaintiffs' suit for specific performance was dismissed. The plaintiffs then filed a suit for refund of the money.

Held, that Art. 120 applied and that the cause of action arose after the dismissal of the suit for specific performance. 92 Ind. Cas. 738=4 Bur. L.J. 160=A.I.R. 1925 Rang. 373.

——Art. 120—Suit for refund of the money wrongly recovered under a decree would be governed by Art. 120 of the Limitation Act and the period would run from the date of decree. 71 Ind. Cas. 427=A.I.R. 1923 Nag. 94.

——Arts. 120 and 62—Application for rateable distribution dismissed—Suit for refund of money paid to defendant—Limitation.

When an application for rateable distribution was dismissed and a revision petition to the High Court was also dismissed, a subsequent suit for refund of money paid to another judgment-debtor filed after 3 years from such payment but within 3 years from the date of dismissal of the revision petition was held barred under Art. 62, Art. 120 not being applicable. 15 B. 438 ; 23 A 313 ; 32 C. 527 ; 30 M. 459; 37 M. 381, foll. 39 Mad. 62=16 M.L.T. 509=27 M.L.J. 640=1 L.W. 952=26 Ind. Cas. 219.

——Art. 120—Suit for refund—Fraudulent mortgage of Sir lands.

Where defendant fraudulently gets his *sir* land mortgaged with possession to the plaintiff the plaintiff is entitled to a simple money decree for the sum advanced with such interest as the Court might find due. The claim falls under Arts. 95 and 97 and not under Arts. 116 and 120. 13 O.C. 148=6 Ind. Cas. 1013.

22. Reimbursement.

——Art. 120—Suit for contribution.

A claim for contribution in respect of a share of the amount spent by the plaintiff for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by him and the defendant is governed by Art. 120, and not by Art. 61. The cause of action in such a case does not arise when the stamps are purchased but when they are actually utilised for the purpose in question. A.I.R. 1941 Mad. 96=(1940) 2 M.L.J. 494=52 M.L.W. 508=(1940) M.W.N. 982=193 Ind. Cas. 823.

——Art. 120—Suit for contribution.

Mortgagees sub-mortgaging their rights—One of the mortgagees paying his share—Sale of mortgagee rights due to default of other mortgagee—Suit for contribution by other mortgagee.

Held, Art. 120 not applicable. 10 O.W.N. 919=A.I.R. 1933 Oudh 478=147 Ind. Cas. 1042.

——Art. 120—Reimbursement.

There was a dispute between *A* and *B*, and *C* was put in charge of the property has a superdar pending the determination of the rights of *A* and *B*. After these rights were determined and *C* had restored possession *C* was sued for their wages by two watchmen whom he had appointed to watch the standing crop. *C* paid up the decrees and instituted a suit against *A* and *B* for recovery of the money he had to pay to the watchmen.

Held, that the suit was governed by Art. 61, or Art. 120 and not by Art. 102, *C* was entitled to be reimbursed by *A* and *B*. The cause of action in favour of *C* arose when he paid up the decrees and suit by him within three years of payment was in time. A.I.R. 1930 Oudh 421.

——Art. 120—Sale of patni in a rent-decree—Surplus withdrawn by a creditor of one patnidar—Sale subsequently set aside—Zamindar made to pay whole purchase-money—Suit by Zamindar.

Certain patni was sold for arrears of rent and was purchased by a third party. The zamindars took out their dues from the purchase-money and the balance remained in deposit. A decree-holder against one of the patnidars attached the surplus sale proceeds and realized his dues in full under that attachment. Some of the darpatnidars, subsequently brought a suit to have the patni sale set aside. The suit was decreed and the zamindars had to refund to the auction-purchaser the amount which the auction-purchaser had paid for the putni at the patni auctions. Thereafter, a suit was brought by the zamindars against the decree-holder to recover with interest Rs. 161 which he had withdrawn by attachment under the money decree.

Held, that the decree-holder was liable to refund the amount and as decree-holder, when he took the money or the Court when it handed over to him the money, did not intend the money to be for the use of the zamindars, Art. 62 did not apply but the residuarry Art. 120 would apply. 110 Ind. Cas. 49=47 C.L.J. 369=A.I.R. 1928 Cal. 295.

——Art. 120—Contract of indemnity.

Defendant agreed in 1907 to indemnify plaintiff by paying off the mortgage within a month but the non-payment to the mortgagee within a month was not accepted by the plaintiff as a breach of the contract and indeed the contract between the parties was treated by both parties as being open and remaining open until the events which culminated in the sale in execution of mortgage-decree in 1919.

Held the defendant undertook a liability to indemnify the plaintiff against any claim by the mortgagee and the cause of action under that contract of indemnity did not arise until the plaintiff suffered a loss by being ejected from the property. 74 Ind. Cas. 209=17 M.L.W. 453=A.I.R. 1923 Mad. 492.

——Art. 120—Expenses of litigation.

Article 120 and not 61 or 59 applies to a suit for contribution for expenses incurred by plaintiff from his co-plaintiff and limitation begins from the time when co-plaintiff got his share of the decretal amount. 45 Ind. Cas. 786; 25 C.W.N. 813 ; 34 Ind. Cas. 54, foll. 70 Ind. Cas. 405=1922 M.W.N. 608=16 M.L.W. 231=31 M.L.T. 164=A.I.R. 1923 Mad. 64=43 M.L.J. 271.

——Art. 120—Fine paid to Government.

Where the defendant used the plaintiff's land without his permission for non-agricultural purposes and in consequence thereof the plaintiff had to pay fine to Government and the plaintiff sued the defendant for recovery thereof,

Held, that the suit is governed by Art. 120 and not 61. A.I.R. 1922 Bom. 257.

——Art. 120—Where the debtor of an insolvent paid money to the auction-purchaser of the debt and subsequently the Receiver in Insolvency recovered the amount over again from him and he thereupon brought a suit against the auction-purchaser to whom he had paid the money.

Held, that the suit is governed by either Art. 97 or 120 and not by Art. 29 or 62. Art. 29 not being applicable as there is no wrongful seizure of movable property under legal process. 62 Ind. Cas. 929=4 L.L.J 164=A.I.R. 1922 Lah 103.

——Art. 120—Starting point—Contribution.

Plaintiffs and defendants were joint owners of a tank in a Municipality. As the tank was in an insanitary condition, the Municipality ordered the tank to be filled up. Plaintiffs filled up the tank,

Held, that the liability of the defendants to contribute did not arise in successive fragments as plaintiffs paid money to the contractor from day to day ; the liability arose when the tank was filled up and the contemplated benefit conferred. In such circumstances Art. 120 and not Art. 61 was applicable, and the time ran against the plaintiffs from the date of

completion of the work. 62 Ind. Cas. 615=25 C.W.N. 813=A.I.R. 1921 Cal. 93.

——Arts. 120 and 132—Suit by trustee for re-imbursement for out-of-pocket expenses.

A trustee of public trust has a first charge on the trust properties for the purpose of reimbursing himself for advances properly made for the trust and Art. 120 and not Art 132 is the one applicable to a suit for recovery of moneys so spent. It is doubtful whether Art. 132 can properly be applied to a case where a man lends money out of his own pocket to himself as trustee of a religious institution on the security of the trust property. 37 Cal. 229 (P.C.), foll. The right of the ex-trustee to sue for moneys advanced by him for the trust during his trusteeship does not accrue before the date on which he is judicially declared to be no longer a lawful trustee or perhaps till he is dispossessed of such trust estate, in persuance of the judicial declaration. 38 Mad. 260=28 M.L.J. 347 =28 Ind. Cas. 290.

——Art. 120—Trustee—Right to re-imbursement from trust estate—Limitation.

A suit for re-imbursement from the trust estate in respect of the out-of-pocket expenses of a deceased trustee is not barred by limitation if brought within six years of the death of the trustee. 37 Cal. 229= 37 I.A. 27=14 C.W.N. 261=7 A.L.J. 125=7 M.L.T. 63=11 C.L.J. 220=12 Bom. L.R. 257=20 M.L.J. 171=5 Ind. Cas. 404 (P.C.).

——Art. 120—Trustee—Expenses—Recoupment—Suit by trustee's heirs.

A suit by the heirs of a trustee to recover money expended on behalf of the trust by the trustee and not recouped to him is governed by Art. 120 and is in time if brought within six years of the trustee's death. (1900) 5 C.W.N 273.

23. Remuneration for services.

——Art. 120—Applicability—Suit by Government servant for arrears of pay. *See* LIMITATION ACT, ART. 102. (1947) 2 M.L.J 389=1947 F.C.R. 89= A.I.R. 1947 F.C. 23 (F.C.).

——Art. 120—Suit to recover salary.

A claim to recover salary wrongfully witheld falls under Art. 120, Limitation Act. A.I.R. 1943 368=1943 O.W.N. 118=19 Luck. 163=207 Ind. Cas. Oudh 178.

——Art. 120—Proceedings for the recovery of remunerations by a counsel are governed by Art. 115 and not by residuary Art. 120 of Limitation Act. 1941) 43 P.L.R. 97.

——Art. 120—Remuneration for services—Temple service.

A suit by the dwaris of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connexion with the temple is not a suit covered by S. 10. Such a suit is governed by Art. 120 and neither by Art. 102 nor by Art. 131. 94 Ind. Cas. 826=1926 P.H.C.C. 1= 5 Pat. 249=7 P.L.T. 465=A.I.R. 1926 Pat.205.

24. Rent suit.

——Arts. 120 and 110—Fees charged by Municipality for issuing permission for use of Municipal land—Limitation.

The fees charged by a Municipality for issuing a permission for use of Municipal land under the provisions of S. 90, Bombay Municipal Boroughs Act, is not rent within the meaning of Art. 110 and a suit for recovery of such fees is governed by Art. 120 as there is no other article within which it can be brought. A.I.R. 1936 Sind 184=30 S.L.R. 146= 165 Ind. Cas. 369.

——Arts. 120 and 131—Suit for enhancement of rent.

A suit for enhancement brought more than six years after the date of the final publication of the Record-of-Rights, in which the defendants are entered as raiyats at fixed rates, is not barred by limitation as the Record-of-Rights does not create any rights. Article 120 does not apply but Art. 131 governs the case. A claim to enhance is a recurring cause of action and limitation runs from the date of refusals. 2 P.L.J. 124, foll. 72 Ind. Cas. 781 =A.I.R. 1924 Pat. 193.

——Art. 120—Assessment of rent—Starting point of limitation.

An entry in the Record of Rights that a land is liable to assessment confers no title and cannot be the starting point of limitation for a suit for assessment of rent. 22 C.W.N. 685=46. Ind. Cas. 428.

——Art. 120—Rent suit—Suit by co-sharer.

Suit for rent by a co-owner against his co-sharer who occupied the property after the term fixed for such period is governed by Art. 120 and not by 110 or 115. 39 Mad. 54=33 Ind. Cas. 705.

——Arts. 120, 61 and 99—Rent suit—Lambardar—Suit against co-sharer—Limitation.

A Village belonged to three persons in equal shares. The rents payable by tenants, together with the rental assessed on the *Sir* and *Khudkasi* held by the *Lambardar* and another co-sharer, more than sufficed to cover all the annual expenses. By an arrangement among co-sharers no contribution used to be demanded from the third co-sharer until the annual accounts where made up by the *Lambardar*. The *Lambardar* sued for the balance due from the third co-sharer by reason of her failure to pay the rental assessed on the *Sir* Land and *Khudkasht* held by her. **Held,** that the suit was governed by Art. 120 and not by Art. 61 or 99 of the Limitation Act. 11 N.L.R. 156=30 Ind. Cas. 960.

——Art. 120—Assessment of rent—Decree of Revenue Court—Cause of action.

A suit for assessment of fair rent brought within six years of the decree of a Revenue Court, in a proceeding under S. 106 of the Tenancy Act, declaring that the land is liable to pay rent, is not barred by limitation under Art. 120 of the limitation Act. 18 C.W.N. 466=20 Ind. Cas. 910.

——Art. 120—Rent—Revenue—Inamdar—Inferior holder. *See* LIMITATION ACT, ARTS. 110, 120. 3 Bom. L.R. 135=25 B. 556.

——Arts. 120 and 110—Revenue, Public, Assignment of—Assignee's rights—Revenue Recovery Act, Ss. 2 and 42.

An arrangement by which the Government directs its ryot to pay to certain trustees of a mutt first crop assessment on the land. Instead of itself paying each to the said trustees is not an assignment by Government of the public revenue to the trustees. The trustees on default by the ryot in paying the assessment should bring the matter to the notice of the revenue authorities, and it would be competent to the latter

to realize the arrear under Act 2 of 1864 (Madras) and pay it over to the trustees, but the latter will not be entitled to sue in their own name for the amount. Ss. 2, 42 of the Revenue Recovery Act are applicable only to public revenue and not to realization of sums due to an institution like the plaintiff's mutt. If the trustees are entitled under the arrangement to sue, in their own names their claim is only a personal one against the holders of the fund for the time being. Where the trustees are not constituted Inamdars but are entitled under the arrangement to sue in their own names for the first crop assessment, their claim is not one for rent within the meaning of the Rent Recovery Act or Art. 110 of the Limitation Act. Such a claim fall under Art. 120 of the Limitation Act. Where the trustees obtained a decree personally for their claim against the representative of the original ryot, who agreed with Government to pay over first crop assessment to the trustees, the latter are not entitled also to a decree personally against the transferees who were possessed of the land. (1902) 13 M.L.J. 248=26 M. 730.

25. Reversionary suit.

——Arts. 120 and 125—Applicability—Will by Hindu conferring life-estate on widowed daughter and widow of nephew—Alienation by legatees—Suit by reversioners to declare invalid and not binding on the plaintiffs—Limitation.

The applicability of Art. 125, Limitation Act, is confined to cases in which an alienation is good for the alienor's lifetime; the Article cannot apply to cases where the alienation was void *ab initio*, or where it would not be necessary to bring a suit to set aside such an alienation. Art. 125 however, contemplates cases of alienation by female holders which cannot be ignored by reversioners and which are good unless they are set aside either for want of consideration or legal necessity or on other grounds.

Where under a will, the daughter of the testator gets nothing more than what she is entitled to under the Hindu Law, she holds possession for life as a Hindu female as such and the will makes no difference to her status as a Hindu female with limitted powers of alienation. Where under such a will, a widow who is not an heir of the testator also gets a life-estate, no question of alienation by her enuring beyond her lifetime can arise and there can be no necessity of bringing a suit for a declaration that an alienation by her was not binding on the reversioners after her lifetime. In the case of the daughter, it would be necessary for the reversioners to bring the suit to have it declared that an alienation by the daughter was either without consideration or not justified by legal necessity. The reversioners cannot ignore the alienation made by the daughter who could, under the Hindu Law, make an alienation and the alienation would under certain circumstances, be binding even after her death. It would be necessary for the reversioners therefore to get this obstacle out of their way and when the suit is brought on the footing that she held the property as a Hindu female, Art. 125 and not Art. 120, Limitation Act would apply. As no declaration would be necessary in the case of the other legatee (who is not an heir), a suit by the reversioners of the testator for declaration that a sale-deed executed by the two legatees was without consideration, not justified by legal necessity and therefore not binding on the plaintiffs, is governed by Art. 125, Art. 120 would not apply. 29 Pat. 209= A.I.R. 1950 Pat. 218.

——Arts. 120 and 125—Applicability—Female in possession of property under will.

Art. 120 and not Art. 125 of the Limitation Act governs cases where a Hindu or a Muhammadan female is in possession of property under a will or a gift *inter vivos*. 49 P.L.R. 167=A.I.R. 1947 Lah. 290 (F.B.).

——Arts. 120 and 125—Applicability—Suit by reversioners challenging alienation.

Two sisters *A* and *B* inherited property from their father. *A* sold her share to defendants. Reversioner (*i.e.* sons of *B*) filed suit to set aside alienation.

Held, Art. 125 contemplates that the reversioners challenging the alienation must be immediately entitled to the property, if alienator died on the date of the suit. But here even assuming that *A* was dead on the date of the suit, the reversioner would not be entitled to the property because there was *B*, their mother. Hence, Art. 125 would not apply. The proper article would be 120 and 125. (1946) 2 M.L.J. 214=59 L.W. 504=231 Ind. Cas. 143= A.I.R. 1947 Mad. 102.

——Art. 120—Suit by remote reversioner challenging alienation—Starting point of limitation.

Alienation by widow—Immediate reversioners parties to alienation—Remote reversioner can file suit under S. 42, Specific Relief Act—Article applicable is Art. 120—Time runs from the date of alienation—But where the remote reversioner is not born before the date of alienation, the right to sue does not come into existence before the date of his birth. A.I.R. 1941 Cal. 41=72 C.L.J. 208=45 C.W.N. 141=I.L.R. (1941) 1 Cal. 234=193 Ind. Cas. 419.

——Art. 120—Suit to avoid alienation by widow after her death.

Where, after the death of the last male-holder his widow in whom the property vested and her daughter made an alienation and after the death of the widow the plaintiff alleging that he was the adopted son of the daughter sued for a declaration that the alienation was void:

Held, that the suit was not governed by Art. 125 but by Art. 120 and the right to sue arose on the date of the alienation and not on any subsequent date. (1936) M.W.N. 339=44 M.L.W. 208=165 Ind. Cas. 448.

——Arts. 120 and 125—Suit for declaration.

Gift of land by deceased—Registration in favour of donee objected to and contested by daughter of deceased—Transfer registered inspite of objection—No suit for declaration by daughter—Subsequent suit by reversioners of deceased for declaration—Article applicable is 120 and not 125. A.I.R. 1936 Pat. 535=3 B.R. 21=165 Ind. Cas. 21.

——Art. 120—Suit by Hindu against Hindu female for declaration that alienations made by her are void.

A suit by a Hindu to declare void alienations effected by a Hindu female holding a life estate by virtue of a grant, transfer *inter vivos*, or bequest, as not binding on him, is governed by Art. 120, and limitation is six years from date of transfer. If the mortgaged properties have been sold, the plaintiff's right to sue accrues not only when the properties were mortgaged, but also when the mortgagees brought them to sale and the sales give him a fresh cause of action. A.I.R. 1936 Pat. 323=17 P.L.T. 131=15 Pat. 151=2 B.R. 658=163 Ind. Cas. 940.

——Art. 120—Suit for declaration that plaintiffs were owners in possession—Limitation.

A suit by reversioners for a declaration that alienations made by a sonless proprietor should not affect their

reversionary rights was decreed in 1912, subject to the proviso that after the death of a certain widow the reversioners could take possession subject to payment to the alienees of a certain sum which apparently was found to have been taken for necessity by the alienor. After the death of the widow in 1931, the reversioners instituted a suit for a declaration that they had deposited the sum in Court and had obtained possession of the land out of Court from the alienees and, therefore, they should be declared to be the owners of the land :

Held, that the suit was not one for possession and the suit was governed by Art. 120. 38 P.L.R. 537 = A.I.R. 1936 Lah. 835 = 165 Ind. Cas. 149.

——Art. 120 and S. 6—Suit challenging widow's alienation—Limitation—Starting point.

A suit for a declaration filed after the death of the widow whose alienation is challen ged does not fall under Art. 125, but is governed by Art. 120 under which article read with S. 6, the plaintiff will be entitled to bring his suit within three years of his attaining majority. 16 P.L.T. 236 = A.I.R. 1935 Pat. 256 = 1 B.R. 418 = 155 Ind. Cas. 244.

——Art 120—Sale by de facto guardian—Money left with vendee to be paid to minors on attaining majority—Suit by guardian as reversioner for the money—Limitation.

S and *C* were two minor girls. *G* as their *de facto* guardian sold a certain property and it was stipulated that money should remain with vendee and should be paid to *S* and *C* on their attaining majority. *S* got married when she was a minor and by Customary Law, lost the right to the purchase-money, and the right in the purchase-money devolved on *C* who died as a minor. *G*, as reversioner filed, a suit against the vendee for the purchase-money. Vendee pleaded that the suit was barred by limitation under Art. 111.

Held, that Art. 111 did not apply as *G* was not the vendor but Art. 120 applied and limitation ran from the date of the death of *C* when right to sue accrued to *G* and that the suit was not time-barred. A.I.R. 1933 Lah. 860 = 35 P.L.R. 161 = 15 L. 35 = 147 Ind. Cas. 269.

——Art. 120—Mortgage and gift by widow—Suit by next reversioner to declare deeds null and void—Limitation.

Where the widow of the last male-owner of a Hindu family executed a deed of mortgage on February 8, 1912, in favour of a stranger and subsequently on July 21, 1920, a gift-deed in favour of her daughter ; and the son of her daughter's husband's brother, and the next reversioners of the deceased instituted a suit for declaration that the sale-deed and the gift-deed were null and void against them :

Held, that as regards the mortgage deed, the plaintiffs ought to have sued within a period of six years from the date of mortgage, as Art. 120 applied.

Held, also that the gift deed could not be construed as a surrender in favour of her daughter and hence Art. 120 applied to the suit and the suit was barred in respect of the gift-deed also. (1933) A.L. J. 1305 = A.I.R. 1933 All. 856 = 146 Ind. Cas. 977.

——Art. 120—Suit to set aside alienation—Cause of action, when arises.

The cause of action in a suit to set aside an alienation arises when the alienation is made and not when the alienation becomes known to the plaintiffs. 33 Bom. L.R. 1418 = A.I.R. 1932 Bom. 15 = 136 Ind. Cas. 161.

——Art. 120—Starting point—Alienation by widow.

It is obvious that if the widow alienates certain property no fresh cause of action accrues to the reversioners because the alienee in his turn proceeds to alienate the property. The cause of action to the reversioners has accrued when the widow alienated the property. A.I.R. 1929 Lah. 579.

——Art. 120—Starting point—Avoidance of transfer—Void sale.

Where the alienation was by a Hindu widow of an unrecognised portion of a bhag and the reversioner sued to set it aside after the lifetime of the widow,

Held, that the alienation being void *ab initio*, the starting point for computing limitation under Art. 120 is the date of the sale-deed. 32 Bom. L.R. 1013 = 54 Bom. 837 = 127 Ind. Cas. 897 = A.I.R. 1930 Bom. 545.

——Art. 120—Alienation by grand-mother—Suit by daughter's son.

Daughter's sons are under Hindu Law not entitled to succeed in the lifetime of their mother and, therefore, are not the immediate reversioners of their grand-mother. Their suit for declaration that an alienation by their grand-mother is not binding on them is governed by Art 120. 108 Ind. Cas. 184 = A.I.R. 1928 Lah. 242.

——Art. 120—Surrender by widow.

The conveyance of a small portion of the surrendered land for maintanance to the widow is unobjectionable and does not alter the nature of the transaction which remains one of acceleration in favour of the next reversioner ; and that being so, Art. 125 cannot apply, but Art. 120 is applicable A.I.R. 1929 P.C. 75 and A.I.R. 1921 P.C. 107, Foll; 44 Bom. 255, Not foll. 101 Ind. Cas. 275 = 10 N.L.J. 33 = A.I.R. 1927 Nag. 193.

——Art. 120—Right of reversioners to sue for declaratory decree—Limitation—Starting point.

The right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and time begins to run simultaneously against them all and no subsequent disability stops it. 22 All. 33 (F.B.), Dissented; 21 P.W.R. 1907; 22 P.R. 22; 41 Mad. 659 (F.B.), Foll. 90 Ind. Cas. 1022 = 6 Lah. 405 = 26 P.L.R. 695 = A.I.R. 1925 Lah. 654.

——Art. 120—Remote reversioner.

Article 120 applies to a suit by a reversioner remoter than the immediately next one. 83 Ind. Cas. 1055 = 27 O.C. 173 = 11 O.L.J. 236 = A.I.R. 1924 Oudh 381.

——Art. 120—Declaratory suit—Setting aside sale—By guardian of limited owner.

A suit brought by the reversionary heirs of one for declaration that a certain sale of the property left by him is not binding on the estate after the death of his daughter comes under Art. 120, and not Art. 125, where the sale was made by certificated guardian of daughter without Court's permission and was not impeached by the daughter within the time. 41 Mad. 659, Doubted. 81 Ind. Cas. 522 = 51 Cal. 101 = A.I.R. 1924 Cal. 481.

——Arts. 120 and 141—Suit for movable property by Hindu reversioner

A suit by a Hindu reversioner to recover movable property on the death of a Hindu female is governed

by Art. 120 of the Act and time begins to run from the death of the female. In the case of immovable property the Article applicable is 141. 64 Ind. Cas. 980=49 Cal. 45=33 C.L.J. 421=25 C.W.N. 585=A.I.R. 1922 Cal. 321.

——Art. 120—Suit to prevent waste of movable property.

Where a widow, in possession of her deceased husband's estate commits waste of movable property belonging to the corpus of the estate, and action by reversioner to prevent her from doing so is governed by Art 120. 66 Ind. Cas. 10=44 Mad. 984=14 M.L.W. 193=1921 M.W.N. 590=A.I.R. 1921 Mad. 234=41 M.L.J. 279.

——Arts. 120 and 125—Mortgage by Hindu widow —Suit for declaration by remote reversioner.

Where a Hindu widow having a daughter creates a mortgage on the estate and her nearest male reversioner sues for a declaration that the mortgage is not binding on the estate. The suit is governed by Art. 120 and not by Art. 125 of the Limitation Act and the starting point of limitation is the date of the mortgage. "Land" in Art. 125 includes a house and its site. 1 Lah. 69=91 P.L.R. 1920=55 Ind. Cas. 924.

——Arts. 120, 93 and 95—Suit for declaration that document executed by the last owner is not binding on the reversioner—Limitation.

A suit by a reversioner for a declararion that a Kot kabala executed by the last owner and a compromise decree passed on it are not binding on the inheritance is governed not by Arts. 93 or 95 but by Art. 120. Where plaintiff is in possession limitation starts only when some act is done on the document sought to be declared not binding on inheritance. 17 A.L.J. 973=52 Ind. Cas. 646.

——Art. 120—Suit for declaration—Adoption.

A suit for declaration by a Hindu Reversioner of the nullity of an adoption by the widow and entry in revenue papers and in respect of a mortgage by the widow and mutation of names is governed by Art. 120. of the Act. 41 All. 492=17 A.L.J. 766=50 Ind. Cas. 938.

——Arts. 120, 93 and 95—Avoidance of document —Suit by reversioner—Limitation.

A suit by a reversioner for a declaration that a Kot kabala executed by the last owner and a compromise decree passed on it are not binding on the inheritance is governed not by Art. 93 or 95 but by Art. 120. Where the plaintiff is in possession limitation starts only when some act is done on the document sought to be declared not binding on inheritance. 47 Ind. Cas. 2 (Cal.).

——Arts. 120 and 125—Avoidance of document— Hindu widow—Alienation—Suit by remote reversioner—Cause of action.

A suit by remote reversioner for declaration that an alienation by a Hindu widow is not binding on him after her lifetime, is governed by Article 120 and an allegation of collusion of the nearest reversioner will not bring it under Art. 125. 10 M.L.J. 229, Foll. The cause of action for such a suit arises on the date of alienation and the fact that the plaintiffs came to know of the collusion of the nearest reversioner subsequent to the alienation is not a ground for exemption from limitation till date of knowledge. 24 M.L.J. 183 =18 Ind. Cas. 710 cf. 41 Mad. 659=46 Ind. Cas. 202 (F.B.).

——Arts. 120 and 125—Applicability—Claims by remote reversioner.

Art. 120 applies to claims by remote reversioners whose rights to the property do not arise immediately on the death of the widow, i.e., when there are intervening reversioners Art. 125 does not apply. (1917) M.W.N. 30=5 L.W. 482=38 Ind. Cas. 270.

——Arts. 120 and 125—Alienation by widow— Suit by nearer and remote reversioners.

Art. 125 of Schedule 1 applies to an action brought by an immediate reversioner for a declaration in respect of a widow's alienation. A similar suit by a remote reversioner is governed by Art. 120 15 P.R. 1916= 198 P.W.R. 1915=33 Ind. Cas. 161.

——Arts. 120 and 125—Occupancy rights created by widow—Declaratory suit by reversioner.

Art. 125 and not Art. 120 applies to a suit for a declaration that a creation of occupancy rights by a widow is invalid as against reversionary rights of the plaintiff, and limitation commences from the time when the occupancy rights are created. A subsequent and belated objection in partition proceedings as to the partitton of the occupancy holding does not give a fresh period of limitation. 115 P.L.R. 1915=230 P.W.R. 1915=29 Ind. Cas. 789.

——Art. 120—Alienation by widow—Contest by remote reversioners.

A suit for a declaration that an alienation by a Hindu widow is not binding upon the plaintiff a remote reversioner, is governed by Art. 120 and the cause of action for the suit accrues on the date of the alienation. 37 All. 195=13 A.L.J. 196=26 Ind. Cas. 737.

——Arts. 120, 123 and 141—Suit by reversioners.

A suit by reversioners for recovery of immovable property held by a widow on the latter's death is governed by Art. 141, and a suit for movables by Art. 120. In either case Art. 123 does not apply. (1908) 10 Bom. L.R. 210.

——Art. 120—Reversioner's suit for declaration about invalidity of alienation.

See 18. M.L.J. 275=3 M.L.T. 319. *See also* 14 M.L.J. 210.

——Art. 120—Alienation of property by widow—Suit by reversioners for declaration. *See* ART. 91. 32 C. 473.

——Arts. 120 and 125—Suit by reversioner for a declaration that possession is not adverse.

The article applicable to a suit by a reversioner for a declaration that the defendants are merely tenants in occupation of a house, is Art. 120 and not Art. 125. (1902) 26 M. 488.

26. Right to sue and Starting point of limitation.

See also NOTES 1,14,15,19,20,21,22,24,25,27, AND 29.

——Art. 120—Accrual of right to sue—Limitation —Starting point.

The date from which time begins to run according to Art. 120 is the date of the accrual of the right to sue and that means when there is an infringement of or some clear or unequivocal threat to infringe the plaintiffs' right to an account. A general request in the written statement to dismiss suit does not amount to refusal. A.I.R. 1943 Bom. 216=45 Bom. L.R. 424=208 Ind. Cas. 340.

——Art. 120—Right to sue—Accrual of right.

For the purposes of Art. 120, there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. 33 Bom. L.R. 1033=A.I.R. 1931 Bom. 500=134 Ind. Cas. 122.

——Art. 120—Right to sue

There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. 1930 A.L.J. 1188=32 M.L.W. 338=34 C.W.N. 1169=A.I.R. 1930 P.C. 270 (P.C.).

——Art. 120—Right to sue—When accrues—Final decision of appeal.

It is not obligatory on a man to bring a perfectly vain litigation with the natural result that it would be met either by a perfect defence or that the suit would be held in suspense and await the decision of the appeal in another suit. A right to sue therefore accrues only on the final decision of the appeal in the former suit. A.I.R. 1939 Lah. 6=41 P.L.R. 321=182 Ind. Cas. 342.

——Art. 120—Starting point—Decree in original Court.

For a suit under Art. 120 the starting point of limitation is the date of the first decree and not the date of the appellate decree confirming the same. 46 Cal. 670, Foll. 70 Ind. Cas. 45=16 M.L.W. 285=1922 M.W.N. 561=31 M.L.T. 169=A.I.R. 1923 Mad. 23.

——Art. 120—'Right to sue accrues,' meaning of.

The interpretation of the words 'when the right to sue accrues' in Art. 120 would, to a large extent, depend on the particular facts of the case to which the article is to be applied and the relief sought. A.I.R. 1933 Lah. 270=34 P.L.R. 598=143 Ind. Cas. 725.

——Art. 120—The expression 'right to sue' in Art. 120 means the right to bring the particular suit with reference to which the plea of limitation is raised. 53 C.L.J. 333=A.I.R. 1931 P.C. 89=35 C.W.N. 521=(1931) A.L.J. 435=33 L.W. 707=38 Bom. L.R. 885=61 M.L.J. 9=58 C. 1187=58 I.A. 125=131 Ind. Cas. 753 (P.C.).

——Art. 120—Starting point.

The starting point of limitation under Art. 120 is the date on which the circumstances entitling the plaintiff to have his interests guarded first comes to his knowledge and from which date a right to sue accrues to him. A.I.R. 1931 Lah. 70.

——Art. 120—A right to sue accrues whenever a person becomes clothed with a legal character entitling him to a relief which a Court of law is competent to grant. 61 Ind. Cas. 807=2 P.L.T. 556=6 P.L.J. 273=A.I.R. 1921 Pat. 166.

——Art. 120—Applicability—Fresh cause of action.

Though a person allows to pass by an invasion of a right to property he is not debarred from a future suit for a future invasion. 88 P.W.R. 1910=122 P.L.R. 1910=7 Ind. Cas. 528.

——Art. 120—Starting point—Fraud.

In cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Article 120 being an omnibus one, the general expression employed in Col. 3, is necessitated by a variety of suits not specifically provided for coming within its purview, in some of which there would be fraud, misconduct, or mistake as part of the cause of action, but in the rest that element would be absent. It would thus be in consonance with the scheme of the Act, dealing with suits on a cause of action consisting of fraud, misconduct, etc, if the right to sue should be deemed to accrue under Art. 120 from the time of the plaintiff's knowledge of the same even in respect of suits based on similar grounds coming under that article. 120 Ind. Cas. 880=30 M.L.W. 911=A.I.R. 1930 Mad. 173=58 M.L.J. 349.

——Art. 120—Sale in execution—Right to sue for Zarichaharan dues.

In the case of a custom by which in a public sale the decree-holder, judgment-debtor and purchaser of immovable property are jointly and severally liable for the payment of zarichaharan dues to the owner of the site, right to sue for such dues accrues on the confirmation of the sale and not on the date of auction sale. 1930 A.L.J. 1284=A.I.R. 1931 All. 25=52 A. 921=130 Ind. Cas. 12.

——Art. 120—Suit for malikana—Right of action.

Article 120 is the relevant article as regards the malikana and there is no right of action at all in respect of mch a subject-matter as the malikana unless and until a certificate under the Pensions Act has been obtained. A suit brought within six years from the grant of the certificate is not statute-barred under Art 120. 117 Ind. Cas. 498=51 All 439=1929 A.L.J. 716=33 C.W.N. 809=30 M.L.W. 60=56 I.A. 267=31 Bom. L.R. 891=50 C.L.J. 52=6 O.W.N. 589=10 P.L.T. 527=1929 M.W.N. 762=A.I.R. 1925 P.C. 166=57 M.L.J. 160 (P.C.).

——Art. 120—Order without jurisdiction.

Where a Magistrate passes an order under S. 145, Cr. P. Code as to the mode of possession, his order does not give a cause of action for a suit which, if not brought within the statutory period, makes that portion of the order binding between the parties, the order being without jurisdiction. The intention of the law of limitation is that if no suit is brought within the statutory period the remedy is lost and in case of an order of a competent Court it remains binding between the parties. 97 Ind. Cas. 73=30 C.W.N. 873=A.I.R. 1926 Cal. 1022.

——Art. 120—Construction of will—Right to sue—When accrues.

A suit for construction of a will is governed by Art. 120. The right to sue does not accrue from the death of the testator or the date of the probate of the will. But so long at least as the estate is in the hands of the executor and the administration has not been completed, the right to obtain construction of the will is a continuing right. 75 Ind. Cas. 41=37 C.L.J. 482=A.I.R. 1924 Cal. 411.

——Art. 120—Starting point—Breach of conditions—Administration bond.

Where an administration bond contains several conditions, a breach of each one of the conditions gives rise to a cause of action and should, therefore, be taken to be the starting point of limitation in the case of a suit based on that particular breach. Ordinarily, the administrator's work may be said to be

completed when he files his final accounts, showing how he has dealt with the estate, and these accounts have been accepted by the Court ; limitation will then begin to run. But it very often happens that there is litigation pending against the administrator and, in such a case the administrator (and consequently his surety or sureties) cannot be absolved until the close of each litigation. 33 All. 414, Diss. 8 L.B.R. 99 and 17 M.L.T. 61, Foll. 76 Ind. cas. 802=1 Rang. 463=A.I.R. 1924 Rang. 68.

——Art. 120—Starting point—Liability of sureties in an administration bond.

Where an executor entered into an administration bond with two sureties whereby he undertook to exhibit an inventory in a certain time with the proviso that the obligation was to continue in force till the executor fulfilled the duties of administrator and the executor subsequently died the limitation for a suit to enforce the liability of the sureties runs from the death of the executor and not from the date of breach of obligation to exhibit an inventory. 33 All. 414= 8 A.L.J. 199=9 Ind. Cas. 935.

——Art. 120—Fresh cause of action—Application for review.

A petition in appeal of necessity re-opens in a Court of higher jurisdiction matter decided by a Court of lower jurisdiction. An application for review on the other hand does not of necessity, by the mere fact of its being filed, re-open questions settled between the parties by the same Court. The question whether an application for review will give a fresh starting point for limitation or not cannot be decided in the abstract but must depend on the facts of every case. If the application for review is not accepted and the Court refuses to re-open the matter no fresh starting point will be obtained by the applicant for the purposes of limitation. 24 O.C. 280=8 O.L.J. 399=A.I.R. 1922 Oudh 148.

——Art. 120—No doubt where once time has begun to run no subsequent disability or inability to sue stops it, 35 All. 227 (P.C.), Foll. ; but where the claim in respect of which time has begun to run is satisfied, time ceases to run and on the annulment of the satisfaction a fresh cause of action arises and the statute begins to run afresh from the date of such annulment. 43 Mad. 845, Foll. 64 Ind. Cas. 454=2 Lah. 320= 114 P.L.R. 1921=A.I.R. 1921 Lah. 71.

——Art. 120—Landlord and tenant—Limitation—Starting point.

The right to file a suit to challenge the decision of the Revenue Court that the tenant is more than an ordinary tenant accrues on the date of the order of the Revenue Court. The subsequent issue of an abortive notice by the landlord does not give a fresh cause of action. 48 Ind. Cas. 301 (Oudh).

27. Shares.

See also NOTES 2 AND 20.

——Art. 120—Suit for share of income—Limitation—Starting point.

When once the parties are found to have become divided in status and one of them continues in actual possession, and further, when there is a demand for division of that property and a reply is sent by the person in possession saying that he has no objection to the property being divided, he is clearly accountable to the other sharers for their shares in the income of that property. Art. 120 applies to a suit for a share in such income and the period of six years starts from the time when the right of the plaintiff is denied or from the time when there is ouster. In the absence of ouster or assertion of hostile title to the knowledge of the plaintiff, the plaintiff's right to share in the income is not confined to period of six years before the date of suit but he is entitled to a share in the income from the date of division in status. 1942 M.W.N. 239=55 M.L.W. 196=(1942) 1 M.L.J. 408=A.I.R. 1942 Mad. 514=202 Ind. Cas. 78.

——Art. 120—Administration suit by co-heir.

Administration suit by Muhammadan heir against the co-heirs is governed as regards movable property by Art. 120. 1941 A.W.R. 1=1941 M.W.N. 729= A.I.R. 1940 P.C. 215=7 B.R. 210=53 M.L.W. 1=43 P.L.R. 63=45 C.W.N. 226=I.L.R. (1940) Kar. (P.C.) 410 (Sup.)=(1941) 1 M.L.J. 594=I.L.R. (1941) Bom. 8=43 Bom. L.R. 388=73 C.L.J. 214= 1941 O.W.N. 734=1941 M.W.N. 729=67 I.A. 406= 191 Ind. Cas. 113 (P.C.).

——Art. 120—A plaintiff's suit for recovery of his share of property from co-legatee is governed by Art. 120. A.I.R. 1933 Cal. 253=36 C.W.N. 758=55 C.L.J. 420=143 Ind. Cas. 402.

——Art. 120—Co-legatee—Share of movable property.

A suit for recovery of plaintiff's share of movable property in possession of co-legatee is governed, for purposes of limitation, by Art. 120, Limitation Act, and not by Arts. 49, 62 or 123 of that Act. A.I.R. 1933 Cal. 253=36 C.W.N. 758=55 C.L.J. 410= 143 Ind. Cas. 402.

——Art. 120—Share—Outstandings received by divided brothers.

When after partition one brother is recovering outstandings originally due to the joint family there must be an implied contract of agency between one brother and the other and a suit by the other brother for rendition of accounts and recovery of his share of the joint outstandings is governed not by Art. 62 or Art. 120, but by Art. 89. 116 Ind. Cas. 327=30 P.L.R. 275=A.I.R. 1929 Lah. 407.

——Art. 120—Suit for—Share—Tenants-in-common.

Where there has been no division of shares between tenants, they must be regarded as tenants-in-common and where one tenant-in-common sues another tenant-in-common for the recovery of money received by him in excess of his share, the suit is governed by Art. 120 and not by Art. 62. 40 Mad. 491=A.I.R. 1922 Mad. 150 (F.B.), Foll. 115 Ind. Cas. 99=5 O.W.N. 1122=4 Luck. 265=A.I.R. 1929 Oudh. 83.

——Art. 120—Suit after partition.

Where after the passing of a decree in a partition suit one member of a joint family recovered the amount of rent and the mortgage-debt on behalf of the family by purchasing certain property :

Held, that a suit by the other member to recover their share of the property was governed either by Art. 89 or Art. 120 and that in the latter case time would begin to run from the date when an account was demanded and refused. 113 Ind. Cas. 173= 30 Bom. L.R. 912=A.I.R. 1928 Bom. 365.

——Art. 120—Share of mortgage-money received by co-mortgagor.

A suit by one co-mortgagee against another co-mortgagee to recover his share of the mortgage-money received from the mortgagor is covered by

Art. 120 and limitation runs from the date when money was received from the mortgagor. 79 Ind. Cas. 294=5 L.L.J. 111=A.I.R. 1921 Lah. 196.

——Art. 120—Heir of deceased—Suit for share of property.

A suit by a person claiming as heir of a deceased person for a share of his property is governed by Art. 120 of the Act and not by Arts. 49 and 123. 63 Ind. Cas. 685=14 S.L.R. 137.

——Arts. 120 and 62—Suit for share—Mortgage-debt collected by co-heirs—Continuing right.

In a suit for partition by a Mahomedan lady against her co-heir, one of the claims was in respect of the amount of the mortgage-debt due to the deceased and collected by the Defendants more than 6 years before the suit.

Held, that Art. 120 and not Art. 62 applied to the case, the right to sue accrued from day to day and therefore the action was not barred. 30 M.L.J. 104=19 M.L.T. 88=32 Ind. Cas. 83.

——Arts. 120 and 144—Suit for share—Movables and immovables.

To a suit brought by one of the heirs to recover his share of the estate left by a Muhammadan who died intestate. Art. 144 applies if the property is immoveable and Art. 120 if moveables. 34 M. 514, foll. 29 Ind. Cas. 275 (Mad.).

——Arts. 120 and 62—Suit for share—Property managed by one member—Receipt of money by that member—Hindu family.

Three brothers owned specific shares in certain property and did not constitute a joint Hindu family. The management of the affairs of the family was entrusted to one member who received the rents and profits of the immoveable property and invested and otherwise dealt with them. More than three years after the receipt of the invested money, the widow of another brother sued him for actual partition.

Held, the money having been received by the defendant in his capacity of manager, though not of a Hindu joint family, the claim was governed by Art. 120 of the Limitation Act. *Semble* :—If the suit had been a suit simply to recover this sum of money it ought to have been brought within three years under Art. 62. 37 All. 318=13 A.L.J. 407=28 Ind. Cas. 953.

——Arts. 120 and 123—Suit for share against administrator.

Suit by widow for her distributive share of the property of her intestate deceased husband against the person who obtained letters of administration is governed by Art. 120 or 123 and time runs from the date of judgment directing the issue of the letters of administration to the defendant. 15 C.W.N. 107=13 C.L.J. 239=7 Ind. Cas. 704.

——Arts. 120 and 144—Suit for share—Movables and immovables.

A suit by a Muhammadan for a share of the wife's property in possession of another sharer more than 12 years after the wife's death is governed by Art. 120 if the property is moveable and by Art. 144 if it is immoveable. 15 M. 60, Dissented from. 34 Mad. 511 =(1910) M.W.N. 447=20 M.L.J. 288=8 M.L.T. 4= 6 Ind. Cas. 50.

——Arts. 120 and 127—Mahomedan Law—Suit to recover share in joint family property.

Where on the death of a Mahomedan, the plaintiff, his daughter, claimed her share by inheritance in properties alleged to be the properties of the joint family of the plaintiff and her brothers, and it was found that she had ceased to be a member of the family since her marriage :

Held, that Art. 120 and not 127 applied. 14 B. 70, dissented from. (1901) 7 C.W.N. 155. **[See under ART. 123 AND ART. 127—Ed.]**

28. Taxes and Fees.

——Art. 120—Recovery of arrears of income-tax.

If S. 46 of the Act is not exhaustive, the arrears of income-tax for the year 1930-31 remaining due can be legally recoverable in 1935. A suit for recovery of these arrears would lie and would be governed by Art. 120, if not by Art. 149 of the Limitation Act and the Income-tax Officer would be perfectly entitled under S. 49-A of the Income-tax Act to deduct that amount from the sum which was refundable to the assessee on account of income-tax for the year 1932-33. A.I.R. 1942 Pat. 87=8 B.R. 13=196 Ind. Cas. 228.

——Arts. 120, 37 and 115—Suit by District Board for realising tax.

A suit brought by the District Board for realising a certain amount as tax on circumstances and property, is not really a suit for recovery of money but for the recovery of a liability under a particular statute and does not fall within the purview of Arts. 37 or 115 but is governed by Art. 120. (1941) A.L.J. 28= 1941 O.W.N. 282=A.I.R. 1941 All. 152=1941 A.W.R. 24=I.L.R. (1941) All. 276=193 Ind. Cas. 870.

——Art. 120—Terminal tax, suit for recovery of.

A suit for the recovery of terminal tax is governed by Art. 120 and not by Art. 115. A.I.R. 1938 Sind 48=173 Ind. Cas. 678.

——Arts. 120 and 132—Charge for taxes—Suit to enforce.

Suit by Municipality under S. 177, U.P. Municipal Act to enforce charge for taxes is governed by Art. 132 and not by Art. 120. A.I.R. 1939 All. 510= 1939 A.W.R. 261.

——Art. 120—License fee levied by Municipality.

A suit for recovery of license fee levied by the Municipality under S. 180 of the B. & O. Municipal Act is governed by Art. 120 and not by Art. 115 of the Limitation Act. A.I.R. 1938 Pat. 192=4 B.R. 523= 175 Ind. Cas. 86.

——Art. 120—Municipal dues.

Article 120 does not apply to a suit for recovery of dues under the Bihar and Orissa Municipality Act. 18 P.L.T. 252=A.I.R. 1937 Pat. 360=3 B.R. 561= 16 Pat. 302=169 Ind. Cas. 364.

——Art. 120—Suit under S. 130, Bihar and Orissa Municipal Act.

A suit under S. 130 of the Bihar and Orissa Municipal Act is governed by Art. 120. 13 P.L.T. 771= A.I.R. 1933 Pat. 65=141 Ind. Cas. 792.

29. Trust.

See also NOTES 2 AND 22.

——Arts. 120 and 62—Applicability—Suit for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of

a site purchased in the name of the defendant by the defendant and the plaintiff's father——Limitation.

The plaintiff's suit was for recovery of a certain sum of money said to represent the plaintiff's share of the sale proceeds of a site purchased by the first defendant and the father of the plaintiff in the name of the first defendant only. The properties sold were two items, one sold in August, 1938, and the other in February, 1939. The suit was laid on 8th December, 1944.

Held, on account of the jural relationship between the parties a resulting trust can be postulated and any claim based on such relationship must be treated as excluded from Art. 62 and must be brought under Art. 120 of the Limitation Act. It cannot be said that where an account is not called for the suit must necessarily be treated as one falling under Art. 62 and therefore not being within Art. 120.

It cannot be said that a suit filed within six years from the date of plaintiff's knowledge of the sales will be in time.

Accordingly the claim in respect of the sale of February, 1939, is within time though in respect of the sale of August, 1938, it is barred. (1950) 2 M.L.J. 611.

——**Art. 120**—Applicability—Suit by trustee against beneficiary to recover movable property—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 48, 49 AND 120. A.I.R. 1949 Assam 10.

——Art. 120—Trustee declaring that he proposes to hold property as full owner—It does not start limitation running against beneficiaries.

A suit for a declaration does not lie for setting aside a mere assertion. A trustee cannot by his declaration that he has committed or is about to commit a breach of trust, prejudice the rights of the beneficiaries and claim that as from the date of his declaration he began to hold adversely to the trust. A declaration by the trustee to hold the property as full owner is not an overt act which would start limitation running against the beneficiaries of a trust. I.L.R. (1946) Lah 300=A.I.R. 1947 Lah. 117.

——**Art. 120**—Applicability—Claim against a benamidar in respect of moneys received and held by him for the benefit of the real owner. *See* LIMITATION ACT (9 OF 1908), ARTS 62 AND 120. (1946) 1 M.L.J. 140 =A.I.R. 1946 Mad. 248.

——Art. 120—Suit on basis of benami transactions.

Although there is no express trust in a *benami* transaction, there is a trust and a person receiving the property with the knowledge of the true position will take it subject to the trust.

K executed in favour of *A benami* for *B* a promissory note. *A* assigned it to *C* who had knowledge of the *benami* character and paid no consideration. *C* recovered from *K* the amounts due under the said promissory note. Subsequently, *B* instituted a suit against *A* and *C* to recover from them the amount recovered from *K* :

Held (*i*) that *A* was a trustee for *B*, the relationship between a *benamidar* and the real owner being a relationship of trust ;

(*ii*) that *A* having converted the trust property, *B* was entitled to trace the proceeds of the property in the hands of *C* ; and

(*iii*) that the claim against *C* was an equitable claim and was governed by Art. 120. A.I.R. 1941 Mad. 767 (2)=(1941) 2 M.L.J. 222=54 L.W. 115= 1941 M.W.N. 727=200 Ind. Cas. 249.

——Art. 120—Suit to recover trust property from person taking it from trustee by transaction amounting to breach of trust—Suit is governed by Art. 120—Limitation starts from date of knowledge of transaction.

A suit to recover trust property from a person who has taken it with notice of the trust by a transaction with the trustee which was a breach of trust on his part and with notice that it was a breach of trust is governed by Art. 120 and time begins to run from the date when the plaintiff had knowledge of the transaction. A.I.R. 1946 Mad. 519= (1946) 1 M.L.J. 31=I.L.R. (1946) Mad. 429=1946 M.W.N. 9.

——Art. 120—Suit for declaration against defendants not as trustees but as rival beneficiaries.

The plaintiff brought a suit against the defendants trustees as if they were beneficiaries of the trust receiving the money in their own right for their own private expenditure and prayed for a declaration that the plaintiff was entitled to receive that money in the same capacity as the defendants :

Held, that as the suit was for a declaration against the defendants not as trustees but as rival beneficiaries under the trust, it came, not under S. 10 but Art. 120. A.I.R. 1944 Oudh 139=1944 O.W.N. 37=1944 A.W.R. 11=19 Luck. 515=216 Ind. Cas. 276.

——**Art. 120**—Plaintiff drawing *hundi* payable to bearer *S* on Bank, and endorsed to be credited to certain charities—Bank opening account in name of charities—Subsequent transfer of account in favour of *S* on account of overdraft—Suit by plaintiff against Bank for refund of charities of money on footing that *S* committed breach of trust and that Bank had notice of it—Art. 120 and not Art. 36 applied—Limitation started from the time of the plaintiff's knowledge of fraud, misconduct or mistake. A.I.R. 1941 P.C. 1=7 B.R. 466=(1941) 1 M.L.J. 393=I.L.R. (1941) Mad. 175=45 C.W.N. 385=53 L.W. 522=43 Bom. L.R. 440=73 C.L.J. 166=1941 M.W.N. 571=67 I.A. 448=(1941) Kar. (P.C.) 1 (Sup.)=192 Ind. Cas. 1 (P.C.).

——Art. 120—Suit by subscribers of a fund for recovery of their shares.

A suit by the subscribers of the fund held in trust for a particular purpose which fails or comes to an end, brought to recover their shares in the fund is governed by Art. 120 and time runs from the date when there was a failure of the purpose and the resulting trust thereupon arose. A.I.R. 1938 Mad. 641= 47 M.L.W. 389=(1938) M.W.N. 310=(1938) 1 M.L.J. 616=181 Ind. Cas. 801.

——Art. 120—Suit against Government in respect of money deposited in treasury in pursuance of order under S. 146, Criminal P. C.—Limitation.

In 1909, there were disputes between the plaintiff and his father as to the possession of certain lands, the father claiming them to be his self-acquisition and the plaintiff claiming them to be ancestral property in his possession. To avoid a breach of the peace, the Magistrate passed an order under S. 146, Criminal P. C., early in 1910, but instead of appointing a Receiver to manage the property, the Magistrate got the lands cultivated by somebody else and the sale-proceeds were being deposited in the treasury. The father died somewhere about 1915. In 1927, the plaintiff

sent a lawyer's notice to the Collector asking for payment of the money alleged to represent the income deposited in treasury during 1910 to 1917 and threatened to sue in default of payment. The Collector as usual replied that the threatened suit would be awaited. The plaintiff's right was not denied at any earlier stage. Plaintiff then filed a suit :

Held, that as the only dispute was between the father and the son and on the father's death the son became undisputedly entitled to the property, it was not necessary to file a suit to obtain a declaration.

Held, also that though the Government might not be regarded as a trustee within the meaning of S. 10, Limitation Act, they were at least in the position of stake-holders and never claimed to hold the money for themselves. Article 120, therefore, applied to the suit and the suit was not barred by limitation as there was no denial of the plaintiff's right by Government more than six years of the date of suit. Even if the Collector's reply to plaintiff's notice could be regarded as denial, the suit was within time. A.I.R. 1937 Mad. 787=(1937) 2 M.L.J. 296=46 L.W. 632=177 Ind. Cas. 163.

——Arts. 120 and 62—Assignment of mortgage bond to member of joint family by karta—Money actually received before assignment—Suit on mortgage bond.

The plaintiff, who was a member of a joint Hindu family was assigned a mortgage bond by the defendant who was the *karta* of the family at the partition in 1929. The bond, however, was repaid in fact in 1922. An action was brought by the plaintiff on the mortgage against the mortgagors and the *karta :*

Held, that this being merely a case of conversion by the *karta* or a case where having held the money for many years from the date of the partition, he must be said to hold it in trust for the plaintiff in which even Art. 120 would apply and not Art. 62. 1 B.R. 659=A.I.R. 1935 Pat. 159=156 Ind. Cas. 887.

——Art. 120—Suit for recovery of donation on failure of object of donation.

A suit by the donor for the refund of the donation on the failure of the scheme for which the donation was made is governed for purposes of limitation by Art. 120 and the limitation starts from the date on which the fund is diverted to another purpose. A.I.R. 1934 Oudh. 329=11 O.W.N. 937=150 Ind. Cas. 713.

——Art. 120—Loss occasioned to trust—Suit to make it good—Starting point of limitation.

Article 120 is the proper article applicable to a suit file against a trustee or ex-trustee to recover the loss sustained by the trust by reason of his omission to collect moneys due to the trust and not Art. 36.

If a sole trustee of a public trust commits a breach of trust, the loss cannot be made good, without voluntary action of the trustee's part, until there is a new trustee. The right to sue in such a case would have to lie in abeyance until a new trustee was appointed, in which case the period of six years' limitation would not commence until a new trustee had been appointed. If there are other trustees who are themselves not liable, the period of limitation will start running immediately the loss is occasioned because they will have in themselves the right to sue their co-trustee for the loss occasioned by him. Of course, if the co-trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of a defaulting sole trustee. In the case of a private trust, the *cestui que trust* would ordinarily have the right to sue from the date of the breach trust. It will, therefore, depend on the circumstances when time will commence to run. A.I.R. 1938 Mad. 353=(1938) M.W.N. 229=47 M.L.W. 344=(1938) 1 M.L.J. 334=I.L.R. (1938) Mad. 586=174 Ind. Cas. 459 (F.B.)

——Art. 120—Claim for damages—Limitation—Starting point.

A claim to damages for alleged breaches of trust in management of trust property is governed by Art. 120, the time running from the date of the breach and not from the date of loss consequent thereon. A.I.R. 1936 Bom. 30=37 Bom. L.R. 946=160 Ind. Cas. 612.

——Art. 120—Suit by worshippers against alienees for ejectment—Limitation.

Article 134 does not apply to a suit by worshippers against aliences for ejectment as a Hindu religious endowment does not constitute a trust within the meaning of this article and the suit is not for possession but merely for ejectment of the alienees. The article applicable to such a suit is the residuary Art. 120. A.I.R. 1936 Lah. 784=165 Ind. Cas. 48.

——Art. 120—Suit for recovery of trust money—Starting point of limitation.

The defendant was the trustee of a temple and the plaintiffs succeeded him in 1922. The plaintiffs filed a suit in 1923 to recover from the defendant a certain sum of money which the latter had taken from temple funds for the expenses of a litigation to remove him from the trusteeship and to have a scheme framed :

Held, that the suit was governed by Art. 120 and not by S. 10, or Art. 61 or 62. The cause of action arose only when the defendant ceased to be a trustee and the suit was not time-barred. 40 L.W. 275=A.I.R. 1934 Mad. 542=(1934) M.W.N. 1032=152 Ind. Cas. 345.

——Art. 120—Suit to declare decree not binding—Cause of action—When arises.

A suit for a declaration by a trustee that a decree obtained on a simple mortgage in respect of trust properties, executed by the plaintiff's adoptive father who was then trustee, is not binding on the trust property, is in time if brought within six years from the date of the institution of the prior mortgage suit. (1932) M.W.N. 321=A.I.R. 1932 Mad. 589=35 L.W. 350=137 Ind. Cas. 707.

——Art. 120—Agreement between adoptive father and natural father of the plaintiff to devise property to adopted son—Breach—Suit by son for possession against adoptive father's heirs.

Held, that the only remedy of a beneficiary would have been to sue the trustee for a conveyance and such a suit should have been instituted within six years under Art. 120, Limitation Act. 61 N.L.J. 78=35 C.W.N. 953=8 O.W.N. 905=(1931) A.L.J. 783=A.I.R. 1931 P.C. 196=34 L.W. 411=33 Bom. L.R. 1390=10 Pat. 851=13 P.L.T. 1=58 I.A. 279=133 Ind. Cas. 705 (P.C.)

——Art. 120—Trusts—Created by will.

A executed a will in 1887 which provided that income of certain two properties (a khothi and some land) should be given to *B* and his mother by way of allowance. It w s further provided that in case the kothi was sold *B* and his mother would receive Rs. 40 in lieu of the income of the two properties.

In 1908 there was an agreement between the beneficiaries and the then executor, the result of which was that the kothi could be sold and *B* and his mother were to receive Rs. 40 per mensem as their allowance. *B*'s mother died in 1919 and he brought the present suit for arrears of allowance.

Held, that taken as a whole *B*'s suit in substance and reality was based upon the trust created in his favour under the will of 1887 and therefore the suit did not fall under Art. 115. The case was governed by Art. 120 or Art. 123, and the suit was within time. Under the terms of the will *B* was entitled to sue for the whole amount for his own benefit after the death of the mother and not only for a moiety. 30 P.L.R. 689=A.I.R. 1929 Lah. 834.

——**Art. 120**—Suit by co-trustee against legal representatives of his co-trustee for recovery of trust property is governed by Art. 120. Section 10 does not apply to such a case. 103 Ind. Cas. 225=29 Bom. L R. 418=A.I.R. 1927 Bom. 424.

——**Art. 120**—A suit to contest alienation by a Mahomedan Mutwalli and for possession must be brought within 6 years from the date of alienation. 74 Ind. Cas. 403=2 Pat. 391=4 P.L.T. 675=A.I.R. 1923 Pat. 475.

——Arts. 120 and 144—Trust—Prescriptive right to trusteeship—Trust properties.

A prescriptive right to trusteeship can be acquired by six years' adverse possession of it under Art. 120. 19 C. 776, approved. Recovery of immoveable properties attached to the office is governed by the same article and not by Art. 144. 6 M.H.C.R. 301, foll. (1902) 26 M. 113.

——**Art. 121**—Suit by assignee from purchser at revenue sale to set aside encumbrance. See 12 C.W.N. 1029.

——Art. 121—Applicability.

A suit by an auction-purchaser at a revenue sale under S. 80 of Assam Land Regulation to recover possession of the purchased property is governed not by Art. 121 but by Art. 142 or 144, and the fact that symbolical possession was obtained is a good defence so far as any defaulting proprietor was concerned if the suit is brought within 12 years from such possession. 44 Cal. 412, Appl. 115 Ind. Cas. 606=32 C.W.N. 778=A.I.R. 1928 Cal. 870.

——Art. 121—Burden of proof—Sale under Bengal Act 11 of 1859—Suit to avoid under-tenure—Limitation.

In a suit by an auction-purchaser of an estate at a sale under Bengal Land Revenue Sales Act to avoid an under-tenure, if the defendant raises the plea that the suit is barred under Art. 121 the plaintiff should show when, as a matter of fact, the sale became final and conclusive. 51 Ind. Cas. 50 (Cal.).

——Art. 121—Burden of proof.

A purchaser of a *Patni Taluq* relying upon Art. 121 of Schedule II of Act 15 of 1877 must establish that the incumbrance he seeks to annul is one due to adverse possession commencing after the creation of the *patni*. 25 C. 167, foll. 19 C.W.N. 18=21 C.L.J. 265=26 Ind. Cas. 436.

——Arts. 121 and 142—Incumbrance—Adverse possession by trespasser.

The interest acquired in a property by adverse possession is not an incumbrance within Art. 121. Hence a suit by the auction-purchaser in a revenue sale to recover possession of the land so held in adverse possession comes under Art. 142 and not Art. 121. 44 Cal. 412=25 C.L.J. 99=21 C.W.N. 537=39 Ind. Cas. 213.

——Art. 121—Encumbrance—Meaning of—Adverse possession for statutory period before sale if incumbrance—Assam Land and Revenue Regn. (1 of 1886) S. 70.

Prescriptive title acquired before sale under S. 70 of the Assam Land and Revenue Regulation, 1886, is an encumbrance within Art. 121 of the Limitation Act. 22 Cal. 244; 25 Cal. 167, foll. 43 Cal. 779=31 Ind. Cas. 801.

——Art. 122—Scope—Right of suit—Order of insolvency of judgment of High Court—Suit on order—Limitation Act, Art. 122—Interest.

An order of the High Court in the exercise of its insolvency jurisdiction is a judgment of the High Court and a suit based upon such order is maintainable. Such a suit is governed by Art. 122, Schedule 11, of the Limitation Act. (1905) 9 C.W.N. 952=33 Cal. 560.

——Art. 123.

Synopsis.

1. **Applicability and Scope.**
2. **Starting point.**
3. **Suit by Co-heir.**

1. Applicability and Scope.

——Art. 123—Applicability and Scope—Suit, held fell under Art. 123.

Article 123 applies only where the suit is against an executor, or administrator or some persons legally charged with the duty of distributing the estate.

H, by his will, bequeathed his property to *G* on condition that *G* paid Rs. 10 monthly to *H's* widow and spent Rs. 300 on her funeral. On *G's* death, his son continued to pay Rs. 10 monthly to *H's* widow for some time. On the widow's death, her sister obtained a succession certificate and sued the son of *G* for the arrears of maintenance due to the widow and Rs. 300 which the plaintiff claimed to have spent over the widow's funeral.

Held, that the suit fell within Art. 123. A.I.R. 1943 Pesh. 11=205 Ind. Cas. 197.

——Art. 123—Applicability and Scope—Suit against trustee of estate for money bequeathed.

A suit by the plaintiff to recover from the trustee of the estate of the deceased testator, a sum of money alleged to have been bequeathed to him under the testator's will coupled with a prayer for declarations which are wholly unnecessary and merely constitute the grounds of the plaintiff's claim to the decree for the amount sought to be recovered, does not fall under S. 10, but is governed by Art. 123, Limitation Act. A.I.R. 1942 Sind 145=I.L.R. (1942) Kar. 392=208 Ind. Cas. 230.

——Art. 123—Applicability and Scope—Person liable to pay legacy need not be executor or administrator.

The words "payable," and "deliverable" in the third column of Art. 123 indicate that there must be some person who is under a duty to pay the legacy or to deliver the distributive shares. It is not necessary, however, that the persons liable to pay must be executors or administrators. They must be persons in possession of the estate and legally bound to

pay the legacy or hand over the distributive shares. Where, therefore, a testator has, in his will, directed that the person in possession of his estate should pay certain allowance to certain person, a suit to recover the allowance is governed by Art. 123. A.I.R. 1940 Cal. 93=44 C.W.N. 221=186 Ind. Cas. 843.

——Arts. 123 and 120—Applicability and Scope.

Article 123, applies to an application for recovering an annuity payable under a will and not Art. 120. A.I.R. 1940 Pat. 254=6 B.R. 224=185 Ind. Cas. 626.

——Art. 123—Applicability and Scope—Claim for annuity.

Where a person entitled to receive an annuity under the terms of a will files a suit against the executor of the will for recovery of the arrears of the annuity, the suit is governed by Art. 123, Limitation Act, and the plaintiff can recover only such annuities as were not paid within 12 years of the date of such suit. A.I.R. 1938 Pat. 600=19 P.L.T. 202=17 Pat. 350=5 B.R. 551=181 Ind. Cas. 283.

——Art. 123—Applicability and Scope.

Article 123 does not apply to the claims of profits in estate of a deceased person in respect of movable properties. A.I.R. 1938 Rang. 416=178 Ind. Cas. 475.

——Art. 123—Applicability and Scope.

Bequest for charitable uses—Some property omitted in will—Such property not set apart for specific purpose—Suit for its recovery is governed by Art. 123, Limitation Act. A.I.R. 1936 Bom. 30=37 Bom. L.R. 946=160 Ind. Cas. 612.

——Arts. 123, 144 and S. 28—Applicability and Scope—Sale by father and his second wife in 1931—Suit for possession by purchaser in 1933—Claim of son by first wife that he had right in such property.

The respondent was the son of *M* and his first wife, having been born in August 1908, *M's* first wife died in 1914 and about a year later, he married another woman *N*. In November, 1931, *M* and *N* executed a registered deed of sale of the property in suit in favour of the appellant. When the appellant sued to recover possession of the property by virtue of the sale, the respondent put forward the claim that as the property in suit formed the estate of *M* and his first wife, he acquired a vested interest in it upon the re-marriage of *M* with *N* :

Held, that to such a claim, Art. 123 was applicable and not Art. 144 and that the claim preferred by the respondent had long been extinguished by the time he asserted the same in Court. 158 Ind. Cas. 118.

——Art. 123—Applicability and Scope.

A suit for recovery of a legacy from persons in possession of the estate who are legally bound to pay the same is governed by Art. 123. A.I.R. 1935 All. 239 =(1934) A.L.J. 230=56 A. 711=3 A.W.R. 397= 155 Ind. Cas. 390.

——Art. 123—Applicability and Scope.

Article 123 applies only in the case of a suit against an executor or administrator or some person legally charged with the duty of distributing the estate. A.I.R. 1934 Rang. 318=12 R. 409=152 Ind. Cas. 768.

——Art. 123—Applicability and Scope.

Article 123 only applies to a suit brought against an executor or administrator or some person legally charged with the duty of distributing the estate. (1932) A.L.J. 245=34 Bom. L.R. 510=36 C.W.N. 310=62 M.L.J. 371=A.I.R. 1932 P.C. 81=9 O.W.N. 399=35 L.W. 464=55 C.L.J. 420=51 A. 93=59 I.A. 74=136 Ind. Cas. 454 (P.C.).

Impliedly over-rules—A. I. R. 1918 Bom. 54=51 Ind. Cas. 209.

——Art. 123—Applicability and Scope—Suit by heires against trespassers.

A suit by the heirs of a deceased proprietor for recovery of possession of property from persons alleged to be in possession without any title to the property and who were not entitled to represent or to be treated as heirs of the proprietor is not governed for purposes of limitation by Art. 123. 10 R. 82= A.I.R. 1932 Rang. 55=137 Ind. Cas. 200.

——Arts. 123 and 62—Applicability and Scope—Arrears of maintenance.

Where the amount of maintenance granted under a will is to come out of the income of particular property and the defendants are in possession of the property under the will, the proper article of the Limitation Act to apply to a suit for arrears of such maintenance against the defendants is Art. 123 and not Art. 62. A.I.R. 1931 Cal. 670=35 C.W.N. 307=132 Ind. Cas. 684.

——Art. 123—Applicability and Scope.

The word "distribution" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Article 144 and not Art. 123 therefore applies to a suit to recover a share by a Mahomedan heir from a person in management of the property. A.I.R. 1921 Bom. 56, Foll; 118 Ind. Cas. 785=31 Bom. L.R. 199=A.I.R. 1929 Bom. 141.

——Art. 123—Applicability and Scope—Trust created by will.

Suit based on trust created by will falls under Art. 120 or Art. 123 and not under Limitation Act, Art. 115. 30 P.L.R. 689=A.I.R. 1929 Lah. 834.

——Art. 123—Applicability and Scope—Executor de son tort.

A suit by an administrator of an intestate person against an executor *de son tort* is governed by Art. 123 and the latter is liable to account for mesne profits for a period of 12 years before suit. A.I.R. 1926 Mad. 681=A.I.R. 1922 Mad. 457 (F.B.)=A.I.R. 1925 P.C. 105=A.I.R. 1916 P.C. 145 (P.C.) and 43 Bom. 845, Rel. on. 30 P.L.R. 503=A.I.R. 1929 Lah. 753.

——Art. 123—Applicability and Scope—Executor de son tort.

A Hindu died leaving a Will whereby his self-acquired properties were divided equally between his minor grandson, the plaintiff, and his own third son, the defendant. Testator's widow was appointed executrix by the Will. After the death of the testator, when the widow was alive, the defendant took up the management and continued to do so till after widow's death. Plaintiff after attaining majority filed a suit for account and mesne profits against defendant in 1922 :

Held, that defendant was in the position of an executor *de son tort* after the death of the testator and Art. 123 applied. 95 Ind. Cas. 33=23 M.L.W. 528=A.I.R. 1926 Mad. 681.

——Art. 123—Applicability and Scope.

Article 123 applies to every suit in which the plaintiff claims an undistributed share in the estate of a deceased person and not only to suits against persons representing the estate of the deceased such as executors or administrators. 44 Cal. 379 (P.C.) and A.I.R. 1922 Mad. 457 (F.B.), foll. 19 All. 169 and 37 All. 233, Not foll. 97 Ind Cas. 139=A.I.R. 1926 All. 748.

——Art. 123—Applicability and Scope.

Article 123 applies only to cases in which the property sought to be recovered is not only legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is executor of the Will or otherwise represents the estate of testator. 91 Ind. Cas. 725=A.I.R. 1926 Cal. 480.

——Art. 123—Applicability and Scope.

Where a distributive share in the estate of a deceased is claimed, whether against an Administrator or a co-heir, or a person merely in possession the article applicable is Art. 123. Where co-heirs agree to enjoy the property left by the deceased jointly without effecting a partition, Art. 142 or Art. 144 of the Limitation Act will apply. A.I.R. 1924 Rang. 155 and A.I.R. 1925 Rang. 233, Foll. 95 Ind. Cas. 514=5 Bur. L.J. 4=A.I.R. 1926 Rang. 95.

——Art. 123—Applicability and Scope—Suit against co-legatee.

One died in 1910 leaving the whole of his property to his two sons *G* and *B* by a will. The two legatees lived at peace with each other until recently and in the year 1919, *G* brought a suit against his elder brother *B*, for his share in the estate, which he said *B* had appropriated in its entirety.

Held, that Art. 123 applied and that the suit was in time. 75 Ind. Cas. 934=A.I.R. 1924 Lah. 561.

——Art. 123—Appliciablity and Scope—Suit for undistributed share on intestacy—Limitation.

A suit to recover an undistributed share in the estate of an intestate is governed by Art. 123 of the Limitation Act. 43 Bom. 845=21 Bom. L R. 384=51 Ind. Cas. 209.

——Art. 123—Applicability and Scope—Buddhist law—Burmese—Claim as aurasa Child to one fourth share.

The claim of an *aurasa* child to one fourth share is governed by Art. 123. 42 Ind. Cas. 809 (L.B.).

——Art. 123—Applicability and Scope—Suit by residuary legatee.

A suit by the residuary legatee to recover her legacy falls under Art. 123 of the Limitation Act. 41 Cal. 271=25 Ind. Cas. 370.

——Art. 123—Applicability and Scope—Suit for legacy.

A suit for the recovery of a legacy falls under Art. 123 of Limitation Act, 1877. 36 Bom. 111=13 Bom. L.R. 1025=12 Ind. Cas. 702.

——Art. 123—Applicability and Scope—Suit for share of estate.

A suit for share of an estate while the defendant is bound by law to distribute is governed by Art. 123. 34 Mad. 511=20 M.L.J. 288=8 M.L.T. 4=(1910) M.W.N. 447=6 Ind. Cas. 50.

——Art. 123—Applicability and Scope—Suit for share of legacy.

The Article applies where a legacy or share is to be obtained from the executor of the will or a legal respresentative. 5 N.L.R. 41=2 Ind. Cas. 15.

——Art. 123—Applicability and Scope—Legacy in satisfaction of indebtedness by testator to plaintiff—Claim for legacy with ancillary claim for administration of estate.

A testator provided by his will dated 27th April, 1887, that his elder brother's money was kept with him, and that it should be given to him. He died on 14th September, 1888. In January, 1897, plaintiff got Rs. 600 and on 9th May, 1899, he sued the son and executor, claiming an account of the testator's property, that the estate might be administered by the court, and that the balance of principal and interest might be paid to plaintiff. The plea was that the sum was either a loan by plaintiff to the deceased, or a deposit payable on demand, and that a suit for it was barred ; and also the plaintiff was estopped as he had disputed the validity of the will and claimed a share in the testator's property :

Held, (1) The bequest was a legacy in satisfaction of the indebtedness of the testator to plaintiff. (2) Though the plaintiff asked for an administration of the estate, that prayer was only ancillary to the claim for a legacy, and so Art. 123, and not Art. 120, applied. (3) There was no estoppel and his right to the legacy was not affected by the claim. (1902) 12 M.L.J. 183=25 M. 361.

2. Starting point.

——Art. 123—Starting point—Testator by will directing son to pay legacy on attaining majority—Son dying before attaining majority—Effect.

(Obiter).—Where a testator by his will directs his son to pay a legacy to his daughter on attaining majority and the son dies before attaining majority, a suit, claiming the legacy instituted more than twelve years after the date on which the son would have attained majority will be barred by limitation. A.I.R. 1946 P.C. 185=227 Ind. Cas. 12=59 M.L.W. 681=(1946) 2 M.L J. 708=13 B.R. 36=1946 A.L.J. 491=51 C.W.N. 205=43 I.A. 264=1946 A.W.R.P.C. 205=I.L.R. (1947) Mad. 159=1946 Pesh. L.J. P.C. 185 (P.C.).

——Arts. 123 and 131—Applicability—Starting point of limitation—Annuity payable under will in the nature of legacy—Repudiation of right to—Suit to recover—Limitation.

Where the right to receive an annuity under a will is repudiated, Art. 131 of the Limitation Act and not Art. 123 applies to a suit to recover such annuity. A suit to recover such annuity brought after 12 years from the date of repudiation is barred by limitation, even if the annuity is in the nature of a legacy. Once the right to receive recurring payment is repudiated, Art. 131 is the appropriated article to be applied. A person who has taken no action for more than 12 years since the denial or repudiation cannot claim to enforce his right after the lapse of the period of limitation fixed by Art. 131 and say that under Art. 123, he is entitled to the annuity for the last 12 years. 25 Pat. 311=229 Ind. Cas. 348= A.I.R. 1947 Pat. 47=13 B.R. 314.

——Arts. 123, 89 and 62—Starting point of limitation—Defendant undertaking to distribute sale proceeds amongst heirs of deceased—Suit by

one of heirs for his share—Article applicable—Time, when runs.

Where the estate of a deceased Muhammadan was sold in accordance with the wishes of majority of the heirs and the sale proceeds were kept with the defendant for distribution to the heirs according to their shares, a suit for the recovery of his share by one of the heirs cannot be regarded either as one for the administration of the estate or as a suit against a person legally charged with the duty of distributing any portion of it under Art. 123 or as suit by principal against agent under Art. 89. To such a suit article applicable is Art. 62 and the time runs from the date when the defendant received the money and not from the time of the plaintiff's knowledge that the defendant had received the money. 1945 M.W.N. 671=(1945) 2 M.L.J. 422=A.I.R. 1946 Mad. 116=58 L.W. 555=224 Ind. Cas. 21.

——Art. 123—" Payable," starting point of.

A legacy or share in a legacy does not become 'payable' until the executor or other person liable to pay it has in his hands money with which it could be paid. Hence, where land bequeathed is subject to mortgage and the executor is directed to pay off the mortgage and deliver the land to the legatee free of the mortgage, time under Art. 123, Limitation Act, for a suit by the legatee to enforce delivery of the land runs from the date on which the mortgage is paid off by the executor. A.I.R. 1943 Mad. 276=56 L.W. 21=(1943) 1 M.L.J. 36=1943 M.W.N. 78=I.L.R. (1943) Mad. 477=210 Ind. Cas. 89.

——Art. 123—Starting point.

Suit instituted in 1937—Plaint amended on November 7, 1940, whereby suit becoming one by legatee to recover his legacy pure and simple—Suit, held must be taken to have been instituted on date of amendment and 12 year's period under Art. 123 must date back from that date. A.I.R. 1942 Sind 145=I.L.R. (1942) Kar. 392=208 Ind. Cas. 230.

——Art. 123—Starting point.

A suit by husband to recover deceased wife's share in her father's property is barred if brought 12 years after the death of her mother. 101 Ind. Cas. 634=5 Rang. 125=6 Bur. L.J. 55=A.I.R. 1927 Rang. 143.

——Art. 123—" Payable "—Starting point.

A similar interpretation must be to the words " payable," and " deliverable " as used in Art. 123 and a share in the property of an intestate would not be deliverable until the administrator, to whom letters of administration had been granted had in his hands the share to be delivered and, similarly, a legacy or share in a legacy does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid.

A Hindu widow claimed certain property as the heir of her predeceased natural born son. She bequeathed by will, the income of the property before her death. Her title was disputed by another lady who claimed to be the adoptive mother of the deceased son. The validity of the adoption was challenged by the natural mother and the matter was before the Courts. The estate was under the management of the Court of Wards, and later, of Court Receivers.

Held, that no one could have had in his possession or control any fund representing the income of the estate, which the natural mother (the testatrix) had a right to enjoy for her own use but had not received until it had been finally decided by the Courts that the adoption of the propositus by the rival claimant was invalid, and that therefore, for suits to obtain payment of the legacies under the will, time began to run only from the date of the decision of the Privy Council. 87 Ind. Cas. 324=52. I.A. 214=1925 M.W.N. 441=3 Pat. L.R. 208=29 C.W.N. 989=23 A.L.J. 261=6 L.R.P.C. 82=48 Mad. 312=27 Bom. L.R. 823=A.I.R. 1925 P.C. 105=48 M.L.J. 627 (P.C.).

——Art. 123—Burmese Buddhists—Claim for share by sons of first marriage on death of step-mother—Starting point is the date of death of step-mother.

On the death of his father an *orasa* son is entitled to claim ¼ of the property. But if he does not exercise that right and his mother does not die till more than twelve years after the death of his father, he is not barred by the Law of Limitation from claiming a share of inheritance on the death of his mother. Similarly the failure of the plaintiffs to exercise the right to partition on the death of their father, does not debar them from claiming an entirely separate right on the death of their step-mother who re-married their father and had also children of her first marriage. 77 Ind. Cas. 53=4 U.B.R. 140=1 Bur. L.J. 267=A.I.R. 1923 Rang. 110.

——Art. 123—" Payable "—Starting point of limitation.

V, mother of *N*, after his death brought a suit for possession of his property. Pending the suit she died in 1899, but the suit was continued by defendants. By her will she had bequeathed her certain legacies which were to be paid out of the accumulation of the estate. The property was in the possession of a Court of Wards and the income was accumulating. During the pendency of the suit the accumulated income was in 1905 permitted by the Court to be divided among defendants and *P*, who claimed adversely to *F*. They all undertook that the money would be brought in if the Court so ordered. The suit was decreed in favour of *V*, in 1913. Defendants by the decree alone became entitled to the estate. The one-third of the income which had been handed over to *P*, was therefore ordered to be refunded to defendants in 1915 and was refunded in 1917. The legatees within 3 years of this brought a suit against defendants 3 years of this for the payment of legacies, and the defendants contended that the suit was time-barred as it was brought after more than 12 years from 1905.

Held, the defendants did not receive any money which could be considered as available for the legacies until 1915 and, further, as regards that part which they received from *P* and which was to satisfy these claims, they did not receive it until 1917 ; therefore, time under the statutes of limitation does not begin to run until there are available assets.

Article 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased. Article 62 and Art. 120 are not applicable to the case. 70 Ind. Cas. 689=46 Mad. 190=16 M.L.W. 369=1922 M.W.N. 532=31 M.L.T. 221=A.I.R. 1922 Mad. 457=43 M.L.J. 486.

——Art. 123—Starting point.

Where the members of a Mahomedan family continue to live as tenants in common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death, and the article applicable for a suit for distributive share is Art. 144 and not

Art. 123. 44 Bom. 942, Foll. 59 Ind. Cas. 780=45 Bom. 519=A.I.R. 1921 Bom. 56.

——Arts. 123, 141 and 154—Mahomedan law—Succession—Limitation—Estoppel—Onus.

One *M.*, a Mahomadan, died in 1865 possessed of property, which passed first to his mother, and after her death to his senior and junior widows of whom each held an eight anna share. The senior widow died in 1888 and after her death the junior widow retained possession of the whole estate until her death in 1891. On the death of the junior widow mutation of names was made in favour of three sons of another brother of the senior widow, who died in 1890 in respect of a twelve anna share and in favour of the only son of a third brother of the senior widow who predeceased her for the remaining four annas. The plaintiff a sister of the senior widow, instituted against her four nephews and others this suit in 1903 to recover her share of the property including in that estate a share of the estate which had been that of *M*, and which Mubarak was said to have inherited from the senior widow, and also property which he took by inheritance from their father:

Held, that with regard to the property taken by Mubarak from the senior widow the period of limitation began to run from the death of the junior widow and not from any earlier period and that the suit was not barred by limitation. 31 All. 557=36 I.A. 210=10 C.L.J. 297=11 Bom. L.R. 1210=14 C.W.N. 59=19 M.L.J. 698=13 OC. 113=4 Ind. Cas. 457 (P.C.).

——Arts. 123, 142 and 144—Suit for a distributive share of property—Limitation—Starting point.

A suit for the distributive share, brought 18 years after the death of the last owner is barred under Art. 123 as the period of limitation would run from the death of the last owner. If the case fell under Art. 142 the plaintiff would have to show his possession within 12 years before the suit. But if under Art. 144 the burden of proving adverse possession for 12 years before suit lies on the defendant. 6 Bur. L.T. 188=21 Ind. Cas. 335.

——Arts. 123 and 120—Starting point—Suit by widow of Mahomedan for share against son who got order for grant of letters of administration but did not take out same—"Representative"—Time from which limitation runs.

Where on the death of a deceased Mahomedan, a contest amongst his heirs as to who should take out letters of administration was decided in favour of the defendant No. 1 but he did not furnish security and the order for grant of letters of administration who thus never completed.

Held, that if Art. 120 applied to a suit by one of the other heirs to recover her share from the defendant No. 1 who was in possession, limitation ran at the earliest from the date of decision of the appellate court affirming his rights to take out letters of administration. *Quaere* :—The other members of the family of the accused having also been joined as defendants whether defendant No. 1 could be allowed to obtain for himself any advantage by urging that he never in fact became the legal representative of the deceased within Art 123 not having actually taken out letters of administration. (1910) 15 C.W.N. 107=13 C.L.J. 239=7 Ind. Cas. 704.

3. Suit by co-heir.

——Art. 123—Administration suit by Muhammadan heir against his co-heirs—Article 123 does not apply. 1941 A.W.R. 1=1941 M.W.N. 729=A.I.R. 1940 P.C. 215=7 B.R. 210=53 L.W. 1=43 P.L.R. 63=45 C.W.N. 226=67 I.A. 406=(1940) Kar. (P.C.) 410 (Sup.)=(1941) 1 M.L.J. 594=I.L.R. (1941) Bom. 8=43 Bom. L.R. 388=73 C.L.J. 214=1941 O.W.N. 734=1941 M.W.N. 729=191 Ind. Cas. 113 (P.C.).

——Art. 123—Suit by co-heir.

Suit by one co-heir against another to recover his share in the property is not governed by Art. 123. A.I.R. 1940 Cal. 93=44 C.W.N. 221=186 Ind. Cas. 843.

——Art. 123—Suit between co-heirs for share of inheritance.

A claim by a daughter to a share in the estate taken by her mother on her re-marriage with her step-father must be brought within 12 years from the date of her mother's re-marriage. A.I.R. 1936 Rang. 388=164 Ind. Cas. 556.

——Art. 123—Muhammadan co-heirs—Suit by one against others for his share of deceased's estate is not governed by Art. 123. 14 L. 794=A.I.R. 1933 Lah. 784=35 P.L.R. 121=148 Ind. Cas. 1143.

——Art. 123—Heirs of Mahomedan—Suit by co-heir.

A suit by one of the heirs of a Mahomedan owner to recover possession of his share is not covered by Art. 123 but must fall under Art. 144, limitation running from the date when the defendant's possession became adverse. A.I.R. 1928 All. 467 (F.B.), Foll. 121 Ind. Cas. 785=7 Rang. 744=A.I.R. 1930 Rang. 72.

——Art. 123—Suit by co-heir.

Plaintiff, Cutchi Khati daughter, sued her brothers for her share in the ancestral property. Defence raised adverse possession as a bar to the suit,

Held, that the case would be governed by Art. 144 and not by Art. 123. A.I.R. 1930 Sind 193=126 Ind. Cas. 748.

——Art. 123—Suit by co-heir.

Articles 123 applies only when the suit is brought for a share an estate which it is the legal obligation of the defendant to distribute. Where a Muhammadan dies intestate, his estate vests in his heirs as tenants in common and no one is charged by law with its distribution, and if a suit is brought by one of the heirs to recover his share, Art. 144 and not Art. 123 applies. 34 Mad. 511 and A.I.R. 1928 All. 467 (F.B.), Foll. 117 Ind. Cas. 803= 11 Lah. 29=A.I.R. 1929 Lah. 549.

——Art. 123—Suit by co-heir.

A suit by one of the heirs of a Mahomadan to recover possession of his share is not covered by Art. 123 but must fall under Art. 144, limitation running from the date when the defendant's possession became adverse. A.I.R. 1926 All. 748, Reversed. 111 Ind. Cas. 809=51 All. 101=26 A.L.J. 1041=A.I.R. 1928 All. 467 (F.B.).

——Art. 123—Suit by co-heirs—Suit by co-heirs for a share in the corpus of an inheritance is governed by Art. 123—If property is held by one on behalf of all, article applicable is Art. 142 or 144.

The appropriate article for suits instituted by co-heirs for a share in the corpus of an inheritance is Art. 123 but if it can be shown that whoever holds the propeety is holding with the consent, express or implied, of all the heirs on behalf of them all, then Art. 142 or 144 would apply. A.I.R. 1924 Rang.

155 ; A.I.R. 1916 P.C. 145 and A.I.R. 1925 Rang. 228, Foll. 106 Ind. Cas. 828=5 Rang. 582=A.I.R. 1928 Rang. 6.

——Art. 123—Suit by co-heirs.

Article 123 applies to a case of claim to a share against co-heirs in possession of an estate when there was intestacy. But an exception should be made in respect of cases where the whole body of the heirs agree to enjoy jointly the property left by the deceased, without effecting a partition. In such cases Art. 142 or 144 would apply.

There is nothing to prevent the heirs of Karen Christians from taking possession of the estate and agreeing to enjoy it in common. Their title becomes complete when they take possession of the property, and, when thereafter any of them are excluded from enjoyment, the cause of action arises on such exclusion and the article applicable is Art 142. 88 Ind. Cas. 609=4 Bur. L.J. 76=A.I.R. 1925 Rang. 233.

——Art. 123—Suit by co-heir.

The appropriate article for suits against co-heirs for a share the corpus of an inheritance is Art. 123. 72 Ind. Cas. 489=3 Rang. 77=A.I.R. 1925 Rang. 228.

——Art. 123—Suit by co-heir.

The appropriate article for suits, instituted against co-heirs for a share in the corpus of an inheritance is Art. 123. As Burmese Buddhists are not permitted to make wills, the only portion of Art. 123 which can apply to suits relating to their estates is the provision applicable to the distributive share of the property of an intestate. 6. L.B.R. 170, Foll. 76 Ind. Cas. 855=1 Rang. 405=A.I.R. 1924 Rang. 155.

——Arts. 123 and 144—Suit by co-heir—Suit for share of the property of an intestate—Heirs of Muhammadan holding estate as tenants-in-common.

Article 123 does not apply to the Mahomedans who continue to own as tenants-in-common the estate of their deceased father. The ordinary law applies to such cases and time begins to run against one tenant-in-common, when the other tenant-in-common does some act the effect of which is either to exclude his co-tenant from the joint property, to deny his rights to share; and Article 144 applies to the case. 22 Bom. L.R. 939=58 Ind. Cas. 42.

——Arts. 123 and 144—Scope—Co-heirs—Suit for possession.

Art. 123 does not apply to suit by one heir against co-heirs for possession of a house left by the deceased but Art. 144 does. 50 Ind. Cas. 746 (Lah.).

——Art. 123—Suit by co-heir—Suit for share by one heir against another—Applicability.

Art. 123 applies only to a suit for a share of an estate which the defendant is legally bound to distribute and not to suits for recovery of possession by one of the heirs against another heirs. 17 O.C. 157=1 O.L.J. 225=24 Ind. Cas. 45.

——Arts. 123, 120 and 144—Suit by co-heir—Mahomedan Law—Suit by Mahomedan sharer for share of deceased's property after 12 years—Art. 123, Scope of.

A suit by a Mahomedan for a share of his wife's property in the possession of another sharer more than 12 years after his wife's death is governed by Art. 144 in the case of immoveables and by Art. 120 in the case of moveables. Art. 123 applies only when the suit is for a share of an estate which it is the legal duty of the defendant to distribute, and does not apply to the case of a Mahomedan dying intestate, and the estate in that case is at once vested in the heirs as tenants in common and there is no one charged by law with its distribution. (1910) 20 M.L.J. 288=6 Ind. Cas. 5c=8 M.L.T. 4=1910 M.W.N. 447=34 Mad. 511 (F.B.).

——Art. 124.

Synopsis.

1. Adverse possession.
(a) Acquisition and Starting point.
(b) Effect of
(c) Tacking.
2. Applicability and scope.
3. Hereditary office—What is

1. (a) Adverse possession—Acquisition and Starting point.

——Arts. 124 and 141—Applicability—Transfer of pala to stranger by widow of co-shebait—Transferee and his successors in adverse possession for 12 years prior to her death—If acquire title.

A transfer by a conshebait of his *pala* (turn of worship) in a private debutter to a stranger for value is void, and the possession of the transferee and his successors becomes adverse from the date of entry into possession. Once adverse possession has begun to run in favour of a person, a transferee from the latter can tack his possession to that of his predecessor. If the shebaiti right is hereditary, Art. 124 of the Limitation Act applies, and if the transferee and his successors have been in possession claiming absolute title for over 12 years prior to the death of the transferor, they acquire a title by adverse possession.

The fact that the transferor is a Hindu widow who has succeeded to the shebaiti right of her husband does not make Art. 141 of the Limitation Act applicable. As a Hindu female who succeeds to a shebaiti right represents the endowment as completely and effectively as a male heir, subject to the qualification that on her death the shebaiti right goes not to her heirs but to the heirs of the last male holder of the shebaiti right, limitation does not begin to run from her death. 54 C.W.N. 960.

——Art. 124—Shebaiti divided into palas—Possession by shebait of pala of co-shebait under invalid transfer—If adverse.

Co-shebaits are co-owners in the shebaiti right. One co-shebait can, therefore, claim the interest of another co-shebait under Art. 124 of the Limitation Act, if the claim be regarded as a claim to a share in the hereditary office. Where the shebaits have been in possession on the basis of *palas* and one *paladar* is in possession of the *pala* of another *paladar* under an invalid transfer and in open assertion of a hostile title, the possession of the *pala* becomes adverse. 54 C.W.N. 960.

——Art. 124—Adverse possession—Acquisition and starting point—Shebait of temple—Suit for possession of office.

A suit for possession of the hereditary office of *shebait* from a person enjoying it adversely to the plaintiff is governed by Art. 124 and not by Art. 134 or 144 and time starts when the defendant takes possession adversely to the plaintiff. (1918) P.H.C.C. 247=3 Pat. L.J. 327=4 Pat. L.W. 283=47 Ind. Cas. 290.

——Art. 124—Adverse possession—Acquisition and starting point—Suit for office—Suit for possession—Distinction.

In a suit to recover possession of property and hereditary office from the defendant whose father had been in adverse possession of both for over 12 years, and who continued in possession afterwards, *held* that there is no distinction between the claim for possession of the property and that for the office, for purposes of limitation, and that the suit was barred under S. 28 and Art. 124 23 M. 271 P.C., Foll. 39 All. 636=15 A.L.J. 740=42 Ind. Cas. 77.

——Art. 124—Religious Office—Adverse possession—Acquisition.

(*Per Curiam*) :—Mere possession of the properties attached to an office without performing the duties of the office is not adverse possession of the office within the meaning of Art. 124. 20 M.L.J. 781. Foll. 29 M.L.J. 558=18 M.L.T. 402=(1915) M.W.N. 829=2. L.W. 1005=30 Ind. Cas. 962.

——Art. 124—Adverse possession—Acquisition—Suit by heir of shebait—Auction-purchaser of the share of shebait—Incompetency of auction-purchaser to hold office.

Where an auction-purchaser of the share of daily surplus income from the offerings of a temple enjoyed the income for about 20 years as against the widow of the *shebait* though he was incompetent to hold the office owing to his caste, and the reversioner sued on the death of the widow for a declaration that he was entitled to the offerings.

Held, that the suit was not one to recover an hereditary office within Art. 124 of the Limitation Act and was not barred by limitation. The defendant not having taken possession of the office and being incompetent to hold it, could not by adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, acquire a title to the office or a share of the income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled, the defendant committed a fresh actionable wrong in respect of which a suit could be brought against him by the *shebait* but it did constitute him the *shebait* or in any way affect title to the office. 42 Cal. 244=18 C.W.N. 1029=27 M.L.J. 100=1 L.W. 549=16 M.L.T. 210 =(1914) M.W.N. 636=12 A.L.J. 1176=20 C.L.J. 360=16 Bom. L.R. 845=24 Ind. Cas. 501 (P.C.).

——Art. 124—Adverse possession—Acquisition and starting point—Suit for emoluments of an office—Adverse possession—Declaratory decree obtained during period of adverse possession.

In a suit for the emoluments and honours of the office of *Adayapakam*, it was found that defendant had been getting and enjoying the income of the office for over 12 years prior to suit.

Held, that the defendant was in adverse possession of the emoulments and honours of the office and that the suit was barred under Art. 124. The mere passing of a declaratory decree in plaintiff's favour establishing his joint right with defendant during such adverse possession by the defendant will not prevent the defendant from acquiring title by adverse possesson if such possession having commenced before the suit for title, continued afterwards for the statutory period. (1911) 1 M.W.N. 99=9 M.L.T. 171=8 Ind. Cas. 883.

——Art. 124—Applicability of—Adverse possession of profits alone without the office—Plaintiff entitled to beneficial enjoyment of property—Starting point.

Art. 124 applies only when the suit is one against the holder of the office. Possession of the lands alone does not constitute "possession of the office" within the meaning of Art. 124. Where the plaintiff is entitled to the beneficial enjoyment of the lands attached to a trust, time begins to run for a suit to recover the property only from the time when his right to the beneficial enjoyment thereof accrues. The decision in 23 M. 27, has not overruled that in 13 M. 277 in this respect. (1910) 20 M.L.J. 781=9 M.L.T. 73=8 Ind. Cas. 998.

——Art. 124—Adverse possession—Acquisition——Adverse possession of shebaitship.

The right of a person lawfully entitled to the office of a shebait may be extinguished by adverse possession. (1909) 11 C.L.J. 2=3 Ind. Cas. 408.

——Art. 124—Adverse possession of hereditary office—Acquisition.

The analogy of Art. 142 cannot be invoked in interpreting Art. 124, as the two articles substantially differ in their wording. A plaintiff's right to recover a hereditary office will not be barred unless the defendant is found to have been in possession of it adversely to the plaintiff for 12 years; and the fact that the plaintiff had not possession of the office at any time within 12 years previous to the suit is not sufficient in itself to bar his claim. (1908) 19 M.L.J. 257=6 M.L.T. 167=3 Ind. Cas. 123.

——Arts. 124 and 144—Adverse possession—Acquisition and starting point—Trust—Suit for possession of trust property as manager.

Where the plaintiff claimed possession of certain trust property as manager by right of inheritance, from the founders of the trust, there being no allegation of misappropriation of the trust property, it was **held** that the limitation applicable to such suit was that prescribed by Art. 124 or Art. 144 and began to run from the time when the possession of the defendant became adverse to the plaintiff. 1905 A.W.N. 69=2 A.L.J. 304 =27 A. 513.

1. (b) Adverse Possession—Effect of.

——Art. 124—Shebait—Effect of adverse possession of office.

Where a person holds the office of the *shebait* for 12 years and adversely, Art. 124, applies and where the office is thus extinguished by adverse possession, the right to claim *pala* (turn) must also share the same fate. A.I.R. 1936 Cal. 291=166 Ind. Cas. 832.

——Art. 124—Adverse possession of office—Effect of—Suit for trusteeship—Dismissal—Suit for property—Bar.

Plaintiff sued for (a) certain rights in certain temples, (b) the consecrated idols of those temples and (c) certain properties attached to the temples. The suit was dismissed as time-barred. In appeal plaintiffs limited their relief to (c) only. **Held,** that the appeal must fail because if the right to recover trusteeship is lost by the dismissal of suit, the right to recover a portion of the endowments must fail. 35 M. 92=(1910) M.W.N. 735=9 M.L.T. 105=8 Ind. Cas. 760.

——Art. 124—Adverse possession of office—Effect of—Hereditary office, suit for barred—Suit for property also barred with it.

Where a suit for a hereditary office is barred, the right to recover property attached to the office will

be extinguished, though the time for recovery of immoveable property independently will not have expired. (1904) 28 M. 197.

——Arts. 124 and S. 2 (8)—Adverse posession—Effect on successor's claim—Plaintiff—Suit for possession by stani—Malabar Law.

A suit by a *Malabar Stani* for possession of Stanom property from a person claiming adversely thereto, is governed by Art. 124. The Stani is deemed for this purpose, to be the heir of his predecessor in title and is bound by the Defendant's adverse possession against the previous holder. Each holder of the *Stanom* is in the same position as an ordinary heir succeeding on the intestacy, of the previous holder though the holder holds his property only for his life. 33 M.L.J. 26=6 L.W. 195=(1917) M.W.N. 552=41 Mad. 4=42 Ind. Cas. 22.

——Arts. 124 and 141—Adverse possession—Effect on successor's claim—Hereditary office, suit for possession of—Suit by reversioners on widow's death—Adverse possession against widow is adverse to reversioners.

A suit for possession of the hereditary office of trustee by a Hindu reversioner against a stranger in possession is governed by Art. 124 and time will run against the reversioner not from the widow's death as in Art. 141, but from the date when the stranger became possessed of it adversely to the widow. The reversioners should be considered as deriving their right to the office through their predecessor, the widow, and consequently possession adverse to the widow is adverse to the reversioners. A successor in office derives his title through his predecessor for purposes of limitation, even though both were appointed independently of each other, by a third person. (1904) 28 M. 197.

1. (c) Adverse Possession—Tacking.

——Art. 124—Adverse possession—Tacking—Suit for recovery of office of archaka—Defendant in possession for less than 12 years—Possession of predecessors in office—Tacking.

The word defendant in Art. 124 of the Limitation Act includes his predecessors-in-office where the successive persons in possession of the office claim under the same title *e.g.*, appointment by a temple trustee. In a suit for the recovery of possession of an hereditary archaka office, it was found that though the defendant got into possession within twelve years of the suit his predecessors were successively in possession to the exclusion of the hereditary holder for over sixty years under appointments by the temple trustee.

Held, that the suit was barred. The defendant was entitled to tack on the possession of his predecessors in office to his own in establishing a plea of adverse enjoyment. 36 M.L.J. 93=9 L.W. 11=49 Ind. Cas. 393. **See also** 54 C.W.N. 960.

——Art. 124—Adverse possession—Tacking—Trusteeship—Adverse possession—Independent trespassers—Derivation title.

Twelve year's continuous possession is necessary under Art. 124 to a right to trusteeship ; if the possession has been in the hands of independent trespassers it would not be regarded as continuous possession on the part of the defendant trespassers; but where the independent trespassers have all derived title from the same source it may be sufficient to justify a court in holding that the possession was continuous. 14 M. 153; 18 M. 1, Foll. 12 M.L.T. 269=16 Ind. Cas. 225=23 M.L.J. 134.

——Art. 124—Adverse possession—Tacking vacant period.

A person in possession of an Hereditary office cannot tack to his possession the vacant period preceding his possessions. His possession becomes adverse only from his actual possession. 9 M.L.T. 485=10 Ind. Cas. 95.

2. Applicability and scope.

——Art. 124—Applicability and scope.

Article 124 is not applicable where the appointment to the office is made by nomination and applies only when the appointment is by succession through inheritance. A.I.R. 1941 All. 1=(1940) A.L.J. 705=I.L.R. (1940) All. 815=1940 A.W.R. 607=193 Ind. Cas. 697.

——Art. 124—Applicability and scope.

There is no distinction as regards limitation between a claim to an office and a claim to the property of endowment. Nor is there any distinction between movables and immovables in a matter of endowment. A.I.R. 1941 All. 1=(1940) A.L.J. 705=1940 A.W.R. 607=I.L.R. (1940) All. 815=193 Ind. Cas. 697.

——Art. 124—Applicability—Lawful holder of office enjoying its emoluments must be deemed to be in possession of office—Interference with performance of his duties—Every time there is fresh wrong and cause of action, Art. 120 or 124 does not apply. A.I.R. 1941 Mad. 81=52 L.W. 919=(1940) 2 M.L.J. 990=(1940) M.W.N. 1232=I.L.R. (1941) Mad. 275=192 Ind. Cas. 870 (F.B.).

——Art. 124—Applicability and scope—Maharki Vatan.

In the case of a *Maharki Vatan,* each one claims a share for his branch alone to the exclusion of the others, and the alternate working of a branch year by year is also exclusive of the others. A suit for possession of a share in the *Vatan* is governed by Art. 124 as the office of *Mahar* is recognised in the Revenue Rules themselves. A.I.R. 1937 Nag. 84=I.L.R. (1937) Nag. 151=168 Ind. Cas. 351.

——Art. 124—Explanation—Applicability.

The explanation in Col. 3, Art. 124, lays down a general rule for determining the question of possession in respect of offices and is applicable to cases governed by Art. 120, wherever the claim is in substance one to recover possession of an office. A.I.R. 1935 Mad. 449=(1935) M.W.N. 503.

——Arts 124 and 120—Applicability and scope.

A suit for declaration of title to a hereditary office is governed by Art. 124 and not by Art. 120. (1931) M.W.N. 8=A.I.R. 1931 Mad. 505=133 Ind. Cas. 193.

——Art. 124—Applicability.

The nature of the suit intended to be covered by Art. 124 must be a suit filed by a plaintiff who claims the office from a person who at that time holds the office himself. Where the plaintiff has not alleged that the office is now being held adversely to him by any other person, the suit is only against the trustee of the Devasthanam for the recovery of the emoluments, incidentally it may be for a declaration that his title to the office was denied. Article 124, therefore does not apply. 109 Ind. Cas. 771=A.I.R. 1928 Mad. 377.

——Arts. 124 and 120—Applicability and scope—Claim to office—Hereditary office.

A claim to office and to property appurtenant thereto may be barred by limitation. If the office is

not hereditary Art. 120 applies. If hereditary, Art. 124 governs the matter. (1909) 14 C.W.N. 497=11 C.L.J. 304=3 Ind. Cas. 419=37 C. 263.

——**Arts. 124 and 134**—Scope of. 4 Bom. L.R. 743=27 B. 363.

3. Hereditary office—What is.

——**Art. 124—" Hereditary office ".**

The words 'hereditary office' in Art. 124 have been used in contra-distinction to cases where the office is to be filled in by nomination. Where there is no suggestion that the appointment of a *shebait* was to be made by nomination and hence the right of *shebaitship* vesting on the heirs of the founder, after the death of the person appointed by will, it must be regarded as a hereditary office. A suit for possession of such an office is governed by the 12 years' rule laid down in Art. 124. A.I.R. 1937 Oudh 373=1937 O.W.N. 745=13 Luck. 344=168 Ind. Cas. 593.

——Art. 124—Hereditary office, what is—Office claimed for first time.

Where the plaintiff is not a descendant of any of the former holders of the office of Karnam before the villages were re-grouped and is seeking the office for the first time, so to speak, not on the ground of heredity the suit is not one for seeking possession of an hereditary office within the meaning of the Explanation to Art. 124.

The fact that the office will or may become hereditary in the hands of the holder if and when appointed is not material. 99 Ind. Cas. 634=A.I.R. 1927 Mad. 148=51 M.L.J. 678.

——Art. 124—Hereditary office—What is—Succession by nomination of successor is not hereditary.

Where succession to a religious office is by nomination by the holder in office of his successor, it is not a hereditary succession by Art. 124. Hereditary succession is succession by the heir to the deceased under the law the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but the right of the latter should not depend upon the choice of any individual. Therefore the only article applicable to cases of succession after nomination is Art. 120, Art. 144 also is not applicable as the claim to possession is also barred if the claim to office is barred under Art. 120. 97 Ind. Cas. 437=A.I.R. 1926 Mad. 1012=51 M.L.J. 258.

——**Art 124**—An hereditary office subject to a temporary incumbency by a person not in the direct line of succession is still an hereditary office. 93 Ind. Cas. 923=22 M.L.W. 870=A.I.R. 1926 Mad. 245.

——**Art. 125.**

Synopsis.

1. " Alienation."
2. Applicability and scope.
   (a) Nature of reversionary suit.
3. Starting point.
4. Suit by adopted son.
5. Suit by female.
6. Suit by reversioner.
7. Miscellaneous.

1 " Alienation ".

——Art. 125—" Alienation."

The word " alienation " in Art. 125 has not been used in the restricted sense of a transfer by means of written document. The article applies to all cases in which the widow has directly or indirectly parted with her proprietry right in the estate and passed the same to some third person. Where mutation entries in revenue papers are made in the names of the third persons, followed by their possession, it constitutes alienation of those properties within the meaning of the article. A.I.R. 1939 All. 526=1939 A.W.R. 411=184 Ind. Cas. 169.

——Art. 125—" Alienation."

During the registration proceedings, the daughter of the deceased objected and actually contested the registration of the land being effected in the name of the transferee from her deceased father. But in spite of her objections, it was registered in alienee's name and the daughter did not bring any title suit afterwards. Subsequently, the reversioners of the deceased instituted a suit for declaration that the transfer was void against them and hence should be set aside :

Held, that the mere failure of the daughter to bring a title suit did not amount to constructive alienation for the purposes of Art. 125. Threfore Art. 125 did not apply and the article applicable was Art. 120 and the reversioner's suit brought more than six years after the land registration entry was barred. A.I.R. 1936 Pat. 535=3 B.R. 21=165 Ind. Cas. 21.

——Art. 125—" Alienation"—Sir and khudkasht lands.

A perpetual lease of *sir* and *khudkasht* fields is an alienation within the meaning of Art. 125. 16 N.L.J. 300=A.I.R. 1934 Nag. 103=149 Ind. Cas. 687.

——Art. 125—Alienation—Bombay Bhagdari Act (V of 1862), S. 3—Mortgagor selling moiety to mortgagee and other moiety to wife for alleged consideration—Subsequent transfer of her moiety by wife to mortgagee.

Where a mortgagor sells in reality a moiety of the properties to the mortgagees for an amount due on the mortgage, and the other moiety is ostensibly sold in the name of the wife for an alleged consideration, the transaction amounts to a sale of an unrecognised portion of a bhag, and if subsequently after the death of her husband, the wife sells her moiety to the mortgagee the subsequent deed of sale cannot be upheld as in effect causing a past dismembered bhag to be re-united, and a suit by reversioner to set aside the above alienation is not governed by Arts. 125, 126 and 141. 54 Bom. 837=32 Bom. L.R. 1013=A.I.R. 1930 Bom. 545.

——Art. 125—" Alienation."

A proprietor of a house which was mortgaged by his predecessor inherited the mortgagee's right also. After his death, his widow allowed the property to be redeemed by persons who were not reversioners,

Held, that the transaction effected by the widow must be treated as an alienation for the purpose of Art. 125. 111 Ind. Cas. 203=29 P.L.R. 584=10 Lah. 237=A.I.R. 1928 Lah. 932.

——Art. 125—Hindu widow—" Alienation"—Declaratory suit—Compromise—Fresh starting point.

In respect of a Hindu widow's alienation there is only one cause of action for a declaratory suit for

all reversioners near and remote and when the suit on that cause of action once became barred by the lapse of twelve years under Art. 125. No reversioner (whether in existence or not at the date of the alienation) could afterwards bring such suit. 41 Mad. 659, Foll. The compromise of a litigation by a female owner does not amount to a fresh alienation so as to give rise to a fresh cause of action to the reversioners. To see whether a compromise amounts to alienation, the test is to find out whether the property is claimed by the opposite party on a title before the compromise or whether he has first derived his title thereto under and by virtue of the compromise. 33 All. 356; 33 Mad. 473 Foll. 26 M.L.T. 180=53 Ind. Cas. 171.

——Art. 125—"Alienation"—Limitation—Fictitious award—Hindu widow.

A Hindu widow, plaintiff in a suit to recover property in respect of which she was entitled to a Hindu widow's estate, from the possession of the widows of other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her.

Held, that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of Art. 125. 4 A.L.J. 160=1907 A.W.N. 33=29 A. 239.

2. Applicability and Scope.

——Art. 125—Applicability—Conditions—Possession by widow irrespective of her status as Hindu or Mahomedan female.

Art. 125 of the Limitation Act can only apply when the possession of the defendant is that of a Hindu or Mahomedan female as such, that is, by virtue of her being a Hindu or Mahomedan, as heir of the last male owner; it does not apply if the defendant's possession is by virtue of a grant or transfer *inter vivos* or by virtue of a bequest that is to say when her possession is irrespective of her being a Hindu or Mahomedan female. 15 Pat. 151, Foll. A.I.R. 1950 Pat. 447.

——Art. 125—Applicability—Void and voidable alienations—Distinction—Alienation by legatees under will of Hindu, both being widows—One heir of testator and another not heir—Suit by reversioners to declare invalid and not binding on plaintiffs—Limitation. *See* LIMITATION ACT, ARTS. 120 AND 125. A.I.R. 1950 Pat. 218.

——Art. 125—Applicability—Void transactions.

Art. 125 of the Limitation Act in plain terms comtemplates a case where an alienation has to be declared void except for the lifetime of the widow. It must be presumed, therefore, that the applicability of this article is limited to cases where an alienation is good so long as that alienor is alive or so long as she does not remarry, *a fortiori* this article, cannot apply to cases where the alienation is *ab initio* void, (*i.e.*), is bad from its very inception or in other words, is a nullity. An alienation by a person who has no power to make it is viod *ab initio*. 49 P.L.R. 167= A.I.R. 1947 Lah. 290 (F.B.).

——Arts. 125 and 120—Applicability—Female in possession of property under will. *See* LIMITATION ACT, ARTS. 120 AND 125. 49 P.L.R. 167=A.I.R. 1947 Lah. 290 (F.B.).

——Art. 125—Applicability and scope.

Article 125 is not by its wording restricted to suits by reversioners. There is no justification for importing the word 'reversioner' in this article which does not occur there. Consequently, the article governs the suit by certain member of the proprietary body of the village to declare that certain alienation by a widow shall not affect their reversionary rights. A.I.R. 1938 Lah. 457=40 P.L.R. 786=178 Ind. Cas. 270.

——Art. 125—Applicability.

Article 125 applies only to suits brought within the lifetime of the female or females whose alienations are to be declar.d void. It cannot apply to suit instituted after their death (1936) M.W.N. 339=44 M.L.W. 208=165 Ind. Cas. 448.

——Art. 125—Applicability—Conditions.

Article 125 applies when the possession is that of a Hindu or Muhammadan female as such, that is to say, by virtue of her being a Hindu or Muhammadan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or, in other words, when her possession is irrespective of her being a Hindu or Muhammadan female. A.I.R. 1936 Pat. 323=17 P.L.T. 131= 15 Pat. 151=2 B.R. 658=163 Ind. Cas. 940.

——Art. 125—Applicability—Conditions—A suit for a declaration filed after the death of the widows whose alienation is challenged does not fall under Art. 125. 16 P.L.T. 236=A.I.R. 1935 Pat. 256=1 B.R. 418=155 Ind. Cas. 244.

——Art. 125—Applicability and scope.

Article 125 applies to every case where the female making the alienation is a Hindu or a Mahomedan and the immediate reversioners, who bring the suit, also profess the same faith. It is not necessary that the female making the alienation should be actually governed by the Hindu or the Mahomedan Law. 100 Ind. Cas. 84=8 Lah. 215=28 P.L.R. 341=A.I.R. 1927 Lah. 198.

——Art. 125—Applicability and scope.

The article applies to plaintiffs who if the female died at the date of instituting the suit would be entitled to possession of the property in dispute. (1917) M.W.N. 30=5 L.W. 482=38 Ind. Cas. 270, Contra *See* 41 Mad. 659=46 Ind. Cas. 202 (F.B.).

——Arts. 125 and 120—Applicability and Scope.

Art. 125 covers suits for land only and by first reversioner only. 70 P.R. 1914=260 P.L.R. 1914= 165 P.W.R. 1914=25. Ind. Cas. 463.

——Art. 125—Applicability and Scope—Sale of house without site—Applicability of article.

If a widow alienates house property together with the site on which it stands Art. 125 would apply. But it is doubtful whether the Article applies if the widow alienates only the house apart from the site. 15 P.W.R. 1910=5 Ind. Cas. 842.

2. (a) Nature of reversionary suit.

——Art. 125—Suit for declaration of invalidity of adoption or alienation—Nature of.

A suit by a Hindu reversioner to declare an alienation by the widow invalid is a Representative suit and the remote reversioner has a right to join as plaintiff along with or in substitution for the presumptive reversioner. 38 Mad. 406=17 M.L.T. 435=28

M.L.J. 535=17 Bom. L.R. 468=19 C.W.N. 641=2 L.W. 596=(1915) M.W.N. 555=21 C.L.J. 515=42 I.A. 125=29 Ind. Cas. 298 (P.C.).

3. Starting point.

——Art. 125—Starting point.

The reversioner of a Hindu widow sued for a declaration that a mortgage by the widow and a Court sale in execution of a decree on the mortgage were not operative after the death of the widow so as to be binding on the reversioner.

Held, that limitation ran from the date of the mortg ge and not that of the Court sale,

Held, also that to say that the suit is barred or not according as the prayer is for a declaration that the mortgage or sale is not binding is to allow a quibble with words.

Obiter.—But in some cases the widow may do something in the course of the suit itself, whereby it may be possible to say the decree only amounted to an alienation and not the previous mortgage. 88 Ind. Cas. 578=21 M.L.W. 277=A.I.R. 1925 Mad. 567.

——Art. 125—Starting point—Gift made in pursuance of will.

A suit by the reversioner for a declaration that the gift made by the widow is not binding on him is not barred, merely because he does not sue to have an alleged will declared to be void and the time runs from the date of the gift and not of the will, according to directions in which, it is alleged the gift is made. 70 Ind. Cas. 838=A.I.R. 1923 Lah. 53.

——Art. 125—Mortgage—Starting point.

For the purpose of Art. 125, land must be taken to include interest in land. Suits referred to in Art. 125 also include suits in respect of mortgages. A mere decree for sale of the mortgaged property cannot be an alienation. In the absence of fraud, limitation against a suit under Art. 125, commences from the date of the alienation and not from the date when the plaintiffs came to know of it. If a suit for declaration as is referred to in Art. 125 in respect of a mortgage is barred, the Court cannot grant a declaration in respect of the decree obtained on the mortgage. 63 Ind. Cas. 417=18 N.L.R. 42=A.I.R. 1922 Nag. 197.

——Art. 125—Starting point—Sale by managing member—When limitation commences.

Where there is no registered sale-deed to evidence a sale by the Managing members, limitation begins to run against the members from the date when the purchaser takes possession. 25 M.L.J. 405=6 C.L.J. 383, Foll. 26 Ind. Cas. 383 (Mad.).

——Art. 125—Starting point—Setting aside putni granted to widow—When time begins to run.

In a suit to set aside a *putni* granted in 1837 by a person who either had no interest in the property or was only acting as the manager of a lady who owned a Hindu widow's estate therein,

Held, that if the *putni* was void, the period of limitation ran from the date on which it was granted under Regulation II of 1803 as amended by Regulation II of 1805. If it was voidable only by the widow's successor, the right of action arose on the adoption of a son by the widow and time began to run from the date when the adopted son attained his majority in 1856. Under Regulation II of 1803 or Act XIV of 1859, time ran from the date on which the cause of action arose. (1905) 15 M.L.J. 267=9 C.W.N. 673=32 C. 669=2 A.L.J. 794=32 I. A. 80 (P.C.).

4. Suit by adopted son.

——Art. 125—Applicability of to an adopted son.

Art. 125 applies only to a Reversionary heir and is not applicable to the case of an adopted son. 33 Bom. 88=10 Bom. L.R. 1029=1 Ind. Cas. 647.

——Art. 125—Hindu Law—Adopted son, suit by, for declaration—Alienation by adoptive mother before adoption.

The adopted son of a Hindu is entitled to possession of property alienated by his adoptive mother before his adoption only on the widow's death or marriage, and a suit by him for a declaration is governed by Art. 125. (1910) 8 M.L.T. 121=6 Ind. Cas. 443 (1).

5. Suit by female.

——Art. 125—Suit by daughter.

A widow executed a gift of land and a house belonging to her deceased husband to one of her daughters. Plaintiff, the other daughter, brought the present suit for a declaration that the gift should not affect her reversionary rights and was given a decree both as regards the house and the land. The Appellate Court upheld the decree of the First Court in regard to the land but held that Art. 125 did not apply as regards the house.

Held, Art. 125 applies to the suit so far as it relates to the house also. 2 Lah. 5=A.I.R. 1922 Lah. 98.

——Art. 125—Applicability of—Nearer heir a female but absolute owner.

Art. 125 covers only suits by person who if the female died at the date of suit would be entitled to possession. 38 M. 406 (P.C.)—Foll. Though this principle does not apply if the nearer heir is a female and only a limited owner it does apply where the nearer female heir is an absolute owner. 40 Mad. 818=21 M.L.T. 93=5 L.W. 334=38 Ind. Cas. 223.

——Art. 125—Alienation by widow—Suit by daughter.

Suit by the daughter for the declaration that gift by her widowed mother shall not affect her interest is governed by Art. 125 of the Act. 58 Ind. Cas. 333 (Lah.).

6. Suit by reversioner.

——Art. 125—Applicability—Suit by reversioner challenging mortgage by Hindu widow dismissed as barred by limitation—Subsequent sale by widow of the same property to pay amount decreed in a suit on that mortgage—Fresh cause of action to reversioner.

Though a suit by a reversioner challenging the mortgage by a Hindu widow is dismissed as barred by limitation, when there is a subsequent sale by the widow of the same property to pay off the amount decreed in a suit on that mortgage, there is a fresh cause of action to the reversioner as the sale is a fresh alienation. I.L.R. 1950 A. 564=1949 A.W.R. 537=A.I.R. 1950 A. 7.

——Arts. 125 and 141—Suit by reversioner.

A reversioner desiring to challenge alienations by a limited female owner can bring a suit for declaration that the alienation is void against him. Such a

suit is governed by Art. 125, or he may after the death of the female, sue for recovery of possession of the property by avoiding sale. Such a suit is governed by Art. 141. Where a suit is brought for possession of property alienated by a limited owner on the ground of surrender of life estate, but if the relief for declaration is barred under Art. 125, the declaration cannot be granted. 17 P.L.T. 16=A.I.R. 1937 Pat. 105=3 B.R. 403=168 Ind. Cas. 326.

——Art. 125—Suit by reversioner.

Widow and mother of last male holder selling property jointly—Suit by reversioner to declare sale void—Article 125 is applicable. A.I.R. 1937 Lah. 760=40 P.L.R. 131=174 Ind. Cas. 935.

——Art. 125—Suit by reversioner.

A suit by a reversioner challenging an alienation by a widow in respect of non-ancestral property is governed for purposes of alienation by Art. 125. A.I.R. 1933 Lah. 945=34 P.L.R. 929=146 Ind. Cas. 350.

——Art. 125—Suit by reversioner—Successive transfers.

Three Hindu sisters had inherited the property of their father as daughters ; they sold the property to one of themselves on the footing that what was conveyed to the vendee was the absolute right of the vendors. The vendee subsequently sold the property to a stranger. A reversioner of the deceased male owner brought a suit for a declaration that the last sale was not binding on him,

Held, that Art. 125 applied and that the suit if brought more than 12 years after the first sale, was barred by limitation. 86 Ind. Cas. 1016=A.I.R 1925 Mad. 941.

——Art. 125—Suit by reversioner—Collusive mortgage.

A suit by a reversioner on the allegation that the widow executed a sham mortgage to defeat the reversioner's rights and got the property sold in a collusive suit is governed by Art. 125 of the Limitation Act and the reversioner need not sue to set aside the mortgage. 80 Ind. Cas. 554=19 M.L.W. 564=34 M.L.T. 281=1924 M.W.N. 322=A.I.R. 1924 Mad. 617.

——Arts. 125 and 120—Execution of decree against widow—Collusion—Sale—Suit for declaration by reversioners.

A Court sale to which a Hindu widow is a party may be treated as a private sale by her if the Court sale is the necessary result of some collusive arrangement made by her to use the Court as a medium of transfer or in other words if she intended transfer the properties by means of a Court sale and took steps to bring it about. If that is the case a suit by the nearest reversionary heir to declare the alienation void as against him would fall under Art. 125 of the Act. If the Court sale in question is brought about by her as above it cannot be considered as one " made " by the widow and the suit to declare the validity of the sale will be governed by Art. 120 and not 125. 35 M.L.J. 364=8 L.W. 455=(1918) M.W.N. 739=47 Ind. Cas. 578.

——Art. 125—Suit by reversioner—Mortgage by widow—Conversion of mortgage into sale.

A suit by the reversioner, for a declaration that a mortgage by the widow of her husband's property, will not affect his reversionary rights is barred under Art. 125 if brought after 12 years from the date of the mortgage. But, if within 12 years of suit, the mortgage had been converted by the widow into a sale for no further consideration, the sale must be declared to be not binding on the reversioner as having been made without consideration. 25 P.R. 1917=40 Ind. Cas. 63.

——Art. 125—Alienation by Hindu widow—Suit by reversioner for declaration.

A suit by a reversioner during the lifetime of the widow to have an alienation by her declared void except for her life is governed by Art. 125. *Semble*:—A new cause of action does not arise when owing to the death of the next revisioner, a remoter reversioner becomes entitled to sue. A reversioner whose suit under Art. 125 has been barred may still sue for possession if he survives the widow. 15 W.R. 1=14 B. 612, Foll. (1908) 12 C.W.N.857.

——Art. 125—After-born reversioner—Suit by.

Since the existence of a reversioner at the time of the alienation by a limited owner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of S. 6, Limitation Act, in his own right, he cannot be deprived of the benefit of the extended period claimable by a reversioner in existence at the time of the alienation. Hence, when at the time of the alienation, *A*, the nearest reversioner was a minor and *B* on his birth after the alienation became the nearest reversioner, *B* can claim the same period as *A* to file a suit to have the alienation declared void except for the lifetime of the alienor. A.I.R. 1943 Mad. 378=1943 M.W.N. 86=(1943) 1 M.L.J. 157=210 Ind. Cas. 297.

——Art. 125—After-born reversioner—Suit by.

A suit by a Hindu reversioner for a declaration that an alienation by the widow is not binding on him is barred under Art. 125 where the plaintiff was born more than 12 years after the date of the alienation. The cause of action for a suit for a declaration that an alienation by a Hindu widow is invalid beyond her lifetime, arises on the date of the alienation, jointly and simultaneously for the entire body of the reversioners then in existence as well as those coming into existence after the alienation, and the article applicable is Art. 125. If a reversioner who is competent to challenge an alienation or adoption made by a widow does so unsuccessfully or fails to challenge it within the period of limitation allowed by law, the result is binding on his successors in reversion in the absence of fraud, collusion or other invalidating circumstances. 41 Mad. 659=35 M.L.J. 57=24 M.L.T. 115=8 L.W. 62=(1918) M.W.N. 461=46 Ind. Cas. 202 (F.B.).

——Art. 125—Minor reversioner suit by, to set aside alienation—Son not a person claiming through his father.

The cause of action for a reversioner to sue to set aside an alienation by a Hindu widow during her lifetime is distinct from the cause of action for another reversioner to bring a like suit. The fact that one is barred by the law of limitation from bringing a suit cannot be a bar to another reversioner against whom the minority had the effect of extending the time for bringing a like suit. 28 M. 57 ; 22 A. 33 ; 32 C. 62 ; Foll. 27 M. 588 ; 29 M. 390 ; 22 M.L.J. 375 Rel. ; 14 B. 512 ; diss. 25 M. 371 Not Foll. 36 Mad. 570=23 M.L.J. 269=12 M.L.T. 188=(1912) M.W.N. 912=16 Ind. Cas. 839.

——Art. 125—Remote reversioner—Suit by.

Article 125 does not apply to a suit by a remoter reversioner than the immediately next reversioner.

83 Ind. Cas. 1055=27 O.C. 173=11 O.L.J. 236= A.I.R. 1924 Oudh 381.

——**Art. 125**—Suit by reversioner—Nearer reversioner barred effect of on remote reversioner. *See* HINDU LAW—REVERSIONER. 9 C.W.N. 25=32 C. 62. *Also* 29 M. 390.

7. Miscellaneous.

——**Art. 125—Joint tenant.**

A suit by a purchaser from a female heir against a prior purchaser from her co-tenant, to recover possession of the property on the ground that the sale being without legal necessity was binding during her lifetime only, is barred if not brought within twelve years of the death of the latter. 76 Ind. Cas. 915= 36 C.L.J. 92=A.I.R. 1922 Cal. 459.

——**Art. 125—Miscellaneous—Land—If includes equity of redemption.**

In this Article the word land does not cover the equity of redemption in immoveable property. 108 P.R. 1912=29 P.L.R. 1913=17 Ind. Cas. 864.

——**Art. 126.**

Synopsis.

1. **After-born son.**
2. **Alienee not in possession.**
3. **Applicability and scope.**
4. **Interpretation.**
5. **Redemption suits.**
6. **Starting point.**
7. **Suits after 12 years of possession.**
8. **Miscellaneous.**

1. After-born son.

——**Art. 126—Son born after transfer.**

A son born after an alienation gets no new cause of action on his birth and no rights under S. 6. Nor can he confer any benefit under S. 7 to his elder brothers. 66 Ind. Cas. 938=9 O.L.J. 45=A.I.R. 1923 Oudh. 52

——**Art. 126—After-born son.**

Where, in case of an alienation within Art. 126, some of the sons of a Hindu alienor were in existence at the time of the alienation and some were born subsequently, the afterborn sons do not acquire a fresh cause of action on their birth to challenge the alienation. 64 Ind. Cas. 757=24 O.C. 330= 8 O.L.J. 667=A.I.R. 1921 Oudh 196.

——**Art. 126—Suit by—After-born son.**

A suit by an after-born son, assuming he has such a right of suit, to set aside an alienation by his father of the entire family property belonging to himself and his son (grown up) is governed by Art. 126. 30 M.L.J. 592=34 Ind. Cas. 794.

——**Art. 126—Alienation by father—Setting aside —After-born son.**

Where at the time of alienation by a Hindu father only one son was in existence a suit by that and the subsequently born sons to set aside the alienation is maintainable and all the sons are entitled to the relief. 40 Cal. 966=(1913) M.W.N. 661=14 M.L.T. 163=17 C.W.N. 1189=18 C.L.J. 237=15 Bom. L.R. 867=11 A.L.J. 865=25 M.L.J. 512=10 N.L.R. 1=40 I.A. 213=20 Ind. Cas. 958 (P.C.).

2. Alienee not in possession.

——**Art. 126—Alienee not in possession**

Article 126 contemplates the case of an alienation where the alienee has taken possession of the property, because limitation only runs from the date when the alienee so takes possession. It is only when such possession has been taken that any cause of action accrues to the plaintiff, so far as Art. 126 is concerned. Son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession; in case where the alienee never gets possession, no limitation can arise under Art. 126; and in such cases the only right of the son will be to obtain a declaration that the deed is invalid and the limitation prescribed by such a suit is that of six years under Art. 120. A.I.R. 1925 P.C. 33; A.I.R. 1927 All. 702 and 41 Mad. 650, Rel. on. 113 Ind. Cas. 378= 30 Bom. L.R. 1095=A.I.R. 1928 Bom. 383.

——**Art. 126—Alienee not in possession.**

Article 126 is based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession no limitation can arise under Art. 126. In such cases, the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit is under Art. 120. 41 Mad. 650, Rel. on. 106 Ind. Cas. 377=25 A.L.J. 734= A.I.R. 1927 All. 702.

3. Applicability and scope.

——**Art. 126—Applicability and scope—Separate property.**

Where the grandfather devised property to his son and grandson not jointly but exclusively to each separately, the property acquired by the son and the grandson is not ancestral property and an alienation by the son of the grandson's property is not governed by Art. 126. 118 Ind. Cas. 481=29 M.L.W. 169= 1929 M.W.N. 124=A.I.R. 1929 Mad. 313=56 M.L.J. 332.

——**Art. 126—Applicability and scope.**

Article 126 applies also to a suit when the alienation was made by the father in conjunction with an uncle. 97 Ind. Cas. 591=A.I.R. 1927 All. 54.

——**Art. 126—Applicability and scope.**

The language of Art. 91 is almost identical with the description of a suit contemplated by Art. 126 and though the objectives of the suits specified in these Articles are different, the nature of the relief is the same. 90 Ind. Cas. 184=2 O.W.N. 650=A.I.R. 1925 Oudh 678.

——**Art. 126—Applicability and scope.**

Article 126 applies being a special article to a suit by son to set aside alienation by father. On the expiry of 12 years from the date on which the alienee took possession of the property, the right of suit becomes extinguished. 64 Ind. Cas. 757, Foll. 79 Ind. Cas. 1010=5 L.R.A. (Civ.) 423=A.I.R. 1924 All. 677.

——**Art. 126—Applicability and scope—Annulment of sale.**

Where the plaintiff sued for the annulment of the sale by his father and in fact obtained a decree for annulment, Art. 126 applies, and the period of limitation is 12 years. The fact that the plaintiff was

not given a decree for possession as well as for annulment of the sale does not make Art. 126 inapplicable. 77 Ind. Cas. 174=3 Lah. 426=A.I.R. 1923 Lah. 268.

——Arts. 126 and 44—Applicability and scope.

Where property which belongs to a minor exclusively is sold by his father as guardian and the minor after attaining majority sues to recover the property, Art. 44 applies to the suit. The mere fact that the father joins in the execution of the deed in his personal capacity and also his brother does likewise in order to remove the apprehensions of the vendee does not take away the case from Art. 44. 62 Ind. Cas. 630=13 M.L.W. 416=1921 M.W.N. 255=A.I.R. 1921 Mad. 425=40 M.L.J. 475.

——Arts. 126 and 49—Applicability and Scope—Joint family—Sale of movables—Limitation.

A suit to set aside a sale of the *Jajmani Bahi* forming an ancestral property of a joint Hindu family governed by *Mitakshara* falls under Art. 126 and not Art. 49 of the Act (1877), as Art. 126 contemplates a suit in respect of moveables as well as immoveable property belonging to a joint Hindu family. 6 A.L.J. 614=3 Ind. Cas. 505.

4. Interpretation.

——Art. 126—'Alienation.'

"Alienation" in Art. 126 includes a mortgage s well as a sale. 64 Ind. Cas. 757=8 O.L.J. 667=24 O.C. 330=A.I.R. 1921 Oudh 196.

——Art. 126—Interpretation—'Ancestral'.

The expression 'ancestral' to Art. 126 is used in the ordinary sense in which it is interpreted in the Hindu Law and cannot be given a wider interpretation for the purposes of the Limitation Act. A.I.R. 1934 Lah. 397=36 P.L.R. 214=150 Ind. Cas. 963.

——Art. 126—Interpretation—'Set aside'.

"Set asde" in Art. 126 do not include a suit for a declaration that the alienation does not affect the plaintiff's rights. 70 P.R. 1914=260 P.L.R. 1914=165 P.W.R. 1914=25 Ind. Cas. 463.

——Art. 126—Interpretation—"Son".

It would be wrong to hold that the term "son" could be regarded as implying a grandson. Article 126 must be subject to the rule of strict construction, and that article can have no application in terms to a suit a set aside an alienation made by a person's grandfather, as it postulates a suit by a Hindu son governed by the Law of Mitakshara to set aside his father's alienation of ancestral property. A.I.R. 1940 Bom. 136=42 Bom. L.R. 208=I.L.R. (1940) Bom. 109=187 Ind. Cas. 663.

5. Redemption suits.

——Art. 126—Mortgage by Hindu Manager—Redemption suits.

A suit for redemption by the surviving members of a joint Hindu family of a mortgage created by the manager is not one to set aside an alienation within Art. 126 its object indeed being to obtain relief under the alienation and not in spite of it. The allegation that any term embodied in the deed of mortgage was *ultra vires* of the manager of the joint family, the mortgagor, will not change the character of the suit. 8 O.W.N. 1090=A.I.R. 1932 Oudh 66=7 Luck. 505=135 Ind. Cas. 379.

——Article 126—Redemption suits.

A redemption suit is one in which the plaintiff, accepting the position of mortgagor or of a person interested in the equity of redemption, asks for possession in accordance with the terms of the mortgage on payment of the amount due under it. But where the plaintiffs the sons of a Hindu do not admit the validity of the mortgage and ask for possession, not in accordance with but contrary to its terms, the suit is not a redemption suit but one of a kind based on the rule of Hindu law that the manager of a joint family is not entitled to alienate joint family property except for certain necessary purposes, and if he does so his act is not binding on the coparceners whose interests are affected. 64 Ind. Cas. 757=24 O.C 330=8 O.L.J. 667=A.I.R. 1921 Oudh 196.

——Art. 126—Redemption suits.

A suit for redemption by the surviving members of a joint Hindu family is not one to set aside an alienation within Art. 126, its object being to obtain relief under the alienation and not in spite of it. The allegation that a term embodied in the deed of mortgage was *ultra vires* of the mortgagor—the manager of the joint family—will not change the character of the suit. 90 Ind. Cas. 184=2 O.W.N. 650=A.I.R. 1925 Oudh 678.

6. Starting point.

——Art. 126—Starting point.

Ouster from the actual enjoyment of the property is the starting point for limitation under Art. 126. 79 Ind. Cas. 666=10 O.L.J. 404=A.I.R. 1924 Oudh 205.

——Art. 126—Suit for possession by Hindu son—Starting point.

Limitation for a suit for possession by a Hindu son, of the family property sold away by his father, runs from the date of the vendee's possession. 231 P.L.R. 1914=133 P.W.R. 1914=14 P.R. 1915=25 Ind. Cas. 35.

7. Suits after 12 years of possession.

——Art. 126—Purchase by usufructuary mortgage.

Where an usufructuary mortgagee of joint family property, subsequently purchases the same he takes possession as full proprietor from the date of the sale and he no longer remains a mortgagee in possession. A suit, therefore, under Art. 126 must be instituted within 12 years from the date of sale. 112 Ind. Cas. 151 Oudh.

——Arts. 126, 144 and 148—Suit after 12 years—Father mortgaging and then selling equity of redemption—Redemption by alienee—Suit by other members for possession.

A Hindu father and his son mortgaged the family property. The father sold the equity of redemption to the defendant who redeemed the mortgage and continued in possession. The son then sold his share of the equity of redemption to plaintiff who brought a suit for a moiety of the properties on payment of half the mortgage money. The suit was instituted more than 12 years after the defendant obtained possession on redemption.

Held, that Art. 126 applied to the suit and not Arts. 144 and 148 and that the suit was barred. 41 Mad. 650=34 M.L.J. 528=8 L.W. 28=24 M.L.T. 22=(1918) M.W.N. 448=45 Ind. Cas. 867.

——Art. 126—Suit after 12 years of possession.

A suit by a Hindu to set aside his father's alienation of family property more than 12 years after the alienee

took possession is barred by Article 126 of the Act. 26 Ind. Cas. 873 (Cal.).

8. Miscellaneous.

——Art. 126—Miscellaneous—Cause of action.

Obiter:—When cause of action for a suit of the nature contemplated by Art. 126, arises in favour of certain persons, the fact that some of them are minors does not affect the question of limitation and the minors can only take advantage of the same cause of action. 90 Ind. Cas. 184=2 O.W.N. 650=A.I.R. 1925 Oudh 678.

——Art. 127.

Synopsis.

1. **Adverse possession.**
2. **Applicability and scope.**
3. **Exclusion.**
4. **Mahomedans.**
5. **Starting point.**
6. **Suit after partition.**
7. **Miscellaneous.**

1. Adverse possession.

——Art. 127—Co-tenancy—Adverse possession—Exclusion. *See* LIMITATION—ADVERSE POSSESSION. 1907 A.W.N. 195=4 A.L.J. 473.

——Art. 127—Adverse possession between coparceners.

Per *Chandavarkar J*:—Art. 127 governs the question of adverse possession between coparceners *Inter se*. 37 Bom. 84=14 Bom. L.R. 931=17 Ind. Cas. 657.

——Art. 127—Adverse possession as against a co-owner.

Exclusive possession by a co-owner of property which originally had been admittedly joint does not *per se* amount to adverse possession as against his co-sharers. As between brothers and sisters *inter se* the fact of possession by one does not necessarily establish that the possession is adverse possession. (1907) 1908 A.W.N. 239=5 A.L.J. 511.

——Art. 127—Adverse possession—Co-owners.

The equity and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held for the benefit of all, as the possession of one co-owner is in itself rightful and does not imply hostility as would the possession of a mere stranger. A silent possession accompanied by no act which can amount to an ouster or notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession. Mere possession, however exclusive or long continued, if silent, cannot give one co-tenant in possession, title as against the other co-tenants. (1907) 6 C.L.J. 735=12 C.W.N. 127=35 C. 961.

——Art. 127—Adverse possession—Joint owners.

Possession of a part of a joint holding by one of several co-sharers is *prima facie* possession of all. 154 P.W.R. 1909=102 P.L.R. 1909=4 Ind. Cas. 965 (1).

——Art. 127—Adverse possession by co-sharer—Clear proof of abandonment necessary.

In the absence of clear proof of abandonment a co-sharer in possession of an absentee's land cannot claim title by adverse possession. The settlement record of 1851 provided that the absentee's land would be restored to him whenever he returned and claimed it. In 1859, while still an absentee from the village, he claimed a share on the death of a female relative in the holding which was in the possession of his co-sharer and his name was entered in the settlement of 1880 as heir. In 1885 he was again shown as absentee but his share was increased on the admission of the co-sharer in possession.

Held, that the abandonment of his right by the absentee was not proved. 18 P.L.R. 1909=120 P.R. 1908=4 Ind. Cas. 912.

——Art. 127—Adverse possession—Suit by co-sharer against lambardar for profits of his share—Nature of possession of lambardar.

Mere non-receipt of profits for 12 years of his share by a co-sharer will not bar a suit for three years past profits before suit, unless the lambardar had set up an adverse claim or had repudiated the title of a co-sharer so that the lambardar's possession might be regarded as adverse. (1904) 1905 A.W.N. 36=2 A.L.J. 107=27 A. 436. *Also* (1904) 27 A. 348 (1905) A.W.N. 15=2 A.L.J. 110 (N.).

——Art. 127—Adverse possession—between co-sharers—Management when adverse.

Management of joint property on behalf of some of the co-owners without any assertion of hostile title does not constitute adverse possession against another co-owner. (1904) 9 C.W.N. 32=31 C. 970.

——Arts. 127 and 144—Adverse possession—Exclusion from joint property—Joint Hindu family—Coparcener—Suit to recover his share.

P and *N* were undivided brothers in a joint Hindu family. *P* died in 1870, leaving a son *M* (plaintiff) then eleven years old. *F* died in 1881 leaving behind him a son *B* and a daughter *R* (defendant). The whole property then passed into the possession of *R* to whom *N* left it by a will, *B* being a lunatic. *B* died in 1887. After *P*'s death plaintiff was not in possession of any of the property. In 1897, plaintiff commenced a suit to recover possession of the whole property or in the alternative to recover possession of half share in the property.

Held, (1) that the plaintiff's claim to recover more than his share in the property was barred by limitation; (2) that plaintiff's claim to recover his share in the property was not time-barred; for if Art. 127 be applied, it was clear that no exclusion was proved to the knowledge of the plaintiff and if Art. 144 be applied, it was not proved that the possession of the defendant was adverse to the plaintiff for 12 years, as *B* died within 12 years of the institution of the suit. (1902) 4 Bom. L.R. 135.

——Art. 127—Adverse possession—Proof—Coparceners.

Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case. In the case of a joint family, where no partition is proved, the possession of one who continued to live in the village is not by itself adverse to other members who went to live elsewhere. In such cases adverse possession must be very clearly established. 3 Bom. L.R. 47=25 B. 362.

2. Applicability and scope.

——Art. 127—Applicability and scope.

Where in a joint Hindu family consisting of two brothers, one of the brothers was in possession, the other must be deemed to have been in possession

through him. Consequently, a suit by the other brother to enforce a right to share in the property is governed by Art. 127. A.I.R. 1943 Oudh 177=1942 O.W.N. 639=18 Luck. 439=206 Ind. Cas. 94.

——Arts. 127, 144—Applicability and scope.

Open and continues exclusion by lunatic brother of his joint sane brother—Claim by sane brother—Article 127 applies—Death of lunatic—Court of Wards retaining possession for his widow—Article 144 applies. (1942) A.L.J. 197=A.I.R. 1942 All. 267=1943 A.W.N. 305=I.L.R. (1942) All. 518=202 Ind. Cas. 227.

——Art. 127—Applicability and scope.

Article 127 would not be applicable to a suit between one member of a joint Hindu family and a stranger alienee who is in possession of the property by virtue of a transfer made by another member of the joint family including a father or manager. A.I.R. 1940 Bom. 136=42 Bom. L.R. 208=I.L.R. (1940) Bom. 109=187 Ind. Cas. 663.

——Art. 127—Applicability and scope.

When the claim as to either joint possession or enjoyment by rotation in the right to perform service and worship of the idol is made, the case stands in the same way as a claim to immovable property and the article applicable would be Art. 127 rather than Art. 144. 39 Bom. L.R. 94=A.I.R. 1937 Bom. 202=169 Ind. Cas. 81.

——Art. 127—Applicability and scope—Suit for partition—Defence of distruption of family long ago—Finding as to exclusive possession and assertion of title by defendants for more than twelve years—Suit, held barred—Article 127, held governed the case—Even if Art. 127 did not apply, Art. 144 held applied. 2 B.R. 82=A.I.R. 1936 Pat. 68=159 Ind. Cas. 453.

——Art. 127—Applicability and scope.

The income of joint family property, which accrued during the period between the preliminary and final decree in a partition suit constitutes joint family property, and, if that was not divided by the final decree for partition, a suit to enforce a share in such income would be governed by Art. 127 and not by Art. 62. 31 N.L.R. 304=A.I.R. 1935 Nag. 137=156 Ind. Cas. 672.

——Arts. 127 and 144—Applicability and scope—Minor's guardian and Manager alienating property.

Where the manager of a joint Hindu family and a minor coparcener thereof represented by his mother sold property belonging to the family to a stranger in 1904 who sold it to another person in 1917, and the minor sued to recover his share in the property in 1924 after attaining majority in 1921.

Held, that Art. 144 and not Art. 127 applied to the case and the suit was barred. 34 Bom. L.R. 354=A.I.R. 1932 Bom. 255=137 Ind. Cas. 367.

——Art. 127—Applicability and scope.

Though the villages were originally joint family property, the effect of separation was that any immovable joint property which continued undivided was no longer joint family property so as to come under Art. 127 and the claim was barred under Art. 144, Limitation Act. A.I.R. 1931 P.C. 48=35 C.W.N. 438=60 M.L.J. 386=33 L.W. 439=53 C.L.J. 313=14 N.L.J. 56=33 Bom. L.R. 442=27 N.L.R. 131=58 I.A. 106=130 Ind. Cas. 673. (P.C.).

——Art 127—Applicability and scope.

Article 127 pre-supposes the existence of a joint family and the exclusion of a coparcener from his joint family property. 15 O.C. 111 and 24 Cal. 309, Foll. 102 Ind. Cas. 66=49 All. 763=25 A.L.J. 413=A.I.R. 1927 All. 454.

——Art. 127—Applicability and scope—Sale by coparcener.

Where some of the coparceners sell the joint family property and put the vendees in possession and the surviving coparcener brings a suit for possession of the alienated property, Art. 144 and not 127 applies. It is not necessary under Art. 144 to prove the exact date when plaintiff became aware that he had been excluded from a right to share in the joint property. The date of limitation beginning to run against the plaintiff must be taken as starting from the date when the vendors ceased to cultivate the property that they had alienated. 70 Ind. Cas. 317=15 M.L.W. 294=A.I.R. 1922 Mad. 369=42 M.L.J. 364.

——Art. 127—Applicability and scope—Tenants-in-common.

A suit for partition by the heir of one tenant-in-common against the heir of the other tenant-in-common is governed by Art. 144 and not by Art. 127 of the Limitation Act. If on the death of one of tenants-in-common his heir obtains exclusive possession of the whole property asserting an absolute and exclusive title in the deceased, the possession of the heir is adverse to surviving tenants-in-common. 59 Ind. Cas. 978=43 Mad. 288=38 M.L.J. 149.

——Art. 127—Applicability and scope—Denial of title—Residence and maintenance given to plaintiff—If prevents time running.

Where the plaintiff's claim as coparcener is distinctly denied but the plaintiff is allowed to remain in the family house as a dependant the enjoyment of such residence or maintenance is not sufficient to prevent time running against his claim. Under Art. 127 in the case of minors the knowledge of the guardian is quite sufficient. 37 M.L.J. 256=(1919) M.W.N. 440=10 L.W. 156=52 Ind. Cas. 725.

——Art. 127—Applicability and scope.

The word "Share" in Art. 127 is used as a verb and not as a noun. The suit contemplated by Art. 127 is a suit by a member of a joint family against other members of the joint family to be restored to joint enjoyment on the allegation of having been unlawfully excluded from it. The article does not apply to a suit where the alleged joint family property has passed by sale to a stranger. 15 O.C. 111=15 Ind. Cas. 394.

——Arts. 127 and 129—Applicability and scope—Suit for maintenence—Malabar law.

A suit by a junior member, of a family governed by *Aliyasanthana* Law, for maintenance out of the property is governed by Art. 127 of the Limitation Act and not by Art. 129 because the latter applies only to suits for maintenance from property belonging to another whereas in the families in question the property belongs to the persons who claims maintenance. 9 M. 266; 24 M. 73; 14 M. 101, Rel. 36 Mad. 203=11 M.L.T. 112=(1912) M.W.N. 109=22 M.L.J. 309=14 Ind. Cas. 383.

——Arts. 127, 120 and 144—Applicability and scope—Joint family property—Nature not ascertained—Suit for recovery of.

A suit for recovery of property alleged to be joint, from the executors of the deceased coparcener is governed by Art. 127 and not by Arts. 120 and 144. 4 S.L.R. 161=8 Ind. Cas. 930.

——Art. 127—Applicability of moveables and immoveables.

A twelve years limitation applies to a suit for partition in regard to properties remaining joint, Art. 127 applies equally to moveable and immoveable properties. 14 C.W.N. 221=3 Ind. Cas. 9.

——Art. 127—Applicability and scope—Suit for partition of moveables and immoveables.

Period of limitation is the same for moveables and immoveables. (1903) 6 Bom. L.R. 1=31 C. 262=31 I.A. 10=8 C.W.N. 146=14 M.L.J. 8 (P.C.).

——Art. 127—Applicability and scope—Exclusion and knowledge.

Art. 127 requires first, exclusion and, secondly, knowledge of exclusion. (1904) 6 Bom. L.R. 925.

———Art. 127—Applicability and scope.

In order that Art. 127 may be applied to a case, it must be shown that the property is dispute is joint family property and that the plaintiff had been excluded from the enjoyment thereof. (1903) 5 Bom. L.R. 355.

3 Exclusion.

———Arts. 127 and 144—Applicability—Co-parcenary of sane and insane co-parcener—Properties held separately—Insane co-parcener in exclusive possession and enjoyment of portions of family property for over 12 years to the knowledge of the sane co-parcener—Suit by heirs of sane co-parcener for possession of such property—Bar of limitation.

Per *Fazl Ali* and *Mukherjea, JJ.*—Art. 127 of the Limitation Act presupposes the existence of a joint family and joint family property and can be invoked only when the suit is brought to enforce a right to a share therein by a person excluded from such property. Where it is established by evidence that an insane co-parcener was in exclusive possession of definite portions of the family property (through a guardian) for over twelve years with the other sane co-parcener acquiescing in it, and the cumulative effect of the facts established is to negative the existence of a joint family, Art. 127 cannot be applied to a suit by the heirs of the other sane co-parcener for possession of the property in the possession of the insane brother. Article 144 is the proper Article to be applied. Even if Art. 127 is applied the suit would be barred as the other member was to his knowledge excluded for more than twelve years from the property in question. 1949 F.C.R. 715=A.I.R. 1950 F.C. 142=(1950) S.C.J. 514 (F.C.).

———Art. 127—Exclusion—What amounts to.

The question as to what amounts to exclusion depends upon the facts of each particular case but an intention to exclude is essential. 22 Luck. 522=1947 O.W.N. 421=1947 A.W.R. (C.C.) 301=A.I.R. 1948 Oudh 307=1947 O.A. (C.C.) 301.

——Art. 127—" Exclusion ", meaning of.

" Exclusion " in Art. 127, means total exclusion. Where in a litigation concerning a small portion of the joint property, one of the members of the joint family denies the title of the other member, the other member however, winning the case on the plea that the property in litigation formed part of joint property, the denial of title does not amount to " exclusion " within the meaning of Art. 127. A.I.R. 1943 Oudh 177=1942 O.W.N. 639=18 Luck. 439=206 Ind. Cas. 94.

——Art. 127—Exclusion.

Where one of the members of joint Hindu family is in exclusive and separate possession of portion of property for more than twelve years, the claim of others for partition is barred by Art. 127. 35 Bom. L.R. 779=A.I.R. 1933 Bom. 386=145 Ind. Cas. 780.

——Art. 127—' Exclusion '.

There is no definition of the word " exclusion ", in the Limitation Act and the question whether a person has been excluded from joint family, must depend upon the facts of the particular case. An intention to exclude is an essential element. It is necessary therefore, for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person and that exclusion was to his knowledge.

Member of joint family going to live with his maternal uncle voluntarily with consent of eldest male member—Mere fact that joint family did not subscribe towards the maintenance, education or marriage held not sufficient to prove intention to exclude. 118 Ind. Cas. 1=33 C.W.N. 1006=31 Bom. L.R. 1030=50 C.L.J. 135=1929 A.L.J. 1031=30 M.L.W. 514=6 O.W.N. 786=56 I.A. 310=53 Bom. 699=1929 M.W.N. 852=A.I.R. 1929 P.C. 231=57 M.L.J. 287 (P.C.).

——Art. 127—Evidence of exclusion.

Mutation proceeding is not a judicial proceeding and does not decide title and is no evidence of exclusion from property. 98 Ind. Cas. 1013=1 Luck. 389=29 O.C. 316=53 I.A 220=48 All. 529=25 A.L.J. 25=28 Bom. L.R. 1409=44 C.L.J. 330=25 M.L.W. 1=3 O.W.N. 623=1926 M.W.N. 716=13 M.L.T. 81=A.I.R. 1926 P.C. 100=51 M.L.J. 836 (P.C.).

——Art. 127—Exclusion.

Where the members have been, for convenience of management, living at different places and managing the property at each particular place, there is no exclusion or ouster of one member, so as to disentitle him to his share of the other portions, however long their enjoyment by others. A suit for his share is governed by Art. 127 of the Limitation Act. 72 Ind. Cas. 742=29 P.W.R. 1923=A.I.R. 1923 Lah. 569.

——Art. 127—Exclusion.

If exclusion means mere physical exclusion the receipt of maintenance and holding of land out of the estate must prevent its being held that there was exclusion. But is " exclusion " under Art. 127 of the Act, just as in " possession " there is a mental as well as a physical element. Legal or juridical exclusion from an estate by one co-owner of his co-owners is consistent with their physical admission to it. For such mere physical admission to put an end to exclusion it must be possible to infer that it was accompanied by an intention to abandon the position of a right to exclude. No doubt such intention will be inferred where no legal title to excluded is proved to have been set up and maintained, because there is always a presumption in favour of rightful entry and retention. Such presumption is, however, rebuttable. No presumption against indivisibility of possession or title can arise by reason of joint living. 74 Ind. Cas. 225=9 O.L.J. 52=A.I.R. 1923 Oudh 61.

——Arts. 127 and 44—Exclusion—Exclusion from specific items—Effect of.

To bar the right of the plaintiff under Art. 127 of the Limitation Act there must be exclusion from the whole of the joint family property, and not merely from specific items of joint family property. 21 Bom. 325, Diss. 42 Mad. 431=36 M.L.J. 612=(1919) M.W.N. 328=52 Ind. Cas. 470.

——Art. 127—Exclusion—Division in Status—Possession.

Where the members of a joint Hindu family are divided in status without a division by metes and bounds they are tenants in common and the possession of one enures to the benefit of another in the absence of actual ouster. Where no ouster is proved by one co-sharer or a tenant-in-common of another Co-sharer there cannot be said to be

an exclusion from joint family property within the meaning of Art. 127. 17 M.L.T. 361=29 Ind. Cas. 183.

——Art. 127—Exclusion—Limitation.

Limitation runs against a person from the time he is excluded from enjoyment to his knowledge. 37 Bom. 64=14 Bom. L.R. 923=17 Ind. Cas. 642.

——Art. 127—Exclusion from joint family—Expulsion from caste—Re-admission.

In a suit for partition of joint family property, the defence was that plaintiff's father was expelled from the family for some scandalous conduct and that he had received his share of the property. It was in evidence that the plaintiff re-appeared in the village where the family resided, that he took up his abode there and that he was recognized as a member of the family. *Held*, that no case of exclusion from the joint property could be made out against him till five or six years before suit and that the suit was in time. 16 C.W.N. 466=15 Ind. Cas. 184 (P.C.).

——Art. 127—Exclusion by third parties.

Art. 127 does not apply when it is not the original co-sharers who have excluded the plaintiff but third parties. 23 P.L.R. 1911=48 P.W.R. 1911=9 Ind. Cas. 540.

——Art. 127—"Exclusion"—Mere non-participation, no exclusion.

Mere non-participation is not exclusion within the meaning of Art. 127. (1910) 20 M.L.J. 364=1910 M.W.N. 511=7 M.L.T. 174=5 Ind. Cas. 924.

——Art. 127—Exclusion—Proof of exclusion required—Mere non-participation not enough.

It is only ouster of a tenant in common for twelve years that can extinguish his right. Mere non-participation in or refusal to live on joint property for the period is insufficient. (1901) 24 M. 441.

4 Mahomedans.

——Art. 127—Mahomedans.

Article 127 does not apply to undivided property of a family governed by Mahomedan Law and not proved to have adopted as a custom the Hindu Law of the joint family. 2 S.D. 582, Diss. from ; 41 Bom. 588 (F.B.) ; 13 All. 282 (F.B.) ; 16 Mad. 61 (F.B.) ; 22 Cal. 954, Foll. 80 Ind. Cas. 118=16 S.L.R. 25=A.I.R. 1921 Sind 177.

——Art. 127—Mahomedans.

Art. 127 does not apply to a case where the parties are Muhammadans. 22 C. 954; 7 C.W.N. 155, Foll. 38 Ind. Cas. 25 (Cal.).

——Art. 127—Mahammadan Family.

Under the Mahammadan Law there is no such thing as joint family property. If the members of a Mahammadan family succeed to property on the death of a relation each of them takes a share of each item of the property and a suit by such a member for a share is governed by Art. 123 and not by Art. 127 of the Limitation Act. 38 Mad. 1099=32 Ind. Cas. 1002.

——Art. 127—Applicability—Muhammadans—"Joint family property"—Meaning of.

By the Full Bench (*Shah, J.*, dissenting).—The article does not apply to the property of a Muhammadan or any other person not a Hindu unless he has adopted as a custom the Hindu Law of the joint family (1885) P.J. 170, Diss. The expression "joint family" and the article must be read as a compound adjective and the expression joint family property must be read as property appertaining to a joint family (Per *Beamen* and *Heaton, JJ.*), The words "joint family" involve definite legal notions. incidents and consequences, and must primarily be referred to a Hindu joint family and only secondarily to such groups of non-Hindus, as can prove that they have by custom adopted the Hindu Law of the joint family.

(Per *Shah, J.*) *Quaere.*—Whether the Article can apply to person other than Hindus and Muhammandans who are not proved to have adopted as a custom, the Hindu Law of the joint family. 41 Bom. 588=19 Bom.L.R. 579=41 Ind. Cas. 761 (F.B.).

——Art. 127—Muhammadans.

Art. 127 cannot apply to Muhammadans for on the death of a Muhammadan intestate, his estate could not be joint property unless by special family custom it is supposed to be governed by Hindu Law. It is an undistributed estate to be taken in severalty by the heirs, sharers and residuaries. The criterion for the applicability of Art. 127 is that property must be "joint family property" and no such property is known outside the special joint family of the Hindu Law. 38 Bom. 449=15 Bom.L.R. 1044=22 Ind. Cas. 195.

——Art. 127—Applicability—Muhammadans.

Art. 127 of the Limitation Act applies to Muhammadans alone. A suit by the daughter of a deceased Muhammadan to recover by partition the possession of her share in her property is governed by Art. 127 of the Act. 33 Bom. 719=11 Bom.L.R. 1083=44 Ind. Cas. 242.

——Art. 127—Muhammadans.

Art. 127 is not applicable to Muhammadans. (1912) M.W.N. 45=13 Ind. Cas. 791.

——Art. 127—Mahomedan—Suit by a Mahomedan woman to recover her share in her father's property—Limitation.

A suit by the daughter of a deceased Mahomedan to recover her share in his property is governed by Art. 127. (1909) 11 Bom.L.R. 1083=33 B. 719=4 Ind. Cas. 242.

——Art. 127—Muhammadans.

The Article does not apply to Muhammadans who have not alleged that they have by custom adopted Hindu joined family system. 5 N.L.R. 41=2 Ind. Cas. 15.

5 Starting point.

——Art. 127—Starting point.

Although time cannot run against a claim to partition joint family estate unless there has been definite exclusion, yet the fact that when a co-parcener's right to mortgage was challenged 14 years prior to suit and he took no steps, strongly suggests that at that time when evidence might have been more readily available he had no great faith in the value of his claim. 113 Ind. Cas. 897=49 C.L.J. 93=1929 M.W.N. 39=29 M.L.W. 91=6 O.W.N. 104=1929 A.L.J. 9=31 Bom.L.R. 280=33 C.W.N. 435=10 P.L.T. 283=A.I.R. 1929 P.C. 1=56 M.L.J. 435 (P.C.).

——Art. 127—Starting point—Suit by son adopted into another family for share after adoption was declared invalid.

Held :—That limitation for a suit by a person adopted into another family, on the adoption being declared invalid, for a share of the properties belonging to his natural family will only run from the date of his exclusion from enjoyment of the properties by the adopted son. An oral renunciation, made on consideration of the reversioners transferring their reversionary interest is invalid, such transfer being imperative under S. 6 (*a*), T.P.Act. (1906) 30 M. 201=2 M.L.T. 184.

6 Suit after partition.

——Art. 127—Suit after partition.

Article 127 does not apply to a suit to enforce partition of property excluded from previous partition of joint family properties by fraud of other members as it pre-

supposes the existence of a joint family and can have no application where there has been disrupture of the status of jointness since thereafter the members of the family become, tenants-in-common in respect of property left undivided and any exclusion from it would not be exclusion from joint family property within the meaning of that article. A.I.R. 1943 Bom. 419=45 Bom.L.R. 825=214 Ind. Cas. 273.

——Art. 127—Applicability—Suit after partition.

A suit for re-adjustment of shares allotted in a previous partition on the basis of mistake is not governed by Art. 127 or Art. 144, but by Art. 96. 34 L.W. 262=61 M.L.J. 430=A.I.R. 1931 Mad. 707=54 M. 883=135 Ind. Cas. 9.

——Art. 127—Suit after partition—Suit for setting aside partition—Applicability.

A suit by a co-parcener, that a previous partition between the members of the family was vitiated by fraud reduce the suit to one for setting aside the partition on the ground of fraud and so Art. 127 does not apply. 14 Bom.L.R. 771=17 Ind. Cas. 10.

——Art. 127—Suit after partition.

In 1910 *A* and his four sons made a partition of joint family property. In 1911 and 1913, *A* made two gifts of certain of his properties. A suit was filed in 1922 by the sons of *A* for a declaration that the properties allotted to *A* at the partition should go after his lifetime to his sons and that the deeds of gift were invalid.

Held, as the property was not joint family property, Art. 120, Limitation Act, applied instead of Art. 127. A.I.R. 1924 P.C. 150; A.I.R. 1916 P.C. 104 and 15 Bom. 135, Rel. on. 124 Ind. Cas. 773=54 Bom. 4=31 Bom.L.R. 1240=A.I.R. 1930 Bom. 61.

——Art. 127—Suit after partition—Onus.

In a suit by a Hindu for a declaration of his title to a one half share in certain property, it was common ground between the parties that there was no joint family on the date of the suit it was also admitted by both parties that for the last eight or nine years they had been living and messing separately. According to the plaintiff every joint family property had been divided between them except the property in dispute. Bar of limitation was pleaded in defence.

Held, that the onus lay on the plaintiff to prove the point of time at which the status of the joint family broke and that the alleged partition by which his one half-share to the property was determined did take place within twelve years immediately preceding the institution of the suit. A.I.R. 1925 P.C. 132 and A.I.R. 1926 All. 453, Expl. and Rel. on. 105 Ind. Cas. 410=4 O.W.N. 958 =A.I.R. 1927 Oudh 499.

——Art. 127—Suit after partition.

Where certain money bonds remained joint property even after the partition in a Hindu joint family and one of them was realised by the defendants who were some of the separated members, five years, before the plaintiffs, the other members filed a suit for their share of the money realised,

Held, that Art. 62 and not Art. 127 applied as the latter does not apply to a family which has separated prior to the suit and that the suit was barred by limitation. 75 Ind. Cas. 953=A.I.R. 1924 All. 812.

——Art. 127—Suit after partition.

A suit for the recovery of money realised by one member of the family to the exclusion of another is not governed after separation or partition by Art. 127. The realization in this case had been made while the family was till joint. The suit ought therefore to have been brought within three years from the date of separation or partition. 77 Ind. Cas. 697=26 O.C. 191=A.I.R. 1922 Oudh 15.

——Art. 127—Suit after partition—Joint Hindu family—Suit for recovery of share of debt realised by one.

Where after partition, one of its members recovers a debt belonging to the family, a suit by the other members of the family for the recovery of their shares in the money realised would be governed by Art. 62 and not by Art. 127, Limitation Act. 6 A. 442; 24 C. 309; 13 A. 282, Rel. 15 O.C. 397=16 Ind. Cas. 882.

——Arts. 127 and 62—Suit after partition—Joint family—Suit by member to recover share of defendant.

A suit by a member of a joint Hindu family to recover back his share of a joint debt realised by another member after division in status, is governed by Art. 62 and not by Art. 127. 32 Mad. 191=5 M.L.T. 49=19 M.L.J. 94=1 Ind. Cas. 408.

7 Miscellaneous.

——Arts. 127 and 142—Conversion to Islam—Suit by convert to recover property of uncle.

In a suit to by a *convert* to Islam to recover possession of property of joint Hindu family left by his uncle, it must be proved (1) that the separation did not take place more than 12 years before suit, as he ceased to be a member of the joint family on account of his conversion, (2) that he was a member of the joint family within 12 years of the date of the suit; (3) that he could get a share in the ancestral property which was his at his conversion. 57 P.R. 1916=159 P.W.R. 1916=4 P.L.R. 1917= 35 Ind. Cas. 549.

——Art. 127—Miscellaneous—Minor co-parcener.

A suit by a member to enforce a right to share in joint family property is not barred if brought within 12 years of his attaining majority. At the most it can be held that he became aware of his exclusion from the date of the attaining majority. 116 Ind. Cas. 849=1929 A.L.J. 324=A.I.R. 1929 All. 302.

——Arts. 127, 142—Miscellaneous—Onus of proof.

Under Article 127 the onus is on the defendants to prove that the exclusion from the joint family property became known to the plaintiff more than 12 years before the suit. 31 C. 448, explained. (1906) 4 C.L.J. 56.

——Art. 127—Miscellaneous—Possession of co-owner—Distinction between the possession of a member of a joint Hindu family or of a lambardar and that of a member of a Mahomedan family.

A very clear distinction must be made between the case of a non-possession or non-receipt of rents and profits by members of an undivided Hindu family who are co-owners, and the non-possession or non-receipt of rents and profits by a person who was a co-sharer, but entitled to a specific share or interest in the property prior to dispossession or ouster from receipt of rents and profits. Where, therefore, one of two co-owners of a house, who were Mahomedans, left the house, and the other co-owner remained in possession and did not recognise his title for over 12 years.

Held that the other co-owner or his representative could not recover possession of his share in the house. (1905) 1907 A.W.N. 195=4 A.L.J. 473.

——Art. 128—Agreement.

A suit for arrears of maintenance by a widow against her husband's brother, fixed by a mutual agreement is allowed only for the arrears of three years. 75 Ind. Cas. 533=A.I.R. 1924 Nag. 176.

——Art. 128—Applicability and scope.

Article 128 also refers to cases in which the claim of the Hindu is based upon his right as a Hindu to avoid an alienation by a female who is in possession as a Hindu, and does not apply to cases where the possession

and the claim are independent of the status of the parties. A.I.R. 1936 Pat. 323=17 P.L.T. 131=15 Pat. 151=2 B.R. 658=163 Ind. Cas. 940.

——Arts. 128, 129, 115—Word 'Hindu' whether refers to religious persuasion.

The word "Hindu" in Arts. 128, 129, does not refer to the religious persuasion of the plaintiff. It is inconceivable that the Legislature ever intended to provide one period of limitation for a plaintiff of a particular religious faith and another period if he belongs to another faith. Those two articles apply where the maintenance is claimed not on the basis of contract but on the basis of status of the plaintiff under the Hindu Law and a suit for maintenance by even a Hindu under contract is governed by Art. 115. A.I.R. 1936 Pat. 158=16 P.L.T. 789=2 B.R. 333 (2)=161 Ind. Cas. 478.

——Art. 128—Applicability and scope.

A claim for maintenance made by the widow in circumstances in which the husband was not, during his lifetime, legally liable to pay any amount can in no sense of the word be described as maintenance and as it is a money claim, Art. 128 does not apply but the general article applicable to ordinary money claims governs the case. 15 P.L.T. 372=12 Pat. 869=A.I.R. 1934 Pat. 99=149 Ind. Cas. 738.

——Arts. 128, 129—Applicability.

Right to maintenance revives on cessation of unchastity and suit would be governed by Art. 128, Limitation Act, 14 L. 759=A.I.R. 1933 Lah. 747=34 P.L.R. 1082=148 Ind. Cas. 479.

——Art. 128—Scope.

In a joint family, a widow is entitled to claim arrears of maintenance even for 8 years and the Court will not disallow the claim, unless abandonment or waiver is expressed or can be implied from the circumstances. 107 Ind. Cas. 641=A.I.R. 1928 Mad. 561.

——Art. 129—Applicability—Suit for share of property or maintenance.

A suit by a widow for possession of a share in certain land left by her husband in lieu of her maintenance or in the alternative for a cash allowance by way of maintenance is not governed by Art. 129. Article 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied. A.I.R. 1933 Lah. 747=14 L. 759=34 P.L.R. 1082=148 Ind. Cas. 479.

——Arts. 129, 128—"Hindu".

The word "Hindu" in Arts. 128 and 129 does not refer to the religious persuasion of the plaintiff. A.I.R. 1936 Pat. 158=16 P.L.T. 789=2 B.R. 333 (2)=161 Ind. Cas. 478.

——Art. 129—Land in lieu of maintenance.

A suit by a junior member of a family governed by rule of primogeniture for a plot of land in lieu of maintenance on the strength of family custom is governed either by Art. 120 or 144, the choice between the two provisions of law depending upon the question whether the suit is treated as one for declaration or for possession. Therefore when on the evidence it is proved that the defendant has been giving grain to the plaintiffs by way of maintenance and that the allowance was stopped two years before the suit, the suit is clearly in time.

Articles 129 and 131 do not apply to such a case as Art. 129 is restricted in its operation to a suit for maintenance in which the right is based on Hindu Law and not upon custom and Art. 131 is confined to a suit in which the plaintiff seeks simply to establish his right to maintenance and does not ask for a consequential relief. 83 P.R. 1906, Foll. 121 Ind. Cas. 428=11 Lah. 99=A.I.R. 1929 Lah. 872.

——Art. 129—Onus—Denial of right.

Where there is no denial, there is no bar under Art. 129 and proof of denial lies on him who pleads the bar. 26 M.L.J. 205=(1914) M.W.N. 374=23 Ind. Cas. 831.

——Art. 129—Starting point.

The cause of action for maintenance accrues from time to time according to the want and exigencies of the person entitled. 3 Bom. 415 (P.C.); 29 Cal. 557 Foll. Even where suit is barred, the right is not extinguished and a defence of a right to maintenance can prevail. 73 Ind. Cas. 235=A.I.R. 1924 Cal. 364.

——Art. 130—Adverse possession—Nature of plea.

The plea of limitation in a suit for possession of lands in a *patni* depends upon the doctrine of adverse possession and not upon plaintiff's want of possession. 4 C.L.J. 548, Foll. Mere non-payment of rent is not adverse possession. 19 Ind. Cas. 64 (Cal.).

——Art. 130—Applicability—Rent-free tenure.

Unless and until a tenure is found to be a rent-free tenure, Art. 130 of the Limitation Act can have no application to a suit for assessment of its rent. 28 C.L.J. 254=47 Ind. Cas. 420.

——Art. 130—Hindu son's pious obligation when begins.

A Hindu son's liability to pay his father's debt arises when the father fails to discharge his obligations and such a claim is governed by Art. 120 of the Limitation Act. 13 Ind. Cas. 530 (All.).

——Art. 130—Limitation for landlord's suit—Tenant not paying rent.

As between the *raiyats* of an estate and the landlords of an estate, when a *raiyat* holds land of an estate without payment of rent, limitation against the landlord will only arise 12 years after the landlord has come to know that the defendant possesses the land without payment of rent. A.I.R. 1936 Cal. 289=166 Ind. Cas. 821.

——Art. 130—Resumption of life Jagir.

Under Art. 130 a suit for the resumption of a life jagir must be brought within twelve years of the death of the grantee. 71 Ind. Cas. 929=A.I.R. 1924 Pat. 298.

——Art. 130—Suit for assessment.

If the tenant is in adverse possession of the absolute interest for over twelve years, the landlord's right is completely extinguished. If the tenant is in adverse possession for such a period in respect only of a limited interest as tenant, then whatever may be the effect of it on the question of the landlord's right to *khas* possession a claim for assessment of rent will not be barred unless as provided for in Art. 130 or Art. 131. 95 Ind. Cas. 622=43 C.L.J. 387=A.I.R. 1926 Cal. 883.

——Art. 130—Suit for assessment.

Suits for assessment of rent-free lands are governed by Art. 130 and have to be instituted within twelve years from the time when the right to assess the land first arises and this right may arise upon a distinct notice of the tenant's claim to hold it rent-free. 95 Ind. Cas. 622=43 C.L.J. 387=A.I.R. 1926 Cal. 883.

——Art. 130—Suit for assessment.

Article 130 can have no application unless and until the lands is found to be rent free; the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover the rent from his tenant. The right to levy assessment upon rent free lands is governed by Art. 130 and is consequently extinguished under S. 28, if no suit to enforce the right is instituted within the time allowed. On the other hand under Art. 131, the right to levy assessment would, as recurring right, accrue when there has been a demand

refusal only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed. Once that right is established then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse pos session. There must be some overt act such as a refusal to pay the rent or assessment before the time begins to run. This is in harmony with the view that where a tenant claimed land rent free to the knowledge of the plaintiff and no suit for resumption or assessment was brought till after the expiry of 12 years ; the suit was barred by limitation under Art. 130. 72 Ind. Cas. 329=38 C.L.J. 207=A.I.R. 1923 Cal. 392.

——Art. 130—Suit for assessment.

A right to levy assessment on rent free land is governed by Art. 130 and under S. 28 is extinguished if no suit to enforce the right is brought within the time. 5 Cal. 949, Foll. 61 Ind. Cas. 40=45 Bom. 694=23 Bom. L.R. 314=A.I.R. 1921 Bom. 303.

——Art. 130—Suit for assessment—Land entered in the records as liable to assessment.

Where, defendants land was, in 1910 been entered in the Record-of-Rights as liable to be assessed with rent, and the recorded landlord brought the present suit for rent. *Held*, that the entry in the record of rights did not give the starting point of limitation as such entry confers no title (2) the suit was not one for the resumption or assessment of rent free land within Art. 130 of the Limitation Act, but a suit for the assessment of land presumably liable to be assessed (3) the fact that the rent had not been paid more than twelve years before suit is not *per se* sufficient to support a decree for dismissal of such suit for the right to have the rent assessed must continue so long as the relationship of landlord and tenant continued. Such a relationship and liability could be presumed from the Record-of-Rights and it is for the defendant to rebut the presumption by evidence. 40 C. 173, Rel. on. 22 C.W.N. 685=46 Ind. Cas. 428.

——Art. 130—Suit for assessment—Landlord and Tenant—Adverse possession—Effect of.

Where a tenant claimed land as rent-free to the knowledge of the plaintiff and no suit for resumption or assessment was brought till 12 years after, the suit is barred by limitation. 39 Cal. 453=15 C.L.J. 203=16 C.W.N. 981. Note=13 Ind. Cas. 518.

——Art. 130—Suit to recover assessment—Limitation.

A suit to recover assessment on land held by the defendant adversely to the plaintiff from the year 1888 is barred under Art. 130 of the Act. 40 Bom. 606=18 Bom. L.R. 768=36 Ind. Cas. 505.

——Art. 131.

Synopsis.

1. Applicability.
2. Bar of suit.
3. Claim for money.
4. Interpretation.
5. Mutawalli.
6. Onus.
7. Rent suits.
8. Start of limitation.

1 Applicability.

——Art. 131—Applicability—Suit by Government servant for arrears of salary—Limitation—Periodically recurring right. *See* LIMITATION ACT, ART. 102. (1947) 2 M.L.J. 389=1947 F.C.R. 89=A.I.R. 1947 F.C. 23 (F.C.).

——Art. 131—Applicability—Suit to recover arrears of lawajama—Defendant disputing amount payable on account of deductions claimed by him and not denying right—Limitation.

Art. 131, Limitation Act, only applies when the suit is to enforce a right, such as a right to receive an annual allowance, etc., *e.g.*, *lawajama*. Where the right is not denied, and what is disputed is only the amount payable under the right (the defendant claiming certain deductions), a suit for arrears of *lawajama* is governed by Art. 62 or 120, Limitation Act, and not by Art. 131. I.L.R. (1948) Nag. 401=A.I.R. 1948 Nag. 397=1948 N.L.J. 551.

——Art. 131—Applicability—Suit for declaration of right to share in Toda Giras allowance—Limitation Art. 120.

A suit for declaration of a right to a share in Toda Giras allowance, is a suit to establish a periodically recurring right falling within Art. 131, Limitation Act. The fact that the plaintiff could not institute the suit without first obtaining a certificate from the Collector under S. 6 of the Pensions Act would not make Art. 131, inapplicable. Art. 120 does not apply. I.L.R. (1947) Bom. 421=49 Bom. L.R. 318=A.I.R. 1947 Bom. 451.

——Art. 131—Applicability—Kavimera cess.

As long as any person in possession of a village, out of whose income the *mera* is payable, he is subject to the liability and the liability is not one arising out of his having wrongly made a collection of what he was not entitled to collect but one arising from the fact that out of the collections which as a *zamindar* he is entitled to make, he is bound to make the disbursement and appropriate only the balance. In that sense and to that extent it is personal liability. It is not one resting on covenant but in the nature of a charge because the payment is one which has to be made out of the profits of immovable property. From the mere fact of its being a charge, it will not follow that it cannot fall under Art. 131. As long as any person continues to be in possession of a village out of whose *melwaram* the *mera* is payable, he is liable to pay it as a condition of his tenure as a *zamindar*, or other person entitled to possession of the *melwaram* interest. In respect of a claim of this kind, even the suit for payment of arrears due will be governed by Art. 131. A.I.R. 1938 Mad. 47=46 L.W. 358=(1937) M.W.N. 899=176 Ind. Cas. 247.

——Art. 131—Applicability—Manibham allowance.

A suit against a *zamindar* to recover an annual allowance due to the plaintiff from and out of the revenue collection of a village (*manibham*) is a suit to establish a periodically recurring right and is governed by Art. 131. 44 L.W. 253=(1936) M.W.N. 742=A.I.R. 1936 Mad. 704=164 Ind. Cas. 794.

——Art. 131—Applicability.

A suit for rent by a landlord in respect of an *anubhavam* tenure evidenced by a registered document is governed by Art. 116 and not by Art. 131. A.I.R. 1935 Mad. 682=(1935) M.W.N. 866=42 L.W. 596=158 Ind. Cas. 228.

——Arts. 131, 132—Applicability—Malikana.

Article 132 enforces the payment of a money charge on immovable property and *malikhana* is deemed to be a money charge on immovable property. Consequently a suit to recover *malikana* is governed by Art. 132 and not Art. 131. A.I.R. 1934 Pat. 44=154 Ind. Cas. 1043.

——Arts. 131 and 14—Applicability—Sardeshmukhi.

The plaintiffs had a right to collect Govt. dues in respect of certain villages in Malvan and Devgad *taluks* and to take two per cent. of the collections. This right was recognised and continued but in 1889, the Collector of Ratnagiri recommended that the basis of payment should be permanently fixed at the average of five years' receipts at the original rates. In 1882-83 Survey Settlements had been introduced in the Malvan village

and revision survey was applied to them in 1914-15 and in the Devgad villages, Survey Settlement was introduced in 1892-93. The plaintiff applied in 1900 to fix the percentage of his allowance on the Settlement rates and in 1915 his request was granted as regards the Malvan villages but refused as regards Devgad villages. The plaintiff applied against to fix the percentage on the revised survey figures in the villages. On refusal by Government the superintendent sued on March 23, 1923, for a declaration that he had a right to receive *sardeshmukhi* as calculated on the basis of the amount of the assessment of the villages that might be fixed from time to time :

Held, that the plaintiff's cause of action accrued after the final orders of the Government were communicated to him in 1915 and that the suit was not barred as it fell under Art. 131, Lim. Act.

Article 14, Limitation Act did not apply to the case as plaintiff did not seek to set aside the order of any Government Officer, but for recovery of his due percentage out of the villages. A.I.R. 1932 Bom. 319=34 Bom. L.R. 129=139 Ind. Cas. 796.

——Art. 131—Applicability—Maintenance.

A suit by a junior member of a family governed by rule of primogeniture for a plot of land in lieu of maintenance on the strength of family custom is governed either by Art. 120 or 144.

Articles 129 and 131 do not apply to such a case as Art. 129 is restricted in its operation to a suit for maintenance in which the right is based on Hindu Law and not upon custom and Art. 131 is confined to a suit in which the plaintiff seeks simply to establish his right to maintenance and does not ask for a consequential relief. 83 P.R. 1906, Foll. 121 Ind. Cas. 428=11 Lah. 99= A.I.R. 1929 Lah. 872.

——Art. 131—Applicability—Maintenance—Recurring right—Right to maintenance and a right to recover maintenance—Distinction.

A right of maintenance is a right which accrues on the happening of a certain event and is not a recurring right but a constant right till the happening of some other event which determines it. No doubt the right to recover maintenance is a recurring right unless maintenance is fixed by the parties at one consolidated sum, but there is a great difference between a suit to establish maintenance and a suit to recover arrears of maintenance, and even if it be held that Art. 131 would govern a suit to establish a right of maintenance, it cannot be held applicable to a suit to recover arrears of maintenance. 64 Ind. Cas. 892=2 Lah. 243=A.I.R. 1921 Lah. 121.

——Art. 131—Applicability.

Where the relation of landlord and tenant or superior holder and occupant is not established, the article does not apply. A suit to recover assessment by *Inamdar* who claims to have purchased his rights is not governed by Art. 131. 60 Ind. Cas. 892=45 Bom. 638=23 Bom. L.R. 100= A.I.R. 1921 Bom. 175.

——Art. 131—Applicability—Deshmukhi rights.

The right to receive a certain amount for Deshmukhi is a recurring right and, therefore, Art. 131 will apply to such a case. 109 Ind. Cas. 85=11 N.L.J. 62.

——Art. 131—Applicability—Suit to establish right to offerings of temple—Claim for arrears.

A suit for a declaration that plaintiff is entitled to a certain share in the offerings of a temple is a suit to establish a periodically recurring right under Art. 131. Where a person claims to share in the offerings made to a temple he can bring a suit at any time within 12 years from the date when he first asserted his right and did not have it recognised even though his right originated at a previous date. The article has nothinrg whatever to do with a suit to recover arrears. 22 O.C. 346= 6 O.L.J. 677=2 U.P.L.R. (J.C.) 19=54 Ind. Cas. 540.

——Art. 131—Applicability and scope—Proof of demand and refusal necessary.

Art. 131 of the Limitation Act would not be applicable to a case unless it is proved that more than 12 years before the institution of the suit, the plaintiff expressly made a demand of the defendants and was refused. 46 P.W.R. 1914=140 P.L.R. 1914=23 Ind. Cas. 445.

——Art. 131—Applicability—Claim to recover water cess—Illegally levied.

A claim to recover water cess illegally levied is not a suit to establish periodically recurring right governed by Art. 131 but the cause of action arises on each occasion where the cess is demanded. 37 Mad. 322=24 M.L.J. 365=13 M.L.T. 235=(1913) M.W.N. 235=18 Ind. Cas. 770.

——Arts. 131 and 132—Applicability—Periodically recurring right—Meaning of—Suit to recover arrears of dower.

A suit to recover arrears of dower directed to be paid by the mortgagee of the owner of immoveable property is not governed by Art. 132 as that is applicable only to cases where it is charged upon property, not Art. 131 because it does not extend to cases of a plaintiff seeking to recover arrears in respect of a recurring right under a Registered contract ; the article applicable to such a case is either Art. 116 or 120 ; 7 A. 502 ; 83 P.R. (1886) Foll. 34 All. 246=9 A.L.J. 297=14 Ind. Cas. 505.

2 Bar of suit.

——Art. 131—Applicability—Annuity in the nature of legacy payable under will—Suit to recover more than 12 years after repudiation of right—Maintainability. *See* LIMITATION ACT, ARTS. 123 AND 131. 25 Pat. 311=229 Ind. Cas. 348=A.I.R. 1947 Pat. 47.

——Art. 131—Bar of suit—Assessment of rent—Landlord's right, when barred.

Under Art. 131 of the Limitation Act, a landlord's right to have the rent assessed will be barred if there was a demand and refusal more than 12 years before the institution of the suit. 54 C.W.N. 973=A.I.R. 1951 Cal. 330.

——Art. 131—Bar of suit—Bhaoli rent.

Where, in a dispute before the Assistant Settlement Officer during the revisional survey operation, the plaintiffs claimed *bhaoli* rent, not for the trees over which they had no right apart from the land, but for the land of which they were proprietors, and the defendants denied the liability to pay *bhaoli* rent, the defendants' denial amounted to really asserting that they were not liable to pay any rent at all. When, therefore, the Assistant Settlement Officer passed the order in such a dispute, the plaintiffs were "first refused the enjoyment of the right" within the meaning of Art. 131, to realise the rent. Consequently, a suit brought more than 12 years after the order of recovery of the *bhaoli* rent would be barred by limitation. A.I.R. 1941 Pat. 201=7 B.R. 277=191 Ind. Cas. 878.

——Art. 131—Bar of suit—Landlord and tenant.

Landlord and tenant—Suit for assessment of rent—Open assertion of hostile title by tenant to retain land rent-free in the presence of landlord—No attempt by landlord to realise rent until 12 years after such assertion—Suit, held barred—Demand is not necessary for applicability of Art. 131. 21 P.L.T. 838=7 B.R. 43= A.I.R. 1941 Pat. 116=190 Ind. Cas. 840.

——Art. 131—Bar of suit.

Mortgage and lease back—Suit for recovery of money with profits more than 12 years after term of lease—Claim for money barred :

Held, that in view of S. 28 and Art. 139, the suit was barred even in respect of the claim for profits. (1935) M.W.N. 207=41 L.W. 398=A.I.R. 1935 Mad. 377=157 Ind. Cas. 569.

3 Claim for money.

See also LIMITATION ACT, ARTS. 10, 61.

——Art. 131—Periodically recurring right—Suit for tastik allowance by pattali.

A suit by a *pattali* (subordinate *archaka*) of a temple for tastik allowance is not a suit for enforcing a periodically recurring right within Art. 131, but a suit for wages falling within Art. 102, and the fact that the allowance is paid out of the funds provided by the Government by way of deduction from the land revenue cannot affect the question of limitation. A.I.R. 1936 Mad. 149=70 M.L.J. 220=(1936) M.W.N. 156 (2)=43 L.W. 431=161 Ind. Cas. 475.

——Art. 131—Claim for money under recurring rights.

Suit for arrears of *tastik*—Sums due under a periodically recurring right—Article 131 is applicable. 1936 M.W.N. 156.

——Art. 131—Claim for money under recurring right.

Article 131 applies only to a suit to establish a periodically recurring right. It is not applicable to a suit to recover sums due under such a right. Such a suit is governed by Art. 62. A.I.R. 1931 Bom. 189=33 Bom. L.R. 127=55 B. 193=131 Ind. Cas. 465.

——Art. 131—Claim for money under recurring right.

There is a distinction between a suit to establish a periodically recurring right and a suit for the realisation of sums of money due on the basis of that right and the latter claim is not governed by Art. 131. A.I.R. 1936 Pat. 158=16 P.L.T. 789=2 B.R. 333 (2)=161 Ind. Cas. 478.

——Art. 131—Periodically recurring right—Suit for sums due under—Prayer for declaration.

Art. 131 applies to suits to recover monies due under a periodically recurring right, whether or not there is a prayer for declaration that the plaintiffs is entitled to such right. 38 Mad. 916=(1914) M.W.N. 228=15 M.L.T. 226=26 M.L.J. 377=23 Ind. Cas. 806.

——Arts. 131 and 62—Right to recover cash allowance.

Suit for establishing a right to recover a cash allowance comes under Art. 131; but the article applies only to the case of a person originally liable to pay, when the suit is for recovery of arrears under the claim, and Art. 62 applies to the case of a co-sharer. who, has received payment. 34 Bom. 349=12 Bom. L.R. 157=5 Ind. Cas. 869.

4 Interpretation.

——Art. 131—"Recurring right", what is.

Where there is an obligation to pay a fixed sum not dependent upon the varying circumstances each year, there can be said to be a recurring right. 57 M.L.W. 531=(1944) 2 M.L.J. 250=A.I.R. 1945 Mad. 20=1945 M.W.N. 17.

——Art. 131—Interpretation—"Recurring right".

A suit to recover assessment is a suit to establish a periodically recurring right within Art. 131. A.I.R. 1942 Bom. 174=44 Bom. L.R. 288=I.L.R. (1942) Bom. 326=201 Ind. Cas. 120.

——Art. 131—Interpretation.

The words 'a suit to establish a periodically recurring right' are wide enough to include a suit to recover arrears. (1936) M.W.N. 742=44 M.L.W. 253=A.I.R. 1936 Mad. 704=164 Ind. Cas. 794.

——Art. 131—Interpretation—"Set aside"—"Establish".

Meaning of the expressions "set aside" and "establish" as occurring in the Limitation Act discussed by *Bashyam Ayyangar, J.* (1902) 26 M. 291=13 M.L.J. 27.

5 Mutwalli.

——Arts. 131, 120—Mutwalli.

A suit by a *mutwalli* for declaration that he is entitled to receive the *yeomiah* allowance which is annually paid and which is attached to the office of *mutwalli*, is a suit to establish a periodically recurring right alleged to be attached to the office and is, therefore, governed by Art. 131 and not Art. 120. A.I.R. 1941 Mad. 428=I.L.R. (1941) Mad. 587=53 L.W. 325=1941 M.W.N. 232=(1941) 1 M.L.J. 374=199 Ind. Cas. 693.

——Art. 131—Mutwalli.

A suit to which the Secretary of State is made a party, for a declaration that the plaintiff is the duly appointed *mutwalli yeomiahdar* and *katheeb* of a mosque and that as he has been discharging the duties, he or his successors alone are solely entitled to receive the *yeomiah* allowance from the Secretary of State, and for an order restraining Secretary of State by an injunction from paying the allowance to anyone else other than the plaintiff or his successors, in which there is no prayer for recovery of specified sums from the Secretary of State, is not governed by Art. 131, inasmuch as the essential question in such a case is not the liability of the Government to make a payment under a periodically recurring right, but the question whether *A* or *B* is the person entitled to receive a payment admittedly due to the office-holder by virtue of his holding a particular office. (1939) M.W.N. 298=(1939) 1 M.L.J. 476=49 M.L.W. 595=A.I.R. 1939 Mad. 570=186 Ind. Cas. 343.

——Arts. 131 and 120—Mutwalli—Perpetual and periodically recurring right—Distinction—Right of mutwalli to yeomiah.

A claim that the plaintiff is the mutawalli of a mosque and as such is entitled to all *yeomiah* allowance received by a rival claimant is governed by Art. 120 of the Limitation Act. Article 131 does not apply to a perpetual right to receive an annual or a monthly allowance. The mere fact that sums of money are paid periodically does not make the right a periodically recurring right. Where the right is always vested in some person to receive periodical payments, and being vested in one person at one time, passes away at another time to somebody else, such a right is periodically recurring right in the true sense of the term. 4 Cal. 683, Foll. 39 M.L.J. 492=(1920) M.W.N. 394=12 L.W. 600=58 Ind. Cas. 788.

6 Onus.

——Art. 131—Suit to recover Dusturat—Periodically recurring right—Demand and refusal—Onus.

The plaintiffs having asserted that there was no demand and consequently no refusal, the burden of proof was on the defendants to establish the demand and refusal.

Since the suit was to establish a periodically recurring right in the nature of an interest in an immoveable property it was governed by Art. 131 of the Limitation Act. 19 C.L.J. 118=19 C.W.N. 386=21 Ind. Cas. 179.

7 Rent suits.

——Arts. 131, 110, 120—Suit for recovery of arrears of rent periodically recurring—Express declaration of right not asked for.

If the suit is brought merely for a declaration that the

plaintiff possesses a periodically recurring right to get rent from the defendant, then the suit would certainly be governed by Art. 131 and would be barred by time if there had been a refusal of the enjoyment of the right more than 12 years before the suit. But a plaintiff may, in a case where there has been such a refusal more than 12 years before the suit, bring a suit for recovery of the arrears of rent without asking expressly for a declaration of his right to recover rent. A plaintiff cannot be allowed to evade the provisions of Art. 131 by merely not asking for an express relief for a declaration of right.

If, in one and the same suit, both the reliefs for the establishment of a periodically recurring right as well as for the recovery of the arrears as a consequence of such right are claimed, then Art. 131 would apply to the first relief and the appropriate article like 110 or 62 or falling any such article, Art. 120 may apply to the second relief. 1936 A.W.R. 1025=A.I.R. 1937 All. 57=(1936) A.L.J. 1384=I.L.R. (1937) All. 140=166 Ind. Cas. 823.

——Art. 131—Rent suit.

Where the suit is one for a bare declaration of the right to impose full assessment without consequential relief, Art. 131 applies and not Art. 120. Bare declaration would *prima facie* come within Art. 131, it being one for establishing a periodically recurring right. A.I.R. 1937 Mad. 303=(1937) M.W.N. 189=173 Ind. Cas. 307.

——Art. 131—Suit for rent.

Where the plaintiff claims as against the under *raiyats*-defendants that the relationship of landlord and tenant existed and seeks a relief as to his right to receive rent, the period of limitation to be applied to the case is governed by Art. 131 inasmuch as the right of a landlord to receive rent is a periodically recurring right and the period of limitation is twelve years. A.I.R. 1933 Pat. 695=150 Ind. Cas. 242.

——Arts. 131 and 120—Suit for enhancement of rent—Wrong entry in Record of Rights as raiyat—Article applicable.

Art. 131 and not Art. 120 governs a suit for the enhancement of rent if the holding of an occupancy tenant who has been wrongly entered in the Record of Rights as raiyat at fixed rates, and time runs from the date of refusal. 2 Pat. L.J. 124=1 Pat. L.W. 434=(1917) Pat. H.C.C. 108=39 Ind. Cas. 85.

——Art. 131—Periodically recurring right—Suit for rent.

A right to recover rent is a periodically recurring right. A suit for a declaration that the plaintiff is entitled to recover rent is governed by Art. 131 of the Limitation Act. 13 A.L.J. 333=28 Ind. Cas. 600.

——Art. 131—Rent suit.

If a decree for rent has been passed within 12 years before the subsequent suit for rent has been instituted, the claim is not barred by time. 12 Ind. Cas. 329 (Oudh).

——Art. 131—"Periodically recurring right"—Liability to pay rent—Excess demand or illegal levy—Suit for declaration by tenant—Landlord and tenant.

Art. 131 is not applicable to a suit by an agraharamdar against his landlord for a declaration and injunction that the landlord is not entitled to recover more than a fixed amount of rent alleged to be legally due by plaintiff. The suit is not one to establish a periodically recurring right. The plaintiff's right to sue for a declaration arises on each excess collection or demand, each exaction, if illegal, being a separate injury giving rise to a new cause of action; and consequently the fact that the illegal levy has been made for over 12 years before suit and acquiesced in by the plaintiff is no bar to the suit. (1909) 19 M.L.J. 734=33 M. 171=3 Ind. Cas. 747.

——Art. 131—Rent suit—Suit to establish right to recover rent. *See* 14 M.L.J. 477.

8 Start of limitation.

——Art. 131—Start of limitation—Assessment of rent—Denial of right.

If an Inamdar continues to receive per annum certain fixed rent from his tenants for a particular survey number and has made no demand for the actual assessment in excess of amount which the tenants have to pay, that fact would not debar him from claiming assessment if he chose to do so, but once he claims assessment and the right to claim assessment is denied by the tenant limitation begins to run against the Inamdar, and the fact that a fresh survey rate is introduced subsequently would not create a new right in the inamdar to recover that particular rate of assessment from the tenant. 95 Ind. Cas. 851=28 Bom. L.R. 633=A.I.R. 1926 Bom. 345.

——Art. 131—Start of limitation—Demand and refusal.

A suit to establish a right to assessment of rent is governed by Art. 131. Limitation under the article does not run until there has been a proper demand and a refusal, and mere exclusion from enjoyment does not cause time to run unless there has been refusal as a result of a demand properly made. 95 Ind. Cas. 622=43 C.L.J. 387=A.I.R. 1926 Cal. 883.

——Art. 131—Start of limitation—Enhancement of rent.

A claim to enhance rent is a recurring cause of action and limitation runs from date of refusal. A suit for enhancement brought more than six years after the date of the final publication of the Record of Rights, in which the defendants are entered as raiyats at fixed rates, is not barred by limitation, as such Record-of-Rights does not create or extinguish any rights. Article 120 does not apply but Art. 131 governs the case. 2 P.L.J. 124, Foll. 72 Ind. Cas. 781=A.I.R. 1924 Pat. 198.

——Art. 131—Start of limitation—Recurring right—Demand and refusal—Mere omission to exercise right—Effect.

The payment of *Dhara* or assessment or customary rent is a recurring right within Art. 131; such a recurring right can be time-barred; there must be a definite demand and refusal; mere omission on the part of the person entitled, to exercise it will not start a period of adverse possession. 41 Bom. 159=18 Bom. L.R. 950=38 Ind. Cas. 54.

——Art. 131—Start of limitation—Suit for arrears of malikana.

A party whose right to *malikana* is denied must sue within 12 years of refusal. The Article does not apply where in a previous suit plaintiff has got a declaration of his title. 2 Pat. L.W. 64=40 Ind. Cas. 864.

——Art. 131—Non-compliance with demand—Starting of limitation.

Mere non-compliance with a demand, is not an express repudiation of claim, so as to set the time running under Article 131. 7 M.L.T. 278=(1910) M.W.N. 485=5 Ind. Cas. 615.

—Art. 132.

Synopsis.

1. **Applicability and scope.**
2. **Default clause.**
3. **Immoveable property.**
4. **Instalment bond.**
5. **Interest.**
6. **Loan in kind.**
7. **Malikana.**

8. Redemption suit.
9. Security and indemnity bond.
10. Start of limitation.
11. Subrogation.
12. Suit for contribution.
13. Taxes on property.
14. Third party paying mortgage.
15. Usufructuary mortgage.
16. Vendor and vendee.
17. Miscellaneous.

1. Applicability and scope.

——**Art. 132**—Applicability. *See* T.P. ACT (4 OF 1882), SS. 100 AND 91. (1948) 1 M.L.J. 284=A.I.R. 1948 Mad. 412.

——**Art. 132**—Applicability—Suit to enforce charge created by decree of Court in favour of plaintiff who redeemed mortgages. 12 B.R. 127 (P.C.).

——**Arts. 132 and 181—Applicability—Application under S. 44 of the Madras Hindu Religious Endowments Act to enforce charge created in favour of temple under a settlement deed.**

Art. 181 of the Limitation Act does not apply to applications other than those under the Code of Civil Procedure.

An application under S. 44 of the Madras Hindu Religious Endowments Act to enforce a charge created in favour of a temple under a settlement deed is filed as an application rather than as a suit by reason of the special procedure laid down in that section and the limitation applicable thereto would be the period of limitation applicable to a suit for the same relief, that is to say, the period provided for under Art. 132 of the Limitation Act. 1947 M.W.N. 519=60 L.W. 570=A.I.R. 1948 Mad. 199=(1947) 2 M.L.J. 258.

——**Arts. 132 and 147—Applicability—English mortgage executed before 1st April, 1930—Suit thereon—Art. 147 and not Art. 132 applies.**

The right of an English mortgagee to file a suit for foreclosure or sale which had vested in him in the case of an English mortgage executed before 1st April, 1930 was not taken away or affected by the amending Act (20 of 1929) and by the amendment of S. 57 (*a*), T.P. Act, enacted therein and Art. 147, Limitation Act, continues to be the Article applicable to suits filed by English mortgagees where these mortgages have been executed prior to 1st April, 1930. A.I.R. 1946 Bom. 499=48 Bom.L.R. 327=227 Ind. Cas. 135.

——**Art. 132—Applicability—Properties purchased by plaintiff in 1920 already attached before judgment in 1917 in suit against owner of properties—Properties eventually purchased by auction-purchaser in execution in 1929—Plaintiff having discharged mortgages on property resisting claim of purchaser to possession, unless he is reimbursed—High Court order of 28th August 1931, directing plaintiff to deliver possession to purchaser but declaring plaintiff's charge—Suit by plaintiff for recovery of amount paid, by enforcing charge filed on 13th August, 1943 held within time.**

The suit properties originally belonged to one *M* who had executed two mortgagees in favour of *S* in 1910 and 1912. These properties were purchased by the plaintiff in 1920 from the transferee of the original owner. In a suit brought by a creditor of the original owner the suit properties were attached before judgment in 1917 and were eventually sold in 1929 in execution of a decree obtained in that suit. The auction-purchaser proceeded to obtain delivery of possession but were resisted by the plaintiff who alleged that he had paid off the mortgages over the properties in favour of *S* and one *N* and, therefore, urged in the execution that he was entitled to remain possession, till he was reimbursed in the amount paid by him to discharge the mortgages subsisting on the property. The execution Court directed the auction-purchasers to pay the amount before they could obtain possession from the plaintiff. The High Court in appeal ordered the plaintiff to deliver possession to the purchasers leaving it open to the plaintiff to enforce his right to recover the amount by other appropriate proceedings. But to safeguard his rights the High Court declared that the plaintiff shall have a charge on the properties in respect of the amount which he had paid for the discharge of the mortgages. The decree of the High Court which was dated 28th August, 1931 also contained the declaration. On 13th August, 1943, the plaintiff instituted the suit for the recovery of the amount by enforcement of charge so declared. It was contended that the suit was time-barred :

Held, that the suit was governed by Art. 132, Limitation Act. The plaintiff by reason of the payments had the right to recover them, and this right had become merged in the order of the High Court which specifically declared a charge in his favour. The suit having been brought within 12 years from the date of the High Court's order was within time. A.I.R. 1946 Mad. 423=(1946) 1 Mad. L. J. 379=59 Mad. L.W. 302=1946 Mad. W.N. 366.

——**Arts. 132, 89, 116—Applicability—Principal and agent.**

Where the principal sues the agent to enforce in his favour the charge created by the latter to secure money which might be found due from the agent to the principal, the suit falls within Art. 132 and not under Art. 89 or Art. 116. A.I.R. 1941 Cal. 257=72 C.L.J. 480=44 C.W.N. 793=195 Ind. Cas. 151.

——**Arts. 132, 147—Applicability—Arts. 121, 139 (Bhopal).**

Art. 132 of the Limitation Act, corresponding to Art. 121 of Bhopal Act is not applicable to suits for either sale or foreclosure brought on the basis of any mortgage. The appropriate article for such suits is 147 corresponding to Art. 139 of Bhopal Act prescribing a 60 years' limitation. 188 Ind. Cas. 669 (Bhopal).

——**Arts. 132, 75—Applicability—Bond—Ordinary instalment bond and mortgage bond payable by instalments—Difference.**

There is an essential difference between an ordinary instalment bond, and a mortgage bond payable by instalment, because the latter is governed by Art. 132, and the former is governed by Art. 75, Limitation Act A.I.R. 1939 Pat. 433=18 Pat. 459 (F.B.).

——**Art. 132—Applicability.**

Government acquiring portion of mortgaged property under Land Acquisition Act and awarding compensation to mortgagor—Security is substituted—Mortgagee can proceed against compensation money—Such money withdrawn by mortgagor—Mortgagee's original rights as mortgagee are not lost and he can enforce his security against compensation money by bringing a suit within 12 years from the accrual of cause of action under Art. 132. A.I.R. 1938 All. 221=(1938) A.L.J. 313=1938 O.W.N. 433=1938 A.W.R. 188=I.L.R. (1938) All. 513=174 Ind. Cas. 702 (F.B.).

——**Art. 132—Applicability.**

Article 132 will apply only so far as the plaintiff migh. seek to recover the money by sale of the particular property charged and will not govern his right to a decree against the person who has made the collections of *melwaram*. (1937) M.W.N. 899=A.I.R. 1938 Mad. 47=46 L.W. 358=176 Ind. Cas. 247.

——**Art. 132—Applicability.**

Article 132 will not apply to a case in which the plaintiff does not ask for the enforcement of any charge but simply asks for a money-decree against the defendants. 56 A.

711=(1934) A.L.J. 230=A.I.R. 1935 All. 239=3 A.W.R. 397=155 Ind. Cas. 390.

——Art. 132—Applicability and scope.

Under Art. 132, money can become due only when the mortgagee can sue for his money and also the mortgagor can redeem the mortgaged property. (1934) A.L.J. 371=56 A. 496=A.I.R. 1934 All. 152=4 A.W.R. 1535=151 Ind. Cas. 900.

——Art. 132—Applicability—Mortgage decree, nullity—Auction-purchaser's remedy against—Purchaser of equity of redemption.

Where, in a suit on a mortgage brought more than 12 years after due date, the mortgagee did not implead a purchaser of the equity of redemption though he was aware of the purchase and the equity of redemption was wholly unrepresented :

Held, that the mortgage decree so far as the property was concerned was a nullity and the purchaser of the property in execution did not acquire any title to the property and had no remedy against the purchaser of the equity of redemption. Plaintiff, *i.e.*, auction-purchaser's suit for possession against purchaser of equity of redemption, held was rightly dismissed. A.I.R. 1933 Cal. 912=60 C. 1193=147 Ind. Cas. 808.

——Art. 132—Applicability—Mortgagor allowed to redeem within three years—Whether gives right of foreclosure to mortgagee—Limitation.

A provision in a mortgage-deed allowing the mortgagor the right to redeem earlier than the stipulated period is one in favour of the mortgagor and for his benefit and does not give to the mortgagee any right of foreclosure before the expiry of the stipulated period. 9 O.W.N. 1081=A.I.R. 1933 Oudh 81=142 Ind. Cas. 821.

——Art. 132—Applicability—Hypothecation lien.

Article 132 is the article applicable to a relief asking for enforcement of a hypothecation lien. 107 Ind. Cas. 679=26 A.L.J. 53=A.I.R. 1929 All. 121.

——Arts. 132, 116—Applicability and scope—Personal covenant.

Where upon a sale of the mortgaged property under a mortgage-decree obtained in a suit on a registered mortgage deed there is a deficiency, the preiod of limitation to recover the same under a personal covenant in the said deed is six years under Art. 116. 26 All. 138 and 34 All. 464, Not foll. 116 Ind. Cas. 817=29 M.L.W. 143 =52 Mad. 105=A.I.R. 1929 Mad. 53=56 M.L.J. 10 (F.B.).

——Art. 132—Applicability and scope—Dower debt.

Execution of a deed which stipulates payment of dowry on demand and secures its payment by a mortgage of immovable property—Such execution converts a dower debt into a mortgage debt—Six years' rule applies to a suit on such deed after its registration. 99 Ind. Cas. 553=A.I.R. 1927 All. 268.

——Art. 132—Applicability—Purchaser of mortgaged property changing the form of the property—Liability of property in its changed form.

Even if the purchaser of the mortgaged property pulled down the house and utilized the materials for other building or otherwise dealt with them they cannot escape their liability as vendees of the mortgaged property. The mere fact that mortgaged property exists in different shape from that in which it was at the time of mortgage would not extinguish the mortgagee's right against the property in its converted state and if the person who has converted it has appropriated it to his own uses either in the shape of money or in the shape of materials he would still be liable as a mortgagor and the period of limitation in such cases is the usual period of limitation applicable to the case of a mortgage. 91 Ind. Cas. 754=A.I.R. 1926 Mad. 343.

——Art. 132—Applicability—Charge.

The mere fact that the charge does not come within the meaning of S. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132. 42 Mad. 114 and 43 Mad 786, Expl. 90 Ind. Cas. 551=1925 M.W.N. 722=23 M.L.W. 178=A.I.R. 1926 Mad. 141=49 M.L.J. 117.

——Art. 132—Applicability—Pro-note—Subsequent hypothecation.

If a pro-note is first passed for a certain debt and subsequently immovable property is hypothecated for the same debt, the proper article governing the period of limitation for a suit to recover the loan is Art. 132, and though, the creditor's remedy for enforcing the personal obligation of the debtor in respect of the loan is barred, the debt is not extinguished thereby, if the remedy for enforcing the charge on immovable property subsists. 79 Ind. Cas. 942=27 O.C. 268=A.I.R. 1925 Oudh 92.

——Art. 132—Applicabiiity.

When in a suit by a mortgagee a defendant claims adverse possession against the mortgagor by virtue of a title acquired after the date of the mortgage Art. 132 is applicable as against him and not Art. 120 nor Art. 134. 36 All. 567, Foll. 73 Ind. Cas. 428=10 O.L.J. 263=A.I.R. 1924 Oudh 19.

——Art. 132—Applicability—Mortgage security converted into money.

Where property which represented the security for a mortgage has been converted into money the article applicable to a suit upon the mortgage is Art. 132 under which the plaintiff has 12 years to follow up the proceeds in the hands of the defendants. 33 Cal. 92. Foll. 70 Ind. Cas. 648=45 Mad. 827=16 M.L.W. 485=31 M.L.T. 441=A.I.R. 1923 Mad. 76=43 M.L.J. 467.

——Art. 132—Applicability.

Art. 132 of the Limitation Act is wide enough to apply to all cases where there is an effective and binding charge upon immovable property whether created under the T.P. Act, or otherwise. 67 Ind. Cas. 939 (Lah.).

——Art. 132—Applicability.

Where a decree makes a certain sum of money a charge on immovable property, a suit for that money is within the purview of Art. 132. 4 L.L.J. 398=A.I.R. 1921 Lah. 292.

——Arts. 132 and 120—Applicability and scope—"Money charged on immovable property"—Suit to enforce puisne mortgage against balance of sale proceeds in the hands of prior mortgage."

Certain lands were subject to three mortgages, the first and third in favour of defendant and the second in favour of the plaintiff. In a suit on the first mortgage, the second mortgagee was made a party but the surplus sale proceeds after satisfying the decree were withdrawn by the first mortgagee in execution of a decree obtained by him on the third mortgage without impleading the second mortgagee as a party. The second mortgagee sued on his mortgage, seeking a decree against the defendant for the amount with interest of the surplus sale proceeds withdrawn by the defendant.

Held, that the surplus sale proceeds represented the security which the plaintiff had under his mortgage and did not cease to represent that security owing to the defendant having wrongfully and in fraud of the plaintiff withdrawn them from the Court and that the suit was governed by Art. 132 of the Limitation Act.

Quaere :—Whether the said money in the hands of the defendant was *soddled* with a charge in favour of the plaintiff to the extent of his mortgage. 41 Cal. 654=41 I.A. 45=15 M.L.T. 62=12 A.L.J. 82=18 C.W.N. 345=19 C.L.J. 132=26 M.L.J. 243=16 Bom.L.R. 89=(1914) M.W.N. 38=21 Ind. Cas. 961 (P.C.).

——Art. 132—Applicability and scope—Money charged on immovable propeity.

Where a decree for sale on a Mortgage has been converted into immovable property the mortgage of such decree is entitled to the benefit of not only the new security, but also of Art. 132 of the Act. 39 All. 74=14 A.L.J. 1025=37 Ind. Cas. 4.

——Art. 132—Applicability and scope—Money charged on immoveable property—Mortgagee—Right to sue twice.

A mortgagee can sue the sons of a Hindu father to recover the balance with the interest thereon at rate decreed, not recovered from the father under a mortgage decree, even after 12 years from the cause of action. 35 All. 302=11 A.L.J. 402=18 Ind. Cas. 904.

——Arts. 132 and 62—Applicability and scope—Money charged on immoveable property charge under T.P. Act, Ss. 82 and 100.

A suit to enforce a charge under T.P.Act under Ss. 82 and 100 on property is governed by Article 132, but a suit for a personal decree for contribution comes within the purview of Article 62 of the Limitation Act and time runs from the date of receipt by the owner, of the surplus sale proceeds. 33 All. 708=8 A.L.J. 854=11 Ind. Cas. 145.

——Art. 132—Applicability and scope—Money charged on immoveable property—Property—Alleged to be undivided ancestral one of plaintiff and mortgagor—Suit for a share of mortgage money—Limitation.

An undivided co-sharer cannot sue for a share of the mortgage money in respect of a mortgage by the other co-sharer of property belonging to them jointly. Such a suit is not under Article 132 of the Limitation Act, one to enforce payment of money charged on immoveable property. (1913) 1 U.B.R. 178=22 Ind. Cas. 959.

——Art. 132—Applicability and scope—Money charged as immoveable property—Mortgage of ancestral land by father—Suit for sale against sons.

A suit for sale of ancestral property mortgaged by the father governed by the mitakshara law, in the hands of the sons and grandsons is a suit to enforce payment of money charged on immoveable property and governed by Art. 132 of the Limitation Act. 17 C.W.N. 1022=19 Ind. Cas. 878.

——Art. 132—Applicability and scope—Money charged on immoveable property—Purchase by mortgagee—Revenue sale—Surplus sale proceeds, if mortgagee can proceed against—Scope.

Where a mortgagee in execution of his mortgage decree purchased a portion of the entire estate mortgaged, and subsequently the whole of the estate is sold for arrears of Government revenue a suit by him to recover the money representing the portion purchased by him is not governed by Art. 132, as he having already purchased the property could not be said to be seeking to pursue against the surplus sale proceeds the remedy for the recovery of the money charged on the property. 17 Ind. Cas. 351 (Cal.).

——Art. 132—Applicability and scope—Money charged—Immoveable property—Proceeds of Revenue Sales of mortgaged property.

Where the mortgaged properties are sold for arrears of Government revenue for no default of the mortgagee and the mortgagor draws the surplus proceeds of the sale, the mortgagee is entitled to sue the mortgagor for the sum and the period of limitation for such a suit is 12 years from the date when the surplus proceeds were realised. 14 C.W.N. 165=3 Ind. Cas. 311.

——Art. 132—Applicability and scope—Money charged on immoveable property—Suit to recover mortgage money wrongfully realised by the defendant—Limitation.

Plaintiffs, daughters of deceased *G*, sued eleven years after *G's* death to recover possession of property and for mortgage money wrongfully received by the defendant. The money realised by the defendants was held to represent the security which plaintiff had under the mortgage and the suit was held to be governed by Art. 132, Schedule I of Limitation Act. 1 Lah.L.J. 60=2 U.P.L.R. (Lah.) 114=56 Ind. Cas. 944.

——Arts. 132, 36 and 49—Applicability and scope—Money charged on immoveable propery—Trees cut by third parties—Depreciation in value of the mortgaged property.

Certain trees grown on the mortgaged properties were cut and carried away by third parties in 1905, and the mortgagees sued in 1909 to enforce their security.

Held that (1) It was not a suit to enforce payment of money charged on immoveable property within Art. 132 (2). Plaintiff could only sue for damages for depreciation in the security proving that the security had been rendered insufficient as a matter of fact, (3) Either Art. 36 or 49 applied to the case and whichever applied the suit was time-barred being brought after three years from the date of the cutting and appropriation. 3 L.W. 341=32 Ind. Cas. 901.

——Art. 132—Applicability and scope—Money charged on immoveable property—Charge on rents and profits of land.

Money charged on immoveable property includes money charged on rent and profits of land and the specification of the property on the rental of which (or out of the rents and profits of which) a certain money allowance was to be calculated indicates the stock out of which it was to be paid and was therefore a charge on the property. 18 O.C. 380=3 O.L.J. 20=33 Ind. Cas. 555.

——Arts. 132, 147—Applicability—"Foreclosure or sale"—Mortgage suit—English mortgages—Privy Council—Practice—Uniform current of decisions—Statute—Construction.

Art. 147 does not apply so every suit on a mortgage whether the claim is for foreclosure or for sale. The Article is limited in its application to the class of mortgages in which the suit can be and always is brought for "foreclosure or sale," *e.g.*, English mortgage. In the case of mortgages where the mortgagee is entitled to ask for sale only, Art. 132 is the article applicable. (1907) 9 Bom.L.R. 1104=11 C.W.N. 1005=4 A.L.J. 625=17 M.L.J. 444=30 M. 426=34 I.A. 197 (P.C.).

——Art. 132—Applicability—Mortgage suit against father and sons.

The article applicable to a suit against the father (executant) and his sons is Art. 132. (1907) 11 C.W.N. 294=5 C.L.J. 441=34 C. 184.

——Arts. 132, 120—Applicability—Suit for recovery of surplus sale proceeds by puisne incumbrancer.

Per **Genderson and Sale, JJ.** (**Geidt, J.**, dissenting:—A suit by a puisne incumbrancer to recover surplus sale proceeds (after sale in execution of prior mortgage decree) in the hands of a person who has withdrawn it, is governed by Art. 132 and not by Art. 120. 33 Cal 92=(1905) 9 C.W.N. 989.

——Arts. 132, 116, 120—Applicability—Suit to enforce lien on surplus sale proceeds of mortgaged property—Covenant in deed, effect of, on limitation.

A suit on a mortgage to enforce the charge against the sale proceeds of the mortgaged property in a revenue sale is governed by Art. 132. The fact that there was a

covenant in the mortgage deed to the effect that if the mortgage property be sold for arrears of revenue, the plaintiff would have a lien on the surplus sale proceeds of that property, cannot have the effect of diminishing or altering the right which the mortgagee had under the bond, *e.g.*, of diminishing the period of limitation. The mere fact that the mortgagee had the additional right to bring a suit at once, if her security was diminished, would not have the effect of depriving her of the right which she had under the mortgage bond or of altering the period of limitation which she was already entitled to. (1904) 3 C.L.J. 52.

——Art. 132—Applicability—Suit for surplus sale proceeds of mortgaged property sold by Government for arrears—Limitation Act, Art. 131.

The surplus sale proceeds of mortgaged property sold for arrears of revenue represents the mortgaged property itself and a suit by the mortgagee for the surplus is governed by Art. 132, Art. 120 does not apply to the case. (1904) 31 C. 745.

——Art. 132—Applicability—Mortgage—Revenue sale—Surplus—Creditors—Suit to recover amount.

Where a property mortgaged to the plaintiff was sold for arrears of Government revenue and out of the surplus sale-proceeds held in the Colectorate, certain creditors of the mortgagors drew out the amounts of their money decree obtained against the mortgagors, and the plaintiffs sued these creditors for the moneys which they had taken out from the Collectorate with interest.

Held, that having regard to the provisions of S. 73 of the Transfer of Property Act, a suit, like the present, to enforce payment of money charged upon immoveable property, is governed by Art. 132. (1901) 5 C.W.N. 356

2. Default clause.

See also LIMITATION ACT, ART. 132—INSTALMENT BOND.

——Arts. 132 and 75—Applicability—Suit on simple mortgage bond providing for annual payments and recovery of whole on default—Starting point.

Where a suit is brought on a simple mortgage bond which provided for annual payments and for recovery of the whole amount on default of payment of any instalment, the question as to which part of the claim would be barred has to be decided with reference to Art. 132 of the Limitation Act. According to it, limitation would start from the time the 'money' sued for becomes due. The word 'money' refers to the entire mortgage money and the limitation would not start when only one instalment becomes due. There is no doubt that an option is given to the mortgagee to sue for the entire mortgage money on the happening of a default, but if he does not exercise that option the limitation does not start running. The analogy of Art. 75 would not be applicable because according to that Article the period of limitation of an instalment bond runs from the time when the default is made. 1946 A.L.J. 315=1946 A.W.R. (H.C.) 527=1946 A.L.W. 452=A.I.R. 1947 All. 7=230 Ind. Cas. 76.

——Art. 132—Simple mortgage—Default clause.

Under a simple mortgage deed executed in 1916, the mortgagor was to pay the entire amount of the mortgage with interest within one year. In case of default, the mortgagee became entitled to take possession and to realise interest for the period during which he remained out of possession from any other property of the mortgagor. The mortgagor, however, had the right to redeem. The mortgagee had also the option to realise his principal and interest from the mortgagor as well as other property of the mortgagor. On the occurrence of a default the mortgagee sued for and obtained possession of the mortgaged property in 1924. Subsequently on the mortgagor having made an application under U. P. Encumbered Estates Act, 1934, the mortgagee put in a claim including a claim for interest for the period for which he was out of possession. The mortgagor pleaded that the claim in respect of interest was barred by time :

Held, that in the proper construction of the mortgage deed, that the mortgagor intended to give the mortgagee an option as regards the time of suing for interest and that the legal effect could and was bound to be given to this contention, that the mortgage originally simple became usufructuary when the mortgagee obtained possession and under the deed it was open to the mortgagor to redeem and mortgagee to sue for his money at any time and hence his suit for principal and interest was not barred by time. 1944 O.W.N. 509=A.I.R. 1945 Oudh 70.

——Art. 132—Default clause—Mortgage for fixed term with proviso that debt would become exigible on default of payment of interest.

Article 132 would come into operation only when the mortgagee is bound to sue and not when he has the option to sue.

Where a mortgage for a fixed period contains a proviso that the debt would become exigible in default of payment of interest annually payable under the deed, a proviso of this nature is inserted in a mortgage deed exclusively for the benefit of the mortgagees and it only purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. The mortgagor cannot claim to redeem the property after having broken his own contract by refusing to pay the interest. The mortgagor's default would enure only for the benefit of the mortgagee and unless there is mutuaity the mortgagor could not compel him to sue and consequently the time would begin to run against the mortgagee, under Art. 132, not from the date when the default is made by the morgagor in payment of interest but when the mortgage debt becomes due. A.I.R. 1939 Nag. 242=I.L.R. (1939) Nag. 515=1939 N.L.J. 333=188 Ind. Cas. 405.

——Art. 132—Default clause.

A mortgage bond payable by instalments is governed by Art. 132 and not by Art. 75. 5 B.R. 965=A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=183 Ind. Cas. 523 (F.B.).

——Art. 132—Default clause.

There was a stipulation in the mortgage bond executed on 14th April, 1910, that the mortgagee would be entitled to realise certain amount by way of interest every year and in case three years' interest was not so paid, the mortgagee would be entitled to recover the whole amoun by sale of the mortgaged property. No interest was paid as agreed upon and the payment of interest was for the first time made on 28th December, 1921, when a bond for certain amount was executed by the mortgagors in favour of the mortgagee for interest due upto 14th April, 1921. No interest was paid subsequent to this period and on 15th April, 1936, the mortgagee instituted the suit for recovery of the mortgage amount by sale of the property mortgaged. To bring the suit in time, it was sought to avail of the three years' default clause in the mortgage bond :

Held, that the default took place during the first three years and the cause of action arose on 14th April, 1913. Subsequent payment of interest merely gave the mortgagee a fresh start but the *terminus a quo* could not be altered. The mortgagee, therefore, had only twelve years from the date of the bond, dated 28th December, 1921, within which to sue, and as he did not sue within that period, his suit was clearly time-barred. A fresh period of limitation could be computed from the time when the payment was made and no question of further extension of time by a period of three years, as provided

in the case of original default arose in this case. A.I.R. 1938 Lah. 570=40 P.L.R. 571=178 Ind. Cas. 597.

——Art. 132—Default clause—Waiver by mortgagee.

The omission to include in Art. 132 a provision similar to the one in Art. 75 does not operate to prevent a plea of waiver being set up by the mortgagee. On default, the amount becomes due only if the mortgagee exercised the option to call in the amount and not if he waived that right. The mortgage money under the hypothecation bond with a defaulting clause does not 'become due' within the meaning of Art. 132 until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him. Hence where the mortgagee waives such right, the limitation does not run from the date when the instalment is first defaulted. The mortgagee, however, will under such circumstances, be entitled to charge interest only on the instalment which is not paid and not upon the basis that the whole amount of principal became due on default of instalment. (1938) 2 M.L.J. 251=A.I.R. 1938 Mad. 836=(1938) M.W.N. 671=180 Ind. Cas. 570.

——Art. 132—Default clause.

Mortgage-deed—Money payable after one year—Mortgagee given option to sue for full amount in case of default of payment of interest after six months :

Held, that the mortgagee need not avail himself of the option. A.I.R. 1935 All. 421=(1935) A.L.J. 515=1935 A.W.R. 543=157 Ind. Cas. 675.

——Art. 132—Default clause—Construction—Mere receipt of a portion of principal after default, effect of.

A proviso in a mortgage deed entitling the creditor to realise the entire mortgage money with interset in case of default of payment of any instalments of interest is one that is exclusively for the benefit of the mortgagee. It purports to give the mortgagee an option either to enforce the security at once or to stand by the investment for the full term of the mortgage and under Art. 132, which governs suits of this kind, the money does not become due until both the mortgagor's right to redeem and the mortgagee's right to enforce the security have accrued.

The fact that the words used in the default clause are 'you shall collect the principal and interest' instead of the words 'you shall have the power to collect' does not make any difference as to the nature of the proviso.

The mere fact that the mortgagee had after default received payment of the interest and a certain portion of the principal does not necessarily lead to the inference that the mortgagee had exercised his option to enforce the default clause. (1935) M.W.N. 995=A.I.R. 1935 Mad. 884=159 Ind. Cas. 172.

——Art. 132—Default clause—Default clause entitling mortgagee to sue on default to pay interest—Suit within twelve years of termination of period but beyond twelve years of default to pay interest—Suit, if within time.

A mortgage-deed recited that the principal amount was payable within two years, while the interest was payable at the end of each month and in case of default in the payment of interest, compound interest at a much higher rate and also the principal and interest would become payable. Default was made in the payment of the first instalment of interest. The mortgagee instituted a suit for the sale of the mortgaged property within twelve years from date fixed for payment of principal but beyond 12 years from the date of default of payment of interest :

Held, that the period of limitation for the suit should be computed only from the date of the expiry of the term of the mortgage and the clause empowering the mortgagee to sue on default must be deemed to have been inserted exclusively for the benefit of the mortgagee, and as such, it gave him an option to enforce the security at once or to stand by his investment for the full term of the mortgage, and that the mortgagee had the option to sue within the period of limitation allowed by law computing it from the date of default in payment of interest or from the date of default in the payment of principal and interest. (1933) M.W.N. 331=64 M.L.J. 606=37 L.W. 751=A.I.R. 1934 Mad. 227=148 Ind. Cas. 311.

——Art. 132—Default clause—Mortgage—Instalment bond—Default clause—Option of mortgagee to sue for whole amount on default—Default—Whole amount, if 'becomes due.'

Where in an instalment mortgage bond, a condition is inserted that it will be open to the mortgagee to call in the entire money on default by the mortgagor, the default clause is inserted exclusively for the benefit of the mortgagee and confers no right on the mortgagor. Consequently, the mortgagee has an option to realise the whole amount on default by the mortgagor, even though such option is not expressly mentioned and the whole amount does not become due on such default. A.I.R. 1934 Nag. 191=30 N.L.R. 290=152 Ind. Cas. 438.

——Art. 132—Default clause—Agreement to pay in instalments.

Under Art. 132, a suit to enforce a mortgage for a stipulated period can be instituted within twelve years of the expiry of the period, although a default by the mortgagor has occurred during the period and by the terms of the mortgage, the mortgagee thereupon has an immediate right to enforce the mortgage. The money becomes payable within the meaning of Art. 132 only when either the stipulated period has expired, or a default having occurred, the mortgagee has exercised his option to enforce the mortgage.

Where, under the terms of a mortgage-deed, if interest or compound interest for any two periods of six months be not paid in full, the mortgagees had the right, without waiting for the expiration of the period fixed in the mortgage-deed, to recover the whole amount due ; and the mortgagor admitted that he failed to pay in full two instalments of interest and it was also admitted that the mortgagees had exercised their option to enforce the mortgage by sending a registered notice to the defendant demanding payment of the mortgage money within a month :

Held, that the suit for recovery of the whole amount was not premature and was properly instituted. 11 O.W.N. 1141=A.I.R. 1934 Oudh 473=151 Ind. Cas 856.

——Art. 132—Default clause—Cause of action when accrues.

Where, under the terms of a mortgage-deed for a specified term it was provided that if interest for any year were not paid, the mortgagee had power to start foreclosure proceedings and enter into possession of the property irrespective of the term :

Held, that the money under the mortgage did not 'become due' under Art. 132 until both the mortgagor's right to redeem and the mortgagee's right to enforce the security had accrued and a suit for foreclosure filed within twelve years of expiry of the term of the mortgage, was not barred under Art. 132, even though default had been made in the payment of interest during the term. 8 Luck. 240=A.I.R. 1933 Oudh 66=9 O.W.N. 1202=142 Ind. Cas. 64 (F.B.).

——Art. 132—Default clause—Mortgage-deed—Clause empowering mortgagee to sue before expiry of term on default of payment of interest.

By a deed of mortgage dated 26th July, 1912, which purported to be for a period of six years from that date the mortgagor covenanted to pay interest yearly at a certain rate and that in case of default, the mortgagee shall at all times within and after the expiry of the stipulated period of six years aforesaid have the power to realise the entire mortgage money and the remaining interest and compound interest due to him in a lump sum through Court by attachment and sale of the mortgaged share as well as from the person and all other kind of property of the mortgagor. The mortgagor defaulted in the payment of interest for the first year and the mortgagee brought a suit to enforce the mortgage on 28th February, 1928. It was contended for the defendants that immediately upon the default in the payment of interest for the first year the principal moneys 'became due' within the meaning of Art. 132 and that the suit was consequently barred by limitation :

Held, that a proviso of this nature is inserted in a mortgage-deed exclusively for the benefit of the mortgagee and gives him an option either to enforce his security at once on default or if the security is ample, to stand by his investment for the full term of the mortgage and that the mortgage money did not, therefore, "become due" within the meaning of Art. 132, when default in the payment of interest for the first year was made and the suit was within time. 9 O.W.N. 638=63 M.L.J. 187=(1932) M.W.N. 912=A.I.R. 1932 P.C. 207=96 C.W.N. 1017=36 L.W. 246=56 C.L.J. 237=(1932) A.L.J. 913=7 Luck. 442=34 Bom.L.R. 1600=59 I.A. 376=138 Ind. Cas. 779 (P.C.).

[**Overrules** A.I.R. 1929 Ouder 536=125 Ind. Cas. 390].

——Art. 132—Default clause—Mortgage-deed—Provision for suit on default of three consecutive instalments—Starting point of limitation for suit.

A mortgage-deed provided that the amount of the debt was to be paid off within four years by instalments and if the instalments remained unpaid for three consecutive months, the creditor would have the right either to cancel the condition with regard to the period of repayment and to recover the entire amount through Court or to wait until the expiry of the fixed period. In a suit to recover the amount on default of three consecutive instalments :

Held, that limitation ran under Art. 132 from the date of the third consecutive default. 9 O.W.N. 444=A.I.R. 1932 Oudh 253=138 Ind. Cas. 145.

——Art. 132—Default clause—Clause in mortgage-deed providing right to redeem to accrue after five years—Construction.

Where, according to one clause of the mortgage-deed, the mortgagor had power to repay the mortgage money during the period of five years following the execution of the deed and according to another clause, the mortgagees had the right to recall the mortgage money and to sue for foreclosure only in the event of the mortgagor's default in redeeming the mortgage on the expiry of the five years ;

Held, that the combined effect of the two clauses was that the mortgagor had neither the right to repay the mortgage money nor to redeem the mortgaged property and the mortgagees had no right to call the mortgage money and sue for foreclosure before the expiry of five years and under Art. 132, time would run from the date of expiry of the five years. 9 O.W.N. 280=A.I.R. 1932 Oudh 178=139 Ind. Cas. 61.

——Art. 132—Default clause—Default in payment of interest.

A mortgage bond executed on 12th May, 1912, provided that interest would be paid annually and the principal within five years. There was a further stipulation that in the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith, the creditor would be entitled to recover his money, principal and interest in any way by filing a suit. A suit to recover the mortgage amount was filed on 9th April, 1929, and it was contended that the suit was barred as the mortgagor had made default of payment of interest in 1913 :

Held, that the mere default in payment of interest could not be regarded as an act of bad faith giving a right to the mortgagee to sue within the period of five years and the suit was not barred. A.I.R. 1931 All. 537=131 Ind. Cas. 547.

——Art. 132—Default clause—Starting point—Waiver.

In cases which are not governed by Art. 75 but by Art. 132 ; if the terms of the bond themselves provide expressly or by implication that it is open to the mortgagee to sue as soon as the first default happens or to sue later, mere abstention to sue as soon as the first default occurs does not amount to waiver. A.I.R. 1931 Pat. 285=12 P.L.T. 55=11 Pat. 112=134 Ind. Cas. 609.

——Art. 132—Default clause.

In the case of a mortgage bond with a default clause Art. 132 does not bar the mortgagee's suit if he refrains from bringing a suit or there being a default in payment of any of the instalments and prefers to sue on the expiry of the due date. A.I.R. 1931 Pat. 285=12 P.L.T. 755=11 Pat. 112=134 Ind. Cas. 609.

——Art. 132—Default clause in mortgage—Time from first default.

A mortgage-deed made the amount payable by annual instalments and provided that on failure to pay any one instalment for one year after it became due to the whole amount was to become exigible at once. On failure of such one instalment the mortgagee sued to recover his mortgage amounts but the suit was brought twelve years after the day on which the whole mortgage amount became exigible,

Held, that the suit was barred by limitation under Art. 132. A.I.R. 1923 Bom. 201 ; 37 All. 400 ; A.I.R. 1921 All. 192 ; A.I.R. 1922 All. 37 ; A.I.R. 1923 All. 1 and 24 Cal. 281, Rel. on. 32 Bom.L.R. 683=A.I.R. 1930 Bom. 297=125 Ind. Cas. 701.

——Art. 132—Default clause in mortgage—Time from first default.

In a suit on mortgage the limitation begins to run from the date of first default, and the claim to personal relief against the mortgagor is to be brought within six years under Art. 116 although the claim to realization of debt from the property can be brought within 12 years under Art. 132. The mere fact that there is longer period for one relief does not in itself extend the limitation for the other relief. Where therefore a mortgage suit is brought six years after the first default is made the claim for personal decree is barred. A.I.R. 1930 Lah. 993=129 Ind. Cas. 201.

——Art. 132—Default clause.

Where a mortgage bond contains default clause, the question arising under O. 2, R. 2, C.P. Code, as to when mortgagee becomes entitled to sue, and the question arising under Art. 132, Limitation Act, as to when the money becomes due both involve the same principle and are indistinguishable. A.I.R. 1928 Mad. 705, Not appr. 120 Ind. Cas. 353=29 M.L.W. 400=1929 M.W.N. 208=A.I.R. 1929 Mad 371=56 M.L.J. 580.

——Art. 132—Default clause—Time from first default.

The words "when the money sued for becomes due" refer to the earliest date on which it becomes due. Money sued for by a mortgagee must be considered to have become due at the earliest date when it is possible for

the mortgagee to enforce payment of it. Where the interest is to be paid annually and there is a stipulation that in case of breach of contract the mortgagee would be entitled to recover the whole mortgage money the starting point for limitation is the date of the first default in payment of interest. 37 All. 400 ; A.I.R. 1923 All 1 ; A.I.R. 1925 Oudh 502 ; A.I.R. 1927 Oudh 539 and A.I.R. 1928 Oudh 289, *Rel. on.* 6 O.W.N. 925=A.I.R. 1929 Oudh 536.

——Art. 132—Default clause—Time from exercise of option.

Where a mortgage bond contained a provision entitling mortgagee to recover the whole principal and interest " when required " in case of default irrespective of due date of payment,

Held, that the stipulation in question gave only an option to the mortgagee to call in at once the principal amount and interest due on the mortgage bond without reference to the period stipulated for payment, if there was default. It is open to him to exercise it or not as he chooses ; and the time will not run againt him unless he exercises the option. 9 L.W. 479 ; 39 Mad. 981 and 22 Mad. 20, *Rel. on.* 107 Ind. Cas. 650=A.I.R. 1928 Mad. 637.

——Art. 132—Default clause.

Quaere.—Whether a provision in a mortgage bond making amount payable before fixed term, on default of debtor in payment of an instalment makes limitation run against the mortgagee ; view in 37 All. 400 (F.B.) and A.I.R. 1923 All. 1 (F.B.) that it does even against the mortgagee's desire referred to but not discussed. 97 Ind. Cas. 650=48 All. 487=53 I.A. 187=24 A.L.J. 736=1926 M.W.N. 520=24 M.L.W. 241=31 C.W.N. 324=A.I.R. 1926 P.C. 85 (P.C.).

——Art. 132—Default clause in mortgage—Time from first default.

A mortgage-deed provided for the payment of the mortgage money with interest thereon within seven years, and further contained a stipulation that the interest accruing due for the half-year shall, if not paid up, be added to the principal amount, and that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed. It further stated that both the conditions were left entirely to the choice or option of the mortgagee, that the mortgagee had liberty to act in accordance with either of those conditions, that is to say, either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period, or to waive the default and wait for the payment of the principal and interest and compound interest agreed till the expiry of the term fixed. The mortgagor further agreed that if at the stipulated time the money remained unpaid, the mortgage-deed shall be treated as a sale-deed, and the mortgage money as the sale consideration.

Held, that Art. 132 applied and that despite the authority given by the contract, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him. A.I.R. 1923 All. 1 (F.B.) ; 30 Mad. 426 (P.C.) and 14 Cal. 730, Foll. 94 Ind. Cas. 849=48 All. 302=24 A.L.J. 295=A.I.R. 1926 All. 493.

——Art. 132—Default clause—Time from exercise of option.

Under the article it is open to the obligee to waive the benefit of the provision to recover the amount in the case of first default. Each case is to be governed by the article applicable to it. 15 A.L.J. 313, Appl. 89 Ind. Cas. 383=23 A.L.J. 896=6 L.R.A. (Civ). 532=A.I.R. 1926 All. 142.

——Art. 132—Default clause—Time from exercise, of option.

Where there was a clause in the mortgage-deed that in default of payment of interest, the whole amount, principal and interest, up to the date should become due and where on a construction of the language of the document it was clear that the option was reserved with the mortgagee to enforce or not the default clause, at his pleasure.

Held, that the period of limitation started to run not on the date of default but on the date when the money became due, under the terms of the contract, under Art. 132 of the Limitation Act. 9 L.W. 479 ; (1918) M.W.N. 586 ; (1921) M.W.N. 384 ; A.I.R. 1925 Mad. 150, Foll.; A.I.R. 1922 P.C. 412 ; A.I.R. 1922 P.C. 23 ; 37 All. 400 and 43 All. 671, Not foll. 90 Ind. Cas. 1033=49 Mad. 403=22 M.L.W. 67=A.I.R. 1926 Mad. 160=49 M.L.J. 394.

——Art. 132—Default clause—Waiver.

Article 132 does not provide for cases of waiver, and there is no case directly deciding that the principle of waiver would apply to mortgage bonds payable by instalments. But the principle indicated in Art. 75 may be applied in determining when the money sued for becomes due with the meaning of Art. 132 and so acceptance of overdue instalments gives fresh period of limitation. 79 Ind. Cas. 271=27 C.W.N. 893=A.I.R. 1924 Cal. 139.

——Art. 132—Default clause—Separate causes of action.

The covenant in the mortgage-deed as to repayments was to the effect that the mortgage money with interest would be paid by monthly instalments of not less than Rs. 20 plus interest, the payment being made on the 1st day of November, 1899, and on the first day of every succeeding month, provided that the entire advance together with interest thereon would be fully liquidated within the ten years from the date of the mortgage. It was also agreed that defaults in payment of monthly instalments and interest as agreed should constitute separate causes of action.

Held, by providing that default in the payment of each monthly instalment should constitute a separate cause of action the parties clearly intended that prompt payments should be made and that the period of limitation should run from the date of default unless the payee waived the benefit of the provisions of prompt payment in case of default. Mere forbearance to sue would not stop limitation from beginning to run. 75 Ind. Cas. 1048=A.I.R. 1924 Lah. 702.

——Art. 132—Default clause—Time from first default.

The mortgage deed provided, " in case of non-payment of interest from year to year, the creditor has the option to add the interest to the principal and to charge interest thereon at the aforesaid rate or to recover through Court principal and interest from me and hypothecated property and also from my other movable or immovable property and from my person within the stipulated period. The period fixed shall not bar the claim. In case of non-payment within the stipulated period, the creditor shall have the power to recover the money, principal and interst together with compound interest from me mortgaged property to other movable or immovable property of mine."

Held, that as soon as the first default was made a right accrued to the mortgagee to sue for the whole sum with interest. On default having been made the money certainly did become due at once ; and the mere circumstances that the creditor had the option of not calling in the money cannot wipe out the fact that the money

had in fact become due and that the first default having occurred more than twelve years before the suit, money sued for became due then and the claim for the enforcement of the charge is barred by time under Art. 132. (1842) 4 Q.B. 519 ; 37 All. 400 (F.B.), *Foll.* 69 Ind. Cas. 981=20 A.L.J. 819=45 All. 27=4 L.R.A. Civ. 3= A.I.R. 1923 All. 1 (F.B.).

——Art. 132—Default clause—Time from default

The mortgagor by a mortgage-deed of 17th July, 1901, covenanted to pay the interest year by year and the principal within three years of the date of execution, and in case of default of the payment of the annual interest, he empowered the mortgagee without waiting for the expiration of the period fixed for the payment of the principal, to realise the amount due for the principal and interest from the hypothecated property.

Held, the deed means that the privilege of deferring payment of the principal to the 17th July, 1904, was conditional on the punctual payment of the annual interest. No interest was paid at all, so the cause of action arose, on the 17th July, 1902. In these circumstances, the suit which was instituted on the 23rd February, 1916, was time-barred in the absence of acknowledgment. 67 Ind. Cas. 160=20 A.L.J. 346=A.I.R. 1922 All. 524.

——Art. 132—Default clause—Time from first default.

Under a mortgage bond it was provided that the loan was to be repaid within a certain period. It was further provided that each year the mortgagor must pay a certain sum which was a little over the annual interest. The excess over the annual interest was to be credited towards the principal, if in any year the interest was not paid, the interest might be treated as principal and would carry interst at a certain rate. If there was any defaults in payment of the sum stipulated to be paid annually, the mortgagee was to have power without waiting for the expiry of the stipulated period to set aside all the other stipulations embodied in the document and to bring a suit in Court to realise the entire principal together with interest at costs from the persons of the mortgagors and from the hypotheciated property.

Held, that Art. 132 of the Limitation Act clearly applies and time runs from the first default. 37 All. 400 (F.B.), *Foll.* 63 Ind. Cas. 441=19 A.L.J. 592=43 All. 596= A.I.R. 1921 All. 296.

——Art. 132—Default clause—Time from first default.

The bond provided that if the borrower made default in the payment of any instalment of interest the lender could sue for the whole amount, although a period was fixed for re-payment if the borrower re-paid regularly according to the terms of the bond.

Held, that limitation must run from the date of the first default. 37 All. 400, *Foll.* ; 19 A.L.J. 406, *Not foll.* 63 Ind. Cas. 886=43 All. 671=19 A.L.J. 712=A.I.R. 1921 All. 192.

——Art. 132—Default clause—Time from exercise of option.

Where the creditor was given three options in case of default in the payment of two consecutive instalments of interest, namely, either to sue for the principal and interest or to let the interest mount up or to sue for interest only.

Held, that if the creditor did not choose to exercise his option of suing for the whole amount due on default, the time did not begin to run from such abstention. 63 Ind. Cas. 25=19 A.L.J. 456=A.I.R. 1921 All. 171.

——Art. 132—Default clause—Time from exercise of option.

A stipulation in an instalment bond, securing payment of the whole amount due, on failure of any instalment has not the effect of making the whole amount secured by the bond together with interest to fall due as soon as the first default is made.

The cause of action arises from the mortgagee's exercise of his option to demand payment of the whole amount. 36 Mad. 66 and 9 L.W. 479, Foll. 62 Ind. Cas. 762= 1921 M.W.N. 884.

——Arts, 132, 135, and S. 31—Default clause—Money charged on immovable property—Covenant to sell in default of payment.

A mortgage document of the year 1879 did not in terms purport to sell the mortgaged property but only contained a covenant by the mortgagor to relinquish all rights in the property if it had been sold, in case there was default in payment of the mortgage money within the stipulated period. A suit for foreclosure in respect of such a document falls under Art. 132 read with S. 31 and not under Art. 135. 30 M.L.J. 338=34 Ind. Cas. 475.

3. Immoveable property.

——Art. 132—Immovable property.

Maintenance of widow is not a charge on immovable property within Art. 132. 12 Pat. 869=A.I.R. 1934 Pat. 99=15 P.L.T. 372=149 Ind. Cas. 738.

——Art. 132—Immoveable property—Standing trees.

Standing trees are immoveable property within Art. 132 of the Limitation Act. 1887 A.W.N. 59, foll. 9 Ind. Cas. 478 (All.).

——Arts. 132 and 120—Immoveable property—Turn of worship.

A turn of worship is not an interest in immoveable property and a suit to enforce a mortgage of such a right is governed by Art. 120 of the Limitation Act and not by Art. 132. 46 Cal. 455=22 C.W.N. 994=47 Ind. Cas. 25.

4. Instalment bond.

See also LIMITATION ACT, ART. 132—DEFAULT CLAUSE.

——Art, 132—Suit on instalment mortgage bond with exigibility clause—Cause of action, when accrues—Amendment of plaint—Permissibility.

A suit to recover money due under an instalment mortgage bond containing an exigibility clause is governed by Art. 132 of the Limitation Act, and the mortgagee has the option to choose whether he should treat the cause of action as arising on the date of default of the specified instalments when the entire amount became payable in a lump, or on the date when the last instalment fell due. If the mortgagee decides to exercise his option to enforce the exigibility clause and definitely treats the cause of action as arising on the earlier date in the plaint, he must abide by it and will not be allowed to amend his plaint so as to show the cause of action arising as accruing on the later date. I.L.R. (1948) Nag. 370= A.I.R. 1949 Nag. 103=1948 N.L.J. 546.

——Art. 132—Instalment bond—Mortgage-Instalment—When money becomes due—Construction.

A mortgage deed of 1890 provided repayment of principal in instalments with interest and further provided that in case of default in any one of the instalments the whole of the mortgage money would become due and be payable on demand,

Held, that money under the bond became due within the meaning of the Article when the first default was made in 1890 and accordingly the suit was barred. Per *Richards, C.J.*—Money under a bond becomes due as soon as it is legally recoverable quite irrespective of when the suit is instituted. Per *Nanerjee, J.*—Upon a true construction of the bond in this case, the money secured by it became due on the expiration of ten years from the date of the bond and the claim was not barred. 37 All. 400=13 A.L.J. 510=28 Ind. Cas. 910.

——Art. 132—Instalment bond—Cause of action.

When the mortgage bond contains a stipulation to pay the principal and interest at a particular time and on failure a condition that the mortgagor or was to deliver certain produce and on failure to do so, another time was fixed ; limitation runs from the second time. 50 Ind. Cas. 71 (Cal.).

——Art. 132—Instalment bond—Starting point—Option to mortgagee to sue on default of payment interest or after period fixed.

Where there is an option to the mortgagee to sue for the whole amount on default of payment of interest or to wait until the period fixed, he must sue for the whole amount when the cause of action therefor accrued first. 188 P.R.C. 1883 (F.B.), foll; 30 A. 123, disappr. 153 P.W.R. 1915=31 Ind. Cas. 808.

——Arts. 132 and 75—Instalment bonds.

The principle of Art. 75 cannot be extended to cases under Art. 132. 2 Ind. Cas. 653 (Cal.).

——Art. 132—Instalment bond—Arrears of interest—Omission to sue, if amounts to waiver.

A mere omission to sue is not sufficient proof of waiver. A mortgage bond of 11th August, 1890, provided that interest was to be payable yearly, the mortgagee being entitled to recover arrears of interest by suit and that after 10 years if the land was not redeemed, he should be entitled to recover principal and interest by suit. Only a small sum having been paid towards the interest in the early years, the mortgagee sued the mortgagor for principal and interest.

Held, that inasmuch as the plaintiff had the option of suing every year the suit was governed by Article 132 of the Limitation Act and plaintiff could not recover interest that had become due 12 years prior to the institution of the suit. 122 P.W.R. 1915=141 P.W.R. 1916 =113 P.L.R. 1916=29 Ind. Cas. 854.

——Art. 132—Instalment bond—When accrues Right of action.

A Mortgage executed in favour of a widow dated 1st November, 1888, provided for the period for the payment of the principal on 1st November, 1899, and for the annual payment of interest at 6¼ per year with a stipulation for the payment of principal and interest at 12 per annum from the date of default in payment of the interest " without raising the plea of future instalment on the liability of the mortgage property. In a suit by the assignee of the widow it having been found that the widow could assign away the interest that remained due on the date of the assignment but not the principal debt, and the interest not having been paid as provided for, it was contended that the suit was barred by limitation.

Held, (1) that the mortgagee was not bound to take advantage of the default clause and that the right of action did not consequently accrue until the date provided for payment of the principal arrived (2) The suit being governed by Art. 132 of Sch. I of the Limitation Act, it was not time-barred. 28 I.C. 910, Dis. 39 Mad. 981=4 L.W. 77=20 M.L.T. 174=(1916) 2 M.W.N. 125=31 M.L.J. 865=35 Ind. Cas. 418.

——Art. 132—Instalment bond—Whole amount on default of one instalment—Limitation.

A mortgage-deed provided for payment of the mortgage money by certain instalments and that if any default took place the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to sue for the whole amount and interest.

Held, that a suit brought by the mortgagees on the basis of the above mortgage-deed more than 12 years after the date when the first default in payment was made was time-barred under Art. 132. 5 O.L.J. 419 =47 Ind. Cas. 655.

——Art. 132—Instalment bond—Mortgage—Default in payment—Right to sue for the whole amount—Waiver, limitation.

A contract which gives the mortgagee one of two options does not bind him to either of them if he chooses to stick to either. It is open to him to waive the benefit of an acceleration if the contract leaves him such an option and that option cannot be taken away by statute unless there is anything to show that the grant of such an option is illegal or forbidden by law. 5 O.L.J. 73 =45 Ind. Cas. 613.

——Art. 132—Instalment bond—Starting point of limitation for default.

The limitation begins to run from the date of first default though the mortgage deed gave the mortgagee the option of not enforcing payment on such date. 32 Ind. Cas. 551 (Oudh).

5. Interest.

——Art. 132—Interest.

The mortgagors covenanted that they would continue to pay interest yearly and if they failed to pay, it should be added to the principal and bear compound interest. The mortgagees allowed to bring a suit to recover interest only in the alternative. The mortgagees brought a suit to recover principal plus arrears of interest.

Held, that the mortgagees can recover interest for a period of 12 years only prior to the suit, as limitation began to run again the mortgagee from the date of the first default to pay interest by the mortgagors. A.I.R. 1923 All. 1 (F.B.) ; 37 All. 400 (F.B.), Foll. 95 Ind. Cas. 249 (All.).

——Art. 132—Interest.

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary and it is most important that the general rule should not be taken in any particular. A.I.R. 1924 P.C. 183, Foll : A.I.R. 1924 Lah. 273, *Not foll., being considered as overruled by* A.I.R. 1924 P.C. 183. 92 Ind. Cas. 762=A.I.R. 1926 Lah. 530.

——Art. 132—Interest.

Claim for interest being subsidiary or incidental to the claim for the principal the security annexed to the principal must impliedly be available for the interest also. A.I.R. 1923 Nag. 181.

6. Loan in kind.

——Art. 132—Loan in kind.

Where a bond hypothecates property to secure payment of grain, the suit brought upon that bond is a suit to enforce payment of "money" charged upon immoveable property and consequently Art. 132 of the Limitation Act (1908) would be applicable, and the suit being, brought within 12 years after the accrual of cause of action would not be barred. Neither Art. 116 nor 120 of the Act applies to such a case. 24 C.L.J. 348, Not foll. 65 Ind. Cas. 697= 5 N.L.J. 224=18 N.L.R. 111=A.I.R. 1922 Nag. 23,

——Art. 132—Loan in kind.

The word "money" is comprehensive enough to include also money which has or will become due on account of non-performance of an agreement that might give rise to a pecuniary liability. A suit to recover the value of paddy charged upon immovable property is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132. 61 Ind. Cas. 539=48 Cal. 625=25 C.W.N. 57=A.I.R. 1921 Cal. 172 (F.B.).

——Art. 132—Loan in kind.

A suit to recover the value of paddy charged upon immovable property by sale of the latter is governed by Art. 132 of the Limitation Act. 48 Cal. 625, Foll. 64 Ind. Cas. 310 (Cal.).

——Art. 132—Loan in kind.

Where there is a loan of a certain quantity of paddy with a provision for payment of an additional quantity of paddy as interest, and both the principal and interest are secured on immovable property a suit to enforce the security is governed by Art. 132 of the Limitation Act. 25 C.W.N. 57 (F.B.), Foll. 64 Ind. Cas. 210 (Cal.).

——Art. 132—Loan in kind.

A debtor borrowed a quantity of paddy on a mortgage of his property, agreeing to re-pay with interest within a certain time and entitling the mortgagee to realise the money, in case of default by sale of the mortgaged property. On a default by the debtor the mortgagee sued within 12 years of the date of payment for recovery of the money.

Held, a suit was within time. 60 Ind. Cas. 715=32 C.L.J. 221.

——Art. 132—Loan in kind—Paddy charged on immoveable property—Suit for recovery—Limitation.

A suit to recover the valuable of paddy charged upon immoveable property is a suit to enforce payment of money with Art. 132 of the Limitation Act. "Money charged upon immoveable property" in Art. 132 includes money due for non-performance of an obligation when such money is secured by a mortgage of the immoveable property. 32 C.L.J. 278=25 C.W.N. 57=48 Cal. 625=61 Ind. Cas. 339=25 C.W.N. 57=A.I.R. 1921 Cal. 172.

——Art. 132—Loan in kind—Loan of paddy.

The mortgagor took a loan of paddy and agreed to repay it together with interest thereon at so many *kalthas* per year and further agreed that on default of payment within the time stipulated the mortgagee would be entitled to realize the money and costs by sale of the property mortgaged to secure the loan, and if that was insufficient to satisfy the debt, by attachment and sale of other properties of the mortgagor.

Held, a suit brought within 12 years from the due date of payment for enforcement was within time under Article 132. 32 Cal.L.J. 221=60 Ind. Cas. 715.

——Art. 132—Loan in kind—Loan of paddy—Security of land—Limitation.

A mortgage to secure a loan of paddy provided that on default of payment of the paddy the mortgagee would be entitled to attach and sell the mortgaged property and realise the dues, and if that was insufficient, would be entitled to realise them also from other moveable and immoveable property of the mortgagor and from his person.

Held, the mortgagee was entitled to recover money and not to claim specific paddy; and the mortgagee's suit to enforce the bond was governed by Art. 132. 23 C.W.N. 951=58 Ind. Cas. 995.

——Art. 132—Loan in kind—Loan of paddy—Charges on land—Limitation.

A borrowed a quantity of paddy from *B* valued in the bond at Rs. 192 agreeing to repay the paddy with interest at a certain date, failing which *B* was to be entitled to recover the price of the paddy with interest by sale of the mortgaged land.

Held, that Art. 132 of the Limitation Act applied to a suit by *B* to enforce the bond. 47 Cal. 125=23 C.W.N. 949=51 Ind. Cas. 849.

——Art. 132—Loan in kind—Loan of paddy.

Art. 132 of the Limitation Act applies to a suit to enforce a mortgage by which certain immoveable properties are hypothecated as a security for the return of paddy borrowed or of the money value thereof. 51 Ind. Cas. 241 (Cal.).

——Arts. 132, 120 and 116—Loan in kind—Payment of paddy secured on lands—Suit to enforce.

Per *Teunon*, *J.* (*Walmsely*, *J.*, contra) A suit to enforce payment of paddy secured by hypothecation of lands is governed by Art. 132 and not by Art. 116 or 120 of the Limitation Act. 29 C.L.J. 368=50 Ind. Cas. 608.

——Art. 132—Loan in kind—Interest in paddy—Nature of mortgage.

A suit on a mortgage for a sum of money on which the interest in payable in paddy is a suit to enforce a charge of money in immoveable property. 46 Ind. Cas. 384 (Cal.).

——Art. 132—Loan in kind—Mortgage on loan of rice—Suit on.

Where a mortgage deed on the loan of a certain amount of rice provided that on failure to pay the rice according to the *kist* the mortgagee would be entitled to recover money at Rs. 6 per *map* of the rice, by sale of the mortgaged property.

Held, that the suit to enforce the mortgage was a suit to recover money charged on immoveable property and is governed by Art. 132 of the Act. 22 C.W.N. 790=46 Ind. Cas. 78.

——Art. 132—Loan in kind—Interest payable in kind.

Where interest under a mortgage bond is payable in kind, a suit for the interest is governed by Art. 132 as the interest is charged upon the mortgaged premises. 2 Ind. Cas. 111 (Cal.).

7. Malikana.

——Art. 132—Under-proprietary rent in Oudh—S. 132, Oudh Rent Act (XXII of 1886).

The rent payable by an under proprietor in Oudh does not come within the term '*malikana*' occurring in the explanation, to Art. 132, Limitation Act. What an under-proprietor is liable to pay to the superior proprietor is rent and a suit for recovery of it must be brought within three years under S. 132, Oudh Rent Act. A.I.R. 1939 Oudh 57=1938 O.W.N. 1368=1939 R.D. 50=1938 A.W.R. 145=14 Luck. 467=179 Ind. Cas. 1.

——Art. 132—Malikana.

Malikana is deemed to be money charged on immovable property—Suit to recover *malikana* is governed by Art. 132, and not by Art. 131. A.I.R. 1934 Pat. 44=154 Ind. Cas. 1043.

——Art. 132—Malikana.

A suit to recover malikana though coupled with an ancillary relief of declaration of right to receive malikana, is governed by Art. 132. 96 Ind. Cas. 188=6 Pat. 51=1926 P.H.C.C. 199=A.I.R. 1926 Pat. 340.

——**Art. 132—Malikana.**

The explanation to Art. 132 does not merely refer to malikana as contemplated by the Bengal Regulations, but it also covers malikana claimable by a sardar ghatwal under a settlement between the Ghatwals and Zamindars.

A share of bastu rent payable to taraf sardar is malikana where the land is not settled with the taraf sardar but direct with the village sardar. 96 Ind. Cas. 188=6 Pat. 51=1926 P.H.C.C. 199=A.I.R. 1926 Pat. 340.

——**Art. 132—Malikana.**

Under Expl. to Art. 132 of the Limitation Act a claim to a malikana allowance must be deemed for the purpose of limitation to be a claim for money charged upon immoveable property. 35 All. 185, Foll. This principle however is subject to the proviso that the plaintiff coming into the Court to claim such malikana allowance must claim it as a charge upon the immoveable property concerned. 41 All. 259=17 A.L.J. 176=49 Ind. Cas. 737.

——**Art. 132—Malikana—Suit for malikana—Limitation.**

Suit by plaintiff to recover *malikana* allowance for 11 years and claiming decree against the property on which the allowance is chargeable is governed by Art. 132. 35 All. 185=11 A.L.J. 206 =19 Ind. Cas. 63.

——**Art. 132—Malikana—Right to get Nankar.**

Right to get cash *nankar* is a had similiar to one falling under the explanation attached to Art. 132. 19 O.C. 49=33 Ind. Cas. 461.

——**Arts. 132, 115**—Malikana, suit for—Plaint not seeking to enforce the charge. *See* LIMITATION ACT, ART. 115. 33 C. 998.

——**Art. 132—Malikana, suit for—Present and old law.**

Under the former law of limitation the right to receive *malikana* was treated as an interest in land and the claim would be barred if not made within 12 years after the last receipt by the proprietor. A plaintiff who had never been in the habit of receiving any *malikana* from the year 1845 up to the date of the suit (1902) was barred as under Act XIV of 1859 the *malikana* was treated as an interest is land and the right to sue accrued from the time of the accrual of the cause of action. A suit for *malikana* when governed by the present Limitation Act would not be barred because under Art. 142, the right to receive *malikana* is a recurring right and the right to sue accrues when the money sued for falls due. Payment of *malikana* to other maliks had not the effect of saving the plaintiff's right to recover *malikana*. (1905) 10 C.W.N. 151.

8. Redemption suit.

——**Art.** 132—Where, after prior mortgagee has obtained a foreclosure decree and taken possession without impleading the subsequent mortgagee in his suit and the latter brings a suit for redemption of prior mortgage but more than 12 years after prior mortgagee obtained possession, suit, is not barred being governed by Art. 148 and not by Art. 132. A.I.R. 1937 Nag. 205=I.L.R. (1937) Nag. 367=172 Ind. Cas. 289.

——**Art. 132—Redemption suit.**

Suit by representatives of puisne mortgagee to redeem mortgaged property from representatives of prior mortgagee is governed by Art. 148 and not by Art. 132. 1935 O.W.N. 40=A.I.R. 1935 Oudh 139=10 Luck. 531=153 Ind. Cas. 808.

——**Art. 132—Redemption suit.**

Second mortgagee authorised to redeem prior mortgage—Suit for redemption—Article 148 applied and not Art. 132. 14 L. 596=34 P.L.R. 502=A.I.R. 1933 Lah. 503=142 Ind. Cas. 805.

——**Art. 132—Redemption suit—By puisne mortgagee.**

Where the puisne mortgagee has already obtained a decree for sale on his mortgagee without making prior mortgagee a party, he is entitled to redeem a prior mortgagee in a subsequent suit and the subsequent suit is governed by Art. 148 and not by Art. 132, 14 C.W.N. 439, *Expl.* and *held rightly decided on its facts.* 119 Ind. Cas. 135=33 C.W.N. 1067=50 C.L.J. 152=A.I.R. 1929 Cal. 609 (F.B.).

——**Art. 132—Redemption suit—By co-mortgagor.**

The limitation, which governs a suit brought by a co-mortgagor to redeem the property from the hands of the other co-mortgagor, who had redeemed the entire property mortgaged, is 12 years, and this period is to be reckoned from the date, when the redeeming co-mortgagor sets up his adverse possession. 9 O.C. 91: A.I.R. 1927 Oudh 347 and A.I.R. 1927 Oudh 552, Foll. 117 Ind. Cas. 409=6 O.W.N. 305=A.I.R. 1929 Oudh 290.

——**Art. 132—Redemption suit—By puisne mortgagee.**

Where a prior mortgagee obtains a decree on hi-mortgage without impleading puisne mortgagee, purchases the property in execution and enters into possession, a suit by puisne mortgagee who also purchases the property under his decree, obtained without impleading prior mortgagee for redemption and possession against prior mortgagee is governed by Art. 132 and not Art. 148. 14 C.W.N. 439, Foll. 91 Ind. Cas. 719=A.I.R. 1926 Cal. 560.

——**Art. 132—Redemption suit—By second mortgagee.**

The second mortgagee's right of redemption cannot be considered to be a right to enforce payment of money charged upon immoveable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgagee and so Art. 132 does not apply, but under Art. 148 he has 60 years period. 14 C.W.N. 439; A.I.R. 1925 Mad. 150=A.I.R. 1925 Mad. 76, Not foll. 2 L.L.J. 419; A.I.R. 1923 All. 271; and 32 Cal. 891, Foll. 94 Ind. Cas. 284=5 Pat. 513=7 P.L.T. 788=1926 P.H.C.C. 310=A.I.R. 1926 Pat. 337.

——**Art. 132—Redemption suit—By puisne mortgagee.**

Puisne mortgagee cannot redeem prior mortgagee beyond the period fixed by Art. 132. 82 Ind. Cas. 864=20 M.L.W. 620=A.I.R. 1925 Mad. 150.

——**Art. 132—Redemption suit—By puisne mortgagee.**

The right of puisne mortgagee to redeem is only ancillary to right to work out his remedy against the mortgaged estate. He is only permitted to redeem for the purpose of working out his own security. The right of a puisne mortgagee to redeem the prior mortgagee in a case where he had not been joined in a suit on the first mortgage, is a right to redeem that mortgagee, *i.e.*, first mortgagee with a view of enforcing his own mortgagee. His right to redeem the first mortgagee must be considered to be only a means of securing the object of enforcing his own claim by sale. The proper article of the limitation Act applicable to the case is Art. 132. 14 C.W.N. 439, Foll. 84 Ind. Cas. 301=1924 M.W.N. 508=A.I.R. 1925 Mad. 76=47 M.L.J. 602.

——**Arts. 132, 134, 148—Redemption suit—Suit by prior mortgagee without making puisne mortgagee party—Sale and purchase by himself—Subsequent suit by second mortgagee and pur-**

chaser by himself—Interest acquired by latter—Suit by him to redeem prior mortgagee purchaser—Limitation.

Where a prior mortgagee sues on his mortgage without making a second mortgagee a party and in execution of the decree obtained by him purchases the property himself, and subsequently the second mortgagee also sues on his mortgage without making the prior mortgagee a party, and purchases the property in execution of his decree, he acquires by his purchase only the interest he previously possessed as mortgagee. He can seek to enforce his rights as such by suit as against the prior mortgagee-purchaser only within the period of 12 years from the due date of his own mortgage as provided in Art. 132, and he cannot claim the benefit of a fresh period of limitation running in his favour from the date of his purchase. A suit brought by him to redeem the prior mortgagee-purchaser more than 12 years after the due date of his mortgage would be barred by Art. 132. (1909) 14 C.W.N. 439=5 Ind. Cas. 877.

9. Security and indemnity bond.

——Arts. 132, 120, 83—Execution purchase subject to a charge.

Certain immovable properties were given by a judgment-debtor as security for a stay of execution of a money-decree against him pending his appeal, after the dismissal of which but before the decree was executed by sale of the properties given as securities, some of these properties were purchased in execution of another decree by another person subject to the said charge. The first decree-holder began executing his decree against other properties and the judgment-debtor brought a suit against the auction-purchaser as defendant No. 1 and the 1st decree-holder as defendant No. 2. He claimed that the property taken by defendant No. 1 be sold and the proceeds applied in satisfaction of the balance of the decree debt due to defendant No. 2 the surplus, if any, be given to him so as to cover the amount already recovered from him by defendant No. 2:

Held, (*i*) that the security given by the plaintiff in the former litigation was realisable in execution.

(*ii*) as defendant No. 1 purchased the property subject to the charge of defendant No. 2, there was an obligation on him to indemnify the plaintiff against the incumbrance;

(*iii*) the indemnity could be enforced against defendant No. 1 even though the entire debt due under a decree to defendant No. 2 had not been paid by the plaintiff:

(*iv*) the suit being in its nature a mortgage suit the article applicable was Art. 132 and not Art. 83 or Art. 120. (1933) M.W.N. 486=38 L.W. 818=A.I.R. 1934 Mad. 1=66 M.L.J. 4=57 M. 818=149 Ind. Cas. 379.

——Art. 132—Security and indemnity bonds.

A suit against the surety on a simple money bond for the payment of a mortgage debt is not a suit for payment of money charged upon immoveable property and therefore Art. 132 does not apply. 105 Ind. Cas. 168=39 M.L.T. 408=A.I.R. 1927 Mad. 945=53 M.L.J. 453.

——Art. 132—Security and indemnity bond.

Art. 132 applies to a suit by *shebait* of a *Thakur* against the *Tahsildar* of the *debutter* properties of *Thakur*, for accounts based on a security bond executed by the latter in favour of the predecessor of the plaintiff. 59 Ind. Cas. 126=24 C.W.N. 879.

——Art. 132—Security and indemnity bond.

Where a registered contract to indemnify contains a provision for a charge on immovable property, Art. 132 applies and not Art. 83 or Art. 116. 66 Ind. Cas. 554=14 M.L.W. 99=1921 M.W.N. 472=A.I.R. 1921 Mad. 514.

——Art. 132—Security bond—Shebait—Enforcement by successor—Limitation.

The plaintiff *shebait* sued defendant for accounts on a security bond executed by the defendant in favour of the former *shebait*.

Held, that the contract entered into between the parties could be sued upon by the present *shebait*. 24 C.W.N. 879=59 Ind. Cas. 126.

——Art. 132—Security bond—Suit for accounts against Gumastha—Hypothecation of property for due performance of duties—Limitation.

A suit for accounts against a *Gumastha* who has hypothecated property for due performance of duties is governed by Art. 132. 35 C. 298, Foll. 21 C.L.J. 459=24 Ind. Cas. 18.

——Art. 132—Security bond—Kabuliat by agent.

A *Kabuliat* executed by an agent providing for a charge on his immoveable property, if he makes default, does not bring a suit by principal against agent for accounts under Art. 132 but the Arts. 89, 115, and 116 apply. 14 C.W.N. 122=5 Ind. Cas. 59.

10. Start of Limitation.

——Art. 132—Suit on mortgage—Limitation—Starting point—Sale to mortgagee of property other than mortgaged in satisfaction of the mortgage—Mortgagee dispossessed of that property owing to defect in vendor's title—Cause of action on mortgage—If revived from date of dispossession.

In 1918, defendant No. 1 executed a mortgage on property *A*, in favour of plaintiff. In 1928, he executed a second mortgage in favour of defendant No. 2 on properties, *A* an *B*. In 1929, defendant No. 1 sold to the plaintiff property, *B*, in satisfaction of his mortgage. In 1936 defendant No. 2 obtained a decree on his mortgage, purchased property, *B*, in execution and obtained delivery of possession dispossessing the plaintiff, the plaintiff claimed that according to the terms of the sale-deed he was entitled to enforce his mortgage of 1918 and contended that the period of limitation should be computed under Art. 132 of the Limitation Act from the date of his dispossession.

Held, that the breach of condition of the sale-deed did not have the effect of extending the period of limitation for enforcing the mortgage and that there was no revival of the cause of action on dispossession of the plaintiff in execution of the mortgage decree. The parties could not waive the statute by agreement. An agreement by a person against whom a cause of action had arisen that he would not take advantage of the statute could not affect its operation on the origianl cause of action unless such agreement constituted an acknowledgment of liability which the statute itself provides as an exception to the rule. I.L.R. 28 Pat. 303=A.I.R. 1949 Pat. 505.

——Art. 132—Starting point—Mortgage bond—Provision for mortgagee taking possession and to restore it on payment of debt within 5 years—Mortgagor not handing over possession—Suit by mortgagee to enforce mortgage—Limitation—Starting point.

Where, under the terms of a mortgage bond, the mortgagee is to take possession of the mortgaged property and to restore possession to the mortgagor when the latter repaid the money within five years, but the mortgagor fails to deliver possession to the mortgagee, the mortgage debt becomes payable forthwith under section 68 (1) (d) T.P. Act, and the mortgagee must file a suit on the mortgage within 12 years of the date of the mortgage. The fact that the mortgage money is to be paid withi 5 years when the mortgagee is to restore possession to the mortgagor does not postpone the accrual of the cause of action. Once there is failure to put the mortgagee in possessions

as provided in the deed, his cause of action to sue arises and if he fails to sue within 12 years thereafter his suit is barred under Art. 132, Limitation Act. 48 Bom.L.R. 629=231 Ind. Cas. 15=A.I.R. 1947 Bom. 152.

——Art. 132—Starting point—Due date—Transferee from mortgagor—Suit against—Limitation—Starting point of.

The period of limitation for a suit to enforce a mortgage which is fixed by Art. 132, Limitation Act, cannot be extended by the Court on equitable considerations or on the ground of hardship. The expression "due date" in the Article can only mean the date fixed in the mortgage bond as the date by which the mortgage amount should be repaid, irrespective of the fact that the mortgagor has transferred his interests to another. The due date cannot have any reference to a transfer by the mortgagor which brings into existence before the Court a transferee who was not in existence on the date of the mortgage or on the due date. Even as against a subsequent transferee from the mortgagor, the mortgagee has to bring his suit within 12years from the date fixed,and if the suit is brought after the expiry of that period, it is barred by limitation and must be dissmissed as against the subsequent transferee. The due date is not extended merely because of the trnsfer by the mortgagor to another of his interest in the property. A.I.R. 1948 Pat. 420.

——Art. 132—Start of limitation.

Held, on facts that the limitation started from the date of the decree and the suit brought within 12 years from that date was within time. I.L.R. (1944) All. 654=57 M.L.W. 565=48 C.W.N. 830=A.I.R. 1944 P.C. 85=(1944) 2 M.L.J. 330=(1944) A.L.J. 463=1944 O.W.N. 495=1944 M.W.N. 720=71 I.A. 153 (P.C.).

——Art. 132—Start of limitation.

Instalment mortgage-bond—Mortgagee making demand of entire amount after default—Payment by mortgagor received and accepted by mortgagee—Time does not run until fresh default is made. A.I.R. 1944 Mad. 172=57 L.W. 20=(1944) 1 M.L.J. 49=1944 M.W.N. 709.

——Art. 132—Start of limitation—Penal clause.

Obiter.—In the case of a mortgage bond with a penal clause which the mortgagee may or may not enforce, the time for the enforcement of the mortgage runs on the expiry of the full term of the bond. A.I.R. 1941 Sind 158=I.L.R. (1941) Kar. 124=196 Ind. Cas. 565.

——Arts. 132, 57, 59—Start of limitation—No date of repayment mentioned mortgage by conditional sale.

In the case of a mortgage by conditional sale, where no time for payment is fixed, time under Art. 132, runs from the date of the execution of the mortgage-deed which must be deemed to be the date of payment. There is no reason to distinguish between money lent and payable on demand governed by Art. 57 or Art. 59, and money-lent and charged upon land and governed by Art. 132. A.I.R. 1941 Sind 158=I.L.R. (1941) Kar. 124=196 Ind. Cas. 565.

——Art. 132—Start of limitation—Three successive mortgages of same property in favour of same mortgagee.

The mortgagor whose property was mortgaged on March 9, 1918, effected three other successive mortgagees on the same property in favour of the same mortgagee. The third mortgage-deed, dated February 27, 1920, contained a clause: "We agree to pay up the present and the previous mortgage-money after one year." The assignee of the mortgagee instituted a suit on the basis of these mortgages on December 22, 1932, for principal, interest and costs of improvements:

Held, that the suit brought within 12 years from February 26, 1921, was within time and that the article applicable was Art 132, Limitation Act. A.I.R. 1938 Lah. 145=181 Ind. Cas. 620.

——Art. 132—Start of limitation—Successive mortgages.

The purchaser of the equity of redemption, in a suit by the first mortgagee to which the second mortgagee whose existence was not known had not been impleaded, gets afresh cause of action to enforce the mortgage against the second mortgagee from the date of the purchase in execution and, consequently, a suit to enforce the first mortgage against the second mortgagee which is instituted within 12 years of the date of purchase would not be time-barred even though it is instituted after the expiry of more than 12 years from the date of the mortgage. A.I.R. 1935 Mad. 680=157 Ind. Cas. 1050.

——Art. 132—Start of limitation—Suspension or revival of cause of action—Submersion of land.

Where the mortgaged property was diluviated for a certain period and the plaintiff in a suit on the mortgage claimed that the period of limitation was suspended during the period the land was under water:

Held, that the fact that mortgaged property went under water did not in any way affect the plaintiff's right to bring a suit upon the mortgage, inasmuch as with due regard to section 68, T.P. Act, it was open to the plaintiff to bring a suit in spite of the fact that the mortgaged property had gone under water. 6 R.P. 297=A.I.R. 1933 Pat. 693=146 Ind. Cas. 856.

——Art. 132—Starting point—Express covenant for peaceful possession—Breach before expiry of term fixed.

Where the mortgage bond stipulates for peaceful possession for a particular period and the mortgagee is dispossessed from the property, although the mortgagee may be entitled to sue for the mortgage money at the end of the term fixed, the cause of action for the suit arises on the date of dispossession and cannot be suspended till the date under the mortgage bond. 35 C.W.N. 103=129 Ind. Cas. 108=A.I.R. 1930 Cal. 703.

——Art. 132—Start of limitation—Successive mortgages payable together—Redemption of one—Suit on the second.

A mortgagor executed two successive mortgage-deeds in favour of the mortgagee, and it was intended that both the debts should be paid together. Mortgagor sued for redemption on the first deed only. Mortgagee contended that the redemption should not be granted until the debt on the other deed also was paid. The Court held that the two mortgages had not been consolidated and decreed the redemption. In his suit on second deed the mortgagee contended that time accrued for his second deed only when redemption money on first deed was paid.

Held, that as regards the other mortgage-deed time began to run only when the debt became payable according to the terms of the deed and not when money was paid in the redemption suit on the first deed. 121 Ind. Cas. 286=A.I.R. 1929 Oudh 214.

——Art. 132—Start of limitation—Mortgage payable in three years—Provision for acceleration in case of transfer—Transfer—Limitation.

A mortgage bond executed on 1st May, 1900, was payable in three years, but it was provided in it that if the mortgagor should transfer the hypothecated property the creditors shall, even before the expiry of the term, be at liberty to institute a suit for recovery of the amount of the bond with full interest. On 8th March, 1911, the mortgagor executed an hypothecation bond and hypothecated a portion of the mortgaged property. The mortgagees brought a suit on the mortgagee in March, 1924, *i.e.*, within 12 years of the date fixed for payment but after 12 years from the date of subsequent hypothecation.

Held, that the suit was within time. 108 Ind. Cas. 152=50 All. 328=26 A.L.J. 41=A.I.R. 1928 All. 159.

——Art. 132—Start of limitation—Deed of further charge providing for payment of the amount on redemption of original mortgage.

Where a deed of further charge provided that should the mortgagor fail to pay the amount within the stipulated period of one year that amount should be paid at the time of redemption of the original mortgage, the period of limitation for a suit to recover the amount of the further charge cannot commence before redemption is claimed by the mortgagor. A.I.R. 111 Ind. Cas. 106=A.I.R. 1928 Oudh 493.

——Art. 132—Start of limitation—Condition in the mortgage-deed to the effect that the mortgagor shall not be entitled to redeem and the mortgagee to bring the mortgage property to sale till a certain date.

A mortgage-deed, in 1911, provided *inter alia* that only in 1920 (and not till then) the mortgagor should satisfy his full liability by payment of the principal. It also provided that the mortagee was not to bring the property to sale on account of a default until June, 1920. It further provided that, although the mortgagor was not in any circumstances entitled to pay up the principal and redeem the mortgage before June, 1920, the mortgagee might recvoer at his wish either by mutual settlement or through a suit in Court, the entire principal with interest, compound interest and interest on interest in accordance with the conditions of the deed even before June, 1920. The mortgagee brought the suit to recover his money in May, 1926.

Held, that a suit to enforce payment of money charged upon immovable property in this suit could not have been instituted until June, 1920, for the money, the payment of which was charged upon immovable property, did not become due till June, 1920, and in these circumstances the suit was within time. A.I.R. 1923 All. 1 (F.B.), Foll. 112 Ind. Cas. 130=3 Luck 439=5 O.W.N. 385=A.I.R 1928 Oudh 289 (F.B.).

——Art. 132—Start of limitation—Mortgage-money payable on demand—Suit by mortgagee against purchaser of equity of redemption.

In a suit on a mortgage, the purchaser of the equity of redemption was not impleaded as a party. The mortgagee obtained a decree and purchased the property in execution. The purchaser of the equity of redemption filed a suitagainst the auction-purchasr (*i.e.*, mortgagee) and got a decree. More than twelve years from the date of mortgage, the auction-purchaser filed a suit against the purchaser of the equity of redemption for sale of the property in default of redemption.

Held, the mortgage-deed providing that the money was repayable on demand, limitation began to run from the date of the deed and that the suit was barred. 111 Ind. Cas. 132=6 Rang. 297=A.I.R. 1928 Rang. 189.

——Art. 132—Start of limitation—Payable on demand.

Limitation in the case of mortgage payable on demand run from the time when the loan is made and not from the date of the demand. No actual demand is necessary. 21 Mad. 139. Foll. 111 Ind. Cas. 132=6 Rang. 297=A.I.R. 1928 Rang. 189.

——Art. 132—Start of limitation—Payable at any time.

Where the mortgagor is at liberty to pay the mortgage-money at any time and the mortgagee is also equally at liberty to foreclose at any time, his limitation under Art. 132 begins to run at once. 92 Ind. Cas. 656=A.I.R. 1926 Lah. 225.

——Art. 132—Start of limitation—Security for rent.

Where properties were hypothecated to secure the payment of the rent reserved by a lease, time for enforcing the hypothecation runs from the date of the decree for rent that is obtained. 63 Ind. Cas. 504=19 A.L.J. 478=43 All. 539=A.I.R. 1921 All. 301.

——Art. 132—Start of limitation—Renewal.

A mortgage was executed in renewal of a prior mortgage and in consideration of a fresh sum to be advanced. But this sum was not advanced in fact.

Held, that Art. 132 applied to a suit to enforce the later mortgage and time runs from the date of the money became payable under the second mortgage. 4 L.L.J. 478=A.I.R. 1921 Lah. 293.

——Art. 132—Start of limitation.

Where a mortgage in plaintiff's favour provided that the mortgagor would pay off the amount on the security of the lands covered by the deed as well as on the security of certain other lands "after discharging" the mortgage thereon to a third party,

Held, that the words 'after discharging' etc., were no intended to postpone the date on which the cause of action for the enforcement of the plaintiff's mortgage was to arise. 70 Ind. Cas. 759=15 M.L.W. 289=A.I.R. 1921 Mad. 624=42 M.L.J. 339.

——Art. 132—Starting point of limitation—Mortgage payable on demand.

When a mortgage is payble on demand time begins, to run from the date of its execution, otherwise it will be barred by time. This rule applies equally to a transferee of a mortgage right. 42 All. 70=17 A.L.J. 1068=1 U.P. L.R. (H.C.) 187=53 Ind. Cas. 684.

——Art. 132—Starting point of limitation—Adverse possession against mortgagor not adverse to mortgagee—Suit for sale.

A suit for sale on the basis of a mortgage against a person who came into possession of the mortgaged propety adversely to the mortgagor subsequent to the date of the mortgage is not barred because it is brought beyond 12 years from the date of the dispossession of the mortgagor, if it is otherwise within limitation as being within 12 years from the time on which the money became due. 36 All. 567=12 A.L.J. 982=24 Ind. Cas. 997.

——Art. 132—Starting point of limitation—Mortgagee undertaking to pay prior and subsequent mortgages together—Cause of action.

Where, in spite of a condition in a subsequent mortgage that the mortgagor would pay the amount due under that mortgage along with the earlier one, the earlier mortgage only was redeemed the cause of action was held to have accrued on the date the first mortgage was redeemed. 8 A.L.J. 233=9 Ind. Cas. 482.

——Arts. 132 and 144—Starting point of limitation—Adverse possession against mortgagee—Whether adverse to the mortgagor.

Where a person has mortgaged his property with possession and the mortgagee while in possession ousted by a trespasser, the trespass cannot be adverse to the mortgagor having a right to redeem only at the end of the mortgage period. *C.* paid *B.* the amount due on an usufructuary mortgage executed by *A* with his consent and *A*, receiving something more acknowledged the receipt as a sale though unregistered. In a suit brought by *A*, against *C* 30 years from the date of payment by *C* to *B* for redemption. *Held*, the sale-deed not being registered cannot be received in evidence of ownership, that it is evidence of payment of money, that *C* had a lien for the money paid to *B* and the sum paid *A* not as a mortgagee but as alienor which he might have enforced for 12 years from the date of payment, that after 12 years *C* was a trespasser and therefore the suit by *A* against *C* is barred. 35 Bom. 438=13 Bom.L.R. 867=12 Ind. Cas. 362.

——Arts. 132, 134 and 148—Starting point of limitation.

Where a prior mortgagee sued on his mortgage without impleading the 2nd mortgaged and the property was sold in execution of the decree a suit for redemption brought by a purhaser of the mortgaged property on the second mortgage, against the purchaser of it under the first mortgage, is governed by Art. 132 and not by Arts. 134 or 148. Time runs from the date of mortgage debt and not the date of purchase. 14 C.W.N. 439=5 Ind. Cas. 877.

——Art. 132—Starting point of limitation—"Further charge"—Commencement of limitation—Terms postponing—Validity.

Where a deed of further charge provided that the mortgagor should not be at liberty to redem prior mortgages without first redeeming the deed of further charge and that if in the meantime, the mortgagee wanted money, he should recover it whenever he wanted, *Held*, in a suit by the mortgagee, to recover the amount on the deed of further charge brought 20 years after date of execution, that the money became due from the date of execution of the deed and that the suit was time-barrred under Art. 132 of th Limitation Act. 2 O.L.J. 46=18 O.C. 86 =27 Ind. Cas. 540.

11. Subrogation.

——Art. 132—Charge declared by decree in favour of subrogee—Suit to enforce charge—Starting point of limitation.

S, a creditor of *M*, the original owner of certain propreties filed a suit to recover an amount due to him and obtained an attacthment before judgment of the properties of the debtor including the suit properties, which were actually attached in March, 1917. Eventually he obtained a decree in the suit and his legal representatives brought the attached properties to sale and purchased them themelves on 8th April, 1929. *X* purchased the suit properties in 1920 from *N* to whom *M* had alienated the same in 1918. When the auction-purchaser proceeded to obtain delivery of the properties, they were obstructed by *X* who was in possession under his purhase from *N*. Meanwhile a mortgagee of *M* obtained a decree for sale and assigned the decree to *Y*. There was another mortgage also on the properties. *X*, claiming to have discharge these encumbrances urged in the execution proceedings for delivery that in any event he was entitled to remain in possession till he was reimbursed in the amount paid by him to discharge the encumbrances subsisting on the property. Ultimately on 28th August, 1931, the High Court ordered that possession should be delivered to the auction-purchasers but made a declaration that *X* had a charge for the amounts paid by him to discharge the various mortgages. In 1937 the auction-purchasers sold the property to *A* and on 13th August, 1943, *X* instituted a suit to enforce the charge declared in his favour. On a question as to limitation.

Held, that the right of *X* to subrogation became merged in the order of the High Court declaring the charge and the suit to enforce it was in time. In the circumstances it is unnecessary to deal with the difficult question whether the starting point of limitation for a suit to enforce the right of subrogation by a puisne encumbrancer is the date of payment by him in discharge of the prior encumbrance or the date when the prior encumbrance itself became payable. 226 Ind. Cas. 273 =1946 M.W.N. 366=59 L.W. 302=A.I.R. 1946 Mad. 423=(1946) 1 M.L.J. 379.

——Art. 132—Subrogation—Suit for recovery of sum paid by subrogee.

When a person becomes subrogated to the rights of the mortgagee by redeeming a mortgage he is in precisely the same position as the mortgagee and must, therefore, bring his suit for recovery of the sum paid by him within twelve years of the original mortgage. A.I.R. 1927 Mad. 631=102 Ind. Cas. 316 *still held good law and not overruled* by A.I.R. 1944 P.C. 24=212 Ind. Cas. 525 (P.C.). (1945) 1 M.L.J. 341=1945 M. W.N. 319 (2)=A.I.R. 1945 Mad. 500.

——Art. 132—Subrogation—Suit to enforce right obtained by subrogatuion—Limitation—Starting point.

The limitation for exercise of the right of subrogation is that applicable to the original incumbrance and does not depend on the date of payment. A.I.R. 1937 Nag. 402=174 Ind. Cas. 7.

——Art. 132—Subrogation—Suits to enfoce priority.

A claim by a puisne mortgagee who has paid up a prior mortgage to enforce the priority is governed by Art. 132. 8 O.W.N. 522=7 Luck. 26=A.I.R. 1932 Oudh 314=139 Ind. Cas. 626.

——Art. 132—Subrogation.

The right to enforce priority on the ground of subrogation cannot be exercised after 12 years have elapsed since the cause of action under the prior mortgage accrues. 39 Cal. 527 (P.C.); 13 N.L.R. 217,Rel. on. 127 Ind. Cas. 881=A.I.R. 1930 Nag. 166.

——Art. 132—Subrogation.

Article 132 applies to a suit by puisne mortgagee to enforce his rights acquired by him under S. 74, T.P. Act, the period of limitation being 12 years from the date the money became due. The money decreed can he said to have become due to the plaintiff and the right to forceclose in default of its payment to have arisen in his favour only when he made the payment and became entitled under the provisions of S. 74 to the rights created by the decree. A.I.R. 1925 Mad. 61, Foll: 13 N.L.R. 217, Overruled. 92 Ind. Cas. 118=8 N.L.J. 232=A.I.R. 1926 Nag. 84.

——Art. 132—Subrogation.

Subrogee to the rights of a prior mortgagee must sue within 12 years from the date on which the amount of the prior mortgage falls due. 87 Ind. Cas. 264= A.I.R. 1925 Nag. 21.

——Art. 132—Subrogation.

If the right to enforce the security in the hands of the creditor is barred by limitation an assignee of the security does not stand on any better footing. It may be that the right to enforce the security in his own name arises on the date of the assignment, but the limitation has already commenced to run and will not cease to operate just because the creditor has assigned the security to another person. For an action by a subsequent mortgagee to enforce the security of the prior mortgagee as against the original mortgagor, limitation starts from the date when the cause of action of the prior mortgagee arises against the mortgagee for the mortgage-debt and not from the date when the subsequent mortgagee pays off the prior mortgagee. For a simple action however, for reimbursement of the amount paid off the time will run from the date of payment. 39 Cal. 527 (P.C.), Foll; A.I.R. 1922 All. 153, doubted. 68 Ind. Cas. 707=3 Pat. L.T. 583=1 Pat. 780=1922 P.H.C.C. 331 =A.I.R. 1922 Pat. 499.

——Art. 132—Subrogation money charged on immoveable property—Subrogation, right by—Suit to enforce—Limitation.

Where a third mortgagee pays off the first mortgage to which he becomes entitled by subrogation and claims to enforce his priority against the mesne encumbrancer. the claim is barred if brought more than 12 years after the expiry of the term of the first mortgage. 39 Cal. 527=39 I.A. 68=11 M.L.T. 265=(1912) M.W.N. 367=9 A.L.J. 332=14 Bom.L.R. 280=16 C.W.N. 505=15 C.L.J. 411=22 M.L.J. 468=14 Ind. Cas. 496 (P.C.).

12. Suit for contribution.

——**Art. 132**—Applicability—Suit by redeeming co-mortgagor for contribution—Limitation—Starting point *See* T. P. ACT, SS. 82, 92 AND 100. A.I.R. 1950 Pat 174.

——**Art. 132—Suit for contribution—One of several heirs of mortgagor or one of subsequent transferees of mortgaged property paying off entire mortgage decree—Suit for contribution against other heirs of transferees.**

The period of limitation for a suit by one of several heirs of a mortgagor or by one of the several subsequent transferees of the mortgaged property who has paid the entire mortgage decree for contribution or re-imbursement against the other heirs or transferees in which the sale of the defendant's share in the mortgaged property is sought is twelve years from the date of payment and not from the date when the original mortgage money became payable. A.I.R. 1942 Oudh 449=1942 O.W.N. 672=1942 A.W.R. 319=19 Luck. 70=203 Ind. Cas. 285 (F.B.).

——**Art. 132—Suit for contribution.**

Equitable charge created in favour of a co-vendee paying previous mortgage of property purchased—Right to enforce the charge accrues on the date of payment—Such a suit being real one for contribution falls under Art. 132. 1938 O.W.N. 290.

——**Art. 132—Suit for contribution.**

Co-mortgagors—Redemption by one—Right of contribution against others—Such right is a charge and right to enforce such a charge accrues on the date of payment and Art. 132, applies. (1936) M.W.N. 266=43 L.W. 693=70 M.L.J. 532=A.I.R. 1936 Mad. 500=162 Ind. Cas. 828.

Art. 132—Suit for contribution. Art. 132 of Limitation Act applies to a suit for contributors of maintenance charged on two properties owned by plaintiff and defendant. 1936 O.W.N. 982.

——**Art. 132—Suit for contribution—Redemption by co-mortgagor—Enforcement of charge against other—Time when runs.**

Mortgage not possessory—Redemption by one of several mortgagors—Charge accrues in favour of mortgagor who redeems—Such mortgagor is entitled to enforce charge against co-mortgagors—Right to enforce it accrues on the date of payment, the claim being governed by Art. 132. (1932) A.L.J. 19=A.I.R. 1932 All. 250=137 Ind. Cas. 86 (2).

——**Art. 132—Suit for contribution—Suit for recovery of payments made by darpatnidar.**

A suit for recovery of payments made by a *darpatnidar* which he need not have made to the *zamindar*, the usufruct of the property being insufficient, but which he made to save the *patni mahal* is governed by Art. 132 and not by Arts. 61, 99 or 120. A.I.R. 1931 Cal. 493 =35 C.W.N. 678=134 Ind. Cas. 75.

——**Art. 132—Suit for contribution—Co-mortgagors.**

The case of *Raj Kamini Devi* v. *Mukunda Lal Bandapadhya*, 57 I.C. 863 : A.I.R. (Vol. 8) 1921 Cal. 166, was wrongly decided in so far as it was held in that case that a suit by a redeeming co-mortgagor for contribution instituted beyond the period within which the original mortgagee could institute his suit on the mortgagee had it not been redeemed was barred. A.I.R. 1931 Cal. 251=35 C.W.N. 409=53 C.L.J. 154=58 C. 1167=130 Ind. Cas. 889.

[Overrules—A.I.R. (Vol. 8) 1921 Cal. 16=57 Ind. Cas. 868.]

——**Art. 132—Suit for contribution—Co-mortgagor.**

A claim to enforce the co-mortgagor's charge is governed by Art. 132. The starting point for limitation is the time when the money sued for becomes due, that is, when payment was actually made to the mortgagee. 7 O.W.N. 401=5 Luck. 727=125 Ind. Cas. 402=A.I.R. 1930 Oudh 260.

——**Art. 132—Suit for contribution.**

The right to enforce a charge created in favour of a co-mortgagor by virtue of his satisfying the mortgage arises on payment and under Art. 132, he has 12 year within which to enforce the charge. 109 Ind. Cas 38=50 All. 569=26 A.L.J. 298=A.I.R. 1928 All. 241

——**Art. 132—Suit for contribution—Taxes on property—Co-sharer paying Government Revenue.**

One co-sharer paying the Government revenue for whole estate in order to save the estate from being sold is entitled to contribution but there is no charge created in his favour over the property of the defaulting co-sharer. Article 99, Limitation Act, and not Art. 132 will consequently be applicable. The case bears no analogy to the "salvage lien" as the very essence of salvage service is that it must be voluntary. 14 All. 273 (F.B.) ; 14 Cal. 867 (F.B.) (1855) S.D.A. 44 ; (1856) S.D.A. 867; (1859) S.D.A. 515; 8 Cal. 402 and 26 Bom. 437, Foll ; 26 Mad. 686 (F.B.) ; 14 B.L.R. 155 ; 6 Cal. 549 ; 9 Cal. 377 ; 11 Bom. 313 and 11 Mad. 452, Not Foll. 111 Ind. Cas. 84=7 Pat. 613=9 P.L.T. 573=A.I.R. 1928 Pat. 641.

——**Art. 132—Suit for contribution—Co-mortgsgor.**

The money paid by a co-mortgagor in redeeming the entire property mortgaged cannot be considered to have become due before it has been actually paid by the said co-mortgagor, and the period of limitation should be considered to commence from the date when he actually makes the payment and not from any earlier period. A.I.R. 1925 Oudh 613, Foll. A.I.R. 1921 Cal. 166, Diss. from. 95 Ind. Cas. 302=4 O.W.N. 783= A.I.R. 1927 Oudh 552.

——**Art. 132—Suit for contribution—Co-sharer paying Government Revenue.**

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and therefore a suit by him brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act, even where the case is governed by the Madras Estates Land Act. 26 Mad. 686 (F.B.), Foll. 90 Ind. Cas. 551=1925 M.W.N. 722=23 M.L.W. 178=A.I.R. 1926 Mad. 141=49 M.L.J. 117.

——**Art. 132—Suit for contribution—Co-mortgagor.**

One of several mortgagor's paying off the amoun of arrears of *guzara* charged upon immoveable property and decreed by Court has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expense properly incurred in thus redeeming the property and obtaining possession. 28 A. 743 (P.C.) and 26 A. 407, Foll.

The limitation to enforce such a charge against co-mortgagors begins to run from the date of payment to the mortgagee and not from the date of the mortgage because he is not subrogated to the rights of mortgagee. Such a charge cannot however be enforced as against the auction-purchaser where he is a *bona fide* purchaser, for value without notice. 1 O.L.J. 43, Foll. 92 Ind. Cas. 559=12 O.L.J. 313=2 O.W.N. 413= A.I.R. 1925 Oudh 613.

——**Arts. 132, 99**—Suit for contribution—Annuity charged on land. *See* ART. 99. (1906) A.W.N. 216= 28 All. 743.

——Art. 132—Suit for contribution—Government revenue—Payment by one shareholder—Charge—Limitation for suit to enforce charge.

A share-holder paying Government revenue due on land has a charge on the land for the amount so paid to the extent to which he is entitled to contribution from the other shareholders and a suit to enforce such charge is governed by Art. 132. 26 M. 686, Foll. (1905) 15 M.L.J. 219=28 M. 493.

——Art. 132—Suit for contribution by one of several mortgagors.

Where a person who had a mortgagor's interest in a decree for sale on a mortgage satisfied the decree and then brought a suit for contribution against his co-mortgagors without having obtained possession of the mortgaged property.

Held, that the suit is governed by Art. 132, 1904 A.W.N. 3=26 A. 227.

——Arts. 132, 147—Suit for contribution by one of several mortgagors—Charge, suit to enforce—Limitation.

A mortgagor who has paid out of his own pocket that portion of the mortgage money which his co-mortgagor was bound to pay ,acquires a charge on the mortgaged property, and his suit to enforce the same against the co-mortgagor is governed by Art. 132. He is not a mortgagee within the meaning of Art. 147. 12 A. 110 and (1904) A.W.N. 3, Foll. (1904) 1 A.L.J. 276.

13. Taxes on property.

——Art. 132—Taxes on property—Applicability.

Article applies to both charges created by agreement and by operation of law—House tax and general sanitary cess imposed in form of rate on land or building under Bombay District Municipal Act is charge by operation of law on building or land in respect of which it is levied—Claim to enforce payment of money due on account of aforesaid taxes is governed by Art. 132. 44 Bom.L.R. 849=A.I.R. 1943 Bom. 21=204 Ind. Cas. 352.

——Art. 132—Taxes on property.

A suit under S. 177, U. P. Municipal Act to enforce charge for taxes comes within the scope of Art. 132 and not Art. 120. A.I.R. 1939 All. 510=1939 A.W.R. 261.

——Art. 132—Taxes on property.

A suit to recover property tax under the Madras District Municipalities Act by enforcing the charge created in respect of such tax by S. 85 of the Act is governed by the period of limitation prescribed by S. 345 of the Act and not by Art. 132, Limitation Act. 41 L.W. 457=(1935) M.W.N. 379=A.I.R. 1935 Mad. 378=160 Ind. Cas. 254.

——Art. 132—Taxes on property.

A suit for the recovery of a sum of money due on account of house-tax and water-tax under U. P. Municipality Act is a suit to enforce payment of money charged upon immoveable property within the meaning of Art. 132, Limitation Act. 42 Cal. 625, Rel. on. 123 Ind. Cas. 379=A.I.R. 1930 All. 530.

14. Third party paying mortgage.

——Art. 132—Third party paying mortgagee.

L purchased an oil-well subject to a mortgage in favour of *B* and right of pre-emption in favour of *N*. He made payments to the mortgagee *B* in part satisfaction of the mortgage-decree on the oil-well, such payments being necessary to save the oil-well,

Held, that *L* had a charge for the amounts paid, as against *N* who exercised his right of pre-emption as well as against persons claiming through *N*.

Held, further that Art. 132 applied. 79 Ind. Cas. 766=1 Rang. 714=A.I.R. 1924 Rang. 204.

——Art. 132—Third party paying mortgage.

When one person pays off a debt which another is bound to pay, the ordinary relief that the Courts can give is a personal decree, against the defendant for money had and received as S. 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. 74 Ind. Cas. 416=17 M.L.W. 254=A.I.R. 1923 Mad. 392.

——Art. 132—Third party paying mortgage.

Where a third party has advanced money to the mortgagor to pay off the mortgage on the understanding that a further mortgage would be executed by the mortgagor, the third party has no legal title to the property, and no charge to enforce within the meaning of Art. 132. He is only entitled to a declaration of his right to have a mortgage executed in his favour. His suit is therefore governed by Art. 120. 60 Ind. Cas. 903=45 Bom.597=23 Bom.L.R. 84=A.I.R. 1921 Bom. 182.

15. Usufructuary mortgage.

——Art. 132—Usufructuary mortgage—Mortgagee entitled but not bound to enter into possession of mortgaged property—Mortgagee permitting mortgagor to receive rent and profits—Cause of action.

Where a mortgagee is not bound by the terms of the mortgage to enter into possession of the mortgaged property and to apply the rents and profits thereof towards the payment of the debts though he has power to do so, the mere fact that the mortgagee permits the mortgagor to receive the rents and profits from a certain years does not give rise to a cause of action. No specific time having been fixed for the payment of the debt the money does not become due and the cause of action does not arise until demand for the payment of the mortgage debt is made by the mortgagee and is refused by the mortgagor. L.R. 57 I.A. 194=34 C.W.N. 854=53 M.L.J. 379=126 Ind. Cas. 417=54 Bom. 495=32 Bom.L.R. 1527=1930 A.L.J. 1338=52 C.L.J. 539=A.I.R. 1930 P.C. 188 (P.C.).

——Art. 132—Usufructuary mortgage.

Where a usufructuary mortgagee who is dispossessed of the mortgaged property owing to sale for arrears of revenue afterwards sues for mortgage money or in the alternative for possession, his suit is governed by 12 years' rule of limitation and not by six years rule. 8 Pat. 569=A.I.R. 1929 Pat. 209.

——Art. 132—Usufructuary mortgage—Simple mortgage usufructuary.

Where the mortgage is a combination of usufructuary with simple mortgage, a suit to recover mortgage money from lands brought after 12 years of the execution of the mortgage-deed is barred by Art. 132. A.I.R. 1929 P.C. 139, Rel. on. 120 Ind. Cas. 91=A.I.R. 1929 Sind 235.

——Art. 132—Usufructuary mortgage.

Where under a usufructuary mortgage the mortgagee was to retain possession of the land until repayment of the mortgage money and to appropriate the usufruct in lieu of interest and he continued in possession but was dispossessed by defendant mortgagor.

Held, that limitation for mortgagee's suit for possession or mortgage money began from the date of dispossession. 112 Ind. Cas. 655=8 Pat. 68=10 P.L.T. 41=A.I.R. 1928 Pat. 582.

——Art. 132—Usufructuary mortgage.

Where a mortgagor covenanted to deliver possession over the mortgaged property, but the mortgagee did

not obtain possession, a suit to recover money is governed by Art. 132. 95 Ind. Cas. 100=A.I.R. 1926 All. 551.

——Art. 132—Usufructuary mortgage—Dispossession on different dates.

The plaintiff took usufructuary mortgage knowing that some of the villages were already mortgaged. The villages, subject to the prior mortgage, whose possession he had never obtained were sold in execution of a decree of the first mortgagee. He however was content to have the remaining villages as his security. Subsequently he was dispossessed of the remaining villages upon which he depended for security and therefore instituted a suit for mortgage money.

Held, the suit was not barred by limitation. The plaintiff's cause of action arose only when he was dispossessed of the remaining villages which he has accepted as a sufficient security on his mortgage. 64 Ind. Cas. 768=44 All. 77=19 A.L.J. 827=A.I.R. 1922 All. 197.

——Art. 132—Usufructuary mortgage.

Where there is no covenant to pay, on the part of the mortgagor, the right of the mortgagee to sue under S. 68 (*c*) of the Transfer of Property Act arises when the mortgagor fails to deliver possession of property to the plaintiff. 41 Mad. 259 (F.B.), Foll. 62 Ind. Cas. 723=13 M.L.W. 434=A.I.R. 1921 Mad. 636.

——Art. 132—Usufructuary mortgage.

Where a usufructuary mortgage provides that if the mortgagee is dispossessed, he should be entitled to recover the amount advanced by him, and where the mortgagee does not obtain possession of the property, he is entitled to recover the mortgage-money with interest as stipulated in the bond. Such claim is not with respect to a personal covenant but is to enforce the charge upon the immoveable property under the covenants in the bond itself. Such a suit is governed by Art. 132 of the Limitation Act.

A claim for interest in such a suit is not a claim for damages and Art. 132 and not Art. 116 applies to such a claim. But where the claim is interest at enhanced rate covenanted for in case of dispossession, Art. 116 applies. 63 Ind. Cas. 297=2 P.L.T. 229=A.I.R. 1921 Pat. 403.

16. Vendor and vendee.

——Art. 132—Starting point—When "the money, becomes due"—Vendor's lien under S. 55 (4) (b), T.P. Act—Enforcement of—Suit for—Starting point of limitation—Date of sale—"Contract to the contrary"—What is.

Under S. 55 (5) (*b*), unless there is a contract to the contrary, *i.e.*, unless the seller has agreed to postpone the payment of the purchase-money or part of it either to himself or to a third party, to a future date the amount is payable to him or to such third party on the date of the sale and "becomes due" on that date, within the meaning of Art. 132, Limitation Act which applies to a suit to enforce the lien for unpaid purchase-money, and the statutory charge in respect of the unpaid purchase money must be enforced within 12 years from the date of the sale. When there is no time fixed is the sale-deed for the payment of the amount left with the vendee for payment to the creditor of the vendor, nor is any option given to the vendor to make the payment whenever it suits him, there is no contract to the contrary and the buyer under S. 55 (5) (*b*) is bound to pay the money to the creditor at the time and place of computing the sale. The money in such a case "becomes due" of the date of the sale, and a suit if not brought within 12 years of the date of the sale-deed, would be barred under Art. 132, Limitation Act. 27 Pat. 898.

——Art. 132—Vendor and vendee—Unpaid vendor's lien under S. 55, T.P. Act.

An unpaid vendor is given a lien on the property by S. 55, T.P. Act, and that lien continues while the vendor has an enforceable claim against his vendee in respect of the purchase consideration. Hence where in part payment of the purchase consideration the vendee executes a promissory note in favour of the vendor which is kept alive by part payments, a fresh period of limitation runs from the date of the last payment and the unpaid vendor can enforce his statutory lien under Art. 132, Limitation Act within 12 years from that date. A.I.R. 1943 Mad. 28=1942 M.W.N. 631=55 L.W. 740=(1942) 2 M.L.J. 482=I.L.R. (1943) Mad. 405=205 Ind. Cas. 293.

——Art. 132—Vendor and vendee—Statutory charge under S. 55 (b), T.P. Act.

Where a part of purchase-money is left with vendee by the vendor at the time of the sale of his property to him, with a direction that the vendee should pay off a prior encumbrance, a statutory charge for the implied purchase money is created in favour of vendor under S. 55 (4), T.P. Act, and the charge can be enforced for the payment of the amount due if the suit is within 12 years the original sale-deed, for the charge is a statutory charge created by the document and time would begin to run for enforcement of such a charge from the date of that document. A.I.R. 1936 All. 870=1936 A.W.R. 1197=166 Ind. Cas. 908.

——Art. 132—Vendor and vendee.

Vendor can enforce his charge against property in the hands of vendee within 12 years of the date of sale-deed under Art. 132. A.I.R. 1934 All. 525=(1934) A.L.J. 682=3 A.W.R. 697=148 Ind. Cas. 639.

——Art. 132—Vendor and vendee.

Vendor and purchaser—Direction to pay prior mortgage—Default—Suit against vendee—Suit regarding charge governed by Art. 132, and regarding personal claim by Art. 116. A.I.R. 1933 Lah. 109=34 P.L.R. 156=14 L. 380=141 Ind. Cas. 435.

——Art. 132—Vendor and vendee.

Amount left by vendor with vendee for payment to previous creditors is a portion of the unpaid purchase-money and the suit to recover the same is governed by Art 132. 9 O.W.N. 1032=8 Luck. 185=A.I.R. 1933 Oudh 33=141 Ind. Cas. 468.

——Art. 132—Vendor and vendee—Compensation to vendee.

Article 132 is restricted to cases in which payment or compensation is sought to be enforced out of the property on which it is charged, and where the plaintiff is only seeking a personal remedy. Thus where the vendee was to receive compensation from the vendor if on partition less area fell to the share of the vendor, a suit by the vendee is not governed by Art. 132. 72 Ind. Cas. 897=A.I.R. 1923 Lah. 23.

——Art. 132—Vendor and vendee—Purchase-money.

Suit to enforce statutory charge for unpaid purchase-money should be brought within 12 years of the sale unless parties have by proper instrument clearly expressed their intention to extend the period. 82 Ind. Cas. 481=20 M.L.W. 484=1924 M.W.N. 75=A.I.R. 1924 Mad. 854.

——Arts. 132, 111—Vendor and vendee—Vendor's lien—T.P. Act, S. 55.

The charge which a vendor obtains under S. 55, T.P. Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor The article applicable to a suit to enforce the statutory lien is Art. 132 and not Art. 111 and the vendor has for such a suit 12 years from the date of sale. (1905) 29 M. 305.

[This view has been affrmed by the Legislature by the change in Art. 111 Ed.].

17. Miscellaneous.

——Art. 132—Miscellaneous.

English Limitation Act or decisions thereunder do not apply to words of the article (*obiter.*) 99 Ind. Cas. 650=48 All. 457=53 I.A. 187=24 A.L.J. 73 =1926 M.W.N. 52 =24 M.L.W. 241=31 C.W.N. 324=A.I.R. 1926. P.C. 85 (P.C.).

——Art. 132—Miscellaneous—Recurring liability

A suit for recovery of a recurring liability arsing every year is not barrd by mere failure to sue for the money for any particular year for more than 12 years. 91 Ind. Cas 411=A.I.R. 1926 Cal. 552.

——Art. 132—Miscellaneous—Dekk. Agri. Rel. Act, S. 48.

The limitation prescribed for a suit or application of the kind referred to in S. 48 of the Dekkan Agriculturists Relief Act is 12 years. 13 Bom.L.R. 284=10 Ind. Cas. 910.

——Art. 132—Miscellaneous—" Actual demand not necessary."

Actual demand is not necessary under Art. 132 of Limitation Act evern though money is made payable, on demand" 18 M.L.T. 459=(1916) 1 M.W.N. 121=31 Ind. Cas. 335.

——Art. 132—Miscellaneous—C.P. Tenancy Act. S. 38.

Art 132 covers a suit by a first mortgagee against a second mortgagee for dues from the mortgagor, where the second mortgagee had foreclosed the mortgage and then sold it to the Maiguzar under S. 38, C.P. Tenancy Act. 12 N.L.R. 90=34 Ind. Cas. 704.

——Arts. 132 and 135—Miscellaneous—Foreclosure suits—Limitation , prior to Act 9 of 1877—Act 15 of 1871, Arts. 132 and 135.

Foreclosure suits were unknown before the Act 15 of 1877 and suits by a mortgaged for possession by foreclosure were treated either as an enforcement of a charge under Art. 132 or as suits for possession of the mortgaged property under Art. 135 of Act 9 of 1871. 16 O.C. 157=20 Ind. Cas. 465.

——Arts. 132, 147, Ss. 1, 31—Miscellaneous—Applicability of S. 31 to appeal pending before High Court on remand by Privy Council.

A case pending before the High Court on remand by the Privy Council by reason of the latter holding that Art. 147 only applied to English mortgages at the time of the passing of Act of 1908, falls within the benefit of S. 1 of Act, 9 of 1908. (1908) 32 M. 312=5 M.L.T. 287=4 Ind. Cas. 501. After remand by P.C. in 30 M. 426=34 I.A. 187, Supra.

——Art. 132—Miscellaneous—Special Bench, powers of.

A special Bench to which a question involving the reconsideration of a decision of a Full Bench was referred cannot consider the correctness or otherwise of a decision of a Full Bench on another question not referred and which was raised in the course of the argument before the Special Bench. In the present case which came from the Sambalpur District.

Held, that the Full Bench ruling in 14 C. 730 applied, and that the suit which was for the foreclosure of a mortgage by conditional sale was governed by Art. 132 and not by Art. 147, and having been instituted more than 12 years after the due date was barred by limitation. The Special Bench gave effect to the plea of limitation although it was never raised in either of the Courts below nor even in the memorandum of appeal to the High Court, and was taken for the first time before the Special Bench, the majority being of opinion that the point arose on the face of the plaint and there was no question of fact to be enquired into to enable the Court to dispose of it. (1907) 11 C.W.N. 959=6 C.L.J. 237=34 C. 941 (S.B.).

——Art. 133—Applicability.

Where the property transferred is claimed in the suit by a Mahant who alleges that it belongs to a religious institution, the rule of limitation governing the suit depends upon the nature of the property. The absence of finding as to whether the property belongs to the religious institution or is the private property of the alienor makes judgment of lower Court defective and case should be sent back for retrial. A.I.R. 1930 Lah. 191.

——Art. 133—Pledge by trustee.

Where an executor pledges trust property with a Bank and the beneficiary sues the Bank for recovery thereof.

Held, that Art. 133 does not apply as it does not include a case of pledge or mortgage. 67 Ind. Cas. 761=24 Bom.L.R. 513=A.I.R. 1923 Bom. 155.

——Art. 134.

Synopsis.

1. Applicability.
2. Assignment of mortgage.
3. Burden of proof.
4. Date of transfer.
5. Foreclosure decree.
6. Good faith.
7. Involuntary transfer.
8. Mortgage by conditional sale.
9. Permanent lease of trust property.
10. Possession under transfer.
11. " Purchased."
12. Redemption by one mortgagor.
13. Scope.
14. Starting point.
15. Sub-mortgage.
16. Transfer of absolute right.
17. Trust property.
18. Miscellaneous.

1. Applicability.

——Art. 134—Applicability.

The sections have no retrospective application. 11 P.L.T. 403=A.I.R. 1930 Pat. 455.

——Art. 134—Applicability—(Before amendment of 1929)—Transfer under which possession is not taken by transferee—Art. 134 does not apply. A.I.R. 1940 Mad. 920=(1940) M.W.N. 907=(1940) 2 M.L.J. 409.

——Art. 134—Applicability—Simple mortgage executed by usufructuary mortgagee.

A simple mortgage executed by a usufructuary mortgagee on an assertion that he is the full owner of the property mortgaged, does not come within Art. 134 of the Limitation Act. Under this article, the transfer by the mortgagee must be a transfer with possession to the transferee, at least a transfer which would entitle the transferee to get possession from his vendor. 52 C.W.N. 443=A.I.R. 1947 Cal. 461.

——Art. 134—Applicability.

" Transfer " in column three refers to transfer of possession and not merely to conveyance of title—Transfer by mortgagee—Possession not given on date of transfer—Suit for possession and redemption by vendee of original mortgagor—Art. 134 does not apply. (1938) M.W.N. 117=(1938) 1 M.L.J. 101=A.I.R. 1938 Mad. 394=180 Ind. Cas. 468.

——Art. 134—Applicability.

The transfer of property mortgaged contemplated by Art. 134 is something other than an express transfer of the original mortgage. Art. 134 contemplates a transfer by a mortgagee purporting to transfer a larger interest than that given by the mortgagee or at any rate an interest unencumbered by a mortgage. 117 Ind. Cas. 22=51 All. 367=1929 A.L.J. 566=56 I.A. 192=33 C.W.N. 761=31

Bom.L.R. 854=30 M.L.W. 76=50 C.L.J. 74=1929 M.W.N. 676=A.I.R. 1929 P.C. 158 (P.C.).

——Art. 134—Applicability.

Art. 34 applies even to transfers by trustee's and mortgagees and there is no distinction between transfers by these two classes. 118 Ind. Cas. 682=A.I.R. 1929 Nag. 267.

——Art.134—Applicability—Successive transferees.

Art. 134 is limited to cases where the property mortgaged has been transferred by the mortgagee for a valuable consideration. That article applies only to cases where a transferee for value from a mortgagee, takes that which is *de facto* a mortgage, upon a representation made to him and in the full belief that it is not a mortgage but an absolute title. The article cannot protect persons who are not transferees from the mortgagees, but are transferees from persons other than the mortgagees or their heirs, *e.g.*, transferees from mortgagee's transferees.

Any person who seeks the protection of Art. 134 must strictly bring his case within that article. 99 Ind. Cas. 280=A.I.R. 1927 All. 177.

——Art. 134—Applicability.

What has to be determined in a case where Art. 134 is relied on by one of the parties is whether any title adverse to that of the original mortgagor has been set up by the deed of transfer concerned and Art. 134 does not apply where the mortgagee only transfers his mortgagee right to a third person. 103 Ind. Cas. 255=A.I.R. 1927 All. 689.

——Art. 134—Applicability—"Transfer" implies transfer with possession.

"Transfer in Art. 134 implies that the transfer must be a transfer with possession, and unless the transferee has been in possession for twelve years a suit against him would not be barred under Art. 134. If the transferee did not obtain possession in pursuance of the transfer, Art. 134 would not apply at all. 40 Mad. 104 (F.B.), Foll. 97 Ind. Cas. 922=1 Luck. 529=3 O.W.N. 693=A.I.R. 1926 Oudh 594.

——Art. 134—Applicability.

Art. 134 controls both Art. 140 and 148. 92 Ind. Cas. 63=47 All. 803=23 A.L.J. 691=A.I.R. 1925 All. 707.

——Art. 134—Applicability.

Art. 134 applies only to cases where there is a transfer of possession, and the transferee can claim the benefit of the law of limitation only when he as enjoyed twelve years' possession. 23 Bom. 614; 29 All. 471, Foll. 90 Ind. Cas. 1011=3 Rang. 367=A.I.R. 1925 Rang. 377.

——Art. 134—Applicability.

Art. 134 is intended to protect the rights of persons in possession who might have obtained by transfer from the mortgage larger rights than what he possessed for valuable consideration and who remained in unqualified enjoyment for over 12 years. But the transfer must be with possession of followed by possession with its necessary incidents or ingredients. 18 A.L.J. 995=A.I.R. 1921 A. 389.

——Art. 134—Applicability.

Art. 134 has no effect where a mortgagee transfers his rights as such but has effect only where he purports to transfer proprietary rights. 2 O.L.J. 483=82 Ind. Cas. 314.

——Art. 134—Applicability—Transfer of mortgagee's right.

The article does not apply where the right of a mortgagee and not full ownership is transferred. 97 P.W.R. 1913=137 P.L.R. 1913=19 Ind. Cas. 122.

——Art. 134—Applicability.

Art. 134, only applies in cases where the purchaser is the purchaser of an absolute title and not merely of the mortgagee's right in the land. 16 M.L.J. 358=29 M 501=1 M.L.J. 290.

2. Assignment of mortgage.

——Arts. 134 and 148—Assignment of mortgage—Suit for redemption of mortgage.

The plaintiff's father mortgaged, in 1882 certain land with possession. The original mortgagees remortgaged the lands to defendants in 1883. The plaintiff sued to redeem his mortgage in 1916, when the defendants resisted on the ground that the plaintiff's claim against them was barred under Art. 134, Limitation Act; *Held*, that the suit was quite in time for it was governed by Art. 148. (*Per Maclead, C.J.*).—A suit to recover possession is not the same thing as a suit to redeem, the period of limitation for which it is sixty years under Art. 148, will not, defeated merely because his mortgagee transfers the mortgage to another person. 44 Bom. 614=22 Bom.L.R. 802=57 Ind. Cas. 568.

3. Burden of proof.

——Art. 134—Burden of proof—Initial onus of proof of time of knowledge of transfer.

Under Art. 134, the onus initially lies on the plaintiff to prove as to when he came to know of the transfer. He must establish that he had knowledge of the transfer within 12 years of the suit. If he shows this, the onus is shifted to the transferee to prove that the transfer was before 12 years of suit and that the plaintiff had knowledge of it. A.I.R. 1942 Pesh. 39=200 Ind. Cas. 732.

——Art. 134—Burden of proof of date of knowledge of transfer.

The question whether notice, actual or constructive, on the part of the transferee that the transferor held only mortgagee rights in the property transferred, is wholly irrelevant for the purpose of Art. 134. The transferee is not bound to satisfy himself that his transferor's title is that of an absolute owner.

Where the right of a mortgagor to redeem the mortgaged property has been extinguished by Art. 134, the amendment introduced in 1929 will not revive the right.

In a suit governed by Art. 134, as it stood before 1929, the onus is on the plaintiff to allege and prove that he knew of the transfer only within 12 years of the suit. 9 O.W.N. 835=A.I.R. 1933 Oudh 38=140 Ind. Cas. 182.

4. Date of transfer.

——Art. 134—Date of transfer.

Under the Art. 134 date of transfer is the date of the transfer of the property or title. If the transfer is by registered instrument, that date is the date of the instrument. 24 C.W.N. 690=58 Ind. Cas. 705.

5. Foreclosure decree.

——Art. 134—Foreclosure decree—Property purchased by defendant—Puisne mortgagee suing—Limitation.

A person who had purchased a property in a foreclosure decree obtained by a prior conditional mortgagee without the puisne mortgagee being impleaded as a party in that suit cannot in a suit by the latter against him plead Art. 134 as he is not a transferee from a mortgagee. 36 All. 327=12 A.L.J. 457=23 Ind. Cas. 559.

6. Good faith.

——Art. 134—Good faith—Question of bona fides or notice of transferee.

The meaning of Art. 134 is clear. No question of *bona fides* or notice of the transferee arises under it. It is the

first principle of the interpretation of statutes that nothing extraneous should be considered in interpreting a statute when its meaning is unambiguous on the face of it. A.I.R. 1942 Pesh. 39=200 Ind. Cas. 732.

——Arts. 134, 148—Good faith—Transferee not acting in good faith.

In the case of transfer by a mortgagee, only a transferee with a *bona fide* belief at the time of the conveyance can claim the protection of Art. 134, in other case the suit to redeem against him is governed by Art. 148. 32 P.L.R. 359=A.I.R. 1931 Lah. 464=132 Ind. Cas. 184.

——Art. 134—Good faith—Bona fides **of transferee, whether material.**

Art. 134 is not restricted in its application to transferees in good faith and there is no distinction in this respect between transferees from trustees and transferees from mortgagees.

Art. 134 is, therefore, applicable to a suit to recover property mortgaged and afterwards transferred by the mortgagee for valuable consideration even if the transferee is not a *bona fide* purchaser. A.I.R. 1931 Lah. 129=32 P.L.R. 17=130 Ind. Cas. 780.

——Art. 134—Good faith—Bona fides **of transferee, whether material.**

Per *Costello, J.*—In the case of a transfer of immovable property by a mortgagee for valuable consideration, the absence of *bona fides* on the part of the transferee is immaterial. Therefore, if the transferee has merely constructive notice of the defect of the transferor's title, he is not precluded from taking shelter behind the provisions of Art. 134.

Quaere.—Whether actual knowledge on the part of transferee is immaterial.

Per *Suhrawardy, J.*—Art. 134 applies both to transferees from trustees as from mortgagees provided the transfer was for valuable consideration and of absolute title and it is immaterial for the purpose of applying Art. 134, whether the transferee had notice or not. 58 C. 234=A.I.R. 1931 Cal. 113=34 C.W.N. 961=130 Ind. Cas. 275.

——Art. 134—Good faith—Want of good faith.

A suit for redemption by a purchaser of the interest of a mortgagor against the transferee of the rights of the mortgagee with notice of the right of the mortgagee is not governed by Art. 134 since the article is designed for the protection of the transferee who has been made to believe by the mortgagee that he was transferrring the full proprietary title in the property. 32 Bom.L.R. 687=A.I.R. 1930 Bom. 292.

——Art. 134—Good faith—Transferee with notice—Article applicable.

Art. 134 would apply both to transferees from trustee as from mortgagees provided the transfer was for valuable consideration and of absolute title. The question of *bona fide* on the part of the transferee is immaterial.

Per *Costello, J.*—Whether actual knowledge on the part of the transferee is immaterial is perhaps a question on which there remains some little doubt. 34 C.W.N. 961=58 Cal. 234=A.I.R. 1931 Cal. 113.

——Art. 134—Good faith—Transferee with notice—Article not applicable.

The omission of the words "good faith" from Art. 134 does not entitle a person, who purchases with full knowledge that his vendor's title is merely that of the mortgagee, to the benefit of that article. 118 Ind. Cas. 659 (All.).

——Art. 134—Good faith.

The fact that there was no reason on record for the vendee to believe that his vendor had absolute title to the property which he could transfer, other than the bare assurance of the vendor that he had such title does not necessarily prove that he did not belive that his vendor had such title nor is it a sufficient reason for holding that he bargained for a transfer of a right that did not exist. 119 Ind. Cas. 154=A.I.R. 1929 Mad. 417.

——Art. 134—Good faith.

Good faith is immaterial and Art. 134 applies even if the transferee known that the transferor was only a mortgagee. 118 Ind. Cas. 682=A.I.R. 1929 Nag. 267.

——Art. 134—Good faith—Transferee with notice—Article applicable.

In the Limitation Act of 1877 as in the Act of 1908 the expressions "*bona fide*" and "good faith" which found a place in the Acts of 1859 and 1871 have been deliberately deleted from the article. This indicates that the section applies not only to cases of purchase and transfer *bona fide* or in good faith but also to cases where there are transfers of property either by the trustee to by the mortgagee, whether *bona fide* or not. A.I.R. 1927 Mad. 1028.

——Art. 134—Good faith—Absolute transfer necessary.

Before Art. 134 can be held applicable to a case there must be a real transfer and that the transfer must be an absolute transfer of the property itself and not a mere assignment of the mortgage. Where, therefore, the transferee in spite the fact that he knew or had reason to believe that the transferor was only a mortgagee still stipulated for an absolute transfer of the land and obtained it, the mere fact that the transferee knew or had reason to believe that the transferor was merely a mortgagee or a limited owner cannot really affect th queston of the applicability of this article. A.I.R. 1927 Mad. 1028.

——Art. 134—Good faith.

A purchaser from a mortgagee with conditional sale who dos not enquire as to whether the mortgagee had acquired full proprietary rights by proceeding under Bengal Land Redemption and Foreclosure Regulation is not *bona fide* purchaser. 96 Ind. Cas. 886=A.I.R. 1926 Lah. 676.

——Art. 134—Good faith.

Art. 134 applies only to *bona fide* purchasers and to other purchasers Art. 148 applies. 96 Ind. Cas. 886=A.I.R. 1926 Lah. 676.

——Art. 134—Good faith—Transferee with notice.

Where both the transferor and the transferee knew that the transferor was unable to confer a higher right than that of a sub-mortgagee on the transferee, and neither the transferor nor the transferee honestly believed that the full ownership was being passed, the mere insertion of some words in the document, which might be construed as if they were the words of a person, capable of passing a title of full owner to his transferee, do not confer full ownership on the transferee. 34 M.L.J. 431, rel. on. The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is question of intention. 93 Ind. Cas. 276=23 M.L.W. 63=1926 M.W.N. 152=A.I.R. 1926 Mad. 311=51 M.L.J. 451.

——Art. 134—Good faith—Transferee with notice—Article applicable.

Art. 134 applies even where a deed of transfer is a sale-deed and what was bargained by the transferee is also an absolute sale though he knew that the transfer has only a mortgagee's interest. A.I.R. 1923 P.C. 175, Foll. The omission of the words "in good faith" which appeared in the Corresponding articles of the Limitation Acts of 1859 and 1871 is not without any significance and the onus is not on a purchaser of the full interest from a mortgagee prove that he acted in good faith before he can plead limtation. 92 Ind. Cas. 342=49 Mad. 29=1925 M.W.N. 866=22, M.L.W. 885=A.I.R. 1926 Mad. 81=49 M.L.J. 634.

——Art. 134—Good faith—Transferee with notice—Article applicable.

A suit by mortgagor to recover property from a transferee of absolute title from mortgagee, is governed by Art. 134 and not by Art. 148. 44 Bom. 614, Not foll.

Under Art. 134 the transferee without notice and the transferee with notice are on the same footing. 47 Cal. 866 and A.I.R. 1922 Bom. 234, Foll. 97 Ind. Cas. 874=1 Luck. 423=29 O.C. 353=3 O.W.N. 674=A.I.R. 1926 Oudh 547 (F.B.).

——Art. 134—Good faith—Transferee with notice—Article applicable.

Art. 134 is not restricted in its application to the purchaser in the good faith, but applies equally to an alienee from a trustee for value, even when he takes the property with full knowledge, that the alienor is acting in excess of his power. 127 P.R. 1908 (F.B.), Foll. 37 All. 660, Not foll. 95 Ind. Cas. 699 (Lah.).

——Art. 134—Good faith—Transferee with notice—Article not applicable.

Art. 134 does not apply to a suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who has taken with notice of the mortgage. Such a suit is governed by Art. 148. 91 Ind. Cas. 87=20 S.L.R. 277=A.I.R. 1926 Sind 145.

——Art. 134—Good faith—Transferee with notice—Article inapplicable.

Art. 134 does not apply to a suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who had even constructive notice of the mortgage. Such a suit is governed by Art. 148 of the Act. 44 Bom. 614, Foll. 89 Ind. Cas. 189=27 Bom.L.R. 661=A.I.R. 1925 Bom. 417.

——Art. 134—Good faith—Transferee with notice—Article not applicable.

Art. 134 applies only against a transferee with a *bona fide* belief at the time of the alienation while as a gainst other transferees a suit for redemption is governed by Art. 148. 9 Bom. 475 ; 15 Bom. 583 ; 45 Ind. Cas. 975 ; 68 Ind. Cas. 734, Not foll. 80 Ind. Cas. 321=6 L.L.J. 151=A.I.R. 1924 Lah. 468.

——Art. 134—Good faith—Transferee without notice.

A transfer by a mortgagee does not stand on the same footing as a transfer by a trustee, where the transfer is made by a trustee for a valuable consideration, the question of good faith becomes practically immaterial for, if the transferee has acquired the property from a trustee in good faith for a valuable consideration without having a notice of the trust, he acquires an immediate title to the property under S. 64 of the Indian Trusts Act ; but if he has not acted in good faith and paid valuable consideration, he acquires and has title after the lapse of the period necessary for extinguishing the right of the beneficiary to follow the trust property in his hands. Where the transferee purchases in good faith and for valuable consideration without having any notice that the transferor had no higher interest than that of a mortgagee, Article 134 protects him from a claim by the mortgagor unless the mortgagor enforces his rights as against such transferee within 12 years from the date of the transfer. 37 All. 660 and 23 O.C. 125, Foll. 77 Ind. Cas. 737=26 O.C. 197=A.I.R. 1924 Oudh 44.

——Art. 134—Good faith—Transferee with notice—Article not applicable.

Art. 134 could be availed of by a transferee from a mortgagee to resist the suit for possession of the property transferred to him but it has no where been laid down that the transfer itself conveyed a valid title to the transferee. If it can be shown that the transferee from a mortgagee knew that the title of his transferor was not free from doubt and such transferee took no steps whatever to clear up that doubt,he can hardly claim the benefit Art. 134. The omission of the words "in good faith from Art. 134 does not entitle a person who purchases with full knowledge that his vendor's title is merely that of mortgagee, to the benefit of that Article. 71 Ind. Cas. 577=A.I.R. 1923 Lah. 219.

——Art. 134—Good faith—Purchaser without notice.

A person who purchases a right which he honestly believes to be a full proprietary right and which is so described in the deed of sale can claim the benefit of the the Article 134, Limitation Act, even though by the exercise of diligence he might have discovered that his transferor was only a mortgagee.

Burden of proving knowldge of the transferee lies on the person who asserts that a transaction was something different from what, on the face of it, it purports to be. 67 Ind. Cas. 572=9 O.L.J. 173=25 O.C. 115=A.I.R. 1922 Oudh 7.

——Art. 134—Good faith.

The right of possession of the heirs of the mortgagor against the mortgagee and the vendee from the mortgagee is barred after 12 years from the date of transfer, and no question of *bona fides* need be enquired into under this article. 12 O.C. 84=2 Ind. Cas. 250.

——Art. 134—Good faith—Knowledge of limited interest.

Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of Art.134; but it will be an important piece of evidence in judging what interest the transferee intended to take. C.L.J. 546, Foll.40 Mad. 745=32 M.L.J. 24=40 Ind. Cas. 531.

——Art. 134—Good faith—Purchase of mortgagee's right with knowledge.

The omission of the words "in good faith " in the Limitation Act does not entitle a person, who purchases with full knowledge that his vendor's title is merely that of mortagage to the benefit of Art. 134 of the said Act. 37 All. 660=13 A.L.J. 945=30 Ind. Cas. 956.

——Art. 134—Good faith—Notice.

Under Art. 134, Limitation Act, the transferee without notice and the transferee with notice are on the same footing. The element of hardship in the case of a transferee without notice is minimised by the system of Registration. 47 Cal. 866=24 C.W.N. 690=58 Ind. Cas. 705.

——Art. 134—Good faith—Alienation of debutter property.

Alienation of *debutter* property by a *shebait* though in excess of his powers falls under Art. 134 if the transferee was ignorant of the fact that the transferor had exceeded his powers. 9 Ind. Cas. 133 (Cal.).

——Art. 134—Good faith—Purchaser at a Court sale.

The purchaser need not prove that he purchased " without constructive notice " of the limited title of the vendor". (1917) M.W.N. 5=5 L.W. 250=38 Ind. Cas. 194.

——Art. 134—Good faith—Applicability of article.

Art. 134 of the Act applies only when the transferee from mortgagee obtains the transferee with the belief that the transferor had an absolute title to make the transfer. 1 L.W. 687=(1914) M.W.N. 735=26 Ind. Cas. 1.

——Art. 134—Good faith—Knowledge of limited interest.

If, at the time of purchase the purchaser well knew that he was not acquiring an absolute interest in the property as opposed to the interest of mortgagee he cannot be protected by Art. 134. 23 O.C. 125=7 O.L.J. 319=57 Ind. Cas. 497.

——**Art. 134—Good faith—Material question.**

The determine whether Art. 134, Limitation Act, applies the question of good faith is very material. If he has not acted in good faith and has paid valuable consideration he acquires a title after the lapse of the period under Art. 134. If the transferee takes the property in good faith without notice of the trust and for consideration no occasion for applying that article arises. The transfer by a possessiory mortgagee of the mortgaged property as it if were his own, stands however, on a different footing. If the transferee has notice that the transferor has no higher interest than that of the mortgagee, he cannot acquire a higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided by Art. 148. Where the transferee purchases in good faith and for a valuable consideration without notice that the transferor had no higher interest than that of a mortgagee, Art. 134 protect him. 6 O.L.J 384=53 Ind. Cas. 168.

7. Involuntary transfer.

——**Art. 134—Involuntary transfer.**

Art. 134 of the Limitation Act, can only apply to a case of transfer, that is to say, case where title is conveyed by act of parties and not by reason of execution of a decree of Court. 52 C.W.N. 443=A.I.R. 1947 Cal. 461.

——**Art. 134—Involuntary transfer.**

Article 134 does not apply to auction-purchasers in execution of a decree for sale on simple mortgage. 102 Ind. Cas. 891=A.I.R. 1927 All. 619.

——**Art. 134—Involuntary transfer.**

Art. 134, Limtation Act, cannot possibly apply to a transfer *invitum* or by operation of law or in execution. A.I.R. 1927 Mad. 1028.

——**Art. 134—Involuntary transfer.**

Art. 134 does not apply to auction-purchaser of mortgagor's interest, in a decree against mortgagee. 79 Ind. Cas. 466=19 S.L.R. 268=A.I.R. 1925 Sind. 167.

——**Art. 134—Involuntary transfer.**

Where, pending a suit for a declaration of a certain property being subject to a trust, the same was sold in execution of a decree and the auction-purchaser entered into possession.

Held, that the adverse nature of the possession of the auction-purchaser is not affected by the subsequent declaration of trust made in the suit. 74 Ind. Cas. 492=18 M.L.W. 903=40 C.L.J. 20=2 Pat. L.R. 104=21 A.L.J. 730=50 I.A. 295=25 Bom.L.R. 1275=28 C.W.N. 495=46 Mad. 715=33 M.L.T. 285=4 L.R.P.C. 180=1924 M.W.N. 25=A.I.R. 1923 P.C. 175=45 M.L.J. 588 (P.C.)

——**Art. 134—Involuntary transfer.**

Art. 134 does not apply to execution sales. 74 Ind. Cas 630=50 Cal. 45=36 C.L.J. 35=A.I.R. 1923 Cal. 1.

——**Arts. 134, 148 and 144—Involuntary transfer—Mortgagor getting a redemption decree but not executing it—Mortgage by the mortgagee as owner—Sale in execution thereof—Effect on the mortgagor.**

In 1861 the mortgagor usufructuarily mortgaged the property to the mortgagee and sued for redemption which was decreed upon payment of a certain amount but the mortgagee remained in possession as the property was not actually redeemed. In 1889 the mortgagee mortgaged it describing himself as absolute owner and the property was sold in execution of a decree on the latter mortgage and purchased by the decree-holder who sold it to be the defendant in 1904. In 1915 the heirs of the original mortgagor sued for redemption of the mortgage of 1851. *Held*, that Art. 144 and not Art. 148 or Art. 134 was applicable. 18 A.L.J. 995=A.I.R. 1921 A. 389.

——**Art. 134—Involuntary transfer.**

The Article does not apply to forced sales in execution of decree. 7 Ind. Cas. 570 (All.).

——**Art. 134—Involuntary transfer—Court sale.**

The Article does not apply to a purchaser in court auction. 21 M.L.T. 62=5 L.W. 690=32 M.L.J. 85=40 Ind. Cas. 50.

——**Art. 134—Involuntary sale—Purchaser by private treaty from auction-purchaser.**

A purchaser by private treaty from an auction-purchaser of the rights of a mortgagee is entitled to the protection afforded by Art. 134 if he purchased in the *bona fide* belief that he was purchasing an absolute proprietary title and the limitation begins to run from the date of purchase by private treaty. 13 A.L.J. 877; Foll. A.I.R. 1930 All. 417=124 Ind. Cas. 408.

——**Art. 134—Involuntary transfer — Purchaser from auction-purchaser—Benefit of Art. 134.**

A purchaser by a private treaty from an auction purchaser of the rights of a mortgagee, is entitled to the protetion of Art. 134 of the Limitation Act, only if he purchased in the *bona fide* belief that he was purchasing an absolute proprietary title. 13 A.L.J. 877=30 Ind. Cas. 564.

——**Arts. 134, 144 and 148—Involuntary transfer—Alienee from transferee.**

A suit for redemption against a purchaser from the motgagee by private sale or a purchaser by private agreement from a Court auction-purchaser whereby the entire interest is transferred is governed by Art. 134 and not by Arts. 144 or 148. (1917) M.W.N. 5=5 L. W. 250=38 Ind. Cas. 194.

——**Art. 134—Involuntary transfer — Execution sale—Purchase of mortgage interest.**

A purchaser at an auction sale is not entitled to the benefit of Art. 134 of the Limitation Act even though the sale purports to transfer not merely the mortgagee's rights which the judgment-debtor really possessed, but the entire proprietary rights. 22 O.C. 72=52 Ind. Cas. 159.

——**Art. 134—Involuntary transfer—Redemption suit by subsequent mortgagee — Sale in execution of rent decree—Subsequent mortgagee not made party—Effect**

Art. 134 should be construed strictly and it applies only where there has been a purchase from a person who is actually the mortgagee of the property. There must be a subsisting mortgage at the time of transfer and plea of limitation should be specifically alleged. A purchaser in execution of a mortgage decree does not become a mortgagee of the property within Art. 134. A sale of part of a mortgaged property in execution of the rent decree by the first mortgagee without joining the subsequent mortgagee to the suit is altogether void. 20 O.C. 164=39 Ind. Cas. 582.

——**Art. 134—Involuntary transfer.**

Art. 134 applies to a case in which the mortgagee has himself voluntarily sold the property and not to a case of a forced sale in execution of a decree nor to a sale of the mortgagee's rights only. (1905) A.W.N. 56=2 A.L.J. 234.

——**Art. 134—Involuntary transfer.**

Where in execution of a money decree, *A's* immovable property, in which his real interest is that of a mortgagee, is sold, the auction-purchaser is not a

purchaser from the mortgagee within the meaning of Art. 134, though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Art. 134 only applies to cases where the mortgagee sells voluntarily. 12 M. 316 overruled.

(2) *Held* by *Shephard* and *Davies, JJ.*—In the case of Court sales, the sale is complete, for purposes of limitation, at the date of purchase, and not at the date of its confirmation. 11 M. L. J. 323=25 M. 99 (F.B.).

8. Mortgage by conditional sale.

——Art. 134—Mortgage by conditional sale.

Where a vendor not in possession of a full title, *e.g.*, a mortgagee under a mortgage by conditional sale, purports to convey an absolute title, the transaction constitutes a transfer within the meaning of Art. 134. A.I.R. 1941 Mad. 666=(1941) 1 M.L.J. 754=1941 M.W.N. 532=53 M. L. W. 731=198 Ind. Cas. 309.

——Art. 134—Mortgage by conditional sale—Applicability of Article to.

Art. 134 is applicable to cases where the transferee from the mortgagee professedly takes an absolute title to and interest in the property transferred. The deed of conveyance and other evidence must prove this intention. This article is not applicable to cases of mortgage by conditional sale. 34 M.L.J. 431=7 L.W. 482=23 M. L. T. 291=(1918) M.W.N. 334=45 Ind. Cas. 975.

——Art. 134—Mortgage by conditional sale—Transfer by mortgagee—Redemption.

Where plaintiff knew of the sale by his mortgagee within three years of the suit and whether the mortgagee's purchaser had notice of the limited right of his vendor but the vendee from the purchaser had no such notice, *held*, that the plaintiff was entitled to redeem. Art. 134 of the Limitation Act, 1877, had not been materially altered by the substitution by the Act of 1908 of the words "transferred by" for the words "purchased from". 1 L.W. 687, foll. (1916) 1 M.W.N. 28=3 L.W. 19=32 Ind. Cas. 265.

——Art. 134—Mortgage by mortgagee purporting to be of a proprietary interest in the mortgaged property—Foreclosure.

A person who *bona fide* purchased from a mortgagee in possession what is represented to him and what he believes to be the absolute interest, is entitled to the protection afforded by Art. 134. The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A. H.* The donee mortgaged part of the property, the subject of this gift, to *P N.*, purporting to mortgage the full proprietary interest in the property. *P.N.* took proceedings for foreclosure against *A.H.* as absolute owner and obtained foreclosure and possession of the property.

Held, on the finding that *P.N.* acted *bona fide* and had no reason to suppose that *A.H.* was not, as he represented himself to be, the full owner of the property mortgaged, that *P.N.* was entitled as against the representative of the original mortgagor to the protection afforded by Art. 134. 1907 A.W.N. 138=4 A.L.J. 375=29 A. 471.

9. Permanent lease of trust property.

——Art. 134—Permanent lease of trust property.

A permanent lease of properties set apart for a family religious trust cannot be considered as a transfer for consideration contemplated under Art. 134. Article 144 only applies to the case. A.I.R. 1922 P.C. 123 and A.I.R. 1922 P.C. 365, Foll. 95 Ind. Cas. 1002=21 M.L.W. 256=A. I. R. 1925 Mad. 796.

——Art. 134—Permanent lease — Trust property —Suit for recovery.

The word "transfer" in Art. 134 of the Limitation Act is wide enough to include a lease in perpetuity. 43 Cal. 34 and 40 M. 745, Foll. Under Art. 134 of the Limitation Act the period is to be reckoned from the date of the alienation. 99 P.R. 1919=51 Ind. Cas. 795.

——Art. 134—Permanent lease—Transfer by head of mutt—Knowledge.

A permanent lease at a fixed rent for all time by the head of a *mutt* is not binding on the successor in the absence of legal necessity even if the rent reserved was adequate at the time of the lease. The head of a *mutt* holds the property of the *mutt* as a trustee for the *mutt* though he has large administrative powers. The sole beneficiary is the *mutt* according to the general rule, 43 C. 707 (P.C.), Foll. The position of the head of the *mutt* enunciated in 27 M. 435 and 33 M. 265 is changed by 43 C. 707 (P.C.). 40 Mad. 745=32 M.L.J. 24 =40 Ind. Cas. 531.

——Art. 134—Permanent lease—If a transfer.

A suit by a *shebait* to recover *debutter* property granted by his predecessor in office on a permanent lease is governed by Art. 134 and must be brought within 12 years of the transfer. *Shebaits* are not successive life-tenants in the management of the endowment but from a continuous representation. Limitation runs against them continuously and not as against each *shebait* as and when he succeeds to the office. 27 C.L.J. 201=44 Ind. Cas. 567.

——Art. 134—Permanent lease—By shebait.

Art. 134 of the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease. In the Act of 1908, the word "transferred" was deliberately inserted for the word "purchased" in view of the decision on the meaning of the word "purchased" in Art. 134 of Act of 1877. The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. 43 Cal. 34= 19 C.W.N. 1082=29 Ind. Cas. 337.

——Art. 134—Permanent lease—Debutter land—Alienation by shebait—Suit by successor—Limitation.

A suit brought by a *shebait of* some family idols to recover possession of a *mouzah* found on the evidence to be a *debutter* and dedicated to the service of the idols, but of which plaintiffs predecessor had granted a permanent lease more than 12 years before suit, is not barred by Art. 134 of the Limitation Act. 36 Cal. 1003, P.C., Foll. 38 Cal. 526= 38 I.A. 76=15 C.W.N. 417=9 M.L.T. 448=8 A. L.J. 528=13 Bom. L.R. 421=14 C.L.J. 238= (1911) 2 M.W.N. 281=21 M.L.J. 1145=10 Ind. Cas. 683 (P.C.).

——Art. 134—Permanent lease — If within Article.

The operation of Art. 134 of the Limitation Act is controlled by S. 10 of the Act. The words "purchaser for a valuable consideration" in Art. 134 of the Limitation Act, 1877, mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. The lessee under a *mokarrari pattah* or permanent lease is not a purchaser of an absolute title. 36 Cal. 1003=10 C.L.J. 284=6 A.L.J. 857 =11 Bom. L.R. 1234=19 M.L.J. 530=14 C.W.N. 1=36 I.A. 148=4 Ind. Cas. 449 (P.C.).

——Art. 134—Permanent lease—Adverse possession.

A *mourasi* lessee may claim the right by adverse possession if the lease constituted an alienation beyond the powers of the lessors. A *mourasi* lessee is purchaser within Art. 134 of the Act of 1877. 738=33 C. 511.

[Overruled by 36 I.A. 148=36 C. 1003 and by the new Act].

——Arts. 134 and 144—Permanent lease by trustee of debutter property—Suit to recover property leased. (1906) 3 C.L.J. 306=10 C.W.N. 738=33 C. 511. (Overruled by 36 I.A. 148=36 C. 1003 and by the new Act.)

10. Possession under transfer.

——Art. 134—Possession under transfer—Suit by trustee to recover trust property mortgaged by pedecessors and foreclosed by mortgagee—Muhammadan Law.

A suit by a succeeding trustee to recover possession of trust property, mortgaged by his predecessor and foreclosed by the mortgagee is governed by Art. 134 of the Limitation Act and is barred if brought more than 12 years from the date of the mortgage, from which time limitation began to run and not from the date when the defendant obtained possession of the property.

Per *Richardson, J.*—A suit to which Art. 134 applies must be a suit to recover possession. The plaintiff must be out of possession and the defendant in possession. The transfers chiefly contemplated are apparently transfers for value in excess of the limited powers of the trustee or mortgagee. Where the transfer is effected by a registered instrument that date is the date of the instrument. To construe the date of the transfer as the date on which the transfer is followed by possession is to import into the Article words which are not there. Where the possession of the trustee is that of a mere manager under a duly constituted trust it is immaterial whether the transferee takes with or without notice of the trust. Under Art. 134 of the Act the transferee without notice and the transferee with notice are on the same footing. Where the transferor is a mere manager he is not the ostensible owner. Nor has the transferee anything corresponding to the English "legal estate" to set over against the prior equity of the beneficial owner; the legal ownership and the prior equity are generally speaking both in the beneficiary. The element of hardship in the case of a transferee without notice is minimised by the system of registration. 47 Cal. 866=24 C.W.N. 690=58 Ind. Cas. 705.

——Art. 134 — Possession under transfer—Limitation—Starting point.

Art. 134 of the Limitation Act is inapplicable to a transfer from a trustee or mortgagee under which possession is not taken by the transferee.

Per *Wallis, C.J.* and *Coutts Trotter, J.*—Art. 134 is applicable to a transfer under which possession is not taken by the transferee at the time of the transfer and the starting point of limitation is the date of the transfer and not the date when possession is taken by the transferee. 40 Mad. 1040=33 M.L.J. 320=22 M.L.T. 236=(1917) M.W.N. 609 =6 L.W. 464=43 Ind. Cas. 31 (F.B.).

——Art. 134—Possession under transfer — Starting point of limitation.

If a person takes possession of the property as owner, he holds it adversely to all, from the date of his possession. 93 P.W.R. 1910=7 Ind. Cas. 708.

11. "Purchased."

——Art. 134—'Purchased.'

Where a mortgagee sub-mortgaged as if he was owner and the sub-mortgagee is in possession for over 12 years:

Held (*Davies, J.*, dissenting) that he had purchased within Art. 134. 'Purchaser' includes 'mortgagee'. 24 M. 471 (F.B.).

12. Redemption by one mortgagor.

——Art. 134—Redemption by one mortgagor—Nature of possession — Limitation against co-mortgagors.

G, a Muhammadan, died leaving some property which was under mortgage. He left a son, a widow and a daughter. The son redeemed the entire property and remained in possession. He then mortgaged the property including his sister's share which was subsequently sold by auction. *G's* daughter's representative brought the suit for redemption:

Held, that the suit having been brought within 60 years of the date of the original mortgage it was not barred by limitation. The possession of the brother or his transferees in respect to the sister's share, was that of a mortgagee and unless there was set up an adverse title to her share the nature of the possession could not change. 7 A.L.J. 95=5 Ind. Cas. 123=32 A. 160.

13. Scope.

——Art. 134—Scope.

A suit for redemption of a usufructuary mortgage from the original mortgagee cannot be a suit within the meaning of Art. 134 of the Act. The article can be applicable only when the suit in question is being brought against the subsequent transferee from the original mortgagee. 90 Ind. Cas. 1011=3 Rang. 367 =A.I.R. 1925 Nag. 377.

——Art. 134—Scope — Purchaser from mortgagor's vendee.

Art. 134 protects a purchaser of the rights of the mortgagor's ostensible vendee from a claim by the mortgagor unless the claim is brought within 12 years from the date of the transfer. 79 Ind. Cas. 274 =26 O.C. 64=A.I.R. 1923 Oudh 246.

——Arts. 134 and 148—Scope of.

Where the mortgagee sells the property to a stran-

ger and then repurchases it his possession is not as representative of the repuchaser, but only as a mortgagee and is liable to be redeemed within 60 years. 22 Bom.L.R. 933=58 Ind. Cas. 39.

——Art. 134—Scope of.

The transferee from a trustee or mortgagee can take advantage of Art. 134 so long as the legal title and possession has been transferred to him. 21 M.L.T. 62=5 L.W. 690=32 M.L.J. 85=40 Ind. Cas. 50.

——Art. 134—Scope of — Redemption against donees from mortgagees—If comes under.

Art. 134 does not apply to a suit for redemption against donees from a mortgagee as it applies only to persons who are transferees for valuable consideration. 4 Bur. L.T. 265=13 Ind. Cas. 375.

——Art. 134—Scope of.

A purchaser of a decree for redemption subsequently redeeming the mortgaged property and taking possession, takes possession as mortgagee and cannot defeat the rights of the heirs of the mortgagor who were not parties to the first suit or to a subsequent mortgage of the same property in which the purchaser is also the purchaser of property at a sale in execution of the decree of the subsequent mortgage. 32 All. 160=7 A.L.J. 95=5 Ind. Cas. 123.

14. Starting point.

——Art. 134—Starting point.

The operation of the Articles begins only from the date on which the purchaser takes possession. 1930 M.W.N. 1148.

——Art. 134—Starting point.

Under Art. 134 there must be a valid transfer between the trasferor and the transferee though it might not be operative as against a trust or any other person, and the time runs only from the date of the transfer. A.I.R. 1930 Mad. 298=126 Ind. Cas. 279.

——Art. 134—Starting point.

Article 134 ought to be applied, as stated in Limitation Act, from the date of transfer and not from the date of possession. 118 Ind. Cas. 659 (All.).

——Art. 134—Starting point.

Limitation under Art. 134 runs only from the date of the transfer by the trustee or mortgagee and not from the preliminary conveyance, bequest or mortgage. 70 Ind. Cas. 912=24 Bom. L. R. 720=46 Bom. 1009=A.I.R. 1922 Bom. 211.

——Art. 134, S. 19—Starting point—Acknowledgment of mortgagee.

When within six years from the date of the original mortgage, the mortgage is acknowledged, a suit to redeem the original mortgage can be brought at any time within sixty years from the date of such acknowledgment. 6 Bom.L.R. 38.

15. Sub-mortgage.

——Art. 134—Sub-mortgage.

As against a sub-mortgagee, as such, the article of the Limitation Act which applies is Art. 148 and not Art. 134. 84 Ind. Cas. 984=2 Rang. 561=A.I.R. 1925 Rang. 140.

——Art. 134—Sub-mortgage.

Art. 134 protects all transferees for value including mortgagees. A suit was brought to redeem a mortgage of 1854 from a mortgagee of a mortgage from a representative of the mortgagee, who claimed absolute title in himself. The suit being after 12 years from the date of the mortgage by the mortgagee, was barred by Art. 134. 36 Bom. 146=13 Bom.L.R. 1057=12 Ind. Cas. 737.

——Art. 134—Sub-mortgage — Applicability of article to.

The right of redemption against a *Karnavan* is not defeated though some members of the *Tarwad* set up a sub-mortgage in their favour by the *Tarwad*. Sub-mortgagees are not purchasers of the property but only of the mortgage interest and they cannot claim the benefit of Art. 134. 7 M.L.T. 187=5 Ind. Cas. 932.

16. Transfer of absolute right.

——Art. 134—Transfer of absolute right.

Article 134 does apply even where the mortgagee has ceased to be a mortgagee by getting the equity of redemption and has obtained possession not under the mortgage but under the purchase of the equity. It is immaterial that the mortgagee should have thought that he was absolute owner if in fact he was mortgagee. It is also immaterial whether he gets possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. 117 Ind. Cas. 22=51 All. 367=1929 A.L.J. 566=56 I.A. 192=33 C.W.N. 761=31 Bom. L.R. 854=30 M.L.W. 76=50 C.L.J. 74=1929 M.W.N. 676=A.I.R. 1929 P.C. 158 (P.C.).

——Art. 134—Transfer of absolute right.

If a purchaser from a mortgagee honestly and after due care, believed that his transferor was the full owner, it may be presumed that what he intended to acquire was full ownership and therefore Art. 134 would govern his case. 34 M.L.J. 431, Rel. on. 115 Ind. Cas. 149=A.I.R. 1929 Mad. 145.

——Art. 134—Transfer of absolute right.

A transferee for value from a mortgagee, who has taken that which is *de facto* a mortgage, upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title, is entitled to the benefit of Art. 134, though the suit is a suit for redemption of the mortgage. 102 Ind. Cas. 135=A.I.R. 1927 All. 807.

——Art. 134—Transfer of absolute right.

Where a person believing that his vendor had an absolute interest in a certain property of which he was only the mortgagee, purchases the same for valuable consideration, the suit brought by the heirs of original mortgagor to redeem the property from such purchaser, if bought more than 12 years after the date of sale, will be barred by limitation. A.I.R. 1922 Oudh 7, Foll. In such cases mere constructive notice without actual knowledge is not sufficient to deprive the purchaser of the benefit of Art. 134 and the purchaser who bought what purported to be and what he believed to be full proprietary right cannot be deprived of the benefit of Art. 134 by failure to make inquiries as to the true state of the title. 95 Ind. Cas. 143=A.I.R. 1926 Oudh 492.

——Art. 134—Transfer of absolute right.

Article 134 presupposes a transfer with possession. The transferor-mortgagee must have been in posses-

sion of the mortgaged property at the time he made the transfer. But the possession which the transferor has at the time of the transfer need not necessarily be acquired under the mortgage originally made in his favour. Even if the mortgage was a simple mortgage and if the mortgagee subsequently gets possession of the mortgage property otherwise, as for example, by purchase in execution of a simple money-decree obtained by another creditor, the article will still appl if it is established that at the time the transfer is made the mortgagee was in possession no matter under what title. Article is designed for the protection of a transferee who has been led by a mortgagee to believe that he is acquiring not merely mortgagee rights but a full proprietary title. 92 Ind. Cas. 63=47 All. 803=23 A.L.J. 691=A. I.R. 1925 All. 707.

——Art. 134—Transfer of absolute right.

Where a mortagee sold the property to another as if he was the owner thereof but the transferee, notwithstanding the fact that he took the sale-deed, admitted the right of the mortgagor, dealt with him on the footing that he was the mortgagor landlord, acknowledged his title, paid him rent and constituted himself mortgagee-tenant and throughout assumed his possession to be that of a tenant,

Held, that the transferee could not rely on Art. 134 in an action against him by the mortgagor.

Held, also that a person claiming from the transferee would not be in a better position than himself. 87 Ind. Cas. 578=A.I.R. 1925 Mad. 1127.

——Art. 134—Transfer of absolute right.

A suit against purchasers from the mortgagee of the whole property and not merely the mortgagee's rights is covered by Art. 134 and the purchaser would be entitled to retain the property if no suit was brought to set aside the sale within twelve years of the transfer. 80 Ind. Cas. 763=26 Bom.L.R. 341=A.I.R. 1924 Bom. 417.

——Art. 134—Transfer of absolute right.

Article 141 covers only those cases in which the cause of action is simply the death of the female. Where the cause of action includes a mortgage by the last male holder and a transfer by the mortgagee, Art. 134 will apply.

A Hindu mortgaged his properties in 1866 and thereafter died leaving daughters. The mortgagee sold the properties to the defendant in 1900 and gave him possession. The last surviving daughter died in 1906 and in 1914 her sons brought a suit for redemption and possession.

Held, that the suit was barred under Art. 134. 68 Ind. Cas. 734=44 Mad. 951=14 M.L.W. 116 =1921 M.W.N. 465=A.I.R. 1921 Mad. 272=41 M.L.J. 163.

——Art. 134—Transfer of absolute right—Subsequent knowledge of transferee immaterial.

Defendant No. 1 with whom plaintiff's predecessor-in-title mortgaged certain lands, sold as owner the land to defendant No. 2 who was a purchaser for value without notice and gave him possession. Defendant No. 2 came subsequently to know that defendant No. 1 was only a mortgagee and not the owner of the land. In plaintiff's suit, after 12 years of the transfer, for redemption:

Held, it was barred under Art. 134 of the Indian Limitation Act. 67 Ind. Cas. 308=24 Bom.L.R. 319=46 Bom. 903=A.I.R. 1922 Bom. 234.

——Art. 134—Transfer of absolute right.

Where a person mortgaged certain properties and the mortgagee treating it as his own, mortgaged it to a third person and that person purchases it in Court sale, in execution of his mortgage decree, and passes title to his vendee, and where a person who buys the equity of redemption from the original mortgagor, brings a suit for redempton against the vendee the suit is governed by Art. 134 or Art. 144 of the Limitation Act, and not by Art. 148. 61 Ind. Cas. 627=2 U.P.L.R. (All.) 410.

——Art. 134—Transfer of absolute right — Mortgagee with possession making simple mortgage—Suit by original mortgagor.

Where a mortgagee with possession makes a simple mortgage of the proprietary interest which he believes and professes or pretends to hold in the property and the mortgagee of such interest purchases it in execution of a decree obtained by him on the mortgage of the so-called proprietary interest of his mortgagor, Art. 134 does not apply to a suit by the original mortgagor for possession but Art. 144 applies to such suit. 61 Ind. Cas. 546=43 All. 164 =A.I.R. 1921 All. 389.

——Art. 134—Transfer of absolute right—Mortgage of—Occupancy holding in Zemindari—Transfer by Zamindar—Limitation.

In a suit for the redemption of the mortgage of an occupancy holding made by the tenant to the *Zamindar* who sold his rights to the defendant.

Held, that the suit was not one to recover possession of a holding from which the plaintiff had been unlawfully dispossessed. Limitation of 12 years from the date of transfer to the defendant applied under Art. 134. 45 Ind. Cas. 549 (All.).

——Arts. 134 and 148—Transfer of absolute right —Mortgagee selling absolute interest in property —Redemption.

A mortgagor's right tc redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means, act of parties to the transaction. No assertion of adverse title by a mortgagee during the currency of a mortgage can count for limitation as against the mortgagor whose right to redeem continues for a period of 60 years. Therefore if a mortgagee sells the mortgaged properties out and out to a stranger, the purchaser's possession is not adverse against the true owner, the mortgagor. A suit for redemption would lie under Art. 148. 29 Ind. Cas. 403 (All.).

——Art. 134—Transfer of Absolute right—Transferee re-conveying property to mortgagee — Redemption.

Where a mortgagee sells the property absolutely to a stranger who again reconveyed them to the mortgagee, *held*, that the mortgagee could not claim the benefit of Art. 134 but was liable to redemption. 22 Bom.L.R. 932=58 Ind. Cas. 39.

——Art. 134—Transfer of absolute right—Onus.

In a suit for redemption where the defendant pleads that he purchased not the mortgage interest but the property absolutely from the mortgagee and claims the benefit of Art. 134 of the Limitation Act, the onus is on the defendant to prove an absolute purchase affirmatively and not on the plaintiff, to prove that the mortgagee did not purport to transfer more than his mortgage interest. 15 Ind. 609 (Mad.).

——Art. 134—Transfer of absolute right — 'Purchased' meaning of.

'Purchased for valuable consideration' in Art. 134 of the Act of 1877 means that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. (1910) M.W.N. 715=9 M. L. T. 87=8 Ind. Cas. 745.

——Art. 134—Transferee of absolute right.

A transferee, from an usufructuary mortgagee, who obtained possession without foreclosure and sold the property to the tansferee as absolute owner gets an absolute ownership at the end of 12 years. 12 O.C. 84=2 Ind. Cas. 250.

17. Trust property.

See also ART. 134—PERMANENT LEASE OF TRUST PROPERTY.

——Art. 134—Trust property.

Suit to recover possession of trust property after twelve years from execution of lease by person claiming through lessor is barred under Art. 134. A.I.R. 1940 Cal. 228=190 Ind. Cas. 405.

——Art. 134—Trust property—Transfer by trustee —Enlargement of time.

If a trustee alienates property he honestly believes to be his own, but which, on a true construction of the deed of trust, belongs to the *cestui que trust*, time which the trustee allows to pass owing to this mistake counts when computing limitation. A.I.R. 1938 Mad. 60=180 Ind. Cas. 462.

——Art. 134—Trust property.

Article 134 cannot be applied to cases of Hindu and Muhammadan religious endowments. The article applies not to sales but only to cases of mortgages. A. I.R. 1937 Lah. 9=39 P.L.R. 222=169 Ind. Cas. 732.

——Art. 134—Trust property.

The principle laid down by the Privy Council in A.I.R. 1922 P.C. 123 applies to sales and is not confined to permanent leases and the rules enunciated in it apply to the endowments of Muhammadan religious institutions and to alienations made by *sajjadanashins* or *mutawallis*.

——Art. 134—Trust property.

Article 134 does not apply to a transfer from a trustee or mortgagee under which possession is not taken by the transferee. Further the article is not applicable to cases where the trustee has a beneficial interest in the trust. 64 M.L.J. 706=37 M.L.W. 737 =A.I.R. 1933 Mad. 533=(1933) M.W.N. 1215= 144 Ind. Cas. 541.

——Art. 134—Trust property.

Where property belonging to the idol is transferred and the rent reserved in favour of the idol of the temple is only eight annas, such rent is not valuable consideration within the meaning of Art. .34. A. I.R. 1930 Mad. 298=126 Ind. Cas. 279.

——Art. 134—Trust property — Adverse possession—Starting point.

In the case of lease of property belonging to a temple, the possession is adverse from the time when the lease is created if the lessee and his successor consistently and unanimously took their stand on the lease and prescribed under it.

If it is a case of out and out-transfer of property whether it is a voluntary sale or a sale in execution, the suit is barred if beyond 12 years from the date of transfer, it is immaterial whether Art. 134 or Art. 144 applies. In the case of temples it does not matter which article is applied; as Art. 144 is only a residuary article one would be right and proper in applying Art. 134, but if Art. 134 does not apply, Art. 144 would apply. In the case of lease of temple property the trustee having beneficial interest he may be still called a trustee and Art. 134 will apply, but if it is a case of a mutt Art. 134 cannot apply and there will certainly be no adverse possession from the date of the lease. Whether there is adverse possession after the death of the lessor would be a matter dependent on the particular facts of each case and no general observation can be laid down. 110 Ind. Cas. 894=A. I. R. 1928 Mad. 614.

——Art. 134—Trust property—Suit by trustee to set aside alienation by prior trustee.

Ordinarily trust property belonging to Hindu religious institutions is not vested in the so-called trustee who is not in the position of an express trustee as understood in English Law and, therefore, a suit by trustee to set aside alienation of trust property by previous trustee is not governed by Art. 134 and even if Art. 144 applies, the period of limitation runs not from the date of alienation but from the date of the accession of the plaintiff trustee to his office. 13 Mad. 277, Foll.: A. I. R. 1922 Pat. 243, Not foll. 91 Ind. Cas. 377=1925 M.W.N. 871=24 M.L.W. 329=A. I.R. 1926 Mad. 193=49 M.L.J. 640.

——Art. 134—Trust property—Suit by trustee to set aside alienation by prior trustee.

Article 134 does not apply to a suit by a Pujari or trustee of a temple as the trustee of temple properties, to recover possession of temple properties sold by a preceding Pujari. A.I.R. 1922 P. C. 123, Appl. 86 Ind. Cas. 231=21 M.L.W. 13=A. I.R. 1925 Mad. 822=48 M.L.J. 114.

——Art. 134—Trust property.

The endowments of a Hindu Math are not "conveyed in trust" nor is the head of the Math a "trustee" with regard to them, save as to any specific property proved to have vested in the head for a specific and definite object; and that consequently Art. 134 of the Limitation Act does not apply where the head of a Math has alienated the properties not proved to be subject to a specific trust. 44 Mad. 831, Foll. 67 Ind. Cas. 401=3 Pat. L. T. 352=1 Pat. 475=A.I.R. 1922 Pat. 243.

——Art. 134—Trust property.

The limitation for a suit for possession of endowed property by a successor-in-office of a Mahant who alienated the endowed property runs from the date of the latter's death, as the Mahanth had a life-estate in the endowed properties and time did not begin to run until his death. 63 Ind. Cas. 231=3 Pat.L.T. 264=1922 P.H.C.C. 188=A.I.R. 1922 Pat. 178.

——Art. 134—Trust property—Lease without necessity.

The language of S. 10 of the Limitation Act gives the clue to the meaning and the applicability of Art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu Law nor

in the Mahomedan system is any property "conveyed", to or vested in a shebait or mutwali, in the case of a dedication. Therefore alienation made by either cannot be treated as an alienation made by a trustee under S. 10. A lease without justification granted by the head of the *mutt* is valid for his life, and if adopted by his successor would endure during his term of office; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession. Possession of the lessee becomes adverse to the successor only on his accession to the office. 65 Ind. Cas. 161=15 M.L.W. 78=3 Pat.L.T. 245=26 C.W.N. 537=20 A.L.J. 497=24 Bom.L.R. 629=30 M.L.T. 66=48 I.A. 302=44 Mad. 831=1921 M.W.N. 449=A.I.R. 1922 P.C. 123=41 M.L.J. 346 (P.C.).

——Arts. 134 and 145—Trust property — Alienation by trustee—Lease—*Pro tanto* purchase—Suit by succeeding trustee. 5 Bom.L.R. 241=27 B. 373. Now to be considered overruled. 36 I.A. 148=36 C. 1003.

——Art. 134—Trust property — Transfer by trustee—Sale by mahant of property given to him in trust.

Where the property was not conveyed to the *Mahant* for his personal use but sold to him for the benefit of the *mutt* the transaction is a conveyance in trust within the meaning of the Art. 134. The head of a *mutt* is a trustee and not a life tenant or a corporation sole. Where the *Mahant* of a *mutt* sued to recover possession of certain lands sold by his predecessor more than twelve years after the sale the suit was barred under Art. 134. 37 M.L.J. 231 =52 Ind. Cas. 914.

——Art. 134—Trust property — Transfer by trustee.

A suit to recover property from the transferees for valuable consideration from express trustees is governed by Art. 134 of the Act. 20 Bom. L. R. 441=46 Ind. Cas. 19.

——Art. 134—Trust property — Transfer by trustee—Alienation for value by mahant—Suit to set aside by successor—Limitation.

Art. 134 of the Limitation Act, applies to a suit instituted by a succeeding *mahant* of an asthal for setting aside an alienation for valuable consideration made by the preceding *mahant* in respect of that property. Such a suit must be brought within 12 years from the date of the alienation. Each succeeding *mahant* does not get a fresh start of limitation in respect of such a suit on the ground of his not deriving his title from the previous *mahants*. 5 O.L.J. 38=45 Ind. Cas. 292.

——Art. 134—Trust property—Transfer by trustee—Mortgage from Trustee—Limitation for suit for recovery of endowed property.

A suit for possession of an endowed property against a mortgagee in possession of it from the trustees for over 12 years on the ground that the alienation was null and void is barred by limitation. 13 A.L.J. 612=29 Ind. Cas. 292.

——Arts. 134, 144 and 12—Trust property—Transfer by trustee—Right of successor of trustee.

Per *Sadasiva Aiyar, J.*—A Matadhipathi can set aside an alienation made by his predecessor within 12 years of his becoming Matadhipathi. 38 Mad. 356=25 M.L.J. 393=13 M.L.T. 498=(1913) M.W.N. 581=19 Ind. Cas. 694.

——Arts. 134, 144 and 124—Trust property — Transfer by trustee — Lease by a Surguro of a Makan—Limitation for possession.

An alienation by a *Surguro* of a *Makan* for the time being is valid only during his lifetime and his successor can recover the property alienated within 12 years of his death. In the case of a lease by such a person time would begin to run not from the commencement of the tenancy of the person claiming to hold as tenant but from the date when the claims of the parties become openly and undoubtedly adverse. 36 C. 1003, P. C.; 12 C. 480, P. C.; 34 B. 329, Rel. 37 Bom. 224=15 Bom. L. R. 266=19 Ind. Cas. 558.

——Art. 134—Trust property—Transfer by trustee—Shebait—Alienation — Suit to set aside—Limitation.

Each succeeding *Shebait* does not acquire a fresh start for the purpose of limitation to bring a suit to set aside a *patni* granted by a former *shebait* of a *debutter* property. 37 C. 885, Rel. 17 C. W. N. 873=16 C.L.J. 349=16 Ind. Cas. 927.

——Art. 134—Trust property—Debutter Mortgage —Adverse possession.

Amritomonohi lands in Orissa being inalienable, an usufructuary mortgagee of such lands may claim title by adverse possession after a period of twelve years. 3 Ind. Cas. 98 (Cal.).

——Art. 134—Trust property—Alienation— Land held on condition of service.

Where the trustees of an endowment property alienate the trust property by way of mortgage which culminates into a sale, a suit by the plaintiffs claiming either as beneficiaries or as mutawallis and impeaching the mortgage and the sale as wholly void, must be brought within twelve years of the alienation. Where the alienation of a trust property is made in violation of the trust, limitation would run against the trust from the date of the alienee's obtaining possession. Where the land, which is held free from a trust on condition of service, is alienated by the holders for the time being, the other members of their family cannot obtain the right to recover the property from the alienees, merely because they (the members) are entitled to perform the service in lieu of the alienors. 5 Bom.L.R. 303=27 B. 500.

——Art. 134—Trust property — Suit to recover possession of immoveable property on behalf of a mutt—Plaintiff succeeding to the trusteeship within 12 years before suit—Property sold by former trustee for valuable consideration.

A suit for possession for and on behalf of a *mutt*, of immoveable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration is governed by Art. 134 and it is no answer to the bar that the plaintiff succeeded to the office of *guru* within 12 years from the institution of the suit.

Semble.—A charity is a trust and the article of the Limitation Act, which relates to a trust applies to charitable trusts also. 23 C. 536, 23 A. 482, 6 H. L.C. 180, foll. 4 Bom.L.R. 743=27 B. 363.

——Art. 134—Trust property—Permanent lease of, for consideration, by shebait—Suit to recover possession—Shebait, successor—Limitation.

If a property is valid *debutter* absolutely dedicated

to one or more *Thakurs* (idols) it falls within the description of property conveyed or bequeathed in trust, and the *shebait* is a trustee within the meaning of Art. 134. A permanent lessee, *e.g.*, patnidar who paid a bonus for his lease is a 'purchaser'. The expression 'purchaser for a valuable consideration' as used in Art. 134, is in contradistinction to a mere volunteer. A suit to recover possession of debutter property, permanently leased out to the defendant for valuable consideration by a shebait in excess of his powers and in violation of the trust is governed by Art. 134 and must be brought within 12 years of the date of the lease. 23 C. 536, foll. If such a suit is brought by the successor of the shebait who granted the lease, limitation as against him runs, not from the date of his appointment but from the date of the lease. Each succeeding shebait is not entitled to bring an action within 12 years as from the date of his appointment to the office, with a view to question the validity of an alienation made by any of his predecessors. Art. 134, is not restricted in its application to purchasers in good faith, but applies equally to alienees from a trustee for value, even when he takes the property with full knowledge that the alienor is acting in excess of his powers. In order to give the purchaser the benefit of Art. 134, the purchase need not be *bona fide* in the sense of being without notice of the restricted nature of the transferor's title, but the term 'purchaser' means a person who purchases that which is *de facto*, a trustee's or mortgagee's limited interest, upon the representation and in the belief that it is an absolute title. Unless the purchaser intends to acquire an absolute interest, that is, an interest in excess of what the transferor is competent to alienate, there is no occasion for the application of Art. 134 as there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest had been asserted. 2 C.L.J. 546.

——Arts. 134 and 144—Trust property, transfer of —'Purchaser', meaning of—Cause of action—Date of accrual.

When a person accepts a transfer of trust property with full knowledge that the alienation is beyond the powers of the transferor and does not believe that he is acquiring an absolute title, he cannot be regarded as purchaser within the meaning of Art. 134. A suit against such a transferee would be governed by Art. 144, and if it is brought by the successor of the trustee who made the alienation, limitation as against him would run from the date when he succeeded to the office. 2 C.L.J. 448.

——Art. 134—Trust property—Wakf.

Art. 134 does not apply to Muslim *waqfs* because neither the *sajjadanashin* nor the *mutawalli* has any right in the property belonging to the waqf as the property is not vested in him but in God. 1933 O. W.N. 815=11 Luck. 297=A.I.R. 1935 Oudh 425=156 Ind. Cas. 92.

——Art. 134—Trust property—Wakf.

A suit to set aside alienation by a *mutawalli* is governed by Art. 144, and not by Art. 134. Time runs, in the case of sale, from the date of alienation. 57 B. 709=35 Bom.L.R. 252=148 Ind. Cas. 385. =A.I.R. 1933 Bom. 217.

——Arts. 134—Trust property—Wakf.

There is no difference between a permanent lease and a sale of *wakf* property and where a sale by the mutawalli of such property is valid during his lifetime, adverse possession against the mosque commences not from the date of sale but from the date of the death of the mutawalli. 35 M.L.W. 396=A. I.R. 1930 Mad. 582=58 M.L.J. 524.

——Art. 134—Trust property—Wakf.

Article 134 does not apply to a *wakf*. 71 Ind. Cas, 646=17 M.L.W. 509=50 I.A. 84=32 M.L.T. 153 =25 Bom.L.R. 670=1923 M.W.N. 441=50 Cal. 329=38 C.L.J. 242=28 C.W.N. 121=A.I.R. 1923 P.C. 44=44 M.L.J. 624 (P.C.).

——Art. 134—Trust property—Wakf.

Art. 144 and not Art. 134 governs a suit to set aside an alienation by a Mutawali of ordinary *waqf* property gifted for general, pious or religious purposes. Section 10 controls Art. 134 of the Limitation Act of 1908. It clearly shows that the Article refers to cases of specific trust and relates to property "conveyed in trust". There is under Hindu and Muhammadan Law, a distinction between a specific trust and a trust for general, religious or charitable purposes. 65 Ind. Cas. 722=A.I.R. 1922 Lah. 271.

——Art. 134—Trust property—Wakf.

Article 134 of the Limitation Act, applies to a suit to recover, on behalf of a trust properties alienated by a mutawalli and the period of limitation commences to run from the date of the alienation. 60 Ind. Cas. 689 (Cal.).

18. Miscellaneous.

——Art. 134—Miscellaneous — Transfer by mortgagee at first sight appearing to be absolute right —Mortgagor can show that it was really of mortgagee right.

Extraneous evidence which includes the knowledge of the parties can be taken into consideration in finding out what was the intention of the parties to the deed. It is admissible for the mortgagor to show that what purports at first sight to be a transfer of an absolute title by the mortgagee was, in the intention of the parties to the deed, only a transfer of mortgagee rights. The burden of proof in such a case lies upon the mortgagor; knowledge of the nature of the title of the transferor is a material piece of evidence for this purpose. Once the nature of the transaction has been determined, whether it was a transfer of absolute title or only an assignment of mortgagee rights, the question of good faith is immaterial. 1945 O.W.N. (C.C) 182=1945 A. W.R. (C.C.) 144=A.I.R. 1945 Oudh 258.

——Arts. 134 and 144—Miscellaneous—Mortgagor of share redeeming whole — If transferee from mortgage.

Art. 134 does not apply to a person, who being interested in part of the mortgage redeems the whole, he being only a charge holder and not a mortgagee.

Held, in the circumstances of the case that the suit was barred under Art. 144 whether the members were joint or separate. 38 All. 138=14 A. L. J. 41=34 Ind. Cas. 244.

——Arts. 134 and 144—Miscellaneous — Suit by trustee against co-trustee for joint possession.

A suit for joint possession of trust property by a trustee against a co-trustee, and an alienee of the trust property from the latter is governed by Art. 134 of the Limitation Act. 51 Ind. Cas. 755 (Lah.).

——Art. 134—Miscellaneous — Transfer from mortgagee, without notice.

Though under Art. 134, the possession derived under a mortgage could be perfected by twelve years adverse possession yet if a new right accrued before the 12 years were over to the ownership of the properties, the adverse possession is broken up. 39 Mad. 879=18 M.L.T. 424=(1915) M.W.N. 873=2 L.W. 989=31 Ind. Cas. 398.

——Art. 134—Miscellaneous—Suit for declaration.

A suit for declaration that a sale by a trustee is invalid is governed by Art. 120, as it is not a suit for recovery of possession. 1914 M.W.N. 581=26 M.L.J. 537=24 Ind. Cas. 369.

———Art. 134-A—Applicability.

Where an owner of property enters upon possession as mutawalli, his position becomes that of a trustee, and Art. 134-A of the Limitation Act becomes applicable to a suit to set aside a subsequent transfer of that property effected by him on the footing that he is a full owner, and the plaintiff has twelve years from the date of his knowledge of the transfer. A plaintiff who derives his title as beneficiary from the deed of wakf and not as the son of the last mutawalli has an independent right of suit. I.L.R. (1946) Lah. 300=A.I.R. 1947 Lah. 117=231 Ind. Cas. 421.

——Arts. 134-A to 134-C—Applicability.

The former *shebait* of a deity mortgaged the property belonging to the deity in 1905 not in his capacity as *shebait* but as secular owner of the property which he purported to hold in *niskar* right. The mortgagee obtained decree on the mortgage and purchased the property himself in execution in 1908 and obtained possession. The decree was not against the *shebait qua shebait* but against him in his own personal capacity. The *shebait* died in 1932 and in 1934 the present *shebait* brought a suit for recovery of possession on declaration of title of the deity. The suit was decreed and possession was obtained. One *H* preferred a claim under O. 21, R. 100, C. P. C., which was allowed. Thereupon the *shebait* brought a suit under O. 21, R. 103, C. P. Code, for recovery of possession of the property on the allegation that it was a part of the *debutter* endowment belonging to the deity and *H* did not acquire any title to it by reason of his purchase at the sale held in execution of a decree obtained by a third party against the representatives of the mortgagee:

Held, that the purchase by the mortgagee in execution of his mortgage-decree was void altogether and the possession of the purchaser was adverse from the date of the sale. Arts. 134-A to 134-C which were introduced by the amending Act of 1929 had no application to the facts of the case. The suit was governed by Art. 144 and was barred by limitation. A.I.R. 1946 Cal. 473=224 Ind. Cas. 398=50 Cal. W. N. 629.

——Art. 134-A—Applicability — Adverse possession—Endowed property—Alienation of — Dates from which adverse possession of alienee starts in cases of void and voidable transfer, stated—When transfers are void and voidable, explained.

When an endowed property is alienated by a manager, the possession of the alienee becomes adverse as soon as he is without any title to the property. If the transfer is void *ab initio*, the possession of the transferee is adverse from the very date of the transfer. If it is not void but it is only voidable at the instance of the succeeding manager, possession cannot be adverse until the office of the alienating *mahant* ceases.

The alienation is void *ab initio* when the manager acts in negation of the trust. In the first place, if the alienation is not merely of certain items of the endowed property, but of the endowment as a whole, the possession of the transferee is unlawful from the very beginning and limitation would run from the date of transfer. In the second place, even if the subject-matter of transfer is only particular item or items of endowed property, the question whether the transaction is void or voidable would depend upon the fact whether the *shebait* or the manager purported to transfer the same in his capacity as manager or in his own individual capacity as the secular owner of the property. A *shebait* or manager has the right to alienate portions of endowed property for purposes of legal necessity. He may exceed his powers but if the transfer of the deity's property is by the *shebait* or manager as such the transferee would at least acquire an interest which would be valid during the lifetime of the transferring *mahant*, but if the manager transfers the property belonging to the deity as his own property asserting his own personal interest in the same, his act itself is adverse to the trust. The transferee in such cases would acquire no title to the property, and his possession would be unlawful from the beginning. The same principle applies to involuntary transfers as well.

A sale of the endowed property in execution of a mortgage decree is governed by the same principle. If the mortgage is executed by the manager *qua* the manager on behalf of the deity the mortgage is not void altogether, and the purchaser at a mortgage sale would, at least, acquire an interest which will enure during the lifetime of the manager. If the manager asserts his own individual ownership in the property in denial of the rights of the deity and purports to act not as *shebait* but as proprietor of the endowed property the mortgagee would not acquire any interest by such transaction. The purchaser at the mortgage sale would be a trespasser out and out and his possession would be adverse from the date of his purchase. A.I.R. 1946 Cal. 473=224 Ind. Cas. 398=50 Cal.W.N. 629.

——Arts. 134-A; 134-B and 144—(Amended by Act 1 of 1929)—Applicability—Trustee of a temple—Mortgage of certain items and sale of certain other items without authority and falsely representing the items to be his private property—Suit to declare them not binding on trust by successor in office—Limitation.

The appellant, a trustee of a temple, was appointed in 1933 displacing the 1st defendant. He sued in 1940, after seven years after coming into the office of trusteeship, for a declaration that a mortgage created by the 1st defendant or properties described as item 1 and 2 and the sale of item 3 as well as a sale in execution by Court of item 4 were not binding, on the trust and that the appellant was entitled to possession from the alienees. The item 1 and 2 were mortgaged in 1928, on the representation that they belonged to 1st defendant and item 3 again was sold in the same manner. The 4th item had been attached as the private property of the 1st defend-

ant who allowed the sale in 1921, to proceed on that basis. On the question whether the suit against all these alienations was barred by limitation,

Held, (1) that since the alienation by sale of item 3 was made within 12 years of the death, resignation or removal of the transferor the principle of Art. 134-B of the amended Limitation Act applied, and the suit was not time barred.

(2) That so far as the mortgage of items 1 and 2 was concerned Art. 134-A applied and saved limitation.

(3) That in the case of item 4 the article governing would be Art. 144 of the Limitation Act, since the adverse possession did not start from the date of Court-sale but only from the date when the defendant ceased to hold office as trustee. Therefore the suit as regards that item also was not barred. I.L.R. (1947) M. 253=228 Ind. Cas. 470=A.I.R. 1947 Mad. 3=59 M.L.W. 448=1946 M. W.N. 529=(1946) 2 M.L.J. 123.

——Art. 134-A—'Plaintiffs'—Meaning—Representative suit.

The word "plaintiff" in Col. 3 of Art. 134-A must, in the case of a representative suit brought on behalf of the general body of worshippers in a village, be understood to refer only to the plaintiffs *eo nomine* on record and not to every individual member of the community. A.I.R. 1940 Mad. 81 =50 M.L.W. 658=(1939) M.W.N. 1137=(1939) 2 M.L.J. 920=189 Ind. Cas. 749.

——Art. 134-A—Suit by Hindu idol restraining transferee from former mahant from disturbing plaintiff's possession.

Where a Hindu idol institutes a suit against a transferee by a former *mahant*, restraining him from disturbing the plaintiff in its possession, what the plaintiff idol asks for is not only an injunction but setting aside the transfer, and the suit is, therefore, governed by Art. 134-A, Limitation Act. If, however, the transferee files a suit against the idol, no period of limitation would run against the idol in its defence. A.I.R. 1938 Lah. 752=178 Ind. Cas. 806.

——Art. 134-A—Starting point.

Where an alienation by *shebait* is disputed by his successor, the limitation of 12 years runs from the death of the alienating shebait, but where the property is sold in execution of a mortgage-decree,, the limitation runs from the date of the sale. 62 C.L. J. 10=166 Ind. Cas. 859.

——Art. 134-A—Starting point — Mahant of idol granting permanent lease in 1909—Lessee obtaining decree for possession—Suit by successor of *mahant* in name of idol in 1935 for permanent injunction restraining lessee from dispossessing him—Suit, held governed by Art. 134-A—Initial onus of proving suit to be in time, held was on plaintiff—Injunction, held could only be granted after he gets transfer of 1909 set aside. A.I.R. 1938 Lah. 470=40 P.L. R. 184=178 Ind. Cas. 787.

——Art. 134-B—Applicability—Execution sale.

The words "transferred by a previous manager for a valuable consideration" in Art. 134-B of the Limitation Act cannot be construed as covering an execution sale under Court process, and the word "transferor" in that article as extending to the judgment-debtor whose land is sold. 25 M. 99 and 50 C. 49, approved. 77 I.A. 42=29 Pat. 279=1950 A.L.J. 108=A.I.R. 1950 P.C. 44=1950 M. W.N. 170=1950 A.W.R. 230=52 Bom.L.R. 493 =86 C.L.J. 1=63 M.L.W. 110=54 C. W. N. 213=(1950) 1 M.L.J. 243 (P.C.).

——Art. 134-A—Applicability—Transfer of wakf property by manager describing it as his private property.

The fact that while selling *wakf* property the manager described it as his private property, would not take the case out of the purview of Art. 134-B of the Limitation Act. The relevant words are, "transfer by a previous manager" and to hold that if the manager while making the transfer denies that the property is *wakf* the article cannot apply, would be to read in the article words like, "manager as such" which do not exist there. A.I.R. 1949 E.P. 233.

——Art. 134-B—Applicability—Endowed property mortgaged by *shebait* not as *shebait* but as secular owner in 1905 and purchased in execution of mortgage-decree by mortgagee in 1908 and possession obtained—Suit for recovery of possession by present *shebait* 1940—Suit is governed by Art. 144 and not Arts. 134-A to 134-C. A.I.R. 1946 Cal. 473=50 Cal.W.N. 629=224 Ind. Cas. 398.

——Art. 134-B—Applicability.

A suit for setting aside an invalid alienation by a *shebait is* barred under Art. 134-B after the lapse of twelve years from the death or removal of the alienating *shebait*. The right to bring such a suit does not revive on the death or removal of each succeeding *shebait*. 48 C.W.N. 172 (1)=A. I. R. 1944 Cal. 211=215 Ind. Cas. 201.

——Art. 134-B—Applicability.

Art. 134-B bars right of *shebait* as well as of deity to recover possession of *debattar* property after twelve years from the date of the death or removal of the alienating *shebait*. 1944 Cal. 211=48 C. W. N. 172 (2)=215 Ind. Cas. 201.

——Art. 134-B—Applicability.

Before the introduction of Art. 134-B in 1929, suit to set aside alienation by *shebait* was governed by Art. 144. A.I.R. 1944 Cal. 211=48 C.W.N. 172 (2)=215 Ind. Cas. 201.

——Art. 134-B—Applicability—Alienation by shebait.

Under Art. 134-B, the *terminus a quo* for a suit to set aside an alienation made by a *shebait* has been rigidly fixed and begins from the date of death or cessation of office of the alienating *shebait* and the Legislature has deliberately avoided all questions of adverse possession after the death of such *shebait*. Therefore, under Art. 134-B, a suit to set aside an invalid alienation by a *shebait* is barred after the lapse of twelve years from the death or removal of the alienating *shebait*. The right to bring such suit does not revive on the death or removal of each succeeding *shebait*. A.I.R. 1944 Cal. 211=48 C.W. N. 172 (2)=215 Ind. Cas. 201.

——Art. 134-B—Applicability.

A suit for a declaration that the mortgage of a *shrotriem* land is not binding on the plaintiff does not fall within the purview of Art. 134-B, Limitation Act. (1940) M.W.N. 404=51 M.L.W. 666 =A.I.R. 1941 Mad. 217.

——Art. 134-B—De facto manager, suit by.

Per *Venkatarama Rao* and *Abdul Rahman, JJ. (In order of reference)*.—The manager contemplated in Art. 134-B is not necessarily a *de jure* manager.

It also includes a *de facto* manager. A.I.R. 1941 Mad. 449=I.L.R. (1941) Mad. 599=(1941) 1 M. L.J. 644=53 M.L.W. 569=1941 M.W.N. 408=199 Ind. Cas. 225 (F.B.).

——Art. 134-B—Endowed property — Possession by alienee—When adverse—Involuntary transfer —Principle applicable. *See* ADVERSE POSSESSION—ENDOWED PROPERTY. 50 C.W.N. 629 =A.I.R. 1946 Cal. 473.

——Arts. 134-B, 144—Hindu religious institution —Alienation by manager.

Per Full Bench(*Abdul Rahman* and *Krishnaswami Ayyanger, JJ.*, dissenting).—Where a manager of a Hindu religious institution makes an alienation of the property of the institution for valuable consideration and the succeeding manager seeks to impeach that alienation by suit, Art. 134-B and not Art. 144, Lim. Act applies when there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager.

Even if Art. 144 does apply, the date of the starting point of adverse possession in such a case is the date of death, resignation or removal of the previous manager who effected the alienation and not the date of the election or the appointment of his successor. A.I.R. 1941 Mad. 449=I.L.R. (1941) Mad. 599=(1941) 1 M.L.J. 644=53 M.L.W. 569= 1941 M.W.N. 408=199 Ind. Cas. 225 (F.B.).

——Art. 134-B—Retrospective effect.

General principle is that the law of limitation applicable to a suit is the law in force at the date of institution of suit—*Debutter* property alienated before amendment—Suit to recover possession—Right to sue accruing after amendment:

Held, that Art. 134-B applied. A. I. R. 1944 Cal. 211=48 C.W.N. 172 (2)=215 Ind. Cas. 201.

——Art. 134-B—Retrospective effect.

The law of limitation applicable to a suit or proceeding is the law in force at the time of the institution of the suit or proceeding unless there is a distinct provision to the contrary. Hence Art. 134-B has retrospective effect. 44 Bom.L.R. 146=A.I. R. 1942 Bom. 138=200 Ind. Cas. 889.

——Art. 134-B—Retrospective effect.

The general rule is that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. The atmost that can be said is that if any prescriptive rights had become vested under the old limitation period, the new Act will not affect such rights. Consequently, to a suit brought in 1930 by *sajjadanashin* of a *Takia* for recovery of possession of immovable property comprised in the *wakf* which had been transferred by trustee *de son tort*, the article applicable is Art. 134-B. A. I. R. 1937 Lah. 9 =39 P.L.R. 222=169 Ind. Cas. 732.

——Art. 134-B—Scope—Alienation of wakf property.

Succeeding *de facto* trustee can sue for possession of property alienated by his predecessor. Limitation would begin to run as soon as a new incumbent succeeds the person in charge of the religious institution who alienated the *wakf* property. A.I.R. 1937 Lah. 9=39 P.L.R. 222=169 Ind. Cas. 732.

——Art. 134-B—Scope.

Mahant mortgaging *debutter* property—*Mahant* removed and new one appointed—Suit by new *mahant* for possession within 12 years from date of removal of previous *mahant*—Suit held within time—Sanction of Collector under Civil P.C., S. 92, not required. A.I.R. 1937 Lah. 660=39 P.L.R. 355=172 Ind. Cas. 319.

——Art. 134-B—Starting point—'Removal' — Decree removing mahant from office—Execution pending appeal—Appeal subsequently dismissed—Suit to declare invalid alienation by mahant—Starting point of limitation—Adverse possession—Interruption. 226 Ind. Cas. 60=12 B.R. 656=24 Pat. 208=A. I. R. 1945 Pat. 326.

——Arts. 134-B, 134, S. 28—Transfer, if includes lease.

The 'transfer' referred to in Art. 134-B must be taken to be transfer whether before or after the amending Act came into force. The word "transfer" is wide enough to include a lease. The substitution of the word "transfer" in Art. 134 by the Act of 1908 in place of the word "purchase" for the purpose of bringing transfers other than sale within the operation of Art. 134 is a sufficient indication of the intention of the Legislature when they used the word "transfer" in Art. 134-B also.

If the transfer which comes under Art. 134-B is a transfer of full ownership, the right of the plaintiff to the property is extinguished after the lapse of the statutory period by operations of S. 28. The effect of the lapse of the statutory period under Art. 134 is to protect all transferees contemplated by that Article. It, therefore, follows that in cases of transfer by way of mortgage or a permanent lease which comes within Art. 134, the transferee acquires on the expiry of the period prescribed by that article, the rights of the mortgagee or permanent lessee as if the mortgage or permanent lease had been executed by the original owner. The right of the original owner becomes subject to the rights of the mortgagee or permanent lessee. There is no reason why the same principle should not apply when the right of the Manager of a Hindu or Muhamadan religious endowment to recover possession of endowed property against a transference of such property by the previous manager of the endowment is barred by Art. 134-B. After the lapse of the period prescribed by that article, the transfer, whether by way of mortgage or permanent lease, becomes binding on the endowment. I.L.R. (1937) 2 Cal. 242=41 C.W.N. 693=A.I.R. 1937 Cal. 305=172 Ind. Cas. 315.

——Art. 135.

Synopsis.

1. Alienation by widow.
2. Applicability.
3. Default clause in mortgage.
4. Foreclosure suit.
5. Mortgage by conditional sale.
6. Mortgagor in possession.
7. Payment of interest.
8. Right to possession.
9. Starting point.
10. Submersion of land.
11. Suit by mortgagee.

1. Alienation by widow.

——Art. 135—Alienation by widow—Reversioner's suit for declaration. *See* ART. 91. 32 C. 473.

2. Applicability.

——Art. 135—Applicability.

Mortgagee purchasing in Court auction—His possession obstructed by prior purchaser of equity of redemption—Mortgagee unaware of any such purchaser till obstruction—His suit against prior purchaser—Art. 114 and not Art. 135, held applied. A. I. R. 1943 Sind 242=I.L.R. (1943) Kar. 315=211 Ind. Cas. 321.

——Arts. 135, 75, Ss. 19, 20 and 21—Applicability.

Two brothers *M* and *S* executing two mortgages in favour of *A* on January 25, 1919—*M* and *S* entitled to redeem on any date on payment of principal and interest—Mortgagee entitled to take possession on failure to pay annual interest for a year or more—No interest paid more than five years—On August 28, 1924, *M*, on behalf of *S*, mortgaging equity of redemption of previous mortgages to *A* for Rs. 72 due as interest on previous mortgages. No further interest paid subsequently—*A* suing on January 11, 1937 for possession of land on basis of original mortgages.

Held, that suit was governed by Art. 135 and was within time—That Ss. 19, 20 or 21 or Art. 75 did not apply. A.I.R. 1939 Lah. 212=41 P.L.R. 529.

——Art. 135—Applicability.

Article 135 applies not only where the suit is filed against the mortgagor but also against a person deriving title from the mortgagor under a prior mortgage. 81 Ind. Cas. 581=11 O.L.J. 269=A. I.R. 1924 Oudh 374.

——Art. 135—Applicability — Suit between mortgagees.

Art. 135 has no application to a case when the mortgagor is merely a pro forma defendant and the real dispute is as to whether the puisne mortgagee is entitled to redeem and to take possession of the mortgaged property from the prior mortgagee. 143 P.L.R. 1911=224 P.W.R. 1911=10 Ind. Cas. 20.

3. Default clause in mortgage.

——Art. 135—Default clause in mortgage—Payment of interest after default.

Where a mortgagee is entitled to possession as per terms of the mortgage deed from the date of default of payment of interest, the cause of action for a suit for possession accrues as soon as the default takes place. Subsequent payment of interest cannot stop the period of limitation from running. 40 P.L.R. 48.

——Art. 135—Default clause in mortgage.

A person mortgaged his land with a stipulation that he would be in possession and be paying annual interest failing which the mortgagee would be entitled either to recover interest independently or to add it to the principal sum and obtain possession of land by suit,

Held, that although the mortgagee had option of choosing between two different remedies, as he could pursue them on the happening of a single event namely a given default, the mortgagor's right to possession had determined at the first default date and mortgagee's suit 12 years subsequent to default was barred. 121 Ind. Cas. 190=A.I.R. 1930 Lah. 327.

——Art. 135—Default—Suit for possession.

A mortgage-deed contained a clause to the effect that the mortgage-money would be paid by annual instalments, and that on the happening of a default in the payment of any instalment the mortgagee would be entitled to take possession of the property. No instalment was paid. In a suit by the mortgagee for possession of the mortgaged property more than twelve years after the date of the first default,

Held, that the suit was barred under Art. 135 of the Limitation Act. 63 Ind. Cas. 579 (Lah.).

——Art. 135—Default—Suit for possession—Limitation—Option to mortgagee—Effect of.

A mortgage deed provided that interest would be paid every six months and on default of such payment, the mortgagee was given the option of either to allow the interest to run on treating the unpaid interest as principal or to take a bond from the mortgagor for the amount of interest accused from up to date or to take possession of the mortgaged property or to sue for the sale of the mortgaged property in lieu of principal and interest then due or to wait till the expiry of the period fixed for the payment of the entire money.

Held, that the mortgagee's right to possession of the property could not be deemed to have determinmined within Art. 135 of the Limitation Act so long as he had not given intimation of any intention to adopt that remedy given by the mortgage. 6 O.L.J. 248=1 U.P.L.R. (P.C.) 45=51 Ind. Cas. 985.

——Art. 135—Default—Suit for possession.

If a mortgagor agrees to pay the mortgage money by instalments and on failure to deliver possession of the mortgaged property to the mortgagee a suit for possession by enforcement of the condition is governed by Art. 135 and must be brought within 12 years from the date of default. 30 P.L.R. 1909 =91 P.R. 1908=156 P.W.R. 1908=4 Ind. Cas. 921.

——Art. 135—Default — Suit for possession of mortgaged property on default by mortgagor in payment of instalment.

When the mortgagor agrees to pay the mortgage money by instalments and stipulates to deliver possession of the mortgaged property to the mortgagee on default in the payment of instalments, a suit for possession by enforcement of the condition is governed by Art. 135 and must be brought within 12 years from the date of default, the suit not being one for recovery of debt. S. 23 of the Act is not applicable to the case, and payments made after the default do not extend the period of limitation. 30 P. L. R. 1909=91 P. R. 1908=4 Ind. Cas. 921.

4. Foreclosure suit.

——Arts. 135 and 144—Foreclosure suit—Limitation—Rights of assignee of mortgage.

If a mortgagee under a mortgage by conditional sale does not sue for foreclosure within 12 years from the date fixed for payment he is barred by limitation from suing for possession as owner. (35 P.R. 1899; 94 P.R. 1912 R.) An assignee of a mortgage can sue the mortgagor for possession though the assignor had erroneously thought that his right of foreclosure is taken away by the Punjab Alienation of Land Act, if it was an incident of the mortgage-transaction. 59 P.W.R. 1917=39 Ind. Cas. 242.

——Arts. 135 and 144—Foreclosure after 12 years —Suit for possession barred — Regulation 17 of 1806.

In a mortgage by conditional sale, the mortgagee was entitled to immediate possession but never took possession. He did not take foreclosure proceedings under Regulation 17 of 1806 within 12 years of the date fixed in the deed of mortgage for payment of mortgage money. After the expiry of 12 years he took foreclosure proceedings and then sued for possession as owner.

Held, the suit was barred by limitation either under Art. 135 or Art. 144 of the Limitation Act. 35 P.R. 1899, foll. 94 P.R. 1912=237 P.L.R. 1912 =178 P.W.R. 1912=15 Ind. Cas. 275.

5. Mortgage by conditional sale.

——Arts. 135 and 144—Mortgage by conditional sale—Suit for possession as full owner after expiry of year of grace—Limitation.

When under the terms of a mortgage deed, the mortgagee is entitled to possession of the mortgaged property without first taking foreclosure proceedings the right to the possession of the mortgagor determines on the date of default but when under the terms of the mortgage deed the mortgagee as such has no right to possession, the right to the possession of the mortgagor does not determine and his possession does not become adverse until foreclosure proceedings have been perfected and the year of grace has expired. 52 P.W.R. 1918=25 P.L.R. 1918=79 P.R. 1918=45 Ind. Cas. 563.

——Arts. 135; 144—Mortgage of 1861—Novation of contract—Adverse possession.

A mortgage which purported to be a usufructuary mortgage was executed on the 14th May; 1861; the ostensible consideration being a sum of Rs. 4,800; but, in fact, only Rs. 2,270 out of the nominal consideration were paid. On the 11th April, 1862, another deed was executed between the parties by which the mortgagee surrendered to the mortgagor a portion of the mortgaged property. At the same time the mortgagor entered into a covenant, the effect of which was to alter the transaction into a mortgage by conditional sale. In 1882 the mortgagees attempted to get possession of the remaining portion of the mortgaged property but their suit was dismissed as barred by limitation. In 1900 the mortgagees sued for foreclosure.

Held, that the suit was barred by limitation whether Art. 135 or Art. 144 Act 9 of 1871 or S. 1 (12) of Act 14 of 1859 prescribed the rule of limitation applicable. 26 A. 4=1903 A.W.N. 175.

6. Mortgagor in possession.

——Art. 135—Mortgagor not in possession.

There is no reason why a puisne mortgagee should be compelled to file a suit for possession within twelve years from the date of his mortgage, when the property is not in the possession of the mortgagor, but is in the possession of a third party or a prior mortgagee. 63 Ind. Cas. 679=4 L.L.J. 13=A.I.R. 1922 Lah. 91.

7. Payment of interest.

——Art. 135—Payment of interest, whether acknowledgment of mortgagee's right to possession on default.

A mortgage deed contained a forfeiture clause whereby the mortgagee might obtain possession of the land in default of payment of the first or subsequent instalments of interest:

Held, that the payment of interest could not possibly be construed as an acknowledgment of the mortgagee's right to enforce his right to possession under the default clause; and that he had a right to secure possession as soon as the first default occurred. The fact that any subsequent default also gave him a right of possession was not insufficient to prevent time from running against him. A.I.R. 1934 Lah. 993=156 Ind. Cas. 42.

8. Right to possession.

——Art. 135—Right to possession — Determination of.

The mortgagor's right to possession determines even when a mortgagee is in possession by his executing a usufructuary mortgage. 2 O.L.J. 488=8 O. C. 280=32 Ind. Cas. 341.

9. Starting point.

——Art. 135—Starting point under—Mortgagor's right to possession—When determines.

Under Art. 135 time begins to run against the mortgagee when the mortgagor's right to possession determines. The mortgagor's right to possession determines at the time when the terms of the mortgage entitle the mortgagee to take possession. But if the parties agreed expressly or impliedly that the mortgagor should continue in possession, it would determine when such agreement comes to an end. 1950 A.W.R. 284.

10. Submersion of land.

——Art. 135—Submersion of land.

In a suit brought more than 12 years after the mortgage by mortgagee for possession of mortgaged property which was submerged under water after the execution of the mortgage,

Held, that as the time began to run from the date of the mortgage, the subsequent submersion of the land under water cannot have the effect of stopping it and, therefore, the suit was barred. 92 Ind. Cas. 178=7 L.L.J. 509=26 P.L.R. 729=A.I.R. 1925 Lah. 627.

11. Suit by mortgagee.

——Arts. 135 and 142—Suit by mortgagee—Limitation.

A suit by a mortgagee against the mortgagor or his succeessors in title is governed by Art. 135. 117 P.R. 1919=50 Ind. Cas. 762.

——Art. 135—Suit by mortgagee—Puisne Mortgagee—Suit for possession—Cause of action.

The time for a puisne mortgagee to sue for possession begins to run from the date of redeeming the prior mortgagee who was in possession of the property. He need not file a suit within 12 years

from the date of his mortgage. 8 P.W.R. 1919= 48 Ind. Cas. 916.

——Arts. 135 and 118—Suit by mortgagee for possession—Nature of suit—Not for specific performance,

A mortgage deed contained recital that the mortgagors had received the mortgage money and put the mortgagee in possession of the mortgaged property. Though possession had not been given, the suit of the mortgagee for possession was not a suit for specific performance of a contract of mortgage but a suit for possession and was governed by Art. 135 and not by Art. 113. 7 Ind. Cas. 646 (All.).

——Art. 135—Suit by subsequent mortgagee against mortgagor for recovery of possession.

For the purpose of Art. 135, the mortgagor must either have actual possession or an unconditional right to recover possession from somebody who has in fact got it, and unless and until he has the right, time does not start to run.

Consequently, where possession is outstanding in a prior mortgage at the date of a subsequent mortgage, time for a suit for recovery of possession against the mortgagor runs against the subsequent mortgagee, not from the time of that mortgage but from the date when possession is recovered by the mortgagor from the prior mortgagee. 35 Bom.L.R. 956=A.I.R. 1933 Bom. 439=57 B. 393=147 Ind. Cas. 919.

——Art. 136.

Synopsis.

1. Applicability.
2. Construction.
3. Decree—Interpretation.
4. Decree-holder.
5. Limitation.
6. Starting point.
7. Suit for partition
8. Transfer by successive vendors out of possession.

1. Applicability.

——Arts. 136 and 141—Applicability—Suit by purchaser from Hindu entitled to possession on death of Hindu female—Limitation—Starting p int.

Art. 141, Limitation Act, refers to a suit by a Hindu entitled to possession of immovablle property on the death of a Hindu female and strictly, therefore, that article would not cover the case of a purchaser from such a person. But by reason of Art. 136 of the Act he would be in precisely the same position as his vendor and time would begin to run against him, as it would against the vendor, from the date of the death of the Hindu female. A.I.R. 1950 Cal. 506.

——Arts. 136 and 141—Applicability — Suit by assignee of reversioner to recover immoveable property. *See* LIMITATION ACT, ART. 141. 8 C.W.N. 802.

——Arts. 136, 141 and 144—Applicabil'ty — Suit for possession of immoveable pr perty by reversioner's assignee — Vendor cut of po session at date of transfer.

Where a suit by an assignee from a Hindu reversioner, who was out possession at the date of assignment, was brought within 12 years from the death of the Hindu female, upon whose death the reversioner became entitled to the property,

Held, that Arts. 136 and 141 should be read together and the suit was not barred. 8 C.W.N. 535.

——Arts. 136 and 127—Applicability—Suit by purchaser from member of a joint Hindu family alleged to have been out of possession—Limitation.

"Possession" in Art. 136 includes such possession as a member of joint Hindu family is presumed to have in the family property until excluded from it. A suit by a purchaser of property from a member of joint Hindu family, who is alleged to have been out of possession at the time of sale comes under Art. 136 and not under Art. 127. 9 M.L.T. 397=(1911) 2 M. W. N. 175=9 Ind. Cas. 495.

——Arts. 136, 138 and 144—Applicability.

P purchased certain property from B who had purchased it in execution of a rent-decree against a judgment-debtor. The property was not in possession of the judgment-debtor at the time of its purchase by *B* but was in possession of one *C* as a statutory mortgagee under S. 171, Bengal Tenancy Act:

Held, that as P's vendor *B* was not entitled before the money deposited by *C* was realised either from the usufruct of the property or by payment made by the judgment-debtor, a suit by *P* for possession within 12 years from the date on which the money deposited by *C* was realised was not barred by time under Art. 136 or Art. 144. Art. 138 did not apply. A.I.R. 1938 Cal. 790=67 C.L.J. 294= 180 Ind. Cas. 215.

——Art. 136—Applicability.

Possession contemplated by Art. 136 is not confined to actual occupation only; it also includes constructive possession. The expression "out of possession," as used in this article implies that some person is in possession adversely to the vendor, some person holding in a character incompatible with the idea that ownership remained vested in the vendor. Time does not begin to run under this article until the property is held in possession adverse to the vendor. In fact the question for decision in applying this article is, whether, if there had been no second sale, and the vendor had brought the suit for possession, he would have succeeded. If he would have succeeded, then the vendee must succeed in the suit brought by him. A.I.R. 1934 Rang. 223=151 Ind. Cas. 357.

——Arts. 136 and 137—Applicability—Suit by representative in interest of auction-purchaser—Possession of Judgment-debtor at date of sale—Burden of proof.

A suit for recovery of possession by a representative in interest of an auction purchaser must be commenced within 12 years, from the date when the judgment-debtor is first entitled to possession, if he is out of possession, and 12 years from the date when the sale becomes absolute if he is in possession, and the burden of proving such possession is on the plaintiff. 19 C.L.J. 209=23 Ind. Cas. 811.

——Arts. 136 and 137—Applicability.

The articles do not apply to suit against vendors or judgment-debtors but apply to suit against third persons or trespassers. 5 Ind. Cas. 273 (All.).

——Art. 136—Applicability — Suit by vendee for possession. See LIMITATION ACT, ART. 11. 4 Bom.L.R. 513=26 B. 730.

2. Construction.

——Art. 136—Construction.

The words "when the vendor is first entitled to possession" in the third column of Art. 136 relate to the beginning of dispossession referred to in the first column of Art. 136. 36 Bom.L.R. 284=58 B. 410=A.I.R. 1934 Bom. 273=154 Ind. Cas. 824.

——Art. 136—Construction — 'Vendor', meaning of.

The expression "vendor" in Art. 136 means a vendor other than the auction-purchaser mentioned in Art. 23. 8 C.W.N. 476=31 C. 681 (F.B.).

——Art. 136—Construction.

The expression 'out of possession' in the first column of Art. 136 implies that some person is in possession adversely to the vendor. 36 Bom.L.R. 284=A.I.R. 1934 Bom. 273=58 B. 410=154 Ind. Cas. 824.

——Art. 136—Construction—'Out of possession'—Meaning of.

The expression "out of possession" in Art. 136 of the Limitation Act implies that some person is in possession adversely to the vendor, some person holding in a character incompatible with the idea that the ownership remained vested in the vendor. The possession in Art. 136 of the Limitation Act includes such possession as a member of the joint family is presumed to have, in the family property, until excluded therefrom. 29 C.L.J. 241=51 Ind. Cas. 123.

3. Decree—Interpretation.

——Arts. 136, 144 and 148—Decree—Interpretation.

A decree directing that *A* should obtain possession on payment of a certain sum to *B* does not create any mortgage or charge and the suit for possession by *C* (a purchaser of *A's* interest) is governed by Art. 136 and not by Art. 144 or 148. 2 O.L.J. 500=32 Ind. Cas. 353.

4. Decree-holder.

——Arts. 136, 138 and 144—Decree-holder—Sale—Auction-purchaser—Possession through Court—Formal possession — Obstruction by judgment-debtor who has continued to be in possession — Limitation.

Arts. 136, 137 and 138 obviously refer to cases where no possession, formal or actual, has been obtained through Court. None of these articles contemplate the case of an auction-purchaser or his assigns who has obtained formal possession and is disturbed by the judgment-debtor or his heirs, who continue in actual possession. Such a case is governed by Art. 144. 25 B. 275=2 Bom.L.R. 1021.

5. Limitation.

——Art. 136—Limitation — Title of vendor not extinct at the time the vendee's suit is brought.

In Art. 136 the words in the third column relate to the beginning of the dispossession referred to in the first column and the meaning of the article is that if the vendor's title would be alive at the time the vendee's suit is brought supposing no sale had taken place, such suit is not barred; but on the other hand, when the vendor's possession had ceased more than twelve years before the vendee's suit, such a suit would be too late. In a suit, such as is contemplated by Art. 136, when the purchaser succeeds in showing that the exclusion of his vendor from possession took place within twelve years of the institution of the suit, he succeeds in showing that his suit is within time. 1901 A.W.N. 137=23 A. 442.

6. Starting point.

——Art. 136—Starting point.

Under Art. 136 a person in his capacity of a private purchaser has 12 years' limitation to sue for possession of immovable property sold to him by his vendor when out of possession at the date of sale, the starting point of limitation being the date when the vendor was first entitled to possession; and the mere circumstance that the purchaser takes five years to complete his title against his vendor cannot give him a fresh starting point of limitation as he can only sue in the right of his vendor. 2 N.L.R. 32, Rel. on. 116 Ind. Cas. 70=A.I.R. 1929 Nag. 298.

7. Suit for partition.

——Arts. 136 and 144—Suit for partition—Exclusion for more than 12 years—Onus.

In a joint Hindu family consisting of father and sons one of the sons agreed in consideration of the assignment of certain immovable properties by the father for maintenance without powers of alienation, not to demand partition of the family properties but the son enjoyed the properties assigned to him only for one year and thereafter was driven out of the family by the father and was refused maintenance and a suit for partition was filed more than 12 years afterwards.

Held, that there was exclusion of the son from the joint family properties, and whether Art. 136 or 144 applied the plaintiff must show that he brought the suit within 12 years from date of exclusion. (1915) M.W.N. 29=26 Ind. Cas. 904.

8. Transfer by successive vendors out of possession.

——Art. 136—Transfers by successive vendors out of possession—'Vendor'—Meaning.

Where there have been transfers by successive vendors, all out of possession, the term 'vendor' includes the first in the series of vendors entitled to sue for possession. 24 Ind. Cas. 216 (Cal.).

——Art. 137—Applicability.

There is no warrant for limiting the application of Art. 137 to cases in which the Court sale has taken place without an antecedent attachment, as for instance, in execution of a mortgage-decree. A.I.R. 1939 Mad. 456=49 M.L.W. 671=(1939) M.W.N. 488=(1939) 1 M.L.J. 802=I.L.R. (1939) Mad. 803=182 Ind. Cas. 999 (S.B.).

——Arts. 137, 144—Co-mortgagor redeeming property—Sale of entire property—Representative in interest of non-redeeming mortgagor suing for re-

covery of possession on payment of porportionate amount—Article applicable.

The land originally belonged to four persons. The share of one of them, *i.e.*, *L* was bought by *M* at a Court auction. At that time, the land was under usufructuary mortgage in which all four original owners had joined. This mortgage was redeemed by the co-mortgagors other than those representing *L's* interest on a date after the Court-auction and on the same date they re-mortgaged a large proportion of the land to some other person. This mortgage they again redeemed. Finally these co-sharers relinquished their interest in the land by selling it to a third party. *M* brought his suit for recovery of possession of his share on payment of proportionate amount. The suit was brought more than 12 years after the redemption of the joint mortgage by *L* and his co-mortgagors but within 12 years of sale of the entire property to the third party. The defendants contended that the suit was barred by time and that Art. 137 applied:

Held, that the co-mortgagors on redeeming this land and coming into possession thereof did not hold adversely to the non-redeeming partner. They either held a charge or obtained the rights of the original mortgagee over the share belonging to *M*. Although they dealt with the land as they would their own and mortgaged it, redeemed it, and mortgaged again none of these acts would make their possession adverse to that of the plaintiff. It was not until they sold the whole of the land including the plaintiff's share that they exercised claims adverse to those of the plaintiff's: therefore the plaintiff must bring his suit within 12 years of the date of sale. Article applicable was Art. 144 and not Art. 137. A. I. R. 1938 Rang. 65=176 Ind. Cas. 923.

——Art. 137—Construction—"Entitled to possession".

The words "entitled to possession" in Art. 137, mean able to exercise his right of possession and the words "out of possession" imply that the judgment-debtor at the time of the sale was not in a position to exercise his right of possession. A.I.R. 1938 Rang. 65=176 Ind. Cas. 923.

——Art. 137—Construction—'Out of possession'—'First entitled to possession'—Meaning of.

The words "out of possession" in Art. 137, Limitation Act, Column 1, imply that some person is in possession adversely to the judgment-debtor some person holding in a character incompatible with ownership remaining vested in the judgment-debtor.

The words "when the judgment-debtor is first entitled to possession" in the third column of the article, relate to the beginning of the dispossession referred to in the first column. If therefore, in case no sale had taken place, the judgment-debtor's suit would have been alive at the time when the auction-purchaser brings his suit, such suit will not be barred. If on the other hand, at the date of the auction-purchaser's suit the judgment-debtor was out of possession for 12 years and had thereby lost his right to recover possession, then the suit of the auction-purchaser would be barred. 48 Bom. L. R. 800=A.I.R. 1947 Bom. 206.

——Art. 137—Mortgage decree.

Article 137 does not apply to purchasers at sale held in execution of mortgage-decrees. 99 Ind. Cas. 831=A.I.R. 1923 Mad. 160=50 M.L.J. 183.

——Art. 137—Mortgagor and mortgagee.

Adverse possession against a mortgagee is generally ineffectual against the mortgagor, especially when it begins at a time when the mortgagee is in possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor. 107 Ind. Cas. 612=A. I. R. 1928 Lah. 147.

——Art. 137—Possession—Whether means actual or constructive.

Article 137 was framed precisely to deal with cases where a person was not in possession at the date of sale. The possession referred to in the article is actual possession, and not constructive or symbolical possession. Hence where a purchaser in execution could not obtain possession of the property on account of a subsisting lease by judgment-debtor, a suit by him for possession within 12 years of the expiry of the lease but after 12 years from the date of purchase is within time. A.I.R. 1943 Mad. 413=56 M.L.W. 136=(1943) 1 M.L.J. 207 =1943 M.W.N. 147=203 Ind. Cas. 559.

——Art. 137—Rent decree—Purchaser in execution of.

Plaintiffs were owners of a miras tenure and under them was a *darminars* tenure held by the defendants. This under-tenure was sold in execution of a rent decree and purchased by a stranger who never obtained possession. In execution of a rent decree obtained against the stranger the under-tenure was again sold more than twelve years after and purchased by the plaintiffs who sued for possession,

Held, Per *Walmsley, J.* (*Woodroffe* and *Suhrawardhy, JJ.*, contra). Art. 137 applied to the case and the suit was barred.

Per *Suhrawardy, J.*—Article 140 or Art. 144 applied to the case.

Per *Woodroffe, J.*—None of the articles of the Limitation Act applied to the case but the suit was barred under S. 167 of the Bengal Tenancy Act. 26 C.W.N. 985=A.I.R. 1922 Cal. 544.

——Arts. 137, 138 and 142—Scope of—Trespass and adverse possession.

Art. 138 of the Limitation Act applies only to the case of a judgment-debtor or those claiming through him who remain in his possession after purchase at an execution sale and not to a case where the defendant, bases his claim to title and possession as a trespasser relying upon adverse possession. Art. 137 has no application to the facts of a case where possession remained with predecessors-in-title of the plaintiff, up to the time symbolical possession was given to the plaintiff. In such a case, Art. 142 only applies. 4 Pat.L.J. 463=(1919) P.H.C.C. 298=51 Ind. Cas. 801.

——Art. 137—Symbolical possession—Delivery of, starting point.

Delivery of symbolical possession is operative

against the judgment-debtor but is wholly ineffectual to affect the title or interrupt the actual possession of others. 22 C.L.J. 574=29 Ind. Cas. 84.

——Arts. 137, 136 and 144—Symbolical possession given—Suit for actual possession.

A suit for actual possession of property obtained in execution of a decree when symbolical possession was given, falls under Art. 144 and not Arts. 136 and 137. They do not apply to a case where Court has already given possession. 35 Ind. Cas. 87 (Pat.).

——Art. 137 — Symbolical possession—Time, when begins to run.

Where an auction-purchaser at a Court sale has obtained judicial possession, he or his assigns may sue the judgment-debtor for actual possession within 12 years from the date of obtaining such possession. When adverse possession is pleaded in a suit for possession during the limitation period the question of limitation becomes a question of title and the plaintiff, must first furnish proof of subsisting title at the date of the commencement of his suit before the defendant is required to establish his adverse possession. 17 Ind. Cas. 518 (All.).

——Art. 137—Suit for khas possession by mortgagee purchaser in execution of mortgage decree, against mortgagor and his tenants. *See* LIMITATION ACT, ARTS. 144, 137 AND 142. 53 C.W.N. 899=A.I.R. 1950 Cal. 92.

——Arts. 137 and 139—Suit for recovery of possession—Auction-purchaser.

Art. 137 applies to an auction-purchaser of the rights of a judgment-debtor not in possession at the date of the sale, while Art. 138 applies where he is in possession at the date of the sale. Under Art. 137 the suit must be brought within 12 years from the date when the judgment-debtor is first entitled to possession; in latter case the suit is in time if brought within 12 years from the date when the sale becomes absolute. 25 Bom. 275 Foll. 26 C.L.J. 339=22 C.W.N. 319=42 Ind. Cas. 709.

——Arts. 137, 142 and 144 — Suit for possession by auction-purchaser.

Property purchased in a suit in 1891 was in the posession of a trespasser and the plaintiff purchasser was given only formal possession under his purchase in 1897: the defendant obtained possession of the property under a decree but he did not derive his possession from or through the first trespasser but was himself a trespasser as regards the plaintiff. In 1908, the plaintiff sued defendant for possession. *Held*, that Art. 144 applied, that in 1897, when the defendant obtained possession, the plaintiff had a subsisting right, that the defendant could not add the period of adverse possession of the first trespasser to his possession, and that, therefore, the plaintiff's claim was in time. Art. 137 does not apply to a suit against the judgment-debtor or his representative. Art. 142 does not apply as the plaintiff was never in actual possession and was never dispossessed. 33 All. 224=7 A.L.J. 1184 =8 Ind. Cas. 1095.

——Arts. 137 and 138, 142—Vacant site—Suit for possession—Limitation.

Where a property was a bare site, plaintiff's symbolical possession is equivalent to actual possession and therefore the suit was *prima facie* governed by Art. 142 of the Limitation Act and not Art. 137 or 138: defendants could defeat the claim only by shewing adverse possession for more than twelve years. 106 P.L.R. 1918=76 P.R. 1918=156 P.W.R. 1918=47 Ind. Cas. 411.

——Art. 138.

Synopsis.

1. Adverse possession.
2. Applicability.
3. Chota-Nagpur Tenancy Act.
4. C. P. Code.
5. Exclusion of time—If should be asked for in plaint.
6. Mortgage pending attachment.
7. Possession.
8. Scope.
9. Symbolical delivery of possession.

1. Adverse possession.

——Art. 138—Adverse possession.

The auction-purchaser must institute a suit for possession of the property purchased by him in execution of a decree within 12 yenrs from the date when the sale becomes absolute and any question of adverse possession in favour of person holding against him is irrelevant. 96 Ind. Cas. 173 (All.).

2. Applicability.

——Arts. 138 and 144—Applicability — Auction-purchaser at Court sale obtaining formal delivery —Subsequent suit for possession — Limitation — Time taken in proceedings to set aside sale—Exclusion of—S. 16.

Art. 144 of the Limitation Act and not Art. 138 applies to a suit for possession by an auction-purchaser of property at a Court sale after he has already obtained formal or symbolical delivery of possession. The suit is not by him as auction-purchaser, but as owner. S. 16 of the Limitation Act cannot apply so as to entitle him to deduct the period taken in proceedings for setting aside the sale. S. 16 can only be helpful to a plaintiff where he has not gone to the executing Court to obtain possession and the time from which limitation starts is the date when the sale becomes absolute. But when the purchaser at the execution sale has gone to the executing Court and obtained delivery of possession, whether formal or actual and is then dspossessed, a suit for recovery of possession by him is not a suit by him as auction-purchaser but an ordinary suit for possession by an owner on title. In such a case Art. 144 applies and there is no scope for invoking S. 16. 24 Pat. 717=A.I.R. 1946 Pat. 202.

——Art. 138—Applicability — Auction-purchaser obtaining symbolical possession.

Art. 138 of the Limitation Act does not apply to the case of a plaintiff who has obtained possession, even though symbolical, in execution of his decree. A suit by such a plaintiff would not be by an auction-purchaser. It would be an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of the sale and delivery of symbolical possession. A.I.R. 1950 Assam 50.

——Art. 138 and 95—Applicability.

Suit by mortgagee of tenure to set aside sale for arrears of rent—Allegation of fraud, held unnecessary.

Held, suit was for possession and Art. 138 applied and not Art. 95. 3 B.R. 296=A.I.R. 1937 Pat. 331=167 Ind. Cas. 481.

——Art. 138—Applicability.

P purchasing property from *B* who had purchased it in execution against judgment-debtor—Property at time of purchase in possession of statutory mortgagee under S. 171, Bengal Tenancy Act, 1885—Suit for possession by *P*—Art. 138 does not apply but Art. 136 or 144. A.I.R. 1938 Cal. 790=67 C.L.J. 294=180 Ind. Cas. 215.

——Arts. 138 and 144—Applicability — Suit by auction-purchaser of mortgage decree against auction-purchaser of money-decree.

In pursuance of a mortgage decree passed in 1888 and affirmed in appeal in 1903, the mortgage property was purchased by *B* in 1912. The sale was confirmed in 1912 and B obtained writ of delivery of possession in 1915. But in attempting to take possession, he was resisted by *R* who had purchased the same property in 1890 in execution of a money-decree after the suit on the mortgage and the decree thereon. In 1927, within twelve years of his obtaining the writ of delivery of possession, *B* instituted a suit for declaration of title and recovery of possession against *R*:

Held, that the plaintiff being the purchaser in execution of the mortgage decree, had a superior title:

Held, also, that Art. 138 did not apply, the plaintiff having obtained a writ of delivery of possession from the executing Court, but Art. 144 governed the case, and the defendant's possession became adverse from the date of delivery of possession and not from the date of sale or date of confirmation of the sale. 13 P.L.T. 121=A.I.R. 1932 Pat. 145=11 Pat. 165=142 Ind. Cas. 246.

——Arts. 138 and 180—Applicability — Suit for possession by auction-purchaser—Limitation.

A suit by a purchaser in a Court auction for recovery of possession of the properties, after confirmation of the sale is governed by Art. 138 and not by Art. 180. 47 Ind. Cas. 844 (Pat.).

——Art. 138—Applicability.

The article applies to a suit by the auction-purchaser though the sale took place before the passing of the Act provided the plaintiff had time enough under that article after the passing of the Act to bring his suit. 38 Ind. Cas. 609 (Cal.).

——Art. 138—Applicability.

Obiter.—Word 'purchaser' is limited to stranger. A.I.R. 1936 Pesh. 85.

——Art. 138—Applicability.

Article 38 applies only to suits between the auction-purchaser and the judgment-debtor or his representative in interest. 35 All. 432=11 A.L.J. 642=18 Ind. Cas. 465.

——Art. 138—Applicability — 'Purchaser' includes decree-holder purchaser.

Per *Jwala Prasad, J*.—The Limitation Act is a law relating to procedure in *pari materia* with the Civil P.C. and both must be taken and construed together. Art. 138 applies to decree-holder purchasers as well as stranger-purchasers.

Per *Wort, J*.—Even a third party purchaser may be a party to the suit. 12 P.L.T. 423=A.I.R. 1931 Pat. 241=10 Pat. 670=138 Ind. Cas. 337. (F.B.).

——Art. 138—Applicability.

The expression "purchaser at a sale in execution of a decree" in Art. 138 does not cover the case of a judgment-creditor who purchases the property in execution of his own decree. 99 Ind. Cas. 677 =50 Mad. 403=25 M.L.W. 61=1927 M. W. N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

——Arts. 138 and 180—Applicability — Suit for possession by decree-holder purchaser — Limitation.

The period of limitation prescribed by Art. 180 of the Limitation Act has reference to applications made under the C.P. Code (1908). The period for bringing a suit for possession by a decree-holder purchaser is that prescribed by Art. 138 of the Limitation Act. (1919) P.H.C.C. 354=4 P.L.J. 716=52 Ind. Cas. 711.

——Art. 138—Applicability to a purchaser who is a decree-holder.

(Per *Stanley, C.J*. and *Knox, J*.)—Art. 138 is a general provision applicable to strangers and cannot be held to apply to an application by a decree-holder purchaser. 31 All. 82=5 M.L.T. 185=6 A.L.J. 71=1 Ind. Cas. 416.

——Art. 138—Applicability — Suits against are not deriving title from judgment-debtor.

Article 138 of the Limitation Act applies to suits brought against the judgment-debtor or persons who have derived title from him. It has no application to a suit brought against a person who has not acquired a title from the judgment-debtor. 12 C.L.J. 378=6 Ind. Cas. 467.

——Art. 138—Applicability — Suit against judgment-debtor's co-tenant.

When a purchaser at Court sale sues the co-tenants of the judgment-debtor, Art. 138 will not apply for that Article applies only against judgment-debtor and persons claiming through him. The suit will be governed by Art. 144. 117 Ind. Cas. 593=33 C.W.N. 46=56 Cal. 616=A.I.R. 1929 Cal. 250.

——Art. 138—Applicability — Suit against trespasser.

Article 138 has no application to suit for possession by a Court auction-purchaser against person who claims title independent of the judgment-debtor. The article applicable is Art. 144 and under Art. 144 a trespasser cannot tack on his possession with that of previous trespasser.

Where the defendant claims through the judgment-debtor, Art. 138 would apply but when symbolical possession has been given to the auction-purchaser it will be equivalent to actual possession against the defendant and thereupon Art. 142 will apply to the case. 70 Ind. Cas. 602=27 C.W.N. 259=36 C.L.J. 140=A.I.R. 1922 Cal. 176.

——Art. 138—Applicability — Suit by vendee in execution sale — Judgment-debtor in possession. See 29 A. 463.

——Art. 138—"Auction-purchaser"—Assignee.

Art. 138 applies to the case of a person claiming through the auction purchaser, and not merely to

the auction purchaser alone. 8 C.W.N. 476=31 C. 681 (F.B.).

3. Chota-Nagpur Tenancy Act.

——Art. 138—Chota Nagpur Tenancy Act—Bengal Rent Recovery Act, S. 11—Auction-purchaser, right of—Suit for possession.

If a purchaser under a sale held under Chota Nagpur Tenancy Act fails to obtain possession of the property under S. 11 of Bengal Rent Recovery Act, he can bring a suit in the Civil Court within 12 years of the sale under Art. 138, Sch. I, Limitation Act. 37 Ind. Cas. 955 (Pat.).

——Arts. 138 and 142—Chota Nagpur Tenancy Act—Suit to recover tenure by auction-purchaser from tenant. *See* BENGAL ACTS—CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT, S. 37. 7 C.L.J. 560=12 C.W.N. 617.

4. C. P. Code.

——Art. 138—C. P. Code—Scope and effect.

Article 138 must be read along with the provisions of the C. P. Code. 99 Ind. Cas. 677=50 Mad. 403=25 M.L.W. 61=1927 M.W.N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

——Art. 138—C. P. Code, S. 47.

Decree-holder auction-purchaser can bring a suit for recovery of possession of the property purchased at the auction sale within twelve years of the sale as provided in Art. 138—Such a suit is not barred by S. 47, Civil P. Code. A.I.R. 1932 Pat. 80=10 Pat. 670=136 Ind. Cas. 49.

——Art. 138—C. P. Code, S. 47 — Scope and effect of.

Article 138 of Limitation Act cannot override the provisions of S. 47 of C. P. Code. 95 Ind. Cas. 494 =53 Cal. 781=43 C.L.J. 345=30 C.W.N. 649 =A.I.R. 1926 Cal. 798 (F.B.).

——Art. 138—C. P. Code, S. 47—Scope and effect of.

Art. 138 of the Limitation Act, should be read with S. 47, C. P. Code. The one does not override the other. When the auction-purchaser is also a party to the suit, his claim for delivery of possession should be determined in the execution department. But when he is a third party, he can bring a suit for possession and such suit will be governed by Art. 138 of the Limitation Act. Where the execution is barred at the date of suit, the suit cannot be treated as a proceeding in execution. 35 Bom. 452=13 Bom.L.R. 661 =11 Ind. Cas. 987.

——Art. 138—C. P. Code, S. 47—Effect of.

The effect of Art. 138 is not to override the special provisions of S. 244, C. P. Code (O.C.) It may be applicable to a stranger-purchaser who is not entitled to prove under S. 244. Per *Stanley, C. J.* But see *contra*, p. 90. Per Majority of the Full Bench. 6 A.L.J. 71=1 Ind. Cas. 819=31 A. 82.

——Art. 138, C. P. Code, O. 21, Rr. 35, 36, 95 and 96—Judgment-debtor in possession — Formal possession with purchaser—Effect of.

Formal possession by the Court-auction purchaser at a Court-sale cannot prevent limitation running in favour of a judgment-debtor when the latter is in actual possession and the property is not in the possession of a tenant or any other person, entitled to occupy it. Symbolical possession is not equivalent to real possession and though the former kind is specified and recognised in O. 21, Rr. 35 and 36, it is not prescribed either by O. 21, R. 36 or 96. 25 B. 275; 25 B. 358, overruled. 36 Bom. 373=14 Bom. L. R. 115=14 Ind. Cas. 447.

5. Exclusion of time—If should be asked for in plaint.

——Arts. 138, 142, S. 14—Exclusion of time; if must be asked in point—C. P. Code, S. 50.

Art. 138 refers more to questions between the auction-purchaser and the judgment-debtor, and the present case fell under Art. 112. The period during which a suit was prosecuted *bona fide* in a court without jurisdiction was properly excluded in computing the period of limitation although the plaintiff in his plaint did not expressly ask for an extension of time on that ground. 12 C.W.N. 617=7 C.L.J. 560.

6. Mortgage pending attachment.

——Art. 138—Mortgage pending attachment.

Where property is usufructuarily mortgaged during pendency of an attachment and it is subsequently sold, the purchaser must sue for possession within 12 years from the date when he took symbolical possession. Nor could he ever sue for redemption. 97 Ind. Cas. 718=24 M.L.W. 263=A.I.R. 1926 Mad. 966=51 M.L.J. 143.

7. Possession.

——Arts. 138, 142 and 144—Possession — Suit by auction-purchaser—Limitation.

A sale was confirmed by the Court on 30th May, 1898 and formal delivery of possession given on 15th May 1899, and the suit for possession by the purchaser was brought on 1st June 1910; *Held*, that the suit was brought under Art. 138. Where however plaintiff alleged that he obtained possession on 15th May, 1899 and lost it in July following. Art. 142 applies, and Art. 144 is not applicable in either case. 10 A.L.J. 13=15 Ind. Cas. 10.

——Art. 138—Possession of third persons.

Where the purchaser at an auction sale brought a suit for possession within twelve years from the date of sale against the defendant who was not the judgment-debtor but was in possession of the land from before the date of sale and for more than 12 years under an independent title *held* that Art. 138 did not save plaintiff's claim from limitation. 40 Ind. Cas. 662 (Cal.).

8. Scope.

——Art. 138—Scope.

A suit against judgment-debtor, or persons deriving title from him, is governed by Art. 138 but a suit against a person, who has not derived his title from the judgment-debtor, is not governed by this article. 12 C.L.J. 378=6 Ind. Cas. 467.

——Art. 138—Scope.

The case of a stranger auction-purchaser is not the only case within scope of Art. 138. 46 P.L.R. 357=A.I.R. 1944 Lah. 402=217 Ind. Cas. 147= I.L.R. (1945) Lah. 252 (F.B.).

9. Symbolical delivery of possession.

——Art. 138 — Symbolical delivery of possession to purchaser—Effect — Transferee from judgment-debtor.

Symbolical delivery of possession amounts to a momentary interruption of the enjoyment, not only of the judgment-debtor, but also of person who claims through him. A suit for possession within twelve years after the symbolical possession is within time even against the person who claims through the judgment-debtor. 58 M.L.W. 408=(1945) 2 M. L. J. 205=1945 M.W.N. 509=A.I.R. 1945 Mad. 484.

——Art. 139.

Synopsis.

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1. Adverse possession by tenant.

——Art. 139—Adverse possession by tenant — Building and occupation by tenants of buildings appurtenant to their holding not adverse so long as they are tenant. (1906) A.W.N. 243=3 A.L.J. 619. *See also* 3 A.L.J. 627.

——Art. 139—Adverse possession by tenant.

The possession of a tenant becomes adverse to his landlord if, after the determination of a lease for a certain period, he pays no rent or if there is no such assent on the part of the landlord to constitute a tenancy within the meaning of S. 116, T. P. Act; and a suit for ejectment must be brought within 12 years from the date of the determination of the tenancy. 1 A.L.J. 201.

——Art. 139—Adverse possession by tenant.

Possession of tenants of lands encroached upon by them could only commence to be adverse when a title adverse to the landlord is asserted or the landlord becomes aware of the encroachment. Acts indicative of possession must vary according to the nature of the property over which possession is exercised. 1865 B.L.R. Sup. Vol. 182=3 W.R. 73 followed: and in the case of birt or waste lands, the cutting of grass and grazing of cattle would be the ordinary acts by which possession would be asserted. 31 C. 397.

——Art. 139—Adverse possession by tenant.

A tenant cannot acquire a right by prescription against his landlord. 6 C.L.J. 218.

——Art. 139—Adverse possession by tenant when adverse to landlord—Tenant holding over—Possession, when will be adverse—Landlord's right to sue.

When there is a current lease, and the tenant is dispossessed by a third party, time does not commence to run against the landlord until the expiration of the lease. 9 C. 367 and 13 C. 101, Foll. But when the lease has expired and the tenant is holding over with the landlord's consent, and the possession of such third party is adequate in continuity, in publicity and in extent so as to show that it is possession adverse to the landlord, the latter is not precluded from determining the tenancy and suing the trespasser in ejectment, and his right to sue will be barred after twelve years of such possession. 10 C. W. N. 343.

——Art. 139—Adverse possession — Lease for definite period—Holding over—Starting point. 20 M.L.T. 131=8 M.L.T. 100=5 Ind. Cas. 907.

2. Applicability.

——Arts. 139 and 144—Applicability — Suit by landlord against ex-tenant on title for possession after termination of tenancy—Limitation.

A suit based upon title by a landlord against his ex-tenant for recovery of possession of the demised property after the expiration of the tenancy is governed by Art. 139 and not by Art. 144, of the Limitation Act. Art. 144 is a residuary article, and when there is a specific article dealing with a specific subject that article has to be applied in preference to a general and residuary article. If therefore, in a suit for possession, it is established that there was a relationship of landlord and tenant between the parties, and that that relationship has come to an end, then the only article that can apply, is Art. 139, and not Art. 144. 61 I. A. 50; 36 Bom. L. R. 408. Expl. 28 Bom. L. R. 1357, Disappr. 22 Bom. 893; 24 Bom. 504; 29 Bom. L.R. 1332; 1928 P.C. 184, foll. I.L.R. (1949) Bom. 135= 51 Bom. L.R. 34=A.I.R. 1949 Bom. 137 (F.B.).

——Art. 139—Applicability of Act to Agra Tenancy Act.

The provisions of the Limitation Act do not govern suits and applications provided for by the Agra Tenancy Act. Therefore, a suit for ejectment of a grove holder after the grove has ceased to exist is not governed by Art. 139, Limitation Act. A.I.R. 1938 All. 213=(1938) A.L.J. 208=1938 R.D. 367 =1938 A.W.R. 145=175 Ind. Cas. 20.

——Art. 139—Applicability.

Art. 139 does not refer to adverse possession and does not, in any way, take away the effect of S. 116, Evidence Act.

(Interpretation and scope of the Article indicated). A.I.R. 1945 Pesh. 16=220 Ind. Cas. 227.

——Arts. 139, 142 and 144—Applicability.

House leased by *P* to *B*, father of *D*, in 1893—Rent-note executed by *B* agreeing to pay monthly rent regularly—*P* to get house vacated in case of default of rent for three months—*B* dying in 1910—Rent not paid by any one since 1900—Suit by *P* against *D* in 1931 for possession and mesne profits—Rent-note, held created tenancy for indefinite period and it reduced itself into tenancy-at-will on three months' arrears—Tenancy ended on death of *B* as he was tenant-at-will and *D's* possession was adverse from 1910—

Suit was time-barred whichever of Arts. 139, 142 or 144 applied—Possession of *D* was not permissive and *D* not estopped under S. 116, Evidence Act. I.L.R. (1940) Nag. 269=A.I.R. 1938 Nag. 506=1936 N. L. J. 317=182 Ind. Cas. 581.

——Art. 139—Applicability.

Lease for a period of less than one year cannot be said to be lease for definite period and the suit for ejectment in such a case was not covered by Art. 139—Tenancy held was monthly lease determinable on 15 days' notice. 45 P.L.R. 454.

——Arts. 139, 144 and 146—Applicability.

The *khoti* land in dispute was alienated by the tenant in 1887 without the consent of the *khot*. In 1909, the plaintiff became the managing *khot* and accepted "*dhara*" and "*jaida*" from the alienee. The alienee was shown as a tenant in 1916 in the Record of Rights. In 1927, the plaintiff brought a suit impeaching the alienation:

Held. that the suit was barred by limitation Art. 139 did not apply, for, the relation between the *khot* and his tenant was not strictly that of a landlord and tenant, since the *khot* is not a landlord, but in theory, at any rate, a farmer of the land revenue. The starting point of limitation in this case, if Art. 143 applied would be the date of the sale in 1887, and that would make the suit long time barred. Under Art. 144, time would begin to run from the point when the possession of the defendants became adverse to the plaintiff, when the latter was fixed with the knowledge of alienation about the year 1909, and considered in this way also, the suit would be barred. A.I.R. 1935 Bom. 98=36 Bom. L.R. 1253=156 Ind. Cas. 339.

——Art. 139 — Applicability — Lessees claiming permanent right.

The *mukarrari istimrari* granted to the original *Mukarraridars* conveyed only a life-interest. But it was claimed by their representatives that the interest which the *mukarrari istimrari* lease conveyed was of a permanent character. Such interest was expressly asserted in the sale-deed executed by the *mukarraridars* at the time. The defendants expressly claimed throughout to hold under the sale-deed as permanent *mukarraridars*.

Held, that the suit was not governed by Art. 139, but by Art. 144 as the defendants had made a definite assertion of an adverse right more than twelve years before the suit. 84 Ind. Cas. 586=1924 P.H.C.C. 313=6 P.L.T. 12=4 Pat. 139=A.I.R. 1925 Pat. 216.

——Art. 139—Applicability — Vendor holding over—Purchaser from — Suit against.

Where the plaintiff purchased half of a field but the vendor remained in possession under a rent-note for one year executed on the same day, the vendor held over and afterwards sold the entire field to defendant and gave up possession in his favour, a suit by plaintiff for possession of the moiety sold to him is governed by Art. 144 and not by Art. 139. 60 Ind Cas. 589=23 Bom.L.R. 60=A.I.R. 1921 Bom. 462.

3. Cause of action.

——Art. 139—Cause of action.

Under Art. 139 the cause of action in cases in which the Malabar Tenants Improvement Act applies, does not arise till the value of Improvements is paid to the tenant. (1916) 2 M.W.N. 324=38 Ind. Cas. 651.

——Art. 139—Claim for more than twelve years by tenants from year to year of permanent occupancy rights to knowledge of landlord—Determination of lease.

A person who has lawfully come into possession of land as tenant from year to year or for a term of years, or as mortgagee, cannot by setting up; during the continuance of such relation, any title adverse to that of the landlord, or mortgagor, as the case may be, inconsistently with the real relation between them and thus, however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation title as owner, or any other title inconsistent with that under which he was let into possession. In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for the redemption of the mortgage, and in the case of a lease, the landlord's title can be extinguisehd only at the expiration of period prescribed by Art. 139. The onus of proving that a person derived a permanent right of occupancy from the proprietors is on the person setting up such right. If, after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner or such limited estate as he might prescribe for. A person coming into possession of land under a lease which is invalid or void as against the person seeking to eject him is really a trespasser, and, as such, after the expiration of the period prescribed by Art. 145, acquires by prescription the limited right under the lease. 12 M.L.J. 119=25 M. 507.

4. Denial of title.

——Art. 139—Denial of title—Time runs only from termination of tenancy.

Where a tenant repudiates the title of the landlord; he is liable to eviction at the latter's option; but till the landlord indicates that he intends to exercise the option, the tenancy subsists, and time runs, under Art. 139, against the landlord from the time the tenancy is determined. This principle applies to tenancies from year to year. 24 M. 246=10 M.L.J. 415. Also 26 M. 488.

5. Ejectment.

——Art. 139—Ejectment—Suit.

After the expiration of a lease for a fixed term, time for a suit for enjectment begins to run against the lessor under Art. 139, to extend time, the lessor must prove payment of rent or admission of his title by the lessee. 5 Ind. Cas. 350 (All.).

——Art. 139—Ejectment—Title.

The plaintiff, with whose grandfather, the ancestors of the defendants had mortgaged a house sued for ejectment and recovery of rent. The defendants failing to establish title for more than 12 years, the suit was held to be within time. 57 Ind. Cas. 269 (Lah.).

6. Encroachment and erection of buildings.

——Art. 139—Encroachment and erection of buildings.

Encroachment and putting up of new buildings by tenants more than 12 years before suit—Plaintiff is not entitled to claim demolition thereof but only to a declaration of his rights of property in the sites. 66 Ind. Cas. 603=A.I.R. 1922 All. 210.

7. Forfeiture.

——Arts. 139 and 143 — Forfeiture — Suit for ejectment—Limitation.

A lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent free for six years and that in the beginning of the seventh year he should cause the lands to be measured and a settlement of rent made in respect of the reclaimed lands—failing which the landlord would be entitled to possession. *Held*, that a suit by the lessor for ejectment on the ground of the lessee's failure to comply with the above-mentioned provision in the lease was governed by Art. 143 and not by Art. 139. 11 C.W.N. 661.

——Art. 139—Forfeiture beyond 12 years.

Forfeiture before 12 years of suit is ineffectual as the basis of a suit. 7 M.L.T. 188=5 Ind. Cas. 933

8. Grant for maintenance.

——Arts. 139 and 140—Grant for maintenance—Suit for recovery of property after death of grantee.

Suit for recovery of possession of lands given for maintenance by the grantor after the death of the grantee comes under Art. 139 and not Art. 140, where the grantees' heirs are tenants with consent of grantor. 37 Cal. 674=6 Ind. Cas. 339.

9. Holding over.

——Art. 139—Holding over.

Tenancy for fixed term—On expiry of term, tenant continuing in possession without paying rent and without assent of landlord—Landlord's suit for possession beyond twelve years from expiry of term is barred. A.I.R. 1940 Lah. 410=42 P.L.R. 535=191 Ind. Cas. 289.

——Art. 139—Holding over.

Lease expiring but tenant continuing in possession without paying rent—Possession not shown to be with landlord's assent—Landlord's suit beyond 12 years after expiry, held barred irrespective of effect of S. 116, Evidence Act. 41 P.L.R. 457=A.I.R. 1939 Lah. 455=185 Ind. Cas. 858.

——Art. 139—Holding over.

Railway Company leasing land to employee on certain terms—Tenant remaining on land after expiry of last of the annual leases but under the same terms:

Held, that there was no period of time from which it could be said that the statute of limitation ran so as to debar the plaintiffs from their remedy for the recovery of the property and that the defendant was not in adverse possession as from the date of expiry of the last date of the lease. 1935 O.W.N. 379=1935 A.W.R. 459=1935 R.D. 165=1 B.R. 425=A.I.R. 1935 P.C. 59=(1935) M.W.N. 434=68 M.L.J. 552=41 M.L.W. 617=39 C.W.N. 552=61 C.L.J. 147=37 Bom.L.R. 390=37 P.L.R. 331=154 Ind. Cas. 945 (P.C.).

——Art. 139—Holding over.

Where a tenant for fixed period continues to hold over on the expiry of the term of lease, he continues as a tenant at sufferance and time will not in such a case begin to run until the tenancy at sufferance thus coming into existence, terminates. 122 Ind. Cas. 865=1930 A.L.J. 594=A.I.R. 1930 All. 177.

——Art. 139—Holding over.

A tenant is estopped from denying the title of his landlord during the continuance of the tenancy, but when there is a particular term fixed by the Kirayanama and after the expiry of that term the tenant continues to hold the leased premises without payment of any rent, he does so in the capacity of a tenant by sufferance, and his position is practically that of a trespasser, and time against the landlord begins to run from the moment that the term fixed by the Kirayanama expires, under Art. 139. A.I.R. 1922 All. 318 and 31 All. 514, Foll. It follows, therefore, that if no rent was paid within 12 years prior to the institution of the suit, the suit is time-barred. 102 Ind. Cas. 231=A.I.R. 1927 All. 821.

——Art. 139—Holding over.

Landlord's remedy to recover possession of his property from his tenant becomes barred by limitation where such tenant continues in possession of such property after the termination of the lease for the full term of the statutory period without payment of rent and without any express or implied agreement between him and the landlord that the tenancy to continue. 105 Ind. Cas. 859=29 Bom. L. R. 1332=A.I.R. 1927 Bom. 650.

——Art. 139—Holding over.

A tenant who holds on to the land after the expiry of term of the lease cannot be said to be holding 'adversely' to the landlord. So long as he is in possession, he cannot deny that it was from lessor that he got the land. But where the tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease, under Art. 139 of the Limitation Act. After the expiry of 12 years, the title of the landlord must cease by the application of S. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Art. 144 of the Limitation Act has nothing to do with the case. 85 Ind. Cas. 550=6 L.R.A. (Civ.) 254=A.I.R. 1925 All. 698.

——Art. 139—Holding over.

Neither Art. 139 nor Art. 144 contemplates that lessee or a tenant-at-will or a tenant at sufferance should give up possession of his property before the period of limitation commences to run. 79 Ind. Cas. 59=A.I.R. 1925 Sind. 36.

——Art. 139—Holding over.

A tenant by sufferance is in by laches of the landlord and is entitled to the benefit of the law of limitation. Where the heirs of the grantees are in uninterrupted possession without paying rent to the landlord a suit beyond 12 years for their ejectment is barred. 18 Bom. 256, Diss. 78 Ind. Cas. 511=3 Pat. 534=1924 P.H.C.C. 159=A.I.R. 1924 Pat. 572.

——Art. 139—Holding over.

Per *Mullick, J.*—Article 139 only applies where the tenancy has been determined.

Per *Jwala Prasad, J.*—Where persons were holding over as tenants under S. 116, T. P. Act and were not trespassers, Art. 139 is not applicable. 83 Ind. Cas. 741=3 Pat. 403=6 P.L.T. 315=A.I.R. 1924 Pat. 560.

——Art. 139—Holding over.

A tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running. But the proposition is

subject to one important qualification and that is that if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year. 71 Ind. Cas. 570=4 P. L. T. 123=1923 P.H.C.C. 54=A.I.R. 1923 Pat. 201.

——Art. 139—Holding over.

The transferee as also landlord who cannot convey to his transferee a better title than he himself has, must sue for ejectment of the tenant holding over, within twelve years after the termination of the tenancy, the article of Limitation Act applicable to the suit being 139. 68 Ind. Cas. 750=20 A.L.J. 696=A.I.R. 1922 All. 423.

——Art. 139—Holding over.

When a tenancy at sufferance has existed for twelve years the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property.

Per *Stuart, J.*—The defendants cannot be permitted to deny the plaintiff's title. The plaintiff is undoubtedly the landlord and the defendants are tenants by sufferance, but once having recognized that the tenants are so estopped, the fact still remains that the suit has been instituted beyond the period of limitation, and is therefore barred. 75 Ind. Cas. 454=44 All. 583=20 A.L.J. 593=A.I.R. 1922 All. 318.

——Art. 139—Holding over.

Applying the principle of S. 116 of the T. P. Act, *held* that the payment of rent by the defendants and the acceptance of the same by the plaintiff resulted in the renewal of the lease every year until the disputes arose and as the suit was instituted within two years of such dispute, it was not barred under Art. 139 of the Limitation Act. 53 Ind. Cas. 212 (Nag.).

——Art. 139—Holding over — Adverse possession.

An intention to hold adversely to the landlord need not necessarily follows from a holding over, though the running of time against the landlord will not be interrupted in such a case. 3 L.W. 408=30 M.L.J. 492=(1916) 2 M.W.N. 79=34 Ind. Cas. 6.

——Art. 139—Holding over — Adverse possession.

A tenant continuing in possession after expiry of the lease cannot be said to be in adverse possession unless he actually surrenders possession to his landlord. (1914) M.W.N. 728=25 Ind. Cas. 109.

——Art. 139—Holding over.

A tenant holding land after the lease period without rent and without the permission of the landlord is a tenant by sufferance and the landlord's ejectment suit against him is barred if brought after 12 years from the determination of lease. 16 Ind. Cas. 546 (Mad.).

——Art. 139—Holding over—Limitation.

In the case of lease for a definite period which is not a lease from year to year, time runs against the lessor from the date the term expires. 20 M.L.J. 131=8 M.L.T. 100=5 Ind. Cas. 907.

——Art. 139—Holding over.

For a suit to recovery possession from tenant-on-sufferance, time begins to run, under Art. 139 Limitation Act, 1877, from the expiry of the term of the lease. 31 All. 514=6 A.L.J. 584=3 Ind. Cas. 566.

——Art. 139—Holding over—Limitation.

If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under Art. 139, against the lessor from the date of the expiry of the lease. 22 B. 893; 24 B. 504; 2 B.L.R. 491 foll. 8 M. 424 diss. from. 7 C.L.J. 615.

10. Landlord and tenant.

——Art. 139—Landlord and tenant—Permanent tenancy, acquisition of, by tenant—Prior decree in favour of landlord for khas possession.

A farmer may acquire by prescription the right of a permanent tenant by setting up such higher right adversely to the zemindar. If a defendant (tenant), notwithstanding a decree and writ of possession being taken out against him, continues to be in possession of the land comprised in the decree, such possession would be adverse to the plaintiff decree-holder (landlord), from the date of the writ and the tenant would ordinarily prescribe for the title asserted by him in the prior suit. 9 C.W.N. 292.

——Art. 139—Landlord and tenant—Possession of the tenant is possession of the landlord—Landlord trespasser and tenant real owner.

The doctrine that the possession of the tenant is possession of the landlord applies even where the tenant is really entitled to the land, but mistakenly takes a lease from a trespasser. 6 C.W.N. 617=4 Bom. L.R. 537=29 I.A. 104=29 C. 518 (P.C.).

11. Non-occupancy tenant.

——Art. 139—Non-occupancy tenant.

Article 1 (a) of Schedule 3 of the Bengal Tenancy Act, 1885, does not apply to suits to eject persons, who were not in law non-occupancy *raiyats* of the land. Article 139 of the Limitation Act applies to such suits. 66 Ind. Cas. 337=35 C.L.J. 506=3 Pat. L.T. 197=1922 M.W.N. 410=26 C. W. N. 833=1 Pat. 340=49 I.A. 81=31 M.L.T. 231=A.I.R. 1922 P.C. 142=43 M.L.J. 55 (P.C.).

12. Non-payment of rent.

——Arts. 139 and 143—Non-payment of rent—Option to lessor to eject tenant on non-payment of rent.

In the Punjab in a case of lease which gives option to a lessor to eject a tenant on non-payment of rent, the mere non-payment of rent in the absence of lessor's intention to determine the tenancy does not determine the tenancy and the right to recover rent or possession is not lost for ever, if no rent is paid within 12 years prior to the institution of the suit or no suit for ejectment is instituted within 12 years of the first default. To such a case, neither Art. 139 nor Art. 143 applies. 43 P.L.R. 261=A.I.R. 1941 Lah. 248=I.L.R. (1942) Lah. 252=197 Ind. Cas. 58.

——Arts. 139 and 144—Non-payment of rent and denial of title—Limitation.

In certain settlement proceedings in 1894, the defendants alleged to be the tenants of plaintiff denied plaintiff's title as landlord and their liability to pay rent. The settlement officer concluded that rent was

not being paid and in the Record-of rights the defendant was recorded as holder of a *Jote* without rent. Plaintiff sued for possession in 1910, *held* that the suit was barred. 36 Ind. Cas. 829 (Cal.).

——Arts. 139 and 144—Non-payment of rent—Mortgagor and mortgagee.

Where a usufructuary mortgagor gets into possession of the property as a lessee under the mortgagee and continues after the expiration of the tenancy in possession without paying any rent for over 12 years, a suit by the mortgagee for possession will be barred under Art. 139 of the Limitation Act. 18 Ind. Cas. 899 (All.).

——Art. 139—Non-payment of rent does not create adverse possession. 7 C.L.J. 615.

——Art. 139—Non-payment of rent.

The tenants must show by clear and conclusive evidence that the contract has been determined or they must satisfy the Court that the parties never intended that the contract should be acted upon. 3 C. 314; 3 C.L.R. 119, followed. 6 C.L.J. 72.

——Art. 139—Non-payment of rent — Lease by mortgagee to mortgagor for 5 years—No payment of rent after 5 years—Adverse possession. See T. P. Act, S. 67. 31 A. 318=6 A.L.J. 239.

13. Possession of site for over twelve years.

——Art. 139—Possession of site for over 12 years — Easements Act, S. 60—License—Revocation—House of a permanent character.

The plaintiff was recorded Zemindar of Dariganj in the Municipality of Allahabad. The wajib-ul-arz provided that the Zemindar was entitled to Dhik (royalty) in case the house of any tenant was sold. Certain houses were attached and advertised for sale as the property of the defendant judgment-debtor. The Zemindar brought this suit for declaration of his right. It was found that for 35 years the judgment-debtor and his predecessor-in-title, who did not cultivate any land were in possession of the houses and the site and had never acknowledged the plaintiff's right nor had paid him any rent. *Held*, that they acquired a title by prescription in the site as well as the houses and their rights could be sold. Per *Stanley, C.J.*:—If a license was granted by the Zemindar to the predecessors-in title of the judgment-debtor and they acting upon that license built a house which was of a permanent character the Zemindar could not revoke the license and seek possession of the site. 1906 A.W.N. 305=3 A.L.J. 760=29 A. 133.

14. Purchaser in rent decree.

——Art. 139—Purchaser in rent decree.

Art. 139 of the Limitation Act is applicable only where the purchaser acquires the right, title and interest of the judgment-debtor. But the rights of a purchaser at a sale under a decree for rent must be governed by the Bengal Tenancy Act. Where a rent-decree has been properly obtained the tenure itself passes to the purchaser and not the right, title and interest of the judgment-debtor only. The rights of the purchaser must be determined by the provisions of the B. T. Act under S. 158-B and S. 159. 26 C.W.N. 985=A.I.R. 1922 Cal. 544.

15. Socpe.

——Art. 139—Scope.

The general provisions of Art. 139, Limitation Act are abrogated by the provisions of S. 5, Malabar Compensation for Tenants' Improvements Act. A. I. R. 1938 Mad. 581=47 M.L.W. 236=(1938) M.W.N. 241=(1938) 1 M.L.J. 313=182 Ind. Cas. 68.

——Art. 139—Scope. See MALABAR LAW. 25 M. 452.

16. Stranger dispossessing tenant.

——Arts. 139, 140, 142 and 144—Stranger dispossessing tenant.

The landlord must sue a stranger dispossessing his tenant, from year to year and holding the land absolutely against them both within 12 years from the date of such dispossession, especially when the tenant has quitted his land for more than 12 years before the suit. The cause of action to such a suit does not arise on the day of notice to quit the land by the landlord to the tenant. It is a question whether the time against the owner would begin to run from the date of dispossession by a stranger of the tenant before the expiry of his lease. (1912) M.W.N. 669 =15 Ind. Cas. 146.

17. Suit against tenant's representative.

——Art. 139—Suit against tenant's representative.

Where, after termination of such tenancy by the death of the tenant, his representatives continue to pay rent to the landlord, the occupation of the leased premises by the representatives must be deemed to be in the capacity of tenants and the landlord would be entitled to a decree for possession provided the possession of the defendants as tenants is traced within twelve years of the date of the suit. A.I.R. 1941 All. 306=1941 O.W.N. 747=(1941) A.L.J. 327=1941 R.D. 542=1941 A.W.R. (H.C.) 191 and 515=195 Ind. Cas. 515.

——Art. 139—Suit against tenant's representative.

Tenancy terminable at landlord's will and for indefinite period—It enures for life-time of tenant and is not heritable—Suit for possession by landlord against representatives of deceased tenant—*Held*, that Art. 139 applied. (1941) A.L.J. 327=1941 R.D. 542 =A.I.R. 1941 All. 306=1941 O.W.N. 747=1941 A.W.R. (H.C.) 191 and 515=195 Ind. Cas. 515.

——Art. 139—Suit against tenant's representative.

Art. 139 and not Art. 144 applies to suits brought against the representatives of the original tenant after the determination of the tenancy to recover the property leased. 86 Ind. Cas. 933=1925 M.W.N. 589 =A.I.R. 1925 Mad. 446=48 M.L.J. 185.

——Art. 139—Suit against tenant's representatives.

The word 'tenant' in Art. 139 includes the tenant's representatives in interest. Art. 139 governs a suit by a landlord to recover possession from a tenant as well as from his representatives-in-interest. 33 Mad. 260=7 M.L.T. 289=19 M.L.J. 732=(1910) M.W.N. 145=4 Ind. Cas. 1080.

——Arts. 139 and 144—Suit against tenant's representative.

The repre entatives of a tenant by sufferance who enter after his death are not tenants within the meaning of Art. 139; and a suit against them is governed by Art. 144. (1908) 18 M.L.J. 26=31 M. 163.

18. Suit for possession by landlord.

——Art. 139—Suit for possession by landlord—Article applicable, whether Art. 139 or 144—Limitati n, when starts.

Art. 139 Limitation Act, applies to a suit by a landlord to recover possession from a tenant and the *terminus a quo* is the date on which the tenancy was determined. This is the specific article for a suit between landlords and tenan s and must be used in all suits of that nature, in preference to Art. 144 which is a general article. It follows that the question in such a case is whether the lease has been put an end to within 12 years of suit, and not whether there has been adverse posse sion. A.I.R. 1935 Bom. 382=37 Bom. L.R. 593=159 Ind. Cas. 378.

——Art. 139—Suit for possession of demised properties.

A suit for possession of properties leased must be brought within 12 years from the date on which the tenancy determined. 31 All. 318=6 A.L.J. 239=1 Ind. Cas. 208.

19. Tenancy determined.

——Art. 139—Tenancy determined — Landlord alleging continuati n of tenancy must prove it.

Art. 139, Limitation Act bars any suit to recover possession from the tenant after the expiration of twelve years from the date when the tenancy is determined. Burden is on the tenant to prove when the question of limitation is involved, when the tenancy was determined.

Where, even after the determination of the lease, the lessee continues to be in possession of the leased property for more than twelve years and it is not shown that he paid any rent or that the landlord assented to his possession after the expiry of the lease or that the lessee had accepted the title of the landlord, the suit of the landlord is barred under Art. 139. A.I.R. 1938 Mad. 73=46 M.L.W. 848=176 Ind. Cas. 84.

20. Tenancy from year to year.

——Art. 139—Tenancy from year to year.

In the case of tenancy from year to year, limitation runs in favour of a person asserting permanent right in the property only from the date of the termination of the tenancy under Art. 139. 9 M.L.T. 224=21 M. L.J. 166=(1911) 2 M.W.N. 36=9 Ind. Cas. 141.

21. Tenancy at sufferance.

——Art. 139—Tenancy-at-sufferance.

A tenancy on sufferance does not fall within Art. 139 and on the expiry of a tenancy on a fixed term, time runs against the landlord unless a novation is proved and the tenancy for a fixed term was shown as succeeded by a tenancy-at-will. 97 P.R. 1915=193 P.W.R. 1915=32 Ind. Cas. 35.

——Art. 140.

Synopsis.

1. Adverse possession.
2. Alienation by widow.
3. Cause of action arising in life time of last full owner.
4. Ejectment.
5. "Estate".
6. Possessory title.
7. Property of absconder.
8. Property devised.
9. Punjab Agricultural land.
10. Remanderman.
11. Reversioner.
12. Scope.
13. Starting point.
14. Suit by lessor against trespasser.

1. Adverse possession.

——Art. 140—Adverse possession against life-tenant.

No adverse possession can run against a person till he becomes entitled to the possession of the property. An adverse possession for any length of time against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life. 92 Ind. Cas. 63=47 All. 803=23 A.L.J. 691=A.I.R. 1925 All 707.

——Arts. 140 and 141—Adverse possession—Possession of one trespasser when can be tacked on to that of another.

The pos ession of one trespasser can be tacked on to that of another and a continuity of adverse possession may result thereby only when the interests of both are not different and antagonistic. Art. 140 applies to the case of a person succeeding to an estate as an heir and not to cases where having succeeded he creates a life estate in favour of some other person himself and then comes in as a remainderman; Art. 141 on the other hand applies only to a case of a person succeeding as a reversioner entitled to succeed on the death of a female heir who has succeeded as such and not in any other capacity. 119 P.L.R. 1914=72 P.W.R. 1914=22 Ind. Cas. 855.

2. Alienation by widow.

——Arts. 140, 141 and 144—Alienation by widow—Next heirs not contesting alienation—Suit for possession by remote heirs after death of nearer heirs.

On the death of *N*, his widow succeeded to the land in suit and sold it in 1890. On her death *H* who was entitled to claim the land did not claim it nor did his son *D*. *D's* widow too made no claim and died in 1907. Plaintiff after her death, became entitled to the land and sued for possession. *Held*, that the right to sue accrued to the plaintiff on the death of *D's* widow and the suit was not barred. 172 P.W.R. 1912=208 P.L.R. 1912=17 Ind. Cas. 503.

——Art. 140—Alienation by widow—Suit to set aside by reversioner — Ouster of widow—Effect.

The limitation for a reversioner to bring a suit to set aside an alienation by the widow is 12 years of the widow's death and no ouster of the widow affects that right. A widow is not said to be ousted when she sells all interest in the property, but if

such an event occurred, the defendant must prove it. 13 C.W.N. 931=3 Ind. Cas. 415.

3. Cause of action arising in life-time of last full owner.

——Arts. 140, 141 and 142—Cause of action arising in life-time of last full owner—Subsequent interposition of life estate.

If the cause of action arose during the lifetime of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, on the principle formulated in S. 9. Art. 142 would apply, time running from the date of the dispossession. A.I.R. 1935 Cal. 702=62 C.L.J. 49=40 C.W.N. 115=63 C. 155=159 Ind. Cas. 1101.

4. Ejectment.

——Art. 140—Ejectment — Grant — Usufructuary mortgage by grantee.

The suit of the grantor of a mokarari for life to evict the usufructuary mortgagee of the grantee, after his death is not governed by Art. 140 of the Act. 32 Ind. Cas. 827 (Cal.).

5. "Estate."

——Arts. 140 and 141—"Estate"—Life estates—English law.

"The estate" referred to in Art. 141 need not be one created in the same way as the particular estate on which the estate in remainder or reversion in Art. 140 leans; nor need it be one having the same incidents as the particular estate. Art. 141 applies to suits to recover estates, which were once in expectancy and which have now become vested in the heir of the last male owner after the life-estate of the Hindu or Mahomedan female. It does not apply to suits by persons claiming through the female, obviously therefore it does not apply when the female holds absolutely. Limited-estates taken by Hindu females are not the same as life estates under English Law but for purposes of Limitation, they are treated on the same principle. 18 O.C. 289=3 O.L.J. 45=33 Ind. Cas. 371.

6. Possessory title.

——Art. 140—Possessory title.

A plaintiff who relies solely on his possessory title and cannot prove his title to succeed to the last holder of the estate cannot invoke the aid of Art. 140 or 141. 93 Ind. Cas. 454=5 P.L.T. (Sup.) 1=A.I.R. 1925 Pat. 68 (F.B.).

7. Property of absconder.

——Art. 140—Property of absconder—Land sold under Ss. 81, 87 and 88, Cr. P. Code—Suit for possession—Time runs from date of absconder's death.

If an absconder's land is sold by order of the Magistrate under Ss. 87 and 88 of the Cr. P. Code a suit for its possession is governed by Art. 140 of the Limitation Act, under which the starting point is from the time when the estate falls into possession, which means from the date of absconder's death. If the plaintiff is not able to show that his suit is brought within 12 years of the absconder's death the suit must fail. 66 Ind. Cas. 1=4 L.L.J. 59=A.I.R. 1922 Lah. 124.

8. Property devised.

——Arts. 140 and 144 — Property devised—Suit for possession from devise—Limitation.

Art. 144 applies when the purchaser of the rights of a devisee sues to obtain possession of the property if the devisee or his transferee has once obtained possession and Art. 140 applies if the devisee has not obtained possession. 56 Ind. Cas. 929 (Nag.).

——Arts. 140 and 144—Property devised—Suit by one devise against co-devisees for possession.

Where two of three devisees are in possession, and there is no evidence of an intention that they hold adversely, a suit for possession by the third devisee not in possession, is not governed by Art. 140. 5 M.L.T. 103=2 Ind. Cas. 311.

9. Punjab agricultural land.

——Arts. 140 and 141—Punjab agricultural land.

A remote reversioner suing to recover possession of property improperly alienated can do so within 12 years from the time when the right to possession accrues to him, Arts. 140 and 141 are inapplicable because the reversioners were not entitled to claim possession when the limited owner died, nor did the estate at that time fall into their possession. 106 P.R. 1906, overruled. 34 P.L.R. 1911=33 P.W.R. 1911=26 P.R. 1911=9 Ind. Cas. 300.

10. Remainderman.

——Art. 140—Remainderman, who is.

A person claiming only an equity of redemption does come within the meaning of remainderman. 117 Ind. Cas. 22=51 All. 367=1929 A.L.J. 566=56 I.A. 192=33 C.W.N. 761=31 Bom.L.R. 854=30 M.L.W. 76=50 C.L.J. 74=1929 M.W.N. 676=A.I.R. 1929 P.C. 158 (P.C.).

——Arts. 140, 141 and 142—Remainderman's suit for possession. *See* HINDU LAW—ADOPTED SON'S RIGHTS. 12 M.L.J. 197=26 M. 143.

11. Reversioner.

——Art. 140—Reversioner's suit for possession. *See* ART. 136. 8 C.W.N. 535.

See ARTS. 118 AND 119. 26 M. 291=13 M.L.J. 27.

——Art. 140—'Reversioner'.

The terms "reversioner", etc., in Art. 140 are used in the technical sense of the English Real Property Law. A reversion arises where the grantor grants a particular estate to a person and does not dispose of the remainder. That which is not deposed of resides in the grantor and is called a reversion. It is the interest in land undisposed of which reverts to the grantor after exhaustion of the particular estate; if the fee simple granted is "conditional" or "determinable" what is left in the grantor is not a reversion but "a possibility of reverter". The case of "a possibility of reverter" is clearly not comprehended within the terms of Art. .40. See HALSBURY'S 'LAWS OF INGLAND', Vol. 24, p. 212. 82 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A.I.R. 1924 Pat. 721.

12. Scope.

——Art. 140—Scope.

Article 134 controls both Arts. 140 and 148. 92 Ind. Cas. 63=47 All. 803=23 A.L.J. 691=A.I.R. 1925 All. 707.

——Art. 140—Scope.

Where the plaintiff became entitled to possession only after the determination of the limited or particular estate held by her mother-in-law, whatever its precise nature might have been, and that estate did not fall into possession until her death, which took place within 12 years before the suit.

Held, that Art. 142 cannot apply as the plaintiff was never in fact dispossessed; nor can Art. 144, as possession of a trespasser cannot be deemed adverse against a person not entitled to be in possession at that time. There was thus no bar to the application of Art. 140. 34 C.L.J. 129, Foll. 65 Ind. Cas. 866=34 C.L.J. 141=A.I.R. 1921 Cal. 687.

——Art. 140—Scope.

Article 140 of the Act contemplates a suit by a remainderman or reversioner for possession of immovable property when his estate falls into possession. 65 Ind. Cas 826=34 C.L.J. 129.

13. Starting point.

——Art. 140—Starting point of limitation.

If a life-tenant be dispossessed, the reversioner or remainderman is in time if he institutes the suit for possession of immovable property within 12 years of the death of the life-tenant, and if successive life estates had been created, the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life-tenant. A.I.R. 1935 Cal. 702=63 C. 155 =62 C.L.J. 49=40 C.W.N. 115=159 Ind. Cas. 1101.

——Arts. 140 and 141—Starting point.

Where the plaintiff brings his case *prima facie* under Arts. 140 and 141, if the defendants want to avoid the operation of these articles, they must prove the necessary facts, namely that limitation began to run from the time of the full owner, that is to say, he was dispossessed when he was the full owner. A.I.R. 1935 Cal. 702=62 C.L.J. 49=40 C. W.N. 115=63 C. 155=159 Ind. Cas. 1101.

——Art. 140—Starting point.

The reversioner's right to sue accrues due from the time of the death of the widow and possession for 12 years as a gift from the widow during her lifetime does not bar the suit. 70 Ind. Cas. 635= A.I.R. 1922 All. 401.

——Art. 140—Starting point.

Even where the remainderman is in possession on behalf of the holder of a life-interest, limitation begins only when the holder of the life-interest dies. A.I.R. 1922 Bom. 337.

14. Suit by lessor against trespasser.

——Arts. 140, 142, 144 and 139—Suit by lessor against trespasser.

Article 140 governs suits against a trespasser by a lessor for the recovery of his leased out lands, as it does not necessarily postpone limitation till it falls into possession. But the case is different when the trespasser asserts his right of tenancy only. The limitation runs against the landlord from the expiry of the lessee's tenancy if the lessor's right is complete; and if no right against tenant, is acquired by adverse possession under the statute by the trespasser. Art. 144 is applicable because his possession would be considered adverse against the lessor after the termination of the lease. This Art. 140 also governs the suits by remainder-man and reversioners against all persons including trespassers and not merely those holding a limited estate on the termination of which the remainder or reversion falls in. This Art. 140 has no application against a tenant as Art. 139 governs suits against him. (1912) M.W.N. 669=15 Ind. Cas. 146.

——Art. 141.

Synopsis.

1. Applicability.
2. Adverse possession against limited owner.
3. Adverse possession against male owner.
4. Death of female.
5. Interpretation.
6. Starting point.
7. Miscellaneous.

1. Applicability.

(a) General.
(b) Female holding as full owner.
(c) Movable property.
(d) Proof required of plaintiff.
(e) Suit against alienee.
(f) Suit by limited owner barred.

1. (a) Applicability—General.

——Art. 141—Applicability — Property held by widow under award for her maintenance.

A Hindu widow was given certain properties by an award for her maintenance. Her interest was expressly limited to her lifetime. The award went on to provide that the widow would be entitled to adopt and that, in case she did not make any adoption and became unchaste, the surviving brothers of her deceased husband would be entitled, to take possession of the property allotted to her for maintenance. The widow was not empowered to alienate the property given to her except to a member of the family. The widow became unchaste in 1910 or 1912 and died in 1929. The present suit was brought on November 26, 1932 by the heirs of the brothers of her deceased husband on the simple allegation that the property given to the widow under the award was for her life and that they were entitled to possession on her death:

Held, that the suit was within time, the cause of action being the death of widow in 1929 and the article applicable being Art. 141 and not Art. 143;

Held, also, that a person entitled to the benefit of forfeiture can waive it and if he has a right to the property wholly apart from forfeiture, that title cannot be affected by the fact that he could have enforced the forfeiture clause but has waived it. On the widow's becoming unchaste, the plaintiffs might have sued for the enforcement of the forfeiture clause in the award. It was open to them to forego the benefit which such clause conferred upon them and to wait till she died when they acquired a fresh right to sue for possession of the estate, in terms of the last clause of the award. A.I.R. 1937 All. 268=

(1937) A.L.J. 139=1937 A.W.R. 93=I.L.R. (1937) All. 424=169 Ind. Cas. 586.

——Art. 141—Widow of taluqdar claiming only limited estate—Suit by rightful heir.

Where the widow of a Hindu *taluqdar* takes possession of the estate as claiming only the limited estate of a widow, her possession is not adverse to the absolute title of the heir-at-law whose right to sue is governed by Art. 141, and accrues on the death of the widow. 11 O.W.N. 351=9 Luck. 484=A. I. R. 1934 Oudh 190=150 Ind. Cas. 495.

——Art. 141—Suit by reversioner.

Where a widow is found to have been lawfully holding her husband's estate for life, whether under a will or under the provisions of S. 22 of Act 1 of 1869, no question of adverse possession arises and the suit for possession by a reversioner is govened by Art. 141 of the Limitation Act. 26 I.A. 71 and 56 Ind. Cas. 267, Foll. 7 O.W.N. 1010=A.I.R. 1930 Oudh 481.

——Art. 141—Applicability — Female succeeding as reversioner.

A Hindu female succeeding as a reversioner to another Hindu female owner does come under Art. 141, under which article the period of limitation runs from the death of the last female-owner. A.I.R. 1937 All. 188=1936 A.W.R. 1279=167 Ind. Cas. 527.

——Art. 141—Suit by reversioner — Starting point—Hindu Law—Suit by daughter.

Suit by daughter for a share in her father's property on her mother's death, falls under Art. 141, and time runs from the date of mother's death. 38 All. 117=14 A.L.J. 11=32 Ind. Cas. 127.

——Art. 141—Suit by reversioner — Daughter—Limitation.

A suit by a Hindu daughter for possession of her father's property after her mother's death falls under Art. 141 and not under Art. 127 or Art. 142 of the Act, and time begins to run from her mother's death no matter who was in possession of the property during the period between her father's and mother's death. 11 A.L.J. 333=20 Ind. Cas. 179.

——Arts. 141 and 119—Suit for possession as adopted son on death of Hindu widow.

A suit for a declaration that plaintiff is the owner of certain property on the death of a Hindu widow on the strength of his adoption and for possession of it is governed by Art. 141, as Art. 119 applies only to a suit under S. 42, Specific Relief Act, for a declaratory decree that an adoption is invalid or did not take place. Time begins to run from the date of the widow's death. A.I.R. 1934 Bom. 110=36 Bom. L.R. 185=58 Bom. 280=149 Ind. Cas. 674.

——Art. 141—Defendant not in possession on date of female's death.

Article 141 contemplates suits for recovery of possession in respect of property of which the reversioners were out of possession at the death of the female and which was in the possession of another person from whom they sought to recover it. Where no one was in possession on the date of the death of the female, the reversioners must be taken to have been in possession and Art. 141 would not apply. 36 C. W. N. 326=A.I.R. 1932 Cal. 504=138 Ind. Cas. 349.

——Art. 141—Bengal Tenancy Act (8 of 1885), Sch. 3; Art. 3.

Article 3, Sch. 3, Bengal Tenancy Act, does not in any way control the provisions of Art. 141, Limitation Act, and consequently where a Hindu widow who is in possession of her husband's estate which comprised a holding is dispossessed therefrom by the landlord, that dispossession cannot avail against the reversioner, so as to bar his right to the suit for recovery of possession by Art. 3 if such suit is not brought within two years from the date of the dispossession of the widow. 9 Pat. 634=11 P.L.T. 714=A.I.R. 1930 Pat. 573=128 Ind. Cas. 131.

——Art. 141—Share in partnership.

Article 141 is the correct article to apply to a suit for declaration and possession of a share in the partnership assets consisting of immovable property, where the plaintiff becomes entitled thereto on the death of a Hindu female. The plaintiff has a period of twelve years from the date of death of the prior female owner to bring the suit. Article 120 does not apply. 124 Ind. Cas 19=1930 A.L.J. 1517=A.I.R. 1931 All. 225.

——Arts. 141 and 134—Mortgage by full owner.

Article 141 covers only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction.

Where the cause of action includes a mortgage by the last male holder and a transfer by the mortgagee, Art. 134 will apply. 68 Ind. Cas. 734=44 Mad. 951=14 M.L.W. 116=1921 M.W.N. 465=A.I.R. 1921 Mad. 272=41 M.L.J. 163.

——Arts. 141 and 144—Suit for possession on declaration of title by plaintiff as reversionary heirs on his mother's death against defendants.

The plaintiff was a minor when his mother died in 1897. He attained his majority in 1911. He, in 1913 as the reversionary heir on the death of his mother brought a suit for possession on the establishment of his title to a share of certain property alleging to be joint family property against defendants. The defence was that the suit was time barred. *Held*, that Art. 144 would apply only if the mother was dispossessed; in that case only the question whether the suit was brought within three years of his attaining majority would arise. 23 C.W.N. 977 =30 C.L.J. 512=47 Cal. 274=56 Ind. Cas. 141.

——Arts. 141 and 144—Co-widows—Suit by reversioner—Limitation.

Of two Hindu co-widows, one who had two daughters, alienated her husband's property on 10-3-1897 and died on 11-7-1902. The other widow died on 17-1-1903. One of the daughters gave birth to a son (plaintiff) in 1905 and died in 1907. The other daughter died in 1911. The plaintiff having filed the suit on 13-1-1915 to set aside the alienation, *Held*, that the suit was not governed by Art. 141 of the Limitation Act in asmuch as the plaintiff claimed as the heir of his mother and the suit was not one brought by a Hindu entitled to the possession of immovable property on the death of a Hindu female. The suit was in time, under Art. 144, for the vendee's possession, however adverse against widows could not be regarded as adverse against the plaintiff. 42 Bom. 714=20 Bom. L.R. 762=47 Ind. Cas. 153.

——Art. 141—Suit for share of inheritance.

A suit for the share in inheritance is barred after lapse of twelve years of the death of the last male owner. 85 P.W.R. 1916=84 P.R. 1916=33 Ind. Cas. 742.

——Art. 141—Applicability—Reversioner's suit.

Art. 141 is extension of Art. 140 and specially refers to reversioners succeeding to the estate after widow's death. 40 Bom. 239=18 Bom. L.R. 14=33 Ind. Cas. 484.

——Art. 141—Applicability of — Succession vesting jointly in two female heirs—Suit by one on death of another, nature of.

Where succession vests jointly in two female heirs between whom no partition of the property is made, a suit by one on death of the other for the property cannot be said to be one for recovery of possession and Art. 141 could not bar the suit. 27 Ind. Cas. 83 (Cal.).

——Arts. 141 and 134—Surrender by widow.

A suit by a purchaser of the equity of redemption from a mortgagee to whom it has been surrendered is governed by Art. 141 and not by Art. 134 as the former cannot be considered to have "purchased mortgage property" within the meaning of the latter article. Art. 134 will apply only when the purchaser acts in the *bona fide* belief that he is purchasing the whole estate and not merely a mortgage interest. 1 L.W. 687=(1914) M.W.N. 735=26 Ind. Cas. 1.

——Art. 141—Applicability —Reversioner's suit—Adoption by widow—Death of adopted son as a major twelve years before suit.

A, a widow, adopted one *K* in 1857. *K* died a major in 1862. *S*, his widow, died in 1898, and the suit was brought to set aside alienations made by *A*, the mother of *K*. *Held*, that the suit was barred, and that Art. 141 did not apply. 24 W.R. 183; 4 C. 523, doubted. (1904) 32 C. 165.

——Arts. 141, 136 and 91—Suit by an assignee of reversioner to recover possession of immoveable property to which the reversioner became entitled on the death of a Hindu widow.

A suit by an assignee of a reversioner, to recover possession of the immoveable property to which the reversioner became entitled on the death of a Hindu widow, is governed by Art. 141, read with Art. 136 and not by Art. 91. (1904) 8 C.W.N. 802.

——Arts. 141 and 118—Suit to recover possession of immoveable property—Finding on adoption essential for the determination of the case. *See* ART. 118. 25 B. 26=2 Bom. L.R. 495.

——Arts. 141 and 118—Suit to recover immoveable property on the death of a Hindu widow—Adoption—Validity of, collaterally involved—Limitation—Conflict of decisions. *See* ART. 118. 9 C.W.N. 222.

——Art. 141. See ART. 118. 30 M. 308=17 M.L.J. 182.

1. (b) Applicability—Female holding as full owner.

——Art. 141—Females holding as full owner

Article 141 does not apply where the Hindu or Muhammadan female has been in possession of a full estate. 18 O.C. 289 and 21 O.C. 1, Foll. 75 Ind. Cas. 626=20 O.C. 133=10 O.L.J. 535=A.I.R. 1923 Oudh 185.

——Arts. 141 and 144—Applicability—Possession of property held by a female as full owner.

Art. 141 of the Limitation Act, lays down a rule of limitation of suits in which it is sought to recover estates which having once been estates in expectancy, have been vested in the heir of the last male owner in determination of a limited estate held by a Hindu or Mahomedan female. It does not apply to cases in which the Hindu or Mahomedan female had been in possession of the full estates. 41 Mad. 538=44 Ind. Cas. 308.

——Arts. 141, 140—Applicability of — Female having absolute estate.

Art. 141 does not contemplate the same kind of estate as one under Art. 140 *i.e.*, by grant or devise Art. 141 applies to suit for recovery of estates which were once estates in expectancy but which have become vested in the person suing as heir of last male holder on the death of Hindu or a Muhammadan female. The person suing must have an independent title in the same way as remainderman or reversioners under Art. 140 and not a title derived from the female. Art. 141 applies to cases of reversioners or remainderman, who claim the estate under a title independent of the Hindu or Muhammadan female and does not apply at all when such female has absolute estate. 18 O.C. 289=3 O.L.J. 45=33 Ind. Cas. 371.

——Art. 141—Female trustee of debutter property.

For all purposes other than succession a debutter estate during the incumbency of a female trustee, resides in her as fully and effectually as it does in a male trustee, and in such a case, the male trustee who succeeds as reversionary heir, cannot claim the benefit of the principle on which Art. 141 is founded. (1907) 6 C.L.J. 621.

1. (c) Applicability—Movable property.

——Art. 141—Movables.

Article 141 does not apply to movable property. 112 Ind. Cas. 496=55 Cal. 903=32 C.W.N. 913=A.I.R. 1928 Cal. 670.

——Art. 141—A suit by a Hindu reversioner to recover movable property on the death of a Hindu female is governed by Art. 120 of the Act and time begins to run from the death of the female. In the case of immovable property the Article applicable is 141. 64 Ind. Cas. 980=49 Cal. 45=33 C.L.J. 421=25 C.W.N. 585=A.I.R. 1922 Cal. 321.

1. (d) Applicability—Proof required of plaintiff.

——Art. 141—Applicability — Proof required of plaintiff.

All that the plaintiffs need prove to bring the case within Art. 141, Limitation Act, is that they are Hindus or Mahomedans entitled to the estate on the termination of a limited interest of a Hindu or Mahomedan female. Once that is established they have made a *prima facie* case that Art. 141 applies and to take the case out of that article the defendants must show that the time had begun to run as against the full owner and that it was actually running when the limited interest came into effect. A.I.R. 1950 Cal. 506.

——Art. 141—Art. 141 is restricted to suits by plaintiff whose title and right as the heir of the last full owner to sue for possession accrues upon the death of a female holding a woman's qualified estate under the Hindu or Muhammadan Law. To claim the benefit of the article the plaintiff must prove first that there was a qualified estate in the Hindu female and secondly that he was entitled to possession after the death of the female as the heir of the last male holder and further it must be shown that having regard to the existing law the plaintiff was entitled to the possession of the properties in dispute at the date of the suit. Art. 141 cannot be construed as altering the law of the land. The words "entitled to the possession of immovable properties" refer to the then existing law. 83 Ind. Cas. 812=3 Pat. 880=5 P.L.T. 513=A. I. R. 1924 Pat. 721.

1. (e) Applicability—Suit against alienee.

——Art. 141—Art. 141, Limitation Act, merely refers to a suit for possession and does not suggest that the reversioner has got to set aside any transaction before he becomes entitled to possession. A. I.R. 1939 Mad 824=50 M.L.W. 260=(1939) M. W.N. 848=(1939) 2 M.L.J. 388=I.L.R. (1939) Mad 917=188 Ind. Cas. 751.

——Art. 141—Suit to set aside sale by Hindu female.

A suit by a reversioner to set aside a sale by a Hindu female brought within 12 years of her death is within time under Art. 141. A.I.R. 1936 All. 557=1936 A.W.R. 691=(1936) A.L.J. 1230=164 Ind. Cas. 193.

——Art. 141—Bequest by widow found to be invalid—Donee's possession is as trespasser from the date of the death of widow—Suit by reversioners is governed by Art. 141. A.I.R. 1934 Lah. 633=35 P.L.R. 494=152 Ind. Cas. 773.

——Art. 141—Suit alleging wrongful possession by alienee—Punjab Limitation (Custom) Act (1920), Art. 2.

Where in a suit for possession the reversioners do not, in the plaint, admit or seek to set aside any alienation made by the deceased Mahomedan widow in favour of the alienee, but simply allege wrongful possession by him, Art. 2 of the Schedule annexed to the Punjab Limitation (Custom) Act (1920) does not govern limitation. The general rule of limitation contained in Limitation Act Art. 141, applies. 11 L.L.J. 465=1930 Cr.C. 95=A.I.R. 1930 Lah. 111=125 Ind. Cas. 502.

——Art. 141—Alienation by widow and mother.

Where mother and the widow both hold property of the deceased jointly without proprietary rights in the same but with rights of survivorship a suit by reversioner impeaching alienations made by the survivor of the two on the death of the survivor is governed by Art. 141. A.I.R. 1930 Oudh 339=7 O.W.N. 711=126 Ind. Cas. 657.

——Art. 141—Alienation of bhag—Bombay Bhagdari Act (5 of 1862), S. 3 — Mortgagor selling moiety to mortgagee and other moiety to wife for alleged consideration—Subsequent transfer of her moiety by wife to mortgagee.

Where a mortgagor sells in reality a moiety of the properties to the mortgagees for an amount due on the mortgage, and the other moiety is ostensibly sold in the name of the wife for an alleged consideration, the transaction amounts to a sale of an unrecognized portion of a bhag, and if subsequently after the death of her husband, the wife sells her moiety to the mortgagee the subsequent deed of sale cannot be upheld as in effect causing a past dismembered bhag to be re-united, and a suit by reversioner to set aside the above alienation is not governed by Arts. 125, 126 and 141. A.I.R. 1930 Bom. 545=54 Bom. 837=32 Bom.L.R. 1013=127 Ind. Cas. 897.

——Art. 141—Remote reversioner.

Possession of alienee from a widow becomes adverse on his death to all the reversioners whether next or remote. The remote reversioner cannot contend that the possession of an alienee became adverse only after expiry of twelve years from the death of the widow. It would be absurd to hold that a remote reversioner should have twelve years for a suit for possession, such period commencing to run after expiry of twelve years from the death of the widow. 121 Ind. Cas. 70=A.I.R. 1930 Lah. 211.

——Art. 141—Under Art. 141, limitation begins to run from the death of the widow; consequently dealings with the property by the female or by her alienees during her lifetime do not affect her husband's heirs whose title comes into existence only on the death of the female. 78 Ind. Cas. 65=A.I.R. 1925 Oudh 164.

——Art. 141—Suit by reversioner—Gift to daughter's son.

A suit by reversioners to set aside a gift to the daughter's son in the Punjab is governed by Art. 141 of the Indian Limitation Act and not by the Punjab Limitation Act. 156 P.L.R. 1914=29 P.R. 1914=24 Ind. Cas. 212.

——Arts. 141 and 144—Applicability—Person in possession by redeeming mortgage created by female—Suit by reversioner.

Art. 141 applies only when a reversioner is entitled to possession on the death of the female; it does not apply to a suit by him to recover possession from a person who had come into possession thereof by redeeming a mortgage created by the female. The article applicable to such a case is Art. 144 and time will run from the date of such redemption. A mere entry in a khewat of a person's name as proprietor does not amount to his having got possession. 11 A.L.J. 179=18 Ind. Cas. 811.

——Art. 141—Suit by reversioner—Gift by widow.

A suit by reversioners for possession of property gifted by a widow is governed by Art. 141 of the Act. 52 P.R. 1912=177 P.W.R. 1912=14 Ind. Cas. 71.

——Art. 141—Suit by Reversioner—Possession—Mortgage by sonless proprietor—Subsequent sale by widow—Limitation.

A suit for possession by a reversioner against a purchaser from a Hindu is governed by Art. 141 of the Limitation Act (15 of 1877) and the period of limitation is 12 years from the death of the widow. 33 P.R. 1911=190 P.L.R. 1911=11 Ind. Cas. 392.

——Art. 141—Suit by reversioners—Gift by widow—Collaterals in Punjab.

The collaterals can recover the gifted property within 12 years from the date of the widow's death under Art. 141 of the Limitation Act, and the donee's possession does not become adverse as long as she

is alive. 238 P.L.R. 1911=40 P.W.R. 1911=32 P. R. 1911=10 Ind. Cas. 387.

——Art. 141—Suit by reversioner—Suit by daughter for possession of immoveable property against alienees from her mother after mother's death.

There is no authority that if a daughter succeeds as heir to her father's estate, her daughter cannot succeed to her. According to custom prevailing among Rajputs of Hoshiarpur District, daughters and after them their daughters are entitled to inherit as against remote collaterals. According to custom daughter's daughters can question alienations made by their mothers without necessity. A daughter's daughter may sue within 12 years from her mother's death for possession of immoveable property from the alienees from her mother. The fact that no suit was brought during the life-time of the mother to set aside the alienation does not shorten the perioed of twelve years. 121 P.L.R. 1909=10 P.L.R. 473=3 Ind. Cas. 984.

——Art. 141—Applicability of—Suit to declare unauthorised alienation void and for recovery of property.

A suit to recover immoveable property alienated by the plaintiff's mother acting as his guardian during his minority, and for a declaration that the alienation is invalid is governed by Art. 141 as it is essentially a suit to recover immoveable property the prayer for declaration being merely ancillary. Art. 91 does not apply as the plaintiff is not seeking relief against his own deed. 32 All. 392=7 A.L.J. 337=5 Ind. Cas. 585.

——Art. 141—Alienation by widow—Suit by son adopted by widow. *See* 1907 A.W.N. 148.

——Arts. 141 and 91—Reversioner's suit on the death of a Hindu female for possession—Property alienated by widow—Void or voidable election—Widow's estate.

A suit by the reversioner to recover property alienated by the widow is governed by Art. 141 and not by Art. 91 and the fact that he prays for a declaration that the alienation is inoperative does not affect the matter. The fact that a document is voidable and not void against a person entitled to possession of property covered by such document does not shew that it is incumbent upon such person to sue to set aside such document before recovering possession. (1906) 5 C.L.J. 334=4 A.L.J. 329=11 C.W.N. 424 =34 C. 329=17 M.L.J. 154=34 I.A. 87=9 Bom. L.R. 602 (P.C.).

——Arts. 141 and 91—Hindu Law—Reversioner's suit for possession of property alienated by widow for no legal necessity. (1905) 9 C.W.N. 636=33 C. 257=1 C.L.J. 408.

——Art. 141—Mortgage by Hindu widow—Partly valid—Suit by reversioner after 12 years—Mortgagee entitled to possession of—Some properties only under the deed of mortgage, effect of. *See*. 4 Bom.L.R. 465.

1. (f)—Applicability—Suit by limited owner barred.

——Art. 141—Suit by widow, barred — Suit by Reversioner also, if barred.

So far as a Hindu widow is concerned she cannot for the purposes of limitation be considered to represent the entire estate, so as to bar a suit of a reversioner when her own suit happens to be barred. This rule would be applicable not only in the case of a Hindu entitled to the possession of the estate after the death of a female, but also to the case of a Mahomedan occupying a similar position. The wording of Art. 141, Act 15, 1877 and of the present Act 9 of 1908 make this amply clear. 108 Ind. Cas. 817=1 L.C. 733=A.I.R. 1928 Oudh 155.

——Art. 141—Suit by reversioner—Widow barred—If reversioner barred — Limitation Act (14 of 1859), S. 12.

A decision against a widow who does not establish her right to recover the estate of her husband within 12 years of the death of the latter does not operate as *res judicata* as against the reversioner as his title to possession accrues only on the death of the widow. Though the widow's right of suit was barred, the reversioner's suit would not be barred under Art. 141 of the Limitation Act. 32 M.L.J. 627=42 Ind. Cas. 228.

2. Adverse possession against limited owner.

——Art. 141—Suit for possession by remainderman after widow's death—Limitation—Defendants in adverse possession against widow.

A suit for possession of immovable property brought by a remainderman entitled to possession after the death of a widow within twelve years of her death is within time under Art. 141, Limtation Act. Any period of adverse possession by the defendants against the widow can be of no assistance to them in defeating the title of the plaintiff which accrued upon the death of the widow. Pak. L.R. 1949 Lah. 737=A.I.R. 1949 Lah. 252.

——Art. 141—Right of reversioner to sue for possession—Inaction of limited owner.

The omission by the daughter or any one of them inheriting immovable property from their father to institute a suit for possession against the trespasser or their allowing the suit for possession to be barred by time does not deprive the reversioner of the right to sue for possession of the property under Art. 141 in the absence of a decree of the Court, binding on him because the inaction is personal and not as representing the estate. A.I.R. 1943 Nag. 193=I.L.R. (1943) Nag. 213=1943 N.L.J. 237=206 Ind. Cas 335.

——Art. 141—Applicability — Adverse possession against limited owner.

Where, on the death of a *bhagdar*, his *bhag* lands were held by his widow, mother and his daughter and subsequently the widow remarried in 1905, and the mother died in 1920, and a reversioner of the *bhagdar* instituted a suit for recovering possession of the lands in 1925 and the daughter pleaded adverse possession:

Held, (*i*) that the suit was governed by Art. 141, and that the suit would not be barred till 12 years after the mother's death in 1920;

(*ii*) that the mother had a right to hold the lands and consequently, the adverse possession of the daughter even if it were adverse to the mother would not bar the reversioner. 34 Bom. L.R. 385 =A.I.R. 1932 Bom. 434=139 Ind. Cas. 28.

——Art. 141—Adverse possession against widow.

A suit for possession by the reversioners is governed Art. 141 and adverse possession against the female

heir in not effective and binding on the reversioner. 120 Ind. Cas. 447=A.I.R. 1930 All. 307.

——**Art. 141**—Adverse possession against a Hindu widow cannot be tacked to the adverse possession against a person or his predecessor-in-title through whom he claims, when the predecessor-in-title has inherited disputed property not from the Hindu widow but from her husband whose reversionary heir he was. A.I.R. 1928 Cal. 670, Not foll. 123 Ind. Cas. 444=50 C.L.J. 260=57 Cal. 289=A. I. R. 1930 Cal. 165.

——**Art. 141**—Adverse possession against a woman holding a widow's or a daughter's estate is binding against the reversionary heir.

Per *Curiam*.—The state of the law created by the case in. 52 I.A. 322 is unsatisfactory. 51 C.L.J. 23.

——**Art. 141—Adverse possession against widow.**

Adverse possession for over 12 years against the widow does not affect the right of the reversioner and the reversioner is, therefore, entitled to twelve years from the widow's death for a suit to recover possession of immovable property where there has been no decree against the Hindu widow or other act in the law in the widow's lifetime depriving the reversioner of the right to possession on the widow's death. 51 I.A. 439 (P.C.), Foll. 9 Pat. 634= 11 P.L.T. 714=A.I.R. 1930 Pat. 573=128 Ind. Cas. 131.

——**Art. 141—No decree or other act depriving widow's right by adverse possession—Title barred in widow's lifetime—Heir can still rely, on widow's death, on Art. 141.**

Where there has been no decree against widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled after the widow's death, to rely upon Art. 141 for the purpose of the determination of the question whether the title is barred by lapse of time. 23 Bom. 725 (P.C.), Foll. 117 Ind. Cas. 498=51 All. 439=1929 A.L.J. 716=33 C.W.N. 809=30 M.L.W. 60=56 I.A. 267=31 Bom. L.R. 891=50 C.L.J. 52=6 O. W. N. 589=10 P.L.T. 527=1929 M.W.N. 762= A.I.R. 1929 P.C. 166=57 M.L.J. 160 (P.C.).

——**Art. 141**—Possession adverse to a Hindu widow is not adverse to the reversioners, and therefore a suit brought by the reversioners within 12 years of the widow's death is not barred by limitation. A.I.R. 1928 All. 561 (F.B.); A.I.R. 1929 Cal. 93, Appr. and Foll. 119 Ind. Cas. 57=29 M. L. W. 590=1929 M.W.N. 314=A.I.R. 1929 Mad. 421=56 M.L.J. 441.

——**Art. 141**—Per Full Bench.—Where a widow has entered into possession as a Hindu widow and has either voluntarily parted with possession or been dispossessed against her consent, a suit by the reversioner brought for possession after her death is governed by Art. 141 and not by Art. 144 and a suit brought within 12 years of the death of the widow is not barred by limitation. 14 All. 156, Affirmed: 23 Bom. 725 (P.C.), Foll. 112 Ind. Cas. 801= 51 All. 188=26 A.L.J. 1049=A.I.R. 1928 All. 561 (F.B.).

——**Art. 141**—Where it is not shown that adverse possession began in the lifetime of the deceased (the original owner of the property) a suit by his reversioners on the death of the widow of the deceased to recover possession from a person in occupation would be governed by Art. 141. 68 Ind. Cas. 177 =36 P.L.R. 1922=A.I.R. 1923 Lah. 106.

——**Art. 141**—Limitation does not bar a suit by the reversioners within 12 years of the death of the last surviving widow to set aside an alienation by which the widows were conferred occupancy rights or to challenge the title acquired by adverse possession by any person against the widows. 68 Ind. Cas. 299=2 L.L.J. 573.

——**Art. 141—Suit by reversioner—Hindu widow—Adverse possession against.**

Possession taken by a trespasser during the lifetime of a Hindu widow or a Hindu female with a life interest is not adverse as against the reversioner until after the death of the widow. 41 All. 154= 17 A.L.J. 44=47 Ind. Cas. 222.

——**Arts. 141 and 144—Suit by reversioner—Hindu widow—Adverse possession.**

Adverse possession which begins in and runs its course before the termination of a widow's life-estate does not affect the rights of the reversioners. The special period provided by Art. 141 overrides the general provision of Art. 144. 42 Bom. 69=19 Bom. L.R. 919=43 Ind. Cas. 233.

——**Arts. 141 and 144—Suit by reversioner—Adverse possession against widow not effeftive against a reversioner—Limitation Acts of 1859 and 1908.**

Art. 141 of the Limitation Act applies to a suit by a Hindu reversioner for possession of properties to which he became entitled after the death of a limited female owner. The reversioner has a fresh cause of action on the date of the death of the limited owner. Under the present Limitation Act unlike the Act of 1859, adverse possession against the widow does not extinguish the title of the reversioner. 23 Bom. 725 (P.C.); 20 M. 493; 23 A. 448; 25 A. 435, foll. 18 M. L. T. 226=2 L.W. 751=30 Ind. Cas. 991.

——**Art. 141—Suit by reversioner — Adverse possession against widow.**

A suit by the reversioners on the death of the widow for recovery of possession of property in which she had a life-estate of inheritance and was held adversely to her more than 13 years by a stranger is not barred by limitation as the plaintiff's claim as the heirs of the last male owner and not as the widow's heirs. 17 Ind. Cas. 136 (Mad.).

——**Art. 141—Reversioner claiming under a family arrangement on death of a Hindu female — Adverse possession against the female, how far binding on reversioner.**

Adverse possession against a Hindu female with only life interest will not affect a reversioner even when he claims not as heir to her husband but under a family arrangement by which she was to have only a life interest in her husband's estate and after her it was to go to the claimant and his heirs. (1902) 4 Bom.L.R. 893.

——**Art. 141—Hindu Law—Adverse possession—Suit by reversioner to estate held by a Hindu female.**

Under Art. 141, a suit can be brought by a reversioner for possession of immoveable property, to the possession of which a female heir has been entitled within twelve years from the date of the death of the female heir, although she may have been out of possession for more than twelve years. 23 B. 725,

foll. (1901) A.W.N. 133=23 A. 448=(1907) 6 C.L.J. 490=(1903) 25 A. 435=1903 A.W.N. 93.

——Art. 141—Applicability of — Adverse possession against daughters.

Where a Hindu governed by the *Dayabagha* law died leaving him surviving 2 daughters and a widowed daughter-in-law and the daughter-in-law took possession of the estate of the last male owner to the exclusion of the daughters and continued in possession of the estate for more than twelve years: *Held*, that the possession of the daughter-in-law was adverse and that since the survivor of the 2 daughters came in on the death of her sister not by way of inheritance but by way of survivorship, Art. 141 would not apply. 18 C.W.N. 904=27 Ind. Cas. 250.

3. Adverse possession against male owner.

——Art. 141—Adverse possession against last male owner.

Where adverse possession commences to run against the last male-owner himself, the intervention of the limited estate will not prevent time running and will not enable the reversioner coming after the limited owner to say that he has got a fresh cause of action on the death of the owner of the limited estate. A. I.R. 1942 Oudh 303=1942 O.W.N. 191=1942 A. W. R. (C.C.) 139=200 Ind. Cas. 265.

——Art. 141—Last full owner dispossessed — Time commenced to run, if arrested by succession of his widow.

Article 141, Limitation Act applies only to cases where it is proved that the last full owner was in possession at the time of his death. If he himself was dispossessed and time began to run against him the operation of the law of limitation would not be arrested by the fact than on his death he was succeeded by his widow. A.I.R. 1941 Cal. 632=197 Ind. Cas. 756.

——Art. 141—Time commencing to run against last male-holder—Owner succeeded by female entitled to woman's limited property—Time is not suspended.

When time has once fommenced to run against the last male-holder, it continues to run and is not suspended or, in any way affected by the mere circumstance that the owner is succeeded by a female entitled to the usual woman's limited estate. After 12 years have run out from the date of the original entry of the trespasser, which happened in the lifetime of the last male-owner, all persons claiming through or under him are barred. Art. 141, Limitation Act is inapplicable to such a case. A. I.R. 1941 Lah. 271=43 P.L.R. 308=195 Ind. Cas. 712.

——Art. 141—Art. 141 will not give the reversioners a right to sue when the period of adverse possession in the lifetime of the propositus added to the period of adverse possession since the death of the widow exceeds 12 years. 86 Ind. Cas. 725=12 O.L.J. 77=A.I.R. 1925 Oudh 400.

——Art. 141—Time commenced to run against last full owner—Article inapplicable.

Article 141 is inapplicable when time has once commenced to run against the last full owner as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate after the statutory period has run out, all persons claiming through the owner are barred. (*See* Rustomji's Limitation Act, 2nd Edition, p. 449). The article makes it clear that the reversioner has 12 years after the death of a Hindu or Mohammadan female to establish his right as heir to the last full owner and it lies upon the party in possession to prove that he has got a better title. 77 Ind. Cas. 479=A.I.R. 1923 Bom. 364.

——Art. 141—Art. 141 applies only where the last full owner was in possession at the time of his death. Where time has begun to run against him, it would not be arrested by the fact that on his death he was succeeded by a limited owner. 67 Ind. Cas. 246=45 Mad. 370=1922 M.W.N. 132=30 M.L.T. 143=A.I.R. 1922 Mad. 59=42 M.L.J. 319.

——Art. 141—Applicability of — Adverse possession against last full owner.

Art. 141 applies only to cases where it is proved that the last full owner was in possession at the time of his death, if he himself was dispossessed and time began to run against him, the operation of the law of Limitation would not be averted by the fact that on his death, he was succeeded by the widow, daughter or mother. Under the law as it stood before the passing of the limitation Act of 1871, adverse possession which extinguished the title of the female heir also extinguished the title of the reversioner. 21 C. L. J. 157=19 C.W.N. 1280=27 Ind. Cas. 954.

4. Death of female.

——Art. 141—Death of female—What amounts to —Influx of time or inaction.

There is no warrant for the contention that the death of a female referred to under Art. 141 of the Limitation Act includes death by influx of time though it may include civil death. 224 Ind. Cas. 537=1946 A.W.R. (C.C.) 120=1946 O.W.N. 195 =1946 A.L.W. (C.C.) 144=(1946) O.A. (C.C.) 120=A.I.R. 1946 Oudh 213.

——Art. 141—Date of death—Onus of proof.

Where plaintiff brought a suit on the 5th May, 1914 and the last female holder died in May, 1902 and where the date of death was not known it was held that defendants were bound to prove that the female died before 5th May, 1902. 1 Lah. 554=114 P.L.R. 1920=2 Lah. 48=56 Ind. Cas. 742.

——Art. 141—Suit by reversioner — Death of a female—Burden of proof.

In a suit by reversioners entitled to property on the death of a particular female which would be governed by Art. 141, the burden of proof is on the plaintiffs to show that the suit was brought within 12 years of the death of the female. 13 N.L.R. 16=39 Ind. Cas. 21.

——Art. 141—Onus of proof as to the date of widow's death—Widow lost heard of prior to 12 years suit—Presumption as to time of death—Evidence Act, Ss. 107, 108.

In a suit by a reversioner for possession of lands on the death of a widow the onus is on the plaintiff to show that the suit is brought within 12 years from the widow's death. Where it was proved that the widow was last heard of on a date prior to 12 years before suit:

Held, that it lay upon the plaintiff to prove that the widow died within twelve years prior to suit; and in the absence of such proof his suit should fail. When the question is not one of death, but death at a

particular time, there is no presumption as to such time, but the party who has to make out death at a particular time must make it out by evidence. (1904) 14 M.L.J. 464.

5. Interpretation.

(a) Entitled.
(b) 'Female'.
(c) 'Hindu'.

5. (a) Interpretation—'Female'.

——Art. 141—More than one female in succession.
Where there has been more than one female in succession, the suit must be brought within 12 years of the death of last female-holder. 20 N.L.J. 278.

——Art. 141—Art. 141, though it uses the word "female" in the singular, clearly covers a case where the Hindu reversioner is entitled to the property on the deaths of more than one female heir inheriting jointly. And when the last column speaks of "when female dies" it clearly means in such a case "after the deaths of all the female co-heirs". 60 Ind. Cas. 135=1921 M.W.N. 29=A.I.R. 1921 Mad. 246=43 Mad. 855=39 M.L.J. 567=12 L.W. 656=28 M. L. J. 272.

5. (b) Interpretation—'Hindu'.

——Art. 141—'Hindu'—Meaning of.
The word "Hindu" in Art. 141 of the Limitation Act means not only a person who is ethnologically a Hindu but also a person who has the legal status of a Hindu and is governed in the matter of inheritance by the Hindu Law. I.L.R. (1946) Nag. 159 =1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

5. (c) Interpretation—'Entitled'.

——Ar. 141—Interpretation—'Entitled'.
Per *Sulaiman, Ag. C. J.*—The arguments that the word "entitled" in Art. 141 necessarily means "entitled under the law and not extinguished by limitation," and that the article applies only to a suit brought by the first Hindu entitled to possession on the death of the first female heir are not supportable. 112 Ind. Cas. 801=51 All. 188=26 A. L.J. 1049=A.I.R. 1928 All. 561 (F.B.).

6. Starting point.

——Art. 141—Suit for possession on death of widow—Starting point of limitation.
Where a testator has made provision for the junior widow, and she has remained in possession until her death, the cause of action for the suit for possession arises only after her death. (1945) O. W.N. 174=49 C.W.N. 485=A.I.R. 1945 P.C. 113 =12 B.R. 94=1945 M.W.N. 626=(1945) 2 M.L. J. 393=1945 A.W.R. 25 (P.C.)=59 M.L.W. 46= (1945) A.L.J. 520=220 Ind. Cas. 458 (P.C.).

——Art. 141—On death of widow, person having no title to property obtaining possession—Person subsequently becoming entitled to share in property along with reversioner—Character of possession is not changel—Suit by reversioner for possession more than 12 years from widow's death is barred. A.I.R. 1940 Mad. 102=50 L.W. 571= (1939) M.W.N. 1225=187 Ind. Cas. 376.

——Art. 141—Suit by reversioner for possession of immovable property on death of Hindu female —Question as to validity of adoption to be decided.
A suit by a reversioner for possession of immovable property on the death of a Hindu female is governed by Art. 141, even if it is necessary to decide in the suit whether an adoption was or was not valid. The suit is not thereby converted into a suit for possession on the ground that the appointment of an heir is invalid or never in fact took place.
The reversioners have the option of treating the adoption as a nullity, and to bring a suit for possession, whether the transaction in question was void or voidable. A.I.R. 1935 Lah. 213 (2)=35 P.L.R. 338=149 Ind. Cas. 434.

——Art. 141—Hindu widow surrendering to daughter—Succession opening on the death of daughter to her father's male reversioners—Suit by next reversioner 12 years after daughter's death is barred under Art. 141. A.I.R. 1934 P.C. 105=11 O.W. N. 596=1934 M.W.N. 414=39 M.L.W. 607=1934 A.L.J. 433=38 C.W.N. 697=59 C.L.J. 354=67 M. L.J. 20=36 Bom.L.R. 563=15 P.L.T. 497=57 Mad. 749=61 I.A. 200=3 A.W.R. 729=148 Ind. Cas. 828 (P.C.).

——Art. 141, Ss. 6, 8, Sch. 1—Alienation by widow—Adoption—Death of adopted son during minority—Succession of mother—Suit by reversioner within 12 years of mother's death—Limitation—Accrual of right to sue.
A Hindu widow sold in 1899 certain properties which she had inherited from her husband. She adopted a boy in 1905 but the latter died while still a minor in 1909. The widow who succeeded him as his mother died in 1921 without avoiding her alienation. The reversioners instituted a suit in 1923 for recovery of possession of the property:
Held, that time began to run only from the death of the widow and suit was not barred. (1930) M.W. N. 811=59 M.L.J. 949=33 M.L.W. 378=A.I.R. 1931 Mad. 273=129 Ind. Cas. 460.

——Art. 141—Suit by co-widow—Starting point.
In a suit by co-widow to set aside a gift of husband's property by her co-widow, the limitation begins to run from the date of co-widow's death. Art. 1 of the Second Schedule of the C. P. Tenancy Act does not apply. 101 Ind. Cas. 822=10 N.L.J. 90= A.I.R. 1927 Nag. 226.

——Art. 141—Time once begun to run.
The father of plaintiff filed a suit during the lifetime of the widow to set aside alienations by her. The suit was held to be not maintainable as he was held not to be the nearest heir, but another *B*. After the widow's death *B* brought a suit to recover possession of the properties. But he was found not to be a reversioner at all. Then plaintiff filed another suit for possession of the properties more than 12 years after the death of the widow.
Held, that limitation when it once begins to run cannot stop running except in the particular exception mentioned in S. 9 of the Limitation Act that the time began to run from the date of the death of the widow and that the suit was barred. 70 Ind. Cas. 446=16 M.L.W. 529=A.I.R. 1923 Mad. 108 =44 M.L.J. 87.

——Art. 141—Where an alienation was made by the daughter of the properties of the last male owner

during the lifetime of the widow and after the death of the last female holder, the reversioner sues for possession of the properties.

Held, that time ran from the death of the last female owner. 69 Ind. Cas. 389=16 M.L.W. 752= A.I.R. 1923 Mad. 168.

——Art. 141—Time begins to run against the transferee from the death of the widow and not from the date of transfer by widow. 68 Ind. Cas. 601=1922 P.H.C.C. 313=2 Pat. 75=4 P.L.T. 267 =A.I.R. 1923 Pat. 72.

——Art. 141—Co-widows—Surrender of her interest by one in favour of the others—Alienation by surenderee—Suit by reversioner—Limitation.

Where one of two co-widows surrendered her interest in her husband's estate in favour of the other and the surrenderee alienated the property, a suit by a reversioner to recover possession of the alienated property within 12 years of the death of the survivor of the widows would be in time. The reversioner is not bound to sue within 12 years of the death of the surrenderee. Under Art. 141 time begins to run only on the death of all the female co-heirs. There can be no acceleration of the right of a reversioner without his knowledge and consent by any agreement between the female co-heirs. 39 M.L.J. 567=28 M.L.T. 272=12 L.W. 656=43 Mad. 855=60 Ind. Cas. 135=A.I.R. 1921 Mad. 246.

——Art. 141—Starting point—'Time runs from death of limited owner'.

As against reversioners time runs from the death for female holder after which event the reversion vests in them. 11 N.L.R. 116=31 Ind. Cas. 290.

——Arts. 141 and 143—Starting point—Remarriage of Hindu widow—Suit by reversioner.

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than twelve years after her remarriage is barred under Arts. 141 and 143. On the remarriage, the widowhood ceases and the property vests in the reversioners. 11 N.L.R. 86=29 Ind. Cas. 612.

——Art. 141—Starting point.

Limitation begins from the death of the widow of a deceased co-sharer for his self acquired property. 6 P.R. 1912=218 P.L.R. 1911=204 P.W.R. 1911= 12 Ind. Cos. 453.

——Art. 141—Starting point.

The starting point is the death of the last surviving widow. The daughter-in-law's possession will not prevent time running unless it is shown that it was permissive. 29 C. 664, Foll. 33 All. 312=8 A.L.J. 57=9 Ind. Cas. 50.

——Arts. 141 and 144—Suit by reversioner—Hostile title by Limited owner.

Though time does not run against the reversioner owing to possession or dispossession of female, so long as she holds as heir of the last male-holder, yet if she holds under some claim of title independent of her possession is hostile to the rightful heir or reversioner. 6 C.L.J. 490; 23 B. 725 (P.C.); 22 Cal. 345, Foll. 9 C.L.J. 236=6 M.L.T. 362= 4 Ind. Cas. 44.

——Art. 141—Starting point—Suit for possession —Limitation when runs.

A suit by a Hindu reversioner entitled to possession of immoveable property on the death of a Hindu female is governed by Art. 141, Limitation Act. (1877) and the period commences from the date of the female's death. 34 C. 329 (P.C.), foll. 6 A.L.J. 723=6 M.L.T. 180=3 Ind. Cas. 536.

——Art. 141—Reversioners' suit—Patilki Vatan—Suit for declaration.

Among sudras, governed by the *Mitakshara*, an illegitimate son is not entitled to succeed collaterally in the family of his father. *G*, the holder of a *Patilki* Vatan, died in 1893. He left him surviving his widow *R*. In 1899, the defendant representing himself as the heir of *G*, got his name entered in the Collector's books as the next *Vatandar R* died in 1903. The plaintiffs, the heirs of *G*, filed a suit in 1906, praying for a declaration that they were the heirs to the *Vatan* and not the defendant. The lower Courts held that the claim was not barred under Art. 120. —*Held*, confirming the decree, that the plaintiffs right to sue for a declaration would not accrue until R's death whose existence at any time between G's death and her own would have defeated the suit for a declaration by the plaintiffs, on the ground that she had a vested right as the nearest heir of the last *Vatandar*. (1909) 34 B. 321=12 Bom.L.R. 204. =5 Ind. Cas. 964.

——Art. 141—Reversionary suit—Last female not holding as heir of last male—Limitation when begins to run.

Although the statute of limitation can never begin to run against the reversioner in consequence of possession or dispossession of a female, so long as she holds as heir of the last made, if she holds under some claim of title independent of him, her possession is hostile to the rightful heir or reversioner from the time it begins. 26 I.A. 71; 6 C.L.J. 490. foll. (1908) 9 C.L.J. 236=4 Ind. Cas. 44.

7. Miscellaneous.

——Art. 141—Effect—Limitation Act of 1871 and 1877.

The effect of Art. 142 of the Limitation Act of 1871 and Art. 141 of the Act of 1877 was to create a fresh rule in regard to limitation in all cases in which the prospective right arising out of adverse possession had not already ripened into an absolute title. 1942 A.W.R. (H.C.) 84 (2)—A.I.R. 1942 All. 175=(1942) A.L.J. 179=I.L.R. (1942) All. 259=200 Ind. Cas. 269.

——Art. 141—Plainiff's suit prima facie under Arts. 140 and 141—Defendant, how can avoid operation of these articles, pointed out. A.I.R. 1935 Cal. 702=62 C.L.J. 49=40 C.W.N. 115=63 C. 155 =159 Ind. Cas. 1101.

——Art. 141—Reversioner added as party after limitation.

Though a suit by one reversioner to recover possession of his share from the alinee from a Hindu widow would be barred under S. 28 read with Art. 141 as being beyond twelve years form the death of the widow, yet when a suit is brought within the proper period of limitation by another reversioner and the other reversioner is made defendant in it and he in his written statement claimed possession of his share, such a claim would not be barred by limitation in spite of the fact that the written statement itself was presented after the lapse of 12 years. 34 Bom. 91, Foll. 119 Ind. Cas. 656= 53 Bom. 472=31 Bom.L.R. 647=A.I.R. 1929 Bom. 345.

——Art. 141—Attachment — Effect on possession of true owner.

If during the attachment, the seisin or legal possession is in the true owner the attachment does not amount to either dispossession of the owner or the discontinuance of his possession. 108 Ind. Cas. 89=7 Pat. 319=A.I.R. 1928 Pat. 260.

——Art. 141—Limited owner—Nature of estate.

Limited estates taken by Hindu females are not the same as life-estates under English Law but for purpose of limitation, they are treated on the same principle. 18 O.C. 289=3 O.L.J. 45=33 Ind. Cas. 371.

——Arts. 141 and 124—Reversioner's suit for hereditary office—Suit or office barred—Suit for property also barred. *See* ART. 124. 28 M. 197.

——Arts. 142 and 144.

Synopsis.

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1. Applicability and scope.

(a) Art. 142.
(b) Arts. 142 and 144.
(c) Art. 144.

1. (a) Applicability and Scope—Art. 142.

——Art. 142 — Applicability — Constructive dispossession.

Art. 142 of the Limitation Act covers cases of actual and constructive possession and dispossession. A person can remain in possession of a property through a licensee or a tenant. He is not in actual possession but his possession in law is there. Such a person can certainly be dispossessed and his dispossession in such a case would occur immediately his title is repudiated. There is no reason why Art. 142, should not apply to a case like this. 16 Lah. 442 (F.B.), foll. A.I.R. 1950 Assam 55.

——Art. 142—Plaintiff resting his case on constructive possession.

Where plaintiff, in a suit for possession never had actual possession but rested his case on constructive possession,

Held, that Art. 142 cannot apply. 68 Ind. Cas. 320=A.I.R. 1923 Nag. 2.

——Art. 142—Applicability — Mortgage decree for sale—Execution—Sale of property not covered by mortgage or decree—Delivering of possession to purchasers—Suit for possession by judgment-debtor—Limitation. *See* C. P. CODE, S. 47. 52 Bom. L. R. 358=A.I.R. 1950 Bom. 346.

——Art. 142—Applicability — No allegation of dispossession.

Art. 142 of the Limitation Act has no application where there is no allegation either of dispossession or discontinuance of possession in the plaint. I.L.R. (1949) Nag. 883.

——Art. 142—Muhammadan widow in possession in lieu of dower debt dispossessed by trespasser—Suit by widow or her heirs for possession—S. 9, Specific Relief Act, effect of.

There is nothing in the provisions of S. 9, Specific Relief Act, which in any way militates against the principle that previous possession enjoyed peaceably by a Muhammadan widow in lieu of her dower debt —or anybody else who has obtained possession even for a period short of the statutory period of 12 years—entitles the person who has been in such possession to a decree for possession in a suit against a trespasser provided the suit is brought within 12 years of the date of dispossession and since the right to retain possession by the Muhammadan widow in lien of her dower debt is heritable, the heirs of the widow can institute a suit for possession against the trespasser under Art. 142. A.I.R. 1944 All. 36 =(1943) A.L.J. 590=1943 A.W.R. (H.C.) 288= I.L.R. (1944) All. 68=211 Ind. Cas. 475.

——Art. 142—Question of applicability of particular article—Duty of Court.

In order to determine the particular article applicable to a suit, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint but the facts show that the defendants entered or must have entered on the land while it was in the possession of the plaintiff, the article applicable would be Art. 142. It would be absurd to hold that a plaintiff, can, at his sweet will, avoid the operation of Art. 142 by framing his suit in such a manner as if there was no dispossession. A.I.R. 1940 Oudh 134=1939 O.W.N. 1005 =1939 A.W.R. 270=15 Luck. 157=185 Ind. Cas. 736.

——Art. 142—When plaintiffs allege their possession and dispossession in a suit for possession, Art. 142 applies. (1940) 42 P.L.R. 531.

——Art. 142—Suit to set aside contract made void by statute—Claim for restitution—Addition of ancillary relief—Transacaion embodied in two instruments—Claim for restitution in respect of separable part:

Held, that Art. 142 was applicable. A.I.R. 1938

Nag. 335=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

——**Art. 142**—Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show that his dispossession occurred within twelve years before the institution of the suit. But where the property is of such a nature that it is not capable of actual physical possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations apply. In considering the question whether the plaintiff was dispossessed within twelve years, or whether his possession discontinued within twelve years, the nature of the property and the position of those actually occupying it, if it is capable of actual occupation must be taken into consideration:

Held, that where the property (a tank) and its appurtenances are not capable of enjoyment and there is no suggestion that the defendants so conducted themselves in relation to the tank purchased by them as to amount to the plaintiff's dispossession, the plaintiff's possession must be taken to have continued till the defendants' possession became adverse as regards continuity and extent. 1935 A.W.R. 728 =1935 R.D. 267=A.I.R. 1935 All. 774=(1935) A. L. J. 828=155 Ind. Cas. 824.

——**Art. 142**—Where the claim to property is not based on possession and subsequent dispossession, Art. 142 does not apply. A.I.R. 1934 Lah. 576=36 P. L. R. 269=151 Ind. Cas. 490.

——**Art. 142**—If an owner sues 12 years after dispossession from land, he cannot set up admission made by the trespasser as giving him further time in which he may bring his suit unless those admissions come within S. 19, Limitation Act. Under Art. 142, the suit must be brought within 12 years of dispossession. A.I.R. 1933 Cal. 414=60 C. 404= 144 Ind. Cas. 177.

——**Art. 142—Length of defendant's possession, if material.**

Article 142 applies only to those cases in which the plaintiffs rely on their possession as opposed to lawful title. Peaceful possession is itself a good title against all the world except a person who can show a better title and such possession is an interest which can be sold and devised. If a person, though not the owner, is, while in the enjoyment of his peaceful possession, ousted, he has a right to claim to to be restored to possession. It is to such cases that Art. 142 applies. Under Art. 142 the question of limitation does not depend on the length of the defendant's possession but on the question whether plaintiff was dispossessed or he discontinued his possession. A.I.R. 1933 Nag. 274=30 N.L.R. 18=150 Ind. Cas. 679.

——**Art. 142—Applies only to suits on possessory title (i.e.), possession and subsequent dispossession.**

Article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years of the date of the suit lies on the plaintiff and on proving these facts, the plaintiff is entitled to a decree unless the defendant establishes that he is the true owner of the property in dispute. 119 Ind. Cas. 6=1929 A.L.J. 1106= 51 All. 1042=A.I.R. 1929 All. 753.

——**Art. 142—Applicability.**

Where there is a clear finding that the plaintiffs were either dispossessed or had discontinued possession of a holding for more than 12 years before suit, the claim of the plaintiffs is clearly time-barred under Art. 142. 119 Ind. Cas. 8 (All.).

——**Art. 142**—Suit for possession — Ancillary prayer for the removal of the trees—Suit is governed by Art. 142. A.I.R. 1922 Oudh 47, Foll. 99 Ind. Cas. 199=A.I.R. 1927 Oudh 89.

——**Art. 142**—Where the defendant admits dispossession of the plaintiff in a suit for recovery of possession, the suit is governed by Art 142. 96 Ind. Cas. 568 (Cal.).

——**Art. 142**—Article 142 has no application to claims which neither in terms nor in substance are claims to possession made necessary, by reason of dispossession or discontinuance of possession. 87 Ind. Cas. 386=21 M.L.W. 398=A.I.R. 1925 Mad. 834.

——**Art. 142—Defendant basing his possession on deed of gift—Gift not proved.**

Where defendant bases his possession on a deed of gift which he fails to prove, the conclusion is not that his possession is permissive but that it is that of a trespasser. Such a suit is governed by Art. 142. 73 Ind. Cas. 41=A.I.R. 1924 Pat. 341.

——**Art. 142—Scope — Simple mortgage—Mortgagor continuing in possession.**

Article 142 cannot be interpreted to include within its scope a case where a simple mortgage was executed and the mortgagor continued in possession as before. 74 Ind. Cas. 630=50 Cal. 49=36 C.L.J. 35=A.I.R. 1923 Cal. 1.

——**Art. 142**—Where there is no reliable proof of un-equivocal acts of ownership, the case must be decided on the proof of possession. Having regard therefore to the definite findings that the plaintiffs were dispossessed by the defendants, and that the defendants have been in possession for a period of 16 years before the suit, the suit must be held to be barred by limitation. 67 Ind. Cas. 1005=27 C.W.N. 340=A.I.R. 1922 Cal. 224.

——**Art. 142**—Where the plaintiffs have not proved their possession and dispossession within 12 years and defendants have proved adverse posession, Art. 142 applies to a case of this description. 59 Ind. Cas. 891=3 L.L.J. 72=A.I.R. 1921 Lah. 202.

——**Art. 142—True owner obtaining possession by force—Limitation.**

Possession of the true owner however obtained, counts in his favour for the purpose of Art. 142 of the Limitation Act, in a suit brought by him for the recovery of possession on estasblishment of title. 45 Ind. Cas. 548 (Cal.).

——**Art. 142 — Applicability — Possession and dispossession.**

If the plaintiffs allege possession and dispossession, the case is governed by art. 142. 2 Ind. Cas. 381 (Cal.).

——**Arts. 142 and 91**—Suit for cancellation of deed—Relief for confirmation of possession or for possession in alternative—Suit barred under Art. 91—Relief of possession also barred—Article 142 held, not applicable. A.I.R. 1937 Cal. 500=65 C.L.J. 34 =172 Ind. Cas. 755.

——**Arts. 142 and 120—Encroachment of gallery on another's land.**

Where a gallery of a person's house encroaches upon another's land, he is unquestionably a trespasser in view of the maxim "whosoever has the soil, also owns to the heavens above and to the centre of the earth." Hence where in such a case, the owner of the land trespassed brings a suit for relief under S. 54, Specific Relief Act, coupled with a claim for possession of land below the gallery, to which the opposite party has asserted his title, the suit is not governed by Art. 120 but by Art. 142. A.I.R. 1939 Nag. 197=I.L.R. (1939) Nag. 580=1939 N.L.J. 297=186 Ind. Cas. 155.

——**Arts. 142 and 120**—Where the suit is on the face of it one for recovery of possession of immovable property who had taken unlawful possession thereof and had planted new trees thereon,

Held, that the suit is governed by Art. 142 of the Limitation Act. A prayer for removal of the recently planted trees is merely ancillary to the claim for possession will not take the case out of Art. 142 and make Art. 120 applicable. 66 Ind. Cas. 799=9 O. L. J. 17=A.I.R. 1922 Oudh 47.

——**Arts. 142 and 120—Non occupancy ryot, suit by, for recovery of possession—Specific Relief Act, S. 9.**

Held, by F.B. (Prinsep, J. dissentiente);—that the remedy in S. 9 of the Specific Relief Act is not the only remedy which the legislature has provided for a non-occupancy raiyat who has been dispossessed otherwise than in due course of law. 7 C.W.N. 218, overruled. The period of limitation applicable to the case of a non-occupancy ryot who has been dispossessed from his holding otherwise than in execution of a decree is either 6 or 12 years as provided in Art. 120 or Art. 142 of the Limitation Act. (1904) 8 C.W.N. 446; 31 Cal. 647 (F.B.).

——**Arts. 142 and 138**—Where the defendant claims through the judgment-debtor, Art. 138 would apply, but when symbolical possession has been given to the auction-purchaser it will be equivalent to actual possession against the defendant and thereupon Art. 142 will apply to the case. 70 Ind. Cas. 602=27 C.W.N. 259=36 C.L.J. 140=A.I.R. 1922 Cal. 176.

——**Arts. 142 and 140**—Life-estate granted by agreement by *B* to his adoptive mother—Dispossession of latter—*B* predeceasing mother—*A* adopted by *B's* widow—Suit by *A* after attaining majority for declaration of title and recovery of possession on ground of dispossession of grandmother—*Held*, Art. 142 and not Art. 140 applied. A.I.R. 1935 Cal. 228= 60 C.L.J. 391.

1. (b) Applicability and scope—Arts. 142 and 144.

——**Arts. 142 and 144—Scope and applicability**

In a suit for possession of a house the main allegations made by the plaintiff in the plaint were that he was the owner of the house, that he had let it out to the defendants 10 or 11 years before the institution of the suit, and that the defendants had not paid any rent since 1939. The defendants alleged that they were the owners of the house, that the plaintiff was not its owner and that they had never been the plaintiff's tenants. The defendants further pleaded that the plaintiff had never been in possession of the house within 12 years prior to the institution of the suit, and that they had been in adverse possession of the house for over twelve years. The Court held that the plaintiff had succeeded in proving his title to the house, that the defendants had been in uninterrupted possession of the house since 1918 and that the plaintiff's allegation that the defendants had ever paid rent to him was false.

Held, that on the findings of fact arrived at, Art. 142 of the Limitation Act applied to the case and that the suit was barred. A plaintiff cannot, by cleverly drafting the plaint, evade the burden of proof which Art. 142 casts upon a person who is suing for possession on the ground of dispossession. As a matter of fact, the allegations made in the plaint in the present case do amount to an allegation that the plaintiff has been dispossessed while in possession of the property in dispute. The allegation that the defendants had been in occupation of the house as the plaintiff's tenants amounted to an allegation that the plaintiff was in possession of the house through his tenants. The allegation that the defendants had not paid any rent since 1939 amounted to an allegation that the defendants had dispossessed the plaintiff.

Held, further, that Art. 144, being a residuary article, was not applicable unless it was found that no other article was applicable to the suit. I.L.R. (1946) All. 178=1946 A.W.R. (H.C.) 216=1946 O.W.N. (H.C.) 188=1946 A.L.W. 196=223 Ind. Cas. 467=A.I.R. 1946 All. 389.

——**Arts. 142 and 144—Applicability—Test.**

Per Ray, J.:—Arts. 142 and 144 of the Limitation Act have to be interpreted as they stand in deciding as to whether a particular case attracts the provisions of this article or that article. So far as Art. 142 is concerned, it is not stated there that the suit should be one in which the plaintiff should allege that he has been in possession and dispossessed. It it not the form of allegations of the plaintiff which will determine the nature of the suit, but it is the substance and the actual facts found by the Courts which will go to decide whether the suit is one which comes within the purview of either Art. 142 or Art. 144. 222 Ind. Cas. 378=12 B.R. 260=27 P.L.T. 217=A.I.R. 1946 Pat. 185.

——**Arts. 142 and 144**—Mere licensee, whether can sue in his name for possession—Arrangement to enjoy usufruct of immovable property described as license, held created interest in immovable property—Suit to enjoy usufruct of property under arrangement held one for possession and maintainable. A. I. R. 1943 Cal. 143=75 C.L.J. 236=206 Ind. Cas. 311.

——**Arts. 142 and 144—Suit by licensee.**

Articles 142 and 144 are not limited to suits for possession based on proprietary title; but they certainly contemplate suits for possession in which some interest in immovbable property is claimed. A mere licensee has no interest in immovable property and is not therefore entitled to maintain an action for possession. But when the so-called license is coupled with an interest in immovable property, the licensee

can maintain a suit for possession. 206 Ind. Cas. 311=75 C.L.J. 236=A.I.R. 1943 C. 143.

——**Arts. 142 and 144**—Where, in a suit for possession, the plaintiff alleges that the defendant's possession is permissive under a license but the defendant denies the same, the suit is governed by Art. 142 and not by Art. 144.

(Distinction between dispossession and discontinuance of possession pointed out.) 1942 N.L.J. 99.

——**Arts. 142 and 144—Dispossession or discontinuance of possession not alleged in plaint but alleged in evidence.**

The plaintiff in his plaint did not expressly allege dispossession or discontinuance of possession but he stated clearly alleged dispossession in evidence. Art. 142 applied to the suit and not Art. 144 Limitation Act and if the plaintiff did not prove possession within 12 years before suit he could not succeed. 1942 O.W.N. 753=18 Luck. 624=204 Ind. Cas. 377.

——**Arts. 142 and 144**—Whether the land belongs to a community or not if one person takes sole and exclusive possession of it, and excludes all others who have a right to occupation, from possession, then the trespass is not a continuing trespass but is dispossession falling under Arts. 142 and 144. A.I.R. 1939 Nag. 145=1939 N.I.J. 153=182 Ind. Cas. 613.

——**Arts. 142 and 144—Distinction between**

Per *Rangnekar, J.*—Article 142 applies in cases where a plaintiff sues to recover possession on the allegation that he was in possession and that his prior possession is lost by dispossession or discontinuance. The sole question under that article is, has the plaintiff alleged that he was in possession and that he has been dispossessed whereas the sole question under Art. 144 is, is the plaintiff owner of the property in question? In other words, has the plaintiff set up his title to the property, leaving it open to the defendant to say that although the plaintiff is the owner, the defendant is in possession which is adverse to him? Under Art. 142, there must be an allegation of prior possession and subsequent dispossession or discontinuance, and it is for the plaintiff to prove that such dispossession or discontinuance has taken place within the period of limitation provided in that article. It does not matter whether he is dispossessed by the defendant or any one else, for Art. 142 does not mention the word "defendant" as Art. 144 does. If it is the plaintiff's case that he was in possession of certain property but that possession is lost by dispossession or discontinuance, then if the dispossession or discontinuance took place more than 12 years prior to the suit, the suit would be barred. All that is necessary is the actual possession of a stranger beyond the minimum period of 12 years. A.I.R. 1939 Bom. 322=41 Bom. L.R. 631=184 Ind. Cas. 23.

——**Arts. 142 and 144—Distinction in applicability.**

The two articles, Art. 142 and Art. 144 apply to two different sets of circumstances. Article 142, on the face of it is restricted to a suit based on the plaintiff's prior possession lost by dispossession, and in order to bring the suit within Art. 142, the plaintiff must allege that he was originally in possession of the property which is the subject-matter of the suit, and that he has been dispossessed by the defendant. In other words, he must prove that he was dispossessed within 12 years. The whole question under Art. 142 is, whether more than 12 years have elapsed since the plaintiff was dispossessed; and, if the plaintiff fails to prove that—the onus obviously being upon him—the defendant is not called upon to set up his adverse possession. Article 142 makes no reference to the defendant or to his possession. That is done in Art. 144. Article 144 is a residuary article, and only applies if no other article is applicable. The article applies only when there is no allegation in the plaint that the plaintiff has been in possession and has been dispossessed. It applies when the suit is based on the ground that the plaintiff is the owner of the property and the defendant is a trespasser having no right to remain in possession. A.I.R. 1938 Bom. 210=40 Bom. L.R. 166=175 Ind. Cas. 93.

——**Arts. 142 and 144—Suit for possession—Denial of ownership — Dispossession prior to suit—Art. 142 governs claim.**

Where, in a suit for possession plaintiff admits that defendant denied his ownership and that defendant entered into possession of plaintiff's share even prior to the suit, the suit is one for recovery of possession on the ground of plaintiff's dispossession and is governed by Art. 142, Limitation Act and not by Art. 144. A.I.R. 1937 All. 124=1936 A.W.R. 1014=167 Ind. Cas. 371.

——**Arts. 142 and 144**—Suit for possession based both on plaintiff's title and possessory title, invite the application of Arts. 142 and 144, according to the varying circumstances of each case. Article 142 applies to a case in which relief for possession sought by the plaintiff is founded on what may be styled as his possessory title. The burden of proving the fact of possession and dispossession lies upon the plaintiff. On the other hand, when a plaintiff sues for possession of property on the basis of his title, the proper article is 144, and the plaintiff is entitled to a decree on proof of his title unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years immediately preceding the suit. 30 S.L.R. 472=A.I.R. 1937 Sind 226=170 Ind. Cas. 621.

——**Arts. 142 and 144—Pleadings should be scrutinised.**

In all cases in which the applicability of Art. 142 or Art. 144, is in controversy, it is necessary to scrutinise the pleadings of the plaintiff and to ascertain exactly the allegations on which the plaintiff has come into Court and the reliefs sought by him. Sometimes the pleas raised in defence by the defendant are also relevant to the enquiry. A.I.R. 1935 Lah. 507=37 P.L.R. 171=157 Ind. Cas. 399.

——**Arts. 142 and 144**—Where the plaintiff's pleadings show that his case is based upon the fact of his possession and subsequent dispossession by the defendant, the case comes within the purview of Art. 142. A.I.R. 1935 Lah. 507=37 P.L.R. 171=157 Ind. Cas. 399.

——**Arts. 142 and 144—Assertion of title but no assertion of possession or dispossession—Article applicable.**

Where there is a clear assertion of title and there is nowhere any assertion of possession by the plaintiffs or of their dispossession by the defendants, then Art. 142 cannot be applied. It is unnecessary for

the plaintiffs to show in their plaint that the case is of a nature to which Art. 144 applied. That article is a residuary article and must be applied unless some special article applies. A.I.R. 1935 Pesh. 133=158 Ind. Cas. 968.

——Arts. 142 and 144—Plaintiff co-sharer with defendants — Dispossession by transferees of latter.

Where a plaintiff, who was a co-sharer with some of the defendants who transferred a part of the property to third parties admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, Art. 142 of the Limitation Act, applies and not Art. 144.

There is no justification for limiting the scope of Art. 142 to suits in which the belief for possession sought by the plaintiff is based on what may be styled as possessory title.

Per *Mukerji, J.*—The proposition that Art. 144 applies to all cases where the plaintiff has proved his title is too wide. (1934) A.L.J. 973=A.I.R. 1934 All. 993=18 R.D. 541=4 A.W.R. 821=57 A. 278 =152 Ind. Cas. 1 (F.B.).

——Arts. 142 and 144 — Applicability — Reference to—Pleadings.

Where, in a suit for possession, the defendant had denied the plaintiff's title, had claimed title in himself and had set up adverse possession, the suit is governed by Art. 144, and if the defendant fails to establish his adverse possession for 12 years, the plaintiff is entitled to a decree for possession. Article 142 has no application to claims which neither in terms nor in substance are claims to possession made necessary by reason of dispossession or discontinuance of possession. "Dispossession" implies the coming in of a person and the driving out of another from possession. "Discontinuance" implies the going out of the person in possession and his being followed into possession by another. The onus of establishing title to property by adverse possession lies on the person asserting it. In order to bring a suit within purview of Art. 142 it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession.

The question whether the article of limitation applicable to a particular suit is Art. 142 or 144 has to be determined by a reference to the pleadings. Where there is no allegation in the pleadings about the plaintiff having lost possession either by dispossession or by discontinuance of possession, and the suit is based on title, the suit is governed by Art. 144, and not by Art 142 of the First Schedule of the Limitation Act. Where there is hardly any evidence of an unequivocal character which can justify a presumption that the plaintiff must have known that the possession of the defendant has been in assertion of a hostile title it cannot be held that the title by adverse possession has been perfected. A.I.R. 1934 Oudh 21=11 O.W.N. 104=147 Ind. Cas. 805 (D.B.).

——Arts. 142 and 144—Article applicable depends to some extent on allegation—Where plaintiff's dispossession is admitted, article applicable is 142 and where it is denied, article applicable is 144. A.I.R. 1934 Pat. 593=1 B.R. 153=16 P.L.T. 109=152 Ind. Cas. 906.

——Arts. 142 and 144 — Defendant in possession for a long time, not with leave or license of plaintiff.

When the defendant is proved to be in possession for a long time, and that not with the leave and license of the plaintiff, a suit by the plaintiff for possession is governed by Art. 142 and not Art. 144. A.I.R. 1933 Rang. 413=149 Ind. Cas. 1120.

——Arts. 142 and 144—Applicability — Reference to pleadings.

Article 142 is restricted to suits for possession on dispossession or on discontinuance of possession. In order to bring a suit within the purview of that article it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Article 144, on the other hand, is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession must fall within this article. The question whether the article of limitation applicable to a particular suit is Art. 142 or 144 has to be determined by a reference to the pleadings.

Mere possession for any length of time does not *per se* create any title by adverse possession. In order to acquire such title, the possession must not only be open and exclusive but it must also be shown to have been adverse for the full statutory period. Notoriety of possession may, in some cases, justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case. 8 O.W.N. 1153=A.I.R. 1932 Oudh 46=7 Luck. 250=137 Ind. Cas. 678.

——Arts. 142 and 144—Discontinuance of possession—Possession not resumed—Article applicable is 142 and not 144. 9 O.W.N. 43=A.I.R. 1932 P.C. 55=36 C.W.N. 250=35 L.W. 217=(1932) A.L.J. 186=55 C.L.J. 136=62 M.L.J. 296=34 Bom. L.R. 463=13 P.L.T. 279=11 Pat. 272= (1932) M.W.N. 660=59 I.A. 130=136 Ind. Cas. 798 (P.C.).

——Arts. 142 and 144—Where the plaintiff alleges his possession over immovable property and dispossession by the defendant and where it is found that the possession of the plaintiff was discontinued when defendant entered into possession not as a tenant of the plaintiff but in his own rights, the article of limitation applicable to such a suit is Art. 142 and not Art. 144. 8 O.W.N. 349=A.I.R. 1931 Oudh 177=136 Ind. Cas. 642.

——Arts. 142 and 144—Frame of suit determines the article applicable as also facts proved.

No doubt whether Art. 144 or 142, Limitation Act, applies depends directly on the frame of the suit. But the plaintiff has to justify the frame of the suit and he cannot merely by framing his suit in a particular manner refuse to allege dispossession when the facts of the case show that there was dispossession and thereby shift the onus on to the defendant. 126 Ind. Cas. 800=A.I.R. 1930 Lah. 330.

——Arts. 142 and 144—Usufructuary mortgagee dispossessed—Suit for possession or mortgage money.

Where a usufructuary mortgagee who is dispossessed of the mortgaged property owing to sale for arrears of revenue afterwards sues for mortgage money or in the alternative for possession, his suit is governed by 12 years' rule of limitation and not by six years' rule. 8 Pat. 569=A.I.R. 1929 Pat. 209.

——Arts. 142 and 144—Dispossession — Usufructuary mortgagee put in possession and subsequently ousted.

Where an usufructuary mortgagee was put in possession but has subsequently lost it, a suit by the mortgagee to recover possession is governed by Arts. 142 or 144 as the case may be. 9 N.L.R. 179= 22 Ind. Cas. 65.

——Arts. 142 and 144—Adopted son not in possession of his deceased father's estate for more than 12 years after the father's death except for an unauthorised and forcible entry for a short time after 12 years—Son's suit to recover possession after 12 years is time-barred. 110 Ind. Cas. 180=5 O. W. N. 515=A.I.R. 1928 Oudh 348.

——Arts. 142 and 144—Defendant in possession of plaintiff's property from 1897 for management—Defendant asserting hostile title in 1915—Plaintiff suing in 1922 for recovery of possession—Plaintiff's suit was held not time-barred as his title was not extinguished by the defendant's adverse acts. The article applicable in the case was 144, and not 142 or 143. 117 Ind Cas. 532=A.I.R. 1928 Cal. 582.

——Arts. 142 and 144—Difference between.

If the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed or has gone out of possession then he must show possession within 12 years. But in every other case in which a plaintiff claims possession of immovable property, it must be a case under Art. 144 because it is a case not otherwise specially provided, and in such a case limitation only begins to run where the defendant's possession becomes adverse. The result of that is that the onus lies on the defendant to plead and prove that his possession became adverse and continued adverse for more than 12 years before the suit. 41 All. 669 and A.I.R. 1916 P.C. 21 Foll. 102 Ind. Cas. 814=25 A.L.J. 802=A. I. R. 1927 All. 799.

——Arts. 142 and 144—Difference between.

Where the plaintiff alleges that he was dispossessed or discontinued possession or where it is proved that the plaintiff had been dispossessed or had discontinued his possession, Art. 142 applies. But in the absence of either allegation by the plaintiff or proof that he was dispossessed or discontinued possession, Art. 144 shall govern. 100 Ind. Cas. 477=A.I.R. 1927 Lah. 236.

——Arts 142 and 144—Suit based on dispossession is governed by Art. 142.

A suit for possession on the ground that the plaintiff has been in possession by using the site up to two years before suit when the defendant built a wall and ousted her, is governed by Art. 142 and not 144. 16 Cal. 743 (P.C.), Foll. 93 Ind. Cas. 1004 (Lah.).

——Arts. 142 and 144—Plaintiff alleging possession—Art. 142 and not 144 applies.

Every suit for possession of immovable property in which the plaintiff alleges that he has had possession, must fall under Art. 142. It is only where the plaintiff does not allege that he had ever been in possession that the case would fall under Art. 144. 39 Bom. 335; 14 N.L.R. 82; 16 Cal. 473 (P.C.) and A.I.R. 1922 Cal. 557, Foll. 87 Ind. Cas. 1023= A.I.R. 1925 Nag. 370.

——Arts. 142 and 144—Obiter:—To a suit for possession involving the question as to whether possession of certain property by a Hindu widow is in lieu of her maintainance or is adverse, the article applicable is Art. 144 and not Art. 142. 87 Ind. Cas. 164=A.I.R. 1925 Oudh 669.

——Arts. 142 and 144—Discontinuation of possession.

Where the circumstances showed that the possession of the plaintiffs was discontinued when the defendant entered into the possession of the house in suit,

Held, that Art. 142 and not Art. 144 applied. 79 Ind. Cas. 964=27 O.C. 130=11 O.L.J. 251=A. I. R. 1925 Oudh 42.

——Arts 142 and 144—Suit in ejectment by person dispossessed — Plaintiff must show his possession within 12 years—Possession of independent trespassers without interval will bar true owner's title—Any interval, however will cause restoration of true owner's title—Adverse possession.

Discontinuance of possession takes place where the person in possession goes out and is followed into possession by another person. In all cases, where the person, who was in possession at one time and discontinued possession or was dispossessed, seeks to eject a person in possession, he has to show that he was in possession within 12 years before the suit.

In order that the title of the true owner may be barred by the adverse possession of a trespasser or a series of trespassers the possession by them must be continued, and so long as it is continuous it is immaterial whether they claim through one another or independently; but if a period of time should elapes, however short, after the abandonment of one trespasser who has not been in for the full statutory period and the entry of another, the title of the true owner is, as from the time of such abandonment, restored to him without any entry or act done on his part, for the statute does not apply to a case of want of possession by true owner but only to the cases where the owner is out of possession and another is in possession for the prescribed time. 67 Ind Cas. 246=1922 M.W.N. 132=45 Mad. 370= 30 M L.T. 143=A I.R. 1922 Mad. 59=42 M.L.J. 319.

——Arts. 142 and 144—Applicability of—Suit for possession of immoveable property.

In a suit governed by Art. 142 the plaintiff must prove has possession within twelve years from the date of suit and on failure to do so, the suit should be dismissed without going into the question of the defendant's title, but in a suit governed by Art. 144 the plaintiff has only to prove his title and the defendant would then have to prove his allegation of adverse possession. 12 Bur.L.T. 234=56 Ind. Cas. 951.

——Arts. 142 and 144—Applicability of—Suit by heir to recover possession from trespasser—Limitation—Tacking of adverse possession.

When an owner of a property has died in peaceful possession of the estate which is then seized by a

trespasser before the lawful heir has entered in possession, a suit by the latter to recover the estate is governed by Art. 144 and not by Art. 142 of the Limitation Act. Distinction between Arts. 142 and 144 pointed out. Though an heir can tack on the possesion of the predecessor-in-title to his own a trespasser cannot be allowed to add to his possession the possession of another previous trespasser whom he dispossessed. 14 N.L.R. 82=43 Ind. Cas. 943.

——Arts. 142 and 144—Applicability of—Burden of proof—Possession and dispossession.

Where the plaintiff alleges possession of land and it is found that part of the land is *de facto* in the possession of another person, the suit must fall under Art. 142. It is only where the plaintiff does not allege that he has ever been in possession that the case will fall under Art. 144. In the former class of cases the plaintiff is bound to show that the dispossession or discontinuance of possession which gives rise to the starting point of limitation was within 12 years of the date of the suit. 39 Bom. 335=17 Bom.L.R. 141=28 Ind. Cas. 24.

——Arts. 142 and 144—Discontinuance of possession—Co-sharer — Possession by mutual consent in ignorance of right—Adverse possession.

Where two persons are in a joint possession of a land by mutual consent for 12 years in ignorance of the fact that one is entitled to the whole, limitation against the latter by discontinuance of possession under Art. 142 or by adverse possession under Art. 144 arises. The mere fact, of consent does not prevent the possession from being adverse. 17 C.W.N. 595=18 Ind. Cas. 869.

——Arts. 142 and 144—Applicability of.

Where, in execution of a money decree against *N*; *A* attached certain properties, for the possession of which *N*, had obtained a decree against *B*, (who was in possession as *N's* guardian but laid claim to the properties in her own right) but had allowed the execution thereof to become barred by litimation and *X* who had dispossessed *B*, intervened and got the attachment removed, and *A* brought a suit under S. 283 of the Old Code of Civil Procedure, *Held*, (1) that *A* must prove that *N*, had a subsisting right to the property and that the suit must be tried as if it were a suit for possession by *N*, the judgment-debtor, (2) that though the decree obtained by *N*, had become incapable of execution the right established by it still remained, (3) that there was no dispossession or discontinuance of possession by *N*, and that therefore the suit is governed not by Art. 142 but by Art. 144, of the Limitation Act. 35 Bom. 79=12 Bom.L.R. 956 =8 Ind. Cas. 639.

——Arts. 142 and 144—Applicability of Dispossession.

Art. 144 applies to a suit where no allegation either of ever having been in possession or of having been dispossessed is made. 14 C.W.N. 317=11 C.L.J. 373=3 Ind. Cas. 15.

——Arts. 144 and 142—Suit on award for possession of immovable properties—Art. 142 or 144 applicable?:—*See* 4 C.L.J. 162=33 C. 881.

——Arts. 144 and 142—Distinction and applicability—Suit under O. 21, R. 63, C. P. Code.

A suit under O. 21, R. 63, Civil P. Code, by a judgment-creditor for a declaration that suit lands are the properties of judgment-debtors was held in the circumstances of the case as not governed by Art. 142 but by Art. 144 even though the judgment-debtors of the creditor had not possession of the lands for 12 years before suit. Per *Chandavarkar, J.*—Discontinuance of possession contemplated by Art. 142 implies that the person discontinuing has given up the land and left it to be possessed by any one choosing to come in. 14 Ch. D. 537, followed. Per *Heaton, J.*—Article 142 has no application to claims which neither in form nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession. As a general principle any one suing in ejectment must prove possession within twelve years. The reason for this is that possession commonly the effective assertion of title which is relied on; but it is not the only one. There is another, which in some cases is equally good, and that is an assertion of title made in court and established by a decree. That is good against those who are party defendants to the suit; and if the same title is re-asserted and made good in a later suit against other opposing parties it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years, unless the opponent can defeat the title by adverse possession. (1910) 12 Bom.L.R. 956=35 Bom. 79=8 Ind. Cas. 639.

——Arts. 142 and 144—Suit on award for possession of immoveable properties.

A suit on an award for possession of immoveable properties is governed by Art. 142 or 144 of the Limitation Act. (1906) 4 C.L.J. 162=33 C. 881.

——Arts. 142 and 144—Suit by widow to recover husband's moveables and immoveables in joint estate. *See* 14 M.L.J. 8=31 Cal. 262=31 I.A. 10 (P.C.).

——Arts. 142 and 144—Mirasi rights, claim for—Limitation applicable.

A claim to mirasi land is subject to the same laws of limitation as regulate suits to recover other immoveable property. 12 B.H.Cr. at p. 93, foll. (1902) 4 Bom.L.R. 801.

1. (c) Applicability and Scope—Art. 144.

——Art. 144—Scope.

Article 144 being a residuary article cannot be applied when some other article is applicable. A.I.R. 1937 Nag. 129=I.L.R. (1937) Nag. 254=171 Ind. Cas. 271.

——Art. 144—Art. 144 applies only where other articles do not. (1902) 12 M.L.J. 119=25 M. 507.

——Art. 144—Applicability — Chur land becoming fit for enjoyment — Adverse possession against rightful owner—When commences.

A rightful owner, who is only presumed to be in possession till a *chur* becomes fit for enjoyment, is not dispossessed by his not taking possession as soon as it becomes so fit, till another person occupies it and begins to till, and such a case would come within Art. 144, Limitation Act, and a defendant pleading that the suit against him is barred under that article must prove adverse possession for 12 years or over before suit. 2 D.R. 265.

——Art. 144—Article 144 only properly applies to a case in which the defendant is holding adversely

to the plaintiff without title. A.I.R. 1936 Pat. 147 =2 B.R. 349=161 Ind. Cas. 585.

——**Art. 144—Agreement to convey certain area of land—Limitation.**

Where parties entered into a compromise in 1918 under which the defendant agreed to give a certain area of land to the plaintiff and the plaintiff sued in 1929 for recovery of the land:

Held, that as the area had not been selected, Art. 144 had no application to the suit. 32 P.L.R. 761= (1932) Lah. 75=A.I.R. 1932 Lah. 24=135 Ind. Cas. 203.

——**Art. 144—Applicability.**

Article 144, is applicable only to a possessory suit by the owner of the property claimed against a person holding adversely to him without title. 35 C.W.N. 953=61 M.L.J. 78=A.I.R. 1931 P.C. 196=8 O.W.N. 905=(1931) A.L.J. 783=34 L.W. 411=33 Bom.L.R. 1390=10 Pat. 851=13 P.L.T. 1=58 I.A. 279=133 Ind. Cas. 705 (P.C.).

——**Art. 144**—Uncle and nephew creating trust at partition between them and managing by rotation —Will by uncle authorising his sons and nephew or his sons after him, to manage—Nephew dying after will, and uncle becoming sole trustee—Will takes effect after uncle's death and his sons can claim management under it—Suit for establishing such right would be governed by Art. 144. 105 Ind. Cas. 194= 39 M.L.T. 214=A.I.R. 1927 Mad. 948.

——**Art. 144**—Gift of mukarrari rent—Suit to set aside, is governed by Art. 144. 97 Ind. Cas. 637=8 P.L.T. 87=A.I.R. 1927 Pat. 49.

——**Art. 144—Suit for possession—Trespasser allowed to remove the building constructed on the land trespassed on—Suit not changed into one for injunction.**

Suit is by an owner for possession of his wall which has been deliberately encroached upon and built upon by the defendants.

Held, that the suit was essentially one for possession and that incidental fact that under the law applicable to such a case in this country it is usual to give to the defendants an opportunity of removing the building, they have constructed on the land encroached upon in no way makes the suit one for injunction. The defendants, if they so choose, need not remove the construction in question and if so it will fall to the owner of the wall to deal with it. The suit is clearly one for possession to which limitation of 12 years applies. 105 Ind. Cas. 286=A.I.R. 1927 Nag. 400.

——**Art. 144—Purchaser from Government—Adverse possession against.**

Where a purchaser of land from Government sued to recover possession within sixty years or but more than 12 years from the commencement of adverse possession but within 12 years of purchase.

Held, that the suit was barred. Article 144 applied and there was only 12 years' limitation. Under S. 2 (8) the period runs as against plaintiff's predecessor-in-title, *viz.*, the Government in this case, should be reckoned against plaintiff. 81 Ind. Cas. 675=28 C.W.N. 66=A.I.R. 1924 Cal. 394.

——**Art. 144—Vendor and Vendee—Suit for possession—Failure to give possession by vendor.**

When the vendor fails to deliver possession of part of the property sold the vendee's remedy is not a suit for specific performance but a suit for recovery of possession and Art. 144, applies. 18 P.R. 1911=45 P.W.R. 1911=92 P.L.R. 1911=9 Ind. Cas. 238.

——**Art. 144**—Art. 144 does not apply to suits for pre-emption. *See* LIMITATION ACT, ART. 10. 3 Bom. L.R. 707=5 C.W.N. 888=24 A. 17= 28 I.A. 248 (P.C.).

——**Arts 144 and 12—Applicability — Suit by third party to set aside a Court sale—Art. 144 applies.**

Where the plaintiff in a suit for possession of property sold in execution of a decree was the original owner of the property and was not a party to the decree under which the sale took place nor a representative of any of the parties and was consequently in a position to ignore the sale altogether,

Held, Art. 12 has no application and the suit falls under Art. 144. Article 91 also is not applicable, as it provides for the cancellation or setting of an instrument not otherwise provided for, and it binds only the parties to the instrument and not strangers. 71 Ind. Cas. 822=A.I.R. 1924 Lah. 396.

——**Arts. 144 and 12 — Setting aside execution sale — Stranger to execution proceedings—Art. 144 applies.**

In execution proceedings against a minor son of the judgment-debtor the application for the appointment of a guardian of the minor was not accompanied with an affidavit and the guardian did not appear and act for the minor and certain property of the minor was sold. After attaining majority the minor brought a suit to set aside the execution sale.

Held, as the application for the appointment of guardian was not made in accordance with O. 32, R. 3 (3), the minor was no party to the execution proceedings and hence the suit to set aside the sale is governed by Art. 144 and not by Art. 12. 67 Ind. Cas. 547=5 L.L.J. 44=A.I.R. 1922 Lah. 447.

——**Arts. 144 and 14—Land not belonging to estate allocated to one of the members on partition — Rightful owner can sue within 12 years.**

If property which did not fall in any way within the estate which was being partitioned was allocated to one of the persons, who was a party to the partition proceedings, it seems incredible to suggest that the person, to whom that property so allocated rightly belonged, could not within 12 years from the date when his right of action accrued, bring a suit for a declaration of his title and if necessary for recovery of possession of that land in question. Further it matters not whether such claimant was an outsider; that is to say, a person who was not a party to the partition proceedings, or a person who was a party to the partition proceedings. In such a case there is no act or order of an officer of Government in the official capacity which could be regarded as bringing the period of limitation within the purview of Art. 14. 96 Ind. Cas. 632=6 Pat. 73=7 P.L.T. 779=1926 P.H.C.C. 236=A.I.R. 1926 Pat. 421.

——**Arts. 144 and 91**—Where the allegations in the plaint that the sale was a sham transaction or a mere paper transaction are correct, a suit for possession of the property based on those allegations must be governed by Art. 144 and not by Art. 91.

A.I.R. 1939 Lah. 544==41 P.L.R. 657=I. L. R. (1940) Lah. 546=185 Ind. Cas. 343.

——**Arts. 144**—The fact that the suit is one for possession will not bring the suit within the 12 years' rule in a case of undue influence inasmuch as an action for possession cannot succeed in such a case unless the plaintiff gets the instrument cancelled. (1931) A.L.J. 909=A.I.R. 1932 All. 63=135 Ind. Cas. 232.

——**Arts. 144, 92 and 93—Plaintiff claiming possession of property apart from will in favour of defendants—Limitation.**

Where the plaintiff claims possession of certain property as the widow of the deceased proprietor of the property against various persons whose substantial defence is that they are entitled under the terms of a will and the plaintiff claims quite apart from the will, there is no obligation on the plaintiff to join to her claim another claim for a relief which she does not seek for and does not need. Articles 92 and 93 do not apply to the case. The proper period of limitation in the case is the period that relates to the cause of action as actually brought and being a suit for possession will attract the application of Art. 144. 42 L.W. 535=A.I.R. 1935 Mad. 709=(1935) M.W.N. 1154=158 Ind. Cas. 121.

——**Arts. 144 and 118**—Article 118 has no application in a suit where the relief sought is possession of property and the validity of factum of adoption is incidentally in issue. 78 Ind. Cas. 284=A.I.R. 1924 Nag. 319.

——**Arts. 144 and 120**—Applicability — Award creating title to immovable property—Suit for possession of such property—Limitation. *See* LIMITATION ACT, ARTS. 120 AND 144. 50 Bom. L. R. 604=A.I.R. 1949 Bom. 64.

——**Arts. 144 and 120**—Applicability — Arbitration—Award—Suit for possession on basis of—Limitation—Award, if creates interest in property. *See* LIMITATION ACT, ARTS. 120 AND 144. 49 Bom. L.R. 731=A.I.R. 1948 Bom. 101.

——**Arts. 144 and 120—Cause of action.**

Dispute about the family property referred to arbitration decree in terms of the award. The award directed that the defendant *G* should take possession of the whole of the property subject to maintenance of *T* who also was given some non-*vatan* lands. Accordingly, possession of the property was handed over. Later on *P* attained majority and applied to the revenue authorities for entering the family property in his name in revenue records. *G* also applied to the same effect but the revenue authorities, however, referred them both to the Civil Court *G* preferred a civil suit against *B* and *P* for a declaration that adoption of *P* by *B* was illegal and that *P* had no right to dispossess him and for injunction restraining *B* and *P* from interfering with his possession. *G* obtained a decree which was upheld by the High Court but was reversed by the Privy Council. *P* and *B* filed a suit to recovery possession of the property and sought to bring it within limitation by relying on Ss. 14 and 15, Limitation Act. *G's* contention was that the suit was barred by limitation:

Held, that the suit was governed by Art. 144, Limitation Act, and not by Art. 120, and the suit was therefore barred by time. Time began to run against *P* when possession of *G* became adverse to *P* and *B*, when *G* obtained possession in accordance with the award or at any rate from time when *P* attained majority, and could sue *G* for possession. It could not be said that the cause of action accrued to *P* on the decision of the Privy Council merely because the validity of his adoption was challenged and it was declared to be valid by the Privy Council. Time had begun to run against *P* even before suit was instituted by *G* and it could not be held that merely because he was restrained from obstructing *G* in his enjoyment of the property, that a cause of action would accrue to him when the temporary injunction was issued against him. A.I.R. 1939 Bom. 1=40 Bom. L.R. 1134=I.L.R. (1939) Bom. 173=179 Ind. Cas. 178.

——**Arts. 144 and 120**—Suit for plot of land in lieu of maintenance on strength of family custom is governed by either Art. 120 or 144 and Arts. 129 and 131 do not apply to such case.

A suit by a junior member of a family governed by rule of primogeniture for a plot of land in lieu of maintenance on the strength of family custom is governed either by Art. 120 or 144 the choice between the two provisions of law depending upon the question whether the suit is treated as one for declaration or for possession. Therefore when on the evidence it is proved that the defendant has been giving grain to the plaintiffs by way of maintenance and that the allowance was stopped two years before the suit the suit is clearly in time.

Articles 129 and 131 do not apply to such a case as Art. 129 is restricted in its operation to a suit for maintenance in which the right is based on Hindu Law and not upon custom and Art. 131 is confined to a suit in which the plaintiff seeks simply to establish his right to maintenance and does not ask for a consequential relief. 83 P.R. 1906, Foll. 121 Ind. Cas. 428=11 Lah. 99=A.I.R. 1929 Lah. 872.

——**Arts. 144 and 120—Applicability — Injunction—Suit for injunction to remove chhappar erected by defendant on plaintiff's land—Art. 120 applies.**

Where the plaintiffs claiming to be joint owners of a certain courtyard, alleged that the defendants had erected certain *chappars* or thatched sheds in front of their house and asked for a perpetual injunction to issue to them directing them to remove the said *chappars* and restore the courtyard to its former condition.

Held, that the suit was essentially a suit for the issue of an injunction and although the injunction would have had the effect of restoring the courtyard to a state in which the plaintiffs might have been able to have a more extensive use of it than they actually had, the suit would not be covered by Art. 144 but Art. 120 would apply. 60 Ind. Cas. 20=3 L. L. J. 128=A.I.R. 1921 Lah. 242.

——**Arts. 144 and 123—Suit by Mahomedan heir against manager for possession—Art. 144 applies.**

The word "distribution" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator. Article 144 and not Art. 123 therefore applies to a suit to recover a share by a Mahomedan heir from a person in management of the property. A.I.R. 1921 Bom. 56, Foll. 118

Ind. Cas. 785=31 Bom. L.R. 199=A.I.R. 1929 Bom. 141

——Arts. 144 and 123—Suit by Muhammadan co heir for possession of his legal share is not governed by Art. 123, but by Art. 144.

Article 123 applies only when the suit is brought for a share of an estate which it is the legal obligation of the defendant to distribute. Where a Muhammadan dies intestate, his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution, and if a suit is brought by one of the heirs to recover his share, Art. 144 and not Art. 123 applies. 34 Mad. 511 and A. I. R. 1928 All. 467 (F.B.), Foll. 117 Ind. Cas. 803=11 Lah. 29=A.I.R. 1929 Lah. 549.

——Arts. 144 and 139—Suit for joint possession.

Plaintiff purchasing half field—Vendor remaining in possession under rent-note—Vendor holding over and selling entire field to defendant—Plaintiff's suit for joint possession is governed by Art. 144, and not by Art. 139. 60 Ind. Cas. 589=23 Bom L.R. 60=A.I.R. 1921 Bom. 462.

——Arts. 144 and 146-A, S. 23—Suit for possession by Union Board constituted under Bengal Village Self-Government Act, 1919 in respect of strip of land which is claimed as part of public road—Defendant found in possession from before date of establishment of Board—Article 144, held applied and not Art. 146-A—Suit, held barred—Section 23, held did not apply. A.I.R. 1942 Cal. 151=73 C. L. J. 608=45 C.W N. 802=200 Ind. Cas. 386.

——Arts. 144 and 148—Subsequent mortgagee from one of three sons taking possession of house under sale on his decree on paying of prior mortgage by father—Heirs of other two sons claiming two-thirds share on paying proportionate sum—Article 148 and not Art. 144 applies. A.I.R. 1936 Pat. 60=2 B.R. 261=160 Ind. Cas. 933.

——Arts. 144 and 148—Purchase of part of equity of redemption—Redemption of whole mortgage by purchaser—Suit for redemption by original owner against purchaser:

Held, that the suit was governed by Art. 144 and not by Art. 148. 35 Bom. L.R. 48=A.I.R. 1933 Bom. 114=57 B. 134=144 Ind. Cas. 8

——Arts. 144 and 148—A suit for redemption of a usufructuary mortgage is in substance a suit for possession of immovable property, but the period of limitation for such a suit is that provided for by Art. 148. 100 Ind. Cas. 346=A.I.R. 1927 All. 311.

——Arts. 144 and 148—Applicability.

Art. 144 is a residuary article which cannot be resorted to, if the suit is governed by Art. 148. 127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Arts. 144 and 148 — Applicability — Redemption.

Article 148 and not Art. 144 governs a suit for redemption against an auction-purchaser who purchases the right, title and the interest of the mortgagee under a mistake that the mortgagee was the full owner of the mortgaged property. 79 Ind. Cas. 466=19 S.L.R. 268=A.I.R. 1925 Sind 167.

——Arts. 144 and 148—Art. 148 does not apply to a suit to recover property on payment of a charge created by Transfer of Property Act. S. 95. Article 144 applies to such suit. A.I.R. 1921 Mad. 326=41 M.L.J. 501

2. Acquisition of title.

See also, (1) EASEMENTS ACT, S. 15.
(2) LIMITATION ACT, SS. 26 AND 28.
(a) General.
(b) Limited interest.

2. (a) Acquisition of title—General.

——Art. 144—Co-parcenary property — Adverse possession against sole co parcener for 12 years—Subsequent adoption by widow of another deceased co parcener — Right of adopted son to recover co-parcenary property.

The title of a person whose possession for more than twelve years has been adverse to the sole co-parcener is good against the co-parcenary property and an adoption made by a widow of another deceased co-parcener after the rights of the co-parcenary have become barred by limitation cannot give the adopted son any right to recover possession of the co-parcenary property from him. A.I.R. 1950 P. C. 43.

——Arts. 142 and 144—Adverse possession—Character of possession necessary—If different from character of possession required to found title under S. 28. *See* LIMITATION ACT, S. 28 AND ARTS. 142 AND 144. 29 P.L.T. 23=A.I.R. 1948 P.C. 76=(1948) 2 M.L.J. 70 (P.C.).

——Art. 144—Suit for possession — Defendant's construction of a permanent character in existence on the land for over 12 years prior to suit—Effect on plaintiff's rights.

Where in a suit for possession of land it is found that the defendant had made certain permanent constructions on the land which had remained in existence for over 12 years prior to suit, and the circumstances are such as not to suggest any temporary occupation, the plaintiff cannot succeed. 1947 A.L.J. 108=1947 A.W.R. (H.C.) 126=1947 A L.W. 212=A.I.R. 1947 A. 409.

——Art. 144—Possession under claim of title—Entry in revenue records as occupier—Possession of claimant and her successors adverse to plaintiff for over forty years—Plaintiff's suit within twelve years of the original claimant's death—If in time.

Though it is a general principle that a Court will always attribute possession to a lawful title where that is possible, there is no room for drawing any such presumption in a case where the circumstances under which the adverse possession was assumed are known. A lady on the death of her father in 1890 took possession of the property under a claim of title derived under her father's will and though she failed to satisfy the Revenue authorities as to her title, the fact that she was in possession was accepted by them and her name was entered as occupier. There was nothing to show that she ever withdrew her claim to title under the will of her father. She died in 1919 and after that the names of her daughters were entered in the revenue records. The plaintiff filed a suit on 28th October, 1931, twelve years all but a day after the death of the lady and claimed that the lady as the heir of her father was entitled to possession of the property under the maintenance grant to him and that her right ceased on her death in 1919, and thereafter, her daughters were in wrongful possession for a period of one day less than twelve years.

Held, that the essential fact was that the lady and

her successors had remained in possession for some forty years prior to the institution of the suit and that they took possession under a claim of right adverse to the title of the plaintiff. In those circumstances the claim of the plaintiff was barred under Art. 144 of the Limitation Act. 73 I.A. 223=I. L.R. (1946) Nag. 917=1946 A.L.J. 472=1946 O. A. (P.C.). 179=13 B.R. 78=51 C.W.N. 175= 60 L.W. 5=1947 N.L.J. 106=A.I.R. 1947 P.C. 15 =I.L.R. (1947) Kar. P.C. 78=227 Ind. Cas. 195 =1946 A.W.R. (P.C.) 179=1946 M.W.N. 759= (1946) 2 M.L.J. 453 (P.C.).

——Art. 144—Plaintiffs out of possession basing claim on adverse possession.

Where, in their plaint the plaintiffs who are out of possession do not claim that they were *bona fide* purchasers for value but base their case mainly on adverse possession of the disputed property, the finding that they were *bona fide* purchasers for value alone would not be sufficient to entitle them to a decree but they can only succeed on the strength of their own title. A.I.R. 1942 Cal. 1=I.L.R. (1941) 2 Cal. 434=73 C.L.J. 475=200 Ind. Cas. 822.

——Art. 144—Land passing by revenue sale.

If it be once shown that the lands in dispute passed by revenue sale, there can in law be no presumption that contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants. Any possesssion which the old proprietors may have exercised after the sale would no doubt be adverse to the purchaser, but they must, prove that they continued in possession and it is not possible for them to prove possession save by proving that they received rents from the tenants notwithstanding the sale. No doubt, if at some date, rent was received by them in respect of a previous period subsequent to the sale, a question may arise whether this receipt does not evidence possession by the tenants on behalf of the old proprietors since the date of the sale; but proof of receipt of rent will be necessary if the old proprietors are to make out a case that the purchaser's title has come to an end by reason of their adverse possession. Proof of receipt of rent may be indirect, for example, public records showing that *A*. *B*. was in possession of the *maliki* interest and this may or may not be sufficient in any particular case. 18 P.L.T. 257 =3 B.R. 368=A.I.R. 1937 P.C. 69=1937 O.W. N. 396=45 L.W. 580=41 C.W.N. 577=1937 R. D. 178=16 Pat. 258=(1937) M.W.N. 593=(1937) A.L.J. 638=39 Bom.L.R. 731=1937 A.W.R. 459 =(1937) 2 M.L.J. 631=31 S.L.R. 242=65 C.L. J. 241=167 Ind. Cas. 329 (P.C.).

——Art. 144—Possession of transferee of undivided share.

Exclusive possession of transferee of undivided share lasting for more than twelve years would create ownership in property by adverse possession as against other joint owner. A.I.R. 1939 All. 518 =1939 R.D. 365=1939 A.W.R. 408.

——Art. 144—Suit or partition—Defence of disruption of family long ago—Finding as to exclusive possession and assertion of title by defendants for more than twelve years—Suit, held barred. 2 B.R. 82=A.I.R. 1936 Pat. 68=159 Ind. Cas. 453.

——Art. 144 — Widow holding life estate—Widow's daughter in possession after her death—Plaintiff's failure to sue for possession for more than twelve years after widow's death—Title, if completed by adverse possession against plaintiff.

One *Mst*. *R* held the estate for her life; she died in August, 1891, and then the share which stood mutated in her name went into the possession of her daughter who continued in possession till her death in February, 1920; *A* and his successors became entitled to the properties on the death of *Mst*. *R* but they did not sue within 12 years from the date on which the daughter obtained possession:

Held, that the claim of *A* and his successors was barred by limitation under Art. 144 which applied to the case. 11 O.W.N. 736=A.I.R. 1934 Oudh 265 =10 Luck. 35=150 Ind. Cas. 519.

——Art. 144—Trespasser — Mother taking possession in presence of widow—Adverse possession—Mortgage by mother—Effect.

On the death of a childless owner, leaving his mother and his widow, the mother, though not the rightful heir took possession of the pdoperty and held it for more than twelve years as such and mortgaged it after the expiry of twelve years of possession:

Held, that the possession of the mother being adequate in continuity, publicity and in extent, was adverse to her son's widow and to persons who were entitled to get the property after the faher's death and that the mere fact that mutation was ordered on condition that she would have no powers of transfer did not affect her title to the property. 10 O.W.N. 42=17 R.D. 104=A.I.R. 1933 Oudh 427 =143 Ind. Cas. 831.

——Art. 144—Conditional decree for possession—Failure to execute.

When a conditional decree for possession has not been executed, the possession of the defendant becomes adverse to the plaintiff and that adverse possession matures into ownership after the expiry of twelve years. 13 L. 311=32 P.L.R. 786=A.I.R. 1932 Lah. 46=133 Ind. Cas. 555.

——Art. 144—The original owner of a property died in 1896. Soon after, the entire property was the subject of alluvial action by a river. When it emerged a trespasser took possession of it. In 1899 the defendant, one of the members of the joint family entitled to the property, instituted a suit against the trespasser and recovered possession under a compromise decree. He subsequently sued and recovered rent from persons in possession of the land. The joint family became divided in 1912 or 1913, but the defendant was left in exclusive possession of the said property. The other members of the family having instituted a suit to recover their shares of the property:

Held, that there was ouster of the plaintiffs and the defendant had obtained title by adverse possession. 8 O.W.N. 710=132 Ind. Cas. 539.

——Arts. 142 and 144—Watan lands.

There is nothing in the nature of a watan estate which prevents the bar of adverse possession against one holder of a watan from operating as a bar against the succeeding watandar. A succeeding watandar derives his title as son and heir of the watandar which is capable of being barred and extinguished by adverse possession. 32 Bom.L.R. 1398=A.I.R. 1931 Bom. 24.

——Art. 144—Hindu widow—Acquisition of title

Where a Hindu widow remained in possession of the property for more than 12 years as of right. *Held*, that she had acquired a title by adverse possession. 8 O.W.N. 6=A.I.R. 1931 Oudh 89.

——Arts. 142 and 144—Title by adverse possession.

A was malikan qabza in a village and as such was not entitled to any share in the shamilat, but he managed to take possession of portions of the shamilat before 1880. He was not shown to have acknowledged *B* as landlord by attornment, payment of rent or otherwise. His possession which was neither lawful nor permissive at its inception continued for over 40 years. During this period he had been exercising all rights of ownership.

Held, that on these facts *A* has succeeded in establishing adverse title to the lands in his possession. 46 Ind. Cas. 964, Foll. 31 P.L.R. 243=11 Lah. 410 =A.I.R. 1930 Lah. 991.

——Art. 144—Adverse possession against District Board through Collector — Collector also President of District Board—Effect of.

Where Government enjoyed an exclusive right of fishery for over twelve years adversely as against a chatram and the District Board which managed the the chatram did not sue to recover possession within that period and when a suit was filed later it was sought to be argued that the Collector who prescribed for the Government was also the President of the District Board and that consequently there was no adverse possession,

Held, that the District Board not having exercised its right of suit apart from the President, the character of the Government's enjoyment remained affected in spite of the Collector holding dual capacities,

Held, also, that there was not a suspense of the right of action which the District Board had because of the position occupied by the Collector. 31 L.W. 508=1930 M.W.N. 328=A.I.R. 1930 Mad. 679= 121 Ind. Cas. 545.

——Art. 144—Acquisition of title—Defendant not a tenant—Suit against him beyond 12 years is barred.

In 1865 certain villages were leased by plaintiff's predecessor to defendant's predecessor on "Mukarrari istemrari" at an annual rent of Rs. 344. In 1879 the original lessee assigned his interest in the villages. The original lessee died about 1891 and afterwards his assignee remained in possession of the village who, it appeared, had paid rent to a mortgagee of the lessor up to 1898, but no rent was paid to the original lessor or his successors. Notices to quit were served in 1915 and again on 20th August, 1919, but the defendants remained in possession, and accordingly, the suit for ejectment was brought in 1920.

About the year 1903, the assignee from lessee apparently, was willing to pay rent to the plaintiff's predecessor-in-title, provided that his name was entered as the holder of the mukarrari interest and that he was given receipts made out in his own name. The plaintiff's predecessor-in-title refused to do this, but expressed his willingness to receive rent and give marfatdari receipts. The assignee refused to accept marfatdari receipts, and consequently no rent was paid by him to the original lessor,

Held, that the payment of the rent to the mortgagee was not sufficient to create a tenancy between the mortgagor and the assignee and, after the termination of the lease for lives, there was no recognition by the plaintiff or his predecessor-in-title so as to constitute the defendants or their predecessors-in-title, tenants. That the plaintiff failed to prove that the relationship of landlord and tenant was in existence within 12 years prior to the institution of the suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act. 109 Ind. Cas. 663=7 Pat. 649=55 I.A. 212=48 C.L.J. 69 =32 C.W.N. 897=28 M.L.W. 41=9 P.L.T. 501 =30 Bom.L.R. 1361=A.I.R. 1928 P.C. 146=55 M. L.J. 882 (P.C.).

——Art. 144 — Auction-purchaser obtaining possession of whole property—Only a portion belonging to judgment-debtor, possession of balance becomes adverse—Suit after 12 years is barred. 96 Ind. Cas. 687=A.I.R. 1926 All. 697.

——Art. 144—To defeat plaintiff's right to succeed, on the ground of adverse possession, it must be affirmatively proved that the possession was held adversely to plaintiff by s omebody for the statutory period. 93 Ind. Cas. 923=22 M.L.W. 870=A.I. R. 1926 Mad. 245.

——Art. 144—Lessee from Government for a term of years—After the term his possession is adverse.

When a zamindar of a thok allowed his revenue to fall into arrears, the areas were taken under the direct management of the Collector and were subsequently made over to a co-sharer of the mahal in which the thok was situated for certain years on his payment or agreement to pay the arrears of revenue to Government,

Held, the co-sharer's possession was that of a lessee of the particular area from Government and when he held over at the end of those years his possession became adverse. A suit to recover possession instituted beyond 12 years from the expiry of the lease is barred. 95 Ind. Cas. 103=A.I.R. 1926 All. 584.

——Art. 144—Malikana qabza remaining in possession of shamilat plots—Landlord's title not acknowledged—Title by adverse possession.

Where the plaintiffs were shown to be *malikan qabza* in the village who were not entitled to any share in the *shamilat* but who managed to take possession of portions of the *shamilat* before 1880 and it was proved that they continued in possession without acknowledging the defendants as landlords,

Held, that the plaintiffs had acquired title by adverse possession. 12 L.L.J 161=11 Lah. 410=31 P.L.R. 243=123 Ind. Cas. 278=A.I.R. 1930 Lah. 991.

——Art. 144—Acquisition of title—Adverse possession—What extinguishes right of the real owner—Continuous possession.

In order to extinguish the right of the real owner the adverse possession must be continuous. Acts of possession exercised at intervals over different portions of land in different years cannot amount to adverse possession. 57 Ind. Cas. 716 (Cal.).

——Art. 142—Dispossession — Successive trespassers—Title by whom acquired.

Of successive independent trespassers who have been continuously in possession for the statutory period, the first trespasser gets the title and not the last who is in possession at the time when the title of the

real owner is extinguished. 21 M.L.T. 62=5 L. W. 690=32 M.L.J. 85=40 Ind. Cas. 50.

——Art. 144—Acquisition of title—Plea of adverse possession in suit on title.

The onus is on defendant to plead and prove adverse possession for the statutory period in a suit for declaration of title based on the defendant's allegad repudiation of it. 39 M. 617, Foll. 37 Ind. Cas. 794 (All.).

——Arts. 144 and 149—Acquisition of title—Prescription—Proof of—Onus — Possession for less than prescriptive period—Onus not shifted.

Islands formed on the bed of the sea within the territorial waters of the Indian Empire vest in the Crown. If Islands so formed are constituted a reserved forest by the Government those who claim them are in the position of plaintiffs claiming a declaration of their title. They must positively prove that they or their predecessors in title have been in possession adversely to the Crown for sixty years under Art. 149. Proof of possession on the part of the claimants for less than the statutory period does not shift the onus on the Crown to show that the claimant's possession commenced or became adverse within sixty years. 39 Mad. 617=31 M.L.J. 324 =20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A. L. J. 1114=20 M.L.T. 435=4 L.W. 486=18 Bom. L. R. 1007=25 C.L.J. 69=43 I.A. 192=35 Ind. Cas. 902 (P.C.).

[On appeal from 33 Mad. 1=20 M.L.J. 66=7 M.L.T. 128=5 Ind. Cas. 882.]

——Art. 144—Acquisition of title — License — Ejectment — When long possession amounts to adverse possession.

Long possession of a plot gives rise to no presumption of a license for building purposes even where the defendant has constructed structures thereon. 14 A. L. J. 115=34 Ind. Cas. 952.

——Art. 144 — Acquisition of title—Absentee owners—Suit for recovery of possession by.

It is the duty of persons possessing rights to keep an eye over their rights. Any overt act of adverse possession by the person in possession of property starts adverse possession as against the absentee owner thereof. 49 P.L.R. 1915=240 P.W.R. 1915 =27 Ind. Cas. 610.

——Art. 144—Acquisition of title—Statutory period—Presumption.

Where 11 years and 5 months before a suit for possession of a tract of jungle, the final record of rights was published showing the defendants to be in possession at the time, having regard to the well-known practice of the settlement department, the defendant must have been found to be in possession at least 7 months before that record was published. 27 Ind. Cas. 802 (Cal.).

——Art. 144—Acquisition of title—Adverse possession — Knowledge — Principal affected by agent's knowledge.

Where a person who claimed ownership was classed as non-ocupancy tenant by the collector and no appeal was preferred and also where in a subsequent settlement and partition proceedings the area was called and recorded as *shamilat Kasba*, estoppel arises and as 12 years have elapsed the suit will be barred by time, even though in the partition proceedings it was only the agent who appeared. Knowledge of the agent must be imported to his principal. 151 P.W.R. 1912=163 P.L.R. 1912=16 Ind. Cas. 891.

——Arts. 144, 139, 140 and 142—Acquisition of title—Prescription.

A person's possession even in cases governed by Art. 144 is held to be in his own right unless any contrary evidence is adduced or there is a relationship between the parties or the circumstances throwing the burden of proving his own right are present. (1912) M.W.N. 669=15 Ind. Cas. 146.

——Art. 144—Adverse possession — Hindu Law —Widow—Compromise by relinquishing rights disputed—Effect of—No alienation.

Plaintiff's father brought a suit against first defendant's father for a third share in the plaint zemindari, obtained a decree and died before division was carried out in execution. Plaintiff's mother was brought on record as the father's legal representative, but her right to execute was contested. The District Court and the High Court decided in her favour, but leave to appeal to the Privy Council was obtained by 1st defendant's father and stay of execution applied for. Plaintiff's mother and defendant's father compromised the dispute, by which plaintiff and her heirs were to relinquish all their rights under the decree for a consideration. Plaintiff, on attaining majority, brought this suit for a declaration that the "alienation" by her mother was invalid and inoperative beyond her mother's lifetime and for recovery of a third share of the zemindari. *Held*: That there was no transfer of right by the compromise and that the compromise did not effect an alienation by the mother of rights which she possessed so as to make the possession of the 1st defendant's father a possession derived from her; and that the suit was barred by limitation, as the defendant and his father had been in possession adverse to the plaintiff and her father for over twelve years, no possession having been obtained by plaintiff's father under the decree obtained by him. (1910) 20 M.L.J. 204=5 Ind. Cas. 640=1910 M.W.N. 60=7 M.L.T. 340=33 Mad. 473.

——Arts. 142 and 144 — Cornice, building of — Overhanging land of neighbour—12 years' prescription—Trespass — Right prescribed for.

If a man erects any building overhanging the land of another, he commits trespass and an action will lie against him; and unless a suit is brought against him within time he would prescribe a title to the space occupied by the building. Whether such trespasser acquires a right only to the space occupied by the projection or also to the space above and below the protrusion depends upon the value of the possession and the other circumstances of the case. The defendant in the case built a cornice projecting from his wall over the ground belonging to the defendant more than twelve years before suit. The cornice was meant partly as decoration and partly as a protection from rain. *Held*, that the defendant had prescribed a title to the space occupied by the projection. (1906) 16 M.L.J. 281=29 M. 511.

——Arts. 142 and 144—Adverse possession—Extinguishment of title of true owner—Subsequent possession—No effect.

If the title of the true original owner has been completely extinguished by adverse possession, even if he should reacquire possession, he is not thereby remitted to his original title. (1904) 6 C.L.J. 621.

2. (b) Acquisition of title—Limited interest.

——Art. 144—Presumption as to right prescribed for—Person in cultivating possession—U. P. Tenancy Act (17 of 1939), S. 180.

S. 180 of the U. P. Tenancy Act shows that where a person is in possession by cultivating a plot or plots of land in an agricultural area, the presumption is that he is prescribing for a tenancy right, although there is no contract of tenancy between him and the owner of the land. His possession is in the capacity of a tenant and not in the capacity of a proprietor. A.I.R. 1950 All. 496=1950 A. W. R. 547.

——Art. 144—Acquisition of limited interest—Landlord and Tenant.

If a person occupies the land for a period of 12 years, he may acquire, if he so chooses, an absolute interest in the land, and it is only because he chooses to assert only a limited interest that he acquires only such interest. Therefore, whether the landlord chooses to make himself acquainted with the facts that the man in possession asserts his own title to the land or not, limitation will run against the landlord. An assertion of title cannot operate against the landlord unless it is made to his knowledge and a purchaser who only pays rent in the name of his vendor cannot be said to assert his own title as a tenant. *Marfatdari* receipts are by no means confined to unrecognised purchasers, and the party who obtains them puts forward not his own title but that of the person on whose behalf he makes the payments. A.I.R. 1934 Pat. 458=150 Ind. Cas. 102.

——Art. 144—Acquisition of title—Void lease—Possession under — Lessee's rights can be acquired by adverse possession—See Bombay Bhagdari Act (1862), S. 3.

Where a person goes into possession of an unrecognised sub-division of a bhag under a void lease and remains in possession for upwards of twelve years, he acquires title by prescription to the limited interest under the lease and cannot be evicted during the period of the lease. 30 Bom. L.R. 980, Foll. 32 Bom. L.R. 930=A.I.R. 1930 Bom. 443.

——Art. 144—Acquisition of title—Limited interest—Rent-free tenure—Adverse possession.

Where in a suit for assessment of rent the plaint proceeds on the assumption that there was no relationship of landlord and tenant between the parties and the evidence also shows that the defendants were in possession not as tenants but wrongfully and without any right, and the defendants, have been in possession for more than 12 years on their own account to the knowledge of the plaintiff though they claim no more than a rent-free title, the suit is barred by limitation. 22 C.L.J. 153=30 Ind. Cas. 948.

——Arts. 142 and 144—Adverse possession as rent free holder.

Where in a suit for rent the plaintiff treats the defendants as tresspassers and the defendants are found to have been in adverse possession as rent-free holders, for over a century, the suit is barred by limitation. 22 C.L.J. 126=24 Ind. Cas. 319.

——Art. 144—Acquisition of title—Limited interest—Adverse possession — Interest in immovable property.

There may be adverse possession of immoveable property as well as of any interest in it under Art. 144. Though a tenant is bound to treat an encroachment as land held under a tenancy, the landlord is not bound to do so. The tenant however may acquire by adverse possession a limited interest so as to bar the landlord's claim for possession. 16 C.W.N. 634 =14 Ind. Cas. 212.

——Arts. 142 and 144—Adverse possession—Claim to hold as minor tenant—Adverse possession of limited interest.

The rights of successive holders of hereditary and impartible estates not governed by ordinary rules of inheritance, but subject to the condition that Government shall approve of the heir, may be barred by adverse possession. Where in an ejectment suit by an inamdar, it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent minor tenants:

Held, that the defendants had acquired a title to the limited interest claimed by them and could not be ejected. (1909) 12 Bom. L.R. 208=A.I.R. 1934 Bom. 329.

——Art. 144—Limited owner—Title acquired by widow when enures to estate of her husband.

The title acquired through adverse possession by a widow who claims and holds a widow's estate enures to the estate of her deceased husband and descends upon her death accordingly. But it is not in every case, whenever a Hindu widow is found in possession of a property without title, that her possession must be regarded as that of a widow's estate, but the determination of the question as regards adverse possession must be based on circumstances of each case. 7 O. W. N. 1082=A.I.R. 1931 Oudh 25.

——Arts. 142 and 144 — Adverse possession of limited interest—Rights of permanent lessee.

A limited interest such as the interest of a permanent lessee, can be acquired in law by adverse possession. (1907) 17 M.L.J. 469=3 M.L.T. 187.

——Arts. 142 and 144—Adverse possession of limited interest.

Per *Batty, J.*—If the tenant not only openly asserts to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession at once becomes adverse and limitation begins to run against the owner from that time. The fact that such assertion and enjoyment are not challenged does not change their adverse character, when once the necessity for challenging them has arisen. Per *Starling, J.*:—There can be an adverse possession of a limited interest in property as well as of the full title as owner. (1903) 27 B. 515=5 Bom. L.R. 274.

——Art. 144—Adverse possession — Limited interest—Landlord and tenant.

A partial interest in land may be lost as well as the whole interest. Though adverse possession for 12 years of a limited interest may be a good plea to a suit for ejectment, it is good only to the extent of such interest. The nature and extent of possession must depend upon the nature and extent of the rights asserted by the over-conduct or express declaration of the person relying on it. There can therefore be no acquisition by adverse possession of an absolute title when it is found that nothing but a limited interest has been asserted. Art. 144 can only apply to bar suits for interests which have been openly claimed or exercised by the person in possession. It cannot begin to operate as a bar to a claim for possession or to any other interest in immove-

able property unless and until it be shown that the adverse possession set up was in the assertion or exercise of a right which would either exclude altogether and absolutely the interest claimed by the plaintiff or would exclude it in the circumstances shown to exist at the time of the suit. The mere fact of possession by defendant is no bar under Art. 144 It must be shown to be adverse and if it is shown to have been adverse only to a limited extent and not absolutely, then it can operate as a bar to that limited extent alone, and the precise extent of its operation must be ascertained before it can be made a basis for judicial decision. Even if the tenants have been holding for the statutory period of twelve years in the assertion of title to a permanent tenancy and so far adverse to the right of the inamdar-landlord to eject them at will, yet unless it be also established that their possession has been similarly adverse to the right of such landlord to enhance the rent within the limits allowed by usage, that right cannot be affected merely by the length of their possession under a tenancy which, though permanent and at a rate hitherto unenhanced, did not originate and has not been claimed as a tenure exempt from liability to such enhancement. (1903) 5 Bom. L.R. 186.

——Arts. 142 and 144—Adverse possession by Hindu widow or daughter as life estate holder—Estate prescribed for.

If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the deed or will though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed and the title of the testator's heir is extinguished he cannot claim by possession an interest in property different from that which he would have taken if the property had passed by the will or deed. A Hindu widow or daughter succeeding to a Dharmakartaship held by the last male owner cannot by possession for over 12 years claim any more interest in the Dharmakartaship than a life estate which is the interest they would have ordinarily taken if the same had passed to them by will or deed. (1908) 18 M.L.J. 409=31 M. 321=4 M.L.T. 5.

——Art. 144—Adverse possession of wakf property—Prescription for right of mutawalli.

In the generality of cases the claim to the office of mutawalli and to the property appurtenant thereto go together and are inseparable. This would depend upon the terms of the foundation or settlement. A person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more than a mutwalli's right in such property and may acquire to that extent the status of a mutawalli. The right to the office and the right to the possession of property are distinct jural concepts. A.I.R. 1930 All. 866=129 Ind. Cas. 375.

——Art. 144—Limited interest — Acquisition by adverse possession.

A limited interest in property can be acquired by adverse possession as well as absolute interest and the quantum of interest acquired depends upon the *animus* with which possession is held by the person in actual possession of the property. Consequently, where it is found that there was an agreement to execute a usufructuary mortgage and that it was under that agreement that the mortgagee came into possession, then, though the usufructuary mortgage contemplated had not been executed, it must be taken that the mortgagee had been in possession only as a usufructuary mortgagee for the amount of the loan advanced. 123 Ind. Cas. 195 (Mad.).

——Art. 144—Acquisition of title—Limited interest—Presumption.

Where a person is in possession of land in the open assertion of a definite and specific right as mortgagee, it is not open whether the mortgage really existed or not, to the owner of the land to question his right after the expiry of more than 12 years from date when such assertion was made within his or his peedecessors-in-title's knowledge. 20 O.C. 208=41 Ind. Cas. 862.

——Art. 144—Acquisition of title—Limited interest—Possession of mortgage for over 12 years—Sale to mortgagee.

Two out of three co-sharers mortgaged the whole property with possessin. Subsequently the land was sold by one of them with the other's consent, to the mortgagee. In a suit by the remaining co-sharer for possession it was held that as the mortgagee had possession as mortgagee for more than 12 years, the mortgage could not be ignored but as the suit was brought within 12 years of the sale his suit so far as the equity of redemption was concerned was not barred. 23 P.L.R. 1911=48 P.W.R. 1911=9 Ind. Cas. 540.

——Arts. 142 and 144—Prescriptive title—Possession as usufructuary mortgagee.

Possession for over the statutory period as usufructuary mortgagee will give a prescriptive title as such over persons against whom the mortgage deed itself cannot be pleaded in priority or otherwise. The fact that such usufructuary mortgagee has been claiming for some time before suit under an invalid sale cannot make his possession less adverse. (1902) 26 M. 72=12 M.L.J. 410.

——Art. 144 — Possession under unregistered document—Nature of right acquired.

Where a person got into possession of properties under an unregistered agreement to the effect that he would be entitled to remain in possession on condition he kept the properties in proper repairs and remained in possession for more than 12 years, held that he acquired title as per the terms of the agreement by adverse possession. 115 Ind. Cas. 141 (All.).

——Art. 144 and S. 3 — Acquisition of title — Limited interest.

The words "possession of the defendant" do not by reference to the definition in S. 3 include the possession of a co-defendant, still in possession under a different title. The adverse possession of a defendant must be of the same nature as that sought by the plaintiff. Thus possession as permanent lessee is not adverse as against proprietor in a suit by proprietor. 17 C.W.N. 748=19 Ind. Cas. 367.

——Arts. 142 and 144—Adverse possession of limited interest.

Adverse possession of a limited interest, though a good plea in answer to a suit for ejectment is good only to the extent of that interest. 2 C.L.J. 125, foll. *Held*, also that in the particular case, the plaintiff's title to recover actual possession was barred even though his title to receive rent was not. (1908) 12 C.W.N. 636=7 C.L.J. 499=35 C. 470.

——Art. 144—Trusteeship with power to appoint a successor.

M was the trustee of certain temples and after him his son and then his grandson. Then the grandson's brother succeeded and appointed his sister and her husband as successors. The husband died and the sister was trustee for over twenty-four years. She appointed her sister's son who held office for twenty years, and appointed by will a great grandson of *M* as his successor. The plaintiffs on behalf of themselves and other worshippers sued for a declaration that the appointment was illegal and void. *Held*, that the sister and her successor acquired a trusteeship with power to appoint a successor. She had acquired a valid title to the trusteeship by prescription and had entered under a will which gave her power to appoint a successor, and she had done so, and given her successor a power to appoint a successor. The title, so acquired was not a hereditary trusteeship passing necessarily to their heirs, but one with power to appoint a successor. A trusteeship with power to appoint a successor in an estate is recognized by the law and could be prescribed for. (1900) 24 M. 219=11 M.L.J. 1.

3. Adverse possession.

See also (1) ADVERSE POSSESSION (2) OUDH RENT ACT (1886), S. 127.

(a) General.
(b) Evidence.
(c) Interruption.

3. (a) Adverse Possession—General.

——Art. 144—Adverse possession — Trustee in possession of trust funds and own funds—Acquisition of property — Presumption — Spending money on constructions over trust property—Presumption.

When a trustee or another person holding a fiduciary character who is in possession of funds belonging to himself as well as the trust acquires property in his own name and it is not established that in the acquisition of the property he has utilised the trust funds, it cannot be said that the acquisition was made for the benefit of the trust. But if such a trustee spends money in making constructions over the property of the trust the presumption is that he is spending the money belonging to the trust for the improvement of the trust property. There is no presumption that the expenditure was made from his own funds or that the constructions were made in breach of faith in order to make the property his own. A.I.R. 1950 All. 316.

——Art. 144—Adverse possession — Proof of—Animus—Trustee asserting hostile title.

A trustee cannot by his declaration that he has committed or is about to commit breach of trust, prejudice the rights of the beneficiaries and claim that as from the date of his declaration he began to hold adversely to the trust. I.L.R. (1946) Lah. 300=A.I.R. 1947 Lah. 117=231 Ind. Cas. 421.

——Art. 144—Adverse possession against one of two joint trustees—Bar against the other.

Held, that if the right of one of two joint trustees to recover the trusteeship and the trust properties from a third person holding them adversely becomes barred by limitation, the right of the other joint trustee becomes likewise barred although the latter sues within three years of his attaining majority. (1910) 20 M.L.J. 421=34 Mad. 284=6 Ind. Cas. 992.

——Art. 144—Adverse possession against Cantonment Board.

There is no provision in the Cantonment Act or in the Limitation Act which prevents adverse possession running against a Cantonment Board. I. L. R. (1950) A. 118=A.I.R. 1950 All. 43.

——Arts. 142 and 144—Suit for possession of property gifted by husband—Husband in possession of gifted property within 12 years of suit—Possession, whether on behalf of wife or adverse to her.

Where in a suit for possession of property gifted to the plaintiff by her husband the plaintiff's case is based on possession as owner within 12 years of the date of suit, it is open to her to prove her possession by adducing evidence showing that she was in actual physical possession or that she was in possession as owner through her agents, managers or relations. Where the plaintiff and her husband were living together and the husband was in continued possession of the property gifted to her by him, his possession must be construed to be on behalf of the wife as her agent and not adverse to her. Having taken up or continued management of his wife's property on her behalf a mere secret change of intention or the act of the husband such as a mortgage deed executed without the knowledge of the plaintiff, will not help him to prescribe against the plaintiff. I.L.R. (1948) Nag. 824=A. I. R. 1948 Nag. 328.

——Art. 144—Hindu lady on disappearance of her husband coming into possession of his property—Her possession, if adverse to her husband.

The nature of title which a person acquires by prescription depends upon the nature of his assertion. Where a Hindu lady acquires by prescription title to immovable property on the assertion that she had been possessing it as a Hindu widow, that is, as heir to her husband, that property becomes a part of her husband's estate. It does not become her *stridhan* and on her death, it would be inherited, not by her heirs, but by the heirs of her husband. If a Hindu widow by prescription acquires only a title for her husband's estate, the nature of the assertion involved in her possession is the assertion of her husband's title. She, in claiming the widow's estate, does not cherish any *animus* to exclude her husband—On the other hand, her *animus* is one of recognition of her husband's title. Wife's possession on disappearance of her husband is accordingly possession not adverse to her husband. It must necessarily be on his behalf. A.I.R. 1942 Cal. 498=47 C.W.N. 9=202 Ind. Cas. 551 (S.B.).

——Arts. 142 and 144—Permissive possession—Possession of husband after—Conveyance of property in satisfaction of mohur.

In 1898, the plaintiff's husband sold to her two houses by a registered document in satisfaction of her mohur (dower). In one of the houses the plaintiff's husband continued to reside as before till his death in 1911. On his death the defendants, having forcibly taken possession of the house, the plaintiff sued for possession. The Lower Courts rejected the claim first, on the ground that the document was without consideration, and secondly, that the claim was barred by time. *Held*, that the document being a docu-

ment of advancement, no consideration was necessary. The suit was in time, for the residence by the husband from 1898 to 1911 was permissive and on behalf of the plaintiff and not adverse. 41 Bom. 5=18 Bom. L.R. 810=36 Ind. Cas. 715.

——Art. 144 — Adverse possession — Possession of Hindu widow of the estate of her husband whom she supposed to be dead but who was not in fact dead—If adverse to the husband who is found to be alive.

Where on the supposed death of her husband, his widow entered on her widow's estate in the undivided share of an estate which belonged to her husband and she thereafter enjoyed it for a period much exceeding the twelve years, on the question whether her possession was adverse to her husband, who was in fact alive.

Held, that possession must be adverse to a living person and as the widow was possessing under a mistake as to her husband's death she cannot claim that by her possession she was asserting a right adverse to one whom she regarded as dead. 73 I.A. 246=51 C.W.N. 98=1946 A.W.R. (P.C.) 182=1947 M. W. N. 7=1946 O.A. (P.C.) 182=49 Bom. L.R. 246=I.L.R. (1947) Kar. (P.C.) 85=A.I.R. 1947 P.C. 19=227 Ind. Cas. 177=1946 A.L.J. 441=13 B.R. 68=(1946) 2 M.L.J. 442 (P.C.).

——Art. 144—Hindu widow — Adverse possession—Tests—Proof.

When the possession of a Hindu widow is adverse, it has to be decided what was her *animus possidendi*; did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption and those who claim for her anything more than a widow's limited interest must prove since when she began to assert her absolute title in herself. The test is always to be found in the origin of the widow's possession. When she enters on land under a title as heir, which is necessarily a limited title under the Hindu Law, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. A. I. R. 1946 Bom. 193=47 Bom. L.R. 962.

——Art. 144—Hindu widow as limited heir cannot prescribe for absolute title by adverse possession.

Where a widow governed by Hindu law has entered on the estate as a qualified heir she cannot subsequently prescribe by adverse possession an absolute title to it. A.I.R. 1946 Nag. 277=1946 N.L.J. 690=I.L.R. (1946) Nag. 159.

——Art. 144—Limited owner—Widow's possession—If adverse to reversion.

Where a widow who is only entitled to a maintenance out of her husband's estate, enters into possession of the property of her husband who was a member of a joint Hindu family at the time of his death, her possession of the share of her husband is *prima facie* adverse unless it can be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited share of a Hindu widow. 7 O.W.N. 1082=A.I.R. 1931 Oudh 25.

——Art. 144—Property bequeathed subject to mortgage—Executor to pay off mortgage and deliver property to legatee—Lease of property by executor before redeeming mortgage is not claim adverse to legatee. A.I.R. 1943 Mad. 276=(1943) 1 M.L.J. 36=56 L.W. 21=1943 M.W.N. 78=I.L.R. (1943) Mad. 477=210 Ind. Cas. 89.

——Art. 144—Adverse possession—Minor.

Sale by mother acting as guardian of minor son—Suit for setting aside sale—Subsequent suit for possession—Question of adverse possession:

Held, that as the plaintiff was a minor, no question of adverse possession arose and the suit was not barred by time. 35 Bom. L.R. 630=57 B. 456=A.I.R. 1933 Bom. 398=148 Ind. Cas. 116.

——Art. 144—Guardian — Adverse possession against minor.

The possession of a de facto guardian or of his mortgagee as a derivative owner cannot be legally deemed to be adverse to the minor, but when the de facto guardian effects a sale of the minor's property, the possession of purchasers would become adverse since the date they got into possession. A.I.R. 1930 Mad. 708.

——Art. 144—Adverse possession — Guardian and minor.

Possession is never to be considered adverse if it can be referred to any lawful authority. Where a Hindu mother on her husband's death entered into possession of properties which vested in her minor son and she herself had the custody of the minor as his guardian, her possession must be taken to have been one on behalf of the minor. 17 M.L.J. 14=30 M. 145.

——Art. 144 — Guardian's possession — Will—Registration — Adverse possession.

The grand-mother of a minor girl managed her property as her guardian and continued to do so even after the minor girl married and went to live with her family in 1884. In 1885, the grand-mother made a registered will leaving all properties to the minor as if the minor's properties belonged to her but with this addition that even without the will she would have taken the properties. In 1891 the guardian revoked the will and left the properties to the defendant who got into possession. The plaintiff who purchased the property from the grand-daughter brought this suit to recover it in 1898.

Held, that the suit was not barred as the possession of the grand-mother was permissive and did not become adverse merely by the registration of the will of 1885. (1901) 3 Bom.L.R. 673.

——Art. 144 — Adverse possession of lunatic's property—Lunacy does not prevent limitation running but only gives Lunatic right to sue within 3 years of the ceasing of the disability.

Lunacy would not by itself prevent limitation from running against a lunatic. Where a person entering into possession of a lunatic's property was in no fiduciary relationship to the lunatic but entered into possession for his own benefit and in assertion of a title hostile to the lunatic, limitation would begin to run from the date when he so took possession though the lunatic would be entitled to sue for recovery of the property within 3 years from the date when his disability ceases, if he dies a lunatic leaving his widow as legal representative, then she could sue within three years of his death; but if the widow fails to sue within the said period for recovery of the property, the reversioners to the estate of the lunatic, would also be barred and they cannot reckon limitation from the death of the widow. 70 Ind. Cas. 678 =1922 M.W.N. 136=15 M.L.W. 382=45

Mad. 361=30 M.L.T. 128=A.I.R. 1922 Mad. 12=42 M.L.J. 262.

——Arts. 142, 144 and 134—Sale of equity of redemption by Muhammadan mother—Redemption by purchaser—Adverse possession by purchaser—Suit by sons for redemption and for accounts.

In 1905, Y acting as the guardian of plaintiffs Nos. 1 and 2 sold an equity of redemption to S. In 1907, S redeemed the mortgage and got possession. In 1924, more than three years after they attained majority, the plaintiffs brought a suit for taking of accounts on foot of the mortgage and alternatively for redemption of seven-eighths share in the property. There was no dispute as to the good faith of S who redeemed the mortgage and the mortgagee who had given up possession:

Held, (i) that Art. 134 of the Limitation Act was not applicable as the mortgagee did not purport to do anything outside or opposed to his mortgage and there was no transfer by the mortgagee in the sense in which that word is used in Art. 134;

(ii) that as the purchase by S was in his own absolute right and he had been holding as owner from 1907 and not on behalf of the mortgagor or mortgagee, his possession was adverse to the knowledge of the plaintiffs and the suit was barred under Art. 144;

(iii) that the suit for accounts as such without setting aside the sale-deed was not maintainable. 33 Bom. L.R. 603=A.I.R. 1932 Bom. 23=134 Ind. Cas. 366.

——Art. 144—Possession of joint estate.

Possession of a joint estate is adverse to any claim to such an estate as a separate one and possession by a joint family may by lapse of time become adverse to a separate estate. 24 M. 387, Foll. 32 Bom.L.R. 314=A.I.R. 1930 Bom. 333.

——Art. 144—Permissive possession—Uncle managing for nephew—Inference.

The property governed by the rule of primogeniture had come into ownership of a Mahomedan boy of tender years living with his uncle and other members of the family. By family custom the uncle used to see to the management of the property.

Held, that, it is impossible to hold by way of inference that the uncle's possession in its inception was adverse and hostile to the legal title of his nephew or that its continuance for more than twelve years had the effect of extinguishing that title. 7 O.W.N. 988=A.I.R. 1930 Oudh 510.

——Art. 144—Father's possession for the joint benefit of co-owners who are his children is not adverse.

A Buddhist father on his re-marriage made over the land in suit to his four children by the first wife by a registered deed towards their mother's share of inheritance in full satisfaction. He continued to be in possession but managed the land for the joint benefit of the co-owners. The husband of one of his daughters sued for his share and mesne profits after more than 12 years of the execution of the deed.

Held, that the deed constituted an outright transfer and the father was holding the property for the joint benefit of all and that the suit was not barred by limitation as limitation does not begin to run until possession becomes adverse to the plaintiff. 105 Ind. Cas. 598=5 Rang. 576=A.I.R. 1928 Rang. 13.

——Art. 144—Adverse possession — By father against daughter—Mahomedan Law.

Held, that there was no adverse possession in the case. (1905) 9 C.W.N. 625=2 A.L.J. 513=2 C.L.J. 179=15 M.L.J. 261=27 A. 320=32 I.A. 86 (P.C.).

——Art. 144—Adverse possession—Possession by father of minor son's properties.

Where a minor receives by a registered deed of gift from his divided uncles, their undivided shares in an ancestral property owned by them jointly with the minor's father and the possession of the whole remains with the minor's father, the father cannot thereby be regarded as setting up a possession adverse to his infant son, nor can the donor's assent to his continuance in possession be garded as an understanding on their part that the possession was adverse either to themselves or to the child. (1902) 4 Bom.L.R. 754=27 B. 31.

——Art. 144—Adverse possession—Possession of a daughter of undivided uncle—Nature of possession. See LIMITATION ACT, ART. 127. 4 Bom.L.R. 135.

——Art. 144—Adverse possession—By father of minor daughter's property—Nature of possession of father.

When a father takes possession of his minor daughter's property, it may be taken that he takes it as her natural guardian and there is no adverse possession against the daughter in such a case. (1901) 6 C.W.N. 601.

——Art. 144—Adverse possession against donee's reversioners.

Held, that the plaintiffs, reversioners of the donor, were barred from recovering possession of the gifted land from the defendants who took possession of the land after the death of the donee's widow as next heirs for the gift was alleged by the plaintiffs to have been made for the life-time of the donee only and consequently the possession of the donee's widow and of the defendants after her death for a period of more than twelve years operated to extinguish the right of the plaintiffs, which ordinarily accrues to the donor or his heirs on the donee dying without lineal heirs. 110 P.L.R. 1909=149 P.W.R. 1909=4 Ind. Cas. 1006 (1).

——Art. 144—Adverse possession of Government against Court of Wards representing private persons—Court of Wards, position of — Chur land, suit to recover—Gradual formation—Proof that any portion formed within period of limitation—Onus.

The Government and the Court of Wards are not identical bodies, nor can the latter be regarded as merely a department of the former. The latter is a statutory body and the mere fact that in this province the Board of Revenue is the Court of Wards does not make the possession by Government of newly formed chur land during the time the claimant's property was under the direction of the Court of Wards, possession by the latter on behalf of the claimants. Held, on the evidence, that Government was in adverse possession of the disputed land as against the Court of Wards representing the claimants. 2 N. W. P. 379

(1870), approved. In a suit for recovery of possession of chur land, which commenced forming more than 12 years before the suit, the onus is on the plaintiffs to prove that any portion of the chur formed within 12 years of the suit. (1909) 14 C.W.N. 317=3 Ind. Cas. 15=11 C.L.J. 373.

——Art. 144—Adverse possession by donee under invalid gift—Attornment by tenant to donee.

Mere attornment and payment of rent by a tenant to the donee of the land from the lessor under a gift rendered invalid for want of registration will not make the possession of the donee adverse to the lessor or his representatives until the termination of the lease. (1908) 19 M.L.J. 255=6 M.L.T. 166=3 Ind. Cas. 122.

——Art. 144—Adverse possession — By stranger against landlord.

Possession during the term of lease cannot be adverse to the Zamindar, at least so long as he does not become entitled to immediate possession. Where the defendant purchased certain plots of land from the lessee, but continued to pay the rent to the Zamindar.

Held, that his possession could not become adverse as there was nothing to put the Zemindar on enquiry. 1907 A.W.N. 185=4 A.L.J. 726 =29 A. 593.

——Art. 144—Adverse possession—Vendor's possession when adverse. See TRANSFER OF PROPERTY ACT, S. 55 (3). 17 M.L.J. 450 =30 M. 524=3 M.L.T. 10.

——Art. 144—Manager—Agent—Overt act.

In order to entitle a person who originally comes into possession of property in the character of manager or agent, to succeed on a title by wrongful detention, it is necessary that he must prove first that he gave notice of his adverse holding to the owner or that he set up his adverse title to his knowledge. Secondly, that he dealt with the property after that as his own. In other words the repudiation of the former capacity as manager or agent must be followed by wrongful taking or unlawful detention, which means some active assertion of an adverse right. Mere repudiation to the knowledge of the owner will not do unless it is accompanied by some overt act. (1905) 7 Bom. L.R. 836.

——Art. 144—Adverse possession—Possession under a widow—Proof that it was adverse to reversioner.

Adverse possession must be strictly proved by the person setting it up. So where a person held possession under a widow who he alleged had no right to possession he must prove that the possession of the widow was adverse to the reversioners, and that her possession was not by reason of any agreement with the reversioners. (1902) 4 Bom. L.R. 312=26 B. 617.

3. (b) Adverse Possession—Evidence.

——Art. 144—Adverse possession — Proof of—Animus in the case of the person in possession standing in fiduciary relationship with the owner.

In order to prove adverse possession, it is necessary to show that the person claiming adverse possession had an animus to possess the thing in question in his own right and against the right of the rightful owner. In the case of possession of a person who is a manager or an agent or stands in a fiduciary relationship with the owner, such animus will not be readily presumed and so long as such a person does not divest himself of that character, his possession will be attributed to the consent express or implied, of the rightful owner. A.I.R. 1950 All. 316.

——Arts. 142 and 144—A trespasser does not displace the rightful owner's title unless he intends to prescribe for a hostile title and he does not necessarily intend so to prescribe simply by remaining in occupation. All the usual presumption about possession being adverse and so forth do not arise except in favour of the person in possession and those who claim through him. If the rightful owner succeeds in getting into possession and an attempt is made to oust him by those who do not, claim through the trespasser then the presumptions are in favour of the rightful owner. 1942 Nag.L.J. 431.

——Art. 144—"Wrongful possession".

It is not necessary that possession, in order to be wrongful, must have been obtained in consequence of some improper act. A.I.R. 1939 All. 529=1939 A.W.R. 344=1939 R.D. 292= (1939) A.L.J. 433=184 Ind. Cas. 91.

——Art. 144—Adverse possession — Essentials—Physical and continuous possession is necessary.

For the purpose of adverse possession regard should be had to the actual physical possession of the person making the claim, provided that that claim has been put forward during the whole period to be entitled to the right which is claimed by adverse possession. Therefore a person claiming adverse possession can add the period of his possession as usufructuary mortgagee to the period of his possession as a vendee from his usufructuary mortgagor. 125 Ind. Cas. 33=A.I.R. 1931 All. 18.

——Art. 144—Adverse possession by defendant—Entry in Record of Rights in favour of plaintiff.

An entry in the record of rights that the land was subject to the rights of the plaintiff does not amount to a tacit recognition of the plaintiff's rights on the part of the defendant. If the defendant was in adverse possession for over the statutory period his title is not prejudiced by any such entry. 16 Cal.W.N. 929 overruled; 22 C. L.J. 309, Approved. 57 Cal. 796=A.I.R. 1931 Cal. 25.

——Art. 144 — Essentials of — Adverse possession—Mere user.

Possession is not the same thing as adverse possession. Where a person has been using the roof belonging to another as a courtyard; sleeping there by night, sitting there by day and using it for occasional ceremonial purposes; such mere user cannot be taken as a definite assertion of proprietary rights and does not constitute adverse possession. A.I.R. 1931 Sind 1=25 S.L.R. 257=130 Ind. Cas. 546.

——Art. 144—Animus Possidendi—Ouster of the real owner is necessary for adverse possession.

If the person possessed of a legal title to an estate is also in the enjoyment of the profits of that estate more or less his title cannot be held to have been extinguished by reason of the physi-

cal possession of the estate held by another person who had no title to it. Such person cannot put an end to the possession of legal owner by any secret intention in his mind. There must be an ouster or equivalent to an ouster. 7 O.W.N. 988=A.I.R. 1930 Oudh 510.

——Art. 144—Definite assertion of adverse possession if always; necessary — Enjoyment of property as owner.

It is not necessary in every case that there should be a definite assertion of adverse possession by the party who pleads a prescriptive title. His conduct as an owner can be looked into. Where a co-sharer who had no interest left in a shamilat on partition, but was under an impression that he had such interest was in cultivating possession of land in shamilat and there was nothing to show that the co-sharer consented to such possession,

Held, that the possession was adverse as to ripen into ownership by cultivation for more than twelve years. A.I.R. 1930 All. 845=128 Ind. Cas. 820.

——Art. 144—An admission of another's title by a person claiming land adversely cancels the effect of any overt act that he has committed and it cannot be inferred or presumed that that admission carries with it an assertion of adverse title. 106 Ind. Cas. 814=A.I.R. 1928 Lah. 317.

——Art. 144—Possession — Nature of property and capability for direct possession to be considered.

In considering the question of possession the Court will have to consider the nature of the property. How far the property is capable of being possessed directly will have to be considered. If, for instance, the property is a land covered all over with wood, water, etc.; even if the man in possession proved that he has been in possession in a clearer manner than the man with the title the adverse possessor may not succeed. 44 Mad. 883 (P.C.), Foll. 85 Ind. Cas. 578=47 All. 389=23 A.L.J. 244=6 L.R.A. Civ. 184=A.I.R. 1925 All. 454.

——Art. 144—Trespass—Planting of trees.

Planting of trees on land belonging to another is an act of active trespass, and the owner of the land can sue for removal of the trees so planted and for recovery of possession of the land at any time within twelve years. 75 Ind. Cas. 266=46 All. 52=A.I.R. 1924 All. 443.

——Art. 144—Adverse possession.

Planting of trees on another person's land is active trespass—Suit by owner for possession—Article 144 applies. 70 Ind. Cas. 483=A.I.R. 1922 All. 50.

——Art. 144—Lawful possession — Presumption.

Possession may either be lawful or unlawful, in the absence of evidence it must be assumed to be the former. 51 C.L.J. 424.

——Art. 144—Trespasser abandoning possession —Possession vests back in rightul owner.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment is in the same position in all respects as he was before the intrusion took place. There is no positive enactment or any principle of law which requires him to do any act or issue any notice or to perform any ceremony in order to rehabilitate himself. 13 A.C. 793 at 798, Foll. 77 Ind. Cas. 905=11 L.B.R. 381=1 Bur.L.J. 251=A.I.R. 1923 Rang. 23.

——Art. 144—Adverse possession must be adequate, continuous and exclusive—Acts of possession by owner though not continuous will destroy adverse possession.

Adverse possession, contemplated by Art. 144 must be adequated in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. Standing a title in A, the alleged adverse possession of B must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. The onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves that he too has been exercising, during the currency of his title, various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. 66 Ind. Cas. 451=26 C.W.N. 666=24 Bom.L.R. 669=30 M.L.T. 42=48 I.A. 395=44 Mad. 883=14 M. L. W. 721=1921 M.W.N. 847=A.I.R. 1922 P. C. 181=41 M.L.J. 650 (P.C.).

——Art. 144—Temporary user, without objection by owner is not adverse possession.

The owner of a vacant plot not requiring it for his present use, it was used by his neighbour for more than twelve years without objection,

Held, that mere user of land for temporary purposes without objection would not amount to an assertion of ownership so as to give title by adverse possession. 68 Ind. Cas. 263=4 L.L.J. 168=35 P.W.R. 1922=62 P.L.R. 1922=A.I.R. 1922 Lah. 82.

——Art. 144—Possession derived from a lessee not necessarily adverse as against the lessor.

Held, that possession acquired by defendant during the continuance of a lease will not ordinarily be adverse possession as against the lessor until at any rate such time as the lessor becomes entitled to possession. 27 A. 395 and 13 C. 131, (10 W.R. 15) 9 C. 367; 10 C. 577 and 23 C. 863, foll.; 14 W.R. 395; 17 W.R. 377 (9 C.L.R. 347) and 26 C. 460, Not Foll. 1907 A.W.N. 185=29 A. 593=4 A.L.J. 726.

——Art. 144—Possession—Nature and effect of.

The nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it. (1906) 12 C.W.N. 636=35 C. 470=7 C.L.J. 499.

——Art. 144—Adverse possession—Essentials.

Possession of property by one party cannot be adverse to another within the meaning of the Limitation Act unless the claims of the parties are hostile and adverse to each other. 12 C. 484, Foll. (1905) 5 C.L.J. 62.

——Art. 144—Adverse possession—Essentials.

The party claiming title should have been in

possession and have exercised rights of possession over the disputed tract. (1904) 5 C.L.J. 71.

——Art. 144—Adverse possession—Essentials of.

It is of the essence of the title by adverse possession that it must relate to some property which is recognised by law. (1904) 6 Bom.L.R. 428 =28 B. 399.

——Arts. 142 and 144—Possession of trespasser—Nature of.

The possession of the intruder, ineffectual for the purpose of transfering title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any claim on the title of the rightful owner. (1904) 32 C. 287.

——Art. 144—Mistake common to all parties.

Adverse possession is not less adverse because it commenced under a mistake common to ail parties as to the real party entitled to the property. 4 Bing. 100, followed. (1903) 5 Bom.L.R. 674 =28 B. 87.

——Art. 144—Adverse possession—Definition of.

Adverse possession is possession which is wrongful. Quaere.—Whether possession which on commencement was rightful can become adverse subsequently. (1903) 27 B. 408=5 Bom.L.R. 269.

——Art. 144—Adverse possession—Acts amounting to—Nature of—Legal origin.

Acts required by law to constitute a title by adverse possession must be of an unequivocal character and they must be such that no legal origin can be ascribed to them. 4 Bom.L.R. 964.

——Art. 144—Possession begun lawfully—Conversion into wrongful possession.

Courts are loath to convert possession lawfully obtained into a wrongful and adverse possession. (1902) 4 Bom.L.R. 355. See also 27 B. 408.

——Art. 144—Adverse possession—What amounts to.

Adverse possession means possession by a person holding the land on his own behalf or some person other than the true owner having a right to immediate possession. There ought to be nothing equivocal in a possession which is relied upon as a bar. (1902) 4 Bom.L.R. 312=26 B. 617.

——Art. 144—Adverse possession—Essentials.

There must be both absence of possession by the person who has the right and actual possession by another whether adverse or not, to be protected, to bring the case within the statute. Consequently, limitation does not continue to run against the rightful owner the moment the intruder loses possession before his title is perfected by limitation though it be by vis major, 13 A.C. 793; 29 I.A. 541, Foll. (1902) 26 M. 410.

——Art. 144—Adverse possession — Nature of—Evidence of—Bar of limitation.

Possession must be in some way or other ostensibly adverse before it can cause limitation to run, and when there is no actual deprivation of any right, there must be a manifest and known assertion of a title incompatible with that of the disseizee. Where there is no ouster or open or notorious act of taking possession, the person relying on his possession to defeat title must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff occasion to dispute that possession (or in other words, that it was such as to give a cause of action or right to sue for possession) throughout the twelve years next preceding the suit. (1902) 4 Bom.L.R. 721 =27 B. 43.

——Art. 144—Adverse possession of a mere right—Nature of—Evidence of—Adverse possession of equity of redemption.

The adverse possession of a right may be entirely distinct from the adverse possession of tangible immovable property; a right to sue in respect of the former arising possibly on open and avowed assertion or manifest adverse exercise of such right, while, the right to sue in respect of the possession can commence only when the possession itself (and not a mere claim to some minor right) becomes adverse to the rights of the person alleging title, which it cannot be as long as that person is not entitled to claim possession. (1902) 4 Bom.L.R. 721=27 B. 43.

——Art. 144—Adverse possession—Essentials and character of.

Where a person claimed adverse possession of the equity of redemption by reason of an agreement entered into by him with the mortgagee to the effect that he will retain possession and pay the interest due on the mortgage, but there was nothing to indicate to the real representative of the mortgagor the character under which the usurpers were holding the lands:

Held, that the position of persons claiming adverse possession was in no way better than if they had taken an assignment from the mortgagees of his interest. (1902) 27 B. 43=4 Bom.L.R. 721.

——Art. 144—Evidence of possession of certain specific property treated as evidence of possession as regards an appendage to such property, though no definite acts of possession were proved as regards the appendage—Limitation.

Where on the right to the produce of certain trees being called in question, it was found that the plaintiffs had not for twelve years previous to the filing of the suit done any specific acts indicating directly their possession of the trees, but that the trees nevertheless grew out of a wall which surrounded a garden in possession of the plaintiffs, it was held that the possession of the garden imported possession of the garden wall and of the trees springing out of the wall and the suit was not barred by limitation. 1902 A.W.N. 45=24 A. 294.

——Art. 144—Adverse possession—Partial possession by real owner—Effect of.

To constitute a title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed. (1901) 4 Bom.L.R. 28=26 B. 410. Also 3 Bom.L.R. 47=25 B. 362.

3. (c)—Adverse possession—Interruption.

See also NOTES 4 AND 29.

——Art. 144—Interruption — Unsuccessful application under O. 21, R. 97, C. P. Code.

An application under O. 21, R. 97, C. P. Code

for delivery of possession against a person in possession which was subsequently dismissed will not interrupt adverse possession in his favour. (1945) 2 M.L.J. 173=58 M.L.W. 383=A.I.R. 1945 Mad. 454.

——Art. 144—Suit under O. 21, R. 63, C. P. Code.

Although an order for attachment does not interfere with adverse possession, the filing of a suit for a declaration of the right to attach property against the person in possession does. It would be a negation of the right given by O. 21, R 63, C. P. Code to hold that when the suit has been filed in time, the person wrongly in possession of the property can get a little by adverse possession after the institution of the suit. The institution of the suit arrests the running of time in favour of the person in possession. Hence a suit under O. 21, R. 63, before 12 years of adverse possession entitles the plaintiff to a declaration of the rights of the parties as at the date of suit. 56 M. L.W. 132 (2)=A.I.R. 1943 Mad. 425=(1943) 1 M.L.J. 212=1943 M.W.N. 170=I.L.R. (1943) Mad. 696=211 Ind. Cas. 27.

——Art. 144—A in possession of property as trespasser since July 16, 1918—R getting possession on strength of his own title on February 9, 1930—Suit by A under S. 9, Specific Relief Act decreed and A restored to possession on September 4, 1931—Title suit by R on November 24, 1931—Period between February 9, 1930 and September 4, 1931, during which R had both title and possession, held could not be ignored—Suit, held within time. A. I.R. 1942 Mad. 728=1942 M.W.N. 478=55 M. L.W. 515=(1942) 2 M.L.J. 266=I.L.R. (1943) Mad. 122=206 Ind. Cas. 371.

——Art. 144—When a trespasser is in possession, and the Court makes a declaration showing that his possession is wrongful, that does not affect the quality of his possession, but merely advertises the fact that it is adverse. A.I.R. 1942 Bom. 44=43 Bom.L.R. 971=I.L.R. (1942) Bom. 14=198 Ind. Cas. 550.

——Art. 144—If party remains in adverse possession of the disputed area for over 12 years, his title is good irrespective of any order passed under the Madras Survey and Boundaries Act, 1897. A. I. R. 1940 Mad. 187=(1940) M.W.N. 41=(1940) 1 M.L.J. 79=51 L. W. 73=I. L. R. (1940) Mad. 501=187 Ind. Cas. 321 (F.B.).

Overruling—A.I.R. 1934 Mad. 685=152 Ind. Cas. 462=40 M.L.W. 536 and A.I.R. 1933 Mad. 279=56 Mad. 366=141 Ind. Cas. 307.

——Art. 144—Break of adverse possession—Dismissal of claim petition.

Obiter.—The dismissal of a claim petition does not operate as a break of adverse possession. Such an order stands on a different footing from symbolical delivery or the decision of a survey officer. 44 L. W. 617=(1936) M.W.N. 1113=A.I.R. 1937 Mad. 44=(1937) 1 M. L. J. 642=166 Ind. Cas. 308 (2).

——Art. 144—Rejection of claim petition by a person in adverse possession does not disentitle a person from relying on his possession from the date of rejection order. He is not required to prove that he got into possession again after rejection order. 44 L.W. 617=(1936) M.W.N. 1113=A.I.R. 1937 Mad. 44=(1937) 1 M. L J. 642=166 Ind. Cas. 308 (2).

——Art. 144—Whether a prior decree to which a defendant is a party operates as breaking the continuity of possession of the defendant or not must necessarily depend on the nature of the decree. Where, however, the decree is in favour of a plaintiff for possession as owner and is passed against a defendant who is in possession, it would break the continuity of the possession of the defendant and prevent him from relying on his prior possession for the purposes of limitation under Art. 144. A.I.R. 1932 Sind 35=26 S.L.R. 127=140 Ind. Cas. 228.

——Art. 144—Lease for term—Tenant continuing in possession without paying rent—Adverse possession if interrupted by paper decree.

The original owner of certain property leased it for eleven months on 16th July, 1899. In 1905 the property was partitioned between the sons of the lessor. In 1912 one of them filed a suit for rent and obtained a decree but did not execute the same. On September 12, 1925, the other brother sued to recover possession of his share of the property,

Held, that the possession of the lessee became adverse from 1900, that adverse possession was not interrupted by the decree obtained by the other brother in 1912, and that the suit was barred by limitation. 32 Bom. L. R. 695=A.I.R. 1930 Bom. 400.

——Art. 144—Declaratory decree—Effect on assertion of adverse title.

Where there is assertion adverse title and ouster of a party, declaratory decree obtained by him does not prevent limitation from running. 120 Ind. Cas. 486=11 L. L. J. 553=A.I.R. 1930 Lah. 297.

——Art. 144—Execution sale pending suit for declaration as to property being subject to trust—Subsequent declaration does not affect adverse possession of auction-purchaser under the execution sale. 74 Ind. Cas. 492=18 M.L.W. 903=40 C.L.J. 20=21 A.L.J. 730=28 C.W.N. 493=50 I.A. 295=25 Bom.L.R. 1275=46 Mad. 751=33 M.L.T. 285=2 Pat.L.R. 104=1924 M.W.N. 65=4 L.R.P.C. 180=A.I.R. 1923 P.C. 175=65 M.L.J. 588 (P.C.).

——Art. 144—Mortgage.

The mortgage by a mortgagor does not stop running of time against him or any one claiming through him. 50 C.L.J. 317=34 C.W.N. 519=A.I.R. 1930 Cal. 313=126 Ind. Cas. 257.

——Art. 144—Co-owners — Ouster — Subsequent acquisition of joint ownership—No interruption.

Where a person has begun to hold possession of land adversely to two co-sharers, each being the owner of a moiety, and before the expiration of the statutory period of limitation succeeds to one moiety upon the death of its owner, his possession continues to be adverse to the owner of the other moiety, although he has become jointly interested with the other. 43 Mad. 244=46 I. A. 285=38 M.L.J. 313=27 M.L.T. 6=22 Bom. L.R. 144=18 A.L.J. 274=24 C.W.N. 346=(1919) M.W.N. 724=10 L.W. 679=53 Ind. Cas. 901 (P. C.). [Affirming 19 M.L.T. 52=

3 L.W. 1=(1916) 1 M.W.N. 17=32 Ind. Cas. 111.]

——Art. 144 — Possession pending suit—Not adverse.

Possession after institution of suit is not adverse. 17 M.L.T. 347=29 Ind. Cas. 168.

——Arts. 144 and 120—Adverse possession—Order under Land Registration Act (Bengal Act) if amounts to dispossession.

During the pendency of a defendant's appeal one of the plaintiff-respondents died and his rights and liabilities in respect of the disputed properties vested by survivorship in accordance with the Mitakshara Law in the remaining plaintiff's-respondents.

Held, that an application by the appellant to have the surviving plaintiffs-respondents, noted as the legal representatives of the deceased comes within S. 362, of the C. P. Code, (1813) and is governed by Art. 179, S. 362, C. P. Code, is not limited in its application to cases where the right to sue (or appeal) survives against the surviving defendants (or respondents) not as the legal representatives of the deceased but by reason of a right vested in them antecedent to the suit. An order under the Land Registration Act refusing to register an applicant's name does not in law amount to a dispossession of the applicant and the putting in possession of the party upon whose objection the application was refused. When the party, whose application for the registration of his name was refused, continued in actual possession, no suit for the recovery of possession within Art. 144 would lie at his instance, and a suit to have his title to the land declared would be governed by Art. 120. 1 C.L.J. 73, foll. (1906) 11 C.W.N. 186=4 C.L.J. 568.

——Art. 144—Adverse possession — Formal possession obtained by auction-purchaser.

Held, that formal possession obtained by an auction-purchaser of an undivided share saves. limitation not only as against the judgment-debtor but as against the co-sharers with whom he is in joint possession. 1906 A.W.N. 278=3 A.L.J. 659.

——Arts. 142 and 144—Delivery, effect of—C.P. Code, S. 244.

Delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises, which may be enforced in a regular suit. The defendant who remains in actual possession notwithstanding execution must be regarded as a trespasser who commits a fresh act of djspossession and this gives a fresh cause of action. (1903) 8 C.W.N. 49 (D.B.).

——Art. 144—Adverse possession, termination of—C. P. Code, S. 331.

Held, that adverse possession of the claimant terminated with the initiation of proceedings under Chapter 19, C. P. Code (1882), before the expiration of twelve years from its commencement and that cannot be counted in favour of the adverse holders till the date of registration of proceedings in the form of a suit. (1905) 7 Bom. L.R. 667=30 Bom. 115.

——Art. 144—Adverse possession — Attachment by holder of decree against owner—Owner's title not barred on date of attachment—Barred at date of suit.

The attachment of property by a decree holder does not arrest the running of time in favour of a trespasser holding the property adversely to the judgment-debtor. Defendants 1 to 3 were holding the plaint properties adversely to defendants 4 to 7. The trespasser's title had not perfected in 1894 when the properties were attached by the plaintiff as belonging to defendants 4 to 7. But at the time of filing this suit for declaration that the properties belonged to defendants 4 to 7 and were liable to satisfy the plaintiff's claim, more than 12 years of adverse possession had elapsed. **Held,** that the attachment did not interrupt the acquisition of the title by prescription and that the suit was barred. (1901) 11 M.L.J. 344. See also 5 C.W.N. 160=28 C. 86.

4. Auction-purchaser and decree-holder.

——Art. 144—Suit for actual possession by auction-purchaser who has obtained symbolical possession—Defaulting proprietor remaining in adverse possession.

Symbolical possession if delivered under the C. P. Code, even though erroneously, operates as actual possession against the judgment debtor and his representatives. The same principle will apply to the case of a defaulting proprietor. If symbolical possession has been delivered, it will be as effective against him as if actual possession had been delivered. There will be a fresh start for the period of limitation and the purchaser will be in a position to sue for possession on the basis of his title by purchase to sue within 12 years of the delivery of possession to him if the defaulting proprietor remains in adverse possession. A.I.R. 1950 Assam 50.

——Art. 144—Applicability — Suit for actual possession by landlord obtaining symbolical possession in execution of ejectment decree against tenant—Limitation—Starting point.

If a landlord obtains symbolical possession through Court in execution of an ejectment decree against his tenants but the tenants continue to remain in actual possession, the landlord must be taken to have obtained possession, on the day when he was given symbolical possession and kept out of possession from the next day. The possession of the tenants therefore becomes adverse to the landlord from the next day and limitation begins to run against him from that date in respect of any suit for possession that he might afterwards bring against them. 53 C.W.N. 899=A.I.R. 1950 Cal. 92.

——Art. 144—Applicability — Suit for actual possession by person who has obtained symbolical possession—Limitation.

Where in execution of a decree symbolical possession is delivered of immovable property to the person entitled to actual possession thereof, the symbolical possession should be deemed equivalent to actual possession as against the judgment-debtor, and a subsequent suit by the decree-holder for actual possession instituted within 12 years from the date of the symbolical possession must be deemed to be within time. A.I.R. 1950 Pepsu 22.

——Art. 144—Applicability — Suit for actual possession by Court auction-purchaser who has obtained symbolical possession — Limitation—Starting point.

Symbolical possession under O. 21, R. 95, C. P. Code, is equivalent to actual possession as against the judgment-debtor or his representative, and a suit for actual possession by the person to whom symbolical possession has been delivered will be in time if brought within 12 years from the date of the symbolical possession. 27 Pat. 267=A.I.R. 1948 Pat. 416.

——Arts. 142 and 144—Bar of remedy and extinguishment of right — Decree-holder's purchasing share of judgment-debtor's property in execution —Failure to obtain actual possession within 12 years—Effect.

When a decree-holder purchasing the share of his judgment-debtor's property in execution fails and neglects to obtain actual possession of it within 12 years, he not only loses his remedy, but his right is also extinguished. 1947 A.L.J. 202 =1947 A.L.W. 232=1947 A.W.R. (H.C.) 229 =A.I.R. 1947 A 296.

——Arts. 144, 138 and S. 16—Suit by auction-purchaser for possession after formal delivery of possession—Art. 144 and not Art. 138 applies—S. 16 does not apply.

Where an auction-purchaser brings a suit for recovery of possession after he has obtained formal delivery of possession, it is not a suit by him as an auction-purchaser but as an owner of the property purchased and is governed by Art. 144 and not by Art. 138. Section 16 has no application in such a case and hence the period during which a proceeding to set aside the sale has been prosecuted cannot be excluded. A.I.R. 1946 Pat. 202=24 Pat. 717.

——Arts. 144 and 120—Decree against manager of joint Hindu family—Sale of property—Property described in sale certificate—Suit by auction-purchaser for possession.

In the execution of an award obtained by a co-operative credit society against the surety who was a manager of joint Hindu family some joint Hindu family property was attached and sold. The boundaries of the area so sold were set out in the certificate for sale issued to the auction-purchaser who had purchased the same with the necessary permission. The auction-purchaser who got only a symbolical possession and not actual possession filed a suit for possession against the manager (Surety defendant):

Held, that Art. 144 applied and not Art. 120. A.I.R. 1946 Bom. 192=47 Bom.L.R. 1102= I.L.R. (1946) Bom. 109=224 Ind. Cas. 206.

——Art. 142—Sale for arrears of rent—Auction-purchaser obtaining receipt of delivery of property from Revenue Inspector without physically evicting tenant—Suit for possession within 12 years of delivery of receipt is in time. A.I.R. 1942 Mad. 698=1942 M.W.N. 543=55 L.W. 548=(1942) 2 M.L.J. 305=204 Ind. Cas. 382.

——Art. 142—Suit by auction-purchaser in execution of mortgage decree, to eject a person in possession of property.

When the owner mortgages his property, part of his interest passes to the mortgagee, but when the property is sold at a Court auction, the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him. Art. 142, therefore applies even to a case where a purchaser at an auction-sale held in execution of a mortgage decree brings a suit to eject a person in possession of the property purchased by him. (1940) 2 M.L.J. 190=52 L.W. 149=(1940) M. W.N. 747=A.I.R. 1940 Mad. 798=I.L.R. (1940) Mad. 953=192 Ind. Cas. 488 (F.B.).

——Arts. 142 and 144—C. P. Code, O. 21, R. 35 (1) — Delivery of possession — Whether gives fresh starting point for limitation for suit for possession.

Where possession of property has been delivered to a decree-holder under O. 21, R. 35 (1), C. P. Code, the decree-holder can claim a fresh period of twelve years from the date of delivery for a suit for recovery of possession. It is immaterial that the judgment-debtor was not apprised of the fact of delivery of possession. 33 P. L.R. 1082=A.I.R. 1933 Lah. 22=140 Ind. Cas. 530.

——Arts. 142 and 144—Purchase of undivided share—Formal delivery of possession—Suit by purchaser.

In execution of his decree, **M**, the decree-holder purchased an undivided share of **S** in certain plots on August 21, 1905, and got formal delivery of possession on February 19, 1907. In 1914, M filed a suit for partition and separate possession against **L** defendant in the present suit the other sharer. Partition was refused but **M** got joint possession which was obtained on September 1, 1915, **M** on August 15; 1916; sold his rights and interest to the father of the plaintiff, who applied for mutation of names. The application was unsuccessfully resisted by defendant; a suit was brought by the plaintiff alleging that since August 15, 1916, his father was in joint possession and after his death, up to his dispossession by defendant, he remained in joint possession. Denying the plaintiff's allegation the defendant pleaded the bar of limitation for 12 years.

Held, that in order to establish adverse possession by one tenant-in-common against his co-tenants, there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. But these proposition have no application to the facts of the present case. In the present case if the controversy had been between the defendant and **S's** sons, it may have been impossible for defendant to successfully put forward the plea of adverse possession, but the plea of limitation raised by defendant against the claim of the plaintiff was unanswerable. There has all along been an open denial by defendant of the title of the plaintiff and of his predecessors-in-title; neither the plaintiff nor his predecessors-in-title ever succeeded in obtaining actual possession of the plots. Consequently, there has been an ouster of the plaintiff and of his predecessors-in-title from the year 1905. Whether there is an actual turning out or keeping excluded of the party entitled to the possession, there is an ouster. The resistance on the part of defendant and the members of his family had the effect of preventing the plaintiff's predecessors-in-title from obtaining ac-

tual possession and this coupled as it was by an open denial of their title, amounted to their ouster. Therefore, time began to run against M from 1st September, 1915, the date on which he obtained formal delivery of possession in execution of the decree obtained by him for joint possession over the plots in dispute. 55 A. 173=(1933) A.L.J. 33=A.I.R. 1933 All. 173=17 R.D. 933=149 Ind. Cas. 819.

——Arts. 142 and 144—Sale in execution—Delivery of symbolical possession to purchaser—Suit by purchaser for possession.

The plaintiff purchased a property in execution of a decree in 1911. He applied for delivery of possession and the **dakhalnama** showed that possession was delivered to him 'as required by law' in 1913. The plaintiff filed a suit in 1925 for recovery of possession; alleging that he was dispossessed in 1914. The lower Appellate Court found that there was no actual delivery of possession by removal of the judgment-debtor and that the suit was, therefore, time-barred:

Held, (i) that the lower Appellate Court was entitled to come to such a finding on the evidence and the finding could not be set aside in second appeal;

(ii) that on that finding the suit was time-barred and rightly dismissed by the lower Appellate Court. (1931) A.L.J. 12=130 Ind. Cas. 706.

——Art. 142—Decree-holder obtaining formal possession.

A decree-holder who obtained formal possession under O. 21, R. 96, C. P. Code must obtain partition or establish his right in some other manner within 12 years therefrom. The delivery of formal possession gave him only a fresh start for the computation of limitation but did not make him owner in possession. 124 Ind. Cas. 767 (All.)= A.I.R. 1931 All. 234.

——Art. 142—A decree-holder auction-purchaser sold the property before obtaining possession from the judgment-debtor who was alleged to have remained in possession as licensee of the decree-holder. The purchaser from decree-holder sued for possession,

Held, that if the judgment-debtor was in possession as licensee as alleged then the suit would be governed by Art. 142. A.I.R. 1930 Cal. 586 =51 C.L.J. 560=34 C. W. N. 1059=128 Ind. Cas. 244.

——Arts. 142 and 144—Delivery of properties given to judgment creditor through Court—Judgment-debtor continuing in possession—Limitation —Starting point.

Even if the judgment-debtors continue to be in the possession of the properties in spite of the delivery of the properties made through Court, yet, as against the judgment-debtors to the suit and persons represented by them, the effect of such delivery should be taken to be that the decree-holder is in possession; and consequently a fresh cause of action arises against the judgment-debtors, and limitation begins to run only from the date of the delivery made through Court. 122 Ind. Cas. 164=A.I.R. 1930 Mad. 206.

——Art. 144—Applicability—Auction-purchaser.

When a purchaser at Court sale sues the co-tenants of the judgment-debtor, Art. 138 will not apply for that Article applies only against judgment-debtor and persons claiming through him. The suit will be governed by Art. 144. 117 Ind. Cas. 593=33 C.W.N. 46=56 Cal. 616=A.I.R. 1929 Cal. 250.

——Arts. 142 and 144—Formal possession under O. 21, R. 95, C. P. Code—Suit for possession is governed by Art. 142.

Where the auction-purchaser of only a share in a certain property, who has obtained under O. 21, R. 95 possession by beat of drum, sues for recovery of possession on the ground that he has not obtained actual possession the suit is governed by Art. 142 and not Art. 144; and the possession of the judgment-debtor who has remained in actual possession in spite of the formal delivery of possession through Court, should be deemed to have become adverse only from the date of such formal delivery. 110 Ind. Cas. 70=5 O.W.N. 372=3 Luck. 506=A.I.R. 1928 Oudh 251 (F.B.).

——Art. 144—Formal possession given — Fresh cause of action.

Formal possession of property in previous suit duly given—Fresh denial of his title to that property gives him a fresh cause of action to establish such right. 109 Ind. Cas. 561=A. I. R. 1928 Lah. 910.

——Arts. 142, 144 and 121—Assam Land and Revenue Regulation (1 of 1886), S. 80—Purchaser at revenue sale suing for possession—Suit within 12 years from symbolical possession—Defendants defaulting proprietors—Suit is governed by Art. 142 or 144 and not by Art. 121 and is within time. 44 Cal. 412, Appl. 115 Ind. Cas. 606=32 C.W. N. 778=A.I.R. 1928 Cal. 870.

——Art. 142—Possession delivered under decree —Suit for possession within 12 years is not barred.

Where a decree-holder has been granted possession by ousting those who were already in possession, his possession is not sham or symbolical and a suit by him for possession within 12 years of such delivery is not barred as the persons in possession must be deemed to be dispossessed on the date of delivery. 105 Ind. Cas. 170=A.I.R. 1928 Mad. 144.

——Arts. 142 and 144—Formal delivery of possession—Effect of—Against previous purchaser from judgment-debtor.

Although the formal delivery of possession under O. 21, R. 95, C. P. Code, may have the effect of actual possession as against the judgment-debtor himself, such formal delivery of possession cannot take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. 111 Ind. Cas. 362=5 O.W.N. 616=3 Luck. 668 =A.I.R. 1928 Oudh 391.

——Arts. 142 and 144—Time begins to run from the date of formal delivery.

Where the auction-purchaser of only a share in a certain property, who has obtained under O. 21, R. 95 possession by beat of drum, sues for recovery of possession on the ground that he has not obtained actual possession the suit is governed by Art. 142 and not Art. 144; and the possession of the judgment-debtor who has remained in actual possession in spite of the formal delivery of possession through Court, should be deemed to

have become adverse only from the date of such formal delivery. 110 Ind. Cas. 70=3 Luck. 506 =5 O. W. N. 372=A.I.R. 1928 Oudh 251 (F. B.).

——Arts. 142 and 144—When amounts to actual possession.

In a suit for possession when the plaintiff has been given symbolical possession in execution of a decree if the defendant is bound by the decree, the symbolical possession delivered against him amounts to eviction. If the defendant is not bound by the decree he is to show that his right by adverse possession has been perfected as against the plaintiff under Art. 144 of the Limitation Act. In either case, the plaintiff is entitled to base his cause of action from the date of the delivery of symbolical possession to him. 96 Ind. Cas. 481 =A.I.R. 1926 Cal. 1172.

——Arts. 142 and 144—Delivery of formal possession gives fresh starting point. 96 Ind. Cas. 591=A.I.R. 1926 All. 691.

——Arts. 142 and 144—Symbolical possession will give fresh starting point — Possession. 73 Ind. Cas. 920=20 A.L.J. 641=A.I.R. 1922 All. 463.

——Arts. 142 and 144—Time runs from date of formal delivery.

One R left a widow P and two daughters J & K. P made a gift of the estates of R to K. J, sued for her half share and got formal possession. J's legal representatives brought a suit for possession,

Held, that limitation began against her from the date of her taking formal possession. 70 Ind. Cas. 488=A.I.R. 1922 All. 55.

——Arts. 142 and 144—Suit in ejectment — Dispossession within twelve years—Possession of open sites—Possession will presumably follow possession of property to which they adjoin—Presumption of possession following title.

The plaintiff who purchased at a Court sale a shop and two open pieces of land in front of it and was placed in possession, sued to eject from the land the defendant who claimed to be a subsequent purchaser from the judgment-debtor,

Held, if the plaintiff established his title over the property he can rely upon the presumption that possession went with the title in absence of satisfactory evidence in rebuttal. As under Art. 142 time begins to run from the date of the dispossession; if the plaintiff alleges his dispossession within twelve years of the suit, then the question must arise according to the circumstances of each case how far the plaintiff has correctly fixed the date of dispossession and how far the onus lies on the defendant to show that that date was wrong. In a suit for ejectment it is for the plaintiff to prove possession prior to the dispossession which he alleges. On the question of evidence however, the initial fact of the plaintiff's title comes to his aid. Possession of open sites goes naturally with the possession of the property to which they adjoin. If the defendant asserts his rights, he must show that he has been in possession adversely against the owner of the property. 66 Ind. Cas. 764=46 Bom. 920 =24 Bom.L.R. 373=A.I.R. 1922 Bom. 243.

——Arts. 142 and 138—Suit by auction-purchaser against trespasser—Art. 138 does not apply—Independent trespassers cannot tack on their possessions—When Art. 142 applies.

Art 138 has no application to a suit for possession by a Court auction-purchaser against a person who claims title independent of judgment-debtor.

The article applicable is Art. 144 and under Art. 144 a trespasser cannot tack on his possession with that of previous trespasser.

Where the defendant claims through the judgment-debtor, Art 138 would apply but when symbolical possession has been given to the auction-purchaser it will be equivalent to actual possession against the defendant and thereupon Art. 142 will apply to the case. 70 Ind. Cas. 602=27 C.W.N. 259=36 C.L.J. 140=A.I.R. 1922 Cal. 176.

——Arts. 142 and 144 — Symbolical possession—Gives a fresh cause of action for possession.

Symbolical possession is as effective as actual possession against the judgment-debtors; and if the judgment-debtors continued in possession even after symbolical possession is delivered to the auction-purchaser, their possession becomes adverse against such purchaser from that very day. The purchaser therefore has a fresh cause of action for instituting the suit for possession against the judgment-debtor; and such a suit would not be one governed by Art. 138, which evidently refers to a case where the purchaser has not obtained delivery of possession, but Art. 144 would apply, and in such case the period during which an application to set aside sale continued cannot be excluded. 70 Ind. Cas. 420=26 C.W.N. 364=A.I.R. 1921 Cal. 385.

——Art. 144—Formal delivery to auction-purchaser—No fresh starting point of limitation.

Where upon an execution sale possession has been delivered in accordance with the provisions of the law, that is, in accordance with S. 318 or 319 of the old Code as the case may be, having regard to the nature of the property, or under O. 21, R. 95 or R. 96, the auction-purchaser gets a fresh start for the compensation of limitation. But where such possession has not been delivered, the mere fact of formal delivery of possession does not save limitation. 63 Ind. Cas. 212=43 All. 520=19 A.L.J. 469=A.I.R. 1921 All. 9 (F.B.).

——Art. 144—Starting point — Symbolical possession—Adverse possession.

The possession of a transferee from the mortgagor is adverse to the mortgagee decree-holder from the date on which the court sale in the latter's favour was confirmed, and not from the date on which he got symbolical possession of the property. 21 A. 269, approved. 4 O.L.J. 481 =42 Ind. Cas. 192.

——Art. 144—Starting point — Symbolical delivery of possession against Government—Ryotwari Tenants — Continuance of possession—Prescription.

Where possession of inam lands wrongly classed as Ryotwari by the Govt. and for which pattas were issued to the ryots is decreed to the inamdar and symbolical delivery is made in execution of the decree a suit brought to oust the ryotwari

tenants within 12 years of the delivery of possession which was acquiesced in by the tenants is not barred by limitation.

(Per Spencer, J.)—The Ryotwari tenants, when they attorned to Government could not simultaneously prescribe for any title which could enure after the title of the Govenment was negatived in the suit of a third party, and so long as they were tenants of the plaintiff or her predecessors-in-interest, their possession was not adverse to that of the landlord. A Ryotwari Pattadar does not acquire any rights against the Government greater than what he gets at the initial grant of Patta.

Per Phillips, J —The original possession of the Ryotwari tenants having been terminated by delivery in execution any fresh title could be acquired by actual possession only after the expiry of 12 years after the symbolical delivery. 41 Ind. Cas. 167 (Mad.).

——Art. 144—Starting point — Symbolical delivery — Onus on defendants.

Where plaintiff had obtained symbolical possession in execution of a decree against the defendants the onus of proving that the defendants have been in adverse possession for the statutory period is upon the defendants. 2 Lah.L.J. 91.

——Art. 144—Starting point—Revenue Sale—Bengal Revenue Sales Law Act (11 of 1859)—Purchaser if claims through defaulter—Adverse possession against defaulter if adverse against purchaser.

A purchaser under the Revenue Sale Law purchases the share and not the right, title and interest of the defaulter. He does not claim under or through the defaulter and hence in a suit for possession by a purchaser who has not been in possession since his purchase, the defendant must show adverse possession for more than 12 years against the plaintiff as the adverse possession against the defaulter cannot be tacked on to adverse possession against plaintiff. 15 C.L.J. 436 =16 C.W.N. 587=14 Ind Cas. 219.

——Art. 144 — Starting point — Symbolical possession—Effect of.

Symbolical possession is effective against a judgment-debtor though not so against a stranger to the suit. 17 C.W.N. 324=18 Ind. Cas. 751.

——Art. 144—Starting point — Symbolical delivery — Decree-holder—Suit for possession against judgment-debtor—Limitation.

Where the decree-holder in execution of a decree for possession is given formal possession the judgment-debtor remaining in actual possession, the possession of the decree-holder is deemed actual or legal possession in the eye of law and he can bring a fresh suit for possession within 12 years. 19 A. 499, Appl. 10 Ind. Cas. 319 (All.).

——Art. 144—Starting point — Symbolical possession—Effect on trespasser's possession.

An auction-purchaser was given formal but not actual possession of the judgment-debtor's property which was at that time in possession of a trespasser; the judgment-debtor subsequently recovered the property;

Held, the auction-purchaser can recover the same within 12 years of the date on which the judgment-debtor obtained possession from the trespasser. 5 Ind. Cas. 273 (All.).

——Arts. 142 and 144—Suit for possession by vendee from mortgagee-purchaser against a vendee from mortgagor not impleaded in suit—Symbolical possession, delivery of.

Delivery of symbolical possession does not operate as an ouster against a stranger in possession, and a suit for possession by a purchaser from the mortgagee-purchaser against a purchaser from the mortgagor who, though in possession, has not been impleaded in the suit, is barred if not brought within 12 years from the date of the mortgage decree. (1907) 7 C.L.J. 640.

——Arts. 142 and 144—Suit by auction-purchaser for possession—Symbolical possession — Starting point.

Time begins to run not from the date of sale at which the plaintiff purchased the property but from the time when the plaintiff obtained symbolical possession of the same, and a suit brought by the plaintiff within twelve years from such date for establishment of his right by purchase is not barred by limitation. (1906) 5 C.L.J. 55.

——Art. 144—Symbolical possession—Judgment-creditor and judgment-debtor—Limitation.

As between the judgment-creditor or his assigns on one side and the judgment-debtor or his heirs on the other, symbolical possession under the execution of a decree is as good as actual possession to give the purchaser or his assigns the right to bring his suit for possession within twelve years from that date. (1900) 25 B. 358=2 Bom. L. R. 1087. Also 27 M. 262; 7 C.L.J. 640.

——Arts. 142 and 144—Decree for possession — Failure to execute—Effect of.

Though a decree for possession has become incapable of execution on account of failure to apply for execution within limitation, the right established by the decree remains. 35 Bom. 79, Foll.

But the right cannot be the basis of a subsequent suit, and the plaintiff, who has neglected to execute the decree till it is time-barred, cannot any the more on that account bring another suit for possession whether founded on the decree or on the continued occupation of the property by the defendant. 5 Bom. 382, Foll. 114 Ind. Cas. 269=30 Bom.L.R. 1583.

——Arts. 142 and 144—Grant for maintenance—Grantor obtaining decree for resuming possession of property granted but, possession remaining with grantee even thereafter for more than 12 years—Suit by grantor for possession is barred. A.I.R. 1924 Pat. 721, affir. 109 Ind. Cas. 818=9 Pat.L.T. 483=48 C.L.J. 104=28 M.L.W. 24=13 Bom. L.R. 1372=A.I.R. 1928 P.C. 165=55 M.L.J. 251 (P.C.).

5. Burden of proof.

See also NOTE 14.
(a) General.
(b) Adverse possession.
(c) Possession within twelve years.

5. (a) Burden of proof—(General).

——Art. 142—Plaintiff out of possession—Need for proof of subsisting title.

A plaintiff out of possession cannot succeed in a suit for possession without proof of title. This title which he must prove is not title anterior to the suit. It would not be enough to prove that plaintiff had title say 15 or 20 years before suit. It should be a subsisting title. A subsisting title would involve proof of title in addition to possession within 12 years. If, therefore, a plaintiff bases the case on the permissive character of his defendant's possession and fails to prove it, he may succeed if his title and possession within 12 years have been proved. It is only on proof of subsisting title that a defendant can be called upon to prove his adverse possession. It would not be necessary to go into the question of defendant's adverse possession if plaintiff has not proved his subsisting title in the suit property. I. L. R. (1940) Mad. 953 (F.B.), Foll. A.I.R. 1950 Assam 55.

——Arts. 142 and 144—Proof that plaintiff has subsisting title—Necessity of — Plaintiff alleging ownership and prior possession—Defendant claiming title by transfer—Presumption.

When a man sues for the possession of property, which is in the possession of another, he must show that he has a subsisting title to the property. It is not enough for him to show that he once had a title to that property. One of the ways in which he can show that he has a subsisting title is to bring evidence to show that he once owned the property, and that at the time he was unlawfully dispossessed, he was still the owner of that property. It cannot be said that the presumption always is that where a man has once been the owner of land, he continues to be owner of the land.

Where the plaintiff to a suit for possession alleges prior possession and ownership and the defendant puts forward a title to land by way of a definite transfer, no presumption can arise in favour of the continuance of the plaintiff's anterior ownership, and on his failing to prove the permissive nature of the occupation, the plaintiff cannot succeed without at first showing that he had been in possession within twelve years of bringing the suit. 8 Rang. 516=A.I.R. 1936 Rang. 124 =161 Ind. Cas. 833.

——Arts. 142 and 144—Suit for possession—Plaintiff proving title.

It cannot be said that in every suit for possession where the plaintiff had established his title, it lies on the defendant to prove his adverse possession, even though the plaintiff had come into Court alleging his possession and dispossession. 8 R. L. 879=A. I. R. 1936 Lah. 208=17 L. 449=38 P.L.R. 988=162 Ind. Cas. 330.

——Arts. 144 and 142—Suit based on title—Burden of proof of adverse possession.

When a plaintiff comes into Court relying upon his title, it is not necessary for him, as in a case falling under Art. 142, to prove that he had been in possession at a period within twelve years prior to the commencement of the suit. It is sufficient if the plaintiff establishes a **prima facie** title and it is then for the defendant to substantiate the plea of adverse possession. 34 P.L.R. 163=A.I.R. 1933 Lah. 105=141 Ind. Cas. 234.

——Arts. 144 and 142—Suit on title—Onus.

A suit based on title and not prior possession and dispossession falls under Art. 144 and not under Art. 142 and it is not necessary for the plaintiff, whose title has been established, to prove his own possession within twelve years. The onus is on the defendant to prove adverse possession.

Art. 142 is restricted to suits which are in terms and substance based on the plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. 15 R.D. 566=8 O. W. N. 921=A.I.R. 1931 Oudh 382=134 Ind. Cas. 599.

——Arts. 142 and 144—In cases falling under Art. 142, the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature, an enquiry into the question of adverse possession is irrelevant.

In cases falling under Art. 144, where the defence is one of title acquired by adverse possession for more than 12 years. it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit. A. I. R. 1931 Oudh 177=8 O.W.N. 349=136 Ind. Cas. 642.

——Art. 144—Where plaintiff claims as heir to a life-holder who is not heard of since over 7 years and defendants are in possession for over 12 years. Art. 144 applies and plaintiff must prove date of death within 12 years of suit. 12 M.I.A. 342; 5 Cal. 36, Appr. 93 Ind. Cas. 280=5 Pat. 312 =53 I.A. 24=24 A.L.J. 105=1926 M.W.N. 203 =7 P.L.T. 163=3 O.W.N. 335=43 C.L.J. 249 =28 Bom.L.R. 855=30 C.W.N. 721=A.I.R. 1926 P.C. 9=50 M.L.J. 289 (P.C.).

5. (b) Burden of proof—Adverse possession.

——Art. 144—Plaintiff establishing relationship of landlord and tenant—Defendant must prove ouster.

Where in a suit for ejectment the Court finds that the defendants' occupation is not independent of the plaintiff that is to say, not on his own independent title but as a tenant under the plaintiff it is necessary for the defendant, in order to succeed, to establish ouster, that is, assertion of hostile title as against the plaintiff and claiming title on his own account and after such assertion to the knowledge of the plaintiff, his remaining in possession for the statutory period of 12 years or more. A.I.R. 1946 Pat. 185=12 B.R. 260=222 Ind. Cas. 378.

——Art. 144—Burden of proof—Adverse possession.

Per **Malik, J.**—It is for the person claiming adverse possession to prove that such possession was adequate in continuity, in publicity and in extent. (1945) A.L.J. 11=I.L.R. (1945) All. 75=A.I.R. 1945 All. 121=1945 A.W.R. (H.C.) 414=222 Ind. Cas. 196.

——Art. 144—Plea of ouster.

Suit for mandatory injunction for removal of construction—Plaintiff proving dispossession within 12 years—Plea of ouster—The burden is on defendant to establish exclusive possession from a date beyond 12 years. 1942 O.W.N. 281 (All.).

——Art. 144—The burden of establishing title to property by reason of possession for a certain requisite period lies upon the person who asserts

such possession. It would be contrary to all legal principles to permit the squatter to put the owner to a negative proof upon the point of possession.

Where during the course of pleadings the acquisition of tenancy is expressly given up, a person having a title can no doubt be defeated by proving adverse possession but it must be shown how and when possession began adversely for the period of twelve years, otherwise the title-holder succeeds. 19 N.L.J. 78=167 Ind. Cas. 801.

——Arts. 144 and 142—Suit by proprietary body against occupiers of shamilat.

Where, in a suit by some of the proprietors of a village for ejectment of the defendants who had been cultivating portions of the shamilat for a considerable time, the defendants denied the title of the proprietary body and claimed the land as theirs:

Held, that the suit was governed by Art. 144 and not by Art. 142, and the onus was on the defendants to prove adverse possession for 12 years.

In a suit which does fall under Art. 142, the fact that the date of dispossession is not given or proved is immaterial, for, if the plaintiff can show possession within twelve years, the fact that he is not in possession at the time he institutes his suit establishes that sometime in the interval he has been dispossessed. A.I.R. 1934 Lah. 245=144 Ind. Cas. 72.

——Art. 144—Adverse possession—Onus.

Per Wort, J.—In a case under Art. 144, the onus is upon the defendants to show that they had got a title at the time of action by adverse possession. 13 P.L.T. 121=11 Pat. 165=A.I.R. 1932 Pat. 145=142 Ind. Cas. 246.

——Art. 144—Burden of proof — Plaintiff basing claim on title—Onus is on defendant to prove adverse possession.

The rule that the onus is upon plaintiffs to prove their possession prior to the time when they were admittedly dispossessed applies only to the case of a plaintiff basing his claim on dispossession. Consequently, where plaintiff bases his claim on title it is for the defendant to establish his adverse possession over a period of twelve years. 41 All. 669, Foll. 122 Ind. Cas. 81=31 P.L.R. 231 A.I.R. 1930 Lah. 608.

——Art. 144—Suit for possession based on title— Suit is governed by Art. 144 and if defendant sets up adverse possession, burden is on him to make out his case, not for plaintiff to make out possession, within limitation. 7 O.W.N. 504=A.I.R. 1930 Oudh 310 =126 Ind. Cas. 703.

——Art. 144—Plea of adverse possession—Defendant must prove.

In a case where the suit is resisted on ground of acquisition of title by adverse possession, it is not for the plaintiff to prove his possession within 12 years. The paramount question is of title and if the title vests in the plaintiff he is entitled to succeed, even if he fails to establish any alleged tenancy or license by the defendant, unless the defendant is able to establish his adverse possession under Art. 144. A.I.R. 1927 Lah. 32; A.I.R. 1927 Lah. 70 and A.I.R. 1916 P.C. 21, Foll. 117 Ind. Cas. 384 (Lah.).

——Art. 144—Suit on title—Defendant to prove adverse possession.

Plaintiffs were the owners of the land in suit and the defendants were in possession. Plaintiffs filed a suit for possession. The defendants contended that they held land in their own rights by adverse possession for more than 40 years. It was found that the land remained uncultivated from the year 1907 to 1919 and the suit was brought on 31st August, 1921. All along in the Jamabandi the plaintiffs had been described as owners and defendants as in possession,

Held, that the onus of proving adverse possession lay on the defendants and the suit was governed by Art. 144, and not by Art. 142. A.I.R. 1916 P.C. 21, Foll. A.I.R. 1929 Lah. 596.

——Art. 144—Burden of proof—Adverse possession.

The onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. A.I.R. 1916 P.C. 21, Foll. 100 Ind. Cas. 336=9 L.L.J. 9=28 P.L.R. 55=A.I.R. 1927 Lah. 777.

——Art. 144—Where in a case under Art 144 plaintiff's title is proved, the burden of proving adverse possession is on the defendant. 97 Ind. Cas. 135=8 P.L.T. 129.

——Art. 144—Plaintiff proving title — Defendant must prove adverse possession for 12 years. A.I.R. 1924 Oudh 286 and 30 Mad. 617 (P.C.) Foll. 94 Ind. Cas. 855 (Oudh).

——Art. 144—Title of plaintiff proved or admitted—Defendant must prove adverse possession for 12 years.

Where a plaintiff sues on the strength of his title without any reference to prior possession or dispossession in such a case it would seem that on the proper construction of Art. 144, the plaintiff would be entitled to succeed on proof of his title, unless the defendant is able to displace it by proof of adverse possession by himself or his predecessor-in-title for the whole statutory period. In a suit falling within Art. 144 the initial onus on plaintiff is to establish his title and he is not under an obligation to prove his possession within 12 years of the suit. On the contrary, when the plaintiff's title has been proved or is admitted, the burden is on defendant to establish that he, or persons through whom he claims has or have been in possession adverse to the plaintiff for over 12 years before the suit. The defendant must also prove when his possession became adverse. It is settled law that the onus of establishing title to property by reason of possession for a certain requisite period lies on the person asserting such possession. 39 Mad. 617 (P.C.), Foll. 92 Ind. Cas. 825=29 O.C. 131=13 O.L.J. 400 =A.I.R. 1926 Oudh 313.

——Art. 144—Plaintiff need prove only title—Onus is on defendant to prove adverse possession for 12 years.

In cases falling under Art. 144 where the defence is one of title acquired by adverse possession for more than 12 years it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit. So far as the onus on the claimant in such a case lies

it is satisfied by proof of title, and it is then for the defendant to establish his plea of adverse possession before the suit can be dismissed as barred by limitation. 39 Mad. 617 and 41 All. 669, Foll. 79 Ind. Cas. 964=27 O.C. 130=11 O.L. J. 251=A.I.R. 1925 Oudh 42.

——Art. 144—Where the title was shown to be with the plaintiffs.

Held, it was for the defendants to prove their adverse possession. 5 L.R.A. Civ. 354=A.I.R. 1924 All. 924.

——Art. 144—When the dispossession by defendants is within 12 years of the suit the onus of proving adverse possession is on the defendants. 79 Ind. Cas. 1038=A.I.R. 1924 Cal. 977.

——Arts. 144 and 142—Adverse possession—Burden of proof.

Where the plaintiff was a reversioner of the persons who were previously in possession of the property,

Held, that title was with them and it is for the defendants who seek to avoid that title on a plea of adverse possession to establish it. 77 Ind. Cas. 705=A.I.R. 1923 All. 563.

——Art. 144—Title of plaintiff proved—Onus is on defendant to prove adverse possession—Possession to be adverse must have all the qualities of adequacy, continuity and exclusiveness. 77 Ind. Cas. 564=36 C.L.J. 472=A.I.R. 1923 Cal. 82.

——Art. 144—Plaintiff proving title—Defendant to prove adverse possession.

In a suit by an inam certificate-holder to recover possession of lands alienated by the predecessor, defendant admitted the title of the plaintiff's predecessors, but sought to show that title was extinguished by adverse possession.

Held, that Art. 144 of the Limitation Act is applicable and it was for defendant to show when his alleged possession under the article became adverse. 59 Ind. Cas. 473 (Nag.).

——Art. 144—Proof of title—Adverse possession.

Proof of identity together with the absence of evidence by the defendant does not establish a title to property, when the plaintiff claiming it was absent for 40 years. He must let in strong and cogent evidence to satisfy the court as to his title. 50 Ind. Cas. 870 (Cal.).

——Art. 144—Proof of title—Onus.

In a suit for possession without dispossession, the burden of proof is on plaintiff to prove title and that defendants' possession is not adverse, is shifted by a prima facie case but not by a mere entry of his name in the revenue record. 42 Ind. Cas. 890 (L.B.).

——Art. 144—Adverse possession—Onus.

Where Art. 144 applies it is for the plaintiff to prove his title and then the onus of adverse possession lies on the defendant. 9 Bur.L.T. 84=32 Ind. Cas. 568.

——Art. 144—Adverse possession—Onus.

To invoke the aid of Art. 144, it lies upon the defendant to show that his possession became adverse to the plaintiff not less than twelve years before suit. (1903) 5 Bom. L. R. 742. Also (1910) 34 Mad. 402=20 M.L.J. 323=5 Ind. Cas. 491.

——Art. 144—Time when adverse possession commences—Onus.

When in a suit for possession a defendant sets up adverse possession under Art. 144, Limitation Act, he must show when the adverse possession commenced. (1902) 4 Bom.L.R. 99=26 Bom. 442.

5. (c) Burden of proof—Possession within twelve years.

——Art. 142 — Suit or possession — Burden of proving dispossession within 12 years of suit.

Where a plaintiff suing for possession has been found to have been dispossessed or his discontinued possession on a certain date, the burden lies on him to prove that the suit was brought by him within twelve years of that date, and upon his failure to discharge the burden, his suit is liable to be dismissed by reason of Art. 142, Limitation Act. A.I.R. 1950 Assam 57.

——Art. 142—Proof of possession within 12 years of suit—Declaratory decree.

A declaratory decree pure and simpliciter or even a decree for possession not effectively executed cannot satisfy the requirement of proof of possession within 12 years of suit which is laid down by Art. 142. 1949 M.W.N. 252=A.I.R. 1949 Mad. 673=62 L.W. 253=(1949) 1 M.L.J. 428.

——Art. 142—Plaintiff alleging dispossession by defendant—If can succeed on proof of discontinuance of possession.

In a suit governed by Art. 142 of the Limitation Act, the plaintiff has to establish that his suit is within 12 years from the date of his dispossession or discontinuance of possession on his part. If he avers in the plaint that the cause of action for the suit took place on the date he was dispossessed by the defendant, the question of discontinuance of possession does not arise for consideration. If he fails to prove dispossession by the defendant on the date alleged, the requirements of law will be satisfied if it is found that the plaintiff was in possession till some time within twelve years of the suit. In such a case the plaintiff is in fact allowed to prove a case of discontinuance of possession rather than dispossession. It would be more a question rule of pleadings and fairness of the trial rather than a question of law to determine whether the plaintiff should be permitted to take a stand on an alternative provided by law but not pleaded by him. Even if a case of discontinuance of possession be acceded to him, he will have to prove specifically how and by what act of the defendant and when the discontinuance of possession took place. A.I.R. 1948 Pat. 391.

——Art. 142—Possession within statutory period—Proof — Possession shown in Record of Rights—Value of—Presumption as to continuity of possession.

A plaintiff suing for possession alleging dispossession by the defendant, must prove his possession within the statutory period. If he relies on the Record of Rights, the actual presumption of correctness which it carries is merely that he was in possession at the time the record was made. The general rule of evidence in favour of presum-

ing the continuity of things shown to exist at a prior date cannot be availed of in suits for ejectment. A.I.R. 1947 Pat. 475.

——Art. 142—Plaintiff must prove possession within twelve years of dispossession.

A suit for possession by the plaintiff alleging possession of his predecessor-in-interest, till dispossession by the defendant falls under Art. 142 and the plaintiff must prove his possession within twelve years of the alleged dispossession. A.I.R. 1941 Cal. 632=197 Ind. Cas. 756.

——Art. 142—Dispossession—Onus.

Where the plaintiffs come to Court on a case of dispossession, Art. 142 is applicable. The onus is on the plaintiffs to prove that they were in possession within twelve years of the suit. A.I.R. 1941 Cal. 193=72 C.L.J. 320=44 C.W.N. 935=195 Ind. Cas. 412.

——Art. 142—Burden is on plaintiff.

Art. 142 applies to a suit for possession based on title where the plaintiff alleges his dispossession and the plaintiff has to prove his possession within 12 years of the suit. 1941 O.W.N. 615=1941 R.D. 466=A.I.R. 1941 Oudh 415=193 Ind. Cas. 686.

——Art. 142—In a suit to which Art. 142 applies the onus lies on the plaintiffs having established their title to prove that they had been in possession, whether actual or constructive within 12 years before the institution of the suit. A.I.R. 1940 All. 428=1940 A.W.R. 387=191 Ind. Cas. 602.

——Art. 142—Onus is on plaintiff.

Where a plaintiff who has purchased a tenure in a certificate sale brings a suit for possesion on the ground that he had obtained **khas** possession but was subsequently dispossessed by the defendants and the defendants maintain that they had been in possession as tenants under the original owner and have continued in possession ever since, the onus is on the plaintiff to prove that he was in **khas** possession of the land within 12 years of the date of the suit. A.I.R. 1940 Cal. 194=70 C.L.J. 539=189 Ind. Cas. 540.

——Arts. 142 and 144—The plaintiff must prove his possession within twelve years of the institution of the suit for possession. (1940) 42 P.L.R. 497.

——Arts. 142 and 144—Co-sharers — Possession within 12 years—Onus on plaintiff.

Even in the case of a suit by a co-sharer it is incumbent on the plaintiff to prove that he was in possession of the land in dispute within twelve years before the institution of the suit. (1940) 42 P.L.R. 497.

——Arts. 142 and 144—Onus is on plaintiff—Possession within 12 years.

A plaintiff who is suing for possession of property in the occupation of another cannot rest his case on title alone. He must show that he has exercised rights of ownership by being in possession within 12 years of suit. The burden then lies upon the plaintiff to prove that he was in possession within 12 years of suit and not upon the defendant to prove adverse possession for a period of 12 years. (1940) 2 M.L.J. 190=52 L.W. 149 =(1940) M.W.N. 747=A.I.R. 1940 Mad. 798=I.L.R. (1940) Mad. 953=192 Ind. Cas. 488 (F.B.).

Overrules (1) A.I.R. 1927 Mad. 287=99 Ind. Cas. 312. (2) A.I.R. 1925 Mad. 834=87 Ind. Cas. 386.

——Arts. 142 and 144—Plaintiff to prove possession.

If a plaintiff sues for possession alleging dispossession (and if the cause of action is dispossession, he must truthfully allege it), he must, all question of title apart, prove possession within 12 years or his suit is barred by time. The defendant need not in that case, prove adverse possession. It is not necessary for the plaintiff to prove possession on a particular day; proof of possession within twelve years is enough. A.I.R. 1940 Sind 49 =188 Ind. Cas. 107=I. L. R. (1939) Kar. 793.

——Art. 142—Independent trespassers in continuous possession for more than twelve years—Suit by owner falling under Art. 142 is barred.

The wording of Art. 142 shows clearly that the burden of proving that he has been in possession of the property in dispute within twelve years of the institution of his suit rests on the plaintiff and he cannot be held to have discharged this burden by showing that the defendant had not been in possession for a period of twelve years, but that trespassers other than the defendant had occupied the land within a period of twelve years from the institution of the suit. If independent trespassers have been in continuous possession without a break for more than twelve years, the plaintiff's suit falling under Art. 142 is barred by limitation. A.I.R. 1939 Lah. 217=41 P.L.R. 538=I.L.R. (1939) Lah. 399=184 Ind. Cas. 179.

——Arts. 142 and 144—In a case which falls under Art. 142, the plaintiff must prove not only title but also possession within 12 years of suit. But before that article can apply, it must be shown either that the plaintiff was dispossessed or that he discontinued the possession. This can be established either by the facts admitted in the plaint or pleadings, or if not admitted there, then by the facts actually found. But unless that is done, the case cannot come under Art. 142 and so the residuary Art. 144 would apply. A.I.R. 1939 Nag. 7=1938 N.L.J. 418=I.L.R. (1941) Nag. 655=181 Ind. Cas. 203.

——Art. 142—Plaintiff proving his title—Onus to prove dispossession, if shifts on defendant.

Where a suit for declaration of title and recovery of possession of certain property is brought by the plaintiff on the ground that while in possession of the property, he was dispossessed by the defendants within 12 years of the date of the suit, it is governed by Art. 142.

In cases under Art. 142, although the plaintiff's title is proved, the onus is on the plaintiff to show that he was in possession within 12 years of the suit. The onus is not on the defendants to show that the plaintiff lost his title by adverse possession on the part of the defendants.

Where a suit for possession is brought about 11 years 11 months and 26 days from the date of the dispossession, and the defendants have admittedly been in adverse possession for over 11 years 11 months, the onus lies heavily on the plaintiff to show that he was in possession within 12 years of

the date of the suit. 66 C.L.J. 359=A. I. R. 1938 Cal. 206=175 Ind. Cas. 247.

——Art. 142—Nature of proof.

A plaintiff who comes into Court and asks for possession is bound to disclose a title to the property or at the very least prior possession and a vague statement to he effect that the land "came into the ownership of the plaintiff" without disclosing how, is not a disclosure of title, not even of possessory title.

Art. 142, Limitation Act, applies to a suit brought for possession of property after its dispossession by the defendant, and the article applies, irrespective of the allegation in the plaint, the moment the plaintiff establishes dispossession or discontinuance of possession though he can assign no date to it. The onus is on the plaintiff to prove not only his title but also possession within 12 years of suit. A.I.R. 1937 Nag. 129=I. L.R. (1937) Nag. 254=171 Ind. Cas. 271.

——Art. 142—Nature of proof—Land capable only of occasional occupation.

Though, in a suit for ejectment, the plaintiff must prove his possession within 12 years of the suit, the nature of proof will vary according to the nature and circumstances of the land in suit. If the land is of such a nature that it can hardly only be occasionally occupied, then it will be impossible for the plaintiff to prove continuous possession over it, and in such a case, the presumption of title following possession is available to the plaintiff. A.I.R. 1937 Pat. 422=3 B.R. 711=170 Ind. Cas. 385.

——Art. 142—Suit by owner alleging dispossession — Possession and dispossession within 12 years mus' be proved. 38 P.L.R. 365.

——Art. 142—Plaintiff's case for possession based on dispossession.

Where the plaintiff's case is one for possession based on dispossession, it falls within the terms of Art. 142, and the burden is upon the plaintiff to establish his possession within limitation. 1935 O.W.N. 8=1935 R.D. 12=10 Luck. 513=A.I.R. 1935 Oudh 88=153 Ind. Cas. 371.

——Arts. 142 and 144—Plaintiff proving his title —Defendant may prove adverse possession—Plaintiff failing to prove possession though asked to do so:

Held, plaintiff cannot object that burden was wrongly put on him and claim that his possession should be presumed from title. A.I.R. 1934 Lah. 1019 (2).

——Arts. 144 and 142—Suit based on title—Possession within twelve years of date of suit—Whether should be proved by plaintiff.

A suit for possession of immovable property based on the plaintiff's title and alleging that shortly before the plaint his title was denied by the defendant who was in posssion and who alleged that he himself was the owner is governed for purposes of limitation by Art. 144 and not by Art. 142. In such a suit, it is not necessary for the plaintiff to prove that he has been in possession within twelve years of date of suit. (1933) A.L.J. 105 =55 A. 209=A.I.R. 1933 All. 775=143 Ind. Cas. 497.

——Art. 142—Where, in a suit for possession, the plaintiff alleges that he has been recently dispossessed, the suit falls within Art. 142, and it is not for the defendant to prove his adverse possession for more than twelve years but for the plaintiff to prove his possession and dispossession by the defendant. A. I. R. 1933 Lah. 627=143 Ind. Cas. 428.

——Art. 142—Date of dispossession, proof of.

Where the plaintiff claimed legal title to certain lands and alleged that the defendants had entered upon these lands and interrupted her possession:

Held, that in order to enable her to sue for recovery, it was incumbent upon her to show not only that she had a good title but also that the date of dispossession was less than twelve years from the date of filing the suit; and that as the plaint clearly alleged title and dispossession, Art. 142 applied to the case and not Art. 144. A.I.R. 1933 Rang. 48=144 Ind. Cas. 274.

——Art. 142—Suit for possession — Possession within twelve years — Onus of proof—Proof of title — Neither party able to prove possession — Onus, whether discharged—Presumption of possession from title.

As a general rule where the plaintiff seeks on the strength of title and dispossession to oust defendant in possession, he must prove possession within 12 years of suit.

But when each party who claims possession is unable to prove any act of effective possession and, therefore, the normal method of possession is not referable to any such act, possession must follow title, since the defendant is no more able than the plaintiff to claim effective possession for 12 years before the suit. Possession in such circumstances is with the party holding title and he should not be deprived of what he has acquired merely because he, equally with the other side, has exaggerated his case in the pleadings by alleging definite act of possession and has failed to prove this. A.I.R. 1931 Mad. 644=33 L.W. 747=61 M.L.J. 224=54 M. 622=133 Ind. Cas. 9.

——Arts 142 and 144—If, in a suit for possession, the plaintiff fails to show that he was in possession of the property within 12 years from the date of the filing of the plaint, the suit must be held to be time-barred. 8 O.W.N. 797=134 Ind. Cas. 475.

——Art. 142—Claimant must prove his possession within 12 years—Inquiry into question of adverse possession is irrelevant.

In cases falling under Art. 142 the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an inquiry into the question of adverse possession is irrelevant. It is not enough for the claimants to show an anterior title. The burden of proof is on him to prove possession at some time within 12 years next preceding the suit and this would shift the burden on to the defence to show that they were entitled to retain possession. 121 Ind. Cas. 84=6 O.W.N. 908=A.I.R. 1930 Oudh 46=5 Luck. 410.

——Arts. 142 and 144—Burden of proof—On whom lies.

In suit under Art. 142 burden of proof lies on plaintiff and in suit under Art. 144 it lies on defendants—Suit for possession of land — But defendants proved to be owner at one time—Plaintiff in possession for last 15 or 20 years—

Plaintiff claiming that defendant obtained possession from him—Suit falls under Art. 142 and so if defendant's possession is not proved to be permissive, plaintiff must prove that he was in possession within twelve years of suit. 117 Ind. Cas. 591=7 Rang. 85=A.I.R. 1929 Rang. 153.

——**Arts. 142 and 144**—Plaintiff sued for possession on the ground that he was the owner of a house which, he alleged was lent to the defendant for temporary use. The latter denied the fact and the plaintiff was unable to prove it.

Held, that the plaintiff ought to have proved possession within 12 years of the suit and the onus was not on the defendant to prove adverse possession. 41 All. 669, Not Foll. 115 Ind. Cas. 534=A.I.R. 1928 Lah. 896.

——**Arts. 142 and 144—Encroachment by defendant—Plaintiff to prove possession within 12 years—Plaintiff's title—Effect of.**

In a case of encroachment it is undoubtedly for the plaintiff to establish that his possession was within 12 years but that in the question of evidence the initial fact of the plaintiff's title comes to his aid, with greater or less force according to the circumstances established in evidence. 16 Cal. 473 (P.C.) and 8 Bom.L.R. 400 (P.C.), Foll. 115 Ind. Cas. 420=10 L.L.J. 517.

——Arts. 142 and 144—Suit to eject defendants—Plaintiff to prove possession within 12 years of suit.

Where in a case for possession by ejectment of the defendants who, it was alleged, had taken forcible possession of the lands two years before the institution of the suit, it was expressly stated in the plaint that the defendants had no right whatsoever dispossess the plaintiffs,

Held, that the burden of proving possession by the plaintiffs within 12 years of the institution of the suit was on them. 109 Ind. Cas. 320=9 L. L.J. 334=A.I.R. 1928 Lah. 32.

——Art. 142—Burden of proof—Extent — Proof of possession within 12 years and dispossession by defendant, is sufficient—Actual date of dispossession need not be proved.

In a suit for possession under Art. 142 what has to be shown is possession and dispossession within twelve years, and to do so it is sufficient to prove possession within twelve years, which can usually be done by the revenue records, if unrebutted, and further, the absence of possession or rather the possession of the defendant on date of suit. The actual date of dispossession need not be proved. 109 Ind. Cas. 266=8 Lah. 655 =29 P.L.R. 77=A.I.R. 1928 Lah. 98.

——Art. 142—In a suit for possession instituted on the allegation of possession and subsequent dispossession it is incumbent on the plaintiffs to establish that they had been in possession within 12 years before the institution of the suit, and proof of an anterior title cannot relieve the plaintiffs from showing their possession at some time within the statutory period of 12 years. 108 Ind. Cas. 732 (Cal.).

——Art. 142—Plaintiff must prove dispossession within 12 years before suit.

The onus is not on defendants to prove that dispossession of the plaintiffs by defendants took place further back than 12 years from the beginning of the suit but it is for the plaintiffs to prove dispossession within that period. 110 Ind. Cas. 623=A.I.R. 1928 Pat. 653.

——Art. 142—Suit for possession alleging possession and dispossession by the defendant —Plaintiff must prove his possession within 12 years, and not that defendant should prove adverse possession for over 12 years. 108 Ind. Cas. 374=A. I.R. 1928 Lah. 704.

——Art. 142—Burden of proof is on plaintiff.

Where the plaintiffs allege possession and dispossession the onus of proving that they had been in possession within 12 years before suit is on them: and the fact that the land remained uncultivated for some harvests does not show that defendants were not in possession for that period. 107 Ind. Cas. 779 (Lah.).

——Art. 142—Burden of proof — Land incapable of possession — Plaintiff must prove posseession within 12 years — When land is incapable of possession plaintiff must prove his title as well, and show that no one else was in possession.

In an action for ejectment under Art. 142 the plaintiff has always to show that he was in possession within twelve years of suit. But in the case of land which cannot be availed of at all, such as jungle land, the plaintiff may show that he was in possession before 12 years and make a case by showing as an additional fact either that the land in question was incapable of possession by any one or that in fact no one was interfering with his right during the 12 years before suit. It is possession, not user, that has to be shown. 105 Ind. Cas. 309=31 C.W.N. 806=A.I.R. 1928 Cal. 118.

——Arts. 142 and 144—Burden of proof is on plaintiff — Declaratory decree in favour of plaintiff is not possession.

Plaintiffs, owners of a one-third shares in the land in suit, instituted a declaratory suit in respect of that share, founding their cause of action on a denial of their title in partition proceedings The suit was decreed. Plaintiffs subsequently instituted the suit for the possession of their one-third share. It was alleged in the plaint that after the previous suit had been decreed the plaintiffs had been receiving their share of the produce of the property till about a year before the date of the present suit. The plea of the defendants was adverse possession for more than twelve years.

Held, that in order to succeed it was necessary for the plaintiffs to prove that they have been in possession of the property in suit at some time within twelve years from the institution thereof and that the mere fact that they had obtained a declaratory decree was not sufficient if they had not followed the declaratory decree by any action to make their title perfect by obtaining possession. 45 P.R. 1914 and A.I.R. 1923 P.C. 175, Foll. 99 Ind. Cas. 956=8 L.L.J. 572=28 P.L.R. 48.

——Arts. 142 and 144—Claimant must prove possession within 12 years of suit—Enquiry as to adverse possession is irrelevant. A.I.R. 1925 Oudh 42, Foll. 98 Ind. Cas. 1061 (Oudh).

——Art. 142—Suit for possession and dispossession — Plaintiff must prove his possession within 12 years—Ejectment. 98 Ind. Cas. 912=31 C. W.N. 60.

——Arts. 142 and 144—Suit for ejectment—Plaintiff must show that he was in possession within 12 years of suit. 5 P.L.J. 592, Expl. 97 Ind. Cas. 267 (Pat.).

——Art. 142—Entry of defendants' name as a tenant-at-will in Revenue Records—If plaintiff entitled to succeed.

Where a plaintiff sues for possession alleging in the plaint dispossession he must prove that the dispossession took place within 12 years of suit. The entry of the defendant as tenant-at-will in the Revenue Records does not entitle the plaintiff to a decree on the ground, his possession cannot be adverse. 89 Ind. Cas. 687 (Lah.).

——Arts. 142 and 144—Plaintiff, a zamindar, sued for possession of a house. It was known dennitely that it was occupied at one time by a person who was not a tenant or raiyat of the zamindar. Furthermore, it was known that at no time the plaintiff had actual possession of it. At no time had the defendant or his predecessors acknowledged the title of the zamindar or paid any rent,

Held, that the suit could not succeed unless plaintiff proved possession within the statutory period. 89 Ind. Cas. 466=23 A.L.J. 874=6 L. R.A. Civ. 501=A.I.R. 1926 All. 82.

——Arts. 142 and 144—Onus of proof of possession is on plaintiff — Question of adverse possession is irrelevant. 16 Cal. 473; 17 Cal. 137, Foll. 79 Ind. Cas. 964=27 O.C. 130=11 O.L. J. 251=A.I.R. 1925 Oudh 42.

——Art. 142—Presumption of possession following title—When arises.

Where the plaintiff sued for possession on the allegation of dispossession.

Held, that Art. 142 is applicable and he is bound to prove possession within 12 years before suit. In order to prove this, he may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession. But if he relies on this presumption he must prove that the land was incapable of actual possession with twelve years before suit. 78 Ind. Cas. 679=51 Cal. 669=28 C.W.N. 637=A.I.R. 1924 Cal. 855.

——Art. 142—Burden of proof—Dispossession of defendant within 12 years.

Where the plaintiffs have not been in possession for more than 12 years, of land beyond the boundary line in dispute, determined by order of Revenue Officers 12 years back unless they can show that they had since that date dispossessed defendants, their suit is barred by limitation with respect to this land. 66 Ind. Cas. 471=1922 P. H.C.C. 114=3 P.L.T. 617=A.I.R. 1923 Pat. 96.

——Arts. 142 and 144 — Possession within 12 years must be proved.

In a suit by plaintiff for possession of land on the declaration of plaintiff's title to the same, plaintiff must show his possession with 12 years even assuming that the title is with him. 65 Ind. Cas. 914=A.I.R. 1923 Cal. 286.

——Arts. 142 and 144—Plaintiff must prove possession within 12 years. 69 Ind. Cas. 883=A.I.R. 1923 Nag. 95.

——Art. 142—Where the plaintiff has been dispossessed and the suit is one for recovery of possession, the onus is upon the plaintiff to prove that he was in possession within 12 years of the suit. 67 Ind. Cas. 673=26 C.W.N. 724=A.I.R. 1922 Cal. 557.

——Art. 142—Plaintiff to succeed has to prove that he has a subsisting title at the date of the suit and not only that he is entitled to possession, that is, he has to prove that he had been dispossessed or had discontinued his possession, within a period of twelve years. 69 Ind. Cas. 171=4 L. L.J. 382=A.I.R. 1922 Lah. 432.

——Art. 142—In a suit for possession after dispossession, the plaintiff must show possession within the statutory period of 12 years. A.I.R. 1922 Pat. 33.

——Arts. 142 and 144—If the plaintiff, in a suit for possession on a declaration of title, fails to prove that he ever exercised possession within 12 years before suit, and there is nothing to show that the land was not capable of ordinary occupation or cultivation, his suit is barred and the defendant need not prove adverse possession for 12 years. 62 Ind. Cas. 707 (Cal.).

——Art. 142—In a case for ejectment, the plaintiff where the defendant is proved to be in possession must in addition to proving his title, make out that the dispossession took place within 12 years of the suit, that is to say, that he was in possession and dispossessed within that period. 2 P.L.T. 55=1921 P.H.C.C. 118=A.I.R. 1921 Pat. 158=58 Ind. Cas. 773.

——Art. 142—Dispossession — Proof of within 12 years.

When a plaintiff sues for possession on the allegation that while in possession he was dispossessed by the defendant he must show the time of dispossession and he must bring the suit within twelve years from that date. 56 Ind. Cas. 40 (Pat.).

——Art. 142—Suit for alluvial land—Burden of proof.

Where a plea of limitation and denial of plaintiff's title is set up in a suit for possession to accretions by alluvion, the onus is on plaintiff, to prove title and possession within limitation. To prove the latter however it is sufficient to prove accrual within limitation or that though it had accrued before limitation it had remained within the limitation period waste land raising a presumption that possession followed title. 15 C.W.N. 887, foll. 34 All. 612=10 A.L.J. 190=17 Ind. Cas. 94.

——Art. 142—Onus.

In a case governed by Art. 142 the onus is on plaintiff to show dispossession within 12 years before suit. (1910) 20 M.L.J. 306=6 Ind. Cas. 667.

——Art. 142—Suit by vendee for possession of immovable property—Vendor out of possession—Burden of proof.

Where a vendee of immovable property sues for possession, his vendor not having been in possession at the time of the sale, it lies upon the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the suit. 16-B. 343, foll. And when in such a case the property sold was a share in a house belonging to two spearated brothers. It was held that the possession of one of the brothers could not be taken to be on behalf of the absent vendor. (1904) 28 A. 479=1906 A.W.N. 95=3 A.L.J. 334.

——Arts. 142, 144—Circumstances under which they apply—Onus of proof—Adverse possession.

Where a plaintiff has been dispossessed, he must show possession and dispossession within twelve years; but

where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit. (1902) 4 Bom.L.R. 721=27 B. 43.

6. Co-heirs.

——**Art. 144**—Person in possession as co-heir—Article 144 applies to such a case—But if he is in possession as customary heir, his possession is adverse from the beginning. A.I.R. 1944 Pesh. 45=216 Ind. Cas. 267.

——**Arts. 144, 120, 106, 123—Administration suit by Muhammadan heir against his co-heirs as regards immovable property.**

To a suit for administration against certain Muhammadan co-heirs by a person entitled to part of the interest of an heir, neither Art. 106 nor Art. 123, Limitation Act is applicable . The heirs of a Muhammadan succeed to his estate in specific shares as tenants-in-common and such suit is governed as regards immovable property by Art. 144 and as regards movables by Art. 120. A.I.R. 1940 P.C. 215=7 B.R. 210=53 L.W. 1=43 P. L.R. 63=45 C.W.N. 226=I.L.R. (1940) Kar. (P.C.) 410 (Sup.)=(1941) 1 M.L.J. 594=I.L.R. (1941) Bom. 8=73 C.L.J. 214=43 Bom.L.R. 388=1941 O.W.N. 734=1941 A.W.R. 1=1941 M.W.N. 729=67 I.A. 406= 191 Ind. Cas. 113 (P.C.).

——**Art. 144—Possession by one co-heir—Nature of—Evidence—Duty of Court—Limitation Act (Bhopal) 1901, Art. 134.**

For a suit for possession and declaration of title, the cause of action arises when the title is denied and the possession refused. Section 6, Limitation Act, has no application when the plaintiff, all along her minority, was under the impression that the possession of the defendant was on her behalf. It is when the plaintiff demands possession from the defendant and when the defendant refuses it, that the cause of action for suit arises. Under these circumstances, according to the nature of the suit, the limitation period under Art. 134 Bhopal Limitation Act, which is equivalent to Art. 144 of British Limitation Act, is 12 years and its commencement would be from the time when the defendant's possession became adverse to that of the plaintiff's . Where in such a suit the defendant has not proved adverse possession at all but on the contrary, he has indicated his readiness to give the plaintiff her share according to Muhammadan Law and the plaintiff has been admittedly in possession of a portion of the house in dispute, the question of adverse possession does not arise. Therefore, the right of suit during minority accruing to the plaintiff is not correct. The Court should first of all decide what the nature of the possession of the defendant is. Where the defendant himself claims to be also an heir of the plaintiff's father, and the plaintiff is also an heir according to the Muhammadan Law and both of them are in possession, the question of limitation does not arise. The possession of heirs under the Muhammadan Law will not be adverse till an heir is dispossessed of the property. 188 Ind. Cas. 872 (Bhopal).

——**Arts. 144, 123: Obiter.**—As between co-heirs, the possession of one is **prima facie** the possession of the others, and consequently the suit by one co-heir against another to recover his share in the property is governed by Art. 144 and not by Art. 123. A.I.R. 1940 Cal. 93=44 C.W.N. 221=186 Ind. Cas. 843.

——**Arts. 144, 120—Suit for share against co-heirs in possession and management of estate consisting of immovables and business.**

An estate partly consisted of immovable property and partyl of business. A suit was brought beyond 12 years of the death of the ancestor, for share in the estate of this deceased ancestor, against heirs in possession and management of the same :

Held, that so far as the suit related to immovable property it was barred under Art. 144 and it was also barred under Art. 120, so far as it related to taking an account of the business. A.I.R. 1936 Rang. 407= 166 Ind. Cas. 504.

——**Arts. 144, 123—Muhammadan co-heirs—Suit by one against others for his share of deceased's estate.**

A suit by one of the heirs o a deceased Muhammadan against his co-heirs for recovery of possession of his share out of the joint property left by the deceased is governed by Art. 144 and not by Art. 123. A.I.R. 1933 Lah. 784 (2)=14 L. 794=35 P.L.R. 121=148 Ind. Cas. 1143.

——**Art. 144—Muhammadan co-heirs.**

Where a Muhammadan dies leaving a number of co-heirs and only one of the heirs remains in possession of the property, his possession is not adverse to the other co-heirs in the absence of a clear denial of title and an overt act amounting to ouster, and the onus of proving adverse possession lies upon the party which urges that plea.

Where the title of the heirs relates to a number of properties, any assertion of adverse title with reference to any one of the properties, whether they are included in the plaint or not, might have some bearing upon the question of adverse possession.

Registration *per se* does not amount to notice to all the world.

Mere hostile feeling cannot amount to adverse possession or ouster.

The mere granting of lease by one of several co-heirs is not an ouster of the others. (1930) A.L.J. 1456= A.I.R. 1931 All. 193=131 Ind. Cas. 211.

——**Art. 144—Childless proprietor—Sale to some collateral heirs—Declaratory decree that sale is not binding on other collaterals—Death of proprietor—Failure of other collaterals to sue for possession—Effect.**

The property in dispute was owned one-half by the predecessors-in-interest of the plaintiffs and defendants Nos. 18 to 22 and the other half by *A*. a collateral of the aforesaid persons and defendants Nos. 1 to 17. In 1903, *A* sold his half share with other properties to the fathers of plaintiffs Nos. 1, 2 and 3. The predecessors-in-interest of defendants Nos. 1 to 17, who were collateral heirs of *A* obtained a decree in 1907, declaring that the sale was not binding on them. The possession, however, continued with plaintiffs Nos. 1 to 3, *A* died in 1919, and the estate of *A* devolved on the plaintiffs and defendants as collateral heirs. Defendants Nos. 1 to 17 applied for partition. The plaintiffs instituted a suit for a declaration in 1923 :

Held, (1) that as the sale by *A* was only to plaintiffs Nos. 1 to 3 the provisions of Art. 2 (*b*), Punjab Limitation Act (I of 1920), read with S. 28, Limitation Act, could not be availed of by the other plaintiffs who had to prove adverse possession for over 12 years :

(2) the possession of plaintiffs Nos. 1 to 3 since the sale in 1903 was not adverse till 1919, as *A* was alive till then and defendants Nos. 1 to 17 had no right to possession ;

(3) their possession subsequent to 1919 was that of co-heirs and was not adverse as there was no ouster of the defendants and the plaintiffs were not entitled to a declaration of sole ownership. A.I.R. 1931 Lah. 439 =131 Ind. Cas. 105.

——Arts. 144 and 123—Applicability—Suit by co-heir—One Mahomedan co-heir suing another co-heir for possession—Article 144 applies.

When a Mahomedan owner dies leaving several heirs, they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property his possession is ordinarily to be referred to his legal title. The other co-owners are accordingly in constructive possession of the property. If therefore, the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all and must fall under the general Art. 144, limitation running from the date when the defendant's possession became adverse. A.I.R. 1928 All. 467 (F.B.), *Foll.* 121 Ind. Cas. 785=7 Rang. 744=A.I.R. 1930 Rang. 72.

——**Art. 144**—Muhamedan co-heirs are presumably co-tenants until ousted. (1912) A.C. 230; A.I.R. 1929 Lah. 195, *Foll*; 89 P.R. 1888; 84 P.R. 1916; A.I.R. 1923 Lah. 519; A.I.R. 1927 Lah. 790; 97 P.R. 1890, *held overruled.* 118 Ind. Cas. 905=10 Lah. 849=31 P.L.R. 179=A.I.R. 1929 Lah. 464.

——Arts. 142, 144 and 123—Applicability of co-heirs.

The appropriate article for suits instituted by co-heirs for a share in the corpus of an inheritance is Art. 123, but if it can be shown that whoever holds the property is holding with the consent, express or implied, of all the heirs on behalf of them all, then Art. 142 or 144 would apply. A.I.R. 1924 Rang. 155; A.I.R. 1916 P.C. 145 and A.I.R. 1925 Rang. 228, *Foll.* 106 Ind. Cas. 828=5 Rang. 582=A.I.R. 1928 Rang. 6.

——Art. 144—Muhammadan Law—Co-heir in possession dispossessing another co-heir—Latter's suit for possession is governed by Art. 144 and not Art. 123.

When a Mahomedan owner dies leaving several heirs they all become co-owners and tenants-in-common. A joint owner is legally entitled to retain possession of joint property. Even if he is in exclusive possession of such joint property, his possession is ordinarily to be referred to his legal title. The presumption therefore is that his possession is lawful and therefore on behalf of all the co-owners. The other co-owners are accordingly in constructive possession of the property. As distinct shares have devolved on them, they all are presumed to have taken their legal shares although possession still remains joint. If therefore the co-owner in actual possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share of the property of an intestate, but is a suit to recover possession of the defined, though undivided, share of the co-owner in the possession of the other co-owners. Such a suit is not covered by Art. 123 at all, and must fall under the general Art. 144, limitation running from the date when the defendant's possession became adverse. A.I.R. 1926 All. 748, *Reversed*. 111 Ind. Cas. 809=51 All. 101=26 A.L.J. 1041=A.I.R. 1928 All. 467 (F.B.).

——Art. 144—Co-heir alienating comon property without other's consent—Time runs from date of alienation.

An alienating co-heir is to be regarded as an agent of the other co-heirs so that an alienation by him of common property without the consent of the rest is adverse to their interest and limitation runs from the date of alienation and not from the date of suit for partionti of common property. A.I.R. 1925 Rang. 40 and (1893-1900), L.B.R. 132, *Foll.* 101 Ind. Cas. 691=5 Rang. 93=A.I.R. 1927 Rang. 158.

——Arts. 142, 144 and 123—Applicability of—co-heirs.

Where a distributive share in the estate of a deceased is claimed, whether against an Administrator or a co-heir, or a person merely in possession, the article applicable is Art. 123. Where co-heirs agree to enjoy the property left by the deceased jointly without effecting a partition, Art. 142 or Art. 144 of the Limitation Act will apply. A.I.R. 1924 Rang. 155 and A.I.R. 1925 Rang. 233, *Foll.* 95 Ind. Cas. 514=5 Bur.L.J. 4=A.I.R. 1926 Rang. 95.

——Art. 144—Co-heirs in common enjoyment of property—Subsequent exclusion of some—Article 142 or 144 and not Art. 123 applies—Karen Christians are within this rule—Limitation Act, Art. 142.

Article 123 applies to a case of a claim to a share against co-heirs in possession of an estate when there was intestacy. But an exception should be made in respect of cases where the whole body of the heirs agree to enjoy jointly the property left by the deceased, without effecting a partition. In such cases Art. 142 or 144 would apply.

There is nothing to prevent the heirs of Karen Christians from taking possession of the estate and agreeing to enjoy it in common. Their title beomes complete when they take possession of the property, and when thereafter any of them are excluded from enjoyment, the cause of action arises on such exclusion and the article applicable is Art. 142. 88 Ind. Cas. 609=4 Bur.L.J. 76=A.I.R. 1925 Rang. 233.

——Art. 144—Heirs of a Mahomedan are co-sharers and unless express ouster is proved to the knowledge of the other party no limitation starts against the other party. 79 Ind. Cas. 174=46 All. 377=22 A.L.J. 307=5 L.R.A. (Civ.) 257=A.I.R. 1924 All. 384.

——Arts. 144 and 123—Co-heirs living as tenants-in-common—Art. 144 applies.

Where the members of a Mahomedan family continue to live as tenants in common without dividing the estate of a deceased ancestor, limitation will not run from the time of his death, and the article applicable for a suit for distributive share is Art. 144 and not Art. 123. 44 Bom. 942, *Foll.* 59 Ind. Cas. 780=45 Bom. 519=A.I.R. 1921 Bom. 56.

——Arts. 144 and 123—Co-heirs—Suit for possession by one heir against another—Whether Art. 123 or 144 applies.

A suit for recovery of possession by one heir against another is governed by Art. 144 and not by Art. 123, 34 M. 511=19 A. 169, Foll.; 15 M. 60, Diss. 17 O.C. 157=1 O.L.J. 225=24 Ind. Cas. 45.

——Art. 144—Co-heirs—Suit by Mahomedan for share of inheritance.

A suit by a Muhammadan for a share of the wife's property in possession of another sharer more than 12 years after the wife's death is governed by Art. 120, if the property is moveable and by Art. 144 if it is immoveable, 15 M. 60, Dissented from. 34 Mad. 511=(1910) M.W.N. 447=20 M.L.J. 288=8 M.L.T. 4=6 Ind. Cas. 50.

7. Co-mortgagors.

——Arts. 144 and 137—Co-mortgagor redeeming property—Sale of entire property—Representative-in-interest of non-redeeming mortgagor suing for recovery of possession on payment of proportionate amount:

Held, that Art. 144 and not Art. 137 was applicable. A.I.R. 1938 Rang. 65=176 Ind. Cas. 923.

——Arts. 144, 148—Redemption by one of several co-mortgagors—Article applicable—Possession of redeeming co-mortgagor, whether adverse.

The position of a co-mortgagor who redeems the whole of the mortgaged property is that of a charge holder and a suit by another co-mortgagor for possession of his share is governed by Art. 144 and not by Art. 148.

When a co-mortgagor redeems the entire property, his possession becomes adverse only when there is any open assertion of an exclusive title by him. A.I.R. 1933 Lah. 91=34 P.L.R. 239=141 Ind. Cas. 404.

——Arts. 144, 148—Redemption by one co-mortgagor—Suit by others for their shares.

The position of a co-mortgagor who redeems the whole of the mortgaged property is that of a charge-holder and not that of a mortgagee and a suit by another co-morrtgagor for possession of his share of the redeemed property is governed by Art. 144 and not by Art. 148.

Limitation in such a case does not begin to run from the date of redemption but only when the possession of the redeeming mortgagor becomes adverse by an open assertion of an exclusive title by him. 32 P.L.R. 622= A.I.R. 1931 Lah. 744=12 L. 671=135 Ind. Cas. 506.

——Art. 144—Co-mortgagors.

A person should not be considered to be in adverse possession of property belonging to another when he does not deny the ownership of the latter but merely claims a charge over it and refuses to allow the latter to enter into possession until payment of the charge.

The possession of a co-mortgagors who redeems the entire property and refuses to give up possession to the other co-sharers until they pay their share is not, therefore, adverse to the latter. A.I.R. 1931 Lah. 313= 134 Ind. Cas. 493.

——Arts. 144 and 148—Co-mortgagors—Redemption of mortgage by one—Suit by another for redemption of his share against the redeeming co-mortgagor.

Where one of five co-mortgagors redeemed the mortgage on whole property, and was in possession of the property, his possession does not on that account become adverse to the other co-mortgagors; he only becomes entitled to the rights of a mortgage in relation to his co-mortgagors and a suit against him by one of the other co-mortgagors for redemption of his share in the property is governed by Art. 148 and not Art. 144. 127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Arts. 144 and 148—Suit by co-mortgagor to recover his share from redeeming co-mortgagor—Article 144 applies and not Art. 148.

A co-mortgagor redeeming the whole mortgage does not become a mortgagee of a portion redeemed belonging to the other co-owners, but becomes merely a charge-holder and therefore, a suit by one of the co-owners to recover his share of the property on payment of his share of the charge cannot be considered to be governed by Art. 148; in such a case Art. 144 must be applicable. 9 O.C. 91 and 6 O.L.J. 364, *Foll.*; A.I.R. 1922 All. 410; 14 All. 1 (F.B.); 38 All. 540; 40 All. 683, *Not foll.* 104 Ind. Cas. 400=2 Luck. 618=4 O.W.N. 713=A.I.R. 1927 Oudh 347.

——Art. 144—Redemption by one of several co-mortgagors—Suit by another for possession—Article 144 applies.

Where one of several mortgagors redeems the whole mortgage and obtains possession, a suit against him by another co-mortgagor to recover his share on payment of his share of the money, is not one for redemption but one to recover possession of property on payment of a charge. Therefore it is governed by Art. 144 and not by Art. 148 of the Act. 69 Ind. Cas. 1004=41 M.L.J. 501=A.I.R. 1921 Mad. 326 (1).

——Arts. 144 and 148—Applicability—Co-mortgagor—Suit for possession by co-mortgagor, is governed not by Art. 148 but by Art. 144.

Article 148 provides for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. But a suit by a mortgagor against a co-mortgagor to recover possession of his share of the mortgaged property is not a suit for redemption nor a suit for possession of immovable property mortgaged. This suit must be governed by Art. 144 and not by Art. 148. 63 Ind. Cas. 282=1922 P.H.C.C. 129=6 P.L.J. 680= A.I.R. 1923 Pat. 98.

——Art. 144—Co-mortgagors—Redemption by one—Suit by co-mortgagor for possession.

Where one of several co-mortgagors redeems and obtains possession of the mortgaged property, Art. 144 of the Limitation Act applies to suits by the other mortgors for recovery of possession of their shares from him. 14 All. 1 and 40 All. 634, doubted. 6 O.L.J. 364=52 Ind. Cas. 875.

——Art. 144—Co-mortgagors—Redemption by one.

Where a co-mortgagor redeems the mortgagee and obtains possession of the property and the other co-mortgagors allow him to retain the possession for 12 years under an openly avowed claim that he is holding in his own right their right to the property becomes extinguished. Where a usufructuary mortgage is satisfied out of the usufruct and a co-mortgagor who is only entitled to claim from the mortgagee, possession of his individual share, gets possession of the whole property, his possession is adverse to that of the other co-mortgagors. 16 A. 254, Foll. 16 O.C. 163=20 Ind. Cas. 580.

——Arts. 144, 148—Mortgage—Redemption by one mortgagor—Rights of co-mortgagor—Limitation.

Where one of several co-mortgagors redeems a mortgage and obtains possession, a suit by the heirs of another of the co-mortgagors to obtain his share in the property redeemed can be brought at any time until the redeeming co-sharer's title becomes indefeasible by twelve years' possession. 11 A. 423, dissented from. The mortgage having been put an end to by redemption, Art. 148 has no application to the case. (1901) 3 Bom.L.R. 685.

8. Co-owners and co-sharers.

See also CO-SHARERS.

——Art. 144—Property held by Muhammadan family —Some co-owners usufructuarily mortgaging specific items of property—Possession of mortgagee becomes adverse to other members of family from moment of his entry into possession and not from date of ouster to their knowledge—Suit by other members of family for possession of their share at end of 12 years of mortgagee's possession is barred. 1942 M.W.N. 525=55 L.W. 532 (2)= (1942) 2 M.L.J. 321=A.I.R. 1942 Mad. 622=I.L.R. (1943) Mad. 15=203 Ind. Cas. 195 (F.B.).

[Overrule A.I.R. 1927 Mad. 111=99 Ind. Cas. 158].

——Art. 144—In the case of the Muhammadan female co-owners, it is necessary to find not merely adverse possession but ouster. A.I.R. 1942 Nag. 75=1942 N.L.J. 261=I.L.R. (1942) Nag. 781=201 Ind. Cas. 325.

——Art. 144—One co-owner cannot hold property adversely to the other co-owners unless he, by means of some overt act, asserts adverse possession or deals with the property in such a manner that his acts amount to an ouster of the other co-owners. 42 P.L.R. 348=I.L.R. (1941) Lah. 340.

——Art. 144—The plaintiff applied for mutation of his name on 29th April, 1924. The defendant objected and denied the plaintiff's title on 19th May, 1924. The plaintiff learnt of this denial 15 days later. The Revenue Court dismissed the plaintiff's application on 30th March, 1925, holding that the defendant was in possession.

The plaintiff brought a suit for possession on 30th March, 1937 :

Held, that the suit was barred by limitation. Even assuming that the parties were co-sharers, the possession of the defendant became adverse to the plaintiff from the date the plaintiff came to know of the denial of his title and not from the date on which the plaintiff's mutation application was dismissed. The suit having been brought after 12 years from such date was time-barred. 1941 O.W.N. 615=1941 R.D. 466=A.I.R. 1941 Oudh 415=193 Ind. Cas. 686.

——**Art. 144**—Plaintiff and defendant were co-owners of certain land which was reserved for grazing purposes. Defendant appropriated the land claiming it to be his exclusive property. Plaintiff filed a suit for an injunction restraining the defendant from interfering with his right of grazing and also for joint possession :

Held, that in the circumstances of the case it would have been sufficient for the plaintiff to sue merely for joint possession and hence the suit was governed by Art. 144. 42 P.L.R. 276=A.I.R. 1939 Lah. 315.

——**Art. 144**—Possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to ouster will put an end to that possession and where a co-owner in possession does not deny the title of the other co-owners till shortly before the institution of the suit and never lays claim to more than his share, it may be presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co-owner. 39 P.L.R 773=170 Ind. Cas. 89.

——**Art. 144**—Where the zamindar claims under an exclusive title, the defendant's possession becomes adverse from the time he denied the plaintiff's title as co-owner. When the case is put upon the ground of co-ownership it is governed by Art. 144. A.I.R. 1936 Nag. 80=31 N.L.R. 191 (Sup.)=162 Ind. Cas. 577.

——Art. 144—Absentee co-sharer—Another co-sharer in possession—Possession, when becomes adverse.

The possession of one co-sharer is the possession of the co-sharers and it is for the co-sharer in possession to prove that by some overt act, he constituted his possession into an adverse possession to the other co-sharers, an overt act of which such co-sharer has knowledge. A.I.R. 1934 Lah. 456=15 L. 907=37 P.L.R. 195=154 Ind. Cas. 983.

——**Art. 144**—Possession of one co-owner is in law the possession of all the co-owners and nothing short of an ouster or something equivalent to an ouster will convert the same into adverse possession. A.I.R. 1933 Lah. 784 (2)=14 L. 794=35 P.L.R. 121=148 Ind. Cas. 1143.

——**Art. 144**—The possession of a co-owner of joint undivided property can never be deemed to be adverse to any one who is lawfully entitled to joint possession with him. 10 O.W.N. 844=A.I.R. 1933 Oudh 439=8 Luck. 602=146 Ind. Cas. 710.

——Art. 144—Transferee from co-owner taking transfer of whole property.

Per *Sulaiman* and *Niamat Ullah, JJ.* (*Mukerji, J.*, contra). —Where a transferee from a co-owner takes a transfer of the whole property, the other co-owner, if he has actually no knowledge of the extent of the share transferred, is entitled to assume that the co-owner has transferred only his own interest and the transferee is enjoying possession of the whole property by virtue of his right to that share. If, however, the assertion of his title to the whole is brought to his knowledge and is accompanied by his ouster and exclusion, then adverse possession will commence against him. The burden, therefore, would be on the transferee to establish that the denial of title and ouster were brought to the knowledge of the other co-owner and in the absence of such proof, he would not be able to perfect his adverse possession.

If a co-owner is in possession of the whole of the joint property and asserting his exclusive title makes a possessory mortgage of the whole and knowledge of the fact is communicated to his co-owners, he can certainly treat his mortgagee's possession as his own constructive possession, and count the period of occupation by his mortgagee as a part of the period of his own adverse possession. But where the possession of the co-owner himself was not adverse to his co-owners, and it is not he, but his mortgagee who, having become his subsequent vendee, is setting up adverse possession, then the mortgagee vendee would not be able to join the two periods together in order to complete his period of prescription for acquiring full title. (1932) A.L.J. 425=A.I.R. 1932 All. 393=54 A. 628=140 Ind. Cas. 653.

——Arts. 144 and 148—Redemption by one co-owner—Suit by others.

A co-owner who redeems a mortgagee becomes a chargeholder and not a mortgagee and a suit by the other co-owners against him for possession is governed by Art. 144 and not by Art. 148. The possession of the redeeming co-owner does not become adverse to other co-owners from the date of redemption but becomes adverse only when he does any unequivocal overt act showing his intention to hold adversely to the other co-owners. 32 P.L.R. 649=136 Ind. Cas. 264 (D.B.).

——Arts. 144, 148—One co-sharer redeeming entire mortgage—Suit by other co-sharer for his share.

A suit by a co-sharer for recovery of possession of his share brought against another co-sharer who has redeemed the property from a mortgage is not governed by Art. 148 of the Limitation Act but by Art. 144 and limitation in such a case commences to run against the plaintiff from the date on which the defendant obtained possession. 8 O.W.N. 637=132 Ind. Cas. 261.

——Art. 144—Redemption of mortgage by one co-owner.

The redemption of a mortgage on the common property by one co-mortgagor places the redeeming co-mortgagor on the footing of a mortgagee in relation to his co-mortgagors and his possession, held under a lawful title, cannot be deemed adverse as against the other co-mortgagors. Something more than mere redemption and consequent acquisition of a charge is necessary to convert the possession held as a co-owner into one which would operate to the prejudice of co-mortgagors. Nothing short ouster of or something equivalent to that can have that result. 13 N.L.J. 166=127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Art. 144—Adverse possession—Proof.

To establish adverse possession as between co-owners there must be evidence of an open assertion of a hostile title by one to the knowledge of the others. The mere fact that one of them was in exclusive enjoyment does not lead to the inference of ouster of the other co-owners. 32 P.L.R. 316=12 L. 101=A.I.R. 1931 Lah. 339=132 Ind. Cas. 177.

——**Art. 144**—Where, in execution of a decree passed against one of four co-owners, a person purchased the entire joint property openly and to the knowledge of the other co-owners, and after the purchase dealt with the property as exclusively belonging to himself and was in possession for more than 12 years :

Held, that his possession was adverse to the other co-owners and he acquired a valid title by adverse possession. 33 M.L.W. 186=A.I.R. 1931 Mad. 22=(1930) M.W.N. 246=129 Ind. Cas. 454.

——Art. 144—Adverse possession.

There can be no adverse possession by one co-owner against another until there is an ouster or something

equivalent to an ouster of the latter. 8 O.W.N. 710=132 Ind. Cas. 539.

——Art. 144—Co-owners—Possession of.

Where land is declared to be in joint ownership of the persons in possession and certain others the possession of the former cannot be adverse to the latter. 31 P.L.R. 659.

——Art. 144—Co-owners—Exclusion from enjoyment of profits—Proof of ouster.

If the person possessed of legal title to an estate is also in the enjoyment of the profits of that estate more or less his title cannot be held to have been extinguished by reason of the physical possession of the estate held by another person who has no title to it. Such person cannot put an end to the possession of legal owner by any secret intention in his mind. There must be an ouster or equivalent to an ouster. 7 O.W.N. 988=A.I.R. 1930 Oudh 510.

——Art. 144—Co-owners—Alienee from.

The rule as to adverse possession among co-owners laid down in *Corea* v. *Apphuhamy*, (1912) A.C. 230 and followed in latter cases is applicable to a transferee from a co-owner as well. 125 Ind. Cas. 833=7 O.W.N. 642=A.I.R. 1930 Oudh 675.

——Art. 144—Co-sharers—Ouster—Proof of.

Mere exclusive possession without more by a co-sharer of joint land and the receipt of rents and profits are not sufficient to constitute an ouster. On this point there is no distinction between exclusive possession by a co-sharer and possession by a stranger transferee of such co-sharers where the interest of a co-sharer is purchased by a third party such purchaser becomes a tenant-in-common with the other co-tenants and his possession cannot in the absence of clear proof to the contrary be adverse to such purchaser. 51 C.L.J. 424.

——Art. 144—One co-owner selling the entire property—Alienee treating it as his own—Adverse possession starts from the date of sale.

Where one of the co-owners purported to sell the entire property and the purchaser dealt with the property as his exclusive property since the date of the purchase and it appeared that the other co-owners were aware of the sale,

Held, that the purchaser must be deemed to have repudiated the title of the other co-owners from the date of the purchase and that adverse possession commenced from the date of the sale. 33 L.W. 186=129 Ind. Cas. 454=A.I.R. 1931 Mad. 22=1930 M.W.N. 246.

——Art. 144—A co-sharer's possession after partition without other sharers' consent is adverse to them.

Where a co-sharer who has no interest left in a shamilat on partition, but was under an impression that he had such interest, is in cultivating possession of land in shamilat and there is nothing to show that the co-sharers consented to such possession, the possession becomes adverse so as to ripen into ownership by cultivation for more than twelve years. 128 Ind. Cas. 820=A.I.R. 1930 All. 845.

——Art. 144—Co-owners—Ouster—Knowledge on the part of person ousted is necessary—Constructive notice.

In order to establish adverse possession among co-sharers proof of ouster is necessary. Exclusion or ouster involves not merely the act of the person ousting but the state of the mind of the person ousted. Knowledge on the part of the latter therefore is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice it may also be proved by showing that the co-sharer against whom the possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person on enquiry and on receipt of which a reasonably attentive man could not but realise that he was ousted. 34 C.W.N. 246=A.I.R. 1930 Cal. 466=128 Ind. Cas. 103.

——Art. 142—Co-owners—Dispossession of, or discontinuance of possession by, co-owner—Suit for possession must be within 12 years.

Where an occupancy holding was owned jointly by two persons *A* and *B*, and *A*, left the village and settled elsewhere, and *B* and his heirs continued in possession of the holding thereafter, and *A's* heirs brought a suit for joint possession of the holding 12 years after the date when *A* left the village.

Held, that the suit was governed by Art. 142 of the Limitation Act and was barred as the plaintiff had either been dispossessed or has discontinued possession since the date when *A* left the village. 119 Ind. Cas. 8 (All.)

——Arts. 144 and 123—Suit for share is ancestral property—Plaintiff, Cutchi Khati daughter sued her brothers for her share in the ancestral property. Defence raises adverse possession as a bar to the suit.

Held, that the case would be governed by Art. 144 and not by Art. 123. A.I.R. 1930 Sind 193=125 Ind. Cas. 824.

——Arts. 142 and 144—Heir of absentee—Co-sharer.—Starting point of limitation for possession.

An absentee co-sharer can recover possession on his return and the limitation period allowed to an immediate heir of an absentee is 12 years from the date of the absentee's death. 109 P.R. 1892 ; 85 P.R. 1909 and 29 P.R. 1910, *Not foll.* 116 Ind. Cas. 310=A.I.R. 1929 Lah. 276.

——Arts. 142 and 144—In case of parti land possession follows title.

In the case of parti land the presumption of law is that possession must follow title. Where, therefore, certain co-sharer got title after partition possession is presumed to have passed to him and suit for possession brought by him long after partition is not barred. 118 Ind. Cas 431=A.I.R. 1929 Oudh 489.

——Arts. 142 and 144—Where person proves title to parti land, his possession will be presumed. It will be for the opposite party to prove his possession for twelve years prior to the suit. A.I.R. 1929 Pat. 529.

——Arts. 142 and 144—Formal delivery of possession of an undivided share in the joint property under O. 21, R. 96—Limitation begins to run from the date of such delivery.

Joint owners by delaying to sue together for ejectment of a trespasser in wrongful possession of a portion of the joint property, or by delaying to have partition in order to assert their separate rights to actual possession in accordance with their shares, cannot stop the running of time in favour of the trespasser.

In execution of his decree *A* brought to sale and purchased *B's* undivided 1/3rd share of a house in 1900, and *A* in 1903 was given formal possession over his 1/3rd joint share. *B*, notwithstanding this, continued in actual physical possession of the house along with other co-owners. In 1916 *A* brought a suit for partition against the other co-owners and obtained a decree of the separation of his 1/3rd share, and in 1917 he applied to be placed in actual possession of his separated share. This application was opposed by *B* on the ground that he was in actual possession and was not bound by the partition decree to which he was not a party. The objection was sustained. Therefore *A* brought a suit in 1921 claiming actual physical possession of the 1/3rd share.

Held, that the suit was time-barred, as *A* failed to prove possession and dispossession within a period of 12 years prior to the suit and limitation began to run in 1903 when *A* was givem formal possession over his 1/3rd

joint share. 115 Ind. Cas. 791=50 All. 813=26 A.L.J. 573=A.I.R. 1928 All. 412.

——**Art. 144—Fallow land—Adverse possession among co-sharers.**

Where the land in dispute was lying fallow from the 15th November, 1912 to the 15th November, 1913, and before the 15th November, 1912, was shamilat land in possession of the defendant on behalf of all the co-sharers and after 15th November, 1913, the defendant was again in possession but in the meantime about July, 1913, exclusive title of the land had accrued to the plaintiffs by partition,

Held, that the plaintiffs were in possession upto the 15th November, 1913, by the partition in July, 1913, and as the land was fallow upto the 15th November, 1913 the suit which was brought on 9th November, 1925 was within time because the adverse possession of the defendant commenced only from 15th November, 1913. 106 Ind. Cas. 130 (Lah.).

——**Art. 144—Non-participation in the fruits is not ouster.**

If the plaintiff is a co-owner with the defendants in any holding in dispute, the mere fact of the non-participation of the plaintiff in the cultivation of the holding for more than 12 years will not enable the defendants to prescribe a title by adverse possession, unless it is proved that there was an ouster of the plaintiff coupled with the denial of his title to the holding in dispute. 100 Ind. Cas. 650=A.I.R. 1927 All. 410.

——**Art. 144—Ouster is necessary for adverse possession against a co-owner.**

The possession of one co-sharer is the possession of all the co-sharers and in the absence of an ouster or overt act amounting to ouster, time does not run against the co-sharer who is not in actual possession of his share. In order to establish his adverse possession the co-sharer in possession must explicitly deny and repudiate the title of the other co-sharers to their knowledge, and at least 12 years must expire from the date of the denial and repudiation before his possession matures into ownership. 106 Ind. Cas. 488=9 L.L.J. 545=29 P.L.R. 131=A.I.R. 1927 Lah. 886.

——**Art. 144—Co-owners—Burden of proof.**

Suit for possession by one co-sharer against another co-sharer—Defendant must prove adverse possession for 12 years—Art. 144 applies. 98 Ind. Cas. 80=13 O.L.J. 824=3 O.W.N. 796=A.I.R. 1927 Oudh 6.

——**Art. 144**—Property owned jointly by two Mahomedan brothers—One going away as trader, but periodically coming and staying with another brother—He is entitled to a share in the properties even after twelve years as there is no adverse possession against him to his knowledge. 84 Ind. Cas. 896=20 M.L.W. 670=A.I.R. 1925 Mad. 287.

——**Art. 144—Co-owners—Ouster—Suit by transferee from a co-sharer for possession against other co-sharers—Article applies—Limitation runs from date of transfer.**

In the case of co-sharers the possession of one co-sharer is the possession of all and if one of them sets up a prescriptive title against the others he must prove that this possession was openly hostile and it could not be lawfully referred to a legal title as co-sharer; but a transferee or an assignee cannot by the mere fact of transfer or assignment, became a co-sharer if his rights as such are denied by the other co-sharers and a suit by him therefore for possession against his assignor's co-sharers must be brought within 12 years from the date of transfer. 78 Ind. Cas. 159=6 L.L.J. 567=A.I.R. 1924 Lah. 682.

——**Arts. 142 and 144**—Co-owners in separate possession—Time of dispossession not shown—Suit for possession is not maintainable where plaintiff does not prove possession with 12 years. 71 Ind. Cas. 1033=A.I.R. 1923 All. 418.

——**Art. 144**—Possession after partition by one co-sharer of property allotted to another at partitions is adverse to the latter.

Subsequent abandonment thereof beyond twelve years would not revive his title. 76 Ind. Cas. 742=A.I.R. 1923 Lah. 362.

——**Art. 144**—Article 144 governs a suit by a co-sharer for removal of obstruction on land reserved by usage and agreement for common use. Under the article the burden is on the defendants to prove facts which would entitle them to say that the plaintiff had lost his rights by reason of something in the nature of adverse possession for the prescribed period. 76 Ind. Cas. 32=A.I.R. 1923 Cal. 356.

——**Arts. 142 and 144**—Where the owner actually has received the rents and profits of the property up to within 12 years prior to suit, his suit for ejectment of a co-sharer of the disputed property is not barred either under Art. 142 or Art. 144 of the Limitation Act. 67 Ind. Cas. 444=20 A.L.J. 545=35 C.L.J. 554=24 Bom.L.R. 951=31 M.L.T. 94=A.I.R. 1922 P.C. 84=43 M.L.J. 104 (P.C.).

——**Arts. 142 and 144—Possession of one is possession of all—There can be no ouster without the knowledge of the person ousted.**

The principle is that the possession of one co-owner is the possession of all for the purpose of limitation. No doubt, the sole possession of one co-owner for a very long period may, having regard to other circumstances, show exclusion or ouster. There can be no dispossession by one joint tenant in the absence of an assertion of hostile title by him to the knowledge of the others sought to be excluded. And if no notice is given to the co-sharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify inference of knowledge on the part of the person excluded. 68 Ind. Cas. 200=26 C.W.N. 890=A.I.R. 1922 Cal. 54.

——**Art. 144—Co-ownerd—Self-acquisition.**

One co-sharer recovering property from trespasser on his own behalf—His possession is adverse to other co-sharers—Art. 144 applies. 3 L.L.J. 441=A.I.R. 1921 Lah. 163.

——**Arts. 144 and 142—Co-owners—Suit for declaration of right to channel—Adverse possession.**

A suit by one co-owner of a channel for a declaration that he has the right to irrigate his fields, from the channel jointly with the others interested with him is not a suit for possession or dispossession and is governed by Art. 144 and not by Art. 142. If the defendant claims to hold the water of the channel on the ground of adverse possession, the onus is upon him to prove that his possession has been adverse for 12 years before the institution of the suit. 1 Pat. L.T. 192=55 Ind. Cas. 247.

——**Art. 144—Co-owners—Adverse possession—Overt Act—Ouster.**

The entry on and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is rightful in itself and does not implyhostility as would the possession of a mere stranger. A co-owner might, however, establish a plea of adverse possession if it is clearly shown that he repudiated the title of his co-owners by an overt claim to exclusive ownership more than twelve years before the institution of the suit. 10 L.B.R. 45=12 Bur.L.T. 129=52 Ind. Cas. 629.

——Art. 144—Co-owners—Adverse possession—Partition—Shamilat.

Possession adverse to the plaintiffs, for 15 years of the *Shamilat* land ripens into ownership in the defendant. 50 Ind. Cas. 550 (Lah.).

——Art. 142—Co-sharers—Adverse possession when.

When one person is in possession of property for himself and his co-sharers, his possession is of a fiduciary character and the mere fact that the mortgages it stating that it was his absolute property by a registered deed does not show that the character of his possession is changed so as to be adverse against the other co-owners,. The doctrine of constructive notice by registration does not arise in the case as there is no duty imposed upon the co-sharer by law to search in the Registering Office. 25 P.L.R. 1917=19 P.W.R. 1917=39 Ind. Cas. 762.

——Art. 144—Co-owners—Partition Suit—Claim to chak in a partition proceeding—Adverse possession.

Where in a certain partition proceeding in 1887 *B* set up a claim to a certain *Chak* in the estate which was being divided and *A*, who had just then come to the possession of the property, resisted the claim but later on withdrew his objections, and subsequently *A* was allotted a portion of the land in dispute in 1903 and he sued *B* for possession of the same, *B* cannot claim it by adverse possession before 1903 as *A's* right dates only from 1903. 12 A.L.J. 102=22 Ind. Cas. 574.

——Art. 144—Co-owners—Adverse possession—Denial of title of person claiming to be co-sharer.

Where certain persons entitled to certain shares in land clearly denied the title of a person to a share in the land more than 12 years before the suit and remained exclusively in possession for that period *held*, that they acquired title by adverse possession for the whole land. 239 P.W.R. 1912=75 P.L.R. 1913=18 Ind. Cas. 750.

——Art. 144—Co-owners—Partition—Lands alloted—Dispossession by stranger—Punjab Land Revenue Act (17 of 1887), S. 122.

Where a land allotted to a certain person on partition, remains in the possession of another, the former must apply under S. 122 of the Land Revenue Act within 3 years of the partition or must sue in the Civil Court, for possession within 9 following years but he cannot bring a suit more than 12 years after partition because the other will claim the land by adverse possession. 81 P.R. 1911=105 P.L.R. 1912=261 P.W.R. 1911=13 Ind. Cas. 790.

——Art. 144—Co-owners—Partition—Suit by transferee for possession.

A suit by a transfer to recover possession of land allotted to his transferor in partition proceedings but possession of which had not been delivered to him is governed by Art. 144. 234 P.L.R. 1911=133 P.W.R. 1911=12 Ind. Cas. 431.

——Art. 144—Co-owners—Ouster—Entry in Government records.

Adverse possession begins from the date of application by a co-sharer in possession for the removal of the absentee sharers, from the Government record even though the Revenue Authorities thought they had no power to alter the Government records and no suit had been brought for the correction of the records. 38 P.L.R. 1911=184 P.W.R. 1911=9 Ind. Cas. 957.

——Art. 144—Adverse possession—Non-payment of profits by some co-sharers to others—Suit by co-sharers for their share of profit.

Where certain co-sharers withheld from other co-sharers the payment of their shares of the profits of the *Shamlat* land, but there was no evidence of adverse claim or repudiation of the title of the plaintiff's :

Held—that the claim of the plaintiffs was not time-barred. *Semble.*—There is no distinction between the case of a lambardar and the case of co-sharers making collections for the whole co-parcenary body. Co-sharers who make collections for themselves and other co-sharers are in the same position as regards the amounts collected as a lambardar. The appropriation of profits by one co-sharer cannot be regarded as notice to other co-sharers that their title was repudiated. (1910) 7 A.L.J. 298=5 Ind. Cas. 559=32 A. 389.

——Art. 144—Co-owners—Ouster.

The possession of a sharer is possession of all the co-sharers unless contrary is shown. Mere possession of a co-sharer even for 40 years, is no bar to a claim for getting a share in the joint property, unless it has been exclusive in intention and adverse. 145 P.W.R. 1909=4 Ind. Cas. 1004.

——Art. 144—Adverse possession—Co-sharers.

In the case of joint property the possession of one co-sharer cannot ordinarily be considered as adverse to the other co-sharers. 78 P.L.R. 1909=4 Ind. Cas. 922.

——Art. 144—Adverse possession—What constitutes—Co-owners.

In a suit for joint possession by one of the co-owners it is for the defendant to show not merely that he has been in sole occupation of the disputed lands, but also that there has been a disclaimer by the assertion of a hostile title and notice thereof, either direct or to be inferred from notorious acts and circumstances. To prove title to land by adverse possession, it is not sufficient to show that some acts of possession has been done ; the possession must be actual, visible, exclusive, hostile, and continued during the time necessary to create a bar under the statute of limitations. In order to defeat a title by dispossessing the owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use. (1907) 12 C.W.N. 127=6 C.L.J. 735=35 C. 961.

——Art. 144—Suit to recover profits of sir land in an undivided mahal—Adverse possession.

In a suit to recover his share of the profits of certain *sir* land appertaining to an undivided mahal the plaintiff had not been in receipt of profits in respect of the *sir* land in suit for more than 12 years ; but he and his predecessor in title had been in receipt of their shares of the rents and profits of the undivided mahal, other than that of the particular *sir* land in question, continuously.

Held, that the mahal being undivided, the defendant' possession of the *sir* land, the profits of which were claimed, had never really been possession hostile to the plaintiff, and the suit, was, therefore, not barred by limitation. 1905 A.W.N. 15=2 A.L.J. 110 (N.)=I.L.R. 27 All. 348.

9. Coparceners.

——Arts. 144 and 127—Applicability—Coparcenary of sane and insane coparcener—Properties held separately—Insane coparcener in exclusive possession and enjoyment of portions of family property for over 12 years to the knowledge of the same coparcener—Suit by heirs of same coparceners for possession of such property—Bar of limitation. *See* LIMITATION ACT (9 OF 1908), ARTS. 127 AND 144. 1950 S.C.J. 514=1949 F.C.R. 715=A.I.R. 1950 F.C. 142.

——Arts. 144 and 127—Open and continuous exclusion by lunatic brother of his joint sane brother—Claim by sane brother—Article 127 applies—Death of lunatic—Court of Wards retaining possession for his widow—Article 144 applies. A.I.R. 1942 All. 267=(1942) A.L.J. 197=I.L.R. (1942) All. 518=1943 A.W.R. 305=202 Ind. Cas. 227.

——Art. 144—Hindu joint family—Ouster of member—What constitutes—Member agreeing to receive maintenance.

When one or more members of a joint Hindu family agree that one alone shall be the headman, or Zamindar, or manager, and agree that they shall only claim maintenance out of the estate this does not necessarily alter the mode of succession or operate as ouster, though such an agreement may, in given circumstances, operate as a contract which binds the actual parties to it. In order to constitute ouster, the exclusion from the entire or portion of the joint family property in dispute must be complete and total. Therefore, if the person setting up ouster has agreed to maintain the ones he says he has ousted from the proceeds of the estate in dispute, there is no ouster and consequently limitation does not begin to run. I.L.R. (1950) Nag. 160=A.I.R. 1951 Nag. 259.

——Art. 144—Adverse possession of undivided share.

Art. 144, Limitation Act, extends the conception of adverse possession to include an interest in immovable property as well as the property itself. There can, therefore, be adverse possession of an undivided share, given the appropriate circumstances. 77 I.A. 42=29 Pat. 279=63 L.W. 110=54 C.W.N. 213=1950 A.L.J. 108=1950 M.W.N. 170=1950 A.W.R. 230=A.I.R. 1950 P.C. 44=52 Bom.L.R. 493=86 C.L.J. 1=(1950) 1 M.L.J. 243 (P.C.).

——Art. 144—Hindu Law—Joint family—Separation of branches—Exclusive possession of one branch—Suit by other branch for possession :

Held, (i) that having regard to the separation of the two branches of the family and to the fact that plaintiff never had possession or participation of profits in all these four villages ever since his father's death in 1880, the plaintiff must have known that his interest in them was not admitted by the defendants and on these facts the lower Courts were justified in holding that the possession of the defendants was adeverse for more than the statutory period. The claim was barred under Art. 144. A.I.R. 1931 P.C. 48=35 C.W.N. 438=60 M.L.J. 386=33 L.W. 489=53 C.L.J. 313=14 N.L.J. 56=33 Bom.L.R. 442=27 N.L.R. 131=58 I.A. 106=130 Ind. Cas. 673 (P.C.).

——Art. 144—Coparceners—Assertion of exclusive right by one against the other Art. 144 applies.

Where two co-parceners have separated but before the property is divided by metes and bounds, one of them asserts an exclusive right of the whole property in himself, a suit by a usufructuary mortgagee from the other for possession would be barred if brought after 12 years, limitation commencing from the date of assertion of adverse title. Article 144 applies and not Art. 127. 110 Ind. Cas. 18=A.I.R. 1928 Lah. 499.

——Art. 144—Joint property—Sale by co-parcener—Suit by others for possession—Art. 144 applies and starting point is date on which vendor ceased to be in possession.

Where some of the coparceners sell the joint family property and put the vendees in possession and the surviving coparcener brings a suit for possession of the alienated property, Art. 144 and not 127 applies. It is not necessary under Art. 144 to prove the exact date when plaintiff became aware that he had been excluded from a right to share in the joint property. The date of limitation beginning to run against the plaintiff must be taken as starting from the date when the vendors ceased to cu tivate the property that they had alienated. 70 Ind. Cas. 317=15 M.L.W. 294=A.I.R. 1922 Mad. 369=42 M.L.J. 364.

——Art. 144—Coparceners—Stranger.

Art. 144 applies where the question is between a co-parcener in a joint Hindu amily and a stranger. 37 Bom. 84=14 Bom.L.R. 931=17 Ind. Cas. 657.

——Arts. 144, 91 and 120—Coparcener—Transferee from—Possession of.

Art. 144 applies to a case where the transferee of a portion of joint family property, from one of the co-parceners, is in possession of it, Arts. 91 and 120 do not apply. 7 A.L.J. 783=6 Ind. Cas. 841.

10. Co-tenants.

——Art. 144—Purchase of property held in common by several tenants from one of them in disregard of title of others—Possession of others—When becomes adverse to purchaser.

Where a person purchases property held in common by several tenants-in-common from one of such tenants-in-common openly and in disregard of the title of the other co-tenants, the possession of the latter becomes adverse to the purchaser from the time of his purchase. Therefore a suit brought by the purchaser for possession of the property against the other co-tenants more than 12 years after his purchase is barred by limitation. 1931 Mad. 22, appl. 1949 A.W.R. 488=A.I.R. 1949 All. 699.

——Art. 144—Adverse possession—Essentials—Co-tenants.

Mere possession, however exclusive or long continued if silent, cannot give one co-tenant in possession title as against the other co-tenant. The entry and possession of one tenant-in-common is ordinarily deemed to be the entry and possession of all the tenants, and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants. A.I.R. 1942 Nag. 75=1942 N.L.J. 261=I.L.R. (1942) Nag. 781=201 Ind. Cas. 325.

——Arts. 142 and 144—Property purchased from co-tenant openly and with knowledge of other co-tenants—Purchaser's possession is adverse.

Where a purchaser of property held in common by several tenants-in-common, purchases it from one of such tenants in common openly and with the knowledge of the other co-tenants, he must be taken to have repudiated the title of the others, then and there, and possession becomes adverse from the time of his purchase. 1930 M.W.N. 246=A.I.R. 1931 Mad. 22=33 L.W. 186=129 Ind. Cas. 454.

——Art. 144—Co-tenants—Presumption—Adverse possession.

A co-tenant out of possession starts with a presumption in his favour that the possession of the other co-tenant is not adverse but lawful. Where the defendants were all along in possession on behalf of one co-sharer and limitation was applied for in that capacity and the heirs of another co-sharer who was absent for a long time and who was subsequently found to be dead sued to establish their title.

Held, that the plaintiffs were entitled to succeed as there was no question of adverse possession among co-sharers under those circumstances. 4 Luck. 339=A.I.R. 1930 Oudh 177=7 O.W.N. 61=121 Ind. Cas. 892 (F.B.).

——Art. 144—Co-tenants—Auction-purchaser obstructed in obtaining possession—Time starts only from obstruction.

Per *Rankin, C.J.* and *Mukerji, J.*—If *A* and *B* together own property of which *A* is in actual possession and *B* sales his moiety to *C* the possession of *A* immediately becomes the possession of *C* also.

A purchaser at Court-sale of a co-tenants' share got his sale confirmed, but when he tried to obtain actual possession of the share he was obstructed by other co-

tenants. He brought a suit for possession after twelve years from the date of sale or its confirmation but before twelve years from obstruction to possession.

Held, that other co-tenants' possession from the time of sale to the time of obstruction to possession was on behalf of and not adverse to the purchaser. The period of twelve years under Art. 144 would run not from the sale or its confirmation but from the time when possession was actually obstructed. The suit was within time. 177 Ind. Cas. 593=33 C.W.N. 46=56 Cal. 616=A.I.R. 1929 Cal. 250.

——**Art. 144—Co-tenants—Ouster—Evidence.**

In the absence of proof of ouster, possession of one joint tenant is not adverse to other joint tenants. An assertion of exclusive title in mutation proceedings may be evidence of ouster but not the institution of a suit by one joint tenant in his or her own name. 64 Ind. Cas. 462 (All.).

——**Arts. 142 and 144—Tenants-in-common—Adverse possession.**

The presumption is that the possession of one tenant-in-common is the possession of the other. And though allegations of dispossession and discontinuance of possession bring the suit under Art. 142, Limitation Act, yet in the case of a suit for possession by a tenant-in-common, the onus lies on the defendant tenant-in-common to prove when the joint possession ceased. 5 S.L.R. 49=10 Ind. Cas. 554.

——**Art. 144—Adverse possession—By tenant-in-common—Ouster—Acts of exclusive possession.**

The question of adverse possession between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to ouster of the other. Two brothers, *C* and *D*, owned a property jointly. In execution of a decree against *D*, the property was sold and purchased by *V* who on taking possession of it was obstructed by *G*. *V* sued to remove the obstruction and obtained a partition decree on the 29th November, 1887, and subsequently obtained symbolical possession of the property on the 11th December, 1895. Meanwhile, on the 4th October 1894, *G*. sold the property to defendant and placed him in possession. The assignee of *V* then sued the defendant on the 4th October, 1906, to recover possession of the property from him. His claim was resisted by a plea of adverse possession.

Held, negativing the contention (1) that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than twelve years before the date of suit) the period of *G's* possession it must be shown that the latter's possession was also adverse; (2) that *G's* possession could not become adverse to *V* so long as the decree for partition was alive and capable of execution as against *G*. (1908) 11 Bom.L.R. 51=33 B. 317=1 Ind. Cas. 322.

——**Art. 144—Tenants-in-common—Ouster.**

It is only ouster of a tenant-in-common for twelve years that can extinguish his right. Mere non-participation in or refusal to live on joint property for the period does not extinguish it. (1901) 24 M. 441.

——**Art. 144—Tenant-in-common—Ouster of onus.**

Where a tenant-in-common sues for a share, and ouster for twelve years and consequent extinguishment of his right is set up in defence.

Held, that the onus of proving such ouster was on those setting it up. (1901) 24 M. 441.

11. Constructive possession.

See also NOTE 29.

——**Art. 142—Parties to suit co-sharers—Plaintiffs alleging his possession and dispossession by defendants—Article 142 applies—Plaintiff should prove possession** within 12 years—Plaintiff cannot be held to be in constructive possession. 40 P.L.R. 997=A.I.R. 1998 Lah. 241=I.L.R. (1938) Lah. 558=181 Ind. Cas. 68.

——**Arts. 142 and 144**—Occupation of land by defendant under erroneous belief that it belonged to his own landlord—Land belonging to plaintiff—Plaintiff's *mahal* isolated from land by road—Situation of land, such as not to invite plaintiff's attention:

Held, no adverse possession and there was plaintiff' constructive possession. 1936 R.D. 52=(1937) A.L.J. 131=A.I.R. 1937 All. 238=1937 A.W.R. 46=169 Ind. Cas. 151.

——**Arts. 142 and 144—Part possession, when operates as possession of whole.**

The rule that acts of possession over a part of any immovable property might be evidence of *de facto* possession of the whole, operates with full force in favour of rightful owners; but it should be applied with some reservation in favour of a wrong-doer, for this reason, among others, that the right to the whole which makes the possession of a part equivalent to the possession of the whole and forms the connecting link between the whole and the part is wanting in the other. The want of that connecting link might, however, be supplied, by others, such as close connection and interdependence between the part actually possessed and the whole of which it was claimed to be a part. 62 C.L.J. 234=164 Ind. Cas. 452.

——**Arts. 142 and 144**—If a person is the owner of the property but does not use it for some time, it cannot be said that he is in 'constructive possession' of it; he is in actual possession so long as he has the power to bring it into use whenever he likes. A.I.R. 1932 Cal. 504=36 C.W.N. 326=138 Ind. Cas. 349.

——**Arts. 142 and 144—Joint family—Secret adoption by widow—Possession of husband's brother, whether adverse to adopted son.**

Where an adoption by a widow has secretly taken place without the knowledge or assent of the brothers of her husband who since the alleged adoption have remained in absolute and exclusive possession of the property, the adopted son cannot be taken to be in constructive possession of the property in suit through his uncles.

In such a case, the possession of the defendant cannot be taken to be that of a co-sharer who has been holding the property on account of himself and the adopted son. A.I.R. 1932 All. 61=133 Ind. Cas. 899.

——**Art. 142—Constructive possession—Possession through tenants—Actual realising of rents must be proved.**

Before a defendant can be called upon to show that he was in possession, it is for the plaintiff ro prove his possession within 12 years before the suit.

Where a person alleges his possession over a certain land through tenants, he must prove realization of rent frent them. 117 Ind. Cas. 606=48 C.L.J. 364=A.I.R. 1928 Cal. 765.

——**Art. 142**—Suit for ejectment on actual possession and dispossession—Whether plaintiff can subsequently put forward a case of constructive possession depends on circumstances—Discretion of Court. 105 Ind. Cas. 369=31 C.W.N. 806=A.I.R. 1928 Cal. 118.

——**Art. 142—"Possession" includes constructive possession.**

Per *Wazir Hasan, J.*—The word "possession" used in Art. 142 should not be read to connote "occupation" or "detention" merely. It will certainly include constructive possession. 110 Ind. Cas. 70=3 Luck. 506=5 O.W.N. 372=A.I.R. 1928 Oudh 251.

——Art. 144—Constructive possession.

If a person is in constructive possession of certain property up to the date of a gift of that property, a suit by his donee within 12 years from such date is within time. 102 Ind. Cas. 426=28 P.L.R. 181=A.I.R. 1927 Lah. 426.

——Art. 142—Plaintiff having title—Constructive possession—Presumption.

Plaintiff having title will be presumed to be in constructive possession——Dispossession within 12 years of suit—Plaintiff will succeed. 96 Ind. Cas. 225, Overruled. 98 Ind. Cas. 704=1 Luck. 441=29 O.C. 395=3 O.W.N. 891=A.I.R. 1927 Oudh 141.

——Arts. 142 and 144—Trespasser—No constructive possession.

There can be no constructive possession of a wrongdoer during the time that he is not actually in possession and the possession of a true owner no matter how that possession is obtained, must be considered as rightful possession in law and the period during which the true owner is in possession will enure to his benefit and not to that of the trespasser. 13 App. Cases 793, Foll. 81 Ind. Cas. 279=A.I.R. 1925 Cal. 270.

——Arts. 142 and 144—Constructive—Possession follows title—Onus in on defendant to show statutory possession.

Constructive possession always follows the true title. In cases under Art. 144 it is not incumbent on the plaintiff to establish possession within 12 years of suit. He has to prove title and it then rests on the defendants to show, that he and those under whom they claim have been in possession for over 12 years before suit. 68 Ind. Cas. 320=A.I.R. 1923 Nag. 2.

——Art. 144—Constructive possession—Trespasser, position of.

A right of a trespasser by adverse possession is confined to land actually in his possession. (1920) P.H.C.C. 146=5 Pat.L.J. 273=1 Pat.L.T. 760=56 Ind. Cas. 184.

——Art. 142—Constructive possession.

If a proprietor is in actual or constructive possession time does not begin to run against him. 17 P.W.R. 1910 =29 P.R. 1910=61 P.L.R. 1910=5 Ind. Cas. 888.

——Arts. 142 and 144—Constructive possession—Hill and jungle lands—Not extended in favour of a wrongdoer.

In respect of jungle and hilly lands possession must be presumed to be with the rightful owner. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest—all these matters, greatly varying, under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession. The plaintiff in an action of ejectment must prove possession actual or constructive within twelve years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that legal possession continued with the rightful owner and it is sufficient for the plaintiff to prove either that the property continued in such state within 12 years of the suit, or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of the property was similar up to a date within 12 years of the suit. If this is established by the plaintiff the presumption would be that the possession of the plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable, and the defendant may show that he has been in actual occupation of the property or of any portion thereof for more than 12 years before suit. If the presumption is thus rebutted and the adverse possession of defendant is proved in respect of any portion of the property, the suit of the plaintiff must fail to that extent. When the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner. The principal upon which the doctrine of constructive is based stated. (1907) 7 C.L.J. 414=13 C.W.N. 272=

See also 6 C.L.J. 735=I.L.R. 35 Cal. 961=12 C.W.N. 127=5 C.L.J. 583.

——Arts. 142 and 144—Constructive possession—Doctrine not applicable to wrongdoer.

The doctrine of constructive possession applies only in favour of a rightful owner and must not as a rule be extended in favour of a wrongdoer, whose possession must be confined to land of which he is actually in possession. (1906) 3 C.L.J. 316.

——Arts. 142 and 144—Trespassers—Constructive possession.

Constructive possession applies only in favour of a rightful owner and need not (as a rule) be extended in favour of a wrongdoer, whose possession must be confined to land of which he is actually in possession. Occupation by a wrongdoer of a portion of land only cannot be held to constitute constructive possession of the whole so as to enable him to obtain a title by prescription. Where the right to the subsoil coal not having been asserted by the Digwar openly to the knowledge of the landlord for more than the statutory period of twelve years, though there may have been no concealment that the Digwar has been working the coal, a suit by the landlord for the subsoil cannot be held to be barred by limitation. (1902) 34 Cal. 753=12 C.W.N. 193=5 C.L.J. 583= 6 C.L.J. 735=12 C.W.N. 127=35 Cal. 961.

——Arts. 142 and 144—Trespasser—Constructive possession—Possession of trespasser discontinued by reason of vis major—Effect of.

Where the possession of a trespasser is discontinued by reason of *vis major*, the real owner's possession revives and the trespasser cannot be held to be in constructive possession of the property. The doctrine of constructive possession does not apply in such a case. (1902) 6 C.W.N. 617=4 Bom.L.R. 537=29 C. 518=29 I.A. 104 (P.C.). *See also* 31 C. 397.

12. Debutter property.

(a) **Adverse possession of.**
(b) **Suit to recover alienated property.**
(c) **Suit to recover from trustee.**

12. (a) Debutter property—Adverse possession of.

——Art. 144—Debutter property—Execution sale—Adverse possession of purchaser—Starting point.

Where land devoted to charitable purposes is sold under an execution sale against the trustee of the charity, the adverse possession of the purchaser commences for the purposes of Art. 144 of the Limitation Act, not from the date of the death of the trustee, but from the date after the sale when the purchaser obtained effective possession of the property sold. 77 I.A. 42=29 Pat. 279=63 L.W. 110=54 C.W.N. 213=1950 A.L.J. 108=1950 M.W.N. 170=1950 A.W.R. 230=A.I.R. 1950 P.C. 44=52 Bom.L.R. 493=86 C.L.J. 1=(1950) 1 M.L.J. 243 (P.C.).

——Art. 144—Title by adverse possession—Wakf property.

It is now settled law that the Limitation Act applies to wakf property as much as to private property. A person can, therefore, acquire title to wakf property to adverse possession. A.I.R. 1949 E. P. 141.

——Art. 144—Suit by *sajjadanashin* for recovery of possession of *wakf* land from *mujawars*— Adverse possession—Essentials of—Transfer between *mujawars inter se* without *sajjadanashin's* knowledge—Whether can be relied on to prove adverse possession :

Held, also on the evidence that the facts relating to the period subsequent to the year 1903 are consistent with the occupation of lands by the defendants being by the leave and licence of the *sajjadanashin*, which was induced through the *mujawars* continuing to perform the services at two of the shrines in the village, and the title to the lands being in the plaintiffs, the defendants had not discharged the onus that was on them to prove the adverse possession relied on by them.

Held, further that transfer between the *mujawars inter se* not made with the knowledge of the *sajjadanashin* could not be relied on as showing that the possession of the *mujawars* was adverse to the *sajjadanashin*. 11 O.W.N. 297=A.I.R. 1934 P.C. 77=61 I.A. 50=39 L.W. 421=38 C.W.N. 400=36 Bom. L.R. 408=3 A.W.R. 387=66 M.L.J. 431=59 C.L.J. 157=(1934) M.W.N. 258=(1934) A.L.J. 466=56 A. 111=147 Ind. Cas. 887 (P.C.).

——Art. 144—Sale valid during mutwali's life-time—Adverse possession begins from his death.

There is no difference between a permanent lease and a sale of *wakf* property and where a sale by the mutwalli of such property is valid during his life time, adverse possession against the mosque commences not from the date of sale but from the date of the death of the mutwalli. A.I.R. 1922 P.C. 123; A.I.R. 1925 Mad. 822; A.I.R. 1927 Mad. 1163; A.I.R. 1926 Pat. 239, Foll. 31 M.L.W. 396=A.I.R. 1930 Mad. 582=58 M.L.J. 524.

——Art. 144—Shebait, whether can prescribe against idol.

A *shebait* cannot make his possession adverse to the idol by changing his original intention to hold as a *shebait* into one to hold as owner and by an application of the income for his own purposes because such a change of intention can only be bought home to the idol by means of the *shebait's* knowledge and the idol can only re-act to it by the *shebaits*. Adverse possession, in such circumstances, is a notion almost void of content.

The possession of two joint *shebaits* does not become adverse to the idol, even where they openly claim to divide the *debutter* property between them. 60 C. 54=A.I.R. 1933 Cal. 295=144 Ind. Cas. 792.

——Art. 144—Debutter property.

Adverse possession will destroy title in lands attached to an idol. 36 Bom. 185=13 Bom. L.R. 1169=12 Ind. Cas. 926.

——Art. 144—Adverse possession—Debutter property—Limitation.

Debutter property vests in the legal entity known as the idol and in the *mahant* who is only its representative and manager. On the death of a *mahant* who had managed the properties on behalf of the idol, disputes arose between his senior and junior disciples as to the succession and they settled the disputes by an *ekrarnamah* of 1874 under which each *Chela* obtained possession of a portion of the debutter properties absolutely. In a suit brought in 1901 by the representative of the senior *chela*, for the recovery of possession of the properties allotted to the junior *chela Held*, that from the date of *ekraranmah*, the possession of the junior *chela* was adverse to the idol and of the senior *chela* as representing the idol and that the suit was barred by limitation. 37 Cal. 885=37 I.A. 147=14 C.W.N. 889=12 C.L.J. 110=(1910) M.W.N. 303=7 A.L.J. 791=8 M.L.T. 145=20 M.L.J. 624=12 Bom. L.R. 632=7 Ind. Cas. 240 (P.C.).

——Art. 144—Adverse possession—Religious endowments—Perpetual lease by one trustee.

Possession of debutter property which is adverse against some of the *shebaits* of an idol is necessarily adverse against all of them. 13 C.W.N. 805=3 Ind. Cas. 93.

12. (b) Debutter property—Suit to recover alienated property.

——Art. 144—Before the introduction of Art. 134-B in 1929, suit to set aside alienation by *shebait* was governed by Art. 144. 48 C.W.N. 172 (2)=A.I.R. 1944 Cal. 211=215 Ind. Cas. 201.

——Arts. 144, 134-A to 134-C—Endowed property mortgaged by shebait but as secular owner in 1905 and purchased in execution of mortgage-decree by mortgagee in 1908 and possession obtained—Suit for recovery of possession by present shebait in 1940—Suit is governed by Art. 144 and not Arts. 134-A to 134-C.

The former *shebait* of a deity mortgaged the property belonging to the deity in 1905 not in his capacity *shebait* but as secular owner of the property which he purported to hold in *niskar* right. The mortgagee obtained decree on the mortgage and purchased the property himself in execution in 1908 and obtained possession. The decree was not against the *shebait qua-shebait* but against him in his own personal capacity. The *shebait* died in 1932 and in 1934 the present *shebait* brought a suit for recovery of possession on declaration of title of the deity. The suit was decree and possession was obtained. One *H* preferred a claim under O. 21, R. 100, C. P. Code, which was allowed. Thereupon the *shebait* brought a suit under O. 21, R. 103, C. P. Code for recovery of possession of the property on the allegation that it was a part of the *debutter* endowment belonging to the deity and *H* did not acquire any title to it by reason of his purchase at the sale held in execution of a decree obtained by a third party against the representatives of the mortgages:

Held, that the purchase by the mortgage in execution of his mortgage decree was void altogether and the possession of the purchaser was adverse from the date of the sale. Articles 134-A to 134-C which were introduced by the amending Act of 1929 and had no application to the facts of the case. The suit was governed by Art. 144 and was barred by limitation. A.I.R. 1946 Cal. 473=50 Cal. W.N. 629=224 Ind. Cas. 398.

——Arts. 142 and 144—*Debutter* property sold by *shebait* in 1916—Purchaser paying for *sheba-puja* of idol and continuing in possession up to 1935—Suit to recover property alienated on behalf of idol in 1938—*Held*, suit was not barred as it cannot be said that the delties were dispossessed or that their possession was discontinue for more than 12 years before the institution of the suit. A.I.R. 1944 Cal. 157=213 Ind. Cas. 234=76 C.L.J. 363.

——Art. 144—Hindu religious institution—Alienation by manager—Interval of time between death, resignation or removal of previous manager and election or appointment of successor—Suit impeaching alienation by successor—Art. 144 does not apply. A.I.R. 1941 Mad. 449=I.L.R. (1941) Mad. 599=(1941) 1 M.L.J. 644=53 L.W. 569=1941 M.W.N. 408=199 Ind. Cas. 225 (F.B.).

——Arts. 142 and 144—Property sold in execution of mortgage-decree against shebait.

Both in case of a lease and in case of a sale limitation for a suit to recover possession will start from the date of the death of the last *shebait* responsible for the transfer. Where, therefore, property is sold in execution of a mortgage-decree against *shebaits*, period of limitation starts from the death of the last of the mortgagors and a suit instituted within 12 years of the death of the last of the alienating mortgagors is within limitation. A.I.R. 1939 Cal. 21=43 C.W.N. 102=180 Ind. Cas. 679.

——Art. 144—Where the *dharmakarta* of a temple granted a perpetual lease of temple lands, and lessees alienated portions of the land for building purposes, and buildings

were erected in contravention of the lease but with the knowledge of the *dharmakarta* who raised no objection and received the rent :

Held, that he accepted it as payable in respect of a permanent right, which it was no longer in the power of his temple to repudiate, and that when the adverse possession of the lessees extended over 12 years, the claim to eject the sub-lessees was barred under Art. 144 Limitation Act. 63 I.A. 261 : 1936 A.W.R. 975 (2)=1936 R.D. 203=A.I.R. 1936 P.C. 183=2 B.R. 567=40 C.W.N. 901=44 L.W. 1=38 Bom.L.R. 702=17 P.L.T. 480=1936 O.W.N. 566=(1936) M.W.N. 733=71 M.L.J. 105=38 P.L.R. 793=63 C.L.J. 491=(1936) A.L.J. 977=59 M. 809=162 Ind. Cas. 465 (P.C.).

——Art. 144—Permanent lease by former trustee—Lease supported by partial necessity—Suit by succeeding trustee to avoid lease and for possession.

The plaintiff who was the *pujari* and manager of a temple instituted a suit in 1927 to set aside a permanent lease granted in 1894 by the plaintiff's father who was the former *pujari* and manager of the temple and to recover possession. The plaintiff's father died in 1915 within twelve years of the date of suit, and the lease was also for necessity in part. The question being whether the suit was barred by limitation :

Held, that inasmuch as the plaintiff's father had power to grant a permanent lease for necessity and as there was no complete lack of necessity, the lease was not *ab initio* void but only voidable and the cause of action for the suit arose only on the death of the plaintiff's father and the suit was not, therefore, time-barred :

Held, further, that the mere fact that the plaintiff had received certain moneys from the defendants could not estop the plaintiff from contending that the lease was not binding on him in the absence of evidence to show that the moneys were paid and accepted as rent. A.I.R. 1936 Mad. 262=(1936) M.W.N. 476=162 Ind. Cas. 325.

——Arts. 142 and 134—Representative suit for possession.

A representative suit on behalf of the Muslim community for possession of a portion of a plot belonging to a graveyard by demolition of constructions made thereon by the defendant on the allegation that he had taken unlawful possession of the land in suit and had built upon it without any right, is governed by Art. 142 and not by Art. 134 and limitation commences from the date of dispossession of the Muslim public and not from the date of the death of the manager or *takiadar* who alienated the land. 1935 O.W.N. 815=11 Luck. 297=A.I.R. 1935 Oudh 425=156 Ind. Cas. 92.

——Art. 144—Suit by succeeding head of mutt to set aside gift and for recovery of possession of property.

A village belonging to a *mutt* was gifted in the year 1797 by the then head of the *mutt* to an ancestor of the defendant ' for the diligent study of the *Vedas* ', and from that time onwards, the village was in the possession of the defendants and his predecessors. In 1912, the plaintiff became the head of the *mutt* and he instituted a suit for recovery of the village on the ground that the gift made in 1797 was invalid. It was contended on his behalf that the true principle applicable to such cases is that so long as there has been no repudiation of the grant, the alienee's possession does not become adverse :

Held, that the authorities do not lay down or support any such principle ; that the possession of the grantee became adverse to the *mutt* on the death of the head of the *mutt* who had made the gift, and the suit was, therefore, barred by adverse possession. (1934) M.W.N. 494=A.I.R. 1934 Mad. 624=67 M.L.J. 430=40 L.W. 829=152 Ind. Cas. 251.

——Arts. 144 and 134—Difference between transfer of entire math and of some properties only.

The *mahant* of a *math* executed a permanent lease on December 21, 1909, of certain properties which belonged to the math and subsequently sold them on February 11, 1911. The *mahant* died in July, 1913, and his successor sued for recovery of possession of the properties in May, 1934, on the ground that neither of the transactions was for legal necessity or for the benefit of the *math*.

Held, (i) that the suit was governed by Art. 144, and not by Art. 134 ;

(ii) that the possession of the alienees became adverse within the meaning of Art. 144 only on the death of the *mahant* who alienated the properties and the suit was not time-barred. 60 I.A. 124=14 P.L.T. 185=A.I.R. 1933 P.C. 75=37 M.L.W. 512=64 M.L.J. 505=(1933) M.W.N. 272=10 O.W.N. 455=37 C.W.N. 541=(1933) A.L.J. 327=57 C.L.J. 229=12 Pat. 251=35 Bom. L.R. 530=17 R.D. 754=142 Ind. Cas. 214 (P.C.).

——Art. 144—Adverse possession, when commences.

Where property does not vest in a *mahant* but vests in the idol, and the *mahant* purports to transfer it in his capacity, as the manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale-deed ; it is not postponed till the death of the *mahant*. (1932) A.L.J. 836=54 A. 909=A.I.R. 1933 All. 19=143 Ind. Cas. 452.

——Art. 144—Alienation of property belonging to religious foundation.

Ordinarily speaking, a *mahant* having power only to alienate the property of a religious institution during his lifetime, adverse possession will commences from his death.

Where property belonging to a *mutt* was gifted by a *mahant* about 50 years ago and his successor sued in 1924, for possession :

Held, that the suit was barred by limitation. 35 Bom. L.R. 368=A.I.R. 1933 Bom. 253=144 Ind. Cas. 277.

——Arts. 144 and 134—*Mutawali* cannot be said to be a trustee with regard to the endowed property except as to the specific property proved to have been vested in him for a specific object and hence a suit to set aside an alienation by *mutawali* is governed by Art. 144 and not Art. 134. 57 B. 709=35 Bom. L.R. 252=A.I.R. 1933 Bom. 217=148 Ind. Cas. 385.

——Art. 142—Applies to—Suit to recover wakf property wrongfully alienated.

A suit by a succeeding mutawali to recover possession of *wakf* property wrongfully alienated will be governed by Art. 142 of the Limitation Act. 34 C.W.N. 498=51 C.L.J. 547=A.I.R. 1930 Cal. 673.

——Arts. 144 and 134—Cowle by Dharmakartha of temple.

The *dharmakartha* of certain temple property instituted suits for the possession of various plots of land in a village which had been alienated by a permanent *cowle*, dated April 1, 1865. by the then *dharmarkartha* in favour of the *dharmakarthas* of two other independent temples from whom the defendants had obtained transfers of their several plot and erected houses and other permanent structures. The plaintiff prayed in the alternative that if possession could not be given, an injunction might be granted for the removal of the structures and for compensation as the defendants were entitled only to rights as agricultural tenants under the *cowle*. The defendants contended that the *cowle* being beneficial to the *Devashanams* was valid and that they had acquired a valid title to permanent tenancy by adverse possession. They also pleaded limitation under either Art. 144 or Art. 134:

Held (i) that the suit was barred under Art. 144 from whichever date adverse possession counted, from the date of the *cowle* or from the date of the death, removal or resignation of the *dharmarkartha* who granted it.

It will be illogical to extend to idols the privileges as to limitation of action conferred on minors in the Limitation Act and hence, in spite of the figurative minority attributed to idols, they are affected by the act of their managers by the rules of limitation and adverse possession. 35 M.L.W. 191=(1931) M.W.N. 1287=62 M.L.J. 496=A.I.R. 1932 Mad. 328=137 Ind. Cas. 487.

——Art. 144—Debutter property.

Where wakf property was the subject-matter of alienation,

Held, that adverse possession commenced from date of sale and that the suit to recover possession was governed by Art. 144 of the Limitation Act. 34 C.W.N. 498=51 C.L.J. 547=A.I.R. 1930 Cal. 673.

——Art. 142—Starting point.

Each succeeding mutwali does not get fresh starting point for the purpose of Art. 142.

The introduction of a fiction as to an idol being under a perpetual tutelage and also of a theory of suspension of cause of action during such tutelage will be an encroachment upon the statute of limitation without legislative sanction and will revolutionize all known principles of law and procedure. A.I.R. 1930 Cal. 673=34 C.W.N. 498=51 C.L.J. 547.

——Art. 144—Suit to set aside alienation by succeeding Mahant is governd by Art. 144 and time begins to run from date of alienation.

Where the properties are endowed properties belonging to a math or idol, the possession of same by a purchaser under a sale-deed executed by the Mahant becomes adverse to the math or idol as also the succeeding Mahant from the date of possession after purchase under Art. 144 and if further such a sale-deed follows, a *mukarari* lease in favour of a member of the joint Mitakshara family of whom purchaser is one ; setting aside *mukarari* lease would not entitle the succeeding Mahant to step into shoes of *mukarari* and keep possession subject to payment of rent when suit to set aside purchase is barred under Art. 144. 11 P.L.T. 403=A.I.R. 1930 Pat. 455.

——Art. 144—Religious Endowment—Alienation by manager—Successor can challenge—Time runs from the time latter assumes office. A.I.R. 1926 Mad. 679, Foll. 104 Ind. Cas. 355=A.I.R. 1927 Mad. 1163.

——Art. 144—Possession adverse against mahant is adverse against the idol—Limitation begins to run from the date of taking possession by alienee—Succeeding mahant does not get fresh start.

Such a manager, *shebait* or mahant would represent the idol or the institution for the time being completely, and possession, if adverse, against the mahant for the time being must be deemed to be adverse against the idol or the institution, unless the character of the alienation under which possession was taken could be deemed to enure only for the lifetime of a particular manager, *shebait* or mahant. The adverse possession in such a case begins to run from the date the alienee takes possession of the property alienated, and each succeeding manager, *shebait* or mahant cannot get a fresh start so far as the question of limitation is concerned, upon the ground of his not deriving title from any previous manager, the reason being that the succeeding managers, *shebaits* or mahants from a continuing representation of the idol or the institution to which the endowed property has been dedicated. 23 O.C. 536 ; A.I.R. 1922 Oudh 24 ; 23 Mad. 271 (P.C.) ; 37 Cal. 885 (P.C.) ; 36 Cal. 1003 ; 38 Cal. 526 (P.C.) ; A.I.R. 1923 P.C. 175 and A.I.R. 1926 Pat. 239, Foll. 95 Ind. Cas. 27=2 Luck. 239=3 O.W.N. (Sup.) 1=A.I.R. 1926 Oudh 444.

——Art. 144—Lease by Mathadipathi without justification—Valid only for grantor's life—Adverse possession—Starts from succeeding Mathadipathi's date of succession.

The language of S. 10 of the Limitation Act gives the clue to the meaning and the applicability of Art. 134. It clearly shows that the article refers to cases of specific trust, and relates to property "conveyed in trust". Neither under the Hindu Law nor in the Mahomedan system is any property "Conveyed", to or vested in a *shebait* or *mutwali*, in the case of a dedication. Therefore alienation made by either cannot be treated as an alienation made by a trustee under S. 10. A lease without justification granted by the head of the *mutt* is valid for his life, and if adopted by his successor would endure during his term of office ; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession. Possession of the lessee becomes adverse to the successor only on his accession to the office. 65 Ind. Cas. 161=15 M.L.W. 78=3 Pat. L.T. 245=26 C.W.N. 537=20 A.L.J. 497=24 Bom. L.R. 629=30 M.L.T. 66=48 I.A. 302=44 Mad. 831=1921 M.W.N. 449=41 M.L.J. 346=A.I.R. 1922 P.C. 123 (P.C.).

——Arts. 144 and 134—Trustee alienating *waqf* property given for general religious purposes—Suit for setting aside alienation and for possession is governed by Art. 144 and not Art. 134. Section 10 controls Art. 134 of the Limitation Act of 1908. It clearly shows that the Article refers to cases of specific trust and relate to property "conveyed in trust". There is under Hindu and Muhammadan Law, a distinction between a specific trust and a trust for general, religious or charitable purposes. 65 Ind. Cas. 722=A.I.R. 1922 Lah. 271.

——Art. 144—Property vested in mahant—Alienation by mahant—Suit by successor against alienee—Time runs from death of alienor or when he is presumed to have died—Property vested in idol—Suit must be brought within 12 years of alienation.

Where the property is vested in the juridical person and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol must bring the suit within 12 years from the date of the alienation. But where the title is in the Mahant of the *shebait* the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purposes of the endowment ; and there is no adverse possession so long as the person making the alienation is alive and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation. Where there can be no doubt whatever that though the property is endowed property in the sense that its income has to be appropriated to the purposes of the endowment, still the title is in the successive Mahants, time is to run from the date of the death of alienor who alienated the properties in dispute. If the alienor has not been heard of for 7 years by those who would naturally have heard of him, if he had been alive, it can be presumed that he is dead. The suits are not barred as the time begins to run from the date of the presumption. 44 Mad. 831, Foll. 67 Ind. Cas. 401=3 Pat. L.T. 352=1 Pat. 475=A.I.R. 1922 Pat. 243.

——Art. 144—Mutawali alienating wakf property—Article 144 applies.

Article 144 and not Art. 134, governs a suit to set aside an alienation by a Mutawali of ordinary *wakf* property gifted for general, pious or religoious purposes. Section 10 controls Art. 134 of the Limitation Act of 1908. It clearly shows that the article refers to cases of specific trust and relates to property "conveyed in trust". There is under Hindu and Muhammadan Law, a distinction

between a specific trust and a trust for general religious of charitable purposes. 65 Ind. Cas. 722=A.I.R. 1922 Lah. 271.

——Art. 144—Starting point—Wakf Property—Permanent alienation.

A *mutwali* can challenge the permanent alienation of the *wakf* property by his predecessor within 12 years from his appointment. 36 P.W.R. 1916=32 Ind. Cas. 558.

——Art. 144—Invalid alienation—Alienation of debutter property.

Alienation of *debutter* property by a *shebait* in excess of his power falls under Art. 114, if the transferee is aware that the alienation is beyond the transferor's powers. 9 Ind. Cas. 133 (Cal.).

12. (c) Debutter property—Suit to recover from trustee.

——Art. 144—Religious institution—Suit for recovery of property from person claiming to be trustee himself—Limitation.

In a suit to obtain control or management of religious institution, when no misapplication is proved, and the defendant admits himself a trustee for the institution, the period of limitation is 12 years under Art. 144. 6 A. 1 ; 10 I.A. 90, Foll. 43 Mad. 253=46 I.A. 204=37 M.L.J. 460=(1919) M.W.N. 850=17 A.L.J. 1097=10 L.W. 642=27 M.L.T. 479=24 C.W.N. 249=53 Ind. Cas. 288. [On appeal from (1915) M.W.N. 650=33 Ind. Cas. 216].

13. Declaration of title.

——Arts. 144 and 120—Applicability—Suit for declaration of title and confirmation of possession—Adverse entry in Record-of-Rights.

Where in a suit for a declaration of title in view of an adverse entry in the Record-of-Rights, and for confirmation of possession, the defence is a denial of the plaintiff's title and assertion of possession for the statutory period, the article applicable to the suit is Art. 144 and not Art. 120 of the Limitation Act. The prayer for "confirmation of possession" must be regarded, in view of the pleadings, as a prayer for possession in a suit for possession, within the meaning of Art. 144, Limitation Act. An owner of property and in possession of it can ignore an adverse entry against him in the Record-of-Rights An adverse entry in the Record-of-Rights cannot be regarded as an accrual of a right to sue within the meaning of Art. 120 of the Act. 47 A. 389, Foll. A.I.R. 1949 Assam 75.

——Arts. 142 and 144—Settlement Record—Adverse entry—No dispossession—Suit for mere declaration of title and confirmation of possession.

A piece of land was recorded on December 9, 1915, in the Settlement Records as belonging to *towzis* Nos. 78 and 79 jointly. The plaintiff who owned *towzi* No. 79 instituted a suit on December 9, 1927, against the defendant who own *towzi* No. 78 for a declaration that the land in question belonged to *towzi* No. 79 and for confirmation of his possession. There was no allegation of any dispossession or interference or threat of interference by the defendant with the plaintiff's possession except in so far as such interference might occur in the future by the wrong entry.

Held, that the suit ought to be dismissed on the ground that no cause of action was disclosed and neither Art. 142 or 144, Limitation Act had any application. A.I.R. 1932 Cal. 842=36 C.W.N. 783=56 C.L.J. 316=139 Ind. Cas. 759.

——Arts. 144 and 120—Suit for declaration of title and confirmation of possession—No allegation as to disturbance of possession by defendants—Cause of action being erroneous entry in Record-of-Rights—Suit is governed by Art. 120 and not Art. 144. 97 Ind. Cas. 635=A.I.R. 1927 Cal. 30.

——Art. 144—Suit for declaration and possession.

A suit may comprise various reliefs and the different reliefs may be governed by different articles of limitation. Consequently where a suit comprises a prayer for declaration and for possession, the whole suit cannot be governed by Art. 144. (1936) M.W.N. 351=A.I.R. 1936 Mad. 804=170 Ind. Cas. 379.

——Arts. 144 and 138—Money-decree after mortgage suit and mortgage decree—Suit by auction-purchaser of mortgage decree against auction-purchaser of money-decree for declaration of title and possession held was governed by Art. 144 and not by Art. 138. 11 Pat. 165=A.I.R. 1932 Pat. 145=13 P.L.T. 121=142 Ind. Cas. 246.

——Art. 144—Applicability—Suit for possession—Lease by person other than natural guardian.

A suit for recovery of possession on declaration of title impeaching the transfer (lease) by a person other than natural guardian of the minor, the transaction not being legal necessity or benefit of the minor is not barred by limitation if brought within 12 years of the transfer. A.I.R. 1930 Cal. 748=34 C.W.N. 642.

——Arts. 144 and 148—A suit which is essence one for declaration of title and recovery of possession is not governed by Art. 148 but by Art. 144. 94 Ind. Cas. 342=A.I.R. 1926 Cal. 910.

——Art. 144—Declaration of title—Suit for possession—Entry in the Record-of-Rights—Declaration.

A suit for possession and mesne profits with the declaration that an entry in the Record-of-Rights is correct is governed by the 12 years' limitation. 52 Ind. Cas. 361 (Pat.).

——Art. 142—Applicability—Suits to set aside order under S. 145, Cr. P. Code.

A suit brought by a person for a declaration of title and for recovery of possession to property which was attached by a Magistrate under S. 145, Cr. P. Code, after plaintifi's attempt to take possession was resisted, in a suit under S. 42, Specific Relief Act and not governed by Limitation Act, Art. 142. 22 C.L.J. 283=20 C.W.N. 481=31 Ind. Cas. 242.

——Art. 144—Applicability—Declaration and injunction.

Suit for declaration that a pathway is public and for injunction to remove obstruction—Article 144 applies. 69 Ind. Cas. 910=26 C.W.N. 587=A.I.R. 1921 Cal. 405.

——Arts. 142, 144 and 120—Suit for mere declaration of title to land.

When a suit is one for mere declaration of the plaintiff's title to certain land and is neither in form nor in substance a suit for possession of the land ; Arts. 142, 144 can have no application and the suit falls under Art. 120. A.I.R. 1942 P. C. 47=8 B.R. 831=1942 O.W.N. 508=55 L.W. 597=(1942) 2 M.L.J. 384=44 Bom. L.R. 868=1942 A.W.R. 37=47 C.W.N. 38=I.L.R. (1942) Kar. (P.C.) 122 (Supp.)=201 Ind. Cas. 499 (P.C.).

——Art. 144—Applicability—Declaratory suit.

If a suit is not for possession but is one for declaration, to such a suit Art. 144 does not apply. 31 Bom. L.R. 1240=54 Bom. 4=A.I.R. 1930 Bom. 61.

——Art. 144—Suit for title to trees—Plaintiffs possession within 12 years of suit and entry in Record-of-Rights—Previous suit for same trees decided in plaintiff's favour—It is not necessary that map in previous suit should be relayed on the map in subsequent suit.

Plaintiff brought a suit for declaration of his title to grow lac on certain trees. Previous to this suit there was a dispute with regard to same trees and against the same defendants when the claim of the plaintiff was denied. In the present suit the entries in Record-of-Rights and other documentary evidence was in plaintiff's

favour and the plaintiff was proved to be in possession within 12 years of suit. But the Commissioner appointed to prepare map of disputed jungle could not correctly relay the map of the previous suit upon the map prepared by him.

Held, that provided the map was correct the plaintiff's title was established and it was not necessary that it should be practicable to relay on it. A.I.R. 1929 Pat. 552.

——Arts. 144 and 149—Applicability—Declaration against Government.

Art. 144 does not apply to a suit for declaration against Government, that plaintiff has acquired owners prescription—Such suit is governed by Art. 149. 96 Ind. 447=7 Lah. 210=8 L.L.J. 309=27 P.L.R.749=A.I.R. 1926 Lah. 437.

14. Ejectment.

——Arts. 142 and 144—In an action for ejectment, the plaintiff can recover only by the strength of his own title, and not by the weakness of that of the defendant. A.I.R. 1942 P.C. 64=9 B.R. 70=(1942) A.L.J. 718=1943 O.W.N. 1=47 C.W.N. 46 (2)=(1943) 1 M.L.J. 11=56 L.W. 8=45 P.L.R. 36=(1942) Kar. (P.C.) 166 (Sup.)=45 Bom.L.R. 275=69 I.A. 137=1943 M.W.N. 205=76 C.L.J. 451=203 Ind. Cas. 1 (P.C.).

——Arts. 142 and 144—Suit for ejectment.

A suit for ejectment must fail until the plaintiff proves that he was in possession within 12 years of the suit. A.I.R. 1940 Cal. 65.

——Arts. 142 and 144—Ejectment suit—Cause of action—Not continuing.

Dispossession is a trespass and in one sense, a continuance of possession thereafter is a continuance of the original wrong but that is not the meaning of S. 23, Limitation Act. The Act must be read as a whole and must be construed in such a way that there is no conflict between S. 23 and Arts. 142 and 144. Complete usurpation of possession and occupation and consequent dispossession of the owner, is a wrong which is complete from the moment of dispossession. It is not a continuing trespass of a character contemplated by S. 23. Hence, where a suit alleging that the defendant had taken possession of certain land and tank forcibly and illegally, that the defendant's possession constituted a trespass and praying that the defendant be ejected, is dismissed, a subsequent suit alleging forcible and wrongful possession and praying for possession of the same land is barred, the cause of action being the same and not a continuing one. A.I.R. 1939 Nag. 145=1939 N.L.J. 153=182 Ind. Cas. 613.

——Arts. 144 and 120—A suit by the proprietors for ejectment of a non-proprietor from the site occupied by him is in its essence a suit for possession and is governed by Art. 144 and not by Art. 120. A.I.R. 1932 Lah. 47=33 P.L.R. 298=134 Ind. Cas. 119.

——Arts. 142 and 144—Ejectment suit.

In a suit for ejectment, the onus is upon the plaintiff to prove that he was in possession within 12 years before the suit: but when evidence has been gone into, that onus may be discharged by reference to the evidence on either side including the evidence that has been adduced for the defence.

Per *S. K. Ghose, J.*—It is not necessary before the plaintiff in a suit for ejectment can raise in his favour the presumption that possession follows title, that he must show that the land was incapable of enjoyment. He can get the benefit of that presumption if he succeeds in showing even by the evidence on the side of defence that as a matter of fact no act of enjoyment has been exercised. A.I.R. 1931 Cal. 501=53 C.L.J. 411=134 Ind. Cas. 319.

——Art. 144—Applicability—Ejectment.

Suit for ejectment—Question as to possession and dispossession not involved—Suit is governed by Art. 144. 98 Ind. Cas. 878=A.I.R. 1927 Lah. 70.

——Arts. 142 and 144—In a suit for ejectment where the plaintiff does not set up dispossession, Art. 144 is applicable and not Art. 142. 97 Ind. Cas. 135=8 P.L.T. 129.

——Art. 142—Ejectment suit—Title and dispossession—Proof.

In an ejectment suit a plaintiff must prove his title and dispossession by the defendant within 12 years before the date of the institution of the suit. Possession is different from user; and if the land is unfit for use in the usual mode, plaintiff's possession is presumed till contrary is proved, which presumption, being one of fact, is not conclusive and depends in every case upon the particular circumstances. 5 Pat. L.J. 724=58 Ind. Cas. 773.

——Arts. 142 and 144—Ejectment suit—Entry of defendant's name in Record-of-Rights—Onus.

In a suit for possession where the entry in the Record-of-Rights is in favour of defendants, plaintiffs must prove his possession within 12 years of suit. 54 Ind. Cas. 960 (Pat.).

——Arts. 142 and 131—Ejectment suit—Suit for possession of temple—Limitation.

The period of limitation applicable to a suit for possession of a temple is that contained in Art. 142 of the Limitation Act. 52 Ind. Cas. 637 (Mad.).

——Art. 142—Ejectment suit—Title—Onus of proof—Prescriptive title.

The onus of establishing title to property by reason of possession for the prescriptive period lies on the person asserting such possession. In a suit under Art. 142 it is on the plaintiff to prove possession within 12 years. 20 A. 182, Not Foll., 39 M. 617 (P.C.): 16 C. 473: 37 Ind. Cas. 794, Foll. 41 All. 669=17 A.L.J. 814=52 Ind. Cas. 366.

——Art. 142—Ejectment suit—Title and possession within 12 years to be proved.

In a suit in ejectment plaintiff must prove a valid title and possession within 12 years, Mere possession without title will not avail unless it is proved to have existed for 12 years. 42 Bom. 357=20 Bom. L.R. 346=45 Ind. Cas. 550.

——Arts. 142 and 144—Ejectment suit—Suit for possession—Burden of proof.

In a suit for possession on dispossession or discontinuance of possession, limitation runs from dispossession or discontinuance of possession and the burden is on the plaintiff to show that he or his predecessor-in-title has been in possession within 12 years of date of suit and the article applicable is 142. 11 Bur. L.T. 150=41 Ind. Cas. 722.

——Art. 142—Ejectment suit—Plea of separate title on parttion—Burden of proof.

The burden of proof in a suit for *khas* possession lies upon plaintiff to prove his title where he pleads joint purchase with defendant notwithstanding the plea of defendants that the land was originally joint and on partition fell to their share. 41 Ind. Cas. 690. (Cal.).

——Art. 142—Ejectment suit—Possession—Onus—Character of land—Proof of proprietary title 12 years before suit—Presumption—Onus.

The onus that lies on plaintiff in a suit under Art. 142 of Limitation Act, of giving affirmative evidence of possession within twelve years prior to the date of suit is not affected by the character of the land in question. Where in a suit to which Art. 142 applies plaintiff proves his proprietary title at a period prior to twelve years before the institution of suit, the presumption is that his possession continued till within twelve years of the suits. In such a case the plaintiff must succeed unless the defendant rebuts the presumption of plaintiff's possession and proves that the plaintiff's title was extinguished by adverse possession. 2 Pat. L.W. 143=2 Pat. L.J. 506=31 Ind. Cas. 114.

——Art. 142—Ejectment suit—Possession within 12 years—Onus.

Where in a suit for possession after dispossession of the plaintiff his possession within limitation is denied, it is for plaintiff to prove such possession. 4 O.L.J. 354=41 Ind. Cas. 80.

——Art. 142—Ejectment suit—Permissive possession—Burden of proof.

Where plaintiff alleged that defendant's possession was permissive and that he constructed his *amla* on the land in suit and where plaintiff sued for possession and for a perpetual injunction to remove his *amla*. *Held*, that Art. 142 did not apply as there was no dispossession or discontinuance of possession though undoubtedly the plaintiff was bound that defendant's possession was permissive. 2 Lah. L.J. 511.

——Art. 142—Ejectment suit—Title and possession to be proved.

A plaintiff in a suit for possession has to show title and where it is alleged that he is out of possession he must show affirmatively that he has been in possession within twelve years of the suit. 40 Ind. Cas. 420 (All.).

——Art. 142—Ejectment suit—Burden of proof.

In an ejectment suit plaintiff should prove his possession within the statutory period but if plaintiff is mentioned in the Record-of-Rights as the person in possession, then the burden is shifted on the defendant and he must prove that plaintiff had been out of possession for more than the statutory period. A Court in dismissing a suit as barred by limitation must state clearly under what law it barred and whether the facts necessary for applying that law have been established. 21 C.W.N. 175=39 Ind. Cas. 356.

——Art. 142—Ejectment suit—Landlord and tenant—Bengal Tenancy, Act, Sch. III, Art. 3.

A suit by tenant for possession of his holding on his being dispossessed by a co-sharer landlord, not in his capacity as landlord but as having acquired a *Jote* interest in the holding independently of his interest as landlord comes under Art. 142 and not under Art. 3, Sch. III, Bengal Tenancy Act. 38 Ind.Cas. 777 (Pat.).

——Art. 142—Ejectment suit—Title is to be proved.

Title must be strictly proved to entitle plaintiff to ejectment. 20 C.W.N. 773=36 Ind. Cas. 890.

——Arts. 142 and 144—Ejectment suit—Possession within 12 years—Onus of proof.

In a suit for possession, the plaintiff must prove not only that he is entitled to the property but also (if and in so far it is contested) that he has not been out of possession during the whole of the 12 years preceding his suit. The fact that defendants are not able to esbtablish affirmatively that they have been continually in possession for the said period of 12 years under Art. 144 does not necessarily entitle the plaintiff to succeed unless the requirements of Art. 142 are also satisfied. 29 Ind. Cas. 10 (Mad.).

——Art. 142—Ejectment—Possession within 12 years.

Where the defendant alleged he was in possession of waste land for 40 years prior to the suit, havng cleared the jungle, the suit is governed by Art. 142 and the plaintiffs have to prove that they were the true owners and were in possession within 12 years prior to suit. 7 Bur. L.T. 255=27 Ind. Cas. 981.

——Art. 142—Ejectment suit—Suit for possession of land free of the house and trees.

A suit for possession of land free of the house and trees wrongfully built and planted by the defendant as distinguished from a claim merely for removal of trees is governed by Art. 142. 17 O.C. 252=25 Ind. Cas. 701.

——Art. 142—Ejectment—Title of plaintiff—Strict proof essential.

The plaintiff in an ejectment action must, in order to succeed, strictly prove his own title. 42 Cal. 384=41 I.A. 290=18 C.W.N. 1154=27 M.L.J. 333=1 L.W. 831=10 N.L.R. 112=16 M.L.T. 447=(1914) M.W.N. 835=16 Bom. L.R. 863=12 A.L.J. 1281=20 C.L.J. 573=25 Ind. Cas. 290 (P.C.).

——Arts. 142 and 144—Ejectment—Landlord and tenant—Rent decree obtained by plaintiff's predecessors.

In a suit for possession of land held by raiyats, a rent decree obtained by plaintiff's predecessors within 12 years before suit save limitation. 18 C.W.N. 940=23 Ind. Cas. 298.

——Art. 142—Ejectment suit—Suit for possession—Proof of possession within 12 years of suit is necessary.

In a suit for possession consequent on a dispossession, plaintiff must prove that the dispossession occurred within 12 years of suit. 18 C.L.J. 601=22 Ind. Cas. 64.

——Art. 142—Ejectment—Title—Possession within 12 years,—Onus.

In a suit for ejectment, the onus is on the plaintiff to prove not only his title to possession but the fact of his dispossession or discontinuance of possession within 12 years. (1913) M.W.N. 157=17 C.W.N. 389=13 M.L.T. 185=17 C.L.J. 277=15 Bom. L.R. 445=25 M.L.J. 95=18 Ind. Cas. 17 (P.C.).

——Art. 142—Ejectment suit—Landlord, and tenant.

Art. 142 is not applicable if the possession by the defendant of a limited interest is land is not adverse to the plaintiff landlord. 8 N.L.R. 163=17 Ind. Cas. 606.

——Art. 142—Ejectment suit—Form of issue.

In a suit for possession falling under Art. 142 of the Limitation Act, the issue should properly "whether the plaintiff was in possession within 12 years prior to the suit". (1912) M.W.N. 175=15 Ind. Cas. 190.

——Art. 142—Ejectment suit—Proof of—Plaintiff's title.

In an ejectment suit, the defendant cannot be put to the defence of his title at all unless the plaintiff claims from the Court the relief to which he is entitled within the time prescribed by law. 10 A.L.J. 13=15 Ind. Cas. 10.

——Art. 142—Dispossession—Onus.

A suit for possession based on a dispossession of the plaintiff by the defendant is governed by Art. 142 and not by Art. 144 of the Act. The onus is on the plaintiff to establish that his possession continued within 12 years before suit. (1912) M.W.N. 832=14 Ind. Cas. 295.

——Art. 142—Ejectment—Landlord and tenant—No evidence as to character of tenancy—Limitation applicable—Special or general.

In a suit for possession by a tenant where nothing is known about the origin and the character of the tenancy the burden is upon the defendant to prove special circumstances abridging the ordinary period of limitation applicable to the case. 14 C.L.J. 598=16 C.W.N. 398=11 Ind. Cas. 164.

——Art. 142—Ejectment suit—Plea of adverse possession—Onus.

Where in a suit for possession the defendant denies the plaintiff's title and sets up adverse possession the plaintiff must prove both ownership and possession within the statutory period. 9 Ind. Cas. 812 (All.).

——Arts. 142 and 144—Ejectment suit—Burden of proof—Plaintiff to show possession and dispossession within 12 years.

The plaintiff in a suit in ejectment from immoveable property must show possession and dispossession within 12 years prior to the date of suit and Art. 142, and not Art. 144 applies to the case. 20 M.L.J. 306=(1911) 1 M.W.N. 93=6 Ind. Cas. 667.

——Arts. 142, 144—Encroachment by tenant on adjoining landlord's suit to recover—Onus—Adverse possession to be proved by the tenant.

If a tenant encroaches on the adjoining land of his landlord he must distinctly prove adverse possession and such adverse possession must be set up in defence to the suit. It must be shown that there was not merely possession, but that such possession was with notice to the landlord and was known by the parties to be a trespass. Art. 142 has no application to such a case. 10 C. 850, Foll. (1908) 13 C.W.N. 698=4 Ind. Cas. 526.

——Art. 142—Ejectment suit—Possession within 12 years—Title.

In a suit falling under Art. 142 the *patta-holder* from Government must prove that he or the Government was in possession of the property within 12 years before suit. 5 M.L.T. 107=2 Ind. Cas. 314.

——Arts. 142 and 144—Ejectment—Title and possession.

If the plaintiffs and their predecessors were found not to be in possession, and the defendants and their predecessors were in possession for the statutory period, the claim is barred under both articles. 2 Ind. Cas. 381 (Cal.).

——Arts. 142 and 144—Ejectment suit—Possession and dispossession.

The plaintiff in a suit in ejectment must show possession and dispossession within 12 years prior to suit and the article applicable is 142, not 144. 7 M.L.T. 310=1 Ind. Cas. 901.

——Arts. 142 and 144—Suit by zamindars to eject defendants as trespassers—Burden of proof—Right of zamindars in respect of uncultivated land.

The zamindars of a village sued to recover possession of a certain plot of land, recorded in the village administration papers as land of the zamindars which had been in fact used for many years by the Muhammadans of the village for purposes of worship.

Held, that in view of the length of possession of the defendants (some forty or fifty years) it lay upon the zamindars to show a title to eject the defendants over and above the mere fact that they were recorded as the zamindar's, whilst the defendants could not show in what manner their possession orginated. (1904) A.W.N. 71.

15. Fishery.

——Art. 144—Exclusive right of fishery—Acquisition of, by adverse possession.

An exclusive right of fishery in a locality in the sense that even lawful owner is excluded from its enjoyment is not a mere "profit *a prendre*" but is a heritable and transferable interest in immovable property which can be acquired by 12 years' adverse possession as against the lawful owner, Art. 144, Limitation Act, being applicable to such a case. 1 Pat. 674 and 14 C.L.J. 572, Foll. 1930 M.W.N. 328=31 M.L.W. 508=A.I.R. 1930 Mad. 679.

——Art. 144—Fishery—Exclusive right of, is an interest in immovable property and it can be acquired by adverse possession.

If it is an exclusive right of fishery it is an interest in immovable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential element of property and even if it may properly be described as a profit a *prendre*, it has also the distinctive features of an interest in immovable property. Even if S. 26 of the Act should be applicable, this would not bar the operation of Art. 144 and S. 28 if the right came under both descriptions. 2 P.L.J. 283, Foll. 67 Ind. Cas. 954=1 Pat. 674=3 P.L.J. 477=1 Pat. L.R. 34=A.I.R. 1923 Pat. 58.

——Art. 144—Acquisition of right to fishery—Period is 12 years.

The right of fishery is an interest in land and the period of limitation for getting title by adverse possession is 12 years under Art. 144 and consequently user for 20 years which is required under S. 26 of the Act is not necessary for getting absolute title. 64 Ind. Cas. 346=3 Pat. L.T. 53=1922 P.H.C.C. 195=A.I.R. 1922 Pat. 9.

——Arts. 142 and 144—Fishery—Ouster from right to catch fish—Limitation.

If a person iscompletely ousted from his right to catch fish in water on his own land by a definite act of agreession by another party, such act amounts to a dispossession from immoveable property within Arts. 142 and 144 and a suit to obtain possession of such benefit must be brought within 12 years of such dispossession. 2 Pat. L.J. 289=1 Pat. L.W. 687=39 Ind. Cas. 777.

——Art. 142—Fishery—Suit for rents.

Art. 142 of the Limitation Act applies to a suit for recovery of possession of a *Jalkar* or declaration of plaintiff's title thereto, where the question is whether the *Jalkar* belongs to the plaintiff or defendant as person claiming to receive rent in respect thereof and which of them is entitled to collect the rent, there having been no grant or completed easement etc., in either party's favour. 34 Ind. Cas. 841 (Cal.).

——Arts. 142 and 144—Fishery—Right to possession of dobas in the bed of the old channel—New channel in communication with the dobas—Grantee of fishery right, continuing to fish in new channel—Limitation.

Where a river shifts its course, leaving *dobas* in it, old bed, and the grantee of a fishery right in it has been fishing in the new channel within the period of limitations there is no bar to a suit for possession of the *dobas*. 23 Ind. Cas. 136 (Cal.).

——Art. 144—Immoveable property—Fishery.

Fishery right in another's waters is not immoveable property but an interest in immoveable property under Art. 144 of the Limitation Act. 14 C.L.J. 572=12 Ind. Cas. 305.

16. Immovable property.

See also NOTE 15.

——Art. 144—Immoveable property—Suit for assessment of rent.

The article does not apply to suits for assessment of fair and equitable rent. 50 Ind. Cas. 908 (Cal.).

——Art. 144—Immoveable property—Interest in parjot, charai and Charsai dues.

The rights to *parjot, Charai and Charsai* dues should, for purposes of limitation, be deemed to be an interest in immoveable property. 22 O.C. 119=46 Ind. Cas. 439.

——Art. 144—Immoveable property—Substituted by moveable property—Claim for proceeds from—If claim for immoveable property.

A claim for the proceeds of what was once immoveable property but which has been substituted by moveable property is not a claim for immoveable property or any interest therein or any benefit arising from land. 3 Pat. 522=46 Ind. Cas. 627.

——Art. 144—Immoveable property—Standing trees.

Standing trees are immoveable property for the purpose of this Act. 7 Bur. L.T. 268=8 L.B.R. 64=24 Ind. Cas. 911.

——Art. 144—Immoveable property—Malikana—Nature of—Right to recover.

Where a *malikana* right was not enjoyed for 12 years, the right to sue for the money due on account of it, is barred. 19 C.W.N. 410=21 Ind. Cas. 779.

——Art. 144—Immoveable property—Right to cess.

The uninterrupted enjoyment of right to levy summary cess for more than twelve years renders the right

unimpeacheable. After that period, any claim to resist the levy of summary cess as illegal both in its origin and its continuance, is incontrovertibly time-barred. The right to levy a cess is immoveable property within the Act. 36 Bom. 174=13 Bom. L.R. 1047=12 Ind. Cas. 716.

17. Interpretation.

(a) "**Possession**".
(b) "**Dispossession**".
(c) "**Discontinuance**".

17. (a) Interpretation—"Possession".

——Art. 142—True owner's possession within statutory period—Sufficiency—Animus—Necessity.

The mere fact of physical possession held by the true owner within the statutory period is not sufficient if it is traceable not to an *animus* on his part to exercise it in assertion of his own right but to the sufferance of the person in wrongful possession.

Where the plaintiffs alleged that the suit property was allotted to them at a partition and that within the statutory period of 12 years under Art. 142 of the Limitation Act they had been in possession of the same but it turned out to be that they had possession by permission only of defendants,

Held, that the kind of possession had by the plaintiffs in this case within 12 years before the suit was not sufficient to satisfy the statute. 63 L.W. 975=(1950) 2 M.L.J. 551=A.I.R. 1951 Mad. 356.

——Arts. 142 and 144—Possession—Meaning—Proof—Continuous actual bodily possession need not be proved.

"Possession" expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else. Absolute security for the future is not requisite for it cannot be had. All that is necessary is that according to the ordinary course of affairs, one is able to count on the continuing enjoyment of the thing. In order to prove possession, it is not necessary to prove a continuous actually bodily possession. 'Possession' always means possession of that character of which the thing is capable. If the land be not capable of any use, mere non-user of it does not lead to the inference that the plaintiff is not in possession. No particular kind of user is necessary to establish possession. All that is necessary to show is that some acts were done and were done in exercise of a right of ownership. A.I.R. 1941 Cal. 676=73 C.L.J. 397=45 C.W.N. 797=198 Ind. Cas. 23.

——Arts. 142 and 144—'Possession'.

As soon as a person is entitled to possession and enters in the assertion of that possession, or which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who so enters. (1847-49) 2 Exch. 803; 76 R.R. 784, Foll. (1909) 10 C.L.J. 527=4 Ind. Cas. 442.

——Arts. 142 and 144—Possession—Mere registration no possession.

The mere registration of names under the Land Registration Act does not constitute possession in fact or in law. (1907) 6 C.L.J. 472.

——Art. 142—"Possession"—Plaintiff's title together with possession obtained not in accordance with law.

When the plaintiff's title is once established, his possession however obtained, is possession within Art. 142. The first question to be tried in such cases is the plaintiff's title, and if that is found in his favour, possession obtained by him in any manner whatsoever, even though he is subsequently dispossessed under S. 9 of the Specific Relief Act, will make limitation run against him from the date of the subsequent possession, *i.e.*, the one under the decree under S. 9 of the Specific Relief Act. 9 C.W.N. 1061 and 2 C.L.J. 1, Foll. (1906) 10 C.W.N. 1081=33 C. 821. *See also* (1905) 2 C.L.J. 1.

——Art. 142—'Possession' and 'dispossession', meaning of—Possession of rightful owner by force and dispossession under S. 9, Specific Relief Act.

Possession of the rightful owner, however obtained, is possession in the eye of the law. The plaintiffs who had been dispossessed by the defendants of some lands appertaining to their taluk, forcibly dispossessed the defendants until the latter recovered possession in execution of a decree under S. 9 of the Specific Relief Act. The plaintiffs brought the present suit for recovery of possession within 12 years from their dispossession in execution of the decree but more than twelve years after the orginal dispossession.

Per *Mitra, J.—Held*, that the suit was not barred by limitation. 12 W.R. 9; 22 W.R. 259; 12 C.L.R. 486, Not Foll. (1905) 9 C.W.N. 1061.

17. (b) Interpretation—"Dispossession".

——Arts. 142 and 144—"Dispossession"—"Discontinuance" of possession—Meaning and essentials of—Payment by occupant of house-tax—If dispossession of owner.

Possession in the eye of law consists of the fact of physical occupation and the mental act of holding the subject of possession to the exclusion of others. The unity of these two elements, occupation and *animus possidendi*, is what constitutes possession in law. It is not mere occupation or detention. Legal possession therefore is occupation with the intention of exercising the right of ownership in respect of it. Mere acts of user which do not interfere and are consistent with the owner's title are not sufficient to constitute dispossession in favour of the occupant; and possession is never considered adverse if it can be referred to a lawful title.

Dispossession under Art. 142, Limitation Act, involves some element of force or fraud and implies the coming in of a person and his driving out another person from possession. There can be no dispossession unless there is a terminiation of the possession of the rightful owner, followed by actual possession of the trespasser.

There can be no "discontinuance" of possession within the meaning of the article merely because of the absence of physical possession. A mere repudiation of the plaintiff's title behind his back (*e.g.*, payment of house-tax) is not such an unequivocal act as would dispossess the plaintiff unless followed by some overt act. Without a voluntary abandonment of possession there can be no such dispossession; merely remaining quiescent cannot amount to discontinuance, which would attract the operation of Art. 142. In such a case the residuary Art. 144 would be the article applicable. I.L.R. (1949) Cut. 804.

——Art. 142—Resumption of land under agreement—If amounts to dispossession or discontinuance of possession.

Art. 142 of the Limitation Act has no application to an agreement whereby possession which has once been to a party is sought to be resumed under the terms of an agreement by the other party. Resumption by agreement or arrangement is neither dispossession nor discontinuance within the meaning of that article. It has therefore no application to a suit for possession of land resumed by Government under an agreement. 230 Ind. Cas. 311=A.I.R. 1947 Sind 69.

——Art. 142—The term "dispossession" applies when "a person comes in and drives out the others from possession". It imports ouster, a driving out from possession against the will of the person in actual possession. It is impossible to hold that this driving out occurs when the transfer of possession was voluntary; not against the will of the person in possession but in accordance with

his wishes and with his active consent. A.I.R. 1939 Nag. 7=1938 N.L.J. 418=I.L.R. (1941) Nag.655=181 Ind. Cas. 203.

——Arts. 142—Decree-holder put in symbolical possession under O. 21, R. 35, C. P. Code—Judgment-debtor continuing possession—Whether amounts to dispossession of decree-holder.

The passing of a decre for joint possession and the handing over of symbolical possession in pursuance thereof under O. 21, R. 35, C. P. Code terminates all claims to adverse title previously put forward by the defendants. But the fact that the person in possession continues to be in enjoyment of the property just after the fomality under O. 21, R. 35 is over does, to all intents and purposes, amount to an immediately dispossession of the decree-holder after he has been put in possession. The decree-holder must, under Art. 142, come within 12 years to recover possession again, and if he does not, his suit is time-barred. A..I.R. 1936 Pesh. 7=160 Ind. Cas. 441.

——Arts. 142 and 144—Dispossession may be actual or constructive.

Where, in a suit for possession, the plaintiffs allege title in themselves and subsequent dispossession by the defendants, the suit is governed by Art. 142 It cannot be said that in all cases Art. 144 is to govern the case once the plaintiff has proved a title to the property. Dispossession may be either actual in the sense of an existing actual dispossession being forcibly terminated by actual dispossession, or it may be a legal constructive possession being terminated by a legal dispossession. A.I.R. 1935 Lah. 475=16 Lah. 442=37 P.L.R. 743=157 Ind. Cas. 686 (F.B.).

——Art. 142—"Dispossession"—Meaning of.

Dispossession contemplated in Art. 142 refers to actual physical dispossession, such as, when a person comes in and drives out the other from possession and not when the person in possession is resisted in his attempts to possess separately his share in the property. 119 Ind. Cas. 289=56 Cal. 914=33 C.W.N. 277=A.I.R. 1929 Cal. 297.

——Art. 142—There is no dispossession or discontinuance of possession unless one person's possession terminates and is followed up by somebody else's possession. 107 Ind. Cas. 95=46 C.L.J. 575=A.I.R. 1928 Cal. 104.

——Arts. 142 and 144—Mere paper dispossession does not amount to dispossession within the meaning of Art. 144 or 142. The *terminus a quo* is the actual physical dispossession. 79 Ind. Cas. 39=A.I.R. 1925 Lah. 53.

——Art. 142—Dispossession and discontinuance of possession, difference between.

'Dispossession' implies the coming in of a person and the driving out of another from possession. 'Discontinuance' implies the going out of the person in possession and his being followed into possession by another. 87 Ind. Cas. 386=21 M.L.W. 398=A.I.R. 1925 Mad. 834.

——Art. 142—"Dispossession" implies ouster, and the essence of ouster is that person ousting is in actual occupation of the land. 61 Ind. Cas. 78=2 P.L.T. 133=A.I.R. 1921 Pat. 277.

——Art. 142—Dispossession—Adverse decision under S. 41, Bengal Survey Act. An adverse decision under S. 41 of the Bengal Survey Act amounts to dispossession within the meaning of Art. 142. 61 Ind. Cas. 78=2 P. L.T. 133=A.I.R. 1921 Pat. 277.

——Art. 142—Dispossession—Order of Collector under S. 41, Bengal Survey Act.

The order of the Collector under S. 41, Bengal Survey Act (5 of 1875) operates as a decree of a civil Court and it cannot be reversed or modified without any limitation of time. Article 142 of the Limitation Act must apply, when it is sought to reverse or modify the order of the Collector, the date of dispossession being the date of the order of the Collector. 61 Ind. Cas. 46=2 P.L.T. 118=6 P.L.J. 51=A.I.R. 1921 Pat. 31.

——Art. 142—Dispossession—Discontinuance of possession—What constitutes.

Under Art. 142 the Court should find the starting point of dispossession or discontinuance of possession. Dispossession implies an ouster from possession followed by the possession of another person. Therefore a finding that the defendant was not in possession for twelve years before suit implies that plaintiff brought his suit within twelve years of his dispossession. 29 Cal. 518 (P.C.), Foll. 1 Pat. L.T. 505=5 Pat. L.J. 592=57 Ind. Cas. 717.

——Art. 142—Dispossession—Meaning of.

If the legal possession remains with the true owner even though property is attached under S. 146, Cr. P. Code, the attachment does not amount to dispossession of the owner or discontinuance of his possession. Dispossession implies the coming in of a person and the driving out of another in possession. Discontinuance of possession takes a place when the person in possession goes out and is followed by another who takes possession of the land. Attachment under S. 146, Cr. P. Code is not dispossession or discontinuance within the meaning of Art. 142, Limitation Act. 22 C.L.J. 283=20 C.W.N. 481=31 Ind. Cas. 242.

——Art. 142—Dispossession—Tresspass—Isolated act of.

An isolated act of trespass does not constitute dispossession. 20 Ind. Cas. 79 (Cal.).

——Art. 142—Dispossession—Symbolical delivery of possession—Scope.

Formal possession as against judgment-debtor may be dispossession within Art. 142 but not as against third persons or trespassers. 5 Ind. Cas. 273 (All.). [*See also* 34 M.L.J. 97=43 Ind. Cas. 268 (P.C.)=22 C.W.N. 807=46 Ind. Cas. 104].

——Art. 142—Dispossession.

To constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control. Acts such as plastering a party wall, & c., which can be refered to the easement right of resting one's rafters are not acts of possession. When an owners of two houses sells both to different persons, and the party wall is used by one house for resting its rafters, the other house passes subject to that burden. (1908) 31 M. 528=19 M.L.J. 309.

——Arts. 142 and 144—Dispossession in law—Execution.

There is no dispossession in the eye of the law unless the deprivation is complete as a fact—A conclusion which the Court has to form on the whole of the evidence, although what may occur may amount to a disturbance or obstruction of possession. (1903) 27 M. 262.

17. (c) Interpreation—"Discontinuance".

——Art. 142—Discontinuance of possession—Meaning of.

The phrase "discontinuance of possession" in Art. 142, Limitation Act, connotes abandonment of possession by the owner followed by the taking of possession by another, the wrong-doer.

A Muhammadan made a *wakf* of his properties and appointed himself as the first *mutwali* and provided that after his death his son should be *mutwali*. The *wakif* continued in possession of the *waqf* properties till his death as *mutwali*. On his death, his daughter instituted a suit for partition of her share in the properties which belonged to her father, on the ground that the *waqf* created by him was invalid. Her brother's defence to the suit was that the *wakf* was valid and he was in possession of the suit properties as *mutwali* :

Held, that the suit was not barred by time. It was instituted just within 12 years of the death of the *wakf* when the plaintiff's right as heir accrued. Article 142,

did not, in terms, apply, as the suit was not for recovery of possession, that prayer having been deleted at the plaintiff's instance. Nor was the case one of dispossession for the *waqif* could not be said to have dispossessed himself. As the *waqif* continued to be in possession after the execution of the *waqfnama*, but only changed the character of his possession, the case would not be governed by Art. 142 time running from the date of the execution of the *waqfnama* even if the suit (which it was not) had been a suit for possession. 74 C.L.J. 261=A.I.R. 1942 Cal. 180=46 C.W.N. 561=200 Ind. Cas. 392.

——**Art. 142**—" Discontinuance " in Art. 142, Limitation Act means that a person in possession goes out and is followed into possession by another person, because unless he is so followed, he will in law be deemed to continue in possession and therefore, there will be no discontinuance. A.I.R. 1939 All. 257=1939 A.W.R. 184=I.L.R. (1939) All. 454=181 Ind. Cas. 945=1939 A.L.J. 94=1939 R.D. 157.

——Arts. 142 and 144—Held, on facts that no question of discontinuance of possession arose and that the suit was governed by Art. 144.

Article 142 applies if the plaintiff has sued on the footing that while in possession he was dispossessed by the defendant, or if the fact be established that while in possession he was dispossessed by the defendant. The word " discontinued " in Art. 142 connotes three elements, two physical and one mental. There must be (1) actual withdrawal (2) with an intention to abandon, and (3) that another should step in, begin to occupy after the withdrawal. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It presupposes physical contract, a collusion either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effected by the latter.

Where a person is not in physical possession either himself or through some one else holding under him at any time after the reformation of the land and he does not exercise any acts of possession but through a fiction of law, he is in possession of the lands till the lands are actually fit for possession and he is not turned out either physically or by adverse acts of another, no question of discontinuance arises and a suit by such per on for establishing his title to and for recovery of possession of such reformed land would come within Arts. 144 and not Art. 142 and the opposite party must prove adverse possession for 12 years or over before suit. The right obtained by adverse possession for more than 12 years would be co-extensive with the assertion of the claimant. A.I.R. 1939 Cal. 354=69 C.L.J. 28=195 Ind. Cas. 714.

——**Art. 142**—The term " discontinuance " implies a voluntary act, an abandonment of possession followed by the actual possession of another. The difference between dispossession and discontinuance of possession might be expressed in this way : the one is where a person comes in and drives out the other from possession, the other case is when the person in possession goes out and is followed into possession by other. There must be an intention to abandon title before there can be saidto be a discontinuance of possession. But this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandoned possession either voluntarily or by *bis major*, for however short a time before he has actually perfected his title by 12 years' adverse possession, the possession of the true owner is deemed to revive and he gets a fresh starting point for limitation. Wrongful possession cannot be assumed against the true owner when the facts disclose that he himself voluntarily handed over possession and was not deprived of it by the other side. 1938 N.L.J. 418=A.I.R. 1939 Nag. 7=I.L.R. (1941) Nag. 655=181 Ind. Cas. 203.

——Art. 142—Mere ce3sation of possession is not enough—It must be followed by possession by another.

Discontinuance implies the abandonment of possession followed by the actual possession of another person and so dispossession implies an ouster from possession followed by the possession of another person. (1847) 10 Irish Law Rep. 514, Foll. The owner must be considered in point of law as always in possession so long as there is no intrusion. 1921 P.H.C.C. 29=A.I.R. 1921 Pat. 36.

——Art. 142—Discontinuance of possession—Dispossession—Distinction.

Dispossession occurs where a person comes in and drives out the other from possession ; discontinuance of possession occur3, where the person in possession goes out and is followed into possession by others. The mere fact that a person being the owner of property ceases to issue bills for its rents will not amount to discontinuance of possession. (1918) M.W.N. 683=8 L.W. 551=24 M.L.T. 424=49 Ind. Cas. 89.

——Arts. 142 and 144—Discontinuance of possession—Mines.

The mere fact that a mine has not been worked by the owner does not amount to a discontinuance of possession within Art. 142 of the Act. 22 C.W.N. 441=44 Ind. Cas. 297.

——Art. 142—Discontinuance of possession—Evidence of.

If the owner leaves his land in the possession of stranger for over 20 years and lives away cultivating other lands it constitutes abandonment. 1913 M.W.N. 218=19 Ind. Cas. 3.

——Arts. 142, 144—Discontinuance of possession—Co-sharers.

Where the co-owners of certain joint property, enjoyed the property by turns each for a year at a time, and later on, when plaintiff's turn came she did not avail herself of it. *Held*, that plaintiff cannot be said to have discontinued possession by not taking her turn of actual possession and Art. 142 of the Limitation Act did not apply to the case. 19 C. 253 ; 9 C. 744 ; 20 W..R. 53; 21 M. 153 ; 11 B. 365, Foll. 5 L.B.R. 112=3 Bur. L.T. 1=4 Ind. Cas. 298.

——Arts. 142 and 144—Discontinuance of possession—Co-sharers.

Where the plaintiffs and defendants, are co-owners, and the possession of one is on behalf of all, the mere fact plaintiffs are unable to show any overt act of ownership within 12 years before suit does not amount to a discontinuance of possession for they can rely upon the possession of the defendants which is on behalf of all. 1 Ind. Cas. 252 (Cal.).

——Art. 142—Discontinuance of possession.

Where, in default of payment of Government revenue by a co-sharer, possession of his share made over to another by Government but no claim was made since then to the possession of the land.

Held, in a suit by the purchasers from the heirs of the absentee, that there was no relation of trust as between them and the persons in possession and that there had been discontinuance of possession within the meaning of Art. 142, and the suit was barred by limitation. 1885 P.R. 711, Foll. 3 A.L.J. 16=1905 A.W.N. 282=28 A. 281.

——Art. 142—Discontinuance—True owner not in possession but no other person in possession—Effect of.

For discontinuance of possession on the part of a true owner to be made out, one must prove not merely that the true owner was not in possession, but that some body else was in possession. 13 A.C. 793. Foll. (1902) 4 Bom. L.R. 537=6 C.W.N. 617=29 C. 518=29 I.A. 104 (P.C.).

18. Invalid alienation.

See also NOTE 12.

(a) Alienation of joint family property.
(b) Alienation of minor's property.
(c) Other alienation.

18. (a) Invalid alienation—Alienation of joint family property.

——Arts. 142 and 144—Alienation by grandfather without justifying necessity.

An alienation by a co-parcener in excess of his powers gives rise to a single cause of action common to all the co-parceners, and the co-parceners, including those born after the alienation, have not a separate cause of action. The cause of action would be identical and the time would run from the date on which the possession of the alienee became adverse to the co-parcenary estate. Consequently, a suit by a Hindu to set aside an alienation of the joint family property made before his birth by his grandfather without any justifying cause is barred by limitation if instituted more than 12 years after the date of the alienation. A.I.R. 1940 Bom. 136=I.L.R. (1940) Bom. 109=42 Bom. L.R. 208=187 Ind. Cas. 663.

——Art. 144—Suit for possession by minor co-parceners on attaining majority.

The members of a co-parcenary have individual rights, separately enforceable, and in a suit for possession by the minor members on attaining majority, the cancellation of the deed of alienation, so far as did affects their rights is a relief ancillary to their claim for possession and the suit is governed by Art. 144. A.I.R. 1936 Lah. 996. 167 Ind. Cas. 916.

——Art. 144—Son born by first wife in 1908—Death of first wife in 1914—Remarriage of father—Sale by father and his second wife in 1931—Suit for possession by purchaser in 1933—Claim of son that he had right in such property—Article 144 does not apply. 158 Ind. Cas. 118.

——Art. 144—Where the alienation complained of is by the eldest managing member of a co-parcenary of the joint family property and not of the property belonging to the minor by his guardian, such a case is governed by Art. 144. 12 N.L.R. 12, Foll. 107 Ind. Cas. 516=A.I.R. 1928 Nag. 151.

——Art. 144—Joint Hindu family—Suit to set aside an alienation by a manager—Art. 144 applies not Art. 44 or 97. 13 A.L.J. 94 ; 12 N.L.R. 12, Foll. 68 Ind. Cas. 731=A.I.R. 1922 Lah. 386.

——Art. 144—Invalid alienation—Hindu father—Setting aside.

A suit to set aside an alienation by a Hindu father during his son's minority without any benefit or necessity is not governed by Art. 44 or 91 but by Art. 144. Plaintiff must sue for cancellation if the burden of proving invalidity lies on him. 17 Bom. L.R. 1137 (Note)=33 Ind. Cas. 441.

18. (b) Invalid alienation—Alienation of minor's property.

——Art. 144—Possession of person under invalid transfer—Whether can be adverse to minor.

A person holding under an invalid transfer holds adversely to the real owner, and his possession is adverse from its commencement even if the real owner is a minor. Consequently limitation would in ordinary circumstances run against the minor from the date of possession. A.I.R. 1948 Oudh 351.

——Arts. 142 and 144—Applicability—Minor—*De facto* guardian—Alienation of minor's property by as own property—Suit for possession by minor after majority—Limitation—Proof of title within 12 years—Necessity. *See* LIMITATION ACT, SS. 6, 7 AND 8. A.I.R. 1950 Pat. 191.

——Art. 142—When the guardian alienates the property of the minor ward by means of a deed which the void *ab initio*, and the minor, after attaining majority, files a suit for its recovery, the suit is governed by Art. 142. A.I.R. 1941 Oudh 172=1940 O.W.N. 1318=1941 A.W.R. 22=191 Ind. Cas. 885.

——Art. 144—Alienation by guardians of minor co-parceners—Suit by surviving minor to set aside alienation within 12 years of alienation but 3 years after attaining majroty—Article 144 does not apply. (1934) M.W.N. 960=40 M.L.W. 760=A.I.R. 1935 Mad. 1=68 M.L.J. 87=154 Ind. Cas. 616.

——Art. 144—Hindu Law—Joint family—Minor's guardian and manager of family alienating family property—Suit by minor after becoming major is governed by Art. 144. 34 Bom. L.R. 354=A.I.R. 1932 Bom. 255=137 Ind. Cas. 367.

——Arts. 144 and 44—A suit for possession by a minor on attaining majority against a transferee from the guardian where the latter has obtained permission from the District Judge to effect the transfer on ground of fraud or misrepresentaton iis not governed by Art. 144 but Art. 44. (1931) A.L.J. 997=A.I.R. 1932 All. 108=53 A. 738=136 Ind. Cas. 71.

——Art. 144—In the case of an alienation by an authorised guardian the minor must sue within three years of his coming of age. 32 All. 392, Diss. 61 Ind. Cas. 384=3 L.L.J. 280=A.I.R. 1921 Lah. 25.

——Art. 144—A conveyance executed by a *de facto* guardian is void and a suit by a minor for possession of property is governed by Art. 144. A.I.R. 1931 Rang. 178=134 Ind. Cas. 214.

——Art. 144—Invalid alienation.

Alienation by mother and guardian of two minor sons—One of them not repudiating sale—Other son repudiating transaction.

Held, that the suit was governed by Art. 144 of the Limitation Act and time began to run from the date when the ward attained majority. 1930 A.L.J. 852=A.I.R. 1930 A. 861=52 A. 768.

——Art. 142—Void lease by guardian—Suit by minor.

Where a minor sued after attaining majority to set aside a void lease,

Held, that Art. 142 and not Art. 44 or Art. 91 applied to the case. 34 C.W.N. 642=A.I.R. 1930 Cal. 748.

——Art. 144—Void transfer—Article 144 and not Art. 44 applies in case of transfer of minor's property by unauthorised person.

Where the property of a minor has been transferred by wholly unauthoeised person, the transaction is void *ab initio* and it is necessary for the minor in order to recover possession of property transferred to have the transfer set aside. In such cases Art. 44 will have no application and the suit will be governed by Art. 144. 1929 A.L.J. 1248=A.I.R. 1929 All. 879.

——Arts. 142 and 144—Sale by unauthorised persons.

When a sale is made not by a guardian but by a wholly unauthorised person, (in this case by a Mahomedan step-mother) Art. 144 is inapplicable but Art. 142 applies and a suit brought within 12 years from date of sale is within time. 84 Ind. Cas. 923=6 L.L.J. 516=A.I.R. 1925 Lah. 239.

——Arts. 144 and 44—Invalid alienation—Minor's property—Alienation by an unauthorised person—Suit to set aside—Limitation.

A suit for possession of immoveable property of a minor, alienated by one who is not a guardian either by law or by appointment is governed by Art. 144 and not Art. 44. 125 P.W.R. 1916=83 P.R. 1916=33 Ind. Cas. 943.

——Arts. 142 and 144—Invalid alienation—Minor—Suit by, to set aside—Alienation by guardian—Cause of action.

The cause of action for a suit by ward to recover his property, moveable or immoveable, misappropriated or alienated, by the guardian, arises from the date of the

gusrdian's removal. But when immoveable property has already been alienated by the ward's predecessor-in-title, the suit to recover it by ward, on the ground of invalidiry of the alienation, comes under the 12 years rule of limitation and the right to sue accrues from the date of alienee's possession,whether Art. 142 or 144 applies. 213 P.L.R. 1910=86 P.W.R. 1910=7 Ind. Cas. 505.

——**Arts. 144, 44**—Suit by ward to recover property on setting aside sale by guardian. *See* ART. 44. 28 M. 423.

18. (c) Invalid alienation—Other alienations.

——**Arts. 144 and 148—Inalienable property—Usufructuary mortgage—Mortgagee in possession undisturbed for over 12 years—Subsequent sale to mortgagee—Sale not challenged and mortgagee left in possession for statutory period—Effect—Suit for possession—Limitation—Adverse possession.**

Where property which is inalienable is mortgaged usufructuarily, the mortgage is invalid. But if the transaction is not questioned or challenged and the mortgagee remains in possession undisturbed for over twelve years, he acquires by lapse of time the status of a usufructuary mortgagee by adverse possession. If, thereafter, the property is sold to the mortgage by the owners of the equity of redemption, the sale-deeds are also invalid ; but if the sales also are left unchallenged, to mortgagee-vendee gets title by adverse possession, because even an invalid transaction supported by possession for the statutory period confers the right purported to be created by the invalid transaction. A suit for possession of the property is governed by Art. 144 and not by Art. 148, Limitation Act, as the suit cannot be regarded as one for redemption, because the equity of redemption no longer subsists having been acquired by the person in possession by prescription. 26 Pat. 717=A.I.R. 1949 Pat. 197.

——**Art. 144—Alienation by holder of grant not being full owner—Suit by successors to set aside and for possession—Cause of action—When arises.**

In the case of a grant which is not alienable by the holder, a suit by his successors to set aside an alienation by the last holder, and for possession on the ground that the alienor was not the full owner of the property dealt with, may be instituted within 12 years from the date of the death of the alienor. The cause of action for the suit arises only on the death of the alienor ; the fact that a suit by the plaintiffs for a declaration of their reversionary interest might be barred long ago is irrelevant, because the causes of action are different. I.L.R. (1946) Lah. 569=I.L.R. (1946) Kar. (P.C.) 138=59 L.W. 585=226 Ind. Cas. 295=A.I.R. 1946 P.C. 165 (P.C.).

——**Arts. 142 and 144**—The relevant portion of the grant by Government made in favour of the descendants of *R* was as follows :

"The Lieutenant-Governor considers that all the tenures now in possession of the family must be declared released in perpetuity to heirs general, under Muhammadan Law of descent, with a distinct proviso that no tenure now declared released in perpetuity can be alienable by an incumbent for any period longer or beyond, his individual title":

Held, the grant created a succession of independent life estates. The intention of Government in making this grant must be taken to have been to keep the property in the family of *R* for the maintenance in perpetuity of his descendants and to prevent strangers from coming in. If any such descendant did not, within 12 years fo his becoming entitled to possession on the death of the last preceding incumbent, attack a transfer made by any of his predecessor, his right to recover the property for himself would be barred. But that would not bar the right of any of those coming after him. 1942 A.W.R. 266=A.I.R. 1942 All. 402=(1942) A.L.J. 430=I.L.R. (1942) All. 871=203 Ind. Cas. 664.

——**Art. 144—Alienation of inam.**

Where an *inamdar* has alienated his *derva inam*, a suit to set aside such alienation must be brought within 12 years from the death of the *inamdar* alienating *inam*, as the limitation runs from the date of his death. Suit held is barred under Art. 144 as it was brought after 12 years after his death. A.I.R. 1938 Bom. 331=40 Bom. L.R. 400=176 Ind. Cas. 586.

——**Art. 144 and S. 2 (8)—Adverse possession—Watan lands—Sale of—Possession by vendee—Starting point—Subsequent watandars—Right to sue.**

The possession by a vendee of watan lands become from the date of the death of the alienor and a suit to set it aside will be barred if not brought within twelve years from that date by the next watandar or subsequent watandars claiming under the previous holder. 9 Bom. 198 (F.B.), Foll. 32 Bom.L.R. 1398=A.I.R. 1931 Bom. 24.

——**Art. 144—Transfer of Property Act, S. 54—Sale for less than Rs. 100—Property in vendee's possession.**

Where a daughter executed an invalid sale-deed in favour of her mother of property which was in the latter's possession and on her death, the mother succeeded her as heir :

Held, in a suit by the daughter's husband that the possession, of the mother was not adverse to him, that possession in order to be adverse, must be by a person claiming as of right as against the true owner, it must be continues for the statutory period and open and notorious it would not do if the possession is merely permissive nor will it do if the person against whom adverse possession is sought is not entitled to immediate possession nor will it do if the circumstances show that person had no knowledge of the hostile claim. A.I.R. 1933 Cal. 544=142 Ind. Cas. 582.

——**Arts. 142 and 144**—A sale was executed and properties were transferred in the name of vendee and he was in possession adversely to others. More than 12 years subsequent to this, legal representative of vendor sued for recovery of property on the ground that sale was invalid as being for immoral consideration.

Held, the suit was time-barred. A.I.R. 1933 Bom. 209=149 Ind. Cas. 464.=35 Bom.L.R. 345.

——**Art. 144—Symbolic possession in execution of decree—It has same effect as actual possession against judgment-debtor and mortgagee** pendente lite—Lis pendens.

Where in execution of a decree on a mortgage symbolic possession is delivered of immovable property to the person entitled to possession thereof and such person bring a suit for recovery of actual possession ; the symbolic possession is deemed equivalent to actual possession as against the judgment-debtor or his representatives and the suit is brought in time if it is brought within twelve years from the date of the said synmbolic possession. And further if during the pendency of suit on such mortgage another mortgage is executed by the mortgagor in favour of third persons they are bound by the decree in execution of which symbolic possession was delivered. They are affected by the doctrine of *lis pendens* and the symbolic possession as against them would be equivalent to actual possession and in this respect their possession is not different from that of the judgment-debtor of that mortgagee decree. 121 Ind. Cas. 407=56 Cal. 1130=33 C.W.N. 963=A.I.R. 1930 Cal. 15.

——**Art. 144**—Transferee *pendente lite* cannot prescribe title by adverse possession against mortgagee-auction-purchaser till he is entitled to actual possession in execution of his decree. 100 Ind. Cas. 294=A.I.R. 1927 All. 309.

——**Art. 144**—A suit to recover possession of land from assignees of Adimayavana right on the ground that the right was not alienable is governed by Art. 144 and the limitation begins when the first period for which the right was created expired. Article 143 does not apply to such a case. 92 Ind. Cas. 245=23 M.L.W. 58=A.I.R. 1926 Mad. 849.

——**Art. 144**—Suit by other members to recover tarwad property alienated by Karnavan not only as Karnavan but also as guardian of minor members is governed by Art. 144 and not by Arts. 91 or 44—Limitation Act, Art. 44—Limitation Act, Art. 91. 78 Ind. Cas. 564=19 M.L.W. 395=34 M.L.T. 89=A.I.R. 1924 Mad. 607=46 M.L.J. 340.

——**Art. 144—Starting point—Conditional transfer.**

Where plaintiff who was under a sentence of transportation for life, gifted property to another on condition that if he returned from Port Blair the donee was to return it and where the donee sold the property more than 12 years before his return.

Held, that for a suit by plaintiff against vendee, limitation began only on return from Port Blair. 69 Ind. Cas. 673=1922 M.W.N. 657=16 M.L.W. 552=31 M.L.T. 465=A.I.R. 1923 Mad. 67=43 M.L.J. 340.

——**Art. 144—Punjab Limitation Act (1 of 1900)—Alienation by male proprietor—Starting point of limitation.**

Where the transactions were alienations of ancestral land by a male proprietor and as alienations whether they be regarded as mortgages or as sales, time begins to run from the date of the attestation of the alienations. Even if Art. 144 were held to apply, the suits would still be barred as time would begin to run from the date when the alienees came into possession as owners and under S. 9 of the Limitation Act would continue to run not only as against the original alienors but against all the world. 18 P. R. 1919, Foll. A.I.R. 1923 Lah. 133.

——**Art. 144—Suit by co-sharer for declaration that lease by Lambardar is invalid—12 years rule applies.**

The position of a Lambardar with reference to his co-sharer in the matter of letting out vacant land cannot well be put higher than that of a manager of the joint property of a Hindu family, and therefore a suit by a co-sharer for a declaration that a lease granted by a Lambardar is invalid against him is within time, if brought within 12 years of the date on which the execution of the lease became known to the co-sharer, on the principle that a suit for declaration of a right cannot be held to be barred so long as the right to the property in respect of which declaration is sought is a subsisting right. 64 Ind. Cas. 775=17 N.L.R. 169=A.I.R. 1921 Nag. 74.

——**Art. 144—Invalid alienation—Possession—Adverse.**

The possession of a purchaser under a void sale is adverse to the real owner. 47 Ind. Cas. 694 (Oudh).

——**Arts. 142 and 123—Invalid alienation—Joint Share—Suit to set aside.**

A suit to set aside an invalid sale to the extent of the plaintiff's joint share and for possession thereof is governed by Art. 142 and not 123. 11 Bur. L.T. 119=42 Ind. Cas. 121.

——**Art. 142—Invalid alienation—Revenue sale—Suit for possession by proprietor.**

In a suit for possession by proprietor against a purchaser of his estate, in a revenue sale by the collector under Bengal Revenue Sales Act (1859) if the arrears is not due, the sale is void and no suit to set it aside is necessary. The proprietor can sue within 12 years of the alienation and dispossession. 22 C.L.J. 525=31 Ind. Cas. 965.

——**Arts. 142 and 144—Invalid alienation—Possession under.**

A village was leased in 1881 for 10 years. In 1885 the lessor mortgaged the village. In 1887 the mortgagee sued on his mortgage, brought the properties to sale and purchased and obtained possession of the same in 1890. In 1903 a successor of the lessor sued the auction-purchaser for recovery of possession on the ground that the properties belonged to a trust and as such the auction sale was void. **Held,** that whether Art. 142 or 144 applied, the suit was barred in as much as the purchaser remained in possession adversely to the trust from 1890. Very strong evidence is required to show that the auction purchaser was not in possession. 27 M.L.J. 195=26 Ind. Cas. 537.

——**Art. 144—Invalid alienation—Occupancy right—Alienation of—Suit to set aside.**

A suit for possession on the ground that the proprietor had no right to alienate occupancy rights is cognizable by a civil court and is governed by Art. 144. 112 P.W.R. 1914=228 P.L.T. 1914=25 Ind. Cas. 871.

——**Arts. 142 and 144—Sale a nullity—Sale execution of property not belonging to the judgment-debtor—Suit by owner of property so sold to recover possession—Limitation Act, Arts. 12 and 144.**

Where in execution of an order under S. 412 of the Code of Civil Procedure for payment of court-fees, certain immoveable property was sold as the property of the person liable under such order, which in fact did not belong to them but to a third person who had no notice of the sale, it was **held** that the true owner of the property so sold was competent to treat the sale as a nullity and to bring his suit for recovery of possession at any time within 12 years from the date when he lost possession. The case of an execution proceeding in which the property under attachment by the court is liable of satisfy the demand of the decree-holder is very different. 1904 A.W.N. 35=26 A. 346=1 A.L.J. 53.

——**Arts. 142 and 144—Contract to sell—Possession.**

Obiter.—Delivery of possession of properties under a contract to sell them as well as other properties in the possession of the vendor's mortgagee without registration will simply give a starting point of limitation to the vendee and the vendee may acquire a right to the properties in twelve years. (1900) 5 C.W.N. 217=24 Mad. 377=29 I.A. 46 (P.C.). **See also** 12 M.L.J. 410=26 M. 72.

19. Landlord and Tenant

(a) Suit by landlord for enhancement or assessment of rent.

(b) Suit by landlord for possession.

(c) Suit by tenant for possession.

(d) Miscellaneous.

19. (a) Landlord and Tenant—Suit by landlord for enhancement or assessment of rent.

——**Art. 144—Landlord and tenant—Suit for enhancement of rent.**

Art. 144 of the Limitation Act has no application to a landlord's assertion and the tenant's denial of the right to enhance the rent of the holding. 22 C.W.N. 856=43 Ind. Cas. 59.

——**Art. 144—Landlord and tenant—Claim for assessment of rent—Trespasser.**

Where plaintiff who was out of possession for more than 12 years based his claim on the ground that the defendants, were trespassers and did not elect to treat them as tenants, the claim for assessment of rent in respect of the disputed land is barred by limitation. 22 C.L.J. 151=30 Ind. Cas. 946.

——Art. 144—Landlord and Tenant—Rent free title—Encroachment—Presumption—Assessment of rent.

A tank was excavated on a waste land within the plaintiff's *Zamindari* by the predecessors of the defendants, many years ago, and plaintiff neither claimed nor received any rent for it. **Held,** the plaintiff's right to assess with rent was barred by lapse of more than 12 years' time before institution of suit from the date the defendants set up their rent-free title. Where more than 12 years before suit, there was a direct assertion of title negativing the theory of encroachment which would have conferred upon tank the character of an addition to the origional holding a suit for assessment of rent is barred by limitation. 22 C.L.J. 147=30 Ind. Cas. 942.

——Art. 144—Landlord and tenant—Suit for assessment of rent—Limitation—Tenancy.

If a person squats upon the land of another and if the latter accepts him as his tenant either by express declaration or by implication, the squatter acquires, the status of a tenant. But it is open to the proprietor to repudiate the tenancy, and to evict the person who has come upon the land without his consent. If a person occupies the land of another, it is not open to the proprietor, any length of time afterwards, to treat the occupier as tenant, in the absence of any indication that he intended to hold as tenant. Where it is not the case of any party that the tenancy ever existed and the plaintiff seeks for assessment of rent for the future, the suit is essentially for recovery of possession and the rule of limitation applicable to suits for recovery of possession is applicable. 22 C.L.J. 135=30 Ind. Cas. 931.

——Art. 144—Landlord and tenant—Suit for assessment of rent and mesne profits, claim for—Maintainability.

If the relation of the landlord and tenant subsists, a claim for assessment of rent and for mesne profits does not fail on the ground of adverse possession. 22 C.L.J. 122=30 Ind. Cas. 917.

——Art. 144—Landlord and tenant—Adverse possession.

Plaintiff's case was that the defendant unlawfully took possession of a certain tank but defendant averred that more than 12 years before the commencement of the suit, in the course of the settlement proceedings, she set up a rent-free grant and disclaimed all liability (to pay the rent to the plaintiff in respect of the disputed tank and the defendant's averment was proved.

Held, that a suit for a declaration that the plaintiff was entitled to have rent assessed on the tank was barred under Art. 144 of the Limitation Act. 22 C.L.J. 132=30 Ind. Cas. 902.

——Art. 144—Landlord and tenant—Suit by Zamindar—Title and possession—Assessment of rent—Record of rights—Starting point.

On the claim of the defendant before the Settlement Officer but without actual decision, the Record-of-Rights was finally published to the effect that the defendant was a settled *Raiyat*, and that no rent had been assessed in respect of those lands. A suit within 12 years from the date of the publication of the Record-of-Rights, by the *Zamindar* for declaration of title and for possession or in the alternative for assessment of rent is not barred, as on the publication of the Record-of-Rights, it is open to the plaintiff to rely upon the entries therein as a tacit recognition of his right to have rent assessed at any rate within 12 years of this date. 16 C.W.N. 929=15 Ind. Cas. 64.

19. (b) Landlord and tenant—Suit by landlord for possession.

——Arts. 144 and 139—Article 139 being a specific article for a suit for possession between landlord and tenant must be used in preference to Art. 144 which is a general one. A.I.R. 1935 Bom. 382=37 Bom. L.R. 593=159 Ind. Cas. 378.

——Arts. 144 and 139—Applicability—Landlord and tenant—Suit by landlord for possession on title after termination of tenancy—Limitation applicable. *See* LIMITATION ACT, ARTS. 139 AND 144. 51 Bom. L.R. 34=A.I.R. 1949 Bom. 137 (F.B.).

——Art. 144—Starting point—Landlord and tenant.

Tenant holding possession after expiry of term—Tenant's possession becomes adverse from the date on which term expires and limitation begins from that date, in the absence of proof of fresh tenancy. 22 Bom. 893 and 24 Bom. 504, Foll. 98 Ind. Cas. 911 =28 Bom. L.R. 1357.

——Arts. 144 and 139—Article 139 and not Art. 144 applies to suits brought against the representatives of the original tenant after the determination of the tenancy to recover the property leased. 86 Ind. Cas. 933=1925 M.W.N. 589=A.I.R. 1925 Mad. 446= 48 M.L.J. 185.

——Arts. 144 and 139—Tenant holding on after expiry of term—Article 139 and not Art. 144 applies.

A tenant who holds on to the land after the expiry of term of the lease cannot be sold to be holdings 'adversely' to the landlord. So long as he is in possession, he cannot deny that it was from the lessor that he got the land. But where the tenant holds on after the expiry of the lease, time begins to run against the landlord from the date of the expiry of the lease, under Art. 139 of the Limitation Act. After the expiry of 12 years, the title of the landlord must cease by the application of S. 28 of the Limitation Act. With the cessation of the right to recover the land his right to the property is also extinguished. Article 144 of the Limitation Act has nothing to do with the case. 85 Ind. Cas. 550=6 L.R.A. Civ. 254=A.I.R. 1925 All. 698.

——Arts. 142 and 144—Tenancy-at-sufferance—Starting point.

Per *Niyogi, A.J.C.*—Whatever possessory rights a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the "tenancy-at-sufferance" is heritable. The son of such a tenant cannot in any event style himself as a tenant holding over. His position is nothing better than that of a trespasser. His possession would, therefore, be clearly adverse to the owner of the land and would ripen into a prescriptive title so as to extinguish the plaintiff's title.

Limitation begins to run against the landlord from the date when efflux of time, the tenancy comes to an end. A.I.R. 1934 Nag. 67=30 N.L.R. 155=148 Ind. Cas. 561.

——Arts. 142 and 144—Landlord and tenant—Suit to eject tenant—Plea of adverse possession—Burden of proof—Presumption based on title in favour of landlord—Limited interest—Adverse possession.

There is no difference in principle between a case where a tenant sets up a title adverse to his landlord's entire interest, and a case where he prescribes for the limited interest of a tenant. Though a tenant is bound to treat that which was an encroachment on his landlord's land as held by him under his landlord, the latter is not bound to treat the land on which the tenant has encroached as held under such tenancy. But the landlord's right to possession of the land encroached upon may be lost by adverse possession by the tenant asserting his title to the land as tenant for more than 12 years under Art. 144, there may be adverse possession not only of immoveable property but also of any interest therein, and the tenant may claim to have been in adverse possession for over 12 years of a limited interest in the encroached land, *viz.*, a tenancy commensurate with that in the admitted lease between the parties. The onus of establishing property by reason of possession for a requisite period is upon the person asserting it, *i.e.*, on the tenant, and the landlord cannot fail in his suit for ejectment until the tenant establishes adverse possession for the statutory period either of the entire or the limited interest. It has also to be borne in mind that in such a suit where both parties have not adduced satisfactory evidence, the Court is entitled to take into consideration the presumption arising from title and the probabilities of the case. Because the landlord has not established very satisfactory evidence it cannot be held that the article applicable is Art. 142, and that because he has not discharged the burden of proof under Art. 142, the suit must fail. 16 C.W.N. 634; 2 P.L.J. 506; 6 P.L.T. 514; A.I.R. 1934 Pat. 339, foll. A.I.R. 1950 Pat. 484.

——Arts. 142 and 144—Applicability—Suit for possession—Allegation in plaint that property was let to defendant.

Where in a suit for possession the allegation in the plaint is that the plaintiff was in possession of the property in dispute and that she let it to the defendant who refused to vacate it, Art. 144 and not Art. 142 of the Limitation Act would apply to the suit. In order to apply Art. 142, it has got to be established that the plaintiff abandoned the possession of the property and it was followed by the possession of the defendant in his own right. A.I.R. 1950 Pesh. 31.

——Art. 144—Ejectment suit—Court finding that defendant's occupation was that of tenant under plaintiff—Proof required of defendant to succeed.

Where in a suit for ejectment the Court finds that the defendant's occupation was not independent of the plaintiff, that is to say, not on his own independent title but as a tenant under the plaintiff, it is necessary for the defendant, in order to succeed in the case to establish ouster, that is, assertion of hostile title as against the plaintiff and claiming title on his own account and after such assertion, to the knowledge of the plaintiff his remaining in possession for the statutory period of 12 years or more. 222 Ind. Cas. 378=12 B.R. 260=27 P.L.T. 217=A.I.R. 1946 Pat. 185.

——Arts. 142 and 144—Tenant taking possession of land outside tenancy and holding same far over twelve years—Landlord, if can recover khas possession.

Where the tenants take possession of the plot by including it in the site of the permanent house that they had built upon the land included in the tenancy and have been in possession of the plot for twelve years the landlord is barred under Art. 142 from recovering *khas* possession of that plot, but he is not barred from bringing a suit for fixing a rent and for recovery of three years arrears because as the possession is only in the character of a tenant, it is not adverse to the landlord in the character of a landlord. A.I.R. 1944 Pat. 109=10 B.R. 486=9 C.L.T. 57=212 Ind. Cas. 273.

——Arts. 142 and 144—*Abadi* site—Usufructuary mortgage of—Mortgagee a mere trespasser—Suit by landlord for possession—Suit is governed by Art. 142 or Art. 144 and not by Art. 120, Lim. Act. A.I.R. 1939 Nag. 163=I.L.R. (1941) Nag. 337=1939 N.L.J. 136=182 Ind. Cas. 527.

——Arts. 142 and 144—Ejectment suit.

Where, in a suit for ejectment, the case set up by the plaintiff is one of tenancy, it is tantamount to saying that the defendants, when they repudiated his title as landlord dispossessed him, so that here is in effect an assertion of possession and dispossession—Precisely what is contemplated under Art. 142. The mere fact that the plaintiff's witnesses depose that the suit properties were never, to their knowledge, in the possession of the plaintiff, but on the contrary, strangers were in possession, this evidence of course falls short of what would be requisite under Art. 144. That the plaintiff was out of possession, would not suffice; the admission that strangers were in possession, would be equally insufficient for, it might mean that there were independant trespasses not connected as of right. A.I.R. 1938 Mad. 415 =(1938) M.W.N. 105=47 M.L.W. 165=(1938) 1 M.L.J. 113=183 Ind. Cas. 88.

——Arts. 142, 144 and 139—House leased by *P* to *B*, father of *D* in 1893—Rent note executed by *B* agreeing to pay monthly rent regularly—*P* to get house vacated in case of default of rent for three months—*B* dying in 1910—Rent not paid by any one since 1900—Suit by *P* against *D* in 1931 for possession and mesne profits—Rent-note, held created tenancy for indefinite period and it reduced itself into tenancy-at-will on three month's arrears—Tenancy ended on death of *B* as he was tenant-at-will and *D*'s possession was adverse from 1910—Suit, held was time-barred whichever of Arts. 139, 142 or 144 applied. 1938 N.L.J. 317=I.L.R. (1940) Nag. 269=A.I.R. 1938 Mag. 506=182 Ind. Cas. 581

——Arts. 142 and 144—Person having right and title to possession suing for possession—Defendant should prove title.

Where a person who is the admitted landlord having a right and title to the possession of land sues for possession, it is for the defendant to show a title to the property in suit, and, it would certainly not be in the interests of justice to throw out the suit on a technical ground that the plaintiff bases his suit on a technical ground that the plaintiff bases his suit on dispossession and fails to establish it when the parties are residents of a rather out-of-the-way portion of a backward district where the Courts should ordinarily use their discretion liberally in construing the pleadings and, where necessary, allowing amendments. Order 6 R. 17, Civil P. Code, expressly contemplates allowing all necessary amendments in order to determine the real questions in controversy between the parties. A.I.R. 1938 Pat. 118=4 B.R. 464=174 Ind. Cas. 627.

——Art. 144—Melwaram right.

Where a suit is one for recovery of the *melwaram* right, Art. 144 would apply. When the *melwaram* right consists in the imposition of the full assessment

it would be an interest in immovable property within the meaning of that article. The fact that the *zamindar* claims possession of the land in the notice, would not preclude him from getting the lessor interest of *melwaram* and the suit would not be barred if it is filed within 12 years of the date from which the land was resumed. A.I.R. 1937 Mad. 303=(1937) M.W.N. 189=173 Ind. Cas. 307.

——Arts. 142 and 32—Suit for possession of land by removal of trees unauthorisedly planted—Tenant not having legal right to use land.

The plaintiff sued as *zamindar* of a village the tenants for possession by removal of trees planted by the tenants on plots with which they had no concern. It was found that the tenants were not grove-holders but the way in which they could use the property amounted to a mere user by way of license and they had no legal right to use it :

Held, that for purposes of limitation, the case was governed by Art. 142, and not by Art. 32 which governed cases of persons having legal right to use certain property. A.I.R. 1935 All. 964=1935 R.D. 400=1935 A.W.R. 1362=159 Ind. Cas. 521.

——Arts. 142 and 144—Suit on title and tenancy.

Where, in a suit for possession, the plaintiff alleges his title and also specific tenancy of the defendants under him and the tenancy is not proved, then, with respect to the question of limitation, the proper article to be applied is Art. 144. If the defendants are not able to prove adverse possession under Art. 144, then the plaintiff must get a decree for possession though the tenancy alleged by him has been found against. Article 142 applies only to cases of continuance and discontinuance of possession. 42 M.L.W. 593=(1935) M.W.N. 740=A.I.R. 1935 Mad. 754=156 Ind. Cas. 581.

——Arts. 142 and 144—A landlord cannot have his possession disturbed by a trespasser in such a way that time begins to run against him so long as he is in fact not entitled to actual possession which vests in his tenant. 1934 M.W.N. 290.

——Art. 142—Tenant-in-possession for more than 12 years.

Where plaintiff sues for recovery of possession of certain property on the ground that the defendant is his tenant but fails to prove his tenancy, and the tenant has been in possession for more than 12 years :

Held, that the suit was barred by time under Art. 142. A.I.R. 1933 Lah. 893=35 P.L.R. 144=147 Ind. Cas. 285.

——Arts. 144, 142 and 32—Mere planting of trees on another's land does not amount to dispossession unless there is denial of right of owner.

The mere planting of trees on another persons land does not amount to dispossession. In such cases a person who plants trees has either right of ownership or on right at all. Where therefore a person had planted trees on the landlord's land without permission and after doing so had asserted no possession either by using the trees or by using the land and he had no right to continue to enjoy the trees after the landlord has asserted his ownership over the land on which the trees were situated. The landlord is entitled to the possession of the land. Article 144 applied to the case not Arts. 32 and 142. 7 O.W.N. 509=A.I.R. 1930 Oudh. 304.

——Art. 144—Applicability—Landlord and tenant—Suit against tenants—Defendants' claiming to be tenants under their party—Third party's title found against—Article applies.

The findings in a suit for declaration of title and fixation of rent against the tenants were that the defendants held the land as tenants. They never claimed title in themselves. Instead of saying that they were the plaintiff's tenants they set up a third party. But they never claimed any higher right than that of a tenant.

Held, that if the defendants did not occupy the land as included within their holding, it should be assumed that they were encroaching upon the land of their landlord when the land in suit is found to be the plaintiffs and not of the third parties as alleged by the defendants. In a case like this, Art. 144 applies. 57 Cal. 371=A.I.R. 1930 Cal. 579.

——Arts. 142 and 144—Suit for possession based upon title—Art. 144 applies.

The original tenant of a certain grove died leaving no heir. Under the law of the province and village custom, a tenant's grove escheats to the landlord if the tenant has no heir. The plaintiff being a village landlord sued for a declaration that he was the owner and possessor of that grove. The trial Court, regarding the suit as one only for possession, held that the suit fell under Art. 142 and threw the suit on the ground that the plaintiff had not proved possession within twelve years.

Held, that this was not a suit to which Art. 142, Limitation Act, applies, but that the article more strictly applicable was Art. 144. The essential difference between these two articles is that in the first case the owner bases his claim from the date of his dispossession, and in the second he bases his claim on his title without regard to his possession or dispossession, and time begins to run from the date that the defendant's possession becomes adverse to the plaintiff. 108 Ind. Cas. 109=5 O.W.N. 121=A.I.R. 1928 Oudh. 246.

——Arts. 142 and 144—Plaintiff setting tenancy as basis of defendant's possession—Defendants setting up adverse possession—Plaintiff need not prove possession within 12 years—Defendant must prove adverse possession—Suit is governed by Art. 144.

Article 142 is applicable only to cases where the palintiff alleges possession and dispossession in his plaint. 99 Ind. Cas. 312=25 M.L.W. 127=A.I.R. 1927 Mad. 287.

——Art. 142—Encroachment by a tenant under a claim adverse to a limited extent—Article applies.

If the possession by the tenant is under a claim which is adverse to the landlord though only to a limited extent, then the purpose of the right which the tenant is claiming, the possession of the tenant is no longer the possession of the landlord and it must be treated as dispossession of the landlord within Art. 142.

Where the tenants had encroached on certain tanks belonging to the landlord under a claim to the tanks forming part of their tenancy,

Held, that the case fell under Art. 142 and the landlords having been out of possession for more than 12 years, the tenants could not be deprived of their possession of the tanks. 84 Ind. Cas. 657=40 C.L.J. 160=A.I.R. 1925 Cal. 193.

——Arts. 144 and 139—Article 144 and not Art. 139 governs suit by landlord against Mukarrari-

dars claiming permanent interest while lease granted only life interest.

The *mukarrari istimrari* granted to the original *mukarraridars* conveyed only a life-interest. But it was claimed by their representatives that the interest which the *mukarrari istimrari* lease conveyed was of a permanent character. Such interest was expressly asserted in the sale-deed executed by the *mukarraridars* at the time. The defendants expressly claimed throughout to hold under the sale deed as permanent *mukarraridars*,

Held, that the suit was not governed by Art. 139, but by Art. 144 as the defendants had made a definite assertion of an adverse right more than twelve years before the suit. 84 Ind. Cas. 586=4 Pat. 139=6 P.L.T. 12=1924 P.H.C.C. 313=A.I.R. 1925 Pat. 216.

——**Arts. 142 and 144**—Sale of groves—Subsequent relinquishment to landlord by vendor—Landlord's suit against vendees—Arts. 144 and not 142 applies—Time runs from relinquishment—The reason for this is that the landlord, on relinquishment by the grove-holder claims in his own right to re-enter and not under a derivative title through the grove-holder—The sale by the grove-holder can be treated by the landlord as abandonment, in which case time will run from the sale—But the landlord is not compelled to treat it as abandonment by the grove-holder. 84 Ind. Cas. 237=27 O.C. 301=A.I.R. 1925 Oudh 307.

——**Art. 144—Landlord and tenant—Trespass by stranger.**

The article governs a suit by lessor for possession against a trespasser who has wrongfully dispossessed the lessee who was holding over and the plaintiff can succeed unless the adverse possession has ripened by prescription. 57 Ind. Cas. 994 (Cal.).

——**Art. 144—Landlord and tenant—Adverse possession.**

In a suit by a landlord to eject the defendant his tenant, the court must consider the length of the defendants, possession and the title claimed by him. If the tenant had been claiming occupancy rights for over 12 years the right of the landlord is to sue for assessment of rent. 29 C.L.J. 607=52 Ind. Cas. 650.

——**Art. 144—Landlord and tenant—Suit for possession by landlord—Gift of occupancy holding by widow of deceased tenant.**

The possession of a donee of a right of occupancy from the widow of a deceased occupancy tenant becomes adverse to the landlord not from the date of his (donee's) obtaining possession in pursuance of the gift, but from the date of the widow's death; consequently a suit brought by the landlord for possession of the holding within 12 years from her death is within time and is governed by Art. 144 of the Limitation Act. The landlord is not bound to sue the transferee during her life-time. 44 P.R. 1917=51 P.L.R. 1917=1 P.W.R. 1917=39 Ind. Cas. 163.

——**Art. 144—Landlord and tenant—Interruption.**

A tenant asserted that he was a *mulgeni* tenant in 1894 and in a suit brought by a *Moktesor* of a temple to eject him in 1903 the *moktesor* got into possession, the tenant having been held to be a *chalgeni* tenant though that decree was reversed by the High Court for insufficiency of notice. In a subsequent suit brought in 1909 by the same plaintiff to eject that tenant;

Held, (1) that the defendant's plea was not barred by *res judicata* as the decision as to the in-sufficience of notice did not necessarily involve the finding that the tenent was a *chalgeni* tenant. 13 C. 17 and 18 C. 647, Foll. (2) that in consequence of the disturbance of possession brought about by a decree in the former suit the continuous possession which the defendant was bound to have proved under Art. 144, Schedule I of the Limitation Act, was broken and therefore the defendant did not acquire a prescriptive title and could be ejected. 31 M.L.J. 311=(1916) 2 M.W.N. 133=20 M.L.T. 228=35 Ind. Cas. 421.

——**Art. 144—Landlord and tenant—Tenancy—Proof of.**

When the plaintiff comes into Court on the allegation that the defendants had not attorned to him, the possession of the latter could not be said to be for the benefit of the former. If the plaintiff has failed to prove that the land was *Mal* or that he had ever been in possession thereof by actual occupation or by receipt of rent for more than 12 years, his claim for possession is barred by limitation. 22 C.L.J. 144=30 Ind. Cas. 939.

——**Art. 144—Landlord and tenant—Adverse possession.**

Where defendant to the knowledge of plaintiff claiming a limited interest in encroached land, *viz.*, a right to realise rent, asserted a hostile title more than 12 years before the commencement of suit,

Held, that the plaintiff (landlord) had no enforceable title under Art. 144 of the Limitation Act. 22 C.L.J. 129=30 Ind. Cas. 896.

——**Art. 144—Landlord and tenant—Non-transferable holding.**

A landlord suing in ejectment a purchaser of non-transferable holding cannot succeed unless he makes out a case under S. 18 of the Limitation Act, where the purchase took place more than 12 years before the suit. 19 C.W.N. 136=28 Ind. Cas. 708.

——**Art. 142—Dispossession—Landlord and Tenant.**

Time does not begin to run against the landlord until expiration of the lease, when he is dispossessed of land, held, by tenant under lease. Time will run against landlord if he was in possession of the land of which he was dispossessed, after the expiry of one of several leases. When the defendant claims to hold the disputed land as accession to the leased land, Art. 142 applies. The plaintiff must show that he was in possession within 12 years of the suit or that he had a right to sue. 2 Ind. Cas. 168 (Cal.).

——**Art. 144—Suit for possession under an Artha-Mulgeni lease.**

A suit for possession under an Artha-Mulgeni lease is governed by Art. 144 and not by either Art. 113 or 116. (1907) 31 M. 51=3 M.L.T. 241.

——**Art. 144—First suit based upon particular lease—Lease found against—Plea of occupancy right—Second suit on different lease for a number of years—Expiry of more than 12 years from the date of prior suit—Adverse possession.**

Where the landlord first brought a suit alleging a particular lease for a number of years and on the tenants pleading permanent occupancy rights, a subsequent suit by the landlords on the allegation of a different lease will be barred if brought more than 12 years from the date of the defendants setting up their occupancy right in the first suit, their adverse

possession dating from such time. (1902) 26 M. 535.

19. (c) Landlord and Tenant—Suit by tenant for possession.

——**Art. 142**—Suit by tenants who have been dispossessed of their land for declaration of their title and possession, as occupancy raiyats—Art. 142 applies. 105 Ind. Cas. 561=9 Pat. 340=A.I.R. 1928 Pat. 128.

——**Art. 142—Dispossession—Landlord and tenant—Suit by occupancy tenant against landlord for possession of holding of which he was dispossessed.**

The period of limitation for a suit by an occupancy tenant for possession of an occupancy holding from which he was dispossessed by the landlord is twelve years from the date of dispossession under Art. 142 of the Second Schedule to the Limitation Act. 133 P.L.R. 1911=243 P.W.R. 1911=11 Ind. Cas. 521.

19. (d) Landlord and Tenant—Miscellaneous.

——**Arts. 142 and 144**—Per *Full Bench, Digby, J.*, contra. Surrender illegal on account of its being part of transaction against S. 49, C. P. Ten. Act, 1920—Suit to set aside is governed, not by Art. 1 of Sch. II of the C.P. Ten. Act but by the povisions under Art. 142, Limitation Act, and not Art. 144. A.I.R. 1938 Nag. 435=I.L.R. (1939) Nag. 1=177 Ind. Cas. 6 (F.B.).

——**Arts. 142 and 144—Grant of surface rights.**

Upon a grant of the surface rights by a *zamindar* he remains in the eye of the law in possession of the sub-soil. Cases of adverse possession of mineral rights have, therefore, to be decided under Art. 144 Limitation Act, rather than under Art. 142, and the trespasser must establish adverse possession whether he is the grantee of the surface or a stranger. A.I.R. 1931 P.C. 162=35 C.W.N. 870=(1931) A.L.J. 566=34 L.W. 1=54 C.L.J. 137=33 Bom. L.R. 1273=61 M.L.J. 632=58 I.A. 228=59 C. 80=132 Ind. Cas. 610 (P.C.).

——**Art. 144—Possession of under-raiyat for life—When becomes adverse to landlord.**

An under-raiyat holding occupancy rights for his life was ejected by the landlord. The under-raiyat brought a suit under S. 9, Specific Relief Act, asserting that he held permanent heritable occupancy rights. The Court, though it decreed the suit was not concerned with the exact status of the parties. The landlord did not thereupon bring a suit for declaration under S. 42, Specific Relief Act.

Held, that the landlord was not bound to bring a declaration suit under S. 42, and the possession of the under-raiyat was not adverse against him since the decision of the suit under S. 9, Specific Relief Act, as the question whether the occupancy rights held by the under-raiyat were heritable or not, did not really arise in that suit. 11 Pat. L.T. 539=127 Ind. Cas. 835=A.I.R. 1930 Pat. 562.

——**Arts. 142 and 144—Landlord and tenant—Adverse possession by tenant—Starting point.**

The tenant himself cannot during the term by any act or declaration of his disseise the landlord. He may by repudiating the landlord s title during the term. forfeit the term, but the landlord is not bound to take advantage of the forfeiture and his estate cannot be affected. A tenant cannot use the statute of limitation to run against his landlord by giving notice to him of an adverse title during the term. The statute of limitation runs against the landlord only when the relationship of landlord and tenant has determined and the landlord is entitled to take possession. 85 Ind. Cas. 678=A.I.R. 1926 Cal. 193 (D.B.).

——**Arts. 142 and 144—Evidence Act, S. 101—Title with plaintiff—Onus is on defendant to prove adverse possession—Kabuliyats and application's to Municipality are good evidence of possession.**

In a case where the suit is resisted on the ground of acquisition of title by prescription it is not for the plaintiff to prove his title within 12 years. It is for the defendants to prove his adverse proprietary title. 39 Mad. 670 ; 17 A.L.J. 84, Foll.

Kabuliats and application to the Municipality may not be sufficient to prove possession but *prima faice* counterparts of leases executed by tenants and applications for permission to build, put in the Municipal Board are the best possible evidence of possession. They would at least tend to show which were the persons who were in actual possession and on whose behalf they held that possession. The application would show also that a certain party alleged himself to be in possession of the property in dispute. 74 Ind. Cas. 879=A.I.R. 1923 All. 565.

——**Art. 144.**—Possession taken during a lease cannot be adverse as against the lessor until the termination of the lease, the lessor being unable to sue for possession while the lease is still current. 4 Cal. 327 and 27 All. 395, Foll. 63 Ind. Cas. 717=3 L.L.J. 215=A.I.R. 1921 Lah. 17.

20. Mines and Minerals.

——**Arts. 142 and 144—Mines and minerals—Essentials for adverse possession explained—Possession in question of fact—Extent of possession is inference of fact.**

In order that possession of mineral rights be adequate in publicity the defendant must prove that there was that to be seen on the surface which the plaintiff or his predecessor being reasonably vigilant ought to have seen and so seeing would have been put on his guard although he did not have any title to the surface.

As a general rule where title is founded on adverse possession the title will be limited to the area of which actual possession has been enjoyed. In the case of mines there is no presumption in law that possession of a part of a seam infers possession of the whole seam much less of all the seams in the mineral field in which part of a seam has been worked. Possession is a question of fact and the extent of possession is an inference of fact. A.I.R. 1946 Cal. 123=49 Cal. W.N. 810=223 Ind. Cas. 515.

——**Arts. 142 and 144—Mines and minerals—Possession of part of seam.**

Where title is founded on adverse possession, the title would be limited to the area of which actual possession has been enjoyed.

In the case of mines there is no presumption in law that possession of part of a seam infers possession of the whole seam, much less of all the seams in the mineral field.

Possession is a question of fact and the extent of possession is an inference of fact. 49 C.W.N. 810=A.I.R. 1946 Cal. 123=223 Ind. Cas. 515.

——**Arts. 142 and 144—Sub-soil rights—Removal of comparatively small quantity of mineral—**

Whether sufficient to constitute adverse possession.

In order that mineral rights he lost by adverse possession, the working of the mines should be so general as to indicate that the defendant has taken possession of the minerals of the *Taraf*. Removal of a comparatively small quantity of mineral from here and there will not be sufficient. The adverse possession must be complete and will only affect the mineral for which possession has been proved. A.I.R. 1935 Pat. 33=13 Pat. 517=1 B.R. 570=156 Ind. Cas. 136.

——Arts. 142 and 144—Sub-soil rights.

Upon a grant of surface rights by the *zamindar* he remains in the eye of the law in possession of the sub-soil. Cases of adverse possession of mineral rights have to be decided under Art. 144 rather than Art. 142 and the trespasser must establish adverse possession whether he is grantee of the surface or stranger. A.I.R. 1931 P.C. 162=35 C.W.N. 870=(1931) A.L.J. 566=34 L.W. 1=54 C.L.J. 137=33 Bom. L.R. 1273=61 M.L.J. 632=58 I.A. 228=59 C. 80=132 Ind. Cas. 610 (P.C.).

——Arts. 142 and 144—Minerals.

Where a person without any colour of right, wrongfully takes possesion as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed. The maxim *tantum prescriptum quantum possessum* is rigorously applied to him.

In the case of mines, there is no presumption in law that the possession of a part of a seam infers possession of the whole seam, much less of all the seams in the mineral field in which part of a seam has been worked. On the other hand, possession is a question of fact and the extent of the possession may be an inference of fact.

In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth it is not possible to take actual physical possession at once of a whole mineral field ; it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must necessarily be partial. The real question is what in fact his been possessed.

In considering whether a person has acquired title to minerals by adverse possession, it is nothing to the purpose to prove that the person in possession had not worked any one pit for 12 years continuously, if for 12 years he had carried on operations in various parts of the mineral field. On the other hand, the fact that one pit in a mineral field is discontinued and another opened in different part of the field and that bores are sunk in likely places is excellent proof of possession of the whole area. A.I.R. 1931 P.C. 186=60 M.L.J. 183=33 L.W. 162=35 C.W.N. 265=53 C.L.J. 81 and 487=58 I.A. 29=(1931) M.W.N. 121=33 Bom. L.R. 425=12 P.L.T. 251=15 R.D. 194=10 Pat. 407=(1931) A.L.J. 537=130 Ind. Cas. 315 (P.C.).

——Art. 144—Starting point—Quarries.

Where defendants worked quarries without objection, the period of adverse possession is not to be counted from the time when different sorts of earth were found, at different depths, but from the time they began to make quarries. A.I.R. 1925 P.C. 43, Foll. 106 Ind. Cas. 117=55 Cal. 35=46 C.L.J. 307=32 C.W.N. 16=A.I.R. 1927 Cal. 956.

21. Mortgagor and Mortgagee.

——Arts. 142 and 148—Simple mortgage—Suit on—Decree and sale in execution—Purchase by mortgagee and entry into possession—Nature of possession—Suit by mortgagor's heir or representative for possession alleging mortgage invalid—Limitation.

Where a simple mortgage obtains a decree on his mortgage and sells the property in execution of that decree and himself purchases the property at the sale and enters into possession of the mortgaged property under his purchase in Court sale, his possession cannot be said to be as a mortgagee, but in assertion of an absolute title in himself, that it is adverse to the mortgagor and his representatives and amounts to dispossession of the mortgagor. A suit by the mortgagor's representative or heir to recover possession from the mortgagee-purchaser on the ground that the mortgage was invalid, is governed for purposes of limitation by Art. 142 of the Limitation Act ; Art. 148 does not apply.

Where the plaintiff comes to Court with a clear case of dispossession and seeks to recover possession, he cannot get relief unless he establishes possession within the period limited by Art. 142. A.I.R. 1950 Pat. 206.

——Arts. 144, 137 and 142—Suit for khas possession by mortgagee-purchaser in execution of mortgage decree, against mortgagor and his tenants—Tenants in adverse possession against mortgagor—Limitation—Starting point.

Art. 144, and not Art. 137 or 142, of the Limitation Act, applies to a suit for *khas* possession by a simple mortgagee-purchaser in execution of his mortgage decree against the mortgagor and his tenants, and such a suit will be in time it brought within twelve years from the date of the plaintiff's purchase in execution of his mortgage decree, although the possession of the tenants was adverse to the mortgagor even prior to that date. As a simple mortgagee the plaintiff had no right to demand possession at the time when the adverse possession of the tenants against the mortgagor started. He became entitled to possession only when he purchased the mortgaged property, in execution of his decree and the possession of the tenants became adverse to him only from that date.

Art. 137 of the Limitation Act contemplates an auction-purchaser who has by his purchase acquired just the interest which the judgment-debtor had in the property at the date of the sale and no higher and who stands in precisely the some position as the judgment-debtor did in relation to third parties in respect to that property. The purchaser at a sale in execution of mortgage decree, however, becomes clothed not merely with the equity of redemption but also the mortgagee's interest in the mortgaged property. Art. 137 cannot, therefore, apply to such a purchaser.

Art. 142 of the Limitation Act cannot apply to the suit as the plaintiff was never in possession. 53 C.W.N. 899=A.I.R. 1950 Cal. 92.

——Arts. 144 and 135—A mortgagee-in-execution of a decree obtained by him in his suit to enforce his mortgage purchased the property in court-auction and tried to take possession. His possession was obstructed by a person who claimed to be a purchaser of the property as a sub-mortgagee. The mortgagee never knew of any such purchase of equity of redemption until he was obstructed. Possession being thus obstructed mortgagee brought a suit against the prior purchaser. This suit was apparently more than 12 years after

the money on the mortgage became due. It was contended that the suit against the purchaser was barred by time :

Held, that the time ran against the plaintiff from the date of his purchase. Article 144 and not Art. 135. of Limitation Act applied. A.I.R. 1943 Sind 242= I.L.R. (1943) Kar. 315=211 Ind. Cas. 321.

——Art. 144—Agreement between mortgagee in possession and stranger to pay annuity to latter—Whether adverse possession of equity of redemption.

An agreement between mortgagee in possession and stranger to pay an annuity to the latter and recognised the claim of the latter as a person entitled to the equity of redemption cannot be regarded as tantamount to adverse possession of the equity of redemption unless the agreement to pay an annuity was known to the mortgagor and amounted to hostile possession of his interest in the property. A.I.R. 1940 Bom. 225=I.L.R.(1940) Bom. 453=42 Bom. L.R. 399=189 Ind. Cas. 561.

——Arts. 142 and 144—Rent and profits payable to mortgagor by mortgagee in possession, appropriated by stranger to the knowledge of mortgagor—Mortgagor's right to redeem would be barred after 12 years. A.I.R. 1940 Bom. 225=42 Bom. L.R. 399=I.L.R. (1940) Bom. 453=189 Ind. Cas. 561.

——Arts. 142 and 144—Mortgagor executing lease—Mortgagee questioning it—Suit by mortgagee on mortgage and purchase of property in execution by himself—Ejectment suit by him against lessees.

Where a mortgagor executes a lease but that lease is questioned by the mortgagee as unauthorised and the mortgagee brings a suit on his mortgage and purchases the property himself but does not go into possession, his suit to eject the lessees must be brought within 12 years of the sale and the limitation cannot be extended by another infructuous litigation carried on to get possession to which the lessees are not parties. A.I.R. 1938 Pat. 189=19 P.L.T. 95=4 B.R. 565= 175 Ind. Cas. 279.

——Arts. 144 and 120—Suit for possession by auction-purchaser of mortgaged land leased subsequently.

In a suit by mortgagee auction-purchaser for the possession of certain land which was leased out by the mortgagor, after its mortgage, it is not necessary for the plaintiff to sue or pray for cancellation of the lease and this being so, the case is governed by Art. 144 and not by Art 120, Limitation Act. 1936 O.W.N. 399=1936 R.D. 168=A.I.R. 1937 Oudh. 146=12 Luck. 161=162 Ind. Cas. 225.

——Art. 144—Possessory mortgage—Equity of redemption, if capable of possession.

Although the equity of redemption in the case of a possessory mortgage is an intangible thing, yet it is an estate in land and is fully capable of possession. Art. 144 relates to a suit for possession of immovable property or any interest therein not otherwise specially provided for. A claim for possession of the equity of redemption is a claim for possession of an interest in immovable property within the meaning of Art. 144. 1936 O.W.N. 243=A.I.R. 1936 Oudh 168=1936 R.D. 93=160 Ind. Cas. 920.

——Art. 144—Mortgage with possession—Possession of stranger, when adverse to mortgagor.

There could in law be adverse possession on the part of a stranger against the mortgagee in possession but also against the mortgagor. Before the Court finds such possession adverse against the mortgagor during the currency of the mortgage it must be distinctly alleged and proved that the possession of the stranger was in ascertion of a right adverse to the mortgagor *and* to his knowledge. 1930 M.W.N. 1148.

——Art. 144—Mortgagor and mortgagee.

Part of mortgaged property sold to mortgagee in possession and whole mortgage satisfied—Mortgagee still continuing in possession—Mortgagee's possession becomes adverse. 34 C.W.N. 646=A.I.R. 1930 Cal. 402.

——Art. 144—Adverse possession against mortgagor commencing after mortgage does not affect right of mortgagee. This rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession. 50 C.L.J. 317=34 C.W.N. 519=A.I.R. 1930 Cal. 313.

——Art. 144—Possessory mortgage—Possession of trespasser is not adverse to mortgagor, but may be adverse to mortgagee. A.I.R. 1925 Bom. 465, Foll. A.I.R. 1929 Pat. 639.

——Art. 144—Adverse possession—Assertion of title against mortgagor and mortgagee.

Adverse possession against a mortgagee is generally ineffectual against the mortgagor, especially when it begins at a time when the mortgagee is in possession but when a trespasser takes possession of the mortgaged property and asserts a title which is hostile not only to the mortgagee but which also assails the title of the mortgagor and the mortgagor allows 12 years to elapse, the title of the trespasser will become indefeasible not only against the mortgagee but also against the mortgagor. 107 Ind. Cas. 612=A.I.R. 1928 Lah. 147.

——Art. 144—Usufructuary mortgagee purchasing mortgaged property by unregistered document—Mortgagee's possession becomes adverse from date of sale. 118 Ind. Cas. 177=50 All. 986=26 A.L.J. 1084=A.I.R. 1928 All. 726 (F.B.).

——Art. 144—Possession of mortgagee—If adverse to mortgagor.

A mortgagee to possession cannot, by getting himself recorded in the revenue papers as owner, defeat the right of the mortgagor to redeem. 120 Ind. Cas. 789 (Lah.).

——Art. 144—Exclusive possession by mortgagee—Mortgagor's right to decree, if barred.

As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years not any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redemption. 32 All. 296 (P.C.), Foll. 97 Ind. Cas. 922=1 Luck. 529=3 O.W.N. 693=A.I.R. 1926 Oudh. 594.

——Art. 144—Denial by mortgagee of title of mortgagor does not curtail period for redemption.

It is not open to a mortgagee by denying the existence of a mortgage to curtail the period of limitation provided for a suit for redemption. Once a mortgage comes into existence it continues to subsist as a mortgage until the period for its redemption expires despite any attempt made by the mortgagee to deny the existence of that mortgage or to set up an adverse title in himself. Article 144 of the Limitation Act (IX of 1908) is only a residuary artile and does not apply so long as Art. 148 of that Act is applicable. 74 Ind. Cas. 830=A.I.R. 1923 All. 613.

——Art. 144—Mortgagor and mortgagee—Mortgagee obtaining mutation as owner—If can set up adverse possession.

A mortgagee who obtains possession cannot set up adverse possession by mere mutation of names unless he proves that he purchased also the equity of redemption. 17 B. 755, Foll. 9 P.W.R. 1912=135 P.L.R. 1912=13 Ind. Cas. 852.

——Art. 142—Adverse possession by mortgagee—Mere assertion of title if amounts to.

A mere assertion of title by a mortgagee in possession does not give a starting point for limitation for a suit by a mortgagor for redemption. Nor does the fact that the mortgagee's name appear in the Revenue registers as owner, is a sufficient evidence of adverse possession against the mortgagor. 4 Bur. L.T. 185 =11 Ind. Cas. 853.

——Art. 144—Mortgagor and mortgagee—Erroneous representative by mortgagee as owner.

A mortgagee, by erroneously representing himself as owner, cannot make his possession adverse to the true owners. 4 A.L.J. 787=1908 A.W.N. 1.

——Art. 144—Mortgagor and mortgagee.

Possession of the Mortgagor is only permissive and can never be adverse to the mortgagee. (1905) 7 Bom. L.R. 772.

——Art. 144—Exclusive possession by mortgagee—Bar of equity of redemption of.

As between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption would be a bar or defence to a suit for redemption if the mortgagor be otherwise entitled to redeem. (1904) I.C.L.J. 584=2 A.L.J. 71=9 C.W.N. 201=7 Bom. L.R. 1=32 C. 296=32 I.A. 23 (P.C.). **See also** 1907 A.W.N. 221=4 A.L.J. 521=29 A. 640.

——Art. 144—Possession by mortgagee—Consideration not paid—Effect of.

Where possession is held under a mortgage for which no consideration was paid, the possession is still only that of a mortgagee, and is not adverse to the mortgagor. (1902) 4 Bom. L.R. 966=27 B. 154.

——Art. 144—Unauthorized transferee from mortgagee's transferee, holding possession for more than 12 years—Suit for redemption against such transferee is barred under Art. 144. 43 All. 164, Foll. 99 Ind. Cas. 280=A.I.R. 1927 All. 177.

——Art. 144—Mortgagee suing for possession—Defendants pleading adverse possession against mortgagor—Defendant to prove such possession.

Where a suit for possession of the mortgaged property by the mortgagee resolves itself, so far as limitation was concerned, into an assertion on the one side, that the mortgagor was the owner of the property and on the other, the pleas on the part of co-defendants to the suit, alleging title to the mortgaged property by adverse possession, that the property never belonged to the mortgagor but that if title was found to be originally with the mortgagor it had been lost by adverse possession of the co-defendants,

Held, that Art. 144 was applicable to the case and that the onus of proving a prescriptive title against the mortgagor was rightly placed on the co-defendants, alleging such title. 99 Ind. Cas. 642=A.I.R. 1927 Lah. 171.

——Art. 144—Mortgagee in possession—Adverse possession of equity of redemption—Overt act.

Possession by a man of the equity of redemption, while the property is in the actual possession of the mortgagee should be deemed to become adverse when he signifies his assertion of his rights by an overt act. Paying off mortgagee and taking possession of the mortgage lands was held to be such overt act. 84 Ind. Cas. 374=48 Bom. 654=26 Bom. L.R. 829= A.I.R. 1925 Bom. 9.

——Art. 144—Mortgagor and Mortgagee—Mortgagor getting a redemption decree but not executing it—Mortgage by the mortgagee as owner—Sale in execution thereof—Effect on the mortgagor.

In 1861 the mortgagor usufructuarily mortgaged the property to the mortgagee and sued for redemption which was decreed upon payment of a certain amount but the mortgagee remained in possession as the property was not actually redeemed. In 1889 the mortgagee mortgaged it describing himself as absolute owner and the property was sold in execution of a decree on the latter mortgage and purchased by the decree-holder who sold it to the defendant in 1904. In 1915, the heirs of the original mortgagor sued for redemption of the mortgage of 1861, **held,** that Art. 144 and not Art. 148 or Art. 134 was applicable. 43 A. 164=A.I.R. 1921 A. 389=18 A.L.J. 995.

——Art. 144—Mortgagor and Mortgagee—Sir land—Exproprietary rights.

In a mortgagee of *sir* and zemindari rights the loss of the latter makes the zemindar an exproprietary tenant of the *sir* and the mortgage does not become ineffectual as regards the *sir*. Where the ex-proprietor on loss of zemindari becomes an exproprietary tenant but the transferee remains in possession, the possession is adverse. Where such rights are mortgaged prior to their coming into existence by the tenant there can be no adverse possession. 33 Ind. Cas. 483 (U.P.B.R.).

——Art. 144—Mortgagor and mortgagee—Adverse possession.

Where the relationship of mortgagor and mortgagee comes to an end by the satisfaction of the mortgage, the possession of the mortgagee will be adverse from that date against the mortgagor, within Art. 144, Limitation Act. 24 A. 44 (F.B.), Foll. 25 Ind. Cas. 611 (All.).

——Arts. 144 and 148—Mortgagor and mortgagee—Adverse possession—Redemption.

Where a mortgagor sues for redemption the suit would be barred if the trespasser did not derive possession from the mortgagee but held adversely for over twelve years to both the mortgagor and mortgagee. 6 Bur. L.T. 196=7 L.B.R. 97=21 Ind. Cas. 348.

——Art. 144—Mortgagor and Mortgagee—Usufructuary mortgage—Subsequent sale of equity of redemption to A—Another sale of same to B after sale to A—Recovery of property by B after redemption—Suit by A for possession—Limitation—Cause of action.

A person had mortgaged certain property of his with possession and then sold the equity of redemption therein to A and again purported to sell the same to B, who paid off the mortgage and recovered possession of the property.

Held, in a suit by A against B for recovery of possession that limitation began to run against A

only from the date on which B recovered possession, and that the suit instituted within 12 years of that date was not barred. 252 P.W.R. 1912=14 Ind. Cas. 513.

——Art. 144—Usufructuary mortgage—Ouster of mortgagees.

One of the purchasers of the equity of redemption in a usufructuary mortgage ousted the mortgagees and took possession of the entire mortgaged property which he retained for more than twelve years; but title, it was found that he never denied the mortgagors' title and that the mortgagors had no right to prevent possession.

Held, that there was no adverse possession as against the other mortgagors although there was as against the mortgagees, and that the right of redemption was not lost; the ouster of the mortgagees did not entitle the plaintiff to re-enter into possession. 1908 A.W.N. 25=5 A.L.J. 85=30 A. 119.

——Art. 144—Adverse possession against mortgagor—Effect of mortgage—Purchase by mortgagee at mortgage sale—Previous purchase by another at a rent sale—Preferential title.

The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee who has purchased the property at a sale in execution of a decree obtained on his mortgage until after the sale when the ownership in, and the beneficial title to, the land for the first time vests in him. (1906) 10 C.W.N. 904=33 C. 1015.

——Art. 144—Mortgagor and mortgagee—Possession against mortgagee not necessarily adverse to mortgagor.

Possession which may be adverse to the mortgagee is not necessarily adverse to the mortgagor, the reason being that possession adverse to the mortgagor, can only arise after the mortgagor has become entitled to immediate possession, which, in the case of a usufructuary mortgagee will not be till he has redeemed the mortgage. Any steps taken apparently without any statutory authority by the Revenue authorities to remove the name of the original mortgagor from the record of rights and substitute that of a trespasser as owner, cannot in any way affect the title of the mortgagor or constitute adverse possession against him in the said trespasser. (1904) 1 A.L.J. 725=1905 A.W.N. 4=27 A. 395.

——Art. 144—Possession adverse to mortgagee entitled to possession—How for adverse to mortgagor—Mortgagor's right of suit.

Where a mortgagee in possession is dispossessed on grounds affecting only his right the dispossession of the mortgagee does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him. (1902) 4 Bom. L.R. 721=27 B. 43.

——Art. 144—Adverse possession of equity of redemption—Mortgagor not aware of any claim by another to the equity—Effect of.

Where the mortgagor is not aware of the claim made by another to the equity of redemption, any payment by or act done by that other which the mortgagor alone is entitled to do for the statutory period does not give him a prescriptive title to the equity of redemption. (1902) 4 Bom. L.R. 721=27 B. 43.

——Art 144—Adverse possession of equity of redemption—Mortgagee in possession.

The equity of redemption in a case where the mortgagee is in possession under the mortgage is capable of being acquired by adverse possession. (1901) 6 C.W.N. 601.

——Art. 144—Adverse possession against mortgagee not adverse against mortgagor. *See* 6 C.W.N. 60.

——Art. 144—Possessory charge created by award—Time for redemption is 12 years, and not 60, as in the case of a mortgage. 77 Ind. Cas. 113=20 A.L.J. 611—A.I.R. 1922 All. 410.

22. Office and Emoluments.

——Arts. 144 and 127—Right to perform service and worship of idol.

Where the claim as to either joint possession or enjoyment by rotation in the right to perform service and worship of idol is made, the case stands in the same way as a claim to immovable property and article applicable would be Art. 127 rather than Art. 144. 39 Bom. L.R. 94=A.I.R. 1937 Bom. 202=169 Ind. Cas. 81.

——Art. 144—Dismissal of archaka—Suit for possession after 12 years.

Where an *archaka* was dismissed and more than twelve years after the date of dismissal, a newly appointed *archaka* instituted a suit for possession of the *inam* properties against the dismissed *archaka's* heirs who were in possession.

Held, that even assuming that the grant was to the temple or to the office-holder for the time being, the possession of the dismissed *archaka* and his successors was adverse and the suit was time-barred.

Held, also that if the position of the *archaka* was that of a trustee, he could be removed only by the Court in properly instituted suit and his dismissal being invalid, the plaintiff had no right to sue. 39 M.L.W. 513=A.I.R. 1924 Mad. 381=150 Ind. Cas. 156.

——Art. 144 and 120—Succession to religious office after nomination—Article 144 does not apply but Art. 120 applies.

Where succession to a religious office is by nomination by the holder in office of his successor it is not a hereditary succession within Art. 124. Hereditary succession is succession by the heir to the deceased under the law the office must be transmitted to the successor according to some definite rule of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but the right of the latter should not depend upon the choice of any individual. Therefore the only article applicable to cases of succession after nomination is Art. 120. Article 144 also is not applicable as the claim to possession is also barred if the claim to office is barred under Art. 120. 97 Ind. Cas. 437=A.I.R. 1926 Mad. 1012=51 M.L.J. 258.

——Art. 144—Meikkavalgar in possession of *mani-bham* lands for 12 years after his dismissal from offices—Suit for possession by his successor is barred—When

on the death of the plaintiff his successor continued the suit.

Held, his right was also extinguished by adverse possession. 70 Ind. Cas. 369=15 M.L.W. 33=1921 M.W.N. 870=A.I.R. 1922 Mad. 406=42 M.L.J. 1.

——Art. 144—Lands attached to office of karnam —Adverse possession.

A person in adverse possession of lands annexed to the office of *karnam* for over 12 years acquires a prescriptive title to the lands as against the holder of the office and his successors. 59 Ind. Cas. 65=11 L.W. 453=38 M.L.J. 320.

——Art. 144—Lands attached to office of karnam —Adverse possession.

A person in adverse possession of lands annexed to the office of *karnam* for over 12 years acquires a prescriptive title to the lands as against the holder of the office and his successors. 38 M.L.J. 320=11 L.W. 453=59 Ind. Cas. 65.

23. Partition Suit.

——Arts. 144 and 95—Suit for partition of property not covered in previous partition on account of fraud of other members falls under Art. 144.

Where, subsequent to partition of joint family property, a person files a suit to enforce partition of certain other property which was joint family property but which has been excluded from the previous partition by fraud of the other members, such a suit is governed by Art. 144 and not by Art. 95. 45 Bom. L.R. 825=A.I.R. 1943 Bom. 419=214 Ind. Cas. 273.

——Arts. 142, 144, 95 and 96—Suit for partition—Subsequent suit for items left out by mistake or fraud:

Held, that the proper article to apply to such a case would be Art. 142 or Art. 144 and not Art. 95 or Art. 96. A.I.R. 1931 Sind 27=130 Ind. Cas. 552.

——Arts. 144, 120 and 113—Partition deed—Provision that if shares were found unequal excess must be made good from certain plot—Suit for deficit—Nature of suit—Limitation—Neither Art. 144 nor Art. 120, but Art. 113 applied. 42 L.W. 208=(1935) M.W.N. 540=A.I.R. 1935 Mad. 559=156 Ind. Cas. 879.

——Arts. 144, 127 and 96—A suit for re-adjustment of shares allotted in previous partition on the basis of mistake is not governed either by Art. 127 or Art. 144 but by Art. 96. 34 L.W. 262=61 M.L.J. 430=A.I.R. 1931 Mad. 707=54 M. 883=135 Ind. Cas. 9.

——Arts. 142, 144 and 120—Some co-parceners mortgaging their share and one of them selling his share to mortgagee—Suit by mortgagee's successor-in-title for partition and allotment of share and enforcement of mortgage—Article 120 applied and not Art. 142 or Art. 144. A.I.R. 1939 Bom. 322=41 Bom. L.R. 631=184 Ind. Cas. 23.

——Arts. 142 and 144—Suit for possession by partition by transferee from daughter of her share in her father's estate.

Article 142 is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost dispossession or discontinuance of possession. A suit for possession by partition by a transferee from a daughter entitled to her share in her father's property where it is not alleged that she was ever dispossessed is not within the ambit of Art. 142 but is governed by Art., 144. 8 O.W.N. 1364=15 R.D. 808=A.I.R. 1932 Oudh 122=136 Ind. Cas. 256.

——Art. 144—Suit for partition by auction-purchaser of a share in joint property—Time is 12 years from date of symbolical possession.

An auction-purchaser purchasing judgment-debtor's share in a joint property obtains a perfect title thereto not from the date when sale is confirmed but from the date of his obtaining symbolical possession following such sale. And a suit by such an auction-purchaser for partition and possession of his share is competent if brought within 12 years from the date of his obtaining symbolical possession. If in such a suit the co-sharers joint with the judgment-debtor set up title in them by adverse possession for statutory period, the burden is on them to prove conversion of their possession as co-sharers into adverse possession by some overt act. A.I.R. 1930 Lah. 914=31 P.L.R. 519=129 Ind. Cas. 699.

——Art. 144—Partition Suit—Purchaser of share of co-parcener—Adverse possession.

Art. 144 governs a suit by a purchaser of the share of co-parcener for partition of property from which is vendor is excluded. 34 Mad. 402=20 M.L.J. 323=7 M.L.T. 155=(1910) M.W.N. 55=5 Ind. Cas. 491.

——Art. 144—Joint property—Suit for partition is not barred as there is no adverse possession.

In a suit by a Mohammadan for partition and possession of property that had devolved on him and the defendants jointly some 50 years prior to the suit it was found as a fact that they were joint.

Held, that the suit was within time and cannot be barred by adverse possession. 77 Ind. Cas. 257=4 L.L.J. 57=A.I.R. 1922 Lah. 193.

——Arts. 144 and 127—Suit for partition of Zamindari adversely held —Article 144 applies.

The possession of the Zamindari Estate by the daughter from the date of her succession, is exclusive and adverse to the claims of the other branches, within the meaning of Art. 144 of the Act and consequently a suit for partition of the estate is governed by Art. 144, Art 127 has no application to such a case. 59 Ind. Cas. 978=43 Mad. 288=38 M.L.J. 149.

——Art. 144—Partition Suit—Mohammedan heirs.

Suit by an heir for his share in a Mohammadans property is governed by Art. 144 and time runs from the time when the attempt to exclude or deny his right is made. 22 Bom. L.R. 939=58 Ind. Cas. 42.

——Art. 144—Partition Suit—Tenants-in-common.

Art. 144 applies to a suit for partition between tenants-in-common although a tenant has acquired his rights by a purchase at court auction. In such a suit, there can be no question of adverse possession because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common. 28 M.L.J. 642=(1915) M.W.N. 414=29 Ind. Cas. 976.

——Art. 144—Partition Suit—Adverse possession.

The rule that possession of one co-owner is the possession of all does not apply where there is nothing to show that the property possessed was ever the common property of them all.

Held, that plaintiff had failed to show that he continued to be a co-sharer at the date of suit. 116 P.L.R. 1913=78 P.W.R. 1913=18 Ind. Cas. 868.

——Art. 144—Partition suit—Cause of action.

The cause of action to get a share in the property left by a deceased member of a joint Hindu family arises on his death and must be enforced within 12 years of the exclusion. 8 P.W.R. 193=26 P.L.R. 1913=18 Ind. Cas. 53.

——Art. 144—Partition suit—Prior suit for declaration of title impeaching validity of the will—Suit decreed—Subsequent suit within 12 years of decree—Not barred.

Plaintiffs instituted a suit for declaration impeaching the validity of a will left by their father on the ground that being the father of an undivided Hindu joint family, he had no right to dispose of the ancestral property by will. The suit was decreed. They subsequently brought a second suit for partition of the properties dealt with in the will, within 12 years from date of the decree of the trial court in the prior suit.

Held, that the suit was not barred by Limitation. 7 Ind. Cas. 284 (All.).

24. Possession follows title.

——Arts. 142 and 144—Proof as to possession—Absence of definite evidence of possession of either party—Presumption.

In the absence of any definite evidence of possession of either party, it must be presumed that possession followed title. 1947 A.L.W. 53 =1947 A.L.J. 302= 1947 O.W.N. (H.C.) 26=A.I.R. 1948 All. 56.

——Art. 142—Suit in ejectment—What plaintiff must prove—Vacant site—Mode of proving possession—Presumption as to possession following title—Applicability.

A person suing in ejectment on the strength of his title and dispossession should establish not only title but also possession within twelve years prior to the suit. If once he establishes that the date of possession of discontinuance of possession is within twelve years from the date of suit as required by Art. 142 of the Limitation Act, in order to establish prior possession within the meaning of the first column of that article it is permissible having regard to the nature of the land such as vacant site, or having regard to the absence of evidence of effective possession or conflicting evidence as to possession before the date of dispossession, to invoke the aid of the presumption of possession following title. This is merely a mode of proving prior possession as required by Art. 142. The Full Bench decision in (1940) 2 M.L.J. 190 does not purport to deal with the mode or manner of establishing possession but only lays down the requisites to be proved in a suit falling under Art. 142. 61 L.W. 178 =A.I.R. 1948 Mad. 420=1948 M.W.N. 176=(1948) 1 M.L.J. 194.

——Arts. 142 and 144—Where the plaintiff's evidence of possession is weak and a large portion of the lands is *patit*, the question whether the plaintiff can have the benefit of the doctrine that possession follows title depends on facts. A.I.R. 1940 Cal. 185=70 C.L.J. 534.

——Arts. 142 and 144—Where the plaintiff, in a suit for possession, admits the defendant's possession, but alleges that he was dispossessed within 12 years of the suit by the defendant and the defendant contends that he has been in possession for more than 12 years and the suit is time-barred, the plaintiff cannot be allowed to say that if he has failed to prove his possession by evidence, his possession must be presumed, as the title is with him, because in spite of his title the other party is found to be in possession. The presumption that possession follows title is rebutted by the fact that the defendant is found in possession. A.I.R. 1939 All. 257=(1939) A.L.J. 94=1939 R.D. 157=I.L.R. (1939) All. 454=1939 A.W.R. 184=181 Ind. Cas. 945.

——Arts. 142 and 144—Absence of evidence as to person in possession—Possession of owner is presumed.

Article 142 relates to a suit for possession of an immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession; such a suit must be brought within 12 years of the date of the dispossession or discontinuance.

A sold on August 27, 1915, certain property to *B's* father who died in July, 1918. *B* was a minor at the time and soon after the sale, *A* and the other defendants took forcible possession of the property. *B* instituted a suit on August 29, 1927 :

Held, that the suit was not barred as in the absence of evidence to prove possession from 1915 to 1918, the presumption that the owner was in possession applied and it should be taken as proved that *B's* father was in possession from 1915 to 1918. 36 Bom. L.R. 445=A.I.R. 1934 Bom. 207=58 B. 397=149 Ind. Cas. 882 (F.B.).

——Arts. 142 and 144—Presumption of possession with person having title—Joint Hindu family—Suit by purchaser from one co-parcener against purchaser from other co-parceners—Nature of.

If the plaintiff is entitled to immovable property and possession thereof and the property sued for is such that actual or effective enjoyment of it by taking produce is not possible, possession will be presumed to be with the person who has the title.

When all the members of a joint family have parted with their rights in a specific property of the family, questions between the alienees of the several members are not questions between co-parceners. The right of an alienee against the other alienees in such a case is not a mere equitable right to claim partition but a right of ownership. (1933) M.W.N. 823=A.I.R. 1933 Mad. 871=65 M.L.J. 769=38 M.L.W. 952= 147 Ind. Cas. 680.

——Art. 142—Possession following title—Suit on title—Article does not apply.

A certain property was gifted and the deed showed that the donee had got possession. The donee instituted a declaratory suit based on title though the plaint contained also a prayer for possession of property on the alternative,

Held, that the ordinary presumption is that possession goes with title, and the suit does not fall under Art. 142. 111 Ind. Cas. 376 (Oudh).

——Art. 144—Presumption is possession goes with title.

Where there was no allegation of dispossession of plaintiff by the defendant and the plaintiff was found to have title and the defendant was unable to prove his possession for 12 years,

Held, that Art. 144 applied and in the absence of evidence that any third party was in possession, the law will presume that the plaintiff had possession. 99 Ind. Cas. 971=38 M.L.T. 137=A.I.R. 1927 Mad. 1094.

——Arts. 142 and 144—Presumption of possession following title—When arises.

There are only two exceptions to the well established principle of law that in a suit in ejectment on the allegation of possession and dispossession, it is for the plaintiff to make out satisfactorily that he was in possession within 12 years before suit and that the dispossession was within that period. The first exception is where the plaintiff is not able to prove effective possession, as in the case of an open site on which anybody could walk or throw rubbish or stack temporarily firewood, etc, the Court would be justified where the defendant does not adduce satisfactory evidence as to possession in relying upon the presumption of law as to possession following title and giving a decree to the plaintiff on proof of his title. The second exception is where the plaintiff proves his title but cannot prove effective possession as in the case of forest lands or vast wastes and the evidence is not satisfactory on both sides, the Court not being in a position on the evidence to come to a conclusion as to possession, would be justified in relying upon the presumption of law as to possession and giving a decree to the plaintiff. 6 Pat. L.J. 478 (F.B.), Foll. 101 Ind. Cas. 813=25 M.L.W. 603=38 M.L.T. 366=A.I.R. 1927 Mad. 509.

——Arts. 142 and 144—Presumption of possessing following title—Has operation in future.

The law presumes that possession follows title and does not favour forcible entry into possession by trespassers. Further, the presumption is prospective rather than retrospective in operation. The presumption of continuity has an operation in the future because if it be shown that a particular state of things was existing at a particular time, that state of things will be presumed to continue in the absence of anything to the contrary.

Where in an ejectment suit the plaintiff alleges dispossession by defendant within 12 years, the onus of proving plaintiff's possession prior to his dispossession lies upon him, but in the absence of any proof of defendant's possession for the full statutory period the initial fact of the appellant's title comes to his aid and with greater or less force according to the circumstances established in evidence. 16 M.L.J. 272 (P.C.), Foll. 97 Ind. Cas. 1006=A.I.R. 1927 Nag. 37.

——Art. 142—Presumption of possession following title—Plaintiff proving title—Onus is on defendant to prove plaintiff's dispossession within 12 years.

Where there is no satisfactory evidence in rebuttal the presumption that possession goes with title must be given effect to and it is only in cases where it is clearly proved that the plaintiff has either been dispossessed or that he has discontinued possession that Art. 142 would apply. In cases where the plaintiff has succeeded in proving a clear title the burden lies on the defendants to prove adverse possession for the statutory period, and if he fails to do so, the plaintiff must succeed simply on the strength of his *prima facie* title as owner. 89 Ind. Cas. 995=A.I.R. 1926 Lah. 13.

——Arts. 142 and 144—Suit for recovery of possession—Plaintiff can invoke the presumption that possession follows title, if he proves ownership up to the time immediately preceding 12 years where manifest acts of enjoyment cannot be proved.

The question, therefore, in every case is (1) whether a plaintiff has proved ownership up to the point of time immediately preceding the 12 years' period; (2) whether all the circumstances were such as to render it natural for the plaintiff to exercise manifest acts of enjoyment of the land during the twelve years preceding suit. If the plaintiff merely proves title at a remote date, he cannot ask the Court to presume that his title continued up to the point of time in question because he may have lost title by adverse possession. A.I.R. 1922 Cal. 557; 2 P.L.T. 487 and 8 M.I.A. 199 (P.C.), Foll. 96 Ind. Cas. 225=A.I.R. 1926 Oudh 528.

——Arts. 142 and 144—Possession goes with title applies where land actually vacant—Otherwise presumption exists in favour of person in actual possession.

Where land is admittedly vacant there is no doubt that possession may be presumed to go with title but before possession can be presumed to go with title it must be clearly proved that the land has been lying vacant. Where it is not so proved the presumption is that possession has been with the person in actual possession although he may be holding under an invalid sale. 69 Ind. Cas. 427=A.I.R. 1924 Lah. 276.

——Arts. 142 and 144—Title with plaintiff, but possession with defendant—Plaintiff to prove dispossession within 12 years.

There is no absolute presumption that possession always follows the paper title. When the plaintiff comes to prove his possession under Art. 142 his paper title comes to his aid with greater or less force according to the circumstances established in evidence. As far as the paper titles went it appeared that the plaintiff on the one hand and the defendants on the other hand were to divide survey No. 58 into equal moieties of 12 acres and 5 gunthas each. But in 1915 when a survey party came to measure the fields it was found that the defendants were in actual possession of more than half of the land, namely, about one acre and 10 gunthas in excess of the moiety shown under the paper title.

Held, that there being no evidence at all to show at what period the discrepancy in area between the title deeds, and the actual occupation crept, in plaintiff must prove that the discrepancy arose within the last 12 years. 77 Ind. Cas. 506=A.I.R. 1923 Bom. 361.

——Arts. 142 and 144—When land is not capable of actual enjoyment in the usual modes previous possession of plaintiff will be presumed to continue till contrary is proved.

Per *Dawson Miller, C.J.*—Possession, however, is not necessarily the same thing as user and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes it may properly be presumed that the previous possession of the plaintiff continued until the contrary is proved. This presumption is a presumption of fact. It is by no means conclusive and whether is should be applied or not must depend upon the facts of each particular case.

Per *Mullick, J.*—In every case the Court may draw a presumption as to possession from title. It is a presumption of fact which the Evidence Act expressly warrants by S. 114. Section 4 of that Act enacts that the Court may regard the fact as proved unless and until it is disproved or may call for proof of it. The discretion of the Court is to be exercised with due regard to the nature of the land and the evidence in the case. 1921 P.H.C.C. 118=2 P.L.T. 55=A.I.R. 1921 Pat. 158=58 Ind. Cas. 773.

——Art. 142—Possession following title—Presumption.

In a case with evidence equally strong on both sides the presumption of possession arises on title, but when

there is no evidence on either side presumption from title will save limitation under Art. 142, in the case of arable lands. 1 Pat. L.J. 146=35 Ind. Cas. 554.

——Arts. 142 and 144—Value of possession.

To recover possession a plaintiff must show a better right in himself to possession than in the defendant. He may, within the period prescribed by the Limitation Act, show that in a case where he is dispossessed, either by establishing title or by showing a prior legal possession entitling him to be restored to the same. Possession is *prima facie* proof of ownership. It is so because it is the sum of acts of ownership. This applies both to prior and to present possession. Possession has a two-fold value ; it is evidence of ownership and is itself the foundation of a right to possession. (1905) 8 Bom. L.R. 96.

——Arts. 142 and 144—Adverse possession—Two persons doing acts of ownership and possession—Person in possession in the eye of law.

Where two persons are doing acts evidencing possession in a certain land, the person having title is in possession in the eye of the law. 1 A.C. 423, Foll. (1901) 4 Bom. L.R. 28=26 B. 410.

25. Possessory Title.

——Art. 142—Dispossession of plaintiff by defendant—Suit for possession within limitation—Plaintiff is entitled to possession unless defendant proves better title. A.I.R. 1937 Pat. 418=4 B.R. 20=171 Ind. Cas. 317.

——Art. 142—Right to relief on prior possession.

Where, in a suit for possession of land, neither the plaintiff nor the defendant was able to prove his title but the plaintiff proved that he was in possession for four years when he was dispossessed:

Held, that the plaintiff was entitled to a decree for possession. A.I.R. 1932 Mad. 32=(1931) M.W.N. 487=35 M.L.W. 142=135 Ind. Cas. 910.

——Art. 144—Possessory title—High way, possession of Government—Onus.

Possession of Government land for over 12 years throws the onus on the Government of proving possession or title within 60 years. But this rule does not apply to a public pathway even if possession is proved for over 40 years. 27 M.L.J. 299=1 L.W. 758=(1914) M.W.N. 711=25 Ind. Cas. 608.

——Art. 142—Possessory title—Ouster—Plaintiff shown to be in actual cultivating possession.

Where the plaintiff is shown to be in actual cultivating possession in the settlement record of 1910-11 and this entry has not been rebutted, it is correct and plaintiff was in possession within 12 years. The mere entry by the *patwari* in the mutation register that the exchange took place on a certain date does not of itself prove that the exchange did take place on that date. 2 Lah. L.J. 230.

——Art. 142—Possessory title—Possession under an illegal order—Effect.

Possession under an illegal order or decree of a Court is not possession that can avail plaintiff under this article. 29 Ind. Cas. 10 (Mad.).

——Art. 142—Possessory title—30 years' user—Government.

If the plaintiff proves 30 years' possession of land against Government the burden of proving a present subsisting title lies on the Government. If it fails to prove it or possession within 60 years before suit the plaintiff is entitled to a declaration of title and not merely a right to possession. 33 Mad. 173=6 M.L.T. 306=20 M.L.J. 71=5 Ind. Cas. 121.

——Art. 142—Possessory title—40 years' user—Improvement.

If a person makes improvements in a tank and then enjoys it adversely to Government for 30 or 40 years then the burden of proving title or possession within 60 years just before the suit, lies on the Government. If the Government fails to prove the person's right becomes absolute. 33 Mad. 362=7 M.L.T. 139=20 M.L.J. 74=5 Ind. Cas. 118.

——Art. 142—Possession and title.

Possession is good proof of title against all but the true owner. (1903) 5 Bom. L.R. 264. **See also** 29 A. 52.

——Art. 142—Possessory title—Wrong doer.

Possession peaceably held entitles a person to recover without further proof of title as against a mere wrong doer. (1901) 3 Bom. L.R. 246.

——Arts. 142 and 144—Suit for—Previous suit by defendant—Dismissal—Subsequent trespass—Title.

A plaintiff who is unable to prove his title to properties may yet recover possession of them from a defendant who had brought a suit against the plaintiff for these very properties and failed and subsequently trespassed upon them. (1900) 5 C.W.N. 234.

26. Reversioner.

——Art. 144—Suit for possession by Reversioner.

A suit for possession during lifetime of widow by a reversioner of an estate surrendered to him by her against the person who has been in adverse possession of the estate for more than 12 years will be barred under Art. 144 and the reversioner cannot maintain the suit during the lifetime. But he can file a suit within 12 years after her death. A.I.R. 1935 Mad. 664=157 Ind. Cas. 1100.

——Art. 144—Reversioner—Suit against alienee.

One reversioner suing to recover possession from widow's alienee within 12 years from widow's death and impleading other reversioner as defendant—Latter submitting written statement after 12 years claiming his share—Latter's claim is not barred by Art. 144 read with Limitation Act. S. 28, though a suit by a reversioner to recover his share would be barred under S. 28 and Art. 141 if brought 12 years after widow's death. 34 Bom. 91, Foll. 119 Ind. Cas. 656=53 Bom. 472=31 Bom. L.R. 647=A.I.R. 1929 Bom. 345.

——Arts. 144 and 141—Adverse possession against Hindu widow—Suit by reversioner after her death—Article 141 applies and not Art. 144.

Per *Full Bench.*—Where a widow has entered into possession as a Hindu widow and has either voluntarily parted with possession or been dispossessed against her consent, a suit by the reversioner brought for possession after her death is governed by Art. 141 and not by Art. 144 and a suit brought within 12 years of the death of the widow is not barred by limitation. 14 All. 156, *Affirmed*; 23 Bom. 725 (P. C.), Foll.

Per *Boys, J.*—The question whether a reversioner is barred by adverse possession against the widow on the basis that she represented the estate is a question to be decided, as in the case of a decree, on the facts

of the particular case. A.I.R. 1928 Cal. 670, *Appr.* 112 Ind. Cas. 801=51 All. 188=26 A.L.J. 1049= A.I.R. 1928 All. 561 (F.B.).

——Arts. 142 and 144—Suit by reversioners for possession against alleged adopted son within twelve years of Hindu widow's death is in time.

Reversioners suing for possession of property from an alleged adopted son and his transferees are not bound to bring a suit for declaration that the alleged adoption had in fact not taken place. They are entitled to wait till the lady died and then bring a suit for recovery of possession and therefore a suit brought within 12 years of the death of the widow cannot be held to be barred by the six years' rule. 87 Ind. Cas. 938=46 All. 637=22 A.L.J. 690=A.I.R. 1925 All. 79.

——Arts. 142 and 144—If the plaintiff's title to the property commences from the death of the previous full owner, limitation begins to run against him from that date notwithstanding the estate may be in the possession of the last full owner's widow under a will which he had no power to make. 93 Ind. Cas. 454=5. P.L.T. Sup. 1=A.I.R. 1925 Pat. 68 (F.B.).

——Art. 144—If no declaratory decree has been obtained in respect of an alienation, the period of 12 years for a suit for possession is to be counted from the date of the mutation, from the date of the alienee obtaining possession, etc., as the case may be; and it is by no means a rare thing that a suit for possession is barred by limitation though the right to sue for possession has not yet accrued. It would be absurd that each successive reversioner should have twelve years for a suit for possession from the date of the death of the preceding reversioner. 67 Ind. Cas. 388=3 Lah. 188=A.I.R. 1922 Lah. 380.

——Art. 144—Reversioners—Adverse possession against.

Though the possession of defendants was adverse to their uncles from 1890 or 1891, still inasmuch as the plaintiff's right to sue for possession was not derived from or through them, the possession of the defendants could not be adverse to them until after the dying out of intermediate reversioners, when their right to possession accrued. 106 P.R. 1906, *Diss. from.* 77 Ind. Cas. 222=4 L.L.J. 201=A.I.R. 1922 Lah. 37.

——Arts. 142 and 144—Suit by reversioner for possession from trespassers against widow—Articles do not apply.

Where during the life-time of a Hindu widow the defendants trespassed on the lands and remained in possession for over 12 years and after the widow's death the reversioners sued for possession,

Held, that the suit was not barred under Arts. 142 and 144 as the plaintiff was not dispossessed and as the possession of the defendants did not become adverse to the plaintiff's until the widow's death. 65 Ind. Cas. 826=34 C. L.J. 129.

——Art. 144—Reversioner—Suit for possession—Failure of direct line of donee—Trespasser.

Where on failure of the donee's line of descendants the gifted property is taken possession of by a trespasser, his possession is adverse within Art. 144 of the Lim. Act. to the nearest reversioner entitled to immediate possession and to the remote one who is not entitled to claim possession at once. 1 Lah. 210= 112 P.L.R. 1920=56 Ind. Cas. 733.

——Art. 144—Reversioner—Adverse possession—Person claiming title as heir.

The possession of a trespasser claiming as heir is adverse to the collaterals. 76 P.R. 1919=52 Ind. Cas. 857.

——Arts. 144 and 141—Applicability—Suit for possession of taluka—Oudh—Evidence Act, S. 116—Oudh Estates Act (1809), S. 22—Succession.

At the time of annexation of Oudh a Thakur held a Taluka on whom it was settled at the first summary settlement. He died issueless in 1857 and his widow who belonged to Amithia Thakur family, took possession and continued it till the Lord Canning's proclamation in 1858. Second summary settlement was made with her wherein she was described as the widow of the Thakur. Subsequently she declared that she had no intention to give possession to Ammithia Thakurs. In 1859, the letter of the Governor-General was published by which she got a sanad of primogeniture and her name was entered in lists one and two. After her death in 1893 a collateral of her deceased husband took possession of the Taluka. But her brother's grandson, One R sued the collateral for possession of the Taluka and got a decree in 1900 and in 1911 brought a suit in ejectment against the present plaintiff who was in possession of one of the villages and who set up under-proprietary title on the ground that his predecessors were in adverse possession for many years on payment of revenue and cesses. The plaintiff was proved to be not an under-proprietor and thus R got the decree. The plaintiff in 1913 sued R, claiming to be the nearest male heir of the Thakur and thus entitled to possession in preference to R. R based his title under S. 22 (6), Oudh Estates Act, pleaded limitation and also *res judicata*.

Held, under S. 22, Oudh Estates Act, R was the rightful heir of the widow and that the case was governed by Art. 144 and not Art. 141 of the Lim. Act, but as the plaintiff was entitled to succeed not as the heir of the widow but of her husband, Art. 141 applied and the suit was barred. 4 O.L.J. 648=21 O.C. 1=44 Ind. Cas. 368.

——Art. 144—Reversioner—Suit for possession—Commencement of cause of action.

Where on the death of a certain person, his wife and mother jointly inherited his estate in 1894, and the wife was found to have led a life of un-chastity which by the local custom would debar her from enjoying her husband's estate but the mother died in 1903,

Held, in a suit by the plaintiff, a collateral, in 1913 for recovery of the property that the suit was not barred by limitation since the cause of action commenced only from the date of death of the mother who could have inherited the wife's share by survivorship. 58 P.W.R. 1917=39 Ind. Cas. 204.

——Art. 144—Reversioner—Suit by—Possession of trespasser.

A suit by reversioners within 12 years from the death of a widow, in whose life-time, the estate was in the possession of trespassers is barred by Art. 144 as their possession was *ab initio* adverse. 113 P.R. 1916= 175 P.W.R. 1916=38 Ind. Cas. 64.

——Art. 144—Reversioner—Suit for possession—Punjab Limitation Act (I of 1900).

Where a person alienated properties in 1887 and died in 1894 but mutation was effected on the 23rd February, 1897, and the heirs of the alienor brought a suit for possession of the alienated properties on the 20th February, 1909.

Held, that the suit was barred because the reversioner must sue within 12 years of the alienor's death not from the date of mutation especially if the alienor died before Act 1 of 1900 came into force. 30 P.R. 1912=133 P.W.R. 1912=72 P.L.R. 1912=13 Ind. Cas. 343.

27. Service Tenure.

——Art. 144—Service tenure—Saranjam lands—If can be acquired by adverse possession.

Quaere.—Whether *saranjam* lands granted by the *saranjamdar* to a person for performance of service can be claimed adversely to the *saranjamdar*, at least so long as the services are being performed, is not free from doubt. 47 Bom. L.R. 214=A.I.R. 1945 Bom. 310.

——Art. 144—Land held as service-tenure—Non performance of service.

If a land is held as a service tenure to be enjoyed as remuneration for services, the fact that no services have been performed for any length of time cannot of itself make the holding adverse. In order to make the possession adverse to the owner, there must be a refusal to perform service or a claim to hold the land free of service. A.I.R. 1933 Mad. 668=147 Ind. Cas. 501.

——Arts. 142 and 144—Sale of watan land—Possession by vendee—Commencement of adverse possession—Suit by succeeding watandar—Bar—Bombay Hereditary Offices Act (30 of 1874), S. 5.

In case of an absolute sale of watan land, possession by the vendee operates as adverse possession from the date of the death of the alienor and if the succeeding watandar fails to recover possession within twelve years, he is barred and the succeeding watandars claiming title as heirs of the previous watandar are similarly barred. 9 Bom. 198 (F.B.), Foll. 32 Bom. L.R. 1398=A.I.R. 1931 Bom. 24=55 Bom. 21=129 Ind. Cas. 145.

——Arts. 142 and 144—Service tenure—Patilki and Kulkarniki Vatan—Possession of Jahagirdar is not adverse to Vatandars.

Assuming that the Nadgirs were entitled either by agreement or by custom to get back their *Vatan* lands on payment of *Judi*, time would not begin to run against them until they were made aware that the Jahagirdars were setting up a title to hold the *Vatan* lands in their own right. Nor is it easy to see how the Jahagirdars could acquire the office of Patil and Kulkarni by adverse possession. The *Vatan* lands had not become the absolute property of the *Jahagirdars* considering the way in which they were treated both by Government and its assignees the *Jahagirdars*. 24 Bom. L.R. 214=A.I.R. 1922 Bom. 18.

——Art. 144, S. 3—Adverse possession—Vatandar—Minority of vatandar.

It is only by giving the words "plaintiff and defendant," in Art. 144 the extended meaning given to them in S. 3 that adverse possession for 12 years during the lifetime of one holder of service vatan lands is a bar to succeeding holders as decided by the Full Bench decision of the Bombay High Court in 9 B. 168. Consequently the adverse possession commenced in the life-time of one vatandar avails as against the subsequent vatandar and will not be estopped by his minority at the death of such preceding vatandar. 9 B. 198, Foll. (1904) 7 Bom. L.R. 135.

——Art. 144——Art. 144 applies to suit by patnidar **to recover possession of chaukidari chakran lands, which have been resumed and settled with the zamindar, by the Government.**

The *patnidar's* sight under the patni grant to the *chaukidari chakran* lands are not disturbed, on resumption of *chaukidari chakran* lands by the Government and settlement of the same with the zamindar. A suit by the *patnidar* for the recovery of possession of these lands against the zamindar is not barred by limitation, unless for more than 12 years prior to the date of the institution of the suit, the possession of the zamindar had become adverse to the plaintiff. The possession of the zamindar may become adverse to the *patnidar* in a variety of ways, *e.g.*, when the lands are settled by the zamindar with tenants or when the *patnidar* after being invited to give and take the land does nothing and the zamindar thereafter makes other arrangements either for holding the lands in *khas* or for setting the same with ijardars or the like. In each case, the facts have got to be investigated having regard to the language of Art. 144 of the Lim. Act. 74 Ind. Cas. 153=50 Cal. 577=28 C.W.N. 114=A.I.R. 1923 Cal. 734.

——Art. 142—Service tenure—Chowkidari Chakran Lands—Resumption—Suit for possession.

A *patnidar's* possession of *Chowkidari Chakran* lands through receipt of the services performed by the *Chowkidar's* is discontinued on resumption of the lands inasmuch as the services cease to be performed. So that a suit by a *Patnidar* for possession of resumed lands is governed by Art. 142 of the Act and must be brought within 12 years of the date of resumption. 46 Ind. Cas. 895 (Cal.).

——Art. 144—Suit by Patnidar for possession of Chowkidari Chakran lands—Limitation.

Art. 144 of the Limitation Act applies to the suit of a *patnidar* brought against the *Zamindar* for the recovery of possession of *chawkidari chakran* lands transferred to the latter under the Act. To ascertain when the *Zamindar's* possession became adverse, the court must find when the lands were settled by the *Zamindar* with tenants and when those tenants took possession of the lands and whether such possession was to the knowledge of the *patnidar*. 41 Ind. Cas. 728 (Cal.).

——Arts. 142 and 144—Service tenure—Resumption—Suit for possession.

A suit by a *Patnidar* to recover possession of *Chowkidari Chakran* lands resumed by the Collector and transferred to the *Zamindar* are governed by Art. 142 or 144 of the Lim. Act of 1877. 35 C. 346, Foll. 15 C.W.N. 5=13 C.L.J. 102=8 Ind. Cas. 766.

28. Starting point.

See also NOTES 4, 12, 18, 19, 21, 26 AND 27.

——Arts. 142 and 144—Starting point of limitation—Grant—Each heir of grantee to hold for life—On death of heir, next heir to take as such heir and not as predecessor's heir—Limitation starts against heir when his title accrues on previous heir's death.

Where a grant is made enjoyable in perpetuity generation after generation for the maintenance and help of the heirs of the grantee and each heir is to hold for life only, and on the death of an heir the next heir of the grantee is to take as such heir and not as heir of his predecessor, the limitation would start to run against an heir from the date when his title accrues on the death of the previous heir. A.I.R. 1946 P.C. 59=59 M.L.W. 268=50 C.W.N. 477=12 B.R. 459=1946 A.L.J. 228=1946 M.W.N. 389=81 C.L.J. 107=

(1946) 2 M.L.J. 98=1946 Pesh. L J.P.C. 59=223 Ind. Cas. 394=48 Bom. L.R. 430=1946 A.W.R.P.C. 914=1946 O.W.N. 207=I.L R. (1946) Kar. P.C. 24 (P.C.).

——**Art. 142**—Where it is a case of dispossession and the suit is for recovery of possession by ejectment of the defendant, then Art. 142 provides a period of 12 years' limitation from the date of the plaintiff's ouster. A.I.R. 1942 Pat. 188=22 P.L.T. 1001=8 B.R. 302=197 Ind. Cas. 818.

——Art. 144—Mortgage—Redemption—Re-mortgage—Continuity—Disturbance of possession of mortgagee—Suit for possession—Starting point of limitation.

A and his brother *B* on behalf of himself and his minor son *C*, members of joint Hindu family, executed a mortgage in 1916 which was subsequently redeemed by *A* who afterwards gave the property in usufructuary mortgage to *Y* in 1925. *B* died in 1922 and soon after *C* also died without ratifying the mortgage which was found to be without legal necessity. *X*, son of *B*, was born subsequently to the mortgage before *C's* death. In 1924, *R* purchased *X's* interest in the mortgaged property and transferred the same to the plaintiff in 1930. The possession of the plaintiff being interfered with by *Y*, he filed a suit for possession in 1936. It was contended that the suit was barred by limitation since the starting point must be regarded as having commenced in 1916.

Held, that there was no continuity between the mortgage of 1925 and the earlier mortgage of 1916 and as the trespass was to be taken from the year 1925, the suit which was filed in 1936, was well within time under Art. 144. A.I.R. 1942 Pat. 99=20 Pat. 727=8 B.R. 561=23 P.L.T. 528=8 C L.T. 99=199 Ind. Cas. 408.

——Art. 144—Time, when begins to run.

The starting point of limitation under Art. 144 is the date when the possession of the defendant becomes adverse. To apply this article it must be determined first what was the nature and effect of defendant's possession. This would depend upon the nature and extent of the rights asserted by the overt act or express declaration of the person relying on it. 62 C. 921=164 Ind. Cas. 61.

——Art. 142—If the cause of action arose during the lifetime of last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or 141 on the principle of S. 9, Limi ation Act, Article 142 would apply time running from the date of dispossession. A.I.R. 1935 Cal. 702 =62 C.L.J. 49=40 C.W.N. 115=63 C. 155=159 Ind. Cas. 1101.

——Arts. 142 and 144—Declaratory decree—Starting point—Decree of trial or appellate Court.

The period of limitation would commence, not from the date when the declaratory decree was obtained from the Court of first instance, but from the date when the decree was finally confirmed by the last Appellate Court. When a competent appeal is pending, the matter is still *sub judice* and therefore, time does not begin to run until the appeal is disposed of. A.I.R. 1935 Lah. 662=159 Ind. Cas. 1030.

——Art. 144—Where the plaintiff does not claim to have been dispossessed or to have discontinued possession, Art. 144 and not Art. 142 applies and limitation runs from the date when the possession of the defendant becomes adverse to the plaintiff. A.I.R. 1934 Nag. 36=30 N.L.R. 284=148 Ind. Cas. 62.

——Art. 144—Grantee asserting right by adverse possession—Starting point of limitation.

Where certain persons who were allowed a right of residence in a house by an *ekrarnama* remained in occupation and subsequently asserted their right of residence adversely to the grantor :

Held, that Art. 144, applied and not Art. 142, and that limitation began to run from the time of assertion of adverse possession and denial of plaintiff's right to *khas* possession. 36 C.W.N. 972=A.I.R. 1933 Cal. 102=58 C L J. 259=140 Ind. Cas. 799.

——Arts. 142 and 144—Adverse possession by a non-*watandar* of *watan* lands where it is not perfected into title on the *watandar's* death can be considered in computing the period of adverse possession against the *watandar* who succeeds him. A fresh period of limitation does not start against each succeeding *watandar* on the death of his predecessor. 34 Bom. L R. 967=A.I.R. 1932 Bom. 464=139 Ind. Cas. 223.

——Art. 144—Starting point—Assertion of hostile title.

Limitation with regard to suits for the recovery of immovable property runs from the date on which an open assertion of hostile title to such property is made. 100 Ind. Cas. 607=A.I.R. 1927 Cal. 417.

——Art. 144—Starting point—Death of last owner.

On the death of a Mahomedan, each of his heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. 144, Limitation Act. A.I.R. 1923 Lah. 519, Foll. 100 Ind. Cas. 145=A.I.R. 1927 Lah. 790.

——Art. 144—Suit for ejectment—Defendants claiming title, and denying liability to ejectment—Adverse possession begins to run from that date. 64 Ind. Cas. 352=15 P.L.R. 1922=A.I.R. 1922 Lah. 70.

——Art. 144—Starting point—Revenue sale—Bengal Revenue Sale Law (Act 11 of 1859)—Adverse possession against purchaser commences from sale.

In a sale held under Act 11 of 1859 what is sold is not the interest of the defaulting owner which is determined on the failure to pay the Government assessment but the interest of the Crown subject to the payment of the Government assessment and therefore the period of limitation for adverse possession against the purchaser at such a sale only commences to run from the date of the sale. 65 Ind. Cas. 866=4 C.L. J. 141=A.I.R. 1921 Cal. 687.

——Art. 144—Starting point—Distant collaterals—Adverse possession—Cause of action.

Possession cannot be adverse to a person until he can sue for possession. 1 Lah. 210=112 P.L.R. 1920=56 Ind. Cas. 733.

——Art. 142—Dispossession—Suit for possession—Palayam—Successive holders—Fresh cause of action.

Assuming that the estate of a *poligar* is one for life, the *poligar* for the time being ordinarily represents the estate. If therefore the *poligar* for the time being is dispossessed and he fails to sue for possession within 12 years of the dispossession, the person in possession gets an absolute title to the estate. The successor of *poligar* has not got a fresh starting point from the date of his succession unless he shows that his predecessor had effectually debarred himself from suing and there was no one else who would have sued successfully

for possession. 41 Mad. 749=34 M.L.J. 563=24 M.L.T. 1=8 L.W. 382=47 Ind. Cas. 733.

——Art. 144—Starting point—Collaterals—Suit for possession.

The right of suit of collaterals under Punjab Customary law is derived from the common ancester who owned the land and therefore time under Art. 144 does not run against him till the right to sue accrues to him. 174 P.W.R. 1916=37 Ind. Cas. 412.

——Art. 144—Starting point—Gift—Possession by donor appointing himself as mutwalli—Suit by donor's heir's for possession—Limitation.

The possession of the donor appointing himself as *mutwalli* becomes that of the manager and a suit for possession by his heirs 12 years after the date of the gift is barred. 1 O.L.J. 204=24 Ind. Cas. 72.

——Art. 144—Starting point—Allotment at partition lands.

The cause of action in a suit for possession of lands allotted to a person at partition, commences from the time of allotment of the lands. 22 Ind. Cas. 575 (Cal.).

——Art. 144—Starting point.

Limitation under Art. 144 does not begin to run until possession becomes adverse. 8 N.L.R. 163=17 Ind. Cas. 606.

——Art. 144—Starting point—Settlement proceedings—Adverse decision—Starting of adverse possession, though prior relation was fiduciary.

An adverse decision in settlement proceeding was held to mark the starting of adverse possession though the parties stood in a fiduciary relation before the event. 33 All. 125=38 I.A. 23=13 C.L.J. 63=8 A.L.J. 132=15 C.W.N. 273=9 M.L.T. 200=(1911) 1 M.W.N. 127=13 Bom. L.R. 75=21 M.L.J. 109=14 O.C. 95=9 Ind. Cas. 391 (P.C.).

——Art. 144—Starting point—Suit on title—Pattah-holder.

In a suit governed by Art. 144 the plaintiff *pattah-holder* must bring the suit within 12 years from the date, when the possession of the defendant or his predecessor-in-title become adverse. 5 M.L.T. 107=2 Ind. Cas. 314.

——Art. 142—Adverse possession continuous—Temporary interruption of possession—Plaintiff temporarily in possession in pursuance of decree—Subsequent dispossession on reversal—Fresh cause of action.

If a person who has been dispossessed by a trespasser was put in possession of the property in pursuance of a decree and was again subsequently dispossessed on a reversal of that decree, he cannot treat the second dispossession as a fresh cause of action. 5 B. 382, Foll. (1904) 28 M. 338.

——Arts. 142 and 144—Cause of action—Usufructuary mortgage—Security, deprivation of—Suit for money.

The cause of action for a suit by a usufructuary mortgagee to recover the money on being deprived of the secuirty arises on such deprivation and time runs from that date. (1901) 3 Bom. L.R. 156. **Also** 26 M. 72.

29. Submergence.

——Arts. 142 and 144—Diluviated land.

Land subject to submersion of 3 months annually making cultivation by trespasser impossible—Plea of adverse possession is untenable. 20 Pat. 497=7 B.R. 969=A.I.R. 1941 Pat. 422=22 P.L.T. 35=195 Ind. Cas. 746.

——Arts. 142 and 144 —Held, that for submergence to interfere with continuous adverse possession it is not necessary to show that the submergence was such as interfered with the usual agricultural operations in the neighbourhood. It is enough if the submergence prevented such use and occupation as the possessor would normally have but for flooding and submergence. A.I.R. 1941 Pat. 422=20 Pat. 497=22 P.L.T. 35=7 B.R. 969=195 Ind. Cas. 746.

——Arts. 142 and 144—Constructive possession during submergence, presumption—Onus.

In the case of lands incapable of possession, as for instance, forest lands or lands under the bed of a river, the rightful owner has possession in the eye of the law. If a trespasser was in possession before submergence and had not perfected his title by adverse possession for twelve years or more, on submergence his possession ceases and the possession of the owner revives and continues till the lands are again formed and become fit for user and occupied by another and the fact that the plaintiffs had no physical possession at the time of the last submergence is not material for the purpose of enabling them to call to their aid the principal of constructive possession provided that their title and not been extinguished by adverse possession before the last submergence. Whichever side can show subsisting title at the time of submergence will have the benefit of the principle of constructive possession during submergence, but this fact can in no way affect the question that the onus of proving title by adverse possession is on him who asserts it. A.I.R. 1941 Cal 193=72 C.L.J. 320=44 C.W.N. 935=195 Ind. Cas. 412.

——Arts. 142 and 144—Suit for possession of land subject to fluvial action of river—Plaintiff admitting discontinuance of possession—Plaintiff to prove possession within twelve years.

Where in a suit for possession of land subject to fluvial action of a river, the plaintiffs admit discontinuance of their possession, Art. 142, *prima facie* applies to the case and the plaintiffs must show that they were in possession of the land in dispute within 12 years before the institution of the suit. In such a case, the plaintiffs' possession is to be presumed during the time the land was unfit for actual possession, either because it was under water or because it was no more than a sandy tract unfit for any use. In recording a finding on the question of limitation, this aspect of the case should not be lost sight of. In establishing their own possession within limitation, the plaintiffs can show that the defendants' actual possession was not continuous for 12 years; and if they succeed in establishing such a state of possession, their own possession during the interval when the defendants were not in possession should be presumed. A.I.R. 1939 All. 626=(1939) A.L.J. 708=1939 R.D. 493=1939 A.W.R. 671=186 Ind. Cas. 564.

——Arts. 142 and 144—The land may be incapable of actual enjoyment as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the period of diluvion, his possession will continue so long as the land continues to be submerged. Mere absence of possession of the rightful owner is not sufficient to defect his title. An owner is not barred by simple non-user for any length of time, so long as no other person has been in possession. The owner remains in point of law in possesion till

he is dispossessed by another person obtaining actual possession. A.I.R. 1939 All. 257=(1939) A.L.J. 94=1939 R.D. 157=1939 A.W.R. 184=I.L.R. (1939) All. 454=181 Ind. Cas. 945.

——Art. 144—Submersion of lands, interrupts trespassers' adverse possession.

Adverse possession should rest on *de facto* use and occupation; where the possession of the trespasser has been interrupted either continuously or periodically by the submersion of the lands under water, it prevents the p rfection of his title by adverse possession. 29 Cal. 518 (P.C.); 44 Cal 858 (P.C.), Foll. 123 Ind. Cas. 817 (All.).

——Arts. 142 and 144—Where the title of the plaintiff is not denied and the land is shown to have been under water till within twelve years of the suit the burden of proof is on the defen c to show that they have been is possession for 12 years before suit. To such a case Art. 144 and not Art. 142 applies. 117 Ind. Cas. 202=10 Pat. L.T. 122.

——Art. 142—Submergence.

Submergence does not amount to discontinuance of possession. 32 Bom. L.R. 1157=52 C.L J. 132=32 M.L.W. 311=126 Ind. Cas. 81=59 M.L.J. 208=34 C.W.N. 772=A.I R. 1930 P.C. 198 (P.C.).

——Arts. 142 and 144—Diluviated land—Possession will be deemed to be with plaintiff during the period of submergence only if at its beginning plaintiff had possession or subsisting title.

Where plaintiff sues in ejectment and his case in his plaint is one of possession and dispossession, Art. 142 applies, and to succeed he must first of all prove that he had possession wit in the statutory period. Cases of diluviated land or jungle or waste lands are no exception to the general rule A.I.R. 1922 Cal. 557 and 16 M.L J. 272 (P.C.), Foll; 29 Cal 518 (P.C.). Foll. 88 Ind. Cas. 567=30 C.W.N. 497=A.I.R. 1925 Cal. 1230.

——Art. 144—Submerged land—Title of rightful owner is revived during submersion.

Where land becomes submerged it becomes constructively in the possession of its lawful owner. W.re a trespasser had been in possession of the lands wh'ch, at intervals of 4 or 5 years became submerged, there is an interruption of the possession of the trespasser and a revival of the possession of the true owner during the period of submersion. Consequently the trespasser's possession is not continuous and he cannot acquire a title by a verse possession. 69 Ind. Cas. 912=20 A.L.J. 756=A.I.R. 1923 All. 75.

——Arts. 142 and 144—Possession before submersion is possession during submersion of submerged land.

Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance must depend upon the character and condition of the land in dispute. Where the land is incapable of actual enjoyment as in the case of diluvion by a river, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue so long as the lands continue to be submerged. No such presumption however arises in the case of a wrongdoer. 67 Ind. Cas. 673=26 C.W.N. 724=A.I.R. 1922 Cal. 557.

——Arts. 142 and 144—Submerged land—Suit for possession—Limitation.

It lies on the plaintiffs to prove possession and dispossession within twelve years of suit. But possession is not the same thing as actual user. The true rule is that, where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that state naturally would and probably did continue within 12 years before the suit, it may properly be presumed that it did so continue and that the plaintiff's possession continued also, until the contrary is shown. 9 Cal 741, Foll. (1920) P.H.C.C. 245=1 Pat. L.T. 229=56 Ind. Cas. 344.

——Art. 142—Submerged land—Possession within 12 years—Onus—Waste land—Inundation.

In a suit for possession on a dispossession by the defendant the burden is primarily upon plaintiff to establish his possession within the statutory period. But in the determination of this question of possession, the nature of the land must be considered. If the land was wholly or partially subject to inundation by the water of a river, the plaintiff must be deemed to have been in possession of the submerged portion during the period that such tract was covered by water no matter who was i possession at the date of the submergence. 29 C.L J. 259=51 Ind. Cas. 70.

——Arts. 142 and 144—Submerged land—Dispossession—Diluviated lands—Periodical submersion—Adverse possession—Lim. Act, S. 2 (4)—Independent trespassers.

The term "dispossession" though not defined in the Lim. Act is well understood. A man may cease to use his land because he cannot use it, as when it is under water. He does not thereby discontinue his possession; constructively; it continues until he is dispossessed and upon t e cessation of the dispossession before the lapse of the statutory period, constructively it revives. There can be no continuance of adverse possession, when the land is not capable of use and enjoym nt, as long as such adverse possession must rest on *de fecto* use and occupation. The annual cultiv tion of parts of diluviated lands when they emerge during a portion of the year is not a dispossession of the owner of the lands within Art. 142, for during their next submersion the rue owner's possession revives There may be circumstances to link together various portions of ground so as to make the possession of a part as it em rged amount constructively to a possession of the whole. Where l nd is dlluvia ed du ing a part of every year, there cannot be continueous adverse possession of the same under Art. 144 of the Lim. Act, as during each submersion the true owner gets into constructive possession of the l nd. 29 I A. 104, applied. In order to make out a case of adverse possession for the statutory period, the defendants in the case could not tack on their possession to that of the Government who had released the reformed lands to the defendants on the ground they were the persons entitled to them. In such circumstances the defendants do not derive their liability to be sued from or through the Government within S. 3 (4) of the Lim. Act. 44 Cal. 858=1 Pat. L W. 593=32 M.L J. 505=21 C.W.N. 642=15 A.L J. 398=25 C L J. 487=19 Bom. L.R. 480=(1917) M W.N. 482=6 L W. 117=22 M.L.T. 310=44 I A. 104=40 Ind. Cas. 337 (P.C). Reversing 14 C.W.N. 317=11 C L J. 373=3 Ind. Cas. 15.

——Art. 144—Constructive possession—Submerged land.

Where lands are subject to periodical submersion their possession is with the owner during submersion. The constructive possession is with the true owner. Continuous adverse possession is not possible in the case of lands subject to seasonal submersion. 44 Cal. 858=1 Pat. L.W. 593=32 M.L.J. 505=21 C.W.N.

642=15 A.L.J. 398=25 C.L.J. 487=19 Bom. L.R. 480=(1917) 1 M.W.N. 482=6 L.W. 117=22 M.L.T. 310=44 I.A. 104=40 Ind. Cas. 337 (P.C.). (**On appeal from** 14 C.W.N. 317=11 C.L.J. 373=3 Ind. Cas. 15).

——Arts. 142 and 144—Submerged land—Suit for possession—Limitation.

In a suit for possession on dispossession the onus is on the plaintiff to prove possession in him within twelve years of the suit and he cannot shift the onus on to the defendant by showing his own possession at any period prior to twelve years before suit. But if plaintiff shows that his possession continued up to the time when the land was submerged his possession is presumed to continue throughout the period of submersion when the land was reformed within 12 years of the suit unless defendant to proves the contrary. 8 Cal. 744, Foll. 5 Pat. L.J. 632 =57 Ind. Cas. 744= 2 Pat. L.T. 59=A.I.R. 1921 Pat. 234.

——Art. 142—Submerged land—Trespasser—Derelict land—Abandonment—Submersion of land temporary by floods.

The presumption of ownership which would exist in favour of the holder of a perfect title during the period the land remained derelict cannot be made for the benefit of a holder of an imperfect title. Thus a trespasser whose title is not perfected by adverse possession cannot tack on to his period of possession the period during which the land remained derelict. The requisite factor for the application of this principle is the factor of abandonment and the question is whether the land did or did not remain derelict. Such a principle cannot be applied where there has been no actual submersion of the land in the proper sense of the term and no abandonment but which has only been flooded in parts by temporary floods which interfered for short periods with the use to which it could be put. 19 O.C. 374=3 O.L.J. 595=37 Ind. Cas. 715.

——Art. 144—Constructive possession—Lands submerged by floods.

It is not possible for a trespasser to acquire a title by prescription to lands which remain submerged every year for a certain period for he must be deemed to have been dispossessed by *vis major* during the time of flood and in the eye law, the possession during flood time is in the person who has title. 29 Ind. Cas. 278 (All.).

——Art. 144—Constructive possession—Submerged land—Cause of action.

During the period of diluvion, the rightful owners must be deemed in law to have been in possession of the submerged lands. The point for investigation in such cases is the time when the lands re-appeared and became fit for cultivation. Where the possession of the defendants, after the reformation of the disputed lands has not extended over the statutory period, there is no limitation as regards the plaintiffs' claim to lands which lie within the *Thak* boundaries of the *Churs*. The theory of constructive possession is applied only in favour of the rightful owner and does not apply in favour of a wrong doer whose possession is treated as confined to land which he is actually in possession. 19 C.W.N. 565=29 Ind. Cas. 156.

——Art. 144—Constructive possession—Trespasser—Actual possession necessary—Land under water.

As against the rightful owner the claim of adverse possession is available only when there is actual possession of the disputed land or overt or physical act of ownership done upon it. Therefore a mere assertion of hostile title by a trespasser when the land is under water and cannot be actually occupied, cannot affect the possession of the true owner. 18 C.L.J. 274= 20 Ind. Cas. 821.

——Art. 142—Submerged land—Dispossession—Alluvions.

Art. 142 is applicable to a suit for declaration and possession of *char* lands which had diluviated more than 12 years before suit where the plaintiff's have proved possession and title up to the time of diluviation, and allege that the disputed lands had reformed within 12 years before suit. 7 C. 225, Foll. 9 Ind. Cas. 554 (Cal.)

——Arts 142 and 144—*Vis major*—Submerged land—Constructive possession of true owners.

Where a party is dispossessed by *vis major* e.g. flood, the constructive possession of the land so long as the land remains submerged is in the true owner. (1906) A.W.N. 234=3 A.L.J 567=28 A. 760.

——Arts. 142 and 144—Adverse possession of chur and jungle lands—What constitutes adverse possession—Possession of submerged land—Presumption.

The nature of *chur* and jungle lands is peculiar and the mere cessation of possession cannot amount to discontinuance of possession, unless it is followed by the possession of another person in whose favour time would run. A mere trespass without claim of right, as in the case of a squatter does not amount to an ouster of the true owner. During the period when a piece of land is submerged under water the true owners must be held to be in constructive possession, and when it reappears and does not become fit for enjoyment in the usual modes, it is presumed that the previous possession continues until the contrary is proved. 29 C. 518. foll. (1904) 9 C.W.N. 111.

——Arts. 142 and 144—*Vis Major*—Submerged land—Constructive possession of the owner. *See* 3. C.L.J. 316.

30. Suit on title.

——Arts. 142 and 144—Applicability—Suit to eject person on title—Allegation that defendant was co-sharer and that suit land fell to plaintiff on partition—Article applicable—Prior suit for rent dismissed on ground of non-existence of tenancy—Effect of.

Art. 142 and not Art. 144 of the Limitation Act applies to a suit for ejectment on title, of a person in possession of land claimed by the plaintiff as his, having been allotted to him on partition and alleging the defendant to be a co-sharer of the joint land when undivided, it having been decided in a previous rent suit between the parties that the defendant was not the tenant of the plaintiff at any time. The plaintiff has to show that he was in possession within 12 years of the suit either directly or through tenants. The starting point is not the date of the earlier suit when the defendant denied the title of the plaintiff. The possession of the defendant must be held to be adverse to the plaintiff not from the date of the prior suit, but from the very date of his entry into possession, even if Art. 144, were held to apply. Possession must be held to be adverse and as a trespasser from the commencement of the defendant's possession and not merely from the date of the rent suit. A.I.R. 1949 Pat. 510= 30 P.L.T. 434.

——Arts. 142 and 144—Suit for declaration of title and possession of area covered by bamboo clump—Court finding title with plaintiff—Possession of plaintiff within 12 years not proved—Latter, if entitled to decree.

In a suit for a declaration of title to and possession of an area covered by a bomboo clump, the lower Court found the title to the plot with the plaintiff but dismissed the suit upon the ground that the plaintiff had not proved that he was in possession within 12 years of the date on which the suit was instituted. There was a finding that the defendant got the bamboo cut on only one occasion a few days before the suit,

Held, that as the subject-matter of dispute was a bamboo clump which was not capable of possession every day or even at a particular season every year, the plaintiff was entitled to a decree in the suit title having been found to be with him. A.I.R. 1948 Pat. 408.

——Art. 142—Suit by Zamindar for possession based on title—Defendant in possession for more than 12 years without acknowledging plaintiff's title.

The plaintiff *zamindar* who owned a house site in a town brought a suit for its possession alleging that his ancestor had settled a person on the land to act as a purohit and the defendant too, wrongful possession of the land on the death of that person. The plaintiff however, filed to prove his case and there was nothing to show as to how the defendant entered the land. The defendant and his ancestors were found to have been in possession from the time of Nawabs of Oudh or at least since 1865 without ever acknowledging the title of the plaintiff or his ancestors:

Held, that the presumption arising in the case of agricultural village that a *zamindar* is in possession of all the village sites could not be applied to a town. Although the plaintiff's claim was based on proprietary title, the plaintiff having alleged possession and dispossession, Art. 142, Lim. Act applied and in the circumstances of the case, the defendant acquired title to the site by adverse possession. A.I.R. 1942 Oudh 427 =1942 O.W.N. 351=1942 R. D. 548=1942 A.W.R. (C.C.) 99 and 234=18 Luck. 155=200 Ind. Cas. 744.

——Art. 144—Zamindar's suit for recovery of possession by removal of structure and newly planted trees.

A suit by a *Zamindar* for recovery of possession of land in his *zamindary* by removal of structures, ditches and newly planted trees, which constitute an interference or trespass upon his possession and therefore cast a doubt upon his title falls under Art. 144, Lim. Act. A.I.R. 1941 Oudh 45=1940 A.W.R. 458=1940 R.D. 484=1940 O.W.N. 990=16 Luck. 223=191 Ind. Cas. 157.

——Arts. 142 and 144—An owner of *ahar* land whose rights of irrigation have been obstructed and who has been dispossessed, can bring a suit for possession and he cannot be allowed to circumvent the law of limitation by suing for injunction in respect of irrigation rights. 19 Pat. 852=A.I.R. 1941 Pat. 181=7 B.R. 739=22 P.L.T. 986=194 Ind. Cas. 243.

——Art. 142—Suit based on proprietary title.

Article 142 is very general in its scope and application. There is no reason to confine the word "plaintiff" in this article to plaintiffs bringing their suits on possessory title only. The article will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on the proprietary or his possessory title. There is nothing in the article itself, to make it applicable to suits on possessory title only. A.I.R. 1940 Oudh 134=1939 O.W.N. 1005=1939 A.W.R. 270=15 Luck. 157=185 Ind. Cas. 736.

——Arts. 142 and 144—There is nothing in Art. 142 which would confine its application to suits based on possessory title only and would make it inapplicable where the suit is based on proprietary title or the plaintiff's porprietary title is established. It is not, however, to all suits for possession and ejectment that Art. 142, will apply. Article 144 also contemplates suits for possession and a decree for possession necessarily involves the ejectment of the wrongful occupant. The distinction is between suits for possession where the cause of action is dispossession and a suit for possession where the cause of action in not dispossession. It is not correct to say that a suit for possession necessarily involves dispossession within the meaning of Art. 142. A.I.R. 1940 Sind 49=I.L.R. (1939) Kar. 993=188 Ind. Cas. 107.

——Arts. 142 and 144—Plaintiff basing his claim on title—Defendant pleading adverse possession—Article 142, Lim. Act. does not apply. A.I.R. 1939 Lah. 172=41 P.L.R. 715=183 Ind. Cas. 140.

——Art. 144—*P* purchasing property from *B* who had purchased it in execution against judgment-debtor—Property at time of purchase in possession of statutory mortgagee under S. 171, Ben. Ten. Act, 1885—Suit for possession by *P*—Article 144 applies. A.I.R. 1938 Cal. 790 =67 C.L.J. 294=180 Ind. Cas. 215.

——Arts. 142 and 144—Dispute between two persons claiming title to property in possession of tenants—Suit by one claimant against other for possession.

There was a dispute between two persons regarding claim to title of certain property which was in the possession of the tenants. Each party attempted to get the tenants to attorn to him. One of them subsequently sued the other for possession of the property ;

Held, that Art. 144 and not Art. 142 should be applied in the circumstances of the case. A.I.R. 1938 Mad. 8=46 L.W.651=(1937) 2 M.L.J. 606=I.L.R. (1938) Mad. 220=176 Ind. Cas. 535.

——Arts. 142 and 144—The dispossession referred to in Art. 142 is a forcible dispossession or ouster and the discontinuance referred to in that article being interpreted *ejusdem generis* with possession, means something of the nature of an abandonment. So, where a suit is based on title and dispossession, Art. 142 or Art.144 will apply as the case may be, for, a plaintiff may fail to prove title and yet prove possession within twelve years and win his suit. Where however, a suit is based upon title and an alleged permissive occupancy, Art. 144, applies. A.I.R. 1938 Sind 198=I.L.R. (1939) Kar. 111=178 Ind. Cas. 690.

——Arts. 142 and 144—*A* sold a plot of land to *B* in 1912 and against sold it to *C* in 1930. A suit by *B* for recovery of possession of the plot as it was interfered with by *C* was dismissed on the finding that *B* was not in possession within twelve years of the suit. There was no finding that there was a continuous act of possession by *A* or by *C* :

Held, that in the absence of any evidence to the contrary, the title which was acquired by the plaintiff by the deed must be held to have continued till the interference with his possession as alleged by him and the suit was not barred. A.I.R. 1937 Pat. 252=3 B.R. 447=168 Ind. Cas. 524.

——**Arts. 142 and 144**—The title of a person must depend upon the strength of his own case, and not upon the fortuitous circumstances of whether another person in a similar position had, or had not pressed his claim. A.I.R. 1935 P.C. 125=1 B.R. 652 and 712 (2)=1935 O.W.N. 749=39 C.W.N. 994=37 P.L.R. 546=42 M.L.W. 167=16 P.L.T. 555=37 Bom. L.R. 638=69 M.L.J. 171=61 C.L.J. 491=(1935) M.W.N. 1075=156 Ind. Cas. 548 (P.C.)

——Arts. 142 and 144—Suit for possession on the basis of title—Allegation of dispossession within twelve years prior to suit.

When a person sues for possession on the basis of his title and proves his title and when the defence consists merely of a plea of adverse possession for more than 12 years, then the onus is upon the defendant to prove his adverse possession for the requisite period. But when the plaintiffs allege that they have been dispossessed two months before the suit, and the defendants do not assert adverse possession but plead possession under an irrevocable license, Art. 144, cannot apply, but Art. 142 is applicable Article 142 is not confined to suits based on possessory title only as distinguished from suits in which the plaintiff proves his title also. (1934) A.L.J. 147=A.I.R. 1934 All. 362=56 A. 755=3 A.W.R. 424=152 Ind. Cas. 12 (D.B.).

——Art. 144—Suit on basis of title and not on ground of peaceful possession being disturbed.

Where the plaintiffs do not aver their peaceful possession as having been disturbed by the defendants but claim on the sole ground of their title and they prove their title, that title can only be extinguished by adverse possession on the part of the defendants. Such a case is governed by Art. 144, the burden of proof of adverse possession being on the defendants. 30. N.L.R. 18=A.I.R. 1933 Nag. 274=150 Ind. Cas. 679.

——**Art. 144**—Lease by occupancy tenant—Provision that Rs. 200 were to be paid as *nazarana*—Reservation of Re. 1 per annum as rent—Transaction held sale and not lease—Suit by lessee for possession of land comprised in lease-deed was not one for specific performance of a contract but one for possession based on title and was governed by Art. 144. 10 O.W.N. 660=17 R.D. 686=A.I.R. 1933 Oudh 363=147 Ind. Cas. 430.

——Art. 144—Evidence Act, S. 91—Unregistered mortgagee—Suit for possession on title.

Where a suit for redemption of a mortgage was dismissed on the ground that the mortgage-deed could not be proved as it was unregistered, and the mortgagor instituted a suit for recovery of possession on the basis of his title offering to pay the amount which he had borrowed from the defendant :

Held, that the mortgage-deed could be referred to for the purpose of showing the circumstances under which the defendant obtained possession.

Held, further Per *Otter, J., Brown, J.* contra.—That the proper article applicable to the suit was Art. 144. A.I.R. 1931 Rang. 40=8 R. 556=129 Ind. Cas. 511.

——Arts. 144 and 120—Application under S. 41 of Act (15 of 1882) dismised—Suit on title for possession subsequently—Article 120 or 144 applies.

Orders passed under Chap. 7 cannot be regarded as a "decision or order" on the question of title. In a subsequent suit against an order under that chapter, there is no necessity to alter or set aside any such "decision or order." Consequently, Art. 13, Lim. Act, has no application. The article applicable may be Art 120 or Art. 144. A.I.R. 1927 Mad. 321 and 7. W.R. 199 (F.B.), Foll. 115 Ind. Cas. 504=29 M.L.W. 537=1929 M.W.N. 174=A.I.R. 1929 Mad. 69=56 M.L.J. 199.

——Art. 144—Plaintiff's title declared—Suit for possession within 12 years of such declaration is not barred.

S in 1908 sued *K* for possession and mesne profits of lands in the suit which were always subject of submergence. Possession and mesne profits were refused, *K* having been held not to be in possession, but *S*'s title was declared. Subsequently *S* brought a suit against *K*, in 1917 for possession of the same plot,

Held, it was unnecessary for *S* to prove actual possession in the sense of occupation after the submergence as his possession in law continued until he was dispossessed nor was evidence necessary to show that *K*, had taken possession between 1908, the date, of the earlier suit, and 1917, the date of the present suit, as it was expressly admitted in the written statement that *K*, was in possession in June, 1917, when the present suit was filed. *S* having established his title in the previous suit and not being barred by limitation was entitled to a decree. 118 Ind. Cas. 259=33 C.W.N. 1016=56 I.A. 305=31 Bom. L.R. 1376=30 M.L.W. 840=1929 M.W.N. 905=A.I.R. 1929 P.C. 225=57 M.L.J. 602 (P.C.).

——Art. 144—Suit on basis of title.

The article applicable to a suit in which the plaintiff sues for possession of immovable property on the basis of his title is Art. 144 and if in such a suit the plaintiff proves his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. 119 Ind. Cas. 6=1929 A.L.J. 1106=51 All. 1042=A.I.R. 1929 All. 753.

——Art. 144—Suit on title.

Tenant of grove dying without heir—Custom that in such a case grove passes to landlord—Landlord bringing declaratory suit.

Held, that this was not a suit to which Art. 142, Lim. Act, applies but that the article more strictly applicable was Art. 144. The essential difference between these two articles is that in the first case the owner bases his claim from the date of is dispossession, and in the second he bases his claim on his title without regard to his possession or dispossession, and time begins to run from the date that the defendant's possession becomes adverse to the plaintiff. 108 Ind. Cas. 109=5 O.W.N. 121=A.I.R. 1928 Oudh 246.

——Art. 142—Suit for possession by vendee alleging dispossession of his vendor—Article applies.

Article 142 applies to a suit for recovering possession by plaintiff alleging title by purchase and that his vendor was dispossessed by defendant. There is nothing in that article to show that it applies only to suits based on possessory title and that it does not apply to suits for possession based on title. 91 Ind. Cas. 454=1926 M.W.N. 34=23 M.L.W. 175=A.I.R. 1926 Mad. 181=49 M.L.J. 788.

——Arts. 144 and 142—Suit against alleged lessee—Plaintiff's title proved—But lease not proved—Article 144 applies and not Art. 142. Though lease is found against plaintiff can rely upon his title 87 Ind. Cas. 386=21 M.L.W. 398=A.I.R. 1925 Mad. 834.

——Art. 144—Plaintiff's title proved—No dispossession alleged or proved—Article 144 applies.

The plaintiff proved that he had acquired the lands in a certain year. Subsequently the plaintiff's name disappeared from the settlement record and the defendant's name continued from the last settlement. The plaintiff did not plead dispossession. It was not found that he was actually dispossessed on a certain date.

Held, that the plaintiff having proved that he got the lands in suit in a certain year, that fact should be taken as the basis of decision, and that Art. 144 would apply and the Court should consider whether the defendant had completed a title in themselves by being in adverse possession for twelve years. 39 Mad. 617 and 41 All. 669, Foll. 85 Ind. Cas. 578=47 All. 389=23 A.L.J. 244=6 L.R.A. (Civ.) 184=A.I.R. 1925 All. 454.

——Arts. 142 and 144—Applicability of—Suit for possession based on title.

Where a plaintiff who does not allege dispossession sues for possession of immovable property based on title, Art. 144 and not Art. 142 of the Limitation Act applies. 8. L.B.R. 264=9 Bur. L.T. 242=35 Ind. Cas. 432.

——Art. 144—Suit on title—Suit by adopted son.

An adopted son can sue for possession of immovable property within 12 years from the date of his adoption under Art. 144 of the Act. 27 M.L.J. 569=16 M.L.T. 435=25 Ind. Cas. 692.

——Art. 144—Applicability of—Claim on title.

For the applicability of Art. 144 the claim must be based on title and not on contract only. 7 Bur. L.T. 268=8 L.B.R. 64=24 Ind. Cas. 911.

31. Tacking.

See also 43 Ind. Cas. 943 under NOTE 1 (b).

——Art. 142—Adverse possession for twelve years by several persons in succession not claiming from one another—If bars true owner.

Adverse enjoyment of immovable property for over twelve years, whether by a single person or by several persons in succession, even though they do not claim from one another, provided it is continuous and without a break, bars the true owner under Art 142 of the Limitation Act. (1921) 42 M.L.J. 319=I.L.R. 45 Mad. 370, followed. 62 L.W. 253=1949 M.W.N. 252=A.I.R. 1949 Mad. 673=(1949) 1 M.L.J. 428.

——Art. 144—Possession of trespasser, if and when can be tacked.

One trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true title to possession.

If the possession of one trespasser can be regarded as a continuation of the trespass of the previous occupant through whom he claims then the adverse possession of the one can be taken on to that of the other and if the total period exceeds twelve years, then that possession ripens into full ownership under S. 28 and Art. 144. The period of limitation runs when the possession of the defendant becomes adverse to the plaintiff. One trespasser should derive his liability to be sued from the other. The mere fact that he claims through the other is not enough. A.I.R. 1946 Bom. 193=47 Bom. L.R. 962.

——Art. 144—Obiter.

Under Art. 144, one independent trespasser cannot tack on to his wrongful possession the wrongful possession of another independent trespasser, unless he is claiming through the latter. A.I.R. 1938 Bom. 210=40 Bom. L.R. 166=175 Ind. Cas. 93.

——Art. 144—Where, in a suit for rent and damages instituted in 1928, the defendants contended that since 1915, they had set up a right to hold the land in suit free of rent, the attempt to assess rent was barred and it appeared that since 1921 all that the defendants could be held to have been asserting was that they held as rent-free *raiyats*:

Held, that this title was different from the one they were asserting prior to the litigation of 1917, which ended in the decision of 1924, and that the two periods in which they were asserting different rights could not be added for the purpose of defeating the claim of the plaintiff. A.I.R. 1934 Pat. 31 =146 Ind. Cas. 811.

——Art. 144—Adverse possession by onself or one's predecessor-in-title should be proved.

Under Art. 144, time begins to run when the defendant's possession becomes adverse. The defendant cannot take advantage of the possession of others before him unless they are persons through whom he derives his liability. He must prove adverse possession either by himself or through his predecessors-in-title. He cannot acquire a prescriptive title against the plaintiff's who are the rightful owners by tacking to the term of their own trespass the period of possession held by a person holding under hostile title and not representing him nor whom he represented. 30 N.L.R. 18=A.I.R. 1933 Nag. 274=150 Ind. Cas. 679.

——Art. 144—Rule that possession of independent trespassers cannot be tacked on, applicability of.

In the case of a joint trespass by several persons on the land of an adjoining owner, the possession of one of the trespassers must be treated as the possession of all, and adverse possession will run against the owner even if actual possession is not held by the same trespasser for the statutory period. The rule that successive trespassers cannot add to their adverse possession the period of the adverse possession of those who held the land before them is not applicable to such a case. A.I.R. 1931 Lah. 232=32 P.L.R. 246=131 Ind. Cas. 341.

——Art. 144—Tacking of possession—Possession as mortgagee and possession as vendee.

It is permissible for a person claiming adverse possession to add the period of possession as usufructuary mortgagee to the period of his possession as vendee from his usufructuary mortgagor. 1930 A.L.J. 1420=A.I.R. 1931 All. 18.

——Art. 144—Independent trespassers—Tacking not allowed.

In a case where Art. 144 applies it is not open to the second independent trespasser, in order to prove his adverse title by possession, to tack on the period during which the previous independent trespasser was in adverse possession. 153 P.W.R. 1918; A.I.R. 1921 Bom. 48; 49 Ind. Cas. 751; 33 All. 224 and A.I.R. 1921 All. 389, Foll. 31 P.L.R. 569=A.I.R. 1930 Lah. 809.

——Art. 144—Trespassers—Tacking possession.

One trespasser succeeding, anot er can tack his possession on to the former's even in case of an invalid transfer; especially so where the second trespasser stepped into the shoes of the first with the latter's consent. 35 All. 380, Foll 80 Ind. Cas. 12=5 L.R.A. (Civ.) 386=A.I.R. 1924 All. 738.

——Art. 144—Purchaser from trespasser is entitled to tack his possession to that of the trespasser.

A trespasser cannot tack his own possession to possession of the previous trespasser for purposes of limitation. But where a trespasser sells his claim to possession to a purchaser that purchaser is entitled to tack the previous possession to his own possession for purposes of limitation and each subsequent purchaser of the claim or right to possession would have the similar right to tack the previous periods of his predecessors-in-title. 75 Ind. Cas. 31=1 Rang. 176=A.I.R. 1923 Rang. 261.

——Art. 144—Suit by auction-purchaser against trespasser—Article 138 does not apply—Article 144 applies and independent trespassers cannot tack on their possessions—Delivery of possession will interrupt adverse possession. 70 Ind. Cas. 602=27 C.W.N. 259=36 C.L.J. 140=A.I.R. 1922 Cal. 176.

——Art. 144—Person claiming through trespasser can tack on trespasser's adverse possession.

A person who is in possession of land without title has, while he continues in possession and before the statutory period has elapsed, a transmissible and inheritable interest in the property, but that interest is liable at any moment to be defeated by the entry of the rightful owner; and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period. 61 Ind. Cas. 546=43 All. 164=A.I.R. 1921 All. 389.

——Art. 142—Independent trespassers—No tacking.

The latter of two trespassers could not be allowed to add to the period of her hostile possession the period of possession of a former trespasser, the auction-purchaser, from whom she did not derive title in any way. 22 Bom. L.R. 1452=A.I.R. 1921 Bom. 48 [**Also** 49 Ind. Cas. 751 (Cal.); 44 Cal. 858=40. Ind. Cas. 337 (P.C.).; 2 Pat. L.J. 506=41 Ind. Cas. 114; 37 Mad. 440=16 Ind. Cas. 43].

——Arts. 144 and 142—"Defendant"—Adverse possession—Independent trespassers.

The rights of *S* while in possession of certain trespassers other than defendants, were purchased by the plaintiffs, on 20th November, 1891. Formal possession was delivered to them on 25th November, 1892. Defendants obtained possession not as representatives of the original trespassers, but under an independent title, in 1897. Plaintiffs brought the present suit for possession in 1908.

Held, that the suit was not barred by limitation Art. 137, applied only to a suit against a third party and not the judgment-debtor or his representative. Art. 142 did not apply because the plaintiffs were never in actual possession and were not dispossessed. The Article applicable was Article 144 under which limitation began to run when the possession of the defendants became adverse. 'Defendant' includes a person through whom a defendant derives his liability to be sued. The present defendants did not derive title from the first set of trespassers and were not entitled to add to their own possession the period of their possession. (1910) 7 A.L.J. 1184=8 Ind. Cas. 1095 =33 A. 224.

——Art. 144—Adverse possession—Trespasser deriving title from another trespasser.

If the period of possession of a trespasser and his predecessor in title, who was also a trespasser, extends over a period of 12 years, he acquires an absolute title to the property of which he has been thus in possession. 3 A.L.J. 424=1906 A.W.N. 184.

32. Waste land.

——Arts. 142 and 144—If the land is left vacant and no other person is in possession, the plaintiff does not fail unless he shows actual possession, that is, by positive acts of user and enjoyment within 12 years of the suit. A.I.R. 1939 All. 257 =1939 A.L.J. 94=1939 R.D. 157=I.L.R. (1939) All. 454=1939 A.W.R. 184=181 Ind. Cas. 945.

——Arts. 142 and 144—Possession of waste land.

Where the strip of land in question is a piece of waste land lying on the boundary of a person's land in village and title to the land has been established in such person, it must be presumed that the land has been in such person's possession. 1938 O.W.N. 744=A.I.R. 1938 Oudh 214=1938 A.W.R. 71= 177 Ind. Cas. 52.

——Art. 142—When a large area of waste land is settled with the tenant, he cannot be required to prove specific acts of possession over every square yard of his holding and the cultivation of the bulk of the demised area must be treated as enjoyment of possession of the whole for the purposes of Art. 142 in the absence of proof of specific acts of adverse possession done by some other party. A.I.R. 1938 Pat. 222=19 P.L.T. 133=17 Pat. 210=4 B.R. 537= 175 Ind. Cas. 165.

——Arts. 142 and 144—Possession follows title.

In case of waste lands, possession follows title and the owner is entitled to succeed on the strength of his title even though he has pleaded actual possession and dispossession and has failed to prove them. 1937 M.W.N. 533.

——Arts. 142 and 144—Where the plaintiff alleging definite previous acts of possession regarding a piece of land sues for possession, the proof of his possession may be such as the land is capable of by exercising acts of ownership on it which need not be continuous or frequent, when it appears that the land was not capable of actual and continuous physical possession having regard to the purpose for which land is used. This character of the land does not necessarily make it waste land so as to attract the application of the principle that the possession follows the title. 58 C.L.J. 478=A.I.R. 1934 Cal. 294=149 Ind. Cas. 1109 (2).

——Arts. 142 and 144—Plaintiff putting forward case of actual possession.

In the case of waste land, if the plaintiff proves his title to it, he can prove possession by relying on the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user, but if the plaintiff puts forward a case of effective possession and adduces evidence in support of it, then he cannot give up that case and rely upon any presumption in support of his possession, because the special case set up by him is inconsistent with any such presumption. 60 M.L.J. 430=33 L.W. 457=

(1931) M.W.N. 299=A.I.R. 1931 Mad. 282=130 Ind. Cas. 845.

——Arts. 142 and 144—Waste land—Possession found with defendant in previous proceedings—Party alleging adverse possession must prove it.

In a suit for title to and possession of a jungle it was found that the title was decided to be in the defendant in a previous suit and possession was also decided to be his in proceedings under Cr.P.Code, S. 145 out of which the present suit arose. The plaintiff claimed right by adverse possession.

Held, that under the above circumstances it lay upon him to eastablish affirmatively his adverse possession for twelve years preceeding the suit. The possession which the plaintiff has to prove must be adequate in continuity in publicity and in extent to show that it was possession adverse to the competitor and there was special difficulty in establishing this in the case of uncultivated jungle land in dispute which produced nothing beyond self-sown trees and a seasonal crop of wild grass. 57 I.A. 273=34 C.W.N. 1101=32 M.L.W. 385=52 C.L.J. 283=31 P.L.R. 828=1930 A.L.J. 1369=127 Ind. Cas. 537=32 Bom. L.R. 1559=A.I.R. 1930 P.C. 281=59 M.L.J. 399 (P.C.).

——Arts. 142 and 144—Title to waste land would not avail, if plaintiff is shown not to be in possession within 12 years.

Though title of waste land is an element to be taken into consideration in weighing evidence as to possession of the plaintiffs within twelve years, it can be of no avail when there is clear evidence on behalf of the defendant showing that the plaintiffs were not in possession or exercising any rights as owners within twelve years. 111 Ind. Cas. 533=A.I.R. 1929 Lah. 34.

——Arts. 142 and 144—Waste land—Possession presumed to follow title—No dispossession beyond twelve years of suit—No question of limitation arises 107 Ind. Cas. 95=46 C.L.J. 575=A.I.R. 1928 Cal. 104.

——Art. 142—Waste land.

Waste land presumed to be in owner's possession—Encroachment on waste land—Trespassing defendant has to prove encroachment—Article 144 applies; not Art. 142. 100 Ind. Cas. 51=A.I.R. 1927 Lah. 230.

——Arts. 142 and 144—Presumption of possessing going with title—When does not apply.

In cases in which the property sued for has been lying waste throughout, the proposition that possession follows title and it is for the defendant to prove adverse possession is generally correct, but it does not apply in case where the land has been occupied adversely by the defendant. 59 Ind. Cas. 891=3 L.L.J. 72=A.I.R. 1921 Lah. 202.

——Arts. 142 and 144—Waste land—Ouster from.

Where with the intention of taking possession of a strip of waste land belonging to the plaintiff defendant deposits earth excavated from a tank and cuts the trees thereon and plaintiff sued more than 12 years afterwards to recover possession,

Held, that the acts of defendant amounted to ouster of plaintiff whose suit having been brought more than 12 years afterwards, was barred by limitation. 60 Ind. Cas. 386 (Cal.).

——Arts. 142 and 144—Waste land—Adverse possession—Prima facie title.

Proof of *prima facie* title to waste land is sufficient to throw the onus on the defendants to prove adverse possession for twelve years. Storing dung cakes and tying sheep on site is not sufficient to give a title by adverse possession. 117 P.L.R. 1917=161 P.W.R. 1917=42 Ind. Cas. 412.

——Arts. 142 and 144—Waste land—Abadi in Agricultural Mahal—Onus.

The burden of proving a plea of adverse possession by an occupier of the *Abadi* in an agricultural *Mahal* lies very heavily on him and is not discharged by saying that the *Zamindar* has not proved his possession within twelve years of the date of suit. 40 Ind. Cas. 97 (All.)

——Arts. 142 and 144—Waste land—Presumption.

As regards waste and unoccupied lands the presumption is that possession follows title. When a defendant has obtained possession only a short time before suit, he must prove some other form of adverse title. The burden of proving adverse possession is not shifted to the defendant by the mere fact that plaintiff can show title to land which was once waste, at however remote a period. 79 P.W.R. 1917=140 P.L.R. 1917=39 Ind. Cas. 971.

——Arts. 142 and 144—Waste land—Discontinuance of possession.

Whether a transaction carries with it a share of the Shamilat area is a question of intention to be gathered from the terms of the deed and the surrounding circumstances, and the subsequent conduct of the parties, and ordinarily a finding on a matter of this type is one of fact. 57 P.R. 1915, foll. The plaintiff's predecessor in interest sold his entire holding to defendant's ancestor in 1873; the deed of sale did not specify the proportionate share in the Shamilat. In a suit to recover possession of the Shamilat lands,

Held, considering that the plaintiff never asserted their title at the settlement and at the time of partition of village Shamilat and that the defendants have all along been treated as the persons having a share in the Shamilat, the suit for possession was barred by time. 38 Ind. Cas. 120 (Lah.).

——Art. 142—Waste land—Adverse possession—Possession and title—Site vacant.

A non-proprietor by merely living outside the actual village *abadi* cannot be deemed to have abandoned the site inside the *abadi* on which he once had his house which had fallen down and not rebuilt for many years. Possession in the case of vacant site goes with the title and its mere use by a neighbour for tethering his cattle thereon cannot be regarded as adverse possession and consequently Art. 142 does not apply. 101 P.L.R. 1916=108 P.W.R. 1916=36 Ind. Cas. 207.

——Arts. 142 and 144—Waste land—Adverse possession.

In respect of waste land allowed to remain so there cannot be a discontinuance of possession and the onus is on the defendant to prove when his possession became adverse. 49 P.R. 1881=105 P.R. 1901, Foll. 106 P.W.R. 1914=204 P.W.R. 1914=25 Ind. Cas. 82.

33. Miscellaneous.

——Arts. 142 and 144—Defendant to have opportunity of proving title superior to plaintiff's.

Where a plaintiff intends to rely on the mere fact of his having been in lawful possession of the pro-

perty and alleges that such lawful possession he was deprived of by the wrongful act of the defendant, he must afford an opportunity to the defendant, if so advised, to set up a title to the property superior to the one set up by the plaintiff himself. 1927 M.W.N. 753=A.I.R. 1927 Mad. 1185.

——Arts. 142 and 144—Public Demands Recovery Act (1895), New Act (1913), S. 10.

The provisions of the new statute (Public Demands Act) have no retrospective operation so as to extinguish or modify causes of action which might have already accrued by reason of failure to serve the notice issued under S. 10 of the Public Demands Recovery Act, for S. 36 must be read along with S. 3 (1). The plaintiff is entitled to relief on the footing that the sale which was held without service of the notice on the plaintiff under S 10 has not effected his title. 72 Ind. Cas. 698=36 C.L.J. 208=A.I.R 1923 Cal. 13.

——Arts. 142 and 144—Plea of limitation not taken—Court's duty—Abandonment by pleader, not binding on party.

Refusal by a pleader or counsel to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, especially where the question of limitation obviously arises upon the admitted facts of the case. (1907) 7 C.L.J 152.

——Arts. 142 and 144—Plea barred as a ground of claim barred also in defence.

A claim of title which will be barred if put in as a ground of claim in the mouth of an individual as plaintiff will be equally barred even as a ground of defence in a suit against the individual. (1905) 7 Bom. L.R. 772. *But see* 30 M. 169=17 M.L.J. 19.

——Art. 143—Applicability—Lease in Punjab.

Neither Art 139 nor 143 applies to a case of lease in Punjab which gives option to lesser to eject a tenant on non-payment of rent. A.I.R. 1941 Lah. 248 =43 P.L.R. 261=I.L.R. (1942) Lah. 252=197 Ind. Cas. 58.

——Arts. 143 and 141—Widow awarded property for maintenance for life by arbitrators—Reversioners given right of possession on her becoming unchaste—Reversioners waiving their right to possession on her becoming unchaste—Reversioners, not deprived of their right to possession on her death—Their suit for possession on her death—Article 141 and not 143 applies. (1937) A.L.J. 139=A.I.R. 1937 All. 268 =1937 A.W.R. 93=I.L.R. (1937) All. 424=169 Ind. Cas. 586.

——Arts. 143 and 139—Circumstances when Arts. 143 and 139 would be applicable to the case of a landlord and tenant under Tenancy in Madras pointed out. A.I.R. 1937 Mad. 295=45 L.W. 347=172 Ind. Cas. 690.

——Art. 143—Deed by tenant—Starting point.

Where the alienation by the tenant is evidenced by a deed which was subsequently registered, the landlord's suit against the tenant challenging the alienation is governed by Art. 143, and time runs from the date when the forfeiture was incurred, that is, when the deed was executed. A.I.R. 1936 Lah. 394=17 L. 403=38 P.L.R. 887=166 Ind. Cas. 157.

——Art. 143—'Forfeiture,' when occurs—Suit for possession on forfeiture.

A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for re-entry, or where the title of the landlord is repudiated but other interest owned by persons other than tenants can be forfeited by rule of law or by reason of breach of express conditions, and a person may also be entitled to possession on certain conditions being not performed. The forfeiture of an estate owned by a Hindu widow on remarriage is an instance.

Article 143 is in general terms. By its terms, it applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. When a particular article is intended to be made applicable to suits between landlord and tenant only, it is stated to be so in express terms in the Lim. Act. A.I.R. 1935 Cal. 779=160 Ind. Cas. 250.

——Art. 143—Scope.

Relationship of landlord and tenant not existing—Art. 143 does not apply. 123 Ind. Cas. 444=50 C.L.J. 260=57 Cal. 289=A.I.R. 1930 Cal. 165.

——Art. 143—Starting point.

Claim based upon forfeiture of lease, by reason of alienation—Article 143 applies and time runs from date of alienation. 30 M.L.W. 960=A.I.R. 1930 Mad. 430=58 M.L.J. 89.

——Art. 143—Forfeiture by re-marriage—Re-marriage must be valid.

To succeed under Art. 143 on plea of forfeiture by re-marriage it must be established that there was a valid remarriage, a marriage recognized by custom amongst the people of the caste to which the widow and her second husband belonged. 117 Ind. Cas. 703=A.I.R. 1928 Cal. 714.

——Art. 143—Starting point is the forfeiture itself and not the date of the knowledge of the landlord.

The article makes the forfeiture itself, the starting point; there is nothing in it about the lessor's knowledge. The fact that there were previous alienations which the landlord could have but did not take advantage of is not material, for it was open to him to waive such forfeitures. 15 M.L.W. 164= A.I.R. 1922 Mad. 290=55 Ind. Cas. 380=27 M.L.T. 111=38 M.L.J. 275.

——Art. 143—Right of re-entry if lessee alienated land demised—Time runs from date of alienation.

Under a lease the lessee was to enjoy the land from generation to generation for purposes of residence without power of alienation and in the event of such alienation the lessor would be entitled to *khas* possession. The lessee sold the land and the lessor sued to recover possession.

Held, that Art. 143 was applicable and the period of limitation was 12 years and began to run from the date of alienation and not from the date when the lessee surrendered possession to the transferee. 60 Ind. Cas. 312=24 C.W.N. 1064.

——Art. 143—Knowledge of lessor—Starting point.

Under Art. 143 the starting point of limitation is the forfeiture itself; there is nothing in the article about the knowledge of the lessor. 38 M.L.J. 275= 27 M.L.T. 111=55 Ind. Cas. 380.

——Art. 143—Permanent tenancy—Denial of landlord's title—Forfeiture—Suit for possession.

A person holding under a permanent tenancy holds adversely from the day he denies his landlord's title and a suit for possession on the ground of forfeiture by the tenant falls under Art 143. *Quaere*: Whether time runs against the landlord from the time he exercises his option of determining the tenancy? 57 P.W.R. 1916=76 P.L.R. 1917=36 Ind. Cas. 565.

——Art. 143—Forfeiture—Waiver—Fresh act.

A landlord can condone the forfeiture of his tenant's right caused by the latter's denial of his proprietary title and afterwards bring a suit for possession with 12 years from the time when a separate and entirely distinct act occasioning forfeiture occurred. 56 P.W.R. 1916=141 P.L.R. 1916=35 Ind. Cas. 235.

——Arts. 143 and 144—Landlord and tenant—Suit for rent—Dismissal of—Ejectment suit.

Where a suit for rent is dismissed on the ground of the non-existence of the relationship of landlord and tenant and a suit for possession is brought after 12 years, Art. 144 applies and the suit is barred. Art. 143 does not apply to the case as there is no relationship of landlord and tenant. 18 C.L.J. 553=22 Ind. Cas. 28.

——Art. 143—Temple trustee getting property from private owner in exchange for temple lands—Transfer for valuable consideration—Suit by private owner for lands exchanged. 17 M.L.J. 149=30 Mad. 316.

——Art. 144. *See* LIMITATION ACT, ARTS. 142 AND 144.

——Art. 145.

Synopsis.

1. Applicability and scope.

2. Deposit and loan.

3. Depositary.

4. Movable property.

1. Applicability and Scope.

——Arts. 145 and 48-A—Suit to recover shares pledged in specie.

Where the shares are lodged with the bank as security for the debt, a suit for their recovery by the pawnor in specie form either the bank or from the person to whom they have been sold is governed either by Art. 48-A or Art. 145. A.I.R. 1942 Mad. 386=55 L.W. 90=1942 M.W.N. 129=(1942) 1 M.L.J. 274=206 Ind. Cas. 539.

——Arts. 145 and 49—Scope.

The plaintiff's father had given to the defendant an album containing valuable postage stamps to be taken to England with the object of selling the same for Rs. 65,000 or more. The defendant took the album to England, and in spite of the repeated demands by the plaintiff's father, he neither returned it nor paid its price after his return to India. The plaintiff instituted a suit for the recovery of the philatelic album or its price :

Held, that the article applicable was Art. 145 (Art. 137, Bhopal Lim. Act), and not Art. 49 (Art. 40 Bhopal Lim. Act). (1940) 188 Ind. Cas. 437 (Bhopal).

——Arts. 145 and 49—Applicability.

One *S*, a contractor, was being financed by one *T* for purposes of his business. On December 31, 1917, an agreement was drawn up between them, the effect of which was that the sum stated to be due from *S* was Rs. 5,05,186 and that this debt was to be satisfied partly by a sale-deed in favour of *T* of certain properties of *S* and partly by a bond for the residue of the indebtedness. A sale-deed bearing date January 25, 1918, was in fact executed in respect of properties valued at Rs. 1,65,000 and by the same deed a mortgage was created on other property valued at Rs. 25,000. On January 26, 1918, *S* executed a bond in respect of the residue of the debt. The amount of the bond was over three lacs of rupees. *T* was no long satisfied with this substituted agreement of December 8, 1919 and disputed its validity. On June 30, 1920, he filed a suit against *S* and certain persons claiming that the agreement of December 8, 1919, was obtained from him by the fraud of the defendants to the suit and was null and void. No mention was made of the sale-deed. That deed had become operative as from its date and the properties which it purported to convey to *T* were in fact transferred to him. The suit was compromised between the parties and on November 7, 1921, a decree was passed on that. The decree set out the terms of compromise of which the material terms were as follows : "The documents, dated January 26, 1918 and December 8, 1919, the possessory mortgage-deed, dated January 6, 1920 and the rent agreement, dated January 6, 1920, executed by defendant No. 1 in favour of the plaintiff shall be declared to be null and void. No party shall, in future, be competent to seek any remedy of any kind against the other party under those documents." In a suit by *S* to recovery the promissory notes left by him with *T* as security on for safe custody :

Held, that Art. 145 and not Art. 49 applied and the suit was well within time. (1938) A.L.J. 264=4 B.R. 408=A.I.R. 1938 P.C. 110=1938 O.W.N. 299=47 L.W. 649=(1938) M.W.N. 390=32 S.L.R. 426=173 Ind. Cas. 612 (P.C.).

——Arts. 145 and 49—Government Promissory Notes belonging to joint family of two brothers given as security for service of one brother—Partition—Government Promissory Notes allowed to continue as security—Other brother acknowledgeng receipt of his share in them—Brother's retirement from service and death—Heirs of other brother suing the heirs of this brother for their share :

Held, that the character of the transaction in so far as it was a deposit was not altered, and the person in whose hands the thing deposited came by virtue of his succeeding to the estate of the original depositary, became a depositary within the meaning of Art. 145, The suit was governed by Art. 145 and not by Art. 49. 58 C.L.J. 502=A.I.R. 1934 Cal. 87=61 C. 119=150 Ind. Cas. 398.

——Arts. 145 and 49—Knitting machine was purchased by the plaintiff and in consideration of the selling price a promissory note was executed. Vendor did not deliver the machine and contended that he had a seller's lieu till the amount is recovered.

Held, Art. 49, Lim. Act and not Art. 145 is applicable. 1934 M.W.N. 1291.

——Art. 145—Deposit with employer as security for good conduct.

Article 145 does not apply to a suit by a legal representative of a deceased employee for the return of a sum of money deposited by the deceased with the employer as security for good conduct because in such a case no cause of action arises at the date of deposit and the Lim. Act provides for time running only after the cause of action has arisen. 20 P.L.T. 777=6 B.R. 152=A.I.R. 1939 Pat. 688=185 Ind. Cas. 336.

——Art. 145—Money deposited as security for appointment—Limitation.

Art. 145 of the Lim Act. applies to a suit to recover money deposited by the plaintiff as a security for his appointment as Tahsildar under the Court of Wards. 55 Ind. Cas. 515 (Cal.).

——Art. 145—Alienation by pawnee—Suit to recover damages by pledger, for pledgee's conversion of pledged article is either governed by Art. 145 or Art. 115—Article 36 has no application.

A suit brought by the pledger for wrongful conversion by the pledgee of pledged article within three years from the date of the alleged sale amounting to conversion, is well within time whether the suit be regarded as one for redemption governed by Art. 145 or as one for damages for breach of contract governed by Art. 115. Article 36 has no application to such a suit. 122 Ind. Cas. 37=30 M.L.W. 898=A.I.R. 1930 Mad. 364.

——Art. 145—Suit for price of article—Suit for recovery of gold deposited or its value—Article applies even though property is not recovered in species.

The plaintiff sued for refund of certain gold and silver kept in the custody of the defendant or in lieu of the price thereof. His case was that he handed over two tolas of gold and some silver ornaments to the defendant for making some ornaments but the defendant never made the ornaments and refused to return the gold and silver. The defendant pleaded limitation,

Held, that Art. 145 applied and the suit was not barred as Art. 145 merely applies even when property is not recovered in species.

Held further, that the mere fact of possession by the depository after demand becoming wrongful does not take the case out of Art. 145. 7 C.W.N. 476; 23 C.L.J. 145 and A.I.R. 1921 Cal. 416, Foll. 107 Ind. Cas. 473=A.I.R. 1929 Cal. 143.

——Art. 145—Refusal to return by pawnee.

When goods are deposited, the article applicable is Art. 145; and the mere fact that the depositor demands the thing and the depositee refuses to return the same does not make Article 49 applicable to the case. Art. 145 is not governed by Art. 49. 26 Bom. 430=33 Mad. 56, Foll. 116 Ind. Cas. 468=6 Rang. 547=A.I.R. 1928 Rang. 309.

——Art. 145—Suit for value of moveable—Deposit.

The rule of limitation applicable to a suit against a depository to recover moveable property even when the property is not recoverable in specie, is that contained in Art. 145 of the Limitation Act. 7 C.W.N. 476; 31 C. 519, Foll. 20 C.W.N. 232=23 C.L.J. 145=34 Ind. Cas. 959.

——Art. 145—Suit to recover deposit refused to be delivered on demand—Article 145 applies.

All actions for the recovery of a deposit of movable property are comprised within Art. 145 and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. Further a deposit is one of the species of bailments, and bailments are of two kinds voluntary and involuntary. Where the depository dies and the deposit passes into the hands of his widow or son the latter becomes an involuntary bailee and a suit to recover the deposit from such involuntary bailee is governed by Art. 145. The fact of the possession by the depository after demand being wrongful does not make Art. 49 applicable. 69 Ind. Cas. 900=26 C.W.N. 772=A.I.R. 1921 Cal. 416.

——Arts. 145 and 49—Entrustment of jewel for raising loan—Loan repaid but jewel not returned—Suit for recovery of same—Limitation.

A suit for the recovery of a jewel entrusted to a third person for raising a loan thereon, after such loan has been obtained and repaid and return of the same refused is governed by Art. 49 and not by Art. 145, and the period of limitation is three years from the date of refusal to return the same; mere silence after notice demanding return is not refusal for purposes of limitation. 35 Mad. 636=(1911) 2 M.W.N. 190=10 M.L.T. 572=22 M.L.J. 152=12 Ind. Cas. 207.

——Arts. 145 and 49—Suit by depositor for return of deposit—Demand and refusal:

In a case of deposit of moveable property, whether there has been a demand and refusal or not, a suit for its recovery falls within Art. 145, and Art. 49 is not applicable. *Obiter.*—A deposit is a gratuitous bailment, and the bailee or depositee is bound to return a mere deposit for safe custody at any time irrespective of the time specified in the contract. [*Obiter* in 9 M.L.J. 51, not followed.] (1909) 20 M.L.J. 41=33 M. 56=7 M.L.T. 282=5 Ind. Cas. 1.

——Arts. 145 and 148, 49—Deposit of moveables—Demand and refusal, effect of.

A suit against a depository of moveables is governed by Art. 145 and the fact that the depository refused to return will not take the case out of the article on the principle that a man entrusted with property for safe custody cannot better his position by wrongfully dealing with it. (1902) 26 B. 430=4 Bom. L.R. 72.

——Art. 145—Suit against person in possession.

Article 145 and not Art. 48 governs a suit for the recovery of jewels deposited with the deceased son of the defendant and alleged to be with the defendant after the son's death. 84 Ind. Cas. 1026=20 M.L.W. 758=1925 M.W.N. 143=A.I.R. 1925 Mad. 185.

——Art. 145—Scope.

Article 145 covers a case of deposit more than the *depositum* of Roman Law. 72 Ind. Cas. 842=17 M.L.W. 467=32 M.L.T. 217=1923 M.W.N. 284=A.I.R. 1923 Mad. 578=44 M.L.J. 431.

——Arts. 145 and 49—Suit for recovery of pictures and manuscripts.

A suit recover pictures and manuscripts is ordinarily governed by Art. 145 but when they are not returned on demand Art. 49 would govern the suit and time runs from date of refusal. 41 All. 643=17 A.L.J. 888=1 U.P.L.R. (All.) 95=55 Ind. Cas. 45.

——Art. 145—Deposit of goods.

A suit to recover deposited goods is governed by Art. 145. (1917) M.W.N. 587=6 L.W. 401=33 M.L.J. 577=42 Ind. Cas. 519.

[On appeal 41 Mad. 620=34 M.L.J. 399=44 Ind. Cas. 95.]

2. Deposit and loan.

——Art. 145—Deposit—Meaning of.

Meaning of the word "deposit" in Art. 145 discussed. 188 Ind. Cas. 437 (Bhopal).

——Art. 145—Deposit and loan—Deposit of jewellery—Article 145 applies.

A deposited his jewellery with his friend *B* at the time of *B's* marriage to be used by him for the purpose of the wedding on condition that it would be returned whenever *A* asked for it.

Held, that the transaction was deposit and not a loan and the mere fact that *B* was allowed to use the jewellery did not take the transaction out of the category of deposit as that expression is used in Art. 145. 31 P.L.R. 907=129 Ind. Cas. 199=A.I.R. 1930 Lah. 913.

——Art. 145—Loan of ornaments.

The word "deposit" does not cover a transaction of the nature of a loan.

Where *A* lent some ornaments to *B* used by the latter in a religious procession,

Held, that the transaction was a loan and not a deposit and Art. 145 did not apply. 7 O.W.N. 769=126 Ind. Cas. 682=A.I.R. 1930 Oudh 395.

——Art. 145—Deposit or Loan.

(Per *Seshagiri Iver, J.*) There is only a thin difference between a loan and a deposit; where the arrangement is that the money handed over is to be paid to a third party on demand or on the happening of a specified event the transaction is a deposit and not a loan. (1916) 1 M.W.N. 206=19 M.L.T. 237=34 Ind. Cas. 347.

——Art. 145—"Deposit" meaning—Previous Limitation Acts.

"Deposit" in the Limitation Act, 1908, has the same meaning as in the previous Limitation Acts and means a *deposit* of goods to be returned in specie (*depositum* of Roman Law). 37 Mad. 175=24 Ind. Cas. 852.

——Arts. 145, 49, 115 and 120—Deposit—Loan—Debtor—Executor—Assets

K made over certain Government securities to *I* to be kept by him in deposit and if necessary to be used by him for raising funds wherewith to pay purchase money of a house. *I* was to draw the interest accruing on the securities, from time to time and pay the same to *K*: and in case *I* had occasion to pledge or sell the securities, he was to redeem or replace the same on being required to do so by *K*.

Held, (*Hill, J.*, dissenting):—The transaction was a deposit and not a loan and so is governed by Art. 145. Even if the transaction amounted to a loan, inasmuch as *I* was *K's* executor and acted as such, the equitable doctrine that a debtor executor is accountable for the amount of his debts as assets in his hands would apply, and the plaintiff as administratrix of *K* having instituted the suit within two years of her appointment was not barred Per *Hill, J.*—The transaction was not a deposit. Either Art. 49 or Art. 115 or Art. 120 would apply. There is nothing in Ss. 5 to 25 which gives to the above equitable doctrine the effect of suspending the running of the statute and which controls or modifies the rule enacted by S. 4. (1904) 8 C.W.N. 500=31 C. 519.

——Art. 145—Deposit or loan of Government securities.

Art. 145, governs the case of a deposit of Government securities, even if the transaction is considered as a loan of such securities and not merely as a deposit. (1903) 7 C.W.N. 476.

3. Depositary.

——Art. 145—Depositary's depositary.

A depositary's depositary is not contemplated in the Limitation Act. A.I.R. 1940 Lah. 254=191 Ind. Cas. 330.

——Art. 145—Property of one handed to another—Depositary.

Where one man's property is handed by that man to another, he becomes a depositary of it, unless of course there is something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all. 58 C.L.J. 502=A.I.R. 1934 Cal. 87=61 C. 119=150 Ind. Cas. 398.

——Art. 145—Supratdar of property attached—If depositary.

When the Court orders a *supratdar* to deliver the property attached to the objector holding that it belonged to the objector, the *supratdar* becomes depositary for the objector on the date of the order and Art. 145 governs the suit by the objector. 75 Ind. Cas. 787=A.I.R. 1924 Nag. 12.

4. Moveable property.

——Art. 145— Words "moveable property" in Art. 145 cannot be said to include money deposited. A.I.R. 1944 All. 241=(1944) A.L.J. 339=1944 A.W.R. (H.C.) 175=1944 O.W.N. (H.C.) 252=I.L.R. (1944) All. 554.

——Art. 145—"Moveable property"—"Deposit" whether includes money.

Per *Mookerjee, J.*—The term "moveable property as used in Art. 145 includes money and is not restricted in its application to cases where property is recoverable in specie. If a Government promote or a sum of money is delivered to be held as security for the performance of some engagement and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement has been fulfilled, the person with whom the deposit has been made may rightly be treated as a depository within the meaning of Art. 145. 31 C. 519; 12 C. 113, Foll. Per *Holmwood*, J.—A return of deposit made in current coin is a return in specie, the term specie meaning, when applied to money, current coin of the realm as opposed to bullion. (1907) 6 C.L.J. 535.

——Art. 146—Mortgage of oil-well—Further advance.

A mortgage of an oil-well was executed in 1875, while in 1879 the mortgagor received a further advance and executed a document to evidence the same. The nature of the second transaction was in dispute, the mortgagor contending that it was a further charge and the mortgagee that it was a sale. A suit for redemption of the mortgage was brought in 1908:

Held, that if the transaction amounted to a sale, the vendee was in adverse possession for over twelve years and that if it was a mortgage the right to redeem accrued more than 30 years before suit and that in either case, the suit was barred. 1 L.W. 695=24 Ind. Cas. 310 (P.C.).

——Art. 146-A—Adverse possession against municipality.

A municipality loses its right to demand the removal of an encroachment and to recover the land encroached upon if a suit for possession of the land is not insti-

tuted on its behalf within 30 years of its having been dispossessed of it. A.I.R. 1941 Pesh. 76=196 Ind. Cas. 648.

——Art. 146-A—Adverse possession against municipality — Street encroached upon—Encroachment on public street for 30 years—Municipality's rights barred.

The plaintiff who encroached upon a portion of a public street by building upon it, was called upon by the defendant Municipality to remove the obstruction, after 30 years under S. 122 of the Bombay District Municipal Act. In the suit by the plaintiff to restrain the Municipality from removing the obstruction,.

Held, that the defendant Municipality could take no action under S. 122 of the Act after 30 years to remove the encroachment, it having been barred from filing a suit for the possession of the site encroached upon, the site was no longer a part of the public street but belonged to the plaintiff 22 Bom. L.R. 951, Foll. 64 Ind. Cas 202=46 Bom 335=23 Bom. L.R. 1028= A.I.R. 1922 Bom. 111.

——Art. 146-A—Applicability—Construction and scope.

Arts. 146-A and 142—The words "dispossessed" or "discontinued the possession" in Art. 146-A cannot be deemed wide enough to include a case of being kept out of possession. These words must be given the same meaning as in Art. 142 and the absence of the words "while in possession of the property" in Art 146-A cannot be taken to indicate that prior possession was not contemplated. Article 146-A applies only where the local authority suing has been dispossessed or has discontinued its possession: in other words, it contemplates prior possession of the land by the local authority which it subsequently loses by reason of any act done by the defendant or otherwise. The article can obviously have no operation in a case where the local authority is found not to have been in possession at all. The only effect of the special provision enacted in Art. 146-A in favour of a local authority is that if the local authority was previously in possession it could claim a longer period of 30 years within which to bring a suit. But where this was not the case, evidently the shorter period of 12 years limitation would apply.

The plaintiff Union Board, a local authority constituted under the Ben. Village Self-Government Act of 1919 instituted a suit against the defendant in respect of a strip of land which it claimed as part of a public road vested in it. Its case was that the defendant had encroached upon the disputed land by putting up certain sheds over it, and it accordingly asked for removal of the encroachment and also for a permanent injunction to restrain further encroachment by the defendant. The defendant was found to have been in possession from before the date of establishment of the Union Board and the suit was brought more than 12 years after the date of the establishment of the Board:

Held, that the suit for possession by the Board was governed by Art. 144 and not by Art. 146-A and was barred by limitation:

Held, also that S. 23 had no application. 73 C.L.J. 608=A.I.R. 1942 Cal. 151=45 C.W.N. 802=200 Ind. Cas. 386.

——Art. 146-A—Applicability—Application under S. 364 (1), Calcutta Municipal Act, 1923.

Article 146-A, Limitation Act, applies only to suits and an application under S. 364 (1), Calcutta Municipal Act, not being a suit, the article does not apply to it. A.I.R. 1939 Cal. 470=40 Cr. L.J. 870=184 Ind. Cas. 189 (1).

——Art. 146-A—Declaratory suit against municipality—Government, if a necessary party.

The Government is not necessary party to a suit brought against a Municipality for a declaration of title by adverse possession to a part of a roadway. It may be desirable that Government should be impleaded though different considerations will arise limitation as against Government being 60 years but the suit cannot fail merely on account of the plaintiff's omission to implead the Government. The effect will merely be that the decision will not be binding upon Government and will operate only as a declaration of the plaintiff's title as against the Municipality. A.I.R. 1942 Pat. 42=8 B.R. 404= 7 C.L.T. 38=198 Ind. Cas. 271.

——Art. 146-A—Effect of. *See* MADRAS ACTS —DISTRICT MUNICIPALITIES ACT (4 OF 1884.) 12 M.L.J. 37=25 M. 635.

—Art. 146-A—Interpretation—"Road" used in Art. 146-A—Meaning of.

The expression "road" or "highway" has been considered in many cases in England and it seems that the interpretation put there, is not confined to the portion actually used by the public but it extends also to side lands. A too narrow meaning cannot be put on the expression "public street" or "road" in Art 146-A, as it is intended to safeguard the interest of public bodies which are not expected to be as vigilant over their rights as private individuals "Road" in that article includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purposes of the road. 113 Ind Cas. 24=32 C.W.N. 396=A.I.R. 1928 Cal. 485.

——Art. 146-A—Limitation against municipality—Starting point.

Possession, provided it is not permissive or in the alternative discontinuance of possession by the municipality is quite sufficient to make limitation run against the municipality. An open assertion of hostile title is not necessary to start limitation under Art. 146-A. A.I.R. 1941 Pesh. 76=196 Ind. Cas. 648.

——Art. 147—Applicability—English mortgage executed prior to 1-4-1930—Suit after 1930 by mortgagee—Limitation.

Under S. 67 (*a*) of the Transfer of Property Act, as amended in 1929, the right of an English mortgagee to sue for foreclosure has been taken away and his suit on the mortgage cannot be regarded as a suit for foreclosure or sale within the meaning of Art. 147, Limitation Act. His suit would now fall under Art. 132. But a suit on an English mortgage executed prior to 1-4-1930, is outside the scope of the amendment by reason of the saving clause in S. 63 of the Amending Act of 1929 and will therefore be governed by Art. 147. 227 Ind. Cas. 135=48 Bom. L.R. 327=A.I.R. 1946 Bom. 499.

——Art. 147—Applicability.

A suit to enforce English mortgage not being a suit "for foreclosure or sale" but being one for

sale only is governed by Art. 132 and not Art. 147. A.I.R. 1942 Cal. 153=74 C.L.J. 61=46 C.W.N 33=I.L.R. (1942) 1 Cal. 326=201 Ind. Cas. 353.

——Art. 147—Applicability—English mortgage.

Suits for foreclosure or sale of a mortgage in the English form fall within Art. 147. A.I.R. 1942 Mad. 628=55 L.W. 417=(1942) 2 M.L.J. 406=I.L.R. (1942) Mad. 851=207 Ind. Cas. 49.

——Art. 147—Applicability.

Art. 147 applies not to foreclosure proceedings under the Regulation but to such suits for foreclosure as under the law then in force could be brought. 10 A.L.J. 522=17 Ind. Cas. 467.

——Art. 147—Applicability and scope.

Article 147 is only applicable to a suit on an English mortgage, that is to say, a suit in which the plaintiff is entitled to claim either foreclosure or sale. 30 Mad. 426 (P.C.), Foll. 95 Ind. Cas. 100=A.I.R. 1926 All. 551.

——Art. 147—Applicability and scope.

Article applies to English mortgages only as defined in Transfer of Property Act, S. 58. 30 Mad. 426 (P.C.). Foll. 94 Ind. Cas. 849=48 All. 302= 24 A.L.J. 295=A.I.R. 1926 All. 493.

——Art. 147—When applicable—Only to English mortgages. *See* LIMITATION ACT, ART. 132. 11 C.W.N. 1005=4 A.L.J. 625=9 Bom L.R. 1104=17 M.L.J. 444=6 C.L.J. 379=30 M. 426=34 I.A. 186= 2 M.L.T. 333 (P.C.). Over-ruling 25 M. 220 (F.B.); **also** 16 M.L.J. 53.

——Art. 147—Applicability—Special Bench, powers of.

A special Bench to which a question involving the reconsideration of a decision of a Full Bench was referred cannot consider the correctness or otherwise of a decision of a Full Bench on another question not referred and which was raised in the course of the argument before the Special Bench. In the present case which came from the Sambalpur District :

Held, that the Full Bench ruling in 14 C. 730 applied, and that the suit which was for the foreclosure of a mortgage by conditional sale was governed by Art. 132 and not by Art. 147, and having been instituted more than 12 years after the due date was barred by limitation. The special Bench gave effect to the plea of limitation although it was never raised in either of the Court below nor even in the memorandum of appeal to the High Court, and was taken for the first time before the Special Bench, the Majority being of opinion that the point arose on the face of the plaint and there was no question of fact of the plaint and there was no question of fact to be enquired into enable the Court to dispose of it. (1907) 11 C.W.N. 959=6 C.L.J. 237=34 C. 941 (S.B.).

——Arts. 147 and 148—Limitation for redemption.

Mortgage-deed providing for redemption after 2 years—In default mortgagee to take posession and appropriate profits first towards interest and balance towards principal—Mortgagee taking possession, on failure of payment by mortgagor—Suit for redemption :

Held, that the parties contemplated payment at any time after possession had been given and that the limitation period for redemption was sixty years from the expiry of the stipulated period of two years. A.I.R. 1940 Oudh 428=1940 O.W. 897=1940 A.W.R. 396=1940 R.D. 466=190 Ind. Cas. 828.

——Art. 147—English mortgage—Limitation for redemption sale or foreclosure.

The period of limitation for a suit for foreclosure or sale, or for the redemption of an English mortgage is 60 years under Arts. 147 and 148 respectively. 82 Ind. Cas. 399=20 M.L.W. 153=A.I.R. 1924 Mad. 736.

——Art. 147—Decree for possession—No execution—No fresh starting point by reason of the decree—Adverse possession.

The mere fact that a decree was passed for possession, will not give a fresh starting point as against the judgment-debtor who holds adversely to the decree-holder-Possession for a period of 12 years will give an absolute title if the execution of the decree for possession is barred. 8 B.L.R. 540, foll. A mortgagee is entitled to bring his suit for foreclosure or sale within the period mentioned in Art. 147 to establish his title as against the mortgagor or his successors in title. but is bound to come in within 12 years to vindicate his title to land as against third party in adverse possession who does not claim under the mortgagor 2 N.W.P.H.C. 223, approved. (1902) 25 A. 35= 1902 A.W.N. 175.

——Art. 147—Suit for contribution—Redemption by one of several mortgagors—Such mortgagor not mortgagee.

A co-mortgagor who has redeemed property is not a mortgagee within the meaning of Art. 147, and a suit for contribution by him is governed by Art. 132 and not by Art. 147. (1904) 1 A.L.J. 276.

——Art. 148.

Synopsis.

1. Acknowledgment.
2. Applicability and scope.
3. Co-mortgagor.
4. Co-owner.
5. Onus.
6. Redemption by subsequent mortgagee.
7. Start of limitation.
8. Transferee from mortgagee.
9. Miscellaneous.

1. Acknowledgment.

——Art. 148—Acknowledgment—Attestation by recognised agent of mortgagee—Whether saves limitation.

Where a suit on a mortgage was brought more than sixty years after the deed and the mortgagor relied on an attestation in the settlement records by the recognised agent of the mortgagee within sixty years of the suit and showing the mortgagee expressly as mortgagee :

Held, that the attestation constituted an acknowledgment of the mortgagor's right to redeem. A.I.R. 1933 Lah. 345 = 14 L. 587=34 P.L.R. 862=147 Ind. Cas. 1174.

——Art. 148—Acknowledgment by co-heir.

An acknowledgment made by one of the heirs of the mortgagee who have divided the mortgage property among themselves without the consent of the mortgagor is binding on him or his heir so far as regards the property in his possession though it may not be

binding on the co-heirs of the mortgagee. 32 Bom. L.R. 1096=A.I.R. 1930 Bom. 466 (F.B.)=54 Bom. 625 =128 Ind. Cas. 417.

——Art. 148—Acknowledgment after limitation—Period of limitation not extended by such acknowledgment.

A mortgagor sued to redeem and recover possession of plaint property alleged to have been mortgaged by his ancestor in 1799. The mortgagor relying on an acknowledgment of 1865, brought the present suit on 12th August, 1924.

Held, that the mortgagor's right to sue for redemption of the mortgage was barred on 1st January, 1862, and the acknowledgment, dated 8th September, 1865, would not extend the period of limitation as the acknowledgment ought to have been made in writing within 60 years from the date of the mortgage. The remedy and the right of the mortgagor having been extinguished, nothing contained in the subsequent Limitation Act would affect the operation of the previous enactments. 122 Ind. Cas. 862=31 Bom. L.R. 1287=A.I.R. 1930 Bom. 55.

——Art. 148—Acknowledgment after limitation—Period of limitation not extended by such acknowledgment.

In 1916 a suit was filed by plaintiff to redeem and recover possession of property said to have been mortgaged by a mortgage deed of June 8, 1761. The plaintiffs relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858 in order to save his right from the bar of limitation.

Held, that the acknowledgment, assuming there was one in 1858, having been given more than sixty years after the date of the mortgage did not save limitation and the plaintiff's suit was barred under Limitation Act (9 of 1871) which applied to the case 27 Cal. 1004, *Rel. on.* 87 Ind. Cas. 699=27 Bom. L.R. 467=A.I.R. 1925 Bom. 339.

——Art. 148—Acknowledgment—Must point with certainty the disputed liability.

Where in a rent note of 1878 given by the sub-mortgagee to the mortgagee, the property was described as "the property mortgaged to you."

Held, that the sub-mortgagee's signature on the rent note cannot mean an acknowledgment of liability to be redeemed by the original mortgagor. 70 Ind. Cas. 906=24 Bom. L.R. 713=46 Bom. 1000=A.I.R. 1922 Bom. 356.

2. Applicability and scope.

——Art. 148—Applicability.

See T. P. ACT (IV OF 1882), SS. 100 AND 91. (1948) 1 M.L.J. 284=A.I.R. 1948 Mad. 412.

——Arts. 148 and 144—Applicability.

See LIMITATION ACT, ARTS. 144 AND 148.

——Art. 148—Applicability—Invalid usufructuary mortgage and subsequent sale of property not alienable—Transactions not challenged and vendee left in possession for over 12 years—Effect—Equity of redemption—If subsists—Suit for possession by heir of mortgagor—Limitation. *See* LIMITATION ACT, ARTS 144 AND 148. 26 Pat. 717=A.I.R. 1949 Pat 197.

——Art. 148—Applicability—Simple mortgagee purchasing property in execution of own decree and getting possession—If in possession as mortgagee—Suit against for possession by mortgagor's heir or representative—Limitation. *See* LIMITATION ACT, ARTS. 142 AND 148. A.I.R. 1950 Pat. 206.

——Art. 148—Applicability—Suit to recover possession of mortgaged property, by virtue of S. 9 of U.P. Debt Redemption Act—Mortgage more than 60 years old.

A property comprised in a usufructuary mortgage more than 60 years old was sought to be recovered on the ground that by virtue of the help afforded by the U.P. Debt Redemption Act, the whole of the mortgage money had been paid off. On a plea that it was barred by Art. 148 of the Limitation Act :

Held, the suit is not governed by Art. 148 for the right to recover possession did not arise until the Court determined the question of the mortgage money being paid off and when that was done, the suit was really a suit to recover possession against the defendant as trespasser. 1946 A.L.J. 175=1946 A.W.R. (H.C.) 406=1946 R.D. 193=1946 A.L.W. 361=A.I.R. 1946 All. 400=227 Ind. Cas. 541.

——Arts. 148 and 134—Applicability and scope.

Close perusal of Art. 134 would show that it was brought into existence with the object of filing suits for possession of properties previously mortgaged and subsequently transferred by mortgagees etc. in excess of their rights. If a mortgagee did not exceed his rights, he would be assigning his mortgagee's interest alone and in that case, obviously Art. 148 and not Art. 134 would be held to be applicable. (1938) M.W.N. 117=(1938) 1 M.L.J. 101= A.I.R. 1938 Mad. 394=180 Ind. Cas. 468.

——Art. 148—Applicability—Tenant mortgaging holding—Subsequent sale to third person—Suit by vendee for possession subject to redemption.

A mortgage was created by a tenant of his holding and subsequently the holding was transferred by way of sale to third person. A suit against the mortgagee for possession of the property subject to redemption was instituted by the vendee. It was contended by the mortgagee that the mortgage was invalid and the action for possession could not succeed for the reason that it was brought beyond twelve years and was, therefore, barred by limitation :

Held, that the position of the defendant was that of a mortgagee and, therefore, the right to redeem was not extinguished until a period of 60 years had elapsed under Art. 148. A.I.R. 1936 Pat. 63=2 B.R. 276=160 Ind. Cas. 1066.

——Art. 148—Applicability—One co-sharer redeeming entire mortgage—Suit by other co-sharer for his share—Article 148 does not apply. (1931) 8 O.W.N. 637=132 Ind. Cas. 261.

——Art. 148—Applicability and scope—Suit against redeeming mortgagor—Redeeming mortgagor becomes a mortgagee as regards co-mortgagor's share—Article applies.

A redemption decree was obtained by all the mortgagors, but the redemption money was paid by only some of them. The mortgagors making the payment were recorded as mortgagee in revenue records in respect of a portion of the mortgaged property and in respect of the remaining as proprietors. Representatives of the mortgagors not making the deposit sued for recovery of their shares on propor-

tionate payment within sixty years from the original mortgage.

Held, that the position of those mortgagors who did not pay the mortgage-money remained that of mortgagors, while that of those who paid the share of others became, of mortgagees and the sixty years' rule was not cut down by the mere fact that some of the mortgagors had effected a redemption. The suit therefore, was not barred by limitation. 113 Ind. Cas. 832=A.I.R. 1929 All. 100.

——Art. 148—Applicability—Usufructuary mortgage.

A suit for redemption of a usufructuary mortgage is in substance a suit for possession of immovable property, but the period of limitation for such a suit is that provided for by Art. 148. 100 Ind. Cas. 346= A.I.R. 1927 All. 311.

——Art. 148—Applicability—Lekha-mukhi mortgage.

Article 148 applies to mortgages of the lekha-mukhi variety and time begins to run from the date of the mortgage. 1 Lah. 21, Foll. 101 Ind. Cas. 549= 28 P.L.R. 123=9 L.L.J. 63=A.I.R. 1927 Lah. 828.

——Arts. 148 and 105—Applicability—Suit for surplus profits—Art. 148 and not Art. 105 applies.

A suit for surplus profits is a part of the redemption suit and based on the same cause of action and ought to be tried in the redemption suit. An order by the Judge that it should be tried separately does not alter its nature nor that of the cause of action on which it is based, and limitation is governed by Art. 148, and not by Art. 105. 103 Ind. Cas. 290= 10 N.L.J. 142=A.I.R. 1927 Nag. 302.

——Art. 148—Applicability—Term for redemption not fixed.

Where there was no term fixed for redemption in the mortgage of 1849 and if there was any such term fixed it had not expired before the 13th day of February, 1856.

Held, that the provisions of S. 48, Oudh Courts Act, 1925, were inapplicable and that the provisions of Art. 148, Limitation Act, 1908, were applicable. 105 Ind. Cas. 93=4 O.W.N. 882=A.I.R. 1927 Oudh 457.

——Art. 148—Applicability and scope—Suit against unauthorised redeemer—Article does not apply—Redeemer's possession is adverse to mortgagor.

Where two suits were brought by *A*, auction-purchaser from *B*, for redemption of two properties mortgaged by *B* and in the compromise that followed, *A* agreed to pay in addition to half the moneys due on the two mortgages also half the amount due on a third mortgage made by *B*, and *A* eventually got possession of all the three properties and *B* sued to redeem the third property from *A*.

Held, that *A* did not get the rights and liabilities of the mortgagee by having paid the amount as he had no right of redemption but that he had usurped *B's* rights and so had been in adverse possession and so Art. 148 did not apply to the case so that *A's* right was perfected on the lapse of the ordinary period of limitation. 78 Ind. Cas. 1026=A.I.R. 1926 All. 834.

——Art. 148—Applicability.

A suit which is in essence one for declaration of title and recovery of possesion is not governed by

Art. 148 but by Art. 144. 94 Ind. Cas. 342=A.I.R. 1926 Cal. 910.

——Art. 148—Applicability and scope.

Art. 134 controls both Arts. 140 and 148. 92 Ind. Cas. 63=23 A.L.J. 691=47 All. 803=A.I.R. 1925 All. 707.

——Art. 148—Applicability and scope—Mortgagee not entitled to possession holding adversely—Time for redemption cannot be availed of.

Where the mortgage as such confers upon the mortgagee no right of possession over the mortgaged land and the possession ever since its inception has been that of a full proprietor, the plaintiff cannot avail himself of the longer pesiod of limitation provided for suits for redemption, for that period applies only if the defendant has no better title than that of a mortgagee. 79 Ind. Cas. 39=A.I.R. 1925 Lah. 53.

——Art. 148—Applicability—Mahua grove.

Mahua grove is not timber but is immoveable property and therefore it is governed by Art. 148 for the purposes of mortgage and a suit for redemption. 81 Ind. Cas. 650=A.I.R. 1925 Oudh 108.

——Art. 148—Applicability and scope—Sub-mortgagee.

As against a sub-mortgagee, as such, the article of the Limitation Act which applies is Art. 148 and not Art. 134. 84 Ind. Cas. 984=2 Rang. 561= A.I.R. 1925 Rang. 140.

——Art. 148—Applicability and scope—Setting aside mortgage—Minor setting aside alienation by guardian—Art. 44 applies.

A suit by a *quondam* minor to set aside an alienation of his property by his guardian is governed by Art. 44 and if he cannot establish his right to possession without first setting aside the alienation, the suit for possession is also governed by that article, and not by Art. 148. 44 Bom. 742 and 25 Bom. 337 (P.C.), Foll. 89 Ind. Cas. 240=A.I.R. 1925 Lah. 619.

——Art. 148—Applicability and scope—Auction-purchaser of mortgagee's rights.

Article 148 and not Art. 144, governs a suit for redemption against an auction-purchaser who purchases the right, title and the interest of the mortgagee under a mistake that the mortgagee was the full owner of the mortgaged property. 79 Ind. Cas. 466=19 S.L.R. 268=A.I.R. 1925 Sind 167.

——Art. 148—Applicability and scope—Suit against person in adverse possession—Adverse possession—Is possible against mortgagor even when mortgage is with possession.

Where the land was mortgaged with possession to a certain person, and that person was ousted from possession by another who remained in possession of the said land and dealt with it as his own for more than 12 years.

Held, a suit for redemption brought by the mortgagor or his legal heirs, would not fall under Art. 148, but would be governed by Art. 144 of the Limitation Act, and would fall if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than 12 years prior to suit. 18 Bom. 51, Foll. 77 Ind. Cas. 125=26 O.C. 308= 10 O.L.J. 216=A.I.R. 1924 Oudh 40.

——Art. 148—Applicability.

Claim by the mortgagor for surplus profits received by usufructuary mortgagee, is part of a suit for redemp-

tion for which Art. 148 will apply. 64 Ind. Cas. 75=26 C.W.N. 123=A.I.R. 1922 Cal. 189.

——Art. 148—Applicability and scope--Charge on property.

Transfer of Property Act, S. 95—Charge created by—Suit to recover property by paying charge—Art. 144 and not 148 applies. A.I.R. 1921 Mad. 326=41 M.L.J. 501.

——Art. 148—Applicability and scope—Recovery of possession of family property.

The cause of action for a Hindu to set aside an alienation of ancestral property by his father is a single cause of action and accrues under Art. 126, when the alience takes possession. Art. 148 does not apply. 64 Ind. Cas. 757=24 O.C. 330=8 O.L.J. 667=A.I.R. 1921 Oudh 196.

——Arts. 148 and 134—Applicability—Transfer by mortgagee—Reconveyance—Redemption.

Where a mortgagee transfers the property as proprietor and subsequently gets possession of the property before his transferee acquired a title by 12 years, the mortgage is subject to redemption within the period given by Art. 148. 22 O.C. 72=52. Ind. Cas. 159.

——Art. 148—Applicability and scope—Mortgagor getting a redemption decree but not executing it—Mortgage by the mortgagee as owner—Sale in execution thereof—Effect on the mortgagor.

In 1861 the mortgagor usufructuarily mortgaged the property to the mortgagee and sued for redemption which was decreed upon payment of a certain amount but the mortgagee remained in possession as the property was not actually redeemed. In 1889 the mortgagee mortgaged it describing himself as absolute owner and the property was sold in execution of a decree on the latter mortgage and purchased by the decree-holder who sold it to the defendant in 1904. In 1915 the heirs of the original mortgagor sued for redemption of the mortgage of 1861, held, that Art. 144 and not Art. 148 or Art. 134 was applicable. Art. 148 is intended to protect the interest of the mortgagor against the mortgagee in possession or the person who holds the interest as a mortgagee including the heirs or assigns as such. It applies only for redemption suits instituted against mortgagee or persons claiming under them and does not apply to suits against strangers. 18 A.L.J. 995=43 A. 164=61 Ind. Cas. 546=A.I.R. 1921 A. 389.

——Art. 148—Applicability and scope—Purchaser of equity of redemption in part—Suit for redemption of another purchaser—Limitation.

A purchaser of the equity of redempton in a part of the mortgaged property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in entire possession of the property is liable to be redeemed by the owner of the other moiety within the period prescribed by Art. 148. 40 All. 633=16 A.L.J. 749=47 Ind. Cas. 833.

——Arts. 148 and 144—Applicability and scope—Accessions to mortgaged property—Suit for.

Upon redemption a mortgagor is entitled to take over the accessions to the mortgaged property on payment of the cost of the acquisition and a suit for possession of the accession is not one for redemption governed by Art. 148, but is one governed by Art. 144. 163 P.W.R. 1917=42 Ind. Cas. 468.

——Arts. 148 and 144—Applicability and scope—Mortgage—Redemption.

Art. 144 of the Lim. Act. could not be invoked by the mortgagee, if the mortgagor was not barred by Art. 148 from redeeming and recovering possession of the mortgaged property. 37 Mad. 423=23 M.L.J. 339=12 M.L.T. 425=(1912) M.W.N. 854=15 Ind. Cas. 343.

——Art. 148--Applicability and scope—Usufructuary mortgage—Redemption.

Art. 148 applies for redemption of usufructuary mortgage and recovery of possession even though part of the consideration has become void. 35 Mad. 114=(1911) 1 M.W.N. 113=9 M.L.T. 286=21 M.L.J. 169=9 Ind. Cas. 289.

——Art. 148—Mortgage—Period of redemption—Applicability to trespasser.

The period of 60 years fixed for redemption applies only to cases for the recovery of possession form a mortgagee but not from a person coming into possession of the mortgaged property as a trespasser. 146 P.W.R. 1911=232 P.L.R. 1911=11 Ind. Cas. 429.

——Arts. 148, 91 and 142—Applicability and scope—Mortgage—Fraud—Evidence Act, S. 92.

Where in a suit for redemption of a mortgage, the mortgagee pleaded that the property had been sold, but the plaintiff contended that it was only a mortgage and that his signature was obtained on that representation.

Held, that for such a suit Art. 148 applied and not Article 91 or 142 and that the plaintiff was entitled to prove the fraud played upon him. 4 Bur. L.T. 265=13 Ind. Cas. 375.

——Art. 148—Applicability and scope—Sale—Right of repurchase given under a separate document—Not enforced within time allowed—Nature of document—Suit for redemption—Maintainability of.

A sale deed was executed in 29th August, 1852, by the predecessors of plaintiffs in favour of the predecessors of defendants. On 8th September following, the latter executed a document in favour of the former agreeing to reconvey the property if their money was repaid in 9 or 10 years. The former document was presented for registration on the 18th and the latter on the 19th May, 1855. On a suit for redemption being brought more than six years after execution the court below,

Held, that the document of August, 1852, was an out-and-out sale and the suit on the covenant contained in the 2nd deed, not having been enforced within time, was barred by limitation. 12 A. 387, Foll. Per *Stanley, C.J.*—The transaction did not constitute a mortgage but was a sale with a provision of repurchase. Such a transaction, although not common in India or England, was not illegal. The covenant for repurchase not having been enforced and the period allowed to expire, the suit was barred by limitation. Per *Banerji, J.*—The transaction was one of mortgage and not of sale and the suit having been brought within 60 years was within time. Execution of two documents, one purporting to be a deed of sale and another a deed of mortgage, was common in this country and such transactions were always regarded as mortgages by way of conditional sale. (1910) 7 A.L.J. 484=6 Ind. Cas. 183.

——Art. 148—Applicability and scope—Wajib-ul-arz—Condition enabling co-sharer on the

payment of revenue due to take over the share of a defaulter—Mortgage by conditional sale—T.P.Act, S. 58.

Where the Wabji-ul-arz of a certain village provided that if any co-sharer was in default in the payment of Government revenue and any co-sharer pays it, he will be entitled to take possession of the property, but will be liable to return it if the defaulter or his heir should repay the amount of default without interest within 12 years and not afterwards ; and that the co-sharer who took possession on payment to Government of revenue is not liable to render accounts for the period during which he was in possession.

Held, that not withstanding the possession clause prescribing the 12 years period, the transaction is one of mortgage by conditional sale as defined by S. 58, T.P.Act, and that the defaulter or his representative in the absence of a suit for foreclosure had a period of 60 years within which he might pay and redeem. 1904 A.W.N. 39=1 A.L.J. 48=26 A. 337.

3. Co-mortgagor.

——Art. 148—Co-mortgagor.

A suit against a co-mortgagor who has redeemed a mortgage, and is, therefore, subrogated to the position of the mortgagee, brought by the other mortgagors for redemption is governed by Art. 148, Lim. Act, and time begins to run aginst the plaintiff from the due date of the mortgage. A.I.R. 1943 Bom. 191=45 Bom. L.R. 253=208 Ind. Cas. 285.

——Art. 148—Co-mortgagor redeeming mortgage.

A co-mortgagor who redeems a mortgage is subrogated to the position of the mortgagee. A suit by other co-mortg gor for redemption is governed by Art. 148 Lim. Act, and the period of limitation commences from the time when the right to redeem accrued, that is to say, from the due date of the mortgage, and does not cease to run against the plaintiff's merely because the other co-mortgagors redeem the mortgage. A.I.R. 1941 Pat. 147 =21 P.L.T. 702=6 B.R. 864=19 Pat. 938=189 Ind. Cas. 855.

——Art. 148—Co-mortgagors.

The position of a redeeming co-mortgagor is that of a mortgagee so as to make Art. 148, applicable to a suit for possession by the other co-mortgagors. A.I.R. 1933 All. 228=144 Ind. Cas. 152.

——Art. 148—Co-mortgagor.

Position of co-mortgagor who redeems the whole of mortgaged property is that of a charge-holder and a suit by another co-mortgagor for possession of his share is not governed by Art. 148. A.I.R. 1933 Lah. 91=34 P.L.R. 239=141 Ind. Cas. 404.

——Art. 148—Co-mortgagor.

Redemption by one co-mortgagor—Suit by others for their shares—Article 148 does not apply. 32 P.L.R. 622=A.I.R. 1931 Lah. 744=12 L. 671=135 Ind. Cas. 506.

——Arts. 148 and 144—Redemption of mortgage by one co-mortgagor—Suit by another co-mortgagor for redemption of his share.

A dispute relating to a mortgage executed in 1892 by five brothers was referred to the Debt Conciliation Board which delivered an ward by which *A*, one of the brothers, was made solely responsible for redemption. *A* was put in exclusive possession of the mortgaged property and he discharged the mortgage in 1909. A suit filed by one of the other co-mortgagors for redemption of his share as against *A* is governed by Art. 148 and not Art. 144, and time begins to run from the date of the redemption of the mortgage by *A*. 127 Ind. Cas. 889=A.I.R. 1930 Nag. 300.

——Art. 148—Co-mortgagor—Suit by co-mortgagor to recover his share from redeeming co-mortgagor—Article 144 applies and not Art. 148.

A co-mortg gor redeeming the whole mortgage does not become a mortg gee of a portion redeemed belonging to the other co-owners, but becomes merely a charge-holder and therefore, a suit by one of the co-owners to recover his share of the property on payment of his share of the charge cannot be considered to be governed by Art. 148 ; in such a case Art. 144 must be applicable. 9 O.C. 91 and 6 O.L.J. 364, Foll. ; A.I.R. 1922 All. 410 ; 14 All. 1 (F.B.) ; 38 All. 540 ; 40 All. 683, Not foll. 104 Ind. Cas. 400=4 O.W.N. 713=2 Luck. 618=A.I.R. 1927 Oudh 347.

——Art. 148—Co-mortgagor.

Co-mortgagor who redeems the whole mortgage does not become a mortgagee of the shares of the co-owners, but merely has a charge on the property. 26 Bom. 500 and 55 Ind. Cas. 450, Foll. 92 Ind. Cas. 980=27 P.L.R. 65=A.I.R. 1926 Lah. 238.

——Art. 148—Co-mortgagor.

A co-mortgagor redeeming the whole mortgage does not become a mortgagee of the portion redeemed belonging to other co-owners ; but becomes merely a charge-holder, and Art. 148 of the Limitation Act referd only to a suit against a mortgagee and has no application to a suit against a charge-holder. 71 Ind. Cas. 847=A.I.R. 1923 Lah. 311.

——Art. 148—Co-mortgagor—Suit for possession by co-mortgagor is governed not by Art. 148 but by Art. 144.

Article 148 provides for a suit against a mortgagee to redeem or to recover possession of immovable property mortg ged. But a suit by a mortgagor against a co-mortgagor to recover possession of his share of the mortg ged property is not a suit for redemption nor a suit for possession of immovable property mortgaged. This suit must be governed by Art. 144 and by Art. 148. 63 Ind. Cas. 282=1922 P.H.C.C. 129=6 P.L.J. 680=A.I.R. 1923 Pat. 98.

——Art. 148—Co-mortgagor—Mortgage—Redemption by a co-mortgagor—Other co-mortgagors can sue to redeem him within 60 years. 77 Ind. Cas. 113=20 A.L.J. 611=A.I.R. 1922 All. 410.

——Art. 148—Co-mortgagors—Redemption by one—Suit against charge-holder.

A co-mortg gor redeeming the whole of the mortgage does not become a mortgagee of the portion to the other co-owners. 26 B. 500 ; 46 C. 211 ; 41 M. 650. 40 M. 1040 ; 2 C.L.J. 546, Foll. Art. 148 of the Limit tion Act, refers only to a suit against the mortgage and has no applic tion to a suit against a charge-holder. 55 Ind. Cas. 450 (Lah.).

——Art. 148—Co-mortgagor—Applicability of—Suit to redeem a charge under S. 95, T.P. Act.

Art. 148 of the Limitation Act is inapplicable to a suit for redemption of a charge in favour of a co-mortgagor who has redeemed the whole mortgage and has thus obt ined a charge under S. 95, T.P. Act on the share of other co-mortgagors. Such a suit brought more than 12 years after the creation of the charge is

barred by time, under Art. 144 of the Lim. Act. 46 Cal. 111=22 C.W.N. 637=45 Ind. Cas. 783.

——Art. 148—Co-mortgagor—Mortgage—Redemption—Suit by one co-mortgagor against another.

A suit for redemption by a co-mortgagor against other co-mortgagor who has redeemed the entire mortgages is governed by Art. 148. 38 All. 540=14 A.L.J. 834 =36 Ind. Cas. 452.

——Art. 148—Co-mortgagor—Redemption by co-mortgagor—Adverse possession—Charge—Mortgage—Limitation.

Where one of the co-mortgagors redeems, under a decree passed against the mortgagors, the whole of the mortgaged property, his title to the property redeemed becomes absolute as against his co-mortgagors by twelve years adverse possession. Article 148 does not apply to such a case, since what a redeeming co-mortgagor has over the property is a charge and not a mortgage. (1902) 4 Bom. L.R. 178=26 B. 500. Also 3 Bom. L.R. 685.

4. Co-owner.

——Art. 148—Co-owner.

Co-owner who redeems a mortgage becomes a charge-holder and not a mortgagee and a suit by the other co-owners against him for possession is not governed by Art. 148. 32 P.L.R. 649=136 Ind. Cas. 264.

——Arts. 148 and 144—Co-owner—Mortgage—Redemption by alienee from co-mortgagor—Suit by others—Limitation.

A co-owner redeeming the whole of the mortgage is not a mortgagee but a mere charge-holder and a suit by the other co-owners; for possession on payment of a proportionate part of the mortgage-money is governed by Art. 144 and not by Art. 148. 41 Mad. 650=34 M.L.J. 528=8 L.W. 28=24 M.L.T. 22=(1918) M.W.N. 448=43 Ind. Cas. 867.

5. Onus.

——Art. 148—Suit for redemption—Onus.

The burden of proof in every case lies upon the plaintiff to prove that his claim is within limitation. It is not enough for a mortgagor to merely allege that the mortgage was about 40 years old. He must specify the date of the mortgage and prove that the claim is not barred by limitation. The onus is not on the mortgagee. 1950 A.L.J. 86=A.I.R. 1950 All. 88=1950 A.W.R. 189.

——Art. 148—Suit for redemption—Limitation—Onus.

In a suit for redemption the burden rests on the plaintiff-mortgagor to prove that the mortgage was made within 60 years of the institution on the suit. The mere fact that the mortgage was in existence in a particular year does not prove that it came into existence in that year. A.I.R. 1950 E.P. 157=52 P.L.R. 75.

——Art. 148—Redemption suit—Limitation—Onus.

The burden of proof in redemption suits, is on the plaintiff primarily to show that he has on the date of suit, a subsisting right of redemption. The burden is not discharged by showing that the mortgage subsisted upto within 12 years before suit. 4 O.L.J. 494=42 Ind. Cas. 119.

6. Redemption by subsequent mortgagee.

——Arts. 148 and 132—Suit for redemption of prior mortgage by subsequent mortgagee.

Article 148 is the only article applicable for a suit for redemption. Where after, a prior mortgagee has obtained a foreclosure decree and taken possession without impleading the subsequent mortgagee in his suit and the latter brings a suit for redemption of the prior mortgage but more than twelve years after the prior mortgagee obtained possession, the suit is not barred being governed by Art. 148 and not by Art. 132. A.I.R. 1937 Nag. 205=I.L.R. (1937) Nag. 367=172 Ind. Cas. 289.

——Arts. 148 and 144—Redemption by subsequent mortgagee—Subsequent mortgagee from one of three sons taking possession of house under sale in his decree on paying of prior mortgagee by father—Heirs of other two sons claiming two-thirds share on paying proportionate sum.

A mortgagee from one of three sons took possession of a house mortgaged to him under the sale in execution of his mortgage-decree after paying off the prior mortgage created by the father. The heirs of the other two sons brought a suit claiming to be entitled to possession of the 2/3rd share of the house on payment of the proportionate sum :

Held, that the subsequent mortgagee had been subrogated to the rights of the prior mortgagee by paying him off and was, therefore, a mortgagee within the meaning of Art. 148, and consequently Art. 148 applied to the suit and not Art. 144. A.I.R. 1936 Pat. 60=2 B.R. 261=160 Ind. Cas. 933.

——Arts. 148 and 132—Redemption by subsequent mortgagee—Suit by representatives of puisne mortgagee to redeem mortgaged property from representatives of prior mortgagee.

A suit by the representatives of the puisne mortgagee to redeem the mortgaged property from the hands of the representatives of the prior mortgagee is governed by Art. 148 and not Art. 132. Whatever the ulterior purpose of the plaintiff may be, such a suit cannot be treated as one to enforce payment of money charged upon immovable property. 1935 O.W.N. 40=10 Luck. 531=A.I.R. 1935 Oudh 139=153 Ind. Cas. 808.

——Arts. 148 and 132—Redemption by subsequent mortgagee.

The purchaser at an auction in execution of a decree obtained by a subsequent mortgagee to which the prior mortgagee was not a party is to be deemed as the assignee of the mortgagor's right and of the prior mortgagee's right. The subsequent mortgagee can redeem the prior mortgage from him. It will, of course, be open to the auction-purchaser to redeem the subsequent mortgage himself, if he so likes, provided there is no other impediment. But this circumstance cannot deprive the puisne mortgagee of his right to redeem the prior mortgage so long as he himself is not redeemed.

To such a case Art. 148 applies and not Art. 132. A.I.R. 1934 All. 946=4 A.W.R. 70=153 Ind. Cas. 664.

——Arts. 148 and 132—Redemption by subsequent mortgagee—Second mortgagee authorised to redeem prior mortgage.

Article 148, Lim. Act, is not limited to suits by the mortgagor but governs all suits for redemption by parties entitled to redeem the mortgage.

K mortgaged a property to the ancestors of defendants Nos. 1 to 3 in 1891. In 1893, *K* created a second mortgage on the same property in favour of *H* authorising him to redeem the prior mortgage of 1891. The successors-in-interest of *H* instituted a suit in 1930 against defendants Nos. 1 to 3 for redemption of the mortgage which *K* had created in their ancestor's favour in 1891 :

Held, that Art. 148 and not Art. 132 was the appropriate article governing the case and that the suit was within time. A.I.R. 1933 Lah. 503=34 P.L.R. 502=14 Lah. 596=142 Ind. Cas. 805.

——Art. 148—Redemption by subsequent mortgagee.

Puisne mortgagee getting decree for sale without joining prior mortgagee—Subsequent suit by him to redeem prior mortgagee is governed by Art. 148 and not by Limitation Act, Art. 132, 14 C.W.N. 439, *Expl.* and *held, rightly decided on its facts. Case-Law referred.* 119 Ind. Cas. 135=33 C.W.N. 1067=50 C.L.J. 152=A.I.R. 1929 Cal. 609 (F.B.).

——Art. 148—Redemption by subsequent mortgagee.

Where a prior mortgagee obtains a decree on his mortgage without impleading puisne mortgagee purchases the property in execution and enters into possession, a suit by puisne mortgagee who also purchases the property under his decree, obtained without impleading prior mortgagee for redemption and possession against prior mortgagee is governed by Art. 132 and not Art. 148, 14 C.W.N. 439, Foll.; 91 Ind. Cas. 719=A.I.R. 1929 Cal. 560.

——Art. 148—Redemption by subsequent mortgagee—Suit for redemption of prior mortgage is not governed by Art. 132 but by Art. 148.

The second mortgagee's right of redemption cannot be considered to be a right to enforce payment of money charged upon immovable property. The second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgagee and so Art. 132 does not apply, but under Art. 148 he has 60 years period. 14 C.W.N. 429; A.I.R. 1925 Mad. 150; A.I.R. 1925 Mad. 76, Not foll.; 2 L.L.J. 419; A.I.R. 1923 All. 271 and 32 Cal. 891. Foll. 94 Ind. Cas. 284=5 Pat. 513=1926 P.H.C. C. 310=7 P.L.T. 788=A.I.R. 1926 Pat. 337.

7. Starting point of limitation.

——Art. 148—Starting point of limitation—Simple mortgage to become usufructuary in certain events.

A simple mortgage for one year provided that in case of default the mortgagee would take possession and appropriate the profits in lieu of interest. It also provided that when the mortgage would thus become usufructuary, the mortgagor will be entitled to redeem in *Jeth* of any year for ten years. The mortgage became usufructuary on the default having been made.

Held, that the right to redeem accrued in the first *Jeth* after the mortgage became usufructuary. A.I.R. 1943 Oudh 425=1943 O.W.N. 302=209 Ind. Cas. 604.

——Art. 148—Start of limitation—Redemption of mortgage—Statutory right under Bengal Regulations 1 of 1798 and 17 of 1806.

In case of a mortgage by conditional sale executed before 1882, (before T.P. Act), the mortgagor has a statutory right under Ben. Regns. 1 of 1789 and 17 of 1806 to redeem within any stipulated period provided in the deed. Therefore, even if there had been only a period of 2 years in the deed, the statutory right existed by which the mortgagors could have redeemed from the date of execution and the suit for redemption brought more than 60 years would therefore be barred by the period of limitation under Art. 148. A.I.R. 1940 All. 29=I.L.R. (1939) All. 990=(1939) A.L.J. 1127=1940 A.W.R. 21=187 Ind. Cas. 485.

——Art. 148—Start of limitation.

Mortgage-deed providing that mortgagor would redeem in any *Jeth* within 10 years and on default mortgagee to become owner—Suit for redemption more than 60 years after first *Jeth* succeeding date of mortgage is barred. A.I.R. 1937 All. 32=(1936) A.L.J. 1358=1936 A.W.R. 1080=(1937) A.L.J. 5=166 Ind. Cas. 473.

——Art. 148—Start of limitation—Usufructuary mortgage—Receipt of profits gives no fresh start to a suit for redemption.

Receipt of profits by the usufructuary mortgagee does not entitle the mortgagor to the benefit of S. 20 as to give him a fresh start to bring a suit for redemption of a mortgagee which must be brought within sixty years. If that were not so there would never be any limitation in a suit for redemption of a usufructuary mortgage. 26 All. 167, Foll. 110 Ind. Cas. 560 (All.).

——Art. 148—Start of limitation.

Sale with option to vendor to have property reconveyed on payment of principle within a certain period Article applies and time for redemption runs from the date fixed for making the payment. 86 Ind. Cas. 353=A.I.R. 1925 Cal. 862.

——Art. 148—Start of limitation.

Where a usufructuary mortgage provided that the mortgagor can redeem in payment of the money after the mortgagee gets possession, time runs under Art. 148 only after possession is given to the mortgagee. 90 Ind. Cas. 763 (Cal.).

——Art. 148—Starting point—Lakha ukhi—Usufructuary mortgage.

The starting point for limitation in respect of a suit for redemption of a *lakha mukhi* mortgage is the same as in the case of an ordinary usufructuary mortgage and the suit is governed by Art. 148 of the Lim. Act. 1 Lah. 21=51 Ind. Cas. 956.

——Art. 148—Start of limitation—Mortgage—When the right to redeem accrues.

A mortgage was executed in 1828 and was made redeemable at the end of any relative year from the date. The present suit for redemption was brought in 1902.

Held, that the suit was barred. (1908) 18 M.L.J. 235.

——Art. 148—Mortgage by conditional sale—Redemption—Starting point of limitation—Agreement of parties—Statements in plaint.

In the absence of a special provision entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But the parties may agree that the mortgagor might discharge the debt within the period and take back the property, in which case the period of limitation for

redemption commences as soon as the debt is discharged and from the expiry of the term provided for in the deed. 36 All. 195=41 I.A. 84=18 C.W.N. 586=26 M.L.J. 474=12 A.L.J. 473=19 C.L.J. 477=(1914) M.W.N. 411=15 M.L.T. 389=16 Bom. L.R. 344=1 L.W. 813=23 Ind. Cas. 355 (P.C.). [On appeal from 29 All. 471=(1907) A.W.N. 133=4 A.L.J. 375].

8. Transferee from mortgagee.

——Art. 148—Transferee from mortgagee.

In the case of tranfer by mortgagee only transferee with a *bona fide* belief at the time of conveyance can claim protection of Art. 134 in other cases, suit to redeem against him is governed by Art. 148. 32 P.L.R. 359=A.I.R. 1931 Lah. 464=132 Ind. Cas. 184.

——Art. 148—Transferee from mortgagee.

Article 134 applies only to *bona fide* purchasers and to other purchasers Art. 148 applies. A.I.R. 1924 Lah. 468, Foll. 96 Ind. Cas. 886=A.I.R. 1926. Lah. 676.

——Art. 148—Transferee from mortgagee.

Suit to recover property from mortgagee's transferer —Article 134 applies and not Art. 148, 44 Bom. 614, *Not foll.*

Under Art. 134 the transferee without notice and the transferee with notice are on the same footing. 47 Cal. 866 and A.I.R. 1922 Bom. 234, Foll. 97 Ind. Cas. 874=1 Luck. 423=3 O.W.N. 674=29 O. C. 353=A.I.R. 1926 Oudh 547 (F.B.).

——Art. 148—Transferee from mortgagee.

Article 134 does not apply to a suit by a mortgagor to recover possession of any mortgaged property from an alienee of the motgagee who has taken with notice of the mortgage. Such a suit is governed by Art. 148. 91 Ind. Cas. 87=20 S.L.R. 277=A.I.R. 1926 Sind 145.

——Art. 148—Transferee from mortgagee.

Article 134 does not apply to a suit by a mortgagor to recever possession of the mortgaged prroperty from an alienee of the mortgagee who had even constructive notice of the mortgagee. Such a suit is governed by Art. 148 of the Act. 44 Bom. 614. Foll. 87 Ind. Cas. 189=27 Bom. L.R. 661=A.I.R. 1925 Bom. 417.

——Art. 148—Transferee from mortgagee.

Only *bona fide* transferee is protected under Art. 134 otherwise Art. 148 applies. 9 Bom. 475, 15 Bom. 583=45 Ind. Cas. 975; 68 Ind. Cas. 734, Not Foll. 80 Ind. Cas. 321=6 L.L.J. 151=A.I.R. 1924 Lah. 468.

——Art. 148—Transferee from mortgagee.

Mortgagee with possession, professing to transfer proprietary interest to transferee in good faith for valuable consideration—Transfer is not of mortgagee's interest so as to attract Art. 148. 61 Ind. Cas. 546=43 All. 164=A.I.R. 1921 All. 389.

9. Miscellaneous.

——Art. 148—Fresh suit.

When under a compromise arrived at in a redemption suit the parties did not agree that plaintiff's right to redeem would be extinguished absolutely, he is not prevented from bringing a second suit for redemption. The mortgagee is still a mortgagee and does not become the absolute proprietor of the property. 92 Ind. Cas. 260=48 All. 17=23 A.L.J. 888=A.I.R. 1926 All. 20.

——Art. 148—Miscellaneous—Mortgage before act.

Where at the time the mortgage was entered into, there was no law of limitation existing, the right to redeem cannot be lost by lapse of time. 78 Ind. Cas. 368=A.I.R. 1925 Lah. 105.

——Art. 148—Miscellaneous—Mortgage—Redemption.

A transfer made in the year 1830-1831 was interpreted to be a mortgage with possession in 1858-1859 and in 1868 the parties got themselves recorded in the Revenue papers as mortgagor and mortgagee according to their desire

Held, a suit for redemption in 1914 was barred. 3 O.L.J. 696=38 Ind. Cas. 626.

——Art. 148—Miscellaneous—Restrictions under Oudh Estates Act—Conditions necessary for taking advantage of S. 6, Act. 1 of 1869, explained.

In order to take advantage of S. 6, Lim. Act (1 of 1869) the mortgage must have been executed on or after 13th February, 1844 and then too the advantage is available in two cases only namely, in mortgages which fixed no term within which the property comprised might be redeemed or mortgages which fixed the term within which the property comprised might be redeemed if such term had not expired before 13th February, 1856. 122 Ind. Cas. 769=7 O.W.N. 209=A.I.R. 1930 Oudh 270.

——Art. 148—Miscellaneous—Whether time is of essence—English principle that in mortgages time is not of the essence does not apply in India.

The doctrine of equity recognized by the English Courts that the time stipulated in a mortgage-deed is not of the essence of the contract has no application in India, in the absence of statutoty law or any established practice to that effect and therefore on the breach of the condition of re-payment, the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them. 1 Mad. 1 (P.C.) Foll.

Even in Sind the Court would not permit the mortgagor to re-open the transaction entered into before the extension of the Transfer of Property Act to Sind and redeem the property if the time for payment was passed. 97 Ind. Cas. 725=A.I.R. 1927 Sind 46.

——Art. 149.

Synopsis.

1. Applicability.
2. Burden of proof.
3. "Suit."
4. Transferee from Government.

1. Applicability.

——Art. 149—Applicability—Suit by Municipal Committee for possession of Government land vested in it for management.

Where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the committee for management, the committee cannot take advantage of the sixty years'

limitation allowed by Art. 149 of the Limitation Act. 50 P.L.R. 4=A.I.R. 1948 Lah. 153 (F.B.).

——Art. 149—Applicability—Suit by assignee of Government.

Art. 149 of the Limitation Act applies only to suits brought by or on behalf of the Government and has no application to suits brought by assignees and other persons deriving or claiming through or under the Government. I.L.R. (1946) Nag. 246=233 Ind. Cas. 486=1946 N.L.J. 223=A.I.R. 1946 Nag. 228.

——Art. 149—Applicability.

Government undertaking to acquire land for Railway Company—Land not actually required by Company to be returned to Government—Land acquired in 1900 and with exception to land in question, made over to Railway Company—Suit land recorded as *raiyati* of *M* and as part of estate—*D*—*M* transferring to *R*—*R* selling it to *S* in 1924—*S* since then cultivating it—No claim either by Railway Company or Government—Government neglecting to take action till 1929 when suit for ejectment of *S* filed—Article applicable is Art. 149. A.I.R. 1937 Pat. 568=18 P.L.T. 486=4 B.R. 75=171 Ind. Cas. 828.

——Arts. 149, 109 and 116—Applicability—Land belonging to Railway Company given for cultivation—Company having no power to grant lease—Word licence used—Suit for ejectment of licensee and for mesne profits—Article 149 applicable.

Land belonging to the Railway Company which had no power to grant a lease and had been strictly enjoined not to grant a tenancy but in respect of which licence could be granted for certain purposes was given to the defendants for cultivation purposes. The word 'licence' was actually used in the document and instead of the word 'rent' the expression 'in lieu of rent' was inserted.

Held, that a suit by the Railway Company for ejectment of the licensee and for mesne profits was governed by Art. 149 and not by Art. 109 or 116, Lim. Act, as the Company was merely the managing agent on behalf of the Government. A.I.R. 1936 Pat. 362=17 P.L.T. 206=2 B.R. 620=163 Ind. Cas. 525.

——Art. 149—Applicability—Suit by Municipal Committee for possession of Crown land against trespasser.

A suit by a Municipal Committee on behalf of the Secretary of State for recovery of possession of Crown land entrusted to its possession against a trespasser is governed by Art. 149, and the period of limitation is 60 years. A.I.R. 1934 Lah. 960=36 P.L.R. 251=153 Ind. Cas. 964.

——Art. 149—Applicability—Suit against Government.

Art. 144 does not apply to a suit for declaration against Government, that plaintiff has acquired ownership by prescription—Art. 149 applies. Consequently it must fail unless the plaintiff is able to show that he has been in adverse possession for more than 60 years. 96 Ind. Cas. 447=7 Lah. 210=8 L.L.J. 309=27 P.L.R. 749=A.I.R. 1926 Lah. 437.

——Art. 149—Applicability.

Specific Relief Act, S. 9—Suit under or otherwise, by Government is governed by Limitation Act, Art. 149 and not Art. 3. 87 Ind. Cas. 1002=A.I.R. 1925 Sind. 275.

——Art. 149—Applicability—Suit by Government against Municipal Servant—Bom. Dt. Municipalities Act, S. 42.

Suit by Government against Municipal Councillors for embezzlements of Municipal money by Municipal servants is governed by Art. 149. 40 Bom. 166=17 Bom. L.R. 115=33 Ind. Cas. 428.

——Art. 149—Applicability and Scope—Suit by Pattah-holder.

Art. 149 does not apply to a suit by *pattah-holder* from Government for possession of property leased from a person who pleads adverse possession, the suit is not one by or on behalf of Secretary of State for India and hence Art. 149 does not apply. 5 M.L.T. 107=2 Ind. Cas. 314.

——Art. 149—Applicability—Suit by assignees from Government.

Art. 149 is not applicable to suits by assignees from Government. (1906) 17 M.L.J. 174=30 Mad. 245.

2. Burden of proof.

——Art. 149—Burden of proof—Land in C. P.—Suit against Government relaying on possessory title—Burden of proof.

The fundamental right to all land in the Central Provinces resides in Government just as much as is does in the case of lands in Berar. Accordingly a person who relies on a possessory title cannot succeed against Government unless he can show either that Government has parted with its titled in some way to to the plaintiff or his predecessors, or that the plaintiff and his predecessors have been holding adversely against Government for sixty years and so have acquired a good title against Government by adverse possession. I.L.R. (1949) Nag. 755=A.I.R. 1949 Nag. 403=1950 N.L.J. 66.

——Art. 149—Burden of proof.

Person claiming land against Government must prove his possession and possession of his predecessors-in-title for the requisite statutory period of 60 years. Merely showing possession for period less than statutory period would not relieve him of his burden. (1936) M.W.N. 850=A.I.R. 1937 Mad 212=169 Ind. Cas. 343.

——Art. 149—Burden of proof—Possession for 60 years must be proved.

A *Jagirdar* claimed to recover possession of certain forests from the Government on the ground and they formed part of his *Jagir*. In support of his title he proved his possession from 1872 down to date (1914).

Held, that as the original title must be deemed to have been in the Crown, plaintiff's possession for 60 years under Art. 149 must be proved to extinguish the title of Government. 39 Mad. 617 (P.C.), *Rel. on.* 22 M.L.W. 546=91 Ind. Cas. 179=A.I.R. 1926 Mad. 125.

——Art. 149—Burden of proof.

Plaintiff in possession of land—Government showing that under general law it is owner—Plaintiff must prove better title or adverse possession for 60 years—*Case Law referred.* 61 Ind. Cas. 440=45 Bom. 789=23 Bom. L.R. 238=A.I.R. 1921 Bom. 177.

——Art. 149—Burden of proof—Suit against Government—Original title of Government admitted—Claim by prescription.

Where a plaintiff sues the Government for possession of certain lands which admittedly belonged to

the Crown at the time when they emerged out of the sea and pleads acquisition of title by long possession adverse possession for the full period of 60 years has to be proved by the claimant. Proof of possession for less than the period does not shift the onus on the Government to show that adverse possession commenced within 60 years. 39 Mad. 617=31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A.L.J. 1114=20 M.L.T. 435=4 L.W. 486=18 Bom. L.R. 1007=25 C.L J. 69=43 I.A. 192=35 Ind. Cas. 902 (P.C.).

——Art. 149—Suit against Government—Proof of plaintiff's possession for 30 years—Burden of proof—Extent.

Where in a suit against Government plaintiff proves 30 years possession the onus is on Government to prove that the plaintiff had no possession within 60 years. Though the plaintiff's evidence is discredited defendants' evidence which shows that certain acts of ownerships were exercised by the plaintiff must also be considered by the Lower Court. 12 M.L.T. 159=16 Ind. Cas. 626 [(This is no longer Correct. See 39 Mad. 617=35 Ind. Cas. 902 (P.C.)].

——Art. 149—Burden of proof—Proof of possession for 30 or 40 years—Mirasidars' claim to a village tank in the Tanjore District.

Possession for 30 or 40 years is sufficient to shift the onus on Government of showing that they have been in possession at some time within 60 years prior to suit.

Held also, on the evidence that the plaintiffs, Ekabogam (sole) Mirasdars of a village in the Tanjore District, have established their ownership of a tank and its banks in the village (the tank being one used for drinking and bathing purposes) as against Government. 20 M.L.J. 74=7 M.L.T. 139=5 Ind. Cas. 118=33 M. 362.

——Art. 149—Burden of proof—Adverse possession against the Crown-Gramanattam.

The bare classification of lands as gramanattam by the revenue officials will constitute at the most an assertion of title and nothing more. In a suit against the Crown for recovery of possession of lands, claimed by the Crown, if the plaintiff proves long possession on his part (e.g., as in this case, twenty and forty years in respect of the suit items) even though the proof does not extend to sixty years, it is upon the Crown to prove that it had possession within the statutory period, and in the absence of such proof, the plaintiff is entitled to a declaration that he is the sole owner. 20 M.L.J. 71=6 M.L.T. 306=4 Ind. Cas. 1070=33 M. 173.

——Art. 149—Burden of proof—Ownership in waste lands and islands—Godavari delta lands—Limitation Act, Art. 149—Limitation against the Crown—Onus—Forest Act—Notification constituting a reserve forest.

The rule of English law is that islands arising out of the sea belong *prima facie* to the Crown ; and the same rule would apply in India in the absence of local usage or statutory enactment to the contrary though the reasoning on which it was sought to be based will not hold good after. Where a person has proved possession of the land notified by the Government as a reserved forest as against the Crown for 20 years prior to the notification, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse, within 60 years before the notification. 20 M.L.J. 66=7 M.L.T. 128=5 Ind. Cas. 882=33 M. 1.

3. "Suit."

——Art. 149—"Suit"—Quaere.

Whether proceedings by the Collector for assessment of revenue on invalid *lakherajes* under the provisions of Regulation 2 of 1805, are suits within the meaning of Art. 149, Lim. Act. A.I.R. 1940 Cal. 455=I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101=191 Ind. Cas. 499.

——Art. 149—"Suit" what is.

Bengal Resumption of Revenue Regulation (2 of 1819)—Application under, is not a suit—Limitation Act, Art. 149 does not apply. 98 Ind. Cas. 334=53 Cal. 561=A.I.R. 1926 Cal. 1064.

4. Transferee from Government.

——Art. 149—Transferee from Government—The period for acquiring title is only 12 years, not 60 as is against Government.

Where a person has been in adverse possession for 12 years of lands belonging to Government and the lands are granted by Government to a third person, the grantee can successfully be must with a plea of adverse possession, although it would have been open to Government to resume the lands, 60 years adverse possession not having been completed as against the Government. Whether 12 years' possession as against the grantee was completed before the grant or afterwards is immaterial. A.I.R. 1924 Mad. 783. *Diss from* ; 30 Mad. 245 and A.I.R. 1924 Cal. 394 *Rel. on, Case-law discussed.* 97 Ind. Cas. 253=A.I.R. 1926 Mad. 1155.

——Art. 149—Transferee from Government—Purchaser from Government—Adverse possession against.

When a purchaser of land from Government sued to recover possession within sixty years or but more than 12 years from the commencement of adverse possession but within 12 years of purchase.

Held, that the suit was barred. Article 144 applied and there was only 12 years' limitation. Under S. 2 (8) the period run as against plaintiff's predecessor-in-title, *viz.*, the Government in this case, should be reckoned against plaintiff. 81 Ind. Cas. 675=28 C.W.N. 66=A.I.R. 1924 Cal. 394.

——Arts. 149 and 144—Transferee from Government—Adverse possession—Municipality—Transfer of right by Government.

The possession by a Municipality of waste lands transferred to them by a Government Resolution, is not that of an agent or trustee on behalf of Government, but in their own right as beneficial owners thereof, subject only to the right of Government to repossess themselves of any portion thereof if and when required for public purposes. The beneficial interest so transferred, is lost by adverse possession for 12 years under Art. 144. 9 S.L.R 1=30. Ind. Cas. 13.

——Art. 151—Applicability—Appeal from Original side.

An appeal from a judgment passed by the High Court in the exercise of its original civil jurisdiction, whether ordinary or extra-ordinary, is governed by Art. 151, Limitation Act which is subject to S. 12

Limitation Act. A.I.R. 1941 Lah. 257=I.L.R. (1941) Lah. 191=43 P.L.R. 297=195 Ind. Cas. 452 (F.B.).

Overrules—A.I.R. 1921 Lah. 26=61 Ind. Cas. 327=2 Lah. 127.

——Art. 151—Appeal from original side.

The period of limitation for an appeal from a judgment of the original side under Cl. 13 of the Letters Patent is 20 days from the date of the judgment. 98 Ind. Cas. 417=4 Rang. 265=5 Bur. L.J. 187=A.I.R. 1927 Rang. 20.

——Art. 151—Bombay High Court—Practice of.

The practice in the Bombay High Court has always been to date the decree as on the day on which judgment is pronounced and not on the day on which the decree is settled. The last mentioned words do not mean decree under Art. 151, time runs from the date of the decree. A.I.R. 1937 Bom. 64=38 Bom. L.R. 1281=I.L.R. (1937) Bom. 421=167 Ind. Cas. 664.

——Art. 151—Computing time.

The right to file a requisition for drawing up a decree in the High Court on the original side is primarily plaintiff's and where he has filed the requisition within four days, the period required by the plaintiff for drawing up the decree should be excluded in favour of the defendant in computing the period of limitation for his appeal against the decree, when he has been otherwise diligent. 121 Ind. Cas. 307=56 Cal. 709=A.I.R. 1929 Cal. 734.

——Art. 151—Date of decree—Meaning of.

The expression "date of decree" in the third column means the date the decree is directed to bear (*i.e.*) the date when the judgment is delivered and not when the decree is actually prepared of signed. 17 C.W.N. 959=19 Ind. Cas. 410 [Also 25 M.L.J. 560 and 25 Ind. Cas. 67].

——Art. 151, S. 5—Decree amended—Date of decree.

Where the original decree is wrong in a material particular, the date of the amended decree is the date from which time should be counted for the purpose of the appeal.

Held also, that there was sufficient cause for not presenting the appeal within thirty days from the date of the first decree within the meaning of S. 5. (1905) 32 C. 908.

——Art. 151—Interpretation—'Decree or order' include and cover 'judgment' as used in Letters Patent (Rang.), Cl. 13.

The words "decree or order" as used in Art. 151 are wide enough to cover a "judgment" in the sense in which that word is used in Letters Patent, Cl. 13 and therefore the period of Limitation for an appeal under Cl. 13 of the Letters Patent from a judgment of the High Court on its original side is 20 days from the date of the judgment. 98 Ind. Cas. 689=5 Bur. L.J. 75=A.I.R. 1926 Rang. 143.

——Art. 152—Agra Ten. Act—Appeal to Dt. Judge.

The period of limitation for an appeal to the Dt. Judge is thirty days under Agra Tenancy Act, 1901. 10 A.L.J. 535=17 Ind. Cas. 653.

——Art. 152—"Date of decree"—Meaning of—Date of judgment or date of signing of decree.

The word "decree" in Art. 152 of the Limitation Act has the same meaning as in S. 2, C.P. Code. A judgment in a Civil Suit consists of two parts (1) reasons for the decision and (2) the decision itself. Both are given on one and the same day by one document. It is true a formal decree is drawn up some time after but Art. 152 does not prescribe thirty days from the date of the signing of the decree it prescribes thirty days from the date of the decree which means the date on which the judgment is pronounced. 13 C. 104, cons. A.I.R. 1949 Assam. 23.

——Art. 152—"Date of decree".

The period for preferring an appeal against a decree to the Court of the District Judge is thirty days from the date of the decree. The last mentioned words do not mean the date when the decree is prepared or signed. It means date when the judgment is delivered in accordance with the provisions of O. 20, R. 7 of the Civil Procedure Code. 40 C.W.N. 83=165 Ind. Cas. 53.

——Art. 152—"Date of decree" is date of judgment though signed later.

The third column of Art. 152 of the schedule to the Limitation Act gives the date of the decree appealed from as the time from which the period begins to run in the case of an appeal under the Civil Procedure Code to the Court of a District Judge. The decree must be deemed to come into existence on the day the judgment is pronounced. For a decree is a decree before it is signed according to Rr. 7 to 8. 66 Ind. Cas. 7=A.I.R. 1922 Nag. 113.

——Arts. 152 and 156—Date of decree—Decree against several defendants, at different times—Whether a consolidated decree—Limitation.

A money decree against different defendants at different times is not a consolidated decree against all for purposes of the Limitation Act and limitation in respect of each decree runs from the date on which it was passed. 31 Ind. Cas. 917 (Mad.).

——Art. 152—Civil Procedure Code, O. 20, R. 7—"Date of decree".

Art. 152, Limitation Act, read together with Civil Procedure Code O. 20, R. 7 makes the "date of decree" for calculation of time for appeal, to be the date when the judgment was pronounced. 16 Bom. L.R. 441=38 Bom. 653=25 Ind. Cas. 66.

——Art. 152—Date of decree or judgment knowledge of party—If material under.

Under Art. 152, there is no question of the knowledge of the party regarding date of the decree or judgment. A.I.R. 1936 L. 742=166 Ind. Cas. 698.

——Art. 152—Limitation expiring on Sunday.

The period of limitation for filing an appeal expired on December 11. That day, however, was a Sunday and on the next day, that is on December 12, the appellant applied for copies. The copies were ready on December 22, and the appellant filed his appeal on December 23 :

Held, that the appeal was filed in time.

Held, further that even assuming that appeal was filed one day beyond limitation, the Court ought to have excused the one day's delay. A.I.R. 1939 Bom. 46=40 Bom. L.R. 1211=179 Ind. Cas. 645.

——Art. 152—Starting point.

Judgment not pronounced according to law, but written and intimated to palintiff's counsel—Limi-

tation runs not from date of judgment but from date of receipt of intimation by party's pleader. 27 P.R. 1919 and A.I.R. 1923 Pat. 129 Foll. 100 Ind. Cas. 909=28 P.L.R. 132=A.I.R. 1927 Lah. 839.

——**Art. 154**—Applicability—Application under S. 520, Criminal Procedure Code, regarding disposal of property—If appeal from order under S. 517. *See* CRIMINAL PROCEDURE CODE, S. 520. 225 Ind. Cas. 525=A.I.R. 1947 Nag. 33.

——Art. 154—Applicability.

Where a Court refuses to complain under S. 476, Criminal Procedure Code, it is an order to which Art. 154 of the Limitation Act applies. 1931 M.W.N. 1064.

——Art. 154—Applicability—Petition to Court to make a complaint under Ss. 476-A and 476-B —Appeal against order on Article 154 applies.

The scheme of the Ss. 476-A and 476-B is that, if the Subordinate Court has neither made a complaint under S. 476 nor rejected an application for the making of a complaint then the Superior Court may take action and make a complaint. But where the Subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code is by way of an appeal to the Superior Court. Appeal Judge should consider whether the appeal is filed within the time specified in Art. 154. 90 Ind. Cas. 529=52 Cal. 1009=26 Cr. L.J. 1569=42 C.L.J. 120=29 C.W.N. 1035= A.I.R. 1925 Cal. 1228.

——Art. 154—Applicability.

An application to a higher Court under S. 195 (6) of the Criminal Procedure Code though akin to an appeal and though treated as an appeal is not an appeal for the purposes of Limitation Act and an application to the appellate Court cannot be time-barred under the Limitation Act. 60 Ind. Cas. 33= 1 Lah. 602=22 Cr. L.J. 177.

——Art. 154—Applicability—Appeal — Criminal Procedure Code, S. 195 (6).

Art. 154 does not apply to proceedings under S. 195 (6) Criminal Procedure Code. 40 Cal. 239=13 Cr. L.J. 599=17 C.W.N. 91=16. Ind. Cas. 167.

——Arts. 154 and 178—Applicability—Appeal —Sanction under S. 195, Criminal Procedure Code—Superior Court—Application to.

An application to a superior court for revoking a sanction granted by an inferior court is not an appeal within Art. 154 of the Limitation Act and such applications are not governed by the Limitation Act. 39 Mad. 750=11 M.L.T. 367=(1912) M.W.N. 499= 22 M.L.J. 419=13 Cr. L.J. 209=14 Ind. Cas. 305.

——Art. 154—Computation.

Complaint by Sub-Divisional Magistrate—District Magistrate allowing complaint to be withdrawn— In revision High Court restoring complaint—Appeal to Sessions Judge against Sub-Divisional Magistrate's complaint—Days from order of withdrawal to restoration of complaint, held should be excluded A.I.R. 1943 Sind 39=44 Cr.L.J. 293=204 Ind. Cas. 415 (F.B.).

——Art. 154—Extension of time.

The delay caused by the fact that an appellant's not knowing that a complaint under S. 476, Criminal Procedure Code, has been filed till after the thirty days prescribed by Art. 154 have expired, can be excused by the appellate Court under S. 5. 108 Ind. Cas. 26=30 Bom. L.R. 76=29 Cr.L.J. 315=9 A.I. Cr.R. 435=A.I.R. 1928 Bom. 64.

——Art. 154—Starting point.

Appeal under S. 476-B, Criminal Procedure Code— Time under Art. 154 or Art. 155 of Limitation Act runs from the date when the complaint is signed and not when the compalint reaches the Magistrate concerned. A.I.R. 1943 Sind 157=I.L.R. (1943) Kar. 122=45 Cr. L.J. 76=209 Ind. Cas. 113.

——Art. 154—Starting point.

Appeal under S. 476-B, Criminal Procedure Code— Limitation can run only from the date on which the complaint is made, the date on which the finding becomes operative to the prejudice of the party concerned. A.I.R. 1935 Nag. 199=36 Cr. L.J. 1371= 31 N.L.R. 370=158 Ind. Cas. 496.

——Art. 154—Starting point.

Limitation for an appeal under S. 476-B, Criminal Procedure Code, begins to run for the purposes of Art. 154, Limitation Act from the date when the finding under S. 476, Criminal Procedure Code, is completed or supplemented by an actual complaint. A.I.R. 1927 Lah. 54, Foll. 108 Ind. Cas. 26=30 Bom. L.R. 76=52 Bom. 164=29 Cr.L.J. 315=9 A.I.Cr.R. 435=A.I.R. 1928 Bom. 54.

——Art. 154—Starting point—Criminal appeal.

Limitation for a criminal appeal begins to run from the date when the copy of the judgment is ready for delivery and does not cease to run till its receipt by the appellant. 8 Cr. L.R. 66.

——Art. 155—Application for determining status of convict.

An appeal to the High Court in the words of S. 449 read with S. 443 is governed by Art. 155 which is not limited only to appeals to the High Court from the Sessions Courts in the mofussil or from other Courts from which appeals to the High Court lie direct.

An application presented after 60 days from date of conviction for the determination of the status of the prisoner under S. 449 read with S. 443 is out of time. 98 Ind. Cas. 248=53 Cal. 746=27 Cr. L.J. 1304=A.I.R. 1926 Cal. 1203.

——Art. 155—Leave to appeal to Privy Council.

Criminal Procedure Code, S. 449 (1) (*c*)—Application for leave to appeal comes within Art. 155. 101 Ind. Cas. 657=54 Cal. 52=28 Cr. L.J. 481=A.I.R. 1927 Cal. 307.

——Art. 155—Order under S. 476-B, Criminal Procedure Code.

Criminal Procedure Code, S. 476-B—Appeal under to High Court—Limitation Act, Art. 155, applies. 104 Ind. Cas. 456=46 C.L.J.40=8. A.I.Cr.R. 433=28 Cr. L.J. 840=A.I.R. 1927 Cal. 718.

——Art. 155—Order under S. 476-B.

The limitation for an appeal under S. 476-B against an order refusing to file a complaint under S. 195 is the one provided by Art. 155 and not Art. 156. 93 Ind. Cas. 851=24 A.L.J. 368=7 L.R.A. Cr. 80= A.I.R. 1926 All. 211.

——Art. 156—Appeal from appellate decree— Copies of first Court's judgment and decree

not filed within limitation—Effect—Civil Procedure Code, O. 42, R. 1.

Where an appeal directed against an appellate decree is presented with the certified copy of the judgment and decree appealed against within the time allowed by Art. 156 of the Limitation Act, no question of limitation arises if the certified copies of the first Court's judgment and decree are not filed within the period of limitation. The defect would be a defect in form. I L.R. (1946) 1 Cal. 396=223 Ind. Cas. 261=50 C.W.N. 213 (1) =A.I.R. 1947 Cal. 67.

——Art. 156—Appeals under Guardians and Wards Act—Guardians and Wards Act (8 of 1820), S. 47—Appeal under—Art. 156 applies.

Though it is true in an appeal filed under S. 47, Guardians and Wards Act, the Act appears to be silent both as regards the procedure to be followed in respect of appeals and the period of limitation for the same, still as the general provisions of the Civil Procedure Code as regards procedure are applicable to cases under the Guardians and Wards Act, the procedure in respect of appeals under S. 47, Guardians and Wards Act must be taken to be governed by the provisions of the Civil Procedure Code, and the period of limitation in respect of the appeal under S. 47, Guardians and Wards Act, would therefore seem to be 90 days from the date of the order under appeal. 7 P.R. 1898 and 43 Mad. 51, Foll. 110 Ind. Cas. 374= A.I.R. 1928 Lah. 488.

——Art. 156—Appeal—Land Acquisition Act, S. 54—Limitation.

Art. 156 of the Limitation Act applies to appeals to the High Court under S. 54 of the Land Acquisition Act. The expression "an appeal under the Civil Procedure Code" in the first column is not restricted to appeals, the right to prefer which, is conferred by the Civil Procedure Code but cover appeals, the procedure with respect to which, is governed by the Civil Procedure Code.43 Mad. 51=37 M L.J. 110=26 M.L.T. 136=10 L.W. 226=(1919) M.W.N. 565=53 Ind. Cas. 405.

——Art. 156—Appeal without copy of judgment—Memo. without copy of judgment—Time is not saved.

It being required by rules of Patna High Court that where several appellants appeal from the same judgment, each memo. of appeal must be accompanied by a copy of the judgment appealed from, the mere presentation of memo. of appeal does not save time though one of the memos. is accompanied by a copy of judgment and there is a request that in other cases the copy of judgment be dispensed with. 69 Ind. Cas. 686=1 Pat. 670=4 P.L.T. 290=A.I.R. 1922 Pat. 580.

——Art. 156—Computation.

Judgment pronounced on September 27, 1929—Copy of decree applied for on November 8, 1929—Decree was signed on November 9, 1929 and the copy was ready on the same day—Copy of judgment applied for on January 2, 1930—It was ready on January 6, 1930 and the appeal was filed next day—Period of limitation was 90 days from the date of decree which expired on December 26, 1929—Court was closed on that day and reopened only on January 2, 1930 :

Held, that the appeal was not barred. 14 P.L.T. 91=A.I.R. 1931 Pat. 60=130 Ind. Cas. 265 (1).

——Art. 156—Computation of time.

The date of the decree must correspond to the date on which the judgment is pronounced no matter what the date of the signing of the decree may happen to be. The time for the presentation of the appeal should be computed, not from the date of the signing of the decrees, but from the date of the pronouncement of the judgment. A.I.R. 1941 Pesh. 74=196 Ind. Cas. 654.

——Art. 156—Scope.

Article 156 pre-supposes that the remedy by way of appeal has become available to the appellant and the date of the decree in the article signifies the date when the decree becomes appealable. When a decree is in favour of the decree-holder it is unappealable in spite of an adverse finding in the judgment, but it becomes appealable when it is scaled down under S. 19 of the Madras Agri. Relief Act. 1944 M.W.N. 702=(1944) 2 M.L.J. 384=I.L.R. (1945) Mad. 378= A.I.R. 1945 Mad. 62.

——Art. 156—Starting point—Decree amended—Limitation for appeal—Computation of.

Where a decree is amended, and the amendment is in regard to a pure arithmetical error if the amendment is not the reason for the grievance of the appellant there is clearly no reason for allowing the appellant to calculate the period of limitation from the date of the amendment rather than from the date of the original decree. If, however, the appellant is aggrieved not by the original decree but by the decree as amended, logically and equitably, time for that appeal should run from the date of the decree as amended. I.L.R. (1946) Mad. 854=225 Ind. Cas. 434=59 L.W. 132= 1946 M.W.N. 124= A.I.R. 1946 Mad. 291=(1946) 1 M.L.J. 198.

——Art. 156—Appeal—Starting point.

Article 156 lays down that the *terminus a qua* for an appeal is the date of the decree or the order appealed from and O. 20, R. 7 provides that a decree shall bear the date on which the judgment is pronounced. Taking both the provisions together and in view of the fact that every body is presumed to know the law, it may be interpreted that the time for appeal starts from the date of judgment. 47 P.L.R. 193= A.I.R. 1945 Lah. 233.

Overruling—A.I.R. 1936 Lah. 976=168 Ind. Cas. (897).

——Art. 156—Starting point—Ex parte decree set aside—Decree restored in revision.

Where an *ex parte* decree is set aside under O. 9, R. 13, Civil Procedure Code, but the order setting aside that the decree is set aside by the High Court in revision, the date of the decree for purposes of appeal is the date when the decree was restored in revision by the High Court. 60 M.L.J. 239=33 L.W. 154=A.I.R. 1931 Mad. 149=(1931) M.W.N. 18=54 M. 455=130 Ind. Cas. 738.

——Art. 156—Starting point.

Decree amended in material particular forming subject-matter of appeal. Time for appeal runs from date of amendment. 32 Cal. 908, *Rel. on.* 117 Ind. Cas. 187=A.I.R. 1930 Pat. 142.

——Art. 156—Starting point.

Where a decree was signed the next day the judgment was pronounced, the time for filing an appeal runs from the day the judgment was pronounced. 97 Ind. Cas. 307=22 N.L.R. 60=A.I.R. 1926 Nag. 349.

——Art. 156—Starting point—Date of decree—Appeal.

Where judgment is pronounced on one day and the decree was to be passed on a later date on plaintiffs complying with a certain condition time begins to run for purposes of appeal from the date of the decree as the decree is in substance as well as in form, the mouth-piece of the suit in its immediate result and without it the dispute between the parties would not be intelligible. 9 S.L.R. 193=34 Ind. Cas. 867.

——Art. 156—Date of decree—Dismissal of Appeal—Review—Rehearing—Dismissal on other grounds—Starting point for limitation.

Where on an application for review of a dismissal of an appeal, the application is admitted, the appeal reheard and a fresh decree dismissing the appeal is passed on different grounds, a fresh period of limitation for the appeal begins to run from the date of the new decree. 8 Bur. L.T. 101=27 Ind. Cas. 732.

——Art. 156—Starting point—Date of decree appealed against—Amended decree.

Even when there is an amendment of the decree, time must be taken to run from the date of the decree as originally drawn up. 14 M. 150=6 C. 22=22 M. 364, Foll. (1905) 3 C.L.J. 188.

——Art. 156—Appeal—Order setting aside a sale—Appeal against—Starting point of limitation.

Starting point for limitation as regards an appeal against an order setting aside a sale is the date on which the order was signed. (1902) 6 C.W.N. 873=29 C. 420.

——Art. 158.

Synopsis.

1. Applicability.
2. Decree before limitation.
3. Extension of time.
4. Interpretation and scope.
5. Limitation—Computation of.
6. Starting point.
7. Miscellaneous.

1. Applicability.

——Art. 158—Applicability—Petition of objection filed by a party in answer to an application under S. 14 of the Arbitration Act.

The contention that Art. 158 does not at all apply to a petition of objections filed by a party in answer to an application under S. 14 of the Arbitration Act is not sound. In so far as the objections relate to the setting aside of the award, it would be governed by Art. 158. I.L.R. (1949) A. 631=1948 A.L.J. 524=A.I.R. 1949 A. 234.

——Art. 158—Applicability.

Articles 158 and onwards of Schedule I, Limitation Act, relate to applications by a party or parties who seek some relief from the Court against some other party or parties. A.I.R. 1943 Sind. 33 = I.L.R. (1942) Kar. 466=205 Ind. Cas. 304.

——Art. 158—Applicability and scope.

The statement made by the referee according to the agreement is an admission under S. 20, Evi. Act and operates as an estoppel against parties. In such a case, no question of para. 15, Schedule II, Civil Procedure Code or Art. 158, Limitation Act, arises. A.I.R. 1939 All. 176=(1939) A.L.J. 1=1939 A.W.R. 7=180 Ind. Cas. 364.

——Art. 158—Applicability and scope.

Article 158 is not applicable to application under para. 20, Schedule II, Civil Procedure Code, but to one under para. 16 of that schedule. A.I.R. 1936 Pesh. 135.

——Art. 158—Applicability and scope—Objection to award.

Article 158 cannot apply to an objection to an award in a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of Court. A.I.R. 1935 Lah. 951=162 Ind. Cas. 124.

——Art. 158—Applicability and scope.

Article 158 applies only to objections under para. 15, Schedule II, Civil Procedure Code, where the application is to set aside the award completely; where the prayer is only for the modification or remission of the award, the prayer comes within para. 15 or para. 14, and hence Art. 158 is not applicable. (1933) A.L.J. 519=A.I.R. 1933 All. 648=146 Ind. Cas. 596.

——Art. 158—Applicability—Insolvency proceedings.

Limitation Act, Arts. 158-183, are not intended to apply to applications made under the Insolvency Acts, because those Acts are intended to be complete Codes of the Insolvency law, and to prescribe their own periods of limitation. 104 Ind. Cas. 816=5 Rang. 384=A.I.R. 1927 Rang. 263.

——Art. 158—Applicability—Award filed before amendment.

Amending Act (18 of 1919)—Objection to award filed before coming into force of Act, but decided after—Amending Act applies. 63 Ind. Cas. 399=19 A.L.J. 404=A.I.R. 1921 All. 63.

——Art. 158—Applicability—Application to make the award a rule of Court—Written statement by Defendant.

Art. 158 cannot apply to a written statement by the defendant in an application to have an award made a rule of Court. 14 O.C. 308=13 Ind. Cas. 520.

——Art. 158—Applicability—Application to set aside award.

There is no limitation for making an application to remit an award for re-consideration of the arbitrators owing to an illegality apparent on the face of it. The period of ten days is not applicable to proceedings under para. 12 or 14 of Schdule II of the Civil Procedure Code. 24 M.L.T. 102=(1918) M.W.N. 477=8 L.W. 171=47 Ind. Cas. 597.

2. Decree before limitation.

——Art. 158—Decree before limitation.

The Court has no power to pass a decree before the expiry of the 10 days allowed by Art. 158 of the Limitation Act, in the case of an award. 71 Ind. Cas. 266=15 M.L.W. 160=45 Mad. 456=1921 M.W.N. 793=A.I.R. 1922 Mad. 179.

——Art. 158—Decree before limitation.

Where an award is filed without notice to the defendant and a decree is passed on the award before the expiry of the time allowed by Art. 158, Limitation Act, for filing objections, the procedure is illegal and the decree must be set aside. 21 M.L.J. 444,

Foll. 64 Ind. Cas. 90=24 O.C. 234=8 O.L.J. 626=A.I.R. 1921 Oudh 148.

3. Extension of time.

——Art. 158—Extension of limitation.

Court has power to extend the time allowed under Art. 158, Limitation Act, for supplying Court fee stamp on an application to set aside an award. 107 Ind. Cas. 223=23 S.L.R. 91=A.I.R. 1928 Sind 87.

——Art. 158—Extension of limitation.

Section 5 does not apply to applications under Art. 158. 100 Ind. Cas. 955=8 Lah. 274=28 P.L.R. 441=A.I.R. 1927 Lah. 273.

——Art. 158—Extension of time.

Objections to the award must be taken within ten days and this time cannot be extended by the Court. 18 C.W.N. 626, Foll. 100 Ind. Cas. 955=8 Lah. 274=28 P.L.R. 441=A.I.R. 1927 Lah. 273.

——Art. 158—Extension of time—Objections to award—Amendment.

A court has discretion to allow an additional ground of objection to the award beyond time, by way of amendment of the objections filed within time or to entertain it of its own motion if the objection would render the award invalid. 16 O.C. 233=20 Ind. Cas. 773.

4. Interpretation and scope.

——Art. 158—Interpretation and scope—"Court"—Meaning of—Calcutta High Court Rules.

The word "Court" in Art. 158 of the Limitation Act means the court and not its chief ministerial officer *e.g.*, the Registrar in the case of a High Court. "Submission" means submission to the court and not to the Registrar. Rule 1 of Ch. 23 of Hechle's Rules is not in conformity with schedule II para. 10, Civil Procedure Code. 46 Cal. 721=23 C.W.N. 280=53 Ind. Cas. 46.

——Art. 158—Interpretation and scope.

Whether the word "given" in Col. 3, Art. 158, Limitation Act, is to be interpreted as actually received by the party for whom the notice was intended or is to be treated merely as the issue of the notice. 1930 A.L.J. 1166=126 Ind. Cas. 14=A.I.R. 1930 All. 477.

——Art. 158—Interpretation and scope—"Notice"—Meaning of.

The direction to issue a notice is not equivalent either to the issue of the notice or of giving of the notice to the parties concerned. 1930 A.L.J. 1166=126 Ind. Cas. 14=A.I.R. 1930 All. 477.

——Art. 158—Interpretation and scope—"Parties"—Meaning—Notice given to pleader—Sufficiency.

"Parties" in Art. 158 of the Limitation Act cannot be confined to parties personally but includes pleaders and other persons specially authorised by the parties to take notice,

Held, that a notice given to a duly authorised pleader to file objections was sufficient. 1930 A.L.J. 995=A.I.R. 1930 All. 711.

——Art. 158—Interpretation and scope—"Submission of the award to the Court"—What is not.

The presenting of an award without the knowledge of the parties before the date fixed for its filing is not submission of the award to the Court for the ten days time allowed for filing objections to begin to run. 14 P.W.R. 1916=34 Ind. Cas.250.

5. Limitation—Computation of.

——Art. 158—Filing objections to award—Limitation—Terminus a quo.

Under Art. 158 of the Limitation Act, as it now stands amended by Act 10 of 1940, objections to the award have to be put in within thirty days from the date when notice of the filing of the award is given to the parties concerned. A.I.R. 1948 E.P. 11=50 P.L.R. 57.

——Art. 158—Limitation—Computation—Time how reckoned—Notice of submission of award.

The period of 10 days is to be computed from the day in which the parties receive notice of the submission of the award and not from the day on which it is actually received. 13 N.L.R. 172=42 Ind. Cas. 266.

——Art. 158—Limitation—Computation—Objection ten days after award—Notice.

Under Art. 158 of the Limitation Act the period of ten days is to be computed from the day on which the parties receive notice that the award has been submitted to Court, and not from the date on which it is actually received by the Court. 96 P.L.R. 1915=30 P.W.R. 1915=28 Ind. Cas. 427.

——Art. 158, S. 12—Limitation—Computation—Time for filing objections to award—Time for obtaining copy to be deducted. *See* 1907 A.W.N. 184=29 A. 584=4 A.L.J. 450.

——Art. 158—Limitation—Computation—Application to set aside award—Limitation Act, S. 12.

An application to set aside an award must be made within ten days from the time the award is submitted to the court subject to the deduction of the time requisite for obtaining a copy of the award as prescribed in S. 12. (1901) 12 M.L.J. 77=29 C. 167=6 C.W.N. 226=4 Bom. L.R. 161=25 P.R. 1902=29 I.A. 51 (P.C.).

——Art. 158—Limitation—Computation—Application to set aside award.

An application to set aside an award must be made within ten days from the time the award arrives at the Registrar's office for the purpose of being filed, and not from the time when it is filed. (1901) 5 C.W.N. 813.

——Art. 158—Limitation—Computation—Application to set aside award—Civil Procedure Code, S. 521—Arbitrator's signature, forgery of—Objection after time.

Where an award on the face of it bears the signatures of all the arbitrators, but one party objects that the signatures of some of the arbitrators were not genuine, but forged, the objection is one which ought to be urged within ten days under Art. 158. So held by *Maclean, C.J.*, and *Rampini J.*, *Gupta, J.* dissenting Per *Gupta, J.*:—Art. 158 applies only to objections under S. 521, C.P.C., (O.C.) and not to objections which, if proved, will make out the award to be a nullity, for in these latter cases there is no award to set aside. (1901) 29 C. 36.

6. Starting point.

——Art. 158—Starting point.

Under Art. 158, three things are necessary for fixing the starting point of limitation ; (1) the award must have been filed, (2) in Court, and (3) notice of the filing has been given to the parties. The mere handing over, or deposit of the document with the Reader who is not authorised to file awards or documents, in the absence of the Judge on leave, is not filing it in Court. An award cannot be said to be 'filed in Court,' within the meaning of Schedule II, para. 10, Civil Procedure Code, by simply showing it on the record ; it is necessary that it must be placed on the record by order of the presiding officer of the Court, or by an official specially authorised in this behalf. "Filing" a document, in legal parlance, is 'placing it in due manner among the records of the Court." Further, even "filing in Court" is not by itself sufficient. Time begins to run when, after the award had been filed, notice of the filing had been given to the parties.

The notice, of course, need not necessarily be in writing formally delivered to the parties ; it might be given orally if the parties are present in Court personally or by authorised agent at the time of the filing of the award. A.I.R. 1942 Lah. 190=44 P.L.R. 249=201 Ind. Cas. 462.

——Art. 158—Starting point.

When arbitrator states special case, award is completed when Court expresses its opinion and period of limitation begins only thence. 84 Ind. Cas 378=48 Bom. 663=26 Bom. L.R. 836=A.I.R. 1926 Bom. 22.

——Art. 158—Application to set aside award—Limitation—Starting point.

The limitation prescribed by Art. 158 for an application to set aside an award commences to run from the date of submission of the award to the Court and not from date of service of the notice. 8 S.L.R. 190=27 Ind. Cas. 371.

——Art. 158—Setting aside award—Time when begins to run.

For an application to set aside an award, time begins to run from the date when the award is submitted to the Court, not from the date when notice is given to the party of the submission of award. (1897) Sind S.C.R. 1 Overruled ; 29 C. 167, Foll. 5 S.L.R. 125=13 Ind. Cas. 234.

7. Miscellaneous.

——Art. 158—Filing of award.

To say that no application could be said to have been made within the meaning of Art. 158 until either a notice of motion had been given or a rule *nisi* had been obtained, is taking too technical a view of what is required by Schedule 2, R. 15 of Civil Procedure Code. 63 Ind. Cas. 929=45 Bom. 1071=23 Bom. L.R. 614=A.I.R. 1921 Bom. 419.

——Art. 158 — Miscellaneous — Award—Objections—Time.

It is not necessary to allow ten days for objections, where parties have accepted an award. 27 P.W.R. 1914=69 P.L.R. 1914=23 Ind. Cas. 591.

——Art. 158—Miscellaneous—Arbitration—Award—Decree on award—Application to revise—Nature of Application.

See 6 C.W.N. 226=31 I.A. 51=29 Cal. 167=12 M.L.J. 77.

——Art. 159—Rule 101, Rangoon Small Cause Court—If ultra vires.

Rule 101, Rangoon Small Cause Court—Rule is *ultra vires* to the extent that it conflicts with provisions of Art. 159, Limitation Act. A.I.R. 1936 Rang. 501=14 Rang. 728=166 Ind. Cas. 148.

——Art. 159—Negotiable instruments—Summary suit—Leave to defend—Extension of time. *See* 5 C.W.N. 259.

——Art. 160—Review-Petition—Illness, if sufficient ground.

Where the absence of all the applicants or their counsel is not explained satisfactorily, though one applicant may be ill, no sufficient cause is made out for restoration of a dismissed application for review. 16 P.W.R. 1915=68 P.L.R. 1915=27 Ind. Cas. 703.

——Art. 161—Small Cause Court—Review—Deposit.

An application to review of judgment of a Small Cause Court was made on the last day of the period prescribed for limitation but without deposit of the amount of the costs or security for the same as required by S. 17. On the following day the Court allowed the applicant time for making the deposit which was eventually made and the application for review was granted.

Held, that the application failed to comply with S. 17 and was barred under Art. 161, Limitation Act. It was doubtful whether S. 5. Limitation Act applied to the case at all as the application was made within time. 24 C.W.N. 380=31 C.L.J. 197=56 Ind. Cas. 551.

——Art. 162—Applicability and scope—Insolvency proceedings.

An application to a High Court for a review of a judgment passed by it in its insolvency jurisdiction is not governed by Art. 162. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——Art. 162—Applicability and scope.

Review of judgment in Art. 162 refers to review under Civil Procedure Code, O. 47, R. 1. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——Art. 162 and S. 12—Limitation—Computation.

Plaintiff applied to have the decree drawn up on March 7, 1936 and decree was finally filed on April 28, 1936. On May 18, 1936, when limitation was about to expire, but had not expired, defendant applied for a copy of decree. He obtained copy on May 20, 1936 on which date he filed his memorandum of review :

Held, that as under the Rules and Orders (original) of Calcutta High Court, person against whom decree or order is obtained cannot apply for drawing it up unless the other party fails to do so within four days from date of decree or order, the defendant was entitled to exclude the period from May 18 till May 20 as well as the period from March 4 to April 24 and he was just within the period of limitation. 41 C.W.N. 129=(1937) 170 Ind. Cas. 653.

——Art. 162—Judgment of Original Side of High Court—Limitation—Starting point.

Art. 162, Limitation Act, provides that an application for review of a judgment of the original side of the High Court must be made within 20 days from the date of the decree or order and not from the date of the knowledge of the decree or order. A.I.R. 1950 Cal. 217=54 C.W.N. 110.

——Art. 162—Limitation—Starting point.

If a party who has obtained an order fails to apply to have it drawn up within four days of the making of the order, the party against whom it is made can so apply, and if he fails to apply, the period of limitation begins to run against him. A.I.R. 1938 Cal. 321=42 C.W.N. 317=I L.R. (1938) 2 Cal. 22=177 Ind. Cas. 729.

——Art. 162—Application—Limitation—Starting point.

Where notice has not been served on the applicant, limitation for an application for re-hearing the appeal dates from the time when the applicant has knowledge of the decree. 96 P.R. 1918=47 Ind. Cas. 962.

——Arts. 162, 164, 168 and 169—Ex parte—Application to set aside—Limitation—Starting point.

If a plaintiff or appellant seeks to set aside an ex parte order, limitation runs only from date of the order but if a defendant or respondent seeks such relief he can, in cases where he has not had due notice, count limitation from the date of his knowledge of the order. The benefit which the law allows only to a defendant or respondent cannot be allowed to an appellant. 1 Lah. 363=2 Lah. L.J. 249=58 Ind. Cas. 789.

——Art. 163—Limitation for application for restoration *See* 31 C. 150=8 C.W.N. 97.

——Art. 163—Application to set aside a dismissal for default—Application without proper affidavit. *See* RULES OF PRACTICE—MADRAS—ORIGINAL SIDE. 17 M.L.J. 215.

——Act. 163—Applicability and Scope—Suit dismissed for default by original side decree.

An application by the plaintiff to have the decree of the original side dismissing his suit for default set aside is governed by Art. 163, Limitation Act. The application must be made befor the Judge and within 30 days of the date of dismissal,; merely the giving of notice of the application or the filing in the Registrar's office of the notice of the application is not enough. A.I.R. 1943 Cal. 257=47 C.W.N. 450=I.L.R. (1943) 2 Cal. 227=209 Ind. Cas. 182.

——Art. 163—Applicability and Scope—Recourse to S. 151, Civil Procedure Code, if can be had.

When an order setting aside an *ex-parte* decree has been passed in the absence of the plaintiff, there is no obligation again to issue notice to the plaintiff of the date on which the restored case is to be taken up. Where, on the date so fixed, the suit is dismissed under O. 9, R. 8, Civil Procedure Code, due to plaintiff's absence, the limitation for filing the restoration application is governed by Art. 163, and this cannot be avoided be recourse to S. 151 Civil Procedure Code. A.I.R. 1936 Lah. 495=38 P.L.R. 697=163 Ind. Cas. 274.

——Art. 163—Applicability and scope.

File of suit ordered to be put in presence of plaintiff. No notice to plaintiff—Suit called for hearing in plaintiff's absence—Dismissal for default :

Held, that the case was covered by S. 151 and not O. 9, R. 8, Civil Procedure Code—Limitation article applicable was Art. 181 and not Art. 163. A.I.R. 1935 Pesh. 186=160 Ind. Cas. 457.

——Arts. 163, 181 and 182—Applicability and Scope—Execution by Collector—Application to send papers back.

An application to send the papers back to the collector when returned by him for some reason is governed by Art. 181 or 182 of the Act according as it may be for the continuance of the previous application or for taking a step-in-aid of execution, and not by Art. 163. 42 All. 152=11 L.W. 384=(1920) M.W.N. 3=22 Bom. L.R. 415=2 U.P.L.R. (P.C.) 55=24 C.W.N. 394=38 M.L.J. 259=18 A.L.J. 235=55 Ind. Cas. 486 (P.C.).

——Art. 163—Extension of time.

Where in an application under O. 9, R. 9, the Court granted an extension of time not known to law,

Held, that the order was illegal and must be set aside in revision. 52 C.L.J. 23.

——Art. 163—Dismissal for default—Application by representative of deceased plaintiff—Limitation.

An application for restoration of a suit dismissed for default, by the representative of the deceased plaintiff more than 30 days after the dismissal is time-barred. 14 Ind. Cas. 221 (Oudh).

——Art. 163—Nature of—Provision mandatory.

Art. 163, Limitation Act is intended to be strictly followed and the Court has no discretion to enlarge the period of 30 days therein prescribed. 27 P.W.R. 1920—116 P.L.R. 1920=55 Ind. Cas. 55.

——Art. 163—Applicability—Application to set aside dismissal of suit on original side of High Court—Limitation—Starting point.

Art. 163, Limitation Act, is not confined only to applications made under Civil Procedure Code. It applies to an application by the plaintiff on the original side of the High Court to set aside a dismissal of suit for default of appearance. I.L.R. (1943) 2 Cal. 227, Foll.

Under Art. 163, Limitation Act, limitation runs not from the date of the knowledge but from the date of the dismissal of the suit.

The taking out of a notice of motion *per se* does not operate to save limitation. The application has to be moved and made to the Court. A.I.R. 1950 Cal. 217=54 C.W.N. 110.

——Art. 163—Starting point.

Under Art. 163, the period of limitation for an application for restoration of a suit dismissed for default runs from the date of dismissal and not from the date on which the applicant had knowledge of the dismissal. A.I.R. 1933 Pat. 557=147 Ind. Cas. 179.

——Art. 164—See also CIVIL PROCEDURE CODE O. 5, R. 20 AND O. 9, R. 13—LIMITATION.

——Art. 164.

Synopsis.

1. **Applicability and scope.**
2. **Burden of proof.**
3. **Due service.**
4. **Duty of Court.**
5. **Ex parte decree under old Act.**

6. Extension of limitation.
7. Interpretation.
8. Knowledge.
9. Second application.
10. Setting aside—Limitation.

See also LIMITATION ACT, ART. 164—SUBSTITUTED SERVICE.

11. Substituted service.
12. Miscellaneous.

1. Applicability and Scope.

——**Art. 164**—Applicability—Application to set aside sale held in the absence of a proclamation of sale. *See* CIVIL PROCEDURE CODE, O. 21, R. 66. (1950) 1 M.L.J. 22=A.I.R. 1950 Mad. 367.

——**Art. 164—Applicability and scope—Ex parte decree—Application—When to be filed.**

Under Art. 164, an application to set aside an *ex parte* decree must be filed within thirty days from the date of decree or where the summons has not been duly served, from the date of the applicant's knowledge of the decree and not within thirty days of the knowledge of the suit. A.I.R. 1933 Pat. 279=14 P.L.T. 326=12 Pat. 745=145 Ind. Cas. 314.

——**Art. 164—Applicability and scope—Application to set aside order granting amendment.**

An application to set aside an order granting an amendment under S. 152, Civil Procedure Code, is governed, not by Art. 164, but by Art. 181. A.I.R. 1933 Rang. 264=145 Ind. Cas. 823.

——**Arts. 164 and 181—Applicability and scope.**

An application to set aside an order of adjudication of an insolvent which has been passed *ex parte* is governed by Art. 164, and not by Art. 181. A.I.R. 1932 Lah. 522=33 P.L.R. 698=138 Ind. Cas. 377.

——**Art. 164—Scope and applicability—Applies to proceedings other than suits.**

Article 161 is not necessarily restricted to applications to set aside a decree passed in a suit. It applies to applications under O. 9, R. 13 read with S. 144 in proceedings other than suits, *e.g.*, to petitions for filing an award under the Arbitration Act. 75 Ind. Cas. 1035=A.I.R. 1924 Sind 56.

——**Art. 164—Applicability and scope—Summons not duly served.**

Where summons is once served, absence of notice of adjourned hearing will not attract the application of Art. 164. 57 Ind. Cas. 15 (Lah.).

——**Art. 164—Applicability and scope—Ex parte order—Order for payment under S. 150 of the Companies Act.**

A payment order made *ex parte* under S. 150 of the Companies Act, 1882 is not a decree and Art. 164 of the Limitation Act has no application for setting it aside. 1 Lah. 187=2 Lah. L.J. 291=55 Ind. Cas. 820.

——**Art. 164—Applicability.**

The limitations laid down in Art. 164 applies to the case of a defendant only. 41 Cal. 819=24 Ind. Cas. 27.

——**Art. 164—Applicability and scope—Ex parte order—Order in execution.**

Art. 164 applies not only to decrees but to orders in execution which are decree in Civil Procedure Code. 37 Mad. 462=26 M.L.J. 189=(1914) M.W.N. 205=1 L.W. 251=22 Ind. Cas. 899.

——**Art. 164—Applicability and Scope—Notice to show cause against enforcement of decree—Process of enforcin judgment—Civil Procedure Code O. 21, R. 22.**

A notice under O. 21, R. 22 to show cause why a decree should not be executed is not a process for enforcing a judgment within Art. 164 of the Act (15 of 1877). 2 C. 123 Foll.; 22 W.R. 5, not Foll. 9 M.L.T. 111=8 Ind. Cas. 663.

2. Burden of proof.

——**Art. 164—Knowledge of decree—Burden of proof.**

The burden of proving that an application lies under O. 9, R. 13, Civil Procedure Code, and that the applicant had knowledge of the decree only within 30 days of the date of the application is on the applicant. 228 Ind. Cas. 121=A.I.R. 1947 Pesh. 7.

——**Art. 164—Burden of proof—Burden to show that application is within thirty days of applicant's knowledge of decree is on him.**

The burden of proving the fact that the application for setting aside the decree is made within 30 days of the applicant's knowledge of the decree is on him. A.I.R. 1946 Pesh. 7=1946 Pesh. L.J. 7=228 Ind. Cas. 121.

——**Art. 164—Burden of proof.**

When a defendant comes forward with an application for setting aside *ex parte* decree more than thirty days after the date of the decree, the onus lies on him of proving for purposes of Art. 164 that his application is presented within thirty days of his having knowledge of the decree if the summons was not duly served upon him. 33 P.L.R. 123 (2)=139 Ind. Cas. 131.

——**Art. 164—Burden of proof.**

Ex parte decree—Application to set aside—Burden of proof is on applicant to show want of knowledge within thirty days. 146 P.W.R. 1918; A.I.R. 1924 Lah. 603 and A.I.R. 1926 Lah. 379 Foll. A.I.R. 1924 Lah. 233, *Not foll.* 124 Ind. Cas. 673.=A.I.R. 1930 Lah. 192.

——**Art. 164—Burden of proof.**

In case of an application to have an *ex parte* decree set aside the onus is on the applicant to prove that he became aware of the decree within 30 days before the application. 107 Ind. Cas. 284 (2) (Lah.).

——**Art. 164—Burden of proof.**

Ex parte decree—Setting aside after 30 days—Onus is on defendant to show absence of knowledge within limitation. The onus lies upon him more heavily when it is found that he was perfectly well aware of the progress of the suit. 95 Ind. Cas. 124=7 Lah. 161=8 L.L.J. 267=27 P.L.R. 321=A.I.R. 1926 Lah. 379.

——**Art. 164—Burden of proof.**

Where the defendant proved that a summons was never sent to be served on him and there was no rebuttal, and his application to set aside *ex parte* decree was made on the 37th day after the decree was passed,

Held, under the circumstances, the onus was upon plaintiff to show that defendant had knowledge of the decree more than 30 days before date of his application. 73 Ind. Cas. 34=A.I.R. 1924 Lah. 233.

——Art. 164—Burden of proof—Knowledge—Ex-parte decree—Application to set aside.

In an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within thirty days of the application is on the applicant. 146 P.W.R. 1918=46 Ind. Cas. 777.

3. Due service.

——Art. 164—Due service.

It cannot be said to be a case of summons "duly served" within meaning of Art. 164 when defendant is served with the summons too late. A.I.R. 1941 Mad. 435=53 L.W. 246=1941 M.W.N. 180=(1941) 1 M.L.J. 319.

——Art. 164, O. 9, R. 13, C. P. Code—Due service—"Due service of summons," meaning of.

In Art. 164, Limitation Act, and O. 9, R. 13, Civil P. C., "due service of summons" means not only that the summons was served in proper form according to the directions laid down in the Code but also that the summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him except of course in the case where the defendant had purposely put it out of his power to have such knowledge. A.I.R. 1939 Rang. 436=1939 Rang. L.R. 606=185 Ind. Cas. 663.

——Art. 164—Due service — Substituted service under O. 5, R. 20, is due service.

If substituted service is effected under O. 5, R. 20, C. P. Code, such service is as effectual as if it is made on the defendant personally and must be deemed to be due service within the meaning of Art. 164, Limitation. A.I.R. 1927 Mad. 507 and A. I. R. 1927 Mad. 487, Foll. 110 Ind. Cas. 490=1928 M.W.N. 49=28 M.L.W. 513=51 Mad. 860=A.I.R. 1928 Mad. 815=55 M.L.J. 566.

——Art. 164—Due service.

Substituted service is not due service within Art. 164. A.I.R. 1927 Mad. 487, Diss. from. 108 Ind. Cas. 889=A.I.R. 1928 Mad. 655=54 M.L.J. 448.

——Art. 164—Due service.

It is only when the summons was not duly served that ignorance of the decree saves limitation, as due service imports knowledge. A.I.R. 1926 Mad. 31, Not foll. 108 Ind. Cas. 753 (Mad.).

——Art. 164—Substituted service is due service.

In the case of substituted service effected under the provisions of O. 5, R. 20, the summons is "duly served" on the defendant within the meaning of Art. 164 even though it does not in fact come to the defendant's knowledge and time for an application to set aside the decree runs from the date of the decree. 101 Ind. Cas. 661=38 M.L.T. 359=A.I.R. 1927 Mad. 487=52 M.L.J. 512.

——Art. 164—Due service.

An application to set aside an *ex parte* decree must be made within thirty days of the date of the decree and not of the date on which the applicant comes to know of the decree, when he is proved to have been served with the summons. 89 Ind. Cas. 223=27 Bom. L.R. 690=A.I.R. 1925 Bom. 444.

——Art. 164—Due service — "Duly served" — Meaning of —C. P. Code, O. 5, R. 19.

The words "duly served" in Art. 164 of the Limitation Act, are used in the same sense as in O. 5 R. 19 of the C. P. Code and means "served in such a manner as to give the defendant information of the proceedings taken against him. 11 S.L.R. 71=42 Ind. Cas. 611.

——Art. 164—Due service—Ex parte decree—Application to set aside—Summons not served.

A defendant who has been duly served cannot get an *ex parte* decree set aside unless he can show that he was prevented unavoidably from appearing at the hearing and Art. 164 is a bar if he does not seek to set it aside within 30 days after the decree. 'Duly served' in Art. 164 cannot be construed to exclude a case where a summons was not served in sufficient time. 8 S.L.R. 153=27 Ind. Cas. 351.

4. Duty of Court.

——Art. 164—Duty of Court — Judgment-debtor applying against ex parte decree for restoration—Wrong date of knowledge of decree mentioned—Mistake apparent—Court's duty to look into the question.

The judgment-debtor with his application of May 13, 1933, filed a copy of a notice which was served on him on March 7, 1933. The notice was issued on March 4, and March 23, was fixed for hearing. In the application filed by the judgment-debtor on April 1, 1933, for restoration of an *ex parte* decree passed against him on November 15, 1932, and in the affidavits supporting that application, he stated in para. 4 of each of these documents that it was on February 7, 1933, when he was served with a notice relating to the application of the decree-holders that he received information for the first time of the suit. On May 13, the judgment-debtor made an application to the effect that February 7, was written by error and that he meant to state that it was on March 7, that he was served with a notice and received information. On the date of his application, May 13, 1933, the Court passed an order holding that the application was barred by time. Basing its decision on the admission of the defendant that he had knowledge on February 7, and as his application for restoration was dated April 1, it held that the period of 30 days allowed by Art. 161 of the Limitation Act had elapsed and therefore, that the application for restoration was time-barred:

Held, that the notice could not have been served on him on February 7, because the notice in question which he produced was dated March 4. It was the duty of Court below to have taken evidence on this point and to have made an enquiry in the matter and to have come to conclusion on facts as to whether the defendant had made a *bona fide* mistake or not. A.I.R. 1934 All. 1011=4 A.W.R. 208=151 Ind. Cas. 579.

5. Ex parte decree under old Act.

——Art. 164—Application to set aside ex parte decree passed when Act of 1877 in force—Law applicable.

A decree was passed when the Limitation Act of 1877 was in force, but a process for execution was issued for the first time under the Act of 1908. On an application by the judgment-debtor to have the decree set aside. *Held*, that the limitation to be applied was that under the law existing at the time when the application was made. 37 All. 597=30 A.L.J. 837=30 Ind. Cas. 573.

——Art. 164—Decree under old Act—Ex parte decree—Application to set aside.

If the right of a defendant to make an application to set aside an *ex parte* decree was lost under Art. 164, Limitation Act (1877) before the passing of the Act of 1908 the provisions of Art. 164 of the Limitation Act of 1908 cannot revive the right having regard to S. 6 of the General Clauses Act, 1897. 39 Cal. 506=15 Ind. Cas. 551.

——Art. 164 and S. 3—Decree under old Act—Ex parte decree—Application to set aside—Limitation.

Art. 164 applies to an application to set aside an *ex parte* decree made, after that Act came into force, the decree being passed before the Act came into force; S. 3 clearly lays down a rule to that effect. 70 P.L.R. 1911=265 P.W.R. 1911=10 Ind. Cas. 823.

——Art. 164—Ex parte decree under old Act—Application after.

Before the passing of the Limitation Act and C. P. Code of 1908, a plaintiff obtained an *ex parte* decree against a company. After the new Acts came into force, the plaintiff applied for execution and a notice under O. 21, R. 22 was served in the defendant company's office. The defendant company obtained a rule *nisi* against the plaintiff to explain why the *ex parte* decree should not be set aside. The plaintiff objected that the application was barred under the Limitation Act, 1908. The defendant contended that they had a right under the old Limitation Act 1877, and that under the General Clauses Act, S. 6 (2) they could not be deprived of that right when the old Limitation Act was repealed. *Held*, (i) that the application was time-barred under Art. 164 new Limitation Act. (ii) that the C. P. Code (14 of 1882) S. 436 did not apply to the companies registered under the Companies Act, but to the more uncommon companies with a right to sue or to be sued through their trustees or officers. (iii) that the C. P. Code gives remedy to the party in the exparte decree, while the Limitation Act regulates the time of limitation to seek the remedy. 12 Bom. L.R. 730=7 Ind. Cas. 982.

——Art. 164, S. 14—Ex parte decree under old Act — Application to set aside ex parte decree framed before Amending Act—Semble.

Where an application to set aside an *ex parte* decree is made after the Limitation Act of 1908 came into operation although the decree was passed before it came into force, the provisions of the Act of 1908 and not those of the Act of 1877 would apply. An *ex parte* decree was obtained in a Small Cause Court on the 7th August, 1901, and on the 14th December, 1908, a fraudulent entry was obtained in the records of the court that the decree had been partially executed by attachment of moveables. On the 26th February, 1909, the judgment-debtor first became aware of the existence of the *ex parte* decree against him. On the 15th March he applied before another court to have the *ex parte* decree set aside. Subsequently the application was returned for presentation to the court which passed the decree. On the application being refiled in the court it was registered as an ordinary application to set aside an *ex parte* money decree. On 9th August 1909, it was discovered that the decree was a Small Cause Court decree and an order was made giving the petitioner time to deposit the amount of the decree under S. 17 of the Provincial Small Cause Courts Act. The time having subsequently been extended the amount was ultimately deposited on the 28th August, 1908; *Held*—That in the circumstances whether the Limitation Act of 1877 or that of 1908 applied, the application was not liable to be rejected as time barred as under S. 14 of the Limitation Act the judgment-debtor would be entitled to a deduction of time from the 15th March to the 7th August when he was prosecuting another legal proceeding in good faith; also, in the circumstances, he must be deemed to have first become aware of the decree as a decree of the Small Cause Court on the 7th August, 1909. That regarding the application as having been filed on the 7th August 1909, no question as to the deposit being made out of time as prescribed by S. 17 of the Provincial Small Cause Courts Act arises. Where an application is made by a party on the allegation that an entry in a judicial record is fraudulent, there is nothing to prevent the application being entertained without a preliminary enquiry into the truth of the allegation. Where a fraud was committed by a person who has obtained property thereby the party defrauding can resist the application of the injured party on the ground of limitation, only if he can show that the injured complainant had clear and definite knowledge of the facts constituting the fraud at a time too remote for the suit to be brought and the mere suggestion of being defrauded is not sufficient for the purpose. 17 B. 341, foll. 15 C.W.N. 102=6 Ind. Cas. 154.

6. Extension of limitation.

——Art. 164—Extension of limitation.

The Courts are not entitled to enlarge the period prescribed by Art. 164 by having recourse to S. 151, Civil P. C. A.I.R. 1934 Nag. 43=144 Ind. Cas. 394.

——Art. 164—Extension of limitation—Limitation Act, S. 5 made applicable by rule under S. 122 to application under O. 9, R. 9—Rule under S. 122 is intra vires and retrospective.

The extension of the provisions of S. 5, Limitation Act, to an application under C. P. Code, O. 9, R. 9, is not an enactment of a new period of limitation. Section 5 is not in any way amended or repealed. The change effected by the rule under C. P. Code, S. 122, relates to the procedure governing applications to restore suits, dismissed for default, to the file. The application was governed by Limitation Act. Art. 164, and it continued to be governed by the same article. The rule, therefore extending S. 5, Limitation Act, to O. 9, R. 9 is *intra vires* and is restrospective. 53 Bom. 453=31 Bom.L.R. 484 =A.I.R. 1929 Bom. 262.

——Art. 164—Extension of limitation.

Section 5 does not apply to application under Art. 164. 100 Ind. Cas. 936=A.I.R. 1927 Lah. 342.

——Art. 164—Extension of limitation.

The Court has no discretion to enlarge the thirty days allowed by Art. 164 within which the defendant can apply to set aside the *ex parte* decree and in entertaining the application after the expiry of Limitation, the Court assumed illegally a jurisdiction which it did not possess. A.I.R. 1926 Lah. 379, Foll, 100 Ind. Cas. 936=A.I.R. 1927 Lah. 342.

7. Interpretation.

——Art. 164—"Decree" what is.

Civil P. Code, O. 21, R. 50 (2) Order permitting execution of decree against partner under O. 21, R. 50 (2), is not decree within meaning of Art. 164. 120 Ind. Cas. 833=31 Bom.L.R. 995=53 Bom. 839 =A.I.R. 1929 Bom. 386.

——Art. 164—Interpretation.

The word "duly" in O. 9, R. 13 and Art. 164 of the Limitation Act, is not equivalent to "personally." 102 Ind. Cas. 243=38 M.L.T. 275=A.I.R 1927 Mad. 507=52 M.L.J. 477.

——Art. 164—Interpretation—"Summons".

The summons referred to in Art. 164, is the summons for the first hearing of the case, and there is no essential difference between case where a suit is adjourned owing to the absence of the presiding officer or for some other cause and a case in which a suit is remanded for re-trial by the Appellate Court. The underlying principle in such a case is case is that where the existence of the suit has been brought to the notice of the defendants by due service of a summons on them, it is their duty thereafter to inform themselves of what is being done in the case. A.I.R. 1935 Pesh. 7=154 Ind. Cas. 429.

——Art. 164—Interpretation—'Summons' has reference to notice of first hearing.

The words in Art. 164 "when the summons was not duly served" refer to the summons given for the first hearing of the suit and that where there has been due service of such summons the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed. 76 Ind. Cas. 14=A.I.R. 1924 Lah. 666.

8. Knowledge.

——Art. 164—Knowledge.

'Knowledge' and 'means of knowledge' cannot be said to have the same meaning. 53 L.W. 246=A. I.R. 1941 Mad. 435=1941 M.W.N. 180=(1941) 1 M.L.J. 319.

——Art. 164—Knowledge—Specific knowledge of the particular decree, necessity of.

The knowledge of the decree mentioned in Art. 164 is the knowledge of the particular decree and not a knowledge of a decree. A vague information about there being a decree is not sufficient for the period of limitation to run against the applicant. The question whether the knowledge which an applicant had on a particular date can be said to be a knowledge of the decree is practically a question of fact. Where a person files an application for time in the execution proceedings, it cannot be inferred that he had complete information about the decree. A.I.R. 1937 Pat. 17=3 B.R. 202=13 P.L.T. 72=166 Ind. Cas. 635.

——Art. 164—Ex parte decree—Knowledge.

In the case for an application for setting aside an *ex parte* decree the law requires that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum, not merely the knowledge that a decree had been passed by some Court against him. 27 N.L.J. 53=A.I.R. 1931 Nag. 119=134 Ind. Cas. 279.

——Art. 164—Knowledge contemplated — Knowledge of the decree within 30 days is material and not knowledge of suit.

The fact that a party had the knowledge of the suit on a particular date is a wholly immaterial circumstance for the purposes of computing limitation under Art. 164. The second part of that article comes into operation only where the application is made more than 30 days after the passing of the decree and the applicant pleads that he had not been duly served and had knowledge of the decree within 30 days from the day on which he made the application. A.I.R. 1930 Lah. 397=120 Ind. Cas. 689.

——Art. 164—Knowledge.

It is necessary for the Court setting aside an *ex parte* decree to find definitely that in cases in which the summons was not duly served the applicant did not have knowledge of the decree more than 30 days before the application was made. The *terminus a quo* is not the commencement of the execution proceedings but the date of the application. 116 Ind. Cas. 620=A.I.R. 1929 Lah. 235.

——Art. 164—Knowledge.

Where all that the defendant was told was that some unknown plaintiff had obtained some sort of a decree against him in a suit, of which he was given no detail.

Held, that defendant cannot be said to have knowledge of the decree against him, and there was no obligation on his part to enquire further. The duty rather was on the plaintiff of giving him full information as to the litigation and the nature of the decree. 99 Ind. Cas. 621=A.I.R. 1927 Mad. 381.

——Art. 164—Knowledge—Specific knowledge is necessary.

The words of the Article mean something more than mere knowledge that a decree had been passed in some suit, in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular man for a particular sum. 72 Ind. Cas. 130=25 Bom.L.R. 74=47 Bom. 485 =A.I.R. 1923 Bom. 193.

——Art. 164—Knowledge — Defendant alleging service of summons but no knowledge decree.

Art. 164 applies only when the defendant has knowledge of the decree where summons was not duly served but not to a case where the defendant alleges service of summons but that he had no knowledge of any of the proceedings. (1912) M.W.N. 361=13 Ind. Cas. 642.

——Art. 164—'Knowledge'—Meaning of.

'Knowledge' in Art. 164 means certain and clear conception of a fact, *i.e.*, of the decree in the particular case and not of a decree. 11 Bom. L.R. 1296, foll. So knowledge of the petitioner's brothers cannot be attributed to him when he lives far away from them. 38 Cal. 394=13 C.L.J. 221=15 C.W.N. 399=9 Ind. Cas. 189.

——Art. 164—'Knowledge'—Meaning of.

Knowledge of decree means knowledge of the existence of the decree and not knowledge of the

contents and the general effects of the decree. 12 Bom.L.R. 462=6 Ind. Cas. 901.

——Art. 164—'Knowledge'—Meaning of.

The word 'knowledge' in Art. 164 of the Limitation Act means a clear and certain knowledge. The use of the word 'the' and not 'a' must be taken to require knowledge of the particular decree which is sought to be set aside. 11 Bom.L.R. 1296=4 Ind. Cas. 586.

9. Second application.

——Art. 164—Second application.

Application to set aside *ex parte* decree dismissed for default—Application made to set aside the dismissal of first application—Such second application cannot be treated as an original application to set aside the *ex parte* decree. A.I.R. 1925 All. 773 and 1 Lah. 359, Foll. 100 Ind. Cas. 313=A.I.R. 1927 Lah. 904.

——Art. 164—Second application — Ex parte decree—Application to set aside—Subsequent application—Continuation.

The mere fact that the original application to set aside an *ex parte* decree which was made in time was consigned to the record room did not in any way necessitate a fresh application. A subsequent application must be considered as merely in continuance of the suspended original application. Consequently no question of limitation arose in the case. 55 Ind. Cas. 824 (Lah.).

10. Setting aside—Limitation.

See also LIMITATION ACT, ART. 164—SUBSTITUTED SERVICE.

——Art. 164—Application for setting aside ex parte decree — Defendant duly served with summons—Limitation—Starting point.

Under Art. 164 of the Limitation Act, limitation for an application for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, is 30 days from the date of the decree, if the defendant had been duly served with summons. A.I.R. 1949 Assam 5.

——Art. 164—Setting aside—Limitation.

If the Court, having regard to all the circumstances of the case, comes to the conclusion that there was no due service, limitation would be computed from the date of applicant's knowledge of the decree. (1931) A.L.J. 1049=A.I.R. 1931 All. 727 =54 A. 154=136 Ind. Cas. 609 (F.B.).

——Art. 164—Setting aside—Limitation.

In a suit for rendition of accounts neither the defendant nor his Counsel appeared on the date of hearing and the Court ordered the suit to proceeds *ex parte* and passed a preliminary decree on November, 14, 1922. A final decree was subsequently passed on December 20 1927. The defendant applied on November 10, 1928, to set aside the decree alleging that he came to know of it on November 2, 1928:

Held, (1) that it was not necessary to give the defendants a fresh notice before a final decree was made:

(2) that the order directing proceedings to proceed *ex parte* against the defendant continued and remained in force till the passing of the final decree;

(3) that time began to run against the defendant under Art. 164, from the date of the decree and he was not entitled to count limitation from the date on which he had knowledge of the decree as the case was not one where the summons had not been duly served so as to make the second part of the provision in the last column of Art. 164 applicable. A.I.R. 1931 Lah. 268=33 P.L.R. 938=135 Ind. Cas. 42.

——Art. 164—Ex parte decree — Setting aside—Limitation.

An application to set aside an *ex parte* decree made within thirty days from the time the defendants were informed of its passing, is not barred though it was made more than thirty days from the passing of the decree. 111 P.L.R. 1916=137 P.W.R. 1916=36 Ind. Cas. 32.

——Art. 164—Setting aside ex parte decree—Executor of deceased defendant not brought on record—Limitation.

An application on 30th September, 1912 for setting aside an *ex parte* decree passed on 28th August, 1912 by the executor of a deceased defendant is barred by Art. 164. The word "defendant" is wide enough to include the executor of the original defendant (since deceased) though not on record. 38 Mad. 442=14 M.L.T. 396=(1913) M.W.N. 899=21 Ind. Cas. 568.

——Art. 164—Ex parte decree — Setting aside—Limitation.

The plaintiff obtained an *ex parte* decree on the 15th November, 1904. An application to execute the decree was made on the 3rd September, 1909, and notice under O. 21, R. 22, of the Civil Procedure Code of 1908, was served on the defendant on the 14th September, 1909. On the 20th September, 1909 the defendant obtained a rule against the plaintiff to show cause why the *ex parte* decree should not be set aside. The plaintiff contended that the defendant had knowledge of the decree before the 14th September, 1909, and that his application was barred under Art. 164 of the Limitation Act of 1908. The defendant in contending that the application was governed by Art. 164 of the Limitation Act of 1877, relied on S. 6 of the General Clauses Act, 1897:—*Held*, overruling the defendant's contention, that the remedy in respect of the liability involved in the *ex parte* decree was given by the Civil Procedure Code, the Limitation Act merely regulated time within which the remedy must be sought. *Held*, that therefore, the defendant's application was barred under Art. 164 of the Limitation Act, 1908. 12 Bom.L.R. 730 = 7 Ind. Cas. 982.

——Art. 164—Ex parte decree — Setting aside—Limitation.

Notice under S. 248 is a process for enforcing a decree, and process is executed when notice is served. An application to set aside an *ex parte* decree passed in a small cause suit, must be made within one month after such notice. 34 Mad. 88=7 M.L.T. 308=(1910) M.W.N. 279=6 Ind. Cas. 400.

——Art. 164—C. P. Code, S. 108—Ex parte decree against more defendants than one—Execution against some of the defendants — Application by other defendants — Setting aside decree—Limitation.

Where an *ex parte* decree is passed against more defendants than one, and the decree is executed against one of them only, then that is not an execution of process for enforcing judgment against the others within the meaning of Art. 164. The latter

can therefore apply to have the *ex parte* decree set aside within 30 days of the date of any process in execution against them. (1888) P.J. 56, foll. (1907) 9 Bom.L.R. 323=31 B. 303.

——Art. 164—Attachment before judgment — C. P. Code (1882), S. 490—Confirmation of attachment after decree—Starting point of limitation.

Where an attachment before judgment has been levied and an *ex parte* decree passed, the time to set it aside is thirty days, under Art. 164 from the date of executing any process for enforcing the judgment. An application after decree for confirmation of the attachment under S. 490, Civil Procedure Code, (1882) does not give the starting point of limitation, as it is not an enforcement of any process of execution warranted by law. (1906) 8 Bom.L.R. 567.

11. Substituted service.

——Art. 164—Applicability — Substituted service —Ex parte decree — Personal knowledge of the passing of the decree whether provides starting point for limitation.

In a suit by the plaintiff against the defendant (petitioner) living in Bombay for recovery of moneys for goods sold, summons was issued and was not served till 14th August, 1948, when the Court ordered substituted service. On 26th August, the Court passed an *ex parte* decree against the defendant. The defendant filed a petition to set aside the *ex parte* decree on, 27 h September, 1947, alleging that he came to know of the decree only on the 5th of September. On the question whether application was barred by Art. 164 of the Limitation Act,

Held, that the application to set aside the order was barred by limitation under Art. 164 of the first schedule of the Limitation Act.

Substituted service is as effectual as if it has been made on the defendant personally. Hence the want of knowledge of the defendant of the passing of the decree will not affect the running of the time for limitation. (1926) 52 M.L.J. 512 and (1917) 42 Ind. Cas. 611, foll. A.I.R. 1950 Mad. 282=(1949) 2 M.L.J. 815.

——Art. 164—Substituted service.

The fact that service substituted by order of the Court has been declared under O. 5, R. 20 (2) to be as effectual as if it had been made on the defendant personally does not necessarily mean that first part of Art. 164, Limitation Act covers the application to set aside a decree which follows such service. A.I.R. 1935 Pesh. 137=158 Ind. Cas. 355.

——Art. 164—Substituted service.

Substituted service is as effectual as personal service and is hence due service within the meaning of Art. 164. A.I.R. 1932 Mad. 472=(1932) M. W.N. 133=138 Ind. Cas. 146.

——Art. 154—Substituted service.

Substituted service under O. 5, R. 20, Civil P. Code, is as effectual as personal service and is "due service" within the meaning of Art. 164.

Therefore, where the order for substituted service is based on proper materials and an *ex parte* decree is passed, an application for having it set aside should be made 30 days of the date of the decree. 8 O.W. N. 845=A.I.R. 1931 Oudh 369=132 Ind. Cas. 778.

——Art. 164—Substituted service—In case of substituted service terminus a quo is date of decree.

In the case of substituted service, if the summons was duly served the *terminus a quo* under Art. 164 is the date of the decree and not the date when it first comes to the knowledge of the defendant, 122 Ind. Cas. 35=A.I.R. 1930 Mad. 222.

——Art. 164—Substituted service.

Order of substituted service rightly made and properly effected—Knowledge of defendant is immaterial —Time runs from date of decree.

Where, however, an order for substituted service is improperly obtained, as being made on insufficient material contained in an application supported by affidavit the summons cannot be said to have been duly served within meaning of Art. 164, and the time accordingly runs not from the date of the decree but from the date when it first came to the knowledge of the defendant. 122 Ind. Cas. 35=A.I.R. 1930 Mad. 222.

——Art. 164—Substituted service.

Substituted service—Summons is duly served even if, it does not come to the knowledge of defendant—As time runs from the date of the decree, the application for setting aside an *ex parte* decree made after the expiry of 30 days from the date of the decree is clearly barred by time. 92 Ind. Cas. 272=7 L.L.J. 448=26 P.L.R. 704=A.I.R. 1925 Lah. 639.

——Art. 164—Substituted service — Time runs from date of decree and not from date of knowledge.

In an application to set aside a final decree passed *ex parte*, after substituted service had been taken out to the defendant,

Held, that the matter of the time at which defendant first had knowledge of the decree only becomes relevant after he has proved that substituted service ought not to have been ordered or was not duly carried out. Unless he can do one of these things his application is barred by time. The notice of the application for final decree being as effectual as if it had been served on him personally, the limitation for his application to set aside the *ex parte* decree runs from the date of the decree. 9 N.L.R. 35, Foll. 69 Ind. Cas. 549=A.I.R. 1923 Nag. 13.

12. Miscellaneous.

——Art. 164—Miscellaneous.

Application under S. 17, Prov. Small Cause Courts Act not accompanied with a cash deposit or security bond—Subsequent completion within the time allowed by Art. 164 for making the application —Applicant held had a right to be heard on merits. 1936 O.W.N. 688=A.I.R. 1936 Oudh 407=12 Luck. 287=164 Ind. Cas. 470.

——Art. 164—Miscellaneous.

Application to set aside *ex parte* decree—Security bond not verified by sureties—Verification two days after limitation—*Ex parte* decree set aside—Revision in High Court against order:

Held, that the Court did not act illegally in setting aside *ex parte* decree and hearing the suit on the merits inasmuch as the bond as originally filed was not an ineffective bond and the Court went through the formality either for its satisfaction or for the protection of decree-holder and not because the bond was not a perfectly good bond. (1933) A. L.J. 992=A.I.R. 1933 All. 933=147 Ind. Cas. 853.

——Art. 164—Miscellaneous—Fraud.

The fraud which can be relevant to be considered for the purpose of Art. 164 is not only a fraud with

reference to the service of notice but it covers any fraud and S. 18 can be applied. 94 Ind. Cas. 56= A.I.R. 1926 Nag. 388.

——Art. 164—Miscellaneous — Ex parte decree—Notice—Executing a process of enforce judgment

Attachment of money belonging to the Judgment-debtor in the hands of the decree-holder is an execution of a process for enforcing judgment. 15 O. C. 289=17 Ind. Cas. 420.

——Arts. 165 and 181—Applicability—Application by judgment-debtor for restoration of property in excess of that decreed—Article 165 does not apply but Art. 181, applies. A.I.R. 1944 Pat. 254=23 Pat. 145.

——Art. 165—Applicability — Objection petition —Objections to execution proceedings—Art. 165 does not apply.

Article 165, Limitation Act, does not govern the cases of those applications which are filed by the parties to the suit as objections to the execution proceedings under S. 47, C. P. Code. The only article applicable in those cases is Art. 181. 38 All. 339; 42 Mad. 753 (F.B.); A.I.R. 1922 Bom. 271 and 1 L.L.J. 230, Foll. 115 Ind. Cas. 444=5 O. W.N. 1053=4 Luck. 209=A.I.R. 1929 Oudh 76.

——Arts. 165 and 181—Applicability — Excessive execution—Restoration.

An application by the judgment-debtor for restoration of property seized in excess of his decree by the decree-holder can be made within 3 years of the date of seizure as Art. 181 of the Limitation Act governs the case. Art. 165 which prescribes 30 days is not applicable. 38 All. 339=14 A.L.J. 401=34 Ind. Cas. 231.

——Arts. 165 and 181—Applicability—Application for restoration of possession.

Art. 165 was not intended to apply to an application by a judgment-debtor. An application for restoration of possession is governed by three year's rule as laid down in Art. 181. 38 A. 339, Foll.; 21 M. 494 and 25 A. 343, dissented from. 1 Lah.L.J. 230.

——Art. 165—Scope.

Applies only to applications under O. 21, R. 100, C. P. Code. 67 Ind. Cas. 663=A.I.R. 1923 Cal. 287.

——Art. 165—Scope.

The wording of Art. 165 of the Limitation Schedule makes is absolutely clear that it was intended to apply to an application provided for by O. 21, R. 100 of the C. P. Code, and no other and therefore, where the applicant is a judgment-debtor who has no remedy by a suit, the proper article which applies is Art. 181 and not Art. 165. 38 All. 389 and 42 Mad. 753, Foll. 68 Ind. Cas. 349=46 Bom. 1031=24 Bom. L.R. 771=A.I.R. 1922 Bom. 271.

——Arts. 165 and 166—Scope—Excessive execution—Restoration.

Application to set aside sale of plots not specified in mortgage-deed, and the decree for sale and for recovery of possession comes under Art. 165 not under Art. 166. 17 O.C. 94=24 Ind. Cas. 137.

——Art. 165—Scope — Application by judgment-debtor.

Article 165 includes the case of a judgment-debtor who has been dispossessed of immoveable property and who disputes the right of the decree-holder to be put in possession. 22 M. 494, followed. 25 A. 343= 1903 A.W.N. 59.

——Art. 166.

Synopsis.

1. Applicability and Scope.
2. Extension of limitation.
3. Fraud and collusion.
4. Sale in insolvency.
5. Sale when complete.
6. Starting point.
7. Void sale.
8. Miscellaneous.

——Art. 166. See also (1) C. P. CODE, O. 21, R. 90—LIMITATION.
(2) LIMITATION ACT, ART. 181.

——Art. 166. See C. P. CODE, O. 21, R. 72. 13 M.L.J. 231.

——Arts. 166, 181—Suit by purchaser in a rent sale to set aside previous rent sale. *See* LANDLORD AND TENANT. 14 C.W.N. 1096=6 Ind. Cas. 804.

1. Applicability and scope.

——Arts. 166 and 181—Applicability—Application by judgment-debtor to set aside sale in execution of his property on the ground that he had no saleable interest in it—Limitation — Sale if can be ignored as void or if to be aside.

When the judgment-debtor has no saleable interest in the property sold in execution, being village service inam, the attachment and sale of which are prohibited by S. 5 of the Madras Hereditary Village Offices Act, even as the purchaser must make his application within 30 days of the sale (Art. 166 of the Limitation Act being applicable) to have it set aside, so also must the judgment-debtor in an application made by him in that behalf. The necessity for the jugdment-debtor to proceed under S. 47 and not under R. 91 of O. 21, C. P. Code, does not give him an advantage over the purchaser in regard to the period within which his application should be instituted. The application, although made under S. 47 is one to which the principles of O. 21, R. 91 apply as also do the incidents attached to such an application. Art. 166 and not Art. 181 of the Limitation Act is applicable to such an application.

Per *Patanjali Sastri, J.*—The sale must stand as between the parties to it until it is set aside by the Court.

Per *Govindarajachari, J.*—The judgment-debtor must apply to set aside the sale. I.L.R. (1948) Mad. 522=A.I.R. 1948 Mad. 226=60 L.W. 769= 1947 M.W.N. 700=(1947) 2 M.L.J. 468 (F.B.).

——Art. 166—Applicability and scope.

Art. 166 of the Limitation Act, as amended by the Act of 1927, is quite general and it governs every application by a party to set aside a sale, whether the application falls under S. 47 or under O. 21, Rr. 72, 89, 90 and 91, C. P. Code. The article does not however apply when the sale is void or a nullity. No application is required to set aside what is a nullity. It does not also apply to the exercise of the Court's inherent powers under S. 151, C. P. Code. I.L.R, (1947) Nag. 344=A.

J. R. 1948 Nag. 52=231 Ind. Cas. 6=1947 N. L. J. 240.

——Art. 166—Applicability and scope.

Execution sale—Application to set aside, on ground of exemption under S. 60 (1) (c), Civil P. C.—Article applicable is Art. 166. A.I.R. 1943 Pat. 75=21 Pat. 774=9 B.R. 180=24 P. L. T. 97=204 Ind. Cas. 601.

——Art. 166—Applicability and scope.

Application to set aside sale such as on ground of exemption provided in S. 60, Civil P. C., falls under S. 47, Civil P. C. and the limitation is governed by Art. 166, Limitation Act—The word "sale" in Art. 166, refers to auction-sale. A.I.R. 1942 Lah. 153=44 P.L.R. 302=I.L.R. (1942) Lah. 559=203 Ind. Cas. 166 (F.B.).

Overruling—A.I.R. 1939 Lah. 113=I.L.R. (1939) Lah. 103=184 Ind. Cas. 393.

——Art. 166—Applicability and scope.

The law of limitation governing application to set aside sale in execution of attached debt will be Art. 166, Limitation Act. A.I.R. 1941 Mad. 276 =52 L.W. 471=(1940) M.W.N. 992=(1940) 2 M. L. J. 503.

——Art. 166—Applicability and scope.

An application by Receiver to set aside a sale of insolvent's property is governed by Art. 181 and not by Art. 166 which applies only to applications under O. 21, Rr. 89 to 91, Civil P. C. A.I.R. 1940 Nag. 414=1940 N.L.J. 505=192 Ind. Cas. 183.

——Art. 166—Applicability and scope.

Decree executable only against property of deceased judgment-debtor in hands of his sons—Application by son to set aside sale on ground that part of property sold was his personal property—Article 166 and not 181, applies. A.I.R. 1940 Pat. 192 =6 B.R. 770=5 C.L.T. 22=189 Ind. Cas. 256.

——Art. 166—Applicability and scope — Applications under S. 47 and O. 21, R. 90, C. P. Code.

Article 166, Limitation Act, applies to an application under O. 21, R. 90, and there is no article applicable to an application under S. 47, Civil P. C. though, of course, such an application must be made while the Court is still seized of the proceedings. A.I.R. 1939 Lah. 113=I.L.R. (1939) Lah. 103=41 P.L.R. 436=184 Ind. Cas. 393.

——Art. 166—Applicability and scope.

Article 166 extends to all applications for setting aside a sale under S. 47, Civil P. C. and is not limited to applications under O. 21, Rr. 89, 90 or 91. But Art. 166 must be confined to cases where the sale is voidable only and not void. A.I.R. 1938 Cal. 113=42 C.W.N. 87=I.L.R. (1938) 1 Cal. 280=178 Ind. Cas. 540.

——Art. 166—Applicability and scope.

The applicability of Art. 166 is very wide and there is no ground for holding that it is restricted to applications under O. 21, Rr. 72 and 89 to 91. It applies to all applications under S. 47, Civil P. C. A.I.R. 1938 Nag. 558=(1938) N.L.J. 589=I. L. R. (1941) Nag. 381=180 Ind. Cas. 553.

——Art. 166—Applicability and scope.

Article 166 is a general provision applying to many applications under the Code and not only to applications under O. 21, Rr. 89 to 91. It cannot override the special provisions of any particular section or rule of the Civil P. C. to the contrary. If, therefore, O. 34, R. 5 gives a time other than that provided by Art. 166, the special provision must prevail. 45 L. W. 486=(1937) 1 M.L.J. 569=(1937) M.W.N. 526=A.I.R. 1937 Mad. 560=172 Ind. Cas. 247.

——Art. 166—Applicability and scope.

Application under O. 21, R. 90, Civil P. C. to set aside sale barred by time—Court cannot set aside sale. A.I.R. 1935 Lah. 972=159 Ind. Cas. 988.

——Art. 166—Applicability and scope.

An application under R. 90, O. 21, is governed by Art. 166, Limitation Act. A.I.R. 1934 All. 314=3 A.W.R. 545=(1934) A.L.J. 859=151 Ind. Cas. 244.

——Art. 166—Applicability and scope—Deposit of amount for setting aside sale.

It may be taken as settled law that under O. 21, R. 89, Civil P. C. read with R. 92 (3) and Art. 166 of the Limitation Act, it is necessary that not only the application but also the deposit must be made within 30 days of the date of the sale. A. I. R. 1934 Lah. 875=36 P.L.R. 101=155 Ind. Cas. 603.

——Art. 166—Applicability and scope—Objection to attachment.

An objection or application by a judgment-debtor that his property is not liable to attachment and sale under S. 60, Civil P. C., is an objection under S. 47 of the Code and is governed by Art. 166 of the Limitation Act. A.I.R. 1934 Nag. 82=30 N.L.R. 135=148 Ind. Cas. 200.

——Arts. 166 and 181—Applicability and scope—Objection under O. 21, R 90, C. P. Code.

Objection that decree was in reality mortgage-decree and that other properties of judgment-debtor could not be sold unless the mortgaged properties are first sold and the sale proceeds proved insufficient falls under S. 47, Civil P. C., and is governed by Art. 181 and not by Art. 166. Second appeal lies from the order therein. A.I.R. 1933 Lah. 570 =145 Ind. Cas. 113.

——Arts. 166, 181—Applicability and scope—Application by judgment-debtor to set aside sale.

Under the Limitation Act, 1908, as amended by Act 1 of 1927, an application by a judgment-debtor under S. 47, Civil P. C., to set aside a sale in execution on the ground that notice had not been served on him under O. 21, R. 22 or O. 21, R. 66, Civil P. C. is governed by Art. 166 and not by Art. 181, Limitation Act, and the period of limitation is 30 days from the date of the sale. (1931) A.L.J. 119 =A.I.R. 1931 All. 145=130 Ind. Cas. 708.

——Art. 166—Applicability and scope.

An application to set aside a sale under S. 47 or under O. 21, R. 90, Civil P. C. is governed by Art. 166 and consequently, such an application is barred if made after 30 days. A.I.R. 1931 Cal. 425=35 C.W.N. 31=131 Ind. Cas. 561.

——Art. 166—Applicability and scope.

Applications under O. 21, R. 89, Civil P. C., are governed by Art. 166. 8 O.W.N. 633=A.I.R. 1931 Oudh 291=132 Ind. Cas. 263.

——Art. 166—Applicability and scope — Application under S. 47, C. P. Code.

Application under S. 47, C. P. Code—Setting aside sale, asked for—Article 181, and not Art. 166 applies. 116 Ind. Cas. 634=A.I.R. 1928 Cal. 865.

——Art. 166—Applicability and scope—Sale contrary to directions in decree.

Sale contrary to decree—Application to set aside Art. 166 applies—*View of Oldfield, J.*, in 27 M. L. J. 605, Foll. 106 Ind. Cas. 242=A.I.R. 1928 Mad. 140.

——Art. 166—Applicability and scope — Sale on original side—Sale by Registrar on original side—Art. 166 does not apply.

An application to set aside a sale held by the Registrar of the original side under mortgage decree under the rules of the High Court in Chap. 27 under certain conditions which prescribe certain conditions as to the title which the purchaser should be entitled to require before he is compelled to complete is neither governed by Art. 166 nor by the rule which requires that the sale should be excepted to within 14 days. 103 Ind. Cas. 621=54 Cal. 493=47 C.L.J. 75=A.I.R. 1927 Cal. 818.

——Art. 166—Applicability and scope—Defect in judgment-debtor's title.

Decree-holder auction-purchaser failing to get possession for defect in judgment-debtor's title after satisfaction of decree recorded—He cannot proceed with fresh execution without getting sale set aside within 30 days.

He cannot get round the limitation of 30 days under Art. 166, Limitation Act, merely by putting in a fresh execution application. A.I.R. 1927 Mad. 394, Foll. 104 Ind. Cas. 614=26 M.L.W. 212=1927 M.W.N. 224=39 M.L.T. 121=A.I.R. 1927 Mad. 835=53 M.L.J. 255.

——Art. 166—Applicability and scope—Sale under Tenancy Act—Governs application under S. 173, Bengal Tenancy Act.

Article 166 of the Limitation Act governs an application under S. 173 of the B. T. Act, because the application is cognizable under S. 47 of the C. P. Code. Article 166 is quite general in its terms and all applications for setting aside an execution sale come under its scope. 82 Ind. Cas. 322=51 Cal. 1014=A.I.R. 1925 Cal. 351.

——Art. 166—Applicability and scope—Applies to every application to set aside a sale whether for illegality or for irregularity.

The wording of the article includes all applications made under the Code to set aside a sale and not only applications specifically provided for by the Code, under Rr. 89, 90 or 91. Whether the ground for seeking to set aside a sale is the commission of an irregularity or illegality and whether S. 47 or O. 21, R. 90 is the appropriate provision of Law, to be entered at the head of the petition, an application under the Code of Civil Procedure to set aside a sale in execution of a decree falls within the definition in Art. 166. 11 L.W. 59; 16 L.W. 934; 38 Mad. 1076; 1 L.W. 969; 16 L.W. 178; 46 Cal. 975 and 61 Ind. Cas. 823 (Pat.), Foll. 77 Ind. Cas. 631=18 M.L.W. 780=1924 M.W.N. 27=33 M.L.T. 137=47 Mad. 525=A.I.R. 1924 Mad. 137=45 M.L.J. 829.

——Art. 166—Applicability and scope—Want of attachment.

Setting aside sale on any ground comes under this article. 77 Ind. Cas. 368=1 Rang. 533=A.I.R. 1924 Rang. 124.

——Art. 166—Applicability and scope — C. P. Code, S. 47—Petition under—Art. 166, applies. 70 Ind. Cas. 743=16 M.L.W. 178=1922 M.W.N. 514=31 M.L.T. 135=A.I.R. 1922 Mad. 417=43 M.L.J. 184.

——Art. 166—Applicability and scope — Application to set aside sale are all governel by Art. 166.

An application for setting aside a sale in execution of a decree under the C. P. Code is governed by Art. 166, even though the ground for setting aside should be fraud or any other reason. The effect, however, of Art. 166 of the Limitation Act cannot be evaded merely by stating in the application itself that it is brought under S. 47 as well as under O. 21, R. 90. 77 Ind. Cas. 957=3 Pat. L.T. 501=1922 P.H.C.C. 269=2 Pat. 65=1 Pat. L.R. 18=A.I.R. 1922 Pat. 507.

——Art. 166—Applicability and scope—All sorts of applications for setting aside sale are governed.

Article 166 does not apply only to an application under O. 21, Rr. 88 to 90, but it is a general one and governs all applications based upon whatever grounds, to have an execution sale set aside. Therefore an application for setting aside a sale on the ground of irregularity in serving notice under O. 21, R. 22, is governed by Art. 166. 61 Ind. Cas. 823=2 P.L.T. 401=6 P.L.J. 319=1921 P.H.C.C. 181=A.I.R. 1921 Pat. 145.

——Arts. 166 and 181—Applicability and scope—Execution sale—Application to set aside—Property—Not liable to sale—Limitation.

Article 166, is not limited to applications under O. 21, Rr. 89 to 91 of the C. P. Code. It is perfectly general and refers to an application under the Code to set aside a sale in execution of a decree. An application to set aside a sale in execution of a decree passed against the father, on the ground that the property sold belongs to the applicant and not to his father is governed by Art. 166. 46 Cal. 975=54 Ind. Cas. 431.

——Art. 166—Applicability anl scope—C. P. Code (1882), S. 311—Execution of decree—Sale—Application to set aside—Minority—Effect of.

Held, that an application under S. 311, C. P. Code, 1882, to set aside an auction sale presented on behalf of a minor by his next friend or guardian after expiry of one year from the date of sale is not barred under Art. 166. S. 7 applies to such case and the period of limitation is extended under the provisions of the section. 1 C. 226; 23 C. 374; 9 A. 411, foll. The operation of S. 7 is not confined applications made by minors after attaining majority but extends to applications made by guardians during the minority of their wards. *Held*, also, that S. 6 of Act 9 of 1908, did not govern the application which was made before the Act had come into force. 5 P.L.R. 1910=118 P.W.R. 1910=6 Ind. Cas. 488.

2. Extension of limitation.

——Art. 166—Extension of limitation.

The decree-holder is not entitled to enlarge period of limitation merely because the main relief sought by him in the subsequent application is further execution of the decree. Nor can the Court set aside the order recording satisfaction and allow further execution after the period for setting aside the sale has expired without any application being made for this purpose. 41 L.W. 422=(1935) M.W.N. 453=A.I.R. 1935 Mad. 340=159 Ind. Cas. 993

——Art. 166—Extension of limitation.

The period of limitation prescribed by the Limita-

tion Act cannot be varied by consent of parties. This is correct only as an abstract proposition; but in a case where the decree-holder consents to accept a deposit made by the judgment-debtor in full satisfaction of his decree, and consents to have the sale set aside on receipt of such deposit, then it is open to the Court to set aside the sale, though the deposit was made beyond the period prescribed in the Limitation Act. 1935 O.W.N. 975=A.I.R. 1936 Oudh 55=11 Luck. 418=157 Ind. Cas. 803.

——Art. 166—Extension of limitation.

The period of limitation under Art. 166, being fixed by statute and not by the Court it cannot be extended under S. 148, Civil P. Code, or under S. 5, Limitation Act. A.I.R. 1934 Pesh. 25=148 Ind. Cas. 1082.

——Art. 166—Extension of limitation.

The period prescribed under Art. 166 cannot be enlarged under the provisions of S. 5 of the Limitation Act or otherwise, but presumably it can be enlarged under S. 18 of the Limitation Act. 92 Ind. Cas. 839.

——Art. 166—Extension of limitation.

The court cannot extend limitation in case of application to set aside sale. 57 Ind. Cas. 224 (Lah.).

3. Fraud and collusion.

——Art. 166—Fraud and collusion.

Where the sale is sought to be set aside on the ground of fraud, Art. 166 applies. 81 Ind. Cas. 844=20 M.L.W. 242=A.I.R. 1924 Mad. 817.

——Art. 166—Fraud and collusion.

Where an execution sale is alleged to be fraudulent and collusive, the period of taking proceedings to set aside the sale, in the case of fraud would be three years from the time when the sale took place or when the plaintiffs knew of the fraud. 74 Ind. Cas. 202=1919 P.H.C.C. 386 (Pat.).

——Art. 166—Execution sale—Fraud—Limitation.

An application to set aside an execution on the ground of fraud must be made within the time prescribed by Art. 166 of the Limitation Act. To avail himself of S. 18 of the Act the applicant must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside. 51 Ind. Cas. 447 (Lah.).

——Art. 166—Execution sale — Fraud—Setting aside, O. 21, R. 90, C. P. Code—Limitation.

Art. 166 governs an application to set aside a sale under O. 21 R. 90 of the C. P. Code. 57 Ind. Cas. 404 (Pat.).

4. Sale in insolvency.

——Art. 166—Sale in insolvency.

The provisions of O. 21 of the C. P. Code, are applicable to insolvency proceedings, and the limitation applicable to a petition for setting aside a sale in an insolvency proceeding must be thirty days as laid down in S. 21 read with Art. 166. A.I.R. 1921 Nag. 25, Foll. 102 Ind. Cas. 543=A.I.R. 1927 Nag. 262.

——Arts. 166 and 181—Sale by Insolvency Court—Fraud—Limitation.

An application either of an insolvent or of his creditor for cancelling, on the ground of fraud, a sale of immoveable property by the Insolvency Court in realising the assets of the insolvent is governed by Art. 181 and not Art. 166. 36 P.W.R. 1914=107 P.L.R. 1914=23 Ind. Cas. 397.

5. Sale, when complete.

——Art. 166—Sale, when complete.

The word "sale" in Art. 166 is used in the same sense as in the Civil P. C., namely, a sale as at the conclusion of the auction and not as confirmed by Court. A.I.R. 1942 Lah. 102=44 P.L.R. 126=I.L.R. (1942) Lah. 349=200 Ind. Cas. 302 (F.B.).

——Art. 166—Sale, when complete.

The sale of property in an auction by the order of a Court, although held by an officer of the Court or by any person appointed in this behalf, is nevertheless a sale by the Court itself. It is not completed until the Court formally accepts the bid and declares the purchaser under O. 21, R. 84, Civil P. C. Prior to such order, the bidder whose did has been accepted by the sale officer at the time of the bid, does not acquire any interest in the property. The decree-holder is declared a purchaser only when the execution Court "approves" of the sale and the starting point of limitation under Art. 166, Limitation Act for an application under O. 21, R. 89, Civil P. C., is the date on which the sale is so approved by the Civil Court. A.I.R. 1935 Oudh 131 =1935 O.W.N. 208=1935 R. D. 99=10 Luck 557 =153 Ind. Cas. 719.

——Art. 166—Sale, when complete.

In case of a sale in execution, the sale is complete only on the date when the bid is accepted and a declaration made about a person being a purchaser which is to be followed immediately with the deposit of the one-fourth of the purchase-money; and a starting point of limitation for an application under O. 21, R. 89 must be the date of such declaration and deposit, and not the date when the bid was made. 11 O.W.N. 18=A.I.R. 1934 Oudh 25=9 Luck 393=147 Ind. Cas. 1077.

——Art. 166—Sale, when complete—Deposit of 25 per cent., whether material.

The sale is complete as soon as the offer of the auction-purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art. 166, whether the 25 per cent. deposit was made or not. A. I. R. 1935 Pesh. 160=159 Ind. Cas. 273.

6. Starting point.

——Art. 166—Starting point.

Under Art. 166, an application to set aside execution sale must be filed within 30 days from the date of the sale. 58 M.L.W. 235=(1945) 1 M.L.J. 267=1945 M.W.N. 474=A.I.R. 1945 Mad. 499.

——Art. 166—Starting point.

The limitation for an application to set aside a sale on the ground that the property was not valued as required by S. 13 of Bihar Money-lenders' Act, 1939, is governed by Art. 166. A.I.R. 1942 Pat. 238=21 Pat. 281=23 P.L.T. 139=8 B. R. 720 =200 Ind. Cas. 782.

——Art. 166—Starting point — Application under C. P. Code, O. 21, R. 89.

The starting period of limitation under Sch. 1, Art. 166 of the Limitation Act and R. 99 (2) of O. 21, Civil P. C. for an application to set aside the sale under O. 21, R. 89, Civil P. C. is the

date when the sale is approved by the executing Civil Court, and not the date when the Collector or sale-officers accepts the bid and reports the sale to the Civils Court. The same is true even where the sale is by a Rent Court and even though, by the force of certain rules in the Revenue Manual, the officer to carry out the sale on the spot may have to be the *Qurq Amin*. A.I.R. 1940 Oudh 261=1940 O.W.N. 381=1940 A.W.R. 173=187 Ind. Cas. 603.

——Art. 166—Starting point.

Order 21, R. 89, Civil P. C. contemplates an application for setting aside a sale within 30 days of it as prescribed in Art. 166, Limitation Act. 17 P.L.T. 940=A.I.R. 1937 Pat. 113=16 Pat. 202=3 B. R. 579=169 Ind. Cas. 483 (F.B.).

——Art. 166—Starting point — Sale set aside by executing Court but confirmed by High Court—Application by another judgment-debtor to set aside sale—Starting point of limitation.

On an application by judgment-debtor, an execution sale was set aside after a month from the date of sale. Appeal was dismissed but the sale was confirmed on revision by the High Court. Subsequently, another judgment-debtor and other persons having an interest in the property and who had knowledge of the sale applied to set aside sale:

Held, that the right of petitioners of making an application for setting aside the sale became barred before the sale was set aside by the Court and this right could not be revived on account of a subsequent wrong order of the Court setting aside sale. Consequently, under Art. 166, the starting point of limitation for setting aside sale was not the date of the confirmation of the sale but the date of sale. A.I.R. 1936 Pat. 558=3 B.R. 280=167 Ind. Cas. 225.

——Art. 166—Starting point.

If a party wants a sale to be set aside for any of the reasons given in O. 21, R. 90, Civil P. C., then the application must be made within 30 days as required by Art. 166, Limitation Act. A.I.R. 1934 All. 314=(1934) A.L.J. 859=3 A.W.R. 545=151 Ind. Cas. 244.

——Art. 166—Starting point—Date of sale is the date on which property is put up for sale.

An application under R. 89 to set aside the sale after making the necessary payment into Court must be made within thirty days from the date of the sale, and the date of the sale is when the property is put up for sale and knocked down to the highest bidder within Limitation Act, Art. 166. 95 Ind. Cas. 549=28 Bom. L.R. 510=A.I.R. 1926 Bom. 335.

——Art. 166—Starting point — Personal covenant in mortgage—Cause of action on.

Where in a mortgage-deed, the mortgager covenanted to pay the debt in six months and on failure to pay the same, a suit was instituted nearly ten years after the debt became payable and a personal decree was passed therein.

Held, that the cause of action on the personal covenant accrued when there was a failure to pay the debt, *i.e.*, six months from the date of the mortgage and that the claim had become barred under Art. 66. 53 I.A. 134=24 A.L.J. 615=28 Bom. L. R. 931=43 C.L.J. 545=24 M.L.W. 50=1926 M.W.N. 535=3 O.W.N. 591=7 Pat. L T. 501 =95 Ind. Cas. 839=A.I.R. 1926 P.C. 56=51 M. L. J. 82 (P.C.).

——Art. 166—Starting point.

An application to set aside a sale in execution of a decree must be presented within thirty days from the date of the sale and not from the date or confirmation of the sale or from the date of deposit under O. 21, R. 84, C. P. Code. 78 Ind. Cas. 47=19 N.L.R. 162=A.I.R. 1924 Nag. 108.

——Art. 166—Starting point.

Court sale voidable—Application to set aside must be made within 30 days under the Article. 69 Ind. Cas. 1001=16 M.L.W. 319=1922 M.W.N. 707=31 M.L.T. 363=A.I.R. 1923 Mad. 48=43 M.L.J. 477.

——Art. 166—Starting point — Application after one month—Application to set aside sale beyond one month of sale—Whether barred.

An application to set aside sale assuming it to be under S. 47, C. P. Code, if made beyond one month after sale is barred under Art. 166, Art. 181 does not apply. 27 M.L.J. 605 (1919). M.W.N. 897; 46 Cal. 975, 38 Mad. 1076, Foll. 74 Ind. Cas. 458=1922 M.W.N. 176=16 M.L.W. 934=A.I.R. 1922 Mad. 95.

——Art. 166—Starting point.

Under Art. 166 time runs from the date of sale and not from the date of confirmation of sale. 8 N.L.R. 177=17 Ind. Cas. 884.

——Art. 166—Starting point — Application to set aside sale—Date of sale, what is.

The date of sale under Art. 166 is not the date on which it is knocked down but the date of the completion of the sale. So where a decree-holder purchases property in auction and does not pay the deposit of 25% the date of the completion of the sale is the date on which the court acting under S. 306. (O. 21, R. 84.) C.P.C., orders that the purchase-money be set off against the decree amount. 1 P. W. R. 1909=1 Ind. Cas. 12.

7. Void sale.

——Art. 166—Applicability—Void sale—Execution sale a nullity judgment-debtor having no saleable interest—Necessity to have the sale set aside. *See* C. P. CODE (5 OF 1908), S. 2 (10) AND LIMITATION ACT (9 OF 1908), ART. 166. (1948) 1 M.L.J. 422=A.I.R. 1948 Mad. 301.

——Art. 166—Void sale.

Several provisions of O. 21, Civil P. C. and Art. 166, Limitation Act deal with setting aside execution sales. They affect voidable sales only for void sales do not require to be set aside. A.I.R. 1941 Pat. 566=8 B. R. 507=199 Ind. Cas. 169.

——Art. 166—Void sale.

Article 166 can only apply where it is necessary to have a formal order setting aside the sale. It is clearly not necessary where the sale was a nullity. A.I.R. 1937 Rang. 126=1937 Rang. L.R. 164=169 Ind. Cas. 967.

——Art. 166—Void sale.

Obiter—An application on behalf of minor to set aside sale in execution of decree against him on ground of its being made in absence of any guardian to represent the interests of minor in execution proceeding is governed by Art. 181, and not by Art.

166, inasmuch as the sale is void. A.I.R. 1935 Lah. 972=159 Ind. Cas. 988.

——Arts. 166 and 181—Void sale—Execution sale.

Where properties are sold in execution of a decree and the judgment-debtor makes an application under Sl. 47, Civil P. C., which does not contain any prayer for setting aside the sale but merely brings to the notice of the Court the fact that the entire proceedings including the sale are null and void, such an application is not one for setting aside the sale within the meaning of Art. 166, and is, therefore, governed by Art. 181 and not by Art. 166. A.I.R. 1931 Lah. 586=32 P.L.R. 440=132 Ind. Cas. 493.

——Art. 166—Void sale.

Where the contention is that the Court sale in execution proceedings in a nullity, Art. 166 does not apply and the objections against such a sale, even when taken after the lapse of a month, are within time. 47 Mad. 288 (F.B.), Foll. 125 Ind. Cas. 53=11 L.L.J. 457=A.I.R. 1930 Lah. 17.

——Art. 166—Void sale—Want of notice—C. P. Code, S. 65—Notice required by O. 21, R. 22 not given; sale becomes void—To set aside such sale—Art. 181 applies.

Where notice required by O. 21, R. 22 is not given but the sale or excess sale taxes place such a sale is void. Being void the sale need not be set aside and as such sale need not be set aside the period of limitation (comparatively shorter) prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceedings under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art 181. 123 Ind. Cas. 24=1929 M.W.N. 811=A.I.R. 1930 Mad. 12.

——Art. 166—Void sale.

An application for declaring that a sale in execution is void for non-compliance with C. P. Code, O. 21, R. 22 (1), not being an application to set aside the sale, is governed by Art. 181 and not Art. 166. 27 C.L.J. 528 and A.I.R. 1924 Mad. 431 (F.B.), Foll. 105 Ind. Cas. 65=46 C.L.J. 579=55 Cal. 96=A.I.R. 1928 Cal. 60.

——Art. 166—Void sale.

Application to set aside execution sale on the ground of want of notice under O. 21, R. 22, is governed by three years' rule of limitation under Art. 180. 97 Ind. Cas. 798=8 P.L.T. 28=A.I.R. 1926 Pat. 397.

——Art. 166—Void sale.

Article 181 and not Art. 166 applies where sale being void, relief is claimed under S. 47, C. P. Code. 80 Ind. Cas. 92=47 Mad. 288=19 M. L. W. 179=34 M.L.T. 37=1924 M.W.N. 182=A. I. R. 1924 Mad. 431=46 M.L.J. 104 (F.B.).

——Arts. 166 and 181—Void sale—Application by exonerated defendant — Sale in execution of his properties.

An application by a defendant who is exempted by the decree from liability, to set aside a sale in execution of his property by the plaintiff is governed by Art. 181 and not by Art. 166. If an execution sale is a nullity, *i.e.*, (made without jurisdiction) or is void *Ab Initio*, Art. 181 governs an application to set it aside, and not Art. 166. 43 Mad. 313=38 M. L. J. 62=(1920) M.W.N. 127=56 Ind. Cas. 260.

——Art. 166—Void sale—Execution sale—Irregularity—Purchase without leave.

Purchase by decree-holder without obtaining leave to bid is irregular and not void and an application to set aside is governed by Art. 166. 41 Bom. 357=19 Bom. L.R. 75=39 Ind. Cas. 3.

——Arts. 166 and 181—Void sale—Execution sale—Notice of sale—Proclamation not given to judgment-debtor.

A sale held without notice of sale proclamation to a judgment-debtor is not a nullity and an application to set it aside is governed by Art. 166 of Limitation Act. (1919) M.W.N. 897=11 L. W. 59=53 Ind. Cas. 809.

——Art. 166—Void sale—Execution sale—Nullity—Limitation.

Where sale in execution of a decree is a nullity, Art. 166 does not apply. 26 M.L.J. 267=23 Ind. Cas. 251.

——Art. 166—No void sale—Sale — Omission to comply with S. 290, C.P.C. (O.C.)—No nullity. *See* C.P.C., O. 21, R. 68. 31 C. 385.

8. Miscellaneous.

——Art. 166—Miscellaneous.

The judgment-debtor first made an application under O. 21, R. 90 Civil P. C. and that was not withdrawn when he first made his application under R. 89. The application under R. 90 was withdrawn when the limitation for application under R. 89 had expired:

Held, that the application under R. 89 which was barred by the application under R. 90, could be said to have been made only when the application under R. 90 was withdrawn and it was, therefore, barred by limitation. A.I.R. 1940 Sind 181=I.L.R. (1940) Kar. 360=192 Ind. Cas. 10.

——Art. 166—Miscellaneous—Absence of formal notice.

Where an application is to be made to the Court within a limit of time, it is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court.

When the purchaser has actual notice of an application to set aside the sale, absence of formal notice is not a bar. A.I.R. 1933 Cal. 886=60 C. 1106=147 Ind. Cas. 797 (2).

——Art. 167. See C. P. CODE, O. 21, R. 95. 1904 A.W.N. 46=26 A. 365=1 A.L.J. 86.

——Art. 167—Applicability and scope — Successive applications under O. 21, R. 35, C. P. Code—Obstruction — Application under O. 21, R. 97 within 30 days of last application and obstruction but more than 30 days of obstruction, on prior application—If barred.

A judgment-creditor holding a decree for possession is entitled to file any number of applications for execution within the time allowed to him by law under O. 21, R. 35, C. P. Code, until he obtains possession. Each time an application is made an obstruction might be caused and in that case each obstruction constitutes a fresh cause of action; it does not matter that the obstruction is caused by the same person or different persons. The fact that the judgment-creditor who is obstructed when seeking to take possession in pursuance of his application for

possession under O. 21, R. 35, does not come to apply under O. 21, R. 97 for removal of obstruction within the period of 30 days therefrom is no ground for holding that he is not entitled to apply again for possession and then on obstruction to apply under O. 21, R. 97 within thirty days of such later obstruction, because the interval between the two obstructions has exceeded the time allowed by Art. 167, Limitation Act.

What is contemplated under Art. 167 is a complaint of a particular obstruction or resistance, and if a complaint is made within thirty days of it, Art. 167 applies and the application is in in time. It makes no difference that there was a prior obstruction which was not acted upon. Each time a decree for possession is sought to be executed and the execution is met by resistance or execution, such resistance or execution may be complained of within thirty days; each obstruction or resistance is a fresh cause for complaint. I.L.R. (1946) Kar. 317=A. I.R. 1947 Sind. 118.

——Art. 167—Failure to complain of resistence.

Failure of auction-purchaser to complain of resistance under O. 21, R. 97, Civil P. Code, within 30 days—It cannot take away the right to apply under O. 21, R. 95, Civil P. Code to which Art. 181 applies. A.I.R. 1941 Nag. 322=1941 N.L.J. 494= I.L.R. (1942) Nag. 633=198 Ind. Cas. 284.

——Art. 167—Limitation — Start of.

Every fresh obstruction gives fresh right provided fresh writ for possession is issued—Time runs from resistance alone which decree-holder is complaining. A.I.R. 1939 Cal. 494.

——Art. 167—Limitation—Computation.

The period of 30 days prescribed by Art. 167 is to be counted from the date of the resistance of obstruction of which complaint is made. A.I.R. 1936 Cal. 352=42 C.W.N. 478=176 Ind. Cas. 816.

——Art. 167—Decree — Sale — Obstruction to possession—Application for removal within 30 days—Transfer of decree—Application in transferee Court after 30 days from the date of obstruction:

Held, that the time must be computed, not from the day on which the application to the transferee Court was filed but from the day on which the first application, was filed and that the application, as it fell under S. 47, Civil P. Code, had three years' period of limitation. A.I.R. 1936 Sind 11=30 S.L. R. 290=161 Ind. Cas. 524.

——Art. 167—Obstruction — Objection—Limitation.

An objection to an obstruction to possession on application under O. 21, R. 35, must be raised within thirty days from the date of obstruction. 35 Bom. L.R. 1033=A.I.R. 1933 Bom. 457=146 Ind. Cas. 11 (F.B.).

——Art. 167—Purchase of property by decree-holder in auction—Resistance to delivery of possession:

Held, that the decree-holder may either apply under O. 21, R. 97 or may make a fresh application for execution. A.I.R. 1933 Nag. 369=147 Ind. Cas. 582.

——Art. 167—Acquiescence.

An application for removal of a second obstruction made more than thirty days after acquiescence in a previous obstruction is not barred by Art. 167. Such acquiescence does not deprive the person entitled to possession, of any further right to obtain it in execution. 66 Ind. Cas. 722=1921 M.W.N. 698=A.I.R. 1921 Mad. 559.

——Art. 167—C. P. Code, O. 21, Rr. 95 and 97—Failure to complain of obstruction within 30 days—Fresh application for possession—If barred.

The failure of the decree-holder to complain of obstruction under O. 21, R. 97, C. P. Code within 30 days prescribed by Art. 167 is no bar to a fresh application for delivery of possession under O. 21, R. 95. 13 M. 504, Foll. 24 Ind. Cas. 512 (Mad.).

——Art. 168—Applicability — Appeal dismissed for non-payment of printing charge within time fixed — Application to set aside and to restore appeal to file—Limitation — C. P. Code, S. 151 and O. 41 R. 19.

Article 168 of the Limitation Act has no application to an application under S. 151, Civil Procedure Code, to set aside an order dismissing an appeal for failure to comply with an order to pay the printing cost and for restoring the appeal to file; such an application does not come within the provisions of O. 41, R. 19, Civil Procedure Code, but lies under S. 151, which preserves the inherent powers of the Court to act *ex debito justitiae* and this inherent power is not affected by the law of limitation. 19 Pat. 159 (F.B.), foll. 27 Pat. 745=A.I.R. 1949 Pat. 112 =29 P.L.T. 483.

——Art. 168—Applicability — Dismissal of appeal for appellant's failure to pay proclamation charges.

The dismissal of an appeal for failure of the appellant to pay the proclamation charges for the service of the unserved respondents, amounts to dismissal for want of prosecution, and as such falls within Art. 168, Limitation Act. A.I.R. 1950 E.P. 255.

——Art. 168—Applicability.

An application for restoration of an appeal which has been dismissed for want of prosecution is governed by Art. 168 and S. 5 of the Limitation Act is not applicable to such an application. A.I.R. 1933 Rang. 96=142 Ind. Cas. 185.

——Art. 168—Applicability.

An application for restoration of an appeal dismissed under O. 41, R. 10 (2), Civil P. Code, is governed by Art. 168, Limitation Act. 61 M.L.J. 688=(1931) M.W.N. 1124=34 M.L.W. 783=A.I.R. 1932 Mad. 170=136 Ind. Cas. 45.

——Art. 168—Applicability.

Article applies to application for re-admission under O. 41, R. 19, C. P. Code as it is outside Limitation Act, S. 6. 60 Ind. Cas. 919=45 Bom. 648=23 Bom.L.R. 110=A.I.R. 1921 Bom. 20.

——Art. 168—Applicability — Dismissal for default—Restoration — O. 41, R. 10 (2) of C. P. Code.

Even if Art. 168 of the Limitation Act does not apply to an application for the restoration of an appeal dismissed under R. 10, O. 41, C. P. Code. Such an application ought to be made within a reasonable time and by analogy should be made within 30 days. 28 C.L.J. 163=40 Ind. Cas. 234.

——Art. 168—Extension of time—C. P. Code (5 of 1908), S. 151.

The limitation allowed to a party seeking to set aside an *ex parte* order dismissing his appeal in default, runs from the date of the order and not from the date of the knowledge. The inherent power

of the Court to break through the provisions of S. 3 of Limitation Act can not be invoked to enable it. 1 Lah. 363=2 Lah. L.J. 249=58 Ind. Cas. 789.

——Art. 168 — Improper dismissal — Appeal—Dismissal of ultra vires — Article does not apply.

Where no date is fixed for the hearing of an appeal and no notice is given to the parties of any date on which the hearing of the appeal would be taken up, an order dismissing the appeal for default is without jurisdiction. In such case the limitation of thirty days for setting aside the dismissal does not apply, especially when the record does not show that the appellants were informed of the dismissal. If the order of dismissal were made under circumstances which would render such action *ultra vires* of the Court, the 30 days' limitation under Art. 168 ought not to apply. 69 Ind. Cas. 618=A.I.R. 1924 Lah. 279.

——Art. 168—Non-payment of process—Appeal dismissed for want of prosecution—Article 168 applies for application for restoration.

There is no distinction in principle or substance between an appeal dismissed on the day fixed for the hearing for default in payment of process fee under O. 41, R. 18, and an appeal dismissed before the hearing for default in payment of process fee or of the costs of preparing the paper book. They stand upon the same footing and cannot be differentiated and an application to restore an appeal in the one case is *ejusdem generis* with similar applications in the other cases. In each instance the appeal is dismissed for want of prosecution and to an application to restore any such appeals Art. 168, Limitation Act, applies. Case-law, referred. 8 Rang 380=127 Ind. Cas. 161=A.I.R. 1930 Rang. 228 (F.B.).

——Art. 168—Rangoon rules.

Rule 9 (2), Appellate Side Rules of Procedure of the Rangoon High Court is *ultra vires* in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Limitation Act. 8 Rang. 380=127 Ind. Cas. 161=A.I.R. 1930 Rang. 228 (F.B.).

——Art. 168—Scope.

The provisions of O. 41, R. 18, Civil P. C. read with Art. 168, Limitation Act are exhaustive. There is no inherent power remaining to the High Court *ex debito justitae* to allow appeals which are time-barred or to set aside an order dismissing an appeal under O. 41, R. 18, Civil P. C. A.I.R. 1943 Sind 132=I.L.R. (1943) Kar. 409=209 Ind. Cas. 326.

——Art. 168—Scope — Appeal dismissed for default.

There is nothing in the terms of Art. 168, Limitation Act, to exclude an application made under S. 151, Civil P. C. for the re-admission of an appeal dismissed for want of prosecution from the operation of the article.

It is clear that whereas in the case of the appellant, limitation runs from the date of the dismissal, in the case of the respondent limitation may be reckoned from the date his knowledge of the decree, if notice of the appeal was not duly served on him. The appellant cannot escape the operation of Art. 168 even if the application for admission of appeal dismissed for default could lie under S. 151, Civil P. C. A.I.R. 1937 Oudh 426=1937 O.W.N. 743=13 Luck. 425=170 Ind. Cas. 155.

——Art. 169—Applicability — No service on respondent — Service without declaration under S. 82, C. P. Code—No good service.

Art. 169 has no application to case where the respondent had no notice of the appeal itself. (1908) 18 M.L.J. 96.

——Arts. 169, 164 and 162—Applicability.

Art. 169 is wholly inapplicable to applications by a party who has never been served with notice to set aside the whole proceedings in the suit, and Art. 164 is the article applicable to such proceedings. (1907) 17 M.L.J. 436=30 M. 535.

——Art. 169—Application to re-hear — What the applicant has to prove.

In order that application to re-hear an appeal decreed *ex parte* may be allowed, it is incumbent on the applicant to show that he had not engaged any Counsel, that he was not duty served with notice and that he presented the application within 30 days from the time when he first came to know of the decree. 35 P.L.R. 146=A.I.R. 1933 Lah. 882 =147 Ind. Cas. 288.

——Art. 169, C. P. Code, O. 41, R. 17—Notice on Pleader.

The expression "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of.

A notice of the date of the hearing of an adjourned appeal was served on the Pleader of the respondent but the Pleader reported that he was not engaged to appear at the place of the hearing. The respondent was not aware of such date and an *ex parte* decree was passed:

Held, that it was unfair to penalise a litigant for the fault of his Pleader. The mere fact that the party had been originally served with notice of the appeal was wholly immaterial. The party could, therefore, apply for setting aside of the *ex parte* decree within 30 days of his knowledge of the decree. A.I.R. 1940 Lah. 49=42 P.L.R. 38=186 Ind. Cas. 788.

——Art. 169—Rehearing of appeal—Limitation.

Under Art. 169, the period of limitation for the re-hearing of an appeal heard *ex parte* is 30 days from the date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree. 1937 O.W.N. 743=A.I.R. 1937 Oudh 426=13 Luck. 425=170 Ind. Cas. 155.

——Art. 170—Appeal filed within limitation—Appellant asked to pay a larger court-fee—Appellant then applying for leave to appeal *in forma pauperis* after the period of 30 days, allowed by Art. 170—Court extending time for making application under S. 5 in view of special circumstances of the case—Revision:

Held, that there was no illegality or material irregularity so as to justify interference in revision. A.I.R. 1942 Oudh 240=1942 O.W.N. 106=1942 R.D. 181=1942 A.W.R. 79=199 Ind. Cas. 614 =17 Luck. 628.

——Art. 170—Cross-objection.

The limitation of 30 days from the date of the decree does not apply to applications for leave to file cross-objections in *forma pauperis*. 12 C.L.J.

173, Rel. on. 119 Ind. Cas. 900=7 Pat. 827=10 P.L.T. 387=A.I.R. 1929 Pat. 31.

——**Art. 170 — Unstamped memorandum of appeal and Pauper application presented together—Pauper petition dismissed.**

A memorandum of appeal unstamped and presented along with a pauper petition cannot if it is stamped subsequently after the period of limitation, and after the pauper petition is dismissed, be treated as an appeal filed on the day on which the memorandum was filed and is therefore barred. 7 L.B.R. 90=22 Ind. Cas. 884.

——**Art. 171—Application by assignee of decree.**

An application made by an assignee of the preliminary decree for the preparation of the final decree is not governed by Arts. 171 and 176. 121 Ind. Cas. 689=1929 A.L.J. 921=A.I.R. 1929 All. 444.

——**Art. 171—Extension of Limitation.**

Ignorance of death of party in the absence of negligence is sufficient cause for extending period of limitation for an application to set aside abatement. (1932) A.L.J. 18=A.I.R. 1932 All. 459=54 A. 280=135 Ind. Cas. 159.

——**Art. 171—Failure to brief representatives on record.**

Where the plaintiff failed to bring on record the legal representative of the defendant, though with smallest diligence he would have discovered that the defendant had died.

Held, the abatement could not be lightly set aside, the plaintiffs had to satisfy the Court that there was sufficient cause for not applying in time. 67 Ind. Cas. 917=49 Cal. 62=A.I.R. 1922 Cal. 335.

——**Art. 171—Legal representatives—One only brought on record in time.**

Where one legal representative of a deceased party is brought on record in time, there is no bar by time if others are brought in, subsequently. 3 A. 517; 12 B. 48, Foll. 11 M.L.T. 19=(1912) M.W.N. 9=22 M.L.J. 169=13 Ind. Cas. 313.

——**Art. 173 — Application for review—When barred—Application for review of order is barred if not filed within 90 days of that order.**

An application for review of an order is barred by limitation under Art. 173 if it is not filed within 90 days from the date of the order sought to be reviewed. The fact that the judgment-debtor had no knowledge of the order makes no difference. It is open to the judgment-debtor in such a case to apply under S. 5, Limitation Act, for an extension of the period of limitation if in fact he could prove that he had no knowledge. 121 Ind. Cas. 552=A.I.R. 1929 All. 485.

——**Art. 173—High Court decree — Review—Delay to be accounted for.**

An application for a review of a decree of the High Court must be presented within 90 days of the decree, and every day's delay over that period must be duly accounted for. (1916) 1 M.W.N. 277=3 L. W. 244=32 Ind. Cas. 1000.

——**Art. 173—Knowledge after limitation.**

Under Art. 173, 90 days time is allowed to the petitioners for review, from the date of their knowledge, but the contention that where the knowledge is after that period, there is no period prescribed by the Limitation Act, or Art. 181, Sch. 2, Limitation Act at most applies, is wrong. 119 Ind. Cas. 99=A.I.R. 1929 All. 545.

——**Art. 173—Scope.**

Article 173 is restricted to applications for review under C. P. Code. 118 Ind. Cas. 615=7 Rang. 201=A.I.R. 1929 Rang. 229.

——**Art 174. See also C. P. CODE, O. 21. R. 2.**

——**Art. 174—Application, held not barred.**

The decree-holder agreed to accept Rs. 4,500 in full satisfaction of his decree provided the payment was made to him by the end of May, 1942. It was further agreed that there would be no adjustment until and unless the defendants were ready to pay the whole sum in one payment, and that the judgment-debtor would not be entitled to treat it as an agreement for adjustment nor apply for the adjustment to be certified until the amount was tendered:

Held, that the terms were settled in March, 1941, but it did not become an adjustment so as to entitle the judgment-debtors to apply under O. 21, R. 2, Civil P. C., until tender was made on April 2, 1942. The application having been made within 90 days of that date, was not barred. A.I.R. 1943 Cal. 634=I.L.R. (1943) 1 Cal. 195=211 Ind. Cas. 154.

——**Art. 174—Applicability.**

Article 174, Limitation Act, applies only to the action taken by the judgment-debtor under O. 21, R. 2 (2), Civil P. C., and there is no time limit for a certification by the decree-holder. A.I.R. 1939 All. 581=1939 A.W.R. 635=184 Ind. Cas. 668.

——**Art. 174—Scope — Adjustment and payment —Distinction.**

There is a substantial distinction between an adjustment and a payment and such distinction is recognised in Art. 174. A.I.R. 1938 Rang. 328=178 Ind. Cas. 20.

——**Art. 174—Scope and operation of.**

An omission on the part of the decree-holder to certify a payment even if he may have promise to do so, does not entitle the judgment-debtor to override the 90 days' limitation of Art. 174 for making an application under O. 21, R. 2. A.I.R. 1936 Pat. 270=17 P.L.T. 195=2 B.R. 516=15 Pat. 422 162 Ind. Cas. 849.

——**Art. 174—Scope and operation of.**

The limitation of ninety days provided by Art. 174 is not applicable to a certification by a decree-holder. 15 L. 910=A.I.R. 1935 Lah. 194=37 P. L.R. 196=155 Ind. Cas. 315.

——**Art. 174—Adjustment — Not recorded—C. P. Code, S. 47.**

Adjustment not recorded within time as provided by Art. 173-A, cannot be recognised by executing Court. 16 C.L.J. 169=7 Ind. Cas. 625.

——**Art. 174—Application contemplated, what is not.**

Application by the judgment-debtor made six months after a payment, applying for deposit of balance and attaching a receipt for the previous payment and containing an endorsement of the subsequent payment by the decree-holder's pleader is not an application for recording and certifying the previous payment under O. 21, R. 2 (2).

Even if it can be so regarded it is barred by limitation under Limitation Act, Art. 174. 115 Ind. Cas. 139=A.I.R. 1929 All. 674.

——**Art. 174—Application by decree-holder—Application by decree-holder to record payment**

made to him out of Court—Art. 181 applies not Art. 174.

Where a decree-holder in execution of his decree sought to escape the bar of limitation under Art. 182 by reference to a payment made by the judgment-debtor out of Court.

Held, that he was entitled to plead the payment that Art. 174 of the Limitation Act is not applicable to a case under sub-R. 1 of R. 2 of O. 21, but is applicable only to a case under O. 21, R. 2, sub-R. (2) and that under Art. 181 the decree-holder can certify the payment within 3 years of the date of payment.

There is no period of limitation for an application by decree-holder, who has received payment from the judgment-debtor out of Court, to record the payment. Therefore the only article applicable is 181 of the Limitation Schedule which provides that an application, for which no period of limitation is provided elsewhere in this schedule, shall be made within three years from the time when the right to apply accrues. 68 Ind. Cas. 780 =26 C.W.N. 529=35 C.L.J. 71=A.I.R. 1922 Cal. 30.

——Art. 174—Decree against several defendants at different times—Consolidated decree.

An application by a judgment-debtor to record satisfaction of decree made by him more than three years from the date of the decree against him is barred even though it may be within three months from the date of the revised decree as against other defendants. 31 Ind. Cas. 917 (Mad.).

——Art. 174—Extension of limitation—Omission of decree-holder to certify adjustment — Time is not extended.

Mere omission on the part of the decree-holder to certify the fact of adjustment of the decree does not entitle the judgment-debtor to override the period of limitation provided in Art. 174 of the Limitation Act. for an application under O. 21, R. 2, Cl. (2), and to secure an investigation of the very same matter and an extension of time by invoking the terms of S. 47 of the C. P. Code. A.I.R. 1923 Cal. 342, Foll. 88 Ind. Cas. 48=A.I.R. 1925 Nag. 374.

——Art. 174—Fraud under S. 18—Keeping the judgment-debtor from knowledge of his right to apply for certifying adjustment of decree.

Where a settlement had been come to, to satisfy the respective decrees in two suits and the decree-holders represented to the judgment-debtors that this was the case, and on the strength of such representation judgment-debtors signed it, and thought that, as it was filed, the two decrees were adjusted.

Held, such conduct could be said to keep the judgment-debtors form the knowledge of the right of applying to the Court for the adjustment of the decree to be certified. 70 Ind. Cas. 859=1 Bur.L. J. 43=A.I.R. 1922 L.B. 31.

——Art. 174 — Fraud — C. P. Code (Act 5 of 1908) S. 47 and O. 21, R. 2.

In cases where fraud is alleged, the judgment-debtor must so inform the Court and protect himself, but he cannot be allowed to evade the provisions of Art. 174 of the Act and obtain a decision not properly coming under S. 47. The judgment-debtor has his remedy by a suit properly framed. 16 C.W. N. 396=13 Ind. Cas. 424.

——Art. 174—Mortgage decree — Adjustment.

A mortgagor can claim an account of receipts and disbursements of income of the mortgaged property during the time the mortgagee was in possession under the decree. 39 Mad. 1026=38 Ind. Cas. 675.

——Arts. 174, 173-A—Payment before order absolute.

Article 173-A does not apply to a case of any payment made before a decree absolute (mortgage decree) is made. (1903) 8 C.W.N. 102.

——Art. 175—Applicability.

A mortgage bond payable by instalments is governed, not by Art. 175, but by Art. 132. A.I.R. 1939 Pat. 433=20 P.L.T. 443=18 Pat. 459=5 B. R. 965=183 Ind. Cas. 523 (F.B.).

——Art. 175—Payment of decree by instalments.

Appeal by judgment-debtor dismissed—Application by judgment-debtor for payment of decree by instalments under O. 20, R. 11, Civil P. Code—The only decree in respect of which an order for payment of instalment can be made and therefore the only decree to which Art. 175 can refer is the decree of the Appellate Court. Time runs from the decree which is capable of execution, *i.e.*, the appellate decree. A.I.R. 1932 Rang. 54=135 Ind. Cas. 858.

——Art. 175—Extension by consent.

Application made beyond six months for payment by instalments—Parties agreeing to it—Court passing order—Order is good. 73 Ind. Cas. 671=A.I.R. 1923 Lah. 381.

——Art. 176—*See also* C. P. CODE, O. 1, R. 10 O. 22, RR. 3, 4, and S. 141.

——Art. 176—Applicability—Revision.

Article 176 refers to appeals and not to revisional applications. 47 Bom.L.R. 845=A.I.R. 1946 Bom. 201 also Pak. L.R. (1948) Lah. 225.

——Art. 176—Applicability.

Death of landlord applicant—Provisions of O. 22, C. P. Code, in regard to substitution and abatement do not apply in view of S. 50, U. P. Encum. Estates Act—Application for substitution—Art. 176, Lim. Act does not apply. A.I.R. 1940 Oudh 394=1940 O.W.N. 735=1940 R.D. 343=1940 A.W.R. 295 =16 Luck. 72=189 Ind. Cas. 388.

——Arts. 176, 177—Applicability.

Prima facie, neither Art. 176 nor Art. 177 applies to a case where the deceased is neither plaintiff or an appellant nor a defendant or a respondent, but is merely an applicant or opponent in a proceeding which is instituted as a preliminary stop to the filing of a suit or of an appeal. A.I.R. 1934 Sind 36=28 S.L.R. 150=148 Ind. Cas. 819.

——Art. 176—Applicability.

For complying with R. 3, Ch. II, Allahabad High Court Rules, there is no limitation, and all that is required is that the appeal should be filed in time. Art. 176 has no application. (1932) A.L.J. 1069= A.I.R. 1933 All. 111=144 Ind. Cas. 340 (1).

——Art. 176—Omission to substitute legal representative—Effect.

Under O. 22, R. 3, a suit abates so far as the deceased plaintiff is concerned when there is no application within 90 days for the substitution of his legal representatives. A.I.R. 1933 Rang. 234= 145 Ind. Cas. 693.

——Art. 176—Application under Tenancy Act.

Application under Chota Nag. Ten. Act, to substitute L. Rs. of plaintiff is within the article. 69 Ind.

Cas. 613=1922 P.H.C.C. 363=1 Pat.L.R. 55=2 Pat. 243=4 P.L.T. 367=A.I.R. 1923 Pat. 29.

——Art. 176—Assignment of decree.

An application made by an assignee of the preliminary decree for the preparation of the final decree is not governed by Arts. 171 and 176. 121 Ind. Cas. 689=1929 A.L.J. 921=A.I.R. 1929 All. 444.

——Art. 176—Death before amendment of article—Application made after time under O. 22, R. 3, C. P. Code, should be amended into one under O. 22, R. 9.

Plaintiff died on 30th August, 1920. On 1st January, 1921, Act 26 of 1920, came into force which reduced the period of limitation for putting the legal representatives on the record to three months. The application on behalf of the minor was not made until 28th February.

Held, that the Court should have amended the application so as to make it one under O. 22, R. 9, and should not have rejected the application as being made under O. 22, R. 3 and so beyond time; that the minor should not be prejudiced by the fact that the proper remedy was not suggested to him by the Court, and therefore the abatement of the suit should be set aside. 80 Ind. Cas. 761=26 Bom.L.R. 378=A.I.R. 1924 Bom. 416.

——Art. 176—Death of sole plff. before hearing—Dismissal of suit for default—Legal representative—Right of to be made a party.

Where on the death of a sole plff. before trial the Court dismisses the suit for default of appearance, the order is unsustainable and it is open to the legal representative of the deceased plff. to apply within the time prescribed by Art. 176 to be made a party. 35 All. 331=16 O.C. 194=40 I.A. 150=17 C.W.N. 829=11 A.L.J. 625=18 C.L.J. 9=15 Bom.L.R. 640=14 M.L.T. 33=(1913) M.W.N. 566=25 M.L.J. 148=19 Ind. Cas. 526 (P.C.).

[On appeal from 14 Ind. Cas. 221 and 711.]

——Art. 176—Effect of amendment—New rules of limitation apply to causes of action already arisen.

New rules of limitation, which are regarded merely as matters of procedure, apply to causes of action which arose before the enactment of the rules.

An appellant died on 31st July, 1920. At that time the period of limitation for bringing on record his legal representatives was six months. Early in September, 1920, by an amendment of the Limitation Act, the period was reduced to 90 days. But the coming into force of the amendment was postponed to the 1st January, 1921.

Held, that the amendment operated retrospectively and that an application to bring the legal representatives on record filed after the 1st January, 1921, was time barred although within 6 months from the date of the appellant's death. 62 Ind. Cas. 795=13 M.L.W. 522=1931 M.W.N. 338=A.I.R. 1921 Mad. 650=41 M.L.J. 65.

——Art. 176—Execution proceedings.

Application for execution against surety is governed by Art. 182 and not by Art. 176 after the death of the principal debtor and execution can be had even though the legal representatives have not been brought on record. 66 Ind. Cas. 176=A.I.R. 1922 Nag. 112.

——Art. 176—Extension of limitation.

Death of plaintiff—Legal representative living in different province, presenting application to be made party, on knowing of death—Ordinary period of limitation can be extended. 119 Ind. Cas. 759=A.I.R. 1929 Lah. 634.

——Art. 176—Legal representative.

An application under O. 22, R. 3 to bring on record the legal representative of a deceased appellant is governed by Art. 176 and S. 6 of the Limitation Act, 1877, does not apply to such an application. 10 Bur.L.T. 27=35 Ind. Cas. 438.

——Art. 176—Rival claimants.

The right to be brought on the record vests in the one or the other rival claimant from the date of the death of the deceased party. The limitation therefore begins to run against both the rival claimants and each would get barred by time at the expiry of the limitation prescribed by Art. 176. Therefore one rival claimant, who has not applied to be brought on the record within the limitation period, cannot continue a suit revived by his rival's application in time. 104 Ind. Cas. 398=A.I.R. 1927 Nag. 343.

——Art. 176—Scope.

C. P. Code, O. 30, R. 4 (2) (*a*)—Application under—Art. 176 applies. 67 Ind. Cas. 10=34 C.L.J. 405=A.I.R. 1921 Cal. 722.

——Art. 176—Suit by trustee.

C. P. Code, O. 1, R. 11 and O. 22, R. 3—Suit by trustee impleading co-trustee as a party defendant—Plaintiff dying during suit—Co-trustee can conduct suit—Art. 181 applies, and not Art. 176 for such transposition. 62 Ind. Cas. 360=1921 M.W.N. 108=13 M.L.W. 148=A.I.R. 1921 Mad. 124=40 M.L.J. 208.

——Arts. 176, 175 (c)—Respondent in second appeal, death of—Application to bring in legal representatives — Limitation—Civil Procedure Code, Ss. 368, 582, 587.

Art. 175 (*c*) applies to the case of an application to bring in the legal representatives of a deceased respondent in second appeal and is not confined to cases coming within S. 368 or Ss. 368 and 582, C. P. C. (O.C.). An application that is authorized by S. 587, C. P. Code, to be made under Ss. 368 and 582, C. P. Code, is an application under Ss. 368 and 587, C. P. Code (1905) 15 M.L.J. 404=28 M. 498; *also* (1906) 16 M.L.J. 475=29 M. 529 (F.B.). [Which Full Bench decision has now been overruled by the Legislature.—Ed.]; *also* (1908) 10 Bom.L.R. 509; *also* (1906) 1907 A.W.N. 155=4 A.L.J. 397=29 A. 535; *also* (1907) 11 C.W.N. 1100=34 C. 1020.

——Art. 176 (175)—Substitution, application for—Application after preliminary decree for sale in mortgage suit.

Applications governed by Art. 175-A, are applications for substitution made in the course of the suit. An application for bringing the representatives of a mortgagee who died after the preliminary decree for sale is not governed by Art. 175-A. (1906) 11 C.W.N. 156.

——Art. 177—Applicability—Forma pauperis.

An application for bringing on the record the legal representative of a deceased opponent in an application for permission to sue *in forma pauperis* is not governed by the provisions of Art. 177. 116 Ind. Cas. 111=A.I.R. 1929 Sind 136.

——Art. 177—Applicability—Execution proceedings.

Art. 177 has no application to execution proceedings. 99 P.W.R. 1911=174 P.L.R. 1911=10 Ind. Cas. 405.

——Art. 177—Effect of amending Act.

Limitation for an application for substitution under Art. 177 was six months and not ninety days under Limitation Act till it was again amended so as to reduce the period specifically to ninety days. 97 Ind. Cas. 316=A.I.R. 1927 Pat. 142.

——Art. 177—Effect of amending Act.

The period of limitation under Art. 177 remained at six months even after the amending Act (Act 26 of 1920); A.I.R. 1924 Lah. 65; A.I.R. 1925 77, Foll. A. 92 Ind. Cas. 566=22 M.L.W. 538=A.I.R. 1926 Mad. 65=49 M.L.J. 363.

——Art. 177—Effect of amending Act.

The amending Act 26 of 1920, did not touch Art. 177. Therefore, after the Amending Act was passed the period in the column, according to law, opposite Art. 177, was still six months notwithstanding the use of the word "ditto." Subsequently in 1923, by Act 11 of 1923, the period has been altered to 90 days. 92 Ind. Cas. 330=5 L.R.A. Civ. 607=A. I.R. 1925 All. 77.

——Art. 177—Effect of amending Act—Amending Act (26 of 1920) has not altered the period.

The words "six months" opposite Art. 177 in the Limitation Act have not been altered by anything contained in the Amending Act of 1920 and the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still six months. A.I.R. 1924 Lah. 65, Foll. 78 Ind. Cas. 771=A.I.R. 1925 Lah. 98.

——Art. 177—Effect of amending Act—Amending Act of 1920—Period of limitation is still 6 months.

The words "six months" that occur opposite Art. 177 in the authenticated text of the Limitation Act, have not been altered by anything contained in the amending Act of 1920, and that the period of limitation for making an application to implead the legal representatives of a deceased defendant or of a deceased respondent is still 6 months. 77 Ind. Cas. 409=4 Lah. 367=6 L.L.J. 25=A.I.R. 1924 Lah. 65.

——Art. 177—Effect of amending Act.

The period of limitation under Art. 177 is now 90 days and does not continue to be six months. 77 Ind. Cas. 474=A.I.R. 1923 Bom. 299.

——Art. 177—Effect of amending Act.

The new amending Act 26 of 1920, passed by the Governor-General does not reduce the period of Limitation of Art. 177 as prescribed by Act 9 of 1908, as no mention of Art. 177 is made in the body of new Act although there may be mention of this in the statement of objects and reasons. 69 Ind. Cas. 748=A.I.R. 1922 Lah. 211.

——Art. 177—Execution proceedings—Appeal.

An appeal in execution proceedings is governed by Art. 177 and would abate if the respondent dies and his legal representatives are not brought on record in time. 40 M.L.W. 623=A.I.R. 1934 Mad. 664 =(1935) M.W.N. 89 (1)=151 Ind. Cas. 777 (1).

——Arts. 177 and 181—Execution proceedings —Appeal—Legal representative.

Art. 177 and not Art. 181 governs an application to bring on record the legal representatives of the deceased respondent in an appeal against an order made in execution proceedings. A.I.R. 1932 Mad. 574=(1932) M.W.N. 597=36 M.L.W. 170=55 M. 1006=63 M.L.J. 827=139 Ind. Cas. 409.

——Art. 177—Extension of limitation—Application after limitation—Abatement—Setting aside—Absence of knowledge 3 months before application, to be proved.

Where no application for substitution of legal representative is made within the period of limitation unless the plaintiff can satisfy the Court that he had no knowledge of the death of the defendant till within three months of the date on which he applies for substitution of the legal representative of the deceased defendant, the application is beyond time and there can be no ground for setting aside the abatement. 1930 A.L.J. 825=126 Ind. Cas. 20=52 A. 910= A.I.R. 1930 All. 779.

——Art. 177—Extension of limitation—Death before Amending Act—Ignorance of the amendment—Time can be extended.

The Limitation Act was amended so as to reduce the period of limitation for application under Art. 177 from six months to 90 days between the death of a defendant on 30th September, 1920 after the passing of the preliminary decree in a suit for dissolution of partnership and his son applying on the 6th January, 1921, to be brought on the record.

Held, that in the circumstances of the case it was in the interests of justice necessary for all parties interested to be added under O. 1, R. 10, C. P. Code. 78 Ind. Cas. 168=A.I.R. 1925 Mad. 347.

——Art. 177—Extension of limitation—Ignorance of change in land—Application after three months—Delay may be excused.

The error that the defendant's heirs were brought on the record more than three months after the death of the original defendant without formally setting aside the abatement of the suit which resulted in consequence of the lapse of three months from the date of the defendant's death, was rightly excused as the application was made within six months, which was the period allowed by the Act of 1908, and the change in the period of limitation effected by Act 26 of 1920, may not have been and probably was not known to the parties, and the omission to set aside the abatement was a formal defect not affecing the merits of the order. 75 Ind. Cas. 283=47 Bom. 92=24 Bom.L.R. 909=A.I.R. 1922 Bom. 449.

——Art. 177—Legal representative already on record.

When the legal representative of a deceased defendant is already on record, an application to bring his legal representative on record within 3 months is not necessary. 1938 O.W.N. 1043=A.I.R. 1938 Oudh 259=177 Ind. Cas. 979.

——Arts. 177, 176—Scope.

Deceased merely applicant or opponent in proceeding preliminary to filing of appeal—Neither Art. 176 nor Art. 177 applies. A.I.R. 1934 Sind 36=28 S. L.R. 150=148 Ind. Cas. 819.

——Art. 177—Scope.

An application for bringing on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death is governed by Art. 181 and not by Art. 177. 73 Ind. Cas. 387=A.I.R. 1924 Lah. 316.

———Art. 177 and S. 30—Scope of—Appeal filed under Old Act—Limitation Act (1877) and (1908), Art. 177—Death of respondent—Legal representative—Limitation.

Though an appeal is filed while the Act of 1877 was in force, the legal representatives of the deceased

respondent, should be brought on record within the period under Art. 177 of the Limitation Act of 1908 though the Act, comes subsequently in force. Otherwise the appeal would abate. 34 Mad. 292=20 M. L.J. 347=7 M.L.T. 115=(1910) M.W.N. 516=5 Ind. Cas. 420.

——Art. 178—Applicability and scope—Application contemplated by.

An intimation to the Court by the arbitrator that he is filing the award in Court will not be an application as contemplated under Art. 178 of the Limitation Act for filing the award in Court. But if a party has to make an application to the Court asking the Court to order the arbitrator to file the award in Court, such an application by the party to the Court is covered by Art. 178 of the Limitation Act. I.L.R. (1949) A. 631=1948 A.L.J. 524=A.I.R. 1949 A. 234.

——Art. 178—Applicability and scope—Article applies only when there is an application by the party.

Under Art. 178, it must be an application by the party to the reference made to the Court for the filing in Court of an award, which can come under that article. Filing of an award by the arbitrator of his own accord does not come under the Article. 47 Bom.L.R. 317=A.I.R. 1945 Bom. 417=I.L.R. (1946) Bom. 113.

——Art. 178—Applicability and scope.

Application to the Court to make the award a rule of the Court does not fall under Art. 178—Court holding application barred, wrongly applying Art. 178. Revision lies. 46 P.L.R. 232=A.I.R. 1944 Lah. 398.

——Art. 178—Applicability and scope.

Rule 22 framed under S. 43 of the Co-operative Societies Act, 1912, has ousted the jurisdiction of civil Court throughout the arbitration proceedings. Art. 178, therefore, has no application and the amended provision regarding limitation as it occurs in Sch. IV, Arbitration Act is also inapplicable. A.I.R. 1943 Cal. 255=47 C.W.N. 478=I.L.R. (1943) 2 Cal. 431=208 Ind. Cas. 196.

——Art. 178—Applicability and scope—(As amended by Arbitration Act of 1940, Sch. I, Part 3)—Applicability of Art. 178 to application by arbitrator for filing award in Court.

Article 178 of the Limitation Act, as amended by Arbitration Act (10 of 1940), applies only to cases where a party to the arbitration applies to the Court for the filing of an award either under S. 14 (ii) or under the implied power given by S. 38, Arbitration Act 1940. It does not apply to an application by the arbitrator for the filing of the award in Court. The rules framed by Sind Chief Court which prescribe a form in which the application by an arbitrator for filing an award is to be made, cannot bring the application by the arbitrator for filing an award in Court within the purview of Art. 178. A.I.R. 1943 Sind 33=I.L.R. (1942) Kar. 466=205 Ind. Cas. 304.

——Art. 178—Applicability and scope.

A period of limitation will be prescribed by the Legislature for a party who seeks the assistance of the Court for the establishment of a pecuniary claim or any other legal rights against another party or parties. The Legislature would not provide a period of limitation for an application by a party who has no interest therein and who does not seek the assistance of the Court for any such purpose such as for example an application by an arbitrator to file an award in Court under the Arbitration Act. A.I.R. 1943 Sind 33=I.L.R. (1942) Kar. 466=205 Ind. Cas. 304.

——Art. 178—Applicability and scope—As amended by Arbitration Act 10 of 1940—Effect of amendment.

Applicability of Art. 178 to applications under Arbitration Act for obtaining filing of award and not for filing of award itself—Art. 178, held inapplicable to facts of the case. A.I.R. 1942 Cal. 542=I.L.R. (1942) 2 Cal. 69=203 Ind. Cas. 269.

——Arts. 178, 181—Applicability and scope.

Application to file award passed under Arbitration Act—Article applicable is Art. 181 and not Art. 178. A.I.R. 1941 Pesh. 3=192 Ind. Cas. 758.

——Art. 178—Applicability and scope.

Art. 178 has no application, when award is not filed under S. 20 of the Second Schedule of the C. P. Code for the purpose of obtaining a decree thereon. 39 C.W.N. 1301=163 Ind. Cas. 591.

——Art. 178—Applicability and scope.

An application under para. 20, Sch. II, is not the only remedy open to a person in whose favour the award is made. He can file a regular suit in which case Art. 178, Limitation Act does not apply. A.I.R. 1935 Lah. 134.

——Arts. 178 and Ss. 5 and 12—Application beyond time.

An application to file an award beyond 6 months after date of its being given, is barred under Art. 178 and in the circumstances of the case. Ss. 5 and 12 did not save limitation. 38 All. 85=13 A.L.J. 1115 =31 Ind. Cas. 899.

——Art. 178—Application to file an award—Limitation.

The time for an application to file the award begins on the date the award is delivered to the parties and not the date of signatures by the arbitrators. 4 Pat.L.J. 394=48 Ind. Cas. 711.

——Art. 178—Award not filed in time.

Award not made rule of Court within limitation period—Award does not become invalid. 11 L.R. A. Rev. 32=A.I.R. 1930 Oudh 51.

——Art. 178 (as amended in 1940)—Starting point—"Date of service of the notice of the award".

The notice referred to in the third column of Art. 178, Limitation Act, as amended by the Arbitration Act, 1940, is the notice in writing required by S. 14 (1) of the Arbitration Act to be given by the arbitrators. Time runs only from the date of the service of the notice under S. 14 (1). 27 Pat. 86 =A.I.R. 1949 Pat. 393.

——Art. 178—Period fixed under—Computation—Starting point.

The period of 90 days referred to in Art. 178 of the Limitation Act is to be computed from the date when one of the parties or both file an application in Court under S. 14 of the Arbitration Act and has no reference to the time when the arbitrators or umpire are requested to file the award. A.I.R. 1948 Pat. 171.

——Art. 179—Appeal to Privy Council—Limitation.

Interlocutory judgment by the High Court—Issue

remitted to lower Court for finding—On receipt of finding final judgment passed:

Held, appeal to Privy Council lay from final judgment and that an application for leave to appeal could be made within 90 days of the final decree. 35 Bom. L.R. 415=A.I.R. 1933 Bom. 251=145 Ind. Cas. 258.

——Art. 179—Limitation — Computation—Art. 179 and S. 5—Application for leave to appeal to Privy Council—Time taken up in review of judgment sought to be appealed against can be excluded—Time taken in obtaining copy of review order if can be excluded.

In computing the period of limitation for an application for leave to appeal to the Privy Council the time taken up for review of the judgment sought to be appealed against was allowed to be excluded under S. 5.

But the time taken up in obtaining a copy of the review order was not allowed to be excluded as a copy of that order would not have been reasonably required for drawing up either the petition for leave or the grounds of appeal. A.I.R. 1946 Cal. 10=49 Cal.W.N. 758=222 Ind. Cas. 475.

——Art. 179, 181—Limitation—Computation.

An application in an income-tax case for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council is governed by Art. 179 rather than by Art. 181, and the time has to be computed from the day of judgment. A.I.R. 1932 Cal. 587=36 C.W.N. 127=59 C. 251=139 Ind. Cas. 236.

——Art. 179—Limitation—Computation—Time for obtaining copies.

Application for leave to appeal to P. C.—Time for obtaining copies should excluded.

Such petition after 90 days is not barred, if in support of exclusion of copying time, the copy of decree is filed by applicant. 105 Ind. Cas. 852=10 N.L.J. 242=24 N.L.R. 97=A.I.R. 1928 Nag. 63.

——Art. 179—Limitation—Computation—Time taken for review.

In computing the period of limitation for an application for leave to appeal to Privy Council, the time taken up for review of the judgment sought to be appealed against should be excluded. 85 Ind. Cas. 191=49 Bom. 149=26 Bom.L.R. 1261=A.I.R. 1925 Bom. 137.

——Art. 179—Limitation—Computation—Application for leave to appeal to His Majesty-in-Council—Time taken for obtaining copies of decree and judgment, can be excluded.

In computing the period of limitation under Art. 179 of the Limitation Act, the applicant is entitled under S. 12, Cl. 2 to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree. S. 12, sub-S. (2) of the Limitation Act is general in its terms and applied to all applications for leave to appeal including an application for leave to appeal to His Majesty-in-Council. Under sub-S. (3) of S. 12 the time requisite for obtaining a copy of the judgment ought also to be deducted in cases of application for leave to appeal to His Majesty-in-Council. The provisions of sub-S. (3) are meant to apply generally to cases covered by sub-S. (2) and the reason seems to be this that if the appeal in question is from a decree then it is generally necessary that the judgmenr on which that decree is based should also be obtained. 66 Ind. Cas. 88=3 P.L.T. 289=1922 P.H.C.C. 193=1 Pat. 429=A.I.R. 1922 Pat. 255.

——Art. 179—Criminal case.

Quaere:—Seeing that Art. 179 mentioned only civil cases, is the general rule of limitation of three years contained in Art. 181 to hold good in criminal cases. 82 Ind. Cas. 763=38 C.L.J. 406=25 Cr. L.J. 1371=A.I.R. 1924 Cal. 338.

——Art. (179) 177 and S. 5—Scope—Application filed during holiday—Filed during vacation—Limitation Act (XI of 1877), S. 5, Art. 177—Vacation—High Court when closed.

The Second paragraph of S. 5 of the Limitation Act, 1877, applies to Art. 177. When, therefore, an application for leave to appeal to His Majesty in Council was filed in the Privy Council department of the office of the High Court during the long vacation, when the Court was notified as closed, but the offices were open, the applicant was entitled to the benefit of the second paragraph of S. 5 of the Limitation Act. (1908) 10 C.L.J. 118 =3 Ind. Cas. 400. *Also* (1909) 10 C.L.J. 120=3 Ind. Cas. 401.

——Art. (179) 177—Scope and applicability—Ss. 5 and 12 not applicable to appeals to Privy Council.

See C. P. Code, S. 100. 1906 A.W.N. 55=3 A. L.J. 165=28 A. 391.

——Art. 179—Starting point.

Where the original decree is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up. 64 Ind. Cas. 622=34 C.L.J. 397=A.I.R. 1921 Cal. 89.

——Art. 180.

Synopsis.

1. Applicability and scope.
2. Fresh application.
3. Interpretation.
4. Limitation and starting point of.
5. Sale, when complete.
6. Miscellaneous.

1. Applicability and Scope.

——Arts. 180, 182—Application for possession by decree-holder auction-purchaser.

An application for possession by an auction-purchaser whether he is a decree-holder or a stranger, is governed by Art. 180 and not by Art. 182. There is nothing to indicate that the Legislature intended this article to apply to those auction-purchasers who were strangers. A.I.R. 1941 Pesh. 10=193 Ind. Cas. 337.

——Arts. 180, 181, 182—Applicability and scope—Application for possession by decree-holder-purchaser.

As Art. 180, applies to an application for possession by a decree-holder purchaser, the residuary Art. 181, does not apply. Nor can the application for delivery be regarded as an application for execution. So Art. 182 cannot apply. Art. 180 being the more specific article, it must therefore apply. A.I.R. 1935 Mad. 803=(1935) M.W.N. 926=42 M.L.W. 375=8 R.M. 483=58 M. 893=69 M.L.J. 821=159 Ind. Cas. 279 (F.B.).

——Art. 180—Applicability and scope.

Article 180 applies to application by purchaser for delivery of possession and not Art. 181. There is no warrant for extending the period of limitation by

applying Art. 181 to a case where, owing to the auction-purchaser's default, delivery could not be effected. Opinion of *Oldfield, J.*, in (1918) M.W. N. 914, Foll. 91 Ind. Cas. 485=23 M.L.W. 472= A.I.R. 1926 Mad. 385=50 M.L.J. 72.

——Art. 180—Applicability and scope.

An application by a decree-holder purchaser for delivery of possession of the properties purchased by him in Court-auction is not an application to execute the decree and is governtd by Art. 180. 32 M. 136, Foll. 19 M.L.T. 164=3 L.W. 191=32 Ind. Cas. 993.

2. Fresh application.

——Art. 180—Previous petition dismissed for no fault of party—Subsequent petition must be treated as continuation of previous one.

An auction-purchaser who had applied for delivery of possession apprehended obstruction from the defendant and wanted time to take possession with necessary Police help. The Court, instead of posting the petition to some other date to enable the purchaser to get the necessary Police help, dismissed the petition:

Held, that since this was not a case in which the party was at fault, the dismissal of the petition must be considered to be an order adjourning the petition *sine die* till the petitioner took steps, and a subsequent petition must be considered to be a continuation or reminder of a previous application for the purposes of limitation. A.I.R. 1942 Mad. 718= 1942 M.W.N. 554=55 M.L.W. 569 (2)=(1942) 2 M.L.J. 355=204 Ind. Cas. 468.

——Art. 180—Application 'closed' without final orders—Fresh application—Limitation.

An execution sale was confirmed on 30th August, 1921. The decree-holder who had purchased the properties, which included a house in auction filed a petition for delivery of possession on 22nd September, 1921, but the house was not delivered. He filed another petition on 23rd September, 1924, alleging that the house had not been delivered to him as it was under lock and key. The Court ordered delivery. On 11th March, 1926, he again applied for delivery. This application was dismissed as time-barred. Another application was filed on 3rd, March, 1927. The final order on the petition of 22nd September, 1921, was simply 'closed' and on the petition of 23rd September, 1924, was 'delivery on 9th December, 1924,' after which there were no further orders:

Held, (1) that the last petition, namely, that of 3rd March, 1927, should be regarded as a reminder to the Court to proceed with the original petition on which delivery was ordered and which was never properly disposed of and it was not, therefore, time-barred. No time runs against the presentation of such a reminder petition. 38 M.L.W. 347=65 M. L.J. 305=A.I.R. 1933 Mad. 745=(1933) M.W. N. 970=145 Ind. Cas. 397.

——Art. 180—Fresh application—Petition of compromise—Petition of compromise filed before Court executing decree—Judgment-debtor entering into arrangement for instalments with decree-holder—Executing Court directing case be disposed of according to petition of compromise—Compromise acted on and certain payments under it credited by decree-holder—Fresh application for execution beyond three years of passing of decree—Effect could be given to compromise so as to save limitation.

A decree for Rs. 4,087-6-0 with costs and interest at 6 per cent. was passed on 11th April, 1923. A petition of adjustment was filed on 19th September, 1924 before the executing Court and the Court directed that the terms should be noted and the case disposed of in terms of the petition of compromise. The compromise provided that the decree-holder should get Rs. 4,000 in full payment of his decree, that the judgment-debtor should pay Rs. 1,000 forthwith and the balance in monthly instalments of Rs. 150 from October, 1924, and in default of payment of four instalments the decree-holder would realize the whole of the decretal amount with interest at 9 per cent. The last clause of the agreement was that the house belonging to the judgment-debtor should remain charged for the decretal amount and that the decree-holder should in default of payment realize the same by sale of the house with interest at 9 per cent. by calculating from the date of default of any payment. Rs. 1,000 were paid and also the first two instalments and thereafter payment ceased. On 10th December, 1928, an application for execution of the decree was made. It was argued that more than three years had elapsed after the last step-in-aid of execution on 13th September, 1924, and that the parties could not by agreement enlarge the time of limitation. Alternatively it was argued that if effect could be given to the compromise, then under the terms the whole debt became due in April, 1925, and that application was more than three years after that date,

Held, that as the compromise had been acted upon and payments made under it which were credited by the decree-holder, effect could be given to the compromise.

Held, further that when all the clauses of the agreement were read together, the intention of the parties was to leave at the option of the decree-holder either to enforce the payment of the whole of the decretal amount at once or to continue to abide by the instalments and that he was entitled to recover the instalments which were due for three years before the application. A.I.R. 1930 Pat. 615=11 Pat.L.T. 609=128 Ind. Cas. 786.

——Arts. 180 and 181—Fresh application—Execution Sale—Application by purchaser for possession of property—Further application to carry out order for delivery—Limitation—Dismissal or stiking off execution application—Conduct of decree-holder.

The sale of properties to the decree-holder auction-purchaser was confirmed on 16th January, 1911. On 9th November, 1912 and 4th December, 1912, he made applications for delivery of possession but they were both dismissed by an order, dated 4th December, 1912, on the ground that he was unable to identify the land. A third application was made on 4th July, 1913, but on 30th July, 1913, the Court ordered on it. "No one to take delivery, Petition dismissed". Finally on the 16th April, 1915, the purchaser again applied for delivery of possession but was met with a plea of limitation. *Held* Per *Abdur Rahim, J.* (Oldfield, J. contra) that there being no evidence to show that the order of dismissal on 30th July, 1913, was made after hearing the purchaser, it must be deemed a dismissal only for statistical purposes; and (2) that the application of 1915 might be treated as one for execution of the general order for delivery made on 4th July, 1913, and being in that view merely a con-

tinuation of the prior proceedings was not barred by Art. 180. (1918) M.W.N. 214=7 L.W. 16=43 Ind. Cas. 155.

3. Interpretation.

——Art. 180—Interpretation—The meaning of Art. 180 is plain because the word "purchaser" in this article includes cases of a decree-holder purchaser and a purchaser who is not a decree-holder. A.I.R. 1935 Mad. 803=(1935) M.W.N. 926=42 M.L.W. 375 =58 M. 893=69 M.L.J. 821=159 Ind. Cas. 279 (F.B.).

4. Limitation and starting point of.

——Art. 180—Application for delivery—Limitation.

An application under O. 21, R. 95, C. P. Code, has to be made within 3 years from the date of the confirmation of sale. It cannot be delayed merely because sale certificate has not been issued though no order could be passed until a certificate is issued. 56 C.L.J. 574=A.I.R. 1932 Cal. 75=134 Ind. Cas. 1188.

——Art. 180—Starting point.

Period of three years under Art. 180 governing the application of the auction purchaser for delivery of possession of property purchased is to be reckoned from the date of the confirmation of sale under O. 21, R. 92 and not from that of the final disposal of the application of judgment-debtor under O. 21, R. 90. 120 Ind. Cas. 107=56 Cal. 608=A.I.R. 1930 Cal. 86.

——Art. 180—Limitation and starting point of.

After an auction-purchase possession cannot be granted more than three years after its confirmation. Defect as to limitation is not a formal one. 79 Ind. Cas. 691=A.I.R. 1925 Oudh 106.

——Art. 180—Application under O. 21, Rr. 90 and 92—After statutory period—Sale partially set aside—Application by purchaser for possession—Limitation—Suspension of.

Per *F. B. (Oldfield, J., Diss.)*.—An application to set aside Court sale made after the statutory period after the confirmation of the sale, was admitted and partly disallowed. *Held*, in an application by an auction-purchaser to be put in possession, time is to be computed from the date when the application under O. 21, R. 90 was disallowed and not from the date of the confirmation in the first instance. 43 Mad. 185=26 M.L.T. 459=38 M.L.J. 1=54 Ind. Cas. 66 (F.B.).

——Art. 180—Limitation and starting point of —Delivery of possession—Application for, after passing of Act.

Where an auction-sale was confirmed before the Limitation Act of 1908, but the application for possession was made after the coming into force of the Act, the application was governed by the Art. 180 and is barred, if not made within three years from the date when the sale became absolute. 27 Ind. Cas. 420 (Cal.).

——Art. 180—Execution of decree—Confirmation of sale—Application for delivery of possession—Limitation.

Where an execution sale was confirmed and the judgment-debtor appealed against the confirmation and the same was compromised on terms that the decree amount was to be paid by instalments and on default of payment the sale should stand confirmed, and where default was made and an application was made by the decree-holder for possession of the property, limitation counts from the date of the default of payment of the instalment and not from the date of the first confirmation of the sale. 22 Ind. Cas. 497 (Cal.).

——Art. 180—Starting point—Application for delivery of property.

An application for delivery of property sold in Court-auction should be made within 3 years from the date when the sale becomes absolute. 12 M.L.T. 311=(1912) M.W.N. 1136=17 Ind. Cas. 242.

——Art. 180—Delivery of possession—Limitation.

The purchaser should apply for delivery of possession within three years of the date of confirmation. 14 C.W.N. 433=11 C.L.J. 357=5 Ind. Cas. 89.

5. Sale, when absolute.

——Art. 180—Order of confirmation of sale challenged under S. 47|151, C. P. Code—Application for possession — Limitation — Starting point.

Where the formal order of confirmation of sale is challenged by a petition under S. 47|151, C. P. Code, the order itself comes into question. If such a petition is made within three years, the period within which an auction-purchaser must apply for possession under O. 21, R. 95, C. P. Code, the sale cannot be described as absolute during the period that the petition for setting aside the sale remains pending. For purposes of Art. 180 of the Limitation Act, the sale becomes absolute not on the date when the formal order of confirmation was passed but on the termination of the litigation commenced by the judgment-debtor for having the sale set aside. I.L.R. (1950) Assam 119=A.I.R. 1950 Assam 89.

——Art. 180—"When the sale becomes absolute"—Construction.

In construing the meaning of the words "when the sale becomes absolute" in Art. 180, Limitation Act regard must be had, not only to the provisions of O. 21, R. 92 (1) of the Schedule to the Civil P. C. but also to the other material sections and Orders of the Code, including those which relate to appeals from orders made under O. 21, R. 92 (1). The result is that where there is an appeal from an order of the Subordinate Judge disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180, Limitation Act until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale as he was bound to do when he decided to disallow the above mentioned application. A.I.R. 1934 P.C. 134=38 C.W.N. 901=67 M.L.J. 79=40 L.W. 65=36 Bom.L.R. 717=59 C.L.J. 547=(1934) M.W.N. 765=(1934) A.L.J. 618=11 O.W.N. 1213=36 P. L.R. 289=61 I.A. 248=4 A.W.R. 1624=61 C. 845=150 Ind. Cas. 11 (P.C.).

[Overrules—A.I.R. 1930 Cal. 86=120 Ind. Cas. 107.]

——Art. 180—Sale, when absolute.

The holder of a mortgage-decree purchased the property on September 17, 1924. The application of one of the judgment-debtors to set aside the sale was dismissed on May 30, 1925, and the sale was confirmed. An appeal by the judgment-debtor was also

dismissed on July 25, 1927. The decree-holder applied for delivery of possession on January 18, 1929:

Held, that the application was governed by Art. 180 and was in time being made within three years of the final order confirming the sale. A.I.R. 1933 Cal. 311 =56 C.L.J. 520=147 Ind. Cas. 881.

——Art. 180—Sale—When absolute.

When there are proceedings disputing the validity of the decree and the validity of the sale held thereunder the sale could not be held to have become absolute till those proceedings are disposed of and final orders passed in them; and time begins to run under Art. 180 from that date only. 43 Mad. 185 (F. B.), Foll. 99 Ind. Cas. 632=25 M.L.W. 108= 1927 M.W.N. 60=A.I.R. 1927 Mad. 391.

——Art. 180—Sale, when absolute—Application to set aside sale dismissed—Suit to set aside sale filed—Time during which the suit is pending cannot be deducted, in favour of an auction-purchaser.

In computing period of limitation under Art. 180 time during which an application under O. 21, R. 90, for setting aside the sale is pending will be deducted as the sale will be deemed to be absolute when such application is rejected, but the time during which a suit to set aside the sale, on rejection of an application under O. 21, R. 90, is pending cannot be deducted. There is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside a Court sale. 96 Ind. Cas. 657=23 M.L. W. 744=1926 M.W.N. 563=A.I.R. 1926 Mad. 857=51 M.L.J. 126.

6. Miscellaneous.

——Art. 180—Proceedings disputing validity—Order confirming sale is valid so long as it is not set aside.

If for some reason or other, that is by operation of S. 18, Limitation Act, or for some other reason, the judgment-debtor prays for time for making an application for setting aside the sale being extended, the order confirming the sale which is already made cannot be said to be ineffective. That order should be considered to be effective so long as it is not set aside. 43 Mad. 185, Foll. 120 Ind. Cas. 107= 56 Cal. 608=A.I.R. 1930 Cal. 86.

——Art. 180—Miscellaneous—Revival.

In the case of application for delivery the revival theory does not apply. The only question is when the right to apply accrued. 95 Ind. Cas. 718=1926 M.W.N. 317=A.I.R. 1926 Mad. 698.

——Art. 181.

See also, LIMITATION ACT, Art. 182.

Synopsis.

1. Applicability and Scope.
2. Addition, Substitution and Transposition of parties.
3. Application—Meaning of.
4. Execution against Surety.
5. Execution of decree.
6. Execution Sale.
7. Insolvency and Winding up proceedings.
8. Instalment decree.
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12. Probate proceedings.
13. Refund and Restitution.
14. Revision application.
15. Revival of execution.
16. Revival of suit.
17. Starting point of limitation.

1. Applicability and Scope.

(a) General.

(b) Whether confined to application under C. P. Code.

(a) General.

——Arts. 181, 182—Article 181 is a residuary article. It cannot be applied if the case falls within Art. 182. The criterion for determining whether Art. 182 or Art. 181 applies to a particular application is to ascertain whether any one of the six points of time specified in column 3 of Art. 182 is applicable to it. If none of them is applicable, only then would Art. 181 apply. 57 M.L.W. 493= (1944) 2 M.L.J. 192=1944 M.W.N. 606=I.L.R. (1945) Mad. 80=A.I.R. 1944 Mad. 561=216 Ind. Cas. 325 (F.B.).

[Overrules—A.I.R. 1924 Mad. 210=79 Ind. Cas. 779].

——Arts. 181, 182—The true criterion in determining whether Art. 182 or Art. 181 applies to a particular application is to ascertain whether any one of the six points of time specified in Col. 3 of Art. 182 is applicable to it and if none of them is applicable, it is only then that Art. 181 will apply. 49 M.L.W. 483=(1939) 2 M.L.J. 271=A.I.R. 1939 Mad. 441=(1939) M.W.N. 305=189 Ind. Cas. 348.

——Art. 181—When the case is covered by any other article, no question of applicability of the residuary article arises. A.I.R. 1942 Oudh 139=1941 O.W.N. 1232=1941 A.W.R. 1057=1941 R.D. 1036=197 Ind. Cas. 12.

——Art. 181—Application in pending case—Art. 181 does not apply nor any rule of limitation. (1915) M.W.N. 725, Appr. 32 M.L.W. 329=59 M.L. J. 102=53 Mad. 378=A.I.R. 1930 Mad. 528.

——Art. 181—Applicability—Application for amendment of order of executing Court under S. 152, C. P. Code.

An application for amendment of an order of an executing Court under S. 152, C. P. Code, is governed by Art. 181, Oudh Sunat Act, corresponding to Art. 181, Limitation Act, and the period of limitation is 3 years from the date when the right to apply accrues. A.I.R. 1950 Pepsu 52.

——Art. 181—Order granting amendment, setting aside of.

An application to set aside an order granting an amendment under S. 152, C. P. Code, is governed by Art. 181 and not by Art. 164. A.I.R. 1933 Rang. 264=145 Ind. Cas. 823.

——Art. 181—Applicability. *See* SECURITY BOND (1948) 2 M.L.J. 287=A.I.R. 1949 Mad. 152.

——Art. 181—Applicability—Proceedings under S. 55 or 56 of the Presidency Towns Insolvency Act.

Art. 181 of the Limitation Act is confined to applications under the C. P. Code, and it has no application to proceedings under S. 55 or S. 56 of the Presidency Towns Insolvency Act, which can be

started at any time during the subsistence of insolvency proceedings. I.L.R. (1949) 1 Cal. 1=52 C. W.N. 343.

——**Art. 181—Applicability—Applications under Provincial Insolvency Act—Question of title if and when can be gone into by the Insolvency Court.**

Art. 181 of the Limitation Act does not apply to applications under the Provincial Insolvency Act. If the title has not been extinguished by adverse possession, the Insolvency Court has power to decide the question of title on an application under S. 4 and Art. 181 of the Limitation Act will not prevent it from so doing. I.L.R. (1948) Nag. 506=A.I.R. 1948 Nag. 367=1948 N.L.J. 264.

——**Art. 181**—Applicability—Application under S. 44 of the Madras Hindu Religious Endowments Act to enforce charge created in favour of temple under settlement deed. *See* LIMITATION ACT, ARTS. 132 AND 181. (1947) 2 M.L.J. 258=A. I.R. 1948 Mad. 199.

——**Arts. 181 and 182**—Applicability—Award under S. 54, Bombay Co-operative Societies Act—Execution—Limitation applicable. *See* BOMBAY CO-OPERATIVE SOCIETIES ACT (AS AMENDED BY ACT XVI OF 1943), S. 59 (1) (a). 49 Bom.L.R. 160=A.I.R. 1947 Bom. 370.

——**Arts. 181 and 182—Applicability—Bombay Co-operative Societies Act, S. 54—Award under —Execution by Civil Court—Limitation.**

The proper article of limitation applicable to the execution of an award under S. 54 of the Bombay Co-operative Societies Act, by the Civil Court under S. 59 (1) (*a*) of the Act, is Art. 182 and not 181 of the Limitation Act. 49 Bom.L.R. 168=A.I.R. 1947 Bom. 375=I.L.R. (1947) Bom. 143.

——**Arts. 181 and 183**—An award filed in Bom. High Court is governed by Art. 183 and not Art. 181. A.I.R. 1942 Bom. 34=I.L.R. (1942) Bom. 124=43 Bom.L.R. 1006=198 Ind. Cas. 505.

——**Arts. 181, 178—Application to file award passed under Arbitration Act.**

An application to file an award passed under Arbitration Act, is governed by Art. 181, Limitation Act, and not by Art. 178 which applies only to applications under C. P. Code, Art. 181, Limitation Act, applies to all applications which are not provided for in the schedule and not necessarily to applications under the C. P. Code, which had not been mentioned in the schedule. A.I.R. 1941 Pesh. 3 (4)=192 Ind. Cas. 758.

——**Arts. 181, 180, 182**—Execution proceeding by decree-holder—Court ordering judgment-debtor's land to be leased to decree-holder for 15 years in full satisfaction of decree—On default, execution filed on 30th September, 1935—Mutation of lease entered and attested on 29th December, 1937—Neither judgment-debtor nor any one representing Court present—On 30th May, 1939, lease certificate drawn up and signed by Judge—Application by decree-holder on 11th November, 1940, for possession of leased land—Arts. 180 and 182 held inapplicable—Art. 181 applied —Time ran from 30th May, 1939, and not from 29th December, 1937. A.I.R. 1942 Pesh. 87=204 Ind. Cas. 66.

——**Art. 181**—Article 181 does not apply to applications in the nature of plaint. In any case the application of Art. 181 to applications under S. 16, Telegraph Act would often be futile for the starting point of limitation does not arise when the damage is caused but only when the right to apply accrues and this in turn does not happen until the dispute with regard to the sufficiency of compensation arises, which may not be until long after the damage is caused. A.I.R. 1942 Lah. 186=I.L.R. (1943) Lah. 677=44 P.L.R. 275=201 Ind. Cas. 739.

——**Art. 181**—Proceedings under S. 17, Telegraph Act are governed by Art. 181, Limitation Act. A. I.R. 1935 Lah. 982=38 P.L.R. 883=17 L. 391=160 Ind. Cas. 636 (2).

——**Art. 181**—An application for leave to execute a decree against a partner under O. 21, R. 50 (2) falls under Art. 82 and not under Art. 181. A.I. R. 1936 Sind 138=30 S.L.R. 88=164 Ind. Cas. 1011.

——**Art. 181**—An application to recover landlord's transfer-fee under S. 26-J, Ben. Ten. Act, 1885 is governed by Art. 181. 38 C.W.N. 50=A.I.R. 1934 Cal. 396=149 Ind. Cas. 1134.

——**Art. 181—"Decree to be drawn up on production of succession certificates."**

The plaintiffs, in a suit to recover money, obtained a decree on 10th June, 1921, subject to the following condition: "The decree should be drawn up after the several claimants produce succession certificates and apply for the drawing up of the decree." In 1923 and 1924, the plaintiffs applied twice for drawing up of the decree but as they produced no succession certificates, the applications were dismissed. On 19th February, 1926, they applied with the certificate and the lower Court held that the application was barred by limitation:

Held, that the succession certificate and not an application for drawing up of the decree was the essence of the judgment, the decree necessarily following upon the production of the certificate, and as the judgment specified no time for the production of the certificates, Art. 181 did not apply to the right of the plaintiffs to produce a succession certificate and, therefore, their application was in time. A.I.R. 1931 Bom. 407=33 Bom.L.R. 618=134 Ind. Cas. 694.

——**Art. 181**—Application under S. 47, C. P. Code must be governed by the residuary article. 97 Ind. Cas. 697=A.I.R. 1927 Cal. 57.

——**Art. 181**—The article applicable for applications under S. 47 of the Code is Art. 181 which gives three years from the date when the right to apply accrues. 103 Ind. Cas. 233=54 Cal. 419=A.I.R. 1927 Cal. 614.

——**Art. 181—Application under S. 39, C. P. Code for transfer of execution.**

Application made under S. 39, C. P. Code for the transfer of the execution of the decree is not an application for execution within the meaning of O. 21, R. 10, but an application to take a step-in-aid of execution, governed by the residuary Art. 181. 94 Ind. Cas. 482=A.I.R. 1926 All. 473.

——**Art. 181—Certification of payment by decree-holder.**

It is not incumbent upon the decree-holder to certify payment by making an application for the purpose, and therefore Art. 181 does not apply. But the certification cannot be postponed indefinitely, for it must be made within three years before execution is applied for to save the decree from limitation under S. 20, Indian Limitation Act, or on the ground

of waiver. 86 Ind. Cas. 1051=30 C.W.N. 945=54 Cal. 143=A.I.R. 1925 Cal. 1012.

——Art. 181—Application to certify payments made within three years of decree may be made within three years from such payments and decree-holder will have fresh start for limitation from such application—Limitation Act, Art. 182. 84 Ind. Cas. 359 =84 Ind. Cas. 473=3 Bur.L.J. 235=2 Rang. 393 =A.I.R. 1925 Rang. 26.

——Art. 181—**Application by decree-holder to record payment made to him out of Court—Art. 181 applies.**

Where a decree-holder in execution of his decree sought to escape the bar of limitation under Art. 182 by reference to a payment made by the judgment-debtor out of Court.

Held, that he was entitled to plead the payment that Art. 174 of the Limitation Act is not applicable to case under sub-R. 1 of R. 2, of O. 21, but is applicable only to a case under O. 21, R. 2, sub-R. (2) and that under Art. 181 the decree-holder can certify the payment within 3 years of the date of payment.

There is no period of limitation for an application by decree-holder, who has received payment from the judgment-debtor out of Court, to record the payment. Therefore the only article applicable is 181 of the Limitation Schedule which provides that an application, for which no period of limitation is provided elsewhere in this schedule shall be made within three years from the time when the right to apply accrues. 68 Ind. Cas. 780=26 C.W.N. 529=35 C.L.J. 71= A.I.R. 1922 Cal. 30.

——**Art. 181—Dismissal for default—Execution application.**

An application to restore an application for execution dismissed for default is governed by Art. 181. 2 Lah.L.J. 627=56 Ind. Cas. 25.

——**Arts. 181 and 84—Applicability of—Taxation of costs—Suit—Application — Calcutta High Court—Original side.**

An application under Ch. XXXVIII, R. 67 of the Rules of the Original Side of the Calcutta High Court is not governed by Art. 84. An application can be ordered summarily only when there is no contest or doubt; otherwise a suit is the proper remedy. 46 Cal. 249=23 C.W.N. 473=51 Ind. Cas. 941.

——**Art. 181 (178)—Rule 859 of the High Court Rules—No period of limitation applies to proceedings under this rule—Practice.**

There is no specific provision in the Limitation Act or anywhere else fixing a period of time within which an application for enforcement of payment of costs by a solicitor against his client by the summary method provided by R. 859 of the High Court Rules, should be made. Art. 178 applies only to applications under the Civil Procedure Code, 1882. (1907) 9 Bom.L.R. 508=32 Bom. 1.

——**Arts. 181, 182, (178, 179)—Applicability—** Only to decrees and orders of civil Court—Not applicable to certificates under S. 38 of Madras Revenue Recovery Act. *See* MADRAS ACTS—REVENUE RECOVERY ACT, S. 40. 17 M.L.J. 441 =31 M. 24.

——**Arts. 181, 182—Test of applicability of article—Mortgage-decree—Application for execution—Limitation—Civil Procedure Code, S. 243—Stay of execution—Suit disposed of—Application after such disposal—Application for order absolute — Application to keep decree alive.**

Whether Art. 179 of Art. 178 (O.A.) will apply to a particular application will depend upon the nature and portion of the decree sought to be executed and upon the fact of the application in question being the first or a subsequent application. The true criterion in determining whether Art. 179 or 178 (O.A.) applies to a particular application is to ascertain whether any one of the six points of time specified in Col. 3 of Art. 179, is applicable to it, and if none of them applies it is only then that Art. 178 will apply. Under the present law (*see* para. 4 of Art. 179) an application cannot be made merely for the purpose of signifying the decree-holder's intention to keep the decree in force as it would be possible under the old law (*see* para. of Art. 167 of Act IX of 1871). An order staying execution under S. 243, C. P. Code, merely postpones execution but does not vary the decree. An order varying the decree can only be made either on review under S. 623, C. P. Code, or on amendment under S. 206, C. P. Code, or under S. 210, C. P. Code. An order staying execution may be passed either by the Court which passed the decree or by the Court executing the decree as a proceeding in execution under S. 244, C. P. Code. Where an order is passed under S. 243, C. P. Code, staying execution of a decree pending the disposal of a suit, no day is fixed for payment of the amount due under the decree within the meaning of para. 6, Art. 179 (3rd Col.) A decree which directs sale of the mortgaged property in default of payment of the mortgage money within a time fixed by the decree is not a decree directing the payment of the amount to be made at a certain date within the meaning of para. 6, Col. 3, of Art. 179. Where no prior application for execution of such decree or to take some step in-aid of execution is made and an order is obtained under S. 243, C. P. Code, staying execution of such decree pending the disposal of another suit, an application for execution made after the disposal of such suit is governed by Art. 178, although 3 years may have elapsed from the date of the decree or the date mentioned in the decree for payment, provided the application is within 3 years from the disposal of the suit, when the right to apply for execution accrues and provided 3 years from the date mentioned in the decree for payment have not elapsed at the date of the order staying execution. A first application for execution of a decree directing the sale of mortgaged property made on default of payment by the mortgagor within the time fixed is governed by Art. 178 and not by Art. 179. Where there is a personal decree against the mortgagor and the application is to execute the decree as such, limitation will run from the date of the decree under para. 1, if payment is enforceable under the decree from the date thereof or from a future date if payment can be enforced under the decree only on or after such future date fixed in the decree. An application for an order absolute for sale under S. 89 of the Transfer of Property Act is only an application to enforce the decree. In construing the Articles stress must not be laid exclusively upon the entry in the first column ignoring the entries in the 3rd column. If the various starting points fixed in the 3rd column of any Article from which the period of limitation is to be reckoned do not cover all cases falling within the class of suits or applications described, then the Article in question is not exhaustive of the class. If the Article is inapplicable to certain cases comprised in the class those cases will be governed, in the cases of suits, by the resi-

duary Article No. 129, and in the case of applications by the residuary Art. No. 178. (1903) 26 M. 780=13 M.L.J. 412.

(b) Whether confined to applications under C. P. Code.

——**Art. 181**—*Quaere.*—It is doubtful whether Art. 181, should be held to include only those applications which are made under some definite provision or rule of the Civil P. C. 44 P.L.R. 275=A.I.R. 1942 Lah. 186=I.L.R. (1943) Lah. 677=201 Ind. Cas. 739.

——**Art. 181**—Article 181, Limitation Act, relates only to applications under the Civil P. C. Where no application is required by the Code, Art. 181 does not apply to such an unnecessary application when made. A.I.R. 1934 All. 465=3 A.W.R. 154=(1934) A.L.J. 86=151 Ind. Cas. 755.

——**Art. 181—Interpretation.**

Article 181 must be construed as referring to *ejusdem generis* applications with those in preceding articles, *viz.*, C. P. Code ones. 102 Ind. Cas. 543 =A.I.R. 1927 Nag. 262.

——**Art. 181—Applicability of—Application under C. P. Code.**

Article 181 of the Limitation Act, refers to all applications for the making of which the Civil Procedure Code gives authority and to no others. 1 Lah. 187=2 Lah. L. J. 291=55 Ind. Cas. 820.

——**Art. 181**—Article 181 governs the limitation of every application made to a Court under any Act except those for which different periods are prescribed in the Acts itself under which they are made. 109 Ind. Cas. 559=24 N.L.R. 100=11 N.L.J. 65=11 N.L.J. 200=A.I.R. 1928 Nag. 194.

2 Addition, substitution and transposition of of parties.

——**Art. 181—Impleading of parties—Right to sue accruing during pendency of suit.**

Limitation bars a suit where the right to sue had already accrued before the suit. But where a suit has already been brought in time and the right to sue some other person accrues during the pendency of the suit, the question is one of impleading parties who are affected by the doctrine of *lis pendens*. Limitation, if at all applicable to such a case, will be governed by Art. 181. But no question of limitation arises where the money has been withdrawn after the preliminary decree. 7 C.L.T. 49=A.I.R. 1942 Pat. 185=23 P.L.T. 412=197 Ind. Cas. 739.

——**Art. 181—Application to be added as plaintiff—Suit under O. 1, R. 8, C. P. Code.**

Article 181 applies to an application to be added as a plaintiff in a suit under O. 1, R. 8, Civil P. C., in place of the deceased original plaintiff. Suit cannot be dismissed for default before the expiry of the period prescribed by Art. 181. A.I.R. 1931 Mad. 590=33 M.L.W. 604=60 M.L.J. 659=54 M. 777 =132 Ind. Cas. 289.

——**Art. 181—Some of legal representatives brought on record in time.**

Where some of the legal representatives have been brought on the record on an application made within limitation, a subsequent application for bringing others on record as legal representatives is not governed by 90 days' rule but is governed by 3 years' limitation under Art. 181. 1944 N.L.J. 331=I.L.R. (1944) Nag. 577=A.I.R. 1945 Nag. 53.

——**Art. 181—Death of decree-holder pending execution—Application by legal representative for substitution.**

Article 181, Limitation Act, applies only to application made under the Civil P. C.

An application by the legal representatives of a deceased decree-holder for substitution and continuing the execution proceedings is not an application under the Civil P. C. They are proceedings by which the inherent jurisdiction of the Court is invoked. Section 151 does not deal with any application nor does it prescribe the procedure for any application; it is a clause whereby the inherent power which is in the Court to act *ex debito justitiae*, is recognised and left unfettered by the Code. An application invoking this power is one which is not made under any provisions of the Code and, therefore, it is not governed by Art. 181 or any other article of the Limitation Act. A.I.R. 1942 Cal. 390=75 C.L.J. 114=46 C.W.N. 326=201 Ind. Cas. 479.

——**Art. 181**—There is no provision of law laying down procedure for substitution in place of a deceased party in revision application and the reason is obvious. The remedy provided by S. 115, Civil P. C., is absolutely discretionary.

Obiter.—But assuming that such an application is subject to the law of limitation, then the residuary article of Limitation Act, *i.e.*, Art. 181 would apply. A.I.R. 1939 Oudh 277=1939 A.W.R. 149=1939 O.W.N. 819=15 Luck. 26=184 Ind. Cas. 81.

——**Art. 181**—Article 177 and not Art. 181 governs an application to bring on record the legal representatives of the deceased respondent in an appeal against an order made in execution proceedings. A.I.R. 1932 Mad. 574=(1932) M.W.N. 597=36 M.L.W. 170=55 M 1006=63 M.L.J. 827=139 Ind. Cas. 409.

——**Art. 181**—The procedure laid down in Rr. 3, 4 and 11 of O. 22, C. P. Code for substitution of legal representative of appellant or respondent is not exhaustive. Such application can be made at any time within period prescribed by Art. 181, Limitation Act. 10 P.L.T. 763=A.I.R. 1929 Pat. 565 (F.B.).

——**Art. 181**—An application for bringing on record the legal representatives of a deceased person who was not a defendant or respondent on the date of his death is governed by Art. 181 and not by Art. 177. 73 Ind. Cas. 387=A.I.R. 1924 Lah. 316.

——**Art. 181**—The period of limitation to bring on record the legal representatives of respondents who have died during pendency of Privy Council Appeal for purposes of execution is 3 years from the date of the decree. 80 Ind. Cas. 85=20 M.L.W. 99=1924 M.W.N. 439=47 Mad. 618=35 M.L.T. 50=A.I.R. 1924 Mad. 695=45 M.L.J. 154.

——**Art. 181—Application for substitution under S. 362, C. P. Code.**

Art. 178 governs applications under S. 362, C. P. Code, for substitution of respondent already on record as representative of a deceased respondent. (1906) 4 C.L.J. 568=11 C.W.N. 186.

——**Art. 181 (178)—Application for substitution of parties pending suit.**

The right to apply for substitution under S. 372, C. P. Code, accrues from day to day and is not barred by Art. 178 (O:A.) even though the application

is made more than 3 years after the death of a party. (1903) 7 C.W.N. 517=30 C. 609.

——Art. 181—Appeal against a representative of a party deceased since the passing of the lower Court's decree—Application to bring his representative on the record. *See* 1901 A.W.N. 46.

——Art. 181—Applicability—Pending suit—Application for substitution — Assignee of preliminary decree.

Where the assignee of a preliminary decree for possession and mesne profits applied for being substituted in the suit, within 3 years from the date of assignment but amended the application after 3 years, *held* that the application must be treated as having been made on the date on which it was originally presented, and even if it is deemed to have been made on the date of assignment it is not barred as the right of the assignee to apply for substitution in a pending suit was a right which accrued from day to day. 18 C.W.N. 450=20 Ind. Cas. 685.

——Art. 181—Transposition of party.

Where a suit is brought on behalf of a trust by a trustee impleading his co-trustee as a party defendant, and where the plaintiff dies, the suit can be continued by the latter. Order 22, R. 3, does not apply. Article 181 and not Art. 176 applies to a petition for such transposition. 62 Ind. Cas. 360=13 M.L.W. 148=1921 M.W.N. 108=A.I.R. 1921 Mad. 124=40 M.L.J. 208.

3 Application—Meaning of.

——Art. 181—"Application", meaning.

The word 'Application' means an application on which judicial decision of Court is required. A.I.R. 1944 All. 217=I.L.R. (1944) All. 473=1944 O.W.N. 141=1944 A.W.R. 168.

——Art. 181—Certificate of a decree-holder under O. 21, R. 2 (1), Civil P. C., is not an application within the meaning of Art. 181. 10 O.W.N. 1251 =A.I.R. 1934 Oudh 426=9 Luck. 288=147 Ind. Cas. 766.

——Art. 181—"Application"—Meaning of.

The mere fact that the document purporting to be made under O. 21, R. 2 (1) was called "an application," and was in the form of a petition cannot alter the real nature of the procedure and convert what was really no more than a certificate of certain payments into an "application," within the meaning of Art. 181. 114 Ind. Cas. 581=3 Luck. 684=56 I.A. 30=29 M.L.W. 161=33 C.W.N. 267=1929 A.L.J. 33=6 O.W.N. 29=31 Bom. L. R. 289=A.I.R. 1929 P.C. 19=56 M.L.J. 233 (P.C.).

——Art. 181—Certification by decree-holder is not application.

The word "application," when used in Art. 181 means an application *"ejusdem generis"* in other words an application on which the Court has to decide judicially; and as certification by a decree-holder under O. 21, R. 2 (1) does not raise any point on which a Court has to decide judicially, a certification is not in any circumstances an application within the meaning of Art. 181. 98 Ind. Cas. 353=1 Luck. 428=29 O.C. 358=3 O.W.N. 829=A.I.R. 1927 Oudh 7.

4 Execution against Surety.

See also under ART. 182.

——Arts. 181, 182—An application to enforce a security bond against the surety to whom the property of the judgment-debtor attached in execution of a decree was entrusted is governed by Art. 181 and not by Art. 182, Limitation Act, as such an application cannot be deemed to be an application for the execution of the decree. (1943) 2 M.L.J. 444 =56 M.L.W. 632=1943 M.W.N. 669.

——Arts. 181, 182—Although a decree is not passed against a surety, it may still be executed against him by reason of S. 145, C. P. Code, and the limitation for an application for execution of a decree against him is laid down by Art. 182, Limitation Act and the decree-holder cannot break away from that article.

On judgment-debtor's furnishing security for mesne profits till disposal of his appeal, the execution of the decree for possession of certain lands was stayed. The surety executed a bond undertaking to pay mesne profits to a certain extent if the appeal was dismissed. On the appeal being dismissed, the decree-holder sought execution against the surety to the extent mentioned in the bond:

Held, that the application was one for the execution of an order of a civil Court under S. 145, C. P. Code. The article applicable was Art. 182 and not Art. 181. 40 P.L.R. 473=A.I.R. 1938 Lah. 590 =181 Ind. Cas. 14.

——Arts. 181, 182—The application for execution against the sureties is an application for execution of a decree as by operation of S. 145, C. P. Code the sureties become judgment-debtors under the decree. Such an application for execution, therefore, comes under Art. 182, and not under Art. 181, Limitation Act. A.I.R. 1937 Cal. 452. 41 C.W.N. 1099=173 Ind. Cas. 183.

——Arts. 181, 182—When a decree, dated 3rd September, 1919, was put into execution, one *N* stood surety for the judgment-debtor and executed a security bond stating that if the decretal amount could not be realised from the property of the judgment-debtor, then he would pay the decretal amount in monthly instalments and that if he failed to pay these instalments, the decree-holder would have the right of recovering the decretal amount from his property. The last application for execution against the judgment-debtor was made on 23rd May, 1930, and it was consigned to the record room after a portion of the amount was paid on 7th October, 1930. The first application for execution against the surety was made on 24th March, 1931:

Held, (i) that the period of limitation against the surety did not run under Cl. 1, Art. 182, Lim. Act, from the date of the decree:

(ii) that Expl. 1, Art. 182, did not cover the facts of the case as the decree was not passed jointly against more persons than one;

(iii) that Art. 181 applied and that the period of limitation was three years from the date when the right to apply accrued and as the decree was kept alive against the judgment-debtor till 7th October, 1930, the application was within time. A.I.R. 1933 Oudh 209=10 O.W.N. 571=8 Luck. 427=143 Ind. Cas. 808.

5 Execution of decree.

———Art. 181—Applicability—Application for execution of notional decree under C. P. Debt Conciliation Act.

Limitation for an application under S. 47, C. P. Code, whether arising in a decree passed by a civil Court, or arising in a proceeding in execution of a notional decree under the C. P. Debt Conciliation Act, is governed by Art. 181 of the Limitation Act. I.L.R. (1948) Nag. 63=A.I.R. 1948 Nag. 147=1948 N.L.J. 24.

——Arts. 181, 182 (2)—Maintenance decree—Decree sought to be varied by suit—Execution petition after passing of decree restoring maintenance decree—Held period between institution of suit for variation and final decree in it not to be excluded—Art. 181 applicable and not Art. 182 (2).

A decree for maintenance payable in cash was passed in 1922. The decree was being executed until filing of a suit in 1935 for variation of the maintenance into grain basis from cash. The trial Court decreed the claim partly on 9th July, 1937. On appeal the suit was dismissed on 12th August, 1940. During the pendency of the suit the decree-holder sought to execute maintenance decree, but it was dismissed on 13th August, 1937, as not pressed. A fresh application was filed in 1941, claiming dues from 10th January, 1935 to 10th January, 1941:

Held (1) that the suit for variation of the maintenance decree was no legal impediment in the way of execution. Hence the period of the suit could not be excluded;

(2) that Art. 181 applied and not Art. 182 (2);

(3) that the order passed on the execution petition filed in 1937 was final and therefore the petition filed in 1941 could not be treated as a revival or continuance of the petition. A.I.R. 1946 Mad. 67=(1945) 2 Mad.L.J. 444=221 Ind. Cas. 554.

——Arts. 181 and 182—Decree for permanent injunction not capable of immediate execution—Execution—Limitation—Art. 181 applies—Bar of S. 48, C. P. Code, does not apply.

Where a decree prohibits the defendant from obstructing a village path it is a decree granting permanent injunction and is not capable of execution on the date it is passed or in other words, until an obstruction is caused there is nothing to execute. In such circumstances its execution may not be necessary till after 12 years of the date of its passing. As soon as any obstruction is caused and the Court's order in that behalf is breached a cause of action for enforcement of the decree arises. In such cases Art. 181, Limitation Act, applies and not Art. 182 and the decree-holder's right to apply accrues only when the obstruction is caused. Such a decree is beyond the reach of the bar provided in S. 48, C. P. Code. A.I.R. 1946 Pat. 392=25 Pat. 397=224 Ind. Cas. 37.

——Art. 181—An application under O. 21, R. 32, C. P. Code, to enforce an execution of the decree for injunction, must be made within limitation as prescribed by Art. 181. A.I.R. 1935 Lah. 702=37 P.L.R. 576=160 Ind. Cas. 777.

——Art. 181—Applicability of—Injunction—Application to enforce—Limitation.

Quaere:—Whether Art. 181 of the Limitation Act applies to an application to enforce an injunction under O. 21, R. 32 C. P. Code or whether there is no limitation for it? 46 Cal. 103=27 C.L.J. 506=45 Ind. Cas. 864.

——Art. 181—Decree for perpetual injunction—Execution. *See* C. P. CODE, S. 260. 29 M. 314.

——Arts. 181, 182—Conditional decree fixing time for payment.

Where a conditional decree for possession fixes a time for the payment of the amount awarded by it as a condition precedent to the possession, its execution for purposes of limitation is governed by Art. 181 and the starting point is the date of the deposit of the money. The mere fact that the decree does not fix any time for payment will not attract the application of Art. 182.

In determining the period for the deposit of the money in cases in which no time is fixed, neither Art. 181 nor Art. 182 applies. Nor is there any other article in the Limitation Act governing the case. Under the circumstances, the decree-holder would be entitled to deposit the money within 12 years or within such period which falls short of the period necessary for the judgment-debtor to acquire an independent title to the property. (1944) A.L.J. 449=1944 A.W.R. 286=A.I.R. 1945 All. 10=1944 O.W.N. 244=I.L.R. (1944) All. 717.

——Arts. 181, 182—Conditional decree for possession.

Where there is a decree for possession on the payment of a sum on a future date, the provisions of Art. 182, Limitation Act can have no application. Art. 181 is the article applicable to such a case and limitation runs from the time when the right to apply accrues. The decree-holder's right to enforce decree arises when the sum is payable. The execution of most decrees necessitates the possession of a certain amount of money and it is impossible to say that a decree is not executable because the plaintiff had not got the money necessary to enable him to execute it. A.I.R. 1938 Bom. 367=40 Bom.L.R. 512=I.L.R. (1938) Bom. 649=177 Ind. Cas. 499.

——Arts. 181, 182—Decree for possession on condition of payment of money to judgment-debtor.

When a decree for possession is passed on condition of payment of a certain sum by the decree-holder, the starting point of limitation for execution of the decree is the date of the decree and not the date of payment by the decree-holder, and an application for execution of such a decree is governed by Art. 182 and not by Art. 181.

Limitation runs in such cases from the date of the decree, whether any time for payment is fixed or not. The only effect of fixing a time for payment is that payment cannot be made after the date fixed. A.I.R. 1931 Nag. 54=26 N.L.R. 353=130 Ind. Cas. 148.

——Art. 181—Conditional decree for possession not fixing time for payment.

Where, under the terms of a decree, the right of the decree-holder to recover possession of some property in the hands of the defendants is contingent upon the decree-holder paying certain sums of money to the defendants but no date for payment is specified, the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment had been made. The right accrues to the decree-holder immediately and at once, an application for execution made more than three years from the date of the decree is time-barred under Art. 181, Limitation

Act. (1931) A.L.J. 319=A.I.R. 1931 All. 326=131 Ind. Cas. 559.

——Art. 181—Conditional decree for possession—Amount to be paid to be decided later.

Decree for possession passed on condition that plaintiff should pay for improvements to defendant. Amounts to be decided later, on commissioner's report—Art. 181 applies and time to apply for execution accrued from date on which amounts were finally fixed by Court. 1930 M.W.N. 979=A.I.R. 1930 Mad. 995=59 M.L.J. 579.

——Arts. 181, 182—Decree held incapable of execution by subsequent decree of competent Court—Period during which subsequent decree is in force must be excluded—Subsequent decree set aside—Decree-holder would get fresh cause of action under Art. 182 (3) or modified decree would be in time under Art. 181.

The law of limitation would apply only if an operative decree were in existence. When no such decree exists, the Limitation Act can have no application to it. The decree-holder is entitled to have full three years for the execution of his decree. If, by the order of a competent Court, the decree has been rendered a nullity, the period during which that order is in force must be excluded, otherwise the period of limitation allowed to the decree-holder would be reduced to less than three years. There is no justification for such a reduction of time for the execution of a decree either in law or equity. The decree-holder would have a fresh cause of action from the date of the decree which sets aside the decree rendering the original decree incapable of execution which should be considered to be the date of the decree under Cl. 3, Art. 182, Limitation Act, or in the alternative, the modified decree would be within time under Art. 181, as the right to execute accrued after the decrees became capable of execution. A.I.R. 1944 All. 88=(1944) A.L.J. 98=1944 O.W.N. 50=1944 A.W.R. 67=I.L.R. (1944) All. 197=212 Ind. Cas. 621.

——Art. 181—*M* obtaining decree for possession against *R*—*B* who was in possession as result of decree in suit between him and *R*, obstructing execution by *M*—*M's* application under O. 21, R. 97, C. P. Code dismissed—Appeal to High Court by *R* against decree in suit between him and *B*—High Court holding *R* as lawful owner—*B* appealing to Privy Council—*M* applying for execution of his decree more than three years after decision of High Court—Application, held time-barred under Art. 181. A.I.R. 1938 Lah. 695=40 P.L.R. 481=179 Ind. Cas. 165.

——Art. 181—Decree against firm—Objections—Limitation.

Decree against firm—Sale—Objection by sons of judgment-debtor that property did not belong to firm—*Ex parte* decree against some sought to be set aside—Dismissal of application under O. 9, R. 13, C. P. Code on ground that decree was against firm.

Held, that decree-holders could not contend that decree was against individuals composing firm—Limitation for objection is governed by Art. 181 and not by Art. 166. A.I.R. 1936 Pat. 496=163 Ind. Cas. 34.

——Arts. 181 and 166—Objection to sale by Judgment Debtor.

Objection that decree was in reality mortgage-decree and that other properties of judgment-debtor could not be sold unless the mortgaged properties are first sold and the sale proceeds proved insufficient, falls under S. 47, Civil P. C. and is governed by Art. 181 and not by Art. 166—Second appeal lies from the order thereon. A.I.R. 1933 Lah. 570=145 Ind. Cas. 113.

——Art. 181—Objections to execution proceedings—Article applies.

Article 165, Limitation Act, does not govern the cases of those applications which are filed by the parties to the suit as objections to the execution proceedings under S. 47, C. P. Code. The only article applicable in those cases is Art. 181. 38 All. 339; 42 Mad. 753 (F.B.); A.I.R. 1922 Bom. 271 and 1 L.L.J. 230, Foll. 115 Ind. Cas. 444=4 Luck. 209=5 O.W.N. 1053=A.I.R. 1929 Oudh 76.

——Art. 181—Satisfaction of decree by execution — Decree-holder compelled to restore property by subsequent proceedings—Revival of decree—Execution.

If, as a result of execution, a decree has been satisfied and if the decree-holder is compelled to refund or restore the property as a result of proceedings taken subsequently by the judgment-debtor or by a third party, the satisfied decree revives on the refund or the restoration of the property and an application to execute the revived decree would be competent within three years from the time when the right to apply accrued to the decree-holder. In such a case, the starting point for an application would be the date when the decree-holder was compelled to refund the amount recovered by him. Where the High Court merely declares that the execution proceedings are ineffectual and it is the executing Court that ordered restitution, the limitation begins to run from the date on which restitution takes place. A.I.R. 1935 Lah. 166=158 Ind. Cas. 5.

——Art. 181—Application during pendency of execution proceeding.

Per *Niamatullah, J.*—Where it is the duty of a Court to do something or to take some action, Art. 181 does not govern such an application to do such thing or take such action. Thus, when an execution proceeding is pending, the right to apply is a recurring one and any application made during the pendency of the proceeding cannot be barred by Art. 181. A.I.R. 1931 All. 458=(1931) A.L.J. 436=133 Ind. Cas. 316.

——Art. 181—Article 181 applies only when Art. 182 cannot apply.

Article 182 is the article framed for an application for execution of a decree. Article 181 could be brought into play only when there are definite circumstances which would make Art. 182 inapplicable.

A decree-holder made an application for execution. Before the date fixed for sale the decree-holder made another application to the Court stating that he had given the judgment-debtor six months' time, that his application may be struck off and the judgment-debtor saddled with costs. He was not taken on his word and the Court directed that the judgment-debtor should appear in order to verify the application. On the day fixed for appearance the judgment-debtor did not appear and Court struck off the application. More than three years after this an application for execution was again made. It was attempted to prove the oral agreement granting six months' time to bring the case within the purview of Art. 181,

Held, that the only article that could apply to the subsequent application was Art. 182 and not 181. 114 Ind. Cas. 894=A.I.R. 1929 All. 606.

——Art. 181—Applicability of—Execution application.

Art. 181 is applicable only to applications for which no period of limitation is provided elsewhere and is clearly inapplicable to applications for execution of decrees to which Art. 182 is applicable. 7 Ind. Cas. 886 (Cal.).

——Art. 181—Date of decree means the date when the decree becomes executable.

A compromise decree provided that the money should be payable without interest within six months and that if no such payment was made, the decree-holder should be entitled to recover his money with interest at Re. 1 per mensem from the date of decree.

Held, that the decree did not become capable of execution till a default had been made by the judgment-debtor to pay the decretal money within the period allowed and whether Art. 181 or 182 (7) was applied, the time would not commence to run till after the expiry of that period. The amount to which the decree-holder became entitled became then determinable and recoverable. 19 A.L.J. 26 (P. C.) and 40 Mad. 989, Foll. 79 Ind. Cas. 605=46 All. 73=21 A.L.J. 861=4 L.R.A Civ. 591=A.I.R. 1924 All. 263.

——Art. 181—Where the execution Court suspended the execution proceedings and ordered that it would not proceed with the execution unless an application was made.

Held, the application would be governed by Art. 181. 61 Ind. Cas. 417=43 All. 383=19 A. L. J. 174=A.I.R. 1921 All. 99.

——Art. 181—Suit under O. 21, R. 63, decided in favour of decree-holder—Fresh attachment if necessary—Limitation therefor.

A claimant's objection to attachment of property on the ground of title succeeded, but subsequently the decree-holder's regular suit was finally decided against the objector,

Held, the final decision of the suit in favour of the decree-holder operated to revive the original application for attachment and no question of limitation arose. But if the decree-holder's successes did not operate to revive the original application for attachment and the decree-holder had to make a fresh application the fresh application is governed by Art. 181 and not by Art. 182 of the Limitation Act. 61 Ind. Cas. 817 (Lah.).

——Arts. 181, 178, 188—Order dismissing appeal on default by the Privy Council—Affirmance of decree below—Limitation for execution of decree.

The decree-holder obtained a decree for sale upon mortgage. The judgment-debtor appealed but the High Court dismissed the appeal on 8th April, 1893. The appellant appealed to the Privy Council but took no steps to prosecute the appeal. His appeal was dismissed for want of prosecution on 13th May, 1901. On 14th May, 1904, the decree-holder appealed to the Court below to make the order for sale absolute. The application was dismissed on the ground that the procedure prescribed by S. 619, Code of Civil Procedure, 1882 had not been followed. An application was made by the decree-holder on 11th June, 1906, under S. 610 and the decree was transmitted for execution to the Court below. The present application was then made for order absolute. *Held,* that the dismissal of the judgment-debtor's appeal for want of prosecution was an affirmance of the decree to the High Court within the meaning of S. 596 of the Code of Civil Procedure, 1882, it being immaterial on what ground the appeal was dismissed. The order of His Majesty dismissing the appeal for default was an affirmance of the decree of the High Court and was alone capable of enforcement. An application for such enforcement made within twelve years of the date of the order was governed by Art. 180 (O. A.) and was an application which was made within time. 20 A. 367, appr. of and applied. (1910) 7 A.L.J. 1001=33 A. 154=7 Ind. Cas. 926 (F.B.).

——Arts. 181, 182—Execution of decree—Limitation—Decree for pre-emption—Time from which limitation begins to run against the decree-holder.

Art. 179 (O.A.) applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution until the decree-holder pays into Court the pre-emptive price. The first application, therefore, for execution of such a decree will be governed not by Art. 179, but by Art. 178, and limitation commences to run against the decree-holder from the time when the pre-emptive price is paid. (1902) A.W.N. 60=24 A. 300. *See also* 1 A.L.J. 15.

——Art. 181 (178)—Execution of decree—Execution temporarily suspended by action of Court.

A decree-holder in whose favour a decree for sale had been passed on the 27th May, 1891, and the 3rd of February, 1892, respectively, applied for sale of the mortgaged property or 4th April, 1893. One of the judgment-debtors instituted a suit to set aside the decree on the ground of fraud and on 5th December, 1892, obtained an injunction restraining further proceedings in execution pending the decision of the suit and ultimately a decree setting aside on the ground of fraud the decree of 27th May, 1891. In appeal, however, the decree of 27th May, 1891, was on the 8th April, 1895, restored, the judgment-debtor's suit being dismissed; and this judgment was affirmed by the High Court on 4-8-1897. On 23-6-1899 the decree-holder again applied for execution of the decree of 27-5-1891.

Held, that Art. 178 (O.A.) applied; that time began to run against the decree-holder from 8-4-1895, when the bar to execution which had been imposed by the injunction and subsequent decree obtained by the judgment-debtor was removed; and that the decree-holder's application for execution was time-barred. (1902) 1903 A.W.N. 221=26 A. 156.

——Arts. 181, 182—Application to take a step-in-aid of execution.

An application to take a step-in-aid of execution may be governed by Art. 178 (O.A.); but Art. 179 does not govern it. (1900) 24 M. 188=10 M.L.J. 342.

——Art. 181—Payment within three years, but certification by decree-holder after expiry of three years, whether saves limitation.

A decree was passed on 4th August, 1917. The first execution petition was presented on 15th March, 1919. The second petition was put in on 16th August, 1924, and in that, the decree-holder gave credit for a payment said to have been made by the judgment-debtor in 1921:

Held, that the decree had not become barred when

the second application was presented even though certification of the payment was made only on the date of the second petition. A.I.R. 1935 Mad. 922 =159 Ind. Cas. 38.

6 Execution Sale.

(a) Application by purchaser for possession.
(b) Application for setting aside.
(c) Fresh application after sale is set aside.
(d) Miscellaneous.

(a) Application by purchaser for possession.

——Art. 181—Failure of auction-purchaser to complain of resistance under O. 21, R. 97, C. P. Code, within thirty days, cannot take away the right to apply under O. 21, R. 95, C. P. Code, to which Art. 181 applies. A.I.R. 1941 Nag. 322=1941 N. L.J. 494=I.L.R. (1942) Nag. 633=198 Ind. Cas. 284.

——**Art. 181—Article 180 applies to application** for possession by a decree-holder-purchaser, the residuary Art. 181, does not apply. A.I.R. 1935 Mad. 803=(1935) M.W.N. 926=42 M.L.W. 375 58 M. 893=69 M.L.J. 821=159 Ind. Cas. 279 (F.B.).

——**Art. 181—Artticle 180 applies to application by purchaser for delivery of possession and not Art. 181.**

Art. 180 is applicable to an application by the purchaser of immovable property of a sale in execution of a decree for delivery of possession and not Art. 181. There is no warrant for extending the period of limitation by applying Art. 181 to a case where, owing to the auction-purchaser's default, delivery could not be effected. *Opinion of Oldfield, J.*, in (1918) M.W.N. 214, Foll. 91 Ind. Cas. 485 =23 M.L.W. 472=A.I.R. 1926 Mad. 385=50 M. L.J. 72.

——**Arts. 181 and 182—Applicability of—Application under C. P. Code, O. 21, R. 95.**

An application by a decree-holder purchaser for delivery of possession of properties is not one in execution of a decree and so is governed by Art. 178 and not Art. 179 and such an application would be barred if not brought within 3 years from the grant of the sale certificate. 32 Mad. 136=19 M.L.J. 224 =1 Ind. Cas 998.

——**Arts. 181, 182—Application for possession under S. 318, C. P. Code (1882), not an application in execution.**

An application by a decree-holder for delivery of property purchased is not in strictness an application for execution of the decree; and an application for possession under S. 318, C. P. Code of 1882 is governed by Art. 178 of the Limitation Act, (1877) and not by Art. 179. (1908) 19 M.L.J. 224=32 M. 136=1 Ind. Cas. 998.

——**Art. 181—Date of confirmation of sale—Starting point of limitation for execution.**

S. 316 of the C. P. Code, provides that the certificate of sale is to bear the date of the confirmation of sale and it must be deemed to have been granted on the date which it bears. Although the grant of a certificate is a necessary preliminary to an application under S. 318, such an application will be barred by limitation under Art. 178 (O.A.) if not made within three years of the date which the certificate bears, that is, the date of the confirmation of sale. Dissenting judgment of *Kemball, J.* in 3 B. 433, foll. (1908) 5 A.L.J. 516=30 A. 390.

(b) Application for setting aside.

—Art. 181—Applicability—Application to set aside sale held in the absence of a proclamation of sale. *See* C. P.CODE, O. 21, R. 66. (1950) 1 M.L.J. 22=A.I.R. 1950 Mad. 367.

——Art. 181—Applicability—Application by judgment-debtor to set aside sale on the ground that he had no saleable interest in the property sold. *See* LIMITATION ACT (IX OF 1908), ARTS. 166 AND 181. (1947) 2 M.L.J. 468=A.I.R. 1948 Mad. 226 (F.B.)

——**Art. 181—Applicability—Sale of shikmi holding in execution of rent decree—Application to set aside—Limitation.**

An application under S. 173 (3) of the Bihar Tenancy Act, to set aside the sale of a *shikmi* holding in execution of a rent decree is governed by Art. 181, Limitation Act; such an application is not one under the C. P. Code, which would attract the operation of a shorter period of limitation of 30 days. 25 Pat. 692=A.I.R. 1947 Pat. 391.

——**Art. 181—Execution sale—B.T. Act, S. 173 —Application to set aside on ground of judgment-debtor purchasing benami.**

An application to set aside an auction sale under S. 173 B.T. Act on the ground that the Judgment-debtor was a benamidar for a third person is governed by Art. 181 Lim. Act. 38 Ind. Cas. 209 (Pat.).

——**Art. 181—Execution sale—Order setting aside rent sale itself set aside—Confirmation later on—Application under S. 173 (3) Bengal Tenancy Act—Limitation.**

Where an order setting aside a rent sale was itself set aside in 1908 and this order was confirmed in 1909 an application under S. 173 (3) of the B. T. Act to set aside the sale on the ground that the purchaser was a *benamidar* for the Judgment-debtor, beyond 3 years from the order of 1908 but within 3 years of the confirmation thereof in 1909 is barred under Art. 181 of the Lim. Act. 24 Ind. Cas. 366 (Cal.).

——Art. 181—Orissa Tenancy Act (B. and O. Act 2 of 1913), S. 227 (3)—Application under, for setting aside sale in execution is not under C. P. Code, S. 47, and is governed by Art. 181 and not by Art. 166, 38 I.C. 209, Foll.; A.I.R. 1925 Cal. 351, Diss. from. 101 Ind. Cas. 564=6 Pat. 366=8 P. L.T. 186=A.I.R. 1927 Pat. 177.

——Art. 181—An application by the son to set aside the sale held in execution of a decree which is executable only against the assets of the deceased judgment-debtor in the hands of the son on the ground that part of the property sold was his own personal property falls under Art. 166 and not under Art. 181, Lim. Act. A.I.R. 1940 Pat. 192=5 C.L.T. 22= 6 B.R. 770=189 Ind. Cas. 256.

——**Arts. 181, 166—Application to set aside sale on behalf of minor.**

Obiter.—An application on behalf of a minor to set aside a sale in execution of a decree against him on the ground of its being made in absence of any guardian to represent the interests of the minor in the execution proceding is governed by Art. 181 and not by Art. 166, inasmuch as the sale is void. A. I.R. 1935 Lah. 972=159 Ind. Cas. 988.

——Arts. 181, 166—Void sale.

If a party wants a sale to be set aside for any of the reasons given in R. 90, O. 21, Civil P. C., then the application must be made within 30 days as enacted by Art. 166, Limitation Act; but where a void sale is sought to be set aside, then the application would not be under R. 90, O. 21, Civil P. C., but will be deemed to be an application made in execution governed by S. 47, Civil P. C., and to which Art. 181, Limitation Act, would be applicable. A.I.R. 1934 All. 314=3 A.W.R. 545=(1934) A.L.J. 859 =151 Ind. Cas. 244.

——Art. 181—Applicability—Sale without notice to minor's guardian. *See* C. P. CODE (V OF 1908), O. 21, R. 22. (1950) 2 M.L.J. 290=A.I.R. 1950 Mad. 801.

——Arts. 181 and 166—Civil P. C., O. 21, R. 22—Application to set aside sale for want of notice.

Where notice has been duly served under O. 21, R. 22, Civil P. C., application to set aside sale for want of notice does not fall within S. 47, Civil P. C., and is not governed by Art. 181 and in the absence of fraud, the question of date of knowledge is also irrelevant. A.I.R. 1932 Cal. 627=36 C.W.N. 242=140 Ind. Cas. 732.

——Art. 181—Under Limitation Act, as amended by Act of 1927, an application by judgment-debtor under S. 47, Civil P. C., to set aside a sale in execution on the ground that notice had not been served on him under O. 21, R. 22 or O. 21, R. 66, Civil P. C., is governed by Art. 166 and not by Art. 181. A.I.R. 1931 All. 145=1931 A.L.J. 119=130 Ind. Cas. 708.

——Art. 181—Setting aside—Void sale—Article 181 applies.

Where notice required by O. 21, R. 22, is not given but the sale or excess sale takes place such a sale is void. Being void the sale need not be set aside and as such sale need not be set aside the period of limitation (comparatively shorter) prescribed by Art. 166 would not apply, so that in cases where sales are held to be void, appropriate relief could be obtained by parties to the suit by proceedings under S. 47, the period of limitation being not the period prescribed for the setting aside of sales but general period of three years prescribed by Art. 181. A.I.R. 1924 Mad. 431 (F.B.), Foll. 123 Ind. Cas. 24=1929 M.W.N. 811=A.I.R. 1930 Mad. 12.

——Art. 181—Application to declare void a sale in contravention of O. 21, R. 22 (1), C. P. Code is governed by Art. 181 and not by 166. 27 C.L.J. 528 and A.I.R. 1924 Mad. 431 (F.B.), Foll. 105 Ind. Cas. 65=55 Cal. 96=46 C.L.J. 579=A.I.R. 1928 Cal. 60.

——Art. 181—Application to set aside execution sale on the ground of want of notice under O. 21, R. 22, is governed by three years' rule of limitation under Art. 181. 97 Ind. Cas. 798=8 P.L.T. 28=A.I.R. 1926 Pat. 397.

——Art. 181—An application under S. 47 falls within Art. 181, Limitation Act and not under Art. 166 of the Act, although in the result the applicant asked for setting aside the sale. 116 Ind. Cas. 634=A.I.R. 1928 Cal. 865.

——Art. 181—Art. 181 applies to application to set aside sale in execution. 84 Ind. Cas. 970=20 M.L.W. 606=1924 M.W.N. 759=35 M.L.T. 96 =A.I.R. 1924 Mad. 859=47 M.L.J. 535.

——Art. 181—Execution sale—Application to set aside—Ex parte decree—Subsequently set aside.

Where properties are sold in execution of an *ex parte* decree and the *ex parte* decree is subsequently set aside, an application to set aside the execution sale is governed by Art. 181 and limitation starts from the date when the *ex parte* decree was set aside. 43 Bom. 235=20 Bom.L.R. 925 =48 Ind. Cas. 130.

——Art. 181—Execution sale—Application to set aside—Suppression of sale process.

An application to set aside an execution sale on the ground of fraudulent suppression of sale process governed by S. 47, C.P. Code and the limitation applicable therefor is that provided by Art. 181 of the Limitation Act. 27 C.L.J. 528=46 Ind. Cas. 221.

——Art. 181—Execution sale—Setting aside—C. P. Code (1908), O. 21, R. 91.

When a portion of a tenure is sold twice for arrears of rent, an application to set aside the sale under O. 21, R. 91 is governed by Art. 181, Sch. 1 and the time runs from the time the right to sue accrues. 14 C. W. N. 1096=6 Ind. Cas. 804.

——Art. 181 (178)—Application to have sale set aside—Fraud in execution proceedings.

An application to have a sale set aside for fraud in execution proceedings is governed by Art. 178 (O.A.) and should be made within 3 years from the date of sale. (1907) 5 C.L.J. 328. *Also* (1900) 5 C.W.N. 265.

6. (c) Execution sale—Fresh application after sale is set aside.

——Art. 181—Execution sale — Sale set aside — Fresh opplication—Pendency of appeal—Effect.

After a sale in execution of a decree is set aside the decree-holder can within three years from the date of the order setting aside the sale again apply for execution. Though the order forms the subject of an appeal, an application for execution during the pendency of the appeal within the aforesaid period of three years is not barred. 56 Ind. Cas. 1004 (Pat.).

——Art. 181—Execution sale—Set aside — Fresh application.

The limitation for a fresh execution begins on the date when a previous execution sale is set aside on account of fraud as between the judgment-debtor and the auction-purchaser. 4 Pat.L.J. 213 =(1919) P.H.C.C. 121=48 Ind. Cas. 245.

——Arts. 181 and 182—Execution sale—Set aside at instance of judgment-debtor—Fresh application —Limitation.

Where an application for execution of decree was made in July, 1909 in pursuance of which the property attached was sold and the sale was set aside at the instance of the judgment-debtor on 12th February, 1910 and a fresh execution petition was filed on 10th December, 1912 to bring to sale the very same property,

Held, that the last application was a continuation of the previous application and was therefore within time. It would also be treated as an applica-

tion under Art. 181 and was within time because it was made within 3 years of the date on which the sale was set aside. 1 Pat. L. W. 73=2 Pat. L. J. 115=(1917) P.H.C.C. 133=39 Ind. Cas. 89.

——Art. 181 (178)—Execution sale set aside—Application for fresh sale.

Where an auction sale held in execution of a decree is set aside, an application by the decree-holder for a fresh sale is governed by Art. 178 (O.A.) and time does not run until the date of the order directing him to refund the purchase money. (1906) 17 M.L.J. 194=30 M. 209.

6. (d) Execution sale—Miscellaneous applications.

——Art. 181—Application by auction-purchaser for confirmation of sale.

Application by auction-purchaser for confirmation of sale would not attract the operation of Art. 181, Limitation Act; which contemplates a case where a Court has got to be moved by an application and without which it is not bound to exercise its powers. A.I.R. 1941 Cal. 411=45 C.W.N. 493=195 Ind. Cas. 708.

——Art. 181—Applcation for re-sale.

The Civil Procedure Code contains no provision stating when the application for a resale shall be made, and therefore the decree-holder is entitled to make the application at any time within three years as Art. 181, Limitation Act applies. A.I.R. 1940 Mad. 566=(1940) 1 M. L. J. 537=(1940) M.W.N. 345=51 M.L.W. 739=193 Ind. Cas. 325.

——Art. 181—S. 47, C. P. Code—Suit against plaintiff and *A*—Decree against *A* alone——Property attached as belonging to *A*—Objection by plaintiff dismissed—Property sold—Suit by plaintiff under O. 21, R. 63, for declaration that property was his and sale was nullity—Question, held was between parties to suit and fell under S. 47 and suit was not maintainable—Executing Court, held could give declaration even though sale was confirmed—Art. 181, Limitation Act and not Art. 166 applied to such a case—Suit being brought within limitation under Art. 181 could be treated as application under S. 47. A.I.R. 1938 Cal. 113=42 C.W.N. 87=I.L.R. (1938) 1 Cal. 280=178 Ind. Cas. 540.

——Art. 181—When the sale is void for want of jurisdiction, the applicant need not apply for an order asking the decree-holder to deliver the property to him. If such an applications is made, it is governed by Art. 181 and not by Art. 166. The nature of the application is not affected by the mere fact that he has also asked for setting aside the sale. A. I. R. 1937 Rang. 126=1937 Rang.L.R. 164=169 Ind. Cas. 967.

——Art. 181—Objection that property is not liable to sale.

An objection that certain property which has been attached is not liable to sale under S. 60, Civil Procedure Code, falls under S. 47, Civil P.C. and such an application is governed by Art. 181 where the judgment-debtor has not been dispossessed and the time begins to run from the date when the property was attached. 33 Bom.L.R. 781=A. I. R. 1931 Bom. 446=133 Ind. Cas. 858.

——Art. 181—C. P. Code, S. 47, O. 21, R. 9—Execution sale—Application by judgment-debtor pointing that sale is null and void without prayer to set aside sale is governed by Art. 181 and not by Art. 166. 32 P.L.R. 440=A.I.R. 1931 Lah. 586=132 Ind. Cas. 493.

——Art. 181—Art. 181 and not Art. 166 applies where sale being void, relief is claimed under S. 47, C.P. Code. 80 Ind. Cas. 92=47 Mad. 288=19 M. L.W. 179=34 M.L.T. 37=1924 M.W.N. 182=A. I.R. 1924 Mad. 431=46 M.L.J. 104 (F.B.).

——Art. 181—Petition for review of order confirming auction sale is application under S. 47 and governed by Art. 181. 116 Ind. Cas. 65=A.I.R. 1929 Nag. 305.

——Art. 181—The right to apply to recover property wrongly sold in execution accrues at the date of sale. 103 Ind. Cas. 233=54 Cal. 419=A. I. R. 1927 Cal. 614.

——Arts. 181 and 165—Execution sale—Application for — Restoration of possession of property excessively taken in execution.

An application by a judgment-debtor for restoration of immoveable property delivered in execution proceedings in excess of what has been decreed by the Court is governed by Art. 181 and not by Art. 165. 21 M. 494 over-ruled. 38 A. 339 Foll. 42 Mad. 753=37 M.L.J. 340=(1919) M.W.N. 732=26 M.L.T. 297=10 L.W. 410=53 Ind. Cas. 437 (F.B.).

7. Insolvency and winding up proceedings.

——Art. 181—Starting point—Official Receiver in insolvency—Application for possession of property of debtor sold in execution pending application for adjudication.

It is not open to the Official Receiver in insolvency to dispute the validity of an execution sale of the debtor's property held pending the application for adjudication, or the title of the auction-purchaser to the property; an application for possession by the Receiver of the property sold will therefore be in time if presented within three years of date of adjudication, though beyond three years of the sale and the insolvency application. I. L. R. (1946) Nag. 937=A.I.R. 1947 Nag. 76=1946 N. L. J. 597=226 Ind. Cas. 290.

——Art. 181—Sale of insolvent's property—Application by Receiver to set aside.

An application by Receiver to set aside a sale of insolvent's property is governed by Art. 181 and not by Art. 166 which applies only to applications under Rr. 89 to 91 of O. 21, C. P. Code. A.I.R. 1940 Nag. 414=1940 N.L.J. 505=I.L.R. (1942) Nag. 377=192 Ind. Cas. 183.

——Art. 181—Art. 181 does not govern an application under S. 36 of the Provincial Insolvency Act by the Official Receiver to set aside an alienation by the insolvent. 79 Ind. Cas. 443=A. I. R. 1925 Mad. 172.

——Art. 181—Insolvency proceedings — Application by Official Receiver under S. 36 of the Provincial Insolvency Act.

An application under S. 36 of the Provincial Insolvency Act by the Official Receiver for having a transfer made by the insolvent avoided is not governed by Art. 181 of the Limitation Act. That article

applies only to applications made under the C. P. Code. 12 L.W. 535=60 Ind. Cas. 123.

——Art. 181—Provincial Insolvency Act (1907), S. 37—Applications under, by a Receiver are not are not governed by Art. 181 of Limitation Act.

An application under S. 37 of Act 3 of 1907 is not governed by Art. 181 of the Limitation Act. According to the wording of S. 37, if the High Court chooses to take action itself under that section it is not bound by any period of limitation. Therefore the fact that the Court was moved to take action by the Receiver makes no difference. The Court, if it so desires can take action under S. 37, at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice and therefore there is no reason why the Receiver should be restricted by Art. 181 of the Limitation Act in moving the Court to take action.

Obiter: Even assuming Art. 181 to be applicable the right to move in the matter accrued to Receiver from day to day as long as the proceedings continued. 69 Ind. Cas. 403=A.I.R. 1924 Lah. 331.

——Art. 181—Insolvency proceedings — Applications under S. 37, Provincial Insolvency Act—Limitation.

An application under S. 37 of the Provincial Insolvency Act, would be governed by the three years limitation commencing from the date of the adjudication. 151 P.R. 1919=52 Ind. Cas. 188.

——Art. 181—The Court can take action under S. 53 at any time during the pendency of the proceedings when a transfer open to objection under the said section is brought to its notice, by an application made to it by a creditor of the Insolvent, Art. 181 has no application to this case. 75 Ind. Cas. 995=A.I.R. 1924 Lah. 553.

——Arts. 181 and 164—Order of adjudication of insolvent—Application to set aside.

An application to set aside an order of adjudication of an insolvent which has been passed *ex parte* is governed by Art. 164 and not by Art. 181. A. I.R. 1932 Lah. 522=33 P.L.R. 698=138 Ind. Cas. 377.

——Art. 181—Insolvency Proceedings — Application.

The Limitation Act provides periods with reference to suits, appeals and applications, the last being matters arising out of suits. It has no application to proceedings in Insolvency. 17 M.L.T. 347=29 Ind. Cas. 168.

——Art. 181—Application under S. 186, Companies Act.

Art. 181, Limitation Act only relates to applications under the Civil P. Code, in which case no period of limitation has been prescribed for the application. Even if that article applies to an application under S. 186, Companies Act, the period of limitation prescribed by that article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding-up order. (1933) M. W. N. 190=A. I. R. 1933 P. C. 63=(1933) A. L. J. 175=35 Bom. L. R. 319 =37 M. L. W. 445=64 M. L. J. 403=37 C. W. N. 379=57 C. L. J. 166=54 A. 1067=60 I. A. 13=142 Ind. Cas. 7 (P.C.).

8. Instalment decree.

——Art. 181—Starting point—Instalment decree—Default clause—Default — Execution — Application beyond three years of 1st default—Bar of—Waiver—Effect.

In the case of an instalment decree providing that on failure of payment of certain instalments the whole amount may be recovered, the decree-holder is not entitled to exercise his option to recover the whole amount then recoverable when the first default occurred more than three years before the filing of the execution application.

It is well-settled that the right which is given to a decree-holder under a decree to enforce the payment of the full decretal amount in default of payment of any instalment is a right given to the decree-holder for his benefit. He may or may not enforce it; and although a default may take place, he may treat the decree as still a decree for instalments and he may pursue in execution his right to obtain the instalments as and when they fall due.

The mere fact that the decree-holder has an option to exercise a right does not mean that the right does not accrue to him so long as he does not exercise the option. Limitation begins to run when the right accrues for the first time, and once limitation begins to run, it cannot be stopped. It would be open to the decree-holder to waive or condone the default in which case limitation would not run from the default condoned or waived but from the default which the decree-holder treats as a default under the decree. I.L.R. (1951) Bom. 65=A.I.R. 1950 Bom. 188=52 Bom.L.R. 250 (F.B.).

——Arts. 181 and 182—Instalment decree without any default clause—Arrears of instalments—Period for which execution can be had.

In the case of an instalment decree where there is no default clause, execution can be ordered in respect of all instalments due within 3 years of the application for execution. 1947 A.W.R. (Rev.) 89.

——Art. 181—Preliminary mortgage-decree providing instalments—Default in three instalments—Application for final decree three years after the third instalment—Final decree for subsequent instalment—Rights of decree-holder.

There is nothing in Art. 181 which indicates that the decree-holder's right to apply for final decree accrues only once, namely, as soon as the default is made in payment of three instalments and this right accrues not only once but on every subsequent default.

A preliminary mortgage decree providing to pay the sum in eight instalments which would be due in January and July of every year and with usual law in case of default of instalments was passed on September 1, 1936. No instalments were paid and the third instalment fell due on January 1, 1938. But the decree-holder did not apply for the final decree until July 28, 1941, *i.e.*, after three years from the due date of the third instalment. The trial Court dismissed the application as having been time-barred. On first appeal, the lower Appellate Court held that the decree-holder was entitled to waive his right to have a final decree for the entire amount as stated in the preliminary decree and to ask for a final decree in respect of the instalments which were within limitation, *i.e.*, from July 1, 1938 onwards:

Held, that the right to apply for final decree was not limited to the first default, but would arise, not only on the first, but also on subsequent breaches and therefore, the decree of the lower Appellate Court was correct. 1945 A.W.R. (H.C.) 54=A. I.R. 1945 All. 161=I.L.R. (1945) All. 277=1945 O.W.N. (H.C.) 184.

——Arts. 181 and 182—Instalment decree.

The principle of election applies to an instalment decree with a default clause. As soon as default is made, the decree-holder is given two inconsistent rights; he can continue under the decree to recover the amount by instalments, or he can recover the whole amount at once; but he cannot do both. He has alternative rights, and the debtor is subject to alternative obligations. Where the creditor elects to enforce his right to recover the whole debt in one lump sum, the future obligation of the debtor is fixed accordingly, and, it is not open to the creditor subsequently to turn round, and seek to enforce the decree as an instalment decree. It is immaterial whether the execution of the decree-holder is fructuous or not. To such a case article of limitation applicable is Art. 181 and not Art. 182. A.I.R. 1943 Bom. 36=44 Bom.L.R. 880=I.L. R. (1943) Bom. 55=204 Ind. Cas. 526.

——Arts 181, 182—Where a decree is ordered to be paid in instalments and it is provided that the whole decree shall accrue due at once in case of any default, and default occurs in paying an instalment, an application for execution of the remaining unpaid balance of the decretal amount under the second part of the decree is not governed by Art. 182 at all but by Art. 181, and limitation will run from the date of default, the decree-holder being entitled to a decree for the whole balance due less the amount of any individual instalments which, regarded as individual instalments, are not already barred by limitation. A.I.R. 1942 Oudh 31=1941 O.W.N. 1205=17 Luck. 346=1941 A.W.R. 340 =197 Ind. Cas. 689.

——Art. 181—Preliminary mortgage decree directing payment by instalments—Decree-holder, on any default entitled at his option to sell mortgaged property for instalments remaining unpaid—New cause of action accrued on every fresh default. A. I. R. 1942 Mad. 581=55 M.L.W. 276=(1942) 1 M.L.J. 532=1942 M.W.N. 367=I.L.R. (1942) Mad. 770 =202 Ind. Cas. 629.

——Art. 181—Where a decree provides that the amount should be paid by instalments and further provides that in case of any default, the entire sum should be recovered at once, and the default is made, the decree-holder applying for execution of such a decree can rely on the decree as a whole for the purpose of limitation even though his application for the enforcement of the default clause may be barred. The decree-holder's claim to individual instalments which are not barred by time is not time-barred on account of his failure to waive his right to claim the entire decretal amount on the first default. A.I.R. 1942 Oudh 219=1941 O.W.N. 1313 =1941 A.W.R. 382=17 Luck. 449=199 Ind. Cas. 636.

——Arts. 181, 182 (7) (5)—Decretal amount agreed to be paid in instalments—Courses open to decree-holder.

Where the parties agree that the decretal amount should be paid in instalments, a decree-holder has two distinct rights: (1) to receive instalments as and when they fall due: (2) to enforce the payments of all the instalments that might remain unpaid, in the event of two successive instalments remaining unpaid. The first remedy to receive the instalments as an when they fall due will come under Art. 182 (7), Limitation Act. Therefore, this is not a case which is under Art. 181. As the case comes under Art. 182 (7), the first application for execution will come under that paragraph and subsequent applications for execution will come under para. (5). A.I.R. 1938 All. 210=(1938) A.L. J. 117=I.L.R. (1938) All. 342=1938 A. W. R. 115=175 Ind. Cas. 136.

——Art. 181—Held, that the equities were all in favour of decree-holders and that it was not equitable to enforce against the decree-holders an optional clause which was intended to be favourable to them. According to the compromise, the option arose on default in respect of "kisi yek kist" that is any one kist. Article applicable was Art. 181 and that the plaintiffs had a fresh starting point from the default which took place in 1931 and subsequent defaults and that their application for final decree could be granted in respect of the instalments still due. A.I.R. 1938 Oudh 112=1938 O.W.N. 360=173 Ind. Cas. 956.

——Art. 181—Compromise instalment decree—On default of two successive instalments whole amount to be due—Application for recovering instalments —Art. 182 (7) applies—Application for balance of decretal amount—Art. 181 applies.

Where a compromise decree directed payment by instalments on named dates, and further directed the judgment-debtor to pay the entire balance due if he made default as to any two successive instalments.

Held, (Per *Full Bench*).—That if the application for execution is an application to recover certain instalments already overdue, Art. 182 (7) applies and limitation will run in respect of each instalment from the date on which it became payable.

Held, further, that if the application for execution is an application to recover the balance of the decretal amount remaining unpaid, Art. 181 applies and limitation will run as to the whole balance unpaid, from the date of the later of the last two succesive instalments unpaid, the decree-holder being entitled to a decree for the whole balance if his application is within three years of that date less the amount of any individual instalments, which regarded as individual instalments, are not already barred by limitation.

Per *Mukerji, J.*—The provision in the decree, which makes the whole of the decretal amount payable, in case of one or more defaults, is only an ancillary clause and can have no independent existence. It is, therefore, not right to say that, there being no clause in Art. 182 which would directly apply. Art. 181 should apply to it. 112 Ind. Cas. 73=26 A. L.J. 966=51 All. 237=A.I.R. 1928 All. 629 (F. B.).

9 Mesne profits.

——Art. 181—Applicability—Application for mesne profits after restoration of property under S. 144, C. P. Code—Starting point.

Where on an execution sale being set aside property is restored under S. 144, C. P. Code, to the

judgment-debtor who seeks to recover by way of restitution mesne profits for the period in which the property was in possession of the auction-purchaser, the Court has undoubtedly power under S. 151, C. P. Code, to grant the relief sought for by him. But it cannot grant such relief without any application being made. The period of limitation for making the application is that provided by Art. 181 of the Limitation Act, and the limitation commences to run from the date on which the sale was set aisde. 51 C.W.N. 302=A.I.R. 1948 Cal. 37.

——Art. 181—Application of ascertainment of mesne-profits is not necessary, but if made it is governed by Art. 181. A.I.R. 1940 Mad. 124=50 M.L.W. 933=(1940) 1 M.L.J. 54=1940 M.W.N. 118=186 Ind. Cas. 474=I.L.R. (1940) Mad. 372 (F.B.).

[Overruling A.I.R. 1936 Mad. 801=71 M.L.J. 338=164 Ind. Cas. 670.]

——Art. 181—Mesne profits—Accrual of right.

Decree-holder is entitled to mesne profits up to the date of recovery of possession. But it cannot be said that such right arises on his taking possession. Such right accrues on the day of his wrongful dispossession and ceases on the day he recovers his possession. That being so, it would be contradiction in terms to say that the right accrues on the day it ceases. A.I.R. 1935 Nag. 76 =17 N.L.J. 281.

——Art. 181—An application for mesne profits by way of restitution which does not fall under S. 144 but under S. 151, C. P. Code, is still governed by Art. 181, Limitation Act, and the period of limitation would run from the date of delivery of possession. A. I. R. 1933 Lah. 876=144 Ind. Cas. 553.

——Art. 181—Art 181 applies to applications specifically provided by the C. P. Code, and therefore, it does not apply to an application for the ascertainment of mesne profits. A. I. R. 1923 Bom. 268, Foll. 109 Ind. Cas. 734=52 Bom. 360 =30 Bom.L.R. 503=A.I.R. 1928 Bom. 236.

——Art. 181—Application for determination of mesne profits is one within the scope of Art. 181. 109 Ind. Cas. 528=1928 M.W.N. 222=28 M.L.W. 152=A.I.R. 1928 Mad. 522=54 M.L.J. 665.

——Art. 181—The right to apply for ascertainment of mesne profits will arise either when the delivery of possession is actually given or three years expire from the date of the preliminary decree. 84 Ind. Cas. 272=4 Pat. 57=5 P. L. T. 626=1924 P.H.C.C. 265=3 Pat.L.R. (Civ.) 32 =A.I.R. 1924 Pat. 781.

——Art. 181—Mesne profits—Ascertainment of.

Under the old Code there was divergence of opinion between the High Courts upon the point of limitation of applications for ascertainment of mesne profits and the present code has tried to solve it by making the ascertainment of mesne profits a part of the suit and in continuation thereof. No longer is such a proceeding a separate proceeding and an application for ascertainment of mesne profits is no longer an application in execution. 84 Ind. Cas. 272=4 Pat. 57=5 P.L.T. 626=1924 P.H.C.C. 265=3 Pat.L.R. (Civ.) 32=A. . R. 1924 Pat. 781.

——Art. 181—Application to ascertain mesne profits—Article does not apply.

The Limitation Act does not apply to all applications. The applications specifically described in the 3rd division of the first schedule of the Indian Limitation Act are all the applications under the C. P. Code and under those Art. 181 must be so limited. An application to ascertain mense profits under O. 20, R. 12 (1) (*c*) is not one for governed by Art. 181 of the Act. 77 Ind. Cas. 497=A.I.R. 1923 Bom. 268.

——Art. 181—Mesne profits—Application for ascertainment of.

An application for ascertainment of mesne profits under O. 20, R. 12 C. P. Code is not one for execution, and Art. 181 applies to it. 37 Mad. 186=13 M.L.T. 79=(1913) M.W.N. 114=24 M. L.J. 96=18 Ind Cas. 586.

——Art. 181—Mesne profits—Application —Limitation.

An application for mesne profits by defendant against whom a suit is dismissed, should be made within three years from the date when possession was given to him and not from the date on which the suit was dismissed. 11 C.L.J. 541=6 Ind. Cas. 125.

——Arts. 181, 182—C. P. Code, Ss. 211, 212 — Mesne profits left to be subsequently ascertained.

Where in a decree for possession of immoveable property and for mesne profits the amount of mesne profits has been left to be subsequently ascertained, neither Art. 178 nor Art. 179 (O.A.) applies to an application by the decree-holder to have the amount of mesne profits ascertained. 19 C. 132; 14 A. 531, foll. 1 A.L.J. 344=26 A. 623.

——Art. 181—Restitution—Mesne profits—Period for which claimable.

Art. 181 merely fixes the date from which limitation for an application for restitution starts, but does not limit the right of the applicant to recover mesne profits to a term of three years. The applicant can recover mesne profits for the whole period for which he was out of possession *pendente lite*. 3 Pat.L.J. 367=47 Ind. Cas. 47.

10. Mortgage decree.

(a) Application for final decree.
(b) Application tor order absolute.
(c) Applicatios for personal decree.
(d) Decree for redemption.
(e) Execution.

10. (a) Application for final decree.
(i) General.
(ii) When appeal is filed against preliminary decree.

10. (a) (i) Mortgage decree — Application for final decree—General.

——Arts. 181 and 183—Applicability—Application for final decree—C. P. Code, O. 34.

An application for a final decree under O. 34, C. P. Code, is governed by Art. 181 or Art. 183 of the Limitation Act, as the case may be. 1 D. R. 59.

——Art. 181—Starting point under — Absence of any opinion in the decree — Application for final decree—Limitation.

The expression "when the right to apply accrues" occurring in Art. 181 of the Limitation Act means "when the right to apply *first* accrues". It follows that in a case where there is no option contained in a preliminary decree in a mortgage suit making provision for payment by instalments, the limitation under Art. 181 of the Limitation Act for an application for the preparation of a final decree runs from the date when the decree-holder *first* becomes entitled to make an application. I. L.R. (1946) All. 570=1946 A.W.R. (H.C.) 59 =1946 A.L.W. 221=1946 O.W.N. (H.C.) 213 =A.I.R. 1946 All. 360=1946 A.W.R. (H. C.) 558.

——Arts. 181 and 182—Application for final decree.

Art. 182 applies only to execution applications. An application for final decree in a mortgage suit being an application in suit and not in execution is, governed by Art. 181 and not by Art. 182. 1945 A.W.R. (H.C.) 54=A.I.R. 1945 All. 161 =I.L.R. (1945) All. 277=1945 O.W.N. (H.C.) 194.

——Art. 181—Preliminary mortgage decree ex parte—Application to set it aside dismissed for default—Decree-holder's application for final decree three years after preliminary decree though within three years of dismissal for default—Application held time-barred. A.I.R. 1944 Mad. 209=57 M. L.W. 9=1944 M.W.N. 35=I.L.R. (1944) Mad. 791=(1943) 2 M.L.J. 678=218 Ind. Cas. 425.

——Art. 181—Mortgage-decree— No amount specified nor date fixed for payment—No default being committed, running of time.

A decree-holder can apply for a final decree only when there has been a default on the part of the judgment-debtor in the payment of the amount specified in the preliminary decree by the date specified therein. Where no amount is specified and no date is fixed, it is not possible for the decree-holder to say that there has been a default by the judgment-debtor in payment as directed by the decree. In these circumstances, time never begins to run against the decree-holder under Art. 181, Limitation Act for the making of an application for the preparation of a final decree. A. I. R. 1943 All. 321=(1943) A.L.J. 349=1943 A.W.R. 167=I.L.R. (1943) All. 684=210 Ind. Cas. 573.

——Arts. 181, 183—Mortgage suit on Original Side of High Court.

The contention that no limitation applies to a final decree for sale is not maintainable.

In a mortgage suit on the Original Side of the High Court, an application for final decree for sale is not an application to enforce a preliminary decree which has been already passed. Such application is not, therefore, governed by Art. 183, but by Art. 181. A. I. R. 1938 Bom. 354=40 Bom. L. R. 507=I.L.R. (1938) Bom. 273=177 Ind. Cas. 470.

——Art. 181—Application for final decree.

After a preliminary decree was passed, the decree-holders applied within three years for preparation of a final decree. Their first application was rejected for default as they had omitted to take some steps with regard to the service of notice on the judgment-debtors. They then filed another application:

Held, that the order rejecting the application did not amount to dismissal of the mortgage suit. After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. And even if the decree-holder's second application was filed after the expiry of the period of limitation, the Court had full power to restore the original application and make its preliminary decree final for the ends of justice under S. 151, C. P. Code and that the decree which was not time-barred was also not incapable of execution. 16 P.L.T. 744=A.I.R. 1936 Pat. 93=15 Pat. 51 =159 Ind. Cas. 248.

——Arts. 181, 183—Mortgage suit — Application for final decree.

The right that is given under the preliminary decree to the mortgagee is a right subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property.

An application for a final decree is not an application to enforce the preliminary decree. Such an application does not fall within Art. 183 but falls within Art. 181. A.I.R. 1935 Rang. 239=13 R. 325=157 Ind. Cas. 784.

——Art. 181—It cannot be said that an application of obtain execution under a preliminary mortgage-decree is an application for the same relief as the application to the Court for a final mortgage-decree for sale in the suit. 1935 O.W.N. 527= (1935) M.W.N. 438=1935 A.W.R. 615=41 L. W. 629=(1935) A.L.J. 578=A.I.R. 1935 P.C. 85=39 C. W. N. 640=68 M. L. J. 665=61 C. L.J. 267=37 P.L.R. 395=37 Bom.L.R. 533=57 A. 242=62 I.A. 80=155 Ind. Cas. 205 (P.C.).

——Art. 181—C. P. Code, O. 34, Rr. 3, 5 and 6 —Distinction.

There is a distinction between Rr. 3 and 5 and R. 6 of O. 34. R. 6 requires no application and therefore escapes the operation of Art. 181 of the Limitation Act. Both Rr. 3 and 5 make it incumbent that the decree-holder must present an application and where an application is to be presented the period of limitation provided for such an application by Art. 181 must apply. 42 Cal. 294, Diss.; 42 Cal. 776 (P.C.), Foll. 91 Ind. Cas. 617=2 A.W.N. 842=A.I.R. 1926 Oudh 12.

——Art. 181—Applies to application for final decree—Limitation in case of preliminary mortgage decree is not suspended by another decree holding the property not to be the mortgagor's.

There is no suspension of the Limitation till such decree is set aside by an Appellate Court. 85 Ind. Cas. 272=20 M.L.W. 987=A. I. R. 1925 Mad. 334=48 M.L.J. 74.

——Art. 181—Application for final decree—Date fixed for payment postponed at defendant's request —Fresh application is not necessary — Limitation Act, Art. 181 does not apply.

The words "the day fixed" in O. 34, R. 3 refer to the day fixed under the preceding rule.

Postponement of the day fixed for payment at defendant's request does not amount to a dismissal of the application of the plaintiff to have a final decree passed. The application must be deem-

ed to have remained pending for final orders and the Court to have postponed the passing of such orders. No further application for a final decree is necessary and any subsequent application if made in that behalf is only for the purpose of continuing the proceeding on the original application which had been suspended. Such an application is not governed by Art. 181 and there is no limitation in respect of it. 88 Ind. Cas. 901=21 N.L.R. 47=A.I.R. 1925 Nag. 291.

——Art. 181—Art. 181 applies to application under C. P. Code, O. 34, R. 5.

An application for final decree under O. 34, R. 5 is governed by the residuary Art. 181. After the period of limitation has expired, the application by one of the defendants to set aside the preliminary decree does not revive the plaintiff's right to apply for the final decree. 87 Ind. Cas. 746=A. I. R. 1925 Cal. 1030.

——Art. 181—An application for the preparation of the final decree, must be made within three years from the time "when the right to apply accrues", *i.e.*, the day fixed by the preliminary decree for payment of mortgage money. The mere fact that by a clerical error a wrong sum has been entered, does not affect the case, as there was no alteration in the decree. 69 Ind. Cas. 199=20 A.L.J. 640=A.I.R. 1923 All. 22.

——Art. 181—Mortgage-decree not made final—Previous applications for final decree will not save limitation for later applications therefor. 73 Ind. Cas. 187=25 Bom.L.R. 459=A.I.R. 1923 Bom. 420.

——Art. 181—The application for a final decree in a mortgage suit more than 3 years after the date fixed for payment under the preliminary decree, is barred by limitation under Art. 181 of the Limitation Act. 7 L.W. 438, Foll. 69 Ind. Cas. 366=1922 M.W.N. 11=16 M.L.W. 198=30 M.L.T. 228=A.I.R. 1922 Mad. 65=42 M.L.J. 51.

——Art. 181—Mortgage decree — Final decree—Application for.

The right to apply for decree absolute in mortgage suit accrues at the end of the period of grace allowed in the preliminary decree and the period is governed by Art. 181. (1919) P.H.C.C. 272=4 Pat. L.J. 523=50 Ind. Cas. 544.

——Art. 181—Mortgage decree—Preliminary decree after the new C. P. Code—Application for final decree—Limitation.

Article 181 applies to an application under O. 34, R. 5 (2) of the C.P. Code for a final decree in which the priliminary decree was passed after the passing of the present Code. 7 L.W. 438=45 Ind. Cas. 76.

——Art. 181—Mortgage decree—Application under O. 34, R. 5, C. P. Code.

An application under O. 34, R. 5, C. P. Code is governed by Art. 181 of the Limitation Act. 39 All. 641=15 A.L.J. 734=42 Ind. Cas. 93.

——Art. 181—Mortgage decree — Application for final decree—Limitation

The period of limitation for an application for a final decree in a mortgage suit is three years under Art. 181 of the Limitation Act from the expiration of the time allowed by the decree for the payment of the mortgage money. 16 A.L.J. 143=43 Ind. Cas. 518.

——Art. 181—Decree nisi for foreclosure—Receiver appointed—Starting point of limitation for application for making decree final runs from the date when the decree-holder was given liberty to apply for final decree. The decree-holder is incompetent to make such an application so long as the Receiver is in possession of the mortgaged properties. 66 Ind. Cas. 97=3 P.L.T. 565=1 Pat. 435=1922 P.H.C.C. 342=A.I.R. 1922 Pat. 201.

——Art. 181—Mortgage decree—Final decree.

Application for a final decree for a foreclosure or sale is an application under C.P. Code and thus an application made after the passing of the C.P. Code and Limitation Act, 1908 is governed by Art. 181. 1 Pat.L.J. 364=3 Pat.L.W. 74=38 Ind. Cas. 385.

——Arts. 181 and 182—Mortgage decree—Application for final decree for foreclosure after consent decree.

Article 181, and not Art. 182 of the Act applies to an application for a final decree for foreclosure after a consent decree, which is a preliminary decree in the suit for foreclosure. 37 Ind. Cas. 802 (Cal.).

——Art. 181—Mortgage decree—C. P. Code, O. 34, Rr. 3 and 6.

Art. 181 of the Limitation Act does not apply to applications either under R. 6 or R. 3 of O. 34, C.P. Code. 42 Cal. 294=30 Ind. Cas. 719.

10. (a) (ii) Mortgage decree — Application for final decree—When appeal is filed against preliminary decree.

——Art. 181 and C. P. Code (5 of 1908), O. 34, Rr. 4 and 5—Preliminary decree modified in appeal after final decree—Fresh preliminary decree drawn up—No fresh final decree—Application to execute original final decree—Maintainability—Application to amend the original decree filed beyond three years—Bar of limitation.

After the passing of a final decree under O. 34, R. 5, the preliminary decree was modified in appeal. Though a fresh preliminary decree was drawn up, no application for a final decree was made. The decree-holder applied to execute the original final decree and later on (*i.e.*) more than three years after the date of the fresh preliminary decree was drawn up applied to have the final decree drawn up in conformity with the fresh preliminary decree.

Held, when the first preliminary decree was varied in appeal, the final decree passed on the basis of that preliminary decree fell to the ground and it could not be executed until it was made consistent with the fresh preliminary decree drawn up or a fresh final decree was prepared accordingly. Hence the application to execute the original final decree was not maintainable. The application to amend the original decree or to draw up a fresh final decree in terms of the second preliminary decree was barred by Art. 181 of the Limitation Act as it was beyond three years. I.L.R. (1947) All. 40=227 Ind. Cas. 57=1946 A.L.J. 395=1946 A.W.R. (H.C.) 589=1946 A.L.W. 578=A.I.R. 1947 A. 83.

——Art. 181—Appeal against preliminary mortgage decree filed without stamp and subsequently withdrawn—Application for final decree—Starting point of limitation.

Where in an appeal against a preliminary decree on a mortgage the mortgagee did not pay any Court-

fee whatsoever on his memorandum of appeal and the question of the payment of the requisite amount of Court-fee was agitated on various dates at the instance of the Stamp Reporter before the Registrar and the appellants ultimately withdrew the appeal on 22nd January, 1936, as they were not willing to pay the Court-fee demanded, the time for making the application to make the preliminary decree final would run from 22nd January, 1936, and must be made within three years thereof. The fact that in another appeal by another mortgagee the question of priority between the appellant and the other mortgagee was pending cannot suspend the period of limitation till the date of dismissal of the other mortgagee's appeal. Principles as to suspension of period of limitation on account of pendency of collateral proceedings and authorities discussed. 25 Pat. 432=225 Ind. Cas. 256=12 B.R. 588=A.I.R. 1947 Pat. 225.

——Art. 181—Starting point is date of appellate decree.

The right to make an application for passing of a final decree on a mortgage accrues for purposes of limitation on the date fixed by the preliminary decree, but if the preliminary decree is appealed against then the time begins to run from the decree of the Appellate Court. An order of dismissal of a mortgage decree on the ground that the memorandum of appeal is not sufficiently stamped and the deficiency has not been made good within the time allowed is decree of the Court of appeal for this purpose. (1944) 23 Pat. 635=10 C.L.T. 59=25 P.L.T. 159.

——Art. 181—Applicability—Application for final decree where preliminary decree has been passed under O. 34. R. 4, C. P. Cide—Confirmation of preliminary decree on appeal—Time when begins to run.

When a preliminary decree passed under O. 34, R. 4, C. P. Code, is maintained in first appeal the period 3 years provided by Art. 181 of the Limitation Act for making an application for a final decree runs from the expiry thereafter of the period allowed to the mortgagor under the preliminary decree to make the payment of the sum due, even though the decree of the appellate Court maintaining that of the trial Court does not expressly allow the same period for payment. (1946) A.W.R. (H.C.) 591 =1946 A.L.W. 587.

——Art. 181—Time under Art. 181 for an application for a final decree runs not from the date of the preliminary decree passed by the Court of first instance but from the date when the appeal against that preliminary decree is dismissed by the Appellate Court. When a preliminary decree for sale in a mortgage suit had been passed and while the appeal was pending, a final decree was prepared in terms of the preliminary decree and later on the High Court affirmed the decree of the first Court:

Held, that in spite of the fact that a final decree had been passed in the Court of first instance, the Court below could prepare a new final decree in terms of the preliminary decree passed by the High Court; that time under Art. 181 for an application for a final decree accordingly ran not from the date of the preliminary decree passed by a Court of first instance, but from the date when the appeal against that preliminary decree was dismissed by the Appellate Court. (1934) A.L.J. 446=A. I. R. 1934 All. 89=4 A.W.R. 1519=151 Ind. Cas. 294.

——Art. 181—Preliminary decree—Appeal against —Withdrawal of appeal—Dismissed with costs—Application for final decree—Limitation, when begins to run.

An appeal was held against a preliminary decree in a mortgage suit and was formally before the Court for disposal. The appeal was subsequently withdrawn by the appellant and it was dismissed on January 21, 1924, with costs of the respondents that appeared. The transferee decree-holder then presented an application for final decree, on January 21, 1927:

Held, that the order passed by a decree dismissing the appeal with costs notwithstanding the fact that the appeal was withdrawn by the appellant should be held to be an order finally disposing of the appeal superseding the order of the Court appealed against and that for the purpose of the present case, time began to run from the date of the order of the High Court, and, therefore, the application for passing of the final decree was not barred by limitation, and that the time for applying for final decree under Art. 181 ran from the date of the order dismissing the appeal and not from the date fixed in the preliminary decree.

Per *Madhavan Nair, J.*—The decision in A. I. R. 1914 P.C. 66=23 Ind. Cas. 649—should be interpreted to be confined strictly to cases which have been dismissed for default of prosecution and not to cases in which the appeal was formally brought before the Court, but was withdrawn and dismissed. 37 L.W. 557=64 M.L.J. 695=56 M. 520=A.I.R. 1933 Mad. 442=(1933) M. W. N. 623=143 Ind. Cas. 412.

——Art. 181—Limitation for final decree runs from date of appellate decree.

Where there has been an appeal from a preliminary mortgage decree, the period of three years within which, under Art. 181, an application for a final decree must be made runs from the date of the decree of the appellate Court and not from the expiry of the time for payment fixed by the preliminary decree. *(Case-law discussed)*. 123 Ind. Cas. 199=A.I.R. 1930 Mad. 356.

——Art. 181—Preliminary decree appealed from —Time for applying for final decree runs from appllate decree.

Where there has been an appeal from a preliminary mortgage-decree and the appellate Court has not extended the time for payment, the period of three years within which, under Art. 181 an application for a final decree under O. 34, R. 5, sub-R. (2), must be made, runs from the date of the decree of the appellate Court, not from the expiry of the time for payment, fixed by the preliminary decree, even when the appellate Court has confirmed the decree of the lower Court.

Where before the date of the appellate Court's decision the three years and six months had passed and therefore it was contended that decree was dead before the appellate Court gave its decision and could not be revived.

Held, that when an appellant appeals, unless there is some rule dismissing the appeal by appellate Court for went of time or an order is procured dismissing P.C. 93, Rel. on. 100 Ind. Cas. 22=8 Lah. 253= it, his appeal stands till it is heard. A. I. R. 1926

54 I.A. 52=25 A.L.J. 78=1927 M. W. N. 87=38 M.L.T. 46=4 O.W.N. 181=28 P.L.R. 117=31 C.W.N. 444=45 C.L.J. 297=25 M.L.W. 722=29 Bom.L.R. 782=8 P.L.T. 377=A.I.R. 1927 P.C. 25=52 M.L.J. 366 (P.C.).

——Art. 181—Appeal filed against preliminary decree—Time for applying for final decree runs from appellate decree. 38 All. 21, overruled. 98 Ind. Cas. 499=6 Pat. 24=53 I.A. 197=24 A. L. J. 765=7 P. L. T. 575=1926 M. W. N. 591=44 C. L. J. 63=3 O. W. N. 690=24 M. L. W. 394=28 Bom. L. R. 1395=31 C.W.N. 58=A. I. R. 1926 P. C. 93=51 M. L. J. 781 (P.C.).

——Art. 181—Limitation for an application for final decree starts from the date of appellate decree.

Against a preliminary decree for sale in a mortgage suit against the executant and his sons, an appeal had been preferred by the sons only, on behalf of and in the interest of the whole family on the ground that the entire family property was to be exempted from the decree An application for making the decree final was made within three years from the date of the appellate decree.

Held, that the appeal was preferred on behalf of the whole family though in the name of the sons only and the decree passed in appeal was a decree in which the first Court's decree merged and that limitation for the application for making the decree final, would run from the date of such decree and the application was within time. 89 Ind. Cas. 214=47 All. 913=23 A.L.J. 867=6 L.R. A. Civ. 485=A.I.R. 1925 All.691.

——Art. 181—Where only a part of the preliminary decree is appealed against, and the appeal is directed against some defendants only, those defendants who are made respondents cannot be heard to say that the time to apply for final decree runs from the date of the decree of the first Court. 40 All. 203, Foll. 74 Ind. Cas. 372=21 A.L.J. 526=4 L.R.A. Civ. 278=A.I.R. 1924 All. 99.

——Art. 181—Preliminary decree appealed against—Right to apply for final decree accrues from date of appellate decree. 39 All. 641, Foll. 66 Ind. Cas. 790=1922 P.H.C.C. 164=3 P.L.T. 329=1 Pat. 444=A.I.R. 1922 Pat. 205.

——Art. 181—The starting point for limitation to applications for final decree to which Limitation Act, Art. 181 applies, is the date of the preliminary decree of the appellate Court and not that of the original, whether the appellate decree varies or affirms the original decree. 64 Ind. Cas. 470=44 Mad. 714=14 M.L.W. 180=A.I.R. 1921 Mad. 414=41 M.L.J. 117.

——Art. 181—Mortgage decree — Preliminary decree — Application for final decree—Limitation—Starting point.

Where a preliminary decree in a mortgage suit is affirmed on appeal, the right to present an application to make the decree final accrues on the day the appellate decree is passed. The Lower Court's decree merges in the appellate decree. 54 Ind. Cas. 323 (Nag.).

——Art. 181—Preliminary decree passed by the Trial Court merges in the decree of the Court of appeal and the latter is the only decree which can be made final. Application for final decree is accordingly within time under Art. 181 if made within 3 years of the appellate decree. 81 Ind. Cas. 649=5 Lah. 257=A.I.R. 1924 Lah. 582.

——Art. 181 — Mortgage decree — Application for final decree for sale—Limitation—Confirmation of preliminary decree on appeal.

An application for a final decree for sale under O. 34, R. 5 (2), C. P. Code, is governed by Art. 181 of the Limitation Act and time runs from expiry of the period fixed for redemption by the preliminary decree. If there has been an appeal from the preliminary decree, time begins to run from the date of the decree on appeal even though appellate decree merely confirms the decree of the first Court. 36 M.L.J. 507=48 Ind. Cas. 185.

——Art. 181 — Mortgage decree — Application for final decree—Limitation.

The period of limitation for an application for a final decree for sale under O. 34, R. 5 of the C. P. Code should be computed from the date of the decree of the Court of final appeal. 21 O.C. 176=47 Ind. Cas. 206.

——Art. 181—Mortgage decree — Final decree—Limitation — Appeal from preliminary decree.

An application for a decree absolute under O. 34, R. 4 of the C.P. Code is beyond time when it is made more than 3 years after the date of the decree in appeal passed by the High Court. 40 All. 203=16 A.L.J. 85=43 Ind. Cas. 870.

——Art. 181—Mortgage decree—Application for order absolute — Limitation — Starting point—C. P. Code, O. 34, Rr. 4 and 5.

An application for an order absolute under O. 34, R. 5, C.P. Code, is governed by Art. 181 of the Limitation Act. The period of limitation should be computed from the time when the right to apply first accrued *i.e.*, the expiration of the period fixed for payment of the mortgage money. An appeal and a second appeal from the preliminary decree does not give rise to a fresh right, unless the decree of the Court of First Instance was in any respect varied by the Appellate Courts. 38 All. 21=13 A.L.J. 985=30 Ind. Cas. 494.

——Arts. 181 and 182—T. P. Act, Ss. 86 and 87—Mortgage — Suit for foreclosure decreed in part—Appeal — Application for order absolute for foreclosure.

A mortgagee brought a suit for foreclosure of five villages. The suit was decreed as to three villages and dismissed as the remaining two. The mortgagee appealed, and it took more than three years for the dismissal of the appeal. Subsequently, an application for order absolute was made, *i.e.*, three years after the day fixed for the mortgage money.

Held, the application was not barred by limitation, having been brought within three years from the appellate decree, and that Art. 178 does not apply to the case. The nature of proceedings for foreclosure is such that a mortgage must be foreclosed as a whole or not at all. (1904) 1905 A.W.N. 70=2 A.L.J. 180=27 A. 501 (F.B.).

10. (b) Mortgage decree — Application for order absolute.

——Art. 181—Conditional decree to be made absolute—Article 181 applies.

An application for making a conditional decree passed by consent, absolute would be governed by

the general Art. 181 which applies to all applications for which no period of limitation is provided elsewhere in the Limitation Act or by S. 48, C. P. Code. Even where there is a condition in the decree that until one judgment-debtor's share is found to be insufficient no steps are to be taken against the other judgment-debtor, the right to apply against both accrues at the same time. The right to apply for order absolute is one thing and the determination of the question as to which property should be sold first is another. 70 Ind. Cas. 840=A.I.R. 1923 All. 29.

——Art. 181—Application for decree absolute.

Subsequent to the date fixed for payment in the preliminary decree obtained by a third mortgagee a second mortgagee obtained a decree on his mortgage in which the Court expressed the opinion that the third mortgagee could not sell the property before he had paid off the second mortgage,

Held, that the period from the date of the judgment which contained that opinion to the date when the third mortgagee paid the sum due to the second mortgagee, should be deducted in caiculating the time-limit for an application for decree absolute by the third mortgagee, assuming Art. 181 applied. 62 Ind. Cas. 418=33 C.L.J. 260=25 C.W.N. 376=A.I.R. 1921 Cal. 381.

——Arts. 181 and 182—Mortgage decree—Decree usder S. 88 of the T. P. Act — Application for order absolute—Limitation.

Three years after a mortgage-decree was passed in December, 1908, the decree-holder applied for an order absolute for sale The application was dismissed for default and the decree-holder after three more years again applied for an order absolute.

Held, that the first application of the decree-holder for an order absolute was not barred either by Art. 182 or by S. 48, C.P. Code. 56 Ind. Cas. 563 (Mad.).

——Arts. 181 and 182—Mortgage decree—Preliminary decree for sale under T. P. Act—Expiry of the time fixed for payment—Application for order absolute—Limitation.

A preliminary decree for sale was passed under the T. P. Act. Before the expiry of the time fixed by the decree for the payment of the mortgage money, the new C. P. Code came into force,

Held, that a final executable decree was passed under the T. P. Act notwithstanding that the direction in the decree for sale of he property was made conditional on default of payment of the amount due by a certain date. The remedy of the mortgagee was to apply for an order absolute. The enactment of the C.P. Code did not give the mortgagee a right to apply for a final decree. The period of limitation for the mortgagee's application was that fixed by Art. 182 and not by Art. 181 of the Limitation Act. 32 M.L.J. 455, not foll. 35 M.L.J. 194=48 Ind. Cas. 732.

——Art. 181—Mortgage decree — Decree before new Code—Application for order absolute under new Code—Right to apply when accrues.

Where the preliminary decree was passed before C.P. Code of 1908 and the application for order absolute was made after the new code, *held*, that though O. 34, R. 4 rendered an application necessary to make the decree absolute for sale, Art. 181 of the Limitation Act, did not govern the case, the right so to apply not having accrued to plaintiff till the new C. P. Code conferred it on him. 42 Bom. 309=20 Bom.L.R. 481=46 Ind. Cas. 107.

——Art. 181—Mortgage decree — Order absolute—Limitation.

Where it is the dut, of Court to take action without any application by the party, no question of limitation can arise in such a case. In a pending suit, the party need not make applications from time to time asking the Court to proceed to judgment. The procedure is prescribed by the Code which the Court has to follow. An order for decree absolute in a mortgage suit cannot be made without application. 19 C.W.N. 473=22 C.L.J. 66=28 Ind. Cas. 211.

——Art. 181—Mortgage decree — Application for decree absolute—Limitation.

An application for a decree absolute for sale in a mortgage suit under a consent decree fixing instalments if made after expiry of 3 years from the due date of the last instalment is barred by Art. 181. 38 Bom. 32=15 Bom.L.R. 841=21 Ind. Cas. 318.

——Art. 181—Mortgage decree — Final Decree—Application — Limitation.

An application for an order absolute in a mortgage suit where an instalment decree *nisi* has been passed is governed by Art. 181 and time will run from the date of the default but acceptance of over due instalments may have the effect of remitting the parties to the rights they would have had, if no default would have occurred. 35 All. 178=11 A.L.J. 224=18 Ind. Cas. 731.

——Art. 181 — Mortgage decree — Application for order absolute—Limitation.

An application for order absolute under O. 34, R. 5, is governed by Art. 181 of the Limitation Act. 14 M.L.T. 194=16 Ind. Cas. 799.

——Arts. 181, 182 — Mortgage decree—Proceedings subsequent to preliminary decrees for redemption and sale.

Proceedings subsequent to preliminary decrees for redemption and sale are not governed by C. P. Code or Limitation Act. 4 L.B.R. 83, Foll. The assignee decree-holder should in such cases apply to the Court for an order of sale in pursuance of the preliminary decree, if the assignee's status had already been recognised and his name substituted for that of the original decree-holder. An application for an order absolute for sale of the property does not fall under Art. 178 or 179 of the Limitation Act, 1877. 3 Bur.L.T. 142=8 Ind. Cas. 986.

——Art. 181—Mortgage decree—Order absolute—C. P. Code, O. 34, R. 3.

Though Art. 178 of the Limitation Act of 1877, did not apply to applications beyond the scope of the C. P. Code, it does not follow that, that the article or the corresponding article of the Limitation Act of 1908 applies to all applications made in the course of a suit. Art. 181 of the Limitation Act of 1908 does not govern an application for order absolute under O. 34, R. 3 of the C. P. Code of 1908. An application for execution of a decree may be treated as one in continuation of or for revival of a previous application, similar in scope and character interrupted by the intervention of objections and claim subsequently

proved to be groundless, or suspended by reason of an injunction or the like obstruction. 37 Cal. 796=15 C.W.N. 337=12 C.L.J. 328=6 Ind. Cas. 537.

——Arts. 181 and 182—Application for order absolute.

An application for an order absolute for sale under S. 89, T. P. Act, is an application for execution and is governed as regards limitation either by Art. 178 or Art. 179 (O.A.). The latter article will apply if any of the clauses specified in the third column of that article can be made applicable; otherwise Art. 178 will apply. (1902) 2 A.L.J. 371=1905 A.W.N. 136=27 A. 625.

——Arts. 181 and 182—Application for order absolute—T. P. Act, Ss. 86 and 87, Execution of decree—Limitation.

An application for an order absolute under S. 87 of the T. P. Act, 1882, is an application in execution of the decree under S. 86 of the Act, and is governed as to limitation by Art. 178 (O.A.), the time from which limitation begins to run being the date fixed in the decree under S. 86 for payment of the mortgage money. (1902) A.W.N. 160=24 A. 542.

10. (c) Mortgage decree — Application for personal decree.

——Art. 181—Starting point of limitation under—Mortgage suit — Preliminary decree passed——Assertion of title paramount by third party—Resistence by mortgagee—Adverse decision by trial Court—Appeal — Application under O. 34, R. 6, C. P. Code—Starting point.

The *terminus a quo* under Art. 181 of the Limitation Act has to be determined having regard to the nature of the particular case and the right to relief claimed therein. The Court has jurisdiction to pass a combined decree awarding relief first against the mortgaged property and then against the mortgagor personally for the deficit, if any, instead of passing two decrees successively at the different stages. But it cannot be said that R. 6 of O. 34, C. P. Code, applies where the mortgagee is deprived of title by the assertion of title paramount which is upheld by the Court. In such a case the mortgagee's right to apply for a personal decree accrues the moment when it was finally decided by the Court that the mortgagor had no title to the property. In the case of a mortgagee who has obtained a preliminary decree and who subsequently defends the mortgagor's title to the mortgaged properties against attacks by third parties in a suit, it is open to him, when he fails in the Court in the first instance to carry the matter in appeal. And the starting point of limitation for his application for a personal decree under O. 34, R. 6, C. P. Code, will be the date when the appeal was finally disposed of. I.L.R. (1947) Mad. 731=60 L.W. 77=A. I. R. 1948 Mad. 33=1947 M.W.N. 143=(1947) 1 M.L.J. 142.

——Art. 181—Application under O. 34, R. 6, C. P. Code—Terminus a quo — Basis of accrual of right to apply in litigation in appellate Court.

Art. 181 of the Limitation Act applies to an application for a personal decree under O. 34, R. 6, C. P. Code, and the *terminus a quo* dates from the first accrual of the right to apply, provided it is definitive and absolute. But where the very basis of the accrual of the right is itself in litigation in an Appellate Court, the statute should not be so unreasonably construed as to compel a person to act when his action may become infructuous as a final result of the litigation. In such a case, the person entitled to the right, has the option but not the duty to exercise the right till the question on which the right accrued is finally adjudicated upon. 53 C.W.N. 631.

——Art. 181—Application for personal decree under O. 34, R. 6, C. P. Code.

Where, in execution of a final decree for sale on a mortgage, the property was sold for a smaller amount than the debt and the order of confirmation of sale was affirmed in appeal, and the mortgagee applied for personal decree under O. 34, R. 6, C. P. Code:

Held, that Art. 181, Limitation Act governed the application. (1937) A.L.J. 135=A. I. R. 1937 All. 285=1937 A.W.R. 103=I.L.R. (1937) All. 481=168 Ind. Cas. 673.

——Art. 181—Application for personal decree under O. 34, R. 6, C. P. Code, limitation runs from the date on which it was finally decided by the Appellate Court that the sale should stand. (1937) A.L.J. 135=A.I.R. 1937 All. 285=1937 A.W.R. 103=I.L.R. (1937) All. 481=168 Ind. Cas. 673.

——Art. 181—Time for application for personal decree runs from Appellate Court's order. A.I.R. 1935 Mad. 640=(1935) M.W.N. 594=42 L.W. 518=157 Ind. Cas. 942.

——Art. 181—Application for personal decree under O. 34, R. 6, C. P. Code—Article applicable is Art. 181 and the right accrues, not from the actual date of sale but when the sale is confirmed, after hearing objections. But once the right accrues, time begins to run and the uncertainty caused by an appeal or other proceedings taken is not itself sufficient to suspend the operation of statute or to entitle the plaintiff to get a deduction. A.I.R. 1931 Cal. 166=58 C. 741=52 C.L.J. 531=35 C.W.N. 231=130 Ind. Cas. 815.

——Art. 181—Preliminary mortgage decree fixing date for payment passed *ex parte* against four defendants—One of the defendants applies for setting aside of the decree—That application is dismissed—Limitation for an application to pass final decree runs from the date fixed for payment and not from the date of the dismissal of the application to set aside the *ex parte* decree. 1936 Mad.W.N. 146.

——Art. 181 and 183 — Application for personal decree against mortgagor.

An application for a personal decree against the mortgagor is not a mode of enforcing the preliminary decree or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally. Such an application is not governed by Art. 183, but by Art. 181. A.I.R. 1935 Rang. 187=13 R. 305=156 Ind. Cas. 701.

——Art. 181—Application for personal decree.

An application for a personal decree against a mortgagor-judgment-debtor for the balance of amount

due by him after sale of the property is governed for purposes of limitation by Art. 181. 60 C. 19 =A.I.R. 1933 Cal. 251=143 Ind. Cas. 679.

——Art. 181—Application under O. 34, R. 6.

Preliminary mortgage-decree for certain amount, against Hindu father—Sons, not parties to suit, subsequently obtaining declaration that smaller amount was binding on family—Final decree passed for the smaller amount but silent as to balance—Plaintiff applying under O. 34, R. 6, C. P. Code for recovery of balance after three years after declaratory decree obtained by sons,

Held, that the effect of the declaratory decree obtained by the sons was to confine the charge on the family property to smaller amount only, and that the balance of the amount ceased to be a mortgage-debt and hence the plaintiff had under O. 34, R. 6, C.P. Code, no right to recover the balance of the amount.

Held, further, that the right of plaintiff to recover the balance must be by execution of the decree for the balance, treating it as a simple money decree.

Held, also that since right to recover the balance personally from mortgagor accrued to plaintiff when the declaratory decree in favour of the sons was passed, on that date, it must be deemed to have been settled, that his remedy for the balance was against mortgagor personally.

The application which was made more than three years after the date of the declaratory decree in favour of the sons, date for execution of the personal decree was barred under Art. 181, Limitation Act. 111 Ind. Cas. 221=26 A.L.J. 1374= A.I.R. 1929 All. 15.

——Art. 181—Application under C. P. Code, O. 34, R. 6—Art. 181 and not 183 applies.

An application under O. 34, R. 6 is an application for a new decree in the suit and it cannot be said to be an application for enforcing a judgment or decree within the meaning of Art. 183, and consequently Art. 183 is not applicable to an application under O. 34, R. 6. Art. 181 of the Limitation Act applies to such an application. 42 Cal. 294, Overruled; 40 All. 551, Foll. 89 Ind. Cas. 1=29 C.W.N. 678=52 Cal. 828=A. I. R. 1925 Cal. 834 (F.B.).

——Art. 181—An application for a personal decree against the mortgagor or his surety after exhausting the hypothecated properties is governed by Art. 181. Even if Art. 182 applies any application for execution against the mortgagor would save limitation against the surety under Art. 182. Explanation I. 60 Ind. Cas. 23=(1920) 3 U.B. R. 261.

——Art. 181—Mortgage decree — Application for personal decree.

Art. 181 of the Limitation Act applies to an application for a personal decree under O. 34, R. 6 (2), C. P. Code. 42 Mad. 52=(1918) M.W.N. 792=35 M.L.J. 552=8 L.W. 526=24 M. L. T. 486=48 Ind. Cas. 298.

——Art. 181—Mortgage decree — Application for decree under O. 34, R. 6, C. P. Code.

An application under O. 34, R. 6 of the C. P. Code is an application in the original suit for a new decree and is governed by Art. 181. 40 All. 553 =16 A.L.J. 438=47 Ind. Cas. 561.

——Art. 181—Mortgage decree — Application under C. P. Code, O. 34, R. 6.

Art. 181 prescribed the period of limitation for an application under O. 34, R. 6, C. P. Code. 13 N.L.R. 76=39 Ind. Cas. 854.

——Art. 181 — Mortgage decree — C. P. Code, O. 34, R. 6 — Application for personal decree—Limitation.

An application for a money decree under O. 34, R. 6 of C. P. Code is governed by Art. 181 and time begins to run when the right to apply accrues. 9 A.L.J. 569=14 Ind. Cas. 591.

——Art. 181 (178)—Applicability to applications other than under C. P. Code—Application for personal decree under S. 90, T. P. Act.

Art. 178 is limited to applications under C. P. Code. It does not apply to an application under S. 90, T. P. Act. 22 C. 921, Foll. (1907) 6 C.L.J. 119=11 C.W.N. 674=34 Cal. 672.

——Art. 181—T. P. Act, S. 90—Decree improperly directing sale of non-hypothecated property —Amendment of decree—*'Terminus a quo'* for limitation in respect of an application under S. 90, T. P. Act. 1902 A.W.N. 50.

——Art. 181—Sale set aside—Sale proceeds refunded to purchaser by mortgagee—Mortgagee can apply under O. 34, R. 6, C. P. Code—Time runs from date of refund. 29 All. 260, Not foll.; 26 All. 25, Foll. 100 Ind. Cas. 775=25 A.L.J. 485=49 All. 506=A.I.R. 1927 All. 395.

10. (d) Mortgage decree—Decree for redemption.

——Art. 181—Redemption suit — Application for final decree.

Redemption suit—Application for final decree within years from decree in second appeal from preliminary decree, held to be within time. 31 M.L.W. 207=1930 M.W.N. 104=A.I.R. 1930 Mad. 353=58 M.L.J. 207.

——Art. 181—During the three years fixed by Art. 181 of the Limitation Act for applying for a final decree, the suit for redemption continues, and during that period rights of the mortgagor and the mortgagee are governed by the preliminary decree. 100 Ind. Cas. 324=A.I.R. 1927 All. 305.

——Art. 181—Preliminary decree for redemption passed—Mortgagor not paying amount within six months—Mortgagee not applying for final decree —Court extending time for payment by mortgagor and accepting payment after six months—Limitation for final decree begins from the date for payment so extended.

Per *Shah, J.*—Where the time is extended and the payment is made within that extended time the mortgagor must be taken to have paid into Court the amount declared due on the day fixed within the meaning of this rule; and it is possible that the Legislature intended that where the payment was made by the mortgagor, the application for making the decree final was necessarily implied, and that, therefore, the words as to application to be found in sub-R. (2) were not considered necessary in sub-R. (1). 98 Ind. Cas. 943=50 Bom. 730=28 Bom.L.R. 1325=A. I. R. 1927 Bom. 32.

——Art. 181—Art. 181 of the Limitation Act applies to an application under O. 34, R. 8 to order sale in redemption suit. 80 Ind. Cas. 706 =28 O.C. 46=A.I.R. 1925 Oudh 255.

——Art. 181—As it is not laid down that the mortgagor before paying money is to make any application to Court, the provisions of Art. 181 would not apply to the payment of money after the date fixed for payment. 90 Ind. Cas. 418= 28 O.C. 261=A.I.R. 1925 Oudh 649.

——Arts. 181 and 182—Mortgage decree—Decree for redemption—Application for extension of time to pay up the mortgage money and to recover possession.

An application to extend the time for the payment of mortgage debt, is governed by Art. 181 of the Limitation Act. *Held*, by *Shah, J.* that even if the application be treated as one not merely for the extension of time for the payment of the mortgage-debt but for the recovery of possession of the property as in terms it purported to be, it was an application for the execution of the decree and as such governed by Art. 182 of the Act. 43 Bom. 689=21 Bom.L.R. 687=51 Ind. Cas. 924.

——Arts. 181 and 182—Application for execution —Mortgage decree — Mortgagee in possession— Accounts—Limitation.

By a mortgage decree passed in April, 1877, the mortgagees were directed to remain in possession till the mortgage debt was paid off from the usufruct of the property. In 1885, there was presented by the mortgagors an application in the execution department for the taking of an account and for redemption. An account was filed but nothing more was done. The present application was made in 1903 for similar relief:

Held, (*Woodroffe, J.* dubitante).—Either Art. 178 or Art. 179 (O.A.) applied to the application which was barred by limitation.

Held, also, (conceded on the other side) the proper remedy of the mortgagor would be by a regular suit. (1906) 5 C.L.J. 289.

10. (e) Mortgage decree—Execution.

——Art. 181 — Mortgage-decree — Possession deliverable on plaintiff depositing Rs. 55 in any Chaitra month—Time does not begin to run until deposit is made.

The decree was, "The plaintiff do pay to the defendants Rs. 55 in respect of the debt on mortgage in *Chaitra* of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed. The plaintiff is not entitled to take possession of the lands in dispute in any other month except *Chaitra*." The plaintiff was now seeking to execute the decree and was met by the contention that execution was barred.

Held, that the relationship of the mortgagor and mortgagee still continued to exist between the parties. It was really a preliminary decree. Under Art. 181, until he paid the money he was not entitled to possession and until possession was asked for and refused he had no right to apply to the Court. 72 Ind. Cas. 556=25 Bom.L.R. 358=47 Bom. 692=A.I.R. 1923 Bom. 300.

——Arts. 181 and 182—Mortgage decree — T.P. Act, Ss. 88 and 89.

Execution of decree passed before the new C. P. Code came into force is valid without a final decree and therefore such cases are governed by Art. 182 and not Art. 181. An application for execution made within 12 years from the date of decree and within three years from the date of the last application is not therefore, barred by limitation. 32 Ind. Cas. 39 (Mad.).

——Art. 181—Mortgage decree — Execution— Application — Limitation — Decree absolute— Starting point.

In an application for execution of mortgage decree, the date of the order absolute is to be considered as the date of the decree for the purpose of calculating the period of Limitation. 33 A. 264, Foll. 15 Ind. Cas. 732 (Mad.).

——Art. 181 (179)—Application for execution of mortgage decree after partial satisfaction by a previous execution proceeding — Transfer of Property Act, S. 90—Order of the court passing a decree for the balance—Decree.

Where on an application under S. 90 of the T. P. Act the court passed an order for the balance of the decretal amount to be recovered and a decree specifying the amount three days later in accordance with that order:

Held, that as regards an application for execution, limitation of three years will be counted from the date of the decree and not from the date of the order. (1905) 3 C.L.J. 291.

——Arts. 181 and 182 — Execution of decree for sale—Not capable of execution on the date of passing — T. P. Act, Ss. 88 and 89—Execution— Appeal from portion of decree—Satrting point of limitation for execution of non-appealed portion

Art. 179 (O.A.) has no application to the case of decrees or orders which on the date thereof are not capable of execution, and consequently will not apply in the case of a decree passed under S. 88, T. P. Act. The article applicable is Art. 178, and the right of the decree-holder to apply for an order absolute accrues on the expiry of the time fixed in the decree, under S. 88, for payment of the mortgage money. The starting point of limitation for execution of the portion of the decree not appealed against when the other portion was under appeal is the date of the original decree and not the appellate decree, especially where there was nothing to preclude the decree-holder from going on with the execution of the non-appealable portion. (1904) 1 A.L.J. 15. *See also* 24 A. 300.

——Arts. 181 and 182—Execution of decree— Limitation—Decree on mortgage—Subsequent suit to obtain exemption of part of the mortgaged property, but no order for stay regarding the suit.

On the 21st of September, 1895, Manik Kishore Singh obtaind two decrees, one for sale and the other for foreclosure against one Narotam Singh. The time for payment of the mortgage money was fixed as the 21st March, 1896, but was afterwards extended to the 21st May, 1896. On the 2nd May, 1896, the sons and grandsons of Narotam Singh filed a suit for declaration that their interests in the mortgaged property were not liable under the decrees obtained by Manik Kishore Singh and obtained a decree which however, was reversed in appeal on the 3rd March, 1899. No order for stay of execution was made in consequence of the suit.

On the 4th of September, 1899, the decree-holder applied for the first time for execution of his decree.

Held, that whether Art. 178 or Art. 179 (O.A.) was applicable, execution of the decrees was barred by limitation. (1902) **A.W.N. 154.**

11. Partition decree.

(a) Application for final decree.
(b) Miscellaneous.

11. (a) Partition decree—Application for final decree.

——Art. 181 — Applicability — Partition suit—Preliminary decree — Final decree — Application for—Limitation—Failure to take steps—Dismissal—Power of Court.

Where, in a suit for partition and accounts, a preliminary decree has been passed, the suit cannot thereafter be dismissed for failure on the part of the plaintiff to take further steps. A party need not make an application to make the preliminary decree final. It is no doubt usual for the plaintiff to make an application for the appointment of a commissioner, but there is no legal bar to the Court appointing the Commissioner *suo motu* and asking the plaintiff to deposit the commission fee. If the plaintiff does not deposit the fee any other party can do so and take upon himself the carriage of the proceedings. There is no limitation for making the decree final in such cases, and Art. 181, Limitation Act, does not apply. A.I.R. 1948 Cal. 363=53 C.W.N. 582.

——Art. 181—Where in a partition suit a decree was passed on a compromise which not only declared the rights of the several parties interested in the property but also required further proceedings to be taken before the plaintiffs could get the relief claimed by them:

Held, that the decree which incorporated the terms of the compromise was a preliminary decree and Art. 181 Limitation Act, did not, therefore, apply to an application for preparation of final decree. A. I. R. 1938 Oudh 229=1938 O.W.N. 916=14 Luck. 223=177 Ind. Cas. 556.

——Art. 181—Application for preparation of final decree—Limitation —Award in partition proceedings.

In partition proceedings the arbitrators made their award on November 27, 1929. On January 13, 1930, an application was made for filing the award and on January 30, 1930, an order was made for final decree in terms of the award. It was further ordered that the decree be prepared when the necessary stamp was filed. As none of the parties filed the stamp in spite of notice being issued to them, the Court dropped the proceedings on August 16, 1930. Subsequent to this, plaintiff No. 2 died and on May 26, 1933, an application was made by his legal representatives to have their names substituted in place of the deceased. The application was granted on September 9, 1933. While these proceedings were pending, an application was also made by the legal representatives of plaintiff No. 2 offering to file the stamp paper and asking to have the final decree engrossed on the stamp paper:

Held, that the application which was made on August 4, 1933 was not an application for making a final decree, order for which had already been passed on January, 30, 1930. After the making of that order, the proceedings must be deemed to be pending until the decree is engrossed on a stamp paper. The application made on August 4, 1933, in reality meant nothing more than that the stamp paper which the applicant offered to file be accepted. Such an application was merely a step in the proceedings for preparation of the final decree and was not subject to any rule of limitation. 1937 O.W.N. 124=13 Luck. 135=A.I.R. 1937 Oudh 409=166 Ind. Cas. 718.

——Art. 181—Partition suit—Application for final decree.

Art. 181 applies only to applications to Court for exercise of acts and power which the Court is not bound to perform *suo motu*. An application for the exercise of purely ministerial functions which the Court has no discretion to refuse is not within Art. 181. In a partition suit after the preliminary decree, the Court is bound to proceed further and to appoint a Commissioner to actually partition the property and on the report of the Commissioner, if accepted, to pass a final decree, and Art. 181 does not apply, inasmuch as the Court has to carry on the proceedings after the preliminary decree *suo motu*. A. I. R. 1933 Pesh. 101=146 Ind. Cas. 201.

——Art. 181—Application for the preparation of a final decree is not an application for the execution of a decree but an application which is governed by Art. 181. 118 Ind. Cas. 670=1929 A.L.J. 976=A.I.R. 1929 All. 677.

——Art. 181—After preliminary decree in partition suit, application for final decree is proper course and fresh suit for absolute partition does not lie—Art. 181, does not apply to such application,—Such application however, affects properties then in suit and not new properties.

There is no limitation to an application made in partition suit after the passing of a preliminary decree. 121 Ind. Cas. 280=6 O. W. N. 804=A.I.R. 1929 Oudh 456.

——Art. 181—The application for making absolute a preliminary decree for partition is governed by Art. 181. 112 Ind. Cas. 205=A.I.R. 1929 Oudh 117.

——Art. 181—An application for final decree is a proceeding in a suit and not in execution. Only one such application is permissible and it must be filed within three years of the preliminary decree. 85 Ind. Cas. 808=35 M.L.T. 131=1924 M.W.N. 884=20 M.L.W. 954=A.I.R. 1924 Mad. 890=47 M.L.J. 641.

——Art. 181—Preliminary decree affirmed on appeal—Time for applying for final decree is 3 years from the date of affirmance. 39 All. 641; 40 All. 203; 40 Mad. 714, Foll. 75 Ind. Cas. 2 =37 C.L.J. 452=A.I.R. 1923 Cal. 389.

——Art. 181—As a preliminary decree in a partition suit, is not capable of execution, an application to effect partition and to prepare a final decree is not one for execution, coming under Art. 181. Such an application is one in the suit to which law of limitation does not apply. 60 Ind. Cas. 433=7 O.L.J. 538=23 O.C. 281.

11. (b) Partition decree — Miscellaneous.

——Art. 181—Applicability — Preliminary decree in partition suit directing determination of mesne profits due to plaintiff on his application in execution—Application under O. 20, R. 12. *See* C. P. CODE, O. 20, R. 12 AND LIMITATION ACT, ART. 181. (1948) 2 M.L.J. 205=A.I.R. 1949 Mad. 134.

——Art. 181—Decree for partition of land assessed to payment of revenue — Application for sending papers to Collector for effecting a partition.

Whether the decree referred to in O. 20, R. 18, sub-R. (1) is a final decree or a preliminary decree, an application made by a party to a decree under O. 20, R. 18 (1), asking that the papers should be sent to the Collector for effecting a partition as directed in it is of the nature of a mere proceeding in the suit rather than an application to execute the decree, and there is no period of limitation for making it and is not governed either by Art. 181 or Art. 182, Limitation Act. A. I. R. 1945 Bom. 338=47 Bom.L.R. 447=221 Ind. Cas. 383 (F.B.).

——Art. 181—Where under the terms of a preliminary decree for partition the Court has to appoint a Commissioner and get the partition effected through him, an application reminding the Court in the matter cannot be treated as an application falling within the purview of Art. 181. 122 Ind. Cos. 441=13 N.L.J. 83=26 N.L.R. 166=A. I. R. 1930 Nag. 206.

——Art. 181 (178)—Application for appointment of commissioner in partition suit not subject to rules of limitation.

The appointment of a Commissioner in a partition suit is one which the court is competent to make without any application by a party; and consequently an application for the purpose is not governed by Art. 178 or, for the matter of that, by any rules of limitation. (1904) 14 M.L.J. 436 =28 M. 127.

12. Probate proceedings.

——Art. 181—Art. 178 of the Limitation Act of 1877 (which is Art. 181 of the present Act) did not apply to an application for revocation of a probate under Succession Act. A. I. R. 1931 Cal. 717=35 C.W.N. 568=135 Ind. Cas. 286.

——Art. 181—Probate proceedings — Limitation.

The provisions of Art. 181, Sch. I of the Limitation Act have no application to petitions under the Probate and Administration Act and consequently an application may be made even 4 years after the death of the testator. 141 P.L.R. 1911=20 P. R. 1912=233 P.W.R. 1911=10 Ind. Cas. 130.

13. Refund and Restitution.

See also (1) C. P. CODE, S. 144—RESTITUTION AND S. 151.

(2) LIMITATION ACT, ART. 182—RESTITUTION.

——Art. 181 — Applicability — Application by judgment debtor for refund of excess amount paid by mistake—Limitation — Starting point.

An application by the judgment-debtor under S. 47, C. P. Code, for the refund of an excess amount paid by him by mistake is governed by Art. 181 of the Limitation Act. According to this article, the period of limitation commences from the date on which the right to apply accrues. The right to apply in the case of a mistake accrues on the date on which the mistake is discovered. 50 P.L.R. 294=A.I.R. 1949 E.P. 213.

——Art. 181—Application for refund of money wrongly paid—Order of appellate Court determining nature of decree—Limitation for application for refund. *See* C. P. CODE (5 OF 1908), S. 151. (1947) 1 M.L.J. 87=A. I. R. 1947 Mad. 339.

——Arts. 181 and 182—Applicability — Application for restitution.

An application for restitution under S. 144, C. P. Code, or the principles contained therein is governed not by Art. 182 but by the residuary Art. 181 of the Limitation Act. Art. 182 is a special article which governs an application to execute a decree or order. The proceedings contemplated by S. 144, C. P. Code, are of a preliminary nature taken with a view to pass a just and correct order of restitution and to determine all questions necessary for that purpose. An application under S. 144, C. P. Code, is to move the Court to pass such an order which under S. 2 (2), C. P. Code, is a decree and executable as such. An application to pass an executable order or decree cannot be an application for execution in itself. Execution is open to the applicant only if his application is allowed and an order under S. 144 passed. I.L.R. (1947) Nag. 176=1947 N. L.J. 197=A.I.R. 1947 Nag. 239.

——Art. 181—Applicability — Application for restitution.

Where a suit for possession of land was decreed and possession was delivered to the plaintiff, but on appeal the decree of the trial Court was set aside and the case was remanded for re-trial, and the trial Court after the remand dismissed the suit, the *terminus a quo* from which limitation runs for an application for restitution and the delivery of possession of the land back to the defendant, is the date of the dismissal of the suit by the trial Court, and not the date of the decree confirming such dismissal in appeal or second appeal. 223 Ind. Cas. 300=48 P.L.R. 138=A.I.R. 1946 Lah. 416.

——Art. 181 — Possession wrongly taken from party under wrong decree—Application for possession — Application is not one under S. 47, C. P. Code—Art. 181 does not apply.

An application by a party for correction of a mistake in a decree wrongly including a plot of land in it and for restoration of possession of the same to the applicant which had been taken in execution of such decree cannot be treated under S. 47, C. P. Code, as it does not relate to execution, discharge or satisfaction of the decree and no question of limitation arises in the case and therefore Art. 181 has no application. A.I.R. 1946 Oudh 210=1946 A.W.R. (C.C.) 74=1946 A.W.R. (Rev.) B. 54=1946 Oudh W.N. 112=223 Ind. Cas. 250.

——Art. 181—Application by judgment-debtor for restoration of property in excess of what has been decree—Art. 165 does not apply but Art. 181

applies. A.I.R. 1944 Pat. 254=23 Pat. 145=220 Ind. Cas. 335.

——Art. 181—The article of Limitation Act appliable to applications under S. 144, C. P. Code, is Art. 181. A.I.R. 1941 All. 28=1940 A.W.R. 579=193 Ind. Cas. 387.

——Art. 181—Application for restitution is governed by Art. 181 and not by Art. 183. A.I.R. 1940 Cal. 260=I.L.R. (1940) 1 Cal. 486=71 C. L.J. 127=44 C.W.N. 436=189 Ind. Cas. 581.

——Arts. 181, 182 and 183—Where restitution is required by reason of a final decree passed by a Court in India in an appeal from a *muffasil* decree, Art. 181 and not Art. 182 is applicable to an application made under S. 144, C. P. Code. If Art. 183 is of the same scope as Art. 182, the case would be governed by Art. 181 in spite of the fact that restitution is required by reason of the order of His Majesty in Council. A.I.R. 1940 Cal. 260=I.L.R. (1940) 1 Cal. 486=71 C.L.J. 127=44 C.W.N. 438=189 Ind. Cas. 581.

——Arts. 181 and 182—As execution is provided for in the present C. P. Code in Part II and O. 21, while applications for restitution are dealt with in Part XI, C. P. Code, and as O. 21 of the present Code is headed: "execution of decrees and orders" and as Art. 182, Limitation Act, provides for the execution of a decree or order of any Civil Court using exactly the same words as are used in the C. P. Code, it was clearly intended that Art. 182, Limitation Act, should apply to applications that fall within O. 21 of the Code and Art. 181 will apply to all other applications. There is provision for consecutive applications for execution and a fresh start is provided for in Art. 182 from the date of the final order passed on a previous application for execution. In Art. 181, there is only one period of limitation and the starting point is the date on which the right to apply accrues. Art. 181, therefore, applies not only to restitutions under S. 144, C. P. Code, but also to all applications for restoration under the inherent powers of the Court. A.I.R. 1939 Lah. 73=I. L.R. (1938) Lah. 571=41 P.L.R. 208=181 Ind. Cas. 119.

——Art. 181—Proceedings under S. 144, C. P. Code, are not proceedings in execution of a decree and are, therefore, governed by Art. 181, Limitation Act. A.I.R. 1939 All. 66=(1938) A.L.J. 1189=I.L.R. (1939) All. 103=1939 A.W.R. 87 =180 Ind. Cas. 633.

——Arts. 181 and 182—Application under S. 144, C. P. Code.

An application under S. 144, C. P. Code, is not an application in execution and is not governed by Art. 182, Limitation Act. Art. 181 applies to such application. A. I. R. 1938 All. 552=1938 A.W.R. 542=177 Ind. Cas. 695.

——Arts. 181 and 182—Application under S. 144 C. P. Code.

Art. 181, Limitation Act applies to an application for restitution under S. 144, C. P. Code. Such an application is not one for execution and Art. 182 has no application. A.I.R. 1938 Lah. 456=40 P.L.R. 692=177 Ind. Cas. 430.

——Arts. 181 and 182—Article applicable.

An application for restitution under S. 144, C. P. Code, is not an application for execution and is, therefore, governed by Art. 181, and not by Art. 182. 59 C. 337=A.I.R. 1932 Cal. 308=35 C.W.N. 1294=54 C. L. J. 506=137 Ind. Cas. 302.

——Art. 181—An application for restitution under S. 144 is not an application for execution but a miscellaneous application, and Art. 181 governs it. 67 P.R. 1918, Foll. 96 Ind. Cas. 804=A.I.R. 1926 Lah. 685.

——Art. 181—The application for restitution is not an application for execution of a decree and therefore limitation cannot be governed by Art 181, Limitation Act. 71 Ind. Cas. 42=A.I.R. 1923 Nag. 94.

——Art. 181—An application for restitution is an application in execution governed by Art. 182 and not by Art. 181. 15 P.L.T. 745=A.I. R. 1934 Pat. 646=1 B.R. 156=152 Ind. Cas. 944.

——Art. 181—On stay order, application under S. 144, C. P. Code filed—Stay order vacated—No final orders passed—So long as application is pending, no question of limitation under Art. 181 arises. A. I. R. 1938 All. 552=1938 A.W.R. 542=177 Ind. Cas. 695.

——Art. 181—Application for refund of purchase-money under O. 21, R. 93.

Application by auction-purchaser under O. 21, R. 93, C. P. Code for refund of purchase-money is governed by Art. 181 and not by Art. 182 and must be made within three years from the date of first order setting aside the sale. A. I. R. 1937 Mad. 779=(1937) M.W.N. 749=46 M. L. W. 280=172 Ind. Cas. 468.

——Art. 181—A decree for rent was passed against *A* and his co-sharers and the holding was sold in execution on July, 27, 1920, for an amount exceeding the decree debt. Application to set aside the sale was allowed by the first Court and the Court directed refund of the purchase-money to the purchaser who withdrew the excess amount, which remained in deposit for payment to the judgment-debtors. The decree-holder appealed and the sale was confirmed on August 17, 1925. One of the judgment-debtors appealed making *A* a respondent. This appeal was dismissed on March 24, 1927. On March 22, 1930, *A* applied for an order on the auction-purchaser to refund the surplus amount withdrawn by him.

Held, that the right to ask for refund of the money withdrawn by the auction-purchaser arose on August 17, 1925 when the sale was confirmed and as the application was not made within 3 years of that date, it was barred notwithstanding the fact that an appeal had been preferred by another judgment-debtor.

In cases of this nature, the right to apply accrues really on the date when for the first time a decision is given entitling the parties asking for restitution to have restitution. A.I.R. 1933 Cal. 422=144 Ind. Cas. 150.

——Art. 181—Where the pre-emption decree of the trial Court is reversed in appeal by the original vendee, the right to apply for restitution in respect of the amount withdrawn by the vendee before the appellate decree from out of the deposit made in

Court by the pre-emptor decree-holder for payment to the vendee, accrues at the moment when the first Court's decree is drawn up and the limitation runs from that time. The right to apply for restitution is not suspended because a second appeal is preferred by the pre-emptor. In respect of the amount withdrawn by the vendee after the decree of the first Appellate Court, limitation for restitution in respect of that amount runs from the date on which the amount was withdrawn. A.I.R. 1941 All. 28=1940 A.W.R. 579=193 Ind. Cas. 387.

——Art. 181—As regards starting point, the law allows a successful party to execute the decree as soon as it has been obtained in the Court of first instance. Similarly, the party who has succeeded in the first Appellate Court is entitled to apply for restitution without waiting for the decision of any second appeal that may be preferred by the other party. The starting point for limitation under Art. 181, therefore, is the date of the decree of the Appellate Court. An unsuccessful attempt by the other party to get that decree reversed cannot give a fresh start. A.I.R. 1939 Lah. 73=I.L.R. (1938) Lah. 571=41 P.L.R. 208=181 Ind. Cas. Cas. 119.

——Art. 181—Under Art. 181, the right to apply for restitution on the reversal of a decree on appeal arises as soon as the decree is reversed in appeal; and is not suspended by the filing of a second appeal against the appellate decree. 54 A. 770=(1932) A.L.J. 724=A.I.R. 1932 All. 609=141 Ind. Cas. 121.

——Art. 181—Terminus a quo.

On 4th March, 1916, an *ex parte* decree for sale was passed in a mortgage suit. In execution of that decree the property was purchased by certain third parties, and the sale was confirmed by the Court on 25th June, 1917. On the application of the defendant, the *ex parte* decree was set aside on 7th July, 1921. The suit was tried on the merits and dismissed in February, 1922. On 10th April, 1923, the mortgagor applied for recovery of possession of the property which had been sold in execution of the *ex parte* decree but the application was dismissed in April, 1924. On 18th October, 1924, he made an application that the money realised by the sale of the property may be paid to him:

Held, that the right to apply accrued on 7th July, 1921, there was no fresh accrual of right which could supply a new *terminus a quo*, and the application was, therefore, time-barred.32 P.L.R. 395=A. I. R. 1931 Lah. 504=134 Ind. Cas. 206.

——Art. 181—Restitution.

An application under S. 144 is an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the Court of first instance, it being in substance an application made for seeking the aid of the Court in working out the final decree. Where an appellate Court has ordered restitution to a person who has been dispossessed under a decree and an appeal against that order has been dismissed by the High Court the period of limitation under Art. 181 for an application for assessment of mesne profits begins to run from the date of the order of the High Court. 7 O.W.N. 1153=A. I.R. 1931 Oudh 51.

——Art. 181—Where a trial Court's decree is reversed in first appeal which, in its turn, is affirmed in second appeal but the trial Court's decree is executed during pendency of first appeal, the limitation for an application for restitution begins from the date of the decree in first appeal and not that in second appeal. 56 Cal. 61=117 Ind. Cas. 543=32 C.W.N. 971=A.I.R. 1928 Cal. 646.

——Art. 181—Pending appeal by the defendants, properties were delivered to the plaintiff in execution of the decree. Defendants succeeded in their appeal and also in the High Court. They got back their properties and then applied for mesne profits by way of restitution:

Held, that the article applicable to an application for restitution was Art. 181, Limitation Act. A.I.R. 1925 Pat. 1 (F.B.), Foll.; and that the time was to be computed from the date of the final decree which was the decree of the High Court and not that of the first appellate Court. 39 All. 641 and A.I.R. 1926 P.C. 93, Foll. 114 Ind. Cas. 476=7 Pat. 724=10 Pat. L.T. 49=A.I.R. 1928 Pat. 598.

——Art. 181—The period of limitation is three years for an application for restitution. 24 C.L.J. 469, Foll. 92 Ind. Cas. 960=A.I.R. 1926 Cal. 981.

——Art. 181—C. P. Code, S. 144—Application under—If governed by Art. 181 or 182.

Per *Das* and *Kulwant Sahay, JJ.*—An application for restitution is governed by Art. 181 and not Art. 182.

Per *Ross, J.*—There is no reason in principle why an application for restitution should not be treated as an application for execution, and therefore such an application is governed by Art. 182. 24 C.L.J. 467; 28 Cal. 113; 16 I.C. 238; 11 C.L.J. 541, Foll. 78 Ind. Cas. 200=3 Pat. 371=1924 P.H.C.C. 33=5 P.L.T. 145=A.I.R. 1925 Pat. 1 (F.B.).

——Art. 181—C. P. Code, S. 144—Application for restitution—Art. 181 applies. 17 N.L.R. 62=A.I.R. 1921 Nag. 112.

——Art. 181—Judgment-debtor's application for restoration of excess property—Article 181 applies.

The wording of Art. 165 of the limitation schedule makes it absolutely clear that it was intended to apply to an application provided for by O. 21, R. 100 of the C. P. Code and no other and therefore, where the applicant is a judgment-debtor who has no remedy by a suit, the proper article which applies is Art. 181 and not Art. 165. 38 All. 389 and 42 Mad. 753, Foll. 68 Ind. Cas. 349=24 Bom. L.R. 771=46 Bom. 1031=A.I.R. 1922 Bom. 271.

——Arts. 181 and 109—Restitution — Possession —Temporary injunction.

Possession under a temporary injunction is not wrongful within Art. 109 of the Limitation Act. The Article is confined to suits and is inapplicable to an application for restitution which is governed by Art. 181. 54 Ind. Cas. 664 (Nag.).

——Art. 181—Restitution — Application for compensation three years after restoration of possession.

Where in execution of a decree the shares of the judgment-debtors were purchased by *A* in an execution sale which the judgment-debtors got set aside, their application for compensation for the period during which they were out of possession made three years after restoration of possession to them is barred by the provisions of Art. 181. Art. 181 applies only to applications made under the Code of the Civil

Procedure. 2 Pat. L.J. 206=3 Pat. L.W. 423=(1919) Pat. 282=39 Ind. Cas. 653.

——Art. 181—Restitution — Application by judgment debtor to recover posses ion of immovable property of which he has been wrongly dispossessed.

An application by a judgment-debtor to recover possession of immoveable property of which he has been dispossessed by the decree-holder in excess of the decree falls under Art. 181. 38 A. 339, Appr. (1918) 3 U.B.R. 79=46 Ind. Cas. 323.

——Art. 181—Restitution — Limitation — Starting point—Preliminary decree.

Time begins to run against the party claiming restitution from the date when the final pronouncement is made in the proceedings instituted to test the propriety of the preliminary decree or order of the lower Court. 27 C.L.J. 451=43 Ind. Cas. 775.

——Arts. 181 and 182—Restitution — Application for.

An application for restitution under the C. P. Code being the enforcement of an obligation arising from the appellate decree itself, is an application for execution governed by Art. 182. 24 C.L.J. 467, Expl. 6 L.W. 359=(1917) M.W.N. 643=33 M.L.J. 413=22 M.L.T. 333=42 Ind. Cas. 530.

——Art. 181—Restitution — Application for.

Art. 181 is applicable to an application for restitution. Time will run against judgment-debtor only from the date of supersession of the erroneous decree. 24 C.L.J. 467=21 C.W.N. 564=38 Ind. Cas. 17.

——Art. 181—Restitution — Application for.

An application for restitution under S. 144, C. P. Code not being an application for execution, Art. 181 of the Limitation Act applies. 8 Bur. L.T. 165=8 L.B.R. 262=30 Ind. Cas. 680.

——Art. 181—Restitution — Application.

An application for refund of the amount levied in execution of a decree, subsequently set aside, is governed by Art. 181 of the Limitation Act. 16 Ind. Cas. 238 (Cal.).

——Art. 181—Amendment of decree after execution—Application for refund of excess realized.

Where a decree was amended to the advantage of the judgment-debtor after execution an application for the refund of the excess realised is governed by Art. 178 (O.A.). (1905) A.W.N. 63=2 A.L.J. 169=27 A. 485.

——Arts. 181 and 182—Payment under ex-parte decree set aside—Suit ultimately dismissed—Restitution — Starting point — Applicability of Art. 179.

Where under an *ex parte* decree money was paid to the decree-holder, and the *ex parte* decree was afterwards set aside and the suit was dismissed, the Article applicable to an application for refund of money paid to the decree-holder is Art. 178 and not Art. 179. The starting point is the date of setting aside the *ex parte* decree and not that of the dismissal of the suit. (1900) 28 C. 113.

14. Revision application.

——Art. 181—Revision application.

No special period of limitation is prescribed for revision application. Hence, if any Article is applicable, it is Art. 181 which prescribes a period of three years from the time when the right to apply accrues. When an application is made beyond three months but within three years of the order, the application is within time and no question of application under S. 5, Limitation Act, arises. The question whether the Court will entertain it or not account of delay, (according to practice of Oudh Chief Court), is a question to be considered in the application for revision itself. A.I.R. 1942 Oudh 340=1942 O.W.N. 245=1942 A.W.R. 193=200 Ind. Cas. 259.

——Art. 181—Article 181, Limitation Act, does not apply to application in revision—No time limit is placed on High Court's power of revision.

These powers are exercised by High Court quite irrespective of any right on the part of the aggrieved party to move the Court. 7 O.W.N. 663=126 Ind. Cas. 395=A.I.R. 1930 Oudh 401.

——Art. 181—Revision — Limitation for.

The period of limitation for making an application for revision against the decision of a Small Cau es Court to the High Court is three years under Art. 181 of the Act from the time when the right to apply for revision arose. 92 P.R. 1910=126 P.W.R. 1910=187 P.L.R. 1910=8 Ind. Cas. 318.

15. Revival of execution.

See also under ART. 182.
(a) General.
(b) When execution has been stayed.

15. (a) Revival of execution—General.

——Art. 181—Where an execution case is struck off for the time being, because some other suit is pending with regard to the same property, the application to proceed with the execution after the matter has been finally decided amounts to an application for revival of the original execution application and is governed by Art. 181. A.I.R. 1944 Pesh. 17=212 Ind. Cas. 628.

——Art. 181—In execution certain properties sold—12 years after decree, sale set aside under O. 21, R. 90 Civil P. Code—Decree-holder filing execution application for re-sale of same property—Subsequent application *held*, was for revival of previous application and S. 48 Civil P. Code, did not apply but Art. 181 applied. A.I.R. 1937 Pat. 43=3 B.R. 238 (2)=18 P.L.T. 90=166 Ind. Cas. 950 (1).

——Art. 181—Application for revival, whether to be made within three years of withdrawal of obstacle.

Where the execution of a decree has been suspended through no act or default of a decree-holder, he has a right to ask the Court to revive and carry through the execution proceedings which have been suspended, and this right can be exercised by means of a proper application to that effect made within three years of the date on which the right to make it accrued, as such application would be one for which no period of limitation has been expressly provided and would, therefore, fall under Art. 181. 1934 A.L.J. 363=3 A.W.R. 550=A.I.R. 1934 All. 294=148 Ind. Cas. 525.

——Art. 181—Execution of decree—Compromise giving time—Default — Application for revival.

An *ex parte* mortgage decree was passed in January, 1924. An application for execution was filed on August 7, 1925, and while that was pending, the judgment-debtors applied for the setting aside of the *ex parte* decree on October 13, 1925. An *interim* order staying execution was passed on that date. On April 24, 1926, the decree-holder and the judgment-debtors compromised and agreed that the judgment-debtors should be given 3 months to pay up the amount and if they failed to do so, execution should proceed. There was written compromise filed in Court and verified by the parties on May 12, 1926. On May 22, the Court passed an order striking off the application for the setting aside of the *ex parte* decree on the ground that the matter had been compromised. Subsequently, on June 4, 1926, the office put up a report before the Court stating that the decree-holder could sell the property if the amount was not paid within three months. On this, the Court ordered the 'execution case be struck off for the present without payment being entered.' The judgment-debtors did not deposit the the amount within the period which expired on July 24, 1926. An application for execution of the decree was made on July 24, 1929:

Held, that the application was in substance one merely to revive the earliest proceedings which had been kept in abeyance; that Art. 181 did not apply and the application was not time-barred.

Held, further that assuming Art. 181 applied, the decree-holder had applied within 3 years of the date when the right to apply accrued. (1931) A.L.J. 436=A.I.R. 1931 All. 458=133 Ind. Cas. 316.

——Art. 181—Application for reviving execution proceeding is governed by Art. 181 unless decree-holder is prevented from taking action in pursuance of his rights. Properties of the judgment-debtor were sold in execution of the decree when a third person became the auction-purchaser. The judgment-debtor having objected, the sale was set aside on 5th July, 1923. The auction-purchaser appealed against the order which was confirmed on appeal. The decree-holder filed a fresh application for execution of the decree on 15th December, 1926.

Held, that the time for reviving the execution proceedings accrued on 5th July, 1923 when the execution proceedings were at an end, the sale being set aside. The present application being made on 15th December, 1926 more than three years after the right to apply accrued, was barred. The decree-holder could not take advantage of the appeal by the auction-purchaser and count the period from the date of order of appellate Court. The appeal by a third party could not prevent the decree-holder from making a fresh application for execution of his decree. 34 C.W.N. 102=A.I.R. 1930 Cal. 329.

——Art. 181—Striking off application.

Striking off on statistical or administrative ground an application for judicial relief, does not amount to judicial disposal of it. For the purposes of limitation an application so struck off must be regarded as pending. 118 Ind. Cas. 769=A.I.R. 1930 Mad. 328.

——Art. 181—Application in execution, when can be treated as continuation of a previous application.

In order that an application for execution may be treated as an application in continuation of the previous application, the previous application must have been dismissed without any default on the part of the decree-holder, and the scope and character of the two applications must be the same.

Where in an application the first condition was fulfilled but as regards the second some new properties have been added in the fresh application, but this amendment as to adding properties was made within a reasonable time from the date when amendment became necessary,

Held, that the application ought to be treated as an application in continuation of the previous execution. 102 Ind. Cas. 895=6 Pat. 274=8 P.L.T. 771=A.I.R. 1927 Pat. 223.

——Art. 181—Application for revival of pending execution is distinct from fresh application for execution—Article 181 applies.

Per *Sulaiman, J.*—The question of exclusion of time can only arise when a fresh application for execution is made, whereas it is only a previous application which has not been properly and finally disposed of which can be revived. The application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely to request the Court to take up and continue the proceedings which have not finally terminated, but which have remained in abeyance for some reason or other beyond his control. It is not correct to say that the amendment of S. 15 was intended to sweep away and replace the old doctrine of revival. The two principles are not co-extensive or identical. The application for revival not being a fresh application for execution cannot be governed by Art. 182. The proper article is Art. 181. 100 Ind. Cas. 692=49 All. 276=25 A.L.J. 201=A.I.R. 1927 All. 16 (F.B.).

——Art. 181—Execution application recorded for statistical purposes—Application remains pending.

The Court passed an order on an execution application as follows. "The 3rd item was delivered to the petitioners and the petition was recorded." There were some proceedings in Court relating to item 2 and a temporary injunction prevented its delivery. Subsequent to the removal of the temporary injunction, an execution application was put in,

Held, that the original application should not be regarded as dismissed. It was still pending and the latter application was only intended to call the attention of the execution Court to the fact that the execution application had to be proceeded with. Hence there was no bar to the original execution application being proceeded with. 92 Ind. Cas. 782 =1926 M.W.N. 262=A.I.R. 1926 Mad. 453=50 M.L.J. 215.

——Art. 181—Application for execution — Further progress barred by act of Court—Application to revive is governed by Art. 181 — Application kept on pending list need not be revived.

It may be that where a bar to the further progress of execution proceedings has been created by an order of a Court of competent jurisdiction such proceedings may only be revived by an application under Art. 181 after the removal of the bar, but in a case where the Court intended to and did, as a matter of fact, maintain an application for execution on its pending file, and stopped proceedings for the

time being and did not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file, so that it may proceed with it, is not governed by any Article of the Limitation Act. An application contemplated by Art. 181 must be an application required by law to be made, and there is no provision of law which requires a decree-holder to make an application where the sole object is the continuation of proceedings in a pending case. 85 Ind. Cas. 450=28 O.C. 158=A.I.R. 1925 Oudh 552.

——**Art. 181**—Execution against property specified in execution application failing for no fault of decree-holder's—Subsequent application to proceed against other properties, though beyond three years of decree is not barred.

When on an application for execution made in accordance with law, execution cannot be successfully taken against the property specified, by reason of causes for which the decree-holder is in no way responsible, he should not be confined to the properties first specified. It is open to him to ask the Court to proceed against other properties specified in his supplementary list and his application to so proceed though beyond time is not barred. 88 Ind. Cas. 204=A.I.R. 1925 Mad. 981=48 M.L.J. 563.

——**Art. 181**—When an execution application is brought and properties are attached in execution of that application if any obstacle is placed in the way of the properties being sold and assets realised for the purpose of meeting the decree debt by the action of a third party putting in a claim petition and it becomes necessary for the decree-holder either to dispute the claim proceedings or to bring a suit to have the matter decided whether the properties are those of the judgment-debtor, his subsequent application to sell those properties is not governed by Art. 182 of the Limitation Act, but is in the nature of a revival of the original execution application and Art. 181 of Limitation Act will apply. This principle will apply even in the case of an attachment before judgment though it had not been followed by an application for execution of the decree after the decree was passed. 79 Ind. Cas. 779=47 Mad. 176=19 M.L.W. 20=A.I.R. 1924 Mad. 210 =45 M.L.J. 822.

——**Art. 181**—Application for revival of execution application dismissed for no fault of decree-holder is good by Art. 181 and S. 6 extends starting point in case of minors. 80 Ind. Cas. 775=26 O.C. 206=11 O.L.J. 133=A.I.R. 1924 Oudh 31.

——**Art. 181—Litigation by stranger setting aside sale in execution revives execution proceedings.**

Where the effect of the decree in favour of a stranger, was to set aside the sale and the decree-holder and the judgment-debtor were both parties to the suit.

Held, that by reason of the litigation which took place after the sale and by reason of the decree in favour of the stranger the execution proceedings can be said to have been revived and the subsequent execution case may be regarded as a continuation of the former execution proceedings. 76 Ind. Cas. 927=2 Pat. 829=1 Pat. L. R. 358=1923 P. H. C. C. 342=5 P.L.T. 345=A.I.R. 1924 Pat. 273.

——**Art. 181**—On the amendment of the preliminary decree in a mortgage suit by the mortgagee, the decree-holder's right to obtain a final decree which is barred by limitation is not revived and the decree-holder does not become entitled to a final decree on the basis of the amended decree. 68 Ind. Cas. 919=18 N.L.R. 58=A.I.R. 1922 Nag. 217.

——**Art. 181**—Previous application suspended by objection afterwards found groundless—Subsequent application may be treated as continuation of previous application. 68 Ind. Cas. 207=35 C.L.J. 84 =26 C.W.N. 338=A.I.R. 1921 Cal. 472.

——**Arts. 181 and 182—Revival of execution—Dismissal for statistical purposes—Fresh application.**

An execution application, which has not been judicially disposed of, but simply removed from the court's file for statistical purposes does not require to be revived. The Court had only to be apprised of, in some recognised manner, and a subsequent application presented to the High Court requesting it to deal with the prior pending application, is not one to which either Art. 181 or 182 of the Act applies. 11 L.W. 42=55 Ind. Cas. 526.

——**Arts. 181 and 182—Revival of execution—Execution by Collector—Application to send papers back.**

An application to send the papers back to the collector will be governed by Art. 181 or Art. 182 of the Limitation Act, according as it may be for the continuance of the previous execution proceeding or for taking a step-in-aid. Art. 163 would not apply. 7 O.L.J. 11=55 Ind. Cas. 485.

——**Arts. 181 and 182—Revival of execution—Dismissal of execution application—Decree-holder not at fault—Limitation.**

The dismissal of an application for execution for no fault of the decree-holder is a mere direction to the Officers of the Court to remove the application from the pending list. The decree-holder's right to apply for its revival accrues from day to day and will be barred if no application is made for the purpose before three years have elapsed from the date when such proceedings were closed in fact or struck off. 6 O.L.J. 656=54 Ind. Cas. 426.

——**Arts. 181 and 182—Revival of execution—Mortgage decree — Application for final decree—Continuation of prior application.**

On 30-6-14, an application for final decree by the surviving decree-holders in their capacity also as legal representative of deceased Plaintiffs was put and on 19-8-14 a final decree was passed. On 8-1-15 the Judgment-debtor objected that the widow was the legal representative which decreed in favour of Judgment-debtor. On 7-12-15, an application was made by the widow to be made a legal representative This application was held to be in time and Art. 181 Limitation Act did not apply and it should be dealt with under O. 22, R. 9, C.P.C. and should be considered as one in continuation of the surviving decree-holder's application for a final decree. 45 Ind. Cas. 657 (Cal.).

——**Arts. 181 and 182—Revival of execution—Limitation.**

Art. 182 does not apply to the cases of an application to revive and carry through a pending execution; and such an application is not barred if brought more than 3 years after proceedings had ceased to be pending. 36 Mad. 553=24 M.L.J. 545=14 Ind. Cas. 264.

——**Arts. 181 and 182—Revival of execution—Continuity of proceedings of last application—**

Execution interrupted by appeals of judgment-debtor.

The last application for execution was made on 3-7-02. On the objection of the judgment-debtor, which was over ruled by the first court, the High Court remanded the case, and it was ascertained by Commissioner that the judgment-debtor was entitled to a certain deduction, an so on 29-6-07, the objection of the judgment-debtor was allowed in part. On the same day, the Court passed the following order "Case put an end to after decision of the objection." The judgment-debtor again appealed to the High Court, but his appeal was dismissed on 4-3-10. On 6-12-10 the decree-holders applied for execution. *Held*, that the present application was one to continue further, the execution proceedings which had been interrupted by the two appeals of the judgment-debtor to the High Court, that there was nothing in law to compel the decree-holder to proceed with execution during the appeal, more especially when the amount for which execution should be levied depended on the decision of the Appellate Court, that Art. 181 applied, and that the application was not barred. 11 Ind. Cas. 972 (Cal.).

——Art. 181—Revival of execution — Execution of decree—Time to run from the removal of the obstruction.

If an objection is raised for attachment in execution of a decree, time runs against the decree-holder from the removal of obstruction. 24 B. 345; 23 C. 397; 28 M. 50, (F.B.), Foll. 7 Ind. Cas. 707 (All.).

——Art. 181—Execution application for continuation or revival of previous application—Test—Application for order absolute—C. P. Code, O. 34, R. 3—Applicability to applications.

An application for execution of a decree may be treated as in continuation or for revival of a previous application similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction. (1910) 12 C.L.J. 328=37 C. 796=15 C.W.N. 337=6 Ind. Cas. 537.

——Arts. 181 and 182—Execution — When prior application to be considered pending.

So long as the proceedings in execution initiated by the decree-holder are pending, his right to apply for the continuance occurs from day to day, *i.e.*, on every day on which the court does not *suo motu* continue them. The right to apply for execution will not be barred till 3 years have elapsed after the proceedings have ceased to be pending. An order "dismissing" an execution petition on the ground of stay of execution pending an appeal to the appellate court is not a nullity; but, if passed without notice and in the absence of parties, it cannot be regarded as an order between the parties at all, but is merely a direction to the officer of the court to remove the proceedings from the pending list. The execution petition itself should, under the circumstances, be considered as pending. A decree-holder applied for execution on 3-10-99. Objection was taken by the judgment-debtor that the debt was satisfied. On 31-10-99 the Munsif disallowed the objection. The judgment-debtor appealed. There was an order by the appellate court for stay of execution and the Munsif passed an order on 15-12-'99:—"Execution ordered to be stayed; petition dismissed." This order did not appear to have been passed after notice to the parties or in their presence. On 20-7-00 the appellate judge reversed the order of the Munsif and remanded the petition for further enquiry and on 25-1-01 the Munsif decided that the decree had been satisfied. On 11-12-01 of the District Judge, on appeal, reversed this order; on 29-10-03 his decision was confirmed by the High Court. The present application for execution was presented on 3—7—'05. *Held*, that under the circumstances, the application of 3—10—'98 should be considered pending and that the present application was barred only so far as it was a fresh application for execution, *i.e.*, in so far as it asked for attachment of property not proceeded against in proceedings instituted by the application of 1899 and that in so far as it repeated what the application of 1899, prayed for, it was not barred. (1907) 18 M.L.J. 46=31 M. 71=3 M. L.T. 329.

——Art. 181 — Application to revive former application for execution.

A decree-holder applied for the sale in execution of shares in five villages, and shares in two villages, were sold and the decree satisfied but subsequently the sale was held to be a number and the decree-holder made an application to revive the previous application. **Held**, that this was not an application coming under S. 179, but an application to which Art. 178 applied, the right to apply accruing on the date when the sale was held to be a nullity. 1906 A.W.N. 152=3 A.L.J. 845=28 A. 651.

——Arts. 181 and 182—Application for execution —Revival of, pending execution.

A decree-holder applied for execution on the 24th August, 1888. The judgment-debtor objected, but an order was made on the 18th December, 1888 that the execution should proceed. On the 29th November, 1889, another order was made to the effect that the property to be sold being ancestral, the case should be struck off the file and the papers transferred to the Collector for the completion of the sale proceedings. The last order in the proceeding purports to have been made on the 23rd December, 1889, and was to the effect that the decree-holder not having deposited the cost of transmitting the order for sale and the copy of the decree to the Collector's Court, the records, owing to the default of prosecution on the part of the decree-holder be not sent to the Collector's court for taking the sale proceedings. Meanwhile, on the 15th February, 1889, this judgment-debtor had filed an appeal in the High Court from the order of the 18th December, 1888. That appeal having succeeded, the decree-holder appealed to the Privy Council, who by a judgment delivered on the 24th November, 1894, and embodied in an Order in Council of the 12th December, 1884, reversed the High Court's order. On the 23rd November, 1897, the present application was made for the revival of the execution case instituted on the 24th August, 1884. *Held*, that the order of the 23rd December, 1889, the regularity of which was questioned by the High Court, even if otherwise valid, was in no sense a final order, and the present application was in substance as well as in form an application to revive and carry through a pending execution, suspended by no act or default of the decree-holder, and was not an application to initiate a new one. It was therefore, not barred by limitation. (1905) 15 M

L.J. 258=7 Bom.L.R. 433=2 A.L.J. 397=9 C. W.N. 601=27 A. 334=32 I.A. 102 (P.C.)=1 C.L.J. 381.

——Arts. 181 and 182—Revivor—Transfer of decree—Transferee applying for execution — Objection by judgment-debtor — Transfer benami for him—Application dismissed—Suit by transferee for establishing right and decree—Application for execution.

Where the transferee of a decree applies for execution which is rejected on the ground that the transfer is for the benefit of the judgment-debtor, and where, after establishing his right to execute in a suit, he again applies for execution, such application is merely to revive or continue the former application and is governed by Art. 178 and not by Art. 179. (O.A.) 10 M. 22, overruled. Time only begins to run from the date of the decree declaring the respondent's right to proceed in execution. (1904) 14 M.L.J. 401=28 M. 50 (F.B.).

——Art. 181 (178)—Continuation of previous application—Intervening disability.

A decree-holder attached the judgment-debtor's salary and on the latter's representation that he had taken insolvency proceedings and that all his properties were vested in a receiver, the Court released the salary from attachment. The judgment-debtor was discharged. Within three years from the date of discharge, the decree-holder applied to revive his application. *Held*, that it was not barred, as it was only a continuation of the prior one, and as it was made within three years from the time when he could ask for such a continuation. Where a decree directed that the plaintiff should not execute till the defendant's petition for insolvency was disposed of:—*Held*, that he should apply within three years from the date of the order of the first court in insolvency under S. 351 of the Code, granting the petition for insolvency. (1902) 30 C. 407.

15. (b) Revival of execution—When execution has been stayed.

——Arts. 181 and 182—Revival of execution application—Stay of execution—Execution application consigned to record room—Subsequent application—Nature of—Limitation.

Where an execution application for sale is consigned to the record room on receipt of an order of stay of execution the petition is not disposed of, but is only kept pending and hence a subsequent application is only in the nature of an application to revive the pending execution application and is not governed by any limitation. It is not a new execution application. A.I.R. 1950 M.B. 71.

——Art. 181—Revival of execution—Application "filed" due to say order — Subsequent application —If revivor—Limitation.

Where an application for execution is for the time being "filed" owing to an order of the superior Court staying sale in execution and for no fault of the decree-holder, the application must be considered to be still pending, undisposed of. A later application by the decree-holder after the stay order gets vacated to continue the application is not a revival application and is not governed by Art. 181 or any other article of the Limitation Act. In fact no such application is necessary on the part of the decree-holder, as the Court is bound to watch the position and to continue the proceedings after the obstacle is removed of its own motion. I.L.R. (1948) Nag. 320=A.I.R. 1948 Nag. 284=1948 N.L.J. 262.

——Art. 181—Application to continue execution after stay order has ceased.

Execution proceedings are not terminated when the execution is stayed under O. 21, R. 29, Civil P. Code, pending disposal of judgment-debtor's suit and the execution application is thereon consigned to record room. When the stay order has ceased to operate it is not incumbent on the decree-holder to make an application to set execution proceedings in motion. Where, however, he makes such an application, it is not governed by Art. 181, and cannot be barred even if made more than three years of the disposal of judgment-debtor's suit. A.I.R. 1940 All. 151=(1940) A.L.J. 130=I.L.R. (1940) All. 246=1940 A.W.R. 118=187 Ind, Cas. 313 (F.B.).

——Art. 181—Where the obstacle to the further progress of the execution is the injunction issued in another suit, as soon as the suit is dismissed, the obstacle is withdrawn and the decree-holder gets a right to proceed with the execution proceedings. An application for continuation of execution should therefore be filed within a period of three years from the date on which the injunction become ineffective. A.I.R. 1934 All. 294=(1934) A.L.J. 363=3 A.W.R. 550=148 Ind. Cas. 525.

——Art. 181—Fresh application after disposal of appeal.

Where pending an application for execution an appeal was filed and the execution was stayed and no final orders were passed thereon and after the disposal of the appeal the decree-holder made an application to continue the previous application:

Held, that the petition was really one to revive the previous execution application and that in default of any specific section or article of the Limitation Act, the general Art. 181 applied so that a decree-holder had three years from the date on which stay came to an end, namely the date of disposal of the appeal. 38 M.L.W. 268=A.I.R. 1933 Mad. 325=142 Ind. Cas. 534.

——Art. 181—Stay of execution pending re-hearing till further orders.

An *ex parte* decree was passed in December, 1922. On January, 4, 1923, the judgment-debtor applied for setting aside the decree. On April 9, 1923, the decree-holders applied for execution but on May 25, 1923, the judgment-debtor obtained from the Court an order staying the execution proceedings until the re-hearing was disposed of. The execution was stayed 'until further orders'. In compliance with this order, the executing Court passed an order on December, 14, 1923, in these terms: "It is useless to keep the execution case pending any longer. Struck off." The re-hearing petition was dismissed on December 19, 1923. On January 7, 1924, the judgment-debtor filed an appeal but it was dismissed on June 21, 1926. On January 11, 1929, the decree-holders filed a fresh execution application:

Held, that no 'further orders' having ever been passed, the decree-holders were entitled to wait till the proceedings relating to the rehearing were finally disposed of on appeal and that the execution application was in time. A.I.R. 1932 Cal. 19=58 C. 1113=35 C.W.N. 540=134 Ind. Cas. 939.

——Art. 181—Revival of execution proceedings—Application for, must be made within 3 years from suspension. A.I.R. 1927 All. 16 (F.B.), Foll. 100 Ind. Cas. 790=A.I.R. 1927 All. 802.

——Art. 181—Execution stayed by injunction through Court—Application for revival is governed by Art. 181 and time runs when obstacle to its execution is removed.

A final decree for sale was made on the 7th June, 1913. An application for execution was made on 4th January, 1916. The decree was sent to the Collector for execution. While the execution was still pending before the Collector certain people filed a suit on 13th November, 1916, to obtain a declaration that the property ordered to be sold was not liable to be sold in execution of the decree-holder's decree. On the same day the Court seized of the suit, enjoined the decree-holders from proceeding with the same. The suit was finally dismissed by the High Court on 6th July, 1920.

Held, that the obstacle to the execution of the decree was removed on 6th July, 1920 and therefore an application for revival of the execution proceedings filed within three years of this date was within time. 100 Ind. Cas. 692=49 All. 276=25 A. L.J. 201=A.I.R. 1927 All. 16.

——Art. 181—Execution stayed by an injunction—Right to execute revives on injunction coming to an end—Decree-holder must apply for revival within three years from accrual of right. 89 Ind. Cas. 992=7 P.L.T. 39=A.I.R. 1926 Pat. 62.

——Art. 181—Revival of execution.

Where a decree holder is prevented by an injunction from executing his decree he must apply for execution within three years from termination of the injunction period, to save his decree from being barred. 42 All. 564=18 A.L.J. 643=56 Ind. Cas. 1006.

——Art. 181—Revival of execution—Application—Injunction.

Where owing to an order staying a sale in execution of a decree the decree-holder is prevented from taking further steps in the execution proceeding a subsequent application for execution must be treated as an application to continue the previous proceeding or to revive or carry through a pending execution which was suspended by no act or default of the decree-holder. 22 O.C. 75=52 Ind. Cas. 116.

——Art. 181—Revival of —Execution — Application to continue stayed proceeding—Limitation.

The starting point for limitation for an application to continue a stayed proceeding in execution is the date on which the order for stay is withdrawn or became inoperative even though the execution proceeding may have been struck off by the order of stay. 17 O.C. 169=25 Ind. Cas. 160.

——Art. 181 (178)—Execution suspended by action of court—Limitation.

Application for execution of a decree for sale on a mortgage passed on the 30th of March, 1893 was made in March 1896, and property mortgaged was advertised for sale on the 20th of May 1897. A suit was, however, filed by the minor son of the judgment-debtor, in consequence of which the sale was, on the 17th of May 1897, stayed "pending the decision of the suit." A decree was given in favour of the son on the 2nd of August 1897; but this was reversed in appeal on the 9th of February 1898, and the son's suit was dismissed. But there was a further appeal to the High Court, which, on the 29th June 1900, set aside the decree of the lower appellate Court and remanded the record for trial on the merits. Finally the decree of the 2nd August 1897, was reversed and the son's suit was dismissed on the 29th of March 1901. On the 11th of May 1901, the decree-holder presented an application praying the Court to take up and proceed with the application which had been stayed by the order of the 17th May, 1897. *Held*, that time began to run against the decree-holder from the 9th February 1898, but inasmuch as by the action of the court execution of the decree had been from time to time suspended, the only periods which could be counted against the decree-holder were from the 9th of February 1898 to the 29th of June 1900, and again from the 29th of March 1901 to the 11th of May 1901. These periods together not amounting to three years, the decree-holder's application of the 11th of May 1901 was within time. (1903) A.W.N. 211 =26 A. 140.

16. Revival of suit.

——Art. 181—File of suit ordered to be put in presence of plaintiff—No notice to plaintiff—Suit called for hearing in plaintiff's absence—Dismissal for default—Held, case was covered by S. 151, Civil P. C., and Art. 181 and not Art. 163, Limitation Act applied. A.I.R. 1935 Pesh. 186=160 Ind. Cas. 457.

——Art. 181—Revival of suit—Hindu Reversioner.

An application by a Hindu reversioner to continue a suit instituted by a nearer reversioner since deceased is governed by Art. 181; if the suit had been treated as abated the application must be made within three years of the order. (1912) M.W.N. 105, doubted. 25 M.L.T. 116=(1918) M.W.N. 888=9 L.W. 166=49 Ind. Cas. 268.

——Art. 181—Revival of suit—Inherent power.

An application to the Court to restore a suit in the exercise of its inherent power is covered by Art. 181 of the Limitation Act. 5 O.L.J. 259= 47 Ind. Cas. 137.

17. Starting point of limitation.

See also NOTES 4 TO 10, 13 AND 15.

——Art. 181—Starting point—Dismissal of second appeal under O. 41, R. 11, C. P. Code—Time, if extended.

Where a second appeal is summarily dismissed under O. 41, R. 11, C. P. Code, it cannot be taken into account in computing the time under Art. 181 of the Limitation Act. (1946) A.W.R. (H.C.) 591=1946 A.L.W. 587.

——Art. 181—Two separate suits—One for possession and the other for mesne profits—Suits not consolidated but evidence in one treated as evidence in other—Possession and mesne profits decreed in first suit—Other suit dismissed—Defendant appealing against first:

Held, mesne profits could not be granted—Plaintiff applying to set aside decree in second suit—Court has power under S. 151 to set aside decree—Plaintiff had no right to apply until decision of Appellate

Court from which date time began to run. A. I. R. 1934 Nag. 234=31 N.L.R. 53=152 Ind. Cas. 211.

——Art. 181—Starting point.

As soon as right of possession to land is disturbed, right to apply accrues under Art. 181.

So long as he is in possession it does not matter to him what orders of excess sales or excess deliveries are passed behind his back. 123 Ind. Cas. 24=1929 M.W.N. 811=A.I.R. 1930 Mad. 12.

——Art. 181—An application falling within Art. 181 must be made within three years commencing from the date when the right to apply accrues, that is from the date on which the relief which the applicant seeks in available to him. 122 Ind. Cas. 392=24 S.L.R. 132=A.I.R. 1930 Sind 180.

——Art. 181—Application for execution made beyond time. Application to be regarded as application for extension of time governed by Art. 181.

The period of limitation begins to run at the latest on the last date fixed in the original decree for payment. 43 Bom. 689, Foll. A.I.R. 1929 Rang. 304.

——Art. 181—After passing a preliminary decree in mortgage suit the Court appointed a Receiver to sell the mortgaged properties. The proceedings of the Receiver were slow and the deed of conveyances were not executed till long after the settlement of the terms of the sale in favour of the mortgagee decree-holder,

Held, application for balance was not barred by Art. 181. Time did not begin to run till the deed of conveyance had been executed. The appointment of Receiver though unusual is perfectly legal. 79 Ind. Cas. 85=21 A.L.J. 37=4 L.R.A. (Civ.) 73 =A.I.R. 1923 All. 203.

——Art. 182.

See also (1) C. P. CODE, S. 48.

(2) LIMITATION ACT, S. 7 AND ART. 181.

(3) OUDH RENT ACT, 1886, S. 145.

Synopsis.

1. Applicability and scope.
2. Clause (1)—Date of decree.
3. Clause (2).
4. Clause (3)—Review of judgment.
5. Clause (4).
6. Clause (5) — Application "in accordance with law".
7. Clause (5)—"Final order".
8. Clause (5) and Explanation II—"Proper Court".
9. Clause (5)—Step-in-aid.
10. Clause (6)—Refund.
11. Clause (7).
12. Explanation I.
13. Continuation or revival of application.
14. Execution against surety.
15. Interpretation.
16. Res judicata.
17. Restitution.
18. Saving of time.
19. Starting point of limitation.
20. Miscellaneous.

1. Applicability and scope.

(a) Art. 182.
(b) Art. 182 and S. 48, C. P. Code.
(c) Arts. 182 and 180.
(d) Arts. 182 and 181.
(e) Arts. 182 and 183.
(f) Decree transferred for execution to another Court.

1. (a) Applicability and scope—Art. 182.

——Art. 182—Applicability — Enforcement of award under Co-operative Societies Act.

R. 18 (h) of the Rules framed under S. 48 of the Co-operative Societies Act gives the status of a decree to an award of the arbitrator for purposes of enforcement. Therefore an application for enforcement of the award is governed by Art. 182 of the Limitation Act read with S. 48, C. P. Code. 48 P.L.R. 538=A.I.R. 1947 Lah. 269.

——Art. 182 — Award under Co-operative Societies Act—Execution.

An award under the Co-operative Societies Act filed in Civil Court under R. 15 (7) (c) as framed under the Co-operative Societies Act, by Madras Government—Execution of award:

Held, that for the purpose of limitation the Article applicable is Art. 182 and not Art. 181. 51 M.L.W. 189=(1940) 1 M.L.J. 268=(1940) M. W. N. 147=A.I.R. 1940 Mad. 635=I.L.R. (1940) Mad. 649=191 Ind. Cas. 226.

Overruling—I.L.R. 1937 Mad. 495=A.I.R. 1937 Mad. 31=167 Ind. Cas. 223.

——Art. 182—Award — Enforcement.

Award by Registrar of Co-operative Societies—Enforcement of award by Civil Court other than High Court:

Held, that for the purposes of limitation, the article applicable is Art. 182. A.I.R. 1939 Mad. 304=49 M.L.W. 143=(1939) 1 M.L.J. 695= (1939) M.W.N. 397=185 Ind. Cas. 230.

——Art. 182—Application for deciding legal representatives.

The word 'representative' in Art. 182, Explanation 2 does not cover transferee *pendente lite*.

An application to have the question of legal representatives decided is not governed by Art. 182. It may be filed at any time before the right to have partition effected by the Collector lapses. It is an interlocutory matter to be decided before such proceedings start or while they are pending. I.L.R. (1944) Nag. 852=A.I.R. 1945 Nag. 86.

——Art. 182 — Execution of decrees — Santhal Parganas Justice Regulation, 1893.

One year's limitation for execution of decrees prescribed by R. 35, made under S. 27 Santhal Parganas Justice Reg. 1893, is obviously inconsistent with Art. 182, Limitation Act which relates to the execution of decrees and hence R. 35, to that extent is *ultra vires* and has no binding effect upon the Court. A.I.R. 1936 Pat. 104=17 P.L.T. 57 =15 Pat. 356=2 B.R. 286=160 Ind. Cas. 1096.

——Art. 182—Application under S. 70 (2), Madras Hindu Religious Endowments Act.

An application under S. 70 (2) of the Madras Hindu Religious Endowments Act to recover a demand for contribution made by the President of the Religious Endowment Board is governed for purposes of limitation by Art. 182. 68 M.L.J. 200

=41 M.L.W. 264=(1935) M.W.N. 142=A.I.R. 1935 Mad. 217=58 M. 760=156 Ind. Cas. 747.

——**Art. 182—Respondent dying before decree appealed against—Legal representatives not impleaded—Decree does not become invalid if the nature of appeal is such that it can be proceeded with without legal representative.** Such a decree, provided it be not barred under Art. 182, is executable. A. I. R. 1933 Mad. 218=145 Ind. Cas. 765.

——**Art. 182—Application for execution.**

Application under C. P. Code, O. 21, R. 50 (2) is not one for execution within Art. 182. 122 Ind. Cas. 392=24 S.L.R. 132=A.I.R. 1930 Sind 180.

——**Art. 182—Defendant to elect—No time fixed for election — Plaintiff's application putting defendant to election must be within 3 years.**

Where in a partition suit the decree gave a choice to an alienee to insist on full or half payment before delivering up properties proportionally and did not fix any time within which the plaintiff should put the alienee to the election.

Held, that Art. 182 applied and the application by the plaintiff putting the alienee to the election filed more than three years after an order dismissing a previous defective application, was barred. 32 Bom. L.R. 427=A.I.R. 1930 Bom. 503.

——**Art. 182—Decree not directing sale of mortgaged property in case of default by mortgagor to pay—Decree should be treated as under S. 375, Act 14 of 1882, and not under S. 92, T. P. Act and Art. 182 will apply.**

Certain persons instituted a suit for redemption of a certain mortgage against *A* and *S*. At that time, the procedure in respect of mortgage suits was governed by the provisions of certain sections of the Transfer of Property Act. The parties entered into an amicable arrangement and a decree was passed giving effect to the terms of that arrangement. The decree stated that if the plaintiffs, who represented the mortgagors paid a certain sum at any time to the defendants, the representatives of the mortgagees, the defendants, were to restore to them the possession of the mortgaged property. *A* was then a minor. He was not a party to the compromise. The same *A* claiming that he was the representative of one of the mortgagors in 1926, applied to pay the money into Court and to redeem the property as against *S*.

Held, that the decree as it failed to give the mortgagee authority to sell the property was not a decree under S. 92, T. P. Act, and therefore, must be treated as a decree under S. 375, Act 14, 1882, and so it was governed for the purpose of limitation by Art. 182. 110 Ind. Cas. 77=3 Luck. 578=5 O.W.N. 364=A.I.R. 1928 Oudh 286.

——**Arts. 182 and 181—Applications for enforcing final decree for sale in mortgage suits are applications for execution and are governed by Art. 182 and not by Art. 181.** 102 Ind. Cas. 811=6 Pat. 780 =8 P.L.T. 379=A.I.R. 1927 Pat. 215.

——**Art. 182—Applicability of—Mortgage decree—Execution — Limitation.**

For an application for execution of a decree for a sale in a mortgage suit, limitation runs from the date of the order absolute. 18 Ind. Cas. 10 (Mad.).

——**Art. 182—Applicability — Application under C. P. Code, O. 34, R. 6.**

An application for an order under O. 34, R. 6, C. P. Code must be treated as an application in execution proceedings to which Art. 182 of the Limitation Act would apply. 10 Ind. Cas. 21 (Oudh.)

——**Art. 182—Order of contribution — Enforcement.**

That the making of an order of contribution is not controlled by any rule of limitation does not lead to the conclusion that the enforcement of the same order is equally not so controlled. Steps taken for the enforcement of the order are controlled by the general law of limitation. 93 Ind. Cas. 631=1 Luck. 153=13 O.L.J. 43=3 O.W.N. 237=A.I.R. 1926 Oudh 289.

——**Art. 182—Non-payment within time being not penalised ordinary limitation applies.**

A decree was silent as to the effect of non-payment of the decretal amount within the time limited.

Held, the decree-holder is entitled to enforce his decree at any time within the period of limitation prescribed for execution of decree in Art. 182 of Sch. I to the Limitation Act notwithstanding the fact amount was deposited after the fixed time 19 Ind. Cas. 856; 14 All. 350, Foll. 76 Ind. Cas. 144=A.I.R. 1924 Lah. 635.

——**Art. 182—An application for the ascertainment of mesne profits is one in execution and is not a proceeding in continuation of the suit, and therefore comes under Art. 182,** 37 Mad. 186; 24 Bom. 149, Foll.; 19 Cal. 132 (F.B.); 25 All. 385; 26 All. 623 and 40 All. 211, Not foll. 61 Ind. Cas. 448=45 Bom. 819=23 Bom.L.R. 263=A.I.R. 1921 Bom. 404.

——**Art. 182—Applicability — Application under O. 21, R. 32, C. P. Code.**

An application to a Court to exercise its power under O. 21, R. 32 of the C. P. Code is an application for the execution of a decree and as regards limitation, is governed by Art. 182 of the Limitation Act. 5 Bur.L.T. 116=6 L.B.R. 85=15 Ind. Cas. 945.

——**Art. 182—Applicability of — Declaratory decree.**

A lien or judicial hypotheca created by a declaratory decree does not cease to exist because an application for execution of the decree has not been made in accordance with Art. 179. 108 P.W.R. 1913=181 P.L.R. 1913=109 P.R. 1913=19 Ind. Cas. 481.

——**Art. 182—Applicability of — Decree for redemption—No time for payment fixed.**

The limitation for execution of a decree for redemption which does not provide any period for payment of the mortgage amount is governed by Art. 182, Limitation Act. 44 P.L.R. 1913=53 P. W.R. 1913=68 P.R. 1913=18 Ind. Cas. 48.

——**Art. 182—Applicability — Mesne profits for particular year—Limitation.**

An execution application otherwise in time, will not be barred, merely because the claim under the decree for mesne profits for a particular year is more than three years from the date of the application; the starting point for limitation is the date of the decree. (1911) 2 M.W.N. 258=12 Ind. Cas. 272.

——**Art. 182—Applicability of — Mortgage decree—Preliminary decree — Order absolute — T. P. Act, S. 88.**

The powers by which a preliminary decree under S. 88 of the T. P. Act is to be made absolute is by way of execution. The preliminary decree passed

under S. 88, T. P. Act is executable. To obtain an order absolute under S. 89, T. P. Act steps have to be taken in execution. Art. 182 of the Limitation Act (1908) governs such applications. There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree. 39 Mad. 544=17 M.L.T. 424=29 Ind. Cas. 237.

——Art. 182—Applicability—Mortgage— Preliminary decree against joint mortgagors — Ex parte decree against one defendant set aside on application—Fresh decree—Application for order absolute —imitation—Order on prior application—When res judicata.

A mortgagee obtained a decree against his mortgagors of whom *S* was *ex parte* on 25—8—1900 and it was made absolute on 21—12—1901. *S* applied and got the *ex parte* decree as against her set aside, but on 15—8—1902 a decree was also made against her which was confirmed on appeal on 16—11—1914. The decree-holder applied for an order absolute and for an order for sale on 15—12—1905, but his application was granted only as against *S*. The decree-holder again applied on 21—12—1905 for execution by way of sale against all the defendants. *Held*, that the execution was not barred. The earlier decree of 1900 having been treated by the Court and the parties as a mere step towards granting the relief, the latter decree of 1904 which completed it, gave for the first time to the respondent decree-holder a right to joint execution. Under Art. 179 of the Limitation Act, 1877 time began to run from 27—11—1905 when the order absolute was made on the decree on 1904.

The dismissal of the prior application of 15—2—1905 did not operate as *res judicata* to the application of 21—12—1905, the latter being based on an order absolute which was different from and later than the prior order.

It might have been more in accordance with strict procedure if the Court had set aside the whole judgment on the application of *S*. and has proceeded to retry the case against all the defendants. The irregularity however had worked no wrong and was of no consequence. 33 All. 264=15 C.W.N. 370=8 A.L.J. 332=13 C.L.J. 351=9 M.L.T. 380=13 Bom.L.R. 367=4 Bur.L.T. 121=21 M.L.J. 1140=(1911) 2 M.W.N. 177=38 I.A. 37=9 Ind. Cas. 975 (P.C.).

[On appeal from 29 All. 623=4 A.L.J. 552=27 A.W.N. 204].

——Art. 182—Transfer of Property Act, Ss. 88, 89—Order for sale without order absolute—Application for order absolute more than three years afterwards.

Where an order for sale is passed without a previous order absolute for sale, and the application for sale was afterwards dismissed owing to failure to pay the expenses, and the decree-holder applied more than three years afterwards for an order absolute.—*Held*, that the order for sale must be taken to be an order absolute for sale, as well as an order directing certain further steps in execution, and that hence he could not apply now for an order absolute. His present application was hence an application for execution and hence barred under Art. 178. (1901) 24 M. 695.

——Art. 182—Applicability of—C. P. Code, Sch. 3, Para. 11 (3).

The protection extended to a decree-holder by para. 11, (3), Sch. III applies, both to the limitation of 12 years referred to in S. 48 of the Code of 1908 and to the limitation of 3 years provided by Art. 182 of the Limitation Act of 1908. 13 O.C. 303=8 Ind. Cas. 377.

——Art. 182—Decree granting an injunction—C .P. Code, S. 260.

Article 179 does not apply to an application asking the Court to enforce a decree granting an injunction to abstain from some particular act. All that the Court has to see is whether the party bound by the decree has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it. 23 A. 405, foll. 3 A.L.J. 836=1906 A.W.N. 10=28 A. 300.

——Art. 182—Redemption decree — Money made payable within 6 months.

Notwithstanding that time is granted to a mortgagor for payment, a decree for redemption should be taken to be executable from the passing of the decree and consequentiy is governed by Art. 179. 24 A. 300, doubted. (1904) 28 M. 211.

——Arts. 182, (179)—Bengal Tenancy Act (7 of 1885), Sch. 3, Art. 1—Application for execution of decree for rent by a co-sharer landlord for a sum not above Rs. 500 in value.

An application for execution of a decree for a sum not above Rs. 500 in value got by one of two or more joint landlords for his share of the rent is not governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act, but by the general law of limitation namely, Art. 179 of the Limitation Act (O.A.). (1901) 5 C.W.N. 763 =29 Cal. 54.

——Art. 182—Attachment of decree—Application for execution of attached decree—Decree 1907—Application 1909.

It is the Limitation Act that is in force on the date of an application that will govern it. 12 A.L.J. 1006 =25 Ind. Cas. 738.

1. (b) Applicability and scope—Art. 182 and S. 48, C. P. Code.

——Art. 182 and C. P. Code, S. 48—Art. 182 only applies in cases which are not covered by S. 48, Civil P. Code. A.I.R. 1944 Lah. 68=46 P.L.R. 24=212 Ind. Cas. 228.

——Art. 182 and S. 48, C. P. Code — Analogy between.

There is no analogy between Art. 182 and S. 48, Civil P. Code. Article 182 expressly states that all applications that fall under S. 48, Civil P. Code, are excluded from its operation. A.I.R. 1941 Mad. 477=53 M.L.W. 284=1941 M.W.N. 292=(1941) 1 M.L.J. 365=199 Ind. Cas. 812.

——Art. 182 and C. P. Code, S. 48—Relative Scope.

Article 182, Limitation Act expressly leaves S. 48, Civil P. Code, untouched. Article 182, is expressly limited to applications for execution not provided for by Art. 183 or by S. 48, Civil P. Code. A.I.R. 1940 Mad. 127=51 M.L.W. 173=(1940) M.W.N. 181=(1940) 1 M.L.J. 235=I.L.R. (1940) Mad. 349=187 Ind. Cas. 176 (F.B.).

——Art. 182 and C. P. Code, S. 48—Relative Scope.

Section 48 Civil P. Code controls Art. 182,

Limitation Act. A.I.R. 1939 Nag. 245=1939 N.L. J. 387=I.L.R. (1939) Nag. 559=184 Ind. Cas. 72.

——Art. 182 and C. P. Code, S. 48—Art. 182 should not be invoked in determining starting point for limitation under S. 48, Civil P. Code. A.I.R. 1939 Pat. 607=18 Pat. 395=20 P.L.T. 932=6 B.R. 172 (2)=185 Ind. Cas. 373 (2).

——Art. 182 and C. P. Code, S. 48—Applicability of S. 48, Civil P. Code and Art. 182, indicated. A.I.R. 1932 Oudh 220=9 O.W.N. 430=138 Ind. Cas. 149.

——Art. 182—Construction of—C. P. Code, S. 48.

The fresh periods obtainable under Art. 182 are controlled by S. 48, C. P. Code. *N* got a compromise decree in 1884 by which the amount was payable in instalments and on default *N* was to get possession of a share of a property *P*. Default was made in 1892, application for possession was made in 1898 and the judgment-debtor died in 1902 and his minor sons, through next friend applied to be brought on record but their application as well as that of *N* to execute the decree were struck off. In 1909 one of the sons attained majority and a fresh application was made. *Held*, the application was barred by S. 48, C. P. Code. 39 Bom. 256=17 Bom.L. R. 178=28 Ind. Cas. 478.

1. (c) Applicability and scope—Arts. 182 and 180.

——Arts. 182, 180—Execution proceeding by decree-holder—Court ordering judgment-debtor's land to be leased to decree-holder for 15 years in full satisfaction of decree—On default execution filed, on September 30, 1935—Mutation of lease entered and attested on December 29, 1937—Neither judgment-debtor nor any one representing Court present—On May 30, 1939, lease certificate drawn up and signed by Judge—Application by decree-holder on November 11, 1940 for possession of leased land—Articles 180 and 182 held inapplicable. A.I.R. 1942 Pesh. 87=204 Ind. Cas. 66.

——Arts. 182 and 180—An application for possession by an auction-purchaser whether he is a decree-holder or stranger is governed by Art. 180 and not by Art. 182. A.I.R. 1941 Pesh. 10=193 Ind. Cas. 337.

——Arts. 182 and 180—As Art. 180 applies to an application for possession by a decree-holder-purchaser, the residuary Art. 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So Art. 182 cannot apply. (1935) M.W.N. 926=42 M.L.W. 375=A.I.R. 1935 Mad. 803=58 M. 893=69 M.L.J. 821=159 Ind. Cas. 279 (F.B.).

——Arts. 182 and 180—C. P. Code, O. 21, R. 95—Decree-holder, auction-purchaser—Application under the rule is governed by Art. 182.

An order on an application under O. 21, R. 95, by an auction-purchaser who is also decree-holder, is an order under S. 47, C. P. Code. The application is governed by the limitation laid down in Art. 182 and not by Art. 180.

Where the auction-purchaser is the decree-holder himself and he presents an application for possession, he occupies therein, in reality, a dual position. He is, from one point of view the auction-purchaser applying to be put in possession of his property, while from another point of view he is the decree-holder claiming to have his decree fully satisfied by having, so to speak, the proceeds of the decree made over to him. A.I.R. 1926 Cal. 798 (F.B.); 41 All. 479; 35 Bom. 452; 28 Mad. 87 and 31 Cal. 737, Foll. 103 Ind. Cas. 335=A.I.R. 1927 Nag. 204.

1. (d) Applicability and scope—Arts. 182 and 181.

——Arts. 182 and 181—Applicability—Criterion.

The criterion for determining whether Art. 182 or Art. 181 applies to a particular application is to ascertain whether any one of the six points of time specifield in Cl. 3 of Art. 182 is applicable to it. 57 L.W. 493=(1944) 2 M.L.J. 192=1944 M. W. N. 606=A.I.R. 1944 Mad. 561=I.L.R. (1945) Mad. 80=216 Ind. Cas. 325 (F.B.).

Overruling—A.I.R. 1924 Mad. 210=79 Ind. Cas. 779.

——Arts. 182 and 181—The true criterion in determining whether Art. 182 or 181 applies to a particular application is to ascertain whether any one of the six points of time specified in Cl. 3 of Art. 182 is applicable to it and if none of them is applicable, it is only then that Art. 181 will apply. A. I. R. 1939 Mad. 441=(1939) M.W.N. 305=(1939) 2 M.L.J. 271=49 M.L.W. 483=189 Ind. Cas. 348.

——Arts. 182 and 181—Art. 182 applicable—No question of applicability of Art. 181.

Where the case is clearly covered by Art. 182, Limitation Act, the question of applying the residuary Art. 181 does not arise. 1941 O.W.N. 1232 =1941 A.W.R. 1057=1941 R.D. 1036=A.I.R. 1942 Oudh 139=197 Ind. Cas. 12.

——Arts. 182 and 181—Decree for khas possession of land by ejecting defendant—Defendant allowed one month's time to vacate—Appeal by defendant rejected—Execution application—Limitation, whether runs from date of rejecting appeal or from one month after such rejection—Article applicable.

Plaintiff obtained a decree in the following terms: "The plaintiff's title to the land mentioned in the schedule above is hereby declared and the plaintiff will get *khas* possession by evicting the defendants. The defendants are allowed one month's time to vacate the land." The defendants appealed but the appeal was rejected, court-fees not being paid. The plaintiff then applied for execution of the decree and contended that the period of limitation should be computed from one month after the order of the Appellate Court rejecting the appeal, on the ground that that order itself amounted to a decree, and this being the case, this decree embodied all the terms and conditions of the decree of the first Court:

Held, that part of the first Court's decree which embodied the concession must be deemed to have ceased to operate after the expiry of a month from the date of the decree. The decree of the Appellate Court was actually executable on that date and hence no exemption of one month could be claimed. The article applicable was Art. 182, Limitation Act and not Art. 181. A.I.R. 1937 Cal. 728=41 C.W.N. 1285=I.L.R. (1938) 1 Cal. 171=175 Ind. Cas. 555.

——Arts. 182 and 181—An application for leave to execute a decree against a partner under O. 21, R. 50 (2) Civil P. C., falls under Art 182 and

not under Art. 181. A.I.R. 1936 Sind 138=30 S. L. R. 88=164 Ind. Cas. 1011.

——Arts. 182 and 181—Application for execution —Article applicable.

An application for execution of a decree is governed by Art. 182, Limitation Act and not by Art. 181. A.I.R. 1935 Pesh. 129=158 Ind. Cas. 517.

——Art. 182—Where there is a decree for possession on the payment of a sum on a future date, the provisions of Art. 182 can have no application. A. I. R. 1938 Bom. 367=40 Bom. L.R. 512=I.L.R. (1938) Bom. 649=177 Ind. Cas. 499.

——Arts. 182 and 181—Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182, is clearly inapplicable, and the only article governing the execution is the residuary Art. 181. (1931) A. L. J. 319=A.I.R. 1931 All. 326=131 Ind. Cas. 559.

——Arts. 182 and 181—Decree for possession on condition of payment.

Decree for possession on condition of payment of money to judgment-debtor—Application for execution of such decree is governed by Art. 182 and not by Art. 181—Starting point is date of decree and not the date of payment by decree-holder. A.I.R. 1931 Nag. 54=26 N.L.R. 353=130 Ind. Cas. 148.

——Arts. 182 and 181—Applicability—Giving time by the decree-holder to the judgment-debtor does not take an execution application out of Art. 182.

Article 182 is the article framed for an application for execution of a decree. Article 181 could be brought into play only when there are definite circumstances which would make Art. 182 inapplicable. Those circumstances should not and cannot include an alleged fact that the judgment-debtor had been given time out of Court without any record or that fact being placed in the proceedings.

A decree-holder made an application for execution. Before the date fixed for sale, the decree-holder made another application to the Court stating that he had given the judgment-debtor six month's time, that his application may be struck off and the judgment-debtor saddled with costs. He was not taken on his word and the Court directed that the judgment-debtor should appear in order to verify the application. On the day fixed for appearance the judgment-debtor did not appear and Court struck off the application. More than three years after this an application for execution was again made. It was attempted to prove the oral agreement granting six months' time to bring the case within the purview of Art. 181.

Held, that the only article that could apply to the subsequent application was Art. 182 and not 181. 114 Ind. Cas. 894=A.I.R. 1929 All. 606.

——Arts. 182 and 181—Execution struck off as claim being satisfied—Further execution is governed by Art. 182.

Where the case is not one of execution proceedings being obstructed or delayed by suits being brought to elucidate the rights of the objector or for other matters asked and the case is not struck off merely because the decree-holder was not by reason of litigation in a position to proceed at once, but on the footing that his claim has been satisfied,

Held, the application for execution against other properties on the footing that the decree is wholly unsatisfied is governed by Art. 182 and not by Art. 181. 84 Ind. Cas. 983=40 C.L.J. 246=A.I.R. 1925 Cal. 207.

——Arts. 182 and 181—Decree not executable.

Art. 182 (1) contemplates only a decree or order made in such a form as to render it capable of being enforced in execution; if a further application is necessary to make the decree executable then Art. 181 applies for such further application. 40 M. L. J. 1=48 I.A. 17=19 A.L.J. 26=1 Pat. L.T. 731=59 Ind. Cas. 636 (P.C.).

[Reversing on appeal 2 Pat. L.W. 199=(1917) P.H.C.C. 253=42 Ind. Cas. 666].

1. (e) Applicability and scope—Arts. 182 and 183.

——Arts. 182 and 183—Payment order passed by the District Judge under S. 164, Companies Act—Article applicable is Art. 182 and not Art. 183.

By reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court. But the District Judge does not, for the purposes of Art. 183, Limitation Act, by virtue of S. 164, become the High Court. A. I. R. 1938 Lah. 368=178 Ind. Cas. 288.

——Arts. 182 and 183—Hindu family — Decree against father—Execution against son.

A person who has obtained a decree against the father can proceed at once against the property in the hands of his son who is liable under the Hindu Law for the payment of the debt of his deceased father and it is no longer necessary to apply Art. 120 Limitation Act because in such cases either Art. 182 or Art. 183 will directly apply. A.I.R. 1932 Pat. 261=11 Pat. 445=13 P.L.T. 719=139 Ind. Cas. 397.

——Arts. 182 and 183—Decree of Chief Court executed by High Court—Limitation for execution is governed not by Art. 183 but by Art. 182.

The object of S. 26, Burma Courts Act (2 of 1912) is simply and solely to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It was not intended that a decree of the Chief Court should come under a different law of limitation simply because it was executed by the High Court. The article applicable therefore to such decrees is Art. 182 and not Art. 183. 114 Ind. Cas. 674=6 Rang. 566=A.I.R. 1928 Rang. 317.

——Art. 182—Order of Privy Council.

Where the preparation of the final decree was purely a ministerial act to enable the order of His Majesty-in-Council to be enforced,

Held, it could not be contended that the execution proceedings were not taken in order to enforce the order of His Majesty-in-Council. 8 Cal. 218 (F.B.); 20 Cal. 551, Foll. 78 Ind. Cas. 766=3 Pat. 596=5 P.L.T. 451=1924 P.H.C.C. 221=2 Pat. L.R. (Civ.) 249=A.I.R. 1924 Pat. 576.

1. (f) Applicability and scope—Decree transferred for execution to another Court.

——Art. 182—Applicability—Decree of Presidency Small Cause Court transferred for execution to an ordinary Court in moffusil. *See* **C. P. CODE (5**

OF 1908), S. 48 AND LIMITATION ACT (9 OF 1908), ART. 182. (1950) 1 M.L.J. 437 =A.I.R. 1950 Mad. 504 (F.B.).

——Arts. 182 and 183—Decree of Presidency Small Cause Court—Transfer to District Munsif's Court for execution—Execution application in latter Court beyond twelve years from date of decree but within three years from last execution—Execution, if barred.

A decree passed by the Presidency Small Cause Court was transferred for execution to District Munsif's Court. An application for execution was filed in the latter Court beyond 12 years from the date of the decree but within 3 years from the last execution:

Held, that the execution was governed by Art. 182 and not by Art. 183 of the Limitation Act and was therefore, not barred by limitation under S. 48, Civil P. C. 7 C.L.T. 45=8 B.R. 256=23 P.L.T. 87= A.I.R. 1942 Pat. 128=197 Ind. Cas. 627.

——Art. 182—Art. 182 continues to govern a decree of a Presidency Small Cause Court and the execution of the decree is not barred on the expiry of 12 years from the date of the decree although it may be transferred to and may happen to be executed by a Court to which S. 48, Civil P. C., applies. Section 48 provides a rule of limitation and not of procedure. 26 S.L.R. 910=A.I.R. 1932 Sind 116 =140 Ind. Cas. 702.

——Art. 182—Applicability of — Transfer of decree—C. P. Code, S. 48.

Although a decree is transferred by the Court which passed it to another for execution, the control of the execution is still in several respects in the hands of the former Court. So when a decree of the Presidency Small Cause Court is transferred to the City Civil Court for execution Art. 182 of the Limitation Act and not S. 48, C.P.C. governs the case for purposes of limitation. 36 Mad. 108=21 M.L.J. 777=10 M.L.T. 75=(1911) 2 M.W.N. 565=11 Ind. Cas. 635.

——Art. 182—When a decree passed by one Court is sent to another Court for execution, the period of limitation applicable to the execution of the decree depends on the character of the Court which passed the decree, and not on the character of the Court executing it. Section 42, Civil P. C., deals simply with the manner of execution and leaves the matter of limitation to be governed by the Limitation Act. 7 C.L.T. 45=8 B.R. 256=23 P.L.T. 87= A.I.R. 1942 Pat. 128=197 Ind. Cas. 627.

——Art. 182—Court passing decree governed by special law of limitation—Decree sent for execution where that law is not applicable—Execution, if governed by special law.

Obiter.—Where the Court which passed a decree is governed by a special law of limitation and the decree is sent to another Court for execution, where that law is not applicable, the execution proceedings are nevertheless governed by the special law of limitation. Consequently, where a decree is barred by time according to the law, when it was transferred to the executing Court, the bar cannot be removed on the ground that the decree is not barred according to the law of limitation in force in the executing Court. 17 P.L.T. 57=2 B.R. 286=A.I.R. 1936 Pat. 104 =15 Pat. 356=160 Ind. Cas. 1096.

2. Cl. (1)—Date of decree.

(a) Meaning of.
(b) Amount left to be determined.
(c) Decree conditional on payment.
(d) Ex parte decree.
(e) Mortgage suit.
(f) Partition suit.
(g) Miscellaneous.

2. (a), Cl. (1)—Date of decree—Meaning of.

——Art. 182 (1)—"Date of decree"—Meaning of —Date of judgment or date on which decree is drawn up and signed.

The phrase "date of decree" in Art. 182 (1), Limitation Act, should be construed, with reference to O. 20, R. 7, C. P. Code, as the date on which the judgment in the suit is pronounced, and not the date when the decree following on the judgment is actually drawn up and signed. 16 Cut. L.T. 8= I.L.R. 1950 Cut. 253=A.I.R. 1950 Orissa. 125 (F.B.).

——Art. 182 (1)—Date of decree or judgment.

Limitation for execution of a decree runs from the date of the judgment and not from the date on which the decree is signed. (1945) 24 Pat 421.

——Art. 182 (1)—Date of judgment.

Limitation for execution of decree under Art. 182 runs from the date of judgment which is also date of decree. A.I.R. 1942 Oudh 139=1941 O.W.N. 1232=1941 R.D. 1036=1941 A.W.R. 1057=197 Ind. Cas. 12.

——Art. 182 (1)—Date of decree—Meaning of.

The date of decree in Art. 182 (1) of the Limitation Act means the date when the judgment was pronounced and not the date when the decree is actually signed by the presiding Officer of the Court. The time between the date of delivery of judgment and the signing of the decree cannot be deducted in computing the period. 5 Pat. L.J. 490=1 Pat. L.T. 394=57 Ind. Cas. 531.

——Art. 182 (1)—Date of decree sought to be executed.

Article 182, Cl. (1) refers to the date of the decree or order that is sought to be executed. (1933) M.W.N. 23=37 M.L.W. 180=64 M.L.J. 251= A.I.R. 1938 Mad. 315=56 M. 458=148 Ind. Cas. 58.

——Art. 182, Cl. (1)—Date of decree—Step-in-aid —Payment of Court-fee to complete decree.

The date of the decree for purposes of article 182 must be taken to be the date of the judgment whatever the date on which a decree may be stamped. The payment of the Court-Fee for the decree is not a step in aid of execution. 17 C.W.N. 959=19 Ind. Cas. 410.

2. (b), Cl. (1)—Date of decree—Amount left to be determined.

——Art. 182 (1)—Date of the decree—Final decree for mesne profits in suit for possession—Order determining amount of profits—Direction to postpone drawing up decree till payment of Court-fee —Limitation for execution—Starting point—C. P. Code, S. 2 (2).

Where the matter in controversy between the parties, in proceedings for a final decree in a suit for

possession and mesne profits is the amount of mesne profits and the Court finally determines the amount of mesne profits payable to the plaintiff, the date of the order ascertaining the amount of mesne profits is the date of the final decree for purposes of execution under Art. 182, Limitation Act. The fact the drawing up of the decree is postponed until the court-fee is paid, does not extend the period to the date of the formal drawing up of the decree upon payment of the court-fee, when nothing more remains to be decided by the Court, and the order determining the mesne profits is the decree as contemplated by S. 2 (2), C. P. Code. 27 I.A. 209; 7 Pat. 491; 21 Pat. 366; 1 P.L.J. 359; 5 P.L.J. 490, foll.; I.L.R. (1938) All. 848, not foll. 29 Pat. 600=A. I. R. 1950 Pat. 524.

——Art. 182 (1)—Date of decree—After preliminary decree, Commissioner appointed to ascertain mesne profits—On January 6, 1936, Court accepting report and ordering drawing up of final decree and also observing that decree should not be prepared until deficit court-fee was paid—Decree drawn up on January 30, 1939 and signed on February 11, 1939.

After the preliminary decree had been passed, a Commissioner was appointed by the Court to ascertain the mesne profits. The Commissioner submitted his report which was accepted by the Court on January 6, 1936, and the Court passed the following order on that date: "The Commissioner's report is put up. Let final decree be prepared in terms of the Commissioner's report. The plaintiff shall get costs on *ex parte* scale and Pleader's fee Rs. 2½ per cent. No decree shall be prepared unless deficit court-fees are filed." The deficit court-fee was filed on December, 1, 1938. The decree was actually drawn up on January 30, 1939, and was signed on February 11, 1939. The application for execution was filed on January, 17, 1940:

Held, (*i*) that limitation under Art. 182, Limitation Act, must be computed from the date of the decree and the date of the decree under O. 20, R. 7, Civil P. C. was the date of the judgment. January 6, 1936 must be taken to be the date of the decree, since on that date the final adjudication between the parties regarding the amount of mesne profits was given;

(*ii*) that the matter in controversy was the amount of mesne profits. It was finally determined on January 6, 1936. The question of court-fee payable was a matter of mere calculation. No further adjudication was necessary. The order of January, 6, 1936, was, therefore, final;

(*iii*) that the application which was made by the plaintiff on September 10, 1938, for assessment of deficit court-fee and preparation of the final decree was not a step-in-aid of execution. A.I.R. 1942 Pat. 410=23 P.L.T. 202=8 B.R. 631=21 Pat. 366 =199 Ind. Cas. 818.

——Art. 182 (1)—Mesne profits — Ascertainment of—Starting point.

In a suit for redemption of a mortgage where the decree directs the mesne profits due to the mortgagor to be ascertained in execution time begins to run when the profits are so ascertained. 25 All 385, Foll. 40 All. 211=16 A.L.J. 88=43 Ind. Cas. 932.

——Art. 182 (1)—Date of decree—Ascertainment of decree amount.

Where a decree for redemption was passed on a certain date, but the judge actually signed the decree more than 6 months after, after the exact sum to be paid in redemption had been ascertained by a commissioner specially appointed for that purpose in the interval, limitation to execute that part of the decree which awards the costs of the defendant payable by the plaintiff runs from the former date and not the latter date. 20 C.W.N. 950=1 Pat.L.J. 359 =3 Pat. L.W. 102=34 Ind. Cas. 504.

——Art. 182 (1)—"Date of the decree"—Portion of amount left unspecified and left to be determined —Cause of action, when arises.

Where a portion only of the amount decreed is left to be ascertained in future, limitation for the execution of the whole decree runs from the date of ascertainment. The policy of the Limitation Act is to treat a decree as a whole, although only a part may be the subject of an appeal, or review or amendment. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case where the decree directs payment on different dates. 36 Mad. 104=21 M.L. J. 546=10 M.L.T. 69=(1911) 2 M.W.N. 93=10 Ind. Cas. 552.

——Art. 182 (1)—'Date of decree or order'.

If something has been left unascertained by the decree, without which ascertainment the decree will not be executable, time runs only from the date of such ascertainment, the decree not being a final and executable one until that event. (1905) 29 M. 46.

2. (c) Clause (1)—Date of decree—Decree conditional on payment.

——Arts. 182 and 181—Decree directing possession conditionally on payment—No time fixed for payment—Application for execution—Starting point.

When a decree for possession is passed on condition of payment of a certain sum by the decree-holder, the starting point for limitation for execution of the decree is the date of the decree and not date of payment by the decree-holder. The decree is one that is capable of being executed immediately, as the condition of payment is one entirely dependent upon the will of the decree-holder or his ability to pay. In such a case the decree cannot be said to be a conditional one or one that is incapable of being executed until a condition is fulfilled. The decree-holder cannot obtain extension of limitation by deferring payment. Limitation runs from the date of the decree, whether any time for payment is fixed or not. The only effect of fixing a time for payment is that payment cannot be made after the date fixed. If no time is fixed, payment may be made under the terms of the decree at any time within the period of limitation, *i.e.*, within three years of the date of the decree. Such a case, therefore, is governed by Article 182, and not by Article 181. 24 A. 300, Diss. 26 M. 780 and 23 B. 592, Foll. 26 N.L.R. 353=A.I.R. 1931 Nag. 54=130 Ind. Cas. 148.

——Art. 182 (1)—Starting point.

When no time is mentioned for making a payment and delivery of possession in a decree the application should be made within three years of decree. 14 O.C. 100=10 Ind. Cas. 187.

——Art. 182 (1)—Date of decree—Decree conditional on payment of money—Execution—Limitation.

A decree directed the defendant to surrender the land to plaintiff on his paying a certain sum for improvements. An application for execution made more than three years from the date of the decree was held time-barred. 26 M. 780, foll. (1910) M. W.N. 391=8 M.L.T. 251=7 Ind Cas. 568.

——Art. 182 (1)—Date of decree—Indefinite decree—Execution—Starting point.

A decree passed in 1894, directed that plaintiffs, would be entitled to get possession on payment of Rs. 750, in Jeth of any year. *Held*, that the right to apply for execution would accrue only when the payment is made and in this case it having been made in 1915, the present application was not barred by limitation. 1 U.P.L.R. (H.C.) 118=17 A.L.J. 841=51 Ind. Cas. 576.

2. (d) Clause (1)—Date of decree—Ex parte decree.

——Art. 182 (1)—Execution of ex parte decree—Time taken in attempting to set aside the decree cannot be excluded.

An application for execution of an *ex parte* decree against which no appeal is preferred is governed by Art. 182, Cl. (1) and the time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree cannot be deducted nor does the limitation begin from the date of the dismissal of the application. 68 Ind. Cas. 728=18 N.L.R. 190=A.I.R. 1922 Nag. 197.

——Art. 182 (1)—Date of decree—Ex parte decree set aside against some defendants.

Where an *ex parte* decree having been passed against 3 defendants it was set aside and another decree passed in favour of one of them, limitation for execution against the other 2 defendants runs from the date of the first decree. 46 Cal. 25=50 Ind. Cas. 15.

——Art. 182 (1)—Ex parte decree—Setting aside.

A decree passed ex parte was subsequently set aside and another passed on its merits. Several applications for execution were made but no proper application was made within three years from the date of the new decree. *Held*, the subsequent application was held to be time barred and that all previous applications under the *ex parte* decree were null and void. 78 P.W.R. 1916=103 P.R. 1916 =133 P.L.R. 1916=35 Ind. Cas. 110.

——Art. 182 (1)—Date of decree—Decree ex parte —C. P. Code, S. 108—Decree set aside as against one of several joint judgment-debtors — Decree passed subsequently against exempted party—Execution of decree—Limitation.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte* and it was set aside as against her on appeal on the 11th March, 1902 Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November, 1904. As against this defendant the decree was made absolute on the 27th November, 1905. *Held*, that the orders of the 25th August, 1900, and the 16th November, 1904, between them, operated as one decree for the sale of the mortgaged property: that the joint effect of the orders of the 21st December, 1905, and the 27th November, 1905, was to make absolute the decree, and that an application for the execution on the 21st December, 1905, was not barred by limitation. 1907 A.W.N. 204=4 A.L.J. 552=29 A. 623.

2. (e) Clause (1)—Date of decree—Mortgage suit.

——Art. 182 (1)—Mortgage decree—Words "the date of decree" mean the date of effectiveness of the decree—(Obiter).

Where a mortgage-decree stated that the property mortgaged by *H* should be put up to sale first, and if the sale of that property was not sufficient to satisfy the decretal money, the sale of the property mortgaged by *F* should follow forthwith,

Held, that an application to proceed against *F's* property would be in time if it was made within three years of the period since the decree-holder became entitled to proceed against that property. 105 Ind. Cas. 545=1 L.C. 543=A.I.R. 1927 Oudh 488.

——Art. 182 (1)—Date of decree—Mortgage suit —Time runs only from final decree though preliminary decree is executable.

Where a compromise decree was passed in a mortgage suit which was itself executable but the decree-holder applied subsequently for a final decree which was passed without any objection by the judgment-debtor,

Held, that limitation for an application for execution commenced to run only from the date of the final decree and not from the date of the compromise decree. 121 Ind. Cas. 818=A.I.R. 1930 A. 520.

——Art. 182 (1)—Execution of decree — Decree conditional on redemption of prior mortgage — Limitation.

Where a decree on a mortgage was passed in 1885 application for execution thereof was not made till 1897 in which year a prior mortgagee got a decree to the effect that the decree-holder of 1885 cannot execute it until the redemption of the prior mortgage and the latter was redeemed in 1910 afer which the decree of 1885 was put in execution. *Held*, that the application was time-barred and the redemption of the prior mortgage was entirely in the hands of the decree-holder. 18 Ind. Cas. 897 (All.).

——Art. 182 (1)—Date of decree—Mortgage decree.

Period of limitation for execution of a decree for sale in suit on a mortgage, begins from the date on which decree *nisi* for sale is made absolute. 23 M. L.J. 675=12 M.L.T. 659=17 Ind Cas. 759.

——At. 182—"Date of the decree or order"—Mortgage decree—Order absolute—Starting point —Transfer of Property Act, Ss 88, 89.

An application for an order absolute is an application in execution; and limitation for execution for a mortgage decree for sale runs from the date of the decree and not from the date of the order absolute for sale. Where the decree-holder applied for an order absolute for sale and stated further that he could not get justice unless he realized his money by sale, and the Court merely ordered, "decree made absolute"—*Held*, that the application was really one for an order for sale and that the Court should have passed an order for sale, and that until such an order passed the application should be considered pending. (1906) 16 M.L.J. 503=1 M.L.T. 294.

[The provisions of T. P. A. having now been embodied in C. P. C., O. 34, all cases, holding that applications for order absolute are applications in execution may no longer hold good. Ed.].

2. (f) Clause (1)—Date of decree—Partition suit.

——Art. 182 (1)—Partition decree—Stamps under Art. 45, Stamp Act not paid—Limitation for execution—Starting point.

The date of the decree in a partition suit for the purpose of Art. 182, Limitation Act is the day on which the judgment was pronounced and limitation runs from that date although the party in whose favour the decree has been passed has not furnished the stamp paper for the purpose of the drawing up of the decree.

It is incorrect to say that in a partition suit until the final decree has been drawn up on non-judicial stamp paper of the required value, time does not begin to run. A.I.R. 1943 Mad. 650=56 M.L.W. 393=(1943) 2 M.L.J. 112=1943 M. W. N. 439=I.L.R. (1944) Mad. 266=212 Ind. Cas. 619.

——Art. 182 (1)—Time runs from date of decree which is date of judgment—Equitable considerations do not apply.

The date of the decree is the day on which judgment is pronounced, and limitation begins to run from that date although no formal decree can be drawn up in a partition suit until paper bearing a proper stamp under the Stamp Act is supplied to the Court. A.I.R. 1942 Pat. 335=8 B.R. 116=197 Ind. Cas. 217.

——Art. 182 (1)—Partition suit.

For purposes of limitation under Art. 182, Limitation Act, the date of the decree in a suit for partition must be taken to be the date on which the order for drawing up the final decree was passed and not the date on which the necessary stamp paper was supplied by the decree-holder. A.I.R. 1940 Lah. 337=192 Ind. Cas. 93.

——Art. 182 (1)—Partition decree—Date of decree is the date of judgment.

The date of the decree under the article is the day on which judgment is pronounced and limitation begins to run from that date although no formal decree can be drawn up in a partition suit until paper bearing a proper stamp under Art. 45 of Stamp Act is supplied to the Court. 72 Ind. Cas. 646=A.I.R. 1924 Cal. 351.

——Art. 182 (1)—Partition decree — Judgment-debtor disputing adequacy of stamp—Calculation of limitation period.

Where an order for drawing up final decree is passed in a partition suit and the judgment-debtor has disputed the adequacy of the stamped paper supplied by the decree-holder, the time taken up in getting a final decision on the point should in any case be deducted as the decree-holder could not get a decree drawn up owing to the dispute raised by the judgment-debtor and his cause of action for execution should, therefore be taken as suspended. A. I. R. 1940 Lah. 337=192 Ind. Cas. 93.

2. (g) Cl. (1)—Date of decree—(Miscellaneous).

——Art. 182 (1)—"Date of decree" — Award — Filing into Court—Execution—Starting point of limitation—Date of award or date of filing thereof into Court. *See* ARBITRATION ACT. (1899), S. 15. (1946) 1 M.L.J. 244=A.I.R. 1946 Mad. 352.

——Art. 182 (1)—Execution against surety—Limitation.

Decree—Execution against judgment-debtor—Surety executing security bond—Undertaking to pay on failure to realise from judgment-debtor—Limitation against surety:

Held, that period of limitation against surety did not run under Cl. 1, Art. 182 from the date of decree and that Expl. 1, Art. 182 did not cover the facts of the case as the decree was not passed jointly against more persons than one. A.I.R. 1938 Oudh 209=10 O.W.N. 571=8 Luck. 427=143 Ind. Cas. 808.

——Art. 182 (1)—Date of decree — Mistake of Court.

Where a decree was by a mistake of the Court dated February 16, 1929, while the actual date of decision of the case was February 11, 1929, and the decree-holder being led to believe that the suit was decreed on February 16, 1929, applied for execution on February 15, 1932:

Held, that although the Court had no power to extend the period of limitation, yet in the circumstances of the case, in the interest of justice, the decree ought to be regarded as having been passed on February 16, 1929, on the principle *actus curiae neminem gravabit*, and consequently, the application for execution should be regarded as having been made in time. 56 C.L.J. 185=A.I.R. 1933 Cal. 239=141 Ind. Cas. 114 (1).

——Art. 182 (1)—Decree declared inexecutable in execution proceedings—Decision reversed—Subsequent application for execution—Limitation.

A decree for money was passed on April 20, 1922. On December 26, 1924, the decree was declared incapable of execution on the application of the judgment-debtor. The Appellate Court reversed this decision on February 26, 1925, and the decree-holder applied for execution for the first time on June 9, 1928. It was contended that the application was time-barred:

Held, (*i*) that theory of continuation or revival of petitions was not applicable as the decree-holder had not made any previous application which could be continued or revived;

(*ii*) the decree-holder's objection to the judgment-debtor's petition could not be regarded as a step-in-aid of execution as there was no previous application for execution;

(*iii*) but it was not an unwarrantable extension to hold that the date of the decree in Art. 182 (1) was really when the bar to its executability was removed by the appellate decision, or alternatively to regard the application filed after such removal as governed by Art. 181, and in either view, the application was not time-barred. 38 M.L.W 557=A. I. R. 1933 Mad. 785=65 M.L.J. 747=145 Ind. Cas. 930.

——Art. 182 (1)—Prior orders.

Limitation runs from that order alone which has finality as a decree.

Prior orders if any, in the same suit, though they may have decided some rights of the parties, cannot give a starting point for limitation. 102 Ind. Cas. 106=8 P.L.T. 141=A.I.R. 1927 Pat. 171.

——Art. 182 (1)—List of properties cannot be supplemented out of limitation.

Time must begin to run from the date of the final decree, however informally it is expressed. A sub-

sequent application made after the expiry of the period of limitation for execution of the decree, to add other properties to the list given in original application which is within the period of limitation should not be allowed. 74 Ind. Cas. 1017=50 Cal. 743=A.I.R. 1924 Cal. 131.

——**Art. 182 (1)—Decree for perpetual injunction—Application within 3 years of breach is proper.**

When a perpetual injunction has been granted on each successive breach of it the decree may be enforced by an application made within 3 years of such breach. Cultivation of land is an infringement of the right of grazing and every successive season in which the land has been cultivated is the occasion of a fresh breach of the injunction. 66 Ind. Cas. 166 (Lah.).

——**Art. 182 (1)**—Where the original decree is incapable of execution, time runs from the date when a proper decree capable of execution has been drawn up. 64 Ind. Cas. 622=34 C.L.J. 397=A.I.R. 1921 Cal. 89.

——**Art. 182 (1)—Date of decree—Decree incapable of execution, meaning of—Decree ordered to be executed by sale of property of deceased person in the hands of the judgment-debtor—Property came into the hands of the judgment-debtor after period of limitation—Whether application barred.**

An application for execution is barred by limitation is made after proper time even if J. D. did not get possession of property within limitation against which only the decree was to be executed. The expression "incapable of execution" means that there must be some inherent defect in the decree itself which makes it incapable of execution and if there is no such defect the decree cannot be held to be incapable of execution. (1917) P.H.C.C. 253=2 Pat.L.W. 199=42 Ind. Cas. 666.

[Reversed O.A. *See* 48 I.A. 17=19 A.L.J. 26=40 M.L.J. 1=13 L.W. 546=(1921) M.W.N. 21=1 Pat. L.T. 731=59 Ind. Cas. 636 (P.C.)]

——**Arts. 182 (1) and (4)—Date of decree—Decree incapable of execution—Limitation.**

Limitation for an application for execution of a decree can apply only where there is a decree capable of execution and consequently a decree incapable of execution cannot be time-barred. If the decree is amended time runs from the date of amendment. 18 C.W.N. 268=21 Ind. Cas. 615.

——**Art. 182—Expl. 1—Date of decree—Decree set aside and fresh decree passed.**

A mortgage decree was passed against several defendants but *ex parte* against one defendant on whose application the decree was set aside as against him and a fresh decree was subsequently passed. *Held*, an application for order absolute against all defendants was governed by Art. 182 but the starting point of limitation was the date of the later decree. 33 All. 264=38 I.A. 37=15 C.W.N. 370=8 A.L.J. 332=13 C.L.J. 351=9 M.L.T. 380=13 Bom. L.R. 367=4 Bur. L.T. 121=21 M.L.J. 1140=(1911) 2 M.W.N. 177=9 Ind. Cas. 975 (P.C.).

[On appeal from 29 All. 623=4 A.L.J. 552=27 A.W.N. 204].

——**Art. 182 (1)—Date of decree—Property under Government.**

The period during which the estate is in charge of Government under the Act is excluded from limitation to file an application for execution. 38 Cal. 288=15 C.W.N. 155=7 Ind. Cas. 787.

——**Art. 182, Cl. (1)**—Date of decree—Application for ascertainment of profits not an application for execution. 13 A. 53; 19 C. 132, foll. 25 A. 385=1903 A.W.N. 80.

[Now made clear by C.P.C., new Code.—Ed.].

——**Art. 182 (1)—"The date of decree or order"—Suit to set aside the decree—How far final decree in such suit.**

The decree-holder obtained a decree for rent on the 12th January, 1892 and made an application for execution on the 10th March 1892, which was dismissed on the ground of informality on the 30th June 1892. On the first July 1893, a temporary injunction was issued restraining the decree-holder from executing the decree pending the decision of a suit brought by the judgment-debtor, in which it was, *inter alia*, prayed for setting aside the decree which had been executed the suit was decreed by the first court but on appeal it was dismissed and the injunction was discharged on the 20th May 1897. *Held*, that the application dated the 18th May 1900, for execution of the rent decree was barred; that the decree-holder was not entitled to a fresh starting point from the 20th May, 1897. (1901) 6 C.W.N. 735.

3. **Clause 2.**
   (a) **Applicability.**
   (b) **Appellate decree.**
   (c) **"Where there has been an appeal."**
   (d) **'Final decree or order'.**
   (e) **Starting point of limitation.**

3. (a) Cl. (2)—Applicability.

——**Art. 182 (2)—Appeal against order on objection as to property A—Subsequent execution as to property B.**

Where the only question for decision in an appeal against order on an objection is whether execution could be levied against property *A* while in subsequent execution petition execution is sought to be levied against property *B* and the two proceedings have nothing whatever in common, there is nothing in Art. 182 (2) which assists the decree-holder. (1943) 1 M.L.J. 95=A.I.R. 1943 Mad. 398=1943 M. W. N. 83=1.L.R. (1943) Mad. 485=210 Ind. Cas. 79.

——**Art. 182 (2)—Appeal — Application for execution against surety—Limitation.**

An execution application against sureties made within three years of the appellate decree was resisted by the sureties as being barred on the ground that it was not made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy. *Held*, negativing the contention that the application was within time, and the appellants were liable to be proceeded against in execution under Cl. 2, Art. 182 of the Limitation Act. 44 Bom. 34=21 Bom.L.R. 861=53 Ind. Cas. 187.

——**Art. 182 (2)—Appellate decree — Execution of decree of primary Court—Limitation.**

In determining a question of limitation the Court should adhere as strictly as possible to the terms of the law. Art. 182. Cl. (2) of the Limitation Act, ought to be construed liberally and its application should not be restricted to the detriment of the decree-holder, nor should the clause be confined to cases where the application for execution is made in res-

pect of the final decree of an Appellate Court; it should be applied to a case where the application is made for execution of the decree of the primary Court but the period limitation should be calculated from the date of the final decree of the Appellate Court. 16 Ind. Cas. 370 (Cal.).

——Art. 182 (2)—Appeal — Time fixed by first Court—Time not extended.

The judgment-debtor was granted three months time for payment under a decree which was affirmed by the High Court and Privy Council too, but the time was not extended. *Held*, the time is to be counted from the date of the decree of the first court and not that of the decree of P. C. 31 All. 379=6 A.L.J. 493=2 Ind. Cas. 364.

3. (b) Cl. (2)—Appellate decree.

——Art. 182 (2)—Decree of appellate court—Decree prepared by subordinate Court according to directions in appellate judgment.

Decree prepared by Subordinate Court according to directions in the appellate judgment is the decree of appellate Court and not of the Subordinate Court.

And an application for execution within three years of the passing of the appellate judgment is within time. 108 Ind. Cas. 112=5 O.W.N. 157=A. I. R. 1928 Oudh 228.

——Art. 182 (2)—Where once an appellate decree is passed, whether it confirms, varies, or reverses the decree of the Original Court, it is the only decree capable of execution for it has been substituted for that of the Original Court and technically a fresh application for execution is necessary. 32 Bom. L.R. 300=A.I.R. 1930 Bom. 225.

3. (c) "Where there has been an appeal."

(i) Appeal, if includes revision.
(ii) Appeal from order refusing to set aside decree.
(iii) Appeal from part of decree or by some parties.
(iv) Appeal from preliminary decree.
(v) Miscellaneous.

(i) Appeal, if includes revision.

——Art. 182 (2)—Appeal — If includes revision.

The word "appeal" in Art. 182 of the Limitation Act should not be interpreted in the narrower sense of the term as used in the C. P. Code. It includes revision. I.L.R. (1947) A. 191=1947 A. L.W. 201=1947 A.W.R. (H.C.) 89=1947 A.L. J. 79=A.I.R. 1947 All. 390.

——Art. 182 (2)—Appeal — If includes revision.

The word 'Appeal' occurring in Arts. 182, Limitation Act, includes revision. A.I.R. 1940 Mad. 281=49 M.L.W. 768=1939 M.W.N. 624=(1939) 2 M.L.J. 469=189 Ind. Cas. 185.

——Art. 182 (2)—'Appeal', if includes revision petition.

Article 182 (2), applies to civil revision petitions as well and not only to appeals in the narrower sense of that term as used in the Civil P. Code. Consequently, when a revision petition is filed, it is permissible to hold under Art. 182 (2) that the date of the order in revision made by the High Court furnishes the starting point and the term 'appeal' is not used in the restrictive sense so as to exclude revision petitions and the expression "the Appellate Court" is not to be confined to a Court exercising appellate, as opposed to revisional powers. (1937) M.W.N. 31 and 35=(1937) 1 M. L.J. 453=A.I.R. 1937 Mad. 385=I.L.R. (1937) Mad. 616=45 L.W. 457=168 Ind. Cas. 561 (F.B.). [Overruling—36 Mad. 135=24 M.L.J. 457].

——Art. 182 (2)—Revision — Modification of decree in revision—Limitation.

Where the decree of a Court of first instance is modified in revision by the High Court, limitation for the execution of the decree runs from the date of the order passed by the High Court in revision. 22 C.W.N. 158=44 Ind. Cas. 141.

——Art. 182 (2)—Appeal — Revision — Execution of decree—Revision, if gives fresh starting point.

The date of rejection of a revision petition does not give a fresh starting point of limitation for the execution of the decree sought to be revised. 153 P. W.R. 1913=298 P.L.R. 1913=20 Ind. Cas. 563.

——Art. 182 (2)—Revisional jurisdiction—High Court's order.

An order of the High Court in the exercise of its revisional jurisdiction under S. 115 of C. P. Code is an order on an appeal within Art. 182, Sub-Cl. (2) so as to create a fresh starting point for limitation. 22 M. 68; 15 C.W.N. 858; 15 C.W.N. 879; 11 Ind. Cas. 65, Foll. If a revision petition is simply dismissed, no fresh starting point of limitation arises. 36 Mad. 135=24 M.L.J. 457=10 M. L.T. 260=(1911) 2 M.W.N. 198=12 Ind. Cas. 38.

(ii) Appeal from order refusing to set aside decree.

——Art. 182 (2)—Appeal — Meaning — Appeal against order refusing to set aside ex parte decree —If falls within Art. 182 (2)—Dismissal of such appeal—If affords fresh starting point.

The appeal in Art. 182 (2) of the Limitation Act means an appeal from the decree sought to be executed and no other appeal. An appeal from an order refusing to set aside an *ex parte* decree is not an appeal contemplated by Art. 182 (2) and hence its dismissal cannot afford a fresh starting point for execution of that decree. A.I.R. 1950 All. 327.

——Art. 182 (2) — "Appeal" — Appeal against order dismissing application to set aside ex parte order—Final decree or order in—If furnishes fresh starting point.

The word "appeal" in cl. (2) in Col. 3 of Art. 182, Limitation Act, is not limited to an appeal from the decree or order sought to be executed; it would include any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court. Consequently an appeal against an order refusing to set aside an *ex parte* decree would be an appeal falling within the clause: and the final decree or order made by the appellate Court in such an appeal furnishes a starting point of limitation for an application to execute that decree 59 I.A. 283=34 Bom.L.R. 1065, foll. 16 Bom. 123, Diss. and declared overruled. 50 Bom. L. R. 696=A.I.R 1949 Bom. 115.

——Art. 182 (2)—"Appeal" — Meaning of—Ex parte decree—Application to set aside ex parte decree—Order rejecting — Appeal from—If saves limitation for execution.

"Appeal" in Art. 183 (2) of the Limitation Act means and can only mean an appeal which is directed against the decree sought to be executed and is of such a nature that the result of it is likely to affect the decree. An appeal from an order rejecting an application to set aside under O. 9. R. 13, C. P. Code and *ex parte* decree (which is sought to be executed) does not extend the period of limitation for execution under Art. 182 (2). I.L.R. (1946) 1 Cal. 637=82 C.L.J. 226=224 Ind. Cas. 111=50 C. W.N. 667=A.I.R. 1946 Cal. 375.

——Art. 182 (2)—Expression, "where there has been an appeal," if applies to appeal from order refusing to set aside ex parte decree.

It does not necessarily follow that because a decree or order is mentioned in Col. 1, the appeal which is mentioned in Col. 3 of Art. 182 must be against that decree or order. It is equally logical to say that it must be something which affects that decree or order. Consequently, the words "where there has been an appeal" would apply to an appeal against an order refusing to set aside an *ex parte* decree. A.I.R. 1939 Mad. 157=48 M.L.W. 751=(1938) M.W.N 1155=(1938) 2 M.L.J. 1048=I.L.R. (1939) Mad. 252=181 Ind. Cas. 491.

——Art. 182 (2)—'Where there has been an appeal,' meaning of.

The words 'where there has been an appeal' in Art. 182 (2) contemplates and mean an appeal from the decree itself and do not include an appeal from an order rejecting an application to set aside the decree. (1932) A.L.J. 731=A.I.R. 1932 All. 601=138 Ind. Cas. 692.

——Art. 182 (2) — Ex parte decree — Rejection of appeal against refusal to set aside decree—Application for execution of original decree—Limitation.

Where the Court refuses to set aside an *ex parte* decree and an appeal against such order is rejected, time for executing the original decree is not thereby enlarged under Art. 182, Cl. 2. 52 C.L.J. 594=35 C.W.N. 155=A.I.R. 1931 Cal. 332=131 Ind. Cas. 263.

——Art. 182 (2)—Appeal from order refusing to set aside decree.

The second clause of Art. 182 is not intended to cover an appeal from an order refusing to set aside a decree, 35 C.W.N. 155=52 C.L.J. 594=A.I.R. 1931 Cal. 332.

——Art. 182 (2)—Word "appeal" refers to appeal from decree and not from order rejecting application to set aside *ex parte* decree. 8 Cal. 248, held not good law. 120 Ind. Cas. 179=11 L.L.J. 61=30 P.L.R. 283=A.I.R. 1929 Lah. 283.

——Art. 182 (2)—An application for execution was presented more than three years after an *ex parte* decree was passed, and it was sought to be proved to be within time on the ground that limitation ran from the date of the appellate decree passed on an application of judgment-debtor who applied to set aside the *ex parte* decree.

Held, that an application to set aside an *ex parte* decree does not keep the decree open, and is not to be regarded as an appeal from the *ex parte* decree itself. 8 Cal. 248, *held* wrongly decided. 16 Bom. 123; 21 Cal. 387; 3 P.L.J. 119, Foll. 104 Ind. Cas. 466=54 Cal. 1052=A.I.R. 1927 Cal. 904.

——Art. 182 (2)—"Where there has been an appeal"—Appeal means appeal from decree or order sought to be executed.

They do not include an appeal from an order dismissing an application to set aside an *ex parte* decree. 68 Ind. Cas. 728=18 N.L.R. 190=A I.R. 1922 Nag. 197.

——Art. 182 (2)—Starting point—Appeal against order on application to set aside the decree—Limitation.

The 'words where there has been an appeal' in Clause 2 of Art. 182 of the Limitation Act mean where there has been an appeal against a decree in the suit and cannot be held to include an appeal against an order made on application to set aside that decree. 3 Pat.L.J. 119=44 Ind. Cas. 575.

(iii). Appeal from part of decree or by some parties.

——Art. 182 (2)—Nature of decree appealed against—Not material.

Whatever the nature of a decree appealed against, whether a decree proceeds upon a ground common to the defendants or not, and whether one defendant appeals from such decree in so far as it affects his own interests or whether all the defendants appeal from only a part of a decree, and whether the parties against whom execution is sought were parties to the appeal or not, the period of limitation under Art. 182 commences to run only from the date of the appellate decree. A.I.R. 1941 Nag. 19=1940 N.L.J. 571 =I.L.R. (1941) Nag. 199=192 Ind. Cas. 270.

——Art. 182 (2)—Decree granting some reliefs and refusing others—Appeal as to reliefs refused—Execution of decree as to reliefs granted by trial Court—Limitation, when runs.

In all cases, what Art. 182 (2) refers to is 'a decree,' that is, one decree and it is not permissible for Courts in execution to say that there are several reliefs which are severable and that the decree, although nominally one decree, consists of several decrees for purposes of computing period of limitation.

If there is a decree giving some reliefs and denying others and the plaintiff or the defendant appeals against either the refusal to grant a relief sought for or a relief being granted and does not appeal with regard to other reliefs, the period of limitation runs under Art. 182 (2), only from the date of the appellate decree even with regard to the reliefs granted by the first Court and which were not the subject-matter of appeal. (1935) M.W.N. 329=A.I.R. 1935 Mad. 557=156 Ind. Cas. 1029.

——Art. 182 (2)—Character of appeal and parties to it—Whether material.

For purposes of Art. 182 (2), it is sufficient that there has been appeal and there is no warrant for reading into the words of the article any qualification either as to the character of the appeal or as to the parties to it. 35 P.L.R. 194=A.I.R. 1934 Lah. 318=15 L. 267=154 Ind. Cas. 516.

——Art. 182 (2)—Execution of decree—Limitation—Starting point—Appeal as to part only or between some parties, whether saves limitation—Irregular appeals, effect of.

The words "where there has been an appeal" in Art. 182 (2) must be construed according to their plain meaning; there is no warrant for reading into the words any qualification either as to the character of the appeal or as to the parties to it.

In order to save limitation under Cl. 2 of Art. 182, it is not necessary that the appeal must be one to which the persons affected were parties.

Further, where there has been an appeal, limitation will be saved under the said clause even though the whole decree has not been imperilled by the appeal.

Again, any application by a party to an Appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and it is no less an appeal because it is irregular or incompetent. A.I.R. 1932 P.C. 165=36 C.W.N. 803=(1932) A.L.J. 643=59 I.A. 283=34 Bom.L.R. 1065=55 C.L.J. 528=33 P.L.R. 621=60 C. 1=9 O.W.N. 681 =(1932) M.W.N. 817=63 M.L.J. 329=36 L.W. 7=137 Ind. Cas. 529 (P.C).

——Art. 182 (2)—Appeal against other defendants in which decree against some defendants not challenged and has become final—Time begins to run from date of decree of trial Court and not from date of decree in appeal.

The expression 'final decree' clearly implies that the appeal should be from the decree which is sought to be executed; or at any rate, in the appeal that decree should be impugned, so that the order passed by the appellate Court should finally incorporate the decree of the first Court. In cases where the first Court's decree becomes merged in the appellate Court's decree, time, of course, begins to run from the date of the appellate Court's decree. Article 182 does not mean that even if an appeal has been preferred against other defendants in which the decree against some defendants who are not parties to the appeal is not challenged in any way and has, in fact, become final the time can still be enlarged by reason of the appeal. 26 Mad. 91 (F.B.), and 47 Cal. 813, Not foll. 1930 A.L.J. 941= A.I.R. 1930 All. 636.

——Art. 182 (2)—Time for applying for execution runs from date of appellate decree even when the appeal is against a portion of the decree.

When a decree is appealed against even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the appellate Court, and there is no part of the first Court's decree that remains to be executed. There is only one decree to be executed and that is the decree of the appellate Court. Hence time for applying for execution runs from the date of the appellate Court's decree. 25 Cal. 594 (F.B.), Foll. 97 Ind. Cas. 838=53 Cal. 901=44 C.L.J. 544=31 C.W.N. 262=A.I.R. 1927 Cal. 89.

——Art. 182 (2) — Appeal by some—Appellate decree is the final decree for all.

Where some of the parties to a decree appealed against it, the decree in appeal is the final decree for the purpose of the execution with respect to all the parties. Where the appeal by the judgment-debtor abated against some decree-holders, even those decree-holders are entitled to treat the appellate decree as the final decree. 5 P.L.J. 731, Not foll.; 33 Bom. 39, Foll. 91 Ind. Cas. 308=7 P.L.T. 209=4 Pat. 844=1925 P.H.C.C. 224=A.I.R. 1925 Pat. 585.

——Art. 182 (2)—Appeal from part, and by some parties, brings article into operation. 79 Ind. Cas. 794=3 Pat. 327=5 P.L.T. 21=1924 P. H. C. C. 105=A.I.R. 1925 Pat. 40.

——Art. 182 (2)—Appeal against only one defendant—Time for execution against other defendant is also from date of appellate decree.

Plaintiff, sued *A* and *B*, upon a hand note. The suit against *A* was decreed, but against *B*, it was dismissed. Plaintiff appealed against the decree dismissing his suit and did not implead *A*, as a party. His appeal was dismissed, and within three years of the date of the appellate decree he applied for execution against *A* and the question was whether the application was barred by limitation,

Held, that the application was not barred, as time ran from the date of the appellate decree finally dismissing the suit against *B*. 60 Ind. Cas. 915=47 Cal. 813.

——Art. 182 (2)—Appeal — Limitation for execution when entire decree is appealed against.

Art. 182 of the Act makes the limitation for execution run only from the date of the final decree of the appellate Court in cases where the entire decree is appealed against. 1 Pat.L.W. 309=37 Ind. Cas. 883.

——Art. 182 (2)—Appeal—Joint decree—Appeal by some defendants—Limitation.

Where a single decree is passed against two defendants and is affirmed on appeal preferred by one of them, time runs even as against the non-appealing defendant from the date of the decree of the appellate Court. It is doubtful whether when the decree of the first Court consists of two definitely independent decrees an appeal against one of them would prevent time from running against the other. 3 L.W. 521=34 Ind. Cas. 791.

——Art. 182 (2)—Appeal—Consent decree.

Where a person sued two persons *A* and *B* and got a decree by consent against *A* but after contest against *B* then if it did not specify the portion of the property of each of the defendants it is an entire decree and so *B* appealing from the decree against him is doing so against the whole decree and the consent decree is imperilled thereby under Cl. (2) of Art. 182 and so time runs against *A* under the consent decree from the date of the final appellate decree in the appeal preferred by each even though the consent decree of *A* is not appealable. 22 C.L.J. 333 =20 C.W.N. 178=31 Ind. Cas. 426.

——Art. 182, Cl. (2)—Appeal by some defendants.

The words "Where there has been an appeal" in Art. 182 (2) mean where there has been an appeal against the decree or order for the execution of which an application is made. Therefore where in a suit against several defendants a decree is given against some and the suit is dismissed with costs against others and the former set alone appeal, and the decree for costs in favour of the other defendents is not appealed against, Art. 182 (2) does not apply and the application is barred if filed after three years of the date of the original decree when an appeal does not imperil the whole decree. The appeal by one defendant will not prevent limitation for an application for execution running against others. 19 C.W.N. 287=22 Ind. Cas. 685.

——Art. 182 (2)—Appeal by some defendants —Decree—Limitation.

Where there is an appeal by some of the defendants and not by others, time runs for the execution of the appellate decree against all the defendants including those who have not appealed, from the date of final decree of the appellate Court. 33 Bom. 39=10 Bom. L. R. 939=1 Ind. Cas. 459.

——Art. 182 (2)—'Where there has been an appeal'—Decree against judgment-debtors jointly — Appeal against order absolute by one judgment-debtor only—Subsequent application for execution.

A decree under S. 88 of the Transfer of Property Act was obtained against three persons jointly and only one of the judgment-debtors appealed against the subsequent order absolute under S. 89, and after the rejection of the appeal another of the judgment-debtors objected that an application for execution was time-barred as against him. *Held*, that limitation must be taken to run from the date of the rejection of the appeal against the order absolute. 1906 A. W.N. 155=3 A.L.J. 381.

——Art. 182, Cl. (2)—Decree—Appeal by one of two judgment-debtors — Execution.

A decree was passed against two persons and on appeal by one of them only, the appeal was decreed. Execution was applied for against the other who had not appealed, but in the meantime more than 3 years had elapsed since the date of the 1st Court's decree. *Held*, that execution was barred. 13 A. 1 (F.B.), foll. (1904) 1 A.L.J. 409.

——Art. 182 (2)—Decree—Appeal—Limitation.

Where there is a decree partially against *A* and partially against *B* and there is an appeal by one of them, but the appeal imperils the whole decree, limitation runs from the date of the appellate decree. *Quaere.*—Whether it will be the same in case the appeal does not imperil the portion not appealed against. (1903) 5 Bom. L. R. 735.

——Art. 182 (2)—Decree—Appeal against part execution—Limitation—Civil Procedure Code, S. 230 (a).

Where a decree is appealed against in part, the starting point of the period of limitation prescribed by Art. 179, (O. A.) and by S. 230 (*a*) of the Code of Civil Procedure, is the date of the appellate decree, as well in respect of the part not appealed against as in respect of the part dealt with on appeal. *Obiter.*—Per *Bhashyam Aiyangar, J.*—There can be but one decree in a suit. Where several persons appeal against several parts of a decree, the appeals must be heard together and one single decree should be made. If several decrees were made, the date of the last of such decrees will furnish the starting point. (1902) 26 M. 91 (F.B.). But see 1 A.L.J. 15.

(iv). Appeal from preliminary decree.

——Art. 182 (2)—"Appeal"—Appeal from preliminary decree in mortgage suit—If extends limitation for execution of final decree.

"Appeal" in Art. 182 (2), Limitation Act, means appeal from the decree or order sought to be executed; an appeal presented against the preliminary decree in a mortgage suit is not competent to extend the limitation for the execution of the final decree passed during the pendency of the appeal from the preliminary decree. I.L.R. (1948) Bom. 521=A.I.R. 1948 Bom. 337=50 Bom.L.R. 221.

——Art. 182 (2)—Mortgage suit—Preliminary decree—Appeal—Proceedings of lower Court not stayed and final decree passed—Preliminary decree confirmed — Limitation—Starting point.

The fact that an appeal is preferred against the preliminary decree in a mortgage suit does not prevent the Court from passing the final decree. Where no order staying proceedings pending the appeal is obtained, it is the duty of the trial Court to proceed to pass the final decree. That decree remains binding and in full force until set aside. Where the Court passes the final decree and the preliminary decree is confirmed on appeal, the limitation for an application for execution of the final decree runs, not from the date of the final decree, but from date of decree of the Appellate Court in appeal from the preliminary decree.

The decree-holder can execute the final decree without obtaining a fresh final decree after the decision of the appeal against the preliminary decree. A.I.R. 1939 Mad. 735=49 L.W. 707=(1939) M. W. N. 563=(1939) 2 M.L.J. 86=I.L.R. (1939) Mad. 828=185 Ind. Cas. 578.

——Art. 182 (2)—Mortgage suit—Preliminary decree—Final decree pending appeal—Appeal dismissed—Application to execute final decree within three years of dismissal of appeal but more than three years of final decree—Whether in time.

The expression "where there has been an appeal" in Art. 182 (2), means an appeal in the suit which is likely to affect the decree sought to be executed.

Where, therefore, pending an appeal against the preliminary decree in a mortgage suit, a final decree is passed, and the appeal is ultimately dismissed and the preliminary decree is confirmed, an application to execute the final decree made within three years of the dismissal of the appeal against the preliminary decree is in time even though filed more than three years after the passing of the final decree. It is not necessary to file a fresh application for final decree or for amendment of the original decree after dismissal of the appeal. 45 L.W. 278=(1937) M.W.N. 336=(1937) 1 M.L.J. 407=A.I.R. 1937 Mad. 421=171 Ind. Cas. 980.

——Art. 182 (2)—Partition suit—Preliminary decree—Appeal—Final decree during pendency of appeal—Execution of final decree—Limitation, when starts.

A preliminary decree was passed in a partition suit and during the pendency of the appeal therefrom, the final decree was passed on September 30, 1919. The appeal against the preliminary decree was passed on March 20, 1923. Application for execution of the final decree was made on March 24, 1925:

Held, that the period of limitation should not be computed from the date of decision of the appeal from the preliminary decree but should be computed from the date of the final decree on September 30, 1919. There is no substance in the argument that the final decree is imperilled by the decree that may be passed by the Appellate Court in the appeal against the preliminary decree, and that, therefore, the time should be calculated only from the date of the appellate decree. (1933) M.W.N. 23=64 M. L. J. 251=A.I.R. 1933 Mad. 315=37 L.W. 180=56 M. 458=148 Ind. Cas. 58.

——Art. 182 (2)—Preliminary mortgage-decree—Final decree passed during pendency of appeal from

the former — Test to determine the starting point is whether appellate decree imperils decree under execution. 110 Ind. Cas. 483=A.I.R. 1928 Pat. 581.

——**Art. 182 (2)**—Final decree passed during pendency of appeal from preliminary decree—Appeal dismissed—Application for execution—Time runs from date of dismissal af appeal.

The intention of the Legislature in making this provisions, *i.e.*, Art. 182, Cl. (2), was that if an appeal in any way imperils the decree sought to be executed, then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed. 19 C.W.N. 287, Not foll. 102 Ind. Cas. 811=8 P.L.T. 379=6 Pat. 780=A.I.R. 1927 Pat. 215.

(v). Miscellaneous.

——Art. 182 (2) and (3)—Scope and applicability—Application under S. 36 of the Bengal Money-Lenders Act to re-open mortgage decree —Dismissal—Application for restoration and appeal thereon—If save time for execution of mortgage decree.

The expression "where there has been an appeal" in Cl. (2) of Art. 182 of the Limitation Act must be read with the words in column 1 of Art. 182, *viz.*, "for the execution of a decree or order of any civil Court" and it cannot be held to cover an appeal from an order which is passed in a collateral proceeding or which has no direct bearing or immediate connection with the decree under execution.

The words "where there has been a review" and "the decision passed on the review" in Cl. (3) of Art. 182 of the Limitation Act show that before a case can be brought under Art. 182, Cl. (3), it must be shown firstly that the Court had undertaken to review the relevant decree or order and secondly, that there has been a decision on the review.

After a preliminary mortgage decree an application made by the judgment-debtor under S. 36 of the Bengal Money-Lenders Act for re-opening the decree was dismissed for default and thereafter a final mortgage decree was passed on 22nd December, 1941. Subsequently the judgment-debtor made an application for restoration of the proceedings under the Bengal Money-Lenders Act which was finally dismissed on appeal on 3rd July, 1944. Thereafter an application to execute the final mortgage decree was made on 9th April, 1945, which was dismissed for default and a fresh one was filed on 2nd June, 1945. On a question whether Cl. (3) or (2) would operate to save limitation,

Held, even if it be taken that the application for re-opening the decree under S. 36 of the Money-Lenders Act was an application for review, there was in fact no review of the decree, and the appeal from the order dismissing the application under O. 9, R. 9, would not be an appeal as contemplated by Cl. (2) of Art. 182 with the result that there would be no saving of time and the application for execution was therefore barred by limitation. 1950 S.C.R. 25 =1950 R.L.W. 115=A.I.R. 1950 S.C. 6=(1950) S.C.J. 171.

——Art. 182 (2)—"Where there has been an appeal"—Strict grammatical meaning—Execution within three years of dismissal of application for leave to appeal to Privy Council but beyond three years of dismissal of appeal by High Court—If within time.

The expression "where there has been an appeal" has to be construed according to the strict grammatical meaning of the words used by the Legislature. It follows that where an execution application is beyond three years of the disposal of the appeal by the High Court though within three years of the dismissal of the application for leave to appeal to the Privy Council, it would be barred. 1950 A.W.R. 358 =1950 A.L.J. 286.

——Art. 182 (2)—"Where there has been an appeal"—Appeal not against decree sought to be executed—Effect.

There is no warrant for reading into the words "when there has been an appeal" in Art. 182 (2) any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say.

A suit by certain minors was dismissed. An appeal was allowed on 11th December, 1935, and the case was remanded for trial *de novo*. An order for costs was, however, made in favour of the respondent against the guardian on account of her negligence. No appeal was filed against the order of remand or the order for costs. The suit was again dismissed by the trial Court. An appeal was filed, and on 27th March, 1936, the suit was decreed with costs of both Courts. On 24th March, 1939, the respondent filed an execution application for the recovery of costs against the guardian *ad litem*, due under the order of 11th December, 1935:

Held, that the order for costs in favour of the respondent, though not varied by the final order in appeal, was at least closely related to it since both were passed during proceedings in the same suit. The starting point for limitation for execution was, therefore, the date of the latter order, namely, 27th March, 1936, and not 11th December, 1935, which was the date of the original order. A.I.R. 1942 Oudh 464=1942 O.W.N. 315=18 Luck. 68=1942 A.W.R. (C.C.) 213=203 Ind. Cas. 346.

——Art. 182 (2)—Judgment-debtor's application for recording satisfaction of decree dismissed—Appeal therefrom also dismissed—Such appeal, if falls under Art. 182 (2).

The word 'appeal' in Col. 3 of Art. 182 (2) means an appeal in the suit which is likely to affect the decree sought to be executed.

The application by the judgment-debtors for an order directing satisfaction of the decree to be entered up was dismissed. The judgment-debtors appealed against the order but were again unsuccessful. The decree-holder then applied for the execution of the decree and the plea of limitation having been taken by the judgment-debtors, he contended that time began to run from the date on which the appeal of the judgment-debtors was dismissed:

Held, that the appeal did not fall within Art. 182 (2) as the granting of the judgment-debtor's application for an order directing the entering up of satisfaction would not have cancelled the decree. The decree would still stand and govern the rights of the parties. The only effect of the payment of the decretal amount would be that the decree could no longer be available to support an application for execution. A.I.R. 1941 Mad. 616=(1941) 1 M. L.J. 614=53 L.W. 545=1941 M.W.N. 438=I.L. R. (1941) Mad. 703=198 Ind. Cas. 531.

——Art. 182 (2)—"Where there has been an appeal," meaning of.

The words "where there has been an appeal,"

mean an appeal from the decree sought to be executed, and not an appeal from another decree, though made in the suit. Where therefore in a suit for partition of immovable property, part of it being house property, and part of it being property subject to assessment to Government revenue, a final decree is passed as to the property assessed to Government revenue, and another final decree is subsequently passed in respect of house property and against such decree, an appeal has been preferred, an application only for execution of decree relating to property assessed to Government revenue made within 3 years of the disposal of the appeal but more than 3 years from the date of the final decree sought to be executed is barred under Art. 182, Lim. Act. 41 Bom. L.R. 921=A.I.R. 1939 Bom. 454=186 Ind. Cas. 119.

——**Art. 182 (2)—"Appeal" in Art. 182 (2) is not limited to competent appeals—It applies whenever there is appeal—Presentation of memo. of appeal is preferring appeal.**

The reference to an appeal in Art. 182 (2), Lim. Act is not limited to an appeal which is a competent appeal; the article applies whenever an appeal has been preferred; and the presentation of a memorandum of appeal is preferring an appeal. A.I.R. 1941 Pat. 213=22 P.L.T. 26=7 B.R. 799=20 Pat. 513 =194 Ind. Cas. 608.

——**Art. 182 (2)**—Appeal not lying but appeal *bona fide* presented to Court which would have jurisdiction—Time should be excluded under Art. 182.

Per *Madgavkar, A.J.C.*—It is well settled that at least where the appeal imperils the whole decree, the words "where there has been an appeal" must be construed in their plain sense and that the Courts cannot add to these words provisions such as "where an appeal lies" or "by the judgment-debtor proceeded against." 33 All. 264; 9 Cal. 100 and 20 C.W.N. 178, Foll. 79 Ind. Cas. 477=16 S.L.R. 245=A.I.R. 1921 Sind 132.

——**Art. 182 (2)**—Word "appeal in Art. 182 (2) means appeal which affects decree sought to be executed and not any appeal the result of which may affect, not the decree itself, but only the decree-holder's right to execute it at a particular time and in particular circumstances—Application by judgment-debtor more than three years after passing of decree for recording satisfaction dismissed—Appeal by judgment-debtor also dismissed—Appeal does not fall within purview of Art. 182 (2) and the decree-holder cannot claim date of dismissal of appeal as starting point of limitation. A.I.R. 1941 Mad. 40 =52 L.W. 277=(1940) 2 M.L.J. 371=(1940) M. W.N. 898.

——**Art. 182 (2)—Applicability to appeal against review applications to set aside order recording satisfaction of decree.**

Clause (2) of Art. 182, Lim. Act, has no application to appeals other than appeals against the decree itself. Its scope has been extended to cover an appeal against a preliminary decree in a mortgage suit when there is an executable final decree which is liable to be modified in the light of that appeal. But there is no authority for extending the scope of Art. 182, Cl. (2) to appeals from orders in collateral proceedings which may affect the decree to be executed. There is no statutory provision whereby the person whose decree has been modified as a result of a review application against an order recording satisfaction can have the benefit for purposes of limitation of the period taken up by appeals against that order. 50 L.W. 497=A.I.R. 1939 Mad. 892=(1939) M.W.N. 996=187 Ind. Cas. 591.

——**Art. 182 (2)—Appeal against review order.**

A suit was tried in 1931 and was dismissed by the trial Court on 8th January of that year. On 7th August, following an appeal was allowed and the suit decreed *ex parte* by the lower Appellate Court. Upon this the defendants made an application under O. 41, R. 21, on 27th August. On 19th November, the application was rejected by the lower Appellate Court. Against this rejection, there was an appeal to the High Court, which was dismissed on 1st September, 1933. The application of the decree-holders for execution was filed on 15th November, 1934.

Held, that if no appeal had been preferred from the order on the application for restoration, the date of that order would have been the starting point for limitation under Cl. (3) of Art. 182, but as an appeal from this order was preferred, the start of limitation was the date of the order of the Appellate Court, *i.e.*, 1st September, 1933, and consequently, the execution application was within time. 18 P.L.T. 231=3 B.R. 598=A.I.R. 1937 Pat. 337=16 Pat. 306=169 Ind. Cas. 581.

——**Art. 182 (2)—Decree—Appeal and application for review—Application for review granted—Amendment of decree—Appeal against order granting review—Dismissal of both appeals—Application for execution—Limitation.**

A and *B* who were defendants Nos. 1 and 2 in a suit obtained a decree against *C* who was defendant No. 3, on 14th December, 1925, *C* applied for a review and *B* filed an appeal in the High Court against the original decree. In July, 1926, the review application was allowed and the decree was amended. *A* and *B* appealed to the High Court against the order granting review. Both the appeals were dismissed by the High Court on 2nd September, 1929, and an application was made to execute the decree:

Held, that the period of limitation commenced to run from the date on which the High Court dismissed the appeals and that the application was in time, and that if the appeal had been successful, the previous unamended decree would have remained the only subsisting decree capable of execution and the subsequent amending decree *ipso facto* would have been of no effect.

An appeal against an order granting a review is included in the definition of appeal. 35 Bom.L.R. 432=A.I.R. 1933 Bom. 255=57 B. 388=147 Ind. Cas. 1227.

——**Art. 182 (2)—Not confined to appeal against decree.**

Sub-Cl. (2), Art. 182, does not refer exclusively to appeals against a decree. Where there has been an appeal of any sort, time is to run from the date of the decree of the Appellate Court. A.I.R. 1936 Bom. 162=38 Bom.L.R. 215=162 Ind. Cas. 223.

——**Art. 182 (2)—Appeal rejected as out of time—Limitation for execution, when runs.**

Having regard to the new sub-S. (3) added to R. 1 of O. 41, C. P. Code, in the Madras Presidency, where an appeal filed out of time is rejected by the High Court as time-barred, there is no appeal to the High Court within the meaning of Art. 182 (2) and limitation for execution of the decree runs from the date of the decree appealed from and not from the

date on which the memorandum of appeal was rejected by the High Court. 66 M.L.J. 486=A.I.R. 1934 Mad. 303=39 L.W. 499=57 M. 741=(1934) M. W.N. 710=150 Ind. Cas. 71.

——Art. 182 (2)—Appeal from amended decree.

Decree amended long after judgment—Appeal preferred from amended decree—Amended decree modified—Second appeal preferred to High Court dismissed—Correct date for determining time for execution is date of dismissal of second appeal. 50 C. L.J. 12=33 C.W.N. 958=A.I.R. 1929 Cal. 676.

——Art. 182 (2)—Final decree for partition, ordering one defendant to pay costs to another—Plaintiff appealing—All defendants made parties—Appeal dismissed—Time for recovering costs awarded to the one defendant as against the other runs from dismissal of appeal. 89 Ind. Cas. 268=48 All. 6=23 A.L.J. 878=6 L.R.A. (Civ.) 516=A.I.R. 1926 All. 145.

——Art. 182 (2)—Dismissal after hearing of an appeal for want of proper court-fee is not absence of appeal.

Where appeal was admitted and was heard by the Court and a decree was pronounced dismissing the appeal upon the ground that it was incompetent as the appeal was not valued and proper court-fees had not been paid.

Held, that it cannot be said that there was no appeal within the provisions of Art. 182 (2). The word appeal cannot be read to mean *bona fide* appeal. 74 Ind. Cas. 679=A.I.R. 1924 Cal. 349.

——Art. 182 (2)—Starting point—Ex parte decree—Fresh decree on appeal.

Where a decree was passed against several defendants of whom one was *ex parte* and subsequently the *ex parte* decree was set aside and a fresh decree was passed and confirmed on appeal the starting point of limitation for execution is from the date of the appellate decree. 33 All. 264=38 I.A. 37=15 C.W.N. 370=8 A.L.J. 332=13 C.L.J. 351=9 M.L.T. 380=13 Bom. L. R. 367=4 Bur.L.T. 121=21 M.L.J. 1140=(1911) 2 M.W.N. 177=9 Ind. Cas. 975 (P.C.).

[On appeal from 29 All. 623=4 A.L.J. 552=27 A.W.N. 204].

——Art. 182 (2)—Execution of decree—Limitation—Appeal—Appeal not pressed—Terminus a quo.

Where there has been an appeal from a decree, limitation does not the less begin to run from the date of the final decree in appeal because the appeal may have been dismissed upon the representation of the appellant's counsel that he was unable to support it. 16 M.L.J. 393, foll. (1908 A.W.N. 161 =5 A.L.J. 580=30 A. 385.

3. (d) Cl. (2)—"Final decree or order".

——Art. 182 (2)—Order by Appellate Court finally disposing of appeal.

When an Appellate Court makes an order which has the effect of finally disposing of an appeal time runs from the date of that order and not from the date of the decree against which the appeal was preferred. A.I.R. 1935 Lah. 771=16 L. 564=37 P. L.R. 727=161 Ind. Cas. 122.

——Art. 182 (2)—Final decree, meaning of.

The words 'final decree' in Art. 182 (2) merely indicate the final order by which an Appellate Court decides an appeal and the article cannot be interpreted to mean that the decree must be one which finally disposes of the suit and merges in itself the decretal order of the original Court. 'Final' is used in contradistinction with interlocutory. 35 Bom.L.R. 432=A.I.R. 1933 Bom. 255=57 B. 388=147 Ind. Cas. 1227.

——Art. 182 (2)—Final order — Meaning — Order dismissing appeal for want of prosecution —Starting point.

The expression "final order" in Cl. (2) of Art. 182 of the Limitation Act does not mean an order finally disposing of the rights of the parties. It merely means an order finally disposing of the appeal. An order dismissing an appeal for want of prosecution is a judicial order disposing of the appeal. Since no further appeal is provided against such an order, it is a final order within the meaning of Cl. (2) of Art. 182. The limitation for an application would, therefore, be counted from the date of the order dismissing the appeal for want of prosecution. 1950 A.L.J. 565=1950 A.W.R. 536=A. I.R. 1951 A. 493.

——Art. 182 (2)—Appeal dismissed for default —Starting point of limitation.

An order of the Appellate Court dismissing an appeal for want of prosecution does not amount to a decree as contemplated by the Civil P. C. Hence, where the appeal was dismissed for failure on the part of the appellants to deposit the printing charges, it cannot form the starting point of the limitation for purposes of execution which date must be counted from the date of the judgment of the lower Court. 1945 R.D. 65=1945 A.W.R. (H.C.) 34=I.L.R. (1945) All. 71=1945 A.L.J. 73.

——Art. 182 (2)—Dismissal of appeal for non-prosecution after admission and appearance of parties—Whether final decree or order.

Even a dismissal for non-prosecution after admission and appearance of the parties does not constitute a 'final decree or order' within the meaning of Art. 182 (2) and the addition of the words 'or withdrawal of the appeal' does not really make any difference. Consequently, limitation for execution of the decree starts only from the date of the decree and not from that of dismissal by Appellate Court. When a case is dismissed for want of prosecution, there is practically no appeal and the decree of the lower Court stands unaffected. A.I.R. 1936 Lah. 479=167 Ind. Cas. 477.

——Art. 182 (2)—The plain meaning of Cl. (2) of Art. 182, Limitation Act, is that the time for execution runs from the final order of the Appellate Court, whether that be an order for dismissal in default of prosecution or an order passed in the appeal on merits. A.I.R. 1935 Pesh. 129=158 Ind. Cas. 517.

——Art. 182 (2)—Privy Council appeal—Dismissal for non-prosecution, if 'final decree or order of Appellate Court.'

Where an appeal to the Privy Council is dismissed for non-prosecution, not only under R. 34 of the Judicial Committee Rules but also under R. 36, even after admission and appearance of the respondents, the order does not constitute the 'final decree or order of the Appellate Court,' within meaning of Art. 182 (2) and limitation for an application in execution runs from the date of the decree of the High Court which is the final decree of the Appellate Court, and not from the date of order of dismissal for non-prosecution.

(Scope of Rr. 34, 35 and 36 of Judicial Committee Rules indicated). A.I.R. 1932 Pat. 251=11 Pat. 477=139 Ind. Cas. 198).

——Art. 182 (2)—Lim. Act (15 of 1877), Art. 172—Final order of appellate Court—Dismissal of appeal to Privy Council for want of prosecution—Execution application—Limitation.

Where an appeal to the Privy Council from a decree of the High Court is automatically dismissed for non-prosecution under R. 5 of the Standing Order in Council, the time for execution of the decree under Art. 179 of the Lim. Act, 1877, runs from the date of the High Court's decree as there was no final order or decree of the Privy Council dismissing the appeal and none was necessary under the rules. 36 All. 284=1 L.W. 729=41 I.A. 104=18 C.W.N. 740=12 A.L.J. 596=19 C.L.J. 574=16 Bom.L.R. 360=27 M.L.J. 1=16 M.L.T. 1=(1914) M.W.N. 437=23 Ind. Cas. 644 (P.C.).

[On appeal from 7 Ind. Cas. 36].

——Arts. 182 (2) and 183—Dismissal of appeal for want of prosecution—Decree of lower Court capable of execution—Barred rights cannot be revived — Mortgage — Preliminary decree—Order absolute.

An order dismissing an appeal for default does not deal judicially with the suit and is not an order adopting or confirming the decision appealed from. The appellant is in the same position as if he had not appealed at all.

Where an appeal pending before the Privy Council is dismissed for want of prosecution the decree of the lower Court is not constructively turned into a decree of His Majesty in Council. The only decree which is in existence is the decree of lower Court. The period of limitation for executing such a decree is three years under Art. 182 and not 12 years under Art. 183 of the Limitation Act. Where a mortgage decree was passed before C. P. Code, 1908, the subsequent application for order absolute is one in execution. A right to enforce a decree which had become barred before the C. P. Code of 1908, came into force cannot be revived. 36 All. 350=1 L.W. 483=12 A.L.J. 624=16 Bom.L.R. 395=18 C.W.N. 963=19 C.L.J. 626=27 M.L.J. 17=(1914) M.W.N. 485=16 M.L.T. 44=23 Ind. Cas. 649 (P.C.).

[On appeal from 33 All. 154=7 A.L.J. 1001=7 Ind. Cas. 926].

——Art. 182 (2)—Dismissal for default—C. P. Code (14 of 1882), S. 596—T. P. Act, S. 89.

The Privy Council's order of dismissal for want of prosecution is an order confirming the decision of the lower Court and its execution is governed by Art. 180 of the Limitation Act (1877). An application to make a sale absolute is one for execution under S. 89 of the T. P. Act. 7 A.L.J. 1001=33 All. 154=7 Ind. Cas. 926 (F.B.).

——Art. 182 (2)—Dismissal of appeal as incompetent—Order gives fresh starting point of limitation.

The only essentials under Art. 182 (2) are that there must have been an appeal and an order of the Appellate Court.

An *ex parte* decree was passed on 11th November, 1938. An application to set aside the *ex parte* decree was dismissed and an appeal from this order was also dismissed on 5th August, 1940, on the ground that no appeal lay. The final order on the first execution petition was made on 5th July, 1939. On a subsequent application by the decree-holder on 25th July, 1942, for the execution, he contended that the period of limitation commenced to run on 5th August, 1940, the date of disposal of appeal filed by the defendant:

Held, that even if the appeal was incompetent on the ground that it did not lay, the order dismissing the appeal gave a fresh starting point of limitation for execution of the decree. The execution petition of 25th July, 1942, was, therefore, within time. A.I.R. 1945 Mad. 261=58 M.L.W. 222=(1945) 1 M.L.J. 421.

——Art. 182 (2)—Order dismissing appeal on ground of incompetency.

Obiter.—It may be that for purposes of Art. 182, an appeal may not be a proper or a competent appeal. But once it is entertained and heard by the Appellate Court, the mere fact that the final order dismisses the appeal on the ground that it is incompetent in law is nonetheless a judicial order which finally disposes of the appeal. A.I.R. 1938 Cal. 533=42 C.W.N. 698=178 Ind. Cas. 62.

——Art. 182 (2)—Starting point—Abatement of appeal or revision—Date of abatement or date of formal order declaring appeal or revision to have abated.

Where there is an order of Court declaring an appeal or revision to have abated, limitation under Art. 182 of the Limitation Act starts to run only from that date, even though the appellant or petitioner might have died earlier. I.L.R. (1947) A. 191=1947 A.L.W. 201=1947 A.W.R. (H.C.) 89=1947 A.L.J. 79=A.I.R. 1947 A. 390.

——Art. 182 (2)—Order of abatement of appeal.

Order declaring appeal to have abated on ground that heirs of deceased party were not substituted is final order within meaning of Art. 182. A.I.R. 1941 All. 371=1941 A.W.R. 255=(1941) A.L.J. 480=1941 R.D. 767=I.L.R. (1941) All. 658=197 Ind. Cas. 800.

——Art. 182 (2)—Order stating that appeal has abated, comes within Art. 182 (2) and time runs from such order even if appeal has abated before such order. A.I.R. 1941 Mad. 671=53 L.W. 726=1941 M.W.N. 633=(1941) 2 M.L.J. 66=196 Ind. Cas. 94.

——Art. 182 (2)—Order declaring that appeal had abated, whether final order and given fresh start for limitation.

When an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal, such an order gives a new starting point for the period of limitation prescribed by Art. 182 (2).

Consequently, where there has been an appeal from a decree and the Appellate Court has made an order that the appeal has abated, such an order is 'a final order of the Appellate Court' within the meaning of Art. 182 (2) and the period of limitation for the execution of the decree runs only from the date of such order. 10 O.W.N. 183=37 L.W. 296=(1933) M.W.N. 170=A.I.R. 1933 P.C. 68=60 Cal. 662=(1933) A.L.J. 239=35 Bom.L.R. 337=64 M.L.J. 421=37 C.W.N. 412=57 C.L.J. 130=34 P.L.R. 335=60 I.A. 83=142 Ind. Cas. 326 (P.C.).

——Art. 182 (2)—*R* obtaining decree against *G* on 29th March, 1922—*G* appealing—*R* dying during pendency of appeal—No substitution in his place—Appeal declared to have abated on 21st May, 1925—Time will begin to run from 21st May, 1925, and

not from 29th March, 1922. 104 Ind. Cas. 566=46 C.L.J. 111=A.I.R. 1927 Cal. 760.

——Art. 182 (2)—An order by which an appeal abates is not the final decree or order contemplated by the clause. 2 P.L.T. 49=A.I.R. 1921 Pat. 280.

——Art. 182 (2)—Applicability of—Abatement of appeal—Limitation—Starting point.

A mortgagor brought an appeal against a decree obtained by the widow of the mortgagee but he impleaded along with the widow another representative and heir of the mortgagee who had obtained a decree and was declared successor to the mortgagee's estate. But the declared successors died during the pendency of the appeal. As none of his representative was brought on record the appeal against him abated. Afterwards the widow and the mortgagor compromised and the appellate Court passed a decree in accordance therewith. In an application for executing the original decree by the successor's representatives it was contended that limitation began to run against the applicant from the date of abatement.

Held, the successor's representative could not apply as the successor was not party either in the original or appellate decree and the original decree was merged into appellate one. The order of abatement is not a final decree or order within the meaning of Art. 182 (2) of the Act, and hence incapable to give a fresh start of limitation. 5 Pat.L.J. 731=(1920) P.H.C.C. 342=58 Ind. Cas. 977.

——Art. 182 (2)—Appeal neither registered nor numbered due to deficiency in court-fee—Deficit not paid within time allowed—Order rejecting appeal, whether decree—If gives fresh start for limitation.

Where a memorandum of appeal is presented to the Appellate Court but it is neither registered nor numbered as an appeal and the memorandum being insufficiency stamped, the Court allows time to put in the deficiency and the deficient court-fees not being paid in time the appeal is rejected, the order rejecting the appeal has not the effect of the decree and does not deal with the appeal at all which has not yet come into existence. It amounts merely to this that the appellant has not complied with the conditions under which alone he was competent to file an appeal and, therefore, the petition is exactly the same as if no appeal has been filed. The order, therefore does not give a fresh start for limitation. A.I.R. 1938 Cal. 533=42 C.W.N. 698=178 Ind. Cas. 62.

——Art. 182 (2)—Appeal on insufficient stamp admitted—Subsequent rejection after hearing parties—Time, when runs.

Where an appeal on insufficient court-fee is duly registered but subsequently rejected after notice to the parties and after hearing them, the time begins to run under Art. 182 (2), from the date of the order of the Appellate Court. A.I.R. 1938 Pat. 79=4 B.R. 303=19 P.L.T. 243=173 Ind. Cas. 615.

——Art. 182 (2)—Order dismissing appeal as time-barred, whether gives fresh starting point.

Under Art. 182, Cl. (2), limitation for execution of a decree runs only from the date of the order or decree of the Appellate Court if an appeal is preferred, even though the appeal is dismissed as being time-barred. 12 P.L.T. 701=A.I.R. 1931 Pat. 422 =11 Pat. 430=134 Ind. Cas. 425.

——Art. 182 (2)—Inexecutable order may also be "order" within the meaning of Art. 182.

Where there has been an appeal and where that appeal has been properly presented and is within time any order of the High Court dismissing the appeal or putting an end to the appeal in any way is either a decree or order within the meaning of the present Art. 182 (2), although it may be that in many cases such an order is not an order of which execution could be sought. 59 Ind. Cas. 896=6 P.L.J. 27=2 P.L.T. 28=1921 P.H.C.C. 34=A.I.R. 1921 Pat. 6.

——Art. 182 (2)—Order returning memorandum of appeal to be presented to proper Court—If appellate decree.

An order directing the return of the memo. of appeal for presenting to the proper Court is not a 'final order' nor is the Court an 'Appellate Court' within Art. 182 (2) and the time for executing the decree does not run from the date of such order. 60 Ind. Cas. 267=43 Mad. 835=12 M.L.W. 304=1920 M.W.N. 587=39 M.L.J. 431.

——Art. 182 (2)—Order returning appeal—Starting point.

An order returning an appeal presented to a wrong Court *bona fide* is not covered by Cl. (2) and the decree-holder does not get extension of time from the date of such return counting it as the starting point. 43 Mad. 835=(1920) M.W.N. 587=39 M.L.J. 431=12 L.W. 304=60 Ind. Cas. 267.

——Art. 182 (2)—Compromise—Striking off appeal.

Where a compromise petition to the appellate Court prayed to strike off the appeal and the Court dismissed the appeal by a separate order, separate from the order recording the petition, the original decree cannot be held to be superseded by a fresh decree or set aside by the compromise petition. 25 M.L.J. 586=14 M.L.T. 574=21 Ind. Cas. 639.

——Art. 182 (2)—Appeal—Decree affirmed—Starting joint.

Even when the decree of the appellate Court affirms the decree against which the appeal is preferred it is the final decree in the case and as such the only decree capable of enforcement in execution after it is once pronounced. 16 W.R. 1, foll. 16 Ind. Cas. 945 (Cal.).

——Art. 182 (2)—'Decree'—Meaning of.

Neither an order rejecting a petition for revision passed without summoning the respondent nor an order disallowing the application for review of this order falls within the meaning of 'decree' or 'order' under Art. 182 of the Lim. Act. 87 P.W.R. 1909 =81 P.L.R. 1909=4 Ind. Cas. 629.

——Art. 182 (2)—"Final decree or order of the appellate Court"—Appeal, withdrawal of—Decree dismissing the appeal with costs.

Where an appeal is withdrawn and an order is made by the Court to which the appeal is preferred which has the effect of finally disposing of the appeal, time for execution runs from the date of the order by the appellate Court. (1906) 16 M.L.J. 393=30 M. 1 (F.B.)=1 M.L.T. 233.

3 (e). Cl. (2)—Starting point of limitation.

—Art. 182 (2)—Plaintiff's suit and first appeal dismissed with costs—Second appeal also dismissed with costs for failure to file *talbana*—Application for

restoration also dismissed—Execution of decree for costs of suit and appeals.

Held, that the time ran from date of dismissal of second appeal and not from date of dismissal of restoration application. A.I.R. 1941 Pat. 213=22 P. L.T. 26=7 B.R. 799=20 Pat. 513=194 Ind. Cas. 608.

——Art. 182 (2)—Appeal does not operate as stay of execution but only postpones the time of limitation.

For execution purposes an appeal by itself never operates as a stay. There is the right to execute the moment the decree is passed; but if there is an appeal the time of limitation is postponed and does not run until the decree determining the appeal is made. So the broad principle in India as regards execution matters is that time is not computed from the date when the right to apply accrues but is postponed in cases where there is an appeal. 50 C.L.J. 12=33 C.W.N. 958=A.I.R. 1929 Cal. 676.

——Art. 182 (2)—Time begins to run from the date of appellate decree where decree is appealed against. 81 Ind. Cas. 569=51 Cal. 342=A.I.R. 1924 Cal. 686.

——Art. 182 (2)—The starting point for limitation is the date of the appellate decree. 61 Ind. Cas. 679=13 M.L.W. 37=1921 M.W.N. 181=A.I.R. 1921 Mad. 126.

——Art. 182 (2)—Withdrawal of appeal.

Where an appeal is filed but withdrawn an application to execute within three years of withdrawal is not time-barred. 94 Ind. Cas. 390=24 A.L.J. 544.

4. Cl. (3)—Review of judgment.

——Art. 182 (3)—Applicability—Application under O. 9, R. 13—Suspension of time—Rule as to.

A contention that an application under O. 9, R. 13, Civil Procedure Code, is virtually an application for review within the meaning of Cl. (3) of Art. 182 of the Limitation Act, goes against and beyond the normal meaning of the word "review" in that clause of the article and cannot be accepted.

There can be no suspension of time which has once begun to run except under the heads of deduction specifically recognized and provided for by statute. 63 L. W. 467=A.I.R. 1950 Mad. 552=1950 M.W.N. 380=(1950) 1 M.L.J. 648.

——Art. 182 (3)—Proceedings for setting aside an *ex parte* decree are not proceedings for 'review of judgment' within the meaning of Art. 182 (3). (1932) A.L.J. 731=A.I.R. 1932 All. 601 (602)=138 Ind. Cas. 692.

——Art. 182 (3) and (4)—Decree—Amendment of — Review.

An application for the amendment of a decree even as regards costs is an application for review of judgment and hence a fresh starting point for limitation for the execution of such decree begins to run from the date of amendment. 10 C.L.J. 467=3 Ind. Cas. 391.

——Art. 182, Cl. (3)—Civil Procedure Code (1882), S. 206.

A decree was passed on 31st December, 1893. The 2nd defendant filed a petition for the amendment of the decree in respect of the costs, which was granted on 6th October 1893. On 6th July, 1896 he applied for execution and again on 29th April, 1898. *Held*, that the application was not barred as the order passed by the Court determining the amount of costs must be treated as a continuation or completion of judgment, and the amendment was substantially a review of judgment and Art. 179 (3) (O.A.) applies. (1900) 24 M. 25.

——Art. 182 (3)—'Review'—Amendment of decree, no review—Civil Procedure Code, S. 206.

An order granting an application under S. 206 of the Code of Civil Procedure is not an order passed upon review of judgment within the meaning of Art. 179 and has not the effect of extending the period of limitation for execution of the decree. 20 A. 304, 8 A. 492 and 13 A. 134, foll. 1905 A.W.N. 108=2 A.L.J. 287=27 A. 575.

——Art. 182 (3), Applicability of.

The words "where there has been a review of judgment" in Art. 182 (3), must be interpreted strictly as meaning what they say. These words, in their plain meaning, only cover cases where the application has been allowed and there has been an actual review or re-hearing of the case or appeal. In that case the limitation will begin to run from the date of the new decree. It would indeed begin to run from the date of the new decree even if the new decree was the same as the decree in respect of which the application for review had been made and allowed. Hence Art. 182 (3), has no application to cases in which the application for review has been rejected. In such cases limitation begins to run from the original decree. 1942 A.W.R. 246=A.I.R. 1942 All. 338=(1942) A.L.J. 352=202 Ind. Cas. 726.

——Art. 182 (3)—"Review of judgment", meaning explained.

The words "when there has been a review of judgment" in Art. 182 (3), must mean a review by some one who can review the judgment, that is to say, by the Court which pronounced the judgment to be reviewed. Hence the article will have no application where an application for review has been rejected, because in that case there has not been a review of judgment. The words 'review of judgment' cannot be construed to mean proceedings for review of judgment. A.I.R. 1941 Pat. 213=22 P.L.T. 26=7 B.R. 799=20 Pat. 513=194 Ind. Cas. 608.

——Art. 182 (3)—Limitation—In peculiar circumstances of case limitation for appeal, held should be reckoned from date of decision of review and was well within time.

An appellate decree was passed by the District Judge on December 20, 1939, but on the next day, he passed an order to the effect that it was necessary to review the decision as there had been an error in his finding as regards the amount due to the plaintiff. He *suo motu* issued notices to the parties with the object of reviewing it. No decrees were, therefore, prepared on the basis of the judgment pronounced on December 20, 1939. Decrees were only prepared after the decision on review on January 25, 1940. The appellant had applied for copies on December 22, 1939, but they could not be given as no decree was prepared:

Held, that in the peculiar circumstances of the case, the period of limitation should be reckoned from January 25, 1940. Counting the period from that date and allowing for the time required for copies, the appeal was well within time:

Held, also that even if an appeal was to be lodged from a decree on the basis of the judgment, dated December 20, 1939, the period till the decree was actually signed would have to be excluded for the purposes of limitation. A.I.R. 1941 Lah. 212=43 P.L.R. 88=195 Ind. Cas. 157.

——Art. 182 (3)—Review decision.

Application for review of decree rejected—Appeal against, will not stop limitation, running against decree-holder. 68 Ind. Cas. 727=A.I.R. 1923 Cal. 288.

——Art. 182 (3)—Review — Application for rehearing or review dismissed.

The intention of the Legislature was to allow further time to a holder of a decree or order for costs where there has been an application for review which had been heard and a fresh decision has been pronounced not to allow further time where an application for rehearing or review has been put forward on untenable grounds and has consequently been rejected or dismissd. *Quaere*: Whether the words "review of judgment" in clause (3) of Art. 182 of the Limitation Act cover an application for re-hearing of a suit dismissed for default. 3 Pat. L.J. 119=44 Ind. Cas. 575.

——Art. 182 (3)—"Decision passed on review," meaning of.

The words "decision passed on review" in Art. 182 (3), mean a decision passed in review proceedings; and whatever such a decision is, it gives a fresh starting point of limitation. The starting point of limitation under sub-R. (3) is the order passed on review, and the only orders under review contemplated by O. 47 are those under R. 4, and the words in Art. 182 (3) presumably apply to such orders and orders made in appeal against such orders. A.I.R. 1936 Bom. 162=38 Bom.L.R. 215=162 Ind. Cas. 223.

——Art. 182 (3)—Review of judgment, whether extends limitation against persons not party to review.

Dhere there has been a review of decree the period of limitation for making an application for execution runs from the date of the revised decree even as against persons who were not parties to the review proceedings. 64 M.L.J. 75=A.I.R. 1933 Mad. 276=36 L.W. 919=(1933) M.W.N. 155=141 Ind. Cas. 175 (2).

5. Clause (4).

(a) Applicability.
(b) Executing Court cannot question propriety of amendment.
(c) Starting point of limitation.

(a). Applicability.

(i) Amendment of decree after period of limitation.
(ii) Formal amendment of decree.
(iii) Formal amendment of decree after period of limitation.

(i) Amendment of decree after period of limitation.

——Art. 182 (4)—Decree amended after it was barred—Application for execution within three years of amendment—If within time.

Though a decree may have amended after it was barred, if the application for execution is within three years of the date of the amendment, it would be within time. 1950 A.L.J. 676=A.I.R. 1950 A. 655=1950 A.W.R. 646.

——Art. 182 (4)—Applicability — Decree drawn up in name of wrong person—Amendment after three years correcting error—Execution within three years of amendment—If barred.

Where a decree drawn up incorrectly in that the decree was not drawn in the name of the correct person but in the name of wrong person, is amended after the lapse of three years from the date of the original decree, and an application for execution is made within three years after such amendment, such application is not barred by limitation; the decree executed being the amended decree, limitation starts only from the date of the amendment. A.I.R. 1948 Pat. 158.

——Art. 182 (4)—Amendment of decree by apportionment of rent in manner set out in plaint—Limitation for execution, when begins to run.

If there has in fact been an amendment within the meaning of Cl. (4) of Art. 182, then, even though that amendment has been made more than three years from the date of the original decree, *terminus a quo* for an application for execution runs from the date of the order of the amendment. But it does not save limitation if the alteration in a decree does not amount to an amendment within the meaning of cl. (4) of Art. 182.

In a suit for rent of number of holdings, the plaintiff set out the amount of rent claimed in respect of each of the holdings. The suit was decreed; but in the decree that was drawn up, the rent due in respect of each of the holdings was not shown, but the consolidated amount due for all the holdings was entered as the amount which the decree-holder was entitled to recover. The decree was passed on December 22, 1936. On January 10, 1940, the decree-holder applied for amendment of the decree by apportionment of the rent in the manner set out in the plaint. The amendment was allowed by an order dated January 22, 1940. An application for execution of the amended decree was made on April 6, 1940. The application was opposed by the judgment-debtors on the ground that it was barred by limitation.

Held, that as originally passed, the decree only entitled the decree-holder to sell the right, title and interest of the judgment-debtors in their holdings. It was incapable of execution as a rent decree. The consequence of the amendment was to confer on the decree-holder the right to sell the holdings of the tenants. Such an amendment was of a substantial nature and resulted in time running against the judgment-debtors from the date it was made and not from the date of the original decree. A.I.R. 1942 Pat. 478=8 B.R. 853=23 P.L.T. 731=202 Ind. Cas. 105.

——Art. 182 (4)—Applicability, when amendment is made more than three years after date of original decree.

There is no warrant for the proposition that Cl. (4) of Art. 182 applies only if the amendment had been made on a date when the original decree had not become barred under Cl. (1) or Cl. (2). An execution application brought within three years from the date of amendment is within time even if the amendment is made on a date when the original decree had been barred under Cl. (1) or Cl. (2). A. I. R. 1941 Lah. 131=43 P.L.R. 11=I.L.R. (1941) Lah. 659=195 Ind. Cas. 250.

——Art. 182 (4)—Application for amendment of decree five years after date of decree—Whether gives a fresh start to limitation.

A decree which is capable of execution, and is not executed within three years from its date becomes dead, and cannot be revived by a subsequent application for amendment. Clause (4), Art. 182, Limitation Act pre-supposes that at the time of amendment the decree is alive. The basic idea underlying Art. 182 is that the decree is subsisting at the various points of time from which the limitation starts to run under the provisions of Cl. (3) of this article. It would not be consistent with the obvious intention of the Legislature to hold that the decree-holder can get a start for limitation from the date of amendment even in a case where the decree had already become barrd by time when the amendment was made. A.I.R. 1934 Oudh 43=11 O.W.N. 10=147 Ind. Cas. 815.

——**Art. 182 (4)—Application for amendment made within time—Amendment beyond time.**

Application for amendment made within time—Action of Court in delaying amendment beyond time does not prejudice decree-holder's right in respect of decree. A.I.R. 1929 Cal. 650, Foll.; 11 P.L.T. 181=A.I.R. 1930 Pat. 286.

——**Art. 182 (4)**—A decree-holder made an application for execution claiming the correct amount as due to him. In the sale proclamation, however, by some clerical mistake, a lesser amount was put down. The sale proceeded but the decree remained unsatisfied as to a certain amount. Long after 3 years from first application but within 3 years from intermediate application the decree-holder again executed the decree and claimed the correct amount due to him. The Court held that the decree-holder having failed within three years' time to have the figure corrected is debarred from executing the decree in respect of the correct amount. In no instance, however, did the decree-holder claim anything less than what was actually due to him under the decree.

Held, that the decree-holder was not precluded from claiming the correct amount due to him.

Held, further, that the matter might have been different if he had allowed an order to be passed that the decree had been fully satisfied, on receiving a lesser amount. 111 Ind. Cas. 698.

——**Art. 182 (4)—Amendment after period of limitation—Decree not revived.**

Where a decree is quite capable of execution as it stands, its amendment cannot entitle the decree-holder to a fresh period of limitation under Art. 182, Cl. (4). A decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application for amendment. 32 I.C. 744: 59 I.C. 186, Foll.; 73 Ind. Cas. 461=5 L.L.J. 398=A.I.R. 1924 Lah. 329.

——**Art. 182 (4)—Amendment of decree.**

Amendment of decree after the execution is barred by limitation gives no fresh start of limitation for execution from that time. 32 Ind. Cas. 744 (Cal.).

(ii). Formal amendment of decree.

——**Art. 182 (4)—Amendment formal or unnecessary.**

There is no warrant for the proposition that Cl. 4 of Art. 182, Limitation Act applies only to cases where the amendment is in the real sense of the term, that is, of some substance as affecting the rights of the parties. Application of the clause cannot be restricted to those decrees only in which the amendment is of a particular type. The article applies whether the amendment was merely a formal one or was really unnecessary. A.I.R. 1941 Lah. 131=43 P.L.R. 11=I.L.R. (1941) Lah. 659=195 Ind. Cas. 250.

——**Art. 182 (4)—Scope of.**

An amendment of a rent decree where it is merely a correction of the rate, the amount decreed remaining the same, made after the right to execute the decree had expired, does not give the decree-holder a fresh starting point of limitation. 2 Pat.L.J. 286 =3 Pat.L.W. 435=39 Ind. Cas. 624.

(iii). Formal amendment of decree after period of limitation.

——**Art. 182 (4)—Construction and scope—Amendment of decree and fresh start of limitation—If dependent on amendment being one of substance—Amendment beyond three years of date of decree—If furnishes fresh start.**

Under Art. 182 (4), Limitation Act, time for execution of a decree, which has been amended, runs from the date of the amendment, even though the amendment was made more than three years after the date of the decree; and it is not competent to the executing Court to decide whether the order for amendment of the decree was proper or not.

Imam, J.:—If the amendment is one of substance, and not merely one of form such as correcting an arithmetical mistake or a clerical error, a fresh period of limitation starts from the date of the amendment of the decree.

Narayan, J.:—A fresh *terminus a quo* is available to the decree-holder in all cases of amendment, irrespective of whether the amendment is one of substance or not. 41 C.W.N. 1330; A.I.R. 1941 Lah. 131; 16 Pat. 290, foll. 27 Pat. 513.

——**Art. 182 (4)—Scope—Decree barred—Amendment—If gives fresh start of limitation for execution.**

There is no warrant for holding that "the date of the amendment" given in the third column of the schedule under Art. 182 (4), Limitation Act, applies only when the decree amended was still capable of execution at the time of the amendment. An amendment of a decree undoubtedly gives a fresh starting point for limitation, whether the amendment be formal or substantial, and whether the decree amended was or was not time-barred at the date of the amendment. 49 Bom.L.R. 557=A.I.R. 1948 Bom. 49.

——**Art. 182 (4)—Amendment of decree after three years—Amendment without notice to judgment-debtor and merely to correct arithmetical error.**

If Cl. (4) of Art. 182 is to be literally construed, the amendment of a decree provides a fresh starting point for limitation and it is immaterial whether the application for amendment was made within three years of the date of the decree or more than three years after it.

But the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term, that is, of some substance as affecting the rights of the parties, and not merely the correction of a clerical error or a trafling arithmetical mistake such as the Court might at any time correct of its own motion. Where there was no real amendment of the decree and the Court which was asked to amend it, did not issue notice to the opposite party

before passing final orders upon the decree-holder's application, Art. 182, Cl. (4) cannot be availed of by the decree-holder and the execution after three years of the decree is barred by limitation. A.I.R. 1938 Pat. 57=16 Pat. 453=18 P.L.T. 679=4 B. R. 425=174 Ind. Cas. 418.

——Art. 182 (4)—Decree only requiring verbal corrections—Objections as to limitation, in subsequent execution proceedings.

Where the decree-holder does not take any step to execute his decree within period of limitation but subsequently seeks to amend the decree, though the decree is capable of execution without such amendment, which is merely of the nature of verbal corrections not falling within the meaning of Art. 182 (4), such amendment and correction do not save the limitation and the execution filed afterwards is barred. The judgment-debtor, who was not made a party to the amendment proceedings and the previous execution having been dismissed for failure on the part of the decree-holder to take any further steps after notice to the judgment-debtor, can take objection in subsequent execution proceedings that the amendment, not being necessary, cannot save limitation. A.I.R. 1937 Cal. 581=41 C.W.N. 1151=67 C.L.J. 92=173 Ind. Cas. 584.

——Art. 182 (4)—Amendment of formal nature—Limitation.

Under Art. 182 (4) where a decree has been amended, the decree-holder is entitled to apply for execution within three years from the date of the amendment. The fact that the decree had become time-barred at the time of the application for amendment or that the amendment applied for is unnecessary, are matters to be dealt with by the Court to which the application for amendment is made.

A final decree was passed on 2nd December, 1921; on 21st October, 1925, that decree was amended. On 20th January, 1928, an application for execution was made:

Held, that the application was not time-barred, even though amendment of the decree was merely a formal one and the final decree was an executable one even in its un-amended form. (1934) M.W.N. 1402=40 L.W. 896=67 M.L.J. 904=A.I.R. 1935 Mad. 97=58 M. 743=154 Ind. Cas. 847.

(b). Executing Court cannot question propriety of amendment.

——Art. 182 (4)—Nature of amendment of decree cannot be considered by execution Court.

Under Art. 182, Cl. (4) it is irrelevant to look into the nature of an amendment. An executing Court does not sit as a Court of Appeal over the Court which has made the decree or which has made the amendment, but only sees whether the decree has been amended in order to decide whether the application for execution is barred by limitation. 18 P. L.T. 18=16 Pat. 290=A.I.R. 1937 Pat. 316=3 B.R. 275=167 Ind. Cas. 134.

——Art. 182 (4)—Decree amended—Limitation for execution runs from date of amendment—Executing Court cannot question propriety of the amendment. A.I.R. 1929 Cal. 650.

(c). Starting point of limitation.

——Art. 182 (4)—Decree under S. 8 of the U. P. Debt Redemption Act amended—Execution—Limitation.

An order amending a decree under S. 8 of the U. P. Debt Redemption Act must bear the date on which the order was made, and the decree-holder can execute the decree within three years of the date of amendment under Art. 182 (4) of the Limitation Act. Although sub-S. (2) of S. 8 of the U. P. Debt Redemption Act provides that a decree amended under the provisions of sub-S. (1) shall be deemed to bear the date of the original decree, it nowhere lays down that the date of amendment shall be deemed to be the date of the original decree. A.I.R. 1947 All. 249=1946 A.W.R. (H.C.) 543.

——Art. 182 (4)—Where a decree has been amended limitation for execution of the decree runs from the date of the amendment under Cl. (4) of Art. 182 and this clause must be read in its exact sense. 66 M.L.J. 492=(1934) M.W.N. 90=A.I.R. 1934 Mad. 283=39 L.W. 488=57 M. 795=148 Ind. Cas. 1088.

——Art. 182 (4)—If there has been an amendment of a decree which was incapable of execution, the period shall run from the date of the amendment, otherwise it must date back to the date of the original decree. 115 Ind. Cas. 118=1939 A.L.J. 427=A.I.R. 1929 All. 253.

——Art. 182 (4) and Old (6)—Execution of adjusted decree.

After recording compromise in execution the decree is adjusted and the decree to be executed is the adjusted decree. The limitation applicable in such a case is that contained under Art. 182, Cl. (4) and under Old Cl. (6) of the same article there would be a period of three years allowed from the issue of the notice to the judgment-debtor to pay under the decree. 97 Ind. Cas. 768=A.I.R. 1927 Nag. 31.

——Art. 182 (4)—Application for execution filed within three years of a modified decree is in time. 100 Ind. Cas. 164=A.I.R. 1927 Lah. 719.

——Art. 182 (4)—The "date of amendment" in Art. 182 (4) means the date of the order for amendment and not the date on which the decree is actually amended. 95 Ind. Cas. 196=49 Mad. 807=23 M. L.W. 692=A.I.R. 1926 Mad. 747=50 M.L.J. 554.

——Art. 182 (4)—Amended decree—Execution—Limitation when begins.

The date of amendment of a decree is the date of passing the order of amendment and not the date of actual amendment. Therefore an application for the execution of a decree three years after the date of the order amending the decree, but less than three years after the actual amendment, is barred. 3 Pat. L.W. 447=36 Ind. Cas. 533.

——Art. 182 (4)—Arbitration—Execution petition referred to arbitration—New instalment decree on terms of award—New decree, if can be executed where old is barred.

Where in execution of a decree the matter is referred to an arbitrator and on the basis of his award a new decree results, the new decree is capable of execution thought the old one is barred. 16 C.W.N. 34=11 Ind. Cas. 457.

——**Art. 182 (4)—Decree as originally framed incapable of execution—Amendment of decree.**

A decree for sale under S. 88 of the Transfer of Property Act, 1882, and the order absolute for sale under S. 89, directed the sale of a village which was non-existent. The decree was, however, amended on the application of the decree-holders.

Held, on an application for execution by decree-holders that such a decree was until amendment incapable of execution and limitation therefore began to run not from the date of the decree but from the date of the amendment. 17 A. 39, foll. (1908) A. W.N. 191=5 A.L.J. 403.

[Now made clear by Cl. (4) of the new Act—Ed.].

——**Art. 182 (4)—No amendment of decree except under S. 206 or S. 623 of the Code.**

Time runs from date of original decree and not from date when decree was amended without any power to do so. When decree is amended without power to do so, time runs for application for execution from the date of the original and not that of the amended decree. (1898) 24 M. 1=4 C.W.N. 725=10 M.L.J. 221=2 Bom.L.R. 771=27 I.A. 197 (P.C.).

——**Art. 182 (4)—Appeal from amended decree postpones execution.**

Upon strict construction of Art. 182 or in principle, case of an appeal from amended decree is in no way different from case of an appeal from any other decree and as in the other case, appeal from an amended decree postpones the date from which limitation runs for execution purposes. 50 C.L.J. 12=33 C.W.N. 958=A.I.R. 1929 Cal. 676.

6. Application "in accordance with law."

(a) Application—Meaning of.
(b) Decision in subsequent execution application.
(c) Defective application.
(d) Test.
(e) What is and what is not.

(a). Application—Meaning of.

——**Art. 182 (5)—Application—If includes suit.**

A "suit" is a proceeding which is instituted by the presentation of plaint and is, in its nature, different from an "application made" under the Limitation Act. A.I.R. 1939 Rang. 296=1940 Rang.L.R. 82=185 Ind. Cas. 70.

——**Art. 182 (5)—Application—Suit in the executing Court dismissed as barred by S. 47, C. P. Code—Order of dismissal if can be a step-in-aid of execution.**

The word 'application' in Art. 182 (5) must be strictly construed as the Act itself draws a clear distinction between suits and applications. Suits are not included under the provisions of this article. Hence the dismissal of a suit filed in the executing Court where an execution application is pending, on the ground that it is barred by S. 47, C. P. Code, cannot operate as a step-in-aid of the pending execution. 1946 A.M.L.J. 13.

——**Art. 182 (5)—Application—Suit under O. 21, R. 63, C. P. Code.**

A suit under O. 21, R. 63, C. P. Code, cannot be treated as an "application" for purposes of Art. 182 (5), Limitation Act, and therefore such a declaratory suit cannot be a step-in-aid so as to save limitation. I.L.R. (1946) Kar. 412=227 Ind. Cas. 17=A.I.R. 1947 Sind 48.

——**Art. 182 (5)—"Application"—Suit under O. 21, R. 63—If step-in-aid.**

A suit under O. 21, R. 63, C. P. Code, by a to the attached property cannot be regarded as a step-in-aid under Art. 182 (5), Limitation Act, such a suit is not "an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order." "Application" in the Article does not include a suit. I.L.R. (1945) Bom. 893=225 Ind. Cas. 142=A. I.R. 1946 Bom. 187=47 Bom.L.R. 848.

——**Art. 182 (5)**—The plaint in declaratory suit under O. 21, R. 63, cannot be treated as an application in accordance with law within meaning of Art. 182. A.I.R. 1942 Mad. 5=54 L.W. 45=1941 M. W.N. 752=(1941) 2 M.L.J. 754=200 Ind. Cas. 815.

——**Art. 182 (5)—Plaint in suit in Court passing decree for declaration that property is liable to be attached in execution.**

A plaint in a suit filed in the Court passing the decree for declaration that certain property is liable to be attached in execution of the plaintiff's decree against his judgment-debtor, is not an application to take some step-in-aid of execution wihin the meaning of Art. 182 (5), Limitation Act. A.I.R. 1939 Cal. 399=I.L.R. (1939) 2 Cal. 33=43 C.W.N. 604=69 C..L.J. 543=187 Ind. Cas. 831.

——**Art. 182 (5)—Claim suit under O. 21, R. 63 is not a step-in-aid of execution.** A.I.R. 1938 Nag. 534=1938 N.L.J. 336=I.L.R. (1940) Nag. 334=180 Ind. Cas. 903.

——**Art. 182 (5)—Plaint—Treatment of, as application.**

The word "application" in Cl. (5) means a "document containing a request".

A plaint in a suit by a decree-holder to obtain a declaration that the property attached by him belongs to his judgment-debtor and is liable to be sold in execution of his decree, instituted in the same Court in which the decree under execution was passed, can be treated as an application to take a step-in-aid of execution of the decree within the meaning of Cl. (5), Art. 182. A.I.R. (1930) 22 All. 376; A.I.R. 1921 All. 174 and 29 All. 348, Foll. 7 O.W.N. 887=A.I.R. 1930 Oudh 468.

——**Art. 182 (5)—Claim suit by decree-holder—Institution of, is a step-in-aid of execution.**

Where the decree-holder files a suit for a declaration that a sale by the judgment-debtor is fraudulent and that the properties are liable to be attached in execution of his decree *held*, that the institution of the suit is a step-in-aid of execution of his decree.

The expression "in accordance with law" means "in accordance with the whole body of law applicable, and not merely the law relating to the execution of decrees".

The word 'application' means a 'document containing a request'. A plaint can for the purposes of the section be treated as an application.

'Proper Court' means the Court whose primary duty is to execute its own decree. 69 Ind. Cas. 660=9 O.L.J. 444=26 O.C. 71=A.I.R. 1923 Oudh 9.

——Art. 182 (5)—Application.

Filing tabular statement under O. 21, R. 11, is making application.

The making of an application does not imply an application on which an order has been made. 115 Ind. Cas. 83=55 Cal. 1341=A.I.R. 1929 Cal. 193.

——Art. 182 (5)—Consent by decree-holder for adjournment of sale—No application.

A consent by the decree-holder for adjournment of sale on an application by the judgment-debtor for postponement is not 'an application' by the decree-holder; and consequently a fresh application within three years from the date of consent, but after three years from the date of the previous application, is barred. (1904) 28 M. 40.

(b). Decision in subsequent execution application.

——Art. 182 (5)—Question whether execution was in accordance with law—Decision in subsequent execution application.

Where the question whether an application for execution was an application in accordance with law was not raised in the execution proceedings, it can be decided in the subsequent execution application and though *prima facie* it may not be fair or equitable that the decree-holder should be exposed to the risk of having his application declared in a subsequent application for execution to have been an application not in accordance with law when the question is not easy to decide, still it should be decided as equitable considerations are out of place. A.I.R. 1943 Bom. 353=45 Bom.L.R. 707=210 Ind. Cas. 376.

——Art. 182 (5)—"In accordance with law"—Test to decide whether earlier application was according to law.

In considering whether an earlier application for execution was or was not in accordance with law within the meaning of Art. 182 (5), Limitation Act, the Court has to consider only one thing, that is, whether the provisions of Rr. 10 to 14 of O. 21, C. P. Code, had been complied with in respect of that application. Whether the earlier application was *bona fide*, made with a genuine intention to prosecute the same, and whether the Court was competent to grant all the reliefs prayed for, and other questions of that kind are entirely irrelevant, as they do not affect the question. I.L.R. (1946) Kar. 450=A.I.R. 1947 Sind 152.

——Art. 182 (5)—Application in accordance with law.

In considering whether an application for execution of a decree is within time, it is not necessary to examine the previous applications to ascertain whether they in all respects comply with the provisions of law. 65 P.L.R. 1916=202 P.W.R. 1915=34 Ind. Cas. 955.

——Art. 182 (5)—A judgment-debtor who was not a party to a previous application for execution of a decree or to any order made upon it is not precluded from showing that the said application was barred by limitation and that therefore it was not in accordance with law. 67 Ind. Cas. 879=A.I.R. 1923 Cal. 322.

(c). Defective application.

(i) Certificate and necessary papers required by law.

(ii) Copy of decree and judgment.
(iii) Court-fee.
(iv) Dead judgment-debtor or some or wrong legal representative.
(v) Description of property.
(vi) Description of suit or parties.
(vii) Jurisdiction of Court.
(viii) Leave of Insolvency Court.
(ix) Minor.
(x) Relief.
(xi) Test.
(xii) Verification and vakalat.
(xiii) Wrong applicant.
(xiv) Other defects and mistakes.

(i). Certificate and necessary papers required by law.

——Art. 182 (5)—Execution application for sale of property already attached before judgment—Insolvency of judgment-debtor—Certified extracts of mutation register required by Court not filed — Execution application dismissed for default—Application, held one in accordance with law.

The decree-holder applied for execution of his decree by the sale of the villages which had already been attached before judgment. The Court registered the application and admitted it ordering the decree-holder to file copies of mutation registers under O. 21, R. 14. Meantime, the judgment-debtor was adjudicated insolvent. The decree-holder put in a claim in the Insolvency Court supported by an affidavit giving the particulars of his debt as required by S. 49 of the Provincial Insolvency Act. Time for filing copies of mutation register was extended from time to time. The Court dismissed the execution application for default as the decree-holder was absent and the copies of the mutation register were not filed:

Held, that the Court might well have, abstained from requiring the decree-holder to produce the certified extracts and proceeded with the execution of the decree seeing that the property had been under attachment and the necessary particulars about it were already known. A.I.R. 1943 P.C. 98=47 C.W.N. 715=(1943) 2 M.L.J. 121=56 M.L.W. 444=(1943) A.L.J. 323 (2)=10 B.R. 49=1943 M.W.N. 565=I.L.R. (1943) Nag. 669=70 I.A. 83=(1943) N.L.J. 587=1943 A.W.R. 11=46 Bom.L.R. 306=I.L.R. (1943) Kar. (P.C.) 109 (Sup.)=208 Ind. Cas. 102 (P.C.).

——Art. 182 (5)—Execution application complying with O. 21, Rr. 11 to 14—Sale papers and encumbrance certificates not filed.

An application for execution which complies with the requirements of O. 21, Rr. 11 to 14, Civil P. C., is an application in accordance with law within Art. 182 (5), Limitation Act. The mere non-production of the sale papers and the encumbrance certificates with the application cannot render it as one not in accordance with law and cannot justify an order returning the same as being defective for it is not till a late stage that these papers can be called for under R. 194 of the Civil Rules of Practice of the Madras High Court. A.I.R. 1943 Mad. 297=(1942) 2 M.L.J. 768=I.L.R. (1943) Mad. 357=1943 M.W.N. 68=208 Ind. Cas. 361.

——Art. 182 (5)—Decree in respect of equitable mortgage—Documents of title not filed—Application for execution, held in accordance with law.

There is no presumption in favour of the regularity of an execution petition, and the entire burden is upon the decree-holder to show that the requirements of law were complied with.

With an application for execution of a decree in respect of an equitable mortgage, the extracts from *D* register were filed. But on the decree holder's failure to file the documents of title, the execution petition was dismissed:

Held, that as the preliminary decree was filed along with the execution petition, all particulars relating to the mortgaged properties could be gathered from the decree and the omission to file the documents of title could not be held to be a defect in the application which would prevent the Court from proceeding with the execution application and selling the mortgaged properties. Hence the execution petition was in accordance with law. A.I.R. 1943 Cal. 131=76 C. L.J. 35=208 Ind. Cas. 26.

——Art. 182 (5)—Some of decree-holders applying for execution of decree in 1931—Final order on January 27, 1931—Some of decree-holders dying—Surviving decree-holders and legal representatives of deceased applying in 1931—No succession certificate obtained—Objection by judgment-debtor pending—Surviving decree-holders applying on March 19, 1932, for execution on footing of O. 21, R. 15, Civil P. C.—Court refusing to grant application on March 24, 1932:

Held, that the application of March 19, 1932 was one according to law—Order of March 24, 1932, was final order within Art. 182 (5). A.I.R. 1937 Cal. 16=41 C.W.N. 310=169 Ind. Cas. 739.

——Art. 182 (5)—Application according to O. 21, Rr. 11 to 14—No succession certificate.

An application for execution is in accordance with law if it complies with the requirements of O. 21, Rr. 11 to 14, Civil P. C. The want of succession certificate, no doubt, may deprive the applicants of their remedy, namely, execution of the decree, but that would not vitiate the application itself. Applications in execution are not always successful; nevertheless they are treated as steps-in-aid of execution. A.I.R. 1935 Nag. 1=31 N.L.R. 126=153 Ind. Cas. 955.

——Art. 182 (5)—Filing without succession certificate.

An execution application is in accordance with law within Art. 182 (5) if the particulars required by Rr. 11-14, O. 21, are mentioned in the application. Where, therefore, an application contains these particulars, the fact that it was presented without a succession certificate makes no difference, as an application without a succession certificate is perfectly in order; only no relief can be granted until the succession certificate is produced. 164 Ind. Cas. 218=6 Pat. 440=8 P.L.T. 671=A.I.R. 1927 Pat. 324.

——Art. 182 (5)—Application in accordance with law—Succession certificate.

An application for execution made by the heir of a deceased decree-holder without obtaining a succession certificate is one in accordance with law. 9 Ind. Cas. 800 (All.).

——Art. 182 (5)—Omission to produce copies of khewat, effect of—Dismissal of application for default of decree-holder—Whether makes it ineffective—Tests under Art. 182 (5).

The expression "in accordance with law" should be taken to mean that the application, though defective in some particulars, was one upon which execution could lawfully be ordered. If the omissions were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not in accordance with law. Consequently, the omission to produce copies of the *khewats* as required by Rr. 187 and 188 of the Oudh Civil Rules is not such an omission as to make it impossible for the Court to issue execution upon it.

The fact that the application was subsequently dismissed on account of the decree-holder's default, cannot make the application ineffective for saving limitation if it was a proper application made in accordance with law. In considering whether an earlier application is effective to save limitation it is sufficient to show that an application was made in accordance with law to the proper Court for execution or ta take some step-in-aid of execution of the decree. It is the application and not the result of the application, which is contemplated as being sufficient to save limitation. 1937 O.W.N. 169=A.I.R. 1937 Oudh 233=13 Luck. 162=167 Ind. Cas. 34.

——Art. 182 (5)—Non-production of power.

The non-production of the power under which the Agent of the decree-holder Bank signed an application for execution on behalf of the Bank will not render an application itself, otherwise valid, invalid, although non-production of the power, if its production was ordered by the Court, may entail the dismissal of the application.

There is no rule under which it is necessary that such power should be produced along with the application for execution. If the application was signed by a properly authorised person, it would be in order. 2 B.R. 92=A.I.R. 1936 Pat. 62=159 Ind. Cas. 494.

——Art. 182 (5)—Application under R. 11, O. 21—Affidavit not accompanying application.—Certificate of Sub-Registrar not filed—Application, if one in accordance with law—Limitation, saving of.

Where an application for execution of a final decree in a mortgage suit was filed by the decree-holder alleging that a previous application under O. 21, R. 11, C. P. Code, saved limitation while the judgment-debtor objected that that application was not in accordance with law as it was not accompanied by the affidavit required by O. 21, R. 66 (3) and the certificate of the Sub-Registrar regarding prior encumbrances:

Held, that the certificate and affidavit could be filed at a subsequent stage and that the previous application for execution under O. 21, R. 11, was one in accordance with law and saved limitation. (1932) A.L.J. 578=A.I.R. 1932 All. 484=139 Ind. Cas. 201.

——Art. 182 (5)—Step-in-aid—Application in accordance with law—Certificate.

An application for execution of a decree against the defendants—talukdars unaccompanied by a certificate of the managing officer though rejected was within time even on representation. The plaintiff was allowed to exclude period from the date of decree to the date of the submission of the claim.

Per *Shah, J. (Marten, J., Contra.)*:—An application even if unaccompanied by the certificate is in accordance with law which refers only to form and

procedure unless there is other prohibition. S. 29-E of the Gujrat Talukdar's Act does not lay down any such prohibition. 43 Bom. 44=20 Bom.L.R. 872=47 Ind. Cas. 726.

——Art. 182 (5) and Old (6)—Dek. Agri. Rel. Act, S. 47—Application without certificate of conciliator.

An application to execute a decree was filed without the conciliator's certificate required by S. 47 of the Dek. Agri. Rel. Act. The Court accepted the application and ordered notice under S. 248, C. P. Code (1882). The notice was not served upon the judgment-debtor and the execution proceedings came to an end.

Held, that the previous application for execution was 'in accordance with law' within Art. 182 of the Limitation Act, though not accompanied by conciliator's certificate. 12 Bom.L.R. 801, Foll. The applicant was entitled to take advantage of the issue of the notice under S. 248 of the C. P. Code (1882) even though the application might be defective owing to the absence of the conciliator's certificate. 17 Bom. L.R. 203=28 Ind. Cas. 493.

(ii). Copy of decree and judgment.

——Art. 182 (5) and C. P. Code, O. 21, R. 11 (2) and (3) and Civil Rules of Practice, Rr. 142 and 143—In accordance with law—Application filed without the copy of the decree—Rr. 142 and 143 of the Civil Rules of Practice cannot override the provisions of the C. P. Code.

R. 142 of the Civil Rules of Practice is a mere re-numbering of the old R. 164, framed under the C. P. Code of 1882. R. 142 has not been made or promulgated in accordance with the procedure prescribed by Part X of the C. P. Code of 1908. According to S. 157 of the C. P. Code of 1908, the rules made under the Code of 1882, shall so far as they are consistent with the Code of 1908 have the same force and effect as if they have been made under the new Code. The necessary corollary is that if the Civil Rules of Practice framed under the Old Code are, to any extent, inconsistent with the provisions of the C. P. Code of 1908, they *pro tanto* cease to have operation after the coming into force of the Code of 1908. O. 21, R. 11, is part of the Code of 1908 and in so far as R. 142 of the Civil Rules of Practice is inconsistent with it, the latter must stand abrogated.

According to the provisions of O. 21, R. 11, the production of a certified copy of the decree sought to be executed as an annexure to the first execution application is not necessary as a certified copy need be furnished only if and when the Court requires the applicant to produce it. R. 142 of the Civil Rules of Practice in so far as it requires an applicant who first applies to execute his decree to produce along with his application a certified copy of the decree is not only inconsistent with the provisions of O. 21, R. 11 (2) and (3) but is diametrically opposed to them and the two provisions cannot stand together.

Where in a first application to execute a decree, the certified copy of the decree is not filed, it cannot, for that reason, be said that the application is one not in accordance with law under Art. 182 (5) of the Limitation Act. (1937) 2 M.L.J. 881, foll.; (1949) 1 M.L.J. 66, overruled. I.L.R. (1950) Mad. 651=1950 M.W.N. 120 (2)=A.I.R. 1950 Mad. 261=62 L.W. 804=(1949) 2 M.L.J. 617.

——Art. 182 (5)—Execution application without copy of decree, whether saves limitation.

There is no obligation on the decree-holder under O. 21, R. 11, C. P. Code, to produce a copy of the decree with the application for execution. An application made without such copy is "in accordance with law" even if it is rejected for non-production of a copy of the decree as required by the Court under O. 21, R. 11 (3) and such an application saves limitation. A.I.R. 1938 Mad. 144=(1937) M.W.N. 1192=46 M.L.W. 700=(1937) 2 M.L.J. 881=175 Ind. Cas. 827.

——Art. 182 (5)—Step-in-aid—Application in accordance with law—Time given for filing a decree—Non-compliance—Subsequent application.

An application for execution complying with all the requirements of O. 21, R. 11 of the C. P. Code, but not accompanied by a copy of the decree which is filed subsequently is an application in accordance with law and saves limitation. 40 All. 209=16 A.L.J. 87 =43 Ind. Cas. 914.

——Art. 182 (5)—Application not accompanied by copy of the decree.

An application for execution of a decree though not accompanied by a copy of the decree as required by R. 80 of the High Court Circulars (Civil) is application 'in accordance with law' within the meaning of Art. 179, (O.A.). The proper view to take of R. 80, is not that it prescribes the essentials which an application for execution must contain and which are necessary to constitute the application itself an application in accordance with law, but that it requires something further besides the application itself an accompaniment extraneous to the application as a condition precedent to further action by the Court executing the decree. 5 Bom.L.R. 394, not foll. 28 M. 557, foll. (1906) 31 B. 162=8 Bom.L.R. 892.

——Art. 182 (5)—Application in accordance with law—Application without copy of the decree—Civil Rules of Practice, Madras.

An application for execution even though not accompanied with a copy of the decree (as required by the Rules of Practice) is an application in accordance with law. The absence of a copy of the decree will be a good ground for the Court not proceeding further with the application until it is furnished. The article should receive a fair and not too technical a construction. (1905) 28 M. 557.

——Art. 182 (5) (Art. 179 (4))—Application in accordance with law—Application without copy of decree.

Rules made by the High Court under S. 656, C. P. Code, and published in the local official Gazette have the force of law: hence when an application for execution is not accompanied by a copy of the decree of which execution is sought, the application cannot be treated as a step-in-aid of execution within the meaning of Cl. (4) of Art. 179 (O.A.). (1903) 5 Bom.L.R. 394.

(iii). Court-fee.

——Art. 182 (5)—Execution application for future mesne profits without court-fee.

Decree for past and future profits—Execution application without paying court-fee for relief of future profits—Application is in accordance with law —Fact that it is rejected without being numbered

does not make it one not in accordance with law. A.I.R. 1944 Mad. 38=56 M.L.W. 567=1943 M. W.N. 607=(1943) 2 M.L.J. 521=211 Ind. Cas. 606.

——Art. 182 (5)—Application to excuse delay in furnishing stamp paper or execution application before furnishing stamp.

In the case of a partition decree, an application for execution made before furnishing the stamp paper required or an application to excuse delay in furnishing the requisite stamp paper is not a step-in-aid of execution within the meaning of Art. 182 (5). A.I.R. 1943 Mad. 650=56 L.W. 393=(1943) 2 M.L.J. 112=1943 M.W.N. 439=I.L.R. (1944) Mad. 266=212 Ind. Cas. 619.

——Art. 182 (5)—Application for execution of decree for which deficit court-fee has not been paid—Whether step-in-aid.

An application made for the execution of a decree upon which a deficit court-fee has not been paid cannot fall within the provisions of Art. 182 (5), and cannot be deemed to be a step-in-aid of execution for the purpose of saving limitation. The words "in accordance with law" are not necessarily limited to the provisions of law contained in O. 3, and O. 21. If, for instance, the law required that an execution application should be accompanied by a particular certificate, if the execution application is not so accompanied by a certificate, that application will not be in accordance with law. A.I.R. 1937 Sind 108=31 S.L.R. 14=170 Ind. Cas. 493.

——Art. 182 (5) (Art. 179)—Decree for partition—Execution conditional on payment of court-fees—Application for execution without payment—Application made in accordance with law.

A decree for partition of immovable property was passed on the 30th of June, 1900, whereby it was directed that the plaintiff should not be entitled to executed it until he had paid the court-fees. An application to execute this decree was made on the 29th June, 1903, but it was not accompanied by payment of the court-fee it was dismissed. A second application to execute the decree was made on 27th June, 1906, and the court-fees were paid. The lower Courts held that the second application was time-barred for the application was not one made in accordance with law as required by Art. 179.

Held, that the second application was in time, since the first application was made in accordance with law, for it was competent to the Court to order on the application that the execution should begin on court-fee being paid within a certain date. An application for the execution of a decree to be in accordance with law must ask for something within the decree and not outside it. (1909) 12 Bom.L.R. 13 =34 B. 189=5 Ind. Cas. 601.

——Art. 182 (5)—An execution application, though not stamped does not become necessarily invalid, especially when action has been taken thereon without objection. 106 Ind. Cas. 485=A.I.R. 1928 Mad. 142.

6 (c) (iv), Cl. 5. Application "in accordance with law"—Defective application—Dead Judgment-debtor or some or wrong legal representative.

——Art. 182 (5) and C. P. Code, S. 48—Step-in-aid—Execution application against deceased judgment-debtor by mistake due to negligence but honestly made—Application for execution against deceased judgment-debtor filed within twelve years of the decree—Application to add legal representatives made and ordered after the twelve years—Execution, if barred.

An application for execution presented against a deceased judgment-debtor by mistake due to negligence but honestly made, is a *bona fide* mistake and the application though it could not be acted upon by the executing creditor would be an effective step-in-aid for the purpose of saving limitation.

Where such an application was filed within twelve years of the decree sought to be executed, but the application to add the legal representatives of the deceased judgment-debtor was filed and ordered beyond the twelve years allowed by S. 48, C. P. Code, on a question whether the application was not barred.

Held, the naming of a deceased judgment-debtor as the person against whom execution is sought is no more than a mistake in giving the particulars required under O. 21, R. 11 (2), C. P. Code and it could be remedied under O. 21, R. 17 (1) and when so remedied by amendment it has to be deemed, under O. 21, R. 17 (2), to have been an application in accordance with law and presented on the date when it was first presented. Hence, as the legal representatives of the deceased judgment-debtor, were brought on record only by way of amendment in the execution application which was filed within the twelve years allowed by S. 48, execution was not barred under the section. 1948 M.W.N. 697 (2)= A.I.R. 1949 Mad. 348=61 L.W. 771=(1948) 2 M. L.J. 377.

——Art. 182 (5)—Application for execution against the judgment-debtor who was then dead is neither application made in accordance with law for execution nor application to take some step-in-aid of execution. Whether that is the true position or not, cannot depend on or be governed by mere subjective factors such as intention, knowledge or good faith of the decree-holders. A.I.R. 1944 Nag. 145=1944 N.L.J. 200=I.L.R. (1944) Nag. 419=217 Ind. Cas. 295.

——Art. 182 (5)—When, owing to a *bona fide* error, the execution application is filed against a dead judgment-debtor or a wrong legal representative, the application is a step-in-aid of execution. (1938) 40 P.L.R. 25.

——Art. 182 (5)—Applications against deceased judgment-debtor or wrong legal representative.

Where owing to a *bona fide* error, an execution petition names the deceased judgment-debtor as the person against whom execution is sought, it is sufficient to save limitation.

An execution petition presented *bona fide* against a wrong legal representative of a deceased judgment-debtor is still an application to take a step-in-aid of execution sufficient to save limitation. (1935) M. W.N. 15=A.I.R. 1935 Mad. 161=41 M.L.W. 173 =68 M.L.J. 261=155 Ind. Cas. 327.

——Art. 182 (5)—Application for execution made against dead person.

An application for execution made against a dead person is not one in accordance with law and does not amount to an application for taking steps-in-aid of execution. A.I.R. 1934 All. 463=1934 A. L.J. 829=148 Ind. Cas. 1131.

——Art. 182 (5)—Application for transfer of decree against dead person—Ignorance of judgment-debtor's death.

An application for transfer of decree to another Court under S. 39, Civil P. C., made by the decree-holder in ignorance of the judgment-debtor's death constitutes a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act. 36 Bom. L. R. 510=A.I.R. 1934 Bom. 266=151 Ind. Cas. 767.

———Art. 182 (5)—Application against deceased judgment-debtor in good faith without knowledge of his death.

An application made by the decree-holder against the deceased judgment-debtor in good faith without having the knowledge of the latter's death must be deemed to be an application made in accordance with law as to amount to a step-in-aid of execution. It is open to the Court to allow an amendment of the application by permitting the decree-holder to substitute the names of the legal representatives. The amended application would be a valid application entitling the Court to execute the decree against the legal representatives of the deceased judgment-debtor. A.I.R. 1934 Lah. 55=154 Ind. Cas. 307.

——Art. 182 (5)—Execution application against only one of legal representatives—Bona fide omission — Application, if one in accordance with law—Pendency of application — Amendment—If permissible.

An application for execution of a decree made against one only of two executors under the *bona fide* belief that there was only one executor is an application in accordance with law and in any event it is an application to take a step-in-aid of execution of the decree and would give a fresh start to the period of limitation.

A Court is competent in such a case at any time before execution proceedings terminate, and before the decree becomes barred by limitation to allow the decree-holder to amend the application by the addition of the other executor.

Even if no amendment is permissible after the application has been registered, there is nothing to prevent the Court from treating the amended application as a fresh application for execution where on the date the amendment was allowed to be made the decree was not barred by limitation. 11 Pat. 508=A.I.R. 1932 Pat. 306=139 Ind. Cas. 840.

——Art. 182 (5)—Application against wrong legal representative.

A *bona fide* application for execution against a wrong person as the legal representative of the deceased judgment-debtor saves limitation. 33 Bom. L.R. 622=A.I.R. 1931 Bom. 425=134 Ind. Cas. 699 (1).

——Art. 182 (5)—Application against wrong person under a bona fide mistake is a step-in-aid.

An application for execution made against a wrong person under a *bona fide* belief that that person was the legal representative of the deceased judgment-debtor is a good application, and even if it cannot properly be regarded as an application under S. 234 of the old Code of Civil Procedure, by reason of mistake, it would still be an application to take a step-in-aid of execution. 20 Cal. 388; 35 Cal. 1047 and 9 C.L.J. 443, Foll. 99 Ind. Cas. 501=1926 P.H.C.C. 342=8 P.L.T. 217=A.I.R. 1927 Pat 92.

——Art. 182 (5)—Name of legal representative incorrectly given—Still execution application is a step-in-aid. 35 Cal. 1047, Foll. 90 Ind. Cas. 1050=26 P.L.R. 740=A.I.R. 1926 Lah. 34.

——Art. 182 (5)—Application against deceased judgment-debtor due to bona fide mistake is a step-in-aid.

If an application for execution of a decree be made under the influence of *bona fide* mistake against a dead person, though that application cannot be acted upon, still it is an application in aid of execution within the meaning of Art. 179 (4) of the Limitation Act (15 of 1877) which saves the execution of the decree from being time-barred. 72 Ind. Cas. 1003=4 P.L.T. 54=A.I.R. 1924 Pat. 333.

——Art. 182 (5)—Wrong person as the legal representative.

An application against the wrong person as the legal representative will not keep alive the decree for execution against the right person. 7 A.L.J. 512=6 Ind. Cas. 38=32 A. 404.

——Art. 182 (5)—Application against a wrong or dead person under 'bona fide' mistake.

Where an application for execution has been made under the influence of a *bona fide* mistake against a wrong person or a dead person, though that application could not be acted on still it is an application in aid of execution within the meaning of Cl. (4), Art. 179, so as to save the execution of the decree from being barred. (1908) 35 C. 1047.

6 (c) (v), cl. (5). Application "in accordance with law"—Defective application—Description of property.

——Art. 182 (5)—Description of property to be attached not given.

Where the execution application does not contain the description of the property sought to be attached as required by O. 21, R. 13, Civil P. C., it is not one in accordance with law within the meaning of Art. 182 (5). Similarly, where it is very generally stated in the application that the necessary steps may be taken without making it clear what steps were required to be taken, the application cannot be treated as a step-in-aid of execution. A.I.R. 1944 Pat. 214=23 Pat. 103=218 Ind. Cas. 265.

——Art. 182 (5)—A mere reference in *darkhast* application that the property subject to be sold is attached already, is a sufficient specification of that property, and if merely its sale is asked for in execution of the decree, the requirements of O. 21, R. 11 (2), cl. (*g*) are sufficiently complied with. Such a *darkhast* is in accordance with law within the meaning of Art. 182 (5). A.I.R. 1940 Bom. 250=42 Bom.L.R. 423=190 Ind. Cas. 21.

——Art. 182 (5)—Execution application not giving description of property to be attached and sold.

An application for execution of a decree which does not contain the description of the property to be attached and sold is not an application in accordance with law within the meaning of Art. 182, Limitation Act, as it contravenes the provisions of O. 21, R. 13, Civil P. C. 32 Bom.L.R. 1368=A.I.R. 1931 Bom. 128=129 Ind. Cas. 159.

——Art. 182 (5)—"Application in accordance with law"—Application for execution containing no description of property—C. P. Code, O. 21, R. 13.

An application for execution which does not contain any description of the property and other parti-

culars required by O. 21, R. 13 of the C. P. Code, cannot be deemed to be 'an application in accordance with law' for the purpose of saving limitation under Art. 182. 32 Bom. L. R. 1368=A.I.R. 1931 Bom. 128.

6 (c) (vi), Cl. (5). Application in accordance with law—Defective application—Description of suit or parties.

——Art. 182 (5)—Non-compliance with O. 21, R. 11—Suit number not correctly mentioned.

Where the execution application does not comply with the requirements of O. 21, R. 11 by not mentioning the correct number of the suit, the application cannot be said to be in accordance with law. 58 M.L.W. 568=(1945) 2 M.L.J. 427=1945 M.W.N. 695=A.I.R. 1946 Mad. 61.

——Art. 182 (5)—Application without correct number of suit.

An application which does not contain the correct number of the suit, the decree in which it is proposed to execute, cannot be deemed to be an application made in accordance with law. A.I.R. 1940 Mad. 215=50 M.L.W. 793=(1939) M.W.N. 1206=(1939) 2 M.L.J. 864=189 Ind. Cas. 822.

——Art. 182 (5)—"In accordance with law"—Meaning of.

An application for execution which does not contain any description of the property and other particulars required by O. 21, R. 13 of the C. P. Code, cannot be deemed to be 'an application in accordance with law' for the purpose of saving limitation under Art. 182. 32 Bom.L.R. 1368=A.I.R. 1931 Bom. 128.

——Art. 182 (5)—Names of the parties to the suit were not rightly given in an execution application in that though one of the decree-holders had died, the name of his son as his legal representatives was not shown:

Held, that the matter was one of form and that although amendment was necessary the defect amounted to irregularity rather than illegality and that the application, though irregular, was according to law. A.I.R. 1943 Nag. 296=I.L.R. (1943) Nag. 584=1943 N.L.J. 391=213 Ind. Cas. 191.

——Art. 182 (5)—Legal representative mentioned but not shown in proper column.

It is not every defective application that can be said to be an application not in accordanse with law. Where the application mentions the legal representative of a deceased judgment-debtor, the mere fact that he is not mentioned as legal representative in the appropriate column does not render the application one not in accordance with law. (1937) M.W.N. 31 & 35=(1937) 1 M.L.J. 453=45 M.L.W. 457=A.I.R. 1937 Mad. 385=I.L.R. (1937) Mad. 616=45 L.W. 457=168 Ind. Cas. 561 (F.B.).

——Art. 182 (5)—Carelessness in writing name of judgment-debtor.

Trivial mistakes do not take an application out of the fifth clause of Art. 182. Under the present law of limitation neither *bona fides* nor due diligence on the part of the decree-holder is required to keep the decree alive and there is no warrant for reading into the clause any requisites of good faith or due diligence. The language of the clause ought not to be strained in favour of the judgment-debtor who has not paid his debt. Carelessness in the matter of writing the name of the judgment-debtor is not the same thing as *mala fides*. A.I.R. 1934 Pat. 289=149 Ind. Cas. 102.

6 (c) (vii), cl. (5). Application "in accordance with law"—Defective application—Jurisdiction of Court.

——Art. 182 (5)—Application for execution to proceed against parties outside jurisdiction.

In order to get a fresh starting point of limitation, an application for execution must be in accordance with law. An application for execution by sale of the properties of the judgment-debtor situate outside the Court's local jurisdiction is not in accordance with law and cannot give a new starting point of limitation. If, however, an application is made for the amendment of the above application by inserting a list of properties situate within the Court's jurisdiction, a fresh period of limitation can start from the date the application for amendment is put. A.I.R. 1945 Pat. 71=219 Ind. Cas. 491=23 Pat. 707.

——Art. 182 (5)—Judgment-debtor outside British India—Execution petition by decree-holder for arrest—Application, if can save limitation.

An application by the decree-holder for the execution of his decree by the arrest of the judgment-debtor residing outside British India is not a step-in-aid of execution and cannot save limitation. A.I.R. 1940 Pesh. 27=189 Ind. Cas. 738.

——Art. 182 (5)—An application for execution made to a Court passing a decree in respect of property situated outside its territorial jurisdiction is an application to a proper Court in accordance with law and is effective to constitute a fresh starting point of limitation, although the Court has no jurisdiction to carry on such execution and it cannot be said that an application for execution to that Court is not made in accordance with law, merely because, instead of asking for a transfer of the decree to the Court within whose jurisdiction the property is situated, the application asks for the issue of a warrant of attachment. The question is not whether the Court has jurisdiction to execute the decree, but whether it has jurisdiction to entertain the application. A.I.R. 1936 Rang. 271=14 R. 550=163 Ind. Cas. 403.

——Art. 182 (5)—Application for execution to Court passing decree—Absence of territorial jurisdiction—Saving of limitation.

Even if an application is made to a Court which passed the decree to execute it in respect of a property outside its territorial limits the Court will not have jurisdiction to carry on such execution. Where however the limits of the jurisdiction of the oid Court were altered and an application was made to the Court which passed the decree for execution.

Held, that the decree should be forwarded to the proper Court but that it had the effect of saving limitation. 35 C.W.N. 77=58 Cal. 832=52 C.L.J. 569=A.I.R. 1931 Cal. 312=132 Ind. Cas. 149.

——Art. 182 (5)—Application to attach property beyond executing Court's jurisdiction is not step-in-aid as the Court is not competent to grant the prayer. 12 All. 64; 27 All. 619; 28 All. 387 and 43 All. 550, Foll.; 6 Mad. 250, Not foll. 90 Ind. Cas. 938=48 All. 468=24 A.L.J. 137=A.I.R. 1926 All. 95.

——Art. 182 (5)—Application for transfer of decree to Court of another district—Latter Court for temporary reasons not having jurisdiction.

An application for transfer of a decree is a step-in-aid of execution but in order to save limitation, it must also be in accordance with law. The phrase

"made in accordance with law" does not include an application to the Court to do something which either from the decree-holder's direct knowledge of fact or from his presumed knowledge of law, he must have known the Court was incompetent to do. The presumed knowledge of law refers to knowledge of the general law and not to knowledge of any particular orders varying the pecuniary jurisdiction of a particular Court. It cannot be said that an application for transfer of a decree to a Court of any other district which for merely temporary and accidental reasons, has not the necessary jurisdiction at the particular time is not an application in accordance with law. A.I.R. 1940 Pat. 677=19 Pat. 354=7 B.R. 245=191 Ind. Cas. 695.

——Art. 182 (5)—"In accordance with law"—Application to a Court having no jurisdiction is not one.

"Applying in accordance with law" means applying to the Court to do something which by law that Court is competent to do and not to do something which the decree-holder presumes that the Court is competent to do. 93 Ind. Cas. 292=A.I.R. 1926 All. 345.

6 (c) (viii), Cl. 5. Application "in accordance with law"—Defective application—Leave of Insolvency Court.

——Art. 182 (5)—Where a judgment-debtor is adjudged an insolvent after a decree has been passed against him and the decree-holder applies for the execution of the decree subsequent to the adjudication and also brings a declaratory suit against the judgment-debtor without obtaining leave of the Insolvency Court, the application and the suit are not steps-in-aid of execution taken in accordance with law, and therefore, they cannot save limitation. In such a case, the time for applying for execution of the decree begins to run which cannot be suspended by a subsequent disability. Moreover, the disability in such a case can be removed by the decree-holder himself applying to the Insolvency Court for permission to sue. Where no such permission is asked for, S. 15, Limitation Act, cannot possibly apply. A.I.R. 1939 Lah. 270=41 P.L.R. 799=184 Ind. Cas. 573.

——Art. 182 (5)—Insolvency of judgment-debtor—Application for execution without leave of Court, whether application in accordance with law.

An execution petition filed without the leave of the Insolvency Court against a person whose property has vested in the Official Receiver appointed by that Court is not an application in accordance with law. A.I.R. 1936 Mad. 284=(1936) M.W.N. 364=71 M.L.J. 180=44 L.W. 403=59 M. 759=162 Ind. Cas. 376.

——Art. 182 (5)—The application for execution by arrest of the judgment-debtor after his adjudication made without obtaining previous leave of the Insolvency Court is not one in accordance with law. A.I.R. 1934 Mad. 392=39 L.W. 639=57 M. 808=67 M.L.J. 762=150 Ind. Cas. 113.

6 (c) (ix), Cl. (5). Application "in accordance with law"—Defective application—Minor.

——Art. 182 (5)—Application for execution against minor represented by deceased person as guardian.

An application for execution against a minor judgment-debtor mentioning therein as his guardian the person who had been appointed and was acting as guardian but who happened to have died before the date of the application is sufficient to furnish a fresh starting point for limitation for the execution of the decree. (1933) M.W.N. 819=A.I.R. 1933 Mad. 696=38 M.L.W. 435=65 M.L.J. 374=145 Ind. Cas. 714.

——Art. 182 (5)—Application for execution against minor—Guardian ad litem dead—Proceedings, whether step-in-aid.

Where an application for execution is made against a minor and property is attached, the proceedings would operate as a step-in-aid of execution even if the guardian *ad litem* was dead at the time of the application. 32 P.L.R. 635=A.I.R. 1931 Lah. 636=134 Ind. Cas. 1107 (2).

——Art. 182 (5)—Minor judgment-debtor—Appointment of guardian after limitation—Effect.

Under the C. P. Code, procedure in execution is intended to be less rather than more formal than in a suit. Where, therefore, in an execution petition against minor filed within limitation, the minor is not described as such and the guardian *ad litem* of such minor is appointed after the expiry of limitation, the execution cannot be barred by limitation against the minor. 18 P.L.T. 311=A.I.R. 1937 Pat. 321=16 Pat. 316=3 B.R. 638=169 Ind. Cas. 872.

——Art. 182 (5)—Application in accordance with law—Minor—Execution against.

An application for execution of a decree made against a minor judgment-debtor represented by his mother without applying for her appointment as guardian *ad litem* is in accordance with law and saves limitation. 4 Pat.L.J. 35=48 Ind. Cas. 415.

——Art. 182 (5)—Step-in-aid—Application in accordance with law—Application without describing judgment-debtor as guardian of minor.

An application for execution of the decree in which all the defendants were named but the minor and his guardian were not described as such is one in accordance with law. 43 Ind. Cas. 519 (All.).

——Art. 182 (5)—Where an application for execution was made by the guardian *ad litem* of a minor after the minor had attained majority, but the latter ratified the application within three years of his attaining majority.

Held, that the ratification rendered the application valid from the date of ratification. A.I.R. 1931 Lah. 600=32 P.L.R. 290=135 Ind. Cas. 207 (2).

6 (c) (x), Cl. (5). Application "in accordance with law"—Defective application—Relief.

——Art. 182 (5)—In accordance with law—Application claiming amount in excess of what was rightly due—Application if in accordance with law.

Though an execution petition claims an amount in excess of what was rightly due under the decretal order it cannot be said that the application is not in accordance with law. 1948 M.W.N. 516=A.I.R. 1949 Mad. 193=61 L.W. 641=(1948) 2 M.L.J. 113.

——Art. 182 (5)—Mere claiming more money than due.

The mere fact that the decree-holder claims more than what he is entitled to, does not render the application itself one not in accordance with law. A.I.R. 1940 Mad. 893=(1940) M.W.N. 547.

——Art. 182 (5)—Decree for certain amount against three defendants—One defendant depositing part of

amount and revised decree passed after deducting such amount—Number of applications for execution by decree-holder based on original decree, held in accordance with law. A.I.R. 1941 Mad. 528=53 L.W. 155=1941 M.W.N. 171=(1941) 1 M.L.J. 267=200 Ind. Cas. 748.

——Art. 182 (5)—Decree on mortgage—Application for execution—Prayer for recovery of amount from proceeds of sale in execution of rival decree-holder's decree—Application, whether in accordance with law.

A Bank, to whom certain properties had been mortgaged obtained a decree for the mortgage amount "recoverable from the lands" and also from the person and other property of the defendants. Another creditor had also obtained a decree against the same judgment-debtor. The Bank applied for execution of its decree praying that a certain sum of money may be paid to the Bank first and the rest may be paid *pro rata* along with the other decree-holders according to an order which had been passed by the Court in execution of the decree of the rival decree-holder:

Held, (i) that inasmuch as the Court had either intentionally or otherwise merely passed a decree for money, the executing Court could not question the validity of the decree;

(ii) under the decree in question, the Bank was not bound to sell any property but could ask for the recovery of the money from the judgment-debtor personally;

(iii) that, therefore, there was nothing improper in seeking the assistance of the Court for recovery of the decree amount from the amounts to be realised by the sale of the property in execution of the decree obtained by a rival decree-holder and the application for execution was, therefore, one in accordance with law within the meaning of Art. 182 (5) of the Lim. Act. A.I.R. 1932 Lah. 534=14 L. 6=34 P.L.R. 376=138 Ind. Cas. 249.

——Art. 182 (5)—Application for incompetent relief.

Where it was decided in execution proceedings that the surety was liable only to the extent of one-sixth of the decree, but nevertheless the decree-holder applied for execution of the whole of the decree against the surety and the judgment-debtors and the application was dismissed as incompetent;

Held, that it was not 'an application in accordance with law so as to save from the bar of limitation a subsequent application for execution, inasmuch as it was for a relief which the Court had decided, could not be given and which was entirely outside the law. 10 Pat. 183=A.I.R. 1931 Pat. 274=13 P.L.T. 70 =131 Ind. Cas. 815.

——Art. 182 (5)—Error as to date of decree—Praying for impossible reliefs—Burden of proof of limitation.

Showing the date of decree wrongly in an application for execution is an immaterial irregularity which does not affect the validity of the application.

The burden of proving that an application for execution is not time-barred and is in accordance with law is on the applicants.

An application for execution of a decree is not one in accordance with law where execution is sought against the movable property of the judgment-debtor and the judgment-debtor neither resides nor has any movable property within jurisdiction of the Court.

Obiter.—Such an application might, however, be held to be in accordance with law if there is a *bona fide* belief that the movable property did exist within the jurisdiction of the Court. A.I.R. 1931 Sind 160 =25 S.L.R. 528=134 Ind. Cas. 1182.

——Art. 182 (5)—Incorrectness or superfluity as to the reliefs asked for does not render an application not a step-in-aid. 75 Ind. Cas. 312=3 Pat. 42=A.I.R. 1924 Pat. 471.

——Art. 182 (5)—Defective application—Application not praying for execution.

An application to take a step-in-aid of execution, in order that it may be in accordance with law, within the meaning of Art. 182 of the schedule to the Limitation Act must be one praying for some relief which the Court is competent to grant.

An application even though it be deemed so defective as not to be an application for execution, must still be regarded as an application made to the proper Court in accordance with the law to take some steps-in-aid of execution. 10 C.L.J. 19; 17 M.L.J. 475, Foll. 64 Ind. Cas. 571=35 C.L.J. 82=A.I.R. 1922 Cal. 44.

——Art. 182 (5) and (6)—Application in accordance with law—Relief not granted by the decree—Application for.

An application for execution of a decree which prays for a relief not granted by the decree, is not an application in accordance with law and cannot be treated as a 'step-in-aid' so as to save the bar of limitation. Where no personal decree is passed in a mortgage suit an application in execution praying for the attachment of non-mortgaged properties is not covered by cls. (5) and (6) of the Limitation Act. 43 Ind. Cas. 537 (Mad.).

——Art. 182 (5)—Application for wrong relief.

An application for execution asking a relief not allowed by decree is a step-in-aid saving limitation, as a mistake in an execution application does not make it void. (1916) 2 M.W.N. 128=35 Ind. Cas. 614.

——Art. 182 — Application in accordance with law—Relief.

An application for execution would not be bad even if it seeks relief not strictly claimable. If a person other than the one entitled to apply applies or if the person entitled applies for execution in a mode and for a relief outside the decree, the application is not in accordance with law because the decree of which execution is sought is not the decree to which the application purports to relate but some other decree not existing. An application for execution seeking some or all of the reliefs given by a decree though the Court after consideration comes to the conclusion that the particular relief cannot be granted is still an application in accordance with law if it meets in substance the requirements of the C. P. Code or any other law relating to execution. An application asking for relief given till the happening of a certain event is still an application in accordance with law even though it does not ask for that relief to which he is entitled in a certain event. Omission to file inventories with the darkhasts cannot affect the question whether the darkhast is substantially in accordance, with law. The words 'In accordance with' have no reference to the likelihood of the application succeeding or to the competency of the Court to grant any particular relief prayed for. If the application complies with the forms and procedure the application is

in accordance with law. 37 Bom. 42=14 Bom. L.R. 861=17 Ind. Cas. 210.

6 (c). Cl. (5) Application "in accordance with law"—Defective application—Test.

——Art. 182 (5)—"In accordance with law"—Meaning of—Decree in favour of one firm against another—Both firms having one common partner—Execution — Application for without obtaining leave under O. 30, R. 9, C. P. Code—If in accordance with law.

Whether a particular application for execution is or is not in accordance with law must largely depend upon the nature of the application and the circumstances under which it is made.

An application for execution of a decree obtained by one firm against another, there being a common partner in both the firms, is nevertheless one in accordance with law, although no leave is obtained under O. 30, R. 9, C. P. Code for such execution. Under R. 9, of O. 30, leave is not a condition precedent to the maintainability of the execution proceedings, but execution is only postponed until leave has been obtained by the decree-holder from the Court. Hence a darkhast may be maintained without the leave of the Court, though the decree-holder cannot get the assistance of the Court unless and until leave has been obtained. 17 Bom.L.R. 203; 47 Bom.L.R. 104, foll. 52 Bom.L.R. 205=A.I.R. 1950 Bom. 184.

——Art. 182 (5)—In accordance with law—Application for execution by attachment and sale of judgment-debtor's movables "as per list"—No list filed.

An application for execution "by attachment and sale of defendant's movables as per list" is in accordance with law, although no list of movables is filed with the application, when there is no express statement whether the movables to the attached are in the possession of the defendant judgment-debtor or not. If the movables to be attached are in the possession of the judgment-debtor, there is no rule which requires the decree-holder to specify these movables. It cannot therefore, be said that the application is so defective as to render it to be a nullity. A.I.R. 1943 Bom. 353, applied. A.I.R. 1950 Cal. 493=54 C.W.N. 815.

——Art. 182 (5)—In accordance with law—Application stating all particulars and asking for attachment and sale of property within territorial limits of another Court — Omission to state that decree should be transferred to that Court—Effect.

If a decree-holder gives all the particulars that he is required to give in an execution application under O. 21, R. 11 (2) (j), C. P. Code, and asks for the attachment and sale of a property within the territorial limits of another Court the mere omission on the part of the decree-holder to say expressly that the decree should be transferred to that Court does not make the application one not in accordance with law and not made to a proper Court, when the Court to which the application is made is the only Court competent to issue a certificate of non-satisfaction and transfer the decree for execution. The test applicable in such a case is "could the Court have proceeded with the case notwithstanding the defect?" and if it could, then the application can be considered to be one in accordance with law and as filed in the proper Court. I.L.R. (1946) Nag. 563=1946 N.L.J. 354=A.I.R. 1946 Nag. 365.

——Art. 182 (5)—Defective application kept in abeyance to permit defects to be remedied.

Per Stodart, J.—Article 182 (5), does not provide for the case where no order is passed by the Court on a defective application. An application which does not conform to the requirements of O. 21, Rr. 11 to 14, C. P. Code and which, for that reason, has to be kept in abeyance, if the Judge so wishes to permit the defect to be remedied., is not an application made in accordance with law. A.I.R. 1939 Mad. 841=50 L.W. 311=(1939) M.W.N. 769=(1939) 2 M.L.J. 671=I.L.R. (1940) Mad. 60=189 Ind. Cas. 411.

——Art. 182 (5)—An execution application can be held to be not in accordance with law only if the defendant's omissions to be found therein were such as to make it impossible for the Court to issue execution upon it and not merely because it was defective in some minor particulars. 4 B. R. 424=A.I.R. 1938 Pat. 75=18 P.L.T. 954=174 Ind. Cas. 355.

——Art. 182 (5)—"In accordance with law"—Defective application but execution capable of being lawfully ordered—Whether falls within Art. 182 (5).

The expression "in accordance with law" in Art. 182 (5), can be interpreted as meaning that the application, though defective in some particular was one upon which execution could lawfully be ordered. If the omissions were such as to make it impossible for the Court to issue execution upon it, it should be held that such an application was not in accordance with law.

As in a case where the omission occurs in the application itself, it is not an application in execution in accordance with law, so even more it is not an application for execution in accordance with law when it has not as its foundation a decree which can be executed. A.I.R. 1937 Sind 108=31 S.L.R. 14=170 Ind. Cas. 493.

——Art. 182 (5)—Tests to see if application is in accordance with law.

In order to see whether a particular application for execution is or is not in accordance with law, what has to be looked to in each particular case is whether the executing Court would or would not issue execution on the application for execution as preferred to it. The expression "in accordance with law" in Art. 182 (5) should be taken to mean that the application, though defective in some particulars, was one upon which execution could lawfully be ordered. If the omission were such as to make it impossible for the Court to issse execution upon it, it should be held that such an application was not in accordance with law.

Where an application for execution in substantial compliance with the law is preferred to the Court, such an application will be effectual to stay the progress of limitation whether the Court admits, or rejects or returns the application or allows such application to be amended. Each

case would depend on its own facts as to whether the application for execution was or was not in accorlance with law. 36 Bom.L.R. 643=A.I. 1934 Bom. 307=7 R.B. 220=59 B. 1=153 Ind. Cas. 273.

——Art. 182 (5)—Form of notice.

An omission to state what form of notice was wanted is not a defect so vital as to warrant the application being termed as one not in accordance with law. As to whether an application is or is not an application in accordance with law, every case must be decided on its own merits. A.I.R. 1933 Rang. 87=142 Ind. Cas. 435.

——Art. 182 (5)—"Application in accordance with law"—Interpretation of.

The language of Art. 182, Cl. (5), ought not to be strained in favour of a judgment-debtor who has not paid his debt and the words "a step-in-aid of execution" should be liberally interpreted in favour of the decree-holder. But whether an application which is defective should be treated as an application in accordance with law must depend on the facts of each particular case, and no hard and fast rule can be laid down in that behalf. A. I.R. 1933 Sind 341=27 S.L.R. 314=147 Ind. Cas. 470.

6. (c) (xii) Cl. (5)—Application "in accordance with law"—Defective application—Verification and vakalat.

——Art. 182 (5)—Execution application not verified—Effect.

An application for execution which, though signed by Pleader is not verified is not in accordance with law and cannot operate to extend limitation. 57 L.W. 514=(1944) 2 M.L.J. 224=A. I.R. 1945 Mad. 97.

——Art. 182 (5)—Execution application neither signed nor verified but Court acting upon it.

An application is required under the provisions of O. 21, R. 11, C. P. Code to contain certain particulars and to be signed and verified. It is the duty of the Court when it is presented to check the application to see that the necessary particulars are given under O. 21, R. 17, and the Court is then empowered either to reject the application or require its immediate amendment or its amendment within a fixed time. If the Court takes none of these actions but acts upon the application, the Court must be deemed to hold the application to be in accordance with law. A.I.R. 1941 Pesh. 103=197 Ind. Cas. 521.

——Art. 182 (5)—Omission of time and place of verification—Effect.

The defect of the omission of the time and the place of verification in an application for execution is a trivial one and is not such a defect as to invalidate the application, as, for this omission, the application cannot be said to be not in accordance with law. 2 B.R. 92=A.I.R. 1936 Pat. 62=159 Ind. Cas. 494.

——Art. 182 (5)—Application within time but not in accordance with O. 21, R. 11, C. P. Code.

The minor defects in an application for execution such as the omission to mention the number of the suit or the date of the decree, etc. do not by themselves render the application for execution defective and not in accordance with law, but the provisions of O. 21, R. 11, C. P. Code as regards the signing and verification of the application for execution are mandatory and the omission to comply with the same constitutes a material irregularity, which, unless cured, renders the application open to the objection that the same is not in accordance with law. 1935 A.W.R. 1131 =(1935) A.L.J. 1184=A. I. R. 1936 All. 17= 158 Ind. Cas. 752.

——Art. 182 (5)—Application signed by Pleader alone.

An application for execution which is only signed by the Pleader but is not signed or verified by the decree-holder is not an application in accordance with law and the representation of the application long after the time allowed by the Court would not bring it within O. 21, R. 17 (2). 34 L.W. 546=61 M.L.J. 516=135 Ind. Cas. 15.

——Art. 182 (5)—Defective and unverified application—T. P. Act, S. 89.

An application for an order absolute though defective in particulars and unverified and consequently returned to the applicant as not being in accordance with the rules, may yet be a step-in-aid of execution when the defects are such as not to prejudice the judgment-debtor or to mislead the Court. (1907) 17 M.L.J. 596=31 M. 68=3 M.L.T. 254.

——Art. 182 (5)—In accordance with law—Presentation to munsarim by pleader having no vakalat from the decree-holder.

An application for execution which is in all other respects in order and which has been admitted and registered by the executing Court can be considered to have been "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act even though it might have been presented to the Munsarim by a pleader who had no vakalat from the decree-holder. I.L.R. (1949) A. 973=1949 A.W.R. 217=A.I.R. 1949 A. 367= 1948 A.L.J. 105.

——Art. 182 (5)—Execution application presented by Pleader who has not been given vakalatnama by party is not "in accordance with law' for the purposes of limitation. (1936) M.W.N. 957=44 L.W. 528=71 M.L.J. 604=A.I.R. 1937 Mad. 239=I.L.R. (1937) Mad. 320=165 Ind. Cas. 659.

——Art. 182 (5)—Execution of decree—Application filed by Pleader within three years—Vakalatnama filed after more than three years—Application duly signed and verified by decree-holder—Application, held in accordance with law and case not time-barred. 40 C.W.N. 730=63 C. 733.

——Art. 182 (5)—Defective vakalatnama—Application, if in accordance with law — Objection, if can be raised in subsequent proceedings.

Where an application for substitution of the name of the decree-holder's sons for execution is signed by a Pleader and accompanied by a vakalatnama in which the place meant for the name of the Pleader was left blank and the vakalatnama did not bear any signature of the Pleader showing that he had accepted it, the application, as filed, is not one filed by a duly authorised person and is not in accordance with law.

When, without noticing the defects in the vakalatnama; the Court ordered notice to issue to the

judgment-debtors who did not appear to show cause or raise objections to the application for substitution of the sons of the decree-holder and the Court ordered their names to be brought on record and the execution to proceed, but the proceeding did not fructify and the execution case was struck off:

Held, that in subsequent proceedings, it was open to the judgment-debtor to object that the defective application could not serve as fresh starting point for purposes of limitation as not being in accordance with law. 57 A. 905=1935 A.W.R. 640 (2)=(1935) A.L.J. 642=A. I. R. 1935 All. 727=155 Ind. Cas. 673.

——Art. 182 (5)—Application by Pleader without vakalat — Judgment-debtor not raising objection but application withdrawn—Res judicata.

An application for execution filed by a Pleader in whose favour a **vakalatnama** has not been executed is not an application in accordance with law. Such an application cannot be treated as valid.

A distinction must be drawn between non-compliance with provisions of law which are fundamental and those which are concerned with mere defects in the drafting of an application.

Where an application was made by a Pleader without a **vakalat** but it was withdrawn without any consideraion of the plea of limitation raised by the judgment-debtor:

Held, that the judgment-debtor was not prevented in a subsequent application, by **res judicata**, from raising the objection. A.I.R. 1935 Mad. 786=158 Ind. Cas. 891.

——Art. 182 (5)—Application in accordance with law — Amendment of Muktearnama, retrospective effect of—Inherent power of Court to amend.

When an application for execution of a decree has been presented by a Muktear who was in fact authorized to file it, but whose name had been omitted by mistake from the Muktearnama, the Court has inherent power to allow the Muktearnama to be amended upon discovery of the mistake. The amendment, when made, validates the proceedings for purposes of limitation, with retrospective effect from their commencement. (1910) 11 C.L.J. 285=5 Ind. Cas. 532=37 Cal. 399.

——Art. 182 (5)—Execution application presented by Vakil—Vakalat not dated.

An execution application presented by a vakil is an application 'in accordance with law' even though the vakalat authorising the vakil did not bear a date there being no law which requires that a vakalat should be dated. (1902) 26 M. 197.

6. (c) (xiii). Cl. (5). Application "in accordance with law"—Defective application—Wrong applicant.

——Art. 182 (5) — Transfer of mortgage decree without registered deed—Application by transferee for execution of mortgage-decree.

Order 21, R. 16, C. P. Code, contemplates transfer of decree-holder's interest in a decree. In the case of a mortgage-decree such a transfer can be effected only by a registered instrument. If an instrument is not registered, no matter what its terms may be, it cannot effect a transfer. There is, therefore, in such a case no transfer, and no transferee and the only person with any title to execute the decree is the original decree-holder. An application, therefore, filed on the assertion that a transfer has been effected when in fact no transfer has been effected cannot be an application in accordance with law within the meaning of Art. 182 (5), Limitation Act. (1940) 1 M.L.J. 595=51 L.W. 427=(1940) M.W.N. 361=A.I.R. 1940 Mad. 610=191 Ind. Cas. 795.

——Art. 182 (5)—Assignment of decree—Execution application by assignor.

Where a portion of his interest in the decree is assigned by the decree-holder to **A** as the benamidar of **B**, an execution application by the decree-holder and **B** is not "in accordance with law." A.I.R. 1938 Pat. 457=5 B.R. 41=19 P.L.T. 901=17 Pat. 223=177 Ind. Cas. 992.

——Art. 182 (5)—Decree on July 28, 1928—Execution application presented by person having no authority — Part payment pleaded admitted by Court on September, 18, 1931—Subsequent application by same person on November 25, 1933—Court discovering defect in previous petition—Previous application held did not save time under Art. 182 (5) not being in accordance with law. A.I.R. 1937 Mad. 760=(1937) M.W.N. 355=174 Ind. Cas. 28.

——Art. 182 (5)—Application by general attorney decree-holder being at the time within the jurisdiction of the court, not in accordance with law. 1901 A.W.N. 161=23 A. 499 nor application by mother as guardian of minor decree-holder when he is really major. (1905) 28 M. 396=1 M.L.T. 113.

——Art. 182 (5)—Wrong person—Mortgage decree—Execution application by widow — Widow disputing adoption.

An application by a widow of a deceased decree holder for the execution of a decree will not enure to the benefit of the adopted son, if the widow disputes the adoption and the widow cannot be treated as the representative of the adopted son as against the judgment-debtor. 4 L.W. 291=37 Ind. Cas. 750.

6. (c) (xiv) Cl. (5). Application "in accordance with law"—Defective application—Other defects and mistakes.

——Art. 182 (5)—Formal mistake about costs of previous application.

A mistake in an execution application about the costs of the previous execution application in itself is no sufficient reason for holding that the application is not a step-in-aid of execution or is not made substantially in accordance with law.

Where an application is rejected, dismissed or struck off for mere formal defects or a **bona fide** mistake in furnishing details or on account of the decree-holder's absence; such an order cannot estop the decree-holder from showing that his application was not defective but in accordance with law. Rejection on the ground of decree-holder's absence and his failure to correct an unimportant inaccuracy in the costs does not amount to an express or implied finding that the application is not in accordance with law.

Such a finding, therefore, cannot be res judicata. A.I.R. 1940 Nag. 87=1939 N.L.J. 596=185 Ind. Cas. 545.

——Art. 182 (5)—Application, held not in accordance with law—Failure of Court to see whether requirements of Rr. 11 to 14 of O. 21, are complied with—Decree-holder, if protected from consequences of time-barred application.

Although the duty is cast upon the Court under O. 21, R. 17, C. P. Code, to see whether the requirements of Rr. 11 to 14 are complied with, the decree-holder is not protected if the Court fails to do so, from the ordinary consequences which follow when his request to the Court for its assistance is barred by time.

It is a matter of policy laid down by the Legislature that applications to the Court for its assistance must be made in time whether the application takes the form of a plaint or an application in execution.

An application for execution dated February 1, 1932, which on the face of it, was time-barred was not an execution application made in accordance with law, as it did not mention a previous execution application dated February 5, 1929, which it should have mentioned if the application of February 1, 1932, itself was to be in time. But the Court, instead of complying with the provisions of O. 21, R. 17, admitted the application and ordered notices to issue and costs to be deposited. In the subsequent application dated December 8, 1932, the decree-holder again failed to mention the application of February 5, 1929, but subsequently applied for amendment of the application:

Held, that the application of December 8, 1932, was barred and that there was no substance in allowing the amendment as the application of February 1, 1932, which omitted reference to the application of February 5, 1929, and which was consequently out of time was not in accordance with law and it, therefore did not give fresh starting point of limitation. The fact that it was an error to allow the execution of Febuary 1, 1932, did not make any difference. A.I.R. 1939 Sind 272=185 Ind. Cas. 835.

——Art. 182 (5)—Omission to state the fact that there was an appeal and diminution of decree amount in appeal.

Omission from an execution petition of the particulars required by cls. (d) and (g) which are required to be contained in every petition for execution by O. 21, R. 11 (2), C. P. Code does not render the petition not in accordance with law within the meaning of Art. 182 (5). 38 L.W. 877 =A.I.R. 1933 Mad. 872=(1933) M.W.N. 929 =147 Ind. Cas. 386.

——Art. 182 (5)—If any material particular required by O. 21, R. 11 has been left out in an application for execution and the defect is not repaired in time, it may be said that the application is not in accordance with law. A.I.R. 1933 Sind 78=27 S.L.R. 109=142 Ind. Cas. 489.

——Art. 182 (5)—An application for transfer of a decree to another Court for execution need not be in any particular form. An application for executing a decree and application for transferring a decree to another Court for execution are two different and distinct applications. Whether a particular application is an application for execution or for transfer of a decree is to be decided in the nature of the prayer made and not on the choice of a particular form. An application for transfer of a decree for execution cannot become an application for execution simply because the form of the latter has been adopted.

Some foral defect or some superfluity added to an execution application will not take away that application from the purview of sub-cl. (5). 11 Pat. 785=13 P.L.T. 498=A.I.R. 1932 Pat. 309=142 Ind. Cas. 155.

——Art. 182 (5)—Application containing mistakes—Failure to correct mistakes in spite of orders of Court—Plea in appeal that there are no mistakes, competency of.

An application for execution of a decree which is incorrect in its particulars in respect of the entries in the columns, and which does not consequently comply with the requirements of O. 21, R. 11 (2), C. P. Code, is not an application in accordance with law and cannot save limitation.

Where the Court gives the decree-holder repeated opportunities of either correcting the alleged mistakes or of pointing out to the Court that it was in error, but the decree-holder ignores the order of the Court, he should not be allowed to contend in appeal that there were in fact, no mistakes.

It is a very well-known and sound principle that a superior Court will not listen to a contention of this sort by a litigant who had more than ample opportunity of raising the point to the Court primarily concerned and refused to take advantage of the opportunities given him. A.I.R. 1931 All. 722=131 Ind. Cas. 33 (2).

——Art. 182 (5)—Application with full particulars but containing mistake as to amount of interest.

An application for execution which is correct in all other particulars is an application in accordance with law even if there is a slight mistake as to the amount of interest calculated from the date of the decree up to the date of execution, and is a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act. 8 O.W.N. 639=A.I.R. 1931 Oudh 312= 132 Ind. Cas. 262.

——Art. 182 (5)—Defective application under O. 21, R. 15, C. P. Code and notice thereon, under R. 22, will both save limitation. 69 Ind. Cas. 668=1 Pat. 609=4 P.L.T. 263=A.I.R. 1922 Pat. 597.

——Art. 182 (5) — Application not mentioning previous application is not in accordance with law and will not save limitation.

An application for execution failed to mention costs and the previous application and the Court returned it for amendment. The amended application was not signed and verified and it was filed,

Held, the omission to mention the amount of costs is a defect of immaterial character but the omission to mention, as required by O. 21, R. 11 (b), the previous application was such a material defect as to render the application not in accordance with law, as it did not show whether the application was within the period of limitation. 'In accordance with law is a phrase adjectival not

only to the words 'the proper Court for execution' but also to the words "to take some step in execution'. If a fresh application is not made, after such an irregular application, within three years of the application before the irregular one, it is barred. (1906) 33 Cal. 867; (1896) 22 Bom. 83, Foll. 65 Ind. Cas. 14=15 S.L.R. 156=A.I.R. 1922 Sind 29.

——**Art. 182 (5)**—An execution application which does not contain particulars as to the amount of the decree and costs awarded is not in accordance with law and is not a step-in-aid of execution. 23 Cal. 217; 18 C.L.J. 538, Foll. 65 Ind. Cas. 120 (Pat.).

——**Art. 182 (5)**—A mere mistake in calculating interest or even deliberately calculating more interest than was due, does not make an application for execution one not in accordance with law. If more interest than was due is charged it may be considered as a mere surplusage and be struck out. 63 Ind. Cas. 362=43 All. 550=19 A.L.J. 509=A.I.R. 1921 All. 208.

——**Art. 182 (5)—Defective application — Omission to mention uncertified payment in execution application—Effect of.**

An execution application which omits to mention an uncertified payment out of Court towards the decree is none the less an application "in accordance with law" within Art. 182 of the Limitation Act. 10 L.W. 66=51 Ind. Cas. 114.

——**Art. 182 (5)—Mistake in entering date of decree.**

An execution application can only be vitiated by material defects and a mistake in entering the date of the decree is not a material defect. (1919) P.H.C.C. 121=4 Pat.L.J. 213=48 Ind. Cas. 245.

——**Art. 182 (5)—Application in accordance with law—Non-compliance with O. 21, R. 11, C. P. Code.**

The failure to state the amount of costs is not a serious defect, and the application would be in accordance with law at the time it was made and sufficient to save limitation. Failure to produce the certified copy of the decree did not render the application not in accordance with law. The question whether an application for execution is in accordance with law or not must be determined with regard to what the law requires to be done at the time when the application is made, and in order to ascertain whether the application is in accordance with law, it is not permissible to consider what the law requires to be done after the application has been made. The intention of sub-Rule (2) rule 17 is to relax the law in favour of the decree-holder. 5 Pat.L.W. 205=47 Ind. Cas. 993.

——**Art. 182 (5)—Defective application.**

An execution application containing formal defects is not the less a step-in-aid of execution within the meaning of Art. 182. 40 Mad. 949=21 M.L.T. 257=5 L.W. 648=32 M.L.J. 621=38 Ind. Cas. 136.

——**Art. 182 (5)—Defective application — Inventory of property not annexed—C. P. Code, O. 21 R. 12.**

Where a decree-holder omits to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same as required by O. 21, R. 12, the application is not in accordance with law within Art. 182 and cannot save limitation when it is dismissed for non-compliance with an order for amendment. 37 All. 527=13 A.L.J. 706=29 Ind. Cas. 479.

——**Art. 182, Cl. (5)—Application in accordance with law—Execution of decree.**

Held, that an application for execution of a decree which was defective only in that it stated incorrectly the date of a previous application for execution (such date being under the circumstances of the case quite immaterial), and which was amended within three days of an order of the executing Court requiring the amendment, could not be treated as an application not in accordance with law within the meaning of Art. 179 (O.A.). 25 C. 594, Foll. 1901 A.W.N. 31=23 A. 162.

6. (d), Cl. (5)—Application 'in accordance with law'—Test.

——**Art. 182 (5)—In accordance with law—Application bona fide asking for transmission of the decree under a mistake as to the jurisdiction of the Court in regard to the property sought to be proceeded against—Step-in-aid of execution.**

Where a decree-holder comes to Court with an application bona fide asking for a relief on facts alleged in the petition, which if the facts are proved he would be entitled to obtain, and the application is made to the proper Court having jurisdiction to grant the relief asked for, the fact that that Court came to a wrong decision on the facts would not make the application any the less, an application not in accordance with law. It may be that the order of the Court is wrong as it ultimately turns out, but it does not mean that the step he has pursued is not a step in aid of execution, though it unfortunately turns out to be a wrong step in the end. All that the law requires is that there should be a step-in-aid of execution and is not concerned with the question whether that step ultimately turns out to be infructuous or a wrong step.

Where the decree-holders have throughout acted bona fide and made the execution applications asking for transmission of the decree under the mistaken impression that the property sought to be proceeded against was outside the jurisdiction of the Court which passed the decree and also the Court which passed the various transmission orders did so under the same mistaken belief, it cannot be said that the applications made by the decree-holders are not applications in accordance with law and the steps they took are not step-in aid of execution. 1948 M.W.N. 340=A.I.R. 1948 Mad. 338=61 L.W. 367=(1948) 1 M.L.J. 389.

——**Art. 182 (5)—"In accordance with law" — Meaning of.**

The words 'in accordance with law' cannot be read as meaning 'in accordance with the C. P. Code'. The words are general and mean applying to the Court to do something in execution which by law the Court is competent to do. An application to the Court to do something which, either to the decree-holder's direct knowledge in

fact or from his presumed knowledge of the law, he must have known that the Court was incompetent to do, is not an application 'in accordance with law' within the meaning of Art. 182 (5), Limtation Act. Where the respondent knew by reason of S. 28, Provincial Insolvency Act, that he was not entitled to institute the execution proceedings, and hence executing Court could not grant him the relief he sought.

Held, execution proceeding filed in spite of presumed knowledge cannot be 'in accordance with law' for the purposes of Art. 182 (5). 12 Cut.L.T. 62=13 B.R. 481=231 Ind. Cas. 17=A.I.R. 1947 Pat. 199.

——Art. 182 (5)—'In accordance with law'—Meaning of.

The expression 'in accordance with law' in Art. 182 (5) cannot be read as 'prescribed by law', and cannot be restricted to cover only such applications as fall under some express provision of the Code of Civil Procedure. The fact that there is no specific provision in the C. P. Code to cover an application in execution would not render it one not in accordance with law. I.L.R. (1946) Kar. 371=A.I.R. 1947 Sind 149.

——Art. 182 (5)—Application in accordance with law to the proper Court—Meaning.

Art. 182 (5) requires that an application to be a step-in-aid of execution should not only have been made to the 'proper Court' but also that it should be 'in accordance with law'. The Court concerned must be competent to grant the relief asked for. I.L.R. (1946) All. 856=229 Ind. Cas. 47=1947 A.L.W. 269=A.I.R. 1947 A. 352.

——Art. 182 (5)—'In accordance with law'—Meaning of— Decree of Small Cause Court —Application to that Court for attachment and sale of immovable property—If saves limitation.

'Applying in accordance with law' means applying to the Court to do something in execution which by law that Court is competent to do; it does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known that the Court was incompetent to do. The **bona fides** or **mala fides** of the earlier application is not a relevant or material consideration. An application to a Court of Small Causes to execute a money decree of that Court by attachment and sale of immovable property is not an application 'in accordance with law', within the meaning of Art. 182 (5). I.L.R. (1946) A. 856=229 Ind. Cas. 47=A.I.R. 1947 A. 352.

——Art. 182 (5)—Court not competent to grant application.

There may be circumstances in which a person against whom a decree has been passed quoad the assets of a deceased person in his hands may become liable to arrest, but where no such circumstances were stated by the decree-holder in the application for execution by the arrest of the judgment-debtor and the fact that the judgment-debtor was not personally liable was well known to the decree-holder, the application for arrest of the judgment-debtor is not one which the Court is competent to grant and is not, therefore, one in accordance with law within Art. 182 (5), Limitation Act. 1944 A.W.R. 7=A.I.R. 1944 All. 35=(1943) A.L.J. 607=1944 O.W.N. 53=I.L.R. (1944) All. 183=211 Ind. Cas. 467.

——Art. 182 (5)—'In accordance with law', meaning of—Application under O. 21, Rr. 15 or 16—Subsequent default.

The expression 'in accordance with law' does not imply that the application must be successful. It may be in accordance with law for the purpose of Art. 182 (5) and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. The notices under O. 21, R. 16, C.P. Code are to be given after the application for execution is presented. A valid application made in accordance with law cannot cease to be in accordance with law by any subsequent default on the part of the applicant. 47 Bom.L.R. 104=A.I.R. 1945 Bom. 380=I.L.R. (1945) Bom. 463.

——Art. 182 (5)—'In accordance with law'—Rejection of relief prayed for does not render the petition one not in accordance with law, whether the petition be 'for execution' or to take some step-in-aid of execution'. 98 Ind. Cas. 33=1 Luck. 569=3 O.W.N. 749=A.I.R. 1926 Oudh 616.

——Art. 182 (5)—Mere formal compliance with form prescribed is not enough.

A mere compliance with the formal requirements of the C. P. Code as to the manner of filing, and the particulars to be shown in an application for execution would not suffice to make it an application in accordance with law. A decree-holder seeking enforcement of a money-decree, e.g., might seek to bring to sale property not belonging to the judgment-debtor and not covered by the decree and yet might follow the requirements of O. 21, in framing his application. Such an application would on the face of it be one not in accordance with law. The expression 'not in accordance with law' cannot be construed so as to mean 'not in accordance with law on the face of the application.' The expression 'in accordance with law' must have some reference to the material content apart from the form and formal content of the application for execution. So far as the provisions of O. 21, R. 11, Sub-R. (2), Cl. (j), are concerned, the Legislature did not intend that a mere formal compliance with the form and procedure prescribed should be enough. The main test of an application for execution being in accordance with law is whether it is possible for the Court to issue execution upon it, i.e., whether it is within the power of the Court to grant the kind of relief asked for, though in the particular case, the relief may not, on the merits, be granted, e.g., owing to some finding on facts, not to the nature of the application itself. A.I.R. 1943 Bom. 353=45 Bom.L.R. 707=210 Ind. Cas. 376.

——Art. 182 (5)—In accordance with law—Test.

When all the requirements of an execution application laid down in O. 21, R. 11 are satisfied, when the applicant is a person entitled to execute the decree against a person who is liable to satisfy the decree when the execution is sought in one of the modes allowed by law and the application itself is not barred by limitation, then the execution application is one in accordance with law and it is immaterial whether the application, in the light of

the future circumstances, will be effective or ineffective. I.L.R. (1942) Kar. 428.

——Art. 182 (5)—Application—Court not in existence.

The mere fact that the decree-holder applies for transmission to a Court which does not exist but which he wrongly believes to exist does not prevent the application as being one in accordance with law since the mistake is one of fact and not of law. 1939 M.W.N. 11=A.I.R. 1939 Mad. 378=(1939) 1 M.L.J. 827=186 Ind. Cas. 449.

——Art. 182 (5)—Decree against father, providing that it is not binding on sons—Decree-holder applying to execute it by arrest of son—Application, held not in accordance with law.

The words 'in accordance with law' which occur in Art. 182 (5), are general and cannot be construed to mean only in accordance with the law of C. P. Code. The expression means applying to the Court to do something in execution which, by law, that Court is competent to do and it does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from his presumed knowledge of the law, he must have known the Court was incompetent to do.

Consequently, where the decree was only against the father and provided that the loan incurred by him was not binding on the sons and in spite of this decree-holder applied for execution by the arrest of the sons:

Held, that the application was not in accordance with law since the Court could not grant the relief by virtue of the decree. A.I.R. 1937 Pat. 522=3 B.R. 800=171 Ind. Cas. 99.

——Art. 182 (5)—Prior application must have been within time.

The expression 'in accordance with law' in Art. 182 (5), does not necessarily mean an application prescribed or required by law. An application would be in accordance with law even though it is not required by law provided it does not contravene any express provision of law or conflict with any principle of law. The words 'in accordance with law' are adjectival, not only to the words 'to the proper Court for execution,' but also to the words 'to take a step-in-aid of execution.' Therefore, it is necessary to show that the prior application which is relied as step-in-aid of execution was in accordance with law of limitation, i.e., was within time. A.I.R. 1937 Sind 121=170 Ind. Cas. 189.

——Art. 182 (5)—Provided the application for execution is made in accordance with law the question of the decree-holder's intention in applying for execution being bona fide, or otherwise is immaterial. A.I.R. 1929 All. 625 (F.B.), Foll.; A.I.R. 1926 All. 95, Not foll. 122 Ind. Cas. 179=1930 A.L.J. 474=A.I.R. 1930 All. 188.

——Art. 182 (5)—Words 'application in accordance with law to the proper Court for execution' do not refer to anything more than what they state.

In placing a construction on the words of Art. 182, a Court should look at the words themselves and nothing else and not endeavour to introduce extraneous considerations. 110 Ind. Cas. 704=3 Luck. 580=5 O.W.N. 353=A.I.R. 1928 Oudh 337.

——Art. 182 (5)—The circumstance that a man does not really wish to obtain the execution for which he has asked, is not a mala fide act which renders an application made in accordance with law unlawful. 110 Ind. Cas. 704=3 Luck. 580=5 O.W.N. 353=A.I.R. 1928 Oudh 387.

——Art. 182 (5)—There is nothing in the section which would justify the conclusion that an application which is not strictly necessary, is an application which is not in accordance with law. 100 Ind. Cas. 308=2 Luck. 419=4 O.W.N. 175=A.I.R. 1927 Oudh. 134.

——Art. 182 (5)—A bona fide application to execute a decree against a particular judgment-debtor is in accordance with law, and the parties who contend that it is not, are bound to prove it. 92 Ind. Cas. 709=23 M. L. W. 22=A.I.R. 1926 Mad. 321=50 M.L.J. 153.

——Art. 182 (5)—An application praying for a relief which perhaps the Court would not have granted is still treated as an application in accordance with law for the purposes of Art. 182. 37 Bom. 42, Foll. 91 Ind. Cas. 11=22 M.L.W. 744=49 M.L.J. 753=1926 M.W.N. 27=A.I.R. 1926 Mad. 179.

——Art. 182 (5)—Rules 11-14 of O. 21 complied with—Application is in accordance with law. A.I.R. 1924 Pat. 23, Foll. 90 Ind. Cas. 847=7 P.L.T. 330=1925 P.H.C.C. 315=A.I.R. 1926 Pat. 160.

——Art. 182 (5)—An application may be in accordance with law and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. 90 Ind. Cas. 847=7 P.L.T. 330=1925 P.H.C.C. 315=A.I.R. 1926 Pat. 160.

——Art. 182 (5)—'In accordance with law'—What is.

The words 'in accordance with law' should not be pressed too far in favour of a judgment-debtor who has not paid his debt; and certainly an application does not become contrary to law merely because it has been dismissed.

Where the decree-holder came before the Court with a perfectly honest and bona fide application properly expressed for execution of a decree, but while pointing out the fact that he was unable to execute the decree against the judgment-debtor individually, he asked the Court to allow joint execution whereas such joint execution was not permissible in view of an order passed,

Held, it cannot be said that decree-holder when making his application, can be reasonably considered to have known that he was making an application which the Court was incompetent to grant and his application may be considered to be in accordance with law. 79 Ind. Cas. 880=11 O.L.J. 604=A.I.R. 1925 Oudh 77.

——Art. 182 (5)—Application in accordance with law—Meaning of.

Where there is no prohibition in the decree against realising money in its execution an application for its execution by the person who on the face of it is the decree-holder is a step-in-aid though some other person was eventually found to be interested in the decree and not the applicant. 43 Mad. 424=38 M.L.J. 371=(1920) M.W.N. 395=57 Ind. Cas. 753.

——Art. 182 (5) — Step-in-aid — Application in accordance with law.

Obiter:—When an application invites the court to take an action which it is not competent under any circumstances to take, the application is not one in accordance with law. 13 C.W.N. 533=9 C.L.J. 443=1 Ind. Cas. 57

——Art. 182 (5) (Art. 179 (4))—Application for execution "in accordance with law to the proper court", meaning of.

The expression "proper court" in Art. 179, Cl. 4, (1877), means the court whose duty it is to execute the decree. An application to take some step-in-aid of execution, in order that it may be 'in accordance with law', within the meaning of that Article must be one framed some relief which the Court is competent to grant. (1909) 10 C. L.J. 19=2 Ind. Cas. 941.

——Art. 182 (5)—Application in accordance with law—Application for decree under S. 90, T. P. Act.

'Applying in accordance with law' means applying to the court to do something which by law that court was competent to do. It does not mean applying to the court to do something either which the decree-holder's direct knowledge in fact or his presumed knowledge of law he knew that the court was incompetent to do. 27 A. 619, foll. An application for a decree under S. 90, T. P. Act is not an application in execution, and even if it were such, an application after the sale of the mortgaged property was set aside is not an application in accordance with law. (1906) 4 C.L.J. 141=33 C. 867.

——Art. 182 (5)—Sale of personal property asked for—Mortgaged property not exhausted—Application not in accordance with law.

An application for execution, which is not made in accordance with law, cannot save the operation of limitation. Applying in accordance with law means applying to the proper court to do something which by law that court was competent to do. Hence, where an application was made for sale of the personal property of the judgment-debtor without exhausting the mortgaged property and was dismissed, an application made within three years of that application but beyond three years of the application preceding the one for sale of non-hypothecated property, was held to be time-barred. 12 A. 64 applied. 1905 A.W.N. 132=2 A.L.J. 376=27 A. 619.

6. (e) Cl. (5)—Application "in accordance with law"—What is and what is not.

——Art. 182 (5) — "In accordance with law"—Application praying for arrest and detention in civil prison of judgment-debtor—Court not making order for arrest—Effect on limitation.

An application for execution which prays for "the arrest and detention in prison of the judgment-debtor," is one in accordance with law, as it complies with the provisions of law, although the Court does not make an order on it. 49 Bom. L.R. 420=A.I.R. 1947 Bom. 430.

——Art. 182 (5)—"In accordance with law"—Application praying for issue of notice under O. 21, R. 22, C. P. Code—If saves limitation.

The issue of a notice under O. 21, R. 22, C.P. Code, is not a mode of execution and is not a relief which a party asks as awarded by the decree sought to be executed. Hence an application for execution which contains in col. (j). [O. 21 R. 11 (2), C. P. Code] the words "by the issue of a notice under O. 21, R. 22" is not a proper application as prescribed by O. 21, R. 11, and therefore is not one in accordance with law within the meaning of Art. 182 (5), Limitation Act. 49 Bom.L.R. 420=A.I.R. 1947 Bom. 430.

——Art. 182 (5)—In accordance with law—Application by decree-holder who had divested himself of the power of the proprietor of the estate.

A decree may be executed either by the decree-holder himself or by those who claim under him. Hence an application for execution by a decree-holder would be one 'in accordance with law' even though he had divested himself of the power of proprietor of the estate and was debarred from executing the decree and any final order passed on such an application would save limitation. 22 Luck. 217=A.I.R. 1948 Oudh 176= 229 Ind. Cas. 202=1947 O.A. (C.C.) 51=1947 A.W.R. (C.C.) 51=1947 O.W.N. 149.

——Art. 182 (5)—In accordance with law—Decree transferred for execution—Death of judgment-debtor — Application to transferor Court to bring on record legal representative—Nature and effect of.

Where, after a decree is transferred for execution to another Court, the judgment-debtor dies, and the decree-holder applies to the original Court which passed the decree to bring on record the legal representatives of the deceased judgment-debtor, the latter application must be regarded as one made in accordance with law to take some step-in-aid of execution and hence saves limitation under Art. 182 (5), Limitation Act. I.L.R. (1946) Kar. 371=A.I.R. 1947 Sind 149.

——Art. 182 (5)—Decree assigned — Application by original decree-holder.

An application by a decree-holder after assigning his decree for the transfer of the decree is an application made in accordance with law and is sufficient to save limitation for a subsequent application made by the assignee for execution after three years of the date of the decree. A. I.R. 1943 Sind 108=I.L.R. (1943) Kar. 88= 209 Ind. Cas. 560.

——Art. 182 (5)—Application for execution by a decree-holder after assignment of decree—C. P. Code, O. 21, R. 16.

An application by a decree-holder for execution after assignment of his decree is an application made in accordance with law within Art. 182, cl. 5 and is sufficient to save a fresh application by the assignee after three years from the date of of the decree. 16 O.C. 70=18 Ind. Cas. 97.

——Art. 182 (5)—Transfer of decree—Insolvency of transferor—Application by insolvent transferor whether saves decree against purchaser of decree from Official Assignee.

A decree-holder was adjudicated insolvent and his decree was sold by the Official Assignee on September 12, 1925. The original decree-holder himself applied for execution on October 26, 1925 and a subsequent application for execution was made by the purchaser of the decree on July 15, 1927. The question being whether the application

of October, 26, 1925, was an application in accordance with law so as to save the subsequent application from limitation:

Held, that as the original decree-holder was entitled on the face of the decree to execute it on September 25, 1925, the execution petition made by him was an application in accordance with law and his intervening insolvency did not alter the position as the Official Assignee had no interest in the decree on the date of the application.

Where a transferee decree-holder does not take steps to get himself recognised as the decree-holder, the transferor can execute the decree, and the transferee's rights in such a case are against the executing decree-holder alone and not against the judgment-debtor. A.I.R. 1935 Mad. 383=(1935) M.W.N. 203=41 L.W. 295 =68 M.L.J. 392=159 Ind. Cas. 589.

——**Art. 182 (5)**—Application for bringing to sale the property which had been made over to his son by the judgment-debtor is an application made in accordance with law and saves limitation under Art. 182 (5). (1939) 41 P.L.R. 577.

——**Art. 182 (5)—Decree dependent on payment of money by decree-holder — Execution application, whether step-in-aid . even though money not deposited.**

An application for execution of a decree dependent on the payment by the decree-holder of a sum of money is an application for execution made in accordance with law even though the money had not been deposited. A.I.R. 1935 Pesh. 129 =158 Ind. Cas. 517.

——**Art. 182 (5)—Execution of decree made conditional—Condition not fulfilled — Application for execution—If in accordance with law.**

Obiter.—If execution of a decree is conditional on prior payment by the decree-holder of Court-fees, or of the mortgage debt in a redemption suit or on discharge by the decree-holder of an incumbrance or anything else, an application by the decree-holder for execution without fulfilling such a condition is nevertheless one in accordance with law, it being open to the Court, on such application, to order execution on previous compliance by the decree-holder of the condition imposed by the decree. 122 Ind. Cas. 438=A.I.R. 1930 Nag. 241.

——**Art. 182 (5)—Mere non-compliance with a condition of decree—Application is proper.**

The plaintiff got a decree under which he was to produce in the Court within 18th March, 1916, for payment to defendant No. 1 Rs. 1,000—He took out a Darkhast No. 115 of 1919 but it was struck off as the 1,000 rupees were not paid into Court.

Held, that it cannot be said that that Darkhast was not in accordance with law merely because the party did not comply with the conditions of the decree. A.I.R. 1924 Bom. 64.

——**Art. 182 (5)—Decree obtained by two persons — Application for execution by one—Other decree-holder assenting to it—Dismissal of application for want of prosecution—Application, if in accordance with law — Statement, if constitutes assignment.**

Where one of two persons who have obtained a decree sought to execute it and in the course of execution proceedings, the other gave a purshis stating that he had no objection to execution by the other alone and ultimately the application failed for want of prosecution:

Held, that the statement in the purshis did not amount to a relinquishment or to an assignment of his interest in the decree and that the first application to execute the decree, though mistaken, was made by a person entitled to make it and hence, was in accordance with law. 36 Bom.L.R. 437=A.I.R. 1934 Bom. 216=58 B. 428=153 Ind. Cas. 176.

——**Art. 182 (5)**—Where on an application to execute a decree the Court ordered, 'Decree-holder absent, application is reported to be incorrect. It is rejected':

Held, that the order did not contain a finding that the application was not in accordance with law, and hence was sufficient to save limitation, being one in accordance with law. 16 N.L.J. 47=A.I.R. 1934 Nag. 117=142 Ind. Cas. 762.

——**Art. 182 (5)**—Order that application by one of two or more plaintiffs is incompetent means that application is not 'in accordance with law.' 62 Ind. Cas. 507=15 S.L.R. 11=A.I.R. 1921 Snd 13.

——**Art. 182 (5)—Application in accordance with law.**

Execution applications by decree-holder subsequent to appointment of receiver for execution of the decree are valid for purposes of saving limitation. 118 Ind. Cas. 694=31 Bom.L.R. 320=A. I.R. 1929 Bom. 279.

——**Art. 182 (5)**—Execution petition praying for rateable distribution — Petition is in accordance with law if decree is for recovery of money. 98 Ind. Cas. 33=1 Luck. 569=3 O.W.N. 749=A. I.R. 1926 Oudh 616.

——**Art. 182 (5)—Application for execution of decree against wrong person if comes under Art. 182.**

Where the suit was instituted against three persons whose names were mentioned in the plaint in a certain order and the Court, when writing its judgment, altered the serial numbers of the defendants and although apparently it intended to pass a decree, against D, the decree was passed against B, and where applications for execution were filed against B,

Held, that the applications for execution which were filed were wrong on the face of the decree, the only applications which could have been made, and therefore they must be deemed to have been made in accordance with law under Art. 182. 94 Ind. Cas. 877=48 All. 281=24 A.L.J. 266=A.I.R. 1926 All. 384.

——**Art. 182 (5)—Execution application against missing person if saves limitation.**

An execution application against a judgment-debtor whose whereabouts are not known is not invalid and saves limitation. 36 All. 482=12 A. L.J. 830=24 Ind. Cas. 473.

——**Art. 182 (5)—Application for re-arrest of judgment-debtor.**

A judgment-debtor was arrested on an application by judgment-creditor but was released from jail on his applying to be declared insolvent. The judgment-creditor again applied for his arrest. **Held,** that the second application for the arrest

of the judgment-debtor was an application in accordance with law and saved limitation. 33 All. 279=8 A.L.J. 40=8 Ind. Cas. 743.

——Art. 182 (5)—'Application in accordance with law'—Application against some judgment-debtors.

An application for execution against some only of the judgment-debtors must be deemed, in virtue of Expl. 1 of Art. 179 of the Act, to have taken effect against the others and it is one in accordance with law within the meaning of that article. 18 C. 515; 26 C. 888; 30 M. 268, Foll. 11 C.L.J. 83=14 C.W.N. 465=4 Ind. Cas. 408.

——Art. 182 (5)—Application in accordance with law—Application by legal representative without being brought on record—Decree—Construction—Condition precedent.

An application by the legal representative of a decree-holder for execution of the decree is not the less an application in accordance with law, because the name of the legal representative has not been brought on the record nor was a prayer to that effect made in the petition. A decree provided that the plaintiff was not entitled to execute the decree till the defendant's mortgage was discharged by him. The decree-holder died, and an application for execution was put in by the decree-holder's widow before she discharged the said defendant's mortgage. Her name had not been brought on the record as the legal representative of the decree-holder nor did she make a prayer to that effect in the petition.

Held: That the application by widow was an application in accordance with law and saved limitation, that the time in the decree as to payment of the defendant's mortgage was not a condition precedent to the execution of the decree but merely to the recovery of the money from the other defendants and by the sale of the property. and that the condition is not a condition precedent to the application for a conditional order thereunder. (1907) 17 M.L.J. 566=31 M. 77.

——Art. 182 (5)—Application in accordance with law—Redemption decree on condition of payment.

A decree directed 'that the plaintiff is to recover possession on payment of Rs. 865.' Held, that the payment was a condition precedent only to the delivery of possession and not to an application for execution; and that consequently applications for execution unpreceded by payment are applications in accordance with law. (1906) 30 M. 28.

——Art. 182 (5)—Application in accordance with law—Answer to application by judgment-debtor for insolvency—Step-in-aid.

Where the judgment-debtor has applied for a declaration of insolvency and proceedings in insolvency are pending on his application, no application for execution can be made against the judgment-debtor's surety. If, therefore, such application is in fact made, it will not be an application 'in accordance with law' within the meaning of Art. 179. Cl. (4). 12 A. 64 and 1905 A. W.N. 132, Foll.

Held also, that the resistance of the decree-holder to the judgment-debtor's application for insolvency will not amount to a taking of a step-in-aid of execution within the meaning of Art. 179. (1906) A.W.N. 54=3 A.L.J. 143=28 A. 387.

7. Cl. (5)—'Final order'.

(a) Meaning of.
(b) What is.
(c) What is not.
(d) When appeal is filed.

7. (a) Cl. (5)—'Final order'—Meaning of.

——Art. 182 (5)—Final order—Order for attachment made—Subsequent order recording fact of attachment and striking off of petition.

The mere fact that a prayer for attachment asked for in an executed petition has been granted does not automatically involve a dismissal of the execution petition. There must be a judicial order dismissing the execution petition. Hence when a prayer in an execution petition for attachment is ordered on a particular date and on a subsequent date, the Court after recording the fact that the attachment had been effected strikes off the petition then it is the latter date which is the date on which the final order on the petition is passed. 63 L.W. 996=(1950) 2 M.L.J. 261 =A.I.R. 1951 Mad. 274.

——Art. 182 (5)—On an execution petition notice was ordered to the judgment-debtor for January 29, 1937; and the decree-holder was ordered to pay batta. Under the rules, he had to do this within two days. This he did not do and as he had failed to pay batta even by January 15, 1937, District Munsif wrote 'No batta paid, Dismissed.' The present execution petition was filed on January 25, 1940.

Held, that January 29, 1937 and not January 15, 1937 should be taken as the date of the final order and the petition was in time. 1944 M.W.N. 295 =(1944) 1 M.L.J. 454=57 M.L.W. 278=A. I.R. 1944 Mad. 371.

——Art. 182 (5)—Order returning application, whether final—Test.

An order merely returning a petition as defective is not a final order, though in special circumstances such as those which appeared in Kandasami Chettiar v. Gokaldas Madanji and Co., Tuticorin. (A.I.R. 1941 Mad. 731: 197 Ind. Cas. 261), it may amount to one notwithstanding the language employed. The test is whether the order puts an end to the application in respect of which it is made, so far as the Court passing it is concerned.

The question whether an order is a final order within Art. 182 (5) is not to be judged by reference to what the Court passing the order thought at the time, nor by the language employed by it. It is for the Court before which the nature of the order is properly in question which has to decide the matter and the decision must be arrived at on an independent consideration of the correct rule of law as applied to the true facts. A.I.R. 1943 Mad. 297=(1942) 2 M.L.J. 768=1943 M.W.N. 68=I.L.R. (1943) Mad. 357=208 Ind. Cas. 361.

——Art. 182 (5) — Order requiring applicant to do something so that Court may proceed with application.

The 'final order' means an order putting an end to the application in respect of which it is made and not merely the last order in point of time. An order requiring the petitioner to do something

in order that the Court may proceed with his application does not even contemplate the end of the execution petition. Hence an order returning a petition for attending to the direction given by Court that prayer for time should be moved by means of an application supported by an affidavit is not a final order within the meaning of Art. 182 (5), as further action on the petition was contemplated. A. I. R. 1942 Mad. 216=54 L. W. 708=(1941) 2 M.L.J. 1018=201 Ind. Cas. 113.

——**Art. 182 (5)—Final order, meaning of—Final order on application and not final order against judgment-debtor.**

Under Art. 182, "final order" means the final order on the application and not the final order as against any judgment-debtor.

A petition was filed in November, 1929. It was finally disposed of on December 18, 1933. In so far as certain judgment-debtors were concerned the executing Court passed an order on March 30, 1931, calling upon the petitioner to make fresh application with fuller and better particulars. Subsequent execution application was filed in 1935. The judgment-debtors contended that as against them, the date of the final order was March 30, 1931.

Held, that the date of the final order was December 18, 1933, and not March 30, 1931, and such application in 1935 was in time. A.I.R. 1941 Mad. 858=54 L.W. 317=(1941) 2 M.L.J. 493=200 Ind. Cas. 287.

——**Art. 182 (5)—"Final", meaning of—Execution petition returned for amendment—Not represented in due time—Order returning petition whether 'final'—Interpretation of order.**

The word 'final' in Art. 182 (5), cannot be interpreted as being merely the last in point of time. It is not possible to call an order a "final order" unless it puts an end to something or other. It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification. The proper way to deal with such a petition is to treat it as not having come into existence at all. Where execution petition is returned for amendment but is not re-presented within time, the order directing its return for amendment is not final order and does not save limitation.

It is not possible for this purpose to bring in some fictitious date of an order which has not been passed. An order of the Court returning a petition for amendment to be re-presented within certain period cannot be read as containing a statement that in default it should stand dismissed. A.I.R. 1939 Mad. 841=(1939) M.W.N. 769=50 L.W. 311=(1939) 2 M.L.J. 671=I. L. R. (1940) Mad. 60=189 Ind. Cas. 411.

——**Art. 182 (5)—Order rejecting application not on merits.**

Per **Venkataramana Rao, J.**—An order would be a final order within the meaning of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on the merits. An order rejecting an application though not on merits, will, therefore, be a final order. (1937) M.W.N. 31 and 35=(1937) 1 M.L.J. 453=45 L.W. 457=A. I. R. 1937 Mad. 385=I. L. R. (1937) Mad. 616=168 Ind. Cas. 561 (F.B.).

——**Art. 182 (5)**—The expression "final order" in this clause does not mean the last order in point of time but it implies the termination of the proceeding so far as the Court passing it is concerned. (1936) M.W.N. 582=44 L.W. 59=A.I.R. 1936 Mad. 613=71 M.L.J. 336=I.L.R. (1937) Mad. 112=163 Ind. Cas. 354.

——**Art. 182 (5)—Final order — Meaning of — Order returning application.**

Any order passed on execution application is final order if there is no other order after it. Question of finality of order in the sense of its being conclusive is not important from limitation point. 1936 M.W.N. 547.

——**Art. 182 (5)—Whether contemplates judicial order on application by decree-holder.**

What is clearly contemplated by Art. 182 (5), Limitation Act is that a judicial order is to be made on an application by the decree-holder being a step-in-aid of execution and in order that an application for transfer should benefit the decree-holder, it must be in essence in continuation. A. I.R. 1936 Pat. 313=2 B.R. 529=162 Ind. Cas. 984.

——**Art. 182 (5)—Order merely directing office to prepare certificate — Whether can be deemed to have finally disposed of application praying for transmission of the certificate.**

According to Art. 182, Cl. 5, Limitation Act, as amended in 1927, limitation is to be reckoned, not from the date of the application but from the date of the final order passed on an application to the Court to take some step-in-aid of execution. An order merely directing the office to prepare a certificate cannot be considered to have finally disposed of the application which prayed that the certificate be transmitted. The proceedings should be considered to have been disposed on the date on which the required certificate was prepared and handed over to the decree-holder who had undertaken to present it before the transferee Court. If the fact is noted on the application and the record ordered to be consigned, the fact that there is no definite order in black and white directing the office to hand over the certificate to the decree-holder is not material. (1935) A.L.J. 370=1935 A.W.R. 419=A.I.R. 1935 All. 757=154 Ind. Cas. 718.

7. (b) Cl. (5)—"Final order"—What is.

——**Art. 182 (5)—"Final order"—Application for execution filed by pleader duly authorised and returned for complying with certain requirements—Re-presentation by another pleader who had no authority from the pleader on record—Rejection of application on the ground that re-presentation was by an unauthorised person—If final order saving limitation.**

An execution application which was presented by a pleader with proper authority and was returned for compliance with certain requirements but was re-presented by some other pleader on his behalf (not authorised by the pleader on record), even though the application has come to the custody of the Court though not in the regular way, cannot be deemed to be non-existent and treated as such.

The circumstance that the petition which was returned again came back to Court through the agency of an unauthorised person would not invalidate its original valid presentation and therefore the order rejecting the same for non-compliance with certain requirements would be a "final order" so as to save the period of limitation. 63 L.W. 1146=(1950) 2 M.L.J. 539=A.I.R. 1951 Mad. 353.

——Art. 182 (5)—Decree of Court of Small Causes—Execution application for issue of warrant of arrest—Returned as judgment-debtor not found—Order passed striking off—After eleven years another execution petition—Whether barred by limitation.

The petitioner obtained a decree on 9th March, 1936 in a Court of Small Causes. He filed an execution petition on 21st September, 1936 for issue of warrant of arrest of the judgment-debtor. On 23rd September, 1936 an order for arrest was passed returnable on 20th October, 1936. On 21st October, 1936, the following order was passed. "Judgment-debtor not found for arrest. Struck off". After eleven years on 31st March, 1947, another application in execution of the decree was filed. On the question whether it was barred by limitation.

Held, that the order made on 23rd September, 1936, was an order judicially and properly made, having been made under O. 21, R. 24, C. P. Code and therefore a final order. The present application in execution having been filed beyond three years of the date of the order on the previous application, it was clearly barred by limitation.

To enable a decree-holder, who has filed an application for execution asking for arrest or attachment and which warrant has got returned as unexecuted, to revive his rights at any time, will be to nullify the effect of S. 48, C. P. Code. 1950 M.W.N. 159=A.I.R. 1950 Mad. 298=(1949) 2 M.L.J. 836.

——Art. 182 (5)—Final order—Order directing transfer of decree and issuing of certificate under S. 39, C. P. Code.

Where the Court which passed the decree on an application by the decree-holder makes an order directing the transfer of the decree to another Court for execution and also issues the necessary certificate as required by S. 39 of the C. P. Code, it amounts to a "final order" within the meaning of Art. 182 (5) of the Limitation Act. I.L.R. (1950) A. 141=1949 A.L.J. 309 =A.I.R. 1949 A. 751=1949 A.W.R. 331.

——Art. 182 (5)—Execution petition not numbered and containing an incorrect statement regarding the costs of an earlier petition—If in accordance with law — Endorsement of the word "rejected" on petition—If amounts to final order disposing of the petition.

An incorrect statement in an execution petition regarding the costs of an earlier execution petition is not such an error as to make it one which is not in accordance with law.

When a petition is otherwise in accordance with law, absence of a number is of no importance whatever. Hence, no objection to the legality of a previous execution petition can be taken on the ground that it was unnumbered.

An execution petition was filed on 24th June, 1944, to execute a decree of 1935. There was a prior petition filed on 9th March, 1942, which was disposed of on 8th July, 1942, by an endorsement made on it by the Judge, "Not taken back. Rejected."

Held, that the rejection of the application was a final order disposing of the petition and the later application of 1944 was one in time having been filed within three years of the dismissal and final disposal of the previous petition. 60 L.W. 815=A.I.R. 1949 Mad. 43=1948 M.W.N. 83=(1947) 2 M.L.J. 553.

——Art. 182 (5)—Final order—Execution petition filed within three years but re-presented after the expiry of the period fixed for re-presentation—No petition to excuse delay—Order on such petition whether a final order.

The first of five execution petitions was filed within three years of the passing of the final decree in a mortgage suit, but re-presented a few days after the expiry of the period fixed for its re-presentation but without a petition to excuse the delay and on the decree-holder's representing that it was not pressed, it was dismissed. The second petition was filed within three years of this order and was dismissed. The third, filed a few days thereafter was rejected. The fourth, filed within three years of that order of rejection was once again re-presented a few days after the expiry of the period fixed for re-presentation, but again without a petition to excuse the delay. There was a prayer that it was not pressed and that it might be dismissed. That petition was accordingly dismissed a week later. The last petition was filed within three years of this order. On the question, whether it is barred by the provisions of Art. 182 (5) of the Limitation Act.

Held, that the first and fourth petitions were terminated by a final order of dismissal and all the petitions presented in respect of the decree including the last one were filed within time and were not affected by the bar of limitation prescribed in the Article. A formal petition to excuse the delay in re-presentation is unnecessary and the Court can informally grant relief in that respect. Since the order of dismissal was made after delay in re-presentation had occurred it must be presumed that what was required to be done was in fact done and that the making of the order of dismissal reflects that there was an order excusing the delay. Even assuming that the order of dismissal was made wrongly, nevertheless it was an order and it remains alive and effective unless and until it is set aside by means of a proper procedure. I.L.R. (1949) Mad. 88=61 L.W. 302=1948 M.W.N. 283=A.I.R. 1948 Mad. 462=(1948) 1 M.L.J. 327.

——Art. 182 (5)—Final order—Execution petition—Parties reporting matter as "settled" in terms of compromise—Final order if passed—Application to revive competent only when there is no final disposal of former petition—C. P. Code, S. 42—Transferee Court having seisin of execution—Application made to Court passing decree—Effect.

The words "final order" in Art. 182 (5) of the Limitation Act imply that the proceeding has terminated so far as the Court passing it is concerned. An application to revive or continue an exe-

cution petition will lie only when the former petition has not been disposed of finally. Where the order was made on the memorandum of consent which was signed by the parties and their advocates and the formal order of Court recited that the execution petition came beforee the Court to be mentioned as "settled.",

Held, that there was a final disposal of the execution petition and that the inclusion in the order of such words as "dismissal" or or final disposal were quite unnecessary.

While an application can always be made to the Court which passed the decree for an order for re-transferring it and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder, nevertheless a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings; and in such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or unless the proceedings in the Court to which the decree was sent has been stayed for the purpose of executing the decree in the first Court. 1948 M.W.N. 344=61 L.W. 423=A.I.R. 1949 Mad. 80=(1948) 1 M. L.J. 350.

——Art. 182 (5)—"Final order"—Order dismissing unnumbered execution petition which had been returned but re-presented after the time allowed for carrying out certain requirements —If final order.

In an execution petition there was a mistake regarding the amount realised by way of rateables under a prior execution petition. The office returned the execution petition for necessary amendments and also to comply with certain requisitions. On 14th February, 1938, there was a return by the Court fixing seven days' time to comply with the requirements of the office. The petition was re-presented on the 1st March, 1938, beyond the time allowed for re-presenting it. No application to excuse the delay in re-presentation however was filed. The unnumbered execution petition was dismissed on 5th March, 1938, by the order "Not amended. Dismissed." The next execution petition (also unnumbered) was filed on 28th February, 1941, with a prayer similar to the one contained in the prior execution petition. That execution petition was returned from time to time for producing the copy of an order in insolvency. On 17th March, 1941, itwas re-presented with the endorsement "I pray that time for ten days may be granted for filing the copy of the insolvency order." It was again returned by the office with the endorsement "Petition for the relief sought for to be filed. Notice three days." Finally it was re-presented on 26th March, 1941, with the endorsement "I applied for a copy of the insolvency petition. Therefore, I pray that time for one week may be granted." The petition was rejected on 29th March, 1941, with the endorsement "Petition called for not filed. Rejected." In a fresh execution petition filed within three years of that order,

Held. That the orders on the prior unnumbered petitions were "final orders" within the meaning of Art. 182 (5) of the Limitation Act and an execution petition filed within three years of such order will be in time. Even assuming that the orders of dismissal were made wrongly (on the ground that the petitions had no legal existence) nevertheless, the orders remained alive and effective unless and until they were set aside by means of a proper procedure. The propriety of such orders cannot be canvassed in a subsequent proceeding. 61 L.W. 651=A.I.R. 1949 Mad. 250=1948 M.W.N. 689=(1948) 2 M.L.J. 369.

——Art. 182 (5) — Final order—What would amount to—Order for return of execution petition for furnishing particulars — Return not taken—Subsequent order rejecting execution petition—If a 'final order'—Orders rejecting execution petitions on decree-holder failing to comply with the Court's requirements — Final orders sufficient to save limitation.

Where an execution petition is ordered to be returned for supplying certain information within the time given but the decree-holder does not in fact take the return of the petition from the Court and the Court thereupon rejects the petition on a subsequent date, the order of rejection would be a 'final order' on a subsisting petition for the purpose of saving limitations.

Where though the decree-holder might have neglected to comply with the Court's requirements in regard to the execution petitions, their ultimate rejection by the Court for such non-compliance would be final orders sufficient to save limitation for the succeeding petition. 60 L.W. 311=1947 M.W.N. 624=A.I.R. 1947 Mad. 385=(1947) 1 M.L.J. 393.

——Art. 182 (5)—'Final order.'

When there was no defect in the previous execution petition and the same was returned and and there was no undue delay in the representation, the order of the executing Court refusing to excuse the delay and dismissing the execution petition must be taken to be a "final order" within Art. 182. In any case, the refusal of the executing Court to excuse the delay ought not to be held conclusive. It must be open to the Court which has to consider whether the order on the previous execution petition is a "final order" or not, to decide on the facts of each case whether the previous order was a "final order." 58 M. L.W. 285=(1945) 1 M.L.J. 428=A.I.R. 1945 Mad. 347=1945 M.W.N. 730 (2).

——Art. 182 (5) — Order dismissing application for default, if final order.

An execution application oomplying with all the requirements of O. 21, Rr. 11 and 13, C. P. Code, is one in accordance with law and an order dismissing such application for default in compliance with the direction of the Court under O. 21, R. 14, C. P. Code, requiring the filing of patta extracts is a final order within the meaning of Art. 182 (5), even if the execution application was not registered or numbered before its dismissal. 58 M.L.W. 153=A.I.R. 1945 Mad. 154=1945 M.W.N. 197=I.L.R. (1945) Mad. 684=(1945) 1 M.L.J. 270=219 Ind. Cas. 506 (F.B.).

——Art. 182 (5)—Ex parte order for substitution of names set aside—Final order.

What is material under cl. 5 is the date of the final order. The order must be of a Court whose duty it is to execute the decree and must be in

respect of either an application for execution or an application to take some step-in-aid of execution.

An application for substitution of the name of the legal representative of the deceased judgment-debtor is a step-in-aid of execution.

An order disposing of an application to set aside the ex parte order for substitution is a final order for the purposes of cl. (5). A.I.R. 1945 Oudh 298=1945 A.W.R. (C.C.) 137=1945 O.W.N. (C.C.) 210=20 Luck. 449=221 Ind. Cas. 681.

——**Art. 182 (5) — Certificate of non-satisfaction by transferee Court.**

Where the transferee Court to which the decree is sent for execution returns the decree with a certificate of non-satisfaction, the certificate constitutes the 'final order' on the execution application within the meaning of Art. 182 (5). A.I.R. 1945 Oudh 298=1945 A.W.R. (C.C.) 137=1945 O.W.N. (C.C.) 210=20 Luck. 449=221 Ind. Cas. 681.

——**Art. 182 (5)—Petition re-presented but not within time with prayer to excuse delay — Order passed "To be renewed, Rejected" — Delay held excused and order, held final and passed in accordance with law.**

When an order is passed on an application though re-presented after the time fixed, if the delay is excused, it would be an order which would give a fresh starting point of limitation.

In ascertaining the intention of the Judge who passed the order, when the order is not express, it is to be construed reasonably and the Judge must be taken to have known what the law on the point is.

Where, upon the re-presentation of the application after the time fixed the Judge passed an order "To be renewed. Rejected".

Held, that the delay must be considered to have been excused and therefore the order was an order on a petition properly pending in the Court on the date on which the order was passed and as the order was final not only in point of time, but also on the merits because nothing further could be done on that petition after the order of rejection, it was a final order passed in accordance with law and would furnish a fresh starting point of limitation. A.I.R. 1944 Mad. 71=(1943) 2 M. L. J. 454=1943 M.W.N. 677=56 M.L.W. 714=217 Ind. Cas. 28.

——**Art. 182 (5)—Defects pointed out, remedied and petition re-presented—Petition dismissed for default of prosecution—Whether final order.**

The defects pointed out in an execution application were remedied when the petition was re-presented. The petition was dismissed because the decree-holder did not want to prosecute the application and wanted the Court to dismiss it. The petition was not numbered or admitted.

Held, the petition was one in accordance with law when it was presented and the fact that it was not registered could not make it one not in accordance with law, and hence the order of dismissal passed thereon was a final order within Art. 182 (5), Limitation Act. A.I.R. 1944 Mad. 43 =56 M.L.W. 562=1943 M.W.N. 569=(1943) 2 M.L.J. 513=210 Ind. Cas. 556.

——**Art. 182 (5)—Order, held "final" within Art. 182.**

An execution application was made on June 21, 1937, and was endorsed by the Court saying, "Vakil has no power. Returned. Time seven days." The application was not taken away from the Court, but allowed to remain in the office and subsequently on December 23, an order was passed rejecting it; it was contended that the order of December 23, was not a "final order" and could not save time.

Held, the order of December 23 was the final order contemplated by Art. 182, Limitation Act as the application was presented and dismissed within a reasonable time by the Court, on the Court's own initiative because the party would not comply with the Court's order. 1943 M.W.N. 424=(1943) 1 M.L.J. 445=56 L.W. 327=A. I. R. 1943 Mad. 517=211 Ind. Cas. 87.

——**Art. 182 (5)**—Execution petition presented to proper Court dismissed, not for disobedience of order of Court, but because adjournment asked for was refused—Order is final within Art. 182 (5). A.I.R. 1943 Mad. 340=56 M.L.W. 151=(1943) 1 M.L.J. 236=1943 M.W.N. 174=209 Ind. Cas. 316.

——**Art. 182 (5)—Execution petitition lawful — Order rejecting it.**

When a lawful petition is properly before the Court, but the Court rejects it, the order may be a final order. A.I.R. 1943 Mad. 297=(1942) 2 M.L.J. 768=1943 M.W.N. 68=I. L. R. (1943) Mad. 357=208 Ind. Cas. 361.

——**Art. 182 (5)**—Execution application dismissed for default—Order is final within the meaning of Art. 182 (5) and the fact that the application was never admitted and so not entered in the register of civil suits makes no difference. A.I.R. 1943 Nag. 296=1943 N.L.J. 391=I.L.R. (1943) Nag. 584=213 Ind. Cas. 191.

——**Art. 182 (5)—Application for transfer of decree to Bombay for execution—Decree previously transmitted to Bombay — Court's order "copy of decree has not been received from High Court, Bombay; returned," whether final.**

An application was made by the decree-holder, with the request that the decree should be transferred to Bombay for execution. The decree was previously transmitted to Bombay on application of decree-holder. That application was disposed of by the Court in the following language by an endorsement upon the petition "copy of the decree has not been received from the High Court, Bombay; returned":

Held, that the order passed by the Court was a final order within the meaning of Art. 182 (5). A.I.R. 1941 Mad. 731=(1941) 1 M.L.J. 837= 1941 M.W.N. 627=54 L.W. 34=197 Ind. Cas. 261.

——**Art. 182 (5)—Order dismissing application in default, if final order giving fresh start.**

An order would be a final order within the meaning of Cl. (5), Art. 182 if it terminates the execution proceedings so far as the Court passing it is concerned. The order need not be one on the merits. Wherever an application has been put in in the correct form and is eventually dismissed for want of prosecution, the order of dismissal is a final order.

On November 16, 1934, the decree-holder applied for execution. That application was admitted on November 19, and the decree-holder was ordered to pay process fee. The decree-holder failed to pay the process fee or to appear at the next hearing on January 5, 1935, and the application was dismissed in default. The next application was made on December 6, 1937.

Held, that the order of January 5, 1935, dismissing the application in default was a final order and limitation ran from that date. The last application was therefore, in time. A.I.R. 1940 Nag. 301=1940 N.L.J. 418=I.L.R. (1942) Nag. 245=190 Ind. Cas. 697.

——Art. 182, Cl. (5)—Order passed in execution, "execution struck off for partial satisfaction of decree, costs on judgment-debtor"—No notice to parties—Whether a final order.

The question whether an execution case is still pending and has not been terminated must depend on an interpretation of the order passed by the Court and the interference to be drawn as to the Court's intention. If the Court intends that the matter should be shelved for the time being or the record be merely consigned to the record room and be taken up later on by the Court itself **suo motu** or at the instance of the decree-holders, then obviously the case is still pending and is in a state of suspended animation. Where the Court intends to dispose of the matter completely and no longer to keep it pending on its file, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order which will give a fresh start for purposes of limitation, and that the proceeding not being pending there would, in such a case, be no question of revival. The words "final order" in Cl. (5) of Art. 182 do not necessarily mean the order which finally adjudicates upon the rights of the decree-holder on the one hand and the rights of the judgment-debtor on the other.

An order was passed in the following terms without notice to parties: "execution struck off for partial satisfaction of the decree; costs on the judgment-debtor":

Held, that the order could not be construed only as a provisional order suspending the application for execution but it should be considered as a "final order" passed on an application made as referred to in Cl. (5) of Art. 182. 1936 A.W.R. 996=A.I.R. 1936 All. 820=(1936) A. L. J. 1140=I.L.R. (1937) All. 272=166 Ind. Cas. 106 (F.B.).

——Art. 182 (5)—Execution application dismissed on part satisfaction—Decree-holder granting two months' time to judgment-debtor to pay off the balance.

The decree-holder made an execution application on February 25, 1929, and on July 9, 1930, he made an application to the Court to the effect that the case might be dismissed in part payment as two months' time had been given to the judgment-debtor to pay the balance; and the Court, in consequence, recorded an order in the following words: "It is, therefore, ordered that this case be dismissed in part payment and the costs be borne by the judgment-debtor."

Held, that the order passed on July 9, 1930 was a "final order passed on an application made" and that the limitation started from this date and that the period of two months' grace allowed by the decree-holder to the judgment-debtor could not be taken into consideration. (1935) A.W.R. 1055 =A.I.R. 1935 All. 909=(1935) A.L.J. 1087= 157 Ind. Cas. 273.

——Art. 182 (5)—An order for dismissal in default of the appellant under O. 41, R. 17, C. P. Code, is a final order within the meaning of Art. 182, Col. 3, Cl. (2), Limitation Act. A.I.R. 1935 Lah. 771=16 L. 564=37 P.L.R. 727=161 Ind. Cas. 122.

——Art. 182 (5)—Order transferring execution to another Court for rateable distribution.

The expression 'final order' in Art. 182 Cl. (5) means an order which conclusively decides the matter between the parties. An order which does not purport to be a final order cannot be taken to be as such because some other final order which must have been passed is not forthcoming.

Where the execution Court transfers the execution to another Court for the purpose of enabling the decree-holder to receive his rateable distribution, so far as the Court seized with the execution is concerned, it is a final order. A.I.R. 1934 Pesh. 23=149 Ind. Cas. 136.

——Art. 182 (5)—Order closing case.

Where a decree-holder applied for execution asking for issue of notice against the judgment-debtor and the Judge ordered notice to issue and on the date on which the notice was returnable, the case was closed at the decree-holder's request:

Held, 'that the final order' passed on the application was the order closing the case and subsequent application within three years from that date was not barred by time.

An interim order cannot be a final order in the light of subsequent events. A.I.R. 1933 Rang. 87=142 Ind. Cas. 435.

——Art. 182 (5)—Non-payment of printing costs —Appeal dismissed—Order is "final". 59 Ind. Cas. 896=6 P.L.J. 27=2 P.L.T. 28=1921 P. H.C.C. 34=A.I.R. 1921 Pat. 6.

7. (c) Cl. (5)—"Final order"—What is not.

——Art. 182 (5)—'Final order' — Order on execution petition—'No bidders—Sale stopped—Petition struck-off'—If 'final order' or keeps the petition pending on file of the Court.

After the dismissal of the objections of the judgment-debtors, the decree-holder proceeded with the execution and a sale was held on 11th April, 1942, but there were no bidders. The decree-holder who had obtained leave to bid was apparently unwilling to bid at the figure fixed by way of upset price and so the sale became infructuous. Thereupon the Court passed this order:—"No bidders. Sale stopped. Petition struck off". This was on 11th April, 1942, apparently the last working day of the term as the Court was closing for the summer recess immediately thereafter. The decree-holder filed an execution petition on 19th February, 1946, which was beyond three years of the order on the prior petition.

Held: The expression 'struck off' is capable of different meanings according to the context and

attending circumstances. And these wods by themselves are ambiguous and would not conclusively show either that the Court intended to keep alive the matter or intended to dispose of it finally. The order on the prior petition passed as it was on the last day of the term by the Court, and based on no default of the decree-holder, the intention must have been merely to temporarily postpone the matter and not dispose of it finally. Accordingly the previous execution petition must be deemed to be pending and the later petition is one merely to draw the attention of the Court to the pendency of that application on its file and ask it to dispose of it. 63 L.W. 227=1950 M. W.N. 213=A.I.R. 1950 Mad. 656=(1950) 1 M. L.J. 204.

——Art. 182 (5)—Final order—Unnumbered execution petition returned for complying with certain requisitions—Re-presentation with application to excuse delay after a long lapse of time along with fresh execution petition—Rejection — If saves limitation for the fresh execution petition.

An unnumbered execution application filed on 10th October 1941, was returned on 13th October 1941, for filing sale papers, filling up blanks and payment of batta. Two weeks' time was granted for complying with these requisitions and the petition was re-presented on 28th October, 1941, a day after the expiry of the two weeks. The petition was again returned on 31st October, 1941, and was not re-presented to Court till 23rd January, 1943, when that unnumbered execution petition was also filed with an application to excuse the delay in representation along with a fresh execution petition. The Court held that the delay should not be excused and dismissed the fresh execution petition and also rejected the unnumbered petition. On appeal,

Held, as the unnumbered petition was not re-presented for a long time it did not exist in the eye of the law and therefore the order rejecting the petition on refusing to excuse the delay was of no legal consequence. There was no "final order" on the unnumbered petition to save limitation for the fresh execution petition of 23rd January, 1943. 1948 M.W.N. 691=61 L.W. 685=A.I.R. 1949 Mad. 217=(1948) 2 M.L.J. 374.

——Art. 182 (5)—"Final order"—Intimation of non-satisfaction or non-execution by transferee Court to transferor Court—If saves limitation.

Where a decree has been merely transferred for execution to another Court, but no further steps taken in the latter Court by the decree-holder, the mere intimation by the transferee Court to the transferor Court of non-execution of the decree would not amount to a "final order" so as to save limitation under Art. 182 (5), Limitation Act. 25 Pat. 790=A.I.R. 1947 Pat. 388.

——Art. 182 (5)—Order when final—Surreptitious order behind the back of parties—Order, held not final within Art. 182 (5)—Parties not bound by the order.

The question whether an execution case is still pending and has not been terminated must depend on an interpretation of the order passed by the Court and the inference to be drawn as to the Court's intention. In order that the execution proceedings may be held to have been finally disposed of, the Court should pass an order with knowledge and with a definite intention of putting an end to execution proceedings.

The order on an application for execution was a surreptitious order upon which the initials of the Civil Judge who was temporarily in charge of the routine work of the executing Court were obtained by means of fraud by some official of the Court. The Civil Judge who put his initials on the order never had the consciousness that he was passing an order by which the execution proceeding was being disposed of or that he ever had the intention of disposing of the execution proceeding. The order was passed behind the back of the parties and was not on the file of the execution case but on the file of the original suit:

Held, that the order was not final order within meaning of Art. 182 (5) disposing of the execution proceeding and was not binding on the parties even if it were not set aside in appeal or in revision. A.I.R. 1945 All. 172=(1945) A.L. J. 92=I.L.R. (1945) All. 213=1945 O.W.N. (H.C.) 88=1945 A.W.R. (H.C.) 43=222 Ind. Cas. 123.

——Art. 182 (5) — Application returned for amendment and re-presentation — Whether final order.

Article 182 refers to an actual order passed by the Court and not an order which may be deemed to have been passed by the Court.

Application for execution returned for amendment and re-presentation by certain date — Application not re-presented but kept by decree-holder with him and not even re-presented with his subsequent execution petition.

Held, that no final order was or could be deemed to have been passed on the original application presented on behalf of the decree-holder and he could not therefore take advantage of the order of return passed by the Court. That order could not be regarded to be a final order in any sense. A.I.R. 1944 Lah. 158=46 P.L.R. 68=214 Ind. Cas. 10.

——Art. 182 (5)—Order merely returning execution petition—Petition not re-presented in time—Delay not excused—Order rejecting, if final.

An execution petition returned for amendment but not re-presented has no legal existence till it is re-presented and if it is re--presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. Where the delay is not excused the consequence is that there is no valid petition before the Court to be ordered or rejected. Consequently an order rejecting such petition cannot be deemed to be a final order within Art. 182 (5).

The fact that the petition was in accordance with law and was wrongly returned by the Court makes no difference. A.I.R. 1943 Mad. 297=(1942) 2 M.L.J. 768=I.L.R. (1943) Mad. 357=1943 M.W.N. 68=208 Ind. Cas. 361.

——Art. 182 (5)—Transferee Court not taking steps towards execution — Decree re-transferred to Court passing it—Order of re-transfer, if final.

Where the transferee Court has taken no steps towards the execution and the decree is re-transferred by it to the Court passing it, the order of re-transfer is not the final order on an application within the meaning of Art. 182 (5), Limitation Act. A.I.R. 1939 Cal. 741=43 C.W.N. 185=69 C.L.J. 562=185 Ind. Cas. 411.

——Art. 182 (5)—Decree passed in April 1927—First execution application consigned to record room on September 10, 1930—Application really under S. 39, C. P. Code for transfer of decree to other Court for execution but on wrong form made on May 7, 1932—Court returning application to be re-submitted within three days with copy of decree and list of accounts, on May 9, 1932—List of accounts submitted on September 1, 1932—Court again passing order that duplicate list and copy of decree should be submitted within three days—Decree-holder not complying with order applying on July 5, 1934, for transfer of decree, under S. 39, C. P. Code:

Held, that the application of 1932, under S. 39, C. P. Code, was valid and step-in-aid and subsequent application, therefore, was within time—Order of Court requiring papers to be supplied within three days was not final order and that proceedings remained pending. A.I.R. 1939 Oudh 118=1939 O.W.N. 267=180 Ind. Cas. 471.

——Art. 182 (5)—"Final order"—Application for transfer of decree—Court ordering remedying defects—Order held not final.

What is material under the amended Art. 182, cl. 5, is the date of the final order on the application and not the date of the application. The order need not be an order on the merits or a judicial determination of the matter involved in the application, but the words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned. It cannot mean the "last order" in point of time, irrespetive of whether it terminates the proceedings so far as the Court is concerned. When, therefore, the Court makes an order granting further time for remedying the defects in an application made to it for transer of the decree, the proceedings are not terminated and the order is not a final order within the meaning of cl. 5, Art. 182, Limitation Act. A.I.R. 1938 Mad. 113=(1937) M.W.N. 943=46 L.W. 540=I.L.R. (1938) Mad. 326=176 Ind. Cas. 753.

——Art. 182 (5)—Order returning petition.

An order directing the issue of notice on an application or returning an application for complying with certain conditions is not a final order within the meaning of this clause and will not give a fresh starting point for limitation. (1936) M.W.N. 582=44 L.W. 59=A.I.R. 1936 Mad. 613=71 M.L.J. 336=I.L.R. (1937) Mad. 112=163 Ind. Cas. 354.

——Arts. 182 (5) and 181—Final order—C. P. Code, O. 21, R. 2 (1)—Recording of payment under.

The certificate of a decree-holder under O. 21, R. 2 (1), C. P. Code is not an 'application within the meaning of Art. 181, Limitation Act and hence cannot be said to be a step-in-aid and the mere recording of payment by the Court under O. 21, R. 2 (1) is not a final order within the meaning of Art. 182 (5), Limitation Act. 10 O.W.N. 1251=A.I.R. 1934 Oudh 426=9 Luck. 288=147 Ind. Cas. 766.

——Art. 182 (5)—Order recording payment by Court, whether final order.

Per Full Bench.—The recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182 cl. 5. 9 O.W.N. 209=A.I.R. 1932 Oudh 148=7 Luck. 590=137 Ind. Cas. 768 (F.B.).

——Art. 182 (5)—Where a Court passes an order dismissing an application "for the time being" that is in no sense a final order so as to make application filed beyond three years of the date of that order out of time. 27 All. 334, Foll. 71 Ind. Cas. 963=A.I.R. 1923 All. 471.

7. (d) Cl. (5)—'Final order'—When appeal is filed.

——Art. 182 (5)—"Final order"—Order of executing Court dismissing judgment-debtor's objection upheld by High Court on appeal.

Where a miscellaneous case filed by the judgment-debtor objecting under S. 47, C. P. Code, to the maintainability of the execution case started by the decree-holder is dismissed by the executing Court and the High Court upholds the order of the executing Court on appeal, the order of the High Court is a final order in the execution case itself and not an order in a proceeding under S. 47, and the decree-holder is entitled to apply for execution within three years from the date of that order. A.I.R. 1950 Cal. 370.

——Art. 182 (5)—'Final order'—Meaning of—Appeal filed against order of executing Court.

The "final order" in Art. 182 (5) of the Limitation Act means the final order passed by the appellate Court on the application for execution, where an appeal has been filed against the order of the executing Court. 51 C.W.N. 316.

——Art. 182 (5)—Appeal or appication from order of executing Court on execution petition.

Where an appeal is preferred or an application is made to a superior Court from an order passed by executing Court on an application for

execution, the order passed by the superior Court is "final order" within Art. 182 (5) Limitation Act. A.I.R. 1944 Pesh. 5=211 Ind. Cas. 114.

8. Cl. (5) and Explanation II—"Proper Court".

(a) Court—What is.
(b) Transfer of decree for execution.
(c) Transfer of territorial jurisdiction.
(d) Other cases.

8. (a) Cl. (5) and Explanation II—"Proper Court"—Court, what is.

——Art. 182 (5)—'Court' — Collector—Application under S. 59 (1) (b) of Bombay Co-operative Societies Act.

An application under S. 59 (1) (b), Bombay Co-operative Societies Act, made to the Collector for the recovery of the amount of an award under this provision cannot be treated as an application to a Court for execution, or step-in-aid of the execution of the award within the meaning of Art. 182 (5), Limitation Act. A.I.R. 1938 Bom. 424 =40 Bom.L.R. 889=177 Ind. Cas. 897.

——Art. 182 (5)—Court — Collector — Co-operative Societies Act.

A Collector acting under R. 14 (5) made under S. 43, Co-operative Societies Act is not a Court and an application made to him for execution of a decision of the Registrar of Co-operative Societies is not an application to a Court so as to save limitation under Art. 182 (5). (1936) M.W.N. 25=43 M.L.W. 58=70 M.L.J. 31=A.I.R. 1936 Mad. 150=59 M. 257=160 Ind. Cas. 520.

——Art. 182 (5)—Obiter. Sending a money-order from a post office for subsistence allowance of a judgment-debtor cannot be held to constitute an application to a Court within the meaning of Art. 182 (5), Limitation Act. A.I.R. 1939 Rang. 406=1939 Rang.L.R. 508=185 Ind. Cas. 552.

——Art. 182 (5)—Remittance to Superintendent of Jail of subsistence allowance of judgment-debtor by postal money order.

Remittance by the decree-holder through postal money order to the Superintendent of jail of subsistence allowances necessary for the detention of the judgment-debtor in prison is sufficient to save limitation as a step-in-aid of execution within Art. 182 (5).

An application to the Superintendent of Jail should, in the circumstances, be considered to be an application made to the Court under Art. 182 (5) and the despatch by money-order amounts to an application. 36 M.L.W. 738=(1932) M.W.N. 1198=63 M.L.J. 792=A.I.R. 1933 Mad. 83=56 M. 320=140 Ind. Cas. 498.

8. (b) Cl. (5) and Explanation II—"Proper Court"—Transfer of decree for execution.

——Art. 182 (5) and C. P. Code, S. 48—Application on the last day by assignee decree-holder to a Court before his assignment mas recognised and the decree was transferred to it for execution —If a proper application made to a proper Court.

In respect of a decree obtained on 9th July, 1930, in the District Munsiff's Court at Bapatla an execution application was filel in that Court on 14th June, 1942, for recognizing the assignment of the decree in favour of the applicant and for tranfer of the decree together with the certificate to the District Munsiff's Court at Tenali for execution. But this was finally ordered only on 12th August, 1942, and the decree was transferred as prayed for by which time twelve years had elapsed from the date of the decree. Meanwhile on 9th July, 1942, the assignee decree-holder filed an execution petition in the District Munsiff's Court at Tenali mentioning the fact of the assignment of the decree to him and requesting that Court to execute it by attachment and sale of immoveable property. On a question whether the application to the District Munsiff's Court at Tenali was made to the proper Court.

Held, as until a Court has received the decree transferred to it for execution it has no jurisdiction to entertain an application for its execution, the Tenali Court had no jurisdiction to entertain the application of 9th July, 1942, when it was filed nor had the applicant any locus standi on that date to make the same since he was recognised as the assignee decree-holder only on 12th August, 1942, by which time execution had become barred. Hence that application was not one made to the proper Court within the time allowed by law. 1948 M.W.N. 708=A.I.R. 1949 Mad. 218=(1948) 2 M.L.J. 461.

——Art. 182 (5)—Step-in-aid — Execution application by legal representative of decree-holder to transferee Court before being brought on record.

A transferee of a decree must apply in execution to the Court which passed the decree though the decree may have been sent for execution to another Court. A Court to which a decree is transferred for execution is not the proper Court within the meaning of Art. 182 (5) of the Limitation Act. An execution application made to that Court by a person who has not been brought on record as the legal representatives of the decree-holder, is not therefore a step-in-aid of execution. I.L.R. (1947) Kar. 216=A.I.R. 1948 Sind 110.

——Art. 182 (5)—"Proper Court"—Transfer of decree—O. 21, R. 5, C. P. Code, not complied with—Application to transferee Court for execution — Step-in-aid — Jurisdiction of transferee Court.

The jurisdiction to transfer a decree for execution from one Court to another arises under S. 39 and not under Rr. 5 and 8 of O. 21, C. P. Code. Rr. 5 and 8 of O. 21, merely prescribe the procedure by which the transfer is to be carried out and does not touch the jurisdiction. The transferee Court acquires jurisdiction by the transfer under S. 39, C. P. Code. Hence an application to the transferee Court for execution after transfer, is made to the "proper Court" and is a step-

in-aid, notwithstanding that Rr. 5 and 8 of O. 21 C. P. Code have not been complied with; non-compliance with Rr. 5 and 8, is a mere irregularity and does not affect jurisdiction. 25 Pat. 50 =228 Ind. Cas. 195=12 B.R. 698=A.I.R. 1946 Pat. 301.

——Art. 182 (5)—"Proper Court"—Court which passed decree recognising assignment of decree and transferring it for execution to another Court —Application to latter Court—Step-in-aid. See C. P. CODE, O. 21, R. 16. 48 Bom.L.R. 583= A.I.R. 1947 Bom. 113.

——Art. 182 (5)—Decree transferred for execution—Report under S. 41, C. P. Code, not sent by transferee Court — Application for arrest of judgment-debtor made to transferee Court, if to 'proper Court'.

Unless in the order of transfer there is any express limitation of the purpose for which the transfer is made, there is no reason to limit the powers of the Court to which a decree has been transferred for execution. The original Court of jurisdiction is deprived of its power to execute its decree once the decree has been sent to another Court for execution till the certificate under S. 41, C. P. Code, is received from the transferee Court.

Where, therefore, a decree is transferred to another Court for execution and no report under S. 41, C. P. Code, is sent by such Court to the original Court so as to deprive the transferee Court of the power to execute the decree further, an application for the arrest of the judgment-debtor made to the transferee Court is one made to the 'proper Court'. A.I.R. 1938 Mad. 27=46 L.W. 565=(1937) M.W.N. 1086=(1937) 2 M.L.J. 602 =176 Ind. Cas. 327.

——Art. 182 (5)—Transfer of decree by Munsif to Subordinate Judge in same District—Irregularity in mode of transfer — Acquiescence by decree-holder—Subordinate Judge could execute the decree—Application for execution was pending in proper Court and the decree-holders could call in aid Art. 182 (5). 64 C.L.J. 47=A.I.R. 1936 Cal. 571=166 Ind. Cas. 374.

——Art. 182 (5)—Proper Court.

Transferee Court returning decree to parent Court according to R. 161 (a) of the Madras High Court Civil Rules of Practice after six months—Application made to transferee Court after return, is not made to 'proper Court' and does not save limitation. Remarks of Seshagiri Iyer, J., in 39 Mad. 485, Disappr. 98 Ind. Cas. 455=A.I.R. 1926 Mad. 1209=51 M.L.J. 554.

——Art. 182 (5)—'Proper Court'—Decree transferred for execution to another Court—Application to transferor Court before receipt of certificate of non-satisfaction—If step-in-aid.

An application for execution presented to the Court transferring the decree for execution to another Court, after it has transferred the decree to another Court and before the receipt of the certificate of non-satisfaction from the transferee Court, is not an application to the 'proper Court' which will save limitation under Art. 182 (5), Limitation Act. Such an application is not a step-in-aid of execution. 25 Pat. 790=A.I.R. 1947 Pat. 388.

——Art. 182 (5)—Decree transferred to another Court—Application to transferring Court without non-satisfaction certificate—Effect.

Where a decree has been transferred for execution to another Court, an application for execution of such decree made to the transferring Court after the transfer but before the receipt of a certificate of non-satisfaction from the transferee Court is not an application to the proper Court and is, therefore, not a step-in-aid of execution. 23 Pat. 729=A.I.R. 1945 Pat. 129=218 Ind. Cas. 352.

——Art. 182 (5)—Certificate of non-satisfaction not received from transferee Court—Fresh execution application to decree Court.

A fresh application for execution made to the decree Court before receiving a certificate of non-satisfaction from the transferee Court is not a step-in-aid of execution. A.I.R. 1940 Pat. 677 =19 Pat. 354=7 B.R. 745=191 Ind. Cas. 695.

——Art. 182 (5)—Transfer of decree to another Court for execution — Application to first Court to execute it or transfer it to another Court for execution or to transfer it to same Court for execution, made before proceedings taken in other Court have been certified before first Court:

Held, per Full Bench (Skemp, J. contra)— Such an application was a proper application and was a step-in-aid of execution. A.I.R. 1935 Lah. 465=37 P.L.R. 636=157 Ind. Cas. 488 (F.B.).

——Art. 182 (5)—Decree transferred for execution — Proper Court for substitution of legal representative of deceased judgment-debtor.

After a decree is transferred for execution to another Court, an application for the purposes of substitution of the legal representative of the deceased judgment-debtor or for setting aside the substitution order lies in the Court passing the decreee. It is the 'proper Court' as contemplated by Expln. II A.I.R. 1945 Oudh 298=1945 A. W.R. (C.C.) 137=20 Luck. 449=1945 O.W.N. (C.C.) 210=221 Ind. Cas. 681.

——Art. 182 (5)—An application by the sons of the deceased decree-holder under O. 21, R. 6, C. P. Code, to be brought on the record and for permission to continue the execution must be made to the Court passing the decree and not to the Court to which the decree is transferred for execution. Where the application is made to the transferee Court, it is not one made by the decree holder within the meaning of S. 2 (3), C. P. Code, and is not, therefore, a step-in-aid of execution. A.I.R. 1944 Mad. 363=(1944) 1 M.L.J. 156=57 M.L.W. 129.

——Art. 182 (5)—Proper Court—Akola Court transferring decree passed by it to Jalgaon Court for execution — Decree-holder A's application to Jalgaon Court disposed of on March 22, 1933 for want of bidders—A's Pleader at Jalgaon withdrawing copy of decree and certificate and keeping them with himself—A's decree attached in 1934 by B:

Held, that the application by A to Akola Court on December 4, 1935, for fresh certificate, and retransfer was to proper Court and that it also had effect of application for duplicates of necessary paper and saved limitation. A.I.R. 1943 Bom. 1=44 Bom.L.R. 830=I.L.R. (1943) Bom. 7=204 Ind. Cas. 285.

——Art. 182 (5)—Court transmitting decree.

The Court which has transmitted the decree still retains its jurisdiction to execute it under certain circumstances, and is "proper Court" within the meaning of Art. 182 (5). A.I.R. 1941 Mad. 858=54 M.L.W. 317=(1941) 2 M.L.J. 493=200 Ind. Cas. 287.

——Art. 182 (5)—Transferring Court.

When a Court transmits a decree to another Court for execution, it does not thereby divest itself of all its jurisdiction. It still retains that jurisdiction to take certain measures in execution, and it is the proper Court within the meaning of Art. 182 (5), Limitation Act. A.I.R. 1941 Mad. 731=(1941) 1 M.L.J. 837=54 L.W. 34=1941 M.W.N. 627=197 Ind. Cas. 261.

——Art. 182 (5)—"Proper Court", if includes Court which has already transferred decree for execution to another Court.

The expression "proper Court" as defined in Expl 2 to Art. 182, Limitation Act is not wide enough to include a Court which has already transferred a decree for execution to another Court. A.I.R. 1939 Pat. 144=17 Pat. 617=5 B.R. 465=20 P.L.T. 353=180 Ind. Cas. 311.

——Art. 182 (5)—Application for execution to Court which passed the decree and not to transferee Court, whether to proper Court.

After a decree has been transferred to another Court for execution, the proper Court to which a subsequent application for execution should be made is the transferee Court, as that is the Court whose duty it then is to execute the decree so far as it can be executed by that Court. Consequently, an execution application to the Court transferring the decree is not one made to a proper Court. 43 C.W.N. 185=69 C.L.J. 562=A.I.R. 1939 Cal. 741=185 Ind. Cas. 411.

——Art. 182, Cl. (5)—Where a decree is transferred for execution to another Court, an application for execution made to the Court transferring the decree after such transfer is not one made to the proper Court and is not, therefore, a step-in-aid of execution. 5 B.R. 333=20 P.L.T. 356=A.I.R. 1939 Pat. 289=180 Ind. Cas. 81.

——Art. 182 (5), C. P. Code (Act 5 of 1908), O. 21, R. 10—Transfer of decree — Application to Court which passed decree, whether application to 'proper Court'—Re-transfer after application, effect of.

A decree was passed by a Lahore Court. Execution was taken out in Lahore, but proved infructuous. On April 8, 1925, the Lahore Court transferred the decree to Sargodha, where on November 2, 1925, it was consigned to the record room as being unsatisfied. On October 29, 1928, the decree-holder put in a fresh application for execution in the Lahore Court. Subsequently, on April 3, 1929, the Sargodha Court returned the decree to the Lahore Court with a certificate of non-satisfaction. The judgment-debtor pleaded that the execution of the decree was barred by limitation as no application had been preferred to the proper Court within three years from November 2, 1925:

Held, that as the decree had been transferred, the proper Court to execute the decree was the Sargodha Court; that the application made to the Lahore Court in 1928, was not an application to the proper Court; that the subsequent sending of the certificate from Sargodha to Lahore did not cure the defect; and the execution proceedings had, therefore, come to an end by the expiry of more than three years from November 2, 1925. A.I.R. 1931 Lah. 14=130 Ind. Cas. 521.

——Art. 182 (5) — Proper Court — Transfer of decree for execution—Decree Court, if can transfer it to third Court—Such an application, if step-in-aid.

There is nothing in the C. P. Code, to prevent simultaneous execution of a decree in more than one Court, though it is a matter for the discretion of the Court to permit or refuse concurrent execution. The decree Court retains control over execution proceedings. Even after the transfer of the decree an application to the decree Court to transfer the decree to a third Court for execution is one made to the proper Court and amounts to a step-in-aid of execution. A.I.R. 1938 Mad. 113=(1937) M.W.N. 943=46 L.W. 540=I.L.R. (1938) Mad. 326=176 Ind. Cas. 753.

——Art. 182 (5)—Decree Court, if has jurisdiction after transfer to entertain application for transfer to third Court — Subsequent application for transfer to same Court.

After transfer, the decree Court has jurisdiction to entertain an application to transfer to a third Court. In other words, the transfer does not divest the decree Court of jurisdiction generally but only to the limited extent involved in the transfer (if, indeed, the transfer does involve any loss of power in the decree Court). A.I.R. 1937 Nag. 305=I.L.R. (1937) Nag. 440=173 Ind. Cas. 51.

——Art. 182 (5)—Transfer of decree—Subsequent application in transferring Court for return of decree with certificate of non-satisfaction from transferee Court.

The appellant obtained a decree against the respondent in the Court at Dacca. The decree was transferred to Court at Tangail for execution. Execution proceedings were eventually dismissed by the Tangail Court. On January 25, 1929, the appellant filed another application for execution in the Court at Dacca. Subsequently the decree, together with the certificate of non-satisfaction, was returned to the Dacca Court. The appellant's application, dated January 25, 1929, was registered and an order for issue of notice was passed. Notice was, however, not issued and the execution proceedings were dismissed:

Held, that as the application of January 25, 1929 was not made to the proper Court the fresh execution-application was time-barred.

Held, further that the transferring Court retained jurisdiction only for limited purposes, e.g., for dealing with applications for recording assignment of decrees under O. 21, R. 16, C. P. Code and applications against the legal representatives of the judgment-debtor. 37 C.W.N. 1167=58 C.L.J. 192=60 C. 1176=A.I.R. 1933 Cal. 906=149 Ind. Cas. 17.

——Art. 182 (5)—When a Court which has passed a decree sends it for execution to another Court, then the first Court ceases to be the proper Court within the meaning of Sch. 1, Art. 182 (5). 68 Ind. Cas. 506=24 Bom.L.R. 798=47 Bom. 56=A.I.R. 1922 Bom. 359.

——Art. 182 (5)—Proper Court—Decree transferred for execution — Subsequent application — Forum.

Where under S. 223 of the C. P. Code, 1882 (S. 39 of the C. P. Code of 1908) a District Court has transferred its decree for execution to the District Munsif's Court within whose Jurisdiction the properties of the judgment-debtor lay, and the District Munsif's Court continues to have seisin of the execution proceedings, the proper Court in which to apply for execution or take some step-in-aid of execution of the decree is the Court of the Munsif. An application, under the above circumstances, made to the District Court will not save time under Art. 182 of the Limitation Act. 39 Mad. 640=31 M.L.J. 300=18 Bom. L.R. 909=14 A.L.J. 1129=20 M.L.T. 472=24 C.L.J. 478=4 L.W. 558=(1916) 1 M.W.N. 541 =21 C.W.N. 162=1 Pat.L.W. 26=43 I.A. 238 =36 Ind. Cas. 682 (P.C.). [On appeal from 37 Mad. 231=23 M.L.J. 236=(1912) M.W.N. 721 =12 M.L.T. 119=15 Ind. Cas. 738.]

8. (c) Cl. (5) and Explanation 2—'Proper Court'—Transfer of territorial jurisdiction.

——Art. 182 (5)—Subsequent to mortgage-decree, area of mortgaged property assigned to another Court—Execution application filed in latter Court, if one made to proper Court and if saves limitation.

Where, subsequent to the passing of a mortgage decree, the area where the mortgaged property was situated was assigned to another Court and the decree-holder filed an application for execution in the latter Court.

Held, that the first Court did not cease to have jurisdiction to execute the decree and the latter Court could not, therefore, be regarded as the Court which passed the decree within the meaning of S. 37, C. P. Code. The decree-holder could not take the advantage of S. 150, C. P. Code as there was no transfer of business. A.I.R. 1942 Cal. 321=I.L.R. (1942) 1 Cal. 289=46 C.W.N. 141=75 C.L.J. 255=201 Ind. Cas. 234.

——Art. 182 (5)—Mortgage decree—Transfer of territorial jurisdiction to another Court after decree — Application for execution to latter Court, validity of.

Where, after the passing of a mortgage-decree, there is some alteration in the territorial jurisdiction and the mortgaged properties fall within the jurisdiction of another Court, the proper Court to is the Court which passed the decree. (1935) M. which an application for execution should be made W.N. 116=A.I.R. 1935 Mad. 935=69 M.L.J. 466=42 L.W. 856=158 Ind. Cas. 811.

——Art. 182 (5)—Property passing into another Court's jurisdiction—Application to Original Court is a step-in-aid.

A decree was being executed in the Court of S.J., at Dhulia against two defendants both of whom had properties within the jurisdiction of the Court. During the pendency of the execution proceedings, the property of defendant No. 2 passed under the jurisdiction of the Jalgaon Court,

Held, on the question of limitation for an execution application made to the Jalgaon Court that the original application to the Dhulia Court was a step-in-aid of execution but the proper order for the Dhulia Court to make was to transfer the decree or a certified copy thereof so far as it concerned the defendant No. 2 to the Jalgaon Court. 42 Mad. 821 (F.B.), Foll. 89 Ind. Cas. 87=27 Bom.L.R. 649=A.I.R. 1925 Bom. 414.

——Art. 182 (5)—Proper Court—Execution application—Cessation of territorial jurisdiction.

A Court which passes a mortgage decree is the proper Court for execution even though the property over which it had jurisdiction at the time of the decree is taken away from its jurisdiction and assigned to another Court at the time of the presentation of the application for execution. 37 Mad. 462, Overruled. 42 Mad. 821=37 M.L.J. 284=26 M.L.T. 223=11 L.W. 63=(1919) M.W.N. 640=53 Ind. Cas. 213.

——Art. 182 (5)—Proper Court — Application to Court which passed the decree—Transfer of jurisdiction.

Application for execution lies to the Court within whose jurisdiction the property is situated against which the decree is to be executed and not the former Court within whose jurisdiction

the properties originally were and which had passed the decree. (1917) M.W.N. 788=6 L. W. 775=42 Ind. Cas. 671.

——Art. 182 (5)—Proper Court—Decretal Court ceasing to have jurisdiction

Where the Court which passed a decree has ceased to have jurisdiction to execute it the only Court which can execute the decree is the Court which, at the time of filing the execution application would have jurisdiction to try the suit in which the decree sought to be executed was passed. 22 Ind. Cas. 899; 27 Ind. Cas. 88, Foll. 31 M. L.J. 90=20 M.L.T. 327=35 Ind. Cas. 237.

8. (d) Cl. (5) and Explanation 2—"Proper Court"—Other cases.

——Art. 182 (5) and Expl. (2)—Suit under O. 21, R. 63, C. P. Code, cannot be deemed to be filed in 'proper Court' (Semble).

The Court in which a suit under O. 21, R. 63, C. P. Code is filed cannot be deemed to be the proper Court within the meaning of Art. 182, because the circumstances that a suit of this nature happens to be filed in the Court in which the execution proceedings are going on must be purely accidental and cannot, therefore, be held to amount to compliance with the requirement of law. A. I.R. 1946 Bom. 187=225 Ind. Cas. 142=I.L.R. (1945) Bom. 893=47 Bom.L.R. 848.

——Art. 182 (5) and Expl. (2)—The Court in which the suit under O. 21, R. 63, C. P. Code is filed cannot be regarded as a 'proper Court' within the meaning of Art. 182, Expl. 2. A.I. R. 1942 Mad. 5=54 M.L.W. 45=1941 M.W.N. 752=(1941) 2 M.L.J. 754=200 Ind. Cas. 815.

——Art. 182 (5)—Plaint in suit under O. 21, R. 63.

An application which is to save limitation under Art. 182 (5), must be made 'to the proper Court for execution,' a suit to have an order in claim case set aside cannot be treated as an application under Art. 182 (5).

A suit under O. 21, R. 63, C. P. Code, cannot keep the execution proceedings pending when there has been a definite order of the executing Court dismissing the execution application; in such a case, if the decree-holder succeeds in the suit, he will have to file a fresh application for execution and re-attach the property. A plaint in such a suit cannot, therefore, be treated as an application within the meaning of Cl. (5) of Art. 182.

Nor can the filing of such a suit be an application to the proper Court for execution when the filing of the suit in the Court which has jurisdiction to execute the decree or in some other Court must depend upon the fortuitous circumstance of the value of the attached property. A.I.R. 1939 Rang. 296=1940 Rang.L.R. 82=185 Ind. Cas. 70.

——Art. 182 (5)—Proper Court — Insolvency Court.

The phrase 'made in accordance with law to the proper Court' in Art. 182 (5), Limitation Act is to be read also along with the concluding words 'to take some step-in-aid of execution.'

A decree was passed against two brothers jointly. After about five years one of the brothers was adjudged an insolvent and was discharged one year later. The decree-holder sought to deduct the period spent in insolvency proceedings on the ground that these proceedings were steps-in-aid of execution:

Held, that the Insolvency Court was not the proper Court for execution and so the period could not be deducted. A.I.R. 1941 Nag. 60=1940 N.L.J. 605=I.L.R. (1942) Nag. 306=1942 N.L.J. 294=191 Ind. Cas. 554.

——Art. 182 (5)—Application to the Insolvency Court for leave to proceed in execution against the debtor is not an application to the 'proper Court.'

The Insolvency Court which is entirely a creature of the Provincial Insolvency Act is a different Court from the Court which is to execute a decree obtained independently of the Insolvency Act, and the mere fact that the Judge is the same person will not make the two Courts the same. 39 L. W. 639=A.I.R. 1934 Mad. 392=57 M. 808=67 M.L.J. 762=150 Ind. Cas. 113.

——Art. 182 (5)—Proper Court — Application, which, on face of it, is made to Court having jurisdiction.

Where it has not been shown that the decree-holder knew that the judgment-debtor lived outside the jurisdiction of the Court and the application for his arrest is made on the face of it to the Court which had jurisdiction, it cannot be said that the application is not made to the proper Court. A.I.R. 1939 Rang. 345=184 Ind. Cas. 769.

——Art. 182 (5)—Decree obtained in Small Cause Court—Suit in Munsif's Court for declaration that property of judgment-debtor is attachable in execution of decree—Plaint, if step-in-aid— Munsif's Court, if 'proper Court'.

Where a decree is obtained in a Small Cause Court and subsequently a plaint is filed in a Munsif's Court for a declaration that certain property of the judgment-debtor is attachable in execution of the above decree, although the plaint can be treated as a step-in-aid yet when the decree has not been transferred to the Munsif's Court for execution before the plaint is filed, that Court cannot be held to be the 'proper Court' within the meaning of Art. 182, Limitation Act and Cl. (5) of the article will not apply for the purpose of saving limitation. A.I.R. 1935 Oudh 430=1935 O.W.N. 672=11 Luck. 266=155 Ind. Cas. 505.

——Art. 182 (5)—An application by a decree-holder to the Collector for declaration of his mortgage lien is not an application made to the proper Court to take some step-in-aid of execution of the decree for sale of the mortgaged property, the

Collector not being 'the Court whose duty it is to execute the decree' within the meaning of Expl. 2, Art. 182, Limitation Act. A.I.R. 1933 Oudh 564=10 O.W.N. 1229=17 R.D. 1056=9 Luck. 273=146 Ind. Cas. 805.

——Art. 182 (5)—Application to Court which passed decree for sale of properties outside its jurisdiction is an application to proper Court. 52 C.L.J. 569=A.I.R. 1931 Cal. 312=35 C.W.N. 77=58 C. 832=132 Ind. Cas. 149.

——Art. 182 (5)—An Additional District Munsif's Court was directed not to receive plaints or applications except those specifically transferred to it. A suit was transferred and disposed of but execution applications therein were prohibited to be taken by the Additional District Munsif. In pursuance of this order a decree-holder filed successive applications for exscution, within the period of limitation, in the Principal District Munsif's Court. Finally he filed an execution application in the Additional District Munsif's Court.

Held, that the applications filed before the Principal District Munsif's Court were fresh starting point under the Limitation Act. 119 Ind. Cas. 398=30 M.L.W. 381=A.I.R. 1929 Mad. 787=57 M.L.J. 234.

——Art. 182 (5)—Decree-holder applying to Court which passed decree to issue notice to judgment-debtor who was then outside that Court's jurisdiction—Application made bona fide for executing decree—Application is to proper Court and legal—It is step-in-aid of execution. 116 Ind. Cas. 474=A.I.R. 1929 Rang. 95.

——Art. 182 (5)—Proper Court — Court in Native State and British Court.

Application to Court of Native State having agreement with British Government to execute each other's decrees is a step-in-aid. 40 Mad. 1069 (F.B.) Not foll. 31 Bom.L.R. 1105=53 Bom. 844=A.I.R. 1929 Bom. 418.

——Art. 182 (5)—Court in Native State if "proper Court."

When a decree is passed by a Court in a Native State as to which action has been taken by the Government under C. P. Code, S. 44, and is transferred to a Court in British India for execution, execution proceedings pending before the Court in the Native State would save limitation under Art. 182 (5). 59 Ind. Cas. 747=45 Bom. 453=A.I.R. 1921 Bom. 256.

——Art. 182 (5)—Proper Court—Decree of a Court in a Native State—Application for transfer for execution in British Court.

An application for execution of a decree passed by the Court of a Native State to that Court would save limitation in respect of a subsequent application for execution of the decree in a British Court under S. 44 of the C. P. Code. 22 Bom. L.R. 1389=59 Ind. Cas. 747.

——Art. 182 (5)—Proper Court — Application to British Court for execution of a decree in an Indian State.

An application to a foreign Court to execute the decree of a British Court under powers conferred upon it by the legislative authority of its own State is not an application "in accordance with law to the proper Court for execution" within Art. 182 of the Limitation Act. Similarly an application to a British Court to take a step-in-aid of the execution by a foreign Court of a decree of a Court in British India is not an application to take a step-in-aid of execution. 40 Mad. 1069=33 M.L.J. 130=6 L.W. 203=(1917) M.W.N. 712=22 M.L.T. 139=42 Ind. Cas. 294 (F.B.).

——Art. 182 (5) — Proper Court — Execution against talukdar — Certificate, absence of.

Per Marten, J —(Shah J. Dissenting). An application for execution against a talukdar without a certificate under S. 29 (e) of the Gujarat Talukdar's Act, is not made to the proper Court as defined in Explanation II to Art. 182 of the Limitation Act as it was the duty of no Court to execute the decree or order there being no certificate from the managing officer. 43 Bom. 44=20 Bom.L.R. 872=47 Ind. Cas. 726.

——Art. 182 (5)—Step-in-aid — Application in accordance with law—Proper Court.

A vakalatnama enures upto the end of the execution proceedings. Where a receiver was appointed in execution proceedings and when the decree-holder applied to the Court that the Receiver should pay money to him, his application must be taken to have been made to the Court which was executing the decree and was accordingly to law. (1917) Pat. 100=42 Ind. Cas. 802.

——Art. 182, Expln. II—Proper Court—Pecuniary jurisdiction.

Where a decree for over Rs. 1,000 has passed by a munsiff having jurisdiction up to Rs. 2,000 and an application for its execution was presented to his successor who had jurisdiction to try suits up to Rs. 1,000 value only, the District Judge was wrong in holding that there was not an application made to the proper Court and that the second application was barred by limitation. 2 Pat.L.J. 113=1 Pat.L.W. 689=(1917) P.H.C.C. 116=39 Ind. Cas. 63.

——Art. 182, Expln. II — Proper Court—Meaning of.

'Proper Court' as defined in Art. 179, Expl. II means the Court whose duty it is to execute the decree. Application to take some step-in-aid of execution so that it may be in accordance with law, must be framed for some relief which the Court can grant. 10 C.L.J. 19=2 Ind. Cas. 941.

9. Cl. (5)—Step-in-aid.

See also: Notes 12 and 14(b).

Synopsis.

(a) Essentials
(b) Application by assignee or transferee of decree
(c) Application for final or personal decree or for preparation of decree
(d) Application for leave to bid
(e) Application for possession
(f) Application for substitution of legal representatives
(g) Application for time
(h) Application returned for amendment
(i) Attachment of decree
(j) Drawing of money from Court
(k) Filing or defending of appeal
(l) Notice
(m) Oral application
(n) Payment and certification of payment
(o) Process
(p) Recovery of instalment
(q) Transfer of decree
(r) What is—(Miscellaneous)
(s) What is not—(Miscellaneous)
(t) Starting point of limitation.

9 (a). Step-in-aid—Essentials.

(i) General requirements
(ii) Bona fides of decree-holder
(iii) Infructuous application
(iv) Pendency of execution application

9 (a) (i). Step-in-aid—Essentials—General requirements.

——Art. 182 (5)—Applicability—Essentials for, stated.

In order that Cl. (5) of Art. 182 may apply there must be three things: first, an application made in accordance with law; secondly, the application must be made to the proper Court, and, thirdly, it must be either for execution or to take some step-in-aid of execution. The words, "to take some step-in-aid of execution" cannot be read independently of the word "application". A.I.R. 1946 Bom. 187=47 Bom. L.R. 848.

——Art. 182 (5)—Conditions to be satisfied under Cl. 5.

In order to bring a case under Cl. 5 of Art. 182, Lim. Act, the essential conditions which must be satisfied are that there must be: (a) an application in accordance with law; (b) the application must be made to the proper Court; and (c) the application must be to take some step-in-aid of execution of the decree. A.I.R. 1933 Oudh 564=10 O.W.N. 1229=17 R.D. 1056=9 Luck. 273=146 Ind. Cas. 805.

——Art. 182 (5)—Application to proper Court—Necessity for

In order to bring a case under Art. 182 (5), essential conditions which must be satisfied are that there must be (a) an application in accordance with law; (b) the application must be made to the proper Court and (c) the application must be to take some step-in-aid of the execution of the decree. Clause (5) cannot, therefore, apply unless there is an application to the proper Court. 8 O.W.N. 769=A.I.R. 1931 Oudh 356=7 Luck. 38=132 Ind. Cas. 797.

——Art. 182 (5)—Requirements—Step-in-aid.

To consider whether the prior application is a step-in-aid of execution, what has to be decided is whether it was in accordance with law. If it was in accordance with law, then it serves as a step-in-aid of execution and the final order passed on such application gives a fresh start. It is not every defect in execution application that will render the application "not one" in accordance with law. The decree-holder may have persistently refused to carry out certain directions of the Court which were directed to be done; but that is no ground for saying that the application is not a step-in-aid of execution. 58 M.L.W. 379 (2)=(1945) 2 M.L.J. 152=1945 M.W.N. 491=A.I.R. 1945 Mad. 511.

——Art. 182 (5)—Previous execution application, when effective.

Under the terms of Cl. (5) of Art. 182, the previous application, to be effective, must be one "made in accordance with law"; i. e., in accordance with the law relating to the execution of the decrees, otherwise, the date of the final order passed on it cannot constitute a fresh starting point of limitation. A.I.R. 1943 P.C. 98=47 C.W.N. 715=(1043) 2 M.L.J. 121=56 L.W. 444=(1943) A.L.J. 323 (2)=10 B.R. 49=1943 M.W.N. 565=I.L.R. (1943) Nag. 669=1943 N.L.J. 587=70 I.A. 83=46 Bom. L.R. 306=1943 A.W.R. 11=I.L.R. (1943) Kar. (P.C.) 109 Sup.=208 Ind. Cas. 102 (P.C.).

——Art. 182 (5).

The phrase, "in accordance with law" in Art. 182(5), Lim. Act is equally adjectival to the words "to take some step-in-aid of execution." Hence an application to be step-in-aid of execution must be in accordance with law. A.I.R. 1944 All. 35=1944 A.W.R. 7=I.L.R. (1944) All. 183=(1943) A.L.J. 607=1944 O.W.N. 53=211 Ind. Cas. 467.

——Art. 182 (5).

The expression "in accordance with law" is adjectival, both "to the proper Court for execution" and "to take some step-in-aid of execution". 27 S.L.R 314=A.I.R. 1933 Sind 341=147 Ind. Cas. 470.

——Art. 182 (5).

The application or step-in-aid of execution of the nature referred to in Art. 182 (5), can be only in accordance with law if the application is made or the step-in-aid of execution is taken in a Court of competent jurisdiction and if the prayer that is made by the decree-holder is one which the Court can lawfully grant. A.I.R. 1939 All. 57=(1938) A.L.J. 1128=I.L.R. (1939) All. 97=1938 A.W.R. 763=180 Ind. Cas. 403.

——Art. 182 (5).

The Courts, while keeping the provisions of the law of limitation in their mind, should put a large any generous interpretation upon the proceedings taken be the decree-holder as would advance substantial justice and not defeat the just rights of people who, perhaps after years of protracted litigation, sometimes in three or four Courts, have at last obtained a decree. There is no magic in the pharase, "step-in-aid of execution" as used in Art. 182 (5). Speaking generally, anything done by the decree-holder through the machinery of the Court or any proceeding taken by the executing Court, which is calculated to advance the case of the decree-holder in the direction of his ultimate object of reaping the fruits of his decree, can be treated as a step-in-aid of execution and save the running of limitation against him. Each case, of course, would depend upon its own facts and circumstances and no hard and fast rule can be laid down to meet every possible contingency which might arise in the course of execution proceeding. A.I.R. 1937 Lah. 404=39 P.L.R. 683=173 Ind. Cas. 185.

——Art. 182 (5)—The article should be liberally construed in favour of the decree-holder.

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree holder to obtain the fruits of his decree. The language of the article ought not to be strained in the judgment-debtor's favour. 39 Mad. 923, **Foll.** 103 Ind. Cas. 279=A.I.R. 1927 Nag. 308.

——Art. 182 (5)—Construction of.

The language of Art. 179 of the Lim. Act, 1877, ought not to be strained in favour of a judgment-debtor who has not paid his just debt. 13 C.W.N. 533=9 C.L. J. 443=1 Ind. Cas. 57.

——Art. 182 (5)—Tests.

Step-in-aid of execution may be broadly divided into two classes. One of them comprises steps taken with the object of removing certain obstacles in the way of execution. The other consists of steps directed to the furtherance or advancement of execution. For the purpose of determining whether a particular step does or does not consititute a step in-aid of execution, it is immaterial whether the step is, in result, successful or not. 1936 O.W.N. 134=1936 R D. 72=A.I.R. 1936 Oudh 248=11 Luck. 716=160 Ind. Cas. 465.

——Art. 182 (5)—Essentials.

A step-in-aid in accordance with law must be some step taken in aid of executionn and when an application is made relating to the execution of a decree but the applicant does not state what step he wishes to be taken, that application will not come under Art. 182. 36 Bom. L.R. 115=A.I.R. 1934 Bom. 113 =150 Ind. Cas. 866.

——Art. 182 (5).

It is settled law so far as Madras is concerned that a step-in-aid of execution must fulfil two conditions: (1) The step is one which the Court has to take and (2) the Court must be asked to take it. (1933) M.W.N. 352=38 L.W. 301=65 M.L. J. 271=A.I.R. 1933 Mad. 675=145 Ind. Cas. 933.

——Art. 182 (5).

When a decree-holder asks a Court to do a thing which the court is not empowered to do, such an application cannot be held to be step-in-aid or execution.

An application for execution presented to a Court which had no jurisdiction to execute the decree is not a step-in-aid of execution, and therefore, will not save limitation. A.I.R. 1932 Pat. 309=13 P.L.T. 498=11 Pat. 785=142 Ind. Cas. 155.

——Art. 182 (5).

It is not possible to lay down any rule of thumb which might constitute a criterion in all cases for determining whether a particular proceeding is or is not a step-in-aid of execution. The question must depend upon the circumstances of each case. If the facts of a particular case show that the proceeding in question has the effect of facilitating or advancing the execution to any extent or removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution. 9 O.W.N. 209=A.I.R. 1932 Oudh 148=7 Luck. 590=137 Ind. Cas. 768 (F.B.).

——Art. 182 (5)—Words 'for execution' and 'step-in-aid' explained.

The words "for execution" in Art 182 (5) mean "for the purpose of obtaining execution" and the words "step-in-aid of execution" mean "step taken for the purpose of obtaining execution". 90 Ind. Cas. 938=48 All. 468=24 A.L.J. 137=A.I.R. 1926 All. 95.

——Art. 182 (5).

An application to be a step-in-aid of execution must be one in furtherance of execution proceedings. 98 Ind. Cas. 156=50 Mad. 49=24 M.L.W. 488=A.I.R. 1926 Mad. 1178=51 M.L. J. 480.

——Art. 182 (5).

Application not indicating how the Court is to assist decree-holder is not a step-in-aid. 93 Ind. Cas. 364=41 C.L. J. 607=A.I.R. 1925 Cal. 1135.

——Art. 182 (5).

It has never been held necessary that an execution application in order to save limitation should be directed to the same property or even indeed the same person. 74 Ind. Cas. 1014=A.I.R. 1923 All. 384.

——Art. 182 (5)—Step-in-aid—Test of—Application for execution—Endorsement by Court that the decree-holder does not wish to proceed with the execution.

A decree was passed in the 3rd September 1901 and the judgment-creditor applied for execution on 31st July 1903. Notice was issued under S. 248, C. P. Code but was twice returned unserved. Ultimately, it was served and an affidavit of service was filed by the creditor on the 11th November 1903. The Court endorsed on the application on 9—12—'03 that as a third person had undertaken to pay the sum of Rs. 8 and the judgment creditor did not wish to proceed with the execution:

Held, that the affidavit, dated the 11th November 1903 certified only the service of notice on the judgments-debtor and not an application at all; and that

the endorsement dated the 9th December 1903, far from constituting a step-in-aid, a step-in-hindrance of execution. 11 Bom. L.R. 729=3 Ind. Cas. 771.

——Art. 182 (5)—Step-in-aid—Meaning of.

"To take some step-in-aid of the execution of a decree", means to reach a further point along one of the routes to obtain execution, i. e., to obtain some order of the Court in furtherance of the execution of the decree. (1903) 30 C. 761=8 C.W.N. 251.

——Art. 182 (5)—Application in wrong Court—Whether step-in-aid.

An execution application made in a wrong Court is not a step-in-aid of the execution. A.I.R. 1938 Lah. 451=40 P.L.R. 721=177 Ind. Cas. 483.

——Art. 182 (5)—Application of execution not made to proper Court whether saves limitation.

First application of execution on 3—2—13 after final decree on 27—4—1910 to improper Court was infructuous. On 14—7—1915 another application was made to a Court having no jurisdiction. That Court gave a finding that it had no jurisdiction. This finding not being appealed against was held to operate as **res judicata** between parties. Therefore the application of 3—2—1913 did not operate to save limitation. 15 A.L. J. 415=39 Ind. Cas. 796.

9 (a) (ii). Step-in-aid—Essentials—Bona fides of decree-holder.

——Art. 182 (5) — Application for execution — Whether it is necessary for the Court to see that application was made bona fide.

When an application for execution is made all that is required under Art. 182 (5), is to see that the application is made in accordance with the law applicable thereto; it is made to the proper Court and is a step-in-aid of execution. It is not necessary for the Court to be satisfied that the application is made **bona fide.**

Before the amendment introduced by the Amending Act of 1927, it was the application and not the result of the application which was contemplated as being sufficient to save limitation. 11 O W.N. 41=66 M.L J. 79=A.I R. 1934 P.C. 14=(1934) A L. J. 110=39 L.W. 126=(1934) M.W.N. 33=36 Bom. L.R. 237=35 P.L.R. 189=38 C.W.N. 229=15 P.L.T. 221=59 C.L. J. 103=3 A.W.R. 33=61 I.A. 62=55 A. 993=147 Ind. Cas. 323 (P.C.).

——Art. 182 (5)—Execution petition to save limitation need not be bona fide.

An execution application made to a proper Court and outwardly at least in accordance with law is one made in accordance with law within the meaning of Cl. (5) of Art. 182 even if it is made merely for the purpose of gaining time and keeping the decree alive. A.I.R. 1943 Sind 29=I.L.R. (1942) Kar. 448=205 Ind. Cas. 96.

——Art. 182 (5)—Application for execution by issuing notice merely for saving limitation.

Applications for execution by issuing notice, made merely for the purpose of saving limitation are legal, and do operate to extend the time for limitation even if there is no genuine intention to proceed at the time and take further steps, and whether the proceeding end in a voluntary withdrawal or in any other way. A.I.R. 1939 Rang. 433=1939 Rang. L. R. 587=186. Ind. Cas. 42.

——Art. 182 (5)—Bona fides **of decree-holder.**

The question of **bona fides** of the decree-holder is immaterial in considering the question of limitation for an application for execution. A.I.R. 1931 Sind 160=25 S.L.R. 528=134 Ind. Cas. 1182.

——Art. 182 (5)—Application filed merely to keep decree alive, whether saves limitation.

A decree-holder or a person applying for execution of a decree is not called upon to satisfy the Court that a previous application for execution or for some step-in-aid of execution from which he seeks to reckon the period of limitation for his next application had been made with a genuine intention of obtaining execution of his decree, if reasonably possible and that he did not abandon the proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution. It is not open to the execution Court to go into the question of the **bona fides** of the application for execution. If the application purports to be one for execution and fulfils the requirements of O. 21, R. 11, Civil P.C., it is a good and valid application and is operative for the purpose of saving limitation, it being immaterial whether the decree-holder was anxious to have immediate execution or merely wanted to make this application with a view to keep his decree alive. (1931) 131 Ind. Cas. 678

——Art. 182 (5)—Application filed merely to save limitation—Dismissal for default.

Where a decree-holder's previous application for execution is dismissed for default, and even if he states that it was filed merely with the intention of saving limitation and not with the intention of securing execution, such application will extend time. 1930 A.L. J. 1463=A.I.R. 1930 All. 814.

——Art. 182 (5).

Application in accordance with law to proper Court is sufficient—**Bona fide** intention to execute need not be shown. It is wrong to read in Cl. 5, Art. 182, requirements of good faith and due diligence. 118 Ind. Cas. 17=1929 A.L. J. 983=A.I.R. 1929 All. 625 (F.B.).

——Art. 182 (5)—Bona fides**—Necessity of.**

The **bona fides** or **mala fides** of the earlier application is an important ingredient in determining whether that application is effective to save limitation for the later application, though the **bona fides** or **mala fides** of the later application cannot be judged at the time that it is presented from any thing that has gone before and therefore cannot at the time of presentation be entered into. 90 Ind. Cas. 938=48 All. 468=24 A.L.J. 137=A.I.R. 1926 All. 95.

——Art. 182 (5).

A colourable application intended to save limitation and with that intention only, without any intention to prosecute the same, is of no avail in saving limitation as step-in-aid. 90 Ind. Cas. 938=48 All. 468=24 A.L. J. 137=A.I.R. 1926 All. 95.

——Art. 182 (5).

A bogus application merely for the purpose of saving limitation and with little care so proceed therewith is an abuse of the process of the Court, and, therefore, cannot be considered one in accordance with law. A defective application unless admitted by Court does not save limitation. 93 Ind. Cas. 369= A.I.R. 1926 All. 376.

9 (a) (iii). Step-in-aid—Essentials—Infructuous application.

——Art. 182 (5)—Application closed due to inability of decree-holder to furnish particulars of interest due.

Quaere.—Where an execution petition is closed by the decree-holder on request on the ground of his inability to furnish particulars of interest due, whether he can rely upon that application for the purpose of saving limitation in respect of subsequent application for execution. A. I. R. 1939 Rang. 345=184 Ind. Cas. 769.

——Art. 182 (5)—Step-in-aid—Rejection of application.

A decree-holder made application for execution including in it two decrees against the same judgment-debtor. The application being defective in respect of one of them, it was rejected without notice to judgment-debtor. Within three years of this, he filed another application with regard to the other decree, but more than three years of the date of the decree:

Held, that no question of **res judicata** could arise from the order on the prior application as it was not **inter partes** and was merely the rejection of an application by the Court. Further, the application was one which would save limitation as regards this decree, as it was one in accordance with law and hence as a new start for limitation arose from the order rejecting that application, the subsequent application for execution was not time-barred. A.I.R. 1936 All. 467=(1936) A.L.J. 571=1936 A.W.R. 527= 163 Ind. Cas. 841.

——Art. 182 (5).

An application in substantial compliance with the law will save limitation whether admitted, rejected, returned or allowed to be amended. A.I.R. 1934 Pat. 289=149 Ind. Cas. 102.

——Art. 182 (5).

The fact that the application for execution is withdrawn or struck off at the request of the decree-holder does not prevent it from giving rise to a new starting point for the period of limitation. A.I.R. 1933 Rang. 87=142 Ind. Cas. 435.

——Art. 182 (5)—Application returned under misapprehension regarding jurisdiction.

Where a Court retains jurisdiction to execute a decree, the mere fact that an application for execution properly made to that Court is returned by it under a mis-apprehension will not prevent the application from being tantamount to an application to take a step-in-aid of execution. 11 Pat. 513=13 P.L.T. 623=A.I.R. 1932 Pat. 286=139 Ind. Cas. 843.

——Art. 182 (5)—Application dismissed in default without determination as to its propriety.

An application for execution, which has been rejected, is only ineffective for the purposes of saving limitation when the order of rejection amouts to a finding that the application was not in accordance with law. An application which has been dismissed in default without any determination as to the propriety of the application, is effective for the purposes of saving limitation. A.I.R. 1935 Nag. 131=31 N.L.R. 333=156 Ind. Cas. 114.

——Art. 182 (5)—Rejected application, whether saves limitation—Tests.

Whether an application for execution that has been rejected must be regarded as not having been made at all for purposes of Art. 182, depends upon the terms of the order of rejection. If this order amounts to a finding that the application was not in accordance with law, the application is ineffectual to stay the running of limitation; if not, the Court must look to the application itself to see whether it is in accordance with law or not. A.I.R. 1931 Nag. 154=14 N.L.J. 101=28 N.L.R. 7=134 Ind. Cas. 681 (F.B.).

——Art. 182 (5)—Step-in-aid—Dismissal of application for default.

Where a decree-holder's previous application for execution was dismissed for default, and even if he states that it was filed merely with the intention of saving limitation and not with the intention of securing execution such application will extend time. 1930 A.L.J. 1463=A.I.R. 1930 All. 814.

——Art. 182 (5).

Execution application filed after limitation—Warrant of arrest ordered — Costs not deposited—Subsequent application for execution though filed within time from prior one is not within time, first application being infructuous. 22 Bom. 83, **Foll.** 114 Ind. Cas. 674= 6 Rang. 566=A.I.R. 1928 Rang. 317.

——Art. 182 (5)—Execution application represented in time but dismissed on ground of too great delay—Application is step-in-aid.

Where the decree-holder upon his presenting an execution application was asked to explain how the application was not time-barred, which he explained accordingly and re-presented the application in time but somehow the application was dismissed on the ground that the delay in re-presentation was too great:

Held, that the application was a step-in-aid. 1915 M.W.N. 865, 12 L.W. 1207 and 2 L.W. 540, Foll. 88 Ind. Cas. 88=21 M.L.W. 541=A.I.R. 1925 Mad. 714.

——Art. 182 (5)—Application in accordance with law—Subsequent default—C.P. Code, O. 21, R. 22.

A valid application in accordance with law cannot be invalidated by any subsequent act or default of the decree-holder, such as the non-payment of process fees. An application under O. 21, R. 22 for execution of a decree with a prayer for substitution of the legal representatives of the deceased judgment-debtor is a step-in-aid though it is eventually dismissed for non-payment of process fees. 31 C.L.J. 389=55 Ind. Cas. 231.

——Art. 182 (5)—Step-in-aid—Infructuous application.

An informal application, though infructuous to carry on the proceedings in execution, may still operate to keep the decree alive. (1914) M.W.N. 372=15 M.L.T. 337=23 Ind. Cas. 99.

——Art. 182 (5)—Step-in-aid—Application withdrawn.

An application for the execution of a decree was withdrawn as the judgment-debtor objected that the decree had been transferred to the decree-holder's benamidar and re-transferred to the decree holder:

Held, that the application was a step-in-aid of execution and saved limitation. 15 C.W.N. 71=8 Ind. Cas. 833.

——Art. 182 (5)—Application in accordance with law—Defective application—Rejection.

An application for execution of a decree does not cease to be "in accordance with law" though it is rejected as not being on durable paper. Such a rejection does not nullify the act of applying itself. 3 S.L.R. 171=4 Ind. Cas. 1154.

——Art. 182 (5), (Art. 179)—Step-in-aid of execution—Withdrawal of former application, if is.

Where the decree-holder applied for execution of a decree and withdrew the application on the objection of the judgment-debtors that the decree has been transferred to a third person who had re-transferred it to the decree-holder and therefore the execution could not proceed:—**Held,** that the application was a step-in-aid of execution and saved limitation. 15 C.W.N. 71=8 Ind. Cas. 833.

——Art. 182 (5)—Rejected application for adjournment to prove service of notice—Civil Procedure Code (Act XIV of 1882), S. 248.

An application for adjournment to enable the decree-holder to adduce evidence of service of notice under S. 248, C.P. C., is an application made in order to obtain from the Court an order in the furtherance of the execution of the decree. Such an application even though it is refused, is a step-in-aid of execution. 14 C.W.N. 486=5 Ind. Cas. 147.

——Art. 182 (5)—Application for execution rejected wrongly, as not being in accordance with law—No appeal preferred—Application cannot save limitation.

Though an order of rejection was a wrong one nevertheless the Munsif had jurisdiction to decide that the application was not according to law; and that the applicant not having appealed the order was final and cou d not be questioned in subsequent execution proceedings and therefore the application can be of no avail to save limitation for further application:

Held, further that the fact that the order of the Munsif was passed against the decree-holder without any notice having been issued to the judgment-debtor was immaterial. 72 Ind.Cas. 473=8 N.L.J. 91=A.I.R. 1923 Nag. 236.

——Art. 182 (5)—Step-in-aid—Defective application—Non-compliance with requirements of O. 21, Rr. 11 and 17 (2), C. P. Code—Formal defects.

An application for execution rejected under O. 21, R. 17 (2), of the C.P. Code on the ground that it did not specify correctly the particulars required to be specified therein by R. 11 of that order, is not an application in accordance with law or a step-in-aid of execution. 44 Ind. Cas. 220 (Cal.).

——Art. 182 (5)—Step-in-aid—Defective application—C.P.Code, O. 21, R. 17—Rejection.

Limitation under Art. 182 of the Limitation Act is not saved by an application for execution of the decree, when the application for execution of the decree is rejected under O. 21, R. 17, Sub rule (1). 21 C.W.N. 835=37 Ind. Cas. 916.

9 (a) (iv). Step-in-aid—Essentials—Pendancy of execution application.

——Art. 182 (5)—Application, if should be in pending proceeding.

It is not necessary for the purpose of saving limitation under Art. 182 (5) that an application taken as a step-in-aid of execution should be made in a pending execution application. (1945) 1 M.L.J. 47=I.L.R. (1945) Mad. 468=58 M.L.W. 25=1945 M.W.N. 80=A.I.R. 1945 Mad. 139 (F.B.).

Overruling—A.I.R. 1942 Mad. 5=200 Ind. Cas. 875.

——Art. 182 (5).

There is nothing in Art. 182 (5) which contemplates the pendancy of an execution application when an application to take some step-in-aid of execution of the decree or order is made. A.I.R. 1944 Nag. 80=1943 N.L.J. 499=I.L.R. (1943) Nag. 734=212 Ind.Cas. 592.

——Art. 182 (5)—Execution application, if necessary.

There can be a step-in-aid of execution without any application for execution having ever been made at all. A.I.R. 1938 Lah. 326=178 Ind. Cas. 202.

——Art. 182 (5)—Pending proceeding.

The Legislature intended that the last part of the para. (5) of Art. 182 should provide something which may, in some cases, be different from the first part and provide a different date and therefore, there need not be a pending application for execution for a step-in-aid. A.I.R. 1938 All. 210=(1938) A.L.J 117=1938 A.W.R. 115=I.L.R. (1938) All. 342=175 Ind. Cas. 136.

——Art. 182 (5)—Pendency of execution application—Whether necessary.

An application to take a step-in-aid of execution is competent even if there is no pending application for execution. 36 Bom. L.R. 510=A.I.R. 1934 Bom. 266=151 Ind. Cas. 767.

——Art. 182 (5)—Step-in-aid may be taken even when no execution proceeding at the instance of the decree-holder is pending.

It is not necessary that an application to take some step-in-aid of execution must be made during the pendency of an application by that particular decree-holder in accordance with law to the proper Court for execution of the decree; such an application can be made when no execution proceeding at the instance of the decree-holder who makes it is pending in Court,

The words, "where the application next hereinafter mentioned has been made" in Cl. 5, Art. 182 apply both to an application for execution and an application to take some step-in-aid of execution and both the applications are mentioned independently of each other in the clause, with the result that each is sufficient to save limitation and the second kind of application is not dependent on the first. Any action taken by a decree-holder to realize the money decreed in his favour whether such an action is taken in a pending application for execution or otherwise is a step-in-aid of execution. A.I.R. 1922 Mad. 247, **Foll.** 111 Ind. Cas. 259=A.I.R. 1928 Lah. 7.

——Art. 182 (5).

An application, in order to be a step-in-aid of execution need not be made in a pending execution application. **Ayling, J.**, in A.I.R. 1922 Mad. 79, **Diss. from.** 99 Ind. Cas. 677=50 Mad. 403=25 M.L.W. 61=1927 M.W.N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

——Art. 182 (5).

Application to summon witnesses to resist judgment debtor's objection is a step-in-aid.

In order that an application by the decree-holder should serve as a step-in-aid, it is not necessary that it should be made in a pending execution application. A.I.R. 1922 All 432; 22 C.W.N. 1027 and A.I.R. 1927 Mad. 288, Foll. 103 Ind.Cas. 712=A.I.R. 1927 Lah. 653.

——Art. 182 (5)—Step-in-aid — Execution not pending.

An application in furtheranace of an execution to be taken by the Court saves limitation though an execution proceeding is not then pending. Where a compromise decree in a mortgage suit provided payment by instalments (on default of payment of one instalment, the whole amount becoming due) and on such default being made, the decree-holder applied for leave to execute the decree or in the alternative for an absolute order directing the sale of the mortgaged property, Held, that this application amounted to a step-in-aid. 39 Ind. Cas. 101 (Pat.)

——Art. 182(5)—Step-in-aid—Execution application rejected.

Per Thiruvenkatachariar, J.—Apart from a few exceptions, an application to take a step-in-aid of execution necessarily presupposes a pending application for execution and no application for execution of a decree can be held to be pending if the application is not admitted, be rejected on the ground of non-compliance with the requirements of R. 11. 112 Ind. Cas. 36=27 M.L.W. 475=A.I.R. 1928 Mad. 440. But see A.I.R. 1945 Mad. 139 (F.B.), supra.

——Art. 182 (5)—Applications when execution not pending.

Any application which, if successful, would facilitate execution or prevent an obstacle being raised to the execution of a decree, whether an application for execution is pending or not cannot on that ground be treated as a 'step-in-aid of execution'. 17 Cal. 268, Foll.

In some cases the Courts in their anxiety to prevent decree-holders being deprived of the fruits of their decree by the "technical plea of limitation have stretched the article to such a point, that it has become difficult for the most exprienced lawyer (to say nothing of layman) to say when many decrees will become time-barred. In matters like limitation certainty is the first desideratum, An application made at a time, when no execution petition is pending cannot be a step-in-aid of execution. A man cannot be said to take some step-in-aid of a petition which has not been initiated.

Similarly an application by both parties and the presentation of a plaint with respect to another property of the judgment-debtor cannot be treated as 'steps-in-aid of execution'. 70 Ind. Cas. 324=45 Mad. 466=1922 M.W.N. 113=15 M.L.W. 348=32 M.L.T. 27=A.I.R. 1922 Mad. 79=42 M.L.J, 303. But see A.I.R. 1945 Mad, 139 (F.B.) supra.

9 (b). Cl. (5)—Step-in-aid—Application by assignee or transferee of decree.

——Arts. 182 (5) — Application by assignee of decree to Court passing decree for transfer of decree to another Court for execution—Step-in-aid.

A Court hearing an application by an assignee of a decree under O. 21, R. 16, C. P. Code, is an executing Court. An application made to the Court which passed the decree by the assignee in time for transfer of the decree for execution to another Court is one in accordance with law and is a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act. I.L.R. (1946) Bom. 977=A.I.R. 1947 Bom. 113=48 Bom. L.R. 583.

——Art. 182 (5)—Application by assignee under O. 21, R. 16.

An application by an assignee of a decree under O. 21, R. 16, Civil P.C. must be regarded as a step-in-aid of execution within the meaning of Art. 182, Cl. (5). A.I.R. 1938 Bom.309=40 Bom. L.R. 411=176 Ind. Cas. 152.

——Art. 182 (5).

Application by transferee to be brought on record is step-in-aid even if no execution application is then pending. A.I.R. 1938 Nag. 191=I.L.R. (1939) Nag. 367=174 Ind. Cas. 243.

——Art. 182 (5)—Application by transferee of decree by operation of law.

In case of transfer of decree by operation of law from one manager of a joint Hindu family to another manager, an execution application by the transferee is one in accordance with law and is effective for purposes of saving limitation. 1938 A.W.R. 160=A.I.R. 1938 All. 256=(1938) A.L.J. 308=I.L.R. (1938) All. 425=175 Ind. Cas. 590.

——Art. 182 (5)—Assignee's application to get his name substituted, whether an application to take a step-in-aid.

An application by a transferee to get his name substituted is not an application for execution, but

it is an application asking the Court to take a step-in-aid of execution.

Where an application is made, in effect, merely to get rid of the clog which clogs the transferee's freedom of action in executing his decree, he must be regarded as asking the Court to take a step in aiding him to execute the decree. A.I.R. 1933 Rang. 55=144 Ind. Cas. 310.

——Art. 182 (5).

Court's recognizing assignment of decree and allowing assignee to execute gives fresh start of limitation—C. P. Code, O. 21, R. 16. A.I.R. 1921 P.C. 23 and A.I.R. 1925 All. 117, Foll.; 118 Ind. Cas. 775=52 Mad. 590=29 M.L.W. 203=1929 M.W.N. 78=A.I.R. 1929 Mad. 252=56 M.L.J. 555.

——Art. 182 (5).

Joint application by decree-holder and assignee of decree-holder under unregistered assignment for proclamation and holding sale is a step-in aid—Assignee can avail of such application after his assignment is registered. A.I.R. 1927 Mad. 264.

——Art. 182 (5).

An application by assignee decree-holder to the transferee Court praying for return of records to the parent Court for further conducting the proceedings, i.e., for his recognition as assignee, is a step-in-aid. 92 Ind. Cas. 770=A.I.R. 1926 Mad. 431=50 M.L.J. 116.

——Art. 182 (5).

An application by the transferee of a decree to substitute his name for that of the decree-holder is a step-in-aid of execution. 29 All. 301, Foll. 88 Ind. Cas. 112=A.I.R. 1925 Nag. 362.

——Art. 182 (5).

Assignee's application for substiution is step-in-aid. 29 All. 301; A.I R. 1923 Oudh 9, Foll. 74 Ind. Cas. 40=A.I.R. 1924 Oudh 172.

——Art. 182 (5).

Application for recognising assignment of decree and for execution is a step-in-aid. 12 M.L.J. 348, Foll. 80 Ind. Cas. 103=19 M.L.W. 650=1924 M.W.N. 527=47 Mad. 641=A.I.R. 1924 Mad. 673=47 M.L.J. 4.

——Art. 182 (5)—Step-in-aid—Who must apply—Transferee of decree.

Transferee from a decree-holder applied for execution within time. In the meantime the heirs of the decree-holder sued the transferee and got the decree changed in their name. The transferee again applied for execution within 3 years of his last application but it was dismissed. The heirs of the decree-holder applied for execution after three years from the decree but within 3 years from the transferees' application. Held, that the transferees' applications were "in accordance with law" and therefore the application by the heirs was not barred. 43 Mad. 424=(1920) M.W.N. 395=38 M.L.J. 271=57 Ind. Cas. 753.

——Art. 182 (5) — Step-in-aid — Assignee — Mukhtear.

An application for execution of a decree by the assignee of the decree which was dismissed on the ground that the assignee did not produce the deed of assignment and an application for execution made by a **mukhtar** who did not produce the **mukhtarnama** which was consequently dismissed are both step-in-aid of execution so as to save limitation. 34 Bom. 68=11 Bom. L.R. 1281=4 Ind. Cas. 582.

——Art. 182 (5) — Step-in-aid — Application by transferee.

Held, that an application made by the transferee of a decree asking that his name might be substituted on the record for that of the original decree-holder, and a further application asking for time to serve one of the judgment-debtors, wohse address was not then known, with notice of the application for substitution were both applications made to the proper court to take some step-in-aid of execution within the meaning of Art. 179. 1907 A.W.N. 74=4 A.L.J. 184=29 A. 301.

——Art. 182 (5) — Step-in-aid of execution—Application by the transferee decree-holder to be recognized as such.

When a court received an application by the transferee decree-holder for re-cognition as transferee and ordered the same without returning it on the ground that it was not in accordance with S. 232, C.P.C. and there was no appeal from the order:

Held, that the application was an application in accordance with law and that a subsequent application for execution within 3 years from the date of the original application was not barred. Obiter.—An application by the transferee decree-holder for the mere re-cognition by court as transferee is a step-in-aid of execution. (1907) 18 M.L.J. 24=31 M. 234=4 M.L.T. 72.

——Art. 182, (5)—Civil Procedure Code, S. 232—Application in accordance with law.

A person who becomes entitled under a decree to realize the amount due under another decree is a transferee under S. 232, C.P.C., and is the only person who could have applied for execution of the latter decree. Such application is one in accordance with law, though the transferee is subsequently held to have no title and the application has the legal effect of saving the bar and enures in favour of all persons entitled to execute the decree. (1902) 12 M.L.J. 348.

——Art. 182, (5).

An application by the assignee of a decree merely to be brought on the record without asking for execution is not an application in accordance with law. 39 Bom. L.R. 540=A.I.R. 1937 Bom. 365=I.L.R. (1937) Bom. 691=170 Ind. Cas. 877.

——Art. 182, (5).

An application made in the form of an execution application asking for the assignee to be brought on the record and not making any other prayer is not an application for execution made in accordance with law. A.I.R. 1938 Sind 26=159 Ind. Cas. 807.

——Art. 182, (5)—Application under O. 21, R. 16, Civil P.C.

An application for transfer of decree for execution and an application under O. 21, R. 16, Civil P.C., are not steps-in-aid of execution. A.I.R. 1934 Pat. 662=1 B.R. 174 (1)=152 Ind. Cas. 987.

——Art. 282, (5)—Application by transferee of decree to be brought on record without prayer for execution.

An application by the transferee of a decree to be brought on the record without a prayer for execution of the decree is not an application for execution of the decree, that is to say, an application setting the Court in motion that the decree be executed in any manner set out in the last column of the prescribed form and will not save a subsequent application form limitation.

Nor is such an application one made in accordance with law to take a step-in-aid of execution. A.I.R. 1933 Sind 341=27 S.L.R. 314=147 Ind. Cas. 470.

——Art. 182 (5)—Step-in-aid—Assignee of decree-

An application for execution by an assignee decree-holder whose assignment is found to be invalid is not a step-in-aid. 6 L.W. 19=39 Ind. Cas. 950.

——Art. 182 (5)—Step-in-aid—Application by oral assignee.

An application of an oral assignee of a decree is not an application to take a step-in-aid of execution in accordance with law. 16 Ind. Cas. 807 (Mad.)

——Art. 182 (5)—Step-in-aid—Oral assignee of decree—Application for execution—Dismissal of—If can enlarge time.

Dismissal of an application for execution of a decree by an oral assignee cannot have the effect of extending time even if the assignment is obtained in writing after the expiry of time. (1911) 2 M.W.N. 559=10 M.L.T. 532=13 Ind. Cas. 78.

——Art. 182 (5)—Civil Procedure Code, S. 232—Execution of decree—Limitation.

Held, that an application for execution made by a person who claimed to be a transferee of the decree, but whose application under S. 232 of the Code of Civil Procedure, to be notified as such transferee had been rejected was not an application which could save limitation within the meaning of Art. 179 (O.A.). 1907 A.W.N. 39=4 A.L.J. 137=29 A. 295.

——Art. 182 (5)—Deed void ab initio—Limitation is not stopped.

The **darkhasts** filed by the assignee are in-effective to prevent limitation running only if the assignment was void **ab initio**. If the effect of the decree is merely to cancel the assignment as from the date of the suit, it prevents running of limitation. A.I.R. 1941 Bom. 65=42 Bom. L.R. 1057=193 Ind. Cas. 79.

9 (c), Cl. (5)—Step in-aid—Application for final or personal decree or for preparation of decree.

——Art. 182 (5)—"Step-in-aid"—Application by mortgagee for final decree.

An application by a mortgagee for a final decree is not a step-in-aid of execution within the meaning of Art. 182 (5), Limitation Act. 49 Bom. L.R. 864=A.I.R. 1948 Bom. 185.

——Art. 182 (5)—Step-in-aid—Application to make decree final after compromise decree passed in mortgage suit.

An application by the decree-holder for a final decree after a compromise decree has been passed in a mortgage suit, cannot be called a step-in-aid of execution. The application must be regarded as a proceeding in the suit itself though entirely superfluous because the relief claimed had already been got. The question of **bona fides** is irrelevant. The matter has to be judged objectively as to whether the application in question was or was not a step-in-aid of execution. If there is an executable decree that decree has to be executed by a proper application and the application must be in aid of that execution; if there is no decree in existence, then the application is not one for execution of the decree and must, therefore, be regarded as an application in the suit. From whichever point of view the matter is looked at, the application in question does not serve as a step-in-aid of execution. I.L.R. (1947) Nag. 683=A.I.R. 1948 Nag. 308=1947 N.L.J. 502.

——Art. 182 (5)—Payment of deficit court-fee to enable drawing up of decree—Application for final decree.

A step-in-aid implies a decree in existence—Order that decree not to be drawn up until deficit court-fee is paid—Payment of deficit court-fee is not a step-in-aid—Nor is the application for preparation of the final decree, by any means, a step-in-aid of execuiton. 23 P.L.T. 202=A.I.R. 1942 Pat. 410=8 B.R. 631=21 Pat. 366=199 Ind. Cas. 818.

——Art. 182 (5)—Deceree-holder forgetting that final decree has already been passed applying again for final decree.

Where a decree-holder forgets that a final decree had already been passed and applies again for final decree under O. 34, Rr. 4 and 5, Civil P.C., the application is not a step-in-aid of execution as it is not one made in aid of the execution of the decree but something else quite independent of it. A.I.R. 1939 Cal. 488=43 C.W.N. 800=70 C.L.J. 320=183 Ind. Cas. 473.

——Art. 182 (5)—Preliminary decree in mortgage suit made final—Application within limitation for final decree and sale of property—Application rejected—Execution application out of time—Previous application, held was not step-in-aid—S. 14 (2), held did not help decree-holder.

A preliminary decree in a mortgage suit was made final on April 16, 1929. The decree-holder put in an application under O. 34, R. 5, Civil P.C., on February 23, 1932, for final decree and sale of the mortgaged property but it was rejected on May 19, 1932, as the final decree had already been passed. The decree-holder put in an application for execution of the final decree on the same date. In this application, he had stated that he was prevented from applying for execution on February 23, 1932, because of a wrong report of the **Ahlmad**. In the entry in register by the **Ahlmad**, the word "final" was not inserted before "decree" but otherwise it was correct in all respects:

Held, that there could not be a step-in-aid of execution until execution had become possible by the passing of a final decree. The step which the decree-holder contemplated by his application of February 23, 1932

was a step to further his suit and could not be regarded as a step-in-aid of execution.

Held, also that the proceeding of February 23, 1932, was in a Court which did not suffer from any defect of jurisdiction or other cause **ejusdem generis**. Nor could it be said that an application for a final decree was for the same relief as an application to execute a final decree. Section 14 (2), Lim. Act, therefore did not help the decree-holder in any way. A.I.R. 1938 Lah. 117=I.L.R. (1937) Lah. 671=175 Ind. Cas. 846.

Reversing—A.I.R. 1937 Lah. 404=39 P.L.R. 680=173 Ind. Cas. 185.

——Art. 182 (5).

Preliminary decree awarding costs—Final decree silent—Application to recover amount made more than three years after preliminary decree is barred—Application for final decree is not a step-in-aid. 1936 M.W.N. 545.

——Art. 182 (5)—Applications for final decree in mortgage suit if steps-in-aid.

In 1904 a decree was passed in a mortgage suit. Within three years an application for order for sale of property was made, but was dismissed. Within three years of the latter application, similar application was made but was dismissed as no final decree was made as required by the new C. P. Code. Within three years an application for final decree was made which was dismissed for non-payment of process fees. A similar application for final decree was made in time but was withdrawn:

Held, that the applications for final decree were steps-in-aid of execution because they were accepted by the Court as being within time though really out of time, such acceptance gives a fresh start for limitation.

Per **Shah, J.**—An adjudication by Court that a certain application is in time cannot be re-considered when a question that it is out of time is raised at a later stage of execution proceedings. 63 Ind. Cas. 844=46 Bom. 269=23 Bom.L.R. 1013=A. I. R. 1922 Bom. 118.

——Art. 182 (5).

Decree drawn up as mortgage decree for part of claim against X and Y and as money decree for balance against X—Application for final decree as to former will save time as to latter also. 65 Ind. Cas. 358=44 All. 166=19 A.L.J. 962=A.I.R. 1922 All. 388.

——Art. 182 (5)—Instalment decree—Application to make decree final may be a step-in-aid.

A decree was payable by yearly instalments the first of which was payable on the 31st March, 1914. On failure to pay any one instalment in time the decree allowed sale of the mortgage property or a sufficient portion thereof to recover the amonnt of the instalment overdue. The creditors sought to make the decree final on default instead of applying for sale. On the 30th October, 1919 the creditors applied to make the decree final as regards the instalment due on 31st March, 1917. The application was rejected:

Held, that an application to make a decree final may in one case be considered as a step-in-aid although it may in other cases be not so and that the application on 30th October, 1919 was a step-in-aid which started a new period of limitation running. 79 Ind. Cas. 407 =A.I.R. 1924 Bom. 71.

——Art. 182 (5)—Application for personal decree where it was unnecessary.

In a suit for sale on a mortgage a decree was passed by consent which was in effect a combination of a decree under S. 88 of the Transfer of Property Act, 1882, and a decree under S. 90 of the Act. The decree-holders applied for a decree under S. 90. **Held**, that such application was sufficiently an application for execution or to take a step-in-aid of execution to save limitation within the meaning of Art. 179. (1907) A.W.N. 29=4 A.L.J. 40.

——Art. 182 (5)—Application in partition suit for preparation of formal decree-sheet on stamped paper supplied by decree-holder.

The test for deciding whether a certain application is a step-in-aid is whether the granting of the application would aid execution. An application in a partition suit for preparation of a formal decree-sheet on stamped paper supplied by the decree-holder is, therefore, a step-in-aid of execution for purposes of Art. 182, Lim. Act. A.I.R. 1940 Lah. 337=192 Ind. Cas. 93.

——Art. 182 (5)—Suit for partition compromised—Decree under O. 23, R. 3, Civil P. C.—Compromise contemplating preparation of final decree—Application for preparation of final decree dismissed—Application, held step-in-aid.

The parties to a suit for partition entered into a compromise which provided that a decree would be passed in favour of the plaintiff for partition and the amount of mesne profits would be determined at the time of passing of the final decree. A decree was passed upon such compromise under O. 23, R. 3, Civil P. C. Subsequent to this, the decree-holder applied twice to the Court for preparation of the final decree. The last application was dismissed by the Court on the ground that the decree passed was itself a final decree and it could be executed. Upon this the decree-holder applied for execution of the decree but this application was beyond time from the passing of the decree but within time from his application for passing final decree:

Held, that the application made for passing of the final decree were step-in-aid of execution, for the decree-holder was asking the Court to make an order which was thought necessary before taking out actual execution of the decree. Moreover, the equity was also on the side of the decree-holder. As the compromise itself contemplated that a final decree would have to be prepared, the decree-holders were not unjustified in applying for preparation of the final decree in the first instance. 1939 O.W.N. 219=14 Luck. 453=A.I.R. 1939 Oudh 155=18. Ind. Cas. 113.

9 (d). Cl. (5)—Step-in-aid—Application for leave to bid.

——Art. 182 (5)—Application for leave to bid.

Per **Shadi Lal, C. J.** and **Broadway, J.**—While an application by a decree-holder for leave to bid at an auction-sale does not ordinarily amount to an application inviting the Court to take a step-in-aid of execution, the circumstances under which it was made may show that the granting of leave has actually aided or would have aided the execution. If the decree-holder on whom the onus lies proves such circumstances, the application would amount to

a step-in-aid of execution. A.I.R. 1931 Lah. 81=32 P.L.R. 84=Lah. 372=12 L. 153=131 Ind. Cas. 100 (F.B.).

——Art. 182 (5).

Application under C. P. Code. O. 21, R. 72 coupled with request to set off purchase money against decretal amout is step-in-aid.

That is because the request to the Court to set off the purchase money against the decretal amount is one for furthering the execution of the decree. 12 C.W.N. 621, **Foll.** 123 Ind. Cas. 577=53 Mad. 390=1930 M.W.N. 208=A.I.R. 1930 Mad. 588=58 M.L.J. 406.

——Art. 182 (5)—Step-in-aid of execution—Leave to bid at sale—Prayer for amount bid to be set off against decree.

An application by a decree-holder in which he not merely asked for leave to bid at the sale but further prayed that the amount which he bid might be set off against the decretal amount due to him was a step-in-aid of execution within the meaning of Art. 179. (1908) 12 C.W.N. 621.

——Art. 182 (5).

Quaere.—Whether an application for mere leave to bid at the auction is a step-in-aid of execution within the meaning of Art. 182 (5). 123 Ind. Cas. 577=53 Mad. 390=1930 M.W.N. 208=A.I.R. 1930 Mad. 588=58 M.L.J. 406.

——Art. 182 (5).

It is doubtful whether an application by a decree-holder for permission to bid at an auction sale amounts to step-in-aid. 88 P.R. 1884, **Doubted.** 113 Ind. Cas. 909=10 L.L.J. 505=A.I.R. 1929 Lah. 57.

——Art. 182 (5) — Step-in-aid — Application for leave to bid.

An application was made by a decree-holder for leave to bid at an auction sale. The application which was granted by the Court, stated that when the properties would be put up for sale, the decree-holder will have to purchase for the decretal amount, if no other purchaser offered any bid, and prayed for permission in that behalf. **Held,** that application was not an application to the proper court to take a step-in-aid of execution of decree. 13 A. 211; 22 A. 309; 21 B. 331, dis. 9 C. 730; 23 C. 690, foll. 24 C.L.J. 462=37 Ind. Cas. 738.

——Art. 182 (5)—Step-in-aid—Application to bid at auction sale.

An application by the decree-holder to bid at an auction sale after the postponement of the sale for want of bidders is a step-in-aid of execution. 35 P.W.R. 1912=62 P.L.R. 1912=60 P.R. 1912=14 Ind. Cas. 468.

——Art. 182 (5) — Step-in-aid of execution—Application for leave to bid.

Per **Rampini, J.**:—An application by the decree-holder for permission to bid at a sale held in execution of decree is not an application to the court to take some step-in-aid of execution. 9 C. 730; 23 C. 690, foll; 30 C. 761 (769) disapproved. Per **Mookerjee, J.**—It cannot rightly be affirmed as an inflexible rule of law that the granting of leave to a decree-holder to bid at a sale in execution of a decree must in every case, or may not in any case, amount to an aiding of the execution. When a decree-holder relies upon a previous application to the court for leave to bid at a sale, as saving limitation, it is not sufficient for him to show that such application was made, but he must further show that the circumstances under which it was made were such that the grant of leave did in fact aid or would have aided the execution. (1905) 3 C.L.J. 240=10 C.W.N. 209.

9 (e). Cl. (5)—Step-in-aid—Application for possession.

——Art. 182 (5)—Application by D. H. Receiver for delivery of property.

Per **Wadsworth** and **Patanjali Sastri, JJ.** (**in order of reference.**)—Since the application by one of the decree-holders for his appointment as a Receiver to safeguard the properties for the purpose of the realisation of the decree therefrom in execution is a step-in-aid of execution, a subsequent application by the same decree-holder as Receiver for the delivery of those properties to him must also be deemed to be a step-in-aid of execution. 58 M.L.W. 25=(1945) 1 M.L.J. 47=1945 M.W.N. 80=I.L.R. (1945) Mad. 468=A.I.R. 1945 Mad. 139 (F.B.)

——Art. 182 (5)—Application for possession of property, whether step-in-aid of execution.

An application for possession of property or money realised by a decree-holder in execution is step-in-aid of execution. A.I.R. 1943 Mad. 129=55 M.L.W. 857 =(1943) 1 M.L.J. 9=1943 M.W.N. 4=I.L.R. (1943) Mad. 322=206 Ind. Cas. 375 (F.B.).

——Art. 182 (5).

An application for delivery of possession by a decree-holder who has purchased in Court auction is a step-in-aid of execution, even though not made in the court of a pending execution. 38 M.L.W. 347=65 M.L.J. 305=A.I.R. 1933 Mad. 745=(1933) M.W.N. 970=145 Ind. Cas. 397.

——Art. 182 (5).

An application for delivery of property by a decree-holder who has purchased the property in execution of his own decree is a step-in-aid of execution within the meaning of the expression. In Art. 182, Cl. 5 of the Limitation Act even though the application was dismissed for non-payment of batta. 1929 M.W.N. 573=30 M.L.W. 683=57 M.L.J. 468.

——Art. 182 (5).

Application under C. P. Code, O. 21, R. 95, by decree-holder purchasing property in execution of his own decree is a step-in-aid. 99 Ind. Cas. 677=50 Mad. 403=25 M.L.W. 61=1927 M.W.N. 8=38 M.L.T. 156=A.I.R. 1927 Mad. 288=52 M.L.J. 1.

——Art. 182 (5)—Step-in-aid — Application for delivery of possession.

Per **Newbould, J.**—(**Cuming, J. Contra.**)—An application by a decree-holder to be put in possession of the property purchased by him is a step-in-aid. Per **Cuming, J.**—All steps in execution of a decree which can save limitation must be taken by the

decree-holder as decree-holder and not as auction-purchaser. 23 C.W.N. 926=30 C.L. J. 135=54 Ind. Cas. 839.

——Art. 182 (5) — Step-in-aid — Application for delivery of possession—C.P.C., O. 21, R. 95.

Application by decree-holder under O. 21, R. 95, C.P. Code, is step-in-aid of execution and saves limitation for subsequent applications to execute the decree. 41 All. 479=17 A.L. J. 496=50 Ind. Cas. 143.

——Art. 182 (5) — Step-in-aid — Application for delivery of possession.

An application by a decree-holder purchaser for delivery of possession is a step-in-aid of execution within the meaning of Art. 182 so as to give a fresh starting point of limitation. 27 O. C. 709, Foll. 13 C.W.N. 694=1 Ind. Cas. 430.

——Art. 182 (5) — Step-in-aid — Application for delivery of possession—Whether step in-aid of execution—Whether decree satisfied till possession delivered.

Per **Stanley, C. J.** and **Knox, J.**—A sale of property is not complete and a decree cannot be said to be satisfied or executed till possession is delivered; so delivery of possession is a step-in-aid of execution. Per **Banerji, Aikman** and **Griffin, JJ.**—Upon the sale of the judgment debtor's property, the decree is fully satisfied and the question of delivering possession is wholly immaterial to the decree and does not affect it in any way. 31 All. 82=6 A.L. J. 71=1 Ind. Cas. 416.

——Art. 182 (5)—Application for possession by decree-holder—Purchaser—Step-in-aid of execution.

A got a decree on 20th October, 1893, and on 19th October, 1894, he applied for execution and brought under a court sale some land of the judgment-debtor. On 13th March, 1896, he applied for delivery of the land, but delivery was not made in respect of some of them. On 6th March, 1896, he applied for further execution of the decree. **Held,** that the execution was incomplete so long as he did not get possession, and the application of 13th March was one to take a step-in-aid of execution. (1900) 24 M. 185.

——Art. 182 (5).

An application for delivery of possession by the decree-holder-auction-purchaser is not a step-in-aid of execution. 11 pat. 513=A. I. R. 1932 Pat. 286=13 P.L.T. 623=139 Ind. Cas. 843.

——Art. 182 (5)—C.P.Code, O. 21, R. 95—Application under, by auction-purchaser who is also decree-holder for recovery of possession, is not a proceeding in execution and is not a step-in-aid of execution.

Broadly speaking, the fact that the decree-holder and auction-purchaser are one and the same person can have no bearing on the rights and liabilities attaching to a decree-holder as such, and the rights and liabilities attaching, to an auction-purchaser as such. In a case, therefore, where the decree-holder is himself an auction-purchaser and the sale has been confirmed and a sale-certificate granted, the decree-holder must be taken to have received from himself, as auction-purchaser, the sale price, and it is as auction-purchaser and as auction-purchaser alone that he can proceed to make an application, if necessary, under O. 21, R. 95, and therefore the application under O. 21, R. 95, by an auction-purchaser to recover possession is not a proceeding in execution and not a step-in-aid of execution even when such application is made by the decree-holder, who is also the auction-purchaser. 31 All. 182 (F.B.), **Foll**; 19 All. 477 and 41 All. 479, **Cons.** and **Not foll.** 115 Ind. Cas. 869=50 All. 670=26 A.L. J. 498=A.I.R. 1928 All. 368.

——Art. 182 (5).

Neither an application for confirmation of sale nor an application by a decree-holder to be put in possession of the property is an application to take some step-in-aid of execution. 72 Ind. Cas. 938=1 Pat. L.R. 6=2 Pat. 249=1923 P.H.C.C. 300=5 P.L.T. 30 =A.I.R. 1923 Pat. 22.

——Art. 182 (5) — Step-in-aid — Application for delivery of possession.

Quaere:—Whether an application for delivery of possession is an application to the proper court to take a step-in-aid of execution within the meaning of Art. 179. (1909) 11 C. L. J. 357=14 C. W. N. 433=5 Ind. Cas. 89.

9 (f). Cl. (5)—Step-in-aid—

Application for substitution of legal representatives.

——Art. 182 (5) — Step-in-aid — Application to decretal Court by legal representative of deceased decree-holder to be brought on record.

A prayer to have the name of a legal representative or assignee entered in place of the decree-holder is implied in an application under O. 21, R. 16, C. P. Code, for execution of a decree by such legal representative or assignee, and when the legal representative or assignee makes an application to the decretal Court to have his name substituted for the decree-holder and to have intimation sent to the transferee Court, as a preliminary to and to enable him to make an execution application to the transferee Court, it cannot be said that such an application is in contravention of the law, much less can it be said to be not an application asking the Court to take a step-in-aid of execution. The step of substituting the legal representative of the deceased judgment-creditor is a step which must be treated as in accordance with the spirit as well as the letter of the law. I.L.R. (1947) Kar. 216=A.I R. 1948 Sind 110.

——Art. 182 (5)—Application by legal representative of decree-holder for substitution.

An application for substitution by the legal representative of the deceased decree-holder, while it would not amount to an institution of a fresh execution and while it is not itself an application for execution is nevertheless a step-in-aid of execution. It is not correct to say that an application for substitution is not ineffective as a step-in-aid of execution unless accompanied by an actual application under O. 21, R. 16 for the execution of a decree. The two applications, need not be simultaneous or form part of the same application. When a decree has been transferred for execution from one Court to another, it is not correct to say that that application loses its force and does not become an

application for execution until a further application for execution is made in the Court to which the application has been transferred. 1943 N.L.J. 499=A.I.R. 1944 Nag. 80=I.L.R. (1943) Nag. 734=212 Ind. Cas. 592.

——Art. 182 (5).

Decree-holder dying after passing of decree on September 9, 1926—Petition by his nephew on October 15, 1928, for execution, praying that he and widow of his uncle be brought on record and decree be executed for their joint benefit—Widow not only denying nephew's right but praying that she alone be brought on record as sole representative of decree-holder and decree should be executed for her sole benefit—Petition dismissed on April 15, 1929—Subsequent application by widow for execution on December 23, 1931—Previous petition, held could be deemed in law as that of widow and subsequent application was in time. (1938) M.W.N. 191=(1938) M.L.J. 135=47 L.W. 693=A.I.R. 1938 Mad. 323=178 Ind. Cas. 749.

——Art. 182 (5)—An application for substitution of names in execution proceedings is a step-in-aid.

An application for substitution of names in place of the original decree-holder and for continuation of execution proceedings gives warning to the judgment-debtors that the decree-holder died and that his heirs-in law desire subsequently to take proceedings in execution and is therefore a step-in-aid of execution. 29 All. 301 and 31 Mad. 234, **Appl.** 109 Ind.Cas. 412=50 All. 621=26 A.L.J. 417=A.I.R. 1928 All. 299.

——Art. 182 (5) — Step-in-aid — Applications by some legal representatives on their own behalf whether saves limitation.

An application though not purporting to be on behalf of the other legal representatives saves limitation for execution by some of the decree-holder's legal representatives. 18 M.L.T. 517=(1916) 1 M.W.N. 112=31 Ind. Cas. 853.

——Art. 182 (5)—Step-in-aid—Application of legal representative of deceased decree holder.

An application by the legal representative of a deceased decree holder to have his name substituted is a step-in-aid of execution. 6 P.L.R. 1910=125 P.W.R. 1910=6 Ind. Cas. 490.

——Art. 182, (5)—Step-in-aid of execution — Application to be recognised as the representative of decree-holder—C.P.C., S. 232.

An application by the legal representative of a decree-holder for an order recognizing him as the decree-holder is not prohibited by the Civil Procedure Code, and consequently such an application is a step-in-aid of execution within the meaning of Cl. 4, Art. 179. (1907) 17 M.L.J. 475.

——Art. 182 (5)—Application by assignee for bringing heirs of judgment-debtor on record and for execution, whether saves limitation.

Where a decree-holder has put in an execution application on the basis of an oral assignment of the decree from another decree-holder in the same suit and also for bringing the legal representatives of the judgment-debtor on record, the Court has not to consider firstly whether the execution application is valid or not. The Court should firstly consider whether the latter part asking for the legal representatives to be brought on record amounts to a step-in-aid of execution and if that is according to law, the prayer for execution does not matter.

Article 182, Lim. Act seems to be framed precisely in order to admit a case where the decree-holder has put in an application in accordance with law to the proper Court to bring on legal representatives, as a step-in-aid of execution. 34 L.W. 231=61 M.L.J. 541=54 M. 852=A.I.R. 1932 Mad. 19=134 Ind. Cas. 59.

——Art. 182 (5)—Application to substitute legal representatives of judgment-debtor is a step-in-aid.

A step of substituting the legal representative of the deceased judgment-debtor taken by an application is a step which must be treated as one in accordance with the spirit as well as the letter of the law, for it must ultimately assist in the realization of the decree and facilitate the actual execution of the decree when it is taken out. It is therefore a step-in-aid of execution within Art. 182. 2 C.L.J. 544, Foll. 103 Ind. Cas. 279=A.I.R. 1927 Nag. 308.

——Art. 182 (5)—Step-in-aid—Representation.

Application to bring judgment debtor's heirs on record is a step-in-aid—Such application will save limitation as against all legal representatives. 3 All. 517 and A.I.R. 1925 Pat. 551, **Foll.** 103 Ind. Cas. 244=A.I.R. 1927 All. 698.

——Art. 182 (5).

An application for substitution of heirs of a deceased judgment-debtor is a step-in-aid of execution. 79 Ind.Cas. 880=11 O.L.J. 604=A.I.R. 1925 Oudh 77.

——Art. 182 (5)—Step-in-aid—Application to bring on record legal representative.

An application for execution praying for the legal representative of the Judgment-debtor to be brought on the record is sufficient to give a fresh starting point for limitation even if it contains errors in the matter of relief. 14 M.L.T. 530=26 M.L.J. 83=(1914) M.W.N. 157=21 Ind. Cas. 782.

——Art. 182 (5)—Step-in-aid—Application under S. 368, C.P.C.—C.P.C., Ss. 232, 366.

There is nothing in S. 232, C.P.C., to prohibit a a transferree decree-holder from applying for and obtaining an order under S. 368, C.P.C., to bring in the representatives of a defendant; and an application for the purpose is a step-in-aid of execution within the meaning of Cl. 4, Art. 179. (1906) 17 M.L.J. 435=30 M. 541=3 M.L.T. 21.

9 (g). Cl. (5)—Step-in-aid—Application for time.

——Art. 182 (5)—Application for time to put in petition for substituted service, whether step-in-aid.

An application for execution was filed on October 14, 1920. Notice not having been effected, fresh notice was ordered for December 16, 1920. This was returned on the ground that the judgment-debtor had gone to another place. The Pleader asked for time to apply for substituted service but the Court ordered fresh notice for January 17, 1921. As batta was not paid, the petition was dismissed on this ground on December 23, 1920;

Held, that the application for time to put in a petition for substituted service was not, in the circumstances, an application to take any step-in-aid of execution. (1933) M.W.N. 352=38 L.W. 301=65 M.L.J. 271=A.I.R. 1933 Mad. 675=145 Ind. Cas. 933.

——Art. 182 (5)—Application for extension of time to file inventory under O. 21, R. 12, C.P. Code, is a step-in-aid.

The judgment creditor obtained a decree on 4th April, 1918, against the deceased father of the respondent who was a member of a joint Hindu family. The sons were brought upon the record in the darkhast. On 7th November, 1922, the Court ordered notices to issue and on 17th November, the notices were issued returnable on 23rd January, 1923. On 23rd January, 1923, the appellant gave an application to meet the objections of two of the sons who had refused to accept service on the ground that their names were not properly described in the notice. On the same day the judgment creditor applied for further time to put in the list of movables which he had been ordered by the Court to put in under O. 21, R. 12, C.P. Code. That application was rejected and the darkhast was dismissed. The notices ordered on the application of that date were never issued. On 22nd January, 1926, the judgment creditor filed the present darkhast.

Held, that an inventory was not necessary and that the darkhast was a step-in-aid of execution and so was the application of 23rd January, 1923. 122 Ind. Cas. 856=31 Bom.L.R. 1291=A.I.R. 1930 Bom. 65.

——Art. 182 (5)—Amount payable to defendant as condition for delivery of possession—Application for extension of time.

An application for extension of time to pay the amount ascertained as compensation which was made a condition for the delivery of possession to the plaintiff is not a step-in-aid within the meaning of Art. 182. 1930 M.W.N. 979=59 M L.J. 579=A.I.R. 1930 Mad. 995.

——Art. 182 (5).

Decree-holder's application to refute judgment-debtor's objections and for extension of time are steps-in-aid.

The decree-holder though not right in asking the Court to appoint a local commissioner in such an application, cannot be said to be acting not **bona fide.** 40 All. 668; A.I.R. 1925 Pat. 459; A. I. R. 1928 Pat. 612, **Foll.** 119 Ind. Cas. 228=11 L. L.J. 503=A.I.R. 1929 Lah. 335.

——Art. 182 (5)—Filing of encumbrance certificate—Application for extension of time.

An application to amount to a step-in-aid of execution within the meaning of Art. 182, Cl. (5), should be one asking the Court to take some step in furtherance of the execution of the decree. 38 Mad. 695, **Not foll.**

An application by the decree-holder for extension of time to file an encumbrance certificate cannot be said to be a step-in-aid of execution. 106 Ind. Cas. 648=26 M.L.W. 725=1927 M.W.N. 792=A.I.R. 1928 Mad. 143=53 M. L. J. 766.

——Art. 182 (5)—Step-in-aid — Application for time.

Application for adjournment for obtaining an incumbrance certificate and filing a draft proclamation is a step-in-aid of execution. 33 Ind. Cas. 79 (Mad).

——Art. 182 (5)—Step-in-aid—Application for time—Production of encumbrance certificate.

An application by the decree-holder for an adjournment to enable him to produce an encumbrance certificate in respect of attached property is made in furtherance of execution proceedings and is a step-in-aid of execution within Art. 182 (5). 27 Cal. 285, dissented from. 38 Mad. 695=1 L.W. 271=(1914) M.W.N. 563 =26 M.L.J. 433=15 M.L.T. 305=23 Ind. Cas. 533.

——Art. 182 (5).

Request for extension of time for filing necessary papers is not a step-in-aid. A.I.R. 1922 Mad. 79, **Foll.** 98 Ind. Cas. 163=24 M.L.W. 498=A.I.R. 1926 Mad. 1197=51 M.L.J. 489.

——Art. 182 (5)—Application for time for citing witnessses is not a step-in-aid of execution.

In an execution matter, a claim was put in by a judgment-debtor which was registered under S. 47, C. P. Code. On 28th April, 1917, the decree-holder applied for time to file written statement in answer to the claim and to cite witnesses: but as a matter of fact did not prosecute the petition thereafter:

Held, the application of 28th April, did not constitute a step-in-aid of execution. Although an application to the Court to issue summons or do some other act necessary for proceeding with the execution case or for removing a bar to the execution proceedings would be step-in-aid of execution, an application for time to cite witnesses irrespective of whether the decree-holder does so or not, is not a step-in-aid of execution. The question whether an application is or is not a step-in-aid of execution, must depend upon the circumstances of each case. 76 Ind. Cas. 455=27 C.W.N. 505=37 C.L. J. 292=A.I.R. 1923 Cal. 572.

——Art. 182 (5).

An application made by both the parties to the Court to postpone the application in the Darkhast, with a view to a compromise being arrived at between the parties is not a step-in-aid of execution. 38 Mad. 695, **Foll.** 73 Ind. Cas. 1011=25 Bom. L. R. 490=A.I.R. 1923 Bom. 461.

——Art. 182 (5).

Decree providing both for redemption and sale—Application for extension of time by mortgagor is a step-in-aid.

A step is a step-in-aid of execution if it aids the decree-holder in some portion of the execution. 70 Ind. Cas. 333=45 Mad. 202=30 M.L.T. 252=1921 M.W.N. 391=A.I.R. 1922 Mad. 247=41 M.L.J. 374.

——Art. 182 (5).

An application made by the decree-holder for time, to enable him to obtain information regarding the defendant's share in certain property, which was attached, is step-in-aid of execution. 60 Ind. Cas. 916 =23 Bom. L.R. 107=A.I.R. 1921 Bom. 33.

——Art. 182 (5)—Step-in-aid — Application for time.

Application by decree-holder, during execution proceedings for time to ascertain the address of judgment-debtor is a step-in-aid of execution. 50 Ind. Cas. 278 (All.).

——Art. 182 (5)—Step-in-aid — Application for time.

A bona fide application by decree-holder praying for extension of time, for ascertaining the whereabouts of his judgment-debtor, is a step-in-aid and saves limitation. 38 All. 690=14 A.L.J. 890=35 Ind. Cas. 693.

——Art. 182 (5)—Step-in-aid — Application for time.

An application made by a decree-holder praying for extension of time within which he was to produce an extract from the Collector's record to be filed with a pending Darkhast for execution amounts to step-in-aid of execution. 37 Bom. 317=14 Bom. L.R. 1204=17 Ind. Cas. 969.

——Art. 182 (5)—Step-in-aid—Application for time—Copies of Judgment.

A petition for time made by a decree-holder after presenting a petition for execution for procuring copies of the decree and judgment is a step-in-aid of execution. 36 Bom. 638=14 Bom. L.R. 765=17 Ind. Cas. 30.

——Art. 182 (5)—Step-in-aid — Application for time.

An application for time to produce evidence to prove service of notice under C. P. C. (1882), S. 248 is a step-in-aid within the meaning of Art. 179, Limitation Act, 1879, though it is refused. 14 C.W.N. 486=5 Ind. Cas. 147.

——Art. 182 (5)—Step-in-aid — Application for time.

An application for time is not a step-in-aid of execution and does not prevent subsequent applications from being barred. 27 C. 289; 3 C. L. J. 240, **Foll.** (1908) 8 C.L.J. 193=35 Cal. 1060.

9 (h). Cl. (5)—Step-in-aid—Application returned for amendment.

——Art. 182 (5)—Returned application—No representation—Effect.

An application for execution which is returned by the Court but never represented thereafter should be treated as if it had never been presented at all. 1948 M.W.N. 779=A.I.R. 1949 Mad. 363=61 L.W. 760=(1948) 2 M.L.J. 488.

——Art. 182 (5)—Application returned for amendment—Application not represented within time limited.

An annexed petition returned for amendment, i. e., for furnishing the proper stamp paper in the case of a partition decree, but not represented has no legal existence until it is represented, and if it is represented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. 56 L.W. 393=A.I.R. 1943 Mad. 650=(1943) 2 M.L.J. 112=1943 M.W.N. 439=I.L.R. (1944) Mad. 266=212 Ind. Cas. 619.

——Art. 182 (5)—Application for execution returned for amendment, when can save limitation.

Where an application for execution is returned for complying with certain requirements and is not represented within a reasonable time even if none was fixed by the Court, it can be of no avail to save limitation. A.I.R. 1940 Mad. 281=(1939) M.W.N. 624=(1939) 2 M.L.J. 469=49 L.W. 768=189 Ind. Cas. 185.

——Art. 182 (5)—Failure to represent execution petition returned for rectification, whether extends limitation.

It is not permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all. A.I.R. 1939 Mad. 429=(1939) 1 M.L.J. 87=49 L. W. 173=(1939) M.W.N. 426=185 Ind. Cas. 412.

——Art. 182 (5).

An execution application returned for amendment but not represented in time may yet give a fresh starting point for limitation. R. 17 (2) is merely an enabling one. 4 L. W. 103, **Foll**; 5 Cal. 594 (F.B.) 112 Ind. Cas. 36=27 M. L. W. 475=A.I.R. 1928 Mad. 440.

——Art. 182 (5).

Per **Thiruvenkatachariar, J.**—When an application for execution of the decree is returned for amendment on the ground that it does not comply with the requirements of R. 11, O. 21, but the application is not amended and represented to the Court within the time fixed by it, the question whether it was in accordance with law will depend upon whether the defects were material or only trivial and such as could not mislead either the Court or the judgment-debtor. A mere non-compliance with the order of the Court directing amendment cannot have the effect of making the application to be not in accordance with law. 112 Ind. Cas. 36=27 M.L.W. 475=A.I.R. 1928 Mad. 440.

——Art. 182 (5) — Application returned for amendment and not re-filed.

If an application for execution returned for amendment and not re-filed within the time allowed by the Court under O. 21, R. 17, C. P. Code, is in substantial compliance with the provisions of the Code, being defective merely in omitting immaterial particulars, it should be taken as an application in accordance with law within the meaning of Art. 182(5) of the Limitation Act. 25 Cal. 594 (F.B.) and A.I.R. 1924 Pat. 23, **Foll.** 98 Ind. Cas. 166=53 Cal. 664=30 C.W.N. 918=45 C.L.J. 86=A.I.R. 1926 Cal. 1077.

——Art. 182 (5)—Application conforming with O. 21, Rr. 11 to 14 but returned for some other reason is not invalid.

Order 21, Rr. 11 to 14 give the particulars which the law requires to be stated in an application for execution. If the application conforms with those rules and is presented upon a properly stamped paper it must be

taken to have been properly presented in accordance with law. If not, the Court is empowered either to reject the application or to allow the defect to be remedied within the time to be fixed by it. It may therefore be inferred from this that where the application is returned on the ground that the requirements of the rule have not been complied with and is not amended within the time fixed, it cannot be regarded as having been presented in accordance with law ; but it is nowhere stated, that where the application conforms with the prescribed requirements and is returned for some other reasons shall not be deemed to have been presented in accordance with law. 23 Cal. 217, **Not foll.** 74 Ind. Cas. 174=2 Pat. 809=4 P.L.T. 513=1923 P.H.C.C. 229=1 Pat. L.R. (Civ.) 453=A.I.R. 1924 Pat. 23.

——Art. 182 (5).

Application for execution defective—Defect ordered to be amended—Default in making amendment—Dismissal of application for such default—Application cannot be held to have been made at all. In such case the question of the triviality of the defect in the application does not arise at all. 63 Ind. Cas. 971=17 N.L.R. 179=4 N.L.J. 71=A.I.R. 1921 Nag. 28.

——Art. 182 (5)—Step-in-aid — Amendment of application—Amendment.

If a decree-holder files a defective application and is ordered to amend it, he cannot profit from the amendment as being a step-in-aid of execution. In the absence of an application by the decree-holder moving the Court to issue an order directing attachment the original application for execution does not amount to a step-in-aid of execution. 167 P.R. 1919=54 Ind. Cas. 935.

——Art. 182 (5)—Step-in-aid—Defective execution application returned for amendment.

An execution petition returuned for amendment not represented saves limitation. 4 L.W. 103=(1916) 2 M.W.N. 152=31 M.L.J. 561=35 Ind. Cas. 876.

——Art. 182 (5)—Step-in-aid—Defective application—Return for amendment—No representation.

An execution petition which has been returned by a Court for amendment but not represented, is a step-in-aid. 6 Mad. 250; 32 Ind. Cas. 691, **Foll.** 2 L.W. 1207=32 Ind. Cas. 816.

——Art. 182 (5)—Step-in-aid—Defective application—Not represented.

Application for execution returned for amendment but not represented is a step-in-aid to save limitation. (1915) M.W.N. 865=32 Ind. Cas. 691.

——Art. 182 (5)—Step-in-aid—Defective application—Failure to represent an application returned for amendment—Step-in-aid.

Art. 182 only requires that there should be an application. The fact that the application was returned for amendment and it was not represented, would not affect limitation. 28 M.L.J. 494=2 L.W. 540=29 Ind. Cas. 16.

——Art. 182 (5)—Step-in-aid—Defective application—Non-presentation of application for execution after return as defective.

An application for execution of a mortgage decree for sale, wrongly returned for want of a certificate under S. 238, C.P.C., (1892), although not represented, is a step-in-aid of execution within the meaning of Art. 182. 27 Ind. Cas. 811 (Mad).

——Art. 182(5)—Step-in-aid—Defective application—Not represented.

An execution application returned for correction of defects not essential to its validity, though not represented after correction is a step-in-aid of execution and is valid for purpores of S. 48. 26 Mad. 101; 23 Cal. 217; 31 Mad. 68; 6 Mad. 250, Foll. 26 Ind. Cas. 413. (Mad).

——Art. 182 (5)—Application returned for amendment—Re-presentation beyond limitation — No prayer to excuse delay—Limitation, if saved.

When an excution petition is returned for amendment, it has no judicial existence pending its re-presentation. If it is re-presented within time duly amended, the date of the original presentation will be the date of the execution application and the same position would result if it is re-presented late and accompanied by an application to execuse delay and the delay is excused. But if the returned petition is withheld for an inordinately long period and re-presented without anv application to excuse delay merely in the hope of saving limitation for a fresh application, it cannot be deemed to be a pending application, and any order upon it passed subsequently cannot avail to save limitation for the fresh execution petition presented contemporaneouslv. A.I.R. 1940 Mad. 215=50 M.L.W. 793=(1939) M.W.N. 1206=(1939) 2 M.L.J. 864=189 Ind. Cas. 822.

——Art. 182 (5), (179)—Step-in-aid — C.P.C., O. 21, Rr. 12, 14, 17—Application for execution returned for amendment of formal defect—Application amended but not refiled within time allowed or registered.

Where an application for execution of a decree made in proper form under S. 235 of the Civil Procedure Code (1882) was returned by the court for supplying within 10 days the necessary extracts from the Collector's register, under S. 238, regarding certain shares of a revenue paying mouzah and a correct valuation of this and other properties sought to be attached, but the application was not refiled till long after the expiration of 10 days and some days after the period of limitation expired and the decree-holder along with the application filed a petition explaining the delay and it was registered:

Held, that the previous application which was returned was a step taken in aid of execution such as would save the amended application from being barred by limitation. That the decree-holder's application to the Collector for the extracts from the Collector's register was itself a step-in-aid of execution within the proper scope of S. 245 of the Code of Civil Procedure. (1910) 14 C.W.N. 481=5 Ind. Cas. 579.

——Art. 182 (5)—Defective application—Defect not serious—Defect cured by leave of Court—Date of original filing is date on which execution must be held to be taken.

One of the previous applications for execution was filed on the 24th June, 1920 a date within 3 years of the next previous application. The requirements of O. 21, Rr. 11 to 24 had not been complied with. The

Court did not reject the application but returned the application for the defect to be remedied under R. 17 within a certain time fixed by the Court. The time fixed was 15 days and the defect was remedied on 4th July, 1920:

Held, there was no necessity for the return of the application and the Court ought to have kept the application. The time fixed for the curing of the defect may be excluded by the Court under S. 148 of the C.P. Code. As the Court after the defect was cured started proceedings in sale it must be presumed that the Court extended the time under the authority vested in it under S. 148. Under these circumstances, the application of 24th June, 1920 was a legal one and not defective and must be taken to be the one on which the execution proceedings were taken by the Court. Hence the date of filing the application must be taken to be 24th June, 1920 and not 14th July 1920. 86 Ind. Cas. 591=12 O.L.J. 109=2 O.W.N. 70=28 O.C. 382 =A.I.R. 1925 Oudh 399.

——Art. 182 (5).

Under O. 21, R. 17, Civil P.C., when the execution petition is re-presented with the necessary amendment, it is deemed to be a valid presentation on the date of the original presentation itself. (1935) M.W.N. 1300= 69 M. L. J. 908=59 M. 303=43 L. W. 40=A.I.R. 1936 Mad. 91=161 Ind. Cas. 93.

——Art. 182 (5)—Amendment relates back to date of presentation—Attachment of immovable property—No description or specification of interest.

Where an application for execution of a decree by attachment was made within the period of limitation, but it omitted to give any description of the property and the judgment-debtor's interest therein, and the court having registered the application returned it to the decree-holder for amendment, and the amendment was made after the expiry of the period of limitation:

Held, that the amendment related back to the date of the application and the application was not time-barred. (1905) 2 A.L.J. 367.

——Art. 182 (5)—Application for execution—Order allowing amendment.

Where an execution application is returned for amendment and subsequently represented with the necessary amendments, the starting point for a subsequent application for execution is the date of the original presentation of the prior application and not the date on which it was presented after amendment. An endorsement by the Court granting time to enable an applicant to put his petition in the form prescribed by law and the amendment made in persuance thereto are not steps-in-aid of execution within Art. 182 (5) of the Limitation Act. 10 L.W. 222=52 Ind. Cas. 765.

——Art. 182 (5)—Step-in-aid—Defective application —Representation.

The re-submission of an application after amendment as ordered by the Court is not an application to take a step-in-aid of execution under Art. 182, (Art. 179 (4) of the Old Act.) 5 M.L.T. 224=4 Ind. Cas. 1134.

——Art. 182 (5).

Where an application in execution was made and ordered to be returned for certain reasons, a fresh application within 3 years of the order of return was held to be within time in the terms of Art. 182 (5). 1936 M.W.N. 547.

——Art. 182 (5)—Application ordered to be returned for amendment but remaining upon record.

The number of the suits given in the execution application being wrong the Court passed an order that the application should be returned for amendment. The application was never taken back but remained upon the record:

Held, that the application was step-in-aid of execution sufficient to keep the decree alive. 88 Ind. Cas. 266=27 P.L.R. 393=A.I.R. 1925 Lah. 535.

9 (i). Cl. (5) — Step-in-aid—Attachment of decree.

——Art. 182 (5) — Step-in-aid — Attachment of decree—If step-in-aid of execution of attached decree.

An attachment of a decree by a creditor of the holder of the attached decree, is not a step-in-aid of execution as far as the holder of the attached decree is concerned. I.L.R. (1949) Bom. 634=51 Bom. L.R 608 =A.I.R. 1949 Bom. 379.

——Art. 182 (5)—Attachment of decree.

The order of attachment of the original decree, instead of being a step-in-aid of the execution of such original decree is really a request to stay the execution of the original decree. Instead of being a step-in-aid, it rather arrests the execution of the decree and does not save limitation. 60 C. 1357=A.I.R. 1934 Cal. 234 =149 Ind. Cas. 999.

——Art. 182 (5)—Step-in-aid—Decree attached in execution of decrees against holder in different Courts in favour of different persons—Execution applications in latter Court to execute attached decree—If one or separate executions—Execution by attaching decree-holder—If saves time for execution by another attaching decree-holder.

Where a decree against a person passed by one Court is attached successively in execution of decrees of other different Courts against the holder of that decree and executed by the attaching Court separately on transfer of the attached decree to them, the execution applications in those Courts must be considered to be one proceeding and not different proceedings, because the applications are for the execution of one and the same decree though not in satisfaction of the decree of the decree-holder himself but in satisfaction of the decree of his creditors against himself. The execution application of one creditor will therefore operate as a step-in-aid and save limitation in respect of the execution application of another decree-holder taken out later. I. L. R. (1945) Kar. 445=225 Ind. Cas. 472=A.I.R. 1946 Sind 103.

——Art. 182 (5).

Attachment of decree—Dismissal of application for execution while application to execute attached decree is pending—Application to execute attached decree is a step-in-aid of execution of the original decree and the last application was not time-barred. A.I.R. 1931 Lah. 705=132 Ind. Cas. 667.

——Art. 182 (5)—Step-in-aid — Application for attached decree being executed—C. P. Code, O.21, R. 53 (b).

A decree-holder obtained his decree in the Munsif Court, and on his application, a decree passed in favour of the judgment-debtor in the sub-Judge's Court was attached in execution. The decree-holder then applied to the Sub-Judge under O. 21, R. 53 (b), praying that that Court would execute its own decree and apply the sums realised at first in discharge of his decree obtained in the Munsif's Court. **Held**, that the application in the Sub Judge's Court is a step taken in aid of execution of the decree obtained in the Munsif's Court within Art. 182 and that the application for the execution of the decree made within three years from that application was not barred. 8 Ind. Cas. 675 (Cal.).

9 (j). Cl. (5)—Step-in-aid—Drawing of money from Court.

——Art. 182 (5)—Order permitting decree-holder to withdraw money awarded to him upon rateable distribution is ministerial order—Application for withdrawal is not step-in-aid—Subsequent execution petition, held barred by limitation.

In execution of his decree, a decree-holder realised the decretal amount in part after the sale of certain properties. On February 28, 1936, the Court approved the schedule of rateable distribution and dismissed the execution case on part satisfaction. On March 18, 1936, the decree-holder applied for the withdrawal of the amount lying in Court. Subsequent execution petition was filed on March 18, 1939 and it was urged on behalf of the judgment-debtor that the application was barred by limitation:

Held, that the Court had, on February 28, 1936, decided the matter once and for all, and all that was necessary for the decree-holder to do was to comply with the ministerial rule for allowing him to withdraw the money lying in Court. His application on March 18, 1936, and the order passed thereon was purely ministerial order and was not a judicial order in any sense of the word. The subsequent application being, therefore, presented over three years from the termination of the earlier execution case was barred by limitation. A. I. R. 1941 Pat. 428=22 P. L. T. 792=7 B.R. 565=193 Ind. Cas. 566.

——Art. 182 (5)—Step-in-aid of execution — Rateable distribution of sale proceeds—Application to withdraw.

An order permitting a decree-holder to withdraw moneys awarded to him upon rateable distribution amongst several decree-holders of proceeds realised in execution is in substance as well as in form a ministerial order. The application for withdrawal which the rules of the High Court require to be made to the chief ministerial officer of the court is not a step taken in aid of execution within the meaning of Art. 179, (O.A.) although it has finally to be accounted for by the department. (1905) 10 C.W.N. 28=3 C.L.J. 95.

——Art. 182 (5)—Order for rateable distribution—Application to withdraw money to be proved due upon such distribution—Ministerial order—C.P.C., S. 295.

Where upon application made by a decree-holder, an order for rateable distribution was passed under S. 295, C.P.C., without fixing the amount due to the several decree-holders, and then on a later date the decree-holders applied for an order to withdraw the moneys to which he was entitled upon such distribution:

Held, that the order applied for was not merely a ministerial order, but a judicial order to be passed after considering the claims of rival decree-holders. The application therefore was an application to take some step-in-aid of execution, within Art. 179, Cl. (4). (1904) 8 C.W.N. 382.

——Art. 182 (5)—Application by decree-holder to withdraw money deposited in Court for his own benefit.

An application by a decree-holder to withdraw money deposited in Court for his benefit cannot be held to be a step-in-aid of execution and does not give a fresh starting point for limitation. A.I.R. 1938 Lah. 678=40 P.L.R. 494=I.L.R. (1938) Lah. 586=178 Ind. Cas. 995.

——Art. 182 (5)—Application for payment of money realised in execution.

The payment of money after realisation is a purely ministerial act when there is no dispute about it. Unless an application "advances or furthers" execution, it cannot be held to be a step-in-aid of execution. An application, therefore, for the payment of money realised in execution does not advance or further the execution and is not step-in-aid of execution under Art. 182, Lim. Act and therefore, does not save time. A. I. R. 1938 Lah. 138=39 P. L. R. 1027=175 Ind. Cas. 260.

——Art. 182 (5)—Drawing out money from Court.

The mere drawing out of money from the Court in the absence of anything to show that there was an application either before or after is not a step-in-aid of execution. 38 L.W. 205=A.I.R. 1933 Mad. 597=144 Ind. Cas. 66.

——Art. 182 (5)—Application for payment out of money in Court—When, is not step-in-aid.

An application for payment out of money in Court by a decree-holder is a step-in-aid of execution if the money in Court was realised in execution of the decree. But where the amount of money is in Court to the credit of a suit and such amount has not been the proceeds of execution, an application for payment out cannot be said to be an execution application or an application in aid of execution. 2 Mad. 174; 16 Mad. 452; 17 Mad. 165; 22 Bom. 340, Foll. 87 Ind. Cas. 989=A.I.R. 1925 Mad. 703=48 M.L.J. 506.

——Art. 182 (5)—Step-in-aid—Application to draw money from Court.

An application by the decree-holder to withdraw money deposited in Court is not a step-in-aid of execution if the decree-holder is not opposed by the judgment-debtor, though the original application for execution has not been disposed of. 143 P.W.R. 1908; 207 P.L.R. 1908, Foll. 80 P.W.R. 1912=155 P.L.R. 1912=14 Ind. Cas. 335.

——Art. 182 (5)—Step-in-aid—Deposit in Court.

A obtained a decree against B that B should pay Rs. 267 to A and that A should remove certain bags

of salt. The decree was passed in 1903. On the 25th Nov. 1905, B deposited Rs. 267 in Court for payment to A provided the latter is allowed to remove the bags of salt. On the 14th Dec. 1906, A applied for taking out Rs. 267 deposited in Court for him. This application was disallowed. After that, A took no steps until 14th July 1909, when he applied for the attachment of money. The application of 14th December 1906, was not an application to take some step-in-aid of execution of the decree; and consequently, the application of 14th July 1909, was time-barred. 8 A.L.J. 1151=12 Ind. Cas. 734.

——Art. 182 (5).

In a case where it is agreed to pay the decretal amount in instalments, an application to withdraw the instalments, deposited by the judgment-debtor, is a step-in-aid within the meaning of Art. 182 (5). A.I.R. 1938 All. 210=(1938) A.L.J. 117=1938 A.W.R. 115=I.L.R. (1938) All. 342=175 Ind. Cas. 136.

——Art. 182 (5)—Step-in-aid — Application for payment out of deposit.

An application for payment out of money in court in execution is an application for a step-in-aid of execution within Cl. 5 of Art. 182 of Limitation Act. **A Fortiori** it is so where the deposit was made only as security and an order of the Court is necessary to make it available for payment towards the decree amount. 35 M.L.J. 575=24 M.L.T. 483=8 L.W. 519=(1918) M.W.N. 748=48 Ind. Cas. 226.

——Art. 182 (5) — Step-in-aid — Application to withdraw deposit.

An application by a decree-holder to realize money deposited in the court is a step-in-aid of execution and an application for execution within 3 years thereof is not barred. 18 O.C. 359=33 Ind. Cas. 557.

——Art. 182 (5)—Step-in-aid—Application for payment out or for delivery of possession.

An application by a decree-holder for payment to him of money which has been paid into court on his account in execution of his decree and an application to be put in possession of the property purchased by him in execution of his decree are both steps-in-aid of execution. 35 Bom. 452=13 Bom. L.R. 661=11 Ind. Cas. 987.

——Arts. 182 (5), 178—Application by decree-holder for payment of fund in Court—Money in deposit in court—Old and unclaimed deposits—Intestate Act XXV of 1866.

An application by a judgment-creditor for payment of money already realized in execution for him cannot be barred except under Act XXV of 1866. Where a fund standing to the credit of a suit was directed to be paid to some of the parties in the suit: **Held,** that no bar of limitation attached to their application for drawing out the same, although made fifteen years after the order for payment. An application by a judgment-creditor for payment of a fund or money in court attached would be a 'step in aid' of execution, within the meaning of Art. 179 (4) if the money or fund of which payment is sought has not been realized in execution as the result of the attachment. Such an application would be governed by Art. 178. (1905) 10 C.W.N. 354.

——Art. 182 (5), 179, Cl. (4)—Step-in-aid of execution—Decree for sale on mortgage—Application to take out money paid into Court by judgment-debtor—Transfer of property Act, S. 83.

An application by a decree-holder to have paid to him by the court money deposited in court by the judgment-debtor in part satisfaction of the decree is an application to the court to take a step-in-aid of execution within the meaning of Art. 179 (4) (O. A.) and in this respect a decree for sale under S. 88 of the Transfer of Property Act, 1882, is on the same footing as a decree for money. 1901 A.W.N. 29.

——Art. 182 (5)—Step-in-aid—Deposit in Court—Notice to J. D.

Application by a mortgagor plaintiff depositing money and praying that notice might be sent to defendant requiring him to withdraw the money is a step-in-aid of execution. 14 O. C. 10=9 Ind. Cas. 337.

——Art. 182 (5)—Balance in J. D.'s favour—Application that he may be sent for and paid.

A, a decree-holder, applied on 4th November 1895 for attachment of his judgment-debtor's money, which was with a certain Government department. He did not pray therein that the money be handed over to him. On 19th November 1895, the court requested the department to remit the amount to the court. On 29th April 1898 the Deputy Collector informed the court that there was a balance in the judgment-debtor's favour. On 12th December 1898, A applied to the court that he might be sent for and the amount paid to him. **Held,** (1) the application is not barred, and is not governed by Art. 179, as it is one to take a step-in-aid of execution. (2) An application to execute a decree means an application within S. 235, C. P. C., but having set the court in motion by such an application, any further application during the continuance of the same proceeding is one to take a step-in-aid of its execution. (3) Art. 178, may impose a limitation in regard to such an application to take a step-in-aid of execution. But in this case it does not apply, as the right to apply for the payment accrued only in April 1898 when the amount available for payment was first ascertained. (1900) 24 M. 188=10 M.L.J. 342.

9 (k). Cl. (5)—Step-in-aid—Filing or defending of appeal.

——Art. 182 (5)—Step-in-aid—Objection to attachment by judgment-debtor upheld—Filing of appeal by decree-holder is not step-in-aid.

In execution of a decree the judgment-debtor's objection that the property was not liable to attachment was rejected but was upheld on appeal by the judgment-debtor. Instead of proceeding against other property of the judgment-debtor the decree-holder filed a second appeal from the order which was ultimately dismissed on 24-3-1941. In consequence his application for execution was dismissed for default in prosecution on 9-2-1940. The decree-holder thereupon filed a fresh execution application on 18-2-1943:

Held, that the mere filing of the appeal by the decree-holder was not by itself a step-in-aid of execution and therefore the application was barred by limitation. Even if it be assumed that the filing of the

appeal was a step-in-aid it could not possibly be said that any step-in-aid of execution was taken by the decree-holder when the appeal was dismissed. A.I.R. 1946 Pat. 471=12 Cut.L. J. 19=228 Ind. Cas. 224=13 B.R. 163.

——Art. 182 (5)—Execution dismissed—Appeal—Proper Court.

An appeal against an order dismissing an application for execution is a step-in-aid of execution in the proper Court.

Time runs from the date of the Appellate Court's order under both branches of para. 5 of Art. 182. 58 M.L.W. 438=A.I.R. 1945 P.C. 176=1945 M.W.N. 623=47 Bom. L.R. 956=(1945) 2 M.L.J. 224=49 C.W.N. 776=72 Ind. App. 296=I.L.R. (1946) Mad. 142 (P.C.).

Overruling—A.I.R. 1923 Bom. 431=73 Ind. Cas. 1030.

Reversing—A.I.R. 1943 Mad. 398=I.L.R. (1943) Mad. 485=210 Ind. Cas. 79.

——Art. 182 (5).

Appeal to Higher Court which dismissed it, is no step-in-aid of execution to the proper Court. The expression "proper Court" as defined in Explanation II to Art. 182 does not apply to such a case. 74 Ind. Cas. 279=A.I.R. 1924 Cal. 419.

——Art. 182 (5)—Prosecution of appeal from order in execution is not a step-in-aid.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law to the proper Court for execution or take some step-in-aid of execution. 26 All. 608, Foll. 73 Ind. Cas. 1930=25 Bom. L.R. 518=47 Bom. 783=A.I.R. 1923 Bom. 431.

——Art. 182 (5).

Mortgage suit—Decree for sale—Appealing against a decree declaring another entitled to a prior charge on the property mortgaged is step-in-aid. 64 Ind. Cas. 598=19 A.L.J. 905=A.I.R. 1921 All. 174.

——Art. 182 (5)—Step-in-aid—Filing of appeal.

An appeal by the decree-holder against an order declaring a judgment debtor insolvent, is an application to take a step-in-aid of execution. 39 Bom. 20=16 Bom. L.R. 612=26 Ind. Cas. 262.

——Art. 182 (5)—Appeal from order in execution proceedings.

The prosecution of an appeal from an order made in the course of proceedings in execution of a decree cannot be looked on as an application in accordance with law to the proper court for execution or to take some step-in-aid of execution within the meaning of Art. 179. 5 C. 595, appr. 1904 A.W.N. 139=1 A.L.J. 336=26 A. 608.

——Art. 182 (5)—Step-in-aid—Defending appeal.

It cannot be a step-in-aid of execution within the meaning of Art. 182 if the plaintiff defends an appeal preferred by the judgment-debtor in an execution proceeding. 48 Ind. Cas. 167 (Pat).

9 (1). Cl. (5)—Step-in-aid—Notice.

——Art. 182 (5)—Step-in-aid— Application for issue of notice under O. 21, R. 22, C.P. Code—Execution not pending.

An application for the issue of notice under O. 21, R. 22, C.P. Code, is a step-in-aid of execution, even though no application for execution is pending. 54 C.W.N. 815=A.I.R. 1950 Cal. 493.

——Art. 182 (5) — Prayer for notice under O. 21, R. 22, Civil P.C.

Where a petition contains a prayer for the issue of notice under O. 21, R. 22, the prayer amounts to a step-in-aid of execution. 58 M.L.W. 568=(1945) 2 M. L. J. 427=1945 M.W.N. 695=A.I.R. 1946 Mad. 61.

——Art. 182(5)—Application for issue of notice under O. 21, R. 22.

An application for issue of a notice to judgment-debtors under O. 21, R. 22, Civil P.C., is a step-in-aid of execution and the order made on such an application furnishes a starting point for limitation under Art. 182 (5), Lim. Act. A.I.R. 1938 Mad. 553=47 L.W.538=(1938)M.W.N. 478=(1938) 1 M.L.J. 710=178 Ind. Cas. 525.

——Art. 182 (5) — Issue of combined notice under O. 21, R. 22 and R. 16.

The issuing of a combined notice under O. 21, R. 22 and R. 16 upon the judgment-debtor is sufficient under the law to save limitation when notice under R. 16 has once been issued, time runs anew and it is immaterial that it was issued on an application for execution which was defective or invalid. A.I.R. 1933 Pat. 658=13 Pat. 86=15 P.L.T. 407=147 Ind. Cas. 101.

——Art. 182 (5).

Execution application against dead judgment-debtor—Substitution of heir—Notice under O. 21, R. 22, Civil P. C., if saves limitation:

Held, that the order for notice under O. 21, R. 22, though directed against dead judgment-debtors, was a step-in-aid of execution and saved limitation. 13 P.L.T 318=A.I.R. 1932 Pat. 222=11 Pat. 546=138 Ind. Cas 91.

——Art. 182 (5).

Major judgment debtor though described as minor, is party to execution proceedings—Issue of notice to him gives fresh starting point, to decree-holder. 118 Ind. Cas. 237=A.I.R. 1929 All. 795.

——Art. 182 (5).

Service of notice under O. 21, R. 22, C. P. Code, and attachment of judgment-debtor's properties are step-in-aid. 103 Ind. Cas. 39=6 Pat. 277=8 P.L.T. 652=A.I.R. 1927 Pat. 218.

——Art. 182 (5).

Issue of notice under O. 21, R. 22, is step-in-aid though the application is not in accordance with law. 90 Ind. Cas. 847=7 P.L.T. 330=1925 P.H.C.C. 315=A.I.R. 1926 Pat. 160.

——Art. 182 (5) and old (6)—Issue of notice.

Issue of notice does not save limitation under Art. 182 (6), Sub-Cl. (6) has to be read with sub-Cl. (5). The words 'applied for' mean 'applied for as provided in sub-Cl. (5).' 78 Ind. Cas. 241=A.I.R. 1925 Lah. 233.

——Art. 182, Old (6)—Notice to decree-holder issued by execution court forwarded to another for service—Date from which limitation commenced to run—Filing of affidavit of identifier, if step-in-aid.

If notice for the execution of a decree is forwarded to another Court within whose jurisdiction the judgment-debtor resides, limitation under Art. 182 (6) runs from the date when the notice actually left the court of execution. The fact that in the course of service it was made over to the peon on a later date cannot extend the period. The date on which an application for execution of a decree is made and not the date of its disposal is the date from which limitation runs. The mere filing by the decree-holder's identifier of an affidavit of service unaccompanied by any application, oral or written, does not give a fresh start. 21 C.W 423, Foll. 24 C.W.N. 55=30 C.L.J. 518=54 Ind. Cas. 1.

——Art. 182, Old(6)—"Date of issue of notice" —Meaning of.

"Date of issue of notice" in Art. 182 (6) of the Act mean the date of the order of the Court directing that notice should go and not the date on which the notice is signed or actually leaves the Court. 40 All. 630=16 A.L.J. 633=46 Ind. Cas. 584 (F.B.).

——Art. 182, Old (6)—Date of issue of notice—Meaning of.

The date of issue of the notice in Art. 182, Cl. 6 means the date on which the notice actually issued from the office of the Court, i.e., the date for which it is signed by the Sheristadar in the name of the Court. (1918) P.H.C.C. 130=3 Pat. L.J. 285=4 Pat. L.W. 324=45 Ind. Cas. 203.

——Art. 182, old (6)—Notice—Limitation—Starting point.

Under Art. 182 (6) time runs from the date on which the notice was issued and not the date on which the order issuing the notice was passed. 42 Bom. 553=20 Bom. L.R. 351=45 Ind. Cas. 559.

——Art. 182, Old (6)—Notice.

Time begins to run from the date of order of Court for issue of notice to judgment-debtor and not from the date when nazir selects a peon for carrying out the order of the Court. (1917) P.H.C.C. 52=36 Ind. Cas. 999.

——Art. 182, old (6)—Execution application—Issue of notice—Fresh starting point.

Art. 182 of the Limitation Act should receive a fair and liberal and not a too technical construction so as to deprive the decree-holder of the fruits of his decree. Under Art. 182 (6) of the Lim. Act, the mere issue of notice whether the execution application with respect to which it is made is in accordance with law or not, gives a fresh starting point of limitation. 18 M.L.J. 14; 28 Mad. 557, Foll. An application to a Court having no jurisdiction is no application at all. An application once barred cannot be revived. 39 Mad. 923=30 M.L.J. 460=18 M.L.T. 313=(1915) M.W.N. 769=30 Ind. Cas. 707.

——Art 182, old (6)—Notice to judgment-debtor —Limitation.

The date when notice was directed to be issued to the judgment-debtor is the date from which the period of limitation commences to run. 20 C.L.J. 15=24 Ind. Cas. 80.

——Art. 182, old (6)—Issue of notice—C.P.C. (XIV of 1882), S. 248.

The issue of a notice under S. 248 of the C.P.C. of 1882 is sufficient to save a decree from the bar of Limitation Act, Art. 179, even though it is issued upon an application which is not in accordance with law. 10 Ind. Cas. 411 (Cal.).

——Art. 182, Old (6)—Issue of notice — Effect of—Invalid application.

An application for execution was made, after the death of judgment-debtor without bringing his legal representative on the record and notice under O. 21, R. 22 (S. 248, O.C.) was issued. Held, that the period of limitation under Art. 182 (6) began to run from the date of issuing the notice under S. 248 of the C.P. Code, 1882, irrespectively whether the application was valid or not. 15 All. 84, Foll. 6 A.L.J. 944=3 Ind. Cas. 817.

——Art. 182, (5)—Step-in-aid of execution — Application for issue of notice.

An application for execution, though not in accordance with law, may be held to save limitation if it contains an application for the issue of notice under S. 248, C.P.C., in a case in which a notice is necessary in order to enable execution to proceed. (1907) 18 M.L.J. 14.

——Art. 182, old (6)—Starting point of limitation —Date of order to issue notice or date of actually issuing of notice.

The date of issuing a notice under S. 248, C.P.C., referred to in Art. 179 means the date when it is actually issued and not the date when the court passes the order for issuing the notice. (1902) 6 C.W.N. 656. Also (1906) 16 M.L.J. 548=30 M. 30. Also (1906) 4 C.L.J. 530=10 C.W.N. 303.

——Art. 182 (5) — Swearing of affidavit proving notice under O. 21, R. 66, C.P. Code, unaccompanied by any application is not step-in-aid — Nor issue of notice under C.P. Code, O. 21, R. 66.

Notice under R. 66 to be given to the judgment-debtor, in order that he might be present to assist the Court in drawing up the sale proclamation, cannot of itself be described as an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution because the notice is issued not on the application of

the decree-holder but by the Court itself on its own motion. So also the swearing of an affidavit proving service of notice merely filed by the decree-holder's identifier, unaccompanied by any application oral or written, does not give a fresh start to limitation. 24 C.W.N. 55, Foll. 94 Ind. Cas. 44 =A.I.R. 1926 Cal. 879.

——Art. 182 (5) — Petition for issue of mere notice to judgment-debtor to show cause why decree should not be executed.

There is no provision in the Civil P.C. for the issue of a mere notice to the judgment-debtor to show cause why the decree should not be executed against him and a petition requesting the issue of a mere notice of that kind cannot be described as an application to take a step-in-aid of execution. A.I.R. 1939 Mad. 195=48 L.W. 937=(1939) M.W.N. 344=180 Ind. Cas. 674.

——Art. 182 (5).

An application to issue notice to the judgment-debtor is not an application "in accordance with the law" for execution or to take some step-in-aid of execution. 63 Ind. Cas. 116=26 C.W.N. 292=A.I.R. 1922 Cal. 3.

——Art, 182 (5).

Application for issue of notice to judgment-debtor is step-in-aid. 68 Ind. Cas. 337=4 P.L.T. 204=A.I.R. 1923 Pat. 180.

——Art. 182. (5) — Step-in-aid—Application for issue of notice.

Where an application **prima facie** one for execution prays for the assistance of the Court "by the issue of a notice to the defendant to show cause, if any, why the decree should not be executed against him," it is a step-in-aid sufficient to save limitation. 54 Ind. Cas. 433 (Cal.)

——Art. 182 (5)—Step-in-aid—Application for substituted service.

An application asking for substituted service of notice of execution is a step-in-aid of execution and saves limitation. 29 A. 301, **Foll.** 36 All. 439=12 A.L.J. 785 =24 Ind. Cas. 200.

——Art. 182 (5)—Step-in-aid—Filing of affidavit of service.

The filing of an affidavit to prove service on the judgment-debtor of notice issued under O. 21, R. 22, C. P. Code, is an application to take a step-in-aid of execution. 21 C.W.N. 423=38 Ind. Cas. 536.

——Art. 182 (5)—Affidavit of service of notice under S. 248 of the Civil Procedure Code (1882)—Step-in-aid of execution.

An affidavit of service of notice issued under S. 248 of the Civil Procedure Code of 1882 does not amount to a step-in-aid of execution within the meaning of Art. 179. Also an endorsement certifying part satisfaction of a decree, under S. 258. (1909) 11 Bom. L.R. 729=3 Ind. Cas. 771.

9 (m). Cl. (5)—Step-in-aid—Oral application.

——Art. 182 (5)—Oral application for issue of fresh warrant—Effect.

Where, when the warrant of arrest is returned unexecuted, the decree-holder asks the Court that fresh warrant might be issued, he asks the Court to take a step-in-aid of execution proceedings since the action taken on his previous application has failed. The application is a definite act although oral and a necessary act and the subsequent application filed within three years is within time. A.I.R. 1935 Nag. 131=31 N.L.R. 333=156 Ind. Cas. 114.

——Art. 182 (5)—Oral application for time to inquire about judgment debtors's death.

An oral application by the decree-holder to make inquiries as to the legal representatives of a deceased judgment-debtor constitutes a step-in-aid of execution within the meaning of Cl. 5 of Art. 182. 36 Bom. L.R. 510=A.I.R. 1934 Bom. 266=151 Ind. Cas. 767.

——Art. 182—Step-in-aid—Oral application.

A verbal application for amendment of the petition for execution which was already in proper form cannot be said to be a step-in-aid of execution. A.I.R. 1930 Cal. 304=124 Ind.Cas. 830.

——Art. 182 (5)—Time saved by execution applications made though not in writing.

An application in execution was made on 25th January, 1923, the second application was not made until 18th September, 1926. But during the first execution proceedings on the 21st July and 3rd December applications were made for arrest of the Judgment-debtor and attachment of his property, the latter of which was granted but could not be effected:

Held, that the application dated 18th September, 1926 was within time as further applications in execution which need not have been necessarily in writing were made, and that limitation was thereby saved. 117 Ind. Cas. 578=7 Rang. 132=A.I.R. 1929 Rang. 152.

——Art. 182 (5)—Oral application to proper Court asking to issue warrant of attachment is a step-in-aid.

In considering the meaning of the fifth clause of Art. 182 a Court should look very closely at the words used in the clause and should be loath to look at anything else. An oral application made to proper Court asking it to issue a warrant of attachment and sale of certain property in order that the decretal amount might be satisfied from the sale proceeds is a step-in-aid of execution. 100 Ind. Cas. 308=2 Luck. 419=4 O.W.N. 175=A.I.R. 1927 Oudh 134.

——Art. 182 (5).

Oral application to pay money lying in Court is a step-in-aid. 22 Bom. 340, Foll. 89 Ind. Cas. 228=27 Bom. L.R. 671=A.I.R. 1925 Bom. 443.

——Art. 182 (5)—Court forgetting to determine application for arrest of judgment-debtor—Fresh oral application is 'step-in-aid'.

Where there has been a written application by the decree-holder for execution by the arrest of the judgment debtor and subsequently the decree-holder appears in the Court and merely presses his former application the subsequent proceeding cannot be said to be a step-in-aid of execution. But if in the course of the same proceedings, the decree-holder makes a fresh application, though it might be an oral one and such

fresh application is necessary, because, for instance, the Court has forgotten that it has to decide the question whether the judgment-debtor is to be arrested or not, the latter application will be a step-in-aid. 88 Ind.Cas. 232=12 O.L.J. 302=A.I.R. 1925 Oudh 453.

——**Art. 182 (5)—Step-in-aid — Application for** transfer—Subsequent filing of necessary copies—Oral application.

Where, after an application for the transmission of a decree or order thereon, the decree-holder who has not filed the necessary copies under O. 21, R. 6, C.P.C. filed them into Court and orally applied again for the transmission of the decree: **Held,** that the oral application was not one to take a step-in-aid of execution and did not give a fresh starting point under Art. 182, Cl. (5). 12 L.W. 9=58 Ind. Cas. 536.

——Art. 182 (5)—Step-in-aid—Oral application—To proceed with sale.

An oral application made to the Court to proceed with the sale is one in aid of execution and **saves** limitation. 22 O.C. 175=52 Ind. Cas. 116.

——Art. 182 (5)—Step-in-aid—Oral application.

In order that an oral application may be effective as a step-in-aid of execution the application must be one which it is necessary to make in order to get the main reliefs prayed for in the execution petition. It must be of such a nature that if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application or by reason of the Code, or the rules requiring further acts to be done before the main reliefs prayed for in the execution application could be granted or enforced. 41 Mad. 251 =(1917) M.W.N. 502=33 M.L.J. 219=22 M.L.T. 115 =41 Ind. Cas. 701.

——Art. 182 (5)—Step-in-aid—Oral application.

A **bona fide** oral application by a decree-holder to have the form of the sale proclamation corrected, to have a date fixed for the settlement of the terms of the proclamation under O. 21, R. 66 and for issue of notice for a specified date is a step-in-aid of execution to save limitation. Oral application may amount to a step-in-aid of execution. 2 Pat. L.J. 5=(1917) P.H.C.C. 54=3 Pat. L.W. 208=38 Ind. Cas. 540.

——Art. 182 (5)—Step-in-aid—Oral application.

There must be a definite application to take some step but such application can be made orally and can also be inferred from the proceedings and other circumstances. A mere action by the Court **suo motu** will not keep the decree alive. 20 P.W.R. 1913=18 P.L.R. 1912 (Sup.)=18 Ind. Cas. 236.

——Art. 182 (5)—Oral application—Presumption

The presumption of an oral application can arise only when there is necessity for an application. 9 O.W.N. 209=7 Luck. 590=A.I.R. 1932 Oudh 148 =137 Ind. Cas. 768 (F.B.).

——Art. 182 (5)—Oral application—Presumption.

Mere order by Court to take necessary steps, in the absence of evidence of an application, is no step-in-aid. Oral application by decree-holder cannot be presumed. 103 Ind. Cas. 37=8 P.L.T. 670=A.I.R. 1927 Pat. 323.

——Art. 182 (5).

Order by Court to attach on the date fixed for the showing of cause by J. D. in absence of J. D. is no step-in-aid by defendant. No oral application to attach should be presumed where it is superfluous in view of the written application. 76 Ind. Cas. 769= 1923 M.W.N. 660=A.I.R. 1924 Mad. 186=45 M.L.J. 680.

——Art. 182 (5)—Step-in-aid—Oral application—Presumption.

An oral application to the Court to enter partial satisfaction of a decree is a step-in-aid. Even where there is no actual application on the record such an application may be presumed, in cases where the order made in execution is of such a nature that the Court would not have made it except upon an application for that purpose. 10 L.B.R. 34=12 Bur. L.T. 113=52 Ind. Cas. 656.

9 (a). Cl. (5)—Step-in-aid—Payment and certification of payment.

——Art. 182 (5)—Payment out of Court.

A payment of money made by a judgment-debtor out of Court cannot be treated in any sense as a step-in-aid of execution. (1932) A.L.J. 1035=A.I.R. 1933 All. 49=143 Ind. Cas. 324.

——Art. 182 (5)—Payment out of Court, whether saves limitation.

A payment made out of Court to the decree-holder when no application for execution has been made to any Court is not a step-in-aid. 8 O.W.N. 769=A.I.R. 1931 Oudh 356=7 Luck. 38=132 Ind. Cas. 797.

——Art. 182 (5) — Part payment of decretal amount.

A mere payment by a judgment-debtor of a portion of the decree amount is not a step-in-aid of execution; it is only the petition put in to certify such payment that can constitute a step-in-aid of execution such as will give a fresh starting point of limitation under Art. 182 (5), Lim. Act.

The mere mention of such payment in the execution petition under consideration without any request for certification of the payment is not enough to save the application from the bar of limitation. A.I.R. 1933 Mad. 674=147 Ind. Cas. 586.

——Art. 182 (5).

C. P. Code, 21, R. 2 (3)—Period of limitation is to be computed from the date not of payment but of certification. To do otherwise would be recognising, to some extent, an uncertified payment. When then a decree-holder applies for execution he can only invoke a payment certified before execution became time-barred. 107 Ind. Cas. 40=25 A.L.J. 933=50 All. 259=A.I.R. 1928 All. 55.

——Art. 182 (5).

Uncertified payment does not give fresh start for limitation. 98 Ind. Cas. 823=44 C.L.J. 248=A.I.R. 1927 Cal. 29.

——Art. 182 (5)—Step-in-aid—Payment out of Court.

A payment out of Court cannot be considered a step-in-aid. The petition for certifying such payments is a step-in-aid. 82 Ind. Cas. 743=20 M.L.W. 190 =1924 M.W.N. 674=A.I.R. 1925 Mad. 131.

——Art. 182 (5)—Payment out of Court.

See: 1903 A.W.N. 179=26 A. 36.

——Art. 182 (5)—Mere certificate by decree-holder is not step-in-aid.

Certificate by the decree-holders under O. 21, R. 2, Civil P. C., does not involve any application by him for which any limitation is prescribed. Consequently, a certification by the decree-holder is not a step-in-aid of execution and does not by itself operate to save limitation. A.I.R. 1943 Pat. 7=21 Pat. 481=9 B.R. 139=204 Ind. Cas. 318.

——Art. 182 (5)—Application under O. 21, R. 2, Civil P. C., whether step-in-aid.

An application made to the Court to record a part-payment of a decretal debt under O. 21, R. 2, Civil P.C., is not a step-in-aid of execution.

There was a decree dated July 11, 1932, and on June 30, 1935, a part payment was made of the amount due under the decree and on September 16, 1935 the decree-holder applied to the Court to certify the part payment, and the Court acceded to the application. This **darkhast** was issued on November 8, 1935, more than three years from the date of the decree;

Held, that the application of Sept. 16, 1935, was not a step-in-aid of execution under Art. 182 (5), Lim. Act, so as to save limitation. A.I.R. 1942 Bom. 17= 43 Bom. L. R. 880=I.L.R. (1942) Bom. 11=198 Ind. Cas. 206.

——Art. 182 (5)—Certifying payment of amount towards decree.

The certifying of a payment of an amount towards a decree is not a step-in-aid of execution. 1940 O.W.N. 1202=A.I.R. 1941 Oudh 93=1940 A.W.R. (C.C.) 472=16 Luck. 495=191 Ind. Cas. 557.

——Art. 182 (5)—Certification of payment.

Mere certification by the decree-holder of a payment of money under the decree is not an application to take some step-in-aid of execution of the decree within the meaning of sub-Cl. (5) of Art. 182 of the Lim. Act. (1938) A.L.J. 256=A.I.R. 1938 All. 364= 55 A. 393=146 Ind. Cas. 836.

——Art. 182 (5) — Certificate by decree-holder certifying payment.

In the case of certification by the decree-holder, the expression "application or order" has no relevance. A certificate by the decree-holder certifying payment by the judgment-debtor is, therefore, not an "application" within Art. 182, Lim. Act. A.I.R. 1936 Pat. 386=2 B.R. 680=163 Ind. Cas. 915.

——Art. 182 (5)—Application by decree-holder to record part payment of decree debt.

An application made by decree-holder asking Court to record part payment is not an application that can be called as a step-in-aid of execution and hence cannot save limitation. 42 L.W. 858=69 M.L.J. 785 =(1935) M.W.N. 1319=A.I.R. 1936 Mad. 118 (119)= 59 M. 424=159 Ind. Cas. 544.

——Art. 182 (5)—Certification of payment after decree is time-barred, whether can save limitation.

A certification of payment by decree-holder made after the expiry of the period of limitation for execution cannot be pleaded as a step-in-aid of execution and cannot revive the decree. A.I.R. 1933 Sind 365= 147 Ind. Cas. 30.

——Art. 182 (5)—Certification of payment.

Held, per **Full Bench.**—The certification to the Court under O. 21, R. 2 (1), Civil P. C. of a payment of money payable under a decree is not an application to take some step-in-aid of execution. 9 O.W.N. 209 =A.I.R. 1932 Oudh 148=7 Luck. 590=137 Ind. Cas. 768 (F.B.).

——Art. 182 (5)—Civil P. C., O. 21, R. 2 (1).

Held, by the Full Bench.—Certification by a decree-holder under Cl. (1) of R. 2, of O. 21, Civil P.C. is not an application to the Court to take some step-in-aid of execution.

Certification by the decree-holder is not and cannot be treated as an application made to the Court on which there must necessarily be an adjudication or order by the Court. A.I.R. 1931 Cal. 719=54 C.L.J. 201=35 C.W.N. 1192=59 C. 760=134 Ind. Cas. 922 (F.B.).

Overruling—(1) 12 Cal. 608. (2) 20 Cal. 696. (3) 3 Ind. Cas. 391=10 C.L.J. 467. (4) A.I.R. 1919 Cal. 677=45 Ind. Cas. 903=46 Cal. 22.

——Art. 182 (5).

Certification of part payment cannot help the decree-holder if it is made after the period of limitation for execution has expired. 7 O.W.N. 858=A.I.R. 1930 Oudh 504.

——Art. 182 (5)—C. P. Code, O. 21, R. 2 (1).

Certification under O. 21, R. 2 (1), not being an application within the meaning of Art. 181 cannot be an application for the purposes of Art. 182 (5) and is not a step-in-aid of execution. A.I.R. 1925 Rang. 26, **Not Foll.** 126 Ind.Cas. 540=A.I.R. 1930 Rang. 64.

——Art. 182 (5)—Certificate of payment.

Certificate of payment is not an application within the meaning of Art. 182. A.I.R. 1928 All. 629, Foll. 127 Ind. Cas. 424=A.I.R. 1930 All. 461.

——Art. 182 (5).

(Obiter) Per **Cuming, J.**—A certification of payment by a judgment-debtor is not an application to the Court to take some step-in-aid of execution. It is merely a statement of the Court that something had been done and not an application to the Court to do something. 98 Ind. Cas. 825=44 C.L.J. 248=A.I.R. 1927 Cal. 29.

——Art. 182 (5).

Application barred by limitation—Mention of payment made by judgment-debtor in the application does not save limitation—Application for certification must be prior to execution application. A.I.R. 1924 All. 706, Foll. 100 Ind. Cas. 574=A.I.R. 1927 All. 827.

——Art. 182 (5).

A statement by the decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution. A.I.R. 1922 Mad. 79, **Foll.** 37 Bom. 317, **Diss. from.** 98 Ind. Cas. 156=50 Mad. 49=24 M.L.W. 488=A.I.R. 1926 Mad. 1178=51 M.L.J. 480.

——Art. 182 (5).

Application to certify payments made within three years of decree may be made within three years from such payments and decree-holder will have fresh start for limitation from such application. 84 Ind. Cas. 369 =84 Ind. Cas. 473=2 Rang. 393=3 Bur. L.J. 235= A.I.R. 1925 Rang. 26.

——Art. 182 (5).

Application outside 3 years of decree—Order recording payment within 3 years—Application is in time. 67 Ind. Cas. 899=A.I.R. 1923 Nag. 11.

——Art. 182 (5) — Payment to decree-holder — Application for recording, is a step-in-aid of execution.

It is not what the decree-holder does that is a step-in-aid of execution but what he asks the Court to do, and the date from which the period of limitation starts is the date on which he asks for that step to be taken, not that on which it is taken. The application to record the payment is an application to the Court to take a step-in-aid of execution of the decree. 65 Ind. Cas. 681=18 N.L.R. 62=A.I.R. 1922 Nag. 166.

——Art. 182 (5) — 'Step-in-aid'— Application to certify payment—C.P. Code, O. 2, R. 2.

An application of a decree-holder certifying payment of a portion of the decretal amount out of court is a step-in-aid of execution, provided the payment was actually made, even though the decree-holder prayed that the execution case might be struck off. 12 C. 60; 12 A. 399; 20 C. 696; 3 Ind. Cas. 391, Foll. 20 C.W.N. 615=34 Ind. Cas. 625.

——Art. 182 (5)—Step-in-aid — Application to certify payment.

Having regard to the form and purpose of an application by the mortgagor in 1905 for certifying payments made and the fact that the defendant (mortgagee) signed it, an application for foreclosure in 1907 was in time, the former application of 1905 operating as a step-in-aid. 38 Bom. 47=15 Bom. L.R. 930=21 Ind. Cas. 407.

——Art. 182 (5) —Step-in-aid—Application to certify payment—Application under O. 21, R. 2.

An application under O. 21, R. 2 is a step-in-aid within Art. 179 of the old Lim. Act. 12 A. 309, foll. 33 All. 529=8 A.L.J. 487=9 Ind. Cas. 1023.

——Art. 182 (5) — Step-in-aid — Application to certify payment—C. P. C. (1908) O. 21, R. 2.

An application by the decree-holder to certify payment made out of court is a step-in-aid of execution. 6 Ind. Cas. 43 (Cal.).

——Art. 182 (5) — Step-in-aid — Application for record of satisfaction—C. P. C., O. 21, R. 2.

An application by the decree-holder under S. 258, C. P. Code 1882 is one to take step-in-aid of execution within the meaning of Art. 179 (4), Lim. Act, 1877. 32 All. 257=7 A.L.J. 251=5 Ind. Cas. 295.

9 (o). Cl. (5)—Step-in-aid—Process.

——Art. 182 (5)—Batta application by decree-holder under O. 16, R. 1, Civil P. C. for summoning persons to prove that objection of judgment-debtor that decree had been satisfied was untrue.

A **Batta** application was made under O. 16, R. 1, Civil P. C., by the decree-holder asking the Court to summon persons to attend and give evidence to show that the objection of the judgment-debtor that the decree had been satisfied was untrue:

Held, that the decree-holder was asking the Court to do something which would help to remove the obstruction to execution and allow execution to go and that the **batta** application, therefore, was step-in-aid of execution and saved limitation. (1934) M.W.N. 986=A.I.R. 1934 Mad. 710=58 M. 301=69 M.L.J. 19=42 L.W. 523=154 Ind. Cas. 593.

——Art. 182 (5)—Step-in-aid of execution—Batta memo.

Where, in a **Batta** memo, presented to a Court by a decree-holder, there was an entry "sale warrant" under "Particulars of process" and "Immovable property" under "against whom":

Held, that this was sufficient to indicate that the Court was asked to issue a sale warrant, the **batta** being paid for it, and that this was a step-in-aid of execution. 64 M.L.J. 692=A.I.R. 1933 Mad. 438= (1933) M.W.N. 677=38 M.L.W. 766=144 Ind. Cas. 58.

——Art. 182 (5).

As a counter-application to remove the obstruction caused by the judgment-debtors who stated that the decree was satisfied is not a step in execution; to file batta for witnesses in the enquiry necessitated by this plea would not be a step-in-aid of execution. 37 L.W. 455=A.I.R. 1933 Mad. 403=64 M.L.J. 345=142 Ind. Cas. 197.

——Art. 182 (5)—Step-in-aid—Filing batta memorandum is step-in-aid.

On 3rd July, 1922 the decree-holder applied for the arrest of the judgment-debtor. The arrest was ordered on 10th July, 1922. Then, in accordance with R. 166, Civil Rules of Practice the decree-holder brought into Court the necessary fees with the batta memorandum which contained in columns 1 and 5 the statement "batta for arrest."

Held, that this batta memorandum is a direct application that the Court shall receive the fee and

an implied application that it shall issue process and thus it is a step-in-aid. 110 Ind. Cas. 205=1928 M.W.N. 699=29 M.L.W. 327=A.I.R. 1928 Mad. 563=56 M.L. J. 64.

——Art. 182 (5).

Order for issue of warrant—Inference that Court acted on some application of a decree-holder can be drawn—Such application is a step-in-aid.

The filing of an affidavit of service which is the same thing as proving service of notice on the judgment-debtors is a step-in-aid of execution. 109 Ind. Cas. 588=47 C.L.J. 362=A.I.R. 1928 Cal. 302.

——Art. 182 (5)—Application for issue of process to witness is not step-in-aid.

Application for issue of process to a witness does not fall within Art. 182 (5). The words "step-in-aid of execution" cannot cover a subsidiary and incidental application in the course of an already pending proceeding. The words "step-in-aid of execution" must be construed as meaning some step which is not of an incidental nature, but which of itself gives an independent and fresh start to, or marks a new and effective stage in the execution proceedings. 91 Ind. Cas. 1049=A.I.R. 1926 Nag. 250.

——Art. 182 (5) — Application to summon a necessary witness is a step-in-aid.

An application to summon the **Patwari**, to take evidence for rectification of the area of the property to be sold was held to be a step-in-aid as without such an application the Court would not have summoned the **Patwari** and there would have been no means to rectify the area of the property to be sold as required by the Collector. A.I.R. 1922 All. 432, **Foll.** 74 Ind. Cas. 816=A.I.R. 1924 Oudh 177.

——Art. 182 (5).

Application to summon witnesses in an objection case, is a step-in-aid. A.I.R. 1922 All. 432, **Foll.** 79 Ind. Cas. 411=A.I.R. 1923 All. 415.

——Art. 182 (5)—Step-in-aid — Application for summoning witnesses.

Application for summoning witnesses to resist objection to execution constitutes a step-in-aid. 5 All. 344 and 5 Ind. Cas. 292, **Foll.** 64 Ind. Cas. 524=19 A.L.J. 843=A.I.R. 1922 All. 432.

——Art. 182 (5)—Process application indicating applicant's prayer for attachment is step-in-aid.

A **batta** application was termed "process Application" and it was seen from it that the **batta** was paid "to attach the properties in the house of the defendants" and "it was is requested that Re. 1 might be received for the above purpose". In the left hand margin of the application the words "Order for attachment of the movables under O. 21, R. 43" were found:

Held, that there were sufficient indications in the process application to show that the applicant in effect asked for attachment and that it was a step-in-aid of execution. 28 Mad. 399, **Foll.** 89 Ind. Cas. 894=21 M.L.W. 684=1925 M.W.N. 591=A.I.R. 1925 Mad. 880=48 M.L.J. 678.

——Art. 182 (5)—Step-in-aid — Filing list of witnesses.

Any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of execution of the decree is a step-in-aid of execution which can give a fresh start for limitation. Article 182, Cl. (5) does not require that the application to take step-in-aid of execution of a decree should be made only in the course of execution proceedings under S. 47. The step-in-aid of execution may be taken in connexion with any other proceedings which may not, strictly speaking, be proceeding in execution of the decree, but which affects the execution of the decree.

Judgment-debtor applied under R. 90, O. 21, for setting aside sale. The decree-holder filed a hazari, or list of witnesses in attendance, but the application was dismissed and the judgment-debtor applied for review of the order. In the course of the trial of his review application, the decree-holder filed a list of witnesses and a petition of objection to the review:

Held, that the filing of the list of witnesses and the petition of objection are such steps-in-aid of execution as can give a fresh start for limitation any step in any proceeding which obsructs execution being a step-in-aid. 113 Ind. Cas. 582=7 Pat. 708=9 P.L.T. 817=A.I.R. 1928 Pat. 612.

——Art. 182 (5)—Step-in-aid — Filing list of witnesses.

The filing of a list of witnesses in an execution application where the Court directed both parties to adduce evidence is a step-in-aid of execution and saves limitation. 22=C.W.N. 1027=44 Ind. Cas. 604.

——Art. 182 (5)—Step-in-aid — Application for summoning witnesses.

An application during the pendency of a substantial application for execution by the decree-holder for summoning witnesses for the purpose of determining the standard of measurement without which he could not, in the opinion of the Court, obtain execution is a step-in-aid of execution. 21 C.W.N. 868=26 C.L.J. 115=40 Ind. Cas. 1005.

——Art. 182 (5)—Step-in-aid — Filing of — Identifier's affidavit.

Decree-holder ordered to file written processes and identifier's affidavit—Filing only identifiers affidavits is is not a step-in-aid of execution. 24 C.W.N. 55, **Foll.** 108 Ind. Cas. 430=6 Pat. 694=9 P.L.T. 838=A.I.R. 1928 Pat. 145.

——Art. 182(5) and old(6)—Step-in-aid—Identification of judgment-debtor.

The fact that one of the decree-holders accompanied the serving peon to identify the judgment-debtors is not in itself a step-in-aid of execution within Cl. (5) or Cl. 6 of Art. 182. 18 C.W.N. 1288=27 Ind. Cas. 225.

——Art. 182 (5) and old (6)—Step-in-aid—Accompanying serving peon.

Merely accompanying the serving peon to identify the judgment-debtor is not a step-in-aid of execution, 20 C.L.J. 15=24 Ind, Cas. 80,

——**Art. 182 (5)—Step-in-aid—Affidavit to prove service of process of attachment.**

An affidavit sworn and filed on behalf of the decree-holder in proof of service of attachment process is a step-in-aid of execution. 4 Pat. L.J. 521=49 Ind. Cas. 892.

——**Art. 182 (5).**

Mere payment of process fee is not a step-in-aid of execution. 93 Ind. Cas. 631=1 Luck. 153=13 O.L.J. 49=3 O.W.N. 237=A.I.R. 1926 Oudh 289.

——**Art. 182 (5).**

The payment of process fees for the issue of attachment in execution of a decree is neither an application for execution nor an application to take a step-in-aid of execution within the meaning of Art. 182 (5). 22 All. 358 and 30 All. 179, **Foll.** 87 Ind. Cas. 745= A.I.R. 1925 All. 646.

——**Art. 182 (5).**

Batta memo, not applying for issue of process along with payment of process fees for issue of warrant is no step-in-aid. 9 Cal. 644; 23 Cal. 374; 18 Ind. Cas. 455, **Diss.** 82 Ind. Cas. 497=20 M.L.W. 713=35 M.L.T. 97=1924 M.W.N. 840=A.I.R. 1924 Mad. 906 =47 M.L.J. 537.

——**Art. 182 (5)—Step-in-aid—Payment of process fee**—Cross-examination of objector—Not a step-in-aid—Order to pay **batta.**

The cross-examination of a person who objects to the execution of a decree does not amount to a step-in-aid of execution so as to give a fresh shart of limitation. An order to pay fees for the issue of a notice does not furnish a fresh starting point for limitation if the fee is not paid and notice is not issued. 54 Ind. Cas. 643 (Cal.)

——**Art. 182 (5)—Step-in-aid—Payment of process fee.**

The payment of process fee by a decree-holder is only supplementary to an application for execution and is not an application to the Court to take some step-in-aid of execution. 20 O.C. 332=43 Ind. Cas. 342.

——**Art. 182 (5)—Step-in-aid—Payment of process fee**—Batta memorandum, if step-in-aid.

A Batta memorandum which mentions that it is paid for notice to issue under S. 248 of the C.P. Code (1882) is a step-in-aid of execution and saves limitation. 19 M.L.T. 146=(1916) 1 M.W.N. 78=3 L.W. 34=32 Ind. Cas. 484.

——**Art. 182 (5)—Step-in-aid—Payment of process fee—Filing of sale proclamation.**

The payment of process fees and the filing of a notice of sale are step-in-aid of execution whithin the meaning of Art. 182. 18 Ind. Cas. 455 (Cal.)

——**Art. 182 (5)—Step-in-aid—Payment of batta—Deposit of Nazir's travelling allowance.**

Mere payment of Nazir's travelling allowance will not amount to a step-in-aid of execution so as to save limitation under Art. 182 (5). 9 Cal. 644; 28 Mad. 399, Not Foll. 22 All. 358, 30 All. 179, Foll. 17 C.L.J. 422=13 Ind. Cas. 189.

——**Art. 182 (5)—Step-in-aid—Payment of process fee.**

Simple deposit into Court of the process fee or the diet money cannot be taken as an application to the Court to take a step-in-aid of execution. 22 All. 358; 30 All. 179; 25 Bom. 639, Foll. 7 Ind. Cas. 759 (All.).

——**Art. 182, (5)—Step-in-aid of execution—Batta**—Memorandum with a prayer to issue proclamation.

Held, that a batta memorandum which was something more than a mere memorandum of the deposit, containing as it did a prayer for the issue of sale proclamation, already ordered, is a step-in-aid of execution. 10 C. 851, Foll. (1905) 28 M. 399.

——**Art. 182 (5)—Step-in-aid— Execution—Batta, payment of.**

The mere payment of batta in execution proceedings is not a step-in-aid of execution from which a fresh period of limitation will run. **Semble:**—An **actual,** oral or written application to issue process accompanying payment of batta will be a step-in-aid. (1901) 3 Bom. L.R. 275=25 B. 639 (F.B,). Also (1907) 1908 A.W.N. 74=5 A.L.J. 258=30 A. 179. Also 1901 A.W.N. 42.

9 (p). Cl. (5)—Step-in-aid—Recovery of instalment.

——**Art. 182 (5) and (7)—Application to recover** some of instalments then due—Whether step-in-aid of execution in respect of instalments not due.

If there is an application for execution of so much of of the decree as is executable, that is a step-in-aid of execution of the decree and prevents time running in respect of the whole decree.

Hence where a decree is for payment of money by instalments and an application is made to recover some of the instalments then due, the application is a step-in-aid of execution even in respect of instalments not due at the time of the application. A.I.R. 1940 Bom. 148= 42 Bom. L.R. 276=I.L.R. (1940) Bom. 317=187 Ind. Cas. 803.

——**Art. 182 (5)—Application for recovery of one** of several instalments due under the decree is step-in-aid with regard to whole decree.

An application for partial execution of a decree would be a step-in-aid with regard to the whole decree. There is a considerable difference between a decree which directs several things to be done by the defendant without specifying any particular date or dates for their perfomance and a decree which directs instalments to be paid on particular dates; but a Darkhast, which asks for the assistance of the Court for the recovery of one of several instalments at the date of Darkhast, should be considered as a step-in-aid so as to start a new period of limitation with regard to all the instalments then due. 67 Ind.Cas. 169=24 Bom. L.R. 284= 46 Bom. 719=A.I.R. 1922 Bom. 194.

9 (q). Cl. (5)—Step-in-aid—Transfer of decree.

(a) Application for

(b) Application to transferor Court after transfer.

9 (q) (a). Transfer of decree—Application for.

——Art. 182 (5)—Step-in-aid—Application for transfer of decree for execution to another Court—Effect of.

An application to the Court which passed the decree to transfer the same to another Court for execution is a step-in-aid of execution within the meaning of Art. 182 (5) of the Limitation Act. 1 Pat. 328; 19 Pat. 354, Foll. 29 Pat. 686=A.I.R. 1950 Pat. 518.

——Art. 182 (5)—'Step-in-aid'—Pending execution—If necessary—Application for transfer of decree—If step-in-aid.

A step-in-aid of execution can be taken before an application for execution of the decree has been made in Court. An application for the transfer of a decree to another Court and an order on it transferring the decree, are steps-in-aid of execution. I.L.R. (1947) Nag. 572=A.I.R. 1948 Nag. 197=1947 N.L.J. 399.

——Art. 182 (5).

Where an application for transfer of a decree is made to the Court which passed the decree and that application is in time, such an application made in accordance with law is a step-in-aid of execution within the meaning of Art. 182 (5). (1946) 48 Bom. L.R. 583=A.I.R. 1947 Bom. 113.

——Art. 182 (5)—Transfer of decree to another Court—Execution application, if should be pending.

The law clearly contemplates that if a decree is legally capable of being executed, a decree-holder may either apply for its execution by filing an application under O. 21, R. 11, Civil P. C., or apply for some step to be taken in furtherance of any execution proceedings which he may thereafter think it necessary to initiate, and in the latter case, it is not necessary that an application for execution should actually be pending at the time when he files his application. For instance, the decree-holder would adopt a perfectly valid procedure if he applied in a suitable case to the Court which passed the decree for the transmission of the decree to another Court for execution and after this transfer had been effected, applied to the transferee Court for the execution of the decree. An application to transfer a decree to another Court for execution must, therefore, be regarded as a step-in-aid of execution. 71 C.L.J. 535 =A.I.R. 1940 Cal. 557=I.L.R. (1940) 2 Cal. 252= 191 Ind. Cas. 574.

——Art. 182 (5)—Application to Court passing decree to transfer decree to another Court for execution.

An application made to Court that passed the decree to transfer the same for execution to another Court is a step-in-aid of execution. 1938 A.W.R. 763=A.I.R. 1939 All. 57 (1938) A.L.J. 1128= I.L.R. (1939) All. 97=180 Ind. Cas. 403.

——Art. 182 (5)—Application for transfer of decree.

An application for transfer of a decree to a mofussil Court which has passed the same is a step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. A.I.R. 1939 Cal. 399=I.L.R. (1939) 2 Cal. 33=69 C.L.J. 543=43 C.W.N. 604=187 Ind. Cas. 831.

——Art. 182 (5)—Application for transfer of decree.

An application for transfer of decree is an application for a step-in-aid of execuion, within the meaning of Art. 182 (5). (1937) A.L.J. 278=1937 A.W.R. 239= A.I.R. 1937 All. 397=169 Ind. Cas. 225.

——Art. 182 (5)—Application already standing dismissed—Another application.

A decree was obtained in the Small Cause Court. The Court of Small Causes having no power to execute the decree against immovable property, it was necessary to send the decree for execution to a Court which had that power. The application was made on December 9, 1925. On January 15, 1926, the transferee Court received the order. On July 15, 1926, an application in execution was made to that Court and was dismissed on September 2, 1927, for default. On March 23, 1929, the decree-holder applied to the decree Court for another order, the purpose of which was to do what the order of December 9, 1925, did, that is, send the matter to the Court of same Subordinate Judge, Second Class, for execution against the immovable property. That application was dismissed on March 28, 1929, on the ground that it had already been made and granted in 1925, which order was still effective and subsisting:

Held, that the application for transfer was made to a Court which had power to entertain a transfer application.

Held, also, that the application was to transfer the decree, not to a third Court but to the same Court to which it had already been transferred. It was accordingly, even if granted, a perfectly useless step, and it was a matter for consideration whether such a step was a "step-in-aid" seeing that, if granted, it did not aid. But if this sort of step was the only step that could be taken, then doubtless it would be deemed a step in aid, thould it would usually be preferable to move the transferee Court. A.I.R. 1937 Nag. 305 (308)=I.L.R. (1937) Nag. 440=173 Ind. Cas. 51.

——Art. 182 (5)—Order on application for transfer of decree to another Court for execution—Whether step-in-aid.

An order on an application for transfer of a decree for execution to another Court is a step-in-aid of execution and gives a fresh start of limitation. 18 P.L.T. 202=A.I.R. 1937 Pat. 351=16 Pat. 288=9 B.R. 572= 169 Ind. Cas. 399.

——Art. 182 (5)—Order transferring decree for execution.

The order of the Court which passed the decree sending the same for execution to another Court is not a mere ministerial act, but is a judicial act and amounts to a step-in-aid of execution from the date of which the period of limitation prescribed by Art. 182 should be computed. A.I.R. 1937 Rang. 477=1937 Rang. L.R. 287=173 Ind. Cas. 160.

——Art. 182 (5)—Application for transfer.

An application underS. 39, Civil P. C., for transfer of a decree is rot an application for execution. It is only an application for a step-in-aid of execution. 39 Bom. L.R. 540=A.I.R. 1937 Bom. 365=I.L.R.(1937) Bom. 691=170 Ind. Cas. 877.

——Art. 182 (5).

An application for transfer of a decree amounts to a step-in-aid of execution. A.I.R. 1936 All. 369=1936 A.L.J. 254=1936 A.W.R. 294=163 Ind. Cas. 231.

——Art. 182 (5).

The application for transferring the decree from one Court to another and the order thereon is, in fact, a step-in-aid of execution and gives a fresh start of limitation. A.I.R. 1936 Pat. 313=2 B.R. 529=162 Ind. Cas. 984.

——Art. 182 (5).

The expression "step-in-aid of execution" must be taken to be intended to cover every application made by the decree-holder in accordance which law, setting the Court in motion to execute the decree and in furtherance of the proceeding in execution. Consequently, an application made for transfer of the decree from one Court to another for the purpose of execution must be deemed to be an application to keep the decree in force and is in that way a step-in-aid of execution. A.I.R. 1935 Cal. 640=158 Ind. Cas. 590.

——Art. 182 (5).

An application to the Court passing a decree to transfer it to another Court is an application to take a step-in-aid of execution. A.I.R. 1933 Oudh 131=10 O.W.N. 363=143 Ind. Cas. 678.

——Art. 182 (5).

An application for transfer of a decree is a step-in-aid of execution. A.I.R. 1933 Sind 78=27 S.L.R. 109=142 Ind. Cas. 489.

——Art. 182 (5).

Though a mere application to have a decree transferred to another Court is not an application for execution, it is an application for a step-in-aid of execution. 52 C.L.J. 569=35 C.W.N. 77=A.I.R. 1931 Cal. 312=58 C. 832=132 Ind. Cas. 149.

——Art. 182 (5)—Application for transmission of decree to another Court.

The sending of the decree for execution to another Court is not by itself an execution of the decree, though an application for such a transmission may amount to taking step-in-aid of such execution. 115 Ind. Cas. 865=1929 A.L.J. 553=A.I.R. 1929 All. 390.

——Art. 182 (5).

Application for transfer of decree for execution is step-in-aid. 95 Ind. Cas. 26=A.I.R. 1926 All. 660.

——Art. 182 (5)—Application for transfer of decree for execution is a step-in-aid.

An application for a certificate is a step-in-aid of xecution and it is a step which is always necessary where the decree-holder desires to obtain execution against property situate outside the territorial limits of the jurisdiction of the Court which made the decree. 65 Ind. Cas. 332=3 Pat.L.T. 298=1 Pat. 328=A.I.R. 1922 Pat. 301.

——Art. 182 (5).

Application for transfer of decree will be a step-in-aid only when it is in accordance with law. The expression 'applying in accordance with the law' means applying to the Court, to do something in execution, which, by law, the Court is competent to do. It cannot mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact or from the presumed knowledge of the law, he must have known the Court was incompetent to do. 67 Ind. Cas. 538=1 Pat. 651=3 P.L.T. 422=1922 P.H.C.C. 229=A.I.R. 1922 Pat. 188.

——Art. 182 (5) — Step-in-aid — Application for transfer—S. 39 and O. 21, Rr. 5 and 10, C. P. Code—Transfer of decree from one Sub-Court to another Sub-Court in another District—Forum.

The decree-holder having applied for transfer of decree under S. 39, C. P. Code for execution by the Sub-Judge of **D** the former Court of **H.** also a Sub-Court transferred the decree direct to the latter Court situate in another District and the High Court quashed the proceedings directing its transmission through the District Judge of Santhal Parganahs: **Held,** that the application for transfer of the decree for execution made by the decree holder was an application "in accordance with law" under Art. 182 (5), Limitation Act the decree-holder being not responsible for the mistake committed by the Sub-Judge of **H.** 1 Pat. L.T. 386=58 Ind. Cas. 220.

——Art. 182 (5)—Application for transfer of decree without copy of decree.

An application for execution of a decree by transfer to another court, though not accompanied by a certified copy of the decree and though the decree is not transferred is a step-in-aid of execution under Art. 182. 11 Bur. L.T. 116=42 Ind. Cas. 100.

——Art. 182 (5) — Step-in-aid — Application for transfer of decree.

Application for transfer of a decree for execution is a step-in-aid. 14 A.L.J. 415=33 Ind. Cas. 523.

——Art. 182 (5) — Step-in-aid — Application for transfer of decree.

An application to transfer the decree to another court for execution is a step-in-aid of execution for purposes of limitation. 35 All. 389=11 A.L.J. 533=19 Ind.Cas. 664.

——Art. 182 (5)—Step-in-aid — Application for transfer of decree.

See 17 M.L.J. 417=30 M. 537=2 M.L.T. 466.

——Art. 182 (5).

An application to a Court in British India for transfer of decree for execution to Court of Political Agent, Quetta, is valid and can constitute a step-in-aid of execution. A.I.R. 1942 Pesh. 49=201 Ind. Cas. 610.

——Art. 182(5)—Application to British Indian Court to transfer decree for execution to Court in Native State.

An application made to a British Indian Court to transfer its decree for execution to a Court of Native State between which and the British Govt. there exists an agreement to execute each other's decrees, is, a step-in-aid of execution within the meaning of Art. 182, Lim. Act.

A decree-holder who had obtained a decree in the Court at Dindigul (British India) applied on January 21, 1932, for an order transferring it to the Chief Court of the State of Pudukottah and on January 25, 1932, his application was granted. The execution proceedings in Pudukottah led to nothing and the decree-holder caused the decree to be re-transferred to the Court at Dindigul. On October 10, 1936, the decree-holder filed an application for execution in that Court:

Held, (Per **Full Bench**; **Harwill, J., contra**).—That the application to the Court at Dindigul made on October 10, 1936, was within time. A.I.R. 1941 Mad. 309=I.L.R. (1941) Mad. 574=53 L W. 145=1941 M.W.N. 127=(1941) 1 M.L.J. 242=1941 A.W.R. 7 (2) Sup.=195 Ind.Cas. 576 (F.B.).

Overrules—A.I.R. 1918 Mad. 580=42 Ind. Cas. 294 (F.B.).

——Art. 182 (5)—Step-in-aid — Application for transfer—Execution by the Court of Native State—Existence of reciprocity.

An application made to a British Indian Court to transfer its decree to the Court of a Native State between whom and the British Govt. there exists an agreement to execute each other's decrees is a step-in-aid of execution within Art. 182. 42 Bom. 420=20 Bom. L.R. 421=46 Ind.Cas. 56.

——Art. 182 (5)—Fresh start of limitation—Order of transfer of decree—Ministerial order.

The order of transmission on an application made to a Court, not for the execution of a decree but for the transfer of the decree to another Court is a purely ministerial act and cannot be availed of for saving limitation. 219 Ind.Cas. 491=23 Pat. 707=A.I.R. 1945 Pat. 71 (73).

——Art. 182 (5)—Application for transfer of execution, if saves limitation.

A mere application for an order for transmission of execution to another Court does not amount to an application for execution and cannot save limitation. A.I.R. 1939 Lah. 110=41 P.L.R. 105=I.L.R. (1939) Lah. 319=182 Ind. Cas. 871.

——Art. 182 (5)—Application to Court passing decree to transfer decree to another Court for execution—Such other Court having no pecuniary jurisdiction to execute decree.

Where a decree-holder applies to the Court which passed the decree for a transfer of the decree to other Court for execution but such other Court is not competent to execute the decree, the decree amount exceeding the pecuniary jurisdiction of the Court, the prayer in the application is such as the Court to which the application is made is not competent to grant and such an application is not in accordance with law and does not give a fresh start to limitation. A.I.R. 1939 All. 57=(1938) A.L. J. 1128=I.L.R. (1939) All. 97=1938 A.W.R. 763=180 Ind. Cas. 403.

——Art. 182 (5).

Transfer of an execution application from one Court to another on account of territorial adjustment does not affect or alter the date of original presentation. 1931 M.W.N. 413.

9 (q) (b). **Transfer of decree—Application to Transferor Court after transfer.**

——Art. 182 (5).

Step-in-aid of execution—Application to Court which passed decree for an order re-transferring it. See C. P. Code, Ss. 41 and 48. (1947) 1 M.L.J. 156=A.I.R. 1947 Mad. 431.

——Art. 182 (5)—Application to transferring Court for sending for decree from transferee Court and sending it back again to same Court.

A decree was passed by Coimbatore Court and transferred for execution on November 11, 1930, to Malkapur. The decree-holder did nothing till November 11, 1933, when he applied to Coimbatore Court that the Court should send for the decree from Malkapur Court and then send it back again for execution there:

Held, that the application could not be held to be a step-in-aid of execution within the meaning of Art. 182 (5), so as to save limitation. A.I.R. 1942 Nag. 63=1942 N.L.J. 101=I.L.R. (1942) Nag. 539=200 Ind. Cas. 56.

——Art. 182 (5).

Application by decree-holder to transferring Court, to re-call decree from transferee Court, for being executed by the transferring Court itself is a step-in-aid of execution made in accordance with law before the proper Court and saves limitation under Art. 11. 20 P.L.T. 353=A.I.R. 1939 Pat. 144=17 Pat. 617=5 B.R. 465=180 Ind. Cas. 311.

——Art. 182 (5)—Non-satisfaction certificate sent to original Court—Application to recall decree.

In cases where something is done which it is not necessary to do, it cannot be held that any step has been taken in execution.

Where, after the sending of a non-satisfaction certificate to the original Court, the decree-holder does not take any step in execution within three years thereof except by an application to recall the decree sent to the transferee Court, such an application not

being a step-in-aid of execution, it being unnecessary would not save limitation. A.I.R. 1937 Rang. 406= 127 Ind. Cas. 775.

——Art. 182 (5).

A decree was passed on February 17, 1926 by the Court of the Additional Sub-Judge of Alipur. On January 21, 1929, it was transmitted to the District Court at Ranchi and was executed in the Court of the Subordinate Judge of Ranchi. Thereafter, the said execution case was dismissed on part satisfaction on April 30, 1930. On April 5, 1933, an application was filed by the decree-holders in the Court of the Subordinate Judge of Alipur. On April 12, 1933, the Subordinate Judge of Alipur wrote to the District Court at Ranchi enquiring and thereafter, wrote again and then on June 19, 1933 received a reply dated June 17, 1933, in which it was stated that execution case had been dismissed on part satisfaction on April 30, 1930: On the said June 19, 1933, on receipt of the said reply the execution was registered:

Held, that it was the date of the certificate April 30, 1930 and not the date on which the certificate arrived in the Alipur Court which was of any relevancy. On the date of the application, the Court was not in a position to grant the prayers in the absence of the certificate of non-satisfaction. But there was no justification to treat the application as not made or made to a Court without jurisdiction. A.I.R. 1935 Cal. 99=39 C.W.N. 129=60 C.L.J. 461=154 Ind. Cas. 731.

——Art. 182 (5).

Decree transferred for execution—Application to parent Court to re-transfer it to a third Court is proper and is step-in-aid. A.I.R. 1926 Lah. 113 **Appr.**; A.I.R. 1922 Bom. 359, **Diss. from.**; 110 Ind. Cas. 829=A.I.R. 1928 Mad. 493.

——Art. 182 (5).

An application made after transfer of decree to another Court for execution to the Court passing the decree for certificate of part satisfaction of the decree is not an application for execution or to take a step-in-aid of execution. 78 Ind. Cas. 241=A.I.R. 1925 Lah. 233.

——Art. 182 (5).

After a decree is transferred by one Court to another for execution, any application made to the former Court cannot be a step-in-aid. 39 Mad. 640, (P.C.) **Foll.** 74 Ind. Cas. 608=2 Pat. 247=1924 P.H.C.C. 362=A.I.R. 1923 Pat. 384.

9 (r). Cl. (5)—Step-in-aid—What is—(Miscellaneous).

——Art. 182 (5) — Step-in-aid of execution—Absence of prayer for sale in execution for application.

The omission of a prayer for sale in an execution application is not fatal and even if it did not satisfy the requirements of O. 21, R. 11, C.P. Code, it could be considered as an application to take a step-in-aid of execution. 63 L.W. 996=(1950) 2 M.L.J. 261=A.I.R. 1951 Mad. 274.

——Art. 182 (5)—Step-in-aid—Execution by Court passing decree—Transmission to another Court of the decree—Simultaneous execution petition in both Courts—Notice to judgment-debtor—Absence—Effect.

As the law stands in this State, a Court which has passed a decree, can, despite its having transferred it for execution to another Court and not having received a non-satisfaction certificate, entertain an application by the decree-holder for transfer of the decree to a third Court or an application for simultaneous execution which can be ordered by the Court passing the decree.

When an affidavit shows the occasion for making an application for simultaneous execution in general terms it cannot restrict either the scope of the request in the application or the order granting it.

The C.P. Code does not require mandatorily a notice to the judgment-debtor for ordering a petition for simultaneous execution as in the case of O. 21, R. 66. It is only a notice required under the rule of justice, equity and good conscience that no judicial order be passed without giving the party affected an opportunity of being heard. So, though an order passed, like this, may be illegal and deserving of being set aside at the instance of the judgment debtor, it is not a case where the order will be void and of no effect to serve as a step-in-aid of execution. (1945) 1 M.L.J. 355, foll. I.L.R. 1951 Mad. 375=63 L.W. 583=A.I.R. 1950 Mad. 582 =(1950) 1 M.L.J. 787.

——Art. 182 (5)—Discharge under Insolvency Act—Execution petition filed—Petition, if step-in-aid of the execution.

Where the Court was competent to execute the decree personally against the defendant but only by reason of a discharge granted under Insolvency Act, the decretal debt would be deemed to have been extinguished, an execution petition filed in the Court may yet give a fresh starting point for limitation. Such petition is step-in-aid of execution. (1945) 1 M.L.J. 355=58 L.W. 300=A.I.R. 1945 Mad. 352.

——Art. 182 (5)—Suit under S. 61, Oudh Rent Act, if step-in-aid of execution of decree for arrears of rent.

Though a suit under S. 61, Oudh Rent Act is not intended to remove any obstacles, but in so far as the decree passed in such a suit requires the tenant to pay up the arrears within a certain time in default of which he is to be ejected, it is a step in furtherance of the execution of the decree for arrears of rent. 1936 O.W.N. 134=1936 R.D. 72=A. I. R. 1936 Oudh 248=11 Luck. 716=160 Ind. Cas. 465.

——Art. 182 (5)—Step-in-aid—What is.

Judgment-debtor informing adjustment—Decree-holder contesting application—Act is step-in-aid of execution. 124 Ind. Cas. 830=A.I.R. 1930 Cal. 304.

——Art. 182 (5)—Application made to point out official mistake in not calculating interest due under decree is step-in-aid of execution.

The determination of the question whether an application amounts to a step-in-aid of execution depends not, on the stage at which the application is made by the decree-holder, but it depends upon the nature of the application and the relief claimed therein. One main test in such case is whether it was necessary for the decree-holder to make the application in order to realize the money awarded to him under the decree and in accordance with the decree.

An application made to point out that the official had omitted to include interest granted under the decree payable to him and to correct the mistake by addition of interest after calculation, is necessitated by a mistake of an official of the Court and is a step-in-aid of execution. It is a judicial act and not a ministerial one. 114 Ind. Cas. 55=A.I.R. 1929 Lah. 103.

——Art. 182 (5)—Application to appoint Receiver is step-in-aid. 113 Ind. Cas. 909=10 L.L.J. 505=A.I.R. 1929 Lah. 57.

——Art. 182 (5)—Step-in-aid — Application for receiver.

Where the decree-holder asked for the appointment of a receiver to harvest the crop and pay the revenue, after the sale but before confirmation, this application, is a step-in-aid of execution. 7 M.L.T. 86=5 Ind. Cas. 758.

——Art. 182 (5)—Step-in-aid — Decree against estate of deceased in hands of Judgment-debtors—Application for execution not accompanied by inventory — C. P. Code, O. 21, R. 12.

Decree against estate of deceased in the hand of judgment-debtors—Order 21, R. 12, C. P. Code, does not apply—Application for execution need not be accompanied by an inventory to make it step-in-aid of execution. 98 Ind. Cas. 941=28 Bom. L.R. 1322=A.I.R. 1937 Bom. 52.

——Art. 182 (5)—Applications for hastening realization of decree amount are steps-in-aid.

Where the decree-holder by applying for a final decree was endeavouring to get an order which he thought at the time was necessary before executing his decree, but afterwards, due to better advice he gave up that attempt and applied for the execution of the decree without getting a final decree as that was unnecessary,

Held, that such applications were steps-in-aid of execution, for he was asking the Court to make an order which was thought necessary before taking out actual execution of the decree and as the ultimate object of these petitions was to hasten the actual realization of the decree amount. 106 Ind. Cas. 395=A.I.R. 1928 Mad. 38.

——Art. 182 (5)—Permission to execute decree where party on record is dead, is a step-in-aid, but enures only for the then party to the proceedings. 85 Ind. Cas. 657=A.I.R. 1926 Cal. 267.

——Art. 182 (5)—Application to send for records may amount to step-in-aid.

Although every application to send for a record made by a decree-holder may not necessarily amount to a step-in-aid, if the Court before whom the application is made considers it necessary in order to get rid of the objections raised by the judgment-debtor, such an application may amount to a step-in-aid. 88 Ind. Cas. 271=47 All. 667=23 A.L.J. 422=6 L.R.A. (Civ.) 339=A.I.R. 1925 All. 394.

——Art. 182 (5)—Examination of witness to resist objection to execution.

The decree-holders examined a certain witness in order to resist an objection filed by the judgment-debtor to the execution of the decree.

Held, that the action on behalf of the decree-holders was a step-in-aid of execution as contemplated by Art. 182. 21 C.W.N. 868; 22 C.W.N. 1027, and 2 P.L.J. 5, Foll. 88 Ind. Cas. 807=4 Pat. 202=6 P.L.T. 777=A.I.R. 1925 Pat. 459.

——Art. 182 (5)—Application to reject certain objections to execution is step-in-aid. 40 All. 668, Foll. 63 Ind. Cas. 907=19 A.L.J. 641=A.I.R. 1921 All. 119.

——Art. 182 (5)—Step-in-aid — Application to reject objections to the execution of decree.

An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed so as to enable the execution to proceed is a step-in-aid of execution and saves the bar of limitation. 40 All. 668=16 A.L.J. 704=48 Ind. Cas. 38.

——Art. 182 (5)—Step-in-aid — Application for taking evidence.

Application by a decree-holder to reject an objection raised to the execution of decree and an application to examine decree-holder's witnesses are both steps-in-aid of execution and serve to save limitation. 5 Ind. Cas. 292 (All.).

——Art. 182 (5)—Application to receive jail-batta is a step-in-aid of execution.

A written application to the Court, to receive the railway fare and the cost of meals for sending the judgment-debtor to the Civil Jail is a step-in-aid and gives a fresh starting point for limitation.

If an application written or oral has been made asking the Court to take some step-in-aid of execution, it forms a starting point under the article. 70 Ind. Cas. 80=15 M.L.W. 14=A.I.R. 1922 Mad. 30.

——Art. 182 (5)—An application for the revival of previous proceedings for execution is a step-in-aid of execution. 64 Ind. Cas. 727 (Cal.).

——Art. 182 (5)—Step-in-aid — Payment of money due—Pre-emption decree — Limitation.

An application for the execution of a decree for pre-emption can be made within three years from the date when the money due under it is tendered. The payment of money under a decree for pre-emption is a necessary step-in-aid of execution. An application tendering the money in order that the decree-holder might be able to apply for possession forms a fresh starting point for limitation whether Arts. 181 and 182 of the Limitation Act applied to the case. 1 U.P.L.R. (J.C.) 41=22 O.C. 82=52 Ind. Cas. 156.

——Art. 182 (5)—Step-in-aid — Application for for sale.

A memo praying the Court to hold a sale in connection with a pending execution petition is a step-in-aid of execution within Art. 182. 38 Ind. Cas. 152 (Mad.).

——Art. 182 (5)—Step-in-aid — Application for continuation of sale.

An application for the continuance of a sale is a

step-in-aid of execution. 30 C. 761, Foll. 1 L.W. 573=25 Ind. Cas. 58.

——Art. 182 (5)—Step-in-aid — Application for sale proclamation.

Application for the issue of a fresh proclamation is a step-in-aid of execution. 9 Ind. Cas. 634 (All.).

——Art. 182 (5)—Step-in-aid — Compromise postponing execution.

Compromise postponing execution to an indefinite period is a step-in-aid. 15 C.W.N. 82=6 Ind. Cas. 366.

——Art. 182 (5)—Step-in-aid — Attachment of house — Extract from collectorate — Application for.

An application for attachment of the judgment-debtor's house and shares in a Mauza was made within time and in proper form. The application was returned to the decree-holder for supplying the necessary extracts of the collectorate register. The application was refiled after 3 years from the previous application. *Held*, that the subsequent application for collector's extracts was a step-in-aid. 14 C.W.N. 481=5 Ind. Cas. 579.

——Art. 182 (5)—Step-in-aid — Application by Executor.

An application in proper form for execution by the executors of the original decree-holders though probate had not been then obtained, is a step-in-aid of execution. 20 Cal. 755, Foll. 9 C.L.J. 382=4 Ind. Cas. 118.

——Art. 182 (5)—Step-in-aid — Application for arrest and attachment.

An application under O. 21, R. 21, C. P. Code is step-in-aid; the date of application to a proper court is the date of persentation and not the date when it is considered and disposed of. 10 C.L.J. 479=3 Ind. Cas. 336.

——Art. 182 (5)—Application for a 'seal warrant'.

An application made to the Court of Small Causes at Calcutta, in execution of a decree issued therefrom, for the issue of a "seal warrant" is an application to the court to take a step-in-aid of execution of the decree within the meaning of Article 179. And such would be the case notwithstanding that, owing to the absence of the record in another court, a seal warrant could not at once issue on the acceptance of the decree-holder's application. 1906 A. W. N. 269=3 A.L.J. 815.

——Art. 182 (5) (179), Cl. (4)—Presidency Small Cause Court — Seal warrant — Application for execution—Step-in-aid of execution.

An application to the Calcutta Small Cause Court for a seal warrant is an application for execution or to take a step-in-aid of execution and will furnish a fresh starting point of limitation for execution. (1901) 29 C. 580.

——Art. 182 (5)—Foreign decree — Execution in British India—Valid step-in-aid of execution taken in foreign Court—Must be accepted as such in British Indian Court.

Per *Schwabe, C. J.*—The law to be considered is that of the place where the application is made which will generally also be the place of origin of the decree and Cl. 5 of the Art. 182, of the Indian Limitation Act must be read to mean "to take some step which, according to the law of the place where the application therein referred to has to be made, is a step-in-aid of execution."

Per *Wallace, J.*—When we have to consider the interpretation of Art. 182 with reference to execution of a foreign decree, we have to consider not whether the application would have been a step-in-aid in British India with reference to the execution of a British Indian decree, but whether the application having reference to a foreign decree and having been brought in the proper foreign Court, was a step-in-aid under the law of that Court and if it was, such a step-in-aid, it satisfies Art. 182. When a foreign Court has laid down that an application such as the present to transmit the documents to British India was at the time it was made, a proper step-in-aid of execution. It would be wrong for the British Indian Court to hold, when called on to execute that foreign decree that that application was not at the time it was made, a perfectly legal step-in-aid within the meaning of Art. 182 of the Indian Limitation Act. 42 Bom. 420, Appr. 69 Ind. Cas. 932=45 Mad. 1014=1922 M.W.N. 647=16 M.L.W. 735=A.I.R. 1923 Mad. 72=43 M.L.J. 700.

9. (s). Cl. (5)—Step-in-aid—What is not—Miscellaneous.

——Art. 182 (5)—Step-in-aid — Application by decree-holder to have debtor adjudged insolvent—If saves limitation for execution of decree.

An application by a decree-holder to get his debtor adjudicated insolvent is not a step-in-aid of execution and will not therefore give a fresh start of limitation to the decree-holder for executing his decree against the debtor, under Art. 182 (5), Limitation Act. 16 Bom. L.R. 612, not foll. I.L.R. (1949) Bom. 634=51 Bom. L.R. 608=A.I.R. 1949 Bom. 379.

——Art. 182 (5)—Application for ratable distribution—Decree creating charge on property.

An application for ratable distribution made in execution of a decree creating a charge on the property for the recovery of the decree amount is not one made "in accordance with law" and cannot save limitation. A.I.R. 1943 Bom. 353=45 Bom. L.R. 707=210 Ind. Cas. 376.

——Art. 182 (5)—Affidavit in reply to garnishee's objection.

An affidavit filed by the decree-holder in reply to an objection by the garnishee is not application in accordance with law to the proper Court to take some step-in-aid of execution of the decree. A.I.R. 1943 Mad. 398=(1943) 1 M.L.J. 95=1943 M. W. N. 83=I.L.R. (1943) Mad. 485=210 Ind. Cas. 79.

——Art. 182 (5)—Step-in-aid — Application for injunction.

A step-in-aid of execution can be taken before an application for execution of the decree has been made in Court.

After the mortgage-decree was made final, the judgment-debtor transferred a portion of the mortgaged property. It was open to the decree-holder to ask for the execution of his decree before it was barred by limitation, the transfer by the judgment-debtor not having the effect of throwing any obstacle to the execution of the decree. But he applied for an injunction and in the proceedings, the judgment-debtor resisting the application in reply admitted the existence of the mortgage-decree against him:

Held, that the application for an injunction could

not be treated as step-in-aid of execution. A.I.R. 1939 All. 483=(1939) A.L.J. 746=I.L.R. (1939) All. 728=1939 A.W.R. 640=183 Ind. Cas. 685.

——**Art. 182 (5)—Application to revive decree finally satisfied — Whether step-in-aid — Decree, if suspended, pending application to set aside satisfaction order or appeal therefrom.**

When, at the time of making an application, there is no executable decree, the application cannot be regarded as step-in-aid of execution. There can be no question of the execution of a decree which is not in being at the time of the application. It would not be proper to couple an application for execution along with the application to set aside the order of satisfaction, for until the decree had been restored to being, there would be nothing to execute, nor even any determination of the amount for which execution could issue. An application to revive a decree which is finally satisfied cannot be regarded as a step-in-aid of execution of that decree which, unless and until it is revived has no judicial existence. A.I.R. 1939 Mad. 892=50 L. W. 497=(1939) M.W.N. 996=187 Ind. Cas. 591.

——**Art. 182 (5)—Unnecessary application.**

A consent decree passed under S. 15-B, Dekkhan Agriculturist Relief Act, 1879 does not require to be made final. Where such a decree is passed and the decree-holder applies to make it absolute, the application does not constitute a step-in-aid to save limitation. A.I.R. 1937 Sind 121=170 Ind. Cas. 189.

——**Art. 182 (5)—Application to reconstruct decree.**

An application for reconstruction of a decree which has been destroyed is not a step-in-aid of execution. 36 Bom. L.R. 115=A.I.R. 1934 Bom. 113=150 Ind. Cas. 866.

——**Art. 182 (5)—Step-in-aid — Reconstruction of lost record.**

An application for execution of a decree need not be accompanied by a copy of the decree. When, therefore, the decree has been lost or destroyed, it is competent to the decree-holder to apply for execution and to obtain relief upon proof of the contents of the decree by secondary evidence. An application to a court to reconstruct a lost decree, is not a step-in-aid of execution, as it is needless for the decree-holder to have the decree restored before he applies for execution which must be done within three years from the date when the judgment was pronounced. *Quaere*: Whether, when a record has been destroyed, the decree-holder is entitled to bring a fresh suit or whether he must apply for execution of the lost decree and prove its contents by secondary evidence. (1907) 11 C.L.J. 243=5 Ind. Cas. 660.

——**Art. 182 (5)—Obtaining of—Search certificate.**

The obtaining of a certificate of search of certain documents from the Office of the Sub-Registrar cannot by any stretch of language, be called a step-in-aid of execution.

Nor can the fact that the decree-holder got back certain documents filed by her in the previous execution of decree case be looked upon as a step-in-aid of execution of her decree. 10 O.W.N. 1251=A.I.R. 1934 Oudh 426=9 Luck. 288=147 Ind. Cas. 766.

——**Art. 182 (5)—Mere application for a copy of a decree—Application to execution Court itself—'Necessity of'.**

Mere application for a copy of a decree cannot be said to be a step-in-aid of execution. To come within Art. 182, a decree-holder must make some application to the execution Court itself. A.I.R. 1933 All. 756=(1933) A.L.J. 1126=145 Ind. Cas. 915 (2).

——**Art. 182 (5)—Step-in-aid — Application for copy of decree.**

An application for a copy of the decree to be executed is not an application to the Court, to take some step-in-aid of execution and time will not be computed from the date of such an application (1920) M.W.N. 700=12 L.W. 534=39 M.L.J. 572 =60 Ind. Cas. 117.

——**Art. 182 (5)—"Step-in-aid"—Application for transfer — Objection by judgment-debtor—Batta memo.—Application to proceed with execution—Vakalat in appeal by judgment-debtor.**

A decree-holder applied for transfer of a decree on August 20, 1923. The judgment-debtor contended that the decree was satisfied. The Court ordered the decree-holder to produce his accounts. The decree-holder, on December 5, 1923, put in an affidavit, Ex. C, in which he said that he had not kept his day books and ledger with him and stated "as prayed for in the petition, orders are necessary for taking out execution.' Transfer was ordered on December 7, 1923. The present execution petition was filed on November 22, 1926:

Held, (*i*) that the Ex. C was not a step-in-aid of execution as the prayer to the Court to proceed with the execution of the petition was entirely unnecessary since the Court was bound to dispose of it:

(*ii*) that the *batta* memo. put in by the decree-holder for witnesses in the enquiry was also not a step-in-aid.

(*iii*) a *vakalat* filed by the decree-holder in an appeal by the judgment-debtor against the order made on such enquiry would not be a step-in-aid as the appeal was only a continuation of the previous proceeding and the *vakalat* is filed to oppose it. A.I.R. 1933 Mad. 403=37 L.W. 455=64 M.L.J. 345=142 Ind. Cas. 197.

——**Art. 182 (5)—Mere opposition to application** by judgment-debtor to set aside sale, is not step-in-aid of execution. 115 Ind. Cas. 24=30 P.L.R. 419=A.I.R. 1929 Lah. 529:

——**Are. 182 (5)—Step-in-aid — Filing of receipt for costs.**

Mere filing of receipts by a decree-holder for costs on account of maintenance of judgment-debtor in jail, does not amount to a step-in-aid. 101 Ind. 691=A.I.R. 1928 Lah. 443.

——**Art. 182 (5)**—Mere appearance of decree-holder in proceeding under O. 21, R. 90, C. P. Code, dismissed for default is not step in aid. 99 Ind. Cas. 869=1926 P.H.C.C. 381=6 Pat. 280= 8 P.L.T. 356=A I.R. 1927 Pat. 113.

——**Art. 182 (5)**—Application to recover costs incidental to execution, is not step-in-aid. 94 Ind. Cas. 961=48 All. 377=24 A.L.J. 465=A.I.R. 1926 All. 440.

——**Art. 182 (5)—Mere filing of Talbana does not save limitation.**

Where the *talbana* was filed in pursuance of an order passed by the Court requiring the decree-holder to file the same.

Held, that the payment of the *talbana* was a compliance with that order and not an application to take a step-in-aid of execution which could extend the period of limitation. 73 Ind. Cas. 211=A.I.R. 1924 Oudh 231.

——**Art. 182 (5)**—Application against defendants who were declared insolvents is inoperative against them as well as others. 77 Ind Cas 747=25 Bom L.R. 1237=A.I.R. 1924 Bom. 180

——**Stay order is not (Marten, J., doubting).**

Marten, J. (*Quaere*)—Whether a stay of proceedings granted at the instance of the plaintiff can be said to be step-in-aid of execution. A mere adjournment has been held not to be such a step-in-aid of execution, although an application for adjournment in order to obtain further evidence has been held to be a step-in-aid.

Pratt, J.—The application for stay is not a step-in-aid of execution. 76 Ind. Cas. 317=A.I.R. 1923 Bom. 218.

——**Art. 182 (5)**—A warrant of arrest issued at the instance of the decree-holder had been returned, the judgment-debtor not having been found. Thereupon the Court passed an order in the following terms:—"Fresh steps, if any, by 10th May, 1917",

Held, that neither this order nor the application, which must have been made in connection with it is a step-in-aid of execution; it could no be said that limitation began to run from the 10th May, when the application for execution was finally dismissed. 75 Ind. Cas. 489=18 M.L.W. 109=1923 M.W.N. 871=A.I.R. 1923 Mad. 686.

——**Art. 182 (5)**—The payment of maintenance charges for the judgment-debtor in jail cannot by itself suffice to give a fresh starting point under Art. 182 (5) as that article requires an application to take a step-in-aid of execution. It cannot be presumed that an application would have been made, when the decree-holder paid such charges. 62 Ind. Cas. 480=13 M.L.W. 289=A.I.R. 1921 Mad. 532.

——**Art. 182 (5)—Step-in-aid — Application to withdraw previous execution application.**

An application to withdraw a previous application for execution is a mere redundance and not step-in-aid of execution. Hence it cannot save limitation. (1919) P.H.C.C. 80=50 Ind. Cas. 444.

——**Art. 182 (5)—Step-in-aid — Application for Succession Certificate.**

An application by the successor of a judgment-creditor, for a succession certificate is not a step-in-aid of executoin under Art. 182, Cl. 5 of the Act. A step-in-aid of execution is to be taken by the Court and not by the applicant; Art. 182, Cl. 5 means an application in accordance which law made to the proper Court asking it either to execute or to take some step-in-aid of execution. 37 Bom. 559 =15 Bom.L.R. 557=20 Ind. Cas. 252.

——**Art. 182 (5)—Step-in-aid — Application for arrest—Asking for warrant.**

A decree-holder's appearance on the date of hearing of an execution application and his presenting his application for issuing a warrant to the judgment-debtor is not a step-in-aid of the execution and time does not run for a fresh application from the date under Art. 182. 14 O.C. 124=10 Ind. Cas. 182.

——**Art. 182 (5)—Step-in-aid — Application for confirmation of sale.**

An application for confirmation of an auction sale, by the decree-holder as auction-purchaser is not an application to take step-in-aid of execution. 11 C.L.J. 356=6 Ind. Cas. 264.

——**Art. 182 (5)—Step-in-aid — Application for confirmation of sale by decree-holder — Auction purchaser.**

An application for a purpose for which no application is required is no step-in-aid of execution. An application by the decree-holder auction-purchaser for confimation of sale is not a step-in-aid of execution. (1904) 31 C. 1011=9 C.W.N. 193.

——**Art. 182 (5)—Step-in-aid — Application for attachment—Different property.**

A subsequent application to attach another property of judgment-debtor is not a step to carry on an existing application, though the previous application has not been struck off the file. 17 P.R. 1910=20 P.L.R. 1910=22 P.W.R. 1910=5 Ind. Cas. 815.

——**Art. 182 (5)—Step-in-aid of execution—Compromise—Execution at a later date.**

Whether a compromise made upon an application for execution with the result that the decree has been executed in part and the rest of it would be satisfied hereafter and containing no reference to any further proceedings to be taken in execution is not a step-in-aid of execution. (1910) 15 C.W.N. 82 =6 Ind. Cas. 366.

——**Art. 182 (5)—Amendment of decree—No.**

Held, that an application under S. 206 of the Code of Civil Procedure to bring a decree into accordance with the judgment does not give a fresh starting point of limitation and cannot be regarded as a application to the proper Court to take a step-in-aid of execution. 20 A. 304; 27 A. 575, foll.; 25 C. 253, diss. from. 1907 A.W.N. 169=4 A.L.J. 469.

——**Art. 182 (5)—Application for amendment of order absolute.**

An application for amendment of an order absolute is not an application to take a step-in-aid of execution. 2 A.L.J. 287=1905 A.W.N. 108=27 A. 575.

——**Art. 182 (5)—Application to eject—Step-in-aid of execution—U. P. Rent Act — Decree for arrears of rent.**

An application under S. 95 of the U. P. Rent Act to eject a tenant (which is purely optional with the landlord, being in itself a supplemental right) is not a step-in-aid of execution of a decree for arrears of rent. (1905) A.W.N. 213=2 A.L.J. 661=28 A. 131.

——**Art. 182 (5)—Decree directing execution of muchilika and costs—Costs recovered — Application for costs incidental to execution proceedings cannot keep alive decree for execution of muchilika.**

Where a decree directed execution of muchilika and costs, and costs were recovered, applications for costs incidental to execution proceedings cannot keep alive the decree for execution of muchilika, for they were not applications for the execution of the original decree or any part of it. (1901) 24 M. 672.

9. (t) Cl. (5)—Step-in-aid—Starting point of limitation.

——Art. 182 (5)—Step-in-in aid of execution — Application to take—Starting point.

From the language Art. 182 (5) of the Limitation Act it is clear that whether an execution application is one for execution of the decree or to take some step-in-aid of execution of the decree, the starting point of limitation is the final order passed on such an application and not the date on which it was filed. The Article does not permit any differentiation between such applications. 1948 M. W. N. 772=A.I.R. 1949 Mad. 363=61 L.W. 760=(1948) 2 M.L.J. 488.

——Art. 182 (5)—Step-in-aid — Decree including several reliefs based upon distinct causes of action —If separate decrees — Final orders on previous execution petitions—If save limitation for subsequent execution petition claiming reliefs other than that claimed in the prior petitions.

There is only one decree within the meaning of Art. 182 of the Limitation Act, notwithstanding that it includes several reliefs based upon distinct causes of action and it is open to the decree-holder to rely upon Art. 182 (5) of the Limitation Act and ask for limitation to be calculated from the date of the final orders in previous execution petitions notwithstanding that those petitions sought execution of reliefs other than that sought in the later execution petition. I.L.R. (1948) Mad. 624=A. I. R. 1948 Mad. 246=1947 M.W.N. 717=60 L. W. 750=(1947) 2 M.L.J. 443.

——Art. 182 (5)—Step-in-aid—Starting point of limitation — Law before and after amendment in 1927.

Before the Limitation Act was amended in 1927, the starting point for limitation was the date of an application made to a Court for execution of a decree or order. But after the amendment, the limitation runs from the final order passed by a Court on an application for execution or to take some step-in-aid of execution of decree or order. A.I.R. 1939 Rang. 406=1939 Rang. L.R. 508=185 Ind. Cas. 552.

——Art. 182 (5)—Under Cl. (5) of Art. 182 as amended by Act 9 of 1927, limitation for making an application for execution runs from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree. (1936) M.W.N. 582=44 L.W. 59=A. I. R. 1936 Mad. 613=I.L.R. (1937) Mad. 112=71 M.L.J. 336=163 Ind. Cas. 354.

——Art. 182 (5)—As amended by Amending Act (9 of 1927)—Operation of—Application for execution filed after January 1928.

An Amending Act will not disturb vested rights. If, at the time an amending Act came into force, the decree-holder's right to execute the decree had not become barred by limitation, the subsequent application for execution would be in time if filed within three years from the date of the orderr passed on the prior execution petition.

An application to execute a decree was filed on April 20, 1928. The decree was dated June 20, 1923 and the prior applications were, one on January 9, 1925 dismissed on March 23, 1925, and another on March 23, 1928, the latter of which was subsequently dismissed for default:

Held, that inasmuch as when the amending Act of 1927 came into force, the decree was not barrred, any subsequent application made by the decree-holder to execute the decree would be governed by the provisions of the amended Act, and the application made on March 23, 1928, was in time, and consequently the execution was not time-barred. 63 M.L.J. 725=(1932) M.W.N. 1116=36 M.L.W. 716=A.I.R. 1933 Mad. 85=140 Ind. Cas. 500.

——Art. 182 (5)—The amendment will not disturb vested rights and so subject to this, limitation on application made after the 1st January, 1928 will necessarily be governed by the amended Act. 127 Ind. Cas. 572=A.I.R. 1930 Pat. 207.

——Art. 182 (5)—As amended by Act 9 of 1927—Starting point.

Article 182 is plain in its meaning. The time limited is three years from the date of final orders passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order. 127 Ind. Cas. 572=A.I.R. 1930 Pat. 207.

——Art. 182 (5)—Final order—Three years period —Starting point.

Under Art. 182 (5) of the Limitation Act as amended the three years' time is to be calculated from the date when the previous application is filed but from the date when the final order on such application is passed. 34 C.W.N. 733.

——Art. 182 (5)—Time, when runs—Final order on execution application committing judgment-debtor to civil prison — Judgment-debtor subsequently released for non-payment of subsistence allowance.

Where final order on an application for execution is passed committing the judgment-debtor to civil prison, but the judgment-debtor is released subsequently for non-payment of subsistence allowance, the date from which the limitation runs is the date of the final order committing the judgment-debtor to civil prison and the execution proceedings cannot be said to be pending till the judgment-debtor was in prison. A.I.R. 1939 Rang. 406=1939 Rang. L. R. 508=185 Ind. Cas. 552.

——Art. 182 (5)—Successive execution applications, whether competent.

It is clear, both from the Civil P. C. itself and from the provisions of the Limitation Act, that the Legislature contemplated that there might be a succession of applications for execution. A.I.R. 1943 P.C. 98=47 C.W.N. 715=56 L.W. 444=(1943) 2 M.L.J. 121=(1943) A.L.J. 323 (2)=10 B.R. 49 =1943 M.W.N. 565=I.L.R. (1943) Nag. 669=1943 N.L.J. 587=1943 A.W.R. 11=46 Bom. L. R. 306=70 I.A. 83=I.L.R. (1943) Kar. (P.C.) 109 Sup.=208 Ind. Cas. 102 (P.C.).

——Art. 182 (5)—There is provision for consecutive applications for execution and a fresh start is provided for in Art. 182 from the date of final order passed on a previous application for execution. A.I.R. 1939 Lah. 73=I.L.R. (1938) Lah. 571=41 P.L.R. 208=181 Ind. Cas. 119.

——Art. 182 (5)—Final order—Appeal—Starting point.

The period of limitation is computed from the date of the final order passed on an application made

in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order. When the case has gone in appeal, limitation starts from the date of the appellate order. Thus, where the final order of the High Court is passed on April 25, 1928, an application filed on June 8, 1929, is clearly within time. 37 P.L.R. 257=157 Ind. Cas. 604.

——Art. 182 (5)—Application valid at its inception—Limitation, when begins to run.

A Judge has jurisdiction to decide wrongly as well as rightly, and when the execution proceedings began upon an application which was valid in its inception for the purposes of limitation, it does not matter whether the final order passed therein was in accordance with law or not; time will begin to run from the date of such final order. A.I.R. 1934 Rang. 101=149 Ind. Cas. 98.

——Art. 182 (5) (before amendment)—Step-in-aid—Starting point.

Time begins to run not from opening of execution proceedings, but from applications for steps-in-aid of execution. 117 Ind. Cas. 578=7 Rang. 132=A.I.R. 1929 Rang. 152.

——Art. 182 (5)—An application made by a legal representative, for execution more than three years after the decree-holder's death is not time-barred when it is within three years of an application made previously by other representatives. 105 Ind. Cas. 611=3 Luck. 126=4 O.W.N. 1025=A.I.R. 1928 Oudh 30.

——Art. 182 (5) (before amendment)—The date of applying to the Court asking it to take some step-in-aid of execution of the decree or order is to be taken as the date from which the period of limitation should be computed and not the date of petitioners taking some step-in-aid of execution. 98 Ind. Cas. 156=50 Mad. 49=24 M.L.W. 488=A.I.R. 1926 Mad. 1178=51 M.L.J. 480.

——Art. 182 (5)—It is not the application for execution alone which saves limitation. Any other application which may be taken to be a step-in-aid of execution will also start a fresh period of limitation so long as the execution is not barred under S. 48. 74 Ind. Cas. 816=A.I.R. 1924 Oudh 177.

——Art. 182 (5) (before amendment)—Time runs from application not from date of order on the application. 10 C.L.J. 479; 13 C.L.J. 26, Foll. 78 Ind. Cas. 766=3 Pat. 596=5 P.L.T. 451=1924 P.H.C.C. 221=2 Pat.L.R. (Civ.) 249=A.I.R. 1924 Pat. 576.

——Art. 182 (5) (before amendment) — Step-in-aid—Cls. (5) and old (6) of Art. 182 of the Limitation Act are not mutually exclusive.

Where an application to take a step-in-aid of execution has been made after issue of notice under old Cl. (6), the starting point for computing the period of limitation is the date of the application to take a step-in-aid of execution and not the date of issue of notice. 12 Bur.L.T. 74=52 Ind. Cas. 937.

——Art. 182 (5) and old (6)—Step-in-aid—Issue of notice.

Art. 182 (5) and (6) are independent and exclusive of each other and the provisions contained in one clause cannot be imported into the other. 39 Mad. 923=30 M.L.J. 460=18 M.L.T. 313=(1915) M.W.N. 769=30 Ind. Cas. 707.

——Art. 182 (5) (before amendment)—Step-in-aid—Limitation—Starting point.

Limitation begins to run from the date on which application is made to Court to take a step-in-aid of execution and not from the date on which the Court actually takes the step. 13 A.L.J. 305=28 Ind. Cas. 381.

——Art. 182 (5) (before amendment)—Step-in-aid—Limitation—Starting point.

Art. 182 prescribes the period of limitation for execution from the date of applying for it or taking some step-in-aid and so the fact that an application has been pending would not entitle decree-holder to computation of time from any later date. 1 Bom. 59; 1 All. 580, Rel. 80 P.W.R. 1912=155 P.L.R. 1912=14 Ind. Cas. 335.

——Art. 182 (5) (before amendment)— Step-in-aid—Starting point.

Time runs from the date of the presentation of an application to take a step-in-aid for execution not from the date of final disposal. 17 C.L.J. 422=13 Ind. Cas. 189.

——Art. 182 (5) (before amendment)—Step-in-aid—Limitation—Starting point.

Limitation runs from the date of execution of application to take a step-in-aid of execution and not from the date of disposal of such application by the Court. 13 C.L.J. 26=9 Ind. Cas. 213.

——Art. 182 (5) (before amendment)—Execution—Step-in-aid of execution — Application, date of, C. P. Code, S. 231.

Under Art. 179 time runs from the date when an application is presented to the Court and not from the date on which the application is considered and disposed of by the Court. When, therefore, an application for execution was presented to the Court on the 27th August 1904, by one of several joint decree-holders and contained a prayer for leave to execute the decree under S. 231, Civil Procedure Code, time ran from the 27th August and not from the 30th August on which date leave was granted to the petitioner to execute the whole decree on behalf of himself and the joint decree-holders. (1909) 10 C.L.J. 479=3 Ind. Cas. 336.

——Art. 182 (5) (before amendment)—Step-in-aid—Starting point.

Under Art. 179 (4) of the Old Act the period of limitation starts with the application to take a step-in-aid of execution and if the application is in accordance with law it makes no difference whether the Court does or does not not take the step asked for. 8 M.L.T. 235=(1910) M.W.N. 713=7 Ind. Cas. 859.

——Art. 182 (5)—Hostile interests—Steps taken by one—If can enure to benefit of another.

Both *A* and *B* claimed to execute a mortgage decree obtained by the deceased. Execution petition was filed by *A* on May 5, 1930. *B* objected. Both arrived at an agreement which was: "it is settled between the parties that *A* will be entitled to execute the decree, but that for a priod up to October 31, 1933, he should not be allowed to take out of Court the money that may be realized in execution of the decree. If before October 31, 1936, *B* institutes a suit for declaration of his title, in that case the money will remain in deposit until the disposal of the suit". Accordingly *B* filed a suit and it was declared that *B* and not *A* was entitled to

execute the decree. In the meantime *A* had allowed his execution to be dismissed on October 26, 1933, *B* filed an execution petition on September 14, 1936, *i.e.*, within three years from October 26, 1933;

Held, that the rights of the judgment-debtors to raise the question of limitation could not be affected by any agreement between persons with interests hostile to each other and who were carrying on litigation amongst themselves. Steps taken by one could not enure to the benefit of another. Interest of *B* being hostile to that of *A*, steps taken by *A* could not be taken advantage of by *B*, Consequently *B's* application was time-barred. A.I.R. 1938 Pat. 531 =5 B.R. 128=178 Ind. Cas. 759.

10. Cl. (6)—Refund.

——Art. 182 (6)—Decree coming within prohibition of S. 48, C. P. Code—Art. 182 (6), if can be availed of.

Clause (6) of Art. 182, Limitation Act cannot be availed of by a decree-holder, if his decree comes within the prohibition contained in S. 48, Civil P. Code. If, therefore, a decree-holder has realised an amount of money by execution of his decree, but is compelled to refund that amount by a decree passed in a subsequent suit for refund, there is no doubt that he will be entitled to take out execution for this amount, if the application is presented within three years from the date of the final decree in the refund suit, provided 12 years have not already run out from the date of the original decree. If, however, 12 years have already expired from the date of the original decree, the decree-holder will not be entitled to avail himself of the provision of Art. 182 (6).

The decree-holder may be entirely blameless and the refusal order might be made after 12 years, without any default on his part. The law, however, has to be interpreted as it stands even though it may lead to hardship and injustice. A.I.R. 1942 Cal. 255=I.L.R. (1942) 2 Cal. 245=46 C.W.N. 149=74 C.L.J. 502=204 Ind. Cas. 614.

——Art. 182 (6)—Application for refund of purchase-money by purchaser at Court-auction will be within time if made within three years of final appellate decree. 1931 M.W.N. 1006.

11. Clause (7).

(a) Applicability.
(b) Instalment decree.
(c) Interpretation.

(a) Applicability.

——Art. 182 (7) and C. P. Code (V of 1908), S. 55—Bond by surety — Starting point of the period of limitation for execution against surety—Computation of the period of limitation.

A surety executed a bond under S. 55 of the C. P. Code on behalf of a judgment-debtor whereby he undertook to pay the entire decretal amount if the judgment-debtor did not file an insolvency petition within a month and did not prosecute it. The insolvency petition was dismissed for non-deposit of gazette notification charges, and within three years from the date of dismissal the decree-holder sought execution against the surety. On a question whether it was in time,

Held, (*i*) Art. 182 (7) of the Limitation Act applied to the case and as the decree-holder had three years from the date on which the insolvency petition of the judgment-debtor was dismissed for non-prosecution, his application was in time.

(*ii*) The period covered by the insolvency petition can be excluded in calculating the three years from the date of the last order on the execution petition. 1950 M.W.N. 57=A.I.R. 1950 Mad. 756=(1950)' 1 M.L.J. 20.

——Art. 182 (7)—Compromise decree—Amount to be given to plaintiff on attaining majority and on his executing receipt within 6 months after that date—Death of plaintiff before attaining majority—Application for execution by heirs:

Held, that execution application was governed by Sch. 1, Art. 182 (7), and time ran from the date of attaining plaintiff's majority and not from date of his death. 40 L.W. 875=A.I.R. 1935 Mad. 107=154 Ind. Cas. 529.

——Arts. 182 (7) and 181—Instalment decree containing default clause — Execution application relating to instalments falls under Art. 182 (7) and not Art. 181.

For the purposes of limitation, an application must be taken as it is and an application for execution relating to instalments whether it is maintainable or not cannot be treated as one made on the footing of a default clause. The maintainability of such an application depends upon the construction of the particular decree concerned. But so far as the recovery of instalments as such is concerned, the application for that purpose clearly comes under Art. 182 (7) and there is no room whatever for the application of the residuary Art. 181 in such a case. A.I.R. 1946 Cal. 500=81 C.L.J. 325=50 C. W. N. 735=226 Ind. Cas. 343 (F.B.).

——Art. 182 (7)—Insalment decree containing default clause—Construction of — Option of recovering whole amount after default if and when can be waived stated—Application for execution, after default occurs, for remaining instalments; filed more than three years from date of default but within three years of instalments falling due, held maintainable and is within time under Art. 182 (7).

An instalment decree, containing default clause, consists really of three parts. First, there is the part which declares the amount due and it binds the decree-holder and the judgment-debtor equally and absolutely. Next, there is the part providing for payment by instalments and it is for the benefit of the judgment-debtor. Lastly, there is the part providing that in case of a default, the whole of the unpaid balance shall become due, and, it is for the benefit of the decree-holder, who is given a right to foreclosure, as it were, the instalments. Such a provision must, whenever possible, be construed in favour of the decree-holder whose right to get immediate payment has once been interfered with by the order for instalments and the correct way to construe it is to hold in favour of an option, unless the language used in the decree clearly bars it.

A proviso in an instalment decree which merely says that in the event of a default, the entire amount shall immediately become due or payable does not exclude an option in the decree-holder to take advantage of it or not to do so; it is not intended to be substitutive of the order for instalments in a case of

a default, but only to come into force as an alternative at the will of the decree-holder.

The correct view is not that when there is no evidence of waiver, the option must be deemed to have been exercised, but that when there is no evidence that the option has been exercised, it must be deemed to have been waived. When the decree-holder applies for realisation of instalments rather than for the whole amount, that itself is evidence that he does not wish to exercise his option or, to put it in another way, wishes to exercise it in favour of abiding by the instalments; and unless there is something to show that he had previously sought to enforce the default clause, it cannot be said that he must nevertheless be deemed to have done so.

Where, therefore, a decree directs payment of the decretal amount by instalments on particular dates and provides that in case the defendant fails to pay any instalment at the stipulated period, the entire decretal amount would be due, then, after a default has occurred, an application for execution relating to subsequent instalment, as such, is maintainable and any application, made more than three years after the first default, but relating only to instalments which fell due within three years of the date of the application, is within time and is governed by Art. 182 (7), Limitation Act. A.I.R. 1946 Cal. 500=81 C.L.J. 325=50 C.W.N. 735=226 Ind. Cas. 343 (F.B.).

——**Arts. 182 and 181**—Decree ordered to be paid in instalments—Whole decree to accrue due at once in case of any default—Default occurring—Application for execution of remaining balance under second part of decree—Article 182 is not applicable but Art. 181 is applicable. A.I.R. 1942 Oudh 31=1941 A. W.R. (C.C.) 340=17 Luck. 346=1941 O.W.N. 1205=197 Ind. Cas. 689.

——**Art. 182 (7)—Maintenance decree—Payment directed at certain date—Application for enforcing payment—Article applicable.**

The words "such date" in the last column of Art. 182, Cl. (7) refer to the date on which a default was made in the payment of any of the instalments. Where the decree for maintenance directs payment at a certain date, an application to enforce such a payment would fall under Cl. (7) of Art. 182. A.I.R. 1939 Oudh 281=1939 O.W.N. 768=1939 A.W.R. 129=183 Ind. Cas. 706.

——**Art. 182 (7)**—Compromise decree directing payment of decretal amount by instalments on certain dates and in case of default of any, entire amount to be realised—First default—Execution application more than 3 years after but relating to instalments within three years of application—Application is within time—Article applicable is Art. 182. 1935 O.W.N. 837=A.I.R. 1935 Oudh 465= 11 Luck. 276=156 Ind. Cas. 764 (F.B.).

——**Arts. 182 (7), 181**—Instalment decree—Default clause—Provision entitling decree-holder to recover whole amount on default of two successive instalments—Default:

Held, that it must presumed that the judgment-debtors had made default in the payment of the first three instalments and that the execution Court could not take cognizance of these payments as they had not been certified.

Held, also, that the application having been made after the instalments had fallen due, the appropriate article is Art. 182 (7); the application for the recovery of this amount, therefore, was well within time, but his application for recovery of future instalments was premature.

Per *Mukerji, J.*—According to the terms of the decree, the decree-holder has two distinct rights. The first right was to receive instalments as and when they fell due. The second right was to enforce the payment of all the instalments that might remain unpaid in the case of two successive instalments remaining unpaid. If it be a fact that the second right is time-barred, it would not follow that the first right would also be time-barred. A. I. R. 1934 All. 534=(1934) A.L.J. 772=56 A. 921=4 A.W.R. 498=149 Ind. Cas. 598.

——**Art. 182 (7)—Decree on simple money bond—Agreement to pay in instalments—Stipulation entitling decree-holder to realise entire decree amount on default—Default—Application for execution more than three years after default—Maintainability of.**

The decree-holder instituted a suit against the judgment-debtor on foot of a simple money-bond and on September 24, 1927, obtained a decree on the basis of a compromise. It was agreed between the parties that the decretal amount would be paid in instalments yearly. It was also stipulated that in case of default in payment of any instalment on the due date, the decree-holder may realise the entire decree-money. It was found that the first and second instalments had not been paid by the judgment-debtor. The first instalment fell due on April 23, 1929 and an application for execution was made on March 30, 1933; that is, more than three years after the default:

Held, that the question for consideration was whether under the terms of the compromise there was no option left to the decree-holder but to execute the decree for the entire sum due on the non-payment, of the first instalment, that if the decree-holder was not compelled under the terms of the compromise to ask for the recovery of the entire amount due on account of the instalments, there was no reason why he should not be permitted to execute his decree for the instalments that still remained due and that there was nothing in the terms of the compromise which compelled the decree-holder to enforce his decree for the recovery of the entire amount in case of default of payment of any instalment immediately:

Held, also that in a case like this, the decree-holder might execute his decree on the happening of the first, second or any subsequent default; and limitation would run against him only in respect of each instalment separately from the time when each such instalment may become due and payable and that failure to exercise the option when the decree-holder had the power of doing it did not take away from him the right of exercising it on any subsequent occasion, and the case was governed by Art. 182, Cl. 7, Limitation Act. On the occasion of each default, the decree-holder would be entitled to enforce his claim for the payment of the entire amount due except in respect of which his claim had become barred. 11 O.W.N. 498=A.I.R. 1934 Oudh 334= 9 Luck. 602=149 Ind. Cas. 603.

——**Art. 182 (7)**—Instalment decree in 1912—In case of default, the decree-holder, to sell certain immovable property after twelve years—Option—In case of default in payment for two years, decree-

holder at liberty to execute decree at once—Default in 1917—Decree-holder exercising option and applying for sale of property—*Darkhast* not pursued—Second application in 1920—This application also struck off—Another application in 1926 *held*, time-barred both under S. 48, Civil P. C. and Art. 182 (7). A.I.R. 1931 Bom. 263=33 Bom. L.R. 459 =132 Ind. Cas. 437.

——Art. 182 (7)—Applicability — Instalment decree.

Where a compromise decree directed payment by instalments on named dates, and further directed the judgment-debtor to pay the entire balance due if he made default as to any two successive instalments,

Held, (Per *Full Bench*).—That if the application for execution is an application to recover certain instalments already overdue, Art. 182 (7) applies and limitation will run in respect of each instalment from the date on which it became payable.

Per *Mukerji, J.*—The provision in the decree which makes the whole of the decretal amount payable, in case of one or more defaults, is only an ancillary clause and can have no independent existence. It is, therefore, not right to say that, there being no clause in Art. 182 which would directly apply. Article 181 should apply to it. 112 Ind. Cas. 73= 51 All. 237=26 A.L.J. 966=A.I.R. 1928 All. 629 (F.B.).

——Art. 182 (7)—Decree directing payment of annuity and in default, delivery of certain property to decree-holder—Each instalment of annuity is a claim under decree and each default gives rise to right to recover property.

The respondent, on the 30th September, 1916, obtained a decree by which certain properties were to be left in possession of the appellant, who was to pay to the respondent annually a sum of Rs. 2,000 in the month Kason, or in default of payment of the same (Rs. 2,000 annually) the said property would be made over to the respondent. On the 8th October, 1924, the respondent filed an application for execution of the decree against the appellant in default of payment of two instalments of Rs. 2,000 each, for the years 1923 and 1924 respectively and claimed, as the judgment-debtor failed to pay according to the decree that the Court might direct the delivery of the lands by the judgment-debtor to the decree holder. It was pleaded that execution was time-barred.

Held, that each instalment as it became due was a claim originating under the decree from the date when such claim arose, that the provisions of Cl. 7 of Art. 182 applied and that therefore execution to recover the two instalments was not barred, nor was the claim of respondent for delivery of property was barred either, as on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose. 101 Ind. Cas. 736=5 Rang. 422=1927 M.W.N. 442= 54 I.A. 272=29 Bom. L.R. 1014=1 L.C. 192= 46 C.L.J. 123=39 M.L.T. 144=32 C.W.N. 1= 26 M.L.W. 751=A.I.R. 1927 P.C. 146=53 M. L. J. 22 (P.C.).

11. (b) Instalment decree.

(i) Rights of decree-holder.
(ii) Starting point of limitation.
(iii) Waiver of benefit of default clause.

(i) Rights of decree-holder.

——Art. 182 (7)—Instalment decree—Default in payment of instalment—Effect—Whole decree—If executable—Option of decree-holder—Construction of decree.

When an instalment decree directs the payment of the decretal amount in annual instalments, the question whether the decree-holder has an option to execute for the whole amount or only for the instalment or instalments which are in default has to be decided on a proper construction of the decree. 25 Pat. 664=A.I.R. 1947 Pat. 250=12 B.R. 769= 226 Ind. Cas. 552.

——Art. 182 (7)—Option to execute the decree for unpaid balance in case of default in payment of instalment — Default—Some instalments time-barred—Right of judgment-creditor.

Where an instalment decree states that in default of any one instalment, the judgment-creditor will be entitled to execute the decree for the rest of the unpaid balance and no instalment is paid, the judgment-creditor can waive the earlier instalment which fell due beyond the period of limitation, *i.e.*, beyond twelve years from the date of application for execution and can recover those which are within twelve years of date of application. A.I.R. 1945 Pat. 182 =23 Pat. 923=12 B.R. 108=221 Ind. Cas. 219 (D.B.).

——Art. 182 (7)—Exigibility clause — Execution for whole amount—Decree confirmed in appeal—Decree which had ceased to be instalment decree, if converted again into instalment decree.

In the case of an instalment decree with an exigibility clause in default of three instalments, if a decree-holder elects to take advantage of the default clause and applies in execution to recover the whole amount of the decree, he cannot, afterwards, even though his *darkhast* is infructuous, treat the decree as an instalment decree. The confirmation of the lower Court's decree in appeal after the execution petition by the decree-holder has not the effect of converting a decree which had ceased to be an instalment decree into an instalment decree again. The Appellate Court confirmed the decree in the form which it had assumed, *i.e.*, as one which could be executed as a decree for a lump sum. A.I.R. 1943 Bom. 63=44 Bom. L.R. 903=205 Ind. Cas. 447.

——Art. 182 (7)—Option to recover entire amount on default of an instalment—Decree-holder unsuccessfully exercising option — Right to execute decree to recover instalment.

The option to recover the entire decretal claim on the occurrence of the default is a provision inserted for the benefit of the decree-holder. The decree-holder is entitled to take out execution of the decree to recover the instalments not barred by limitation, even if he has already made an unsuccessful attempt to recover the entire amount by making an application to execute the entire decretal claim on default of an instalment. A.I.R. 1943 Nag. 170=1943 N.L.J. 108=I.L.R. (1943) Nag. 334=208 Ind. Cas. 240.

——Art. 182 (7)—'Such date' means when each instalment falls due.

In the case of instalments, "such date" will be the date on which each instalment falls due. When the first instalment has fallen due and can be recovered

by the decree-holder by means of execution, the mere fact that the non-payment of the second instalment entiled the decree-holder to bring the property to sale and recover the whole amount (including the third instalment), does not necessarily mean that he cannot recover the first instalment by proceeding against the judgment-debtor in the normal way. A. I.R. 1943 Pesh. 52=209 Ind. Cas. 424.

——Art. 182 (7)—Instalment decree with exigibility clause—Application not coming to notice of judgment-debtor — Decree holder, if can subsequently apply for instalments becoming due——Previous election, effect of.

Where a decree-holder has definitely elected to proceed in one of two ways permitted him by a decree, he cannot be allowed later to go back upon his election and choose the second way instead of the way he originally chose. But, the doctrine of election is not a mere legal prohibition to any party against ever changing his mind; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party.

Consequently where an execution application making a particular choice (asking for recovery of all instalments relying on a default clause) never came to the notice of the judgment-debtor at all it cannot in any sense be said to prejudice the judgment-debtor. There can, therefore, be no legal obstacle whatever to the decree-holder deciding subsequently that he will execute the decree for the instalments which have fallen due. A.I.R. 1942 Mad. 679=1942 M.W.N. 476=55 L.W. 522=(1942) 2 M.L.J. 225=203 Ind. Cas. 478.

——Art. 182 (7)—Option to execute whole decree in case of default in payment of instalment—Exercise of opinion—Effect.

Where an instalment decree gives to the decree-holder an option to execute his decree for the whole amount in case of default, the moment he successfully exercises the option, he at once converts the decree from being an instalment decree into an ordinary decree for the realisation of the full decretal amount. He cannot gain claim to realise any of the instalments as they fall due or rather within three years from the date on which they fall due. A.I.R. 1941 Oudh 93=1940 O.W.N. 1202=1940 A.W.R. (C. C.) 472=16 Luck. 495=191 Ind. Cas. 757.

——Art. 182 (7)—Failure to enforce default clause—Whether should prove condonation of default clause.

The default clause is not for the advantage of the judgment-debtor but for the advantage of the judgment-creditor. He cannot be compelled to take advantage of this clause which is in his favour on pain of losing further instalments due to him. this payment of instalments being not for his benefit at all but for the benefit of the judgment-debtor. There is no reason why the judgment-debtor seeking to take advantage of his own default should be allowed to require a decree-holder to prove condonation of the default. If the decree-holder says that he did condone the default, then, in the absence of any evidence or conduct by the decree-holder proving the contrary, his statement should be accepted. Consequently, where the decree-holder has failed to take advantage of the default clause, his right to recover instalments due to him within three years of the application for execution is not barred. A.I.R. 1939 Sind 49=I.L.R. (1940) Kar. 385=180 Ind. Cas. 933.

——Art. 182 (7)—Compromise deed in respect of decree—Deed providing for monthly instalments and decree not to be executed until default of three consecutive instalments—Judgment-debtor paying first instalment not paying second and third but paying fourth one—He then not paying fifth and sixth instalments—Decree-holder applying to execute decree.

Held, that when the judgment-debtor made default in paying two instalments but paid the third one, the effect of such payments in law in the absence of express terms that he was paying the third instalment, was that the payment was towards the first instalment that was defaulted and so when he again made default in paying two consecutive instalments, there was a default in paying three consecutive instalments and the decree-holder could, therefore, execute the decree. 1938 O.W.N. 816=A.I.R. 1938 P.C. 250=48 M.L.W. 368=19 P.L.T. 709=(1938) M.W.N. 934=32 S.L.R. 913=42 Bom.L.R. 968=176 Ind. Cas. 890 (P.C.).

——Art. 182 (7)—Where a decree for money is made payable in instalments and in default of payment of any instalment the whole of the decree becomes payable immediately, it is open to the decree-holder to apply, even after three years from the date of the default, to recover such of the instalments as have become due within three years of the date of his application. The default clause in an instalment decree is for the benefit of the creditor and the creditor's failure to avail himself of it would not deprive him of the remedy he would have had, apart from the clause. A.I.R. 1936 Bom. 268=38 Bom. L.R. 492=163 Ind. Cas. 937.

——Art. 182 (7)—Default clause.

Where a decree providing for payment of the decretal amount by instalments contains a provision that if the defendant failed to pay any one instalment, plaintiffs might recover the whole debt at once by executing the decree, the clause making the whole amount payable on default in payment of any instalment is inserted for the benefit of the creditor, who has an option to enforce the clause or not. When default is made in the payment of an instalment, it ought to be held that the fact that default occurred in the payment of an instalment and that the creditor might thereupon have enforced the decree for the whole amount is irrelevant since he did not in fact attempt to do so, and his omission to do so has not deprived him of the right to recover the instalments which became due within the three years before the filing of the petition for execution.

The principles laid down in A.I.R. 1932 P.C. 207; 138 Ind. Cas. 779 (P.C.), apply in the case of an instalment decree. A.I.R. 1936 Bom. 17=37 Bom.L.R. 942=60 B. 62=160 Ind. Cas. 527.

——Art. 182 (7)—Compromise decree — Rupees 300 of decretal amount to be paid on certain date—Balance to be paid in instalments on certain dates—On default of Rs. 300 or two instalments, all money to be paid at once—Default of Rs. 300—Execution for whole not applied for—Subsequent default of two instalments—Execution application of whole amount—Application beyond three years from date of default of Rs. 300:

Held, that the claim to whole was barred. But he could apply for instalments fallen due if within time from date of application; that the payment out of Court was not a step-in-aid of execution and would not extend limitation. 1935 A.W.R. 531=

A.I.R. 1935 All. 259=(1935) A.L.J. 1291=157 Ind. Cas. 1052.

——Art. 182 (7)—Instalment-decree — Option on default to execute for amount outstanding—Decree-holder may execute decree for any instalment not paid within the prescribed time. A.I.R. 1934 Lah. 48=148 Ind. Cas. 177 (2).

——Art. 182 (7)—Default clause—Interpretation—Committal of default—Instalments within time, if can be recovered.

The default clause in an instalment-decree is to be interpreted in favour of the decree-holder who is always entitled to ignore it as if it was not a part of the decree and take out execution for the instalments that are still within the period of limitation. He can do so irrespective of the fact that so far as the execution proceedings are concerned, the default was made from the very start and that the whole amount had become payable. A.I.R. 1933 Pesh. 14=141 Ind. Cas. 745.

——Art. 182 (7)—Some instalments time-barred—Whether decree can be execute regarding other instalments.

Where, in an instalment decree, some instalments have become time-barred, the decree-holder can take out execution with regard to instalments which are not yet time-barred. 33 P.L.R. 30=137 Ind. Cas. 202.

——Art. 182 (7)—In the case of a decree which provides for payment in instalments and entitles the decree-holder in the event of default to treat the whole debt as immediately payable, unless the decree clearly leaves the decree-holder no option on the happening of the default but to execute the decree once for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run against him only in respect of each instalment separately from the time when each such instalment may become due and payable. The failure to exercise this option when the decree-holder had the power of doing it would not take away from him the right to exercise it on any subsequent occasion. 11 Pat. 440=13 P.L.T. 454=A.I.R. 1932 Pat. 253=139 Ind. Cas. 202.

——Art. 182 (7)—Default in instalment—Entire decree amount becoming payable—On default execution need not be for entire amount.

In the case of a decree for money payable by instalments with proviso that in case of default of payment of any instalment judgment-debtor would be liable to pay amount in lump sum, the decree-holder is entitled to execute his decree for any instalments not barred by limitation and is not bound to apply for full execution within three years from the date of first default. 100 P.R. 1902; 6 P.R. 1913; 8 P.R. 1917; and A.I.R. 1921 Lah. 42, Foll. 109 Ind. Cas. 272=10 L.L.J. 382.

——Art. 182 (7)—On default, judgment-debtor to put decree-holder in possession of certain land—Decree-holder is not bound to apply for possession on first default but may do so on any subsequent default. 16 All. 371 and 16 All. 237, Foll. 63 Ind. Cas. 664=2 Lah. 155=80 P.L.R. 1921=A.I.R. 1921 Lah. 42.

——Art. 182 (7)—Instalment decree—No option to decree-holder in the case of the whole amount becoming due under an instalment decree on default of payment of one instalment.

In the case of whole amount under an instalment decree becoming due on failure to pay one instalment no option is allowed to the decree-holder between compelling immediate payment of the whole amount and recovering money according to instalments. 13 C.L.J. 243, not Foll. 21 C.W.N. 835=37 Ind. Cas. 916.

——Art. 182 (7)—Instalment, non-payment of—Subsequent payments of other instalments—Appropriation—Earlier instalments must be deemed to have been paid off. 67 Ind. Cas. 847=24 Bom.L.R. 410=46 Bom. 848=A.I.R. 1922 Bom. 237.

——Art. 182 (7)—Darkhast presented in Court passing decree—Proceedings transferred to another Court—Instalments ordered to be paid and recovered—Decree-holder need not institute fresh proceedings. 59 Ind. Cas. 747=45 Bom. 453=A.I.R. 1921 Bom. 256.

(ii) Starting point of lifitation.

——Art. 182 (7)—Exigibility clause absent—Only interest on default instalment—Decree, held single debt payable by instalments—Payment of instalment, held part payment of whole debt within S. 20.

A consent decree was passed on 29—3—1930. The decree directed payment of the amount to be payable by 76 monthly instalments. The peculiar feature of the decree was that there was no default clause providing that if any instalment or stated number of instalments be in arrears the whole amount due shall become payable. The only penalty for non-payment of an instalment on the due date was that it was to carry interest. From time to time, instalments were paid and the several payments were endorsed on the decree and signed by the judgment-debtor. Attributing the payment of each instalment to the earliest of the instalments then due, there was at no time an instalment which was three years in arrears:

Held, that the decree created a single judgment-debt payable by instalments and did not create 76 separate judgment-debts. When any instalment was paid, it was a part payment of the whole debt and it operated to start a fresh period of limitation under an instalments under an instalment decree for the whole amount of the debt remaining unpaid, and not at the time barred by limitation. A.I.R. 1943 Bom. 260=45 Bom. L.R. 497=209 Ind. Cas. 426.

——Art. 182 (7)—The parties having referred their disputes to arbitration, an award was given on July 8, 1925. The award provided that the debtor should first pay off the unsecured amount of Rs. 2,430 and then payment was to commence in respect of the mortgage amount. The payments were to be made by instalments. The first instalment was to be of Rs. 800 payable on December 15, 1925. Subsequent instalments were to be of Rs. 400 each, payable on June 15, and December, 15 of each succeeding year. It was further provided that if the instalment of Rs. 800 due on December, 15, 1925, was not paid in time, the creditor had the right to recover the whole amount due. In case of default of two subsequent instalments of Rs. 400, the creditor was also entitled to recover the debt

due to him with interest from the date of default. The award was converted into a decree on January 4, 1926. The first execution was filed on December 15, 1928 on the assumption that the first default was made on December 15, 1925, inasmuch as Rs. 800 were paid on January 24, 1926; certain other payments were also shown. This application was dismissed on December 22, 1928. A second execution application was filed on December 10 1932. The further payments were certified. Certain defects pointed out by the Court were not cured, so this application was also dismissed on January 17, 1933. The third execution application was filed on December 22, 1933. The instalments shown as paid in this application were the same as shown in the second application:

Held, that when the mortgagor did not pay the first instalment on December 15, 1925, there was no decree existing at that time. The first default was committed on December 15, 1931, and therefore, the third execution application filed within three years from this date was within time. A.I.R. 1937 Sind 261=172 Ind. Cas. 221.

——Art. 182 (7)—Instalment decree—Limitation—Starting point—Time does not begin to run before date of decree.

Where the parties to a mortgage suit execute a *solenama* by which they agree to a decree for payment of the mortgage-debt by instalments, it is not until a decree is passed on the basis of the *solenama* that the right to realise the instalments accrues to the mortgagee and limitation does not begin to run till then. An application for execution filed within three years of the decree will be within time. A. I. R. 1931 Cal. 546=35 C.W.N. 332=134 Ind. Cas. 80.

——Art. 182 (7)—Instalments become payable after date of appellate decree—Dekkhan Agriculcutrists' Relief Act, S. 15-B.

The time fixed for the payment of the instalments under an instalment decree which is confirmed by the appellate Court should be allowed from the date of the confirmation of the decree. Limitation for an application under S. 15-B of the D. A. R. Act with reference to each instalment should be counted from the date when it is payable under the above calculation. 86 Ind. Cas. 894=49 Bom. 305=27 Bom. L.R. 196=A.I.R. 1925 Bom. 270.

——Art. 182 (7)—Default in payment of instalment under decree waived by decree-holder—Limitation runs from date of default. 86 Ind. Cas. 1051 =30 C.W.N. 945=54 Cal. 143=A.I.R. 1925 Cal. 1012.

——Art. 182 (7)—Instalment decree—Default in payment—Execution—Limitation.

Except where an instalment decree leaves no option to the decree-holder but to execute the decree for the whole amount on default of payment of an instalment, the decree-holder may execute it on the happening of the first, second or any subsequent default. Limitation will run in respect of each instalment separately from the date on which it became due and payable. (1919) P. H. C. C. 46=4 Pat. L.J. 365=48 Ind. Cas 728.

——Art. 182 (1) and (7)—Instalment decree — Default—Limitation.

Under a decree passed in 1909, an amount of Rs. 860 was payable by annual instalments and in case of failure to pay any one instalment within the period fixed or until the period of next instalment, the plaintiff was to recover the whole amount due at that time. The first instalment became due on 6-6-1910 but that the succeeding instalments were not paid. The decree-holder applied on 6-9-1915 to execute the whole decree. *Held*, that the execution was barred by limitation, the decree-holder not having applied to execute the decree within three years of the first default. 42 Bom. 728=20 Bom. L.R. 773 =47 Ind. Cas. 313.

——Art. 182 (7)—Instalment decree—Execution.

A decree provided for payment of amount in three instalments on 4th June 1909, 4th June, 1910 and 4th June, 1911. In default of payment of any one instalment the decree-holder could recover the whole amount without waiting for succeeding instalments. On 8th April, 1913, an application for execution was made for the amounts of the second and third instalments. In the application it was stated that a part of the amount of the first instalment had been received but no claim for the balance of that instalment was made. The application was within time, having been made within three years from 4th June, 1910. 39 All. 230=15 A.L.J. 102=38 Ind. Cas. 634.

——Art. 182 (7)—Instalment decree—Default in payment of—Limitation for execution.

Where a decree is made payable by instalments and on default being made in the payment of instalments the decree-holder is allowed to execute the decree in a certain manner, he must use his right once only. If he fails to exercise the option according to the terms of the decree on the first default being made, he cannot enforce the default clause at a later stage. 8 P.R. 1917=36 Ind. Cas. 978.

——Art. 182 (7)—Instalment decree — Payment not certified.

Where payments towards decree amount are not certified to the executing Court limitation runs against the decree-holder from the day upon which the first instalment is due. 38 All. 204=14 A. L. J. 132=32 Ind. Cas. 590.

——Art. 182 (7)—Decree payable in instalment—Default—Limitation.

If a decree provides for payment in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default. 13 A.L. J. 666=29 Ind. Cas. 274.

——Art. 182 (7) — Instalment decree — Default in payment—Limitation for execution.

Where a decree directed payment by instalments and contained also a proviso that on default of any instalment the decree-holder should be entitled to recover the whole of the balance alone, the decree-holder on default has got the option to execute his decree for any of the instalments not barred or for the whole of the balance within 3 years from the date of default. The decree should be considered as far as possible in favour of the judgment-creditor. 172 P.L.R. 1912=271 P. W. R. 1912=6 P.R. 1913=16 Ind. Cas. 842.

——Art. 182 (7)—Decree payable by instalments—Default in payment of instalments—Limitation.

A decree for sale on a mortgage made the amount due thereunder payable by instalments with a condition that if default were made in payment of any instalment the decree-holder might

execute for the whole amount at once. Default was made, and the decree-holder exercised his option and obtained an order absolute for recovery of the whole amount due under the decree. On the 23rd of February, 1901, the decree-holder applied for execution in respect of the whole amount due and for sale of the mortgaged property. That application was, however, dismissed on the 15th May, 1901 for default of prosecution. On the 1st of July, 1904, the decree-holder again applied for execution.

Held, that execution of the decree was barred by limitation. 1905 A.W.N. 268=28 A. 249=2 A.L.J. 828.

——Art. 182 (7)—Instalment-decree—Decree for possession on default of payment — Default and acceptance—Waiver—Subsequent default—Starting point of limitation.

A decree provided payment by instalments, and possession on default of payment of two consecutive instalments. Two consecutive instalments were not paid in due date, but payment after due date was accepted by the judgment-creditor on both occasions. After some regular payments of instalments which subsequently fell due; there was again a default of two consecutive instalments and the decree-holder applied for execution.

Held, that limitation should be computed from the date of the later default and not from the earlier one which the parties, by their subsequent payment and acceptance, are precluded from afterwards asserting. (1902) 4 Bom.L.R. 688=27 B. 1 (F.B.).

——Art. 182 (7)—Decree for money payable in instalments — On default of payment of one instalment whole to be payable—Starting point of limitation.

In the case of an instalment decree for money which provides for the whole amount becoming due on default of the payment of one instalment, the judgment-creditor cannot wait till the subsequent instalments become due. Limitation begins to run immediately the first default is made. 1 C.W.N. 29, foll. (1901) 6 C.W.N. 348.

(iii) Waiver of benefit of default clause.

——Art. 182 (7)—Default clause instalment decree is for benefit of decree-holder and it is open to him to waive that benefit. (1938) 40 Punj.L.R. 527.

——Art. 182 (7)—Whole amount due on default—Waiver—Question of law or fact.

Where a decree is payable in instalments and on default of any one instalment, the decree-holder is entitled to execute the decree for the whole amount, the question whether circumstances alleged by a party from which the Court is asked to infer a waiver, exist or not is a question of fact, but whether from the facts, if proved, waiver can be inferred is a question of law.

Held, on facts that the decree-holder had not waived his right by accepting the instalments pending execution for the whole amount and he was entitled to execute the decree for the whole amount. A.I.R. 1934 Lah. 425=150 Ind. Cas. 704.

——Art. 182 (7)—Acceptance of overdue instalment, whether amounts to waiver—Waiver, effect of.

Acceptance of an overdue instalment cannot by itself, amount to waiver in the case of an instalment decree, much less can it prove waiver of the right to sue for the whole amount without waiver of the clause relating to payment of interest on default of any instalment. Further, if acceptance of overdue instalments amounts to waiver, the instalments must be deemed to have been paid on the due date fixed for payment. A.I.R. 1933 Sind 365=147 Ind. Cas. 30.

——Art. 182 (7)—Instalment decree entitling decree-holder to realize entire amount on default in any instalment—Time runs from default—Payment and acceptance of overdue instalment is waiver so as to save limitation—But merely not attempting to realize entire amount on default of one instalment is not waiver—Waiver cannot be in respect of future instalments.

But this waiver cannot have the effect of modifying the terms of the decree or operate as a waiver in respect of future instalments. 21 Cal. 542; 31 Cal. 297 and 36 Cal. 394, Foll. 85 Ind. Cas. 784=A.I.R. 1926 Cal. 212.

——Art. 182 (7)—Instalment decree — Payment and acceptance of — Overdue instalments — Limitation.

Whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in the satisfaction of the instalments due so as to extend the period of limitation for execution of the decree is a question of fact. Mere acceptance of overdue instalments is not sufficient proof of waiver. 11 S.L.R. 120=45 Ind. Cas. 324.

——Art. 182 (7)—Instalment decree — Waiver—Acceptance of overdue instalments — When amounting to waiver.

The question when payment and acceptance of overdue instalments cannot by themselves prove waiver is one to be determined on the circumstances of each case. (1902) 4 Bom.L.R. 688=27 Bom. 1 (F.B.).

11. (c) Interpretation.

(i) "Certain date".
(ii) "Directs its payment".
(iii) "Such date".

(i). "Certain date".

——Art. 182 (7)—Applicability — Decree directing payment of certain sum per mensem from certain date — Whether one directing payment at a certain date.

In order that Art. 182 (7) of the Limitation Act may apply, it is not necessary that a specified date for payment should appear in express terms in the decree. It is enough if it could be gathered from the decree as a whole that payment is directed to be made on dates or periods which are sufficiently indicated by the terms of the decree. A decree directing the judgment-debtor to pay a specified sum per mensem from a certain date, satisfies the requirements of Art. 182 (7) as the date for payment could be gathered from the

terms of the decree. A.I.R. 1947 Pesh. 38.

——Art. 182 (7)—"Certain date" — Meaning of.

A date which may or may not occur and which when it occurs, does so by chance, cannot be a 'certain date'. A.I.R. 1946 Cal. 500=81 C.L.J. 325=50 C.W.N. 735=226 Ind. Cas. 343 (F.B.).

——Art. 182 (7)—Conditional decree — Direction in a decree that mortgaged properties be sold and if proceeds be insufficient, balance to be realised from other properties — Not a direction to pay money at a certain date.

A direction in the decree that the mortgaged properties be sold and if the proceeds be insufficient the balance should be realised from sale of other properties of the judgment-debtor is not a direction to pay money at a certain date within the meaning of Cl. 7, Art. 182. 18 C.W.N. 492 =24 Ind. Cas. 35.

——Art. 182 (7)—Maintenance decree.

Held, that a decree directing the defendants to pay plaintiff's maintenance at a certain rate per annum from the date of the plaint is a decree for payment on the corresponding date every year and consequently a "decree directing payment to be made on a certain date" within the meaning of Cl. 6 of Art. 179 of the Limitation Act. (1906) 17 M.L.J. 402=30 M. 504.

(ii) —"Directs its payment".

——Art. 182 (7)—"Directs its payment"—Meaning of.

A provision which declares that an amount shall become payable on a certain date, does not 'direct its payment' on that date. A.I.R. 1946 Cal. 500 =81 C.L.J. 325=50 C.W.N. 735=226 Ind. Cas. 343 (F.B.).

(iii). "Such date".

——Art. 182 (7)—"Such date".

The words 'such date' in Art. 182, Cl. 7, Limitation Act refer to the date on which a default is made in payment of any of the instalments. 11 O.W.N. 498=A.I.R. 1934 Oudh 334=9 Luck. 602=149 Ind. Cas. 603.

12. Explanation I.

(a) Applicability.
(b) Decree against Firm.
(c) 'Joint decree'—Meaning of.
(d) Joint decree-holders.
(e) Joint judgment-debtors.
(f) Partition decree.
(g) Surety.

12. (a). Expl. (1)—Applicability.

——Art. 182, Expl. (1)—Applies to decrees comprising two or more several decrees — Decree providing two interdependent sources of realisation—Explanation does not apply.

The decree was as follows:—"The defendants will pay the entire decretal money within six months. In case of non-payment of the same the mortgaged property will be sold. No person of the defendants is liable under the decree..... The plaintiff will get Rs. 715-3-6 from Abhoy Kumar out of the money of S." The first application for the sale of D was made on the 14th December, 1918, and the execution proceeded to the 1st December, 1919. The second application for execution in respect of the minor relief granted in the mortgage decree namely for realization of Rs. 715-3-6 from Abhoy Kumar was filed more than three years after the date of the decree though it was in time as reckoned from the first application.

Held, that the main relief, the realization of the mortgage dues, being the one governing note of the decree, makes the two sources of realisation interdependent, that the mortgagee was entitled to proceed against one of his securities at a time, if he thought it to be sufficient for realization, and that the second application was not time-barred. A.I.R. 1922 All. 388, Foll.

Held, further that the latter part of Expl. 1 to Art. 182 of the Limitation Act has no application to the case, and it can apply only to a decree which comprises two or more "several" decrees. 76 Ind. Cas. 452=5 P.L.T. 276=A.I.R. 1924 Pat. 700.

——Art. 182, Expln. (1)—Decree obtained by one person—Subsequent transfer of a part of it to another—The portion of decree transferred kept alive by steps taken by transferee—Whole decree is kept alive. It is not permissible to restrict the provisions of sub-Cl. (5) of Article 182 of the Limitation Act, which are intended for the benefit of decree-holders, by extending the words of the first sentence of Explanation I to the same Article to cases not falling within its exact language. 69 Ind. Cas. 277=15 M.L.W. 157= 45 Mad. 35=30 M.L.T. 69=A.I.R. 1922 Mad. 129.

——Art. 182, Expl. (1)—Decree passed in favour of one but afterwards owned by several—First sentence in Explanation 1 is not applicable.

It is not permissible to restrict the provisions of sub-Cl. (5) which are intended for the benefit of decree-holders by extending the words of the first sentence of explanation (1) to cases not falling within its exact language, e.g., to cases where the decree though passed only in favour of one person was afterwards owned by more persons than one in severalty owing to the conduct of the original single decree-holder or otherwise. A.I.R. 1921 Mad. 415=41 M.L.J. 312.

——Art. 182, Expln. 1—Suit for arrears of rent—Separate tenancies — Separate decrees—Application for execution for one decree—Effect.

In a suit for arrears of rent in respect of three tenancies held by the defendants a decree was made specifying the sums due in respect of and to be charged on each of the tenancies.

Held, that the decree though passed in one suit set out in one sheet of paper was precisely the same as if passed in three distinct suits against the defendants, one in respect of each tenancy. Consequently the rule of limitation would apply separately to each sum decreed against each tenancy, so that an application for execution of the decree in respect of the sum leviable from one of the tenancies would not under Art. 182, Cls. (5) and

old (6), protect from the bar of limitation of decree in respect of the sums leviable from the other tenancies. 26 C.L.J. 118=22 C.W.N. 192=36 Ind. Cas. 398.

——Art. 182, Cl. (5) and Expln.—Execution of mortgage decree.

A subsequent mortgagee judgment-debtor can plead limitation to the execution application by the prior mortgagee decree-holder both in the court of first instance and on appeal. Art. 179 does apply to execution application to mortgage decrees. Where a mortgage decree does not apportion the mortgage debt as among the several properties subject to the mortgage, an application for sale as against the mortgagors only, though not as against the sub-mortgagees of some only of the several plots, will not fall within the scope of Part I of para 2, Exp. I to S. 179. (1903) 8 C.W.N. 251=30 C. 761.

12. (b) Expl. (1)—Decree against Firm.

——Art. 182, Expl. (1)—Decree against firm—Application for execution against partners not served in suit:

Held, that the Art. applicable is 182 and not 181. (1935) M.W.N. 849=A.I.R. 1935 Mad. 926=158 Ind. Cas. 907.

——Art. 182, Expl. (1)—Decree against firm—Some partners not impleaded — An application for execution in which an application is also made under O. 21, R. 50 (2) for leave to execute decree against the partners who were not personally served in the suit is not barred so long as the decree against the firm is alive. 34 Bom.L.R. 1112=A.I.R. 1932 Bom. 516=140 Ind. Cas. 519.

——Art. 182, Expl. (1) — Joint family business—Execution against manager — Saves time as regards other co-parceners.

Where a decree was obtained against the eldest brother of a joint Hindu family carrying on a business and several applications for execution were ordered against him and after his death against his legal representatives, the previous applications for execution save limitation for an execution application against the other members of the family. 67 Ind. Cas. 56 (Lah.).

12. (c) Expl. (1)—Joint decree—Meaning of.

——Art. 182, Expl. (1)—Joint decree, meaning of—Any one relief being joint, decree is joint though other reliefs are given separately. 92 Ind. Cas. 782=1926 M.W.N. 262=A.I.R. 1926 Mad. 453=50 M.L.J. 215.

12. (d). Expl. (1)—Joint decree-holders.

——Art. 182, Expl. (1)—Application under O. 21, R. 15 or 16.

An application under O. 21, R. 15 (1) or R. 16 is a regular application for execution and no order under R. 15 (2) or separate application under R. 16 for the issue of notice is required. Hence, whether such order under R. 15 (2) is passed or not and whether such notices are issued or not, the application is a step-in-aid of execution and is sufficient by itself to keep the decree alive. 47 Bom.L.R. 104=A.I.R. 1945 Bom. 380=I.L.R. (1945) Bom. 463.

——Art. 182, Expl. (1) — Execution application by one of joint decree-holders without recourse to O. 21, R. 15.

An application made by one of the joint decree-holders to execute the decree without having recourse to the provisions of O. 21, R. 15, C. P. Code can be taken into consideration on the question of limitation against all the decree-holders. A.I.R. 1943 Pat. 188=8 C.L.T. 86=9 B.R. 388=207 Ind. Cas. 250.

——Art. 182, Expl. (1)—Minors.

Decree in favour of persons some of whom are minors — Execution application more than three years after date of decree is not time-barred. (1942) 2 M.L.J. 736=55 L.W. 835=1943 M.W.N. 81=I.L.R. (1943) Mad. 595.

——Art. 182, Expl. (1)—Joint decree in favour of the brothers—Elder acting as next friend of younger who is insane—Decree empowering elder to recover decree amount:

Held, that the elder brother can give valid discharge without concurrence of the younger and the younger who was under disability is not entitled to the benefit of S. 7 in respect of the execution of the decree. 39 L.W. 62=(1933) M.W.N. 895=A.I.R. 1934 Mad. 103=148 Ind. Cas. 54 (1).

——Art. 182, Expl. (1)—Some decree-holders applying for execution—Application by others incompetent — Two applications considered together, if extend period of limitation.

Some of several joint decree-holders applied for execution on their behalf and when this application was pending, the others also applied:

Held, that the second application was not competent and the two applications could not be considered to supplement each other in order to extend limitation. A.I.R. 1934 Pesh. 40=152 Ind. Cas. 443.

——Art. 182, Expl. (1)—Step-in-aid—Application by one of joint decree-holders.

Application by only one of several joint decree-holders is also covered by Cl. (5). 100 Ind. Cas. 475=9 L.L.J. 76=28 P.L.R. 93=A.I.R. 1927 Lah. 106.

——Art. 182, Expl. (1)—Application of one joint decree-holder takes effect in favour of all.

An application for execution by one of the decree-holders or representative of any one takes effect in favour of all and preserves the period of limitation for all. 34 Bom. 672=12 Bom.L.R. 682=7 Ind. Cas. 939.

12. (e) Expl. (1)—Joint judgment-debtors.

——Art. 182, Expl. (1); Para. 2—Applicability—Decree joint in part and several in part—Execution against one in respect of portion—If saves limitation against others.

The principle underlying the second paragraph of Expl. 1 to Art. 182, Limitation Act, is that when a decree is being executed against A, B and C, who are jointly liable under the decree and the application for execution is only against one of them, the judgment-creditor should not be barred from recovering the decretal amount if he fails

to recover it from a particular judgment-debtor against whom he has applied for execution. But this principle does not apply to a case where a decree is partly joint and partly several; when certain portions of a decree are jointly passed and others severally passed against more persons than one, the principle would not apply and different considerations will arise. The test to be applied is whether the separate relief given against a particular defendant is really a part of the joint decree passed against all the defendants. If it is so, then the execution of the joint decree will keep alive the separate relief also; but if it is in substance a separate decree that principle will not apply. 48 All. 377; 1937 Cal. 547, Appr. 30 Mad. 268, Not Foll. 51 Bom.L.R. 252=A.I.R. 1949 Bom. 260.

——**Arts. 182, Expl. (1) and 182 (4)—Scaling down under Madras Agriculturists Relief Act ordered on application by third defendant—Subsequent application by another defendant—Similar order passed—Decree-holder's petition for execution of amended decree more than three years after the third defendant's scaling down order but within three years of the first defendant's scaling down order—Application, if time-barred.**

The third defendant filed a petition under Madras Agriculturists Relief Act for scaling down the decree on the ground that he was an agriculturist. The petition was ordered in his favour on November 3, 1938. The decree was scaled down only so far as he was concerned. Subsequently, the first defendant also filed a petition under the Agriculturists Relief Act, which was ordered on December 13, 1939. In 1942, an application was filed by the decree-holder to have the decree amended as per the scaling down and that was ordered on October 3, 1942. The third defendant filed a petition for reviewing this order on the ground that the execution had become barred so far as he was concerned and that the amendment was likely to prejudice him as it might be claimed that the amendment would give a fresh starting point for limitation. This petition was dismissed and an execution petition was filed on November 2, 1942. The third defendant contended that as far as he was concerned, the execution was barred by time since the decree was scaled down more than three years before the execution petition:

Held, that the execution was not barred. The starting point of limitation was the date of the amendment on the application of the first defendant though the decree so far as the third defendant was concerned was scaled down as early as November 3, 1938, that is, more than three years before the execution petition. By scaling down the decree at the instance of the 3rd defendant, the joint liability would not become a several one and the decree split up into a several decree. A.I.R. 1945 Mad. 147=(1945) 1 M.L.J. 39=1945 M.W.N. 195.

——**Art. 182, Expl. (1)—Suit on mortgage against several persons — Preliminary mortgage decree for sale for certain sum against all defendants and money-decree against executants of mortgage alone—Money portion of decree being final, ought to be executed within three years of decree—Application for execution of final mortgage decree for sale could not save limitation.** A.I.R. 1944 Pat. 188=23 Pat. 150=214 Ind. Cas. 234.

——**Art. 182, Expl. (1)—Step-in-aid — Joint and several decree against judgment-debtors.**

In the case of a joint and several decree, an application for execution made against any one of the judgment-debtors is a step-in-aid of execution against all even if one of the judgment-debtors is not correctly impleaded, being joined as guardian on behalf of the minor judgment-debtor though he was not so appointed by the Court. 8 B.R. 225=A.I.R. 1942 Pat. 285=23 P.L.T. 734=197 Ind. Cas. 480.

——**Art. 182, Expl. (1)—Where a decree is passed jointly against two persons and the running of the limitation for execution is suspended against one of them owing to the pendency of insolvency proceedings against him, such suspension does not keep the remedy alive against the other as there is no legal bar to the decree-holder executing the decree against the other during the insolvency proceedings against one of them.** 4 B.R. 783=A.I.R. 1938 Pat. 395=19 P.L.T. 831=176 Ind. Cas. 876.

——**Art. 182, Expl. (1)—Joint decree—Separate relief against one defendant but forming part of joint decree—Execution of joint decree keeps alive separate relief — Separate relief not included in joint decree—Principle, if applies.**

Where a joint decree is passed against a number of defendants but a separate relief is also given against a particular defendant, the test whether the execution of the joint decree will keep alive the separate relief also, is as to whether the separate relief given against a particular defendant is really a part of the joint decree passed against all the defendants. If it is so, then the execution of the joint-decree will keep alive the separate relief also, but if it is in substance a separate decree, this principle would not apply. A.I.R. 1937 Cal. 547 =67 C.L.J. 316=174 Ind. Cas. 184.

——**Art. 182, Expl. (1)—Joint decree against F and C — Clause in decree stating that it should firstly be executed against F—Execution application against C on November 10, 1930, dismissed—Second application again against C on October 16, 1933:**

Held, that the first application was effective both against F and C and was in accordance with law—Second application was, therefore, in time. A.I.R. 1937 Lah. 792=39 P.L.R. 1008=175 Ind. Cas. 564.

——**Art. 182, Expl. (1)—Execution petition against one judgment-debtor—Effect.**

A decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly, even though some other reliefs may be given against the defendants separately, so that if in respect of the joint relief an application for execution is made against one of them, it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against them solely. (1937) M.W.N. 31 and 35= (1937) 1 M.L.J. 453=A.I.R. 1937 Mad. 385= I.L.R. (1937) Mad. 616=168 Ind. Cas. 561 (F. B.).

——**Art. 182, Expl. (1)—Where a decree is obtained against a number of judgment-debtors re-**

quiring each of them to pay his own share only of the decretal amount and the costs, the decree must be considered as four separate decrees against the judgment-debtors individually, the mere fact that the decree was written on one sheet of paper making no difference. Consequently, the rule of limitation would be applicable separately to each sum decreed against each so that time begins to run as regards him individually irrespective of the period of limitation as regards others. A.I.R. 1935 Lah. 949=38 P.L.R. 517=162 Ind. Cas. 208.

——Art. 182, Expl. (1)—Decree for rent against many judgment-debtors — Decree in one amount, though individual liability mentioned — Transfer application against some judgment-debtors, if a step-in-aid.

The decree-holder who had obtained a decree for arrears of revenue against a number of parties for a total sum of a single amount which was more than Rs. 500, the individual liability of judgment-debtors having been specified, made an application for transfer of the decree against some of the judgment-debtors to another Court for execution on September 12, 1930. The application included a prayer that notices be sent to other judgment-debtors. But no notices were sent to them. The decree, as prayed for, was transferred and on November 15, 1930, final order consigning the record to the record room was passed. Afterwards on August 20, 1932, an execution application was made as against other judgment-debtors:

Held, that what has to be looked at for the purposes of S. 145 of the Oudh Rent Act is the total amount which the decree involves, even where the decree determines the liabilities of judgment-debtors inter se for lesser amounts and that the application for execution was not barred by the special provisions as to limitation as contained in S. 145 of the Oudh Rent Act:

Held, however, that it could not be said that the application of September 12, 1930, constituted an application in accordance with law to the proper Court as regards the other judgment-debtors for execution, or to take any step-in-aid of execution of the decree within the meaning of Art. 182, Limitation Act. Consequently, the present application was time-barred by reason of the ordinary provisions relating to the execution of decrees, and not by reason of the special provisions contained in the earlier portion of S. 145 of the Oudh Rent Act. 11 O.W.N. 1294=18 R. D. 554=A. I. R. 1935 Oudh 9=10 Luck. 260=152 Ind. Cas. 457.

——Art. 182, Expl. (1)—Several judgment-debtors —Application for execution against some alone:

Held, that Art. 182, Expl. 1, Cl. (2) saved time against others. 31 P.L.R. 961=A.I.R. 1931 Lah. 116=134 Ind. Cas. 194.

——Art. 182, Expl. (1)—Joint decree.

Application for execution against some judgment-debtors, keeps decree alive against all—Joint liability is not affected though decree differentiates between the judgment-debtors as regards mode of execution. 118 Ind. Cas. 237=A.I.R. 1929 All. 795.

——Art. 182, Expl. (1)—Application against one judgment-debtor saves time against all joint judgment-debtors. 106 Ind. Cas. 391=39 M.L.T. 336=A.I.R. 1927 Mad. 1103.

——Art. 182, Expl. (1)—Decree joint and several —Application against one judgment-debtor is step against all. 103 Ind. Cas. 867=A. I. R. 1927 Pat. 416.

——Art. 182, Expl. (1)—Decree party passed jointly and partly severally—First part of the explanation applies to latter and second part to former. 30 Mad. 268, Dissented from. Where, therefore, a step was taken against one judgment-debtor in respect of decree passed severally, it does not save limitation against another. 94 Ind. Cas. 961=48 All. 377=24 A.L.J. 465=A.I.R. 1926 All. 440.

——Art. 182, Expl. (1)—If a decree is passed against **A** and **B** under which their liabilities are separate and several, and execution is taken against **A,** any step taken in such execution will not keep alive the decree against **B,** and simply mentioning **B's** name in the application for execution does not affect the question. 85 Ind. Cas. 657=A.I.R. 1926 Cal. 267.

——Art. 182, Expl. (1)—One judgment-debtor ceasing to have interest in the property—Failure to serve him with notice does not render proceedings invalid. 88 Ind. Cas. 1039=A.I.R. 1926 Cal. 86.

——Art. 182, Expl. (1)—Application against one judgment-debtor takes effect against all.

Where a decree had been passed jointly against defendants 9 and 10, regarding recovery of possession and against defendants 1 to 8 jointly, regarding certain sums, and against 9th defendant severally in respect of certain sums,

Held, that it is a decree passed jointly against more persons than one; and the application against any one of them shall take effect against them all. 30 Mad. 268, Foll. 84 Ind. Cas. 897=1925 M.W.N. 298=35 M.L.T. 107=20 M.L.W. 585=A.I.R. 1925 Mad. 152=47 M.L.J. 608.

——Art. 182, Expl. (1)—Where execution against one of several joint judgment-debtors is stayed, limitation is suspended against the others also. 61 Ind. Cas. 901=1921 M.W.N. 188=13 M.L.W. 59=A.I.R. 1921 Mad. 116.

——Art. 182—Award — Liability of one of the parties limited — Proceedings against saves—Saves time against all.

Where an award is against several persons jointly, although the liability of one of them is limited on account of adjustment, nevertheless that does not entirely separate his interest from that of others, and it still remains an award against all the persons jointly and, therefore any proceedings taken against any of them to keep the award sufficiently alive would keep it in time against all. 79 Ind. Cas. 477=16 S.L.R. 245=A.I.R. 1921 Sind 132.

——Art. 182, Expl. 1—Application against one judgment-debtor if saves limitation against others —C. P. Code (Act 14 of 1882), S. 245.

An application for execution which conforms to the requirements specified in Ss. 235, 236, 237 and 238, of the C. P. Code and on which the Court permits execution is an application "in

accordance with law" within the meaning of Art. 179. Where a decree was for possession against one set of defendants, for possession though tenants and for costs and mesne profits against all the defendants and an application was made for execution of so much of the decree as related to costs against some of the defendants, but not against the others:

Held, that a subsequent application for execution of the unsatisfied portion of the decree against those defendants against whom the previous application was not directed is not barred, if made within three years of the previous application. 11 C.L.J. 83=14 C.W.N. 465=4 Ind. Cas. 408.

——Art. 182—Expln. (1) — Joint judgment-debtors.

An application for execution of a decree against some of several joint judgment-debtors keeps it alive against them all. 13 O.C. 48=5 Ind. Cas. 800.

——Art. 182, Expln. (1)—Application for execution against some judgment-debtors.

Application for execution against some of many judgment-debtors against whom a joint decree has been passed, keeps the decree alive against all. 2 Ind. Cas. 88 (All.).

——Art. 182, Expln. (1)—Decree against several — Time barred against some—Whether time-barred against others also.

If the execution of a decree is time-barred against some of the judgment-debtors it does not thereby become necessarily time-barred as against others. 4 P.W.R. 1909=1 Ind. Cas. 48=5 P.L.R. 1909.

——Art. 182, Expln. (1)—Execution application against some judgment-debtors.

An application for execution against some judgment-debtors only, is effective against all for the purpose of saving Limitation within the meaning of Expl. 1 of Art. 179, Sch. II, Limitation Act; 1877. 31 All. 309=6 A.L.J. 359=1 Ind. Cas. 339.

——Art. 182, Expl. (1), Para. 2—Decree passed jointly against several—Application for execution against one or more of them.

Explanation (1) to Art. 179 should be read literally. Where there is a joint decree against more persons than one, and there has been an application in execution of that decree against one or more of them, the application takes effect against all the persons against whom the joint decree was passed. There was a joint decree for costs against **A, B** and **C,** and a joint decree for mesne profits alone against **A** and **B.**

Held, that an application for execution against **A** and **B** for mesne profits has the effect of keeping alive plaintiff's right to execute the decree for costs against **C.** (1906) 30 M. 268=2 M.L.T. 189.

——Art. 182, Expl. (1)—Step-in-aid—Legal representatives of judgment-debtor—Step taken against one of them—If saves limitation against others.

A step-in-aid of execution taken against one of the legal representatives of a deceased judgment-debtor saves limitation as against the rest. 3 A. 517 and 12 Bom. 48, Appr. 54 C.W.N. 815=A.I.R. 1950 Cal. 493.

——Art. 182, Expl. (1)—Decree against legal representatives as such, if joint and several.

A decree passed against persons as legal representatives is a joint and several decree. Execution can be taken out against any one, or any number, or all of them; any one of them can be made to satisfy the whole amount of the decree to the decree-holder, and he will then, on so satisfying the decree, have a right of contribution against the other legal representatives in proportion as they each obtained the property of the deceased. The fact that there is a limit to the amount which any one judgment-debtor can be required to pay, namely, the amount of the property of the deceased which has come into his possession, does not have the effect of making the decree a several decree. A.I.R. 1934 Rang. 101 =149 Ind. Cas. 98.

12. (f) Expl. (1)—Partition decree.

——Art. 182, Expl. (1)—Decree in partition suit granting reliefs severally and jointly in favour of and against more persons than one — Application for execution in respect of joint relief—If saves limitation in respect of separate reliefs.

A decree is a joint decree within the meaning of Expl. (1) to Art. 182 of the Limitation Act if any one of the reliefs given in the decree is against the defendants jointly, even though some other reliefs may be given against the defendants separately. Ordinarily a decree in a partition suit is one decree. The fact that the decree grants separate reliefs will not by itself transform the decree into separate decree. The fact that the combinations of the decree-holders and judgment-debtors entitled to reliefs under the decree are different and the reliefs are granted both severally and jointly in favour of and against more persons than one, will not also transform the decree into distinct and separate decrees, if the facts taken as a whole justify the conclusion that the decree is one decree. An application for execution of such a decree in respect of the reliefs granted jointly against the defendants, will save limitation against them even in respect of the reliefs which have been decreed against them separately. I.L.R. (1946) 1 Cal. 184=225 Ind. Cas. 516=81 C.L.J. 207=50 C.W.N. 155=A.I.R. 1946 Cal. 266.

——Art. 182, Expl. (1)—Applicability—Partition suit — Decree allotting properties in severalty to shares but leaving part as joint—Application for execution by one sharer — If gives fresh start of limitation for application by others.

Where a decree for partition has allotted certain properties in severalty to each of the parties but has reserved a portion of the properties as joint between the parties, such decree must be regarded as a joint decree within the meaning of Expl. 1 to Art. 182 of the Limitation Act. If, therefore, one of the parties to the decrees starts an execution within three years of the final decree, it would enure to the benefit of the other parties as well so as to give a fresh start of limitation under Art. 182 (5). 25 Pat. 95=226 Ind. Cas. 399 =12 B. R. 759=27 P.L.T. 205=A.I.R. 1946 Pat. 371.

——Art. 182, Expl. (1)—Partition decree—Joint possession in some and separate possession in other properties.

Partition decree giving plaintiff and defendants joint possession of part of property and also separate possession of other properties — Decree must be regarded as joint—Application for execution of such decree by one of the parties takes effect in favour of all parties. A.I.R. 1940 Pat. 147=6 B.R. 94=185 Ind. Cas. 59.

——**Art. 182, Expl. (1)**—Whatever may be the argument as regards the question whether in a final decree in a partition suit, merely awarding several plots to several shares, an application for one plot cannot save from limitation the application for another plot, yet to the extent that there is a declaration of the joint character of the property the decree is a joint one to the benefit of which all the shares are entitled. An application by one for delivery of his share can save the application of another from limitation. 38 L.W. 568=A.I.R. 1933 Mad. 789=65 M.L.J. 582=(1933) M.W.N. 1295=145 Ind. Cas. 968.

——**Art. 182, Expl. (1)—Partition suit—Final decree keeping certain property joint between plaintiff and defendants—Application for execution by plaintiff—Subsequent application by defendants.**

Where the effect of a final decree for partition was to allot various lands in severalty to each of the parties but to reserve a certain property as **ejmali**, and the plaintiff's application for execution was dismissed on part satisfaction, and subsequently some of the defendants applied for execution more than 3 years after the decree but within 3 years of the plaintiff's application.

Held, that the decree so far as the **ejmali** property was concerned, was one passed jointly in favour of the plaintiff and the defendants and inasmuch as the defendants' application was made within three years of the plaintiff's application for execution, it was not time-barred under Expl. (1) of Art. 182, Limitation Act. 36 C.W.N. 772=A.I.R. 1932 Cal. 869=56 C.L.J. 10=139 Ind. Cas. 786.

——**Art. 182, Expl. (1)—Final decree in partition suit allotting separate properties to sharers, whether joint decree.**

A final decree in a partition suit, in so far as it provides for separate allotments in favour of the different parties cannot be regarded as a joint-decree within the meaning of para. 2 of Expl. 1 of Art. 182 but is a decree 'passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each' within para. 1 of the Explanation and an application for execution of such a decree by one party cannot, therefore, save limitation as regards the other. 53 C.L.J. 225=35 C.W.N. 448=A.I.R. 1931 Cal. 581=58 C. 1102=131 Ind. Cas. 860.

——**Art. 182, Expl. (1)—Joint decree—Partition decree—Application by one of the parties for delivery to him of his share — Limitation as regards others will be saved.**

A partition decree passed under C. P. Code, (1882) awarded to plaintiff and each of the 5 defendants one share in the suit property, to be ascertained. On plaintiff's application the six shares were ascertained: but no allotment or delivery was made except to the plaintiff of his share. Later 4th defendant on application obtained an order for delivery to him of his share. On the 3rd defendant's application within 3 years to obtain his share,

Held, the decree was a joint decree within the meaning of Explanation 1 of Art. 182 and the application was in time as it was filed within 3 years from the 4th defendant's application. 65 Ind. Cas. 990=30 M.L.T. 312=14 M.L.W. 498=A.I.R. 1922 Mad. 327=42 M.L.J. 94.

——**Art. 182, Expl. (1)**—Parttion decree—Application by one sharer enures for benefit of others also. 70 Ind. Cas. 296=16 M.L.W. 292=1922 M. W. N. 518=31 M.L.T. 311=A.I.R. 7922 Mad. 456=43 M.L.J. 379.

12. (g) Expl. (1)—Surety.

——**Art. 182 (5), Expl. (1)—Execution of decree against judgment-debtor alone in time—If saves limitation for execution against surety.**

It must be taken as settled that a decree obtained against a judgment-debtor and sought to be executed against him alone can subsequently be executed against his surety also even though more than three years have elapsed since the passing of the decree, provided the decree is kept alive by steps-in-aid of execution either against the judgment-debtor or the surety. 49 Bom.L.R. 554=A.I.R. 1948 Bom. 13.

——**Art. 182, Expl. (1)—Scope of—Surety.**

The first part of Expl. I deals with the case of more than one decree-holders or persons in whose favour an order has been passed and the second part deals with more than one judgment-debtors or persons against whom an order has been passed. It is difficult to see why because Expln. I deals with cases of more than one decree-holders and the judgment-debtors, Art. 182 should be deemed to be confined to applications for execution of decrees against judgment-debtors only. That explanation was apparently necessitated by the realisation where there were more than one decree-holders or judgment-debtors, specially where the decree distinguished portions of the subject-matter as payable or deliverable to or by such parties, doubts might arise in the interpretations of the expression "application made in accordance with law". It does not appear that the Legislature, in enacting this article, had specifically in mind the case of an application for execution against a surety. The last sentence of Expln. I must clearly be read with the earlier part of the second paragraph regarding more than one judgment-debtors or persons against whom an order is passed, the expression "passed jointly against more persons than one" being in contradistinction to the expression "distinguishing portions of the subject-matter as payable or deliverable by each." The first parts of the two paragraphs of Expln. I provide a classification of or an exception to the general principle of cl. (5) and the second parts of the said paragraph must be regarded as amounting to provisos re-affirming that general

principal in case other than those to which the said exception would apply. Hence the scope of the explanation cannot be used in determining the scope of cl. (5). 47 Bom.L.R. 434=A.I.R. 1945 Bom. 489=I.L.R. (1945) Bom. 711.

——Art. 182, Expl. (1)—If applies to case of sureties—Scope of the Explanation.

Explanation I of Art. 182, Limitation Act cannot be made applicable to case where certain persons have made themselves liable for the decretal amount as sureties after the passing of the decree. The explanation contemplates only cases in which a decree has been passed either jointly or severally in favour of or against more persons than one. A.I.R. 1937 Oudh 351=1937 O.W.N. 680 13 Luck. 353=168 Ind. Cas. 600.

——Art. 182, Expl. (1)—Principal judgment-debtor and surety whether joint-debtors—Applicability of Explanation I.

A surety for the satisfaction of a decree is neither a joint judgment-debtor nor a person against whom a decree has been passed severally with any portion of its subject-matter distinguished as payable or deliverable by him within the meaning of Expl. I to cl. (5) of Art. 182 of Limitation Act. An application for execution against a surety is not, therefore, governed by Expl. I but by the simple unqualified words of Art. 182, Cl. (5). 68 M.L.J. 119=41 L.W. 148=(1935) M.W.N. 90=A.I.R. 1935 Mad. 188=58 M. 276=155 Ind. Cas. 864.

——Art. 182, Expl. (1)—Sureties.

A surety is not a joint judgment-debtor within the meaning of Art. 182. 120 Ind. Cas. 315=A.I.R. 1929 Pat. 597.

——Art. 182, Expl. (1)—A surety for satisfaction of decree is not a joint judgment-debtor within the meaning of Art. 182 and the events from which the period of limitation runs in the case of a judgment-debtor do not avail the decree-holder against the surety. The time begins to run against the surety from the period at which the surety becomes liable to decree-holder. 31 Bom. 50, Foll. 120 Ind. Cas. 309=8 Pat. 310=A.I.R. 1929 Pat. 595.

——Art. 182, Expl. (1)—Application against judgment-debtor will not save limitation against his surety.

A decree passed against a judgment-debtor is not a decree against his sureties jointly simply because it can be executed against the sureties as well as against the judgment-debtor. Therefore, an application for execution against the principal debtor would not save limitation as against the sureties, 31 Bom. 50, Foll.

During the pendency of a suit a debt due to the defendant was attached before Judgment and the attachment was removed on security for the due performance of the decree being given. More than three years from the date of the decree the plaintiff sought to execute the decree against the surety. He claimed that limitation was saved by a previous application for execution against the defendant,

Held, that the decree could not be regarded as having been passed jointly against the judgment-debtor and the surety, and that therefore an application of execution against the defendant did not save limitation as against the surety. 31 Bom. 50, Foll. 111 Ind. Cas. 479=6 Rang. 334=A.I.R. 1928 Rang. 282.

——Art. 182, Expl. (1)—Application against judgment-debtor alone—Time against sureties not saved.

An application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, is not a proceeding in the suit but a proceeding in execution and comes within Article 182 and therefore such an application made against the judgment-debtor alone, without joining the sureties would not save limitation against the sureties. 45 Bom. 819, Foll. 73 Ind. Cas. 233=25 Bom.L.R. 810=47 Bom. 778 =A.I.R. 1923 Bom. 366.

——Art. 182, Expl. (1)—Application for execution containing names of surety and judgment-debtor but asking relief only against latter does not save time against surety.

Although a decree is not passed against a surety it may still be executed against him by reason of S. 145, C. P. Code; and the limitation for an application for execution of a decree against him is that laid down by Art. 182, Limitation Act and the decree-holder cannot break away from that Article.

In an application for execution by the decree-holder names of both the judgment-debtor and the surety were given in column 9, the column showing the persons against whom the decree was to be executed. But in column 10, the column showing the mode of execution sought, he prayed only for the attachment of the judgment-debtor's property. Notice was issued to the judgment-debtor only,

Held, although the name of the surety was shown in column 9 in the proceedings of 1917, no steps can be said to have been asked for against the surety in those proceedings; those proceedings therefore do not save limitation so far as the surety is concerned. 60 Ind. Cas. 265=4 L.L.J. 85 =A.I.R. 1922 Lah. 208.

——Art. 182 (179), Expl. (1); para. 2—Decree passed jointly — Surety — Execution against—C. P. Code, S. 254.

A decree executable against a surety in virtue of the provisions contained in S. 253, C. P. Code, is not a decree "passed jointly" within the meaning of Explanation to Art. 179 and consequently, a prior application for execution against a judgment-debtor cannot go to keep alive the execution against the surety. (1906) 8 Bom.L.R. 807=31 Bom. 50.

——Art. 182, Expl. (1)—Application against judgment-debtor alone, saves limitation against sureties also.

An application for execution against the judgment-debtor and the surety is not barred, if made

within three years of the application against the judgment-debtor alone where the surety binds himself to pay the amount of the decree, if the judgment-debtor does not pay. The question depends on the application of the provisions of S. 145, C. P. Code to Art. 182. If the effect of S. 145, C. P. Code; is to make tle decree equivalent to a decree passed jointly against the surety and the judgment-debtor then the case is covered by Explanation (1) to Art. 182, if not Cl. 5 of Art. 182, applies. 77 Ind. Cas. 129=44 All. 743 =20 A.L.J. 726=A.I.R. 1922 All. 481.

——Art. 182, Expl. (1)—Decree against principal and surety but surety liable on default of principal — Execution against principal saves time against surety.

A decree was passed both against principal and surety, but it directed realisation from surety only on the default of principal. Execution was taken out against the principal but the principal was adjudged insolvent. After 3 years from the date of decree but within 2 years from the date of first application for execution, another execution was applied for against the surety.

Held, the second application was not barred according to Expln. 1 of Art. 182 inasmuch as the principal and surety are not made liable under the decree for different portions of the subject-matter thereof but each is made liable for the whole of the decretal amount. The decree is passed 'jointly' against both the judgment-debtors notwithstanding the fact that it is to be executed against the surety only in case the decree-holders fail to realize it from the principal debtors. 67 Ind. Cas. 301=74 P.L.R. 1922=38 P.W.R. 1922=A.I.R. 1922=Lah. 457.

13. Continuation or revival of application.

(a) Application, when pending.
(b) Test.
(c) What is.
(d) What is not.

13. (a) Continuation or revival of application —Application, when pending.

——Art. 182—Where a decree is transferred to a Collector under S. 68, C. P. Code, the application for execution remains pending throughout the period when the papers are in the Court of the Collector. 1944 A. W. R. 120=A.I.R. 1945 Oudh 110=1944 O.W.N. 169=220 Ind. Cas. 137.

——Art. 182 — Application returned and retained by decree-holder.

Where an application for execution has been presented and returned and retained even afterwards in the custody of the applicant, it must be considered for the purposes of limitation as if it had never been made. A.I.R. 1942 Mad. 679= 1942 M.W.N. 476=55 M.L.W. 522=(1942) 2 M.L.J. 225=203 Ind. Cas. 478.

——Art. 182—Application returned for amendment not re-presented within time—Application, if pending.

An application for execution was returned by the Court to rectify certain defects that existed in the petition. The application, however, was not re-presented within the time fixed by the Court:

Held, that it could not be said that the order passed by the execution Court returning the application for rectification was an unjustifiable or a wrong order.

Held, also that the decree-holder having failed to comply with the proper order within the time given to him, could not advance the contention that the application which had been with him throughout should be deemed to be pending. A. I.R. 1942 Mad. 307=55 M.L.W. 18 (2)=(1942) M.L.J. 166=I.L.R. (1942) Mad. 550=206 Ind. Cas. 122.

——Art. 182—Application returned for amendment represented after inordinately long period without application to excuse delay—Execution application, if can be deemed to be pending or revived.

If an execution petition is returned to the decree-holder for some amendment or compliance with some requisition, it is his duty to re-present it within the time allowed or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can properly be described as the final order upon it. If, having received back the petition, he takes no further action upon it, then he should be treated as if he had never put in his petition at all. It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification and the proper way to deal with such a petition as that is to treat it as not having come into existence at all. The suspension of the proceedings in such cases is due to the act or default of the decree-holder in not re-presenting the petition and the petition has no judicial existence pending its re-presentation. If it is represented within time, the date of the original re-presentation will be the date of the execution petition, and the same position would result if it is re-presented late with an application to excuse the delay and the delay is excused. It cannot be deemed to be pending if it is withheld for an inordinately long period and represented without any application to excuse delay merely in the hope of saving limitation for a fresh application. A.I.R. 1942 Mad. 216=54 L. W. 708=(1941) 2 M.L.J. 1018=201 Ind. Cas. 113.

——Art. 182—Restitution petition returned without any orders being passed, on ground that execution had been stayed—Petition, held pending though not physically in Court.

Where consequent on the reversal of a decree, an application for restitution is presented and returned by the Court to the applicant on the ground that an order granting interim stay has been passed and is in force, and no legal or proper orders are passed by the Court, the application, though not physically in Court, must be yet treated to be pending and undisposed of in so far as no interruption was occasioned by any default or laches of the applicant. There is no duty cast on a decree-holder to make an application to revive an execution petition and in the absence of any such duty, a subsequent application by the decree-holder must be taken to be a kind of reminder to the Court to keep up his application for execution

or restitution which has not been disposed of and to decide it according to law. A.I.R. 1940 Mad. 281=49 L.W. 768=(1939) M.W.N. 624=(1939) 2 M.L.J. 469=189 Ind. Cas. 185.

——Art. 182—A decree cannot be treated as having been suspended during the pendency of the application to set aside the satisfaction order and appeal therefrom. A.I.R. 1939 Mad. 892=50 M.L.W. 497=(1939) M.W.N. 996=187 Ind. Cas. 591.

——Art. 182—Execution application returned for amendment — Fresh application — Former represented along with latter—Limitation.

An application for execution filed on June 21, 1928, was returned for correcting certain defects and was re-presented along with another application only on June 19, 1929:

Held, that as no final orders had been made on the prior appiication, it was still pending. The Court would have to pass orders on the prior application, and then; if necessary; consider whether the subsequent application was in time. 37 M.L.W. 469=64 M.L.J. 401=A.I.R. 1933 Mad. 540=144 Ind. Cas. 167.

——Art. 182—Order directing applications to be struck off without notice to the decree-holder is not a judicial order.

Per **Walsh, Ag. C. J.**—An order made by a Judge upon an application which is still pending that it be 'struck off' or 'sent to the record doom' made either without notice to the decree-holder or without giving him an opportunity of being heard is a ministerial order and cannot be regarded speaking generally as a judicial disposal of the application on merits, though special circumstances may appear which make it so.

Per **Lindsay, J.**—An order directing an execution application to be struck off is not an order sanctioned by any rule. A.I.R. 1926 All. 409, Foll. 100 Ind. Cas. 692=49 All. 276=25 A.L.J. 201=A.I.R. 1927 All. 16 (F.B.).

——Art. 182—Direction to consign papers to record room, is not a final disposal of execution application. A.I.R. 1927 All. 16 (F.B.) Appr. and Foll. 104 Ind. Cas. 116=49 All. 509=25 A.L.J. 249=A.I.R. 1927 All. 165 (F.B.).

——Art. 182—Execution petition — Striking off petition—No disposal — C. P. Code, S. 223.

Where a judgment-debtor resides outside the jurisdiction of a court to which an application for execution is made, the court is competent to make an order for transmission of the decree without an application for the purpose.

Held, also that the striking off of an execution petition on the failure of the party to apply for an order for transmission to the court within the time allowed by the court for the purpose, is not a proper disposal of the petition and that the petition should be treated as pending. (1907) 17 M.L.J. 616.

13. (b) Continuation or revival of application —Test.

——Art. 182—Revival — Execution application consigned to record room on full satisfaction — Subsequent application—If one in continuation,

Once the execution proceedings have come to an end because of the full satisfaction of the decree, there is nothing left in the executing Court and the proceedings finish completely, and there cannot be a revivor of such proceedings. If, however; the proceedings are in a state of suspended animation, a subsequent application would be a revivor. 52 P.L.R. 345.

——Art. 182—Continuation of prior application—Intervening applications different in character.

Where the intervening applications between the earliest and latest execution applications, are essentially different in character from the earliest one it is quite open to the Court to infer an abandonment of that application. In any event where the combined effect of the intervening applications marks substantial departure from the previous original application it cannot be said that the later application should be treated as a continuation of the earlier one. (1948) M.W.N. 772=A.I.R. 1949 Mad. 363=61 L.W. 760=(1948) 2 M.L.J. 488.

——Art. 182 — Application, when can be treated as one in continuation.

An application for execution of a decree may be treated as one in continuation or for revival of a previous application for execution, similar in scope and character, the consideration of which had been interrupted by objections and claims subsequently proved to be groundless or had been suspended by reason of an injunction or like obstruction. A.I.R. 1936 Cal. 239=39 C.W.N. 1030=63 C. 57=162 Ind. Cas. 654.

——Art. 182—Although a decree-holder need not be tied down to the form of his application, an execution application asking for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceedings. When the character of the subsequent application is different from that of the previous application, it can hardly be treated as a continuation. A.I.R. 1932 All. 273=(1932) A.L.J. 365=16 R.D. 293=54 A. 573=138 Ind. Cas. 583 (2) (F.B.).

——Art. 182—Application to revive or continue previous proceedings.

If execution is ordered, but owing to some interruption not attributable to the decree-holder himself, the order for execution cannot be carried out, and subsequently, on the removal of the interruption the decree-holder applies to carry out the previous order for execution, such an application is not a fresh application for execution but merely one to revive the previous execution proceedings. 33 Bom.L.R. 1082=A.I.R. 1931 Bom. 492=134 Ind. Cas. 1153.

——Art. 182—Per **Walsh, Ag. C. J. and Mukerji J**—Whether an application is in substance a fresh application or an attempt to revive a former one is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case. 100 Ind. Cas. 692=49 All. 276=25 A.L.J. 201=A.I.R. 1927 All. 16 (F.B.).

——**Art. 182**—Execution application in continuation of previous application—Scope of both applications must be the same. 89 Ind. Cas. 886=A.I.R. 1926 Pat. 129.

——**Art. 182**—Where later application for execution prays for reliefs different from those in the earlier one, it cannot be considered as a revival of the earlier one. 95 Ind. Cas. 718=1926 M.W.N. 317=A.I.R. 1926 Mad. 698.

——**Art. 182**—Unless there is any injunction stopping execution, any intermediate suit by a claimant and not by the decree-holder will not cause suspension of the execution proceedings. Unless there was a suspension without any default on decree-holder's part, the principle of revival of a former execution petition cannot be utilized in favour of the decree-holder. 95 Ind. Cas. 718=1926 M.W.N. 317=A.I.R. 1926 Mad. 698.

——**Art. 182**—Where the properties sought to be attached in two applications are different, the latter is not the continuation of the former, nor where the former application has been dismissed for default of the decree-holder. 79 Ind. Cas. 897=A.I.R. 1925 Pat. 197

——Art. 182—Continuation of previous application should be determined from character and scope of the latter application.

In order to entitle a decree-holder to claim that an application should be regarded as a continuation of the previous application, two conditions must be satisfied; first that the previous application was dismissed for no fault or default on his part, and secondly that the latter application is similar in scope and character to the previous application and in order to determine whether an application may be considered as similar in scope and character to a previous application, a fair test to apply would be to see if the decree-holder could have got the relief in the previous application which he claims in the subsequent application; supposing his previous application had not been struck off. 72 Ind. Cas. 862=1 Pat. L.R. 139=A.I.R. 1924 Pat. 367.

——Art. 182—Application—Disposal of—What amounts to.

Disposal of a petition is not always to be taken literally and absolutely terminating the proceedings. It can be taken in the wide sence, which has received general recognition, of mere termination for administrative and statistical purposes amounting only to a suspension of proceedings until some obstacle has been removed or stage, fixed by the Court and parties, has been reached. Court's intention is to be found out. 76 Ind. Cas. 126=1923 M.W.N. 670=1924 M.W.N. 636=19 M.L.W. 613=A.I.R. 1924 Mad. 178.

——Art. 182—Prior application for sale of properties—Later application for arrest—Latter cannot be regarded as continuation of former.

An application can only be considered as a continuation of the previous application, when it is similar in scope and character to the former application. Where the former application asked the Court, in form and in substance, to sell the properties of the judgment-debtor other than those which were comprised in the mortgage bond, and the next application in form and in substance, asked the Court to realise the money from the judgment-debtor by his arrest and detention in prison.

Held, that it is quite impossible to regard the second application as a continuation of the previous application. The fact that the decree obtained was a mortgage decree makes no difference. 2 P.L.T. 22, Foll. 71 Ind. Cas. 332=4 P.L.T. 393=A.I.R. 1923 Pat. 488.

——**Art. 182**—If execution proceedings are consigned to the record room behind the back of the decree-holder without any default on his part and without any decision a further application though in the form of a new application for execution is really a continuance of the older application. 65 Ind. Cas. 78=A.I.R. 1922 All. 433.

——Art. 182—Continuation of proceedings—Fresh application.

An application for execution of a decree can be treated as a continuation of a previous application even when the property asked to be sold is entirely different. 4 Pat. L.J. 213=(1919) P.H.C.C. 121=48 Ind. Cas. 245.

——Art. 182—Continuation of proceedings—Fresh application—Filing of supplemental list of properties to be attached not mentioned in application—Continuation.

Where on an application for execution of a decree is made in accordance with law, execution cannot be successfully taken against the specified properties in the application by reason of causes beyond the control of the decree-holder he should not be confined to the properties first specified. It is open to him to ask the Court to proceed against other properties specified in his further supplementary list. 47 Ind. Cas. 911 (Cal.).

——Art. 182—Continuation of proceedings—Application dismissed for default—Continuation of old.

Where an execution application has been dismissed for default of decree-holder a subsequent application cannot be construed for purposes of limitation as one in continuation of the previous application. 22 C.W.N. 766=45 Ind.Cas. 712.

——Art. 182—Continuation of proceedings—Fresh application or revival.

The question whether an application for execution of a decree is a new application or a rivival or continuation of an old one is a simple question of substance and not of form. 32 Ind. Cas. 1005 (All.).

——Art. 182—Continuation of proceedings—No limitation

An execution petition which does not appear to have been dismissed, struck off or otherwise disposed of, is still subsisting and a second application merely revives the old proceeding and S. 48 of the Civil Procedure Code has no application. 16 M.L.T. 399=26 Ind. Cas. 244.

——Art. 182—Continuation of proceedings—Pending application—Execution suspended by injunction—Second application after dissolution of injunction—Continuance of first application.

Where the execution of a decree is suspended by an injunction obtained by the judgment-debtor, and a fresh applictaion for execution is put in for the same relief as in the first application the fresh application must, for the purpose of limitation, be deemed to be a continuation of the first application. The intervention of an application in execution for an additional relief, between the first and the second application, will not make any difference. 27 A. 334 (P.C.), Foll. 18 C.W.N. 539=20 Ind. Cas. 244.

——Art. 182—Continuation of proceedings—Bar to execution—Bengal Tenancy Act (8 of 1885), Sch. III, Art. 6, Cl. (3).

Where a decree-holder's application for execution is delayed by a bar imposed at the instance of the judgment-debtor, a second application by the former must be deemed to be a continuation of the first application if the second is presented after the removal of the bar. This principle is applicable to cases of applications for execution of rent decree. 13 Ind. Cas. 140 (Cal.).

——Art. 182—Continuation of proceedings—Civil Procedure Code (Act 14 of 1882), Ss. 235, 237 and 238—Application for execution struck off at creditor's request—Subsequent application more than three years after the decree—Limitation.

Where an execution application is struck off at the request of the decree-holder and a subsequent application is filed more than years after the date of decree but within 3 years of the last one, it is not barred under Art. 182 (5) of the Limitation Act as it cannot be regarded as a revival of the earlier application. 5 S.L.R. 68=11 Ind. Cas. 77.

——Art. 182—Continuation of proceedings—Application within 3 years from removal of block.

If the execution proceedings are blocked by an objector, a subsequent application for execution within 3 years from removal of block is not time-barred. 45 P.R. 1909=68 P.W.R. 1909=66 P.L.R. 1909=2 Ind. Cas. 76.

——Art. 182—Continuation of prior proceedings.

The court looks at the substance of the matter, and if it finds that the proceedings before it can only be regarded with justice to the parties as a continuation of the original application which has never come to an end, then, instead of investigating any question of limitation, it holds that it is not a fresh application, but a continuation of the original application and so within time. (1905) 7 Bom. L.R. 819. **See** 5 C.W.N. 347. **Also** 1 A.L.J. 350.

——Art. 182—Continuation of execution proceedings—Petition struck off.

An application for execution of a decree by a sale of properties already attached in pursuance of a prior application not legally disposed of may be treated as one to continue such prior execution proceedings. But, in so far as the latter application asks for execution by attachment and sale of properties not comprised in the earlier one, such application must be treated as a fresh one and cannot be a continuation of the earlier execution proceedings. An application in execution will be pending until it is validly disposed of; and striking an application off the file is no valid disposal of it. (1900) 12 M.L.J. 24.

13. (c) Continuation or revival of application—What is.

——Art. 182—Continuation of proceedings—Execution consigned to record room—Second application for execution.

An order was issued by the Board under S. 25 of the Punjab Relief of Indebtedness Act and the executing Court stayed the execution of the decree. The parties could not come to an agreement before the Board and a certificate was eventually granted by it under S. 20, as a result of which the decree-holder could not apply for execution for about nine years. On receipt of this certificate the executing Court passed an order consigning the execution to record room as being unsatisfied.

Held, in the circumstances that the order of the executing Court could only be construed as an order of suspension or of stay and not of dismissal and that, therefore, the second application for execution must be held to be an application for continuation of the proceedings held on the previous application, and not a fresh application for execution. 228 Ind. Cas. 607=A.I.R. 1947 Lah. 36.

——Art. 182—Petition "closed" by order of Court—No final disposal of petition—Petition could be continued by a later application.

Where in an execution application the property is put up for sale but is not sold because there were no bidders and thereafter the district Munsiff makes an order that the petition was "closed," there is no final disposal of the petition and a subsequent execution application filed would be in continuation of the prior one. 60 M.L.W. 729 (1)=1947 M.W.N. 678=(1947) 2 M.L.J. 423.

——Art. 182—Execution application "recorded"—If a final disposal of the application—Application for actual possession by decree-holder purchaser—Actual possession not possible to be given—Duty of Court to give symbolical possession—Failure to make such order—Subsequent application—One to bring up a pending application and to have suitable orders passed.

The use of the word "recorded" on an execution application in no way amounts to a final disposal of the application. Seeking actual possession in an application in execution does not prevent, when actual possession cannot be immediately obtained, an order being made for delivery of symbolical possession when the decree-holder is entitled to it and the Court is bound to make such an order.

Where a decree-holder purchaser applied for delivery of possession of two houses and delivery was ordered in respect of one and as there was obstruction by a person who claimed a right of residence regarding the other, the Court ordered the petition to be "recorded." In an application long after three years after the above order, the decree-holder purchaser sought to continue the prior petition.

Held, that the decree-holder in the circumstances ought to have been given symbolical possession and as the execution application had not been finally disposed of it was still pending and the decree-holder was entitled by his later application to have it brought up before the Court and to have orders passed upon it in accordance with his rights. 61 L.W. 350=A.I.R. 1948 Mad. 362=(1948) 1 M.L.J. 437.

——Art. 182—Petition 'closed' for statistical purposes—Fresh application—Revival.

Where a fresh petition is filed as the result of a former petition having been 'closed' for statistical purposes, it is not regared in law as being a fresh application but an application to revive or continue the former application. It is not, therefore, barred on account of its being filed more than three years after the former petition. A.I.R. 1946 Mad. 170=1945 M.W.N. 714=(1945) 2 M.L.J. 456=58 M.L.W. 581=I.L.R. (1946) Mad. 527.

——Art. 182—Execution application—Revival—Decree under execution attachment—Decree converted into one for payment by instalments with default clause under S. 5, U.P. Agriculturists' Relief Act—Attachment in execution allowed

to continue—Default—Previous execution can be revived.

A simple money decree passed on 14th October 1931, was while it was under execution, converted on the application of the judgment-debtor into a decree for payment by four six-monthly instalments under S. 5, U.P. Agriculturists' Relief Act, on 2nd November, 1935, in default of two instalments it was ordered that the entire decretal amount would become at once payable. Meanwhile the attachment in execution was allowed to continue. The judgment-debtor did not pay any instalment. On 1st December, 1942, the decree-holder applied for the revival of the execution which was pending at the time of the order under the U.P. Agriculturists' Relief Act. The judgment-debtor contended that the decree of 1931 having ceased to exist by reason of its conversion into an instalment decree under S. 5, the earlier proceedings automatically, came to an end and there could, therefore, be no revival of them :

Held, that the fresh decree could not be divorced altogether from the earlier one on which it was based and whose date it bore. The only difference between the original decree and the fresh decree was one of amount which could be altered by amendment. The order for payment by instalments having exhausted itself the decree was ripe again for execution ; and the attachment having been continued by an express order of the Court, there was no obstacle in the way of revival of the earlier execution proceedings. A.I.R. 1946 Oudh. 125 =223 Ind. Cas. 48=1946 Oudh W.N. 128.

——Art. 182—Execution petition—Court ordering judgment-debtor to pay decretal dues by monthly instalments—Routine dismissal of execution case—Execution case, held must be deemed to be pending—Subsequent execution petition, though in tabular form and purporting to be fresh one, held was, in substance, one for continuing previous execution case.

In execution of money-decree passed in 1923, the decree-holder made his third application for execution numbered as execution case No. 32 of 1927 in which he sought that the judgment-debtor should be arrested and detained in civil prison for non-payment of the remaining sum out of the decretal dues. The Court, however, ordered the judgment-debtor that he should pay the decretal sum by monthly instalments of Rs. 15 on or before the 15th of every month, in default of any instalment thereby fixed, the judgment-debtor being liable to be sent to civil prison. The judgment-debtor continued paying Rs. 15 per month, as aforesaid, until July, 14, 1937, when he made a default, all these monthly deposits being made in Execution Case No. 32 of 1927. On September 15, 1928, the execution case was dismissed on part satisfaction. Apparently, this dismissal was a mere routine dismissal being neither for the default of the decree-holder nor on termination of the execution proceedings. On August 4, 1937, the decree-holder obtained an order from the Court permitting him to withdraw the amounts in deposit till July, 14, 1937. On December 19, 1939, the fourth execution case was started in the sense that it was numbered as Execution Case No. 89 of 1939, on a fresh application made in a tabular form, though, in substance, it was an application for continuing the old execution proceedings, that is to say, the Execution Case No. 32 of 1927 in which he prayed that the judgment-debtor be re-arrested in terms of the order passed in Execution Case No. 32 of 1927. It was contended by the judgment-debtor that the execution petition was time-barred under S. 46, Civil Procedure Code.

Held, that although the application of December 19, 1939, was in form, a fresh application for execution, yet in substance, it was an application merely to continue the previous Execution Case No. 32 of 1927 which must be deemed to have been pending all the time, because the judgment-debtor had been busy paying the monthly instalments of Rs. 15 until he made a default on July 14, 1937. The application for execution was, therefore, within time. A.I.R. 1945 Pat. 276=26 P.L.T. 155=11 B.R. 468=220 Ind. Cas. 134.

——Art. 182—Order consigning papers of case to record room—Proceeding is not finally disposed of and can be revived upon a subsequent motion by the decree-holder.

An order that the papers of the execution case should, for the time being, be consigned to the record room based upon a report made by the Collector to the effect that all proceedings in execution had been stayed in consequence of an order passed by the Board of Revenue is not an order finally disposing of execution proceeding. The execution proceeding is kept pending and can be revived upon a subsequent motion by the decree-holder. A.I.R. 1945 All. 172=(1945) A.L.J. 92=1945 O.W.N. (H.C.) 88=1945 A.W.R. (H.C.) 43=I.L.R. (1945) All. 213=222 Ind. Cas. 123.

——Art. 182—No bidders—Execution application "struck off"—Subsequent application.

An order "struck of" passed on an execution application merely for the reason that there were no bidders on the date when the sale came on, is illegal and the subsequent execution application must be deemed to be continuation of the prior execution application. A.I.R. 1944 Mad. 24=56 L.W. 575=1943 M.W.N. 600=(1943) 2 M.L.J. 561=210 Ind. Cas. 606.

——Arts. 182 and 181—Subsequent application for revival.

Where an execution case, is still pending, but cannot be proceeded with further by reason of an injunction and has been "struck off the file," or is removed by an order which does not terminate it finally but has the effect of only removing it from the list of pending cases, the decree-holder is not bound to apply for revival of the said proceedings after the removal or discharge of the injunction. His application in substance only conveys to the court the information that the bar has been removed.

Such an application, therefore, not being a fresh application for execution, Art. 182 does not apply to it, and in regard to application of such nature, there is no rule of limitation prescribed. A.I.R. 1936 Cal. 239=39 C.W.N. 1030=63 C. 57=162 Ind. Cas. 654.

——Art. 182—Execution dismissed—Dismissal order set aside by High Court in appeal—Fresh execution petition, whether necessary.

Where the Court dismisses the execution application, but on appeal the High Court sets aside the order of dismissal and directs the execution to proceed except against some of the defendants or their heirs, the effect of the order of the High Court is to revive the execution proceeding by vacating the order of dismissal and consequently, no fresh execution application is necessary. A.I.R. 1936 Pat. 26=2 B.R. 234=160 Ind. Cas. 678.

——Art. 182—Order striking off proceedings—Subsequent proceedings.

An order 'striking off the file' an execution petition is wholly irregular and is not recognised by the law or by any Code of Procedure and if a petition has been

so struck off, a subsequent application should be treated as a revival or continuation of the earlier one which was irregularly stopped. A.I.R. 1935 Mad. 885=(1935) M.W.N. 969=158 Ind. Cas. 829.

——**Art. 182**—The auction-purchaser made an application for possession of property within three years of confirmation of sale. The Court made an order on this, which was not on merits and which did not amount to a refusal of any of the relief claimed by the applicant, hence not compelling him to prefer an appeal. The applicant then presented another application within a year of the last application requesting for possession of the property purchased :

Held, that the second application was in continuation of the previous one and consequently was in time. A.I.R. 1935 Mad. 803=(1935) M.W.N. 926=42 L.W. 375 =58 M. 893=69 M.L.J. 821=159 Ind. Cas. 279 (F.B.).

——**Art. 182**—Suspension of execution proceedings for no fault of decree-holder by reason of sale proceedings going on before Revenue Court at the instance of another decree-holder—Execution application not finally and completely disposed of—Subsequent application for revival made within three years of the date on which obstacle to execution was removed cannot be deemed to be a fresh application and would not be barred. 11 O.W.N. 126=A.I.R. 1934 Oudh 92 =148 Ind. Cas. 451.

——**Art. 182**—Where an application for a final decree which was made within time was adjourned *sine die* on the ground that the judgment-debtor was insane and a subsequent application was made after the prescribed period of three years, against the judgment-debtor's widow :

Held, that the subsequent application was not time-barred. A.I.R. 1933 Cal. 816=37 C.W.N. 583=147 Ind. Cas. 206.

——Art. 182—Application for execution—Order for partial execution—Appeal by decree-holder—Dismissal of application for default by lower Court—Appeal allowed by Appellate Court—Fresh application for execution—Limitation—Proper procedure—Effect of appellate order.

On the objection of the judgment-debtor, an order for partial execution was passed in 1919. The decree-holder appealed. The application for execution was dismissed for default by the executing Court in 1922 during the pendency of the appeal. The Appellate Court, however, allowed the decree-holder's appeal in 1926 and held that the decree was fit to be executed in its entirety. The decree-holder again applied for execution in 1927, this time varying the list of properties against which he wanted the decree to be executed. The judgment-debtor contended that the last application was barred by limitation in respect of the amounts allowed by the executing Court in the first instance :

Held, that the effect of the order of the Appellate Court was to overrule the objections of the judgment-debtor and to leave the decree-holder free to go on with the application of 1919 and it was, therefore the duty of the executing Court to call upon the decree-holder to proceed with the execution as it had been started by him.

Quaere.—Whether it was open to the decree-holder to amend the original application by asking the Court to allow him to proceed against other properties. 34 C.W.N. 897=A.I.R. 1931 Cal. 112=130 Ind. Cas. 143.

——Art. 182—Continuation of proceedings.

Order recording execution petition with permission to decree-holder to renew, is improper but if passed, subsequent execution becomes continuation of previous one. 121 Ind. Cas. 845=A.I.R. 1930 Mad. 303.

——**Art. 182**—Application for revival of previous execution proceedings containing additional prayer for arrest of judgment-debtor is not fresh application. 126 Ind. Cas. 169=A.I.R. 1930 Lah. 753.

——Art. 182—Revival of execution.

Decree-holder applying for sale of properties in a particular way—Execution Court not allowing the prayer, and dismissing application pending appeal by decree-holder against order disallowing execution as prayed for by him—Appeal allowed—Second application by decree-holder is in revival of the first.

If there has been some bar imposed upon the continuation of the proceedings under an application for execution which is subsequently removed by an order of an appellate Court or by any other order lawfully made, then any fresh application for execution is to be treated merely as a continuation of the proceedings which were suspended. 99 Ind. Cas. 865=1926 P.H.C.C. 353=8 P.L.T. 287=A.I.R. 1927 Pat. 114.

——Art. 182—Proceedings under O. 21, R. 95 stayed—Application after vacation of stay—No question of limitation.

Where proceedings in an application under O. 21, R. 95, Civil Procedure Code, are stopped by injunction before any order could be passed to give possession to the purchaser, a second application filed by the purchaser after the removal of the injunction, must be taken to be an application intended to bring to the notice of the Court the existence of the previous application, and to get proper orders passed thereon. In such a case no question of limitation regarding the second application really arises. 99 Ind. Cas. 632=25 M.L.W. 108=1927 M.W.N. 60=A.I.R. 1927 Mad. 391.

——Art. 182—Application for execution ordered to be simply "filed"—Fresh Application is to be treated as if, for revival.

The decree-holder applied in 1918 on the basis of assignment of decree which however by oversight did not refer to the decree in question but his application was filed and not dismissed. He applied in 1921 and in 1924, January. Both these applications were struck off owing to default of the decree-holder. He then filed a fresh application in 1924 May.

Held, the application in 1918 for execution having been ordered to be simply 'filed' and not having been struck off, owing to default of the decree-holder, must be deemed to have been still pending when the application was filed in 1921. Although this application of 1921 purported to be a fresh application for execution it should be treated for the purpose of limitation as an application for revival. 27 All. 334 (P.C.) Foll. 94 Ind. Cas. 869=A.I.R. 1926 All. 510.

——Art. 182—Setting aside of sale under O. 21, R. 90, Civil Procedure Code—Subsequent application for execution is in continuation of the first.

A landlord decree-holder applied for execution of a rent-decree when the Executing Court held that the execution should proceed as on the basis of a money-decree and not as a rent-decree. It proceeded in that way and the sale of certain property of the judgment-debtor was actually confirmed and the case was dismissed on full satisfaction. On the same day, the judgment-debtor put in a petition to set aside the sale under the provisions of O. 21, R. 90, and eventually the sale was set aside ; the decree-

holders then applied once more to execute their decree as a rent-decree.

Held, that the second application should be treated as a continuation of the preceding application inasmuch as the prayers in both were to execute the decree as rent-decree and further that the decree-holder's right to execute the decree revived on the day the sale was set aside. 92 Ind. Cas. 799=7 P.L.T. 410=A I.R. 1926 Pat. 143.

——**Art. 182**—Execution stayed by an injunction—Right to execute revives on injunction coming to an end—Decree-holder must apply for revival within three years from accrual of right. 89 Ind. Cas. 992=7 P.L.T. 39=A.I.R. 1926 Pat. 62.

——Art. 182—Suspension of execution proceedings—Application just after suspension is over revives former application.

Where execution proceedings are suspended at the instance of a stranger having filed a suit in respect of the property, which is the subject-matter of the execution proceedings, an application made just after the close of that suit, is not time-barred though it is filed more than three years after the date of suspension. The application is in effect one to rivive the old one and not a new application at all. 27 All. 337 (P.C.), Foll. 77 Ind. Cas. 871=A.I.R. 1923 All. 600.

——**Art. 182**—Previous application suspended by objection afterwards found groundless—Subsequent application may be treated as continuation of previous application. 37 Cal. 796, Foll. 68 Ind. Cas. 207=35 C.L.J. 84=26 C.W.N. 338=A.I.R. 1921 Cal. 472.

——**Art. 182**—Sale set aside—A second Application in execution is an application for revival of the earlier one and no question of limitation arises. 64 Ind. Cas. 849=35 C.L.J. 135=A.I.R. 1921 Cal. 594.

——**Art. 182**—Previous proceedings stopped due to death of decree-holder—Application for execution by representative within 3 years of closure of previous application is not barred. 64 Ind Cas. 855=A.I.R. 1921 Nag. 64.

——**Art. 182**—Where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been thus suspended. 61 Ind. Cas. 417=43 All. 383=19 A.L.J. 174=A.I.R. 1921 All. 99.

——Art. 182—Continuation of proceedings—Sale set aside owing to fraud of judgment-debtor—Continuation of prior application.

Where an execution sale is set aside on the ground of the fraud of the judgment creditor the application in consequence of which the sale was ordered may be deemed to be pending and a subsequent application for execution may be considered as a continuation of that application. 10 L.B.R. 84=12 Bur. L.T. 245=55 Ind. Cas. 707.

——Art. 182—Continuation of proceedings—Execution—Decree Ex parte satisfied by one judgment-debtor—Decree set aside by latter—Application for execution against other judgment-debtor—Limitation.

Where an ex parte decree which had been executed against one of the judgment-debtors is set aside in a suit by that judgment-debtor a further application on that date by the decree-holder to execute the decree against the other judgment-debtor must be treated as a continuation of the original application which was made within time. 21 C.W.N. 571=40 Ind. Cas. 78.

——Art. 182—Continuation of proceedings—Effect of sale in execution being set aside.

The decree-holder can execute the balance of the decree though time barred if the sale partly satisfying the decree is set aside. 32 Ind. Cas. 699 (Cal.).

——Art. 182—Continuation of proceedings—Civil Procedure Code, O. 21, Rr. 10 and 64—Execution—Order for attachment—Application for execution not disposed of—Subsequent application for sale, if barred.

An application for sale of property attached on a previous execution application which was not disposed of, is not a new application but one to enforce the old; and the decree-holder is not guilty of laches in prosecuting the original application. 31 Ind. Cas. 87 (Mad.).

——Art. 182—Continuation of proceedings—Application consigned to record room—Decree-holder not at fault—Second application—Revival.

An application for execution by sale was made on 1st December, 1908. The Collector, to whom the proceedings had been transferred, discovered that part of the property belonged to persons other than the judgment-debtor and sent the case back. The Subordinate Judge called upon the pleader for the decree-holders to make a statement and on his failure to do so consigned the case to the record room. More than three years after the present application for execution was made.

Held, that the present application was an application to revive the execution proceedings which had been suspended owing to no default of the decree-holders and that the execution was not barred by limitation. 37 All. 518=13 A.L.J. 760=30 Ind. Cas. 877.

——Art. 182—Continuation of proceedings—Power to retransmit the record to Collector—Jurisdiction—No fresh application necessary.

Where a decree transmitted to the Collector for execution, has been reurned by him to the Civil Court after some time, but without putting an end to the execution petition, the Civil Court has jurisdiction to go on with the execution and to transmit it to the collector so long as the execution proceedings are pending, and the decree-holder need not put in a fresh application for execution and start proceedings *de novo*. 18 Ind. Cas. 1004 (All.).

——Art. 182—Continuation of proceedings—Execution of Decree—Claim petition—Stay of execution—Later application.

Where in a pending execution application, proceedings are stayed till the disposal of a claim and time is granted to the execution creditor to file certain papers, the period of limitation begins to run against the execution creditor from the date of the disposal of the claim.

If he later on files a fresh execution application, it should be construed as an application to revive and carry through a pending execution petition. (1912) M.W.N. 860=16 Ind. Cas. 484.

——Art. 182—Continuation of proceedings—Claim by judgment-debtor—Failure—Application for execution if a continuation of the former—Effect where claim is successful.

Where in the execution of a decree a claim petition is first successful but ultimately ends in failure, the

decree-holder is entitled to treat a subsequent execution application as one in continuation of the earlier ; but it is not so where such a claim is successfully proved ultimately. 14 C.L.J. 610=11 Ind. Cas. 48.

——Art. 182—Civil Procedure Code (Act 14 of 1882), S. 230—Application in continuation of previous application for arrest of judgment-debtor.

When applications for the arrest of the judgment-debtor are ineffectually made within 12 years from the date of the decree and struck off owing to the judgment-debtor not being found a fresh application for arrest made after the expiry of 12 years which is not otherwise barred may be regarded as made in continuation of the previous applications and cannot be held to be barred by the provisions of S. 230, Civil Procedure Code (1882). 21 A. 155, 6 M. 365, Foll. 6 P.L.R. 1910=125 P.W.R. 1910=6 Ind. Cas. 490 (1).

——Arts. 182 (179)—Continuation of the previous application—Execution sale set aside for fraud of the decree-holder—Fresh application for execution.

Where on a sale in execution of a decree being set aside on the ground of fraud on the part of the decree-holder he again applies for execution, such application ought to be treated as a continuation of the previous execution proceeding. (1909) 13 C.W.N. 521=1 Ind. Cas. 341.

——Art. 182—Revival of application in continuation of previous proceedings in execution.

On the 7th December, 1903, 'the sale of certain immoveable property, which had been attached was ordered. On the 30th January, 1904, the Amin reported that he had been unable to hold the sale, and there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off " for the present." On the 13th of January, 1906, the decree holder again applied, asking that the property, which was still sounder attachment, might be sold.

Held, that this was not a fresh application in execution, but merely an application to revive the former proceedings, and was not barred by limitation. (1908) A.W.N. 227=5 A.L.J. 616=30 A. 499.

——Art. 182—Application—Revival.

On the 7th December, 1903, the sale of certain immoveable property, which had been attached, was ordered. On the 30th January, 1904, the Amin reported that he had been unable to hold the sale as there were no bidders. Notice of this fact was given to the decree-holder and he was allowed time till the 10th February to pay in fees for a fresh sale. On that date, no steps having been taken by the decree-holder, the case was ordered to be struck off "for the present." On the 13th January, 1906, the decree-holder again applied, asking that the property which was still under attachment might be sold.

Held, that this was not a fresh application in execution, but merely an application to revive the former proceedings and was not barred by limitation. 1908 A.W.N. 39.

——Art. 182—When application in continuance of the previous application.

A mortgage decree-holder applied for sale. A suit was instituted by the son of the mortgagor claiming a portion of the property and an injunction staying the sale as regards his portion was obtained. The sale as regards the remainder became infructuous for want of bidders. On the son withdrawing his suit more than 3 years from the date of the prior application, a fresh application was put in for sale of the whole property, evidently more than 3 years from the date of the previous application.

Held, that although the injunction operated *prima facie* only to postpone the sale of a portion, yet inasmuch as it was effectual in preventing the decree-holder from selling the remaining share of the property, and he was compelled to wait until the bar was removed before renewing the application, which had been virtually suspended in the meantime, the second application was not a fresh one. (1906) 33 C. 689.

——Art. 182—Striking off and dismissal for default, no difference—Fresh application—Limitation.

Where more than 30 days after an application for ascertainment of mesne profits was dismissed for default, a fresh application was made for that purpose:

Held, that the application was not barred ; there is no substantial distinction between an order striking off an application and one dismissing it for default. (1907) 12 C.W.N. 3=7 C.L.J. 301.

——Art. 182—Revival—Execution of decree—Order striking off an application—Second application—Code of Civil Procedure, S. 235—Limitation.

Held, that where in consequence of proceedings taken by some judgment-debtors to set aside a sale held in execution of a decree there was delay in the making of the second application for execution, which was made more than three years after the first application which had been ordered to be struck off, the second application, though made in the form prescribed by S. 235 of the Code of Civil Procedure, was not an application for execution *de nevo*, but was an application to revive the former execution proceedings and execution of the decree was therefore, not time-barred. 18 A. 482 Foll. (1905) 2 A.L.J. 276.

13. (d) Continuation or revival of application—What is not.

——Art. 182—Continuation of previous application—Previous application dismissed as result of Court's mistake.

An executing Court is not entitled to regard a subsequent application for execution as an application to continue a previous application, although the previous application has been dismissed as a result of the Court's mistake. The order dismissing the previous execution application operates as *res judicata* between the parties until it is set aside. A.I.R. 1949 Pat. 117.

——Art. 182—Execution application dismissed for want of prosecution—Another application for revival of execution—Second application dismissed—Yet another application beyond three years from the first but within three years from the second—Maintainability.

Where a fresh application for execution of a decree, the previous application having been dismissed for want of prosecution, was in a tabular form and set forth all the particulars required by O. 21, r. 11, Civil Procedure Code in the 10th column of the application, the decree-holder stating the manner in which he seeks the assistance of the Court and the circumstances under which the previous applications were dismissed and there was a prayer that the decree might be executed and the property sold by "revival" of the previous proceedings :

Held, that the application was a fresh application for execution, and consequently the last application, being within three years from the date of the order passed on this application, was within limitation 4 A.W.R. 396=A.I.R. 1934 All. 1047=152 Ind. Cas. 36.

——Art. 182—Dismissal of application for non-payment of *batta*—Subsequent application, whether can be treated as revival or continuation.

Where an application for execution has been dismissed for failure to pay *batta* for notice of sale, a subsequent application for execution cannot be treated as a continuation or revival of the previous application which was dismissed. There should have been a wrong dismissal on account of some obstacle which then existed but which was subsequently removed, in order to entitle the applicant to have the later application treated as one in continuation of or to revive the former one. 37 L.W. 607=64 M.L.J. 664=(1933) M.W.N. 566=A.I.R. 1933 Mad. 418=56 M. 490=143 Ind. Cas. 1 (F.B.).

——Art. 182—Step-in-aid—Continuation of proceedings.

Application for rateable share in execution proceedings in another decree by another decree-holder in 1920—Application consigned to record room along with execution proceedings which were compromised—Application for arrest of judgment-debtor in 1925—Prayer and relief being different, the latter application is not a continuation of the former. 115 Ind. Cas. 24=30 P.L.R. 419=A.I.R. 1929 Lah. 529.

——Art. 182—Application for certificate of transfer is not application for execution. Therefore subsequent application for execution cannot be deemed to be a continuation of it. 90 Ind. Cas. 274=48 All. 121=23 A.L.J. 977=6 L.R.A. Civ. 582=A.I.R. 1926 All. 93.

——Art. 182—Civil Procedure Code, O. 21, Rr. 90, 95—Application under against one judgment-debtor only dismissed—Later application against all is not continuation of the first application.

If the first application for execution is *ab initio* a bad application the subsequent application cannot be an application made in continuation. Where the question is whether an application by a decree-holder auction-purchaser for delivery of possession is a step-in-aid of execution the answer must be in the negative.

Order 21, R. 95 applies to an application made by the purchaser and an application made by the purchaser cannot possibly be read as an application by a decree-holder to take some step-in-aid of execution, whether the purchaser be the decree-holder or an outsider. 68 Ind. Cas. 638=1 Pat. 701=4 P.L.T. 226=A.I.R. 1922 Pat. 310.

——Art. 182—Execution of decree—Barred—Revival.

Where an application for the execution of a decree is barred by limitation it cannot be revived by a subsequent application for amendment. 59 Ind. Cas. 186 (Cal.).

——Art. 182—Continuation of proceedings—Dismissal of execution application.

If an execution application is dismissed for no fault of laches on the part of the decree-holder, a subsequent application in all respects similar to the former is a continuation of that application. But if it is dismissed on account of the default of the decree-holder in not taking steps to proceed with it a subsequent application cannot be treated as a continuation or revival of the previous application. (1920) P.H.C.C. 109=53 Ind. Cas. 85.

——Art. 182—Continuation of proceedings—Test of Application—Struck off for omitting to bring legal representatives of deceased decree-holder—Subsequent application by decree-holder's son.

A decree-holder applied for execution within three years of decree but died pending disposal. His major son applied to execute the decree after recognising him as the legal representative of the deceased decree-holder. Pending this the application preferred by the decree-holder was struck off on the report of the decree-holder's vakil that he had no instructions.

Held, that the original application for execution was validly disposed of when it was struck off; that the minor son's application was a fresh application for execution and having been presented more than 3 years after the disposal of the prior application, was barred. 41 All. 435=17 A.L.J. 649=49 Ind. Cas. 990.

——Art. 182—Continuation of proceedings—Execution application—Decree satisfied by attachment and execution of another decree set-aside eventually—Fresh application for execution—Limitation.

Where appellant in execution of a decree for costs against a respondent, attached and executed a decree obtained by the latter, but the latter decree having been set aside on appeal, the appellant made a fresh application for the execution of his decree more than three years after his last application.

Held, that the application being in form and substance one for execution of a decree was barred under Art. 182 of the Limitation Act. 45 Ind. Cas. 531 (All.).

——Art. 182—Continuation proceedings—Execution application.

An application for execution cannot be held to be one in continuation of an application for transfer of a decree. 16 Cal. 744=22 Cal. 921, Foll. 14 Ind. Cas. 277 (All.).

——Art. 182—Continuation of proceedings—Execution application—Order attaching immoveables, but otherwise petition dismissed—Subsequent application—Lapse of time.

Where an order was made on an execution application to the effect that the immoveable property should be attached but otherwise the petition was dismissed;

Held, that a subsequent application made after the lapse of 7 or 8 years was barred because it could no be considered as a continuation of the previous proceedings. 13 Ind. Cas. 160 (Mad.).

——Art. 182—Continuation of proceedings—Execution—Revival—Bar by lapse of time.

A judgment-debtor died and execution against his minor heir was brought. The execution was set aside on the ground that she was not properly represented at the execution proceedings,

Held, a second application to revive the first application is barred by limitation if more than 3 years. 8 A.L.J. 1277=12 Ind. Cas. 628.

——Art. 182—Execution of decree—Limitation—Application for executions whether in continuation of former applications or not.

On the death of a mortgagor his heirs partitioned the various items of the mortgaged property amongst

themselves. Subsequently, on the 31st of July 1896, the mortgagees obtained a decree for sale against the mortgagors generally, without distinguishing between their respective liabilities. On application being made for an order absolute for sale, certain of the judgment-debtors paid into Court the proportionate shares of the mortgage-debt according to the property which they had inherited, and objected to their shares being sold. The court ordered that the money so paid should first be taken out of Court, then the property not of the objectors could be sold, and finally the property of the objectors. The order as framed, however, even after amendment, directed the sale of Bahadurpur, a village belonging to one of the objectors. The first application for execution was dismissed on the 12th of July, 1890. On the 7th of August, 1900, the decree-holders applied for the sale of Bahadurpur. The owner objected and the court (contrary to the terms of the order absolute) directed that the property of the other judgment-debtors should be sold first. To this order the decree-holders submitted. The decree-holders then, on the 20th January, 1902, applied for the sale of property belonging to another objector. The owner objected, and the application was dismissed the court directing the decree-holder to proceed against Bahadurpur. The owner of Bahadurpur appealed, and her appeal was dismissed on the 16th of May, 1904, but with the finding that the order complained of was inoperative as regards Safia Begam. On the 9th of February, 1907 the decree-holders again applied for the sale of Bahadurpur.

Held, that under the circumstances of the case the application was barred by limit tion. 1908 A.W.N. 253=5 A.L.J. 622.

——**Art. 182**—Application not in continuance of the previous application—First application for attachment of moveables—Second application for attachment of immoveables—Rent decree. *See* U.P. ACTS—AGRA TENANCY ACT. 1906 A.W.N. 97=3 A.L.J. 324.

——Art. 182—Default of prosecution—Dismissal—Fresh application—Continuation of proceedings.

Though execution was first granted after overruling the judgment-debtor's objections, yet on the failure of the creditor to pay the fess for proclamation required by the court the petition was dismissed, but the attachment already made was maintained :

Held, that an application for execution after this was dismissed should be considered to be a fresh application, and not a continuation of the previous one. (1900) 5 C.W.N. 347.

14. Execution against Surety.

(a) Limitation.

(b) Saving of limitation.

(a) Limitation.

——Art. 182—Surety.

Under S. 145, Civil Procedure Code, where any person has become liable as surety for the performance of any decree or any part thereof, the decree may be executed against him to the extent to which he has rendered himself personally liable, in the manner provided in the Civil Procedure Code for the execution of decrees. There is no reason, therefore, why when a decree is sought to be executed against such a surety, Art. 182, Limitation Act, should not apply. Thus a decree obtained against a judgment-debtor and sought to be executed against him alone can subsequently he executed against his surety also even though more than three years have elapsed since the passing of the decree. 47 Bom. L.R. 434=A.I.R. 1945 Bom. 489.

——**Art. 182**—Execution against surety—Limitation Act, Art. 182 will apply. A.I.R. 1941 Mad. 151=52 L.W. 657=(1940) M.W.N. 1137=(1940) 2 M.L.J. 831.

——Art. 182—Execution against surety.

Although a decree is not passed against surety, it may still be executed against him by reason of S. 145, Civil Procedure Code and the limitation for an application for execution of a decree against him is laid down by Art. 182 and decree-holder cannot break away from that article. A.I.R. 1938 Lah. 590=40 P.L.R. 473=181 Ind. Cas. 14.

——**Art. 182**—Application for execution against sureties is an application for execution of decree as by operation of S. 145, Civil Procedure Code, the sureties become judgment-debtors under the decree. Such an application for execution comes under Art. 182 and not Art. 181. A.I.R. 1937 Cal. 452=41 C.W.N. 1099=173 Ind. Cas. 183.

——Art. 182—Surety.

Though a surety is technically liable from the date of the decree in equity, his liability arises only upon the failure of the judgment-debtor to satisfy the decree and the decree-holder who is proceeding against the principal debtor is not bound to file a formal and otherwise futile petition against the surety before the period of three years expires in order to keep alive the decree against the surety. 68 M.L.J. 119=41 L.W. 148=(1935) M.W.N. 90=A.I.R. 1935 Mad. 188=58 M. 276=155 Ind. Cas. 864.

——Arts 182 and 65—Execution against surety.

Person to whom certain attached moveables were entrusted executing a surety bond and agreeing to produce property whenever called upon to produce by the Court—On failure he and heirs to be bound by any orders of Court—Application by decree-holder more than three years after date of decree, for execution against surety :

Held, that application was governed by Art. 182 and not by Art. 65 ; that the cause of action arose on the date of the decree and not on the date on which the surety failed to produce the property on the requisition of the Court and that the application was barred. (1932) M.W.N. 1296=37 M.L.W. 127=A.I.R. 1933 Mad. 219=142 Ind. Cas. 368.

——**Art. 182**—Application for execution against surety is governed by Art. 182 and not by Art. 176 after the death of the principal debtor and execution can be had even though the legal representatives have not been brought on record. 66 Ind. Cas. 176=A.I.R. 1922 Nag. 112.

——Art. 182—Execution against surety—Limitation—Starting point.

Where a surety bond given in the execution department does not put upon the surety an obligation to make an immediate payment in cash but only gives the decree-holder a realisable security upto a certain amount for the balance of the sum, if any, remaining unpaid after the mortgaged property had been realised, the liability of the surety cannot be enforced until the property has been sold and the limitation starts

only when such sale has taken place. A.I.R. 1932 P.C. 131=36 C.W.N. 701=55 C.L.J. 413=36 L.W. 111=63 M.L.J. 85=14 P.L.T. 273=136 Ind. Cas. 629 (P.C.).

——Art. 182—Execution against surety.

Decretal debt determined and instalments fixed by Debt Relief Court—Execution against surety—Period taken by proceedings before Relief Court cannot be excluded. 1944 N.L.J. 271=A.I.R. 1944 Nag. 277.

(b) Saving of limitation.

See also NOTE 12 (g).

——Art. 182—Application against one surety, if saves limitation against others.

An application to enforce a bond against one of the sureties cannot save limitation against the other sureties, even though the names of the latter were mentioned in the application without any relief being sought against them. 38 L.W. 450=A.I.R. 1933 Mad. 722=65 M.L.J. 507=(1933) M.W.N. 1005=145 Ind. Cas. 1004.

——Art. 182—Application for execution made against surety.

Applications for execution made against the surety of the judgment-debtor under a compromise decree are applications made in accordance with law to the proper Court for execution of the decree, or to take some step-in-aid of execution of the decree and are sufficient to save limitation. It is not right to use Expl. I to Art. 182 so as to restrict the application of the article when the case happens to be fully covered by its terms. A.I.R. 1937 Oudh 351=1937 O.W.N. 680=13 Luck. 353=168 Ind. Cas. 600.

——Art. 182 (5)—Application against surety for his arrest.

An application against a surety for his arrest is a step-in-aid of execution of the decree and brings a subsequent application within time against the original judgment-debtor. A.I.R. 1939 Lah. 587=I.L.R. (1940) Lah. 223=42 P.L.R. 723=186 Ind. Cas. 239.

——Art. 182, Expl. (1)—Application against surety—Saving of limitation against J.D.

During the pendency of the appeal, the judgment-debtor applied for the stay of the execution of the decree for costs. That application was granted subject to his furnishing security to the extent of Rs. 2,000. Thereupon two persons executed a security bond, each of them undertaking liability to the extent of Rs. 1,000 for the due performance of the decree which might ultimately be passed against the judgment-debtor in the security bond; no person was mentioned as a mortgagee or as a person on whom any right to enforce or realise the security was conferred. It merely contained an undertaking to pay. The appeal was ulitimately dismissed and costs of the appeal were awarded against the judgment-debtor. The decree-holder applied for execution of the appellate decree for costs but only against sureties praying for realisation of money by sale of property hypothecated by the security bond.

Held, that though Expl. (1) to Art. 182, Limitation Act had no application, yet the decree-holder could take the benefit of the clause and therefore, since the execution application against the sureties sought to take a step-in-aid of execution, it saved limitation for a subsequent application against the judgment-debtor:

Held, further that no person having been mentioned in the instrument, and thus there being no mortgagee to whom the security was given, the security bond did not amount to a mortgage, and that, therefore, no question of a suit on that instrument arose. No separate suit to enforce the charge could be filed on the basis of the surety bond. Hence an order for sale of the property charged under the security bond could be made by the Court to whom the execution of the decree had been entrusted. The application, therfore, against the sureties was in accordance with law within the meaning of cl. 5 of Art. 182. A.I.R. 1939 All. 463=(1939) A.L.J. 415=I.L.R. (1939) All. 538=1939 A.W.R. 329=183 Ind. Cas. 446.

——Art. 182 (5)—Application to execute entire decree by arrest of surety is "step-in-aid."

An application asking the proper Court to execute the entire decree by the arrest of the person of a surety who has made himself liable for the satisfaction of the decree, amounts to asking the execution Court to take a step-in-aid of the execution of the decree as against the principal whose liability the surety had taken upon himself and the decree-holders are entitled to the benefit of Cl. (5) of the Article. 43 All. 152=A.I.R. 1921 All. 291.

——Art. 182—(5)—Step-in-aid—Surety for satisfaction for decree—Application for arrest of surety.

An application for the arrest of the person of the surety who made himself liable for the satisfaction of the decree after it was passed is a step-in-aid aginst the original judgment debtor. 18 A.L.J. 988=58 Ind. Cas. 794.

——Art. 182—Execution against sureties—Limitation not saved against principal debtors.

Where the sureties have made themselves liable only for a part of the decretal amount and the execution is taken only against them, the sureties not being co-judgment-debtors with the principal debtors the execution against them does not save limitation against the principal debtors. 23 Bom. 478, Foll. 85 Ind. Cas. 657=A.I.R. 1926 Cal. 267.

15. Interpretation.

——Art. 182—Interpretation.

Article 182 ought to be read as "for the execution of a decree or order not provided for as regards dismissal by Art. 183 and by S. 48, Civil Procedure Code." In the same way Art. 181 should be read as application for which no period of limitation for the purpose of dismissal is provided elsewhere in the schedule or by S. 48, Civil Procedure Code. 1930 M.W.N. 979=A.I.R. 1930 Mad. 995=59 M.L.J. 579.

——Art. 182—Liberal construction.

The provisions of the Limitation Act ought to be interpreted as liberally in favour of the decree-holder as the circumstances of the case allow. A.I.R. 1937 Nag. 305=I.L.R. (1937) Nag. 440=173 Ind. Cas. 51.

——Art. 182 (2)—Construction — Amendment suggested.

The construction of cl. (2) of Art. 182 also presents certain difficulties which will be removed if it is made clear that the clause will not have limitation if the appeal is, on the face of it, incompetent. A.I.R.

1938 Pat. 57=16 Pat. 453=18 P.L.T. 679=4 B.R. 425=174 Ind. Cas. 418.

——Art. 182 (2) and (3)—Scope and interpretation of.

There is no warrant for reading into the words of cl. (2) of Art. 182, Limitation Act, any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The clause does not state in its strict grammatical construction, that the appeal must be against the decree in the suit. The real distinction between cls. (2) and (3) of Art. 182 is really one of the particular tribunal which passes the order by which the original decree is imperilled. If the order is made by the Appellate Court, then the period of limitation under Art. 182, cl. (2) runs from the date of the appellate order. If, on the other hand, the order imperilling the decree is made by the original Court which passed it, then the date from which the limitation runs is the date of the order of the original Court. There is no essential difference between orders for restoration and orders for review. All cases in which the Court re-considers its own judgment are cases of review within the meaning of cl. (3) of Art. 182. Applications for restoration and applications for review (using the word in the narrower sense) are it is true, separately dealt with in the orders appended to the Civil Procedure Code. These are mere questions of procedure and may be altered by any particular High Court but the entire jurisdiction of any Court to interfere with its own decision once given is derived from S. 114 of the Code itself where the single word "review" is used. 18 P.L.T. 231=A.I.R. 1937 Pat. 337=3 B.R. 598=16 Pat. 306=169 Ind. Cas. 581.

16. Res judicata.

——Art. 182—Execution application by manager dismissed as time-barred—Fresh application by minor within three years of attaining majority is competent—Fact that decree was eventually passed in name of firm does not affect position.

Since the leave of the Court is necessary to receive decretal money on behalf of a minor, execution proceedings taken by the manager independently to realise the decretal amount on his behalf without making it clear that the money was to be realised on behalf of the minor as well as himself and asking the Court to permit such payment to be made cannot be said to be representative proceeding of such a character as to determine finally the interests of a minor member by the rule of constructive *res judicata*. This rule derives support from the provisions of O. 21, R. 15, Civil Procedure Code. Hence, even when the execution application by the manager on his behalf was dismissed as time-barred, an application for execution by the minor within three years of his attaining majority would be competent. A.I.R. 1942 Lah. 280=44 P.L.R. 368=203 Ind. Cas. 295.

——Art. 182—Execution proceedings—Rejection of execution application.

An order rejecting an execution application as defective not being *inter partes* cannot operate as *res judicata*. A.I.R. 1936 All. 467=(1936) A.L.J. 571=1936 A.W.R. 527=163 Ind. Cas. 841.

——Art. 182—Judgment-debtor having opportunity to raise plea of limitation but not raising—Effect.

Where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation, does not do so and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage in the said execution proceedings. 37 C.W.N. 752=A.I.R. 1933 Cal. 855=149 Ind. Cas. 1017.

——Art. 182—Res judicata.

A judgment-debtor who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order cannot in the matter of a subsequent application for execution of the remaining portion of the decree contend that the first application was not "in accordance with law." 15 B. 242, Foll. 76 Ind. Cas. 1041=A.I.R. 1924 Bom. 112.

——Art. 182—Previous application and order erroneously made but not appealed from—At next application defendant cannot plead previous application was not in accordance with law.

A decree in a partition suit was passed on the 10th January, 1910; the plaintiff being under the impression that the decree in a partition suit was a preliminary decree and required a further decree to make it final, applied to the Court, on 23rd October, 1912, to have the decree made final, and the decree was made final on the 10th of February, 1913, erroneously.

Held, that an application for execution presented on 8th October, 1913, was within time. The defendant not having appealed from the order of the 10th February, 1913, it was not open to the defendant to contend that the application for final decree and the order made on that application were not made in accordance with law. 8 Cal. 51 (P.C.); 15 Bom. 242 and 44 Bom. 227, Foll.

Per *Macleod, C.J.*—The application to make a preliminary decree final is not step-in-execution. 61 Ind. Cas. 159=45 Bom. 952=23 Bom. L.R. 308=A.I.R. 1921 Bom. 260.

——Art. 182—Res judicata—Step in aid—Proper court—Application for execution not made to proper court—Effect in saving limitation.

A suit was filed in the Court of a munsiff having jurisdiction and a decree was passed by the appellate court in 1910. Petition for execution was filed before the Munsiff who had succeeded the munsiff that tried the case. He had no jurisdiction to try cases of the suit amount. This was in April 1913. On 14th July a second application was made to a Munsiff having only ordinary powers. The District Judge held that a Munsiff having ordinary powers had no jurisdiction to entertain this execution application but in a subsequent decision he held that the petition of 14th July, 1915, was not time-barred because the Munsiff had powers to receive the application even though he had no power to pass proceedings on it.

Held, that the finding that the Munsiff had no jurisdiction to execute the decree had become *res judicata* between the parties inasmuch as it was not taken into appeal and that the application of 3rd February did not operate to save limitation under S. 14 of the Limitation Act as was held by the District Judge. 39 Ind. Cas. 795 (Cal.).

——Art. 182—Res judicata—Ex parte order without notice to judgment-debtor that execution application is not time-barred.

An ex parte order passed without giving notice to the judgment-debtor that an execution application

is not barred will note stop the judgment-debtor from raising the plea of limitation in a subsequent execution-application. 20 C.L.J. 15=24 Ind. Cas. 80.

——Art. 182—Res judicata—Decision on prior application.

The first application for execution of a decree passed on November 28, 1899, was made on July 6, 1901, and process fees were paid on July 26. The application was dismissed. A second application filed on July 25, 1904, was rejected as time-barred in August 9, 1904. On July 28, 1905, a third application was made and notices were served on the judgment-debtor but it was dismissed for default on March 28, 1905. The fourth application was made on December 20, 1907.

Held, that this application was barred. 14 C.W.N. 114=3 Ind. Cas. 47.

——Art. 182—How far a help against disobedience of order of Court—Application for execution of decree for perpetual injunction—Res judicata.

Where a plaintiff has once sued for and obtained a perpetual injunction directing the defendant to refrain from certain acts, it is not necessary for the plaintiff, if in future the defendant ignores such injunction, to sue again for similar relief; in fact, such a suit would be barred by the principle of *res judicata*. When a court issues an order to a party in a suit for abstention from any act, and when the person to whom the order has been issued disobeys that order, he is guilty of contempt of court, and the court can take proceedings to enforce its authority notwithstanding anything contained in Art. 179. (1901) A.W.N. 142=23 A. 465.

17. Restitution.

See also (1) CIVIL PROCEDURE CODE, S. 144—LIMITATION. (2) LIMITATION ACT, ART. 181—RESTITUTION.

——Art. 182—Application for restitution is governed by Art. 182. Time runs from the date on which the right to make claim arises. A.I.R. 1940 Bom. 30=41 Bom. L.R. 1204=187 Ind. Cas. 354.

——Art. 182—Application for restitution are treated as applications for execution and would, therefore, be governed by Art. 182, Limitation Act. A.I.R. 1940 Mad. 281=49 L.W. 768=(1939) M.W.N. 624=(1939) 2 M.L.J. 469=189 Ind. Cas. 185.

——Art. 182—*Ex parte* decree set aside and fresh trial held—Decree on new trial is not a decree varying or reversing the decree which had been set aside but a new decree fixing the liability of the defendant. If, as a result of new decree, plaintiff is entitled to less than he actually received upon the execution of the decree which has been set aside, he is bound in equity to restore the same. An application for restoration of such balance from the plaintiff is governed by Art. 182 and can be made within three years of the date of the new decree. (1936) M.W.N. 1112=A.I.R. 1937 Mad. 173=45 L.W. 522=(1937) 2. M L.J. 108=167 Ind. Cas. 458.

——Arts. 182 and 181—Application for restitution—Article applicable.

An application for restitution is an application in execution governed by Art. 182 and not by Art. 181 and what is to be executed is the decree of the Court which, by reversing or varying a decree under appeal, entitles a party to be restored to the position which he occupied prior to the decree reversed or varied. A.I.R. 1934 Pat. 646=15 P.L.T. 745=152 Ind. Cas. 944 (D.B.).

——Arts. 182 and 181—Per full Bench. (Kulwant Sahay and Fazl Ali, JJ. contra).

An application under S. 144, Civil Procedure Code and for mesne profits is an application in execution and is governed by Art. 182 and not Art. 181. 15 P.L.T. 173=A.I.R. 1934 Pat. 246=13 Pat. 411=148 Ind. Cas. 1180 (F.B.).

Overruling—A.I.R. 1925 Pat. 1=3 Pat. 371=78 Ind. Cas. 200 (F.B.).

——Art. 182—An application for restitution is an application for execution under the present Civil Procedure Code, just as it was under the old Procedure Code, and Art. 182 of the Limitation Act applies to such applications. 72 Ind. Cas. 912=1923 P.H.C.C. 1=2 Pat. 277=1 Pat. L.R. 338=A.I.R. 1923 Pat. 371.

——Art. 182—Article 182 applies to application for restitution under Civil Procedure Code, S. 144.

An application for restitution cannot be treated an anything else than an application for execution of the decree of the appellate Court. 62 Ind. Cas. 233=45 Bom. 1137=23 Bom. L.R. 480=A.I.R. 1921 Bom. 67.

——Art. 182—Application for restitution—Limitation—Article applies.

On an appeal to the Privy Council the parties were directed to pay their own costs. An application by the appellant to recover the costs paid by him in pursuance of the decree of the High Court was held to be an application to enforce an order of His Majesty-in-Council although it fell within S. 144 of the Civil Procedure Code, and as to limitation, was governed by Art. 182 of the Limitation Act. 61 Ind. Cas. 806 (All.).

——Art. 182—Applicability of—Restitution—Application for.

An application for restitution under S. 144 of the Civil Procedure Code is an application for execution of a decree within the meaning of Art. 182 of the Act. 36 P.W.R. 1918=15 P.L.R. 1918=67 P.R. 1918=44 Ind. Cas. 301.

——Art. 182—Applicability of—Restitution.

An application for restitution under S. 144, Civil Procedure Code is governed by Art. 182. 6 L.W. 359=(1917) M.W.N. 643=33 M.L.J. 413=22 M.L.T. 333=42 Ind. Cas. 530.

——Arts. 182 and 181—Application for restitution.

As execution is provided for in the present Civil Procedure Code, in Part II and O. 21, while applications for restitution are dealt with in Part XI, Civil Procedure Code, and as O. 21, of present Code is headed "execution of decrees and orders" and as Art. 182, Limitation Act, provides for the execution of decree or order of any Civil Court using exactly the same words as are used in the Civil Proecdure Code, it was clearly intended that Art. 182 should apply to applications falling under O. 21, Civil Procedure Code, and Art. 181 will apply to all other applications. A.I.R. 1939 Lah. 73=I.L.R. (1938) Lah. 571=41 P.L.R. 208=181 Ind. Cas. 119.

——Arts. 182 and 181—Application for restitution under S. 144, Civil Proecdure Code, is not an application for execution and is not governed by Art. 182 but by Art. 181. (1938) A.W.R. 542=A.I.R. 1938 All. 552=177 Ind. Cas. 695.

——Arts. 182 and 181—Application under S. 144, Civil Procedure Code is not an application for execution and Art. 182 is not applicable but Art. 181 govern-

ed the application. A.I.R. 1938 Lah. 456=40 P.L.R. 692=177 Ind. Cas. 430.

——**Arts. 182 and 181**—Application for restitution—Article applicable is Art. 181, and not Art. 182—Time runs from date of lower Appellate Court's decree when the first Court's decree was reversed and the right to apply for restitution first accrued. But where the application is for recovery of mesne profits, the time does not begin to run till possession has been restored to the successful party. (1934) A.L.J. 503=A.I.R. 1934 All. 626=3 A.W.R. 740=57 A. 26=150 Ind. Cas. 1096 F.B.).

——**Arts. 182 and 181**—An application for restitution under S. 144, Civil Procedure Code, is not an application for execution and is not governed by Art. 182 but Art. 181 A.I.R. 1932 Cal. 308=35 C.W.N. 1294=54 C.L.J. 506=59 C. 337=137 Ind. Cas. 302.

——Art. 182—Costs—Starting point.

Under Art. 182, the starting point of limitation for an application for restitution of the costs paid to successful party in a claim under O. 21, R. 58 will be the date of the decree in the suit under O. 21, R. 63 or if there is an appeal from that decree the date of the final orders on the appeal. A.I.R. 1943 Mad. 248=1942 M.W.N. 689=55 L.W. 820=(1942) 2 M.L.J. 791=I.L.R. (1943) Mad. 411=207 Ind. Cas. 434.

——Art. 182—Restitution of costs—Time, when runs—Revision by judgment-debtor against amendment of decree is pending—Effect.

In case of an application by a judgment-debtor for restitution in consequence of an order of the Appellate Court allowing costs of the objection allowed by the lower Court, time begins to run from the date on which the appellate order becomes final. The fact that the revision by the judgment-debtor is pending against the order of the lower Court allowing decree-holder's application for amendment of decree which does not affect the appellate order allowing costs at all cannot help the judgment-debtor as the revision is with respect to a collateral matter. A.I.R. 1940 Mad. 281=(1939) M.W.N. 624=49 L.W. 760=(1939) 2 M.L.J. 469==189 Ind. Cas. 185.

——Art. 182—Restitution.

Plaintiff successful in first Court—Remand by appellate Court—Defendants successful in decision on remand—Application for restitution—Starting point is date of latter decision and not of the order of remand. 76 Ind. Cas. 255=18 N.L.R. 200=A.I.R. 1923 Nag. 101.

——Art. 182—Application in restitution—Injunction restraining applicant from withdrawing money—New trials.

On 7th October '01 an *ex parte* mortgage decree was made in favour of the appellants. Before the decree the appellants had obtained and injunction restraining the respondents from realizing certain money in Court deposit. After decree the appellants withdrew Rs. 19,000 odd from the Court deposit in satisfaction of their decree. The decree was, however, set aside on 9th July, '04 and a final decree was made of 17th September '04 for a less amount in favour of the appellants Rs. 17,000 for odd. The respondents applied for refund of the difference on 17th Sept., '07.

Held, that the injunction revived on the *ex parte* decree being set aside and that as the respondents could not apply for a refund till 17th September '04, the application for refund was in time. 1908 A.W.N. 206=5 A.L.J. 527=30 A. 476.

18. Saving of time.

——Art. 182—Attachment before judgment—Whether keeps decree alive.

It is not a correct proposition of law that once there has been an order of attachment before judgment, the decree which is subsequently passed remains alive indefinitely, irrespective of any application for execution until the order of attachment is cancelled. For the continuance beyond 3 years from the date of the decree, an application for execution must be filed within that period, otherwise the decree-holder loses his remedy. 57 L.W. 493=(1944) 2 M.L.J. 192=I.L.R. (1945) Mad. 80=1944 M.W.N. 606=A.I.R. 1944 Mad. 561=216 Ind. Cas. 325.

[Overruling—A.I.R. 1924 Mad. 210=79 Ind. Cas. 779].

——**Art. 182 and S. 14** (2)—Article 182 prescribes the *terminus a quo*, the point from which limitation shall begin to run. It has nothing to do with any period of time. In other words, the words of Art. 182 cannot be imported into S. 14 (2), Limitation Act. A.I.R. 1940 Pat. 677=19 Pat 354=7 B.R. 245=191 Ind. Cas. 695.

——Art. 182—Enlargement of time.

An order which would have the effect of rendering execution proceedings abortive, does not relieve the decree-holder of the burden of taking the ordinary steps to execute his decree if he wished to save that decree from the bar of limitation. A.I.R. 1939 All. 82=(1939) A.L.J. 29=I.L.R. (1939) All. 207=1939 A.W.R. 93=180 Ind. Cas. 927.

——Arts. 182 and 181—Order in execution recording forged petition exonerating defendant, whether extends period of limitation.

Where, in course of execution proceedings, a memorandum purporting to exonerate one of the defendants was filed and in pursuance of this, the Court passed an order "recorded as prayed for" in 1926 and this order was subsequently cancelled on the ground that the said memorandum was a forgery and in execution proceedings, the decree-holder contended that owing to the Court's order recording the memorandum, it was impossible for him to execute the decree against that defendant and that, therefore, his application for execution which was filed in 1932 was governed by Art. 181 and the period of limitation of three years began to run only from the date when that order was cancelled :

Held, that the decree was not in any way inexecutable, the delay was due to the decree-holder's own negligence and the application for execution was governed by Art. 182 and was clearly time-barred. A.I.R. 1936 Mad. 284=(1936) M.W.N. 364=71 M.L.J. 180=44 L.W. 403=59 M. 759=162 Ind. Cas. 376.

——Art. 182—Saving of time.

The holder of a rent-decree is always a secured creditor. The mere fact that the judgment-debtor was declared insolvent prior to the passing of decree does not save limitation and the application for execution made after 3 years is time-barred. 113 Ind. Cas. 86=4 Luck. 241=5 O.W.N. 1134=A.I.R. 1929 Oudh 71.

——Art. 182—Where a decree-holder is restrained by injunction from executing the decree or where his decree has ceased to exist having been set aside in a separate suit, the time of injunction or the period for which the decree ceased to exist should be ex-

cluded. 102 Ind. Cas. 327=6 Pat. 635=8 P.L.T. 770=A.I.R. 1928 Pat. 86.

——**Art. 182**—Execution stayed until decision in another-suit—Suit decided—Decree-holder must apply within 3 years from the decision, though judgment-debtor might have in the meanwhile preferred an appeal. 19 All. 71 and 26 All. 156, Foll.; 94 Ind. Cas. 1005=A.I.R. 1926 All. 409.

——**Art. 182**—Execution proceedings dismissed for Court's convenience and, therefore, order of dismissal not final—Objection against execution also, dismissed—Remand on appeal from order dismissing objection—Objections re-heard and dismissed and also appeal from second order on objections dismissed—Time up to final order in appeal, should be deducted. 87 Ind. Cas. 561=A.I.R. 1925 Cal. 1185.

——Art. 182—Decree-holder consenting to postponement of execution pending judgment-debtor's suit—Period must be excluded.

There were pending an application for execution by attachment on behalf of the decree-holder, and an application under O. 21, R. on behalf of the judgment-debtors. Both parties were present. The decree-holder consented to the case being filed till the determination of the judgment-debtor's suit.

Held, that the interruption was not attributable to the decree-holder, and the period covered by it must be excluded. 84 Ind. Cas. 1027=A.I.R. 1925 Oudh 315.

——Art. 182—Exclusion of period of execution.

On 7th July, 1917, the execution of a mortgage decree for a sale of a house, was first taken out. On September 12, 1917, injunction was granted restraining the sale of half the house. On 19th November, 1917, an application was made to take a step-in-aid of execution with respect to the other half of the house. That half of the house was sold. The injunction was dissolved on 8th November, 1918. Application for execution with respect to the other half was made on January 10, 1922.

Held, that the last application was made on 19th November, 1917, and limitation began to run from that date. The only period which the decree-holder was entitled to exclude on account of the injunction was from 19th November, 1917, the date on which limitation began to run, to 8th November, 1918, the date on which the injunction was dissolved. Therefore, the application made on 10th January, 1922, having been made more than 3 years after the date of the last application, after deducting the period covered by the injunction the application was time-barred. 78 Ind. Cas. 478=A.I.R. 1925 Pat. 298.

——Art. 182—Certificate of payment saves limitation.

If the part payment of a decree amount is entered in an execution petition presented within three years from the date of such alleged payment, it amounts, if the fact of payment is proved, to a certificate of payment under O. 21, R. 2, and will operate to save limitation under S. 20 of the Limitation Act. 43 Cal. 207, Foll. 75 Ind. Cas. 1029=A.I.R. 1924 Lah. 676.

——Art. 182—A letter by judgment-debtor to decree-holder acknowledging his liability to pay the decretal amount is an acknowledgment within S. 19 and saves limitation for execution. 79 Ind. Cas. 66=A.I.R 1924 Nag. 147.

——Art. 182—The decree-holder is entitled to deduct the period during which the execution of his decree was stayed by an Order of the Court. 68 Ind. Cas. 897=A.I.R. 1923 Cal. 310.

——Art. 182—Period during which execution is virtually stayed should be excluded.

The decree-holder was asked by the executing Court to produce the judgment in a certain suit before a certain date before the decree could be transferred to the Collector for execution. The judgment in that suit was passed at a much later date. Upon the decree-holder's failure to produce the judgment before the required date, the Court dismissed the application for execution. In calculating the limitation for a subsequent execution application by decree-holder,

Held, that the time during which the suit, the judgment in which was required to be produced, continued should be excluded. 64 Ind. Cas. 598=19 A.L.J. 905=A.I.R. 1921 All. 174.

——Art. 182—Deduction of time—Application for transfer of decree—Transmission application sent to special assistant agent direct instead of through the agent—Order set aside by Governor in Council under rules—Subsequent execution—Limitation.

Where an application for transmission of a decree for execution was wrongly sent by the original court to the special assistant agent, Godavari, direct instead of through the agent as required and the order is set aside by the Governor in Council, the applicant is entitled to deduct the time taken in prosecuting the same for purpose of limitation for a subsequent application. (1911) 1 M.W.N. 362=11 Ind. Cas. 338.

——Art. 182—Execution application—Intermediate appellate judgment allowing execution a nullity, because of absence of jurisdiction—No saving of limitation thereby.

Where an intermediate appellate judgment allowing execution is invoked in aid to save the execution application from the bar of limitation, if the appellate judgment is one passed without jurisdiction, it will be a nullity and the opposite party is at liberty to show without having set it aside that it had no legal existence and would not save the bar. (1905) 9 C.W.N. 956=2 C.L.J. 384.

19. Starting point of limitation.

——Art. 182—Decree in suit filed in forma pauperis—Direction to pay the amount of court-fee to Government—Execution applications by Government and attachment of the decree—Subsequent application for execution by decree-holder—Execution applications by Government enure for the benefit of the decree-holder and start a new period of limitation.

In a suit filed *in forma pauperis*, the plaintiff obtained a final decree on 23rd March, 1939, and he was directed to pay the amount of the court-fee to Government. The Government filed on the 9th November, 1939, an application in execution and the final order for attachment of the decree was made on 21st March, 1940 and as the Government did not proceed with the execution, the proceedings were "closed" on that date. Again on 22nd March, 1943, the Government filed another execution application but as it failed to proceed with it, it was also "closed" on 18th November, 1943. Meanwhile, the plaintiff decree-holder applied for execution of the decree on 20th September, 1943. On a contention that it was barred by limitation,

Held, that as for the purpose of executing the order in its favour the Government is a party to the decree and can take steps to execute it, the applications for

execution field by the Government are applications for the execution of the decree itself and therefore enure for the benefit of the plaintiff decree-holder. Further by virtue of the provisions of O. 21, R. 53, Civil Procedure Code, those applications have to be treated as applications for execution by the plaintiff acting through her representative in law. That being so each application started a new period of limitation and therefore the plaintiff's application for execution filed on 20th September, 1943, was in time. I.L.R. (1947) Mad. 515=221 Ind. Cas. 336=A.I.R. 1947 Mad. 121=1946 M.W.N. 662=59 L.W. 593=(1946) 2. M.L.J. 303.

——Art. 182—Minor decree-holder.

Where no valid discharge can be given without the concurrence of the minor decree-holder by the other decree-holders, time does not run against any of them till the minor attains majority. A.I.R. 1945 Cal. 387=49 C.W.N. 558=80 C.L.J. 198.

——Art. 182—Decree for recovery of sums against each other—Limitation.

In a case of a decree which provides for the recovery of sums by two parties one against the other, it is only the party to whom the larger amount is due, who is entitled to execute the decree. Limitation cannot run against the person who is entitled to the lesser decree at a time when that decree is not executable having regard to the provisions of O. 21, R. 10. (1941) 1 M.L.J. 641=A.I.R. 1941 Mad. 662=1941 M.W.N. 482.

——Art. 182—Decree on condition that court-fees were to be deposited—Court-fees paid after three years and accepted by Court—Subsequent application for execution—Time, when begins to run.

A decree was passed on the condition that necessary court-fees were to be deposited. The decree-holder, however, deposited the court-fees only after three years after passing of the decree and they were accepted be the Court. The decree-holder then applied for the execution of the decree. It was contended that application was time-barred:

Held, that under S. 149, Civil Procedure Code the Court had an absolute discretion to allow a person by whom a court-fee is payable to pay the court-fee at any stage. The decree was not complete until the payment of the court-fee, and until that date, there was no decree which could be executed. Until there was a decree capable of execution, it could not be said that limitation had begun to run under Art. 182 Limitation Act. A.I.R. 1938 All. 539=1938 A.L.J. 917=I.L.R. (1938) All. 848=1938 A.W.R. 538=177 Ind. Cas. 875.

——Art. 182—Preliminary decree for partition—Order for costs also—Execution of the order for costs—Limitation—Running of time.

In case where an order or decree separately executable is passed at an earlier stage, limitation for applying to execute such an order or decree runs from its own date.

The Court passed a preliminary decree for partition. Along with it, a decree for costs to be paid by the judgment-debtor to the decree-holder was also passed :

Held, that the execution of the order for costs must be taken within three years of the date of the order it being a separately executable order. It would, however, be open to the decree-holders to ask the Court to incorporate the previous order for costs in the final decree although its independent execution is barred. A.I.R. 1938 Pat. 188=4 B.R. 504=19 P.L.T. 798=175 Ind. Cas. 45.

——Art. 182—Different items to be recovered at different dates—Limitation for recovery of each item.

If, under a decree, different items are payable at different times, the period of limitation is to be computed separately for each item from the date on which it becomes recoverable. 35 P.L.R. 548=A.I.R. 1934 Lah. 610=152 Ind. Cas. 685.

——Art. 182—Decree for confirmation of possession of certain property and costs—Decree joint as regards costs but not as regards possession—Separate appeals filed—Appeals dismissed—Separate second appeals, one dismissed for default, others dismissed in due course—Limitation for execution of one dismissed for default runs from date of dismissal for default and not date of dismissal of other appeal. 123 Ind. Cas. 415=A.I.R. 1930 Pat. 146.

——Art. 182—When a decree is made for possession, that portion of the decree is final ; and when a decree is made for mesne profits in a suit it is only preliminary, because the final decree for mesne profits cannot be made unless the amount due is found upon further enquiry. In such a suit, although one decree is made, it is partly preliminary and partly final. The final part of the decree can be executed apart from the preliminary part and it falls within the provision of Art. 182, Limitation Act. Time for execution of the decree for possession runs at the latest from the date of the final decree of the appellate Court and not from the time when the decree ascertaining the mesne profits was passed. 118 Ind. Cas. 852=A.I.R. 1929 Cal. 383.

——Art. 182—Where an application is made by a decree-holder to appoint a Receiver during the pendency of prior execution proceedings, no question of limitation arises with regard to such application for step-in-aid. 113 Ind. Cas. 909=10 L.L.J. 505=A.I.R. 1929 Lah. 57.

——Art. 182—Moneys awarded under preliminary decree—Execution for—Can be made in 3 years of final decree.

The preliminary decree provided *inter alia* that the plaintiff's were entitled to recover from the defendants a certain sum as their costs and also another amount per year for subsequent profits and that a commissioner should be appointed to divide the plaintiff's property into three equal shares so as to fix the two-thirds share of the plaintiffs. A final decree was passed later on, under which certain plots marked in the commissioner's plan were directed to be given to the plaintiffs for their two-thirds share and this decree further provided that the defendants should pay to the plaintiff Rs. 7 for equalization of the value of the trees and Rs. 14 towards the costs incurred subsequent to the passing of the preliminary decree.

Held, that the first decree was not by itself executable and an execution petition presented after three years from the date of the preliminary decree but within 3 years of the final decree was not barred by limitation, even so far as regards the prayer therein for the realization of the amounts awarded under the preliminary decree. 36 Mad. 104, Foll. 109 Ind. Cas. 829 (Mad.).

——Art. 182—Sale set aside—Auction-purchaser realising purchase money from decree-holder in execution of the decree obtained against him. Then the original decree-holder applied to execute the original decree on the ground that it was not satisfied and sought to attach and sell other properties of the original judgment-debtor.

Held, that the starting point for this application in execution would be the date when in execution of the decree the decree-holder was compelled to pay the amount and not the date of decree.

Held, further that the fresh application was not a continuation of the previous application. 107 Ind. Cas. 653=1928 M.W.N. 83=A.I.R. 1928 Mad. 152.

——**Art. 182**—Where a decree-holder purchases a property in execution but loses possession of the same in a separate suit by a third party, his fresh application for execution or for revival of execution, if one is maintainable, must be filed within three years of the trial Court's decree. 107 Ind. Cas. 42=25 A.L.J. 937=50 All. 211=A.I.R. 1928 All. 46.

——**Art. 182**—Right to apply for continuance is not barred till 3 years from date of their ceasing to be pending—Proceedings are not closed by Court merely recording them. 31 Mad. 71 and 36 Mad. 553, Foll. 84 Ind. Cas. 897=1925 M.W.N. 298=35 M.L.T. 107=20 M.L.W. 585=A.I.R. 1925 Mad. 152=47 M.L.J. 608.

——**Art. 182**—Where under a compromise decree plaintiff was to get possession and management of trust properties for two years and the defendant for two years thereafter and so on alternatively, an application and for execution was made though beyond three years of the previous application for execution but within three years of the period of two years when he was entitled to possession and management,

Held, the application was in time. 79 Ind. Cas. 891=A.I.R. 1925 Mad. 218.

——**Art. 182**—In order to make the provisions of the Limitation Act apply, the decree sought to be enforced must be in such a form as to render it capable, in the circumstances, of being enforced. 27 All. 334 (P.C.), Foll. 59 Ind. Cas. 636=48 I.A. 17=19 A.L.J. 26=23 Bom. L.R. 721=33 C.L.J. 109=25 C.W.N. 337=13 M.L.W. 546=30 M.L.T. 189=1921 M.W.N. 21=6 P.L.J. 132=1 P.L.T. 731=A.I.R. 1921 P.C. 31=40 M.L.J. 1 (P.C.).

——Art. 182—Execution suspended by action of court.

The plaintiff's suit was dismissed by the first court, was remanded on appeal under S. 562, Civil Procedure Code (O.C.) and after remand decreed by the first court on the 21st September, 1897. On appeal the lower appellate Court dismissed the suit on the 26th of August 1889. On second appeal the High Court on the 30th of January, 1901, set aside this decree and remanded the case to the lower appellate court under S. 562, Civil Procedure Code. After this remand one of the defendants died. No legal representative of the deceased having been brought on the record, the court held that the appeal had abated, and on the 5th of June, 1902, passed a decree which in terms affirmed the decree of the 21st September, 1897. On the 19th of January, 1904, the decree-holder applied for execution.

Held, that the application was within time, whether the *terminus a quo* was regarded as the 30th of January, 1901, or as the 5th of June 1902. 1906 A.W.N. 27=3 A.L.J. 8.

20. Miscellaneous.

——Art. 182—Decree against father and son—Execution against son—Limitation—If affected by the fact of the execution of the decree against the father not being barred.

Where a father and a son are sued and there is a decree both against the father and the son, the decree as against the son would become barred by limitation if an application is not made within the time prescribed by Article 182 of the Limitation Act, notwithstanding that for some reason or other (in this case insolvency) execution of the decree against the father is not barred by time. In such a case for purposes of limitation the decree against the son must be looked at independently from the decree against the father and in fact as if they are not so related. I.L.R. (1948) Mad. 653=60 L.W. 813=A.I.R. 1949 Mad. 346=1947 M.W.N. 779=(1947) 2 M.L.J. 583.

——Art. 182—Execution application to transferee Court after twelve years of decree—If barred.

An application for execution filed in the transferee Court more than 12 years after the passing of the decree is barred being beyond time. A.I.R. 1935 Lah. 508 =17 L. 13 =38 P.L.R. 462=158 Ind. Cas. 127.

Reversing—A.I.R. 1930 Lah. 718=125 Ind. Cas. 55.

——**Art. 182**—The plea that a previous application for execution was barred by limitation and hence the subsequent application was not valid should be raised at the earliest possible opportunity. 91 Ind. Cas. 1017=22 M.L.W. 747=1926 M.W.N. 33=A.I.R. 1926 Mad. 177.

——**Art. 182**—Assignment of plaintiff's rights pending suit—Application by assignee for execution is not legal—He must follow procedure laid down in Civil Procedure Code. O. 22 R. 10, or O. 21, R. 16. 96 Ind. Cas. 833= 28 Bom. L.R. 761=A.I.R. 1926 Bom. 406.

——**Art. 182**—Time-barred application allowed and proceedings continuing thereunder—Proceedings provide a fresh starting point of limitation. 8 I.A. 123 and 44 Bom. 227, Foll. 59 Ind. Cas. 747=45 Bom. 453=A.I.R. 1921 Bom. 256.

——Art. 182—Dismissal of execution proceedings—Attachment surviving.

It can hardly be laid down as a general proposition of law that, because an execution case has been dismissed by reason of no steps having been taken by the decree-holder within a certain time limited to bring the attached property to sale, the attachment that has already been put upon it necessarily falls through.

Held, that in the case the prior attachment was existing. (1906) 33 C. 666 **Also** 28 C. 122.

——Art. 182—Execution—Decree sent to another court for execution—Stay ordered by court which passed the decree—Attachment of decree subsisting for more than three years—Subsequent application for execution not barred.

A decree passed by a court at *M* was sent for execution to a court at *A*. After one application for execution had been made to the court at *A*, the court at *M* issued an order staying execution owing to the decree having been attached by a creditor of the decree-holder. The Court at *A* thereupon struck off the execution proceedings from its file and sent a return to the court which passed the decree that no execution had taken place. Attachment continued in force for more than three years, after which period the decree-holder again applied for execution.

Held, that the court at *A* ought not to have struck off the execution case from its file and that execution of the decree was not time-barred. 1901 A.W.N. 117.

——Art. 183.

Synopsis.

1. Applicability of article.
2. Interpretation.
3. Payment—Meaning of.
4. Revivor.

1. Applicability of article.

——Arts. 183 and 181—Applicability—Award—Enforcement.

An award which has been filed in the Bombay High Court can be enforced within 12 years of the date of the award, *i.e.*, the case falls under Art. 183 and Art. 181. A.I.R. 1942 Bom. 34=43 Bom. L.R. 1006=I.L.R. (1942) Bom. 124=198 Ind. Cas. 505.

——Arts. 183 and 182—Award filed in Court—Is executable as decree of that Court.

Where an award has been filed in the Court properly, it is not only to be enforceable as if it were a decree in general, but, having been filed in a particular Court, it is to be enforceable as if it were a decree of that Court and, therefore, shall for purposes of limitation be governed by Art. 182 or 183 according to as it is filed in a Chartered High Court or not. 104 Ind. Cas. 808=31 C.W.N. 1097=A.I.R. 1927 Cal. 853.

——Art. 183—Applicability—Application under O. 45, R. 15, Civil Procedure Code.

An application under O. 45, r. 15, Civil Procedure Code, is one for enforcing an order in Council of His Majesty and is covered by Art. 183, Limitation Act. A.I.R. 1942 Pesh. 14=199 Ind. Cas. 46.

——Art. 183—Applicability—Bringing legal representatives on record.

Application to bring legal representatives of deceased judgment-debtor on record falls within Art. 183—Decree-holder may apply at any time within 12 years of decree or revivor of decree.

The right to bring the legal representatives on the record does not arise on the death of the judgment-debtor; it arises only when an application for execution is made. A.I.R. 1940 Cal. 171=I.L.R. (1939) 2 Cal. 173=187 Ind. Cas. 759.

——Arts. 183 and 181—Applicability—Restitution.

Application for restitution is governed by Art. 181 and not by Art. 183. A.I.R. 1940 Cal. 260=I.L.R. (1940) 1 Cal. 486=71 C.L.J. 127=44 C.W.N. 438=189 Ind. Cas. 581.

——Art. 183—Applicability—Application for restitution in pursuance of order of Privy Council is governed by Art. 183.

Per *Mukherji, J.*—Where an application is made to obtain restitution as the necessary result of the order of His Majesty-in-Council, that application is to be taken as one to "enforce" an order in Council and must be governed by Art. 183 and not by the general and omnibus Art. 181. A.I.R. 1922 All. 238, Foll.

Per *Sen, J.*—Such an application is one under O. 45, R. 15 and Art. 183 applies. 112 Ind. Cas. 876=50 All. 767=26 A.L.J. 587=A.I.R. 1928 All. 203.

——Art. 183—Before amendment.

Per *Walsh, J.*—The expression used in Art. 183 of the Limitation Act are clearly capable of being read so as to cover an application for restitution on reversal of the decree of the High Court by the Privy Council, which is in substance to enforce a decree of the Privy Council which restored the parties to the position they were in before the High Court interfered and Art. 183 of the Limitation Act applies to such applications.

Per *Ryves, J.*—The language of Art. 183 is different from that of Art. 182. Article 182 provides for 'the execution of a decree or order of any Civil Court.' Art. 183 is 'to enforce' a judgment decree or order..... of His Majesty-in-Council. The words "to enforce" there are wider in meaning than the words "to execute," in Art. 182 and should be interpreted as equivalent "to give full effect to" which is synonymous with "to enforce." 66 Ind. Cas. 545=44 All. 555=20 A.L.J. 456=A.I.R. 1922 All. 238.

——Arts. 183 and 182—Applicability—District Judge does not become High Court by virtue of powers conferred by S. 164, Companies Act (7 of 1913), for purpose of Art. 183—His order under S. 164—Article applicable.

To a payment order passed by the District Judge under powers conferred by S. 164, Companies Act, Art. 183, Limitation Act, has no application. The only article applicable is Art. 182. By reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court. But the District Judge does not, for the purpose of Art. 183, Limitation Act, by virtue of S. 164, become the High Court. A.I.R. 1938 Lah. 368=178 Ind. Cas. 288.

——Art. 183—Starting point—High Court passing preliminary decree in mortgage suit—Decree affirmed by Privy Council—Application for execution of final decree—Article applicable—Limitation, when runs.

Where in a mortgage suit, High Court passed a preliminary decree which is affirmed by the Privy Council on an appeal therefrom, the effect is to affirm also the final decree passed by the High Court on the basis of the preliminary decree. The decree of the High Court becomes, on its affirmance by the Privy Council, part of the order of the Privy Council as far as its legal consequences are concerned. Therefore, the application for execution of the final decree is governed by Art. 183, Limitation Act, and the limitation begins to run from the date of the order of the Privy Council. A.I.R. 1939 Cal. 601=I.L.R. (1939) 1 Cal. 477=69 C.L.J. 355=43 C.W.N. 401=186 Ind. Cas. 215.

——Arts. 183 and 181—Mortgage suit on original side of High Court—Application for final decree for sale—Article 183 is not applicable but Art. 181. A.I.R. 1938 Bom. 354=40 Bom. L.R. 507=I.L.R. (1938) Bom. 273=177 Ind. Cas. 470.

——Arts. 183 and 181—Mortgage suit—Preliminary decree—Application for final decree does not fall under Art. 183 but under Art. 181. A.I.R. 1935 Rang. 239=13 R. 325=157 Ind. Cas. 784.

——Arts. 183 and 181—An application for personal decree under O. 34, R. 6, Civil Procedure Code is not governed by Art. 183 but by Art. 181. A.I.R. 1935 Rang. 187=13 R. 305=156 Ind. Cas. 701.

——Arts. 183 and 181—Application under Civil Procedure Code, O. 34, R. 6—Article 181 and not Art. 183 applies.

An application under O. 34, R. 6 is an application for a new decree in the suit and it cannot be said to be an application for enforcing a judgment or decree within the meaning of Art. 183, and consequently

Art. 183 is not applicable to an application under O. 34, R. 6. Article 181 of the Limitation Act applies to such an application and the case of 42 Cal. 294 in so far as it decided that Art. 181 does not apply to such an application, was not rightly decided. 42 Cal. 294, *overruled;* 40 All. 551, Foll. 89 Ind. Cas. 1=52 Cal. 828=29 C.W.N. 678=A.I.R. 1925 Cal. 834 (F.B.).

——**Art. 183**—An application to enforce an order absolute made by the High Court in a suit to enforce the mortgage security, must be made within 12 years from the date when the order absolute for sale was made. 60 Ind. Cas. 880=47 Cal. 746.

——**Arts. 183 and 181—'To enforce a Judgment or decree'—Mortgage—Preliminary decree—Order absolute for sale—Limitation—T.P. Act, Ss. 88 and 89.**

A decree under S. 89 of the T.P. Act having been made by the original side of the High Court, on 16th December' 86 the mortgagee applied for an order absolute for sale on 3rd July,' 09. The High Court held that the application being one "to enforce judgment or decree" within Art. 183 was barred by limitation and that the application was equally barred if viewed as an application for a further decree under Art. 181. The Judicial Committee saw no reason to interfere with the decision of the High Court. 42 Cal. 776=2 I.A. 282=17 M.L.T. 120=21 C.L.J. 118=2 L.W. 282=19 C.W.N. 561=17 Bom. L.R. 408=28 M.L.J. 470=27 Ind. Cas. 683 (P.C.). [**Affirming** 38 Cal. 913=16 C.W.N. 49=11 Ind. Cas. 943].

——**Art. 183—Applicability—Decree against Hindu father.**

Decree against Hindu father—Decree-holder can at once proceed against property in the hands of son—No application under Art. 120 is necessary—In such cases, either Art. 182 or Art. 183 will directly apply. 11 Pat. 445=A.I.R. 1932 Pat. 261=13 P.L.T. 719=139 Ind. Cas. 397.

——**Arts. 183 and 182**—Burma Courts Act (11 of 1912), S. 26—Decree of Chief Court executed by High Court—Limitation for execution is governed not by Art. 183 but by Art. 182. 114 Ind. Cas. 674=6 Rang. 566=A.I.R. 1928 Rang. 317.

——**Art. 183—Order dismissing appeal on default by the Privy Council—Affirmance of decree below—Limitation for execution of decree.**

An order of His Majesty in Council dismissing an appeal for default is an affirmance of the decree of the High Court and is alone capable of enforcement. An application for such enforcement made within twelve years of the date of the order is governed by Article 180 of the Limitation Act, 1877, and is an application which is made within time. 7 A.L.J. 1001=33 A. 154=7 Ind. Cas. 926 (F.B.).

2. Interpretation.

(a) "Enforce".

(b) "Capable of releasing the right."

(a). "Enforce."

——**Arts. 183, and 182—Construction—'Enforce' in col. 1 Art. 183 and 'execute' in col. 1, Art. 182, difference.**

Obiter—There is no substantial difference between the word 'enforce' in Art. 183, col. 1, and 'execute' in Art. 182, col. 1 as is clear from the language of O. 21, rr. 31 and 32 and the marginal note and provisions of O. 45, r. 15, Civil Procedure Code. A.I.R. 1940 Cal. 260=I.L.R. (1940) 1 Cal. 486=71 C.L.J. 127=44 C.W.N. 438=189 Ind. Cas. 581.

——**Arts. 183, 181, 182—Construction—"Enforce a judgment," in Art. 183, meaning explained—Application for restitution is governed by Art. 181 and not by Art. 183.**

The wider words 'enforce a judgment,' etc., used in Art. 183, Limitation Act, should be given their ordinary significance, namely, 'carrying out what has been directed to be done in the judgment' etc. That final judgment or decree furnishes only the foundation to a claim for restitution, gives authority for the view that restitution is necessary. An application for restitution is not one for enforcement of that judgment or decree within the meaning of Art. 183 but it is an application for relief which is consequential upon the Appellate Court's decree of reversal. Thus Art. 183, being out of the way, the residuary article, Art. 181 applies. A.I.R. 1940 Cal. 260=I.L.R. (1940) 1 Cal. 486=71 C.L.J. 127=44 C.W.N. 438=189 Ind. Cas. 581.

(b). "Capable of releasing the right".

——**Art. 183—Construction.**

Words "capable of releasing the right" exclude persons who are legally incapacitated such as infants and lunatics and therefore the words of Art. 183 are not governed by S. 6, 7 and 8. 123 Ind. Cas. 411=A.I.R. 1930 Pat. 141.

3. Payment—Meaning of.

——**Art. 183—Proviso—"Payment," meaning of—Realisation in execution, whether amounts to payment—"Principal money secured by decree," whether includes costs.**

A sum of money realised in execution in partial satisfaction of the decree amounts to 'payment' within the meaning of Art. 183 of Schedule I of Limitation Act and provides a fresh starting point for limitation under the said article.

The word 'payment' is used in Schedule I, Art. 183 of the Limitation Act in a wider sense than in S. 20 and is not qualified in any way as to the mode in which the payment is to be made or as to the person who is to make it.

The 'principal money secured by the decree' referred to in the proviso to the said article includes costs and so payment, made by a debtor towards costs would give rise to a fresh starting point for limitation.

The provisions of Art. 183 regarding acknowledgments as well as payments are self-contained and must be read independently of Ss. 19 and 20 of the Limitation Act. 10 Pat. 213=A.I.R. 1931 Pat. 218=12 P.L.T. 888=132 Ind. Cas. 109.

——**Art. 183—Payment not made by J.D.**

Under Art. 183 payment is not required to be made either by the debtor or by some person acting on his behalf for the purpose of saving limitation. Payment for judgment-debtor or to his account is sufficient. 90 Ind. Cas. 1028=22 M.L.W. 78=1925 M.W.N. 554=1925 M.W.N. 705=A.I.R. 1925 Mad. 1131=49 M.L.J. 101.

——**Art. 183**—Death of decree-holder without drawing out money paid into Court—Administrator-General

applying for having such payment made—Order for payment made—Application for execution made within 12 years from the date of such order.

Held, that it was a proper application by the Administrator-General though, previous to that application, he had not brought himself on the record in the place of the deceased decree-holder. No such process is contemplated by the procedure laid down either in the Civil Procedure Code, or in the rules on the original side and all that is necessary is that the person who becomes by operation of law entitled to have execution is required only to make an application for execution. Under the article the decree-holder has twelve years not only from the date on which he becomes entitled to enforce the decree but also twelve years from the date on which some part of the principal money is secured thereby, or some interest on such money has been paid. 90 Ind. Cas. 1028=22 M.L.W. 78=1925 M.W.N. 554=1925 M.W.N. 705=A.I.R. 1925 Mad. 1131=49 M.L.J. 101.

——Art. 183—Even payment by Court out of auction proceeds gives a fresh starting point.

No doubt a person cannot by his own volition defer receiving payment and thus keep the decree alive for his benefit. But Art. 183 refers to payment only and where the Court orders payment to the decree-holder out of the auction proceeds, a fresh starting point is given to the decree-holder for execution from the actual date of payment. 78 Ind. Cas. 832=34 M.L.T. 285=19 M.L.W. 582=A.I.R. 1924 Mad. 638=46 M.L.J. 453.

4. Revivor.

(a) Decree against firm.

(b) Execution filed within 12 years.

(c) Procedure.

(d) What constitutes.

(a). Decree against firm.

——Art. 183—Decree against firm—Notice under O. 21, R. 22, Civil Procedure Code, served on only one partner—Revivor of decree against other partners for purposes of O. 21, R. 50 (2).

An order for execution of a decree against a partnership firm by attachment of its assets passed after service of notice under O. 21, R. 22, Civil Procedure Code, on only one of the partners, does not revive the decree against the other partners for the purposes of execution under O. 21, R. 50 (2), Civil Procedure Code. When there is more than one judgment-debtor with joint liability, a decree more than a year old cannot be revived against at all unless each of the judgment-debtor is given an opportunity to show cause why the decree should not be executed as against him. This principle applies with equal if not greater force to the case of partners and more so in case of those who come under O. 21, R. 50 (2). 51 C.W.N. 560.

——Art. 183—Application under O. 21, R. 50 (2)—Limitation—Starting point. I.L.R. (1945) 1 Cal. 102=A.I.R. 1949 Cal. 113.

——Art. 183—"Revivor"—What amounts to—Proceedings under O. 21, R. 50, Civil Procedure Code, for leave to execute decree against partner or partners of firm—Order granting such leave—Effect of.

To constitute a revivor of a decree under Art. 183. Limitation Act, there must be, expressly or by implication, a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. Proceedings for obtaining leave to execute a decree against a partner or partners of a firm under O. 21, R. 50, Civil Procedure Code or an order granting leave in such proceedings would not constitute a revivor within the meaning of Art. 183. 19 Pat. 909, Foll. A.I.R. 1951 Pat. 339.

——Art. 183—Joint decree—Execution order against one partner of firm—Whether revivor against others.

As a general rule, nobody can be prejudicially affected by any judicial order to which he is not a party. The provision in Art. 182, Limitation Act is an exception to this general rule. A similar exception cannot be imported into Art. 183 when it is silent about it. An order of revivor of a decree against two persons jointly, when made in an application for execution against only one of them, does not keep the decree alive as against the other. This principle will equally apply where the decree is against a firm. A.I.R. 1940 Pat. 596=21 P.L.T. 431=6 B.R. 708=19 Pat. 909=188 Ind. Cas. 611.

——Art. 183—Revivor.

An *ex parte* decree was obtained on the original side on 18th March, 1912, against a firm of which one *S* was a partner. An application for execution was made on 21st March, 1924. *S* appeared through his solicitor and obtained an adjournment for moving to set aside the decree. No affidavit or any written objection as contemplated by O. 21, R. 16, was filed. On 13th June, 1922, *S* obtained a rule on motion calling upon the decree-holder to show cause why the decree should not be set aside. It was ordered that an issue be tried as to whether *S* was partner in the defendant's firm and that all further proceedings in execution of the decree should be stayed until the trial of the issue. The issue was determined against *S* on 29th May, 1924. An execution application was filed on 3rd September, 1926. It was contended that the order of 29th May, 1924, was by implication a determination that the decree was still capable of execution.

Held, that no question of right to execute the decree was before the Court. The order was confined to the simple question whether *S* was a partner. Such an order could not be regarded as an order determining the question whether decree-holder had a subsisting right to execute the decree and did not constitute a revivor. 110 Ind. Cas. 404=55 Cal. 578=32 C.W.N. 336=A.I.R. 1928 Cal. 686.

(b). Execution filed within 12 years.

——Art. 183—Revivor—Proviso applies only to executions filed after 12 years—Notice under O. 21, r. 22, issued before 12 years—Execution is in time.

The proviso in Art. 183, dealing with the revival, has application only if the application for execution on the face of it is made more than 12 years after the date of the decree. Where the application for execution is within 12 years, Art. 183 is no bar to the execution of the decree particularly when notice under O. 21, r. 22, Civil Procedure Code is issued before 12 years A.I.R. 1943 Bom. 238=45 Bom. L.R. 400=209 Ind. Cas. 593.

(c). Procedure.

——Art. 183—Revivor—Procedure—Scire facias, writ of.

From the judicial decisions bearing on the interpretation of the term 'revivor,' it appears that it had

its origin in the old practice prevailing in the Supreme Court according to which execution could not issue upon judgments more than a year old without issuing a writ of *scire facias* against the defendant. The idea seemed to have been that a judgment not enforced within one year became dormant and a proceeding was necessary to revive it. The procedure for revivor of judgment was to issue the writ of *scire facias* which "was a judicial writ issued for the purpose of substantiating and carrying into effect an antecedent judgment." An analogous procedure for revivor of judgment was introduced into the Original Side of Chartered High Courts in India. This procedure was subsequently embodied in O. 21, rr. 22, 23. A.I.R. 1940 Pat. 596=21 P.L.T. 431=6 B.R. 708=19 Pat. 909=188 Ind. Cas. 611.

(d). What constitutes.

——Art. 183—Decree—Revivor of—What constitutes.

To constitute a revivor of a decree there must be a determination by a Court that the decree is still capable of execution and the decree-holder is entitled to enforce it. Such a revivor can be effected by an order for execution, provided the order made is a valid order. A.I.R. 1946 Bom. 27=47 Bom. L.R. 728=I.L.R. (1946) Bom. 234.

——Art. 183—Order issuing writ of arrest preceded by notice under O. 21, r. 37, Civil Procedure Code—Whether revivor.

The decree under execution was passed by Calcutta High Court on July 11, 1930 and application for execution was filed on September 30, 1942, *i.e.*, more than 12 years after the date of decree. It was urged that order dated June 9, 1931, issuing writ of arrest against judgment-debtor preceded by a notice under O. 21, r. 37 (1) of Civil Procedure Code, had the effect of revivor :

Held, that the term "revivor of judgment" in Art. 183, Limitation Act, was used with reference to O. 9, r. 22 of Civil Procedure Code and the order issuing a writ of arrest against the judgment-debtor on June 9, 1931, did not have the effect of revivor within meaning of Art. 183. A.I.R. 1945 Pat. 182=23 Pat. 923=12 B.R. 108=221 Ind. Cas. 219.

——Art. 183—Revivor—What is—Notice to guardian of minor co-judgment-debtor when he had become major—Revivor, if valid.

A revivor is an order in execution against a particular person consequent upon a notice.

There is no provision in Civil Procedure Code which requires the plaintiff to issue a fresh summons to a minor defendant after he attains majority.

Where, therefore, in an execution petition filed before 12 years from the date of decree, the minor defendant was made a party and a notice was sent to him represented by his father as guardian and after the notice was served upon the guardian an order for sale of properties was passed within 12 years from the date of decree and subsequently after 12 years from the date of decree but within 12 years from the order for sale, another execution petition was filed :

Held, that the decree-holder could not be charged with any consequences on account of the failure on the part of the minor to get himself shown in the records as major ; and the executing Court indicating that the decree was still alive and was capable of being executed was enough to revive the decree and give a fresh starting point of limitation. A.I.R. 1945 Mad. 325=(1945) 1 M.L.J 284=58 L.W. 174=1945 M.W.N. 334.

——Art. 183—"Revivor," meaning of.

The term "revivor" has not been anywhere defined or explained in the Limitation Act, but judicial decisions have laid down that "to constitute a revivor of the decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it." The issue of a notice under O. 21, r. 22 must be distinguished from an order for issue of execution. 6 B.R. 708=A.I.R. 1940 Pat. 596=21 P.L.T. 431=19 Pat. 909=188 Ind. Cas. 611.

——Art. 183—Revivor, what is.

To constitute revivor there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. Issue of notice under O. 21, r. 22, is not an order for issue of execution. A.I.R. 1940 Pat. 596=21 P.L.T. 431=6 B.R. 708=19 Pat. 909=188 Ind. Cas. 611.

——Art. 183—Revivor—Essentials—Held, that in the circumstances of the case, there was no revivor of decree and application for execution was time-barred.

To constitute a revivor of the decree, there must be, expressly or by implication a determination that the decree is still capable of execution, and the decree-holder is entitled to enforce it.

On January 8, 1934, the assignee of the decree applied to the High Court for recognition of his assignment. Notices were issued to the decree-holder as well as to the four heirs and legal representatives of the original judgment-debtor who had died in the meanwhile. On January 26, 1934, the Court passed an order that the assignee should execute the decree against three out of the four judgment-debtors. Thereafter on an application by the assignee, he was allowed to amend his application and on January 29, 1934, the Court passed an order vacating its own order, dated January 26, 1934. On February 5, 1934, the Court made its notice of January 8, 1934 absolute against all the four heirs of the original judgment-debtor. The date of this order was more than 12 years after the date of the decree. The decree was than transferred for execution to the lower Court and on April 4, 1934, a *darkhast* was filed by the assignee of the decree for execution :

Held, that the order of February 5, 1934, was a proper order in the circumstances of the case and in view of the qualification as to limitation of the order of February 5, 1934, that order could not operate as revivor of the decree within the meaning of Art. 183, Limitation Act. The application of April 4, 1934, was, therefore, barred by limitation. A.I.R. 1939 Bom. 51=40 Bom. L.R. 1180=I.L.R. (1939) Bom. 27=180 Ind. Cas. 784.

——Art. 183—Revivor.

To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it.

Decree passed against two persons in 1911 and sent to other Court for execution in 1922—One judgment-debtor dying and his minor son substituted and his mother appointed guardian—Executing Court serving notice under O. 21, r. 22, Civil Procedure Code not on mother of minor but on other judgment-debtor described as guardian in execution application and

attaching judgment-debtor's property in 1923—Last execution application made in 1933 :

Held, that the attachment was within jurisdiction and amounted to revivor and that the application was within time. 19 P.L.T. 193=A.I.R. 1938 Pat. 372=4 R.B. 738=176 Ind. Cas. 566.

——Art. 183—Revivor.

One of the sons of the deceased judgment-debtor was a minor but in execution, against them, such son was not described as such. An objection was raised and guardian *ad litem* was appointed. On the same day when the guardian was appointed, the Court ordered him to be served with a notice which must, according to the normal procedure have been a notice under O. 21, r. 22. There was nothing to show that any objection was filed by the guardian on receipt of the notice, nor had any reason been suggested why the decree should not have been received against the minor. The execution did, in fact, proceed against the judgment-debtors named in the execution petition, and a certain sum was realised:

Held, that it was not necessary for the Court to pass a seperate order dealing with the case of the minor judgment-debtor, and the decree must have been held to have revived within the meaning of Art. 183 against all the judgment-debtors against whom execution was taken out. 18 P.L.T. 341=A.I.R. 1937 Pat. 321=16 Pat. 316=3 B.R. 638=169 Ind. Cas. 872.

——Art. 183—Revivor—Transmission of decree for execution to another court.

Obiter.—The crucial date from which the limitation period is to be computed under Art. 183, Limitation Act is the date of the last revivor, payment or acknowledgement and therefore, the transmission of a decree for execution by another Court need not be a judicial act and not being a revivor, is incapable of giving a fresh start of life to the decree for execution. A.I.R. 1937 Rang. 477=1937 Rang. L.R. 287=173 Ind. Cas. 160.

——Art. 183—Revivor—Order of Master of High Court for transmission of decree to another Court for execution—Notice under O. 21, r. 16, Civil Procedure Code —Whether revivor.

An order passed by the Master of the High Court for transmission of a decree for execution to another Court cannot be regarded as operating as a revivor within the meaning of the proviso to Art. 183, Limitation Act, when there is nothing to show either that he was asked to consider the question of limitation or that he actually considered it. Nor would notice under O. 21, r. 16, Civil Procedure Code issued by the Master operate as revivor within the meaning of Art. 183. A.I.R. 1936 Pat. 398=15 Pat. 102=17 P.L.T. 317=2 B.R. 601=163 Ind. Cas. 411.

——Art, 183—Transfer or decree to another Court for execution does not give a fresh start of limitation. A.I.R. 1927 P.C. 73, Foll. 118 Ind. Cas. 775=52 Mad. 590=29 M.L.W. 203=1929 M.W.N. 78=A.I.R. 1929 Mad. 252=56 M.L.J. 555.

——Art. 183—An application for transmission of a decree from the High Court to the District Court is not by itself a revival of the decree within the meaning of the Act inasmuch as it is a mere ministerial act of an officer of the Court and not the judicial act of a Judge. 43 Cal. 903 (F.B.), *Appr.*; A.I.R. 1925. Cal. 213, Affir.; 101 Ind. Cas. 24=54 Cal. 500=54 I.A. 129=31 C.W.N. 589=1927 M.W.N. 336=4 O.W.N. 474=29 Bom. L.R. 850=38 M.L.T. 90=45 C.L.J. 507=26 M.L.W. 180=A.I.R. 1927 P.C. 73=52 M.L.T. 565 (P.C.).

——Art. 183—A notice issued under O. 21, r. 16 does not operate as a revivor to extend the period of limitation under Art. 183 nor is the application for transfer of a decree an application in execution. 43 Cal. 903 (F.B.), Foll. 84 Ind Cas. 68=28 C.W.N. 963=39 C.L.J. 590=A.I.R. 1925 Cal. 23.

——Art. 183—Transfer of decree—Notice under Civil Procedure Code, O. 21, R. 22—Dismissal of execution case for want of prosecution—None of these is "revivor."

To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. 43 Cal. 903; 14 C.W.N. 35 and 22 Cal. 921, Foll. 87 Ind. Cas. 61=41 C.L.J. 159=A.I.R. 1925 Cal. 668.

——Art. 183—Revivor—Meaning of—Art. 182, Cls. (5) and (6) if similar to Art. 183—Application for transmission of decree and order allowing same, if revivor.

To constitute a 'revivor' of a decree within Art. 183 there must expressly or by implication, be a decision that the decree is still capable of execution and the decree-holder can enforce it; and such determination must be by a competent Court or person. The word 'revivor' in Art. 183 does not mean the same thing as the matters mentioned in Art. 182, Cls. (5) and (6). Where on an application for the transmission of a decree of the original side of the High Court, the Registrar issued notice under O. 21, R. 22, Civil Procedure Code on the judgment-debtor to show cause against execution and the judgment-debtor not appearing, ordered execution as prayed:

Held, that the application and the order do not amount to a revivor of the decree and that there was no determination that the decree was capable of execution. 43 Cal. 903=20 C.W.N. 889=23 C.L.J. 645=36 Ind. Cas. 602.

——Art. 183—Revivor of decree—Transfer of decree—Issue of notice under O. 21, R. 22, Civil Procedure Code—Leave of Court.

An application for the transfer of a decree does not amount to a revivor of it, nor does the issue of a notice under O. 21, R. 22, Civil Procedure Code, amount to any such revivor. But where execution cannot proceed without leave of the Court the granting of that leave is a revivor of the decree. The period of limitation for execution of a decree of the High Court commences from the date of the decree. It is for the executing Court to deal with the questions of limitation and the mere fact that the High Court has transmitted its decree for execution does not mean that it was not in its opinion barred. 23 C.L.J. 641=11 Ind. Cas. 216.

——Art. 183—Revivor.

Preliminary decree for partition—No further steps taken—Application for substitution of heirs and appointment of commission by, after decree :

Held, that though the application could not be dismissed on ground of abatement of the suit or on ground of limitation under Art. 183, the Court could exercise its discretion against the plaintiff under O. 22, r. 10, Civil Procedure Code. A.I.R. 1933 Cal. 696=60 C. 940=147 Ind. Cas. 779.

——Art. 183—A mortgage-decree determining the rights of prior and puisne mortgagees and allowing each mortgagee to enforce his mortgage does not entitle the puisne mortgagee to claim that his right to execute accrued only after prior mortgagee had exhausted his remedies. Execution applications by prior mortgagees will not amount to a revivor of the

right of the puisne mortgage. 78 Ind. Cas. 1001 = A.I.R. 1925 Cal. 213.

——Arts. 183 and 182—Original side decree—Revivor—Civil Procedure Code of 1882, S. 248 and Civil Procedure Code 1908, O. 21, R. 22.

Both on principle and on the analogy of the provisions of the Code which apply to the doctrine of revivor to India as regards the revivor of the decrees of the original side of the High Court, notice must go to the parties against whom it is sought to revive the decree and Expln. 1 in the 3rd column of Art. 182 of the Limitation Act does not apply to the revivor of original side decree. 97 P.R. 1917=93 P.W.R. 1917=113 P.L.R. 1917=40 Ind. Cas. 618.

——Art. 183—Revivor—Notice must be given.

Parties against whom a decree is sought to be revived must be given notice on the analogy of Civil Procedure Code and on the reason of the thing. Revivor of decrees of the original side is not provided for in Art. 182, Expln. I. 40 Mad. 1127=22 M.L.T. 20=6 L.W. 290=33 M.L.J. 533=40 Ind. Cas. 608.

——Art. 183—Decree of Privy Council—Execution—Revivor.

An application to enforce a decree of the Privy Council must be made within 12 years of the accrual of right to enforce, or the date of revivor. Where on an application for execution, notice is issued under O. 21, R. 22 and the Court has decided that the decree is still capable of execution, there is a revivor within the meaning of Art. 183. Where an order in Council is sent to a subordinate Court for execution without any notice to the judgment-debtors, it is not a revivor of the order. 1 Pat. L.J. 385=20 C.W.N. 1051=2 Pat. L.W. 361=36 Ind. Cas. 633.

——Art. 183—Revivor of decree of original side of the High Court—Notice to one only of two judgment-debtors.

A revivor of a decree of the original side of the High Court made on an application for execution against one only of two judgment-debtors in the case does not keep the decree alive so as to be within time, against the other judgment-debtors after twelve years from the date of the decree. 38 Mad. 1102=32 Ind. Cas. 1003.

——Art. 183—Revivor of the decree—What is.

Where the objection of the judgment-debtor is overruled and it is decided that "the decree" is not barred by limitation, the effect of the order is to entitle the decree-holder to proceed with the execution, and there is consequently a revival of the decree. The Article applicable to an application for execution of an order of the Privy Council which merely confirms the lower Court's decree is Art. 180 of the Limitation Act. 36 Cal. 543, 8 Cal. 218 Foll. 11 C.L.J. 91=14 C.W.N. 357=4 Ind. Cas. 402.

——Art. 183—Revivor—Notice.

An order to issue execution after notice to the judgment debtor does revive a judgment or decree within Art. 180 of the Limitation Act (1877) but an order without any notice does not. 33 Mad. 187=7 M.L.T. 32=4 Ind. Cas. 306.

——Art. 183—Revivor.

Where a decree was obtained in 1891, an order made in execution in 1897 after notice to the judgment debtor under S. 248 of the Civil Procedure Code (1882), had the effect of reviving the original decree and the application made within 12 years of that date for execution is not barred by Art. 180, Limitation Act 1877. 36 Cal. 543=9 C.L.J. 271=1 Ind. Cas. 168.

——Art. 183—Revivor of decree.

A decree was passed by the High Court at Calcutta on the 15th of May, 1893. On the 2nd of May, 1905, application was made to transfer this decree for execution to Agra, and an order for transfer was made on the 31st of July, 1905. The decree-holder applied for execution on the 9th December, 1905.

Held, that execution was not time barred; the decree holder's application for execution was either in continuation of previous proceedings in execution of the decree, or was an application made after the decree had been revived within the meaning of Art. 180 (O.A.).. 1907 A.W.N. 164=4 A.L.J. 405.

——Art. 183—Revivor—Notice without order for execution.

The mere fact that an application has been made and notice has been issued to the judgment debtor without their terminating in an order for execution cannot create a revivor of the decree within the meaning of Art. 180. (1903) 7 C.W.N. 793=30 C. 979.

——Art. 183 (180)—Bare order without notice no revivor.

A bare order to issue execution passed without notice to the judgment debtor cannot 'revive' a judgment or decree. 7 M.L.T. 32=4 Ind. Cas. 306 (1)=33 M. 187.

——Art. 183—Execution—'Revivor'.

An order for execution made after such notice as is required by S. 248 has the effect of reviving the decree within the meaning of Art. 180. 24 C. 244; 30 C. 979 and 7 M. 540, Foll. 1904 A.W.N. 51=26 A. 361=1 A.L.J. 80.

——Limitation (Amendment) Act (XVI of 1942)—Act has no retrospective operation.

Limitation (Amendment) Act (XVI of 1942) has no retrospective operation in the sense that it can apply to a suit which had already been instituted. A.I.R. 1946 Pat. 59=219 Ind. Cas. 159.

See also A.I.R. 1943 Nag. 187=I.L.R. 1943 Nag. 422.

LIMITATION AND CODE OF CIVIL PROCEDURE (AMENDMENT) ACT (36 of 1920).

——Applicability.

The amendment of the Act is not meant to apply only to cases where the deaths have occurred after the 1st Jan, 1921. The result of applying the new period to all applications filed after the Act came into force is only this, that in cases of all deaths occurring within three months before the coming into force of the Act, the period would be reduced to 3 months and in those occurring between three months and 6 months before the coming into force of the Act the period would be up to the date of the Act coming into force, *i.e.*, the 1st January. In every one of such cases there would be sufficient notice of the change in the period of limitation. 71 Ind. Cas. 176=A.I.R. 1923 Nag. 166.

——Extension of time.

High Court has no power to extend time for furnishing security for more than 60 days. 74 Ind. Cas. 703=18 M.L.W. 29=1923 M.W.N. 510=A.I.R. 1924 Mad. 44.

LIMITATION REGULATION (BENGAL REGULATION 2 OF 1805).

——Adverse possession.

Limitation Act (1859), S. 28—Under Regulation 3 of 1793 read with Regulation 2 of 1805 and under Act XIV of 1859, adverse possession not only bars remedy but confers title. 11 M.I.A. 345 (P.C.); (1869) 12 W.R. 192; 20 W.R. 104; 1 M.I.A. 446 (P.C.) and 3 Cal. 224, Foll. 118 Ind. Cas. 566=48 C.L.J. 489=A.I.R. 1929 Cal. 149.

——S. 3 (1, 2, 3)—Adverse possession.

Twelve years rule would not apply only if acquisition is by means of "violence, fraud, or any other unjust or dishonest means whatever."

Under Regulation 2 of 1805, the intention of the legislature was to look to the means by which the acquisition took place and not the merits of the acquistion itself. 118 Ind. Cas. 566=48 C.L.J. 489=A.I.R. 1929 Cal. 149.

LIMITED COMPANY.

See (1) COMPANIES ACT.
(2) COMPANY.

LIMITED INTEREST.

See (1) ADVERSE POSSESSION.
(2) HINDU LAW—(i) ALIENATION.
(ii) WIDOW.
(iii) WILLS.
(3) MUHAMMADAN LAW—WILLS.

LIMITED OWNER.

See (1) ADVERSE POSSESSION.
(2) HINDU LAW—(i) ALIENATION.
(ii) WIDOW.
(iii) WILLS.
(3) MUHAMMADAN LAW—WILLS.

LINGAYATS.

See HINDU LAW—APPLICABILITY.

LIQUIDATION.

See (1) COMPANIES ACT.
(2) INSURANCE ACT, S. 33.

LIS PENDENS.

See TRANSFER OF PROPERTY ACT, S. 52.

LITIGANTS.

—Counsel's duty towards.
See LEGAL PRACTITIONER.

DUTY OF.

See CIVIL PROCEDURE CODE, O. 9, R. 9.

LACHES.

See LIMITATION ACT—PREAMBLE AND S. 5.

LIVE BIRTH.

See PENAL CODE, Ss. 299 TO 302.

LOAN AND DEPOSIT.

See LIMITATION ACT, ART. 60.

LOCAL AUTHORITIES LOANS ACT (9 OF 1914)

——S. 3.—Purpose of loan not falling under S. 3.

The Panchayat Board cannot borrow any money at all without the previous sanction of the Local Government. Where the Board has borrowed money from the plaintiff for any of the purposes enumerated in S. 3, Local Authorities Loans Act, without the previous sanction of the Local Government as required by the Rules framed under the Act, the contract is void but the plaintiff is entitled under S. 65, Contract Act, to restoration of his money and can be permitted to amend his plaint so as to claim relief under S. 65, Contract Act.

If, however, purpose for which the loan was taken does not fall within the purposes enumerated in S. 3, Local Authorities Loan Act, the plaintiff is entitled to no equitable relief under S. 65, Contract Act.

The burden to show that S. 65, Contract Act does not apply is on the Panchayat Board and it cannot be discharged merely by reference to the provisions of Local Authorities Loans Act which prohibit the loan. A.I.R. 1942 Mad. 111=(1941) 2 M.L.J. 216=54 L.W. 488=1941 M.W.N. 885=201 Ind. Cas. 81.

LOCAL BODIES.

See also various Local Municipalities and District Boards of Act.

1. Administration.
2. Assessment.
3. Building.
4. Election.
5. Nature.
6. Octroi.
7. Powers.
8. Suits.
9. Taxation.

1. Administration.

——Administration—Municipality—Misapplication of funds—Municipality obtaining consent decree ultra vires its powers or through fraud—Right of rate-payers.

A person who is not a party to a consent decree cannot sue to have that decree set aside. He can, however, sue for a declaration that he is not bound and his interests are not affected by that decree. But different considerations apply where a rate-payer, though a stranger, sues to set aside a decree to which he is not a party, but as a result of which he suffers damage, and where a mere declaration that his interests are not bound or affected by the decree affords him no assistance or protection and will be of no avail. He can sue for an injunction restraining the municipality from misapplying its funds; a municipality cannot be protected from such a suit merely because it has obtained the sanction of the Court to a consent decree *ultra vires* the powers of the municipality, or obtained as the result of collusion or fraud. There is nothing in principle of precedent which should prevent the rate-payer from coming to the Court for relief when that agreement which the municipality intends to carry out has received the seal of the Court in the form of consent decree, and the improper and unlawful purpose of the Municipality has been carried by so much further towards a successful conclusion. A.I.R. 1944 Sind 150=I.L.R. (1944) Kar. 53=220 Ind. Cas. 220.

——Administration—Acts of one meeting, if binding on subsequent meeting.

The acts of one meeting of a municipal committee are not absolutely binding on a subsequent meeting. 1941 N.L.J. 211=I.L.R. (1941) Nag. 266=A.I.R. 1941 Nag. 364=197 Ind. Cas. 570.

2. Assessment.

——Method of assessment wrong—Remedy of aggrieved party—Jurisdiction of Civil Court.

Where a municipal committee has adopted a wrong method of assessments, its act merely amounts to erroneous exercise of jurisdiction and the aggrieved party must seek his remedy from the forum provided in the statute. This is not a matter into which a Civil Court has power to enquire. A.I R. 1942 Lah. 11=44 P.L.R. 463=199 Ind. Cas. 130.

3. Building.

——Building sanction—Civil Station Sub-Committee, Nagpur—By-law No. 10—Plot less than one acre—Conditions—Sanction, if ultra vires.

The word 'area' occurring in parts (*a*) and (*b*) of by-law No. 10 of the Building Byelaws of the Civil Station Sub-Committee, Nagpur, has reference to the plot on which a building is proposed to be erected and not to that part of the Civil Station which is popularly known as a 'Bungalow area.' The plain meaning is that if the committee decides to give permission to erect bungalows in plots less than one acre it should do so on the conditions laid down in that proviso, but it makes it clear that the committee has no power to permit a building on any plot less than 50' x 50.' It must, therefore, follow that the Sub-Committee has power to grant permission to build on the plot which is less than one acre, if there has been no breach of the condition laid down in proviso. A.I.R. 1941 Nag. 364=I.L.R. (1941) Nag. 266=1941 N.L.J. 211=197 Ind. Cas. 570.

4. Election.

——Election Officer illegally rejecting number of votes to favour one party.

Where an Election Commissioner who has jurisdiction to decide election disputes finds that the Election Officer rejected a large number of votes with a view to favour one of the two parties who were contesting the election and that the Election Officer must have played into the hands of the other party and declares the election void on these grounds, the mere fact that he does not in so many words say that the result of the election was materially affected by the rejection of votes and exclusion of voters does not make his order as one without jurisdiction. A.I.R. 1938 Mad. 507=1938 M.W.N. 196=47 L.W. 338=(1938) 1 M.L.J. 375=178 Ind. Cas. 467.

——Election.

The trial of an election petition is not governed by the rules applicable to a criminal case. 40 C.W.N. 741=63 C. 825=165 Ind. Cas. 489.

——Mandalay Municipality—Enquiry by District Judge—Revision.

Under the Mandalay Municipal Electoral Rules, the person or authority appointed to consider the question referred under the Rules is not the Judge of the District Court, but the District Judge acting as a *persona designata* and his opinion is not subject to revision by the High Court under S. 115, Civil Procedure Code.

The rules do not allow of the substitution of the opinion of the High Court or of any other Court or body, for that of the District Judge. 11 R. 1=A.I.R. 1933 Rang. 41=142 Ind. Cas. 80.

5. Nature.

——The Municipality is a corporation and continues to be a corporation even when it is administered by a special officer appointed by the Government Corporation never dies. A.I.R. 1937 Pat. 588=4 B.R. 63=171 Ind. Cas. 691.

6. Octroi.

——Octroi duty—Difference between duty and tax stated.

A tax can be and is usually imposed without difficulty on a person because he is the owner of some species of property such as income, a house or a motor car ; whereas an octroi and customs duty though a tax, are limited in scope to a levy or duty on the import of goods or animals into some town, place or country or a levy or duty on the goods or animals. As such the collection of the duty is effected at the point of entry either by refusing entry or by seizure, or by penalties imposed on any person attempting to introduce the animals or goods and at the same time evading payment of the duty. There are obvious difficulties is imposing personal liability for such a duty, since it is the animals or goods in relation to location which causes the duty to arise and not property in relation to ownership. A.I.R. 1946 Bom. 117=47 Bom. L.R. 898=I.L.R. 1946 Bom. 712.

——Octroi—Taxable commodities—C.P. Notification No. 5931-1924-M-VIII, dated October 25, 1932, Sch. II (e)—Ammonium Sulphate and Sulphate of Potash.

Ammonium Sulphate and Sulphate of Potash are chemicals which are taxable under Sch. II—(e) of C.P. Notification No. 5931-1924-M-VIII, dated October 25, 1932 and the mere fact that they were to be used as manure does not take them out of the category of chemicals. There is nothing in the notification to show that manures as such are exempted if they fall under a head which is taxed. A chemical does not ceases to be a chemical because it contains impurities. A.I.R. 1939 Nag. 195=1939 N.L.J. 265=I.L.R. (1940) Nag. 181=183 Ind. Cas. 443.

——Octroi—Benares Municipality—Schedule of Octroi Rates, Art. 82—Electric fans, if chargable under.

The Benares Municipality, under Art. 82 of the Schedule giving them authority to charge octroi duty on 'hardware,' charged duty on electric fans :

Held, that as 'hardware' did not include electric fans, they were exempt from octroi duty. (1934) A.L.J. 761=A.I.R. 1934 All. 550=3 A.W.R. 239=148 Ind. Cas. 508.

——Octroi—Tax on 'carriages and articles made partly or wholly of metal,' whether includes motor-cars.

Where, under a notification of the Government octroi duty was payable on all 'carriages and on all articles made wholly or partially of metal' brought into a Municipality :

Held, that motor cars came within the terms of the notification and were taxable under the said notification.

The term 'carriage' is wide enough to include a motor car. 32 Cr. L.J. 946=32 P.L.R. 639=13 L. 53=A.I.R. 1931 Lah. 572=132 Ind. Cas. 694.

7. Powers.

——Power to create mortgage.

A corporation as a general rule and apart from the operation of general or special statutes, has the same

powers and is subject to the same liabilities as a natural person. Thus, as a general rule, though there is no express power to purchase land or to sue or be sued yet the corporation may so purchase, or sue or be sued as fully as though all these necessary incidents, had been expressly granted. If the corporation has the power to sell, it has the power to delegate its authority to anyone it likes. Further it is to be remembered that there is a difference between a statutory corporation and a corporation which is not statutory. The former has such rights and can do such acts only as are authorised directly or indirectly by the statute creating it; the latter, speaking generally, can do everything that an ordinary individual can do unless restricted directly or indirectly by statute. Then again a corporation created by charter has at Common Law power to deal with its property and to incur liabilities in the same way as an ordinary individual. Where, therefore, according to the constitution of a non-statutory corporation, the power to mortgage its property is given to the Managing Committee and such committee delegates such power to its secretary, the mortgage created by the secretary will be binding on the corporation. 1938 A.W.R. 513=A.I.R. 1938 All. 527=(1938) A.L.J. 663=180 Ind. Cas. 737.

——Powers.

Corporation has no powers to do anything unless those powers are conferred on it by the statute which creates it. (1935) 63 C. 295=40 C.W.N. 17=164 Ind. Cas. 160.

——Powers—Abuse of powers to be avoided.

A public body invested with statutory powers such as are conferred upon the Corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. A.I.R. 1935 Cal. 298=39 C.W.N. 526=61 C.L.J. 111=62 C. 886=156 Ind. Cas. 727.

8. Suits.

——Municipality—Supersession of—Person competent to take proceedings on behalf of committee.

The provisions of S. 18 of the Punjab Municipal Act relating to the corporate character of the committee and the manner of suing must be read subject to the provisions of S. 238 (2) of the Government of India Act which lays down the consequences of a supersession. When a Municipal Committee has been superseded, the person competent to take proceedings is the Administrator; and even if the true view should be that he should take proceedings in the name of the Committee, the defect is one purely of formal character which can be cured by amendment. A.I.R. 1942 F.C. 14=44 P.L.R. 284=(1942) 2 M.L.J. 1=1942 M.W.N. 393=I.L.R. (1942) Kar. (F.C.) 34 (Sup.)=44 C.W.N. (F.C.) 69=35 L.W. 765=23 P.L.T. 304=8 B.R. 586=1942 O.W.N. 297=1942 A.W.R. 7=76 C.L.J. 286=1942 F.C.R. 31=I.L.R. (1944) Lah. 373=199 Ind. Cas. 331 (F.C.).

——Suits—Injunction—Illegal act in imposing tax.

Where a Civil Court comes to the conclusion that it has jurisdiction to entertain the suit on the ground that the Municipal Committee's act in imposing the tax was illegal, arbitrary and *ultra vires*, this would not by itself entitle the plaintiff to an injunction as a matter of course, in the absence of a finding that the imposition of the tax by the committee was in fact illegal, arbitrary and *ultra vires*. A.I.R. 1942 Lah. 11=14 P.L.R. 463=199 Ind. Cas. 130.

——Suits—Injunction—Levy of tax.

Where the demand made by the municipal committee for the levy of octroi, is not in excess or in contravention of the powers conferred on it by statute and the committee has been acting within its statutory powers, a suit for an injunction is not maintainable. A.I.R. 1942 Lah. 11=44 P.L.R. 463=199 Ind. Cas. 130.

——Suits—Injunction to restrain construction of building—Sanction granted by Municipality to build beyond power—Individual rate-payer, if can sue for injunction.

The mere fact that Municipality acted beyond its powers in granting the sanction to the building will not by itself be sufficient to entitle the rate-payer to sue for an injunction restraining the person concerned from constructing the building. The plaintiff must show some special damage or injury occasioned to him by reason of the permission granted by the Municipality. A.I.R. 1941 Nag. 364=I.L.R. (1941) Nag. 266=1941 N.L.J. 211=197 Ind. Cas. 570.

——Suits.

An extraneous structure brought on to a highway must be maintained in good repair by the authority bringing that structure on to the highway, and where a Municipality is negligent in doing so and owing to it, a person suffers injury he is entitled to sue the Municipality for damages. A.I.R. 1939 Lah. 453=42 P.L.R. 109=185 Ind. Cas. 772.

——Suits—Attack on the validity of proceedings must be clearly defined and proved.

An attack on the validity of the proceedings of a statutory body like a Municipal Committee must be clearly defined and clearly proved and the particulars of the matters complained of must be given. A.I.R. 1939 Pat. 236=5 B.R. 768=20 P.L.T. 613=182 Ind. Cas. 457.

——Suits.

Suit by Municipality to recover Municipal taxes due to them is not excluded from jurisdiction of Small Cause Courts. A.I.R. 1939 Sind 35=I.L.R. (1939) Kar. 134=179 Ind. Cas. 927.

——Suits.

Suit for refund of tax assessed by Municipality on allegation that it was illegal—Declaration also sought that tax was *ultra vires*—Suit held was triable by Small Cause Court. A.I.R. 1938 Nag. 398=175 Ind. Cas. 691.

——Suits.

Suit for declaration that certain assessment by Municipality was *ultra vires* and for recovery of excess amount paid is a small cause suit. A.I.R. 1937 Pat. 25=3 B.R. 221 (2)=166 Ind. Cas. 743.

——Suits—Action for damages.

A Corporation can be actuated by that kind of malice which is essential to the maintenance of an action for malicious prosecution, instituted by its officers in the scope of their duty provided the necessary ingredients of such a prosecution are made out, and, in the assertion of its rights, a Corporation may render itself liable for malicious prosecution. An action for malicious prosecution is maintainable in respect of a prosecution under the Municipal Act. A.I.R. 1935 Bom. 355=37 Bom. L.R. 468=158 Ind. Cas. 31 (2).

——Suits—Suit for arrears of pay against members of Managing Committee of school.

When members of the Managing Committee of a school are sued by a person for arrears of pay on the

ground that he was employed by them as a teacher in the school and discharged, the plaintiff is entitled only to a decree against the assets of the institution in their hands and not to a personal decree against them in the absence of evidence to show that they had made themselves personally liable. A.I.R. 1933 Pat. 210=14 P.L.T. 558=144 Ind. Cas. 311.

——**Suits**—Suit for recovery of profession tax wrongfully levied by Municipality is triable by Small Cause Court. A.I.R. 1932 Mad. 226=35 L.W. 70=(1932) M.W.N. 142=139 Ind. Cas. 620.

——**Suits**—A suit for the recovery of arrears of certain Municipal taxes such as the house and latrine tax does not fall within Art. 13, Schedule II or any other article subject to which S. 15 Prov. Small Cause Courts Act is to be read and hence such a suit is cognizable by a Small Cause Court. A.I.R. 1932 Pat. 220=13 P.L.T. 277=139 Ind. Cas. 104.

9. Taxation.

——Separate liability of every tenement in building to drainage tax.

Under R. 352 made by Ahmedabad Municipality as amended, every tenement in each building is separately liable to the drainage tax, even though it is not connected with the Municipal drainage system if there is a general provision made in one part of the premises for the disposal of waste water of the inmates of all the tenements in the premises and there is a water closet or urinal in the compound of the buildings which is connected with the Municipal drainage system. 46 Bom. L.R. 733=A.I.R. 1945 Bom. 78=I.L.R. (1945) Bom. 113=220 Ind. Cas. 52.

——Taxation—Municipal service—Tax-payers withholding payment of tax.

The insufficiency of municipal service is no ground for the tax-payers withholding the payment of tax. If they are dissatisfied with the service provided by the Municipal Board they may complain to the District Magistrate and have their grievances remedied. The High Court however has no jurisdiction to reduce or disallow taxes on the ground that the Municipality has been inefficient in the discharge of its municipal duties. A.I.R. 1941 All. 153=(1941) A.L.J. 21=1941 O.W.N. 199=1941 A.W.R. (H.C.) 3=I.L.R. (1941) All. 172=193 Ind. Cas. 822.

——Taxation—Municipality—Demand notice and threat of distraint—Voluntary payment, tests of.

The question whether a payment is voluntary or not is to be judged from the real nature of the circumstances in which it was made, the question always being what the person making did think. It is not necessary that the protest should be express. But it cannot be said that, where a statutory body conceiving itself justified under the circumstances in making a demand makes a demand in the form prescribed for such demand, the demand containing the warning that if it is not satisfied, legal process for realisation will be put into force, the payment in pursuance of such notice is sufficient to take it out of the category of voluntary payments.

That the payment was made under a mistake of law is not sufficient to make it a payment under duress. 39 L.W. 660=A.I.R. 1934 Mad. 420=67 M.L.J. 566=150 Ind. Cas. 890.

——Taxation—Gas mains laid in streets, whether immoveable Property—Liability to be taxed as such.

The term 'building' covers constructions such as gas mains laid under public streets, and gas mains so laid must be regarded as immovable property by their nature in the territory in which they are physically situate and are, therefore, taxable as immovable property in the Municipality in which they are laid. (1932) 136 Ind. Cas. 858. (P.C.).

LOCAL GOVERNMENT.

See LOCAL, DISTRICT COUNCILS, MUNICIPALITIES AND SELF-GOVT. ACTS.

LOCAL INQUIRY OR INVESTIGATION.

See (1) CIVIL PROCEDURE CODE, O. 26, R. 9.
(2) CRIMINAL PROCEDURE CODE, Ss. 202 AND 556.

LOCAL INSPECTION.

See CIVIL PROCEDURE CODE, O. 18, R. 18.

LOCAL INVESTIGATION.

See (1) CIVIL PROCEDURE CODE, O. 26.
(2) CRIMINAL PROCEDURE CODE, S. 202.

LOCAL SELF-GOVERNMENT ACT (3 OF 1885).

——S. 139—Encroachment, what is—District Board Road—Right to user by public—Hanging verandah, if and when invades right of user by public.

In a District Board Road, the public have an extended right of user confined to the roadway as well as to the side lands attached to the road and for all forms of usual and customary traffic. A hanging *veranda* would be an encroachment if it amounts to an unlawful gaining upon the right of user by the public and whether it would amount to an encroachment would depend upon the particular circumstances in each case. *Obiter*:—An encroachment is an unlawful gaining upon the right or possession of another man. 15 Cr. L.J. 187=18 C.W.N. 1120=22 Ind. Cas. 763.

LONG POSSESSION OR USER.

See (1) ADVERSE POSSESSION.
(2) EASEMENTS ACT, S. 15.
(3) LANDLORD AND TENANT.
(4) LIMITATION ACT, S. 28, AND ARTS. 142 AND 144.

LORD CANNING'S PROCLAMATION.

See GRANT.

LOST GRANT.

See (1) ADVERSE POSSESSION—PRESUMPTION.
(2) EASEMENTS ACT, S. 15.
(3) GRANT—PRESUMPTION.

LOTTERY.

See (1) CONTRACT ACT, S. 30.
(2) PENAL CODE, S. 294-A.

LOTTERIES ACT (5 OF 1844).

——Lottery—What is—Suit to recover money on wager.

A lottery is a game of chance in which the loss or gain of the prize wholly depends on the drawing

of lots. It is really a bet between each subscriber and the promoter, the subscriber betting the price of his ticket and the promoter betting the total subscription. 9 Bur. L.T. 228=38 Ind. Cas. 566.

LOWER BURMA.

See BURMA (LOWER).

LOWER BURMA CHIEF COURT RULES

——Civil Procedure Code, O. 21, R. 46 (a).

A debtor who admits that he owes money to the plaintiff but refuses to pay should be proceeded against under O. 21, R. 46 (a) of the Burma Chief Court Rules. 9 Bur. L.T. 122=33. Ind. Cas. 169.

LOWER BURMA COURTS ACT (6 OF 1900).

——S. 2—Value of subject-matter.

Held, by Full Bench (*Ormond, J. dissenting*) :—In a suit for redemption by a mortgagor in possession of the mortgaged property the subject-matter of the suit within S. 2 (4) of the Act is the mortgage, and the amount of the principal money secured by the mortgage determines the jurisdiction of the Court Per *Ormond, J* :—The subject-matter of a mortgage suit is the mortgage. The jurisdiction would, therefore, depend upon the "amount of value" of the mortgage. But the "amount of the mortgage" and the "value of a mortgage" are two different things. The former is the amount of all principal moneys that have been advanced on or secured by the mortgage, whereas the latter is the amount presently due on the mortgage. Therefore, in a suit for redemption by a mortgagor in possession of the mortgaged property, the subject-matter of the suit within S. 2 (4) is the mortgage and jurisdiction must be determined according to the principal moneys advanced on or secured by the mortgage or according to the amount due under the mortgage at the time of the filing of the suit, whichever amount is the greater. 3 Bur. L.T. 86=5 L.B.R. 208=8 Ind. Cas. 973 (F.B.).

——Ss. 11 and 12—Certificate of Government Advocate—Scope of—Jurisdiction of Court.

Under S. 12 of the Lower Burma Courts Act, the Government Advocate's Certificate must be as to something decided by the Judge and there is no power to certify as to anything decided by the Jury. A Court dealing with the case on the certificate cannot deal with any other part of the case until it has determined that there is an error on the part of the Judge on some point contained in the certificate. A Court dealing with the certificate is not a Court of Appeal and is subject to limitation even as a Court of review. 35 Mad. 397, Foll. 8 Bur. L.T. 247=16 Cr. L.J. 676=8 L.B.R. 274=30 Ind. Cas. 724.

——S. 12—Reference under section—If Bench can order re-trial.

A Bench of the Chief Court to which a case is referred under S. 12 of the Act can order a re-trial, when the conviction is set aside on the ground of misdirection to the jury. 8 L.B.R. 75, Diss. 9 L.B.R. 60=10 Bur. L.T. 123=18 Cr. L.J. 929=42 Ind. Cas. 161.

——S. 14—Land acquisition—Award of single Judge—Appeal.

An award under Part III of the Land Acquisition Act is neither a decree nor an order. S. 14 of the Lower Burma Courts Act will not apply to such an award passed by a single Judge of the Chief Court and no appeal will lie. 8 L.B.R. 163=28 Ind. Cas. 260.

——S. 27—Retrospective operation.

A party to a suit instituted before the Act same into force, is not entitled to a right of appeal given by the said Act although the decree in the suit was passed after the Act came into force. 5 L.B.R. 148=3 Bur. L.T. 53=5 Ind. Cas. 980.

——S. 27 (2)—Appeal—Formal amendment in decree—Computation of time—Limitation.

If an appeal is directed against a decree which is not substantially altered by an amendment made in it at request of the appellant and wholly in his favour, he cannot be allowed to compute the time for his appeal from the date of the amendment. 22 Mad. 364, Ref. to 10 Bur. L.T. 43=35 Ind. Cas. 347.

——S. 30—Civil Procedure Code, Ss. 100 and 101—Applicability—Question of fact, if can be raised in second appeal.

Ss. 100 and 101, Civil Procedure Code have no application to S. 30 and questions of fact which can be gone into in second appeals under the latter Act cannot be considered in appeals under the former, unless it appears that an Appellate Court has completely gone beyond the pleadings, and framed an altogether new case. 22 Ind. Cas. 802 (L.B.).

LOWER BURMA LAND AND REVENUE ACT (2 OF 1876).

See also BURMA LAND AND REVENUE ACT, (2 OF 1876).

——Ss. 4 and 5—Pagoda land—Jurisdiction—Civil Court.

The "*Tagas*" of a *pagoda* sued the appellant for declaration of title and possession of some land as being *pagoda* property. The boundaries of the land were not defined by the Revenue Officer under S. 5.

Held, that the Civil Courts cannot decide whether the land in dispute formed part of the *pagoda* site and that the trustees must obtain a decision in their favour from the Revenue authorities, before they can make out a title to possession against the appellant. 8 Bur. L.T. 264=8 L.B.R. 260=33 Ind. Cas. 580.

——Ss. 6 and 18—Grant by Government—Right of grantee.

A mere 'squatter' on Government land cannot resist a claim to possession by a grantee of the land from Government. 5 Bur. L.T. 36=14 Ind. Cas. 809.

——Ss. 18 and 19, Rr. 51, 52, 68 and 69—Where a person is prosecuted for non-compliance with a notice of ejectment from part of a demarcated grazing ground, the mere admission by the accused of the receipt of notice and of his failure to comply with it will not amount to an admission of the commission of the offence and the prosecution must prove that he was occupying the land contrary to the rules under the Act. 4 Bur. L.T. 259=13 Cr. L.J. 52=13 Ind. Cas. 388.

——Ss. 19 and 56—Civil Courts—Distinction between claims and disputes.

If the plaintiff was dispossessed otherwise than in due course of law, it may be presumed that he does

not sue as one permitted by Government to occupy or resort to the land, and the jurisdiction of Civil Court would not be barred by S. 56 of the Lower Burma Land and Revenue Act. Per *Fox, C.J. and Twomey, J* :—Claims in Cl. (b) of S. 55 must mean claims advanced to Government or to some Government Officer. Per *Fox, C.J.* Though the plaintiff may not have obtained any grant, lease or landlord's certificate from Government his mere possession of the land gives him an interest in the property which is heritable and good against all the world except the true owner. 8 Bur. L.T. 191=8 L.B.R. 227=30 Ind. Cas. 772.

——Ss. 55-B and 56—"Claims and disputes."

The word "claims" in S. 55 B relates to claims against the Government and the word "disputes" does not include disputes between cultivators regarding land occupied for cultivation. With regard to suits regarding the latter kind the jurisdiction of the Civil Court is not custed by S. 56 of the Act. 10 Bur. L.T. 5=35 Ind. Cas. 277.

——Ss. 55 and 56—Title suit in Civil Court—If comes under.

A Civil Court enquiring as to possession of land incidently and only for deciding the title to the crop on the land, does not exercise any jurisdiction as to the use or enjoyment of the land within S. 56 of the Act. 7 L.B.R. 294=26 Ind. Cas. 684.

——R. 20 (3)—Grant of land—Sanction of Deputy Commissioner—Contract Act, S. 23.

A transfer or grant of land without the sanction of the Deputy Commissioner in contravention of the conditions of the grant renders the grant liable to resumption, and the grantee to certain penalties and risk of loss of rights but it is not a transfer forbidden by law within S. 23 of the Contract Act. 12 Bur. L.T. 156=54 Ind. Cas. 42.

——Rr. 51 and 52—If applicable to demarcated grazing lands.

Rules 51 and 52 do not apply to demarcated grazing lands. 4 Bur. L.T. 259=13 Cr. L.J. 52=13 Ind. Cas. 388.

LOWER BURMA TOWNS AND VILLAGE LANDS ACT (4 OF 1898).

——Ss. 24, 25, and 26—"Tax rate or assessment" meaning of—Burma Land and Revenue Act.

Ground rent, under English Law, does not come within any of the terms "taxes, rates and assessments" but under Ss. 24, 25 and 26 of the Burma (Lower) Town and Village Lands Act, ground rent is payable to Government as a tax or assessment. 9 Bur. L.T. 69=32 Ind. Cas. 630.

——Ss. 15 (2) and 41 (A)—Lands at the disposal of Government—Suit for—Jurisdiction of Civil Court.

Ss. 41 (A) and 15 (2) of the Act do not debar a Civil Court from adjudicating the rights of two persons litigating over land at the disposal of Government. 23 Ind. Cas. 961 (L.B.).

——Ss. 35 and 36—A tax receipt shows that the person, whose name is entered on the roll of town lands is in possession, but does not show that he was entitled to be in possession of it. 11 R. 239=A.I.R. 1933 Rang. 299=147 Ind. Cas. 1105.

——S. 41 (b)—Government of India Act, 1858, S. 65—Indian Councils Act (1861), S. 22.

S. 41 (b) of the L.B. Town and Village Lands Act is *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma as it infringes S. 65 of the Government of India Act, 1858 and S. 22 of the Indian Councils Act. 5 L.B.R. 163=8 Ind. Cas. 1129 (F.B.).

——S. 41—Civil and Revenue Court—Suit between private persons.

Where private persons litigate concerning claims to land right held under grant or lease from Government under a license from the Revenue Officer, but which is at the disposal of Government, the jurisdiction of the Civil Court is not barred by S. 41 (a) of the Lower Burma Towns and Village Lands Act. The eviction of a squatter by another squatter, or of a sub-lessee by a lessee is a matter cognizable by the Civil Courts in cases where no rights as against the Government, are involved. 8 L.B.R. 71=29 Ind. Cas. 872.

LOWER BURMA VILLAGE ACT (3 OF 1889).

——Ss. 10 and 28—Abuse of powers.

For an act to constitute an abuse of powers within S. 10 of the Act it must be shown that it was done in the avowed exercise of some power under the Act and that it was in excess of his powers or must have been exercised in an improper manner or under circumstances when it was not properly exercisable. 6 Bur. L.T. 92=14 Cr. L.J. 413=20 Ind. Cas. 237.

LUCKNOW RENT CONTROL AND EVICTION ORDER (1944).

——Cl. 7—Application for eviction without permission of the specified authority—Maintainability.

Where a suit is instituted for the eviction of a tenant without obtaining the permission of the authority mentioned in cl. (3) of the Lucknow Rent Control and Eviction Order, it is not maintainable and has to be dismissed. 1942 O.W.N. 272 (H.C.), Dissented from. I.L.R. (1949) All. 135.

——Cl. 7—"In arrears"—Meaning—Tender of rent and improper refusal of landlord to accept rent—Tenant, if can be said to be in arrears in payment of rent.

Where the rent was being sent by the tenant to the landlord every month as it fell due but it was being improperly refused by the latter when tendered, the rent cannot legitimately be said to be in arrear within the meaning of cl. 7 of the Lucknow Rent Control and Eviction Act and the tenant cannot be evicted on that ground. I.L.R. (1949) All. 135.

LUNACY.

See (1) HINDU LAW—SUCCESSION.
(2) LETTERS PATENT (MADRAS), CL. 17.
(3) LUNACY ACT.

LUNACY ACT (34 OF 1858).

——Lunatics—Remuneration to committee—Court's jurisdiction to pass the order—Next-of-kin of lunatic not entitled to be heard on the application—Lunatic when same can impeach the order.

The Court has a discretionary power to allow a Committee of a lunatic appointed under Act 34 of 1858, remuneration, but will only allow it under special circumstances. When some relation or friend

of the lunatic can be found who is willing to act as Committee, the Court will not as a rule allow remuneration to such a person : but when no such person can be found and an official of the Court has to be appointed the Court will exercise its discretion and allow remuneration. But in all cases the Court has jurisdiction. On an application for remuneration by a Committee of a lunatic, the next-of-kin of the lunatic have no right to be heard in their own interests, as they have no vested interest in the estate. But a lunatic, if he becomes of sound mind, has the right to impeach any order which he considers has been made without regard to his interest ; and he can impeach the order for remuneration even after the Committee has passed his accounts. This right devolves on the lunatic's death upon his heirs. (1908) 10 Bom. L.R. 772.

——Ss. 2 and 23—Lunatic, definition of—Weakness of intellect and unsoundness of mind—Court of Wards Act, S. 6, Cls. (c) and (d).

A lunatic, within the meaning of S. 23 must be incapable of managing his own affairs and must also be of unsound mind. 24 W.R. 124 referred to and approved. Mere weakness of intellect is not unsoundness of mind within the meaning of that section. Where therefore a person is found to be only of a weak intellect, the Civil Court cannot proceed under this Act, although the person may, from such weakness of intellect, be incapable of managing his own affairs. It is open to the petitioners in such a case to move the Court of Wards under Act 9 of 1879. (1906) 4 C.L.J. 115.

——Ss. 3, 9 and 10—Duty of Court to investigate whether lunatic is possessed of property.

It is not a necessary pre-requisite to the Court taking action that the Court should be satisfied that the alleged lunatic has property. Where a petitioner alleges that the lunatic has property and the counter petitioner denies it, the District Judge should, however, summarily inquire and decide whether the lunatic has property or not, and not to dismiss the petition on the bare denial of the counter-petitioner. (1905) 29 M. 310.

——Ss. 7 and 9—Management of lunatic's estate—Custody of lunatic's person.

Under S. 9 a District Judge is bound to appoint a manager for the estate of the adjudged lunatic. A lunatic should not be forced to go to a lunatic asylum if he is taken proper care of by his relatives, there being no provision in the Lunacy Act authorizing a District Judge to send as adjudged lunatic to the asylum. (1903) 30 C. 973.

——Ss. 9, 10 and 11—Adjudged lunatic—Court of Wards. *See* BENGAL COURT OF WARDS ACT, Ss. 7, 10. 29 C. 638=7 C.W.N. 20.

——S. 14—Powers of guardian to contract to sell—Payment of earnest money before sale—Damages.

Where the guardian of a lunatic entered into an agreement with plaintiff to sell the lunatic's property and received earnest money pending an application before the District Judge to sell and the District Judge refused permission.

Held, that the plaintiff was not entitled to any damages for breach of contract inasmuch as the guardian was not competent to enter into any valid contract, but he was entitled to recover the money paid by him to the guardian. 3 A.L.J. 686=1906 A.W.N. 298.

——Ss. 21 to 23—U.P. Court of Wards Act (3 of 1899), S. 8 (d) (1)—Lunacy—Degrees of mental incapacity.

A person may be incapable of managing his affairs in a prudent manner, but unless this incapacity is due to unsoundness of mind, it does not justify a Civil Court in taking action under Act 35 of 1858. 1905 A.W.N. 8.

——S. 23—Lunacy—Definition—Evidence.

Where, besides the evidence of his brother, who stated broadly that he was made the only evidence against a person in respect of whom a petition that he should be declared a lunatic was before the Court, was the evidence of the Civil Surgeon, who stated :—"Rameshwar Tewari's mental condition is, in my opinion, not up to the average of his class in life. He is in a condition of imbecility resembling the mental condition of a child. In my opinion he has not sufficient mental capacity to enable him to manage large property ;"—It was **held,** that this is not sufficient to warrant the passing of an order under Act 35 of 1858 declaring Rameshwar Tewar to be of unsound mind and appointing a guardian for his person and property. 2 A.L.J. 154=1905 A.W.N. 43.

——S. 23—Adjudication upon admission.

It is necessary for the Court to adjudge a person to be a lunatic within the meaning of S. 23 of the Lunacy Act, before an order can be passed as to the management of his property and for the guardianship of his person. The judge cannot proceed upon an admission made by the supposed lunatic himself though he would be justified in examining him personally. He must come to a decision upon evidence. (1903) 31 C. 210.

LUNACY ACT (4 OF 1912).

——(As amended)—Act, if exhaustive—Power of Court to appoint interim Receiver, even though lunatic is not so determined—Security from Receiver, necessity of.

The provisions of the Lunacy Act of 1912 and the Amending Act which compendiously may be called the Lunacy Act, 1912—1926, are not absolutely exhaustive.

Under the inherent powers of the Court in the case of a lunatic, an *interim* Receiver of his property may be appointed whenever such an appointment is deemed expedient even though no 'action' may be pending at the time, and it makes no difference whether the lunatic has or has not been so found by inquisition. This is a matter which lies outside the actual provisions of the statute, and in those circumstances, the Courts in India are entitled to exercise that kind of inherent jurisdiction which originally was exercised by the Courts of Chancery in England in all matters concerning the welfare and the care of infants and lunatics. Of course in the ordinary way it would be necessary and indeed essential that before taking charge of any of the properties of the supposed lunatic, the person appointed as Receiver should furnish adequate security. But where the Receiver is an officer of the Court security can be dispensed with. A.I.R. 1937 Cal. 735=42 C.W.N. 92=I.L.R. (1938) 1 Cal. 180=174 Ind. Cas. 177.

——(As amended)—Necessity of amendment.

(The necessity of amending the Lunacy Act pointed out.) (1934) M.W.N. 1259=40 L.W. 710=67 M.L.J.

797=A.I.R. 1935 Mad. 91=58 M. 281=152 Ind. Cas. 882.

——S. 3 (5)—"Lunatic"—Insanity, tests of.

No person can have direct experience of the mind of another and the proper test of insanity is conduct. A person might conceivably have all kinds of mental unsoundness; he might have all kinds of delusions, but if his conduct remains normal, there would be no power under the Lunacy Act, to deal with him because the law of lunacy deals with conduct and the proper test for insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person. A.I.R. 1935 Pat. 423=2 B.R. 30=16 P.L.T. 874=158 Ind. Cas. 965.

——S. 3 (5)—Procedure—Duty of Court—Inability to manage affairs should be bound—Reliance not to be placed on opinion of relations.

In assuming jurisdiction under the Lunacy Act the Court must keep in view the distinction between mere weakness of intellect and "lunacy" as understood in the Act. It is only with lunatics as defined in S. 3 (5) that the Act is concerned. It is therefore the duty of the Court before proceeding further to determine judicially whether the person alleged to be incapable of managing himself or his affairs is really a "lunatic" in this sense. The finding has got very far-reaching consequences and must be given after very great care and deliberation. The elaborate procedure laid down by the legislature for conducting an enquiry into the matter must be strictly followed. The Court should not consider itself relieved of its responsibility by the mere circumstance that some or all of the relatives of the person concerned have declared that he is a lunatic. The Court ought to form its own independent judgment on the point. 122 Ind. Cas. 570=31 P.L.R. 98=A.I.R. 1930 Lah. 289.

——Ss. 3 (II), 62 and 63—Relative meaning of—Wife's brother—Application for inquisition under S. 62.

The brother of the wife is related by marriage to the husband of his sister and is therefore a "relative" within S. 3 (II) of the Lunacy Act and he is competent to make an application for inquisition under S. 62 of the Act. A narrow construction should not be placed upon the term "relative" as defined in S. 3 (II) of the Lunacy Act. 22 C.W.N. 547=27 C.L.J. 205=43 Ind. Cas. 511.

——Part II—(Ss. 4 to 36)—Procedure—Orders by District Magistrate—Executive and judicial—Executive orders not subject to revision by High Court.

The Act deals specifically and under separate headings with two branches of proceedings executive and judicial. Any person considering himself aggrieved by an executive order passed by the District Magistrate may apply under Part III for a regular inquisition conducted by a judicial Officer. The result of such inquisition is conclusive and overrides and overrules any order which may have been passed summarily by the executive authority. Under this Act the orders passed by the District Magistrate under Part II are purely executive and cannot form the subject-matter of a revision application to the High Court. 73 Ind. Cas. 696=4 Lah. 1=24 Cr. L.J. 664=A.I.R. 1924 Lah. 55.

——S. 7—Duty of Courts.

A verified petition was presented to the District Judge alleging that a certain person was a lunatic and praying for the appointment of the petitioner as a guardian of the person and the property of the alleged lunatic. The District Judge, without any judicial determination of the question whether an inquisition had been asked for and without recording any order directing an inquisition, issued a commission on the Munsif for inquiry and report as to the mental condition of the lunatic. No notice of any kind was served on the lunatic but his two daughters had been served with notices. The Munsif after investigation reported to the effect that the alleged lunatic was of unsound mind and the District Judge thereon appointed the petitioner as guardian of the person and property of the lunatic:

Held, that such proceedings were not fit to be treated as an inquisition which the Act contemplated and the procedure adopted was irregular.

An order directing an inquisition into a man's state of mind is a very serious thing and such an order is intended by the statute to be a judicial determination carefully made upon adequate materials. A.I.R. 1932 Cal. 20=35 C.W.N. 481=135 Ind. Cas. 734.

——S. 15 (1)—Presentation of written application, if necessary.

The words in S. 15 (1), Lunacy Act are wide in their scope and personal presentation of a written complaint is not necessary to direct detention of a person as a lunatic. The words 'such relative or other person' relate to the words 'or is cruelly treated or neglected by any relative or other person having charge of him.' Where the case alleged is not that the alleged lunatic is 'cruelly treated or neglected,' but that he is not 'under proper care or control.' there is no necessity of formally summoning his relatives with whom the lunatic is living. Interference by the High Court is not necessary on the ground that no summons was formally issued. A.I.R. 1936 Sind 156=29 S.L.R. 431=37 Cr. L.J. 1082=165 Ind. Cas. 119.

——S. 16—Purpose.

The purpose of S. 16 is to limit the period of detention for the purpose of observation. The first period of detention is limited to ten days and the maximum period permitted under the section is 30 days. If, therefore, before the expiry of 10 days the Magistrate is satisfied with the Medical Officer's report and the Medical Officer himself does not require the full 10 days, there is nothing to prevent the Magistrate varying his order and shortening the period of detention at first ordered.

Section 16 relates only to the temporary detention of the alleged lunatic for a specific time for the purpose of observation by a Medical Officer and it will apply also to a case where the Magistrate, acting under S. 14 thinks detention necessary for the purpose of observation. Again, where S. 10 applies to a case by reason of S. 15 (3) the two provisos of S. 14 will also apply if the facts are such as to attract their application.

(Necessity of following with the greatest care the provisions of the Act and the great care which should be shown by Magistrates in proceedings as the result of which a person is found insane and passes from freedom into the confinement of an asylum pointed out.) A.I.R. 1936 Sind 156=29 S.L.R. 431=37 Cr. L.J. 1082=165 Ind. Cas. 119.

——S. 17—Delegation of authority by Commissioner of Police.

The Lunacy Act does not authorise the Commissioner of Police to delegate powers to Deputy Commissioner—Section 6, Madras City Police Act, cannot be invoked to confer such authority as Local

Legislature cannot confer on Commissioner of Police authority to delegate powers which are conferred on him by an Act of Imperial Legislature. (1936) 1936 M.W.N. 1136.

——S. 24—Act 10 of 1914—Lunatic—Court's power to direct reception of Criminal lunatic into asylum—Warrant.

Under the Lunacy Act 4 of 1912 and 10 of 1914 the Magistrates or Courts are themselves competent to direct the reception of a criminal lunatic into any asylum prescribed for the purpose without reporting the case for orders of the Local Government, under S. 471 (1), Criminal Procedure Code. 8 Bur. L.T. 286=8 L.B.R. 290=16 Cr. L.J. 670=30 Ind. Cas. 654.

——S. 33—Application in Habeas Corpus to set at liberty a lunatic.

An application in *Habeas Corpus* that the Court should order a person wrongly confined as a lunatic to be produced before the Court and set at liberty is misconceived. The proper procedure is by an application under S. 33, Lunacy Act. A.I.R. 1936 Sind 156=29 S.L.R. 431=37 Cr. L.J. 1082=165 Ind. Cas. 119.

——Ss. 37 and 62—Jurisdiction of High Courts.

Teunon, J. :—Temporary removal of a lunatic to the mofussil does not oust the jurisdiction of the High Court, over the lunatic and an application under S. 62 in relation to such lunatic must be made on the original side of the High Court. Per *Beachcroft, J* :—A temporary removal to mofussil vests jurisdiction over the lunatic in the District Court in whose jurisdiction he is removed unless the lunatic is at the same time subject to the jurisdiction of the High Court. It is not necessary that the property of the lunatic must be within the jurisdiction of the District Judge. 57 Ind. Cas. 768=32 C.L.J. 314.

——Ss. 37 and 62—Powers of District Court—High Court's jurisdiction excludes District Courts, though the person resides in latter's jurisdiction.

Before a District Court can institute inquisition as to a person possessed of property and alleged to be a lunatic, it must be established not merely that such person is residing within the jurisdiction of that Court, but also that he is not subject to the jurisdiction of any of the High Courts mentioned in S. 37. Consequently, in a case where an alleged lunatic is subject to the jurisdiction of a High Court under S. 37, the District Court had no jurisdiction under S. 62, even though the person may reside within the local limits of the jurisdictions of the District Court, *i.e.*, the jurisdictions of the High Court and the District Court are not concurrent, but the jurisdiction of the High Court excludes that of the District Court ; on the other hand, if the alleged lunatic resides in two Districts the jurisdictions of the two Courts are concurrent and not mutually exclusive. 65 Ind. Cas. 57=48 Cal. 577=25 C.W.N. 178= A.I.R. 1921 Cal. 309.

——S. 38—No order can be passed unless Court finds that respondent is of unsound mind and incapable to manage his affairs.

What has to be found on an application for an order to direct an inquisition under the Lunacy Act is that the respondent is of unsound mind and that the unsoundness of mind is such as to make him incapable of managing his affairs. If the Court finds that the person is not of unsound mind, it is not necessary to proceed beyond that point.

Under the Lunacy Act, the Court has no power on the dismissal of an application for an order directing an inquisition, to make an order that the costs of the petitioner shall be borne by the estate even though it is of opinion that the application was made *bona fide* and in the best interest of the respondent. (1934) M.W.N. 1259=40 L.W. 710=67 M.L.J. 797= A.I.R. 1935 Mad. 91=58 M. 281=152 Ind. Cas. 882.

——S. 38 (1)—Order directing inquisition—Legality.

An order directing an inquisition into a man's state of mind is a very serious thing and such an order is intended by the statutes to be judicial determination carefully made upon adequate materials.

Where the Judge records a finding under S. 38 (1), Lunacy Act, but he does not appear to have considered whether the case calls for an order directing an inquisition or not, it is doubtful whether the subsequent proceedings have any validity.

It is incorrect to say that a person who is not sufficiently intelligent to manage his own affairs must necessarily be of unsound mind. Unsoundness of mind taken by itself is not sufficient to bring a person within the term 'lunatic,' unless it would incapacitate him from managing his own affairs, nor on the other hand, will a person who is incapable of managing his affairs be a lunatic, unless that incapacity is produced by unsoundness of mind. A.I.R. 1934 Nag. 27= 30 N.L.R. 224=148 Ind. Cas. 462.

——S. 38—Order directing inquisition into a man's state of mind—Judicial determination—Must be on adequate materials.

An order directing an inquisition into a man's state of mind is a very serious thing, and such an order is intended by the Statute to be a judicial determination carefully made upon adequate materials.

Where the Judge has *prima facie* evidence before him, which consists of affidavits and documents filed by consent, there is nothing wrong in his ordering the production of the lunatic directing his examination by a Medical Officer and adjudging him a lunatic on the strength of the medical report. (1949) 2 M.L.J. 251.

——S. 38 (1)—Jurisdiction—Alleged lunatic having two residences, one in Calcutta and the other in mofussil—High Court at Calcutta has jurisdiction over him though he may have gone to the mofussil place—Nature of jurisdiction over insane persons.

Section 38 does not define the test to be applied to determine whether a person is or is not subject to the jurisdiction of the High Court for the purpose of judicial inquisition as to lunacy. But the proceedings are directed primarily against the person and only secondarily against his property. The right of the Court to learn judicially whether a person is or is not of unsound mind is inferred from the right to his care and custody provided he is insane. Such authority over the person may unless otherwise directed by statute, be ordinarily exercised in the case of residents within the local limits of the jurisdiction of the Court. It may also be exercised over non-residents, if there is statutory provision to that effect.

One may have two places of residence, in one of which he resides during one portion of the year, in the other during the remaining portion ; what may be said to be the place of personal residence during one portion of the year thus becomes the place of legal residence during the remainder of the year and

vice versa. In such a case the term "reside" may be applied to either place.

Residence should be interpreted to import in such a case not *intelligent* residence but bodily presence. 65 Ind. Cas. 57=48 Cal. 577=25 C.W.N. 178=A.I.R. 1921 Cal. 309.

——S. 39—Appealability—Letters Patent (Bombay), cl. 15.

An order refusing to declare a person as a lunatic on an application under S. 39, Lunacy Act, is not a judgment within the meaning of cl. 15 of the Letters Patent (Bom.) and is not appealable. 35 Bom.L.R. 38=A.I.R. 1933 Bom. 112=57 B. 371=144 Ind. Cas. 100.

——S. 40—Procedure.

If the Judge considers that the case calls for an order directing an inquisition, then it is his obvious duty to record an order directing an inquisition and he may then proceed under Ss. 40, 41 and 42 of the Indian Lunacy Act. A.I.R. 1934 Nag. 27=30 N.L R. 224 =148 Ind. Cas. 462.

——S. 40—Notice—Notice must be issued after an order for inquisition is made—No general notice is to be issued.

The notice contemplated by S. 40 is a notice to be drawn up after there has been an order directing an inquisition. It is notice of such order and of the time and place at which the inquisition is to be held. It is not a notice of the petition. There is nothing in the Lunacy Act about general notices. 103 Ind. Cas. 725=54 Cal. 836=31 C.W.N. 838=46 C.L.J. 197=A.I.R. 1927 Cal. 636.

——S. 42—Scope.

Section 42 in terms refers only to the attendance and examination of the lunatic in Court but the principle contained in S. 42 would apply equally to her attendance and examination before a doctor. 7 O.W.N. 483=A.I.R. 1930 Oudh 301.

——S. 47—Guardian without authority—Position.

If a major comes under disability by reason of insanity, anybody, even if it is his wife, who does any acts on his behalf without being clothed with authority conferred by the Lunacy Act does not do such acts as the lawful guardian of the person under disability and is almost in the position of an intermeddler. 38 L.W. 321=(1933) M.W.N. 365=A.I.R. 1933 Mad. 686=65 M.L.J. 355=56 M. 964=146 Ind. Cas. 49.

——S. 47—Lunatic—Property of—Sale by manager without permission—Effect.

Where the certified guardian of a lunatic sells the property of the lunatic without the permission of the Court, the sale is not binding on the shares of the sons of the lunatic. 3 O.L.J. 173=34 Ind. Cas. 422.

——S. 56—District Judge's order directing payment to lunatic's guardian binding on Land Acquisition Judge.

A Land Acquisition Judge with whom a sum of money is deposited to a lunatic's credit, cannot refuse compliance with an order of a District Judge in his lunacy jurisdiction, directing payment of the money to the lunatic's natural guardian, the order being in accordance with S. 56 of the above Act. 20 C.W.N. 975=37 Ind. Cas. 110.

——S. 61—Applicability—Cases outside Presidency Towns.

S. 61 of the Lunacy Act and the rules framed thereunder are applicable only to cases in Presidency Towns and in the absence of rule applicable to cases outside the Presidency Towns those rules may be made applicable to such cases also. 22 C.W.N. 547=27 C.L.J. 205=43 Ind. Cas. 511.

——S. 62—Court's duty.

Factum of lunacy being contested, Court should not base its conclusion on personal observation alone but follow the procedure in S. 62. 96 Ind. Cas. 333=8 L.L.J. 391=27 P.L.R. 649=A.I.R. 1926 Lah. 536.

——Ss. 62 and 38—Inquisition—When Court is to order.

An inquisition under S. 62 or S. 38 of the Lunacy Act into the state of health, the state of mind the state of property and general capacity of a person is a thing which affects the person so prejudicially that it ought not to be taken except upon a careful consideration of evidence. 80 Ind. Cas. 798=51 Cal. 480=28 C.W.N. 513=A.I.R. 1924 Cal. 658.

——Ss. 62 to 83—Applicability—Course to be followed by Court on death of lunatic.

When the lunatic dies the lunacy jurisdiction comes to an end and the Court must pass some order about the property in the hands of the manager. If the title to the property be in dispute the Court may either decide the issue or ask the manager to file an interpleader suit. But whichever course is followed, the order of the Court will be referable to the jurisdiction exercised over the property of the lunatic under Ch. V of the Lunacy Act and the order must be deemed to be an order under that chapter and according to S. 83 an appeal would lie from such an order. I.L.R. (1948) Nag. 465=1948 N.L.J. 267=A.I R. 1949 Nag. 108.

——S. 62—Jurisdiction—Application for directing judicial inquisition—Permanent residence of lunatic within the jurisdiction of a District Court—Removal of lunatic out of jurisdiction of that District Court—That District Court does not cease to have jurisdiction.

In view of the interpretation of the word "residing" occurring in S. 62 of the Act placed upon it by a number of decisions it follows that an alleged lunatic has his permanent residence where his parental home exists and where his family permanently resides, and the District Court having jurisdiction over that place can entertain an application for directing judicial inquisition under S. 62 of the Lunacy Act. The removal of the lunatic whether by legal means of otherwise to the Mysore State and the residence or the alleged lunatic there might constitute temporary residence, but that would not put an end to the legal residence which the alleged lunatic already possessed and the District Court concerned would not cease to have jurisdiction over the matter. I.L.R. (1950) Mad. 260=A.I.R. 1950 Mad. 371=51 Cr. L.J. 898=62 L.W. 476=1949 M.W.N. 453=(1949) 2 M.L.J. 114.

——S. 62—Jurisdiction—'Residence' of lunatic.

An alleged lunatic ordinarily resided within the District Court of Nadia where he had his house and family. In 1927, however, he was for some time

living temporarily in Calcutta for the purpose of his treatment and during that time, the Chief Presidency Magistrate of Calcutta had passed an order directing the authorities of the mental hospital to receive the alleged lunatic. In 1928 an application was made to the District Court, Nadia, for an inquisition under the Lunacy Act :

Held, that it could not be said that at the date of the application the alleged lunatic was subject to the jurisdiction of the High Court of Calcutta so as to take away the jurisdiction of the District Court to make an order for inquisition. A.I.R. 1931 Cal. 711=35 C.W.N. 543=134 Ind. Cas. 1135.

——S. 62—Powers of District Court.

District Court, within whose jurisdiction lunatic is a permanent resident, has jurisdiction to direct inquisition under S. 62, notwithstanding that he temporarily resides in mental hospital outside that district. A.I.R. 1929 Cal. 512.

——S. 62—Medical Certificate.

Applicants in cases under S. 62 should come to Court fortified with a valid medical certificate of insanity. 42 All. 504, Foll. 96 Ind. Cas. 778=49 All. 3=24 A.L.J. 906=A.I.R. 1927 All. 225.

——S. 62—Procedure—Inquisition—Ordering of by Court—Evidence at inquisition—Nature of —Orders after inquisition.

The first thing which has to be done upon an application for directing an inquisition under R. 62 is that the Judge either with notice to the lunatic or without notice should carefully consider whether the case is one which calls for an order directing an inquisition. If he considers that it calls for an order directing an inquisition then it is his obvious duty to record an order directing an inquisition. When he has once done that, he is then, by the combined operation of S. 62 with Ss. 40, 41 and 42 of the Act, to take certain steps with regard to notice.

It is only a preliminary investigation which is required to justify an order directing an inquisition. Then, an order having been duly made directing an inquisition, the date having arrived and proper notices having been given, the inquisition itself proceeds. Without an order directing an inquisition the inquisition itself is without jurisdiction.

The evidence taken at the inquisition is evidence to be given by people in the ordinary way coming as witnesses before the Court. When that inquisition terminates it terminates in a judgment which finds or does not find that the person is of unsound mind, and upon that finding the jurisdiction arises to give orders as to the custody of the lunatic and to the management of the estate. 103 Ind. Cas. 725=54 Cal. 836=31 C.W.N. 838=46 C.L.J. 197=A.I.R. 1937 Cal. 636.

——S. 62—Procedure—Lunatic served with notice Subsequent proceedings may be ex parte.

Once service has been effected on the alleged lunatic in the manner provided by S. 40, subsequent proceedings may be *ex parte* and the attendance of the alleged lunatic is not a condition precedent to the disposal of inquisition proceedings under the Act. It is not therefore open to a District Court to reject an application made under Ss. 62 and 63 of the Lunacy Act merely on the ground that there is no trace of the alleged lunatic. 95 Ind. Cas. 956=A.I.R. 1926 Sind 223.

——S. 62—Lunacy—Inquisition for ascertaining —Procedure—Preliminaries.

An inquisition under S. 62 of the Lunacy Act once started must be prosecuted to the very end. Before such an inquisition is ordered or started, there ought to be a careful and thorough preliminary enquiry and the Judge ought to satisfy himself that there is a real ground for an inquisition. An application for an inquisition should ordinarily be supported by affidavit or by examination on oath of the applicant and by a medical certificate of some doctor as to the condition of the alleged lunatic. It would also be desirable in many cases that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act. 42 All. 504=18 A.L.J. 577=58 Ind. Cas. 617.

——S. 63—Order on application under—Leave to appeal to Federal Court—If can be granted. *See* C.P. CODE (5 OF 1908), SS. 109 AND 110. 1949 A.L.J. 563=A.I.R. 1950 A. 242.

——Ss. 63 and 80—" Curator ", meaning of.

From S. 63, Lunacy Act, the meaning of " curator " seems to be the public curator appointed under the Succession (Property Protection) Act, 1841.

A person not so appointed can be removed under S. 80.

Non-submission of accounts accompanied by immoral life can raise a reasonable suspicion that the guardian might be misappropriating the income from the property and is sufficient justification for removal of such a guardian. A.I.R. 1933 Lah. 626=146 Ind. Cas. 553.

——S. 63—Power to appoint manager—Person held of unsound mind and Civil Court had jurisdiction to appoint manager of his property.

A person who owned a considerable property voluntarily remained silent for 26 years and did not speak with anybody. He could not answer even simple questions without considerable delay. He was a person who could be easily imposed upon and made to sign almost any document produced before him by a person in whom he had confidence.

Held, that this showed that he was incapable of managing his affairs in consequence of his mental weakness and unsoundness of mind and that the Civil Court had jurisdiction to appoint a manager of his property. A.I.R. 1939 All. 333=(1939) A.L.J. 149=I.L.R. (1939) All. 510=1939 A.W.R. 203=182 Ind. Cas. 431.

——S. 65—Burden of proof.

Case of *senile dementia* in an old man—Court can reasonably presume its continuance—Burden of showing that transaction entered into by patient subsequent to that date were good is on those who assert them to be so. A.I.R. 1940 Mad. 73=50 L.W.668=(1939) M.W.N. 1023.

——S. 65 (2)—Mental unsoundness—Test.

Per *Mushtaq Ahmad, J.*—An order declaring a person to be of unsound mind and incapable on that account of managing his affairs is an order of a very serious character. It is therefore the duty of Court to determine judicially whether the person alleged to be in-

capable of managing himself or his affairs, is really a "lunatic" in this sense.

The expression "mental unsoundness" has not been defined in the Lunacy Act, but it may be safely stated that it implies some unusual feature of the mind as has tended to make it different from the normal and has in fact impaired the man's capacity to look after his affairs in a manner in which another person without such mental irregularity would be able to do in a matter of his own. The idea suggests some derangement of the mind, whatever be its decree, and it is not to be confused with or taken as analogous to a mere mental weakness or lack of intelligence.

Per *Dayal, J.*—A person of a weak mind is not necessarily a person of unsound mind. Merely because a person is incapable of managing his affairs he cannot be said to be a person of unsound mind. Unsoundness of mind by itself should be something different from a mere incapacity to manage one's affairs.

A person with an undeveloped mind or with a weak mind or a feeble minded person is not necessarily a person of unsound mind. 1949 A.L.J. 158=A.I.R. 1949 A. 449=1949 A.W.R. 277.

——S. 65—Person of unsound mind—Unsoundness of mind—What constitutes.

A person whose mental condition has been affected by the stroke of paralysis from which he suffered and both owing to this and owing to his age his memory has been seriously affected and he is unable to recognize his relations, but he is able to answer questions with regard to his estate with a certain amount of intelligence, and also questions with regard to his family, cannot be said to be of unsound mind and incapable of managing himself and his affairs. 90 Ind. Cas. 878=30 C.W.N. 180=A.I.R. 1926 Cal. 155.

——S. 65 (2)—Power to correct a wrong finding.

The High Court has power to interfere to correct a wrong finding under S. 65 (2), Lunacy Act. A.I.R. 1934 Nag. 27=6 R.N. 182=30 N.L.R. 224=148 Ind. Cas. 462.

——S. 65—Evidence Act. (1 of 1872), S. 41—Adjudication as lunatic—Order is binding on parties though judgment in rem.

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41, Evidence Act, it is still relevent and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. (1933) M.W.N. 514=38 L.W. 135=65 M.L. 279=A.I.R. 1933 Mad. 624=56 M. 904=147 Ind. Cas. 479.

——S. 67—Appointment of interim receiver—Inherent power of Court.

Although there is no express provision in the Lunacy Act authorising the Court to make any interim order for the custody or the management of the estate of a person before he is adjudged to be a lunatic, the Act is not exhaustive and does not take away the inherent power of a Court to do so. Proceedings in lunacy being civil proceedings in a Court of civil jurisdiction S. 141, Civil Procedure Code, will apply and the powers for making interlocutory orders under O. 39 and O. 40 must necessarily become available to the Court. This section will also save the inherent powers of the Court.

Even if there be any doubt as to the powers of the District Courts in the matter of making interim orders in pending lunacy proceedings, there is no doubt as to the powers of the High Court as the successor of the Supreme Court to do so. I.L.R. (1947) 2 Cal. 163=51 C.W.N. 665=A.I.R. 1949 Cal. 166=82 C.L.J. 210.

——S. 67—Powers of Judge—Judge cannot delegate his function to arbitrator.

In an enquiry as to the insanity of any person no Judge has any right, or any jurisdiction, to delegate his function to a third person except person appointed to assist or advise a Judge. But such a person is no more than a witness and the Judge must retain the judicial function in his own person. 62 Ind. Cas. 430=43 All. 459=19 A.L.J. 334=A.I.R. 1931 All. 160.

——S. 68—Manager of estate cannot be appointed until Court of Wards have elected not to exercise jurisdiction.

The Court of Wards must be given an opportunity of assuming charge of the estate of the lunatic if they so desire. Till the Court of Wards has not elected to exercise jurisdiction, the Court are precluded from appointing his brother manager of the estate of the lunatic. A.I.R. 1944 Sind. 72=211 Ind. Cas. 487.

——S. 68—Right of guardian to apply for custody.

An order appointing a guardian of the person of a lunatic confers on the guardian, unless anything exceptional appears to the contrary, a right to the custody of the person of the lunatic, (and the Court has power to make an order giving custody of the person of the lunatic to the guardian thus appointed). 58 M. 252=(1934) M.W.N. 843=40 L.W. 712=67 M.L.J. 661=A.I.R. 1934 Mad. 724=153 Ind. Cas. 94.

——S. 71—Appointment of manager—Hindu co-parcener becoming lunatic—Manager can be appointed as to his share—Hindu law.

If a member of a joint Hindu family under the Mitakshara Law be a lunatic, where it is shown that his property is being wasted, the Civil Courts have power to appoint manager of the lunatic's share under the Lunacy Act, although no doubt a strong case must be made out for the appointment of a manager. 6. Cal. 539 and 12 O.C. 209 Foll. 116 Ind. Cas. 663=25 N.L.R. 61=12 N.L.J. 44=A.I.R. 1922 Nag. 93.

——S. 71—Court's duty—Inquisition—When Court can order—Benefit of the lunatic is the paramount consideration.

Where an application is made to ascertain whether certain persons are of unsound mind by an inquisition, the Judge should form his independent judgment upon the point. After examining the parties it may reject the petition *in limine* if it thinks that no *prima facie* case for enquiry is disclosed. Or it may after examining the pleadings of the parties or as a result of its own personal interview with the alleged lunatic come to the conclusion that there are grounds for supposing that the mental condition is such as to bring him within the Lunacy Act. In that case it must order an "inquisition" and proceed in the manner prescribed. After the inquisition has been completed, it must record a judicial finding on points mentioned in S. 65 (*a*) on the materials before it. It is only when these findings have been arrived at as a result of the inquisition that the jurisdiction of the Court to proceed further with the case arises. In determining these questions the paramount consideration is the benefit of the lunatic. A.I.R. 1927 Cal. 636 *Rel. on.* 122 Ind. Cas. 570=31 P.L.R. 98=A.I.R. 1930 Lah. 289.

——Ss. 71 and 72—Guardianship—Wife as first guardian.

Even under S. 72, heir of lunatic may be his guardian. Courts should consider well, before appointing an heir as guardian, who is entitled immediately to inherit the lunatic after his death. Even in India wife has the first claim to the guardianship of a lunatic. 15 A.L.J. 10=36 Ind. Cas. 983=39 All. 158.

——S. 71—Lunatic's estate—Test.

The beneficial interest of the lunatic in joint property belonging to him along with other owners, *e.g.*, brothers and sisters of his, cannot be wholly excluded in deciding what the estate of the lunatic is. 33 Ind. Cas. 106 (Mad.)

——S. 72—Applicability.

The provisions of S. 72 imposing a restriction to the appointment of legal heir of a lunatic to be a guardian of his person cannot be attended to in a case where near relations only can be appointed guardians of the person of the lunatic. 85 Ind. Cas. 276=A.I.R. 1925 Oudh 642.

——S. 72—Guardianship—Legal heir of lunatic, if preferred to non-heir, as guardian.

Section 72, Lunacy Act, operates as a kind of warning that particular care should be exercised by the Court, where a person is entitled to inherit part of the property of a lunatic and would, therefore, benefit by his death, to see that the appointment of such person as the guardian of the lunatic is a beneficial one. A legal heir having a greater interest if the lunatic dies, should not be appointed guardian of the person of the minor in preference to another who is a non-heir. A.I.R. 1934 Rang. 164=152 Ind. Cas. 512.

——Ss. 75 and 69—Arrears of rent, accruing subsequent to lunatic's death—Guardian cannot sue.

The guardian of a lunatic's property appointed under S. 67, Lunacy Act is not competent to maintain a suit after the lunatic's death for the recovery of arrears of rent which accrued subsequent to his death and hence the Court has no jurisdiction to sanction the institution of proceedings by the guardian to recover such amount. The right of action would vest in the heir entitled to take the property after the death of the lunatic. (1943) 1 M.L.J. 22 (2)=1943 M.W.N. 35=56 L.W. 129=A.I.R. 1943 Mad. 265=207 Ind. Cas. 112.

——Ss. 75 and 67—Order by Judge sanctioning suit by Receiver of lunatic's estate to recover arrears of rent is administrative and not judicial.

An order by a Judge sanctioning the institution of proceedings by the Receiver of the lunatic's estate to recover arrears of rent is an order by the Judge under the Act in the exercise of his administrative duties in superintending the estate of the lunatic and is not a judicial order against which it is necessary to move in appeal or revision in order to challenge its validity. A.I.R. 1943 Mad. 265=(1943) 1 M.L.J. 22 (2)=1943 M.W.N. 35=56 L.W. 129=207 Ind. Cas. 112.

——Ss. 75 and 67—Receiver.

Quaere.—Whether the Receiver of the lunatic's estate appointed under S. 67, Lunacy Act has power to realise assets outstanding at the time of the lunatic's death. A.I.R. 1943 Mad. 265=(1943) 1 M.L.J. 22 (2)=1943 M.W.N. 35=56 L.W. 129=207 Ind. Cas. 112.

——S. 75—Committee of estate, powers of.

The committee of the estate of a lunatic applied to the Court for sanctioning certain expenses incurred by them without obtaining the Court's previous sanction. The *bona fides* of the applicants who were managers without remuneration was not disputed nor was it seriously contended that the amount spent was excessive or unreasonable :

Held, that the Court will act on the principles that the first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the household of the lunatic and the final principle is that the Court should not refuse to do on behalf of the lunatic what the lunatic himself would probably have done. The Court could, acting on this principle, sanction allowances paid by the committee to persons other than the lunatic, where such person is the next heir or successor to the lunatic's estate, and collaterals if they are the next of kin, or if not, if the lunatic if of sound mind would have made such an allowance for which of course there must be some evidence.

Held, also, that the Court had a discretion to sanction an expenditure which had been made without the previous sanction of the Court having been obtained although such discretion ought only to be exercised where the reasons are very strong, because Courts in such matters as this ought to have a discertion to do thereafter that which they are empowered to allow on applications made in the first instance. (1937) 1 M.L.J. 287=45 L.W. 326=A.I.R. 1937 Mad. 370=I.L.R. (1937) Mad. 571=171 Ind. Cas. 678.

——S. 75—Mortgage by guardian of lunatic—Suit—Prayer for personal decree if sale-proceeds be found insufficient—Preliminary decree passed accordingly :

Held, that the defendant, not having filed an appeal against the decree it became final and the defendant was precluded from disputing the correctness of the preliminary decree. 10 O.W.N. 653=A.I.R. 1933 Oudh 352=9 Luck. 51=144 Ind. Cas. 931 (F.B).

——Ss. 77 and 83—Order that accounts were passed—Appealability.

An order passed under S. 77 simply to the effect that the accounts were passed implies that the objections to the accounts were rejected. This being an order passed under a section which falls within Chap. V, Lunacy Act, an appeal lies to the High Court under S. 83. A.I.R. 1936 Rang. 51=161 Ind. Cas. 591 (2).

——S. 77—Inquiry under—Necessity of.

Where accounts are filed by the manager of a lunatic's estate and their accuracy is impugned under S. 77, Lunacy Act, some kind of an inquiry must be held under S. 77 and some record must be made of the inquiry and in passing orders reasons must be shown as the order passed is an appealable order and the Appellate Court must be placed in a position of knowing what has moved the mind of the Judge in coming to the conclusion to which he came. A.I.R. 1936 Rang. 51=161 Ind. Cas. 591 (2).

——S. 79—Suit under—Limitation—If Art. 89 or 120 of the Limitation Act applies.

See LIMITATION ACT (IX OF 1908) ARTS. 89 AND 120. 23 Luck. 65=A.I.R. 1949 Oudh 51.

——S. 79—Suit under—Maintainablity after death of lunatic and removal of manager from office.

It cannot be said that S. 79 of the Lunacy Act does not apply to the case of a lunatic who is dead. A suit can be brought against the manager even after he is

removed from his office. 23 Luck. 65=1947 A.W.R. (C.C.) 273=1947 O.A. (C.C.) 273=1947 O.W.N. 530=A.I.R. 1949 Oudh 51.

——S. 79—Leave to sue.

Under S.79 leave of the Court appointing the manager has to be obtained before any suit for accounts can be filed. But to sue surety, no such sanction is necessary.

When there are a large number of items of expenditure which are questioned and where there also may be necessity for enquiring into the amount of profits likely to have been realised from the estate, sanction to file a suit against the manager or his legal representative as the case may be should be given. (1944) 2 M.L.J. 377=A.I.R. 1945 Mad. 89.

——S. 80—" Curator ".

From S. 63 Lunacy Act, the meaning of " curator " seems to be the public curator appointed under the Succession (Property Protection) Act, 1841. A person not so appointed can be removed under S. 80. A.I.R. 1933 Lah. 626=146 Ind. Cas. 553.

——S. 80—Sale of Lunatic's property.

Where a manager of the lunatic's estate has been appointed and has not been removed under S. 80 of the Act, the District Court has no power to alienate any portion of the lunatic's property. 88 P.R. 1919=52 Ind. Cas. 609.

——S. 81—Mode of recovery of fine—Court-Fees Act, 1870, Sch. II, Art. 2.

Although the fine imposed on the guardian of a lunatic under S. 81, Lunacy Act, for his contumacious conduct can be recovered as if it were due under a decree of the Court, yet it is doubtful whether the order imposing the fine can be said to have the force of a decree within the meaning of Art. 2, Sch. II, of the Court Fees Act. 36 P.L.R. 179=A.I.R. 1934 Lah. 853=150 Ind. Cas. 664.

——S. 82—Declaration of soundness—Judge must make an order for such declaration without regard to other proceedings pending in his Court.

An application was made to the District Judge alleging that the unsoundness of mind of the lunatic had ceased and praying that enquiry be made whether he is still of unsound mind and incapable of managing himself and his affairs, and that on the material placed before the District Judge there was very good reason to believe that the unsoundness of the lunatic had ceased.

Held, it was the duty of the judge to have proceeded with the application without regard to the effect of enquiry on the matter in other proceedings pending in the Court. It would be most unfair to keep the lunatic's property under management or his person under guardianship if it could be established. that he was no longer of unsound mind. 88 Ind. Cas. 580= 26 P.L.R. 593=A.I.R. 1925 Lah. 533.

——S. 82—Functions of District Judge—Relative of lunatic, position of—Amicus curiae.

The District Judge under Act is partially judicial and partly administrative authority. The inquiry into the state of a mind of a person affected, is to satisfy his own mind, the relatives to whom notices are issued, being merely *amicus curiae* and not parties to the proceedings. They are allowed to be heard but have no right to be heard. 3 O.L.J. 398=19 O.C. 353=36 Ind. Cas. 705.

——S. 83—Appealable orders under.

Under S. 83 of the Lunacy Act an appeal lies against an order made under Ch. V of the Act. S. 83 does not enumerate the orders which alone are appealable but makes all orders passed under Ch. V. appealable to the High Court. I.L.R. (1948) Nag. 465=A.I.R. 1949 Nag. 108=1948 N.L.J. 267.

——S. 83—Appealable orders under.

An order passed under S. 77, Lunacy Act, simply to the effect that the accounts were passed implies that the objections to the accounts were rejected. An appeal lies against such order under S. 83. A.I.R. 1936 Rang. 51=161 Ind. Cas. 591 (2)

——S. 83—Appealable orders under.

As the power to make an order for giving custody of the person of the lunatic to the guardian is derived from the power to appoint a guardian, an order dismissing an application for custody is appealable, under S. 83, Lunacy Act. (1934) M.W.N. 843=40 L.W. 712=67 M.L.J. 661=A.I.R. 1934 Mad. 724 =58 M. 252=153 Ind. Cas. 94.

——S. 83—Who can appeal.

Where a person has been adjudged lunatic upon inquisition held in irregular and improper proceedings, any person who is a relative and has a right to see that the alleged lunatic's estate and liberty are dealt with according to law, has a right of appeal. 103 Ind. Cas. 725=54 Cal. 836=31 C.W.N. 838=46 C.L.J. 197=A.I.R. 1927 Cal. 636.

——S. 88—Order for payment of costs by Additional District magistrate.

The authority making a 'reception order' under S. 15 of the Act, has to apply to the High Court or the District Court for an order for the payment of the costs of maintenance of the lunatic. The passing of an order by the Additional District Magistrate is, therefore, without jurisdiction. (1938) 40 P.L.R. 496.

——S. 88—Maintenance.

Lunacy Rules, R. 18 —Hindu Father-in-law is liable to pay costs of maintenance of his joint son's lunatic wife under R. 18 (2). 124 Ind. Cas. 813= 32 Bom. L.R. 606=A.I.R. 1930 Bom. 319.

——S. 88—Maintenance—Father as manager—Liability to maintain lunatic son—Not dependent on source of property.

If the father, as a manager of the joint family is liable to maintain his son as a member of the family, he is a person legally bound to maintain the lunatic within the meaning of the section. It does not matter for the purposes of S. 88, whether under the Hindu Law his liability to maintain is limited to the extent of the joint family property in his hands. The word "means" in the expression " means to maintain " has no relation to the source of property.

Rule 18 (ii), which prescribes the fees for maintenante, is not *ultra vires* in any way. 100 Ind. Cas. 575=51 Bom. 120=29 Bom. L.R. 52=A.I.R. 1927 Bom. 91.

——S. 91 (1)—Rules made under by Punjab Government—R. 185.

The words 'District Funds' in r. 185 of the rules framed by the Punjab Government. under Lunacy Act S. 91 (1), do not include funds of the Small Town Committee. A.I.R. 1934 Lah. 148=15 L. 480=36 P.L.R. 350=151 Ind. Cas. 403.

LUNACY (DISTRICT COURTS) ACT (35 OF 1858).

——Preamble—Object of.

The preamble of the Lunacy (District Courts) Act 1858 states that it is expedient to make better provision for the case of the estates of lunatics "not subject to the jurisdiction of the Supreme Court of Judicature." 35 C.W.N. 1045=58 C. 919=A.I.R. 1932 Cal. 91=133 Ind. Cas. 188.

——Object of the Act

The law does not contemplate that a "person" alleged to be a lunatic should be exposed to the publicity and harassment of a trial unless there is some foundation for apprehension that he is incapable to manage his affairs 8 A.L.J. 179=9 Ind. Cas. 207.

——Applicability—Joint family.

Act. XXXV of 1858 has no application to a Hindu co-parcener who has no separate property. 23 M.L.J. 706=12 M.L.T. 585=(1913) M.W.N. 79=17 Ind. Cas. 473.

——Scope and application of—Lunatic a member of joint Hindu family governed by Mitakshara—Interference of Court limited to cases of waste, neglect or ill use.

Luncy Act is applicable in the case of a lunatic possessing no assigned separate share from the joint family property but has a right to it under the Mitakshara Law.Civil Courts should interfere when the manager is wasting, neglecting, or ill-using the property. 12 O.C. 209=3 Ind. Cas. 660.

——Jurisdiction of District Court to require a guardian to obtain its permission before getting a lunatic married.

The District Court has jurisdiction to make an order requiring the guardian appointed by it for a lunatic to obtain its permission before marrying the lunatic. (1908) 32 M. 253=3 Ind. Cas. 388.

——S. 3 (5)—Lunatic—Definition.

A man is not a lunatic simply because he had delusions on one or two points and is incapable of managing his own affairs. Examination by the Court and by a Civil Surgeon combined with the evidence of a doctor treating him is sufficient for the purpose of determination. Examination by the pleader is not necessary. 8 A.L.J. 179=9 Ind. Cas. 207.

——S. 7—Scope of—Enquiry into lunacy.

The Lunacy Act contemplates the question of lunacy or sanity at the time of the enquiry. There is no provision in it that the enquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind. 19 C.W.N. 45=27 Ind. Cas. 459.

——S. 9—Power of manager appointed under.

Manager appointed under S. 9 cannot interfere with personal law of lunatic member of joint Hindu family. A.I.R. 1942 All. 267=(1942) A.L.J. 197=1943 A.W.R. (H.C.). 305=I.L.R. (1942) All. 518=202 Ind. Cas. 227.

——S. 9—Scope.

(*Quaere*)—Whether a manager can be appointed in respect of the lunatic's interest in the co-parcenary property. A.I.R. 1942 All. 267=(1942) A.L.J. 197=I.L.R. (1942) All. 518 =1943 A.W.R. (H.C.) 305=202 Ind. Cas. 227.

——S. 9—Lunatic's estate—Appointment of manager—Court of Wards—Superintendence of an estate of lunatic—Guardian of property.

A person with landed estate, was declared by the District Judge as of unsound mind.

Held, it was not necessary for the Judge under the provisions of the Lunatic Act to inquiry from the Court of Wards whether it would assume the management of estate before appointing a manager. An appointment of manager of the lunatic's property is valid, until the Court of Wards avails itself of assuming the management of the estate. 1 All. 476, Foll. 15 Ind. Cas. 265 (Oudh.)

——Ss. 9 and 20—Lunatic—Appointment of manager—Estate subject to jurisdiction of Court of Wards—Jurisdiction of Civil Court.

A Civil Court has no power to appoint a manager of the estate of lunatic when the Court of Wards has jurisdiction to assume superintendence of the lunatic's property. After making an order adjudging a person to be of unsound mind, the Civil Court is *functus Officio* in cases in which the Court of Wards has jurisdiction. It is only in cases where the Court of Wards has no jurisdiction, or it does not elect to exercise that jurisdiction, that the Civil Court can order appointment of a manager. 6 S.L.R. 65=16 Ind. Cas. 678.

——S. 12—Natural guardian appointed guardian under the Act—Power to mortgage without leave of Court.

A natural guardian appointed guardian under S. 12 of the Lunacy Act cannot mortgage the estate of the lunatic without leave of Court, even though it be for the lunatic's benefit. (1913) M.W.N. 969=14 M.L.T. 489=21 Ind. Cas. 879.

——S. 14—Adjudication of lunacy—Right of manager to sue—Civil Procedure Code, O. 32, R. 15.

Where a manager is appointed to manage the property of the adjudged lunatic and the estate has vested in him, the right to sue on behalf of the lunatic subsists in the manager, until the adjudication of lunacy is cancelled or the managership is determined by the death of the lunatic. Where there is no appointment by the Court, the guardianship of the lunatic will cease on the lunatic ceasing to be of unsound mind. 16 Ind. Cas. 885 (Oudh).

——S. 14—Lease granted for more than 5 years by guardian of lunatic—No permission of Court—Voidable.

A lease granted by a guardian of a lunatic for more than 5 years without the Court's permission under S. 14 of the Act is voidable only and not void. 16 C.W.N. 762=14 Ind. Cas. 218.

——S. 14—Powers of manager—Lease for uncertain period.

Ordinary cultivating lease for an uncertain period is not a lease for any period exceeding 5 years, hence a manager of a lunatic's estate can grant such a lease without the permission of the Civil Court. 6 Ind. Cas. 158 (Cal.).

——S. 14—Sale by manager without order of Court—Void.

A sale of a lunatic's property by the manager without the order or knowledge of the Court is void and could not be ratified. 1 Lah. 109=96 P.L.R. 1920=55 Ind. Cas. 865.

——S. 22—Appeal.

An order appointing a guardian of the property of a lunatic is appealable. 28 P.L.R. 1911=131 P.W.R. 1911=9 Ind. Cas. 548.

——S. 22—Lunatic—Appointment of guardian—Evidence.

A person should not be adjudged as of unsound mind unless he is clearly proved to be unsound. In such cases he should be placed under medical observation of a qualified practitioner and his statement should be recorded by the Court itself. No proper inquiry was made in this case and he was declared lunatic on insufficient grounds. 96 P.L.R. 1916=178 P.W.R. 1916=36 Ind. Cas. 219.

——S. 65—Inquisition proceedings—Petitioner whether entitled to have inquiry conducted so long as he has witnesses—Discretion of Court.

A Judge has got discretion under this Act to stop proceedings in an inquisition for proper grounds: a petitioner is not entitled to have the inquiry conducted so long as he is able to tender witnesses for examination. 3 L.W. 402=33 Ind. Cas. 857.

——S. 65 (2)—Declared lunatic—Presumption.

Where a person has been found to be a lunatic under the Act, the presumption is that he continues to be of unsound mind until the contrary is shown. 3 L.W. 290=19 M.L.T. 243=33 Ind. Cas. 578.

——S. 71—Adoption by lunatic—Validity.

A lunatic can adopt during the continuance of an order appointing a manager to the properties of a lunatic under the Act. 3 L.W. 290=19 M.L.T. 243=33. Ind. Cas. 578.

——S. 71 (1)—Declaration of lunacy and appointment of manager—Tarwad property.

No application can lie for declaration of the lunacy of *Karnavan* and for the appointment of a manager with respect to his separate property. 23 M.L.J. 706=12 M.L.T. 585=(1913) M.W.N. 79=17 Ind. Cas. 473.

——Ss. 74 and 75—Duty of guardian—Marriage of lunatic—Permission of Courts.

The guardian of a lunatic is under the complete control of the Court which appointed him. He must obtain the permission of the Court before arranging for the marriage of the lunatic, though the Court will not ordinarily interfere with his choice. 32 Mad. 253=3 Ind. Cas. 388.

—LUNACY (SUPREME COURTS ACT) ACT (34 OF 1858)—Scope.

The Lunacy (Supreme Courts) Act, 1858 gives power to those Courts to direct an inquiry as to "any person subject to the jurisdiction of the Court." 35 C.W.N 1045=58 C. 919=A.I.R. 1932 Cal. 91=133 Ind. Cas. 188.

LUNATIC.

See also (1) CIVIL PROCEDURE CODE, O. 32.
(2) CONTRACT ACT, S. 12.
(3) CRIMINAL PROCEDURE CODE, Ss. 464 TO 475.
(4) HINDU LAW—SUCCESSION.
(5) LETTERS PATENT (MADRAS), Cl. 17.
(6) LIMITATION ACT, S. 6.
(7) LUNACY ACT.
(8) PENAL CODE, Ss. 84 and 85.

——Joint managers—Co-manager dying—Office of survivor terminates.

Until the Legislature sees fit to introduce into the Lunacy Act a provision similar to S. 38, Guardians and Wards Act, under which on the death of one of the joint guardians the principle of survivorship is applied, the rule of English Law should be followed and, where there is no provision for survivorship in the order of appointment of joint managers, the office of the survivor should terminate on the death of his co-manager. 38 C.W.N. 1054=60 C.L.J. 14=61 C. 986=A.I.R. 1935 Cal. 33=154 Ind. Cas. 108.

——Mahomedan law—Lunatic—Guardian 'de facto'—Sale of lunatic's property by mother and wife for benefit of lunatic.

The mother and wife of a lunatic Mahomedan, acting *defacto* as the guardians of the lunatic, sold certain property belonging to the lunatic in order to discharge debts due by him.

Held, that the transaction could not be impeached, although the mother was not, under the Mahomedan law, the legal guardian of the lunatic. 34 C. 36=34 C. 65 and 26 A. 22, foll. 1908 A.W.N. 220=5 A.L.J. 474=30 A. 462.

LURKING HOUSE TRESPASS.

See PENAL CODE, Ss. 454, 456, 457, 459 AND 460.

MADHYA BHARAT CONSTITUTION ACT (1948).

—Art. 9—Order made by executive authority—Authentication of—Order by Chief Secretary—When illegal—Lapse of Regulations Ordinary—Subsequent order signed by Chief Secretary—Legality of.

Under Art. 9 of the covenant entered into by the rulers of the states of Gwalior, Indore and Malwa (Madhya Bharat), which is the Constitution Act of the United State, the executive authority of the State is to be exercised by the Rajpramukh alone, but he may exercise it himself or through an officer subordinate to him. The responsibility for the action remains that of the Rajpramukh. Under S. 7 (3) of the Madhya Bharat Regulations of Government Ordinance, 1948, orders for detention, etc., have to be expressed to be taken in the name of the Rajpramukh. If an order purporting to be made under S. 3 (1) of the Maintenance of Public Order Ordinance is not made out in the name of the Rajpramukh, it cannot be deemed to be made by the Government of the State. The Rajpramukh is, so far as the exercise of executive authority is concerned, the Government of the United State of Madhya Bharat. A subordinate officer, such as the Chief Secretary, can act for and in the name of the Rajpramukh only when he is authorised by rules made under the Regulations Ordinance, and the fact of such authorization has to be proved.

When the Regulations Ordinance has lapsed by expiry of time under S. 1 (4) of that Ordinance, an order made by the Chief Secretary after such expiry and when the Ordinance is no longer in force, it is not a legal order, as that officer has no longer any authority to act for and in the name of the Rajpramukh. 3 A.I.Cr.D. 407=A.I.R. 1950 M.B. 34=51 Cr.L.J. 902.

MADHYA BHARAT HIGH COURT OF JUDICATURE ACT (8 OF 1949).

——Ss. 25 and 2 (b)—S. 25 if retrospective in operation.

There is no express in the Madhya Bharat High Court of Judicature Act which makes S. 25 of the Act retrospective so as to apply to judgment, decrees, orders and sentences final at the date of the coming into force of the Act and there is nothing in the wording of S. 2 (*b*) and S. 25 of the Act which compels the Court to hold that they were intended to have such retrospective effect. A.I.R. 1950 M.B. 112 (F.B.).

——S. 25, Cl. (2)—Appeal from conviction under S. 385 of the Gwalior Penal Code.

No appeal lies to the Full Bench from a conviction under S. 385 of the Gwalior Penal Code. 4 A.I. Cr.D. 624=51 Cr. L. J. 1265=A.I.R. 1950 M.B. 76=(F.B.).

——S. 32 (2)—Scope of.

The wordings of S. 32 (2) of the Madhya Bharat High Court of Judicature Act (Samvat, 2005) limit the powers and jurisdiction of the High Court within the four corners of S. 435, Criminal Procedure Code and S. 115, Civil Procedure Code. It denies to the High Court jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. A.I.R. 1950 M.B. 28=4 A.I. Cr.D. 195=51 Cr.L.J. 813.

MADHYA BHARAT HIGH COURT ORDINANCE (2 OF 1948).

——S. 24—"Suit"—If includes execution proceedings.

The word "suit" in S. 24, Madhya Bharat High Court Ordinance, 1948, includes execution proceedings, which are in continuation of a suit in which the decree is made. "Appeals arising out of a suit" therefore include appeals from orders in execution proceedings. A.I.R. 1950 M.B. 12=1949 Mar. L.R. 130.

MADHYA BHARAT INSTRUMENT OF ACCESSION.

——Art. 3—Scope and effect of—Authority of Governor-General to make Ordinance for Madhya Bharat State—Influx from West Pakistan Control Ordinance, 1948—Validity of, in Madhya Bharat.

See INFLUX FROM WEST PAKISTAN ORDINANCE. 3 A.I.Cr.D. 413=A.I.R. 1950 M.B. 17.

MADHYA BHARAT MAINTENANCE OF PUBLIC ORDER ACT (7 OF 1949).

——Ss. 2 and 3—Duty of detaining authority—Order of detention when to be made.

What the detaining authority has to do before making an order of detention under S. 3 (1) of the Madhya Bharat Act VII of 1949, is that he should scrutinise the acts and the conduct of the person in question and judge, by applying his mind to the material placed before him whether the acts and conduct, as brought to his notice would have any of the effects stated in the definition of a "prejudicial act," and if he comes to the conclusion that public safety or public order would thereby be endangered, he should proceed to make the order of detention. 3 A.I.Cr.D. 556=A.I.R. 1950 M.B. 9.

——Ss. 3 and 5—Duty of detaining authority—Furnishing of grounds and particulars—Mode of and time for—Delay in furnishing and changing of grounds—Inference.

The grounds and particulars in respect of an order of detention under S. 3 of the Maintenance of Public Order Act, must be supplied to the detenu within a reasonable time. They must not be vague, indefinite or incomplete, but must convey sufficient information to the detenu to enable him to make a representation. Unwarranted delay in furnishing the grounds negatives *bona fide* on the part of the detaining authority. The grounds and additional particulars have to be furnished not in instalments, but at one time soon after the order is made. The detaining authority cannot also go on shifting and changing the grounds as it suits his convenience; that would show *mala fides* on his part. 1949 All. 148 (F.B.); 1948 Pat. 135 (F.B.), Foll. 1949 Oudh 20, rel on. 3 A.I.Cr.D. 425=A.I.R. 1950 M.B. 11.

——Ss. 3 and 5—Scope and object of—"Grounds" and "particulars"—Right of detenu to know—Extent—Discretion of detaining authority—Interference by High Court—Criminal Procedure Code, S. 491—"Illegally detained".

The object of communicating "the grounds on which the order of detention has been made" and "other particular," as laid down in S. 5 of the Madhya Bharat Maintenance of Public Order Act, is that the detenu might, if he so wishes, make a representation against his detention to the detaining authority. He may explain, deny and offer to disprove the facts alleged to exist against him and which have been relied on by the authority to make the order of detention. These facts (except when they cannot be disclosed in the public interst) have to be communicated to the detenu. The detenu is entitled to know so much as will enable him to identify the facts which have affected the judgment of the detaining authority against him. The facts against the detenu consist of and have been split up into two heads namely "grounds" and "particulars". The grounds (the main facts which tell against the detenu) have all to be furnished, but not so in the case of the particulars. Since the detenu is not on his trial, he is not entitled to know every little detail attaching to the leading facts supposed to exist against him. Discretion is vested in the detaining authority by the law as to what particulars out of the many shall be communicated to the detenu; but the law expects the detaining authority to act in the course of law. Though under S. 5, the detaining authority can select the particulars to be communicated to the detenu, he cannot under the guise of exercising the discretion vested in him by law, take away the advantage given to the person detained without trial by law. There is a line of reasonable minimum which the detaining authority cannot cross, and if he does the High Court is bound by law to intervene and declare that the law has been evaded and that the detention therefore is illegal, if proceedings are taken under S. 491, Criminal Procedure Code, in the same way as the High Court will interfere under S. 3. if the "satisfaction" of the detaining authority is to be a sham one, though the satisfaction is the satisfaction of the detaining authority and not that of the Court. 3 A.I.Cr.D. 714=A.I.R. 1950 M.B. 26=51 Cr. L.J. 797.

——S. 5—Scope—Compliance with—Particulars—Statement that detenu was member of a party and a Sabha declared illegal and secretly participated in activity—Sufficiency—Statement as to speech at meeting held on specified day and at named place.

That the detenu was a member of the communist party and a Sabha which have been declared illegal bodies, and that he had been secretly participating in their activities, without more is not a sufficient compliance with S. 5 of the Maintenance of Public Order Act, 1949. Particulars of the participation in and of the activities are also required to be furnished under S. 5 in order to enable the detenu to make a reperesentation. But a statement that the detenu, on a specified date, at a meeting of a specified federation, held at a named place, open to the public, made a spirited speech promoting feelings of class hatred and exhorting the labourers to go on strike and to use violence is a sufficient and substantial compliance with the requirements of S. 5, and would be sufficient to enable the detenu to make the representation which he is entitled to make under the law, though the words used by the detenu in his speech are not reproduced. 3 A.I.Cr.D. 714=A.I.R. 1950 M.B. 26=51 Cr.L.J. 797.

——S. 5—Grounds of detention—Object in furnishing—Nature of requirements in regard to such grounds.

The object of S. 5 of the Madhya Bharat Maintenance of Public Order Act which requires that the grounds of detention should be communicated to the detenu is to enable him to make a representation to the prescribed authority against the order and move it to revoke the order, under S. 4 of the Act. To achieve this object, the grounds should be intelligible and for that it has to be specific, that is to say, they must refer to specific acts believed by the detaining authority to have been done by the person detained and which that authority relied on to make the order of detention against him. 4 A.I.Cr.D. 75=A.I.R. 1950 M.B. 118.

——S. 5—Grounds of detention—Vague generalizations—Sufficiency.

. Merely saying that persons detained were active members of the communist party is vague. Their activity as members of that party should be specified. Statements that they had hired a house for collecting communists and for secretly conspiring and that thay are members of a body which has been declared unlawful are mere generalisations which are too vague and hence insufficient to justify the order. A.I.R. 1950 M.B. 118=4 A.I.Cr.D. 75.

——S. 5—Object of communication of grounds of detention—Grounds to be necessarily intelligible.

The grounds for making the order of detention are required by S. 5 of the Maintenance of Public Order Act to be communicated to the person detained so that he may be able to make a representation to the authority detaining him against the order and move it is revoke the order. To achieve this object the grounds should be intelligible and they will be only so if they are specific, that is so to say, they must refer to specific acts believed by the detaining authority to have been done by the person detained which had induced the authority to make the order of detention. 4 A.I.Cr.D. 75=A.I.R. 1950 M.B. 118.

——S. 5—Grounds—What constitute—Mere generalisations—Sufficiency.

The grounds on which an order of detention under S. 3 (2) of the Maintenance of Public Order Act is made and which are to be communicated to the detenu under S. 5 of the Act, should not be mere generalisations. They must be the acts or conduct of the detenu for which he can be held responsible as affecting the public peace. 3 A.I.Cr.D. 556=A.I.R. 1950 M.B. 9.

MADHYA BHARAT MAINTENANCE OF PUBLIC ORDER ORDINANCE (5 OF 1948).

——S. 3 (1)—Order of detention signed by Chief Secretary to Government—Legality.

The Rajpramukh is, so far as the exercise of executive authority is concerned, the Government of the United State of Madhya Bharat. Hence if an order purporting to be made under sub-S. (1) of S. 3 of the Maintenance of Public Order Ordinance is not made out in the name of the Rajpramukh it cannot be deemed to be made by the Government of the State. When such an order is made by the Chief Secretary to Government of the State it is not a valid order with the result that the detention under it would also be illegal. A.I.R. 1950 M.B. 34=51 Cr.L.J. 902=3 A.I.Cr.D. 407.

MADHYA BHARAT ORDINANCES (1 AND 2 OF 1948).

——Scope and effect—Decision of Full Bench of Indore High Court before merger into Union—Binding authority on High Court of Madhya Bharat—Precedents—Stare decisis.

Madhya Bharat Ordinances Nos. I and II clearly show that the authority promulgating those Ordinances intended to maintain the *status quo* as regards the laws obtaining in the covenanting States of Indore, Gwalior and Malwa. Judicial decisions of the High Courts of those States have the force of law and must be treated on that basis, and should be followed until they are modified by competent authority. It therefore follows that the decisions of the Indore High Court (or of the High Courts of any other covenanting State) given before the merger of those States, being Courts of co-ordinate jurisdiction, should be held to be binding authorities in the same manner as though they were decisions of the M.B. High Courts. Such decisions must therefore be followed by all subordinate Courts in the Madhya Bharat Union in respect of matters decided therein. It is not open to a single Judge of the M.B. High Court or to a Division Bench to dissent from a Full Bench decision of the Indore High Court (or the High Court of any other covenanting State) given before the merger, merely because they are inclined to take a different view. A.I.R. 1950 M.B. 31 (F.B.).

MADHYA BHARAT REGULATION ACT (1 OF 1948).

——Retrospective effect given by—Validity.

The Madhya Bharat Interim Legislature had sovereign power without any restriction to make laws and to give effect to them retrospectively in clear words. Hence the Madhya Bharat Regulation Act I of 1948 giving retrospective effect to that Act is valid and would come into force on the day from which it is given retrospective operation though the Rajpramukh might have given his assent some time later. A.I.R. 1950 M.B. 23=51 Cr.L.J. 742=3 A.I.Cr.D. 655.

MADRAS ACTS, ETC.

Abkari Act (I of 1886).
Abkari (Amendment) Act I of 1915.
Administration of Estate Regulation (3 of 1802).
Agency Tracts interest and Land Transfer Act (I of 1917).
Agriculturists' Relief Act (4 of 1938).
Board of Revenue Act (I of 1894).
Board of Revenue Regulation (I of 1803).

Board of Revenue Standing Orders.
Borstal Schools Act (5 of 1896).
Borstal Schools Act (5 of 1926).
Boundary Marks Act (28 of 1860).
Building (Lease and Rent Control) Act (15 of 1946).
Canal and Public Ferries Act (II of 1890).
Children Act (4 of 1920).
City Civil Courts Act (7 of 1892).
Civil Courts Act (3 of 1873).
City Municipal Act (5 of 1878).
City Municipal Act (1 of 1884).
City Municipal Act (3 of 1904).
City Municipal Act (4 of 1919).
City Police Act (III of 1888).
City Tenants Protection Act (3 of 1922).
Civil Courts Act (3 of 1873).
Civil Rules of Practice—
Coffee Stealing Prevention Act (8 of 1878).
Commercial Crops Markets Act (20 of 1933).
Compensation for Tenants Improvements Act (1 of 1900).
Compulsory Labour Act (I of 1858).
Co-operative Societies Act (6 of 1932).
Cotton Cloth and Apparel (Exports) Control Order 1946.
Court Fees Act (Amendment Act) (5 of 1922).
See COURT FEES ACT (7 OF 1870).
Court of Wards Act (1 of 1902).
Court of Wards Regulation (Mad. Reg. 5 of 1804).
Criminal Rules of Practice.
Darkhast Rules.
Debt Conciliation Act (2 of 1936).
Debtors Protection Act (7 of 1935).
Devadasis (Prevention of Dedication) Act (31 of 1947).
District Municipalities Act (4 of 1884).
District Municipalities Act (1 of 1920).
District Municipalities and Local Boards Amendments Act (II of 1922).
Educational Rules (1918).
Election Rules.
Election Enquiry Rules.
Electoral Rules.
Elementary Education Act (8 of 1920).
Endowments and Escheats Regulation (7 of 1917).
Essential Articles Restricted Acquisition Order (1943).
Estates Land Act (1 of 1908).
Estates Land (Amendment Act) (18 of 1936).
Estates Land (Amendment Act) (II of 1945).
Excise Manual Rules under
(*See* MADRAS ABKARI) ACT (I of 1886).
Firewood Rationing Order (1945).
Food Grains Control Order (1942).
Forest Act (5 of 1882).
Gambling Act (3 of 1930).
General Clauses Act (I of 1891).
General Sales Tax Act (9 of 1939).
Hereditary Offices Regulation (6 of 1831).
Hereditary Village Offices Act (3 of 1895).
High Court Rules.
Hill Municipalities Act (II of 1907).
Hindu (Bigamy Prevention and Divorce Act (6 of 1949).
Hindu Religious Endowments Act (I of 1925).
Hindu Religious Endowments Act (II of 1927).
Hindu Transfers and Bequests Act (II of 1914).
Hindu Transfers and Bequests (City of Madras) Act (Imp. Act 8 of 1921).
See—HINDU TRANSFERS AND BEQUESTS (CITY OF MADRAS) (8 OF 1921).
House Rent Control Order (1941).
House Rent Control Order (1945).
House Rent Control Act.
(*See* MADRAS BUILDINGS LEASE AND RENT CONTROL ACT (15 OF 1946).
Impartible Estates Act (II of 1904).
Inam Rules (1859).
Inams Act (8 of 1869).
Industrial Disputes (Madras Amendment) Act (12 of 1949).
See—INDUSTRIAL DISPUTES MADRAS AMENDMENT ACT (12 OF 1949).
Irrigation Cess Act (7 of 1865).
Kerosene Control Order (1945).
Land Encroachment Act (3 of 1905).
Land Improvement Loans Act (19 of 1883).
Land Registration Regulation (26 of 1802).
Land Revenue Assessment Act (I of 1876).
Local Authorities Entertainments Tax Act 1926 (5 of 1927).
Local Boards Act (5 of 1884).
Local Boards Act (14 of 1920).
Maintenance of Public Order Act (I of 1947).
Maintenance of Public Order Act (23 of 1949).
Maintenance of Public Order Ordinance (I of 1947).
Maintenance of Public Order (Amendment Ordinance) (II of 1948).
Maintenance of Public Order (Removal of Doubts and Amendment) Ordinance (I of 1949).
Maintenance of Public Order Ordinance (4 of 1949).
Malabar Compensation for Tenants Improvements Act.
See—MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT.
Malabar Tenancy Act (14 of 1930).
See—MALABAR TENANCY ACT (XIV OF 1930).
Marumakkathayam Act (22 of 1933).
Medical Registration Act (4 of 1914).
Money Lenders Act (4 of 1939).
Moppilla Marumakkathayam Act (17 of 1939).
Motor Vehicle Act (11 of 1890).
Motor Vehicle Act (I of 1907).
Motor Vehicle Taxation Act (3 of 1931).
Nambudri Act (21 of 1933).
Non Residential Rent Control Orders (1942).
Pawn Brokers Act (23 of 1943).
Permanent Settlement Regulation (25 of 1802).
Places of Public Resort Act (II of 1888).
Plague Regulation.
Planter's Labour Act (I of 1903).
Preservation of Private Forests Act (18 of 1946).
Presidency Small Cause Court Rules.
See—PRESIDENCY TOWN INSOLVENCY ACT (1908) S. 12.
Prevention of Adulteration Act (3 of 1918).
Probation of Offenders Act (3 of 1937).
Prohibition Act (10 of 1937).
Proprietary Estates Village Service Act (II of 1894).
Public Health Act (7 of 1939).
Railway Protection Act (4 of 1886).
Rationing Order (1943).
Regulation 31 of 1802.
See—MADRAS TITLES TO NONBADSHAHI LANDS REGULATION (31 OF 1802).

Regulation I of 1816.
Removal of Civil Disabilities Act (21 of 1938).
Rent Recovery Act (8 of 1865).
Restoration of Village Officers (Validation Act) (18 of 1939).
Revenue Boards Standing Order.
Revenue Recovery Act (2 of 1864).
Revenue Sammond Act (3 of 1869).
Rice Mills Licensing Order (1943).
Rivers Conservancy Act (6 of 1884).
Road Traffic Rules.

(*See*—**MADRAS TRAFFIC RULES**).

Sale of Minor's Estates Regulation (10 of 1831).
Salt Act (4 of 1889).
Settlement Notification (1910).
Small Cause Courts Rules.
Stamp Amendment Act (6 of 1922).
State Prisoners Regulation (II of 1819).
Subordinate Collectors and Revenue Malversation (Amendment) Regulation (7 of 1829).
Suppression of Immoral Traffic Act (5 of 1930).
Supreme Court Charter of (1800).
Surveys and Boundaries Act (4 of 1897).
Survey and Boundaries Act (8 of 1923).
Tanjore Police Regulation (1 of 1816).
Temple Entry Authorisation Act (5 of 1947).
Temple Entry Authorisation and Indemnity Act (22 of 1939).
Tenants and Ryots Protection Act (27 of 1946).
Titles to Nonbadshahi Lands Regulation (31 of 1802).
Town Nuisances Act (3 of 1889).
Town Planning Act (7 of 1920).
Traffic Rules.
Village Courts Act (I of 1889).
Village Panchayat Act (15 of 1920).
Village Police Regulation (11 of 1816).
Water Cess Act (7 of 1865).

See—**MADRAS IRRIGATION CESS ACT (7 of 1865).**

Yarn Dealers Control Order (1943).
Zila Court Chingleput Regulation (6 of 1803).

MADRAS ACTS.

——**XXIV of 1859**—*See* DISTRICT POLICE ACT.
——**II of 1864**—*See* REVENUE RECOVERY ACT.
——**VII of 1865**—*See* WATER CESS ACT.
——**VIII of 1865**—*See* RENT RECOVERY ACT.
——**III of 1869**—*See* REVENUE OFFICERS SUMMONS ACT.
——**III of 1873**—*See* CIVIL COURTS ACT.
——**I of 1876**—*See* LAND REVENUE ASSESSMENT ACT.
——**V of 1882**—*See* FOREST ACT.
——**I of 1884**—*See* CITY MUNICIPALITY ACT.
——**IV of 1884**—*See* DISTRICT MUNICIPALITIES ACT.
——**V of 1884**—*See* LOCAL BOARDS ACT.
——**I of 1886**—*See* ABKARI ACT.
——**I of 1887**—*See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT.
——**III of 1888**—*See* CITY POLICE ACT.
——**I of 1889**—*See* VILLAGE COURTS ACT.
——**IV of 1889**—*See* SALT ACT.
——**I of 1891**—*See* GENERAL CLAUSES ACT.
——**XIX of 1893**—*See* LAND IMPROVEMENT LOANS ACT.
——**II of 1894**—*See* HEREDITARY VILLAGE OFFICERS ACT.
——**III of 1895**—*See* HEREDITARY VILLAGE OFFICERS ACT.
——**I of 1902**—*See* COURT OF WARDS ACT.
——**III of 1904**—*See* CITY MUNICIPAL ACT.
——**I of 1908**—*See* ESTATES LAND ACT.

MADRAS ABKARI ACT (I of 1886).

——Complaint—Procedure.

For complaints under the Abkari Act or under the Opium Act (I of 1878), the ordinary Criminal Procedure Code, is not applicable, but the procedure contained in those Acts is to be strictly followed; and as complaints by private persons are not provided for by the procedure in those Acts, they must be treated as not properly instituted. 119 Ind. Cas. 174=2 M.Cr. C. 168=52 Mad. 613=30 M.L.W. 112=1929 M.W.N. 507=30 Cr.L.J. 1011=1929 Cr. C. 78=A.I.R. 1929 Mad. 604=57 M.L.J. 214.

——Abkari Act and Opium Act.

There is no essential difference between the procedure under the Abkari Act and the Opium Act. 119 Ind. Cas. 174=52 Mad. 613=2 M.Cr.C. 168=30 M.L.W. 112=1929 M.W.N. 507=30 Cr.L.J. 1011=1929 Cr.C. 78=A.I.R. 1929 Mad. 604=57 M.L.J. 214.

——Offences both under Abkari Act and Penal Code.

Where the accused has committed in addition to an offence under the Abkari Act a non-cognizable offence, under the Penal Code, the Police Officer would probably be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, S. 55 of the Abkari Act, and in following the provisions of that Act, so far as it can be done, rather than of the Criminal Procedure Code and, if he can follow the provisions of both by ensuring that the accused should appear before the Magistrate it is obviously his duty to do so. The same procedure would be the proper procedure for a Police Officer to adopt when he is confronted with an offender whose offences are both under S. 55 of the Abkari Act and a cognizable offence under the Indian Penal Code. 90 Ind. Cas. 436=22 M.L.W. 98=1925 M.W.N. 396=26 Cr.L.J. 1556=A.I.R. 1925 Mad. 856=48 M.L.J. 605.

——Possession—Meaning of.

In the absence of any indication to the contrary in the Abkari Act, the word "possession" has its ordinary meaning. 100 Ind. Cas. 355=50 Mad. 745=25 M.L.W. 277=38 M.L.T. 116=1927 M.W.N. 158=28 Cr.L.J. 275=A.I.R. 1927 Mad. 413=52 M.L.J. 226.

——Seizure or detention of liquor—By whom.

Private individual has no authority to seize or detain liquor which he believes to be liable for confiscation under the Act. Only Officers of a certain rank of the Revenue, Police and Abkari Departments are empowered to enter places where liquor is illegally sold or stored. 82 Ind. Cas. 149=20 M.L.W. 239=25 Cr.L.J. 1221=A.I.R. 1924 Mad. 816.

——Operation.

Madras Prohibition Act (IX of 1937), S. 4 (1) (*a*) is completely *ultra vires* the Provincial Legislature in so far as it relates to dangerous drugs—Madras Abkari Acts and rules made thereunder remain in force in relation to dangerous drugs. A.I.R. 1941 Mad. 533=54 L.W. 17=(1941) 2 M.L.J. 41=42 Cr.L.J. 793=I.L.R. (1941) Mad. 687=1941 M.W.N. 525=196 Ind. Cas. 23 (F.B.).

——S. 3 (1)—Abkari—If includes ganja.

The term "Abkari" in the Act includes ganja, 34 Ind. Cas. 927 (Mad.).

——S. 3—Burden of proof.

S. 3 (17-A)—Existence o stray *ganja* plantst—The burden lies on the prosecution to prove cultivation. (1932) 1932 M.W.N. 70.

——S. 12—Lease to unlicensed person.

The Abkari Act does not make a lease for tapping to an unlicensed person illegal. 61 Ind. Cas. 537=14 M.L.W. 226=A.I.R. 1921 Mad. 455.

——S. 13—Partnership—Legality.

A bidder at auction of *toddy* shop entering into partnership agreement with *R* after date of auction but before issue of license :

Held, that by the constitution of this partnership, there was transfer to *R* of the privilege of selling *toddy* and such an agreement being illegal could not be enforced. A.I.R. 1941 Mad. 64=(1940 M.W.N. 958=52 L.W. 530=(1940) 2 M.L.J. 694=193 Ind. Cas. 827.

——S. 13—Partnership of unlicensed person with a licensed one.

S. 13 does not prohibit a person having no license from holding an interest in the manufacture or vend of liquor jointly with a licensed manufacturer or vendor. 20 M.L.J. 337=7 M.L.T. 176=1910 M.W.N. 549=5 Ind. Cas. 456.

——S. 13—Partnership with licensee—Legality—Abkari Rules—R. 27—Notification No. 58, dated 4-2-1890 and 29-9-1896.

Though transfer of an abkari license is illegal, to accept a partner in the license is not. R. 27 is *ultra vires* of the Notification No. 58. 6 M.L.T. 345=3 Ind. Cas. 951.

——S. 13—Partnership which is illegal under the Act—Person carrying on Abkari business as principal should be licensed.

A was licensed to sell toddy and *B* arrack. It was illegal for a person licensed to sell toddy to sell arrack and *vice versa*. *A* and *B* entered into a partnership to sell toddy and arrack.

Held, that the agreement was illegal, as the rule was not one merely to protect revenue, but to regulate the liquor traffic in the interests of the public, and so the agreement was void, being opposed to public policy. Under the Abkari Act, every one carrying on abkari business as a principal should be licensed. So such a business cannot be carried on by a partner who does not hold such a license. (1901) 24 M. 401.

——Ss. 15 and 55—Agreement to take toddy shop in the name of one for the benefit of another—Legality. *See* CONTRACT ACT, S. 65. (1948) 2 M.L.J. 198 =A.I.R. 1949 Mad. 252.

——S. 15—Agreement with licensee—Sale of liquor on latter's premises—Legality.

An agreement by a person to sell liquor on the premises of an abkari licensee without himself taking out a license is illegal, and cannot be enforced in any suit. (1912) M.W.N. 444=14 Ind. Cas. 148.

——Ss. 15, 55, and 56 and R. 27—Partnership for doing arrack business on a licence granted to or to be obtained by only one of the partners—Legality—Suit for balance due on settlement of accounts of such partnership—Sustainability.

A partnership entered into for the purpose of conducting a business in arrack or toddy on a licence granted or to be granted to only one of the partners is void *ab initio*, whether the contract was entered into before the licence was granted or afterwards, in that it either involves a transfer of the licence, which is prohibited under R. 27 and punishable under S. 56, or a breach of S. 15 of the Abkari Act, punishable under S. 55, because the unlicensed partner by himself or through his agent, the other partner sells without a licence. If a partnership is lawful at its inception, because it is not intended to infringe any provision of the Contract Act, it nevertheless becomes unlawful when it intends to conduct the business jointly on a license granted to one only of the partners.

If the licensee holds his licence for the partnership or by an act of volition shares his licence with his partner, then there is a transfer which offends R. 27. If it be found that the licensee does not hold the licence for the partnership, because it is illegal for him to do so, or because for any other reason the non-licensed partner does not purport to sell, by himself or through his partner, under his partner's licence, then there is no transfer ; but the non-licensed partner would then commit a breach of S. 15 of the Act. In either case a punishable offence would be committed ; and a partnership formed that would lead to a breach of these provisions would be illegal, either because an offence would necessarily be committed or because it would be against the general public policy underlying the enactment that only approved persons, specifically licensed, should be allowed to sell liquor. (Case-law discussed).

Accordingly a partner in a partnership entered into for the purpose of vending arrack cannot file a suit for the balance due on settlement of accounts when only one of the partners has obtained a licence under the Abkari Act for the vending of arrack. I.L.R. (1950) Mad. 987=A.I.R. 1950 Mad. 444=63 L.W. 234=1950 M.W.N. 187=(1950) 1 M.L.J. 315.

——S. 15—Partnership.

It is not illegal for persons to enter into a partnership for the purpose of carrying on a toddy shop business, for which they hope at a future date to obtain a licence. 114 Ind. Cas. 655=A.I.R. 1928 Mad. 1197.

——S. 22—Rights of licensee—Assignment of license.

The terms of the license given to the vendor determine his privileges. None else but the licensee can do the business where a term is that the license should not be asigned without the consent of the Collector. 25 Ind. Cas. 42 (Mad.).

——S. 24—Madras Excise Manual, r. 27—Abkari license—Partnership.

Every contract of partnership is not necessarily a transfer, though such a contract may, in many cases, involve a transfer.

The defendant executed a promissory note to the plaintiff on August 27, 1930, and on the same date, the plaintiff, the defendant and three others entered into a partnership. It was agreed that the plaintiff, on behalf of the partnership, was to bid for the right to sell *toddy* and obtain a license in his name. The plaintiff became the successful bidder and obtained a license in his name on September 23, 1930. In a suit on the promissory note :

Held, (*i*) that the promissory note was not illegal inasmuch as the partnership did not amount to any transfer of the privilege of supply or vend which is prohibited by r. 27 of the Madras Excise Manual ;

(*ii*) that the partnership was not opposed to public policy ;

(*iii*) that the suit was maintainable even though the plaintiff had not prayed for the dissolution of

the partnership. (1935) M.W.N. 935=A.I.R. 1935 Mad. 895=42 L.W. 840=69 M.L.J. 490=158 Ind. Cas. 1055.

——S. 24—Abkari license—Clauses 27, 37—Partnership to carry on abkari business standing in another's name—Sanction of Collector not obtained—Suit to recover money advanced to licensee—Maintainability—Legality of partnership.

The effect of cl. 27 of the General Sales Notification issued under the Madras Abkari Act is that a partnership in an *abkari* business is prohibited unless the previous permission of the Collector has been obtained.

The first defendant successfully bid a *toddy* shop at an auction on July 30, 1927, and the license was issued in his name on October 1, 1927. Meanwhile, on August 17, 1927, the plaintiff advanced a sum of money to the first defendant on a promissory note under an agreement to work as partners. No application was ever made for the issue of the license in the name of the partners nor was the permission of the Collector obtained :

Held, that the object with which the money was lent being for the purpose of carrying on a business in contravention of the law and opposed to public policy, the plaintiff was not entitled to recover on the note. (1935) M.W.N. 343=41 L.W. 521=68 M.L.J. 570=A.I.R. 1935 Mad. 440=58 M. 727=155 Ind. Cas. 544 (F.B.).

——S. 24 (c)—Contract to sublet without sanction as required by statute—Suit upon contract tract *See* CONTRACT ACT S. 23. 26 M. 430=13 M.L.J. 133.

——S. 28—Sale for arrears of Abkari revenue—Effect of incumbrances—Limitation Act.

A sale under S. 28 of 1886, for arrears of abkari revenue does not pass to the purchaser of the property free from incumbrances. The change in the wording of S. 28 as compared with the words of the corresponding section in Act II of 1864, S. 10, does not effect any change in the law. 7 M. 434, 25 M. 572 and 26 M. 230. Foll. A suit to enforce the right of the incumbrance is not governed by Art. 12 of the Limitation Act. (1905) 28 M. 420.

——S. 29—Rules under, R. 27, and Ss. 55 and 15.

For purposes of carrying on *toddy* shops, *A* and *B* entering into partnership—This fact disclosed to revenue authorities concerned—*A* bidding at auction sale, and temporary license issued to *A* alone—Conditions for issue of permanent license to partnership, as required by revenue authorities not complied with—On May 18, 1938, revenue authorities refusing to recognise partnership between *A* and *B* and deciding to issue license to *A* alone—Partnership held legal only up to May 18, 1938. (1944) 1 M.L.J. 97=1944 M.W.N. 87=I.L.R. (1944) Mad. 697=A.I.R. 1944 Mad. 295.

——S. 29—Rules under, General Sales Notification, r. 27.

X entering into partnership with *Y*, after bidding for shop at auction, but before the issue of license to him *i.e.*, *X*—*Y* and *X* agreeing to become joint owners, share profit and loss—Partnership, held illegal being opposed to r. 27. (1940) M.W.N. 516=A.I.R. 1940 Mad. 705.

——S. 29—Rules under, r. 27—Partnership for toddy business formed before grant of license—Legality.

Where, before a license for sale of *toddy* was issued seven persons agreed to run *toddy* shops by contributing capital therefor, and financing the licensee under an arrangement that all the seven persons should divide the profit derived equally between themselves.

Held, that the partnership did not infringe the provisions of r. 27 of the Abkari Rules as there was no transfer of the license in such a case. (1936) M.W.N. 397=70 M.L.J. 691=A.I.R. 1936 Mad. 557=44 L.W. 271=162 Ind. Cas. 266.

——S. 29 (n)—Confiscated property—Power of Court—Criminal Procedure Code, S. 517.

The powers conferred by S. 29 (*n*) of the Abkari Act include the power to direct that the confiscated article may be destroyed or sold, as also to give directions as to the mode of the sale. Such an order purporting to have been made under S. 517, Criminal Procedure Code, is unsustainable. 19 M.L.J. 254=5 M.L.T. 256=9 Cr.L.J. 149=1 Ind. Cas. 79.

——S. 30—Police Report to Magistrate.

There is nothing to prevent the Police from reporting to the Magistrates any offences under the Act which have come to their notice while executing warrants issued under S. 30 of the Act, 1936 M.W.N. 495.

—S. 30—Arrest.

Though an officer armed with his own report can arrest a person under S. 31 an officer armed with a search warrant from the Collector under S. 30 is not authorized under that or any other section to arrest. A.I.R. 1930 Mad. 448.

——S. 31—'As the case may be,' interpretation.

The phrase 'as the case may be' in S. 31 can possibly be interpreted to mean that the Legislature intended Abkari Officers making arrests to take bail for appearance before the Abkari Inspector, and Police Officers to take bail for appearance before a Magistrate. (1936) 1936 M.W.N. 495.

——S. 31—Procedure.

An offender arrested under S. 31 may be bailed to appear before either a Magistrate or an Abkari Inspector, while one arrested under S. 34 can be sent only before an Abkari Officer. If the offender is sent under either section before an Abkari Officer, there is an enquiry under S. 40 (3) and the offender is sent under S. 50 with a report to the Magistrate for trial. But there is nothing in the Act to indicate what is the procedure to be followed when the offender is sent under S. 31 direct to a Magistrate. 90 Ind. Cas. 436 22 M.L.W. 98=1925 M.W.N. 396=26 Cr.L.J. 1556=A.I.R. 1925 Mad. 856=48 M.L.J. 605.

——S. 34—Officer not authorized to make arrest—Question of Guilt of accused. *See* CRIMINAL PROCEDURE CODE, S. 190. 26 M. 124.

——S. 34—Scope—Words "open place"—Meaning of—Yard attached to house is not an open place.

Section 34 cannot be read as if it said simply that an arrest could be made without warrant anywhere except in a dwelling house. An arrest without warrant cannot be made under S. 34 of the Mad. Abkari Act in a dwelling house ; but it may be made in any other place, and 'place' includes a house, building, shop or vessel, provided that the place is open. The difficulty in each case will be to decide if the place is not a dwelling house, whether it is "open". "Open place" used in this section includes an open shop,

building, or house other than a dwelling house. The yard attached to the house entirely surrounded by fairly high walls, accessible only through a door and not 'open" to the public is not an open place. 58 L.W. 142=(1945) 1 M.L.J. 334=1945 M.W.N. 186=A.I.R. 1945 Mad. 409=47 Cr.L.J. 220=221 Ind. Cas. 615.

——Ss. 55 and 64—Accused found in possession of wash—Presumption.

Where the accused was found in possession of wash, the presumption set out in S. 64 operates and the accused is presumed to have committed an offence punishable under S. 55 of the Madras Abkari Act of 1886. (1938) M.W.N. 592=39 Cr.L.J .659=(1938) 2 M.L.J. 43=48 L.W. 145 (1)=A.I.R. 1938 Mad. 784=175 Ind. Cas. 896.

——S. 55—Acquittal—Propriety.

Where the actual license was not produced and where the possession of *arrack* was of unauthorised strength, it was held that acquittal was not improper. 1934 M.W.N. 371.

——S. 55—Breach under.

A breach under S. 56 (*b*) is a breach distinct from those provided for in S. 55. Breaches under S. 56 are, from the fact that they do not entail liability to arrest, are of a less heinous kind than those under S. 55. Possession of an illicit quantity of arrack in breach of the license or permit or rule under the Act comes under S. 55 (*a*) and therefore does not come under S. 56 (*b*). 100 Ind. Cas. 355 = 50 Mad. 745=25 M.L.W. 277=38 M.L.T. 116=1927 M.W.N. 158=28 Cr.L.J. 275=A.I.R. 927 Mad. 413=52 M.L.J. 226.

——S. 55—Burden of proof.

The onus of accounting for possession of a *ganja* plant is not on the accused. It is the prosecution that must prove that he cultivated it. (1932) 1932 M.W.N. 70.

——S. 55 (g)—Evidence—Admissibility.

Excise Officers lying in wait early morning to detect illicit manufacture of wash—Accused detected—Confession by accused to Excise Officer—Charge under S. 55 (*g*)—Evidence of Excise Officers only :

Held, that the Magistrate should not have rejected the evidence of the Excise Officers especially when it was reinforced by confession of the accused as under the circumstances it could hardly be expected to procure disinterested witnesses. A.I.R. 1938 Mad. 460=47 L.W. 275=(1938) M.W.N. 95=39 Cr.L.J. 338=(1938) 1 M.L.J. 238=173 Ind. Cas. 448.

——S. 55 (a)—Interpretation.

License for medicated wines does not include unmedicated wines. (1935) 1935 M.W.N. 1224.

——S. 55 (g)—Interpretation—Materials for manufacturing liquor—'Wash' fit for distillation:

A liquid mixture known as 'wash' consisting of jaggery and babool bark and proved to be fit for distillation, form 'materials,' for manufacturing liquor within S. 55 (*g*). (1901) 24 M. 417.

——S. 55 (a)—Possession, what is—Coolies whether in possession.

Where coolies were engaged in the preparation of *ganja beedies* at the instance of their master, it was held that they could not be said to be in possession of *beedies* within the meaning of S. 55 (*a*) Abkari Act. 1937 M.W.N. 54.

——S. 55—Possession—Meaning of.

In S. 55 (*a*) the word 'possession' does not mean constructive possession but actual possession. It is only people who are actually in possession of contraband liquor without license that can be punished under the section. 71 Ind. Cas. 504=45 Mad. 842=16 M.L.W. 496=1922 M.W.N. 570=31 M.L.T. 310=24 Cr.L.J. 152=A.I.R. 1923 Mad. 50=43 M.L.J. 553.

——S. 55—Procedure—Applicability of Criminal Procedure Code.

The Abkari Act is not self-contained in the matter of the procedure for the investigation of offences under S. 55. In such a case the procedure to be followed is laid down in S. 5 (2) of the Criminal Procedure Code to be under that Code. 90 Ind. Cas. 436=22 M.L.W. 98=1925 M.W.N. 396=26 Cr.L.J. 1556=A.I.R. 1925 Mad. 856=48 M.L.J. 605.

——S. 55—Sale—When complete.

A sale is complete as soon as the price is paid or agreed to be paid for ascertained goods. It is not necessary for a completed sale that there should be an actual delivery of the thing sold. Therefore, taking the money and bringing the bottle of liquor out for the purpose of handing it over, constitutes offence under S. 55 (1) of the Abkari Act. 106 Ind. Cas. 716=51 Mad. 335=1 M.Cr.C. 5=29 Cr.L.J. 124=27 M.L.W. 84=A.I.R. 1928 Mad. 179=54 M.L.J. 712.

——S. 55 (b) and (g)—Separate Conviction—Legality.

It is harsh to punish for possession and again for bottling—Bottling is only a mode of possession. (1936) 1936 M.W.N. 495.

——S. 55 (b) and (g)—Unlawful manufacture of arrack—Separate conviction under S. 55 (b), (g) and s. 58, legality of.

The offence of manufacturing *arrack* includes, the offence of being in possession of the apparatus, etc., and there cannot, therefore, be separate convictions of an accused person under Cls. (*b*) and (*g*) of S. 55 of the Madras Abkari Act.

Again if a person unlawfully manufactures *arrack*. and is thus in unlawful possession of the manufactured *arrack*, he cannot be further convicted under S. 58 as the manufacture itself gives him possession. (1935) M.W.N. 946 (1)=42 L.W. 651=37 Cr.L.J. 2=69 M.L.J. 765=59 M. 90=A.I.R. 1936 Mad. 219=159 Ind. Cas. 40 (1).

——S. 55—Transporting—What amounts to.

Ordering servant to carry arrack to another place amounts to transporting. 1927 M.W.N. 212=38 M.L.T. 138=A.I.R. 1927 Mad. 470.

——S. 56—Constructive offence—Punishment for.

A constructive offence under S. 56 read with S. 64 is not punishable with imprisonment under the proviso to S. 64. 1927 M.W.N. 212=38 M.L.T. 138=A.I.R. 1921 Mad. 470.

——Ss. 56 and 64—Depot writer—Liability for offence.

Under S. 56 read with S. 64 a depot writer (not a licensee under the Act), if an actual offender is liable for an offence under the former section. 39 Mad. 895=17 Cr.L.J. 2=32 Ind. Cas. 130.

——S. 56—Partnership.

A partnership prior to taking license to trade in toddy is not illegal where there is no evidence that

business was not begun before taking license. 122 Ind. Cas. 342=A.I.R. 1930 Mad. 361.

——S. 56—Scope of.

This section applies to breaches not provided for in other sections. 100 Ind. Cas. 355=50 Mad. 745=25 M.L.W. 277=38 M.L.T. 116=1927 M.W.N. 158=28 Cr.L.J. 275=A.I.R. 1927 Mad. 413=52 M.L.J. 226.

——S. 57—Arrack—Possession of.

Where the strength of arrack is reduced owing to natural causes while the seals are intact, no offence is committed by possessing the *arrack*. 16 Cr.L.J. 606=30 Ind. Cas. 158 (Mad.).

——Ss. 58 and 55—The offence of manufacturing *arrack* includes the offence of being in possession of apparatus etc. and the accused cannot be convicted under clause (*b*) and (*g*) of S. 55 of the Act.

If a person unlawfully manufactures *arrack* and thus is in unlawful possession of the manufactured *arrack*, he cannot be further convicted under S. 58 as the manufacture itself gives him possession. (1935) M.W.N. 946 (1)=42 L.W. 651=37 Cr.L.J. 2=69 M.L.J. 763=59 M. 90=A.I.R. 1936 Mad. 219=159 Ind. Cas. 40 (1).

——S. 62—" Abkari officer "—Peon.

A peon is not an Abkari officer within the meaning of S. 62. (1908) 18 M.L.J. 455=4 M.L.T. 107.

——S. 64—Liability for acts of employee.

Liability of licensee for act committed by employee—Absence of knowledge or consent of licensee, whether exempts him from liability.

To convict the holder of a licence or permit under S. 64 of the Madras Abkari Act in respect of an offence committed by one of his servants, it is not necessary for the prosecution to prove that the actual offender committed the offence as the agent of the licensee and with his knowledge or approval, as for instance where a man arranges with his servants to commit the crime. The intention of s. 64 is to place a heavier responsibility for the act of his servant upon a licensee as such than lies upon an employer under the ordinary Criminal Law. (1934) M.W.N. 1142=40 L.W. 846=67 M.L.J. 876=A.I.R. 1935 Mad. 79=58 M. 346=154 Ind. Cas. 604.

——S. 64—Possession of wash—Presumption.

Where the accused was found in possession of wash, the presumption set out in S. 64 operates and the accused is presumed to have committed an offence under S. 55 of the Act. (1938) M.W.N. 592=39 Cr.L.J. 659=(1938) 2 M.L.J. 43=48 M.L.W. 145 (1)=A.I.R. 1938 Mad. 784=175 Ind. Cas. 896.

——S. 64—Transportation.

Persons transporting intoxicating drugs to shop not covered by license are guilty under S. 64 where their action was not *bona fide*. 111 Ind. Cas. 849=28 M.L.W. 511=1928 M.W.N. 788=1 M.Cr.C. 293=29 Cr.L.J. 929=A.I.R. 1928 Mad. 1130=55 M.L.J. 712.

——S. 66—Confiscation.

At the time of conviction, the material objects have to be confiscated. 1935 M.W.N. 1224.

——S. 69—Applicability.

When, under condition 10-B of the general conditions applicable to an Abkari License, the Collector notifies the time and hours of sale, it was held the notification is not invalid and that S. 69 has no application to such notification. 1934 M.W.N. 372.

MADRAS ABKARI (AMENDMENT) ACT (I OF 1915).

——Unauthorised Seizure.

Ordinance IX of 1914, Ss. 7 and 6—Seizure of rice not on payment or understanding of payment of compensation but to prevent its export to Godavari District is unauthorized under the Notification issued under S. 7 of the Ordinance. 13 M.L.W. 314=A.I.R. 1921 Mad. 569.

MADRAS ADMINISTRATION OF ESTATE REGULATION (III OF 1802).

——Extent of repeal.

All the sections of the regulation have been repealed except S. 16, Cls. 2 to 7. 85 Ind. Cas. 414=48 Mad. 716=21 M.L.W. 130=1925 M.W.N. 166=A.I.R. 1925 Mad. 240=47 M.L.J. 770.

——S. 16—Several Claimants.

When more than one claimant appears and claims property the Judge has no jurisdiction to give any decision acting under the Regulation. In such a case it is the duty of the Judge to refer the parties to a regular suit. 85 Ind. Cas. 414=48 Mad. 716=21 M.L.W. 130=1925 M.W.N. 166=A.I.R. 1925 Mad. 240=47 M.L J. 770.

——S. 16, Cl. (7)—Claim for property of an intestate—Order dismissing petition—Appeal.

No appeal lies against an order of a District Judge passed under S. 16, Cl. (7). (1900) 24 M. 95.

MADRAS AGENCY TRACTS INTEREST AND LAND TRANSFER ACT (I OF 1917).

——S. 4—Rules under the Act, R. 4—Order refusing ejectment—Second appeal—Order, whether 'decree.'

The provision contained in R. 4 of the Rules framed under the Madras Agency Tracts Interest and Land Transfer Act of 1917, that no second appeal lies from ejectment orders applies not only to orders of ejectment passed under S. 4 (2) of the Act, but also to orders refusing ejectment.

An application under S. 4 (1) of the said Act is not a suit and an order refusing ejectment is not a 'decree' within S. 2, Civil Procedure Code. 38 L.W. 397=A.I.R. 1933 Mad. 695=65 M.L.J. 383=(1933) M.W.N. 975=56 M. 984=145 Ind. Cas. 941.

——S. 5—Jurisdiction of Civil Court to try mortgage suit when mortgaged property is within its jurisdiction but one of the parties is member of hill tribe.

Section 5, Madras Agency Tracts Interest and Land Transfer Act indicates an intention that the personal liabilities of members of hill tribes resident within the Agency shall be decided only by the Agency Courts, but there is no clear indication that this section is intended to abrogate the ordinary powers of a Civil Court to deal with suits relating to immovable property situated within its jurisdiction merely because one party is a member of a hill tribe. A Civil Court has, therefore, jurisdiction to try a mortgage suit when the mortgaged property is within its jurisdiction, even though one of the parties to suit is a member of a hill tribe. A.I.R. 1940 Mad. 160=50 L.W. 893=(1939) M.W.N. 1195=(1940) 1 M.L.J. 177=188 Ind. Cas. 171.

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938).

Synopsis.

1. **Amending Act—Operation of.**
2. **Appropriation.**
3. **Benefit under—Availability.**

4. Construction.
5. Debt on negotiable instrument.
6. Act, if intra vires.
7. Procedure.
8. Restitution.
9. Right of Appeal.

1. Amending Act—Operation of.

——(As amended by Act XV of 1943)—Retrospective operation—Scope of.

The new Act has given the right of appeal retrospectively from October 27, 1939. This right of appeal could not take away the vested rights which had accrued as a consequence of the final order passed before October 27, 1939. A.I.R. 1945 Mad. 304=58 L.W. 216=(1945) 1 M L J. 480.

——Madras Agri. Relief Amending Act—Operation of.

The passing of the Amending Act, though it changes the law with retrospective effect, is not a sufficient ground for re-opening matters which have already been decided on the basis of the law as it stood before the amendment. A.I.R. 1944 Mad. 238=(1944) 1 M L.J. 15=57 L.W. 20 (1)=1944 M.W.N. 56.

2. Appropriation.

——Appropriation of payment—Rules as to—Payment in excess of interest due on date of payment—How to be appropriated.

To constitute appropriation within the meaning of the Madras Agriculturists' Relief Act there must be an overt act from which appropriation can be reasonably deduced or inferred. The mere payment of money towards a debt and the passing of a receipt acknowledging such a payment will take the matter no further.

A calculation of the amount of principal and interest due on the date on which an arrangement is made for the payment of the debt and a statement in deed of arrangement that a portion out of the amount to be raised in the manner indicated therein should be credited towards the debt is not sufficient to constitute appropriation.

Where sales are executed in discharge of mortgages, the national payment made under those documents can only be regarded as being or amounting to open payments.

In cases of payment in excess of interest due on the date of such payment, there is an-appropriation only as regards that excess and no appropriation at all of the balance which would be an open payment liable to be appropriated according to law. 1949 M.W.N. 499=62 L.W. 488=(1949) 2 M.L.J. 305.

——Appropriation—Money decree—Payment by judgment-debtor—Ordinary rule of appropriation first towards interest and then principal—Applicability—Principle not affected by provisions of the Act.

The principle of law which has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter any balance in respect of principal. This principle regarding the utilization of payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturists' Relief Act.

In part payment of a money decree a payment was made in September, 1937. It was not a certified payment nor was any part satisfaction recorded. In the receipt given by the decree-holder he acknowledge the payment as party payment in respect of the decree debt and agreed to exonerate the 3rd defendant alone from his liability in respect of the said decree. On the question whether the payment should be considered as an open payment which being unappropriated by the creditor before 1st October, 1937, shall be credited towards the principal sum owing and not to interest,

Held, that it must be inferred that the creditor had appropriated it towards interest. 61 L.W. 462=A.I.R. 1948 Mad. 434=1948 M.W.N. 505=(1948) 1 M L.J. 441.

3. Benefit under—Availability.

——Benefit of—Availability—Principal and surety—Scaling down of debt as against agriculturist principal debtor—Effect on liability of the surety who is not an agriculturist.

A non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisions of the Madras Agriculturist' Relief Act, but he will be liable only to the extent of the scaled down debt due by the principal debtor. (1941) 2 M L J. 751, overruled. Authorities discussed. I.L.R. (1951) Mad. 305=1950 M.W.N. 851=63 L.W. 1130=(1950) 2 M L J. 674=A.I.R. 1951 Mad. 48 (F.B.).

——Benefit under—Availability—Mortgage decree All mortgagors agriculturists—Decree scaled down as against those who applied but not as against the defendant who did not apply—Decree one and indivisible—Payments towards the decree by judgment-debtors against whom decree was scaled down—Difference between scaled down amount and payments made deposited by the defendant who had not applied for scaling down—Application by him for entering up satisfaction and release of hypotheca—If can be ordered.

In a suit by the mortgagee, the mortgage was held binding on all the defendants and while scaling down was not ordered with reference to the 1st defendant (though he was an agriculturists) as he made no application for scaling down of the decree when the Act came into force, scaling down was ordered so far as the other defendants were concerned, as they had made the necessary applications. In the decree passed there was no specification of the diferent interests in the hypotheca of the several defendants. Thereafter applications were made by the first defendant for amendment of the decree under S. 19 of the Madras Augriculturists' Relief Act. It was dismissed as also his application for permitting him to file an application to have the decree scaled down as against him also. A revised final decree was passed as no payment under the preliminary decree was made, 'that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold.' The other defendants made certain payments towards the decree, when it was put into execution. Then the first defendant deposited an amount equal to the difference between the amount of the scaled down decree against the other defendants and the payments made by them and prayed that the deposit should be accepted and full satisfaction entered up and the entire hypotheca released from the mortgage.

Held, (*i*) As the defendants other than the first defendant could, by payment of the scaled down amount, get the property freed from the burden of the mortgage on the principle of unity and indivisibility of the mortgage and by the terms of the decree, and as the decree-holder could sell the mortgage security only for the reduced amount, there was no reason for holding that further execution of the

mortgage decree could not be resisted by the first defendant by payment of what still remained due out of the amount to which the decree was scaled down.

(*ii*) As the decree was scaled down at the instance of all the mortgagors but one and in view of the restrictions imposed on the mortgagee's rights permitting him to proceed against the mortgage security only for the scaled down amount, there was no logic in refusing to allow the remaining judgment-debtor alone to deposit the balance due and thereby resist the execution of the mortgage decree for anything more than the scaled down amount.

(*iii*) The first defendant was also not precluded from claiming the relief by reason of anything which happened in the course of the execution proceedings. 1948 M.W.N. 393=A.I.R. 1949 Mad. 238=(1948) 2 M.L.J. 28.

——Benefit under—Availability—Non-agriculturist purchaser of hypotheca—If entitled to benefits of Act when mortgagor has ceased to be liable for debt.

A non-agriculturist purchaser of the hypotheca is not entitled to relief in respect of the mortgage-debt under Madras Act IV of 1938, when the agriculturist mortgagor is not at the time when the matter came before the Court a person liable to discharge the debt. Such a purchaser is not entitled to have the debt scaled down merely because the mortgagor was at the commencement of the Act an agriculturist entitled to the benefits of the Act, which benefits he has not claimed. 60 L.W. 583=1947 M.W.N. 542=A.I.R. 1948 Mad. 205=(1947) 2 M.L.J. 273.

——Benefit under—Availability.

Agreement to sell property in satisfaction of debt—Whether it amounts to discharge of debt depends on intention of parties—Creditor describing lands as his in leases obtained from tenants—Debtor in his letter also referring to them as of creditors—Agreement followed by delivery of possession, held amounted to conditional discharge of debts—And debtor, held not entitled to claim to scale down under Mad. Agri. Relief Act. 56 L.W. 679=1943 M.W.N. 718=(1943) 2 M.L.J. 584=A.I.R. 1944 Mad. 218=215 Ind. Cas. 310.

——Benefit under—Availability.

Interest on *kattubadi*—Plaintiff must show that interest was payable—Deposit under S. 15—No interest paid on *kattubadi*—Effect on scaling down.—When interest is due, that interest is to be included in the rent for the purpose of Act IV of 1938. (1942) 1 M.L.J. 385=A.I.R. 1942 Mad. 419=55 L.W. 185=1942 M.W.N. 244=202 Ind. Cas. 88.

——Benefit of the Act—Availability.

An agriculturist tenant can get the benefit of Act V of 1938 by paying the rent on the holding even if there is a non-agriculturist co-tenant. But where the landlord is a *melcharthdar*, he is not a junior or intermediary and the rent cannot be scaled down as against him. A.I.R. 1941 Mad. 436=1941 M.W.N. 239 (1)=53 L.W. 361.

——Benefit under—Availability.

A puisne mortgagee impleded by the prior mortgagee in his suit, can be deemed to be a debtor entitled to the benefits of the Act as he is the person liable to pay the amount of the debt due to the prior mortgagee. A.I.R. 1941 Mad. 113=I.L.R. (1941) Mad. 53=52 L.W. 481=(1940) 2 M.L.J. 513=1940 M.W.N. 1010=195 Ind. Cas. 697.

——Benefit under—Availability—Usufructuary mortgage—Subsequent lease by mortgagor—Plea that debt due to mortgagee is liable to be scaled down.

A lessee has a right to redeem the usufructuary mortgage by virtue of the lease alleged to have been obtained from the mortgagor subsequently to the mortgage and is thus interested in raising the question as to the true amount payable to the mortgagee. He can, therefore, raise the plea that the debt due to the mortgagee is liable to be scaled down under the provisions of Act IV of 1938. (1940) M.W.N. 917=A.I.R. 1941 Mad. 21=(1942) 2 M.L.J. 290.

——Benefits under Act—Availability.

Certain persons who were agriculturist purchasing parts of hypotheca after adjudication of mortgagor—Court holding that they were not entitled to apply for benefits under Act, held that the High Court can interfere in revision as the Court refused to exercise jurisdiction. (1940) 2 M.L.J. 291=(1940) M.W.N. 831=52 L.W. 301=A.I.R. 1940 Mad. 808.

——Benefit under—Availability.—Co-owner in possession of common funds—His liability to pay shares of others, if covered by Act.

Ordinarily, the relation between co-owners, when one of them is in possession of common funds, is not that of creditor and debtor. The liability, therefore, of a co-owner in possession of common funds to pay the shares of other co-owners is not covered by the Mad. Agri. Relief Act. A.I.R. 1939 Mad. 471=49 M.L.W. 391=(1939) M.W.N. 279=(1939) 1 M.L.J. 528=I.L.R. (1939) Mad. 525=186 Ind. Cas. 214.

4. Construction.

——Construction of Act.

Act IV of 1938 is an ex-proprietary measure and if there is any doubt as to the meaning of its terms, that doubt should be resolved in favour of the person expropriated and not of the person who claims the right to expropriate. A.I.R. 1941 Mad. 118=I.L.R. (1941) Mad. 132=(1940) 2 M.L.J. 838=(1940) M.W.N. 1189=52 L.W. 772=195 Ind. Cas. 559.

——Construction.

The provisions of the Act are of an expropriatary character and should be strictly construed. The scope of the Act should not be extended beyond what is clearly and expressly indicated by its terms. A.I.R. 1941 Mad. 158=(1940) 2 M.L.J. 887=52 L.W. 819=(1940) M.W.N. 1247.

——Construction—Scope should not be extended.

The Mad. Agri. Relief Act is designedly expropriatary in its effect and the scope of its provisions ought not to be extended under the guise of what is sometimes called a benevolent construction. A.I.R. 1941 Mad. 321=(1940) 2 M.L.J. 664=52 L.W. 595=(1940) M.W.N. 1067=I.L.R. (1941) Mad. 248=195 Ind. Cas. 776.

5. Debt on negotiable instruments.

——Debt on negotiable instrument.

Compromise decree—Agreement relating to instalments in which it was to be paid and the security to be given—Decree based on promissory note of 1930 which included certain sum paid as cash and certain amount due on earlier promissory note of 1928. The latter pro-note was the result of partition in debtor's family whereby first defendant became liable for half the family debts :

Held, that the integrity of anterior debt was broken and debt incurred after partition by the first defendant became a fresh obligation. The debt, therefore, had to be scaled down to the principal of the 1928

pro-note together with subsequent cash advance under the 1930 pro-note and costs.

Held, also that in scaling down the decree amount representing the costs and the amount representing the debt with interest thereon should be differentiated. (1944) 1 M.L.J. 422=A.I.R. 1944 Mad. 410=57 L.W. 357.

——Debt on negotiable instruments—Act applies and is not ultra vires.

Madras Agri. Relief Act IV of 1938 is not *ultra vires* the Local Legislature because it affects negotiable instruments. Debts arising on negotiable instruments are within the purview of the Act. A.I.R. 1943 Mad. 292 =1943 M.W.N. 26=(1943) 1 M.L.J. 104= 56 L.W. 141=I L.R. (1943) Mad. 717=210 Ind. Cas. 98.

——Debt on negotiable instruments—Provisions of Act affecting rights of parties under Negotiable Instruments Act.

The provisions of the Mad. Agri. Relief Act are not invalid even though they may affect the rights of parties under the Negotiable Instruments Act. A.I.R. 1942 Mad. 169=(1941) 2 M.L.J. 808=54 L.W. 577=201 Ind. Cas. 117.

——Debt on negotiable instrument.

The words 'suit thereon' under Ss. 120 and 121, Negotiable Instruments Act, cannot apply to proceedings initiated by the maker or promisor for relief under a special enactment like the Mad. Agri. Relief Act. A.I.R. 1940 Mad. 52=50 L.W. 587=(1939) M.W.N. 1044=(1939) 2 M.L.J. 658=186 Ind. Cas. 458.

——Debt on negotiable instruments—Act, if repugnant to Negotiable Instruments Act (XXVI of 1881), Usurious Loans Act (X of 1918), or principles of Hindu Law—Act, whether ultra vires—Scope of Act—Debts arising on Negotiable Instruments—Government of India Act, 1935, Sch. VII, List III.

The Madras Agri. Relief Act makes no difference between a simple contract debt and debt due on a promissory note or other negotiable instrument. Therefore, debts arising on negotiable instruments are within the purview of the Act.

The Madras Agri. Relief Act cannot be regarded as really affecting the principles embodied in the Negotiable Instruments Act. Negotiation of a promissory note is not prohibited, nor is it said that a maker or an indorser should not be liable. The only effect of the Madras Agri. Relief Act, so far as negotiable instruments are concerned, is to reduce liability where the maker or indorser is an agriculturist. In providing for this, the Provincial Legislature had acted in the interest of agriculture by regulating money-lending to agriculturists. The Madras Agri. Relief Act, is thus in substance within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contract evidenced by negotiable instruments cannot affect its validity.

Further, the Act can be supported on the ground that it relates to contracts falling within the Concurrent Legislative List. The indebtedness of the agriculturists arises out of contract and contract of the nature contemplated by the Concurrent Legislative List. Regarding the Act as an Act dealing with a matter falling within the Concurrent Legislative List, S. 107, Government of India Act comes into operation. Therefore, its provisions must prevail in the Province by-virtue of the provisions of S. 107, Government of India Act, unless and until the Federal Legislature thinks fit to legislate in respect of the same matter.

The provisions of the Act cannot even be said to be repugnant to Usurious Loans Act, if the Provincial Legislature had the power to pass the Madras Agri. Relief Act, as being an Act dealing with matters in the Provincial Legislative List—The fact that it affects, so far as agriculturists are concerned the discretion given to the Court by the Usurious Loans Act, can make no difference to its validity. But in any event the Madras Agri. Relief Act, here again finds support from the provisions of S. 107, Government of India Act, and hence the Act cannot be said to be repugnant to the Usurious Loans Act.

Similarly, the Provincial Legislature has power to legislate with regard to contracts and no exception is made in respect of contracts entered into by Hindus. There is no Federal or "existing Indian law" which stands in the way and even if there were, the sanction of the Governor-General given under S. 107 (2), Government of India Act, would remove it. The Provincial Legislature had, therefore, full power to legislate with regard to contracts entered into by Hindus and to reduce their contractual obligation. A Hindu son cannot be made liable for more than what his father is liable for, and in cutting down the father's liability, the Legislature is not interfering with any principle of Hindu Law. The same remarks apply in the case of the manager of a family contracting a debt for family necessity. The members of the family are liable to the extent of their interests in the family property for so much of the debt as is fully recoverable. The manager is in the position of an agent and the Provincial Legislature has, under the Concurrent Legislative List, power to legislate with regard to agency as well as with regard to contract. The Act does not therefore, operate to change the principles of Hindu Law.

For these reasons, the Madras Agri. Relief Act is *intra vires* the powers of the Provincial Legislature. 49 L.W. 257=A.I.R. 1939 Mad. 361 =(1938) 1 M.L.J. 272=(1939) M.W.N. 192 (2)=I.L.R. (1939) Mad. 151=180 Ind. Cas. 994 (F.B.).

6. Act, if intra vires.

If *intra vires* of the Provincial Legislature.

See Government of India Act. (1935), S. 107 (2) and Madras Agriculturists Relief Act (IV of 1938). (1950) 2. M.L.J. 328=A.I.R. 1951 Mad. 263.

7. Procedure.

——Appeal pending—Act passed—Application for relief under Act—Procedure.

Where, during the pendency of an appeal, the Act has come into force and an application has been made for relief under the Act, the application should be considered as a matter arising in the appeal. If the Appellate Court transmits the application to the trial Court for disposal, a provision should be made in the appeallate decree for that decree being subject to the order to be passed on the application under the Act by the trial Court. 56 L.W. 105=A.I.R. 1943 Mad. 330=(1943) 1 M.L.J. 32=1943 M.W.N. 94=210 Ind. Cas. 189.

——Appellate Court's decree declaring liability for first time—No written application raising plea for relief under Act before Appellate Court—Proper procedure.

When a liability is being declared in the Appellate Court's decree for the first time and a plea is open to the defendants under the Act, there should be a written application raising this plea before the Appellate Court and on such application, the Appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below.

It is doubtful whether an order reserving a plea under the Mad. Agri. Relief Act for subsequent adjudication should be passed in the absence of an express prayer for the benefits of the Act. But the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order as binding upon them. A.I.R. 1940 Mad. 959=52 L.W. 413=(1940) 2 M.L.J. 473=(1940) M.W.N. 947=194 Ind. Cas. 757.

8. Restitution.

——Mad. Agri. Relief Act and C.P. Code, S. 144—Power to modify decree in the light of Act IV of 1938 after appeal had been disposed of—Restitution—Principle underlying.

A mortgagee filed a suit on a mortgage and the 1st appellate Court decree the suit. The amount due was reduced by the High Court in second appeal. Pending the second appeal the decree-holder took out execution and certain properties were brought to sale and sold to the decree-holder and taken delivery of by him. On the date of the hearing of the second appeal and application was filed by the person whose properties were brought to sale in execution for scaling down the decree in accordance with the provisions of Act IV of 1938. That application when it came on for hearing was remanded to the trial Court for disposal and the trial Court scaled down the debt. On an application for rectitution being field by the person whose properties were sold in execution of the mortgage decree.

Held, (*i*) the decree in second appeal having become final any finding by the trial Court regarding the relief which might have been obtained had the proper procedure been taken will not affect the decree. (1941) 2 M.L.J. 855=I.L.R. (1942) Mad. 346 (F.B.), followed. (*ii*). That as the true criterion for restitution is to consider what would be the position had the appellate Court's decree been passed by the Court of first instance and as the sales which had been held were sales which would have been held even if the court of first instance had decreed the amount eventually found to be due in appeal, there was no legal or equitable reason for setting aside the sales or ordering restitution. 225 Ind. Cas. 127=59 L.W. 14=1946 M.W.N. 25=A.I.R. 1946 Mad. 258=(1946) 1 M.L.J. 5.

9. Right of appeal.

——Right of appeal.

There is no right of appeal when an application for a declaration is dismissed on the ground that the debtor is not an agriculturist or the debt is not one which can be scaled down under the Act. A.I.R. 1944 Mad. 133=(1943) 2 M.L.J. 630=57 L.W. 400=1943 M.W.N. 165=215 Ind. Cas. 28.

——S. 3.

Synopsis.

S. 3 (i)—"Person."
S. 3 (ii)— (*a*) "Agriculturist"
(*b*) Burden of proof.
S. 3 (ii) Pro. (A)—Scope and applicability.
S. 3 (ii) Pro. (B)— (*a*) Interpretation.
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S. 3 (ii) Pro. (C)— (1) Annual rental or Capital value—Calculation.
(2) Burden of proof.
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S. 3 (ii) Pro. (D)—Scope and applicability.
S. 3 (iii)—See also Ss. 8, 9.
1. Applicability.
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Interpretation and Scope.
S. 3 (v)—"Creditor."
S. 3 (i)—"Person."

——S. 3 (i) and (iv)—"Person"—Estate in the hands of an executor—Right to relief under the Act.

There is no provision in the Madras Act (IV of 1938) under which such an impersonal entity as an estate in the hands of an executor can claim relief. It is not a 'person' and hence not an 'agriculturist' and it would seem to be expressly excluded by the terms of S. 3 of the Act. The question of the assessment of the estate is a matter of no relevance for determining the right to relief under the Act. A.I.R. 1946 Mad. 58=58 Mad. L.W. 565=1945 Mad. W.N. 722=(1945) 2 Mad. L.J. 410.

——S. 3 (i)—"Person"—Composite family in Nellore and adjacent Districts, if "undivided Hindu family" within S. 3 (i).

The association known as the composite family, the existence of which by custom has been recognised in he Nellore and adjacent districts, cannot properly be termed "an undivided Hindu family" such as is recognised as a person in the definition in s. 3 (i) of Mad. Agri. Relief Act. A.I.R. 1943 Mad. 5=55 L.W. 706=(1942) 2 M.L.J. 592=1942 M.W.N. 719=204 Ind. Cas. 629.

S. 3 (ii)—(*a*) "Agriculturist."

——S. 3 (ii)—"Agriculturist"—Residence, if test of.

The fact that a person is residing outside the Province of Madras will not affect his status as an "agriculturist" as defined in S. 3 (ii), Mad. Agri. Relief Act. 56 L.W. 105=A.I.R. 1943 Mad. 330=(1943) 1 M.L.J. 32=1943 M.W.N. 94=210 Ind. Cas. 189.

——S. 3 (ii)—"Agriculturist"—Usufructuary mortgagee of agricultural land, if agriculturist.

Usufructuary mortgagee of agricultural land would *prima facie* be an agriculturist unless disqualified under one of the provisos to S. 3 (*ii*) Mad. Agri. Relief Act 54 L.W. 184=A.I.R. 1942 Mad. 296=(1941) 2 M.L.J. 298=1941 M.W.N. 975=200 Ind. Cas. 861.

——S. 3 (ii)—"Agriculturist"—A firm of money-lenders cannot be an agriculturist. A.I.R. 1941 Mad. 537=53 L.W. 105 (1)=1941ff M.W.N. 166=(1941) 1 M.L.J. 172.

——S. 3 (ii)—"Agriculturist"—Person having saleable interest in agricultural land outside Municipality, whether agriculturist.

All that S. 3 (*ii*), Mad. Agri. Relief Act, requires is that the person who claims to be an agriculturist should have a saleable interest in an agricultural land situated outside a Municipality, and if he has such land, it is wholly immaterial whether or not he also owns agricultural lands within a Municipality. 52 L.W. 955=A.I.R. 1941 Mad. 277=(1940) 2 M.L.J. 1055=1941 M.W.N. 176=195 Ind. Cas. 165.

——S. 3 (ii)—"Agriculturist"—Person entitled to collect rents of estate.

Every person entitled to collect rents of an estate is a land-holder under S. 3 (5) of the Madras Estates Land Act, and hence, is not an agriculturist. A.I.R. 1941 Mad. 244=52 L.W. 521=(1940) M.W.N. 1043=(1940) 2 M.L.J. 711.

——S. 3 (ii)—"Agriculturist"—Holder of vendor's lien in land, if agriculturist.

The holder of a vendor's lien in agricultural land is qualified to be an agriculturist. A.I.R. 1941 Mad.

127=52 L.W. 436=(1940) M.W.N. 959=(1940) 2 M.L.J. 501=193 Ind. Cas. 896.

——S. 3 (ii)—"Agriculturist"—Simple mortgagee of agricultural land, if entitled to benefits of Act.

A simple mortgagee of agricultural land has, by virtue of his mortgage, saleable inrerest in agricultural land which would qualify him for the benefits of the Act having regard to the definition in S. 3 (*ii*). 52 L.W. 481=A.I.R. 1941 Mad. 113=I.L.R. (1941) Mad. 53=(1940) 2 M.L.J. 513=(1940) M.W.N. 1010=195 Ind. Cas. 697.

——S. 3 (ii)—"Agriculturist"—Simple mortgagee of agricultural land, if 'agriculturist.'

A simple mortgagee of agricultural land has a saleable interest therein, so as to bring him within the definition of the term, 'agriculturist,' in S. 3 (*ii*) (*a*) of Mad. Agri. Relief Act. A.I.R. 1940 Mad. 941=(1940) 2 M.L.J. 516=52 L.W. 480=(1940) M.W.N. 1006=192 Ind. Cas. 100.

S. 3 (ii)—(*b*) Burden of proof.

——S. 3 (2) (*a*) and Proviso (C)—Agriculturist—Burden of proof—Assessments mentioned in proviso (C) to be treated cumulatively—Proof of entry of holding in the name of a person—If enough to bring the matter within proviso (C).

Though the burden of proving that he is an agriculturist is on the debtor in the first instance, where he shows that he fell within the general definition of the word he would be entitled to relief unless he is deprived of the privilege by one of the provisos, and the burden would lie upon any one so asserting to prove his case.

It is wrong to say that the assessments under the Acts mentioned in proviso (*C*) to S. 3 (2) of the Act should not be treated as cumulative.

Where a person is not the owner of any building, the mere fact, that the assessment registers show that it stands in his name is not enough to bring the matter within proviso (*C*). 62 L.W. 819=A.I.R. 1949 P.C. 319=1949 M.W.N. 721=(1949) 2 M.L.J. 688 (P.C.).

——S. 3 (ii)—Burden of proof—Person having saleable interest in agricultural land—Burden of proving that he is not agriculturist is on creditor—No sufficient evidence on record to show that creditor had discharged burden—Order of Court holding that debtors are disqualified from claiming benefit of Act can be interfered with in revision.

Where a person is shown to have a saleable interest in any agricultural land, the burden of proving that he is disqualified under one or other of the four provisos to S. 3 (*ii*) lies upon the creditor.

In a petition under S. 19-A by the creditor whose mortgage included agricultural land the creditor filed certain certificate granted by the Commissioner of a Municipality which he claimed, showed that the debtors who were said to be undivided were assessed to house and land tax in respect of properties whose annual rental value exceeded Rs. 600, so as to bring the debtor within the mischief of Proviso (C) to S. 3. (*ii*). The certificate, however, showed that names of persons who were now shown to be in any way connected with any one of the debtors were also assessed in respect of the same properties. On the date of hearing the debtors were absent. The creditor adduced no evidence as to who the other persons were and what share they possessed in the properties assessed. The Court without seriously applying its mind to the decision of the case assumed that the certificate was sufficient to bring the debtors within Proviso (C) to S. 3 (*ii*) and held that the creditor was entitled to the amount under the mortgage.

Held, (*i*) that the creditor had failed to show that the debtor's proportionate annual rental value exceeded Rs. 600 and thus failed to discharge the burden that lay on him that the debtors were disqualified from claiming the benefits of the Act.

(*ii*) that in thus disposing of the matter the Court acted wih material irregularity in the exercise of jurisdiction and, therefore, its order could be interfered with in revision. A.I.R. 1946 Mad. 264=59 Mad. L.W. 36=(1946) Mad. W.N. 66=(1946) 1 Mad. L. J. 54.

——S. 3 (ii)—Burden of proof.

A person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in S. 3 (*ii*). Hence it is not correct to say that because the debt was incurred originally by an agriculturist, his transferees are entitled to the benefits of the Act whether they are themselves agriculturists or not. A.I.R. 1942 Mad. 200=I.L.R. (1942) Mad. 308=54 L.W. 579=1941 M.W.N. 1000=(1941) 2 M.L.J. 913=201 Ind. Cas. 218.

——S. 3 (ii)—Burden of proof.

A person applying under the Act claiming himself to be an agriculturist has first to establish a *prima facie* case that he falls under one of the categories enumerated in S. 3 (*ii*) (*a*) to (*d*). Then the burden shifts to the opposite party to show *prima facie* that the applicant is excluded by one or other of the provisos. After this, the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. A.I.R. 1941 Mad. 112=(1940) 2 M.L.J. 498=52 L.W. 470=(1940) M.W.N. 991.

S. 3 (ii), Pro. (A)—Scope And Applicability.

——S 3 (ii), proviso (A)—Scope and applicability—Firm or association of persons assessed to income-tax—Individual member comes within proviso (A) to S. 3 (ii).

Having regard to the provisions of Ss. 14 (2) and 48, Income-Tax Act, when a firm or an association of persons is assessed to income-tax, what is really assessed is the income of the individual members and therefore, the individual member comes within S. 3 (*ii*), proviso (A).

The defendant brought a suit for partition against his father and other members of his family and during the pendency of the suit, applied for appointment of a Receiver. The defendant himself was appointed as Receiver, and while carrying on the family business, he was assessed as Receiver in respect of the profits derived during the pendency of the suit. The assessment was made during the years referred to in proviso (A) to S. 3 (*ii*), Agri. Relief Act. The assessment was made on the basis that the appellant and the members of his family after the institution of the partition suit constituted an association of persons within the meaning of S. 3, Income-Tax Act. It was argued for the defendant that, inasmuch as he was assessed as representing an association of persons, the assessment could not be deemed to have been imposed upon him in his individual capacity and that, consequently, he was not excluded from the benefit of the Act :

Held, that the defendant must be deemed to have been assessed in income-tax and was not entitled to claim the benefits of the Madras Agriculturists' Relief Act. A.I.R. 1942 Mad. 428=1942 M.W.N. 287=(1942) 1 M.L.J. 559=55 L.W. 352=202 Ind. Cas. 456.

——S. 3 (ii) Pro. (A)—Scope and Applicability—Firm assessed to income-tax—Partner not making application for refund under S. 48, Income-Tax Act (XI of 1922)—Partner holding share in firm, if comes within proviso (A).

Where a firm is assessed to income-tax, a partner holding a share in the firm and not having made an application for refund under S. 49, Income-tax Act of the tax upon his share of the firm, comes within the proviso (*A*) to S. 3 whether total income falls below the taxable minimum or not. A.I.R. 1941 Mad. 672=53 L.W. 685=(1941) 1 M.L.J. 782=1941 M.W.N. 488.

——S. 3 (ii), Pro. (A)—Applicability—Criterion.

The criterion for the applicability of Proviso A to S. 3 (*ii*), Mad. Agri. Relief Act, is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to Income-tax in either of the two financial years ending March 31, 1938, and it does not lay down any restriction regarding the period in respect of which that assessment might have been made. A.I.R. 1941 Mad. 289=(1940) M.W.N. 1156=(1940) 2 M.L.J. 817=52 L.W. 731=193 Ind. Cas. 547.

S. 3 (ii), Priviso (B)—(a) Interpretation.

——S. 3 (ii) Proviso (B)—Interpretation—Criterion under Proviso (B) for exclusion from category of agriculturists is actual date of assessment—S. 137-B, Madras City Municipality Act (IV of 1919), intention of—Assessment to profession tax made after October 1, 1937, relating to period immediately preceding—Assessee, if Agriculturist.

The words "has within the two years immediately preceding October 1, 1937, been assessed" in S. 3 (*ii*) Proviso (B) mean what they say and nothing else. The criterion in Proviso (B) for the exclusion from the category of the agriculturists is not the actual period for which the tax is payable but the actual date on which the assessment is made. Section 137-B, Madras City Municipal Act is obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. But in the case of a retrospective assessment, it is not provided that the date of the assessment shall be deemed to fall within the period to which the assessment relates.

Hence a person is not disqualified from claiming to be an agriculturist by reason of an assessment to profession tax made after October 1, 1937, although relating to the period immediately before October 1, 1937. A.I.R. 1941 Mad. 152=I.L.R. (1941) Mad. 383=(1941) 2 M.L.J. 841=(1940) M.W.N. 1192=52 M.L.W. 765=196 Ind. Cas. 288.

S. 3 (ii), Pro. (B)—Scope and applicability.
——S. 3 (ii), Priviso (B).—Scope and applicability.

Assessment to property tax under Madras Local Boards Act, not challenged in appeal within time—Schedule IV of that Act does not empower President or *Panchayat* to cancel assessment—Expunction of assessee's name from registers by *Panchayat* cannot affect assessee's legal position—Assessee must be deemed to be assessed within S. 3 (*ii*), Proviso (*b*), Madras Agri. Relief Act—Court cannot question legality of assessment. A.I.R. 1942 Mad. 598=I.L.R. (1942) Mad. 941=(1942) 2 M.L.J. 153=1942 M.W.N. 447=55 L.W. 470=205 Ind. Cas. 102.

——S. 3 (ii) Priviso (B)—Scope and applicability—Retired Police Officer paying profession tax—Tax—Nature of.

A person who pays profession tax on his pension as retired Police Officer does in fact pay profession tax other than agriculture within proviso B to S. 3 (2) on an income derived from a profession. A.I.R. 1942 Mad. 449=55 M.L.W. 238=(1942) 1 M.L.J. 466=1942 M.W.N. 331=202 Ind. Cas. 19.

——S. 3 (ii), Proviso (B)—Scope and applicability—Only in respect of which agriculturist has actually been assessed to profession tax under District Municipalities Act, should be considered—His share of income of firm separately assessed to profession tax should be excluded.

'Person' under Act IV of 1938 does not include an unincorporated company or association. Therefore, what disqualifies a person under proviso (B) to S. 3 (*ii*) is the individual assessment of that person to profession tax on a certain stipulated income.

Under the District Municipalities Act, however a partnership is included in the definition of "company" and for the purpose of profession tax, a company is a separate unit classified and assessed to profession tax without reference to the private income of the individuals of whom the firm is composed. When a firm has been assessed to profession tax, the individual members of that firm cannot be assessed again on their share of the income of the firm. The tax imposed on the firm is clearly an assessment on that firm as separate unit and the tax imposed on the individual is imposed upon that individual without reference to his capacity as a member of the firm. Therefore, when the firm is assessed to profession tax, it cannot properly be said that the individual partner is assessed to profession tax, though no doubt indirectly he pays that tax. Consequently, in applying proviso (B) to S. 3 (*ii*), Mad. Agri. Relief Act, only the income in respect of which the alleged agriculturist has been actually assessed to profession tax under the District Municipalities Act, should be considered and his share of the income of a firm, which firm has been separately assessed to profession tax should be excluded. A.I.R. 1942 Mad. 382=(1942) 1 M.L.J. 24=1942 M.W.N. 23=55 L.W. 24=204 Ind. Cas. 612.

——S. 3 (ii), Priviso (B)—Scope and applicability.

Under . 3 (*ii*), proviso (B) the assessment for four consecutive half years from October 1935, to September 1937 is not necessary. A.I.R. 1940 Mad. 919=52 L.W. 420 (1)=(1940) 2 M.L.J. 467=(1940) M.W.N. 997.

——S. 3 (ii), Proviso (B)—Scope and applicability.

It is wrong to say that it is only a person who has been validly assessed who is excluded from the definition of agriculturist. A.I.R. 1940 Mad. 919=52 L.W. 420 (1)=(1940) 2 M.L.J. 467=(1940) M.W.N. 997.

S. 3 (ii), Proviso (C)—(1) Annual rental or Capital value—Calculation.

——S. 3 (ii) Proviso (C)—Person owing only share in house assessed to property tax—Annual rental value of house under S. 3 (ii), Proviso (c)—What is.

Where a person owning only a share in a house is assessed to property tax in computing the annual rental value of the house under S. 3 (*ii*), Proviso (c) Mad. Agri. Relief Act, it is not the whole annual rental value of the house that should be taken into account but only the proportionate share of such value 55 M.L.W. 851=A.I.R. 1943 Mad. 258=(1942) 2 M.L.J. 487=207 Ind. Cas. 207.

——S. 3 (ii), Proviso (C)—Annual rental value is net, not gross rental value.

The phrase "annual rental value" is a general phrase and hence the annual value in proviso (C) is the net figure after making the statutory deduction

and not the gross rental. A.I.R. 1943 Mad. 194=1942 M.W.N. 708=55 M.L.W. 780=(1942) 2 M.L.J. 676=I.L.R. (1943) Mad. 591=205 Ind. Cas. 579.

——S. 3 (ii), Proviso (C)—Explanation—Assessment on capital value.

In cases of assessment on the basis of capital value, under the explanation to S. 3 (*ii*), Proviso (*c*), the rental value must be calculated at 5 per cent of the capital value. It is not open to the Court to take evidence of actual rent paid, and capitalise it on the 5 per cent basis. A.I.R. 1941 Mad. 448=1941 M.W.N. 291=53 M.L.W. 391=(1941) 1 M.L.J. 466.

S. 3 (ii), Proviso (C)—(2) Burden of Proof.

——S. 3 (ii), Proviso (C)—Burden to prove that he is agriculturist lies on debtor—Debtor proving that he owns saleable interest in agricultural land—Burden shifts on to creditor—After case is closed and judgment reserved Court allowing mortgagee to file documents to show that debtor was disqualified from claiming benefit of Act by reason of proviso (C)—Debtor stating that properties referred to in documents were wrongly included in mortgage—Question held should have been raised during trial.

Although the initial burden to prove that he is an agriculturist as defined in the Act lies on the debtor when he proves that he owns a saleable interest in any agricultural land of the kind mentioned in S. 3 (*ii*), the burden shifts on the creditor to prove that the debtor is disqualified, under one or the other of the provisos to S. 3 (*ii*), from claiming the status of an agriculturist.

After the case was closed and judgment reserved, the trial Court allowed the mortgagee-plaintiff to file certain documents to show that the properties included in the mortgage were assessed to house tax on the basis of a rental value exceeding Rs. 600 and therefore the defendant was disqualified from claiming the benefits of the Act by reason of proviso (c) to S. 3 (*ii*) of the Act. The Court gave an opportunity to the defendant to rebut these documents. The defendant adduced no rebutting evidence but filed a "memorandum of objections" stating that the properties referred to in the documents were wrongly included in the mortgage :

Held, that the question should have been properly raised by the plaintiff mortgagee during the trial so as to give the defendant an adequate opportunity to repel his alleged disqualification under proviso (C) to S. 3 (*ii*) the burden of proving which clearly lay on the mortgagee in the circumstances of the case. A.I.R. 1946 Mad. 437=(1946) 1 Mad. L.J. 373=59 Mad. L.W. 280=1946 Mad. W.N. 282.

S. 3 (ii), Pro. (C)—(3) Interpretation.

——S. 3 (ii), Proviso (C)—Interpretation—"Aggregate" in proviso (C)—Meaning of.

The word "aggregate" in proviso (C) to S. 3 (*ii*) clearly refers to the total of the rental value of the various buildings and lands in respect of which the tax has been imposed and not to the total of the valuation for two half years. A.I.R. 1942 Mad. 533=55 M.L.W. 288=(1942) 1 M.L.J. 571=1942 M.W.N. 415=202 Ind. Cas. 6.

——S. 3 (ii), Proviso (C)—Interpretation—"Agricultural land"—Question of fact—"Agricultural", meaning of.

The question whether land is or not "agricultural" is legally a question of fact. The term "agricultural" as used in proviso (*c*) to S. 3 must be read in the sense in which it is used in the relevant section of the Madras District Municipalities Act and not in any narrow sense which might be spelt out of the definition of "agriculturist" in S. 3 (*ii*) (*a*) of the Act. (1945) 1 M.L.J. 2=58 L.W. 87 (1)=1945 M.W.N. 41(1)=A.I.R. 1945 Mad. 148.

——S. 3 (ii), Proviso (C)—Interpretation—"Is" must be read as "was"—Property in municipal register in name of third person—Tax, held recovered from real owner.

The verb "is" in the final clause of proviso to S. 3 (*ii*) must be read as being equivalent to "was" and the period during which the rental value is to be not less than Rs. 600 must be the same two years within which the assessment is to disqualify the person who claims to be an agriculturist.

An agriculturist owned property during the whole of the relevant period and regarded himself as responsible for the tax. The tax was demanded from him and on his representation, the assessment was reduced and he paid the tax :

Held, that the agriculturist was the person who was assessed to property tax in respect of his property even though the municipal demand register had not been brought up-to-date by the substitution of his name for that of some former owner. A.I.R. 1942 Mad. 410=1942 M.W.N. 208=55 L.W. 164=(1942) 1 M.L.J. 388=204 Ind. Cas. 570.

——S. 3 (ii), Proviso (C)—Interpretation—Tax, if must have been imposed throughout the period of two years.

It is incorrect to say that in order to come within the purview of proviso (C) to S. 3 (*ii*), property tax on a rental value of not less than Rs. 600 must have been imposed throughout the period of two years specified in the proviso. Such interpretation is against the plain language of the proviso which does not use the word "throughout" but uses the word "within." If at any point of time within the period, the disqualification has been incurred it will satisfy the terms of the proviso. A.I.R. 1942 Mad. 533=1942 M.W.N. 415=(1942) 1 M.L.J. 571=55 L.W. 288=202 Ind. Cas. 6.

S. 3 (ii), Pro. (C)—(4) Scope and applicability.

——S. 3 (ii), Proviso (C)—Scope and applicability—Rate of assessment actually fixed must govern application of S. 3 (ii), proviso C.

The rate of assessment actually fixed must govern the application of S. 3 (*ii*), proviso C. The Court, for the purpose of S. 3 (*ii*), proviso C, cannot the propriety of the assessment. A.I.R. 1941 Mad. 413=(1941) 1 M.L.J. 185=53 M.L.W. 108=1941 M.W.N. 173.

——S. 3 (ii)—Proviso (C)—Scope and applicability.

It cannot be said theat Proviso (C) to S. 3 (*ii*) contemplates only the ownership of the property by the individual concerned and does not contemplate his assessment in respect thereof. Proviso (C) clearly requires that in order to come within its scope, the individual must have been actually assessed. It is not sufficient to show that he is interested in property in respect of which somebody has been assessed.

Where, therefore, the husband and the wife are separately assessed in respect of certain properties covered by the mortgage executed by the husband alone, the assessment of the entire properties cannot be regarded as the assessment of the husband. 52 M.L.W. 765=A.I.R. 1941 Mad. 152=I.L.R. (1941) Mad. 383=(1941) 2 M.L.J. 841=(1940) M.W.N. 1192=196 Ind. Cas. 288.

It is doubtful whether an order reserving a plea under the Mad. Agri. Relief Act for subsequent adjudication should be passed in the absence of an express prayer for the benefits of the Act. But the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order as binding upon them. A.I.R. 1940 Mad. 959=52 L.W. 413=(1940) 2 M.L.J. 473=(1940) M.W.N. 947=194 Ind. Cas. 757.

8. Restitution.

——Mad. Agri. Relief Act and C.P. Code, S. 144—Power to modify decree in the light of Act IV of 1938 after appeal had been disposed of—Restitution—Principle underlying.

A mortgagee filed a suit on a mortgage and the 1st appellate Court decree the suit. The amount due was reduced by the High Court in second appeal. Pending the second appeal the decree-holder took out execution and certain properties were brought to sale and sold to the decree-holder and taken delivery of by him. On the date of the hearing of the second appeal and application was filed by the person whose properties were brought to sale in execution for scaling down the decree in accordance with the provisions of Act IV of 1938. That application when it came on for hearing was remanded to the trial Court for disposal and the trial Court scaled down the debt. On an application for rectitution being field by the person whose properties were sold in execution of the mortgage decree.

Held, (*i*) the decree in second appeal having become final any finding by the trial Court regarding the relief which might have been obtained had the proper procedure been taken will not affect the decree. (1941) 2 M.L.J. 855=I.L R. (1942) Mad. 346 (F.B.), followed. (*ii*). That as the true criterion for restitution is to consider what would be the position had the appellate Court's decree been passed by the Court of first instance and as the sales which had been held were sales which would have been held even if the court of first instance had decreed the amount eventually found to be due in appeal, there was no legal or equitable reason for setting aside the sales or ordering restitution. 225 Ind. Cas. 127=59 L.W. 14=1946 M.W.N. 25=A.I.R. 1946 Mad. 258=(1946) 1 M.L.J. 5.

9. Right of appeal.

——Right of appeal.

There is no right of appeal when an application for a declaration is dismissed on the ground that the debtor is not an agriculturist or the debt is not one which can be scaled down under the Act. A.I.R. 1944 Mad. 133=(1943) 2 M.L.J. 630=57 L.W. 400=1943 M.W.N. 165=215 Ind. Cas. 28.

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S. 3 (i)—"Person."

——S. 3 (i) and (iv)—"Person"—Estate in the hands of an executor—Right to relief under the Act.

There is no provision in the Madras Act (IV of 1938) under which such an impersonal entity as an estate in the hands of an executor can claim relief. It is not a 'person' and hence not an 'agriculturist' and it would seem to be expressly excluded by the terms of S. 3 of the Act. The question of the assessment of the estate is a matter of no relevance for determining the right to relief under the Act. A.I.R. 1946 Mad. 58=58 Mad. L.W. 565=1945 Mad. W.N. 722=(1945) 2 Mad. L.J. 410.

——S. 3 (i)—"Person"—Composite family in Nellore and adjacent Districts, if "undivided Hindu family" within S. 3 (i).

The association known as the composite family, the existence of which by custom has been recognised in he Nellore and adjacent districts, cannot properly be termed "an undivided Hindu family" such as is recognised as a person in the definition in s. 3 (i) of Mad. Agri. Relief Act. A.I.R. 1943 Mad. 5=55 L.W. 706=(1942) 2 M.L.J. 592=1942 M.W.N. 719=204 Ind. Cas. 629.

S. 3 (ii)—(*a*) "Agriculturist."

——S. 3 (ii)—"Agriculturist"—Residence, if test of.

The fact that a person is residing outside the Province of Madras will not affect his status as an "agriculturist" as defined in S. 3 (ii), Mad. Agri. Relief Act. 56 L.W. 105=A.I.R. 1943 Mad. 330=(1943) 1 M-L.J. 32=1943 M.W.N. 94=210 Ind. Cas. 189.

——S. 3 (ii)—"Agriculturist"—Usufructuary mortgagee of agricultural land, if agriculturist.

Usufructuary mortgagee of agricultural land would *prima facie* be an agriculturist unless disqualified under one of the provisos to S. 3 (*ii*) Mad. Agri. Relief Act 54 L.W. 184=A.I.R. 1942 Mad. 296=(1941) 2 M.L.J. 298=1941 M.W.N. 975=200 Ind. Cas. 861.

——S. 3 (ii)—"Agriculturist"—A firm of money-lenders cannot be an agriculturist. A.I.R. 1941 Mad. 537=53 L.W. 105 (1)=1941ff M.W.N. 166=(1941) 1 M.L.J. 172.

——S. 3 (ii)—"Agriculturist"—Person having saleable interest in agricultural land outside Municipality, whether agriculturist.

All that S. 3 (*ii*), Mad. Agri. Relief Act, requires is that the person who claims to be an agriculturist should have a saleable interest in an agricultural land situated outside a Municipality, and if he has such land, it is wholly immaterial whether or not he also owns agricultural lands within a Municipality. 52 L.W. 955=A.I.R. 1941 Mad. 277=(1940) 2 M.L.J. 1055=1941 M.W.N. 176=195 Ind. Cas. 165.

——S. 3 (ii)—"Agriculturist"—Person entitled to collect rents of estate.

Every person entitled to collect rents of an estate is a land-holder under S. 3 (5) of the Madras Estates Land Act, and hence, is not an agriculturist. A.I.R. 1941 Mad. 244=52 L.W. 521=(1940) M.W.N. 1043=(1940) 2 M.L.J. 711.

——S. 3 (ii)—"Agriculturist"—Holder of vendor's lien in land, if agriculturist.

The holder of a vendor's lien in agricultural land is qualified to be an agriculturist. A.I.R. 1941 Mad.

127=52 L.W. 436=(1940) M.W.N. 959=(1940) 2 M.L.J. 501=193 Ind. Cas. 896.

——S. 3 (ii)—"Agriculturist"—Simple mortgagee of agricultural land, if entitled to benefits of Act.

A simple mortgagee of agricultural land has, by virtue of his mortgage, saleable inrerest in agricultural land which would qualify him for the benefits of the Act having regard to the definition in S. 3 (*ii*). 52 L.W. 481=A.I.R. 1941 Mad. 113=I.L.R. (1941) Mad. 53=(1940) 2 M.L.J. 513=(1940) M.W.N. 1010=195 Ind. Cas. 697.

——S. 3 (ii)—"Agriculturist"—Simple mortgagee of agricultural land, if 'agriculturist.'

A simple mortgagee of agricultural land has a saleable interest therein, so as to bring him within the definition of the term, 'agriculturist,' in S. 3 (*ii*) (*a*) of Mad. Agri. Relief Act. A.I.R. 1940 Mad. 941=(1940) 2 M.L.J. 516=52 L.W. 480=(1940) M.W.N. 1006=192 Ind. Cas. 100.

S. 3 (ii)—(*b*) Burden of proof.

——S. 3 (2) (*a*) and Proviso (C)—Agriculturist—Burden of proof—Assessments mentioned in proviso (C) to be treated cumulatively—Proof of entry of holding in the name of a person—If enough to bring the matter within proviso (C).

Though the burden of proving that he is an agriculturist is on the debtor in the first instance, where he shows that he fell within the general definition of the word he would be entitled to relief unless he is deprived of the privilege by one of the provisos, and the burden would lie upon any one so asserting to prove his case.

It is wrong to say that the assessments under the Acts mentioned in proviso (*C*) to S. 3 (2) of the Act should not be treated as cumulative.

Where a person is not the owner of any building, the mere fact, that the assessment registers show that it stands in his name is not enough to bring the matter within proviso (*C*). 62 L.W. 819=A.I.R. 1949 P.C. 319=1949 M.W.N. 721=(1949) 2 M.L.J. 688 (P.C.).

——S. 3 (ii)—Burden of proof—Person having saleable interest in agricultural land—Burden of proving that he is not agriculturist is on creditor—No sufficient evidence on record to show that creditor had discharged burden—Order of Court holding that debtors are disqualified from claiming benefit of Act can be interfered with in revision.

Where a person is shown to have a saleable interest in any agricultural land, the burden of proving that he is disqualified under one or other of the four provisos to S. 3 (*ii*) lies upon the creditor.

In a petition under S. 19-A by the creditor whose mortgage included agricultural land the creditor filed certain certificate granted by the Commissioner of a Municipality which he claimed, showed that the debtors who were said to be undivided were assessed to house and land tax in respect of properties whose annual rental value exceeded Rs. 600, so as to bring the debtor within the mischief of Proviso (C) to S. 3. (*ii*). The certificate, however, showed that names of persons who were now shown to be in any way connected with any one of the debtors were also assessed in respect of the same properties. On the date of hearing the debtors were absent. The creditor adduced no evidence as to who the other persons were and what share they possessed in the properties assessed. The Court without seriously applying its mind to the decision of the case assumed that the certificate was sufficient to bring the debtors within Proviso (C) to S. 3 (*ii*) and held that the creditor was entitled to the amount under the mortgage.

Held, (*i*) that the creditor had failed to show that the debtor's proportionate annual rental value exceeded Rs. 600 and thus failed to discharge the burden that lay on him that the debtors were disqualified from claiming the benefits of the Act.

(*ii*) that in thus disposing of the matter the Court acted wih material irregularity in the exercise of jurisdiction and, therefore, its order could be interfered with in revision. A.I.R. 1946 Mad. 264=59 Mad. L.W. 36=(1946) Mad. W.N. 66=(1946) 1 Mad. L. J. 54.

——S. 3 (ii)—Burden of proof.

A person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in S. 3 (*ii*). Hence it is not correct to say that because the debt was incurred originally by an agriculturist, his transferees are entitled to the benefits of the Act whether they are themselves agriculturists or not. A.I.R. 1942 Mad. 200=I.L.R. (1942) Mad. 308=54 L.W. 579=1941 M.W.N. 1000=(1941) 2 M.L.J. 913=201 Ind. Cas. 218.

——S. 3 (ii)—Burden of proof.

A person applying under the Act claiming himself to be an agriculturist has first to establish a *prima facie* case that he falls under one of the categories enumerated in S. 3 (*ii*) (*a*) to (*d*). Then the burden shifts to the opposite party to show *prima facie* that the applicant is excluded by one or other of the provisos. After this, the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. A.I.R. 1941 Mad. 112=(1940) 2 M.L.J. 498=52 L.W. 470=(1940) M.W.N. 991.

S. 3 (ii), Pro. (A)—Scope And Applicability.

——S 3 (ii), proviso (A)—Scope and applicability—Firm or association of persons assessed to income-tax—Individual member comes within proviso (A) to S. 3 (ii).

Having regard to the provisions of Ss. 14 (2) and 48, Income-Tax Act, when a firm or an association of persons is assessed toincome-tax, what is really assessed is the income of the individual members and therefore, the individual member comes within S. 3 (*ii*), proviso (A).

The defendant brought a suit for partition against his father and other members of his family and during the pendency of the suit, applied for appointment of a Receiver. The defendant himself was appointed as Receiver, and while carrying on the family business, he was assessed as Receiver in respect of the profits derived during the pendency of the suit. The assessment was made during the years referred to in proviso (A) to S. 3 (*ii*), Agri. Relief Act. The assessment was made on the basis that the appellant and the members of his family after the institution of the partition suit constituted an association of persons within the meaning of S. 3, Income-Tax Act. It was argued for the defendant that, inasmuch as he was assessed as representing an association of persons, the assessment could not be deemed to have been imposed upon him in his individual capacity and that, consequently, he was not excluded from the benefit of the Act :

Held, that the defendant must be deemed to have been assessed in income-tax and was not entitled to claim the benefits of the Madras Agriculturists' Relief Act. A.I.R. 1942 Mad. 428=1942 M.W.N. 287=(1942) 1 M.L.J. 559=55 L.W. 352=202 Ind. Cas. 456.

——S. 3 (ii) Pro. (A)—Scope and Applicability—Firm assessed to income-tax—Partner not making application for refund under S. 48, Income-Tax Act (XI of 1922)—Partner holding share in firm, if comes within proviso (A).

Where a firm is assessed to income-tax, a partner holding a share in the firm and not having made an application for refund under S. 49, Income-tax Act of the tax upon his share of the firm, comes within the proviso (*A*) to S. 3 whether total income falls below the taxable minimum or not. A.I.R. 1941 Mad. 672=53 L.W. 685=(1941) 1 M.L.J. 782=1941 M.W.N. 488.

——S. 3 (ii), Pro. (A)—Applicability—Criterion.

The criterion for the applicability of Proviso A to S. 3 (*ii*), Mad. Agri. Relief Act, is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to Income-tax in either of the two financial years ending March 31, 1938, and it does not lay down any restriction regarding the period in respect of which that assessment might have been made. A.I.R. 1941 Mad. 289=(1940) M.W.N. 1156=(1940) 2 M.L.J. 817=52 L.W. 731=193 Ind. Cas. 547.

S. 3 (ii), Priviso (B)—(a) Interpretation.

——S. 3 (ii) Proviso (B)—Interpretation—Criterion under Proviso (B) for exclusion from category of agriculturists is actual date of assessment—S. 137-B, Madras City Municipality Act (IV of 1919), intention of—Assessment to profession tax made after October 1, 1937, relating to period immediately preceding—Assessee, if Agriculturist.

The words "has within the two years immediately preceding October 1, 1937, been assessed" in S. 3 (*ii*) Proviso (B) mean what they say and nothing else. The criterion in Proviso (B) for the exclusion from the category of the agriculturists is not the actual period for which the tax is payable but the actual date on which the assessment is made. Section 137-B, Madras City Municipal Act is obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. But in the case of a retrospective assessment, it is not provided that the date of the assessment shall be deemed to fall within the period to which the assessment relates.

Hence a person is not disqualified from claiming to be an agriculturist by reason of an assessment to profession tax made after October 1, 1937, although relating to the period immediately before October 1, 1937. A.I.R. 1941 Mad. 152=I.L.R. (1941) Mad. 383=(1941) 2 M.L.J. 841=(1940) M.W.N. 1192=52 M.L.W. 765=196 Ind. Cas. 288.

S. 3 (ii), Pro. (B)—Scope and applicability.

——S. 3 (ii), Priviso (B).—Scope and applicability.

Assessment to property tax under Madras Local Boards Act, not challenged in appeal within time—Schedule IV of that Act does not empower President or *Panchayat* to cancel assessment—Expunction of assessee's name from registers by *Panchayat* cannot affect assessee's legal position—Assessee must be deemed to be assessed within S. 3 (*ii*), Proviso (*b*), Madras Agri. Relief Act—Court cannot question legality of assessment. A.I.R. 1942 Mad. 598=I.L.R. (1942) Mad. 941=(1942) 2 M.L.J. 153=1942 M.W.N. 447=55 L.W. 470=205 Ind. Cas. 102.

——S. 3 (ii) Priviso (B)—Scope and applicability—Retired Police Officer paying profession tax—Tax—Nature of.

A person who pays profession tax on his pension as retired Police Officer does in fact pay profession tax other than agriculture within proviso B to S. 3 (2) on an income derived from a profession. A.I.R. 1942 Mad. 449=55 M.L.W. 238=(1942) 1 M.L.J. 466=1942 M.W.N. 331=202 Ind. Cas. 19.

——S. 3 (ii), Proviso (B)—Scope and applicability—Only in respect of which agriculturist has actually been assessed to profession tax under District Municipalities Act, should be considered—His share of income of firm separately assessed to profession tax should be excluded.

'Person' under Act IV of 1938 does not include an unincorporated company or association. Therefore, what disqualifies a person under proviso (B) to S. 3 (*ii*) is the individual assessment of that person to profession tax on a certain stipulated income.

Under the District Municipalities Act, however a partnership is included in the definition of "company" and for the purpose of profession tax, a company is a separate unit classified and assessed to profession tax without reference to the private income of the individuals of whom the firm is composed. When a firm has been assessed to profession tax, the individual members of that firm cannot be assessed again on their share of the income of the firm. The tax imposed on the firm is clearly an assessment on that firm as separate unit and the tax imposed on the individual is imposed upon that individual without reference to his capacity as a member of the firm. Therefore, when the firm is assessed to profession tax, it cannot properly be said that the individual partner is assessed to profession tax, though no doubt indirectly he pays that tax. Consequently, in applying proviso (B) to S. 3 (*ii*), Mad. Agri. Relief Act, only the income in respect of which the alleged agriculturist has been actually assessed to profession tax under the District Municipalities Act, should be considered and his share of the income of a firm, which firm has been separately assessed to profession tax should be excluded. A.I.R. 1942 Mad. 382=(1942) 1 M.L.J. 24=1942 M.W.N. 23=55 L.W. 24=204 Ind. Cas. 612.

——S. 3 (ii), Priviso (B)—Scope and applicability.

Under . 3 (*ii*), proviso (B) the assessment for four consecutive half years from October 1935, to September 1937 is not necessary. A.I.R. 1940 Mad. 919=52 L.W. 420 (1)=(1940) 2 M.L.J. 467=(1940) M.W.N. 997.

——S. 3 (ii), Proviso (B)—Scope and applicability.

It is wrong to say that it is only a person who has been validly assessed who is excluded from the definition of agriculturist. A.I.R. 1940 Mad. 919=52 L.W. 420 (1)=(1940) 2 M.L.J. 467=(1940) M.W.N. 997.

S. 3 (ii), Proviso (C)—(1) Annual rental or Capital value—Calculation.

——S. 3 (ii) Proviso (C)—Person owing only share in house assessed to property tax—Annual rental value of house under S. 3 (ii), Proviso (c)—What is.

Where a person owning only a share in a house is assessed to property tax in computing the annual rental value of the house under S. 3 (*ii*), Proviso (c) Mad. Agri. Relief Act, it is not the whole annual rental value of the house that should be taken into account but only the proportionate share of such value 55 M.L.W. 851=A.I.R. 1943 Mad. 258=(1942) 2 M.L.J. 487=207 Ind. Cas. 207.

——S. 3 (ii), Proviso (C)—Annual rental value is net, not gross rental value.

The phrase "annual rental value" is a general phrase and hence the annual value in proviso (C) is the net figure after making the statutory deduction

and not the gross rental. A.I.R. 1943 Mad. 194= 1942 M.W.N. 708=55 M.L.W. 780=(1942) 2 M.L.J. 676=I.L.R. (1943) Mad. 591=205 Ind. Cas. 579.

——S. 3 (ii), Proviso (C)—Explanation—Assessment on capital value.

In cases of assessment on the basis of capital value, under the explanation to S. 3 (*ii*), Proviso (*c*), the rental value must be calculated at 5 per cent of the capital value. It is not open to the Court to take evidence of actual rent paid, and capitalise it on the 5 per cent basis. A.I.R. 1941 Mad. 448=1941 M.W.N. 291= 53 M.L.W. 391=(1941) 1 M.L.J. 466.

S. 3 (ii), Proviso (C)—(2) Burden of Proof.

——S. 3 (ii), Proviso (C)—Burden to prove that he is agriculturist lies on debtor—Debtor proving that he owns saleable interest in agricultural land—Burden shifts on to creditor—After case is closed and judgment reserved Court allowing mortgagee to file documents to show that debtor was disqualified from claiming benefit of Act by reason of proviso (C)—Debtor stating that properties referred to in documents were wrongly included in mortgage—Question held should have been raised during trial.

Although the initial burden to prove that he is an agriculturist as defined in the Act lies on the debtor when he proves that he owns a saleable interest in any agricultural land of the kind mentioned in S. 3 (*ii*), the burden shifts on the creditor to prove that the debtor is disqualified, under one or the other of the provisos to S. 3 (*ii*), from claiming the status of an agriculturist.

After the case was closed and judgment reserved, the trial Court allowed the mortgagee-plaintiff to file certain documents to show that the properties included in the mortgage were assessed to house tax on the basis of a rental value exceeding Rs. 600 and therefore the defendant was disqualified from claiming the benefits of the Act by reason of proviso (c) to S. 3 (*ii*) of the Act. The Court gave an opportunity to the defendant to rebut these documents. The defendant adduced no rebutting evidence but filed a "memorandum of objections" stating that the properties referred to in the documents were wrongly included in the mortgage :

Held, that the question should have been properly raised by the plaintiff mortgagee during the trial so as to give the defendant an adequate opportunity to repel his alleged disqualification under proviso (C) to S. 3 (*ii*) the burden of proving which clearly lay on the mortgagee in the circumstances of the case. A.I.R. 1946 Mad. 437=(1946) 1 Mad. L.J. 373=59 Mad. L.W. 280=1946 Mad. W.N. 282.

S. 3 (ii), Pro. (C)—(3) Interpretation.

——S. 3 (ii), Proviso (C)—Interpretation—"Aggregate" in proviso (C)—Meaning of.

The word "aggregate" in proviso (C) to S. 3 (*ii*) clearly refers to the total of the rental value of the various buildings and lands in respect of which the tax has been imposed and not to the total of the valuation for two half years. A.I.R. 1942 Mad. 533= 55 M.L.W. 288=(1942) 1 M.L.J. 571=1942 M.W.N. 415=202 Ind. Cas. 6.

——S. 3 (ii), Proviso (C)—Interpretation—"Agricultural land"—Question of fact—"Agricultural", meaning of.

The question whether land is or not "agricultural" is legally a question of fact. The term "agricultural" as used in proviso (*c*) to S. 3 must be read in the sense in which it is used in the relevant section of the Madras District Municipalities Act and not in any narrow sense which might be spelt out of the definition of "agriculturist" in S. 3 (*ii*) (*a*) of the Act. (1945) 1 M.L.J. 2=58 L.W. 87 (1)=1945 M.W.N. 41(1)= A.I.R. 1945 Mad. 148.

——S. 3 (ii), Proviso (C)—Interpretation—"Is" must be read as "was"—Property in municipal register in name of third person—Tax, held recovered from real owner.

The verb "is" in the final clause of proviso to S. 3 (*ii*) must be read as being equivalent to "was" and the period during which the rental value is to be not less than Rs. 600 must be the same two years within which the assessment is to disqualify the person who claims to be an agriculturist.

An agriculturist owned property during the whole of the relevant period and regarded himself as responsible for the tax. The tax was demanded from him and on his representation, the assessment was reduced and he paid the tax :

Held, that the agriculturist was the person who was assessed to property tax in respect of his property even though the municipal demand register had not been brought up-to-date by the substitution of his name for that of some former owner. A.I.R. 1942 Mad. 410=1942 M.W.N. 208=55 L.W. 164=(1942) 1 M.L.J. 388=204 Ind. Cas. 570.

——S. 3 (ii), Proviso (C)—Interpretation—Tax, if must have been imposed throughout the period of two years.

It is incorrect to say that in order to come within the purview of proviso (C) to S. 3 (*ii*), property tax on a rental value of not less than Rs. 600 must have been imposed throughout the period of two years specified in the proviso. Such interpretation is against the plain language of the proviso which does not use the word "throughout" but uses the word "within." If at any point of time within the period, the disqualification has been incurred it will satisfy the terms of the proviso. A.I.R. 1942 Mad. 533= 1942 M.W.N. 415=(1942) 1 M.L.J. 571=55 L.W. 288=202 Ind. Cas. 6.

S. 3 (ii), Pro. (C)—(4) Scope and applicability.

——S. 3 (ii), Proviso (C)—Scope and applicability—Rate of assessment actually fixed must govern application of S. 3 (ii), proviso C.

The rate of assessment actually fixed must govern the application of S. 3 (*ii*), proviso C. The Court, for the purpose of S. 3 (*ii*), proviso C, cannot the propriety of the assessment. A.I.R. 1941 Mad. 413=(1941) 1 M.L.J. 185=53 M.L.W. 108=1941 M.W.N. 173.

——S. 3 (ii)—Proviso (C)—Scope and applicability.

It cannot be said theat Proviso (C) to S. 3 (*ii*) contemplates only the ownership of the property by the individual concerned and does not contemplate his assessment in respect thereof. Proviso (C) clearly requires that in order to come within its scope, the individual must have been actually assessed. It is not sufficient to show that he is interested in property in respect of which somebody has been assessed.

Where, therefore, the husband and the wife are separately assessed in respect of certain properties covered by the mortgage executed by the husband alone, the assessment of the entire properties cannot be regarded as the assessment of the husband. 52 M.L.W. 765=A.I.R. 1941 Mad. 152=I.L.R. (1941) Mad. 383=(1941) 2 M.L.J. 841=(1940) M.W.N. 1192=196 Ind. Cas. 288.

——S. 3 (ii), Pro. (c)—Scope and applicability—Proviso C to S. 3, whether excludes persons who have escaped assessment.

The Proviso C to S. 3, Madras Agricultural Relief Act excludes from the benefits of the Act only persons who have been assessed to property tax. It does not exclude those who, though liable to property tax, have, for some reason or other, escaped assessment. A person cannot be "assessed" unless the assessment is made in his name. 50 M. L. W. 411=A.I.R. 1939 Mad. 942=(1939) M. W. N. 910=(1939) 2 M.L.J. 495=186 Ind. Cas. 424.

——S. 3 (ii), Pro. (c)—Scope and applicability—Nattu Kottai Chettiar — Father, if representative of family.

The assessment of the joint family properties was in the name of the father and the manager, the other members of the family being minors, and the person assessed was described by the well-known family *vilasam* which was also the *vilasam* of what was admittedly the joint family firm. The assessees claimed relief under S. 3 (*ii*), Proviso (*C*):

Held, that having regard to the importance attached to such a description in the *Nattu Kottai Chettiar* community, the description of the father or the manager of the joint family, as found in the Municipal certificates, was a sufficient indication that the assessment in respect of joint family properties was imposed upon the father as representing the family and, therefore, the father as well as other members of the family were disqualified from obtaining the relief under the Act. (1945) 1 M.L.J. 258=1945 M.W.N. 211=58 L.W. 172=A.I.R. 1945 Mad. 301.

——S. 3 (ii), Pro. (c)—Scope and applicability.

For a case to come under Proviso C to S. 3 (*ii*), the property must be one which has a rental value of not less than Rs. 600; it must have been assessed to house or property tax for two years immediately preceding October 1, 1937, and the Municipality demands or recovers the tax from the owner or otherwise treats him as liable to pay the tax. The insertion in the assessment register of the name of the true owner of the property is not the deciding factor. A.I.R. 1944 Mad. 359=1944 M.W.N 427=I. L. R. (1944) Mad. 768=(1944) 1 M.L.J. 424=57 M.L.W. 328=217 Ind. Cas. 329 (2) (F.B.).

——S. 3 (ii), Pro. (c)—Scope and applicability—Property-tax paid by Receiver of mortgaged property is on behalf of mortgagor—Mortgagor cannot claim to be agriculturist—Position of Receiver.

A Receiver appointed under O. 40, R. 1, Civil P. C., in a mortgage suit represents whoever may be found ultimately entitled to the property as the result of the suit. When a Receiver in such a suit pays property tax on the property, he certainly is not paying that property tax of his own individual account.

The payment of the tax by the Receiver is a payment on behalf of and as representative of the mortgagor if he is the true owner and hence the mortgagor is disqualified by proviso (*c*) to S. 3 (*ii*), from claiming to be an agriculturist. The fact that as the result of execution the whole of the hypotheca has been swallowed up without satisfying the mortgages and that the interest of the nominal owner in the property was negligible does not affect the question. A.I.R. 1942 Mad. 602=55 L.W. 298=(1942) 1 M.L.J. 561=1942 M.W.N. 391=202 Ind. Cas. 765.

——S. 3 (ii) Pro. (c)—Applicability of.

For the applicability of S. 3, proviso (c), Madras Agricultural Relief Act, the house must be shown to be assessed as the property of the person sought to be excluded from the category of agriculturist. A.I.R. 1941 Mad. 672=53 M.L.W. 685=(1941) 1 M.L.J. 782=1941 M.W.N. 488=199 Ind. Cas. 424.

S. 3 (ii) Pro. (d)—Scope and applicability.

——Ss. 3 (ii) Proviso (D), 8 and 9—Suit on mortgage impleading mortgagor, his sons and purchaser of mortgaged property in auction sale held by Official Receiver—Sale deed in favour of auction-purchaser not executed until after coming into force of Act—Auction-phrchaser also owning certain villages in respect of which peshkush and jodi amounting to Rs. 1,000 was payable—Auction-purchaser held not agriculturist and could not claim relief under Ss. 8 and 9 of Act—Sons held could redeem mortgage — Madras Estates Land Act (1 (I) of 1908), S. 3 (5).

In a suit on a mortgage executed by defendant 1, defendant 6 who had purchased the mortgaged property from the Official Receiver claimed relief under Ss. 8 and 9, Madras Agriculturists Relief Act. It was contended that defendant-purchaser 6 in auction sale was not entitled to the relief under the Act as he had no interest in the hypotheca till 1939 and that he was not an agriculturist under the Act, as he had purchased villages forming part of an estate of which *peshkush* and *jodi* amounted to nearly Rs. 1,000. It was in evidence that though defendant 6 was a successful bidder in an auction held in 1937 by the Official Receiver the sale-deed in his favour was not executed by the Official Receiver till 20th January, 1939 and also that defendant 6 purchased the said villages in 1935 itself. Defendants 2 and 3, sons of defendant 1 claimed that in the sale by the Official Receiver their interest in the property did not pass and that they were entitled to redeem their shares in the hypotheca. Defendant 6 also contended that as defendants 2 and 3 were entitled to relief as agriculturists that relief must be made available to him though he himself was not an agriculturist:

Held, (*i*) that a mere contract of sale in favour of defendant 6 could not amount to an interest in the property so as to make defendant 6 liable to discharge the debt and that, therefore, he was not entitled to the benefits of the Act.

(*ii*) that defendant 6 was an agriculturist on the date of the commencement of the Act as proviso D to S. 3 (*ii*) of the Act applied;

(*iii*) that the mere fact that defendant 1 owned the property *benami* would not affect his position as under S. 3 (5), Estates Land Act, he being the titular owner was the person entitled to collect the rent and was, therefore, a landholder;

(*iv*) that defendants 2 and 3 were entitled to redeem the mortgage as they remained the owners of their shares in the hypotheca notwithstanding the sale by the Official Receiver;

(*v*) that as defendants 2 and 3 who were entitled to the benefits of the Act had not claimed the relief under the Act and taken steps to prove the same, defendant-purchaser 6 who was not an agriculturist could not urge that their right to relief under the

Act should be investigated merely with the object of giving him an accidental relief. A.I.R. 1946 Mad. 434=59 Mad. L.W. 319=(1946) 2 Mad. L.J. 72=1946 Mad. W.N. 422.

——S. 3 (ii), Pro. (D)—Scope and applicability —Land-holder holding one estate in Madras Presidency as now constituted and other estate in area transferred from Madras Presidency to Orissa Province—Both estates together paying more than Rs. 500 as peshkush—S. 3 (ii) Proviso D applies—S. 7, Regulation (to declare law in force in the Province of Orissa) 1 of 1936—Paras. 11 and 26, Constitution of Orissa Order, 1936 and Para. 8, Adaptation of Indian Laws Order, 1937—Interpretation and effect of.

Under S. 3 (*ii*), Proviso D, it is not necessary that the *peshkush* of not less than Rs. 500 should be payable to the Provincial Government of Madras.

The object and effect of S. 7 of Regulation 1 of 1936 entitled 'a regulation to declare the law in force in the Province of Orissa' read with Paras. 11 and 26 of the Government of India (Constitution of Orissa) Order, 1936 was not to enact a law for the area transferred from the Madras Presidency to the Orissa Province but to provide how certain provisions of law assumed to be in force in the transferred area—Obviously under Para. 26 of Constitution of Orissa Order, 1936—should be interpreted in the changed circumstances. It did not terminate the operation of the Madras Estates Land Act as such in the transferred areas and enact for those areas a new Act in the same terms.

Nor is it correct to say that by reason of the proviso to Para 8 of the Adaptation of Indian Laws Order, 1937, all Madras Acts which, before the order, continued to operate in the areas transferred to the Orissa Province ceased to operate. The purpose of the Proviso was not to terminate the operation of any law in any particular area, but only to provide a particular rule of construction and even that only in respect of "the application of any enactment of Madras." This proviso did, for the rest of the Madras Presidency what S. 7 of the Regulation 1 of 1936 did for the transferred areas, the underlying assumption in both cases being that the pre-existing laws continued to operate as before, subject to the rule of construction enacted by the Regulation and by Para. 8 of the Order in Council respectively. The Madras Estates Land Act therefore continued to operate *proprio vigore* in the areas transferred from the Madras Presidency to the Orissa Province in spite of their transfer. The words "land-holder of an estate under the Madras Estates Land Act" in S. 3 (*ii*) Proviso D therefore are applicable as well to an estate in the areas transferred from the Madras Presidency to the Orissa Province as to an estate which remained in the area now constituting the Province of Madras.

Hence where a landholder holds one estate within the province of Madras and other estate in the areas transferred from the Madras Presidency to the Orissa Province and the two estates taken together pay more than Rs. 500 as *peshkush*, the Proviso D to S. 3 (*ii*) will apply and the land-holder will be excluded from the benefits of the Act. A.I.R. 1944 F.C. 31=1944 M.W.N. 246=57 M.L.W. 301=(1944) 1 M.L.J. 356=48 C.W.N. (F.C.) 104=78 C.L.J. 117=I.L.R. (1944) Kar. (F.C.) 64 Sup.=11 B.R. 76=(1944) F.C.R. 181=214 Ind. Cas. 321 (F.C.).

——S. 3 (ii) Pro. (D)—Scope and applicability.

A co-owner's proportionate share of the liability has alone to be taken into consideration in applying S. 3 (*ii*), Proviso D. Madras Agriculturists Relief Act. A.I.R. 1943 Mad. 292=1943 M.W.N. 26=(1943) 1 M.L.J. 104=56 L.W. 141=I.L.R. (1943) Mad. 717=210 Ind. Cas. 98.

——S. 3 (ii), Pro. (D)—Scope and applicability —Land-holder evading payment of kattubadi—Such evaded kattubadi is not to be excluded.

Even if in a particular year or series of years the land-holder manages to evade payment of the lawful *kattubadi* yet he is the land-holder of an estate in respect of which *kattubadi* is paid. The criterion must not be the actual money which the Government or superior land-holder succeeds in recovering but the proportionate share which the individual owner of a part of the estate has to pay in respect of the share which he owns. A.I.R. 1943 Mad. 586=1943 M.W.N. 269=56 M.L.W. 234=(1943) 1 M.L.J. 333=209 Ind. Cas. 333.

——S. 3 (ii), Pro. (D)—Scope and applicability —Government village — Inam holding forming only portion of village—Holder is not land-holder within Madras Estates Land Act (I of 1908).

In 1809, the proprietor of a *zamindari* made a grant of certain lands which formed only a portion of the village, to the then holder of the *karnam* service. In 1833, as a result of rebellious acts, the *zamindari* was forfeited and the estate was declared to be land belonging to the Government. But the holders of the service *inam* lands continued in possession and their holding was enfranchised in the *inam* commission proceedings of 1863, on payment of the quitrent. Since that date, these lands had been held as an *inam* holding situated within a Government village:

Held, that the *inam* lands were not either an estate or part of an estate in respect of which the holders could be regarded as land-holders within S. 3 (2), Madras Estates Land Act. A.I.R. 1943 Mad. 263=1943 M.W.N. 9=56 M.L.W. 15=(1943) 1 M.L.J. 90=207 Ind. Cas. 89.

——S. 3 (ii) Pro. (D)—Scope and applicability.

Person paying any sum exceeding Rs. 500 as *peshkush* to Provincial Government or any Government is not agriculturists provided such payment is made in respect of estate under Madras Estates Land Act (1 of 1908) or share or portion thereof. A.I.R. 1943 Mad. 91=I.L.R. (1943) Mad. 370=55 M. L. W. 648=(1943) 1 M.L.J. 457=207 Ind. Cas. 175.

——S. 3 (ii), Pro. (D)—Scope and applicability —Proposal to enfranchise inam falling through at time of Inam Commission—By subsequent agreement with zamindar, mokhasadar paying certain fixed amount annually to zamindar as cist—Payment—Nature of.

A proposal to enfranchise the *inam* fell through at the time of the Inam Commission, and the lands continued to be held on a payment varying with the yield of Rs. 4 per *putti* upto 1889, on which date there was an agreement between the *zamindar* and the *mokhasadar*, that instead of this varying payment and annual sum of Rs. 600 should be paid "towards the *cist*":

Held, that the annual payment of Rs. 600 agreed to be paid subsequent to the Inam Commission was in the nature of quit rent or *kattubadi* and the *mokhasadar* was, therefore, a land-holder. A.I.R. 1942

Mad. 733=(1942) 2 M.L.J. 421=55 M.L.W. 610 =1942 M.W.N. 721=204 Ind. Cas. 450.

——S. 3 (ii)—Pro. (D)—Scope and applicability —Total payment of land revenue by jenmi must be taken into consideration.

In proviso (D) of S. 3 (*ii*), Madras Agricultural Relief Act, the word "is a *jenmi* under Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue" do not refer only to the land revenue paid by the *jenmi* on his *jenmam* land but include land revenue paid by the *jenmi* in respect of other lands held on other tenures. Hence, for the purpose of proviso (D), the total payments of land revenue paid by the *jenmi* not only in respect of his *jenmam* land but also in respect of *ryotwari* land or in respect of lands held by him under *kanom* must be taken into consideration. A.I.R. 1942 Mad. 120=54 M.L.W. 466=1941 M.W.N. 914=(1941) 2 M.L.J. 584=200 Ind. Cas. 859.

——S. 3 (ii)—Pro. (D)—Scope and applicability —"Undivided family" covers joint families reunited as well as those which have never separated.

The term 'undivided Hindu family' in S. 3 of the Madras Agriculturist Relief Act covers those joint families which have reunited, as well as those joint families which have never separated. For the purposes of the Act, there is no apparent difference between the two classes of joint families in their obligations, their management and their rights. Hence the members of a reunited Hindu family which pays more than Rs. 100 as *kattubadi* are disqualified from receiving the benefits of the Act. A.I.R. 1941 Mad. 846=(1941) 2 M.L.J. 304=54 M.L.W. 223=1941 M.W.N. 776=197 Ind. Cas. 324.

——S. 3 (ii), Proviso (D)—Scope and applicability—Sharer in shrotariam—Proportionate share of jodi payable by him less than Rs. 100—His share theoretically liable for whole of jodi of shrotriam —Such sharer, if excluded fom category of agriculturist.

The share or portion of an estate in S. 3 (*ii*) proviso D. Mad. Agri. Relief Act does not mean only the separately registered share or portion. Where the proportionate jodi payable by a sharer in in a *shrotriam* village is less than Rs. 100, he is not excluded from the category of agriculturist even though there may be a theoretical liability for the whole of the jodi laid upon his share so far as the Govt. is concerned. A.I.R. 1941 Mad. 741=(1941) 2 M.L.J. 164=54 M.L.W. 118=1941 M.W.N. 746=199 Ind. Cas. 746.

——S. 3 (ii), Proviso (D)—Scope and applicability—Sharer in shrotriam—Proportionate share of ing Rs. 500 though land revenue payable as jenmi less than Rs. 500.

Section 3 (*ii*) Proviso *D* does not restrict the land revenue payable by a *jenmi* to the revenue payable only on the land held by him as *jenmi*. Hence a *jenmi* who is also a *ryotwari pattadar* and whose total payments to Govt. on account of land revenue exceed Rs. 500, cannot be regadred as an agriculturist notwithstanding that the revenue payable by him as *jenmi* is less than Rs. 500. A.I.R. 1941 Mad. 305=1941 M.W.N. 34=52 M.L.W. 835=(1940) 2 M.L.J. 934.

——S. 3 (ii), Proviso (D)—Scope.

Section 3 (*ii*), Proviso (*D*) covers a landholder of an estate or estates in respect of which estate or estates a sum exceeding Rs. 500 is paid as *peshkush*. 52 M.L.W. 521=A.I.R. 1941 Mad. 244=(1940) M.W.N. 1043=(1940) 2 M.L.J. 711.

——S. 3 (ii), Proviso (D)—Scope and applicability—Word 'land-holder' scope of — Landholder executing separate usufructuary mortgages of his zamin rights but retaining ryoti lands and becoming tenant of his mortgagees in respect of them—Collector recognising one of mortgagees as landholder —Mortgagor, if landholder within meaning of S. 3 (5), Madras Estates Land Act (1 of 1908).

The word 'landholder' in S. 3 (*ii*), Proviso *D*, contemplates the qualification of ownership of the *zamin* interest rather than the qualification of recognition by the Collector.

Where, therefore, a landholder executes separate usufructuary mortgages of his *zamin* right in the estate, retains *ryoti* land and becomes the tenant of his mortgagees in respect of those lands the mortgagor as owner of the estate must also be deemed to be a landholder within the definition in S. 3 (5), Madras Estates Land Act, notwithstanding the recognition of one of the mortgagees as landholder by the Collector. A.I.R. 1941 Mad. 200=(1940) 2 M.L.J. 883=52 M.L.W. 832=1941 M.W.N. 31=195 Ind. Cas. 149.

——S. 3 (iii) See also SS. 8, 9.

1. Applicability.

——S. 3—Applicability—Estate of deceased persons—Right of to relief under Act. 223 Ind. Cas. 453=1945 M.W.N. 722 (1)=58 M.L.W. 565 (1) =A.I.R. 1946 Mad. 58=(1945) 2 M.L.J. 410.

——Ss. 3 (iii), 8, 9—Applicability—Person liable on account of possession of property or becoming liable by devolution, when entitled to relief.

The right to claim relief under the Act is not confined to the person who actually contracted the debt but is available equally to persons who are liable on account of the possession of property or a person who comes under liability by devolution, provided of course that such person is agriculturist as defined by the Act even though the original debtor was not an agriculturist or was disquailfied from claiming the relief under the Act. A.I.R. 1943 Mad. 87=55 M.L.W. 729=(1942) 2 M.L.J. 506=207 Ind. Cas. 205.

——S. 3 (iii)—Applicability—Suit by first mortgagee — Puisne mortgagee asked to free his own security.

Where, in a suit by first mortgagee, the puisne mortgagee is given merely the privilege of freeing his own security and preserving his possession, he is not a debtor. A.I.R. 1940 Mad. 61=50 M.L.W. 150=(1939) M.W.N. 736 (1)=(1939) 2 M.J. 225.

S. 3 (iii)—(2) "Debt".

——S. 3 (iii)—"Debt"—Liability of purchaser of equity of redemption, if 'debt'.

The liability of a purchaser of equity of redemption is a 'debt' within the meaning of S. 3 (3) of the Madras Agri. Relief Act. The definition of the word 'debt' should not be understood as limited to cases where a person is personally liable. 48 M.L.W. 954=A.I.R. 1939 Mad. 186=(1939) M.W.

N. 106=I.L.R. (1939) Mad. 218=(1938) 2 M.L.J. 1068=182 Ind. Cas. 879.

——S. 3 (iii)—"Debt"—Liability to make restitution is debt—Liability of original party's son in possession of family property after partition.

The liability to make restitution is a debt within the meaning of S. 3 (3), Madras Agri. Relief Act, and it is no less a debt when due from the son of the original party by reason of his possession of family property after partition. I.L.R. (1941) Mad. 496=1941 M.W.N. 95=53 M.I.W. 69=(1941) 1 M.L.J. 467=201 Ind. Cas. 267.

——S. 3 (iii) — "Debt" — Relinquishment by mortgagee of right to personal decree against agriculturist mortgagor—Non-agriculturist purchasing equity of redemption—Mortgage if converted into 'debt' payable by such purchaser.

The mortgagee's relinquishment of his right to a personal decree against the mortgagors after the Madras Agri. Relief Act had come into force and the mortgagors had in fact applied for relief under it cannot affect the position which arises under the Act with reference to a date long prior to such relinquishment. The relinquishment of the claim for a personal decree against the mortgagor cannot, therefore, have the effect of converting the mortgage into a 'debt' payable solely by the non-agriculturist purchaser of equity of redemption. A.I.R. 1941 Mad. 584=(1941) 1 M.L.J. 561=53 M.L.W. 515=1941 M.W.N. 390=I.L.R. (1941) Mad. 930=200 Ind. Cas. 517.

——S. 3 (iii)—"Debt"—Advance made by partner to partnership, if debt.

There is no reason to suppose that debt is meant to include, contrary to the ordinary usage, an unascertained amount. However that may be, a debt is a liability, and 'liability', must mean a legal liability, a liability enforceable at law. An advance made by a partner to the partnership does not entail a liability by the partners to re-pay that advance, but rather, a mere right in equity to have a claim on the assets to the extent of the advance at the time of the dissolution of the partnership. Such advance is, therefore, not a debt within the meaning of S. 3 (3), Madras Agri. Relief Act. A.I.R. 1941 Mad. 410=(1941) 1 M.L.J. 36=1941 M.W.N. 49=53 M.L.W. 191=198 Ind. Cas. 801.

——S. 3 (iii)—"Debt"—Meaning and extent.

The definition of the word 'debt' found in the Act includes a liability to make restitution. Again, the definition cannot be restricted to cases where a person is liable and it is wide enough to cover the case of every person who is in any manner liable either because he is personally liable or because he is liable on account of the possession of property, and takes in his heirs, legal representatives or assigns. 50 M.L.W. 636=A.I.R. 1940 Mad. 95=(1939) M.W.N. 1077=(1939) 2 M.L.J. 745.

——S. 3 (iv)—Interpretation and scope.

See also S. 15 — INTERPRETATION AND SCOPE.

——S. 3. (iv)—Interpretation and scope.

The scope of the relief intended to be afforded by S. 15 of the Act must be determined with reference to the wider definition of 'rent' contained in S. 3 (4) of the Act and not to the definition contained in Madras Estates Land Act. A.I.R. 1942 Mad. 56=(1941) 2 M.L.J. 159=54 M.L.W. 120=1941 M.W.N. 904=200 Ind. Cas. 881.

——S. 3 (iv)—Interpretation and scope — Phrase 'quit rent....or the like' if includes charges for Police, for roads, for water and similar dues levied by state or local body.

The terms, 'quit rent,' *'jodi'*, *'kattubadi'* and *'poruppu'* denote quit rent on *inams* payable to a superior landlord or to the Government. Therefore, the phrase 'quit rent' *jodi, kattubadi, poruppu* or the like' in S. 3, Madras Agri. Relief Act refers only to payments in the nature of quit rent on *inams* whatever be the name by which they are denoted and does not include charges for Police, for roads, for water and similar dues levied for services rendered by the state or by a local authority. A.I.R. 1940 Mad. 915=(1940) 2 M.L.J. 461=(1940) M.W.N. 946=52 M.L.W. 494=192 Ind. Cas. 336.

S. 3 (v)—"Creditor".

——S. 3 (v)—"Creditor", extent of.

The term 'creditor' as defined in Act 4 of 193[illegible] does not include a person beneficially entiteld to the amount lent. A.I.R. 1943 Mad. 168=55 M.L.W. 785=1942 M.W.N. 718=205 Ind. Cas. 421.

——S. 3 (v)—'Creditor'.

The definition of 'creditor' in S. 3 (*v*), refers to the legal heirs or the legal assigns and not to persons who claimed to have acquired rights in a manner which the law does not recognise. If the debt under a mortgage in some informal way is made over to a person before the second deed is executed in his name, he could not, by virtue of the informal transfer, be deemed to be the assign of the previous mortgagees or of the latter's legal representative. A.I.R. 1943 Mad. 5=55 M.L.W. 706=(1942) 2 M.L.J. 592=1942 M.W.N. 719=204 Ind. Cas. 629.

——S. 3 (v)—'Creditor'—Assignee of pro-note, if creditor within Act.

The endorsee of a promissory note is the assignee of the original promisee even though he has greater rights than an assign by deed in that he is a holder in due course; consequently an assignee of a pro-note is a creditor within the meaning of S. 3, Mad. Agri. Relief Act. A.I.R. 1942 Mad. 169=(1941) 2 M.L.J. 808=54 M.L.W. 577=201 Ind. Cas. 117.

——S. 3 (v)—'Creditor' — Creditor, if includes person beneficially entitled to amount lent.

The definition of the word 'creditor' in S. 3 (*v*) of Act IV of 1938, though it expressly includes the creditor's heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. A.I.R. 1942 Mad. 143=54 M.L.W. 517=(1941) 2 M.L.J. 703=(1941) M.W.N. 1070=201 Ind. Cas. 67.

——S. 3 (v)—'Creditor'—Extent of.

The definition of the word 'creditor' in S. 3 (*v*) extend to a first assignee as well as to any subsequent assignee. The number of links in the chain of succession does not make any difference. A.I.R. 1941 Mad. 74=52 M.L.W. 484 (1)=(1940) M.W.N. 101=(1940) 2 M.L.J. 553.

——S. 4 (a)—Applicability.

The expression 'liability falling under the head of revenue due to Provincial Government' in S. 4 (*a*) does not imply that the liability to pay the revenue to the Provincial Government should be subsisting on the date of the application for scaling down the debt or that the suit itself should be directly by the per-

son entitled to claim the revenue for recovery of the 'revenue' as such.

Where the liability of the petitioner *D* was, in the beginning, to pay the revenue due to the Provincial Government but he never paid it and it was paid by *P* in the circumstances which gave *P* a right to recover that sum from *D* and *P* is seeking to enforce that liability against *D*, the case falls under S. 4 (*a*) and the debt cannot be scaled down even though *P* may not be the assignee of the rights of the Provincial Government. (1945) 1 M.L.J. 20=58 L.W. 89=1945 M.W.N. 172=A.I.R. 1945 Mad. 125.

——S. 4 (b)—Decree-holder, if can show that she is benamidar for her son.

A decree-holder claiming exemption under S. 4 (*b*), Madras Agriculturists Relief Act can adduce evidence to show that she is not beneficially interested in a mortgage standing in her name but is merely a *benamidar* for her son. A.I.R. 1942 Mad. 388 =1942 M.W.N. 139=55 M.L.W. 127=(1942) 1 M. L. J. 289=201 Ind. Cas. 790.

——S. 4 (c)—Interpretation—Words 'by way of loan or otherwise', explained—Sum payable to local authority as rent—Rent, whether contractual or under Estates Land Act is covered by exemption in S. 4 (c).

The words 'by way of loan or otherwise' should not be read as indicating 'by way of loan or some other form of advance.' The words 'any other sum due' are qualified by the words "by way of loan or otherwise"; object of the qualifying words is to prevent the application of the *ejusdem generis* rule which would otherwise apply to the words 'any other sum.' In order to make it clear that there is no such intention, the words 'any other sum' are thus qualified by the very wide description 'by way of loan or otherwise' indicating clearly that the words 'any other sum' are read in their natural and wide sense, not restricted by the proximity of the special words preceding. Therefore, the exemption in S. 4, Cl. (c)' will cover any sum payable to the local authority even though it partakes of the nature of rent and it makes no difference whether the rent in question be an ordinary contractual rent or a rent governed by the special provisions of the Estates Land Act which would bring it within the definition of rent under Act 4 of 1938. A.I.R. 1942 Mad. 462=1942 M. W. N. 215=55 M.L.W. 203=(1942) 1 M.L.J. 416 =201 Ind. Cas. 771.

——S. 4 (c)—Arrears of rent due by lessee of properties of religious endowment under management of District Board under S. 63, Madras Local Boards Act (14 of 1920), whether comes under S. 4 (c).

Clause (c) of S. 4 Madras Agriculturists Relief Act is worded as comprehensively as possible and it comprehends any money due to a local authority. Income from endowments and trusts under the management of a District Board comprises income from endowments and trusts whether derived by reason of the operation of S. 63 or S. 64, Madras Local Boards Act. That income is the District Fund. It is recoverable and must be recoverable only by the local authority. It is a sum due to them, *viz.*, the local authority. Consequently, arrears of rent due by lessee of properties of religious endowment under management of District Board is amount due by lessee to local authority and comes under S. 4 (c) Madras Agriculturists Relief Act. A.I.R. 1940 Mad. 231 =I.L.R. (1940) Mad. 239=50 M.L.W. 503= (1939) M.W.N. 972=(1939) 2 M.L.J. 818=188 Ind. Cas. 640.

——S. 4 (d)—Scope—Mortgage of house property within a Union Board—Inclusion of engine in the house in the schedule to the mortgage—If takes mortgage outside the exemption in S. 4 (d).

A site which is a paved yard adjoining a zinc-sheet shed must be regarded as appurtenant to the shed which is house property and an engine fixed in the house for the purpose of trade being carried on in the premises must be deemed to be a fixture for the beneficial enjoyment of the building and not a separate chattel so as to make the mortgage debt not one contracted on the security of the house property alone in a panchayat which was a union before 26th August, 1930. Accordingly such a mortgage is exempt from the operation of the Act by the provisions of S. 4 (d). 60 L.W. 583=A.I.R. 1948 Mad. 305=1947 M.W.N. 542=(1947) 2 M.L.J. 273.

——S. 4 (d)—Debts.

Section 4 Cl. (d), contemplates a debt contracted on the security of house property, that is to say, a debt for which the debtor has offered as security house property belonging to him. Where the security given is the land underneath the superstructures which belong to third parties and form no part of the security, the debt does not fall within S. 4 (d) and is liable to be scaled down in accordance with the provisions of the Act. A.I.R. 1943 Mad. 258 =(1942) 2 M.L.J. 487=56 M.L.W. 851=207 Ind. Cas. 207.

——S. 4 (d)—"House property" includes compound attached to building site.

The term "house property" will normally include the site on which the building stands and the garden compound or yard attached thereto. A.I.R. 1940 Mad. 54=50 M.L.W. 578=(1939) 2 M.L.J. 782 =(1939) M.W.N. 1148=189 Ind. Cas. 732.

——S. 4 (d)—Debt falling under S. 4 (d)—Promissory note for interest on such debt, if can be scaled down as renewal of debt.

When it is shown that a previous transaction is excluded from the operation of the Act by S. 4 (d), a promissory note for interest due thereon cannot be scaled down as a renewal of that transaction. A. I. R. 1943 Mad. 53=(1942) 2 M.L.J. 420=55 M. L. W. 609=1942 M.W.N. 744=205 Ind. Cas. 29.

——S. 4 (d)—"House property"—Land ear-marked for building purposes but unoccupied by any building, included in mortgage—Mortgage, if immune from operation of Act.

House property includes buildings of all kinds and the sites thereof, and also the gardens, compounds and yards attached thereto. But the ordinary connotation of the term 'house property' in everyday language would not include land ear-marked for building purposes, but unoccupied by any buildings. One would not, in ordinary English, speak of agricultural land as house property merely because the owner thereof is trying to sell it or has sold it to a speculative builder.

Where, therefore, two plots had been separately demarcated and in one of them at the time when the mortgage was executed, a house had been built and the other was destined for building purposes but was still vacant, the latter plot cannot be described as house property and the inclusion of this site is,

therefore sufficient to prevent the mortgage from being immune from the operation of the Madras Agriculturists Relief Act. A.I.R. 1939 Mad. 789= I.L.R. (1939) Mad. 943=50 M.L.W. 181=(1939) 2 M.L.J. 233=(1939) M.W.N. 731=188 Ind. Cas. 895.

——S. 4 (e)—Scope and operation.

Ss. 4 (e), 7, 8—

When Act came into force, preliminary decree on mortgage of Municipal house in existence—Such debt is excluded from operation of Act—After Act came into force, new agricultural security added—Such added security cannot create retrospectively a debt on agricultural land, so as to attract Ss. 7 and 8 of the Act and exclude S. 4 (e). 54 M.L.W. 468=A.I.R. 1942 Mad. 34=1941 M.W.N. 991=(1941) 2 M.L.J. 653=201 Ind. Cas. 265.

——S. 4 (d)—Scope and operation—Society formed under Societies Registration Act (21 of 1860), is corporation—Debts due to it cannot be scaled down.

A society formed under the Societies Registration Act is a corporation and it has a separate existence apart from its members and can sue and be sued in its corporate capacity. Consequently, debts due to such society by an agriculturist cannot be scaled down. 52 M.L.W. 549=A.I.R. 1940 Mad. 949 =(1940) 2 M.L.J. 554=(1940) M.W.N. 1015= 191 Ind. Cas. 816.

——S. 4 (f)—Breach of contract—Ss. 4 (f) and 19 — According to Nattukottai Chetti practice daughter-in-law's stridhan deposited with father-in-law—Position of father-in-law—Decree against father-in-law for return of deposit.

Where, according to the usual Nattukottai Chetti practice, the daughter-in-law's *stridhan* is deposited in the firm of the father-in-law to accumulate interest for the benefit of the bride and her offspring, the father-in-law receives it under an obligation to hold it for a specific purpose, and his position and that of his heirs, the subsequent proprietors of the firm who were aware of the nature of the deposit, is analogous to that of a trustee. Hence, if he refuses to pay back the deposit to the person entitled, he commits a breach of trust. A decree, therefore, for return of the deposit with interest embodies a liability arising out of a breach of trust falling within S. 4 (f) and cannot be scaled down under the Act. A. I. R. 1944 Mad. 256=57 M.L.W. 34=(1944) 1 M.L.J. 38=1944 M.W.N. 118.

——S. 4 (f)—Object—Scope — Surety guaranteeing due discharge of his duties by trustee—Breach by trustee — Liability of surety, if can be scaled down.

The words 'arising out of a breach of trust' in S. 4 (f), Madras Agriculturists Relief Act should not be read so as to cover any liability which is in any way connected with a breach of trust. The object of the clause is not to place creditors who have lost money owing to a breach of trust in a more favourable position than creditors who have merely placed excess confidence in their debtors. The object of this section must be to prevent dishonest trustees from pleading the Act in order to retain the fruits of their dishonesty, that is to say, this exception, just like the other exceptions enumerated in S. 4, is based on grounds of public policy. When a third party gives security for the due discharge by a person under a fiduciary relationship of his duties, the surety incurs towards the beneficiary a contractual liability which is enforceable only in case the trustee commits a breach of trust; but the proximate or immediate basis of the surety's liability is the contract. The breach of trust is a more remote cause from which the liability can be said to arise only indirectly. The claim against the surety on breach of his obligations by the trustee is primarily on the basis of the contractual liability which the surety has undertaken, and hence, in such a case, the surety is entitled to have his liability scaled down under the Act. A.I.R. 1942 Mad. 202=54 M.L.W. 697=1941 M.W.N. 1042=(1941) 2 M.L.J. 1008=201 Ind. Cas. 33.

——Ss. 4 (f), 10 (2) (ii), 19—Scope and applicability.

Where the purchaser of the mortgagors' equity of redemption executes a pro-note to discharge the mortgage debt, the pro-note must be deemed to be a renewal of the pre-existing liability and the debt under the note can be scaled down under S. 19 of the Act.

The liability sought to be scaled down in such a case is not a liability in respect of which a charge is provided under S. 55 (4) of the T. P. Act and hence S. 10 (2) (*ii*) is no bar to scaling down the debt. Section 4 has no application to such a case. A.I.R. 1941 Mad. 59=(1940) 2 M.L.J. 651 =1940 M.W.N. 1042=52 M.L.W. 582=196 Ind. Cas. 276.

——S. 4 (f)—Scope and operation—Co-owner realising interest by investment of common funds—His liability to pay interest to co-owner—Trusts Act (2 of 1882).

Section 4, Cl. (f), Madras Agriculturists Relief Act applies to obligations declared in Chapter 9, Trusts Act. The co-owner who has realised interest by the investment of the common funds is governed by S. 90, Trusts Act, and by virtue of S. 95 of the Act, he incurs a liability to pay interest under S. 23 of that Act.

Hence the liability to pay interest is taken out of the operation of the Madras Agriculturists Relief Act by S. 4, Cl. (f) of that Act. A.I.R. 1939 Mad. 471=49 M.L.W. 391=(1939) M.W.N. 279= (1939) 1 M.L.J. 528=I.L.R. (1939) Mad. 525= 186 Ind. Cas. 214.

——S. 4 (g)—Scope of — Assignee of arrears of maintenance comes within S. 4 (g).

The wording of Cl. (*g*) of S. 4, Madras Agriculturists Relief Act is wide enough to cover the claims not only of persons who are entitled to be maintained but also of assignees from them of their right to recover arrears of maintenance. Section 4, Cl. (g) must be construed as extending the protection of all persons who seek to enforce a liability which arose out of a non-fulfilment of an obligation to maintain. A.I.R. 1943 Mad. 487=1943 M.W.N. 266=56 M.L.W. 238=(1943) 1 M.L.J. 339= I.L.R. (1943) Mad. 218=210 Ind. Cas. 626.

——S. 4 (g)—Scope—Family assigning to plaintiff a security bond in lieu of her maintenance—Liability of debtor—Protection under S. 4 (g).

The mere fact that an asset of the family in the form of a security bond executed by the defendant was assigned to the paintiff in lieu of maintenance will not make the liability of the debtor, *i.e.*, the defendant, a liability in respcet of maintenance protected by S. 4 (*g*) of the Madras Act (IV of 1938).

A.I.R. 1942 Mad. 385=55 M.L.W. 118=1942 M. W.N. 182 (1)=(1942) 1 M.L.J. 290=202 Ind. Cas. 64.

——S. 4 (h)—Exemption under — Availability — Conditions—Debt due to woman—Character and status of creditor when debt is sought to be enforced—Relevancy.

Under S. 4 (*h*) of the Madras Agriculturists Relief Act to get an exemption, it would be enough if the debt was due to a woman in 1st October, 1937, provided she does not possess property of the value mentioned in that clause. If once that condition is satisfied at its origin the Court need not concern itself with the character or status of the creditor at the time when the debt is sought to be enforced. 63 L. W. 1027=1950 M.W.N. 492=(1950) 2 M.L.J. 286 =A.I.R. 1951 Mad. 345.

——S. 4 (h)—Exemption under — Availability — Extent—Debt due to man and woman—Debt due to each ascertainable—Woman only is entitled to protection under S. 4 (h) to extent of her share.

When there is a debt due to a woman and a man and the amount of the debt due to each can be ascertained, if the woman is entitled to the protection under S. 4 (*h*) to the extent of her interest in the debt, the agriculturist-debtors should be refused relief while he should be given relief to the extent of the interest in the debt belonging to the man. 58 L.W. 141=1945 M.W.N. 212=(1945) 1 M.L.J. 468=A.I.R. 1945 Mad. 260.

——S. 4 (h)—Exemption under — Availability—Pro-note of December 1, 1934, renewed on November 24, 1937—Suit—Scaling down.

Clause (*h*) of S. 4, Madras Agriculture Relief Act, must be read as exempting from the operation of the Act that class of liabilities of an agriculturist which are included in that cause regardless of whether after October 1, 1937, a fresh document is or is not executed by the same debtor in respect of that debt. Hence, a suit by a woman on a promissory note, dated November 24, 1937, in renewal of a debt due on an earlier promissory note, dated December 1, 1934 falls within the exemption under S. 4 (*h*) and is not liable to be scaled down. A.I.R. 1943 Mad. 686=56 M.L.W. 493= (1943) 2 M.L.J. 276=1943 M.W.N. 610=210 Ind. Cas. 273.

——S. 4 (h)—Exemption under — Availability — Female assignee from male assignee, if entitled to exemption.

It cannot be said that a woman is not entitled to claim the exemption under S. 4 (*h*), merely because her assignor, a male, was not entitled to such exemption. Having taken the assignment, she becomes the owner of the debt and when she claims the benefit of exemption provided by the Act for women creditors, it is no answer to say that the original payee under the suit note was a male. A.I.R. 1942 Mad. 662= 55 M.L.W. 557 (1)=(1942) 2 M.L.J. 123=(1942) M.W.N. 432=203 Ind. Cas. 192.

——S. 4 (h)—Scope and applicability—Daughter's right under decree to fixed maintenance allowance is property.

A daughter's right under an agreement or a decree to a fixed monthly maintenance allowance from her father's estate is property, within the meaning of S. 4 (*h*), Madras Agriculturists Relief Act. Section 6 (*dd*) of the T. P. Act does not affect the question whether such a right is in the nature of property or not.

The fact that the allowance is actually charged on immovable property has no bearing on the question whether the right to it constitutes property or not. A.I.R. 1941 Mad. 507=53 M.L.W. 75 (2)= (1941) 1 M.L.J. 123=1941 M.W.N. 296=I.L.R. (1941) Mad. 567=199 Ind. Cas. 753.

——S. 4 (h)—Debt due to two women jointly or as co-owners—Interest of each woman in debt and assets of each woman apart from debt must be considered.

When the Court has to adjudicate under the Act on a debt due to two women jointly or as co-owners, the interest of each woman in the debt and the assets of each woman apart from the debt must be taken into consideration in order to determine whther each woman is entitled to claim the exemption under S. 4 (*h*). A.I.R. 1940 Mad. 885=(1940) 2 M.L.J. 342 =52 M.L.W. 292=(1940) M.W.N. 912.

——S. 4 (h)—Words 'other property', meaning of.

The words "other property" in S. 4 (*h*), Madras Agriculturists Relief Act must be taken to refer to property other than debt or debts due to the woman from agriculturists. In other words, debas due from agriculturists to a woman on October 1, 1937, are not to be scaled down, under the Act if, on that date the principal amount of such debts did not exceed Rs. 3,000 and the woman did not own any property other than such debts apart from her personal belongings. A.I.R. 1940 Mad. 421=(1940) M.W.N. 309=(1940) 1 M.L.J. 534=51 M.L.W. 444=I.L.R. (1940) Mad. 688=192 Ind. Cas. 386.

——S. 5—Construction — "Undivided Hindu family' — If synonymous with 'joint family'—Assessment of divided family under S. 25-A of the Income-tax Act (11 of 1922)—Relevancy—Divided member—If also assessed as member of association of individuals.

Section 5 of the Madras Agriculturists Relief Act has no application to the case of Hindu families divided in status. The fact that a divided family is assessed by a fiction as an undivided Hindu family under S. 25-A of the Indian Income-tax Act cannot affect the real status of the family. Under S. 5 of the Madras Act, the words "undivided Hindu family" are synonymous with the words "joint family". It is impossible to say that, when a family whether divided or undivided is assessed as a separate legal entity, a member thereof is also assessed as one of a group of persons. Accordingly a member of a divided Hindu family is entitled to claim the benefits of the Agriculturists Relief Act. 1950 M.W.N. 75 =(1949) 2 M.L.J. 806.

——S. 6—Applicability.

Section 6 is inapplicable to joint families consisting of a person and his descendants. A.I.R. 1945 Mad. 257=58 L.W. 150=(1945) 1 M.L.J. 292=I. L.R. (1946) Mad. 54=1945 M.W.N. 206.

——Ss. 6 and 21—Applicability and scope—Agriculturist Hindu joint family of two brothers—One of them adjudicated insolvent—Sons of both brothers, if agriculturists.

A person whose estate is vested in the Official Receiver in insolvency cannot be deemed to have a saleable interest in that estate so long as the vesting continues. An undischarged insolvent, therefore, normally lacks the basic qualification for the status of

an agriculturist under the Act. When, at the commencement of the Act, there was an agriculturist family consisting of two brothers one of whom was an insolvent on the date of the commencement of the Act, and the other was an agriculturist, the insolvent brother cannot be deemed to be an agriculturist and his sons must be deemed to be non-agriculturists and the sons of the agriculturist brother must be deemed to be agriculturists. A.I.R. 1944 Mad. 497=(1944) 2 M.L.J. 112=1944 M.W.N. 593.

——S. 6—Applicability — Family consisting of father and sons.

Section 6, Madras Agri. Relief Act has no application to a family consisting only of a father and son. It is intended to apply to families in which there are several branches, one or more of which is composed of father and son. A.I.R. 1943 Mad. 35 =55 M.L.W. 636=(1942) 2 M.L.J. 486=1942 M.W.N. 752=I.L.R. (1943 Mad. 294=204 Ind. Cas. 560.

——Ss. 6, 10 (1)—Scope and operation.

Section 10 (1) of the Madras Agri. Relief Act refers only to the qualifications of a person who himself applies for relief under Ss. 8 and 9 of the Act; and it does not affect the status of an alleged agriculturist which is of importance only with reference to the application by his sons for relief having regard to the provisions of S. 6. 1944 M.W.N. 593=(1944) 2 M.L.J. 112=A.I.R. 1944 Mad. 497.

——S. 6—Scope of—Explained.

Section 6, Madras Agri. Relief Act must be confined in its scape to the position in which there is a major family unit which even after the application of the section, still remains an agriculturist family and in such circumstances, the scope of section would be to exclude from the benefits of the Act any member of such an agriculturist family who was a non-agriculturist and his descendants in the male line. The section has no application to a family which consists only of the father and sons. A.I.R 1942 Mad. 402=1942 M.W.N. 191=55 M.L.W. 160=(1942) 1 M.L.J. 327=205 Ind. Cas. 364.

——S. 7—Scope of.

Under S. 7, only debts payable by an agriculturist at the commencement of the Act are to be scaled down. (1945) 1 M.L.J. 384=58 L.W. 246=1945 M.W.N. 383; A.I.R. 1945 Mad. 385 (386) (D.B.).

——Ss. 7, 8, 9; 13—Ultra vires.

Section 7, 8, 9, and 13 of the Madras Agri. Relief Act run counter to Ss. 32, 79 and 80 of the Negotiable Instruments Act and are, therefore, *ultra vires* to the extent to which they offend against those sections of the Negotiable Instruments Act. (1945) 1 M.L.J. 339=I.L.R. (1945) Mad. 679=1945 M.W.N. 258=58 L.W. 199=A.I.R. 1945 Mad. 203 (F.B.).

——S. 7—Scope.

There is no question of decree-holder 'proceeding against' the property within the meaning of S. 7, at the stage when the Court is called upon to confirm the sale. Therefore, a sale which took place before October 1, 1937 could not be set aside under Act IV of 1938. 52 M.L.W. 67=(1944) 1 M.L.J. 110=1944 M.W.N. 75=A.I.R. 1944 Mad. 314=217 Ind. Cas. 372.

——S. 7—Debt, held contingent and not due on date of commencement of Act.

As per terms of the settlement deed, so far as the minor creditors were concerned, the obligation of the debtors was to have ready a sum of money for payment to the father of the minors if and when the father should make arrangements for the purchase of land. That land when purchased, was to be held in the names of the minors by the father and was to be handed over to the minors on attaining majority if they accepted the settlements, but in case the minors repudiated the settlement, the land was to be transferred to the debtors themselves together wih all the accrued profits:

Held, that, on March 23, 1938 there was no debt of an ascertained amount due from the debtors to the creditors who were on that date both of them minors. There was a contingent liability enforceable by the father to finance the purchase of property which probably would go ultimately to the minors, but, might revert to the debtors themselves. It could not, therefore be said that there was, at the commencement of the Act, a debt due from the debtors to the minors. A.I.R. 1944 Mad. 133=1944 M.W.N. 165=57 M.L.W. 400=(1943) 2 M.L.J. 630=215 Ind. Cas. 28.

——S. 7—Mortgage—Mortgaged property sold—Personal remedy against mortgagor barred—Mortgagor cannot claim benefits of Act.

Where, at the commencement of the Act, the mortgagor had ceased to be liable to pay the debt personally by reason of the law of limitation and also had ceased to be liable to pay the debt out of his property by reason of the sale of the hypotheca, he cannot claim the benefits of the Act. A.I.R. 1944 Mad. 82=56 M.L.W. 623=(1943) 2 M.L.J. 434=1943 M.W.N. 667=215 Ind. Cas. 293.

——S. 7—Mortgagor non-agriculturist — Portion of hypotheca purchased by agriculturist and portion by non-agriculturist—Debt scaled down so far as agriculturist purchaser—Agriculturist by paying off full scaled amount, if can redeem whole property so as to bar mortgagee's right to recover full decree from rest of hypotheca.

A purchaser of a portion of mortgaged property who is an 'agriculturist' within the meaning of the Madras Agri. Relief Act is not entitled to redeem the whole of the property on payment only of the scaled down amount of the debt so as to prevent the mortgagee from recovering the mortgage money in full from the rest of the hypotheca in the hands of a non-agriculturist purchaser from the mortgagor. A.I.R. 1943 Mad. 196=(1942) 2 M.L.J. 631=55 M.L.W. 741=1942 M.W.N. 798=I.L.R. (1943) Mad. 665=207 Ind. Cas. 253.

——S. 7—Scope of.

Section 7 contemplates the application of the provisions of the Act to all debts payable by an agriculturist at the commencement of the Act, but this is subject to the qualification in S. 10 of the Act that the provisions of Ss. 8 and 9 shall not apply to a person who was not an agriculturist on October 1, 1937. A debtor in cases where his claim to relief is put forward during the trial of the suit, will be entitled to relief if he can show that he was an agriculturist on October 1, 1937 and on the commencement of the Act, March 22, 1938. A.I.R. 1942 Mad. 726=55 M.L.W. 635=(1942) 2 M.L.J. 498=1942 M.W.N. 809=204 Ind. Cas. 478.

——Ss. 7, 12—Money paid after Act appropriated towards interest — Money in excess of interest as scaled down—Excess, if can be recovered under Ss. 7 and 12.

Where the payments are definitely appropriated towards interest at the time when they are made, neither the debtor nor the creditor has the right to tear up these appropriations by an unilateral act. The Court has no power to re-appropriate the payments to principal unless the Act contains a provision for such re-appropriation. The only way in which a debtor might get back money which he has paid after the Act came into force in excess of the amount properly due under the provisions of the Act, would be by establishing a right to a refund under the ordinary law on the ground that the payment was made under a mistake. Consequently, the excess amount paid towards interest as scaled down cannot be recovered by the powers of Ss. 7 and 12. A.I.R. 1942 Mad. 655=1942 M.W.N. 541=55 M.L.W. 527=(1942) 2 M.L.J. 275=203 Ind. Cas. 596.

——S. 7—Mortgagor agriculturist—Properties purchased by non-agriculturists subject to mortgage —Properties are liable only to extent of scaled amount.

If a debt is scaled down at the instance of the mortgagor who is an agriculturist and claims the benefits of the Act and the properties are purchased by the persons who are non-agriculturists subject to the mortgage, the property can be proceeded against only for the scaled down amount and no more under the general law relating to mortgages. A.I.R. 1942 Mad. 527=55 M.L.W. 283 (1)=(1942) 1 M.L.J. 510=203 Ind. Cas. 417.

——S. 7—Part of mortgaged property sold to non-agriculturist—Money left with him for payment of mortgage—Money not paid—Suit for redemption by agricultural mortgagor.

A non-agriculturist purchased a part of the mortgaged property. The purchase price was left with him for payment to the mortgagee which, however, he did not pay. In a suit for redemption, the mortgagor, who was an agriculturist claimed to scale down the debt. It was contended that the debt should not be scaled down so far as the purchaser non-agriculturist was concerned:

Held, that the whole debt should be scaled down. A.I.R. 1942 Mad. 525=55 M.L.W. 280=(1942) 1 M.L.J. 506=1942 M.W.N. 365=202 Ind. Cas. 402.

——Ss. 7, 8, 19, 4 (e)—Preliminary decree on mortgage—After Act came into force, new agricultural security added—Whether creates retrospectively a debt.

Where when Act 4 of 1938 came into force on March 22, 1938, there was in existence a preliminary decree for the enforcement of a mortgage secured on a municipal house property alone and on October 1, 1937, the date on which under S. 8 the outstanding interest was to be cancelled, there was also a debt contracted on the security of house property alone, by the terms of S. 4 (d) of the Act such a debt is excluded from the operation of the Act. Any addition of security of the agricultural land at a date after the Act came into force cannot retrospectively create a debt contracted on the security of agricultural property other than municipal house property so as to bring into force Ss. 7 and 8 of the Act and to exclude S. 4 (e). The effect of the new security might give the decree-holder a right to execute his decree against both sets of property in any order he pleases in respect of the whole amount of the decree. But this would not make the additional security a part of the hypotheca covered by the preliminary decree so as to entitle the judgment-debtor to scale down the decree under S. 19 of the Act. A.I.R. 1942 Mad. 34=54 M.L.W. 468=1941 M.W. N. 991=(1941) 2 M.L.J. 653=201 Ind. Cas. 265.

——Ss. 7, 8 and 9—'Decree', if includes preliminary mortgage decree.

The word 'decree' in Ss. 7, 8 and 9, includes preliminary mortgage decree and hence such a decree passed before the commencement of the Act can be scaled down. A.I.R. 1941 Mad. 891 (1)=(1941) 2 M.L.J. 359=54 M.L.W. 306=1942 M.W.N. 832 =199 Ind. Cas. 448.

——Ss. 7, 8, 9—Scope and operation.

T holding two mortgages from *M*—*T* purchasing property from *R* and as part of sale price assigning his rights under mortgages valued at Rs. 5,290 to *R* —Suit by *R* on mortgages dismissed against *M* as he was found to have no title to mortgaged lands but decree for Rs. 5,290 passed against *T* on basis of damages for breach of covenant for title:

Held, that there could be no question of scaling down the liability under the decree with reference to the principal of the mortgage debts for which *T* herself was never liable. A.I.R. 1941 Mad. 886=(1941) 2 M.L.J. 360=54 M.L.W. 281=200 Ind. Cas. 163.

——S. 7—Scope and applicability.

Payments made and appropriated after October 1, 1937 and before the Act came into force must be deemed to be available for re-appropriation and re-adjustment under the Act. Section 7 cannot be interpreted to mean that all that can be scaled down is the debt payable at the commencement of the Act and therefore, to the extent to which there have been appropriations before the commencement of the Act there is no debt payable. 52 M.L.W. 484 (2)=(1940) 2 M.L.J. 547=(1940) M.W.N. 1009 =A.I.R. 1941 Mad. 226.

——S. 7—Essentials of.

Debtor seeking relief under the Act, should be an agriculturist at the commencement of the Act and at the time of his application to scale down his debt, and on October 1, 1937—Where the debt was incurred before October 1, 1937, it is immaterial whether he was an agriculturist. (1940) 2 M.L.J. 887=52 M.L.W. 819=(1940) M.W.N. 1247=A. I. R. 1941 Mad. 158.

——S. 7—Deposit made under O. 21, R. 89, C. P. Code, withdrawn by decree-holder in full satisfaction — There is no debt which can be scaled down.

Where the amount deposited under O. 21, R. 89, Civil P. C., necessary to have the sale set aside has been withdrawn by the decree-holder in full satisfaction, there no more remains a debt to found an application under Madras Act 4 of 1938 or a decree to scale down. And the fact that the deposit under O. 21, R. 89, Civil P. C., was made on the day when the Act came into force has no bearing, when the application under the Act was made long after the decree had been satisfied. A.I.R. 1941 Mad.

74=(1940) M.W.N. 911=(1940) 2 M.L.J. 417=52 M.L.W. 386.

——Ss. 7 and 8—Applicability — Plaintiff's claim dismissed in lower Courts but allowed in appeal to High Court—Application by judgment-debtor under Ss. 7 and 8 after judgment but before decree was drawn up:

Held, that in the circumstances of the case, the application was competent. A.I.R. 1940 Mad. 478=51 M.L.W. 606=(1940) M.W.N. 412.

——S. 7—Scaling down—Mortgagor claiming relief under S. 7—Court should restrain mortgagee from selling property outside Court.

It appears to be implied that after the passing of this Act, it is the duty of the creditor to scale down the amounts due to him by his debtor. It will only be in case in which the creditor does not scale down his claim in accordance with the provisions of the Act that the intervention of the Court will be necessary.

When a mortgagee tries to sell all the mortgaged property under the provisions contained in the deed out of Court without having the debt scaled down it is no answer to say that under S. 69, T. P. Act, the mortgagor will be entitled to recover damage if the mortgagee exercises his power of sale in any improper or irregular manner. If the mortgagor is likely to be injured and is asking for scaling down the dues, the Court should restrain the mortgagee from going on with the sale outside the Court. A.I.R. 1939 Mad. 56=(1938) M.W.N. 949=48 M.L.W. 531=(1938) 2 M.L.J. 920=I. L. R. (1939) Mad. 296=183 Ind. Cas. 428.

——S. 8.

Synopsis.

1. Applicability and scope.
2. Appropriation.
3. Interest.
4. Interpretation.
5. Payment.
6. Renewal.
7. Same debtor.
8. Scaling down.
9. Tracing back.

1. Applicability and scope.

——S. 8 (4)—Scope—Not confined to excess payments made prior to 1st October, 1937.

S. 8 (4) of the Madras Agriculturists' Relief Act saves excess payment from the operation of sub-sections (1), (2) and (3) of S. 8. Under this sub-section, the creditor is enabled to retain any excess payments paid to him. The terms of this sub-section are clear and unambiguous and the language is couched in general terms. The operation of this sub-section is not limited expressly or by necessary implication to excess payments made before 1st October, 1937. (1945) 1 M.L.J. 386, dissented from. 1949 M.W.N. 605=A.I.R. 1950 Mad. 98=(1949) 2 M.L.J. 394.

——S. 8, Expl. 3 (added by the Amending Act 23 of 1948)—Applicability and scope—Splitting of continuity of debt—If lost—Scope of.

Expl. (iii)—Notice of Official Receiver of application to scale down debt by insolvent—Necessity.

Where a debt is split up and the debtors execute separate promissory notes for their respective portions of the debt, the continuity of the debt is lost. This view of the law as laid down in (1941) 1 M. L. J. 39 and (1941) 1 M.L.J. 718, is not in any way affected by the new Expl. 3 added to S. 8 by the Amending Act 23 of 1948. The purport of the amendment is only to make a debt a continuous one notwithstanding a change in the creditor or debtor. It does not purport to affect the law with regard to splitting up of a debt. If the Legislature had intended by Expl. 3 to bring about a change in the law relating to the continuity of a debt after it had been split up, one would have expected the Legislature to have introduced expressions in the amendment which clearly brought about that result.

Although notice to the Official Receiver, in an application to scale down by an insolvent is desirable, because it will give the Official Receiver an opportunity of seeing that the application is properly prosecuted, yet it is not legally necessary that he should be impleaded or even given notice of the application. 1949 M.W.N. 801=A.I.R. 1950 Mad. 287=(1949) 2 M.L.J. 768.

——Ss. 8, 9 and 13 and Evidence Act (1 of 1872), S. 92—Applicability and scope—Promissory note executed after the Act came into force—Plea that it was a mere voucher of prior borrowing to which Ss. 8 and 9 of Madras Agriculturists' Relief Act apply—Maintainability — Allegation of misrepresentations by plaintiff—Admissibility of oral evidence.

The suit promissory note was of 1940 after Act 4 of 1938 came into force and was the last of a series of renewals. The original borrowing having been in 1922. The defendant raised the plea that it was not supported by consideration and was merely intended to serve as a voucher for the previous borrowing and that the plaintiff made fraudulent misrepresentations and prevailed upon the defendant to execute the note making him believe that it would not be enforced if it was found that nothing was due under the Act or that only such sum as would be legally found due would be taken. On a question as to the maintainability of the plea and admissibility of oral evidence in support of it,

Held, that such a plea was open to the defendant and that oral evidence of the fraudulent misrepresentations would be admissible. 61 L.W. 595=1948 M.W.N. 619=A.I.R. 1949 Mad. 301=(1948) 2 M.L.J. 282.

——Ss. 7, 8, 9, 13—Applicability and scope—Ultra vires.

Sections 7, 8, 9 and 13 of the Madras Agriculturists' Relief Act offend against Ss. 32, 79 and 80 of the Negotiable Instruments Act and are *ultra vires* to that extent. I.L.R. (1945) Mad. 679=A.I.R. 1945 Mad. 203=(1945) 1 M.L.J. 339=1945 M.W.N. 258=58 L.W. 199 (F.B.).

——S. 8—Explanation — Applicability and scope.

Explanation to S. 8 applies to the whole of S. 8 and not merely to Cl. (1) thereof. A.I.R. 1943 Mad. 479=1943 M.W.N. 219=56 M.L.W. 249=(1943) 1 M.L.J. 321=209 Ind. Cas. 460.

——Ss. 8, 9—Applicability and scope — Liability commencing after October 1, 1932 — Subsequent renewals—Scaling down with reference to initial liability—Debtor and creditor — Conditional concession—Penalty.

The intention of the Legislature in enacting proviso to S. 9 (1) was merely to give a rule for the

classification of debts into those to which S. 3 will apply and those to which S. 9 will apply. There is no provision in S. 9 for the re-opening of this contract except to the extent prescribed in the first part of that section which provides for the reduction of the rate of interest. The explanation to S. 8 which enables the Court to treat as principal the amount advanced under the earlier debt applies only to proceedings under that section. There is nothing in S. 9 which would justify the importation of that rule into the process of scaling down a debt no portion of which was incurred before October 1, 1932. It follows, therefore, that even if the date of the debt were some date earlier than on which the contract was actually executed but not earlier than October 1, 1932, the debtor cannot have relief in respect of interest due on the debt and included in the contract except to a reduction of the rate of interest on the amount contracted for. Where a creditor agrees to give conditional concession to be automatically cancelled on non-fulfilment of the terms, there can be no question of penalty in such a case. A.I.R. 1943 Mad. 344=56 M.L.W. 154=1943 M. W. N. 419=(1943) 1 M.L.J. 231=210 Ind. Cas. 231.

——S. 8 (2) and (3)—Scope of.

Section 8 (2)) and the complementary S. 8 (3) both deal only with the effect of payments by an agriculturist. A.I.R. 1943 Mad. 134=55 M.L.W. 812=1942 M.W.N. 736=(1943) 1 M.L.J. 137=207 Ind. Cas. 438.

——Ss. 8 and 9—Applicability and scope—Appellate Court sending case back for finding—Application for relief under Act must be made to Appellate Court, and not to trial Court. 55 M.L.W. 594 =A.I.R. 1943 Mad. 77=(1942) 2 M.L.J. 452=208 Ind. Cas. 156.

——S. 8—Applicability and scope—Defences.

Where the Court, under the Act, deals with actual proceedings in a suit, defences are open not merely under the Act but also under the general law. A. I. R. 1942 Mad. 134=(1941) 2 M.L.J. 340=54 M.L.W. 105=1941 M.W.N. 927=201 Ind. Cas. 161.

——Ss. 8, 7, 19—Applicability and scope—'Debt' under promissory note — Legislation in respect thereof—Whether ultra vires—Act, if comes under List 1, Government of India Act, 1935, or Lists 2 and 3—'Pith and substance'—'In respect of' in S. 100, Government of India Act, 1935—Decree passed before commencement of Madras Act, on promissory note, is not a debt on promissory note.

Per *Sulaiman, J.*—The expression 'with respect to' in S. 100, Government of India Act, obviously means that looking at the legislation as a whole, it must substantially be with respect to matters in one List or the other. A remote connection is not enough. Those words do not connote the idea that it must be absolutely and exclusively within one List and not encroaching, not even in an indirect way, upon any other. It is unreasonable to assume that Parliament contemplated from the use of the words 'with respect to' in the Indian Act that any overstepping beyond the limit, howsoever small or insignificant, and any encroachment upon the field of List 1, howsoever unimportant, should make the Act wholly void. Incidental encroachment is not really forbidden. The Courts have, therefore, first to see whether the impugned Provincial Act is 'with respect to' any of the matters in List 2. If this is not so, then the Act must fall to the ground. If it falls within any of the matters enumerated in that List, then they have to see next whether it also falls within any of the matters in List 3. If it does and no assent of the Governor-General has been obtained, it must again fall to the ground if it conflicts with an existing Indian Law. But if such assent has been obtained, then it will, for the time being, remain valid. Lastly the Courts have to see whether it falls within any of the subjects mentioned in List 1. If it does not, then there is no difficulty, but if it does then the Court has to see further whether the Act is really 'with respect to' any of the matters in List 1. If it is so, then the Act must fall to the ground. If it is not, then obviously the Act indirectly, or as it has been said 'incidentally' but not in substance, trenches upon List 1. But in order to establish that the provisions of Ss. 7, 8 and 19 of the Madras Agriculturists' Relief Act are within the authority of the Provincial Legislature, it is not necessary to show that the provisions come within any single category. So long as it can be shown that all the provisions contained therein fall within List 2 or List 3, the Province would have *prima facie* an authority to legislate unless it can be shown that it is with respect to any matter in List 1, or is void on account of any repugnancy.

Per *Gwyer, C. J.* and *Sulaiman, J.*—The impugned statute is to be examined to ascertain its 'pith and substance,' or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that.

Per *Gwyer, C. J.*—It is clear that the pith and substance of the Madras Agriculturists' Relief Act, whatever it may be, cannot at any rate be said to be Legislation with respect to negotiable instruments or promissory notes; and it is quite immaterial that many, or even most of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect the question.

Per *Gwyer, C. J.* and *Varadachariar, J.* (*Sulaiman, J., contra*).—Where the liability under the Madras Agri. Relief Act was under a decree on a promissory note passed before the commencement of the Act, the liability ceases to be a debt evidenced by or based on the promissory note, for that has merged in the decree and has become a judgment-debt. The fact that before the provisions of the Act could be applied to the decree, in accordance with S. 19 of the Act, it was necessary to have recourse to the terms of the note, in order to ascertain to what extent the provisions of S. 8 required or enabled the decree to be scaled down cannot affect the nature of the liability, which still remains a judgment-debt; and it is upon that liability and upon no other that the Act operated, even though it might be necessary to go into its earlier history for a particular and special purpose. In such a case, the judgment-debt was already in existence when the Act was passed.

Per *Gwyer, C. J.* and *Varadachariar, J.*—That the Act is not invalid or inoperative even in respect of debts due under negotiable instruments, because it did not 'really affect the principles embodied in the Negotiable Instruments Act' is to put the matter too widely.

Per *Sulaiman, J.*—Taking all the provisions together and considering the Madras Agri. Relief Act

as a whole, it cannot be doubted that it is with respect to matters in Lists II and III. It is impossible to hold that the impugned Act is wholly outside Lists II and III of the Seventh Schedule. As the impugned Act deals with all debts of agriculturists, it necessarily includes their debts due on negotiable instruments as well. But it would be difficult to say that the Act, taken as a whole, is 'with respect to' negotiable instruments mentioned in category of Item No. 28, List I. But at the same time it is impossible to deny that the Act encroaches upon the field covered by such instruments. It is accordingly impossible to hold that there is no trespass on the Federal Legislative field. There is an apparent overlapping, and no clear-cut demarcation is discernable. The maxim *generalibus specialia derogant* cannot be appropriately applied to the three competing Lists, part of an Act can be held valid and another part invalid, if the offending provisions are so interwoven into the scheme that they are not severable. "If the offending provisions are so interwoven into the scheme that they are not severable," the whole is *ultra vires*. The same section containing similar provisions for contract as for the decree based on it has been considered to be severable so as to make the latter valid, while the former is invalid. Taking all the provisions together, particularly S. 8 of the Madras Act, it is very difficult to sever and split up the contract of the loan and the decree passed by a Court on the basis of it. The two are inextricably mixed up together and indissolubly connected. Section 8 treats the liability as a debt wholly irrespective of the fact whether it is a decretal debt or not. These provisions do not indicate that even if the contract could not be interfered with, the decree can be amended. Both the contract and the decree obtaining on it hang together and must stand or fall together so far as the Lists. Accordingly, it is impossible to split up and separate the provision of law with regard to decrees from the provision of law with regard to debts. The former is inseparable from the latter and the power to deal with it is dependant on the existence of the power to deal with the latter, except for repugnancy. Further, the latter provision is in dierct conflict with the provisions of the Negotiable Instruments Act, read with the Usurious Loans Act, and, therefore, amounts to an undoubted trespass on a field already occupied by an existing Indian Law with respect to negotiable instruments. Consequently, the Provincial Act being repugnant to the existing Indian Law relating to promissory notes which is exclusively a Federal subject, is void to that extent. A.I.R. 1941 F.C. 47=53 M.L.W. 109=7 B.R. 523=22 P. L.T. 155=(1941) M.W.N. 100=(1941) 1 M.L. J. 1 Sup.=1941 O.W.N. 425=73 C.L.J. 1=1941 R.D. 205=45 C.W.N.F.C. 1=1940 F.C.R. 188= 1941 A.W.R. 192=I.L.R. (1941) Kar. (F.C.) 25 Sup.=192 Ind. Cas. 225 (F.C.).

——S. 8 (3) (iii)—Applicability and scope—Non-agriculturist Court auction-purchaser of equity of redemption from agriculturist mortgagor, if entitled to benefit of S. 8.

A non-agriculturist Court auction-purchaser of the equity of redemption purchases the properties subject to the burden of the mortgage and if the burden is by reason of the provisions of S. 1, Madras Agri. Relief Act, reduced without payment, the purchase proves to that extent an advantageous one, and there is nothing in the Act to deprive him of the fruits of his lucky purchase, even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. A.I.R. 1941 Mad. 584=(1941) 1 M.L.J. 561=53 M.L.W. 515=1941 M.W.N. 390=I.L.R. (1941) Mad. 930 =200 Ind. Cas. 517.

——Ss. 8 (1), (2), (3), (4), (8) and (12)—Applicability and scope.

Sections 8 (2), (3) and (4) are in the nature of provisos to S. 8 (1) and they qualify and limit operation of S. 8 (1)—Where sums remaining payable in respect of debts are scaled down under S. 8, they carry interest from October 1, 1937 under S. 12. A.I.R. 1941 Mad. 288=(1940) 2 M.L.J. 870= (1940) M.W.N. 1222=52 L.W. 788.

2. Appropriation.

——S. 8 (4)—Sum duly collected before October 1, 1937—Creditor, if can retain.

As the debts falling under S. 8 have to be scaled down as on October 1, 1937, sub-S. (4) must be taken to refer to sums which were duly collected from the debtor before that date but which turn out to be excessive as a result of applying the provisions of the Act, and the provision cannot be understood as justifying the retention of such sums. A.I.R. 1945 Mad, 360=(1945) 1 M.L.J. 386=1945 M.W. N. 316.

——S. 8 (f)—Appropriation—Application, what is —Proof of—Debtor making payment in 1936 far in excess of interest then due—Payment, how to be appropriated.

An appropriation is the indication of an intention that money should be applied in a particular way. The most ordinary way of proving it is by proof of a statement made either orally or in writing. But that is not the only kind of proof possible. It may be proved by circumstantial evidence as is recognised in S. 60, Contract Act.

Hence where the debtor has paid in 1936 a sum which greater by several hundreds of rupees than the interest then due and there is nothing to suggest that he did not know the extent of his indebtedness or the amount of interest due, or that he intended only to pay interest and not principal, it can and ought to be held that the debtor, in 1936, did intend to pay off part of the principal of his debt and indicate that intention by the very act of the payment. A. I.R. 1943 Mad. 236=(1942) 2 M.L.J. 724=1942 M.W.N. 779=55 M.L.W. 842=I.L.R. (1943) Mad. 563=208 Ind. Cas. 69.

——S. 8—Appropriated — Payments adjusted — Fresh document executed — Payments cannot be said to be unappropriated.

When certain payments by the debtor were adjusted to the debt in order to calculate the amount for which the later document was executed, it can no longer be contended that they were unappropriated. A.I.R. 1943 Mad. 5=55 M.L.W. 706=(1942) 2 M. L.J. 592=1942 M.W.N. 719=204 Ind. Cas. 629.

——S. 8—Appropriation.

From mere fact that counter-interest was allowed on unappropriated payment upto date of its appropriation is towards principal and not towards interest —Clause (3) of S. 8 cannot be applied disregarding effect of Cl. (1). A.I.R. 1941 Mad. 479=53 L.W.

240=1941 M.W.N. 188=(1941) 1 M.L.J. 316=199 Ind. Cas. 704.

——S. 8 (1)—Amount realised in execution after October 1, 1937—Appropriation.

An amount realised in execution of the decree after October 1, 1937 cannot be appropriated by the decree-holder towards interest accruing due before October 1, 1937 so as to nullify the effect of the application of S. 8 (1) of the Act. A.I.R. 1941 Mad. 433=53 M.L.W. 227=(1941) 1 M.L.J. 296.

——Ss. 8 and 9 (1)—Appropriation—Rule as to unappropriated payment — Notional appropriation—Pro-note executed in 1929 renewed in 1935—Open payment made in 1937 not appropriated—Interest outstanding.

The ordinary rule that unappropriated payments are first to be applied towards interest is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done. When there is an open payment towards a debt, mere notional appropriation, such as is contemplated in the rule cannot take place of an actual appropriation for the purpose of saving limitation. The creditor is not entitled after the debtor has sought relief under Act 4 of 1938, to treat an open payment as having been theoretically appropriated towards interest when in fact it was not appropriated at all, and thereby nullify the effect of S. 8 (1). Where therefore, a payment has not been appropriated either towards principal or interest, it cannot be said that there is no interest outstanding so as to bring into effect of S. 8 (1). Hence, where a pro-note executed in 1926 is renewed in 1935 and an open payment is made in August 1937, the pro-note of 1935 must, under S. 9 (1), be deemed to be a debt contracted in 1926 and must be dealt with under S. 8. A.I.R. 1941 Mad. 107=I.L.R. (1941) Mad. 57=(1940) 2 M.L.J. 648=52 M.L.W. 580 =(1940) M.W.N. 1053=195 Ind. Cas. 853.

——S. 8 (1) — Appropriation — Payments prior to October 1, 1937 appropriated towards interest cannot be ignored.

Where the creditor appropriates in his plaint all payments prior to October 1, 1937, towards interest, the appropriations cannot be ignored for the purpose of S. 8 (1). For the purposes of scaling down, the Court should adopt the reduced principal shown in plaint and cancel interest remaining due on October 1, 1937. A.I.R. 1941 Mad. 67=(1940) 2 M. L. J. 654=52 M.L.W. 579.

——S. 8—Principal and interest due—Payment by debtor without specification—Appropriation.

Where principal and interest is due and a debtor pays a certain amount without indicating whether it is for interest or for principal and the creditor, after appropriating the amount paid towards the total amount due to him towards interest and principal claims the balance, he must be deemed to have appropriated the amount first in payment of interest and then in payment of the principal. A.I.R. 1940 Mad. 485=(1940) M.W.N. 329=(1940) 1 M. L. J. 860=52 M.L.W. 295.

——Ss. 8 and 9—Application under S. 8 for scaling down debt—Compromise decree—Payment towards amount due under decree—Appropriation.

In proceedings under S. 8 for scaling down of the debts, the decree-holder is entitled to appropriate the payment first towards interest and costs and the balance towards the principal. Where a compromise decree is passed, it cannot be said that a new debt is incurred on the date of the compromise decree and therefore is S. 8 and not S. 9 which applies to the debt due under the compromise decree. A. I. R. 1940 Mad. 419=51 L.W. 237=(1940) 1 M. L.J. 225=(1940) M.W.N. 265.

——S. 8 (1)—Appropriation.

Appropriations towards interest made before October 1, 1937 will be available for re-adjustment under S. 8 (1). (1940) 52 M.L.W. 431=(1940) M. W. N. 957=(1940) 2 M.L.J. 550.

3. Interest.

——S. 8 (2)—Interest — Annual rent fixed on basis of interest—No provision in case of deficiency on excess in yield—Profits cannot be regarded as payments by debtor.

Though interest at a particular rate is mentioned, if there is no provision in the bond that if the yield of the property by less than the estimated rent, the mortgagor would be liable to make good the deficiency or that if during any year the mortgagee would receive more than the estimated rent from the land, he would be accountable to the mortgagor for the excess over such rent, the receipt of the profits by the mortgagees cannot be regarded as payments by the debtor for the purpose of S. 8 (2). In such a case, the mortgage debt cannot be deemed to have been discharged under the Act. A.I.R. 1944 Mad. 501=(1944) 2 M.L.J. 144=57 M.L.W. 483=1944 M.W.N. 586.

——Ss. 8 and 9—Interest — Meaning of—Mortgage for Rs. 2,500—Mortgage to be discharged on payment of nine yearly instalments of Rs. 537-8-0 each amounting to Rs. 4,837-8-0—Excess over Rs. 2,500, held was interest and liable to be scaled down.

The word 'interest' has a basic meaning of advantage or profit. With reference to a loan, it means the profit or advantage of the creditor which he gets by giving to another the use of his money. If the contract stipulates that for the use of the creditor's money, a certain profit shall be payable to the creditor, that profit is interest, by whatever name it is called.

The mortgagor executed a mortgage on September 27, 1930 in favour of the mortgagee in respect of a cash advance of Rs. 2,500. The contract stipulated for nine yearly payments, each of a sum of Rs. 537-8-0 aggregating to Rs. 4,837-8-0. It did not state how the annual instalment was made up. The mortgagor applied under the rules framed under Madras Act 4 of 1938 for a declaration of the amount due:

Held, that the excess payable over Rs. 2,500 was interest and was liable to be scaled down under the Act. A.I.R. 1944 Mad. 243=57 M.L.W. 22=(1944) 1 M.L.J. 52=1944 M.W.N. 119.

——S. 8 (2) and (3)—Interest—Mortgage document reciting rate of interest as part of calculation of purappad payable to mortgagor — Document held did not stipulate payment of interest—S. 8 (2) and (3) did not apply.

Under a mortgage document the *purappad* payable by the mortgagee to the mortgagor was calculated by taking an estimated yield and adjusting it in various ways and arriving at a balance to be paid as

purappad. The only peculiarity of the document was that instead of saying that so much shall be taken by the mortgagee as interest or profits, it worked out this amount on the basis of an expressed rate of interest; there was no intention to make the mortgagor liable to pay this rate of interest, nor was there any intention to limit the profits of the mortgagee to this rate of interest and neither the mortgagee was to be accountable for any surplus which he might realise owing to fluctuations in the yield nor was the mortgagor to be accountable for any deficiency in the rate of interest owing to bad seasons:

Held, that the document, although it recited a rate of interest as part of the calculation of the rate of *purappad*, was not a document which stipulated a rate of interest as due to the mortgagee; nor was the realisation of the produce by the mortgagee under the terms of this document a payment of interest by the mortgagor such as might be taken into account under S. 8 (2) and (3) of Madras Act 4 of 1938. A.I.R. 1943 Mad. 525=(1943) 1 M. L. J. 419=56 M.L.W. 349=1943 M.W.N. 499= 210 Ind. Cas. 27.

——Ss. 8 (1) and 10 (2) (iii)—Interest—Advances by bank—Interest capitalised at end of each year and turned into principal next year—Interest must be deemed as paid and not outstanding — Explanation to S. 8 does not apply—Applicability of S. 10 (2) (iii).

Where the interest on the advances made by the Bank to its debtor is capitalised at the end of each year and carried forward into the next year as interest bearing principal advanced, the interest must be deemed to have been paid and discharged, and to be no longer 'outstanding' to be wiped out under S. 8 (1), Madras Agriculturists' Relief Act.

The explanation to S. 8 cannot, in any view, affect the operation of the above principle. Nor can it be said that the application of the principle in scaling down debts due to banks renders superfluous the exemption of certain liabilities due to 'scheduled banks,' under S. 10 (2) (*iii*) of the Act, as such exemption can still apply in respect of interest due to such banks but not yet capitalised. A.I.R. 1943 Mad. 157=(1942) 2 M.L.J. 753=55 M.L.W. 805 =1942 M.W.N. 737=207 Ind. Cas. 413.

——Ss. 8 and 10 (2) (i)—Interest—Mortgage with possession executed in 1905—Account of income of mortgaged property sent by mortgagee every year upto 1915 accepted by mortgagor—Various amounts found payable to mortgagee as deficit interest—Arrears of interest must be wiped out under Act.

Where, in a mortgage with possession executed in 1905, the account of the income of the mortgaged properties sent by the mortgagee every year during the period of the first ten years as provided in the deed was accepted by the mortgagor and as a result of these periodical settlements, various amounts have been found to be payable to the mortgagee as deficit interest, as the annual income during that period was less than the interest stipulated, the arrears of interest must be wiped out under the provisions of the Madras Agriculturists' Relief Act. A.I.R. 1943 Mad. 100=55 M.L.W. 570=(1942) 2 M.L.J. 398=1942 M.W.N. 635= I.L.R. (1943) Mad. 195=207 Ind. Cas. 137.

——Ss. 8 and 9—Interest — Decree for costs—Scaling down.

A decree for costs is liable to be scaled down under Ss. 8 and 9 as regards interest. A.I.R. 1941 Mad. 500=(1941) 1 M.L.J. 156=53 M.L.W. 86 =1941 M.W.N. 96=199 Ind. Cas. 591.

4. Interpretation.

——S. 8 (2) and (3)—Word 'principal'—Meaning of.

The word 'principal' in S. 8 (2) and (3), refers not to the actual principal of the debt subsisting when the Act came into force, but to the notional principal calculated in the manner laid down in the explanation, and when these classes speak of payments whether by way of principal or interest towards the debt, it seems to follow that payments made towards any component part of that principal must be taken into account having regard to the way in which it is to be calculated by totalling all the sums advanced at different stages.

In the case of a debt which is the result of the clubbing together of pre-existing debts due to the same creditor by the same debtor, when payments have been towards the separate debts before the clubbing took place, applying the rule of *damdupat*, the creditor will be entitled to a decree for the difference between twice the notional principal and the amount of the payments made by the debtor. A. I. R. 1943 Mad. 479=1943 M.W.N. 219=56 M. L. W. 249=(1943) 1 M.L.J. 321=209 Ind. Cas. 460.

——S. 8 (1)—Interpretation — 'Outstanding' meaning of—Interest outstanding as on October 1, 1937, whether liable to be cancelled.

Although a date may be fixed for the payment of interest, must be deemed to have accrued due from day to day according to the ordinary rule. The word 'outstanding' used in S. 8 (1) is used in its ordinary dictionary sense of 'unpaid.' Consequently, the interest outstanding as on October 1, 1937, is liable to be cancelled under S. 8 (1). A.I.R 1942 Mad. 551=1942 M.W.N. 235=55 M.L.W. 201=(1942) 1 M.L.J. 453=203 Ind. Cas. 598.

5. Payments.

——S. 8—Payment—Debtor claiming relief under S. 8 (1)—Court is not justified in granting relief under S. 8 (2) — Payment towards 'interest and principal' is open payment.

The provisions of S. 8 clearly give the debtor the option to claim relief either under Cl. (1) or Cl. (2) of that section. Where therefore a debtor claims relief under S. 8 (1) the Court would not be justified in granting relief under S. 8 (2) without giving any reasons for doing so.

Payment made 'towards the principal and interest due on the debt' is clearly an 'open payment,' *viz*., payment not specifically appropriated towards either principal or interest for the purpose of scaling down a debt under the Act. A.I.R. 1946 Mad. 380= (1946) 1 Mad. L.J. 272=59 Mad. L.W. 203= 1946 Mad. W.N. 415.

——S. 8—Payment — Consolidated debt—Payments made towards debts consolidated — Payments should be treated as towards consolidated debt.

In dealing with a consolidated debt for the purpose

of S. 8 (2) payments made towards the debts consolidated should be clubbed together and treated as payments towards the consolidated debt. A.I.R. 1946 Mad. 305=(1946) 1 Mad.L.J. 129=59 Mad. L.W. 271=1946 Mad.W.N. 143.

——S. 8—'Payment' meaning of—Adjustment by set-off is 'payment'—Joint venture by A and B—Finance by A—Promissory note by B in 1928—Adjustment of accounts in 1937 and fresh promissory note by B for difference due from him--B's liability was held to arise in 1928.

In 1928 *K* and *V* entered into an arrangement for the purchase of a certain property at court auction. Under the arrangement, *K* was to purchase the property at the Court auction and afterwards convey a half share in the property to *V*, *V* was to help *K* with funds, for making the purchase and when *K* convey to *V* the half share in the property, *V* was to pay *K* half the amount of the final bid. In pursuance of the above arrangement, *V* advanced to *K* certain sums of money for which *K* executed two promissory notes in *V's* favour. This was in August and September, 1928. There were further dealings between the parties regarding the same matter till 1937 when *K* and *V* entered into a settlement of their mutual transactions. As a result, the amount due from *K* to *V* in respect of the promissory notes executed by him in 1928 and *K* executed a fresh promissory note in favour of *V* in respect of the difference found due to him on such adjustment. In a suit on this promissory note:

Held, that the correct view to take of the facts was that the advances made by *V* to *K* in 1928 were made to *K* personally, and not towards the joint venture and that according to the true intention of the paries, *K* was to be under an unconditional liability to *V* in respect of the whole of the amounts advanced by him and in respect of which the promissory nofes had been executed by him in 1928. Hence, *K's* liability arose as soon as the promissory, notes were executed in 1928.

Held further, that the adjustment in 1937 amounted to a 'payment' within the meaning of S. 8 (2), Madras Agriculturists' Relief Act, and on that view, nothing remained due to *V*. A.I.R. 1946 Mad. 137 =(1945), 2 Mad. L.J. 429=58 Mad.L.W. 575=1945 Mad.W.N. 692.

——S. 8—Mortgage decree — Payments made towards decree.

When the payments were made towards the decree, there was no recording of satisfaction and nothing on the part of the debtor or creditor indicating as to how the sums paid should be adjusted towards the decree. The payments were made for the specific purpose of reducing the decree. With regard to one of them, there was a statement that it will be adjusted towards the balance due after deducting the previous payments:

Held, that the payments were open payments available for reduction of principal. A.I.R. 1944 Mad. 93=56 M.L.W. 625=(1943) 2 M.L.J. 436=1943 M.W.N. 675=217 Ind. Cas. 23.

——S. 8—Separate debts consolidated — Payments towards separate debts, if can be clubbed together for purposes of S. 8 (2) and (3).

When separate debts towards which payments have been made have been consolidated into a single debt by agreement of parties, payments made towards the separate debts can be clubbed together and treated as payments towards the consolidated debt for the purpose of applying Cls. (2) and (3) of S. 8. A.I.R. 1943 Mad. 479=1943 M.W.N. 219=56 M.L.W. 249=(1943) 1 M.L.J. 321=209 Ind. Cas. 460.

——S. 8 (2)—Payment — Mortgage with possession—Mortgagee to take income of mortgaged property and additional fixed annual sum from mortgagor—Section 76 (h), Transfer of Property Act (4 of 1882), does not apply—Receipt in lieu of interest by mortgagee cannot be regarded as payment within S. 8 (2).

Where there can be no question of any claim or demand for interest by the mortgagee in possession, who is, under the bond, to take the income of the mortgaged properties in lieu of interest without any liability to account, the appropriation by the mortgagee in terms of the bond cannot be said to be a constructive payment by the mortgagor. No settlement of account or adjustment of claims being involved, no constructive payment can be imported, in such cases.

The fact that the mortgagee in possession besides the income of the mortgage property is to receive fixed annual sum from the mortgagor in lieu of interest cannot alter the position. To both cases, namely, where the mortgagee is to take income in lieu of interest and where he is to receive fixed annual sum from mortgagor in addition, the provisions of S. 76 (*h*), T. P. Act, are inapplicable and the receipt by the mortgagee in lieu of interest cannot be said to be a payment so as to attract S. 8 (2), Madras Agri. Relief Act. A.I.R. 1943 Mad. 100=55 M.L.W. 570=(1942) 2 M.L.J. 398 =1942 M.W.N. 635=I.L.R. (1943) Mad. 195= 207 Ind. Cas. 137.

——Ss. 8, 9 and 19—Payment — Decree on pro-note—Property sold in execution and proceeds applied towards part satisfaction and pro tanto discharge given — Presumption — Sale proceeds more than sufficient to cover interest paid before October 1, 1937—Interest, whether outstanding on such date.

When the decree was passed on a pro-note, the amount due for principal and interest was Rs. 3,400 with Rs. 337 as costs. The property of the judgment-debtor was sold in execution for Rs. 3,406 for which amount part satisfaction was entered on July 17, 1937. It was actually applied in satisfaction of the decree and *pro tanto* discharge was given on August 30, 1937. A fresh petition for execution for the balance was filed:

Held, that the payment of Rs. 3,406 could not be regarded as a payment to the debt generally kept in suspense and not appropriated. Even if the presumption that it was appropriated first towards interest could not be drawn when both principal and interest had become merged in a single decree debt, there was certainly no presumption that it was appropriated first towards principal. That being so, the payment being more than sufficient to cover all the interest on the debt, the judgment-debtor was not in a position to show that there was, on October 1, 1937, any interest outstanding. He would not, therefore, be benefited by any re-appropriation from principal to costs under the provisos to S. 19. A.I.R. 1941 Mad. 571=1941 M.W.N. 204 (2)= 53 M.L.W. 190=(1941) 1 M.L.J. 295=200 Ind. Cas. 333.

——S. 8—Payment.

Suit pro-note for Rs. 391-15-1 executed on July 1, 1933 in renewal of earlier pro-note for Rs. 255-15-0—Payment of Rs. 26-5-2 towards interest and Rs. 102-10-2 towards principal on September 4, 1934:

Held, that the appropriations made on September 4, 1934 could not be undone, with the result that as on that date the principal of the suit note was reduced to Rs. 281-12-3 made up of Rs. 255-15-0 being the principal originally advanced and Rs. 25-13-3 interest. Consequently, the principal of the renewed promissory note being Rs. 255-15-0, the interest outstanding on October 1, 1937 could be cancelled under S. 8, Expl. A.I.R. 1944 Mad. 550 =53 M.L.W. 144=(1941) 1 M.L.J. 216=1941 M.W.N. 267.

——S. 8 (2)—Payment — Enjoyment by mortgagee of usufruct of properties in lieu of interest, if payment falling under S. 8 (2).

Where the mortgage is, to some extent, free of interest, the mortgagee getting his compensation by the enjoyment of the produce, such enjoyment of the proudce cannot be deemed to be a payment to the creditor by the debtor falling under S. 8 (2) of the Act. A.I.R. 1941 Mad. 487=53 M.L.W. 105 (2)=(1941) 1 M.L.J. 197=1941 M.W.N. 271=199 Ind. Cas. 854.

——Ss. 8 and 19—Payment — Uncertified payment, if can be proved by judgment-debtor for satisfying decree regarding costs.

When a judgment-debtor applies under S. 19 to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court, if he wants them to be taken into consideration as payments towards the decree. 52 M.L.W. 262=A.I.R. 1941 Mad. 56=I.L.R. (1940) Mad. 947=(1940) 2 M.L.J. 293=(1940) M.W.N. 829=195 Ind. Cas. 752.

6. Renewal.

——S. 8, Expls. I and III—Applicability of Expl. III—Mortgage with a direction to the mortgagee to pay debts of the debtor—If a "renewal" in favour of a "different creditor"—Receipt of money from Court by mortgagee—Rule of appropriation mentioned in Expl. I, if can be applied.

It is wrong to say that the words "different creditor" in Expln. III to S. 8 of the Madras Agriculturists' Relief Act, added by the Amending Act of 1948, is comprehensive enough to include even a third person in whose favour the debtor executed a document requesting him to discharge the earlier debt. The meaning to be attached to the words "different creditor" is necessarily controlled by the clause "where a debt has been renewed or included in a fresh document". To state that the document executed in favour of a third party with a direction that the amount may be paid to the earlier creditor is renewal of the earlier promissory note is certainly doing violence to the language of the Explanation. The established meaning of "renewal" cannot be ignored unless the words used are clear and unambiguous. The fundamental idea of "renewal and inclusion" in the fresh document is that the new contract also must be between the same parties or substantially the same parties. So the words "different creditor" in the Explanation cannot apply to a creditor from whom amounts were borrowed under a different document for the purpose of discharging earlier debts. In no sense of the term can that document executed in favour of that creditor be a renewal of the earlier document or an inclusion of an earlier debt in a fresh document.

The rule of appropriation provided for in Expl. I to S. 8 of the Act cannot be applied to a case of receipt of money from Court under directions in a decree. 63 L.W. 210=1950 M.W.N. 352=(1950) 1 M.L.J. 224.

——S. 8, Expl.—Renewal.

Applicability—Debts due to *A* and *B* by same debtors discharged by joint mortgage in favour of both—If renewal in favour of same creditors—Anterior debt in favour of different creditor—Benami. 224 Ind. Cas. 141=58 M.L.W. 565 (2)=1945 M.W.N. 688=A.I.R. 1946 Mad. 154=(1945) 2 M.L.J. 411.

——Ss. 8 and 9—Renewal of promissory note—Amount due under previous note not scaled down—Suit on later note—Right of debtor to relief. 223 Ind. Cas. 598=1945 M.W.N. 748=58 M.L.W. 638 =A.I.R. 1946 Mad. 111=(1945) 2 M.L.J. 565.

——S. 8—Renewal—Debt due to A and another to B—Joint discharge by execution of one mortgage in favour of A and B—Mortgage, whether renewal in favour of some creditors.

Where a debt to *A* and another debt due by the same debtors to *B* have been discharged by a joint mortgage executed by the debtors in favour of *A* and *B*, the mortgage cannot be treated as a renewal of the two debts in favour of some creditors which can be scaled down separately with reference to their antecedent history. The amount due on mortgage is the principal sum and constitutes one debt. The two joint creditors cannot be deemed to be the same creditors as either on both of the two individual creditors acting separately and independently of each other. (1945) 2 M.L.J. 411 =1945 M.W.N. 688=58 L.W. 565 (2)=A.I.R. 1946 Mad. 154.

——S. 8—Renewal — Explanation — Pronote in favour of widow discharged by execution of mortgage in favour of her adopted son—Mortgage is not renewal of earlier debt.

Where a pronote executed by the debtor in favour of a widow is discharged by the execution of a mortgage by the debtor in favour of her adopted son the mortgage cannot be said to be a renewal of the earlier debt because the creditors are not the same. The Court cannot go into the question whether the mother was the *benamidar* of her husband. A.I.R. 1946 Mad. 154=58 Mad.L.W. 565=1945 Mad. W.N. 688=(1945) 2 Mad.L.J. 411.

——S. 8— Renewal.

When a mortgage in favour of two persons is superseded by a mortgage in favour of one of them, the second mortgage cannot be treated as a renewal

of the first. (1944)' 2 M.L.J. 390 (1)=A.I.R. 1945 Mad. 113=219 Ind. Cas. 512.

——Ss. 8 and 9—Renewal — Questions as to who is creditor under pro-note — Test — Pro-note by A in favour of B and C—Subsequently A executing mortgage in favour of B alone for amount due under pro-note—Renewal of liability.

In 1927 a pro-note was executed by *A* in favour of *B* and *C* who were members of an unregistered partnership. The pro-note was renewed in favour of the same persons in the year 1932. Subsequently, there was a dissolution of partnership or an agreement to divide the joint assets between *B* and *C*, as the result of which the debt under the pro-note fell to the share of *B* but there was no legal assignment in *B's* favour. As a consequence of this arrangement, *A* executed a mortgage in favour of *B* for the debt due under the promissory note of 1932. The question was whether the mortgage must be treated as a renewal of the antecedent indebtedness under the promissory notes:

Held, that in deciding the question as to who was the creditor under a promissory note regard must be had not only to the power to grant a valid discharge but also the power to enforce performance of the contract. As one of the two joint promisees could not give a discharge by taking a fresh document in his own name and the antecedent promissory note could be enforced only by the two promisees jointly, the creditor of the debt under the pro-note was not one person but two. Hence the mortgage in favour of one alone of the two creditors, *i.e.*, *B* could not be said to be to the same creditor as the creditor under the antecedent pro-note. The mortgage, therefore, could not be treated as a renewal of the antecedent, indebtedness under the pro-notes. A.I.R. 1944 Mad. 499=57 M. L. W. 457=(1944) 2 M.L.J. 142=1944 M.W.N. 519.

——S. 8—Renewal — Pro-note by manager and co-parcener—In partition debt allotted to co-parcener—Latter executing fresh document—Liability.

It is not necessary for the purpose of the renewal theory under S. 8 of the Act 4 of 1938 that the debtors in the two transactions should be absolutely identical.

A promissory more debt was due from three persons *A* the manager, *B* the family which he represented and *C*, the junior co-parcener who incurred a personal liability by signing the note along with the manager. In partition, the debt of the family was allotted to the branch represented by *C*, the junior co-parcener. *C* executed a fresh document representing himself and the new family of which he was head:

Held, that under both documents, *C* was personally liable and he could scale down his liability under the later document as a renewal of his liability under the earlier document. 56 M. L. W. 625=A.I.R. 1944 Mad. 93=(1943) 2 M.L.J. 436=1943 M.W.N. 675=217 Ind. Cas. 23.

——S. 8—Renewal — Compromise in partition suit held did not amount to renewal of existing liability for mesne profits.

The question whether a compromise was or was not a renewal of a pre-existing liability must, to a large extent, be a question of fact in every case.

Under a compromise decree in a partition suit, the defendants Nos. 1 and 2 were held liable for a sum of Rs. 9,000 in respect of principal and interest, of mesne profits due on the plaintiff's one-third share of certain items and in respect of the plaintiff's one-third share with interest thereon of the outstandings of the family collected by defendants Nos. 1 and 2 and in respect of costs. There was no ascertainment of mesne profits, no scrutiny of accounts to ascertain the amount of outstandings collected, nor was the amount which could be claimed as costs precisely calculated before a compromise was effected, and a lump sum figure was agreed upon with a view to get rid of all further trouble. There was nothing on record to show as to what extent the lump sum represented the principal or interest of the antecedent liability or the costs of the litigation:

Held, that the compromise did not amount to a renewal within the meaning of the explanation to S. 8, and that the debt was to be scaled down as one arising for the first time under the compromise decree. A.I.R. 1944 Mad. 13=(1943) 2 M.L.J. 367=1943 M.W.N. 594=56 M.L.W. 545=216 Ind. Cas. 179.

——S. 8—Renewal — Pro-note of 1926 by non-agriculturist—Renewal by agriculturist heir in 1930—Heir discharges his own debt of 1926 by pro-note of 1930 — Debt, however, cannot be traced back further than 1926.

Where the son who is an agriculturist, has executed a promissory note in 1930 in discharge of a promissory note of 1926 executed by his deceased father who was not an agriculturist, he has discharged, not his father's debt, but his own debt, imposed upon him by the inheritance which he had taken up. He is, therefore, entitled to say that his debt under the promissory note of 1926 was renewed by the promissory note of 1930. The debt cannot, however, be treated further back as when the father was not an agriculturist. A.I.R. 1943 Mad. 664=56 M.L.W. 415=(1943) 2 M.L.J. 155=1943 M.W.N. 550=212 Ind. Cas. 258.

——S. 8—Renewal—Portions of pre-existing debts included in several new contracts with different terms—Contracts cannot be treated as renewals of part or whole of previous debt.

A renewal is a fresh contract between the same parties with reference to the same debt with the addition of interest accrued on that debt. If the total liability due on a pre-existing contract is split into two fresh liabilities differing from each other and from the original in their terms and a fresh contract is executed with reference to each of those parts, such as a mortgage and a pro-note and it is impossible to say how much principal and how much interest was included in each of the two documents, it is not proper to treat either of the fresh contracts as a renewal of a part of the pre-existing liability. Nor can the separate fresh contracts be treated as if they formed together a single debt renewing the previous liability. A.I.R. 1943 Mad. 338=56 M. L. W. 82 (2)=1943 M.W.N. 120=(1943) 1 M. L. J. 190=210 Ind. Cas. 234.

——S. 8—Renewal of old mortgage — Additional property and additional advance.

A person purchased a property with the liability to discharge debts subsisting on the mortgages of the said property and discharged them executing a fresh mortgage. He claimed in scaling down the debt that the original principals of the earlier mortgages were included in the principal of the fresh

mortgage to the extent to which the amount due under those mortgages contributed to the consideration for the fresh mortgage and that they should be taken into consideration. The creditor contended that the debt could be scaled down only with reference to the renewed mortgage executed by the purchaser and not with reference to earlier transactions:

Held, that the purchaser was, under the circumstances, renewing his own pre-existing liability and was entitled to scaling down as claimed by him. Neither the fact that the renewed mortgage bound property not covered by the pre-existing mortgage nor the fact that it comprised an additional consideration besides the discharge of the earlier mortgages affected the question of its being a renewal of the previous mortgages, the only question to be decided being whether the debtor under the renewed mortgage was a debtor under the pre-existing mortgage. A.I.R. 1943 Mad. 127=55 M.L.W. 779=(1942) 2 M.L.J. 720=1942 M.W.N. 717=208 Ind. Cas. 160.

——S. 8, Expl.—Renewal — Debt due by A, renewed by later debt due jointly and severally by A and B — B's liability if renewal of antecedent debt.

When there is debt due by *A* which is renewed by a later debt due jointly and severally by *A* and *B*, *B* cannot claim that his liability under the later debt is a renewal of an antecedent debt though *A* can put forward such a claim. 54 M.L.W. 105=A.I.R. 1942 Mad. 134=(1941) 2 M.L.J. 340=1941 M. W. N. 927=201 Ind. Cas. 161.

——S. 8—Renewal—Debt due by A to B cancelled and debt due by A to C substituted—B's separate obligation to C also discharged—A's debt to C, if renewal of debt to B within S. 8.

When, by the tripartite arrangement known as '*Havala*,' a debt due by *A* to *B* is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B's* separate obligation to *C*, *A* cannot claim under S. 8 that his debt to *C* is a renewal of the debt to *B*. *C* is not the same creditor as *B* nor is he an assign of *B* in respect of *A's* original debt. A.I.R. 1942 Mad. 12=54 M.L.W. 471 =1941 M.W.N. 946=(1941) 2 M.L.J. 566=199 Ind. Cas. 290.

——S. 8, Expl. and S. 9—Renewal—Testator executing pro-notes in 1933 and 1935 and dying in 1935 — Sole legatee discharging these debts by executing consolidated pro-note in 1936 — If, renewal of previous debts—Scaling down.

Where the testator, after executing pro-notes in 1933 and 1935, died in 1935 and his sole legatee discharged the aforesaid debts by executing a consolidated pro-note in 1936, it cannot be said that the testator was an agriculturist at the time of his death, for, by that time, the state of affairs contemplated in the definition of an 'agriculturist' had not come into being and, therefore, it is impossible to show that the antecedent debts of the testator were debts due from an agriculturist. Hence, the debt under the consolidated pro-note cannot be treated as a 'renewal' of those previous debts so as to import the benefits of the explanation to S. 8, Madras Agriculturists Relief Act. The debt must, therefore, be scaled down as a fresh debt coming under S. 9. A.I.R. 1941 Mad. 854=(1941) 2 M.L.J. 261=54 M.L.W. 225=1941 M.W.N. 863=200 Ind. Cas. 327.

——S. 8, Expl.—Renewal—Debt renewed under S. 8, Expl., must be due from agriculturists—Person claiming benefits should be agriculturist from what time.

The debt which is renewed under the explanation to S. 8 must be a debt due from an agriculturist. It means that it must be due from a person who is an agriculturist during the period contemplated in the definition, that is to say, the period after October 1, 1937, having regard to the provisos to S. 3 (*ii*) of the Act. The person claiming benefits under the Act need not have been an agriculturist at the date on which the prior debt of which the later debt in suit is a renewal came to be discharged. The essential points of time under the Act at which the person claiming benefits has to prove that he was an agriculturist are October 1, 1937, March 22, 1938, and the date on which the actual matter in question came before the Court. A.I.R. 1941 Mad. 829=(1941) 2 M.L.J. 257=54 M.L.W. 181=1941 M. W. N. 1041=200 Ind. Cas. 321.

——S. 8, Expl.—Renewal—Debt under pro-note due from three persons jointly and severally discharged by another pro-note by two of them.

When a debt due under a pro-note due from three persons jointly and severally is discharged by another pro-note executed by two of them, the later debt must be regarded as an inclusion in a fresh document of the former debt within the meaning of S. 8. Explanation Madras Agricuturis Relief Act. A. I. R. 1941 Mad. 829=(1941) 2 M.L.J. 257=54 M.L.W. 181=1941 M.W.N. 1041=200 Ind. Cas. 321.

——S. 8, Expl.—Renewal—Pro-note in favour of *P* and his brother *K*—On *K's* death, *P* and *K's* son *X* agreeing to divide balance due under pro-note equally—Debtor executing two pro-notes in favour of *P* and *X*—Debtor, held, could not treats subsequent pro-notes as renewal of earlier pro-note. A.I.R. 1941 Mad. 628=(1941) 1 M.L.J. 718=53 M. L. W. 642=1941 M.W.N. 501=198 Ind. Cas. 425.

——S. 8, Expl.—Renewal—Mortgage by father of his own property and separate share of his son—Fresh mortgage by son alone binding only his own property and discharging father's mortgage—Whether renewal of son's liability.

In order to constitute either a renewal or an inclusion within a fresh document for the purpose of the explanation to S. 8, the debtor must be substantially the same. Where the father has executed a mortgage of his own property and the son has permitted his separate share to be mortgaged by the father, the subsequent fresh mortgage executed by the son alone binding only his own property and discharging his father's mortgage is not merely a renewal of the son's own liability. A.I.R. 1941 Mad. 495=53 M.L.W. 225=(1941) M.W.N. 186 (2)=(1941) 1 M.L.J. 302=200 Ind. Cas. 283.

——S. 8, Expl.—Renewal—Debt must continue in substance to be same though amount and parties under vouchers given are not identical—Debt divided among creditor's heirs—Debtor executing separate instrument for part of debt in favour of each heir—Renewals of original debt.

Under S. 8, Expl., the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical. This requirement cannot be regarded as satisfied when the

debts is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs. The promissory notes executed by the debtor separately in favour of the heirs for portions of the original debt allotted to them at the partition cannot be said to represent a renewal of the original debt or its inclusion in fresh documents within the meaning of Explanation to S. 8, although the sums for which such promissory notes are given are equal in the aggregate to the amount of the original debt. A. I. R. 1941 Mad. 356=52 M.L.W. 963=(1941) 1 M.L.J. 39=1941 M.W.N. 54.

——S. 8, Expl.—Renewal—Member of joint family executing fresh document for liability binding on family but incurred on its behalf by other member—Previous debt can be regarded as renewed.

Where a member of a joint family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of S. 8, Expl. as the debtor in each case is the same person, namely the joint family. A.I.R. 1941 Mad. 356=52 M.L.W. 963=(1941) 1 M.L.J. 39=1941 M.W.N. 54.

——S. 8, Expl.—Renewal—Renewal must be by same debtor—But parties to earlier and later debt need not be absolutely identical—Member of joint Hindu family executing pro-note jointly with strangers for debt binding on family—Member executing fresh pro-note along with his brothers—Later pro-note—Renewal—Scaling down.

Under S. 8, Explanation, the renewal of a debt or its inclusion in a fresh document must be by the same debtor, but it is not necessary that the parties to the earlier and the later debts should be absolutely identical.

A member of a joint Hindu family executed a pro-note jointly with strangers for a debt binding on the family. Subsequently, the member, along with the brothers, executed a fresh pro-note for the amount due on the earlier pro-note:

Held, that the subsequent pro-note amounted to a renewal within the meaning of S. 8, Explanation.

Even if the earlier note was not executed for a debt binding on the family, its executant being debtor under both instruments, was entitled to have debt under later pro-note scaled down under S. 8, Explanation, because the later transaction, though not a 'renewal' in the strict sense of the term, amounted to an inclusion of the pre-existing liability of the common debtor in the later document. A.I.R. 1941 Mad. 202=52 M.L.W. 678=(1940) 2 M.L.J. 786=(1940) M.W.N. 1135.

——Ss. 8, 9 and 13—Renewal—Claim for interest on debt falling under Ss. 8, 9 and 13—Pro-note executed in January, 1937 for interest due on mortgage bond of 1929—Renewal of previous liability to pay interest—Decree.

Sections 8, 9 and 13 clearly enact that interest due on the various classes of debts for which they respectively make provision should be dealt with in the manner mentioned therein. Whenever a claim is made for interest on debts falling under one or other of those classes, it is the duty of the Court to scale down the claim in accordance with these provisions whether or not the debt in respect of which such claim is made is the subject-matter of the proceeding. Consequently, a pro-note executed in January, 1937 for interest due on a mortgage of 1929 must, under S. 9 (1), be taken to be a renewal of previous liability to pay interest and must be dealt with under S. 8. A.I.R. 1941 Mad. 193=(1940) 2 M.L.J. 874=52 M.L.W. 830=(1940) M. W. N. 1249.

——S. 8—Renewal — Mortgage in favour of S's sons—One item of consideration, discharge of decree on pro-note—S, both payee under pro-note and decree-holder on pro note—Judgment-debtor in mortgage suit, if can contend that S was benamidar for her sons.

Unless the debt of which the suit debt is alleged to be a renewal is in favour of the same creditor, the explanation to S. 8 has no application.

The suit mortgage was in favour of the two sons of *S* and one of the items of consideration for the mortgage was the discharge of a decree in a suit on a promissory note. The payee under the promissory note and the decree-holder in the promissory note suit was *S*, the mother of the two morgagees:

Held, that the decree based on the mortgage-deed could not be scaled down on the basis that it was in part a renewal of the promissory note debt. It could not be contended that *S* was really a *benamidar* for her sons. A.I.R. 1941 Mad. 87=(1940) 2 M.L.J. 756=52 M.L.W. 673=(1940) M.W.N. 1142=198 Ind. Cas. 838.

——S. 8, Expl.—Renewal.

Vendee of mortgagor's property executing mortgage in favour of his vendor's mortgagee and discharging vendor's mortgage—Vendee cannot treat his mortgage as renewal of his vendor's mortgage under S. 8, Explanation. A.I.R. 1941 Mad. 60=52 M. L. W. 764=(1940) 2 M.L.J. 837=(1940) M. W. N. 1217.

——S. 8, Expl. —Renewal — Whether covers case in which debt due by A is discharged on debt due by B to same creditor being substituted for it.

Explanation to S. 8, Madras Agriculturists Relief Act was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of **X** or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. It does not cover a case in which a debt due by *A* is discharged on a debt due by *B* to the same creditor being substituted for it. A.I.R. 1941 Mad. 58=(1940) 2 M.L.J. 517=52 M.L.W. 500 =1940 M.W.N. 1007=I.L.R. (1941) Mad. 128= 193 Ind. Cas. 171.

——S. 8, Explanation — Renewal — Renewing debt or including it in fresh document must be by the same debtor—B taking over debt due by A and executing document.

Meaning of the explanation is that where the debtor merely renews the debt or includes in a fresh document the sum due under the old document, the scaling down provision applies.

Where *B* takes over a debt due by *A*, the document executed by him in favour of the creditor is not a 'fresh document' so far as he is concerned. He is executing a document for the first time. The old debt is extinguished and new debt and a new debtor comes into existence. *B* cannot consequently claim relief under the Explanation to S. 8. A. I. R. 1940 Mad. 58=(1939) M.W.N. 990=50 M.

L. W. 523=(1939) 2 M.L.J. 609 (2)=186 Ind. Cas. 722.

7. Same debtor.

——S. 8—Same debtor — Mortgagee purchasing part of hypotheca—Effect.

By the fact of the mortgagee purchasing part of the hypotheca in *pro-tanto* discharge of the debt, the debt itself cannot be considered to have been split up so as to be liable to be scaled down on the analogy of cases relating to the splitting up of the debts by the debtors executing different documents for portions thereof. What happens is a mere reduction of the debt by transfer of a portion of the hypotheca to the creditor himself and the balance remaining due is the same old debt reduced by a payment. (1944) 2 M.L.J. 140=57 M.L.W. 458=1944 M.W.N. 523 (1)=A.I.R. 1944 Mad. 549=218 Ind. Cas. 485.

——S. 8, Expl.—Same debtor.

Where a debt in favour of *A* is discharged by a debt in favour of *B*, it will not be open to the debtor to let in evidence to show that the money which he owes to *B* is really the money of *A* so as to bring into force the explanation to S. 8. A.I.R. 1942 Mad. 143=54 M.L.W. 517=(1941) 2 M.L.J. 703 =1941 M.W.N. 1070=201 Ind. Cas. 67.

——S. 8, Expl.—Same debtor — Applicability—Debtor must be same—First debtor joint Hindu family — Second debtor, divided individual—Debtors are not same.

In order to apply the explanation to S. 8, Madras Agriculturists Relief Act, the debtor must be the same, though there need not be a complete identity of the debtors under the earlier and the later documents.

When there is a debt due by a joint Hindu family which is a statutory person under the Act, for which is substituted another debt due by an individual who formerly constituted part of the statutory person, there is a different debtor and this different debtor cannot be treated as merely renewing his own liability which resulted from an interest in the joint family property. The first debtor being a joint family and the second debtor being a divided individual, the 2nd debt is not due from the same debtor as the first debt and cannot, therefore, be regarded as a renewal or inclusion in a fresh document of that debt. A.I.R. 1941 Mad. 663=53 M.L.W. 673= (1941) 1 M.L.J. 773=1941 M.W.N. 487=196 Ind. Cas. 474.

——S. 8, Expl.—Same debtor.

Explanation to S. 8 contemplates the renewal of a debt or its inclusion in a fresh document by the same debtor. But it does not necessarily follow that the parties to the first debt and second debt must be absolutely identical. A.I.R. 1941 Mad. 59= (1940) 2 M.L.J. 651=(1940) M.W.N. 1042=52 M.L.W. 582=196 Ind. Cas. 276.

8. Scaling down.

——Ss. 8, 9 and 10—Scaling down — Mortgage debt—Assignment by registered deed of partition Continuance of identity of debt, debtor and creditor—Scaling down of debt—Single debt—Usufructuary mortgage over certain items and hypothecation over others—Debt if severable.

The appellant who had a kanom over certain jenm properties borrowed a certain amount from and executed a promissory note in favour of one *A* who was the manager of a joint Hindu family. Subsequently he executed a deed of simple mortgage hypothecating eighteen items of property to *A* to cover the amount due under the promissory note and a further cash advance. Then there was a partition in *A's* family and the same was evidenced by a registered deed of partition which allotted the mortgage to the share of the respondent. Later on a fresh document of mortgage was executed by the appellant in favour of the respondent covering all the items, but out of them only fifteen items were placed in the possession of the mortgagee while the remaining three continued in the possession of the mortgagor. The jenmi gave a melcharth over the properties covered by the appellant's kanom to a third person who filed a suit for redemption of the kanom impleading the appellant and the respondent. A decree was passed in favour of the plaintiff directing possession to be delivered on paying the value of the improvements. There was also a direction that the respondent should be paid the amount due to him out of the sum to be deposited by the melcharthdar. The appellant who was an agriculturist having contended that the debt due to the respondent should be scaled down under Madras Act 4 of 1938,

Held, that (*i*) under the circumstances of the case there was an assignment of the debt under the deed of partition, that the identity of the debt, the creditor and the debtor continued notwithstanding the subsequent cash advance and that the debt was consequently liable to be scaled down.

(*ii*) the debt was one and indivisible notwithstanding the fact that in relation thereto there was a usufructuary mortgage over certain items and a hypothecation over certain other items. 61 L.W. 730= 1949 M.W.N. 81=A.I.R. 1949 Mad. 372=(1948) 2 M.L.J. 463.

——Ss. 8, 9 and 3 (11)—Scaling down—Mortgage supported by consideration only to a partial extent—Sale in auction of properties including suit hypotheca in insolvency proceedings by Official Receiver—Auction purchaser — Extent of relief he can claim — Son's shares in properties sold by Official Receiver for father's debt—Whether valid.

The first defendant and his two sons, second and third defendants, for whom also first defendant acted, mortgaged suit hypotheca to the plaintiff, first defendant's son-in-law, for a certain amount of which a major portion remained unpaid. Still the findings of the lower Court were that a portion of the consideration passed which was the amount claimed by the plaintiff in the suit. The sixth defendant happened to be the successful bidder at an auction held by the Official Receiver, in insolvency proceedings against the mortgagor, of the properties including the suit hypotheca. But the sixth defendant had nothing more than a contract of sale at the commencement of the coming into operation of the Agriculturists' Relief Act. Apart from that the sixth defendant was not an agriculturist. On the question of the extent of relief to be granted to the sixth defendant,

Held, that the relief to which he should properly have been entitled on the assumption of the lower Court was a scaling down of the debt to the principal sum actually advanced under the mortgage with interest at 6 1/4 per cent. from 1st October, 1937.

Hence plaintiff would be entitled to a decree against sixth defendant for the entire amount of consideration that actually passed with interest at 7 1|2 per cent. up to date of redeption and subsequent interest at 6 per cent.

As regards liability of the sons, second and third defendants, for the debt of the father, and as regards the validity of the sale of shares by the Official Receiver.

Held, that the defendants 2 and 3 remained owners of their respective shares in the hypotheca after the sale, and were entitled to redeem the mortgage. (1943) 2 M.L.J. 87=I.L.R. (1944) Mad. 212 and (1944) 1 M.L.J. 292 foll. 59 L.W. 319=1946 M.W.N. 422=A.I.R. 1946 Mad. 434=227 Ind. Cas. 496=(1946) 2 M.L.J. 72.

——S. 8—Scaling down — Compromise decree—Scaling down—Interpretation.

A suit for Rs. 3,000 due on a mortgage for Rs. 1,600 was compromised. The compromise provided that the plaintiff would give up the whole amount of the suit claim and Court costs except Rs. 2,500. It was found that the costs of the suit would amount to approximately to Rs. 500:

Held, that the suit claim was entirely made up of the amount due on the antecedent mortgage for Rs. 1,600. The parties agreed to pay and receive a lump sum in discharge of the claim and of the amount due for costs. There was nothing to show that the claim for costs was waived. As the decree included costs, the amount decreed less Rs. 500, the costs, must be treated as a renewal of the previous indebtedness. (1945) 2 M.L.J. 135=1945 M.W.N. 489=A.I.R. 1946 Mad. 161.

——Ss. 8, 9 and 13—Scaling down — Pro-note executed after commencement of Act — Amount due under pro-note can be scaled down under S 8 or S. 9 if debtor can show that pro-note was merely voucher acknowledging debt incurred before Act.

No doubt a debt incurred after the commencement of the Act cannot be scaled down except in accordance with S. 13 but in a suit on such a debt the defendant may plead that the document executed after the commencement of the Act on the basis of which the suit is brought was a mere voucher acknowledging a debt incurred prior to the commencement of the Act to which S. 8 or S. 9 would apply. If so much is pleaded and established, the excess over the amount due under the prior document on applying Ss. 8 and 9 of the Act may be treated as an amount in respect of which there is a failure of consideration and thus the defendant debtor can indirectly get a benefit of Ss. 8 and 9 which would not otherwise be available to him.

The suit pro-note for Rs. 17,195 executed in 1939 after the commencement of the Act was a renewal of an earlier pro-note of 1936 for Rs. 12,240 which itself was a renewal of an earlier pro-note of 1930 the principal of which was Rs. 6,000. The creditor came to the debtor on the last day of limitation for the preceding pro-note of 1936 and persuaded the debtor to execute the fresh pro-note of 1939 for the full amount due although both parties were aware that the debtor was entitled to relief under the Act and the amount due would be much less (slightly in excess of Rs. 6,000) if it was scaled down under the Act. The creditor undertook to collect only the amount which would be due after scaling down the debt under the Act. There was no evidence of any such forbearance to sue on the part of the creditor as would amount to a consideration for the excess amount stipulated in the pro-note of 1939:

Held, that as the suit pro-note of 1939 was executed on the last day of limitation for the preceding pro-note it must in the circumstances of the case have been executed as a voucher or acknowledgment with a view to the precise amount which would be due on application of the Act being settled at some future date. There was, therefore, failure of consideration to the extent to which the amount of the pro-note of 1939 exceeded Rs. 6,035 would be the amount due on a proper scaling down of the debt under the Act. A.I.R. 1946 Mad. 111=58 Mad. L. W. 638=(1945) Mad. W.N. 748=(1945) 2 Mad. L. J. 565=223 Ind. Cas. 598.

——Ss. 8 and 9—Scaling down — Father incurring liability under pro-note before October 1, 1932—Sons succeeding to father's estate after October 1, 1932—Debt, if can be scaled down.

Where the original liability was incurred by the debtor under a pro-note executed prior to October 1, 1932, and the debtor's sons succeeded to his estate after 1, 1932, such succession cannot be the basis of a new liability. The son's liability is traceable only to the original transaction and hence the debt is liable to be scaled down only under S. 8 as a debt incurred before October 1, 1932. 55 M.L.W. 729=A.I.R. 1943 Mad. 87=(1942) 2 M.L.J. 506=207 Ind. Cas. 205.

——S. 8—Scaling down — Bond charging lands executed in discharge of promissory notes—Lands purchased with liability to pay amount under bond—Scaling down.

A purchaser of the lands subject to liability to pay amount due under a bond charging such lands in discharge of promissory notes cannot claim that his liability is a renewal of the previous money-debt due from his mortgagor and is not entitled to scale down his debt with reference to the antecedent promissory notes. A.I.R. 1942 Mad. 412=1942 M. W. N. 213=55 M.L.W. 226=(1942) 1 M.L.J. 329=201 Ind. Cas. 709.

——S. 8—Scaling down — Member of Hindu joint family joining with manager in renewal of note executed by manager alone, if entitled to scale down debt.

Where a member of a Hindu joint family joins with the manager in the renewal of a note executed by the manager, such member is entitled under explanation to S. 8 to trace back his liability to the original principal advanced, and to scale down the debt under S. 8. A.I.R. 1942 Mad. 298=(1942) 1 M.L.J. 88=55 M.L.W. 27=1942 M.W.N. 96=205 Ind. Cas. 104.

——S. 8—Scaling down — Promissory note by father—Debt allotted to son on partition—Son executing fresh document—Son, if can claim to scale down debt.

Where certain promissory notes have been executed by a father and the debts thereunder are allotted to the son on partition and the son executes fresh document, the son cannot claim to scale down the debts. A.I.R. 1942 Mad. 143=54 M.L.W. 517=(1941) 2 M.L.J. 703=1941 M.W.N. 1070=201 Ind. Cas. 67.

——S. 8—Scaling down.

Mortgage stipulating that properties shall be enjoyed by the mortgagee for certain period in lieu of interest, that on expiry of that period, mortgagor should pay amount due and on his failure to do so, mortgagee shall enjoy usufruct and shall also be entitled to interest in addition to usufruct—Mortgage, held not saved by S. 10 (2) (1) of the Act, and was liable to be scaled down. A.I.R. 1941 Mad. 487=53 M.L.W. 105 (2)=(1941) 1 M.L.J. 197=1941 M.W.N. 271=199 Ind. Cas. 854.

——Ss. 8 and 19—Scaling down — Promissory note executed in renewal of earlier notes and comprising principal and interest of earlier notes—Payments towards principal—Decree for balance—Scaling down.

A promissory note was executed in renewal of earlier notes and comprised principal and interest of earlier notes. There were payments made towards principal and a decree was passed for the balance:

Held, that in scaling down this decree under S. 19, the appropriations towards principal should be treated as having been made towards principal of the suit note which comprised principal and interest of earlier notes. A.I.R. 1941 Mad. 397=53 M. L. W. 103=(1941) 1 M.L.J. 256=1941 M.W.N. 328.

——Ss. 8 and 19—Scaling down — 'Creditor' in Act, extent of—Negotiable Instruments Act (26 of 1881), Ss. 8 and 78 and C. P. Code, O. 21, Rr. 16 and 53—Effect—Mortgage in favour of manager of joint Hindu family—Subsequent pro-note by mortgagor in favour of son of manager in lieu of interest on mortgage loan—Son obtaining decree—Execution — Judgment-debtor's application under S. 19, for scaling down.

The word 'creditor' in the Madras Agriculturist Relief Act does not include persons beneficially entitled to the sum lent. Sections 8 and 78 of the Negotiable Instruments Act or O. 21, Rr. 16 and 53 of Civil P. C. cannot be ignored in interpreting the term 'credit' or 'the same creditor' in relation to a promissory note or a decree debt.

There was a mortgage in favour of the *karta* of a joint Hindu family. The mortgagor subsequently executed a promissory note in favour of the son of the *karta* in lieu of the interest due on the mortgage loan. The son obtained a decree on the promissory note and sought to execute it by attachment and sale of the mortgaged property. The mortgagor put in an application under S. 19, Madras Agriculturists' Relief Act, for scaling down the debt and claimed to be relieved from his liability in respect of the amount due under the pro-note:

Held, that it was not open to the petitioner to contend that the creditor under the promissory note or under the decree was not the person whose name appeared as the payee on the note and the decree-holder on the decree, and that, therefore, the promissory note could not be regarded as a renewal in favour of the same creditor of the earlier liability to pay interest on the mortgage debt. The decree could, therefore, be amended by scaling down only the interest from October 1, 1937, to the statutory rate of 6 per cent. per annum. A.I.R. 1941 Mad. 321=(1940) 2 M.L.J. 664=52 M.L.W. 595=(1940) M.W.N. 1067=I.L.R. (1941) Mad. 248=195 Ind. Cas. 776.

——Ss. 8 and 9—Scaling down.

Defendants Nos. 1 and 2 members of *tarwad* executing mortgage in favour of plaintiff on behalf of *tarwad*—Suit on mortgage—Defendants Nos. 1 and 2 admitting mortgage but defendants Nos. 3 to 6, other members of *tarwad* contesting *tarwad's* liability for debt—Compromise decree passed whereby plaintiff agreeing to accept smaller amount in instalments in full satisfaction and defendants Nos. 3 to 6 agreeing to withdraw opposition and pay amount personally—Compromise decree, held could be scaled down. A.I.R. 1941 Mad. 231=I.L.R. (1941) Mad. 486=52 M.L.W. 857=(1940) 2 M.L.J. 927=1941 M.W.N. 76=196 Ind. Cas. 291.

——Ss. 8 (1) (4), 19 and 7—Scaling down.

Appropriations made after October 1, 1937 and before Act came into force are available for readjustment—Mode of scaling down debt indicated. A.I.R. 1941 Mad. 226=52 M.L.W. 484 (2)=(1940) M.W.N. 1009=(1940) 2 M.L.J. 547.

——Ss. 8 and 19—Scaling down — Compromise decree passed before October 1, 1932, in renewal of anterior debt—Debt, if can be scaled down and how.

When there is a decree passed before October 1, 1932, in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under S. 8 of Madras Act (4 of 1938), treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced. A.I.R. 1941 Mad. 56=I.L.R. (1940) Mad. 947=(1940) 2 M.L.J. 293=52 M.L.W. 262=(1940) M.W.N. 839=195 Ind. Cas. 752.

——S. 8—Scaling down — Debt incurred before October 1, 1932—Decree passed after commencement of Act—Scaling down.

A debt for the repayment of which a decree has been passed after the commencement of the Madras Agriculturists' Relief Act is not liable to be scaled down in accordance with S. 8 of the Act when the debt is one incurred before October 1, 1932. The word 'decree' in Ss. 7, 8 and 9 must be taken to refer to decrees passed before commencement of the Act. A.I.R. 1940 Mad. 910=52 M.L.W. 176=(1940) 2 M.L.J. 202=(1940) M.W.N. 809=I.L.R. (1940) Mad. 1023=194 Ind. Cas. 753.

——Ss. 8 and 9—Scaling down—Liability to pay principal sum originating in contract or tort—Compensation for withholding payment, if interest—Whether can be scaled down.

Whatever be the nature of the liability to pay the principal sum—whether it originates in contract or in tort—the compensation awarded for wrongful withholding of its payment can appropriately be regarded as 'interest' and is thus liable to be scaled down under the Madras Agriculturists Relief Act. A.I.R. 1940 Mad. 794=(1940) 2 M.L.J. 273=(1940) M.W.N. 884=52 L.W. 289=I.L.R. (1940) Mad. 864=194 Ind. Cas. 408.

——Ss. 8 and 9—Scaling down — Debt incurred before October 1, 1932, ripened into decree after such date—Scaling down.

Clause (1) of S. 8, Madras Agriculturists' Relief Act clearly contemplates the debt incurred before October 1, 1932, as the original debt which ultimately ripened into a decree and consequently, it must be the date of the original debt which is the

governing factor and not the date of the decree. When, therefore, there is a debt incurred before October 1, 1932, which has ripened into a decree after October 1, 1932, the scaling down must be governed by S. 8 and not by S. 9. 52 M.L.W. 173 =A.I.R. 1940 Mad. 793=(1940) M.W.N. 770=(1940) 2 M.L.J. 235=I.L.R. (1940) Mad. 943=194 Ind. Cas. 655.

——Ss. 8 and 19—Scaling down — Debts under promissory notes whether different from other debts.

There is no reason to suppose that it was the intention of the Madras Agriculturists' Relief Act, to make a difference in the matter of scaling down of debts in cases where the original debt was, as it were, borrowed on a negotiable instrument. A.I.R. 1940 Mad. 52=50 M.L.W. 587=(1939) M. W. N. 1044=(1939) 2 M.L.J. 658=186 Ind. Cas. 458.

——S. 8, Expl.—Scaling down.

In scaling down a debt under the Act, the Court must have regard only to the principal sum advanced under the debt immediately preceding that which formed the basis of the suit. (1940) 52 M.L.W. 511=(1940) M.W.N. 1025.

——S. 8—Scaling down — Mortgage by agriculturist in 1929—Equity of redemption in portion purchased by another in 1933—Relief under S. 8—Debt, if can be scaled down under S. 8.

An agriculturist executed a mortgage in 1929. He sold the equity of redemption to another in a portion of the mortgaged property in 1930. In 1933, another agriculturist purchased it from the vendee. In a suit upon the mortgage the mortgagee claimed to bring to sale the properties purchased by agriculturist vendee who subsequently applied for relief under the Madras Agriculturists' Relief Act.:

Held, that he was entitled to get relief under S. 8 of the Act:

Held, also that the whole debt ought to be scaled down in the manner indicated in S. 8 as the relief under the section was not limited to the extent of proportion attributable to the property in possession of the agriculturist vendee. Consequentiy, the mortgagee could not recover his full claim from the property in possession of the mortgagor. A.I.R. 1939 Mad. 186=48 M.L.W. 954=(1939) M.W.N. 106=I.L.R. (1939) Mad. 218=(1938) 2 M.L.J. 1068=182 Ind. Cas. 879.

9. Tracing back.

——S. 8, Expl.—Joint Hindu family—Pro-notes executed by manager *A*—Partition—Liability under pro-notes falling to share of *A's* brother *B*—*B* executing mortgage for liability under pro-notes—Debt under mortgage, held could not be traced to pro-notes and must be taken as principal for purposes of scaling down the debt. A.I.R. 1944 Mad. 31=56 M. L. W. 514=(1943) 2 M.L.J. 352=1943 M.W.N. 637=I.L.R. (1944) Mad. 378=216 Ind. Cas. 77.

——Ss. 8 and 19—Tracing back—Pro-note in favour of minors discharged by pro-note in favour of their sister in 1916—Note of 1916 discharged by fresh note again in favour of minors in 1919—Debt, held could be traced only to 1919 and not earlier.

The debtors executed promissory notes in favour of the minor sister of two minors representing them as guardian. In 1916, in discharge of these promissory notes, the debtors executed a pro-note in favour of the sister personally and again in 1919 in discharge of the note of 1916, they executed a fresh pro-note in favour of the two minors who had by then become majors. It was contended by the debtors that under the Madras Agriculturists' Relief Act, the debt should be scaled down and the transaction should be traced back to the notes in favour of the minors represented by their guardian:

Held, that the intervention of the note in favour of the sister personally broke the series of renewals as she was not the same creditor as the minors and the debt could be traced only as far back as the note of 1919 and not earlier. A.I.R. 1943 Mad. 168=55 M.L.W. 785=1942 M.W.N. 711=205 Ind. Cas. 428.

——S. 9—Applicability and scope — Non-agriculturist donee of hypotheca—Whether entitled to relief.

The non-agriculturist donee of the hypotheca would not be entitled to relief in respect of the mortgage debt under Act 4 of 1938, when the agriculturist mortgagor was not at the time when the matter was before the Court a person liable to discharge the debt. (1947) 2 M.L.J. 273; (1946) 2 M. L. J. 72, followed. 53 L.W. 182=1950 M. W. N. 134=A.I.R. 1950 Mad. 766=(1950) 1 M.L.J. 414

——Ss. 9 and 13—Applicability and scope—Debts incurred after Act in discharge of prior debts before Act—S. 9, if applies.

Section 9, Madras Act 4 of 1938, does not apply to a debt incurred by an agriculturist after the commencement of the Act in discharge of an anterior debt incurred before the commencement of the Act. All debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under S. 13. A.I.R. 1941 Mad. 799=14 R. M. 384=(1941) 2 M.L.J. 307=54 M.L.W. 229=1941 M.W.N. 800=I.L.R. (1942) Mad. 57=197 Ind. Cas. 790 (D.B.).

——Ss. 9, 19 and 15—Applicability and scope—Pro-note for arrears of rent—Character of liability—Suit on pro-note—Defence that amount is not due as it represented rent which must be deemed to be discharged under S. 15.

Where a pro-note is executed for arrears of rent, the character of the liability changes and it ceases to be rent. A decree on such a pro-note is a decree for debt and not a decree for rent. Hence, in a suit on the pro-note, the defence that the amount was not due as it represented rent which must be deemed to be discharged by reason of S. 15 is not open. A.I.R. 1941 Mad. 638=(1941) 1 M.L.J. 633=1941 M.W.N. 454=53 M.L.W. 672.

——S. 9—Applicability and scope — For applicability of S. 9 both prior debt and debt sued on must be debts from agriculturist.

Both the debt sued on and the prior debt which it is found to have been superseded must, if S. 9, Madras Agriculturist Relief Act is to have any application, fall within the definition of the term "debt" in S. 3, that is to say, both the prior debt and the debt sued on must be debts due from an agriculturist.

Where, therefore, *A* and his brother *B* executed a promissory note in supersession of an earlier pro-

missory note executed by *A* alone who was not an agriculturist within the purview of the Act, it is not open to *B* to call in aid S. 9 on the ground that the debt upon which he is sued is in renewal of a prior-debt. A.I.R. 1940 Mad. 836=(1940) 2 M. L. J. 174=(1940) M.W.N. 722=52 M.L.W. 140 =193 Ind. Cas. 470.

——S. 9—Interest.

Lease by usufructuary mortgagee back to mortgagor expiring in 1934—Mortgagor continuing in possession on understanding that formal lease similar to previous one would be executed—Suit by mortgagee to recover mortgage amount and rent Claim to mortgage amount admitted but for rent disputed—Costs—Interest.

Held, that the judgment-debtors having been found to be agriculturists were entitled to relief under the Madras Agriculturists' Relief Act only to the extent to which interests had been decreed. The decree for rent or damages was not a decree for interest; but the interest or arrears of rent and the interest on costs could be scaled down under S. 9. A.I.R. 1942 Mad. 507=1942 M.W.N. 232=55 M.L.W. 247=(1942) 1 M.L.J. 448=202 Ind. Cas. 531.

——S. 9—Interest — Payment in excess — Appropriation.

If the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of principal. A. I. R. 1941 Mad. 382=(1941) 1 M.L.J. 25=53 M.L.W. 67=1941 M.W.N. 39=196 Ind. Cas. 251.

——S. 9—Interest — It is wrong to say that interest calculated at 5 per cent. should be added to principal, and the amount actually paid should be deducted from that sum.

Under S. 9, it is wrong to say that interest calculated at 5 per cent. from the date when the debt was incurred should be added to the principal and from that sum should be deducted the amount actually paid. Section 9 (1) deals entirely with the question of interest, and says that interest shall be calculated up to the date of the commencement of the Act at 5 per cent. simple interest, that credit should be given for the interest already paid, and that the amount outstanding for interest should be added to the principal outstanding and the plaintiff should be given a decree for the amount so calculated. A.I.R. 1940 Mad. 807=(1940) 2 M.L.J. 185=52 M.L.W. 245=(1940) M.W.N. 753.

——S. 9—Interest.

Section 9, Madras Agriculturists' Relief Act refers not only to contractual liability but even to liabilities arising under law, custom or decree of Court.

The liability to pay interest imposed by the decree is, therefore, governed by S. 9. A.I.R. 1939 Mad. 471=49 M.L.W. 391=(1939) M.W.N. 279=(1939) 1 M..L.J. 528=I.L.R. (1939) Mad. 525=186 Ind. Cas. 214.

——S. 9—Interpretation — Word 'incurred' includes liabilities arising under decree.

The Act recognises a decree debt as a species of debt, and there is no doubt that a decree debt is in law so.

The word "incurred" in S. 9 is not confined only to contractual liabilities but also to liabilities arising under a decree of Court and a decree passed after October 1, 1937, may be governed by S. 9. A.I.R. 1940 Mad. 485=52 M.L.W. 295=(1940) M.W.N. 329=(1940) 1 M.L.J. 860.

——Ss. 9 and 8—Reopening on basis of hypothetical principal, when justified.

Unless a debt falling under S. 9, relates back to a debt incurred before October 1, 1932, so as to invoke the provisions of S. 8, there is nothing under S. 9 to justify the re-opening of settlements or the re-appropriation of payments on the basis of a hypothetical original principal. A.I.R. 1942 Mad. 297= 55 M.L.W. 33 (1)=(1942) 1 M.L.J. 86=1942 M. W. N. 120 (2)=202 Ind. Cas. 149.

——Ss. 9 and 8—Scaling down — Compromise decree, if can be scaled with reference to original principal.

A decree on a compromise is substantially the same as a decree on any other contract and to the extent to which the compromise is a renewal of a pre-existing debt, the decree has to be scaled down with reference to the original principal. A.I.R. 1942 Mad. 133=(1941) M.W.N. 922=(1941) 2 M.L.J. 658=54 M.L.W. 461=201 Ind. Cas. 15.

——Ss. 9 and 8—Scaling down — Principal debt cannot be treated as different from principal of contract sued on—Nor does S. 9 warrant procedure analogous to that of S. 8 except for reducing debts originating before October 1, 1932.

There is nothing in S. 9 which justifies the treatment of the principal of the debt as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8 which S. 9 does not seem to contemplate except for the specific purpose of reducing debts which originated before October 1, 1932.

The suit was brought on a promissory note dated September 22, 1937, executed for the balance due on a mortgage bond in favour of the same creditor executed on December 19, 1932, by the defendants and some others. The contention of the defendants was that under S. 9, they were entitled to have the debt scaled down on the basis of the original mortgage advance of 1932, payments thereunder made towards interest being adjusted to interest on the original principal at five per cent.

Held, that the debt could not be scaled down on the basis of the mortgage advance since S. 9 contained no machinery for scaling down debts originating after October 1, 1932, except on the basis of the actual contract sued on with such re-appropriation of payments towards interest as were expressly prescribed. 54 M.L.W. 551=A.I.R. 1942 Mad. 204=(1941) 2 M.L.J. 795=1941 M.W N. 995= 201 Ind. Cas. 324.

——Ss. 9 and 8—Scaling down — Suit by plaintiff on note executed by second defendant in favour of plaintiffs undivided brother, the first defendant which was assigned to the plaintiff—Suit not executed in discharge of earlier note executed in favour of plaintiff when family was undivided—Non-production of earlier note, if bar to scaling down decree against second defendant.

In a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt, the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents.

The plaintiff sued on a note executed by the second

defendant in favour of the plaintiff's undivided brother, the first defendant on April 14, 1933, which was assigned to the plaintiff on August 2, 1937. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour of the plaintiff himself at a time when the family was undivided, the partition being in 1932. The second defendant was an agriculturist. On these facts, the District Judge in appeal found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and in the absence of proof of the documents necessary in order to ascertain the original principal, no decree could be given against the second defendant:

Held, that the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. And if the first note was executed in favour of the plaintiff as representing the joint family and the second note was executed in favour of the first defendant as a member of that family to whom the debt had been assigned on partition, it could not be said that the creditors were the same in the two transactions. No doubt it might be possible for the second defendant to plead and prove that the note of 1931 was assigned by the plaintiff to the first defendant before it was discharged by the note of 1933, in which case there would clearly be a renewal in favour of the same creditor; but no such case was pleaded and no attempt was made by the 2nd defendant to require the plaintiff to produce the earlier note and the earlier note was irrelevant for the purpose of scaling down the debt. A.I.R. 1942 Mad. 280=(1941) 2 M.L.J. 1085=201 Ind. Cas. 284.

——Ss. 9 and 8—Scaling down—Family debt renewed in various documents by different co-parceners—Any member of family liable for that debt, if can get it scaled down—Liability of executant co-parcener.

When there is a family debt renewed in various documents by different co-parceners, any member of the family liable for that debt may get the debt scaled down on the basis of the original liability by which he was bound as a member of the family throughout all the various renewals actually executed by different co-parceners. The liability of the co-parcener who actually executes the note for a family debt can be traced back to earlier documents executed by other co-parceners on behalf of the family. 55 M.L.W. 151=A.I.R. 1942 Mad. 482=1942 M.W.N. 284=(1942) 2 M.L.J. 41=203 Ind. Cas. 345.

——Ss. 9 and 8—Scaling down — On facts, held that Court was concerned only with debt starting on April 11, 1937, to be scaled down under S. 9.

The plaintiff filed a suit for a sum of Rs. 232-11-0 being the balance due under a promissory note dated April 11, 1937 for Rs. 415-7-3 and subsequent dealings. The promissory note itself was a settlement in the account of dealings going back of February 14, 1932. The indebtedness started with dealings early in 1932 and by October 1, 1932, a sum of Rs. 327-15-6 had been advanced. Between October 1, 1932, and the commencement of the Madras Agriculturists' Relief Act, further advances amounting to Rs. 792-14-3 in all had been made:

Held, that the fact that the principal amount due had, by the time the Act came into force, been reduced to a little more than the amount of principal outstanding on October 1, 1932, clearly indicated that the payments in reduction of principal must have amounted to far more than the principal sum outstanding as on October 1, 1932. Applying the general rule that payments towards principal will be deemed to have been appropriated first to the earliest advance, the whole of the sums advanced before October 1, 1932, must be deemed to have been discharged before the Act came into force. There could be no question therefore, of scaling down this debt on the basis of renewals and taking it back to a debt anterior to October 1, 1932. Therefore, the Court was concerned only with the debt starting on April 11, 1937, to be scaled down under S. 9 of the Act. This debt must be regarded as one carrying interest at 5 per cent and the payments made appropriated to principal and interest. A.I.R. 1942 Mad. 673=55 M.L.W. 458=1942 M.W.N. 445=205 Ind. Cas. 237.

——S. 9—Scaling down—Decree for costs.

The decree for costs has to be treated as a debt to be scaled down under S. 9. A.I.R. 1942 Mad. 729=(1942) 2 M.L.J. 424=55 M.L.W. 607=1942 M.W.N. 790=204 Ind. Cas. 373.

——Ss. 9 and 8—Scaling down.

The mere fact that a decree is based on a compromise does not exempt it from the operation of the Act and to the extent to which the compromise can be said to be a renewal of the debt upon which the suit was laid, it is liable to be scaled down with reference to the principal sums originally or subsequently advanced. A.I.R. 1941 Mad. 231=I.L.R. (1941) Mad. 486=(1940) 2 M.L.J. 927=52 M.L.W. 857=1941 M.W.N 76=196 Ind. Cas. 291.

——S. 9—Scaling down — Pro-note by A in favour B in 1924—B endorsing it in favour of C in 1933—C obtaining decree against both A and B—Application by B for scaling down debt.

The original promissory note was executed on January 23, 1924, by defendant No. 1 in favour of defendant No. 2. On January 26, 1933, defendant No. 2 endorsed the promissory note to the plaintiff, who sued upon it and got a decree both against the original promisor and the endorser, defendant No. 2 (the endorser) filed an application to scale down the decree:

Held, that so far as the application was concerned, he incurred a liability for the first time on January 26, 1933. That liability was a personal liability, the basis of which was his endorsement of the pre-existing promissory note. It was, therefore, a debt incurred after October 1, 1932, and had to be scaled down under S. 9. A.I.R. 1940 Mad. 943=(1940) 2 M.L.J. 575=52 M.L.W. 518=(1940) M.W.N. 1037=191 Ind. Cas. 846.

——Ss. 9, 12 and 19—Scaling down — Mortgage executed in 1920 in discharge of earlier promissory notes — Payments made towards mortgage in 1923 and 1924 and appropriated — Decree on mortgage in 1936—How should be scaled down.

A decree dated September 26, 1936, was passed on a mortgage of 1920. The mortgage was for a sum of Rs. 5,570 made up by the discharge of four earlier promissory notes. Towards this mortgage,

there were three payments before suit. On April 5, 1923, a sum of Rs. 1,200 was paid and appropriated for interest and on June 6, 1923, a sum of Rs. 400 was paid and of this sum Rs. 211-14-0 were appropriated for interest and the balance for principal. On October 4, 1924 a payment of Rs. 3,367 was made and the endorsement was that it was made towards principal and interest of the debt, that is to say, there was apparently no specific appropriation towards either principal or interest:

Held, that the payments actually appropriated before October 1, 1937, would stand appropriated. The payment made on October 4, 1924, which had not been specifically appropriated would be disregarded in calculating the amount of interest outstanding on October 1, 1937, unless it could be established that there had been a specific appropriation before October 1, 1937, no fresh evidence being admissible. After calculating the amount of interest outstanding on October 1, 1937, and treating as discharged, the balance of the debt would be scaled down on the basis that the principal remaining bears interest at the rate laid down in S. 12 from October 1, 1937, and the interest on costs would be scaled down with regard to the provisions of S. 9. A.I.R. 1940 Mad. 939=(1940) 2 M.L.J. 712=52 M.L.W. 639 =(1940) M.W.N. 1126.

——S. 9—Proviso—Applicability of proviso more than once in scaling down debt under S. 9.

In scaling down a debt under S. 9 (1), Madras Agriculturists' Relief Act, the proviso to that section can be applied more than once, until the debt is traced back to the principal amount, originally advanced. There is nothing in the language of the proviso to S. 9 to suggest that it can be applied but once in the process of scaling down. The object of the Legislature in enacting this provision is plainly to require the Court to trace the debt back through various renewals to the principal sum or sums originally advanced and scale it down under S. 8 or S. 9 as the case may be. A.I.R. 1940 Mad. 796 =52 M.L.W. 204=(1940) 2 M.L.J. 232=(1940) M.W.N. 800=192 Ind. Cas. 378.

——S. 9—If ultra vires.

Sections 7, 8, 9 and 13 of the Madras Agriculturists' Relief Act offend against Ss. 32, 79 and 80 of the Negotiable Instruments Act and are *ultra vires* to extent. 58 L.W. 199=A.I.R. 1945 Mad. 203= 1945 M.W.N. 258=(1945) 1 M.L.J. 339=I.L.R. (1945) Mad. 679=(1945) 8 F.L.J. 105 (F.B.).

——S. 10.

Synopsis.

1. Applicability.
2. Interest.
3. Interpretation.
4. Scaling down.
5. Scope and operation.

1. Applicability.

——S. 10 (2) (i)—Applicability — Mortgage and contemporaneous lease—Lease not covering property under mortgage—Rent payable at stipulated rate—No relation to the initial instalment due on the mortgage—Payment of interest by mortgagor —S. 10 (1) (i) not applicable—Mode of appropriation.

Where the contemporaneous lease by the mortgagor in favour of the mortgagee of a property not covered by the mortgage does not contain a recital that the lessee hold the property as security for the payment of the debt, but does contain a covenant that the lessee shall pay a stiplated rent for the property, which however is not equal to the initial instalment due on the mortgage, it is impossible to read the lease and mortgage as a single transaction making up an usufructuary mortgage. And even if it did, the stipulation for payment of interest to the mortgagee and the fact that the whole of the property mortgaged is not handed over to the mortgagee would make S. 10 (2) (*i*) of the Act not applicable to the case.

The mode of appropriation of the rent is in the absence of a contract or express appropriation that firstly all interest remaining due on 1st October, 1937, is to be wiped out and the annual rent will have to be adjusted firstly towards interest at the scaled down rate of 6 1/4 per cent. and any balance towards the principal. 1947 M.W.N. 657=(1947) 2 M.L.J. 385.

——S. 10 (2) (i) — Applicability — Mortgage—Mortgagee to be in possession and enjoy profits in lieu of interest—Contingent stipulation for payment of interest on amount which according to the bargain the mortgagee is authorised to advance and added to the mortgage amount — Exemption under S. 10 (2) (i) does not apply.

Where a mortgage was executed by way of renewal of an earlier mortgage for a certain sum and for a further sum due under a compromise decree and it was provided that the mortgagee was to take possession of the mortgaged properties and enjoy the rents and profits in lieu of interest, and that in the event of certain specified irrigation sources going into disrepair the mortgagor should pay interest on excess over a specified sum necessary for the repairs which was payable along with the principal sum as a condition precedent to redemption:

Held, that it was immaterial whether the contingent stipulation for payment of interest was in respect of the amount advanced to the debtor or was in respect of an amount which according to the bargain between the parties the mortgagee was authorized to advance on account of the debtor adding it to the mortgage account. In the latter case also amount must be regarded as part of the amount due under the mortgage and as such the mortgage was not covered by the exemption under S. 10 (2) (*i*) of the Act. 1946 M.W.N. 143=59 L.W. 271=A.I.R. 1946 Mad. 305=(1946) 1 M.L.J. 129.

——S. 10 (2) (ii), 8 and 9—Applicability — Judgment-debtor having a charge on property for unpaid balance of purchase-money—Sale of property in execution of simple money-decree—Nature of decree, if changed.

In execution of a money-decree against *A's* father and uncles, a house of the joint family was attached. *A* claimed that it was his separate property having been purchased from one *K* to whom *A's* father had sold it as his self-acquisition. The Court held the sale as *benami* and rejected the claim. On appeal, the High Court, without going into the question of *benami*, allowed the decree-holder to bring the house no sale as it was admitted by *A's* Counsel that part of purchase-money reserved with *K* for payment to certain creditors of *A's* father including the

decree-holder, had not been paid and that *A's* father had, therefore, a charge for unpaid balance, which the decree-holder would be entitled to proceed against. *A* then proceeded under S. 19 to which the decree-holder contended that his decree, although originally a simple money-decree as a result of the High Court decision became a liability for which a vendor's lien was provided and as such, was exempted from provisions of Ss. 8 and 9 by virtue of S. 10 (2) (*ii*):

Held, that the order of the High Court was only a facility provided for realisation of decree and it did not convert the decree into the liability so as to bring it within the category exempted under S. 10 (2) (*ii*). A.I.R. 1945 Mad. 342=I. L. R. (1945) Mad. 742=(1945) 1 M.L.J. 391=1945 M. W.N. 268=58 L.W. 193.

——Ss. 10 (1) and 6—Applicability of S. 10 (1).

S. 10 (1) refers only to the qualifications of a person who himself applies for relief under Ss. 8 and 9 of the Act and it does not affect the status of an alleged agriculturist which is of importance only with reference to the application by his sons for relief having regard to the provisions of S. 6. A.I.R. 1944 Mad. 497=(1944) 2 M.L.J. 112=1944 M.W.N. 593.

——S. 10 (2) (iii)—Applicability — Debt due to scheduled bank—Interest of the liability sought to be scaled down is to be considered — Pre-existing liability is not to be considered—Liability prior to award at interest more than 9 per cent — Decree on award at interest more than 9 per cent—Decree on award granting interest at less than 9 per cent.—S. 10 (2) (iii) if applies.

In deciding the question under S. 10 (2) of Madras Agriculturists Relief Act, whether the liability is one bearing interest at not more than 9 per cent. per annum, the Court has to look to the actual liability sought to be scaled down and cannot take into consideration any pre-existing liability, which only becomes relevant if and when it has been found that the provisions of the Act have to be applied to the debt. A debt which was contracted in 1931 was payable to a scheduled bank at more than 9 per cent.. In 1933, the matter was referred to an arbitration and it calculated interest on the said debt at 12½ per cent. per annum as default interest and passed an award. The award was embodied in a decree and it directed payment of the amount within a certain date and in default, for payment of interest at 8½ per cent. per annum. The judgment-debtors claimed relief under S. 8 of the Madras Agriculturists Relief Act:

Held, that the award renewed the previous debts and started a fresh liability. It was that debt due under the award that was to be scaled down and not the previous debts. Higher rate of interest on the old debts which were discharged by the award though they were recited in the award as preamble was no ground for holding that the liability which actually ripened into the decree was one carrying more than nine per cent. per annum interest and hence S. 10 (2) (*iii*) of the Agricultural Relief Act applies and the debt was not liable to be scaled down. A.I.R. 1943 Mad. 270 =56 M.L.W. 37=1943 M.W.N. 52=(1943) 1 M. L.J. 172=212 Ind. Cas. 385.

——S. 10 (2) (i)—Applicability — Usufructuary mortgage — Lease back—Mortgagee, if must be deemed to be in possession.

A usufrutuary mortgage and a lease back cannot be regarded as a simple mortgage bearing interest. Though the mortgage and lease back form part of the same transaction, effect must be given to each according to its terms and the Court cannot, by reading the two together, spell out a transcation totally different in character and incidents. A person who leases his land to another remains in possession of the land leased and the same is true whether he be a mortgagee or owes his interest in the land to an absolute title. It is not necessary for the purpose of S. 10 (2) (*i*) that the mortgagee should be in physical possession of the property. A mortgagee with possession who has leased the land back to the mortgagor must be treated as in possession of the property mortgaged, so as to get the benefit of the exception in S. 10 (2) (*i*), Madras Agriculturists' Relief Act. A. I.R. 1942 Mad. 507=1942 M.W.N. 232=55 L. W. 247=(1942) 1 M.L.J. 448=202 Ind. Cas. 531.

——S. 10 (2) (ii)—Applicability.

X entering into agreement with *Y* to purchase land, paying price and getting sale-deed executed—Before registration of sale-deed, *X* agreeing with *A* to get land conveyed to him by *Y*—*A* executing pro-note in *X's* favour and paying certain sum in cash—At *X's* instance, *Y* executing registered sale-deed in *A's* favour—*A* mortgaging land in question to *X* to cover amount due under pro-note:

Held, that the liability covered by the mortgage was not one in respect of which charge was provided under S. 55 (4) (*b*) of the T. P. Act. A.I.R. 1941 Mad. 128=(1940) 2 M.L.J. 920=52 L.W. 825.

——S. 10 (2) (ii)—Applicability.

X selling certain property to *Y*—*Y* executing mortgage in *X's* favour for full sale price and giving as security property sold and also other property:

Held, that the mortgage was one in respect of which a charge was provided under S. 55 (*b*) of the T. P. Act. A.I.R. 1941 Mad. 119=52 L.W. 733=(1940) M.W.N. 1175=(1940) 2 M.L.J. 827.

2. Interest.

——Ss. 10 (2) (iii), 8—Interest.

Where the interest on the advances made by the Bank to its debtors is capitalised at the end of each year and carried forward into the next year as interest bearing principal advanced, the interest must be deemed to have been paid and discharged, and to be no longer 'outstanding' to be wiped out under S. 8 (1), Madras Agriculturists Relief Act. The explanation to S. 8 cannot, in any view, affect the operation of the above principle. Nor can it be said that the application of the principle in scaling down debts due to banks renders superfluous the exemption of certain liabilities due to 'scheduled banks' under S. 10 (2) (*ii*) of the Act, as such exemption can still apply in respect of interest due to such banks not yet capitalised. A.I.R. 1943 Mad. 157=55 L.W. 805 =(1942) 2 M.L.J. 753=1942 M.W.N. 737=207 Ind. Cas. 413.

——S. 10 (2) (i)—Interest — Rate of interest if must be specified in mortgage-deed.

S. 10 (2) (*i*), Agriculturists Relief Act does not require that the rate per cent. should be specified in

the instrument of mortgage. Where the mortgage provides not only that the mortgagee was to take the income of the mortgaged properties in lieu of interest but also that the mortgagor should pay in addition a sum of Rs. 250 every year till redemption, the additional sum cannot be regarded as anything but interest on the principal money, and the rate per cent. is ascertainable by a simple arithmetical calculation. It cannot, therefore, be said that no rate of interest was stipulated in the mortgage-deed. A.I.R. 1943 Mad. 100=55 L.W. 570=(1942) 2 M.L.J. 398=1942 M.W.N. 635=I.L.R. (1943) Mad. 195=207 Ind. Cas. 137.

——S. 10—Interest.

Mortgage with possession executed in 1905—Account of income of mortgaged property sent by mortgagee every year up to 1915, accepted by mortgagor—Various amounts found payable to mortgagee as deficit interest—Arrears of interest must be wiped out under Act. A.I.R. 1943 Mad. 100=55 M.L.W. 570=(1942) 2 M.L.J. 398=(1942) M.W.N. 635=I.L.R. (1943) Mad. 195=207 Ind. Cas. 137.

——S. 10 (2) (iii)—Interest—Covers both simple and compound interest.

Where the Legislature, in the Act, intended to indicate simple interest, the words "simple interest" are found and where the word "interest" is found without any qualification, it is clearly intended to cover both simple and compound interest. The interest referred to in S. 10 (2) (*iii*) covers both simple and compound interest. When a client of a bank borrows under a standing overdraft, agreeing to pay the current rate of interest and the bank, following the usual procedure in calculating interest periodically, treats the interest as paid and the amount due for this interest as an addition to the overdraft, the interest so charged is not excluded from the purview of S. 10 (2) (*iii*). Moreover, such a contract with the bank cannot properly be described as a contract for borrowing at compound interest. A.I.R. 1943 Mad. 10=1942 M.W.N. 552=(1942) 2 M.L.J. 346=55 L.W. 560=206 Ind. Cas. 71.

——S. 10 (2) (iii)—Interest—S. 10 (2) (iii) refers to interest on basic debt and not subsequent interest on decree amount—Mortgage decree providing interest under 8 per cent. with default rate at 12½ per cent.—Default rate actually adopted in decree —12½ per cent. if rate of "interest payable" within S. 10 (2) (iii).

It is the interest on the basic debt and not the subsequent interest on the decree amount to which S. 10 (2) (*iii*) refers. Hence where a mortgage decree provides interest at something under 8 per cent. with a default rate of 12½ per cent. which has actually been adopted in the decree, it cannot be said that the 12½ per cent. is not a rate of "interest payable" within the meaning of S. 10 (2) (*iii*) but a penal rate which could not be recovered. Consequently, the provisions of Ss. 8 and 9 of Act apply to the decree. A.I.R. 1941 Mad. 888=(1941) 2 M.L.J. 988=1941 M.W.N. 784=54 L.W. 239.

3. Interpretation.

——S. 10 (2) (i)—Interpretation — Words "property mortgaged," meaning of.

The words "the property mortgaged" in S. 10 (2) (i) Madras Agriculturists' Relief Act mean all the property mortgaged and not merely "a substantial portion of the property mortgaged." A.I.R. 1944 Mad. 164=56 M.L.W. 748=1943 M.W.N. 812=(1943) 2 M.L.J. 642=211 Ind. Cas. 468.

——S. 10 (2) (iii)—Interpretation — Word "liability," extent of.

The word "liability" cannot be limited to a liability incurred only by a borrower who is guilty of no act of default. It is incorrect to say that in drafting S. 10 (2) (*iii*), the legislature was dealing only with the primary rate of interest charged and that the section cannot apply to any rate which is chargeable in case of default. A.I.R. 1940 Mad. 937=(1940) M.W.N. 993=52 L.W. 432=(1940) 2 M.L.J. 478.

4. Scaling down.

——S. 10 (2)—Scaling down — Mortgage, held exempt from scaling down.

X sold certain land to *Y* who mortgaged the same to *X* for the sale price. The land was sold by *Y* in plots. The sale deed in favour of *Z* directed him to pay proportionate amount to *X* towards his mortgage. *Z* also purchased another plot from *Y*, another vendee from *Y* and again undertook to pay proportionate amount to *X*. *Z* then executed a mortgage in favour of *X* for the amounts undertaken by him and *Y's* mortgage was discharged to that extent:

Held, that *Z's* mortgage was exempt under S. 10 (2) (*ii*) from scaling down as *Z* was renewing libaility of the vendors' lien which then existed. A.I.R. 1943 Mad. 213=1942 M.W.N. 751=(1942) 2 M.L.J. 806=208 Ind. Cas. 113.

——S. 10 (2) (i)—Scaling down — Kanom—Further advance to jenmi by kanomdar which latter was entitled to deduct from rent payable to jenmi Labham, held interest and jenmi entitled to scale down interest on further advance.

An annual compensation paid by a borrower to a lender for the use of the lender's money in interest, by whatever name it is called and although S. 10 (2) (*i*) uses the words "rate of interest", these words do not necessarily imply that a particular percentage need be stipulated in the document, provided that the actual amount of the interest is fixed by the terms of the document.

A *jenmi* borrowed a further sum from his *kanomdar* on what was known as a *puramkadom* which was embodied in a document, the terms of which were that a further change to the extent of such sum should be created over the *jenmi* interest in favour of the *kanomdar* and that in consideration of this further advance, the *jenmi* agreed to pay certain amount annually as *labham* and it was further provided that the *kanomdar* was entitled to adjust this sum annually towards the rent which he had to pay to the *jenmi* and pay only the balance:

Held, that this amount of *labham* which the *jenmi* was entitled to set-off against the rent, was nothing more than interest payable on the second advance and that he was entitled to scale down that interest under S. 8 so as to reduce the interest to 6 1/4 per cent. A.I.R. 1943 Mad. 31=(1942) 2 M.L.J. 422=55 L.W. 608=1942 M.W.N. 804=205 Ind. Cas. 424.

——S. 10 (2) — Scaling down — Usufructuary mortgage executed in renewal of prior simple mortgages — Suit on usufructuary mortgage—Usufructuary mortgage containing clause that simple motrtgages should be kept alive—Mortgagor, if entitled to scale down debt.

Where a mortgagee in possession of the property in lieu of interest files a suit on his mortgage which has been executed in renewal of two prior simple mortgages, the mortgagor is not entitled to scale down the debt even if the subsequent mortgage deed contains a clause that the simple mortgages should be kept alive. The suit cannot be deemed to have been laid on the original mortgages on the basis of such clause. This clause is put in for the benefit of the mortgagee so that he can use it as a shield against any mortgages which might intervene between the two prior mortgages and the present usufructuary mortgage. A. I. R. 1941 Mad. 912=(1941) 2 M.L.J. 376=54 L.W. 301=1941 M.W.N. 802=200 Ind. Cas. 610.

——Ss. 10 (2) (ii), 8 and 9—Scaling down—Applicability of S. 10 (2) (ii)—Endorsement of pro-note in part payment of price of land purchased—Endorsee's right to claim benefit of scaling down.

The liability of the endorser of a promissory note is a personal liability incurred on the date of the endorsement.

S. 10 (2) (*ii*) of the Madras Agriculturists' Relief Act protects any liability for which, at its inception, a charge was provided regardless of whether the charge could actually have been enforced in the particular suit.

A held a pro-note executed in his favour by *B*. *A* endorsed it to *C* in partial payment of the price of the sale of immovable property and thus made himself liable at the date of the endorsement for the debt under the pronote in respect of which up to that date he was under no liability at all:

Held, that since at the inception of the liability of *A* to *C* there was a charge provided under S. 55 (4) (b), T. P. Act, S. 10 (2) (*ii*) excluded *A's* liability from the operation of Ss. 8 and 9. A.I.R. 1941 Mad. 890=54 L.W. 310=1941 M.W.N. 801=(1941) 2 M.L.J. 553=199 Ind. Cas. 867.

——S. 10 (2) (ii)—Scaling down.

An application under S. 19, Madras Agriculturists Relief Act, by the vendee of the hypotheca, who is impleaded in a mortgage suit cannot be rejected on the ground that the liability which is sought to be scaled down is one in respect of which there is a charge under S. 55 (4) (*b*), T. P. Act and therefore by S. 10 (2) (*ii*) of Madras Act 4 of 1938, the debt cannot be scaled down. A.I.R. 1941 Mad. 889 (1)=54 L.W. 240=1941 M.W.N. 804=199 Ind. Cas. 617.

——Ss. 10 (2) (i), 8 (2), 21—Scaling down—Mortgage stipulating that properties shall be enjoyed by mortgagee for certain period in lieu of interest, that on expiry of that period mortgagor shall pay amount due and on his failure to do so mortgagee shall enjoy usufruct and shall also be entitled to interest in addition to usufruct—Mortgage, held not saved by S. 10 (2) (i).

S. 10 (2) (*i*), Madras Agriculturists Relief Act is not confined to mortgages which are usufructuary mortgages within the terms of S. 58 (*d*), T.P. Act. The clause provides a special exemption for any mortgage under which the mortgagee has possession and no rate of interest is stipulated It does not apply to a mortgage in which, although the mortgagee is in possession, a rate of interest is stipulated and it makes no difference whether the rate of interest stipulated in the mortgage is one which might be regarded as a penalty or not.

A mortgage stipulated that the properties shall be enjoyed by the mortgagee for two years in lieu of interest, that on the expiry of two years, the mortgagor shall pay the amount due and, if he fails to do so, the mortgagee shall retain the right to enjoy the usufruct of the properties and shall also be entitled, to interest at three per cent. per annum in addition to the usufruct:

Held, that this was a mortgage under which a rate of interest was stipulated. Consequently, it was not saved by S. 10 (2) (*i*) of the Act and was liable to be scaled down. A.I.R. 1941 Mad. 487 =1941 M.W.N. 271=53 L.W. 105 (2)=(1941) 1 M.L.J. 197=199 Ind. Cas. 854.

——Ss. 10 (2) (ii) and 19—Scaling down.

Mortgage by *X* and *Y* in favour of *A* in renewal of earlier mortgage—Mortgagor selling hypotheca to *B*—*B* undertaking to discharge mortgage by payment of Rs. 2,500 out of purchase price—On default by *B* in payment mortgagee bringing suit on mortgage—Suit resulting in compromise decree—Application by *B* under S. 19 for scaling down:

Held, that the decree was not protected under S. 10 (2) (*ii*) to the extent of Rs. 2,500. 52 L.W. 607=(1940) M.W.N. 1081=A. I. R. 1941 Mad. 62=(1940) 2 M.L.J. 685.

——S. 10 (2)—Scaling down — Mortgage executed for price payable to mortgagee for land purchased from him—Scaling down of such debt.

Where a mortgage is executed for the price payable by the mortgagors for lands purchased by them from the mortgagees, the debt falls under the category of S. 10 (2), Cl. (2) and cannot, therefore, be scaled down. A. I. R. 1940 Mad. 420=(1940) 1 M.L.J. 367=51 M. L. W. 346=(1940) M.W.N. 289=193 Ind. Cas. 281.

——Ss. 10 (2) (ii) and 19—Scaling down.

Where the purchaser of the mortgagor's equity of redemption executes a pro-note to discharge the mortgage debt, the pro-note must be deemed to be renewal of the pre-existing liability and the debt under the note can be scaled down under S. 19 of the Act.

The liability sought to be scaled down under such a case is not liability in respect of which a charge is provided under S. 55 (4), T. P. Act and hence S. 10 (2) (*ii*) is no bar to scaling down the debt. A. I. R. 1941 Mad. 59=(1940) 2 M.L.J. 651=1940 M.W.N. 1042=52 L.W. 582 =196 Ind. Cas. 276.

——S. 10 (2) (i)—Scaling down.

Usufructuary mortgage—Lease back to the mortgagor as part of the same transaction at annual payment of certain amount of paddy—No stipulation for payment of interest in the mortgage, as profits were to be enjoyed in lieu of interest—Suit on mortgage bond—Application for scaling down decree:

Held, that the usufructuary mortgage accompanied by a lease back could not be regarded as a simple mortgage. The mortgage came within the exception in S. 10 (2) (*i*). A.I.R. 1940 Mad.

946=(1940) 2 M.L.J. 760=52 L.W. 683=(1940) M.W.N. 1144.

5. Scope and operation.

——Ss. 10 (2) (iii) and 8, 9, 19—Scope and operation — Liability excluded by S. 10 (2) (iii) from purview of Ss. 8, 9 is present liability.

The liability excluded by S. 10 (2) (*iii*) from the purview of operations under Ss. 8 and 9 of the Act is the present liability under which the debtor is at the time of his application under S. 19 indebted. If that liability is due to a company and carries interest at not more than 9 per cent., it is clearly excluded from the operation of Ss. 8 and 9 and, therefore, these sections cannot be called in aid to substitute for this liability an earlier liability which bore a higher rate of interest and for which the present liability is the renewal. A.I.R. 1942 Mad. 105=54 L.W. 353=(1941) 2 M.L.J. 509=(1941) M.W.N. 887=201 Ind. Cas. 410.

——S. 10 (2) (ii)—Scope of.

S. 10 (2) (*ii*) Madras Agriculturists Relief Act protects any liability of the category of liabilities in respect of which a charge is provided under S. 55 (*iv*), (*b*), T. P. Act. The intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of the Act were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the T. P. Act provided a charge. The essential category into which the liability falls is not affected by the assignment of this liability to a third party. A.I.R. 1941 Mad. 118=I.L.R. (1941) Mad. 132=(1940) 2 M.L.J. 838=(1940) M.W.N. 1184=52 L.W. 772=195 Ind. Cas. 559.

——S. 11—Applicability and scope—S. 11 does not cover costs of execution.

The provisions of S. 11, like those of S. 19 of the Act relate to costs as decreed and do not cover costs of execution. A.I.R. 1941 Mad. 62 =(1940) 2 M.L.J. 685=52 L.W. 607=(1940) M.W.N. 1081.

——Ss. 11 and 19—Applicability and soope—Compromise providing that certain gross sum should be payable in full satisfaction of suit claim and costs without allocating any part of that sum specifically to costs of suit.

Reading Ss. 11 and 19 together, if it is clear that they are applicable only to cases where any specific sum is decreed as costs by the Court. Hence where parties enter into a compromise agreeing that a certain gross sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in such a case to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment-debtor applies for scaling down the decree-debt under S. 19 of the Act. 52 M.L.W. 403=A.I.R. 1940 Mad. 925=(1940) 2 M.L.J. 476=(1940) M.W.N. 945.

——Ss. 11 and 19—Interest on costs, if excluled from scaling down operation.

There is nothing in the Act which excludes from the scaling down operation interest on costs. There is nothing in S. 19 which is inconsistent with the view that the appropriation therein provided for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of S. 11. When there is a decree for costs which forms part of a decree being scaled down under S. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9. A.I.R. 1941 Mad. 52=(1940) 2 M.L.J. 707=52 M.L.W. 638=(1940) M.W.N. 1128 =194 Ind. Cas. 36.

——S. 12—Excess amount paid as interest—Recovery.

The excess amount paid towards interest as scaled down cannot be recovered by the powers of Ss. 7 and 12 of the Act. A.I.R. 1942 Mad. 655=1942 M.W.N. 541=55 M.L.W. 527=(1942) 2 M.L.J. 275=203 Ind. Cas. 596.

——S. 12—Section 8, Mad. Agri. Relief Act, read as a whole shows that the date mentioned in S. 8 (1) is the date up to which all debts falling under S. 8 have to be scaled down and consequently, the sums which remain payable in respect of debt scaled down under S. 8 carry interest from 1st October, 1937, at the rate mentioned in S. 12. (1940) 2 M.L.J. 870=52 M.L.W. 788=(1940) M.W.N. 1222=A.I.R. 1941 Mad. 288.

——S. 12—Plaintiff is entitled to interest only from date of decree.

According to S. 12, a creditor is entitled to interest on any sum remaining outstanding after the debt has been scaled down from the date up to which it had been scaled down. In other words, the plaintiff is entitled to interest only from the date of the decree. A.I.R. 1940 Mad. 807=(1940) 2 M.L.J. 185=(1940) M.W.N. 753=52 M.L.W. 245.

——S. 13, Proviso—Applicability — Government order of 7th July, 1947 altering 6¼ per cent. rate of interest and fixing 5½ per cent. per annum published in Fort St. George Gazette on 29th July, 1947—When operative — New rate of interest—Date from which applicable—Open payments—Appropriation.

L executed on the 9th of November, 1938, in favour of *S* a promissory note for Rs. 240 agreeing to pay interest at the rate of 12 per cent. per annum. There were two payments made to *S*, one of Rs. 100 on 4th November, 1941, and the other of Rs. 150 on 22nd July, 1943. *S* transferred the promissory note on 22nd July, 1945, to *M* who filed a suit on the promissory note on 11th March, 1946, calculating interest at the contract rate and giving credit to the two payments. After adjusting the payments *M* claimed Rs. 160 as due to him. The lower Court dismissed the suit on the ground that the two payments were open payments and that they should be adjusted towards the principal and nothing was due. On revision:

Held, the case must be dealt with in accordance with the provisions of S. 13 of Madras Act 4 of 1938. *M* will be entitled to 6 1|4 per cent. per annum simple interest up to the coming into operation of

the notification of July, 1947, and 5½ per cent. thereafter. The notification has no retrospective effect so as to apply from the date of the promissory note. The notification operates as from the date of its appearance in the Gazette (29—7—1947) and not the date on which the Government made the order (7—7—'47). It is sufficiently clear from the wording as well as the object of S. 13 that the Legislature clearly intended to protect an agriculturist notwithstanding his own consent and it could not have intended to make his right to the benefit contemplated by the Act liable either to be defeated or materially curtailed by an act of the creditor to which the debtor is no consenting party. The creditor cannot therefore claim to appropriate the payments towards interest due and the balance for principal on the date of the plaint. 61 L.W. 792=1948 M.W.N. 765=A.I.R. 1949 Mad. 497=(1948) 2 M.L.J. 500.

——Ss. 13, 8 and 9—Debt renewed after Act—Scaling down—Procedure.

A debt incurred after the commencement of the Act cannot be scaled down except in accordance with S. 13. In a suit on such a debt, the defendant may plead that the document executed after the commencement of the Act was a mere voucher acknowledging a debt incurred prior to the commencement of the Act to which S. 8 or S. 9 would apply. If so much is pleaded and established, the excess over the amount due under the prior document on applying Ss. 8 and 9 of the Act may be treated as an amount in respect of which there is a failure of consideration; that is to say, with reference to a debt incurred after the commencement of the Act, the debtor, if he seeks relief directly under the Act, must rely only on S. 13; but if he can rely on a plea under the general law, he may, in a proper case, indirectly get a benefit which would not be available to him in the absence of such a special plea and evidence to support it. 58 L.W. 638=1945 M.W.N. 748=(1945) 2 M.L.J. 565=A.I.R. 1946 Mad. 111.

——S. 13—Ultra vires.

Ss. 7, 8, 9 and 13 of the Madras Agriculturists Relief Act run counter to Ss. 32, 79 and 80 of the Negotiable Instruments Act and are, to that extent, *ultra vires*. (1945) 1 M.L.J. 339=I.L.R. (1945) Mad. 679=1945 M.W.N. 258=58 L.W. 199 =A.I.R. 1945 Mad. 203 (F.B.).

——S. 13—Scope — Interest, payment made towards — Scaling down of interest.

S. 13 does contemplate scaling down of interest already paid and appropriated as such. It is well established that a payment made under a mistake of law cannot ordinarily be recovered through Courts and hence an express payment towards interest cannot be taken back by the debtor and repaid towards the principal. 57 M.L.W. 550 (2)=(1944) 2 M.L.J. 285=A.I.R. 1945 Mad. 12=1944 M.W.N. 648.

——S. 13—Applicability.

There is nothing in S. 13 which imports the explanation to S. 8 and allows the Court to go behind the suit contract. Thus, where a suit is brought on the basis of a pro-note which supersedes contracts prior to it, S. 13 can be applied to the contract evidenced by the pro-note in suit and not to the contracts superseded by it. 57 M.L.W. 545=(1944) 2 M.L.J. 298=1944 M.W.N. 647=A.I.R. 1945 Mad. 18.

——S. 13—Applicability.

All debts incurred after the commencement of the Act whether they be in discharge of prior debt or not, will fall only under S. 13 of the Act. 1941 M.W.N. 800=A.I.R. 1941 Mad. 799 (2)=I.L.R. (1942) Mad. 57=(1941) 2 M.L.J. 307=54 M.L.W. 229=197 Ind. Cas. 790.

——S. 13—Claim for interest—Scaling down.

Claim for interest on debt falling under Ss. 8, 9 or 13—Court must scale down claim in the manner mentioned in section, whether the debt on which interest is claimed is the subject-matter of proceeding or not. 52 M.L.W. 830=(1940) 2 M.L.J. 874=A.I.R. 1941 Mad. 193=1940 M.W.N. 1249.

——S. 14 — Applicability to Marumakathayam Hindu family.

When an individual member of a *Marumakathayam* family himself constitutes a *tavazhi* entitled to claim partition, his share is attachable; and such a person has a saleable interest in the family property. If that family property is agricultural land and he is not otherwise disqualified, such a person would be entitled to claim to be an agriculturist for the purposes of Act 4 of 1938. With reference to those groups of individuals each constituting a sub-*tavazhi*, the female ancestor of which is still living, they have no right to claim partition without the consent of that female ancestor and they have, as individuals no saleable interest in the family properties, though for calculating the shares into which the *tarwad* properties have to be divided, the number of individuals comprised in such groups is taken into consideration and the allotment of shares is *per capita*. The phrase "Hindu family" in S. 3 (1) would ordinarily include a *Marumakathayam* family which is Hindu by religion. Hence S. 14 applies to a *Marumakathayam tarwad* or *tavazhi* unless it is quite impracticable so to apply it. A.I.R. 1942 Mad. 456 =(1942) 1 M.L.J. 418=1942 M.W.N. 274=202 Ind. Cas. 538.

——S. 14—Debt must be regarded as family debt with regard to every member.

It is wrong to say that if the manager of a family contracts a debt legally binding on the family, it is a family debt only as far as the other members of the family are concerned but not the manager. As the debt is a family debt, it must be a family debt with regard to everybody. A.I.R. 1940 Mad. 797=(1940) 2 M.L.J. 187=(1940) M.W.N. 754 =52 M.L.W. 249.

——Ss. 14, 3, (1)—Interpretation an scope—Word "member" in S. 14, meaning of—Groups of individuals, if 'person' within S. 3 (1)—Sub-tavazhi consisting of group of individuals.

The word "member" in S. 14 must be interpreted as individual or group of individuals entitled to a share at partition in the family property. There is nothing foreign to the tenor of this Act in regarding a group of individuals as a person. For, the definition in S. 3 (*i*) expressly provides that a person means an individual and includes an undivided Hindu family or *Marumakathayam tarwad* or *tavazhi*. The sub-*tavazhi* consisting of a group of individuals in a *Marumakathayam* family is a person within the meaning of the Act and must be regarded as the "member" for the purpose of S. 14, if it can claim a share at partition. A.I.R. 1942 Mad. 456=1942 M.W.N. 274=(1942) 1 M.L.J. 418=202 Ind. Cas. 538.

——S. 14—Object of S. 14 — Interpretation and scope—If deals with personal liability or separate property of member of family.

S. 14 is intended to deal with the difficulty of apportioning a liability which was partly scaled down and partly intact to the properties of the family whether undivided or divided. There is no apparent reason why any special process should be applied so far as the separate properties of members are concerned. The natural process is that in respect of his separate properties, the individual member should claim relief according to his status and without reference to the extent of his share in the family properties. The apportionment of joint liability between agriculturists and non-agriculturists is really not a matter arising with reference to the personal liability of actual executants. S. 14 is concerned only with the liability of family property and the phrase "member or members and his or their share" in that section must be interpreted as "member or members in respect of his or their share." This interpretation involves the least deviation from the language and the apparent scope of the section. Therefore, the operation of S. 14 will not affect the personal liability of the separate property of the members of an agricultural family and hence its operation will not affect the personal liability of the members who have actually executed the promissory note sought to be scaled down. A.I.R. 1942 Mad. 456=1942 M.W.N. 274=(1941) 1 M.L.J. 418=202 Ind. Cas. 538.

——S. 14—Interpretation and scope—'Debt' and 'family debt', meaning of — Debt under decree, held not 'family debt'—A, held not entitled to relief.

Under S. 3 (*iii*) in deciding whether a debt is one due from an agriculturist, regard must be had to the state of affairs existing at least on 1st October, 1937, since the definition of agriculturist cannot properly be applied to the status of any one as it existed at an earlier period. The term 'debt' in S. 14 must be restricted to debts due from an agriculturist and the term "family debt" therefore, necessarily means a debt due from a family which was an agriculturist at the commencement of the Act or at least on 1st October, 1937. It is not the intention of S. 14 to confer upon a non-agriculturist the power to get rid of his liabilities in a case in which those liabilities do not necessarily form part of a major liability to which the Act necessarily applies. *A* and his brother *B*, who were members of a joint family executed a promissory not in 1933 in discharge of a family liability. In November, 1934, there was a partition and the debt was allotted to *A*. In 1936, the creditor got a decree against both *A* and *B*. The decree was based on the joint liability of the brothers under the promissory note and did not proceed on any family liability. *B*, the agriculturist brother, had taken action to get his liability under this debt scaled down. But *A* (the non-agriculturist brother) tried to stop execution against himself on the ground that by reason of S. 14 of the Act, this was a family debt, the decree for which could only be executed against him to the extent of his proportionate share in the debt:

Held, that in ordinary cases, when an agriculturist and non-agriculturist were jointly liable for a debt, the Act did not provide that the non-agriculturist shall be liable only for half the debt and that the agriculturist shall get the other half scaled down. The liability which formed the subject of the decree was not a family debt and *A* was, therefore, entitled to no relief. A.I.R. 1942 Mad. 375=1942 M.W.N. 186=55 M.L.W. 140=(1942) 1 M.L.J. 596=205 Ind. Cas. 377.

——S. 14—Interpretation and scope—S. 14 cannot be interpreted so as to mean that when there is one or more non-agriculturist members, family property has to be split up into individual shares.

There is no reason to suppose that because one or more members of a family are non-agriculturists, the family property has to be split up into individual shares and that each individual share is liable only for its own share of the family debt. This is not what S. 14 means. A.I.R. 1940 Mad. 797=(1940) 2 M.L.J. 187=(1940) M.W.N. 754=52 M.L.W. 249.

——S. 14 (6)—Liability—Extent.

The liability of an agriculturist's dependent extends only to his proportionate share in the decree scaled down at his instance. 52 M.L.W. 479 (1)=(1940) 2 M.L.J. 1054.

——S. 14—Share in family property—Mode of application of S. 14—Procedure.

When there are in one family agriculturist members and non-agriculturist members, the proper procedure, having regard to S. 14 is not to sell each member's share separately for his individual proportionate liability of the debt, but to take together the agriculturist members and sell their collective share of the family property for their proportionate liability as scaled down and to take together the non-agriculturist members of the family and sell together their collective share of the family property for the proportionate share of the family debt as not scaled down. This procedure is simple. There is no equity in restricting the liability of each individual member to his individual proportionate share of the debt; while the use of the singular word "share" instead of the plural "shares" in cls. (*a*) and (*b*) of the section sufficiently indicates an intention that the collective share of each category of members should be jointly liable for what is after all a joint family debt. The procedure in applying S. 14 to a Hindu *Marumakathayam* family would be to find out first which members (including in this term any sub-*tavashi* entitled to claim partition) are agriculturists and which are non-agriculurists; asecertain how many shares belong to the agriculturist members and how many to the non-agriculturist members and after scaling down the debt, hold the agriculturist section of members collectively liable for the proportionate share of the debt as scaled down and the non-agriculturist section of members collectively liable for the proportionate share of the debt as not scaled down. The creditor would thus be required to divide his execution proceedings into two parts, one relating to the scaled down decree and the other relating to the unscaled down decree and so far as family properties are concerned, each of these parts of the decree would be executable against a composite fraction of the family property. A.I.R. 1942 Mad. 456=(1942) 1 M.L.J. 418=1942 M.W.N. 274=202 Ind. Cas. 538.

——Ss. 14, 8, 9—Sealing down — Mode of—Suit note renewal of earlier note of 1927 for Rs. 2.100 —Note of 1927 renewal of other four notes one of them being of 1917 for Rs. 700 which itself was

renewal of note of 1906 for Rs. 250 — Mode of scaling down suit note.

The suit note could be traced back to an earlier note dated 2nd January, 1927, for a sum of Rs. 2,100 executed by a representative of the defendant to the plaintiff's assignor. This note of 1927 was made up of four other notes regarding which the materials were not very complete. But one of those notes was a note for Rs. 700 dated 1st February, 1917, which itself could be traced back to a still earlier note of 6th August, 1906 for Rs. 250 between the same parties so that Rs. 450 out of this Rs. 700 represented interest:

Held, that except for the amount of Rs. 450 representing the interest included in the principal of the note of 1917, the balance of consideration for Rs. 2,100 for the note of 1927 must be deemed to be the original principal of the suit transaction. Therefore, the proper way of scaling down this debt was to treat as the original principal the amount of Rs. 2,100 less Rs. 450, that is Rs. 1,650, and award interest at 6 1|4 per cent. from 1st October, 1937, on that sum. A.I.R. 1942 Mad. 456=(1942) 1 M. L.J. 418=1942 M.W.N. 274=202 Ind. Cas. 538.

——S. 15.

Synopsis.

1. Appeal.
2. Applicability.
3. Benefit under—Availability.
4. Decree for rent.
5. Interpretation.
6. Plea for reduction of rent.
7. Revision.
8. Scaling down.
9. Scope.
10. Miscellaneous.

1. Appeal.

——S. 15—Decree for rent—Scaling down of—No appeal lies.

Where the amount due under the decree is partly satisfied by the statutory deposit and satisfaction of the old arrears and there remains a decree for costs, this residuum of the decree cannot be regarded as an amended decree giving rise to a right of appeal. (Difference between an order under S. 19 and an order under S. 15 explained). A.I.R. 1943 Mad. 32=1942 M.W.N. 469=55 M.L.W. 506=(1942) 2 M.L.J. 237=205 Ind. Cas. 402.

——S. 15—Proceeding for amendment or discharge of rent decree—Appeal.

A proceeding under S. 15, Madras Agriculturists Relief Act for the amendment or discharge of a decree for rent is not a proceeding in execution but a special proceeding under a special statute, and in the absence of any provision, for a right of appeal no appeal lies. A.I.R. 1942 Mad. 413=(1942) M.W.N. 201=55 M.L.W. 161=(1942) 1 M.L.J. 366=202 Ind. Cas. 426.

2. Applicability.

——S. 15 (2)—Applicability.

S. 15 (2) does not apply to cases in which the landlord had ample time to realise the arrears after the Legislative stay under Madras Act 18 of 1936, and the preceding amending Acts with reference to the Madras Estates Land Act had ceased to operate and before the Madras Act IV of 1938 came into force. 57 M.L.W. 253=(1944) 1 M. L.J. 335=1944 M.W.N. 386=A.I.R. 1944 Mad. 375=220 Ind. Cas. 410.

——S. 15—Applicability—Person intermediary up-to 1932 but not so in March, 1938—Rent payable to such person is not rent payable to intermediary —Court cannot discharge arrears of rent.

Where a person to whom the arrears of rent were payable was an intermediary up to 1932 but was not an intermediary in March 1938, when Act IV of 1938 came into force, the arrears of rent payable to such person cannot be deemed to be rent payable to an intermediary on the crucial date. The Court has therefore, no jurisdiction to declare those arrears of rent discharged. A.I.R. 1943 Mad. 690=56 M. L.W. 517=1943 M.W.N. 498=(1943) 2 M.L.J. 313=210 Ind. Cas. 207.

——Ss. 15, 20, 19—Applicability — Rent-decree—Application for relief under S. 15—Time limit under S. 20 does not apply.

The time limit prescribed in S. 20 which in terms applies only to applications for relief under S. 19 does not apply to applications for relief under S. 15 in respect of decrees for rent. A.I.R. 1943 Mad. 321=(1943) 1 M.L.J. 45=1943 M.W.N. 43 (1) =56 M.L.W. 137 (1)=212 Ind. Cas. 214.

——S. 15—Applicability—Decree in suit by jenmi for redemption of kanom passed in 1937 before Act and modified by High Court after Act by reducing amount decreed to defendants under S. 6 (2), Malabar Compensation for Tenants' Improvement Act after allowing full set-off to a plaintiff for arrears of rent—S. 15, not being retrospective, held did not apply.

In a suit by a *jenmi* for the redemption of a *kanom* a decree was passed in July, 1937, before the Madras Agriculturists Relief Act came into force and was only modified by the High Court after the Act came into force by reducing the amount that was decreed in favour of the defendants under S. 6 (2), Malabar Compenstion for Tenants' Improvements Act, after the full set-off allowable to the plaintiff in respect of a decree for arrears of rent which at the date of the suit had become time-barred had been taken into consideration:

Held, that S. 15, Madras Agriculturists Relief Act not being retrospective in character could have no application. Moreover the only decree that S. 6 (2), Malabar Compensation for Tenants' Improvements Act, contemplated was one for improvements after the arrears of rent, etc., had been set-off. Hence the arrears of rent embodied in the decree for which a set-off ought to have been allowed by the trial Court would be wiped off in any case and could not be held to have been decreed. Nor could those arrears of rent be regarded as due or payable after the Act came into force. A.I.R. 1942 Mad. 307= 55 M.L.W. 18 (3)=(1942) 1 M.L.J. 166=I.L.R. (1942) Mad. 550=206 Ind. Cas. 122.

——S. 15—Applicability—Conditions —Applicability where tenancy was not in existence in Fasli 1347.

A tenancy in *Fasli* 1347 is a condition precedent to relief under S. 15, Madras Agriculturists Relief Act. That section does not, therefore, apply when a tenancy has ceased to exist before the commence-

ment of *Fasli* 1347. 53 M.L.W. 287=A.I.R. 1941 Mad. 366=1941 M.W.N. 241=(1941) 1 M.L.J. 333=I.L.R. (1941) Mad. 433=195 Ind. Cas. 351 (F.B.).

——S. 15—Applicability—Agraharam in Kalahasti Zamindari—Zamindar, if 'land-holder'—Proprietor of agraharam also recorded as land-holder by virtue of Amending Act (18 of 1936)— Zamindar's position as land-holder of Agraharam, if affected —Jodi payable by proprietor of agraharam of zamindar.

In the case of an *agraharam* in Kalahasti Zamindari continuing as before the permanent settlement to be held on an under-tenure under the *zamindar*, the *zamindar* must be regarded as the owner, and, therefore, the "land-holder" of the village. The fact that by virtue of the Amending Act 18 of 1936, the proprietor of the *agraharam* has also to be regarded as a "land-holder" does not affect the position of the *zamindar* as a land-holder in respect of that village. The definition of a land-holder clearly contemplates a plurality of land-holders. The relation between the *zamindar* and the proprietor of *agraharam* is thus one of owner and an under tenure-holder and there is nothing incongruous in holding that both of them are "land-holders," as defined in the Madras Estates Land Act. The *jodi* payable by the proprietor of the *agraharam* to the *zamindar* being thus payable to a land-holder of an estate comes within the purview of S. 15, Madras Agriculturists Relief Act. A.I.R. 1942 Mad. 56=(1941) 2 M.L.J. 159=1941 M.W.N. 904=54 M.L.W. 120=200 Ind. Cas. 881.

——S. 15—Applicability—S. 15, if can be invoked in favour of tenant whose rent is payable to an assignee of rent from Malabar Jenmi.

S. 15 of the Madras Act 4 of 1938 cannot be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar *Jenmi*. The terms "*jenmi*" and "*Intermediary*" used in S. 3 and in the succeeding Ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee. A.I.R. 1941 Mad. 201=52 M.L.W. 849=(1940) 2 M.L.J. 935=(1941) M.W.N. 33=193 Ind. Cas. 406.

——S. 15—Applicability.

Suit by *jenmi* for redemption of *kanom* right against *tarwad*—*Tarwad* not agriculturist as paying more than Rs. 500 land revenue—*Tarwad* partitioned and *kanom* right in suit assigned to *tavazhi*—*Tavazhi* paying land revenue below Rs. 500:

Held, *tavazhi* was agriculturist and can apply under S. 15. Application of S. 15 to such a case does not amount to repeal of Malabar Tenancy Act, S. 24. 52 M.L.W. 676=(1940) 2 M.L.J. 788=A.I.R. 1941 Mad. 196.

——S. 15—Applicability.

The surplus reserved to paid to the mortgagor under a possessory mortgage after appropriating part of he usufruct in lieu of interest due on the mortgage money, is not 'rent' in the proper sense of the term and does not come within the mischief of S. 15, Madras Agriculturists Relief Act. (1940) 2 M.L.J. 758=A.I.R. 1940 Mad. 939=52 M.L.W. 674=(1940) M.W.N. 1138.

——S. 15 and R. 6 (1)—Suit by major inamdar against minor inamdar for recovery of water charge —Applicability.

The relationship between the major and minor *inamdars* cannot be held to be that of a landlord and tenant even if the grants were made to both the *inamdars* by the same personage or authority. The minor *inamdar* is not under a liability to pay any rent to a major *inamdar;* hence S. 15 or R. 6 (1) would have no application to the suit. A.I.R. 1940 Mad. 422=51 M.L.W. 322=(1940) 1 M.L.J. 369=(1940) M.W.N. 300.

3. Benefit under—Availability.

——S. 15—Benefit under—Availability — Decree for ejectment—Arrears of rent allowed to be set-off against amount of compensation for improvement—Until payment is actually made by landlord, tenant is entitled to claim relief under S. 15 as if rent has not been paid.

The mere existence of a decree granting the right to the landlord in Malabar to set-off the arrears of rent against the compensation payable is not equivalent to the payment of those arrears. The payment of rent cannot be effected until payment has actually been made by the landlord of the compensation for improvements less the sum due to him for arrears of rent. Therefore, an effective execution application and the recitals of that application cannot affect the situation. The tenant will be entitled to claim relief under S. 15, Agriculturist Relief Act as if the rent had not been paid. A.I.R. 1943 Mad. 314=(1943) 1 M.L.J. 164=56 M.L.W. 66=1943 M.W.N. 117=209 Ind. Cas. 378.

——S. 15—Benefit under—Availability—Perpetual lease by jenmi—Usufructuary mortgage of jenmi's right—Tenant attorning to mortgagee—Mortgagee is intermediary within S. 15—Tenant is entitled to benefits of S. 15.

The words "has transferred possession to others" in S. 3 (j), Malabar Tenant Act, must be read so as to include the person who stands in the shoes of the original transferee and to whom the tenant has attorned. There is nothing in the definition in S. 3 (*j*), to warrant the conclusion that a payment of rent by the intermediary is a necessary qualification. No doubt the definition of tenant in the Malabar Tenancy Act includes an intermediary but from this fact it cannot be inferred that an intermediary must necessarily be a person who himself pays the rent.

Not only in the case of terminable tenancy but even in the case of a perpetual lease created by the *jenmi*, the usufructuary mortgage of the *jenmi's* right creates in the mortgagee an interest which entitles him to possession and by reason of the attornment of the tenant to him, he must be deemed to have transferred such possession to the tenant. The usufructuary mortgagee to whom the tenant has attorned is, therefore, an intermediary within S. 3 (*j*). Malabar Tenancy Act and S. 15, Madras Agriculturists Relief Act and the tenant is entitled to the benefits of S. 15 of Act 4 of 1938 with reference to the rent payable to the mortgagee. A.I.R. 1943 Mad. 116=(1942) 2 M.L.J. 739=1942 M.W.N. 788=55 M.L.W. 832=I. L. R. (1943) Mad. 674=205 Ind. Cas. 487.

agriculturist obtains from a tenant as assignment of land on which the rent was due on June 1, 1931, that is, after the Act came into force, the tenant being his assignor on the date of the commencement of the Act, no rent can be said to be payable by an agriculturist in respect of that land on the date of the commencement of the Act. The mere fact that the land was assigned after the Act came into force to an agriculturist cannot give the latter the benefit of S. 15. A.I.R. 1941 Mad. 432=53 M. L.W. 104=(1941) 1 M.L.J. 177=1941 M.W.N. 186 (1).

——S. 15—Benefit under—Availability — Assignment by original tenant—Arrears before assignment can be said to be payable by assigne—Advantage of S. 15, can be taken by assignee.

Though it is true that an assignee from original tenant is not personally liable to pay rent for the period before the assignment to him, still, the landlord can, in the final accounting between himself and the assignee insist upon the assignee's paying him the whole of the arrears as a set-off against whatever might be payable to the assignee as compensation for this improvements. In the real sense the whole of the arrears is 'payable' by the assignee and the assignee can take full advantage of S. 15. 52 M.L.W. 391=A.I.R. 1941 Mad. 44=(1940) 2 M.L.J. 451=(1940) M.W.N. 935.

——S. 15—Benefit under—Availability—Alienee of whole of tenant's interest in portion of his holding can claim benefit of S. 15 if he is agriculturist.

An alienee of the whole of the tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and hence, is entitled to the benefits of S. 15, provided he is an agriculturist. 52 M.L.W. 737=A.I.R. 1941 Mad. 303=(1940) M.W.N. 1177=(1940) 2 M. L. J. 820.

4. Decree for rent.

——S. 15—Decree for mesne profias is not decree for rent — Land subsequently becoming "estate" does not alter character of decree.

A decree for mesne profits passed by a Civil Court in a suit for ejectment is not a decree for rent within the meaning of S. 15, Madras Agriculturists Relief Act, and the fact that at a date subsequent to the passing of the decree, the village in which the land is situate has become an "estate" under the amended Madras Estates Land Act will not alter the character of the decree already passed. A.I.R. 1943 Mad. 354=56 M.L.W. 178=(1943) 1 M.L.J. 253=1943 M.W.N. 421=209 Ind. Cas. 116.

——Ss. 15 and 19—Procedure under S. 19 can be invoked under S. 15 to discharge decree for rent —Decree on pro-note executed for arrears of rent —If decree for rent.

Section 19, no doubt, in terms applies only to decrees for the repayment of debts, but having regard to the provisions of S. 15 (1), a similar procedure can certainly be invoked under S. 15 for the discharge of a decree for rent.

Per *Wadsworth, J.* (*Patanjali Sastri, J.*, contra).—A decree, on a promissory note executed for arrears of rent is, however, not a decree for rent and consequently S: 15 cannot be applied to discharge that decree which being a decree for a debt falls under Ss. 9 and 19 of the Act. A. I. R. 1941 Mad. 116=(1940) M.W.N. 1155=52 M. L. W. 735=(1940) 2 M.L.J. 825.

——S. 15—Decree for rent.

Decree passed for contractual rent, which alone could be claimed when the Court dealt with the matter—Amendment of S. 3 (2) (*d*), Madras Estates Land Act by Act 18 of 1936 cannot change character of rent or relation of parties at time of previous adjudication—Decree can be scaled down only as decree for debt and not for rent. A.I.R. 1942 Mad. 746=1942 M.W.N. 472=55 M. L.W. 558=(1942) 2 M.L.J. 359=204 Ind. Cas. 367.

5. Interpretation.

——S. 15 (2)—Interpretation.

"Proceedings if instituted would have stood so stayed"—Meaning of. 220 Ind. Cas. 410=1944 M.W.N. 386=57 M.L.W. 253=A. I. R. 1944 Mad. 375=(1944) 1 M.L.J. 335.

6. Plea for reduction of rent.

——S. 15 (4)—Application under—Plea for reduction of rent, when can be entertained.

No doubt in an ordinary case it would not be open to the Court under S. 15 (4) to entertain a plea which amounted in substance to an attempt to reduce the rent from that previously payable or even to entertain a plea which amounted to an attempt to repudiate liability for rent on the ground that irrigation works had not been repaired. Such pleas would not be available to the tenant in an ordinary suit for rent under the Madras Estates Land Act and, therefore, cannot be urged in an application under S. 15 (4) of Act 4 of 1938. But to the extent to which there are contentions open to the tenant affecting the amount of rent payable, the Court dealing with an application under S. 15 (4), necessarily has to go into those contentions in order to find out what is the amount of rent. Where the contract upon which the tenure is based itself provides for an abatement of rent in case there is any shortage in the extent in the possession of the tenant and for an abatement of rent in case there is any deficiency in the supply of water by the landholder to the tenant's holding, it cannot be contended that the Court which has to decide what is the amount of rent can shut out contention based on these clauses in the *patta* which contemplates fluctuations on certain grounds. A. I. R. 1942 Mad. 649=55 M.L.W. 416=(1942) 2 M.L. J. 100=1942 M.W.N. 506=203 Ind. Cas. 249.

——S. 15—Plea for reduction of rent — Revision against order reducing rent under S. 15—Contention that deposit under S. 15 includes arrears of revenue payable by tenant under terms of agreement raised and accepted—Tenant's petition under S. 15 for reducing rent, held could not be rejected.

In revison filed by the *jenmi* against an order reducing rent under S. 15, the contention of the *jenmi* raised for the first time in the course of arguments, that the deposit under S. 15 included arrears of revenue payable by the tenant under

the terms of his agreement was accepted. The *jenmi* further contended that the tenant's petition for reducing rent under S. 15 should be rejected as the deposit by the tenant under S. 15 was not made as aforesaid:

Held, that it was very undesirable in revision to give effect to the land-holder's contention which would result in the complete defeat of the tenant's application under S. 15, a result which would not have been achieved had the contention been taken at the proper time. A.I.R. 1941 Mad. 303=52 M.L.W. 737=(1940) M.W.N. 1177=(1940) 2 M. L.J. 820.

7. Revision.

——S. 15 (4)—Sub-Collector's order under S. 15 (4)—District Collector's order setting it aside — Revision.

The order of the Sub-Collector under S. 15 (4), Madras Agriculturists Relief Act, and the order of the District Collector purporting to set aside are open to revision by the High Court under S. 115, Civil P.C. A.I.R. 1944 Mad. 139=56 M.L.W. 683=(1943) 2 M.L.J. 615=1943 M.W.N. 753= I.L.R. (1944) Mad. 595=217 Ind. Cas. 8.

8. Scaling down.

——S. 15—Scaling down—Landlord's interest undivided — Part of tenant's interest assigned—Assignee, when can get rent scaled down—Division of land-holder's interest corresponding with division of tenant's interest—Tenant, if can get rent scaled down by payment only of rent due to persons entitled thereto of items assigned to him.

When the landholder's interest remains undivided and there is an assignment of part of the tenant's interests, the assignee can get the rent scaled down only on paying the rent of the entire holding. Where, however, there has been a division of the land-holder's interest corresponding with the division of the tenant's interest, the question whether the tenant could get the rent scaled down on payment only of the rent due to the person entitled to the rent of those items assigned to him must depend to a great extent on the facts. If there has been an attornment by the tenant to the sub-divided land-holder, clearly the tenant would be entitled to claim relief against the person to whom he actually paid his rent on the deposit of the rent for one year. If, in fact, the rent of the holding was still payable to the original land-holder who had to make over part of the rent to the sub-divided group, the scaling down could only be ordered on payment of the full rent of the holding. A.I.R. 1942 Mad. 534 (2)=55 M.L.W. 283 (2)=(1942) 1 M.L.J. 573=202 Ind. Cas. 14.

——S. 15 (4)—Scaling down—Suit for redemption of *kanom*—Decree not drawn up according to S. 6, Malabar Compensation of Tenants' Improvements Act (I of 1900)—Decree taking form of two decrees, one in favour of plaintiff for rent and other in favour of defendant for *kanom* amount and value of improvements—Decree becoming final—The lesser decree in plaintiff's favour cannot be said to have been wiped out by greater decree and hence the arrears of rent are liable to be scaled down under S. 15 (4). A.I.R. 1942 Mad. 399=55 M.L.W. 152= (1942) 1 M.L.J. 338=1942 M.W.N. 246=206 Ind. Cas. 150.

9. Scope.

——S. 15 (4)—Scope—Waram rent.

It cannot be said that S. 15 (4) requires a deposit of the landlord's share of the produce where *waram* rent is payable. The section contemplates only payments of money into Court in all cases. 56 M.L.W. 683=A.I.R. 1944 Mad. 139=(1943) 2 M.L.J. 615=1943 M.W.N. 753=I.L.R. (1944) Mad. 595=217 Ind. Cas. 8.

——Ss. 15, 3 (4)—Scope of.

The scope of the relief intended to be afforded by S. 15, Agriculturists Relief Act, must be determined with reference to the wider definition of 'rent' contained in S. 3 (4) and not to the definition in the Madras Estates Land Act. The operation of S. 15 is not confined to cases arising between landlord and tenant under the Estates Land Act. A.I.R. 1942 Mad. 56=(1941) 2 M.L.J. 159=54 M.L.W. 120 =1941 M.W.N. 904=200 Ind. Cas. 881.

——S. 15—Scope—S. 15, if deals with arrears of rent under Malabar Tenancy Act, (14 of 1930).

S. 15, Madras Agriculturists Relief Act, deals with arrears of rent not only under the Madras Estates Land Act which prescribes a special machinery for execution, but also under the Malabar Tenancy Act with reference to which the ordinary procedure applies and the ordinary Civil Courts have jurisdiction. A.I.R. 1941 Mad. 500=(1941) 1 M.L.J. 156=53 M.L.W. 86=1941 M.W.N. 96=199 Ind. Cas. 591.

——Ss. 15, 23—Scope.

S. 23 embraces all decrees and hence applies also to sales in execution of decrees for rent under Madras Estates Land Act (I of 1908)—Sale in execution of rent decree—Until sale proceeds are paid to landholder, mere sale does not wipe off arrears. A.I.R. 1941 Mad. 500=(1941) 1 M.L.J. 156=53 M.L.W. 86=1941 M.W.N. 96=199 Ind. Cas. 591.

——S. 15—Scope—"Michavaram" in S. 3 (q), Malabar Tenancy Act—Deposit under S. 15.

Considering the definition in S. 3 (*q*), Malabar Tenancy Act, "*michavaram*" includes a payment of Government revenue agreed by the *kanomdar* in the *kanom* deed to be made on behalf of the *jenmi* and hence the deposit under S. 15 must be a deposit of arrears of rent for the specified *faslis* including any arrears of Government revenue payable by the *kanomdar* under the terms of his agreement in respect of those *faslis*. A.I.R. 1941 Mad. 303=52 M. L.W. 737=(1940) M.W.N. 1177=(1940) 2 M. L.J. 820.

——S. 15 (3)—Scope — S. 15 (3) not self-contained—Whole of S. 15 is controlled by proviso to S. 15 (1).

Sub-Cl. (3) of S. 15 is not a self-contained enactment and cannot be read by itself. Sub-S. (3) of S. 15, is necessarily part of the main S. 15, and as the proviso to sub-S. (1) of S. 15, quite clearly states that "no tenant shall have the benefit of this section" which must include sub-S. (3) "unless he has paid in respect of his holding, the rent due for *Fasli* 1347 on or before 30th September, 1938," that condition cannot be said to be fulfilled if the rent has been paid on 3rd December, 1938. A.I.R. 1940 Mad. 235=50 M.L.W. 800 (2)=(1939) 2 M.L.J. 791= (1939) M.W.N. 1208.

10. Miscellaneous.

——S. 15—Miscellaneous—Deposit not including rent payable under Estates Land Act is not valid.

Where a deposit made under S. 15, Agriculturists Relief Act does not include interest payable under S. 61, Estates Land Act, the deposit can be a valid deposit within S. 15. A.I.R. 1943 Mad. 354=(1943) 1 M.L.J. 253=56 M.L.W. 178=1943 M.W.N. 421=209 Ind. Cas. 116.

——S. 15—Miscellaneous — Deposit made subsequent to September 30, 1939—When can be treated as made before that date.

A deposit under S. 15, Madras Agriculturists Relief Act made after 30th September, 1939, may be treated as having been made before that date, if it is proved that the applicant was prevented from making the deposit on 30th September, by some default on the part of the treasury officer or the bank or by some delay on the part of the Court in issuing the chalan so as to prevent the applicant from making the deposit in time. A.I.R. 1942 Mad. 534=55 M.L.W. 283 (2)=(1942) 1 M.L.J. 573=202 Ind. Cas. 14.

——S. 15—Miscellaneous.

Pro-note for arrears of rent—Character of liability changes and it ceases to be rent—Suit on pro-note—Defence that amount is not due as it represented rent which must be deemed to be discharged under S. 15 is not open. (1941) 1 M.L.J. 633=1941 M.W.N. 454=53 M.L.W. 672=A.I.R. 1941 Mad. 638.

——S. 15 (4)—Miscellaneous—Object of—Amount of rent already determined by decree of civil Court—Subsequent application under S. 15 (4) in Revenue Court, if maintainable.

When there is a decree of a Civil Court determining the amount of rent payable for the relevant period, there is no room for any application to the Revenue Court under S. 15 (4), Madras Agriculturists Relief Act. The object of S. 15 (4) is clearly to enable a tenant whose liability for rent has not yet come into Court to ascertain what is the extent of that liability as scaled down and pay it into the Revenue Court in order to prevent an unnecessary suit. A.I.R. 1942 Mad. 78=54 M.L.W. 464=(1941) 2 M.L.J. 655=1941 M.W.N. 997=201 Ind. Cas. 195.

——Ss. 16, 15—S. 16 saves land-holder's right to recover any sum paid by him which tenant should have paid and does not make aforesaid sum part of deposit under S. 15.

S. 16 saves the land-holder's right to recover from his tenant anything which the landholder has paid which should have been paid by the tenant. But it does not make these sums part of the deposit contemplated in S. 15. S. 16 safeguards the landholder's right to recover these sums in addition to that which is recoverable under S. 15. It does not provide a machinery for the recovery but leaves the landholder to his ordinary right of suit. A.I.R. 1941 Mad. 303=52 M.L.W. 737=(1940) M.W.N. 1177=(1940) 2 M.L.J. 820.

——Ss. 17, 19—Object and scope of S. 17—If applies to all suits against defaulting tenants whether agriculturists or not.

The object of S. 17, Madras Agriculturists Relief Act is clearly to save the landholders from the necessity of filing large number of suits which would be met by payments under S. 15 and a claim for the cancellation of the earlier arrears. The plain words of the section include suits against all defaulting tenants, agriculturists or non-agriculturists, and the section read in its plain terms does not run contrary to the general object of the Act. It covers any suit in respect of arrears of rent accrued for *Fasli* 1345 or any prior *Fasli* and is not restricted to such a suit filed against an agriculturist. Hence, S. 17 saves limitation in respect of the suit for arrears of rent for *Fasli* 1344 due from a non-agriculturist. A.I.R. 1942 Mad. 79=54 M.L.W. 433=1941 M.W.N. 913=(1941) 2 M.L.J. 604=201 Ind. Cas. 164.

——S. 18—Decree on promissory note obtained in year 1935—Amount recovered by execution—Appeal—Decree set aside and restitution amount got back in October, 1936—Appeal to High Court—Decree of trial Court restored in 1st August, 1938, reserving the judgment-debtor's right for relief under Madras Agriculturists Relief Act:

Held, that the decree should be scaled down on the footing that no payment was made before the Act came into force:

Held, also that the decree-holder could not appropriate amount recovered in year 1936 under right of restitution. (1943) 2 M.L.J. 166=1943 M.W.N. 542=56 M.L.W. 578=A.I.R. 1943 Mad. 671=213 Ind. Cas. 253.

——S. 18—Suit filed before October 1, 1937—Costs.

When a suit is filed before 1st October, 1937, costs should legitimately be allowed on the basis of the decree which would have been passed had it not been for the intervention of Act IV of 1938. The costs cannot be calculated on the amount as scaled down under the Act. A.I.R. 1943 Mad. 5=55 M.L.W. 706=(1942) 2 M.L.J. 592=1942 M.W.N. 719=204 Ind. Cas. 629.

——S. 19.

See also SS. 7, 8 AND 9.

Synopsis.

1. Appeal.
2. Applcability and scope.
3. Debt.
4. Forum.
5. Payment and appropriation.
6. Persons entitled.
7. Power and duty of Court.
8. Procedure.
9. Scaling down.

1. Appeal.

——S. 19—Order dismissing application made in suit on ground that judgment-debtor is not an agriculturist—Appeal—C. P. Code, Ss. 2 (2) and 96.

An order dismissing an application made in a suit under S. 19 of the Madras Agriculturists' Relief Act on the ground that the judgment-debtor is not an agriculturist, is a decree within the meaning of S. 2 (2), C. P. Code and an appeal lies under S. 96, C. P. Code, although the Act does not confer a right of appeal. The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised

by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal. 74 I.A. 264 =I.L.R. (1948) Mad. 505=1948 M.W.N. 15=A. I.R. 1948 P.C. 12=50 Bom. L.R. 18=61 L.W. 52=52 C.W.N. 275=(1948) 1 M.L.J. 41 (P.C.).

——S. 19—Appeal.

The word "judgment-debtor" in S. 19 is wide enough to cover an Official Receiver in whom the estate of the judgment-debtor is vested and who is the only person to satisfy the decree debt. The Official Receiver can, therefore, file an application under S. 19 of the Act for scaling down a decree passed against the insolvent, and can also file an appeal against the orde passed under S. 19. 57 M.L.W. 34= (1944) 1 M.L.J. 38=1944 M.W.N. 118=A.I.R. 1944 Mad. 256.

——S. 19—Appeal.

No appeal lies against orders passed on applications under S. 19. A.I.R. 1943 Mad. 617=(1943) 2 M.L.J. 31=214 Ind. Cas. 282.

——S. 19—Appeal—Decree amended—Appeal lies —Order refusing to amend, if appealable.

When, under S. 19 of the Act a decree is amended, a regular appeal lies against that amended decree, while there is no appeal against an order refusing to amend a decree. A.I.R. 1942 Mad. 610=55 M.L.W. 73=(1942) 1 M.L.J. 213=1942 M.W. N. 110=202 Ind. Cas. 771.

——Ss. 19, 20—Appeal — Dismissal of application under S. 20—No appeal lies.

There is no right of appeal from the dismissal of an application under S. 20, Madras Agriculturists Relief Act. 1942 M.W.N. 141=A.I.R. 1942 Mad. 418=55 M.L.W. 157=(1942) 1 M.L.J. 314 =201 Ind. Cas. 721.

——Ss. 19 and 8—Appeal — Pending appeal in High Court, application for scaling down filed— Proper course.

Obiter.—Where an application for scaling down has been made to the High Court before judgment has been delivered, the proper course will be to reserve the final order until the application for scaling down has been decided. All questions arising in the appeal other than the question of scaling down can be decided and the decree left open until report has been received from the trial Court, the application for scaling down being remitted to that Court for inquiry and report. If this procedure is followed, the final decree of the High Court will state exactly what the judgment-debtor has to pay, bearing in mind all that he is entitled to under the Agriculturists' Relief Act. A.I.R. 1941 Mad. 929=54 M.L.W. 627=(1941) 2 M.L.J. 858=1941 M.W.N. 1052=I. L.R. (1942) Mad. 346=198 Ind. Cas. 117.

——S. 19—Appeal.

Decree-hoder appealing against decree—Pending the appeal, judgment-debtor filing applications under Ss. 19 and 23, against the decree—Applications dismissed—Judgment-debtor allowing appeal by decreeholder to be proceeded *ex parte*—Decree modified in appeal:

Held, that the judgment-debtor's appeal against the dismissal of his applications under Ss. 19 and 23 became infructuous because of the substitution of the appellate decree for the original decree. (1941) 1 M.L.J. 6=53 M.L.W. 22=1941 M.W.N. 51= A.I.R. 1941 Mad. 373.

——S. 19—Appeal — Order under, if appealable.

Proceedings under S. 19, Madras Agriculturists' Relief Act cannot be regarded as proceedings in execution and S. 47, C. P. Code can have no application to them. Hence an order under S. 19, Madras Agriculturists Relief Act, is not appealable under S. 47, C. P. Code. 53 M.L.W. 79=(1941) 1 M. L.J. 164=A.I.R. 1941 Mad. 235=1941 M.W.N. 131=I.L.R. (1941) Mad. 261=198 Ind. Cas. 760 (F.B.).

——S. 19—Appeal — Order passed under S. 19, dismissing application of judgment-debtor—Appli; cability of—Rules issued by Government providing appeal not retrospective — Nature of order under S. 19.

No appeal lies from an order unless S. 19, Madras Agriculturists' Relief Act, dismissing the application of a judgment-debtor even if an execution petition is pending in any Court. The rules issued by Government in October 1939, providing for appeal in such cases; have no retrospective effect. Orders under S. 19 of the Act cannot be deemed to be orders under S. 47, C. P. Code. Application under S. 19 is to be made to the Court which passed the decree, not to the Court which is executing the decree. In this view, the fact that an execution petition is pending makes no difference; nor does it make any difference that the executing Court happens to be the Court which passed the decree. A.I.R. 1940 Mad. 418=(1940) 1 M.L.J. 422=(1940) M.W.N. 290 (1)=51 M.L.W. 756=194 Ind. Cas. 607.

——S. 19—Appeal—Ss. 19, 28 (1) (2) (c), rules under, r. 8—Rule 8, if retrospective.

There is nothing in the Madras Agriculturists Relief Act or in the rules that retrospective effect should be given to the amended rules. The amendments to the rules are not of a declaratory nature. Rule 8 makes an entirely new provision. This being the case, it cannot have retrospective effect in the absence of a provision to that effect. Where the rules are amended long after revision petition under S. 19, had been filed and long after the period of limitation for an appeal had expired, the objection that the petition does not lie by reason of the amendment of the rules must be rejected. A.I.R. 1940 Mad. 417 =(1940) 1 M.L.J. 317=51 M.L.W. 447=(1940) M.W.N. 301=192 Ind. Cas. 896.

——S. 19—Appeal.

Order under S. 19, when no execution is pending is not applicable under S. 47, C. P. Code. (1939) 50 L.W. 537=(1939) 2 M.L.J. 609 (1)=(1939) M.W.N. 1160 (1).

2. Applicability and scope.

——S. 19—Applicability and scope — Requirements under — Relevancy of agriculturist character of the debtor—Crucial dates.

The object of the Act is clearly to provide relief for debtors who are agriculturists at the commencement of the Act, while S. 19 read with the definition of 'agriculturist' seems to require that the debtor seeking relief should be an agriculturist at the time of the application and the 1st paragraph of the section further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should have been an 'agriculturist' on the 1st October, 1937,

as the proposal of affording relief to indebted agriculturists was made known on that date. The agriculturist character of the debtor is not relevant for purposes of scaling down debts under the Act except with reference to these three dates. A.I.R. 1949 Mad. 874=(1949) 1 M.L.J. 658.

——S. 19 and Provincial Insolvency Act (5 of 1920), Ss. 37 and 43 — Applicability and scope—Application for scaling down decree debt—Adjudication of the applicant prior to 1st October, 1937 and annulment of such adjudication after 22nd March, 1938—Effect on ownership of property and on right to claim relief under Act 4 of 1938—Failure to claim benefit under Act 4 of 1938 in proceedings in execution of decree—Subsequent application for scaling down—If barred by principles of constructive res judicata.

A judgment-debtor under a decree passed in a suit of 1933 was adjudicated insolvent on 16th April, 1937. But owing to his laches the adjudication was annulled on 5th March, 1941. He subsequently applied to scale down his debt under S. 19 of the Madras Agriculturists Relief Act. It was contended that as both on the relevant date referred to in the Act and on the date when the Act came into force, the property was vested in the Official Receiver, the applicant had no saleable interest in the property, and could not claim the relief under the Act and that he was barred by the principle of constructive *res judicata* from preferring the petition:

Held, as the effect of the annulment of an adjudication is to bring about the same state of affairs as if there had never been an adjudication, the property should be deemed to have been the property of the insolvent applicant both on 1st October, 1937, the relevant date referred to in the Act and on 22nd March, 1938, when the Act came into force and therefore the provisions of Madras Act, IV of 1938, would apply. (1945) 1 M.L.J. 472, followed.

Held further: It was not open to the insolvent by way of a counter to an execution application to claim that he was entitled to the benefits of Act IV of 1938. Further, the principle of constructive *res judicata* would not apply to the facts of the case. 1950 M.W.N. 3=(1949) 2 M.L.J. 833.

——S. 19, Proviso—Applicability — Decree for arrears of rent and costs — Part-payment—Sale for the balance — Act taking effect subsequent to sale—Application to scale down — Maintainability —Rent whether constitutes debt scaling down regarding costs of suit.

The respondent obtained a decree for arrears of rent and interest due under a kaichit executed before the Madras Agriculturists' Relief Act was passed. The appellants paid a certain amount towards the decree and for the balance the properties were sold in November, 1937. After the Act was passed the sale was set aside on an application under S. 23. Thereupon the appellants applied for relief under S. 15 of the Act and deposited the rent due for faslis 1346 and 1347. The amounts deposited were found to be correct and full satisfaction of the rents was granted. The appellants then filed an application under S. 19 of the Act praying that the entire arrears of rent due under the decree should be scaled down and that the amount paid by theem towards the decree before the commencement of the Act should be adjusted towards the costs payable under the decree under the proviso to that section.

Held, (*i*) that the decree for arrears of rent was not "a decree for repayment of debt" within the meaning of 19 of the Act.

(*ii*) That the costs of the suit were not in any sense borrowed by the unsuccessful party, that the proviso to S. 19 of the Act was inapplicable to the case and that the appellants could not therefore claim to have their payment adjusted first in payment of the costs awarded under the decree. 59 L.W. 549=1946 M.W.N. 629=A.I.R. 1947 Mad. 208 =(1946) 2 M.L.J. 266.

——S. 19—Proviso—Applicability.

The definition of "debt" in S. (3), Cl. (*iii*) excludes "rent" as defined in Cl. (*iv*). A decree for arrears of rent and costs, therefore, cannot be a decree for repayment of debt within the meaning of S. 19. Even if the portion of the decree awarding cost is viewed in a sense as a decree for payment of debt, it cannot be regarded as a decree for *repayment* of debt, for, repayment clearly implies a prior borrowing and it cannot be said that the costs of a suit awarded under a decree were in any sense borrowed by the unsuccessful party. The proviso to S. 19 is thus inappllicable to such a case and the judgment-debtors cannot claim to have the payment made towards the decree, adjusted first in payment of the costs awarded under the decree. 1946 M.W.N. 266=59 L. W. 549=(1946) 2 M.L.J. 266=A. I. R. 1947 Mad. 208.

——S. 19—Applicability and scope—Mortgagors agriculturists having no interest in hypotheca—Purchaser of hypotheca not agriculturist—Mortgagor, if entitled to scaling down mortgage debt.

S. 19 is only concerned with a debt covered by the definition in S. 3 (3) *i.e.*, a liability due from an agriculturist.

The mortgage in suit was executed by the father of defendants Nos. 1 to 4 who were agriculturists. They sold the hypotheca to defendant No. 5 who became insolvent later on. The Official Receiver sold the hypotheca to defendant No. 8 who was not an agriculturist. At the time of the suit by the mortgagee, personal remedy had become barred and the mortgagors defendants Nos. 1 to 4 had no interest in the hypotheca:

Held, that there was no debt which could be enforced against an agriculturist at the time of the commencement of the Act. There was, therefore, no question of scaling down the mortgage debt even though the mortgagors were parties to the suit and in theory, entitled to redeem the mortgage. Defendant No. 1 was not, therefore, entitled to the benefit of S. 19. (1945) 1 M.L.J. 384 =58 L.W. 346=1945 M.W.N. 383=A.I.R. 1945 Mad. 385.

——S. 19—Applicabiiity and scope—Earlier execution proceedings — Judgment-debtor failing to claim relief under S. 19—Subsequent claim, if barred—Nature of proceedings.

The Court is not acting in execution in dealing with applications under S. 19 which are the proceedings of "an independent nature." The circumstances that the Court executing the decree is the same as the Court which passed the decree

which alone has jurisdiction to grant relief under S. 19 does not make it obligatory for the judgment-debtor to raise the question of relief in the execution proceedings. The judgment-debtor is not bound to raise the question by way of objection to the execution of decree on peril of losing his right to such relief if he failed to do so. 58 L. W. 193=I.L.R. (1945) Mad. 742=(1945) 1 M. L.J. 391=1945 M.W.N. 268=A.I.R. 1945 Mad. 342.

——S. 19—Applicability and scope—Sale before October 1, 1937—Purchaser stranger—Order under S. 19 does not affect sale.

The effect of an order under S. 19 is only to reduce the amount due to the decree-holder. There is nothing in the Act to show that such an order affects an execution sale before October 1, 1937, especially when a third party has purchased the property at such a sale. A.I.R. 1944 Mad. 314 =57 M.L.W. 67=1944 M.W.N. 75=(1944) 1 M. L.J. 110=217 Ind. Cas. 372.

——S. 19—Applicability and scope.

Court in Orissa cannot scale down decree under S. 19. A.I.R. 1944 Pat. 309=23 Pat. 446=25 P.L.T. 108=10 C.L.T. 41.

——Ss. 19 and 3 (ii)—Applicability and scope—Agreement to sell—Deed of conveyance—Vendor held, had no saleable interest and hence was not an agriculturist.

The defendants in a suit claimed to be agriculturists on the ground that on October 1, 1937, and March 22, 1938, the material dates on which they should show they had "saleable interest" in agricultural land, on the ground that title to a piece of land, which they had on January 2, 1930, agreed to sell to the plaintiff and delivered possession thereof to him remained with them in the absence of registered deed of conveyance which was only on April 22, 1940:

Held, that the defendants were not agriculturists and they had no "saleable interest" in the land on those dates. A.I.R. 1943 Mad. 711=56 M. L.W. 518=(1943) 2 M.L.J. 285=1943 M.W.N. 603=213 Ind. Cas. 215.

——S. 19—Applicability and scope — Proceedings under S. 19—Nature of.

Proceedings under S. 19 of the Act are independent proceedings. They are neither proceedings in a suit nor in an execution. A.I.R. 1943 Mad. 617=(1943) 2 M.L.J. 31=214 Ind. Cas. 282.

——S. 19—Applicability — Appellate decree passed after Act.

S. 19 applies only to decrees passed before the commencement of the Act. When, therefore, the appellate decree was passed after the Act came into force, the Appellate Court cannot alter its decree under S. 19. 55 M.L.W. 840=A.I.R. 1943 Mad. 160=1942 M.W.N. 681=(1942) 2 M.L.J. 599=207 Ind. Cas. 621.

——Ss. 19, 7, 23, 13 and 10—Applicability and scope—Relief sought during trial of suit itself—S. 19, if applies—S. 7, construction of—Debtor caiming relief during trial of suit—When entitled to relief.

S. 19 has no reference to cases in which relief under the Act is sought in the trial of the suit itself.

Apart from S. 19 and S. 23 where the Act expressly requires that the debtor should be an agriculturist at the time of the application and S. 13, dealing with debts incurred after the Act where the date of the debt is made the important date, there is nothing in the Act which requires the debtor to prove his agriculturist status as on the date on which the nature is brought to the notice of the Court. S. 7 contemplates the application of the provisions of the Act to all debts payable by an agriculturist at the commencement of the Act but this is subject to the qualification in S. 10, that the provisions of Ss. 8 and 9 shall not apply to a person who was not an agriculturist on October 1, 1937. Reading these two sections together, in the absence of any provision requiring proof that the debtor must continue to be an agriculturist also up to the time when the matter comes before the Court, it is clear that the debtor, in cases where his claim to relief is put forward during the trial of the suit, will be entitled to relief if he can show that he was an agriculturist on October 1, 1937, and on the commencement of the Act, March 22, 1938. A.I.R. 1942 Mad. 726 (2)=55 M.L.W. 635=(1942) 2 M.L.J. 498=1942 M.W.N. 809= 204 Ind. Cas. 478.

——S. 19—Applicabiiity and scope — Proceeding under S. 19 is not proceeding in execution of decree but one which gives new statutory remedy.

A proceeding under S. 19 of the Madras Agriculturists' Relief Act is not a proceding in execution of the decree, but one which gives new statutory remedy whereby the decree, as originally passed, is modified in the light of a defence not open to the defendant at the time of the original trial and a fresh decree is substituted for that which has been passed. Hence the proceedings under S. 19 are not proceeding under the decree originally passed. A.I.R. 1942 Mad. 610=55 M.L.W. 73=(1942) 1 M.L.J. 213=1942 M.W.N. 110=202 Ind. Cas. 771.

——S. 19—Applicabiiity and scope—Proceedings under S. 19, after Court comes to conclusion that decree should be amended, if proceedings in suit —Presidency Small Cause Court passing decree without contest—Decree amended under S. 19, after contest—Judgment-debtor, if can file new trial application under S. 38, Presidency Small Cause Courts Act (15 of 1882).

Though the initial stages of a proceeding under S. 19, that is, until the Court comes to the conclusion that the petitioner is entitled to re-open the suit, may properly be regarded as proceedings outside the suit and not in any way ancillary to the decree, but when it has been decided to re-open the suit and to give effect to the defence under S. 19, so as to pass an amended decree, these later stages of the proceedings may properly be regarded as proceedings in the suit resulting in a decree in the suit. Hence, where a decree passed without contest by a Presidency Small Cause Court is amended by that Court on the application by the judgment-debtor under S. 19 after contest, the judgment-debtor, if he is dissatisfied with the amended decree on the ground that full effect has not been given to the defence which he urged under S. 19, can properly file a new trial application under S. 38, Presidency Small Small Cause Courts Act. A.I.R. 1942 Mad. 610=(1942) 1 M.L.J. 213=55 M. L.W. 73=1942 M.W.N. 110=202 Ind. Cas. 771.

——S. 19—Applicability and scope — Proceeding when can be regarded as separate and not mere continuation of suit.

For the purpose of the procedure under S. 19 in respect of adding parties setting aside *ex parte* orders and so on, it may be convenient and proper to regard the whole of the proceedings as a separate petition and not a mere continuation of the suit. A.I.R. 1942 Mad. 610=(1942) 1 M.L.J. 213=55 M.L.W. 73=1942 M.W.N. 110=202 Ind. Cas. 771.

——Ss. 19 and 20—Applicability and scope—Mortgage suit — Preliminary decree before Act—Final decree after Act—Failure to take plea in final decree proceedings is no bar to such plea being taken subsequently.

Where the preliminary decree in a mortgage suit was passed before the Act and the final decree was passed after the Act, failure of the judgment-debtor to take a plea under the Act in the final decree proceedings does not bar the use of the express procedure laid down in the Act subsequently. A.I.R. 1942 Mad. 418=55 M. L. W. 157=1942 M.W.N. 141=(1942) 1 M. L. J. 314=201 Ind. Cas. 721.

——S. 19—Applicability and scope—Appellate decree passed after Act, if can be scaled down.

According to the plain language of S. 19, it would not apply to a decree passed after the commencement of the Act. Hence a decree of the Appellate Court passed after the commencement of Madras Act (4 of 1938) whether in the first instance or in modification or reversal or confirmation of the decree of the original Court cannot be scaled down under S. 19. A.I.R. 1942 Mad. 291=(1941) 2 M.L.J. 1064=55 M.L.W. 180=1942 M. W. N. 385=201 Ind. Cas. 378.

——Ss. 19, 8 and 9—Applicability and scope—Compromise decree not separately allocating payments towards costs—Court, if can re-open com; promise and act under proviso—Promissory note dated January 4, 1931 and letter of guarantee dated August 7, 1933—Decree against both executants—Remedy for scaling down.

Where the compromise did not separately allocate any portion of the payment towards the costs in the suit, it is not proper for the Court to re-open the compromise, tax the costs and treat the payment of the sum so taxed as the amount first to be provided for with reference to the proviso to S. 19 of the Act. This proviso relates only to costs as originally decreed to the creditor.

A decree was passed in a suit on a pronote dated January 4, 1931 executed by defendants Nos. 1 and 2 and guaranteed by defendants Nos. 2 to 5 by letter of guarantee dated August 7, 1933. Defendants Nos. 1 and 5 applied for scaling down the debt under S. 19:

Held, that in applications under S. 19, the Court was entitled only to proceed in accordance with the provisions of that Act. In accordance with the provisions of that Act, defendant No. 5 was entitled to have his liability scaled down with reference to S. 9 and not with reference to S. 8 of the Act inasmuch as his liability arose after October 1, 1932. A.I.R. 1942 Mad. 133=54 M.L.W. 461=1941 M.W.N. 922=(1941) 2 M. L. J. 658=201 Ind. Cas. 15.

——S. 19—Applicability of to decrees against both agriculturists and non-agriculturists.

S. 19 certainly applies to a decree which is passed against both agriculturists and non-agriculturists, though the relief may be confined only to the former. A.I.R. 1942 Mad. 79=54 M.L.W. 433=1941 M. W.N. 913=(1941) 2 M.L.J. 604=201 Ind. Cas. 164.

——S. 19 — Applicability and scope — Proviso—Privy Council decree, if falls under Act — Privy Council, if foreign Court.

The Judicial Committee of the Privy Council possesses all the essential elements of a Court. Consequently, a Privy Council decree falls within the purview of the Agriculturists' Relief Act. The Privy Council cannot be regarded as a foreign tribunal in relation to the appeals preferred from Courts in Madras Presidency. 55 M.L.W. 107=A.I.R. 1941 Mad. 817=I.L.R. (1942) Mad 60=(1941) 2 M.L.J. 125=1941 M. W. N. 741=200 Ind. Cas. 520.

——Ss. 19 and 8—Applicability and scope—Decree, if means decree passed by Courts of Madras Province.

The term "decree" in S. 19, Madras Agriculturists' Relief Act refers to decree passed by the Courts of Madras Province, and S. 19 is not applicable to decrees made by Courts in other Provinces. A.I.R. 1941 Mad. 810=54 M.L.W. 178=(1941) 2 M.L.J. 295=1941 M.W.N. 961=200 Ind. Cas. 503.

——Ss. 19 and 20—Applicability and scope.

Dismissal for default of an application under S. 20 does not bar application under S. 19. 53 M. L.W. 227=A.I.R. 1941 Mad. 433=1941 M.W.N. 270=(1941) 1 M.L.J. 296.

——Ss. 19 and 10 (2) (ii)—Applicability and scope.

Mortgage by *X* and *Y* in favour of *A* in renewal of earlier mortgage—Mortgagors selling hypotheca to *B*—*B* undertaking to discharge mortgage by payment of Rs. 2,500 out of purchase price—On default by *B* in payment, mortgagee bringing suit on mortgage—Suit resulting in compromise decree—Application by *B* under S. 19 for scaling down:

Held, that the decree was not protected under S. 10 (2) (*ii*) to the extent of Rs. 2,500. (1940) 2 M.L.J. 685=52 M.L.W. 607=(1940) M.W.N. 1081=A.I.R. 1941 Mad. 62.

——S. 19—Applicability and scope.

By virtue of S. 141 of the C. P. Code, O. 7, R. 10 of the Code applies to the applications made under S. 19 of the Madras Agriculturists' Relief Act. 52 M.L.W. 846=(1940) 2 M.L.J. 940=(1940) M.W.N. 1258=A.I.R. 1941 Mad. 362.

——Ss. 19 and 7—Applicability and scope—Mortgage decree payable by agriculturists as well as non-agriculturists—If can be scaled down — Fact that puisne mortgagee has sub-mortgaged his interest, whether deprives him of benefits under Act—Mode of scaling down.

S. 19 is only the machinery section. The substantive provisions are contained in S. 7.

It is no doubt true that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-

agriculturist judgment-debtor. But a mortgage-decree which is payable by an agriculturist does not fall outside the purview of the Act merely because it is also payable by a non-agriculturist and the mere fact that the puisne mortgagee has sub-mortgaged his interest to a non-agriculturist cannot deprive him of any benefits to which he may be entitled under the Act as a person liable to satisfy the decree on the prior mortgage notwithstanding the fact that the mortgage is one and indivisible.

(Mode of scaling down the mortgage decree in such a case explained). A.I.R. 1941 Mad. 204 =I. L. R. (1941) Mad. 336=(1940) 2 M. L. J. 872=(1940) M.W.N. 1218=52 M.L.W. 842=195 Ind. Cas. 702.

——S. 19—Applicability and scope.

S. 19 read with the definition of 'agriculturist' requires that the debtor seeking relief should be an agriculturist at the time of his application. A.I.R. 1941 Mad. 158=(1940) 2 M.L.J. 887=52 M.L.W. 819=(1940) M.W.N. 1247.

——Ss. 19 and 15—Applicability and scope.

Section 19, no doubt in terms applies only to decrees for the payment of debts, but a similar procedure can certainly be invoked under S. 15 of the Act for the discharge of a decree for rent, having regard to the terms of S. 15 (1).

Per *Wardsworth, J.* (*Patanjali Sastri, J.* contra). A decree on a pro-note executed for arrears of rent is not a decree for rent and S. 15 cannot be applied to discharge that decree, which, being a decree for debt, falls under Ss. 9 and 19 of the Act. 52 M.L.W. 735=(1940) M. W. N. 1155=(1940) 2 M.L.J. 825=A.I.R. 1941 Mad. 116.

——S. 19—Applicability to decree passed after Act.

Section 19 has no application to a decree passed after the Act came into force. A.I.R. 1940 Mad. 959=52 M.L.W. 413=(1940) 2 M. L. J. 473=(1940) M.W.N. 947=194 Ind. Cas. 757.

——Ss. 19 and 20—Applicability and scope.

Petitions under Ss. 19 and 20 must be deemed to be petitions which raise question relating to execution, discharge or satisfaction of the decree. A.I.R. 1940 Mad. 131=50 M.L.W. 851=(1939) 2 M.L.J. 853=(1940) M. W. N. 64=186 Ind. Cas. 862.

——Ss. 19 and 20—Applicability and scope.

Sections 19 and 20 of the Act should be read together and the explanation of the expression 'Court which passed the decree' in S. 20 equally applies to S. 19. A.I.R. 1939 Mad. 483=(1939 M.W.N. 164=49 M.L.W. 803=(1939) 1 M. L .J. 329=I.L.R. (1939) Mad. 520=183 Ind. Cas. 596.

3. Debt.

——S. 19—"Debt" within the scope of Act, explained.

The mere existence of a right on the part of the original mortgagor to pay the debt does not involve the consequence of deeming him to be under a liability to pay the debt. Similarly, a debt the enforcement of which cannot be secured by a legal process is not a debt which is payable for the purpose of the Act. (1945) 1 M.L.J. 384=A.I.R. 1945 Mad. 385=58 L.W. 246=1945 M. W. N. 383.

——Ss. 19, 8 and 9—"Debt"—Property bound by mortgage-decree — Puchaser in May 1940 cannot apply for scaling down.

A purchaser who purchased property bound by a mortgage decree in May 1940, cannot be said to be a debtor at all when Madras Act 4 of 1938 came into force. Hence there can be no question of calling in aid S. 19 to apply Ss. 8 and 9 to the debt as if it was a debt falling under either of those sections. An application for scaling down the decree by such a purchaser cannot be maintained. A.I.R. 1944 Mad. 128=56 M.L.W. 692 (1)=(1943) 2 M.L.J. 531=1943 M.W.N. 766=213 Ind. Cas. 168.

——Ss. 19, 11, 8 and 9—"Debt" — Decree scaled down—Costs to which decree-holder is entitled—Interest on costs, if to be scaled down.

The liability of an agriculturist judgment-debtor for costs of execution is a debt within the meaning of the Madras Agriculturists' Relief Act as it is a liability payable under an order of a Civil Court. The mere silence of S. 11 or S. 19 with reference to a liability for costs of execution certainly cannot be taken as a provision of law cancelling such a liability. When, therefore, the decree is scaled down under the Act, the decree-holder is entitled, not only to the costs as decreed, but also to the costs of execution. The judgment-debtor can be given relief in respect of costs of execution only to the extent that interest thereon can be scaled down under S. 8 or S. 9 as the case may be. A.I.R. 1944 Mad. 70=(1943) 2 M.L.J. 442=56 M.L.W. 604=1943 M.W.N. 633=211 Ind. Cas. 420.

——S. 19—Debt—Debt contracted outside Madras Presidency — Mortgage of land situate within Presidency executed within Presidency to discharge debt—Liability.

A contract of mortgage of land situate within the Madras Presidency executed within the Madras Presidency to discharge a debt contracted outside the Presidency and imposing conditions which are quite different from those imposed by the pre-existing liabilities which are discharged under the mortgage is governed by the laws of the Madras Presidency and therefore, the liability under the mortgage can be scaled down under the Madras Agriculturists Relief Act. A.I.R. 1943 Mad. 330=(1943) 1 M.L.J. 32=56 M. L. W. 105=1943 M.W.N. 94=210 Ind. Cas. 189.

——S. 19, 7, 8, 4 (d)—Debt.

When Act came into force, preliminary decree on mortgage of Municipal land in existence—Such debt is excluded from operation of Act—After Act came into force, new agricultural security added—Such added security cannot create retrospectively a debt on agricultural land, so as to attract Ss. 7 and 8 of the Act and exclude S. 4 (*d*)—The effect of new security might give decree-holder right to execute his decree against both sets of property in any order he pleases—But this would not make the additional security a part of the hypotheca covered by the preliminary decree so as to entitle judgment-debtor to scale down the decree under S. 19 of the Act. 54 M.L.W. 468=A.I.R. 1942

Mad. 34=1941 M.W.N. 991=(1941) 2 M.L.J. 653=201 Ind. Cas. 265.

——S. 19—Debt.

Pro-note for arrears of rent—Decree on such a pro-note is decree for debt and not decree for rent. (1941) 1 M.L.J. 633=1941 M.W.N. 454 =53 M.L.W. 672=A.I.R. 1941 Mad. 638.

——S. 19—Definition of 'debt' in Act includes decree-debt.

The definition of 'debt' specifically includes a decree-debt and decree-debt is nonetheless a debt because it does not fall within the category for which special provision is made in S. 19, Madras Agriculturists' Relief Act. The Act, therefore, applies to the scaling down of debts which have ripened into decrees after the commencement of the Act. A.I.R. 1940 Mad. 432=(1940) 1 M.L.J. 600=51 M.L.W. 452=(1940) M.W.N. 338=192 Ind. Cas. 400.

4. Forum.

——S. 19—Decree of trial Court superseded by appellate decree — Application for scaling down decree—Forum—Benefit of S. 14, Limitation Act.

Where a decree of the trial Court has been superseded by a decree of the Court of Appeal after coming into force of the Madras Agriculturists Relief Act, an application for scaling down the decree lies, not to the trial Court, but to the Court of Appeal even though the debtor had no notice of appeal:

In such a case, the mere fact that the judgment-debtor has erroneously presented proceedings for scaling down the decree debt in the trial Court does nat entitle him to the benefit of S. 14, Limitation Act so as to enable him to move the Appellate Court. (1944) 2 M.L.J. 338=57 M.L.W. 582=1945 M.W.N. 20=A.I.R. 1945 Mad. 86.

——Ss. 19 and 20—Forum.

Mortgage-decree passed by Court *A* in Madras Presidency—Court *A* allotted to another province but property covered by mortgage retained in Madras Province—Subsequent appplications under Ss. 19 and 20.

Held, that application under S. 19 lay in the Court under whose jurisdiction the properties lay: that is, in the Madras Province. A. I. R. 1943 Mad. 617=(1943) 2 M.L.J. 31=214 Ind. Cas. 282.

——S. 19—Forum—Act coming into force during pendency of appeal—Application under, when should be made.

When a decree has been the subject-matter of an appeal, the decree of the Appellate Court supersedes the decree of the Court below even though the appellate decree is one which merely affirms the decree of the Court below and does not reverse or modify it. The trial Court's decree is superseded not merely to the extent to which it has been altered but *in toto* and the only decree which can be executed is the decree of the Appellate Court. It makes no difference to this principle whether a particular defendant was or was not a respondent in the appeal. Hence, when, during the pendency of an appeal against the trial Court's decree Act 4 of 1938, came into force, an application for relief under S. 19 of that Act must be made to the Appellate Court as the trial Court would no longer have any jurisdiction to alter its superseded decree with reference to S. 19. The fact that the defendant seeking relief was not impleaded as respondent to the appeal makes no difference. He must get himself impleaded in the pending appeal and ask for that relief before the appellate decree is passed. A.I.R. 1943 Mad. 160=1942 M. W. N. 681=55 M.L.W. 840=(1942) 2 M.L.J. 599 =207 Ind. Cas. 621.

——S. 19—Forum.

Appellate Court sending case back for finding—Application for relief under Act must be made to Appellate Court. A.I.R. 1943 Mad. 77=55 M. L.W. 594=(1942) 2 M.L.J. 452=208 Ind. Cas. 156.

——S. 19—Forum — Appellate decree passed after Act affirming trial Court decree passed before Act—Decree to be executed — Application under S. 19 is to be made to Appellate Court.

The final decree in the appeal is the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance and the decree to be executed is the decree of the Appellate Court and not that of the first Court. Hence the expression "a Court which passed a decree" in S. 19 must be construed as meaning in the case of a decree of the Appellate Court not the Court of first instance, but to mean the Appellate Court decree. When the decree of the trial Court passed before the Act is affirmed in appeal after the Act came into force no doubt before the appeal is decided, an application to the trial Court under S. 19 is competent, but if before the application is disposed of, the decree is passed by the Appellate Court, the latter decree becomes final and the application to the lower Court becomes infructuous. Even if the debt has been scaled down before the appeal is decided, it is the duty of eithr party to bring the fact before or at the hearing of the Appellate Court either by way of appeal or otherwise so that the Appellate Court might pass the appropriate decree. To avoid anomalies and multiplicity of proceedings, a party ought to make the application to the appellate Court for the relief he is entitled to under an enactment which came subsequent to the passing of the decree of the original Court and get the necessary relief in accordance with that enactment before the appellate decree is passed, because once a decree, is passed, it is not open to a Court to amend or review a decree except under S. 152 or O. 47, R. 1, C. P. Code. And the relief under the Madras Act cannot be brought under any of those sections. Therefore, the party runs the risk of losing the benefit under the Act if he does not urge before the Appellate Court the plea which the new enactment gives him or if he has already obtained a decree in the first Court, he fails to bring it to its notice.

The authority of an Appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the time of its judgment. It is entitled to pass such a decree as would be in accordance with any later enactment which came into operation subsequent to such date. 55 L.W. 180=A.I.R. 1942 Mad. 291=(1941) 2 M.L.J. 1064=1942 M.W. N. 385=201 Ind. Cas. 378.

5. Payment and appropriation.

——S. 19—Payment and appropriation — Subsequent purchaser of hypotheca not applying for relief under the Act and not included in the final decree as scaled down — Rights of — Mortgage money as scaled down paid into Court—Effect—Entire mortgage discharged as against mortgagors as well as all the subsequent purchasers.

The preliminary decree in favour of the mortgagees in a mortgage suit was scaled down under S. 19 of the Madras Agriculturists' Relief Act on applications by the mortgagors and subsequent purchasers except the 13th defendant who was a purchaser of portions of the hypotheca from the 9th defendant who was himself a purchaser from the mortgagors of portions of the hypotheca. The preliminary decree was confirmed in appeal by the High Court and the final decree was drawn up for the scaled down amount. The 13th defendant then applied to the High Court to include his name in the final decree but the application was rejected as it was much too late to give effect to his contentions. In the course of the execution proceedings instituted by the decree-holder, the scaled down amount was deposited by the mortgagors and the other interested parties in Court and satisfaction of the decree was entered as far as they were concerned. The 13th defendant then filed an execution application for entering up satisfaction of the decree even as against himself. The 9th defendant also filed an execution application for the same relief as there was an indemnity clause in his sale to the 13th defendant:

Held, (i) that when an agriculturist mortgagor obtains the benefit of the Act and pays the amount of the debt as scaled down, the entire mortgage debt is discharged against all persons interested in the security even though such persons may not be agricultrists entitled to claim relief in their own right under the Act and that the order of the High Court on the 13th defendant's application did not have the effect of denying to the 13th defendant the relief he now sought, for all that the High Court refused to allow was the prayer to have the decree expressly amended and, from the rejection of that prayer as having come too late it cannot follow that the 13th defendant cannot claim the benefit of the scaling down in other appropriate proceedings, if he is so entitled under the law. Reading the decree as a whole it was clear that there was no apportionment of the liability as between several sets of defendants and the effect of the payment accordingly was to discharge the decree as a whole even as against the 13th defendant and others who did not apply for the benefit of the Act in their own right. (ii) Even though the rejection of the application of the 13th defendant would give rise to a claim by way of indemnity against the 9th defendant, it is not sufficient to entitle the 9th defendant to make an application for entering up satisfaction of the decree as against the 13th defendant. 59 L. W. 710=A.I.R. 1947 Mad. 255=(1946) 2 M.L. J. 429.

——S. 19—Payment and appropriation—Claim of partial failure of consideration—Duty of Court.

Where the petitioner admits the subsistence of the debt but contends that there is a partial failure of consideration and that the payments which ought to have been appropriated to this debt have wrongly been appropriated to some other debt, the Court cannot refuse to adjudicate on such contentions and give a positive determination of the amount due after applying the provisions of the Act to the debt having regard to the finding on such plea. (Effect of S. 2 of the Madras Act XV of 1943, considered.) (1944) 1 M.L.J. 299=1944 M.W.N. 259=221 Ind. Cas. 41=57 M.L.W. 283=A.I.R. 1944 Mad. 369 (1).

——Ss. 19, 8 (2) (3)—Payment and appropriatian —Mortgage decree—Sale in execution — Pending confirmation puisne mortgagee applying under S. 19 and alleging certain adjustment filed before sale but not rejected — Setting aside of sale—C. P. Code, O. 21, R. 90.

Pending the confirmation of sale in execution of a mortgage decree, the puisne mortgagee applied under S. 19, Madras Agriculturists' Relief Act and also under S. 47 and O. 21, R. 90, C. P. Code, to set aside the sale on the ground that if an uncertified adjustment which had been filed by him in Court twice before the sale, and had not been rejected, had been taken into account and Madras Agriculturists' Relief Act applied, the decree would have been satisfied and there would be nothing for which the sale could be held:

Held, that before it could be shown that the decree was satisfied, the puisne mortgagee had to establish a number of things and it was by no means clear that all these factors which he had to establish were self-evident. There being no application pending at the time of the sale under Act IV of 1938, the mere holding of the sale without first applying Act IV in favour of the person interested in the hypotheca would not amount to a material irregularity such as would justify the setting aside of the sale. 55 M.L.W. 812=A.I.R. 1943 Mad. 134=1942 M.W.N. 736=(1943) 1 M.L.J. 137=207 Ind. Cas. 438.

——Ss. 19 and 9—Payment and appropriation—Payment by mortgagor pending suit by mortgagee appropriated by Court in mortgage-decree dated 3rd October, 1936, to interest due on mortgage—Parties not objecting — Appropriation is binding.

There is no provision in the Act which permits the re-appropriation of payments made before 1st October, 1937, except only the proviso to S. 19, which deals with payments made under the decree. Where a certain payment made by the mortgagor pending the suit by the mortgagee was appropriated by the Court in the mortgage-decree, dated 3rd October, 1936, to the amount of interest due on the mortgage in order to work out the amount due under the decree, the appropriation is just as binding on the parties who did not object to it as if it had been made by one of the parties before the decree was drafted. There is no provision in the Act which permits the re-opening of this appropriation which cannot be said to be in respect of a payment made under the decree. 55 M.L.W. 607=A.I.R. 1942 Mad. 729=(1942) 2 M.L.J. 424=1942 M.W.N. 790=204 Ind. Cas. 373.

——S. 19—Payment and appropriation — Decree —Application to scale down—Uncertified payments can be proved.

If, for the purpose of scaling down a debt embodied in a decree, the Court finds it necessary to ascertain what payments have been made towards

that decree, the bar in O. 21, R. 2, C. P. Code, would not prohibit the proof of payments which have not been certified. A.I.R. 1942 Mad. 597 =(1942) 2 M.L.J. 185=1942 M.W.N. 494=55 M. L.W. 491=I.L.R. (1943) Mad. 138=203 Ind. Cas. 481.

——S. 19—Payment and appropriation.

Property sold in execution—Judgment-debtor applying under S. 19 and also under O. 21, R. 89, C. P. Code and making necessary deposit—Decree found satisfied by previous payments—Decree-holder applying for withdrawal of deposit:

Held, that by virtue of provisions of Madras Agriculturists' Relief Act, the decree became liable to be scaled down, and having regard to previous payments the decree must be held completely satisfied and discharged. The decree-holder could have no right to claim the money deposited in Court under O. 21, R. 89. A.I.R. 1942 Mad. 453=55 L.W. 260= (1942) 1 M.L.J. 500=1942 M. W. N. 333=202 Ind. Cas. 94.

——Ss. 19, 8 and 9—Payment and appropriation —Execution — Plea by surety that full amount due from judgment-debtor has been paid, if can be adjudicated.

It may be that under the general law, the surety will have a right to resist execution on the ground that the full amount due from the principal debtor has been paid. But an adjudication on such plea cannot form part of proceedings under S. 19 of Madras Agriculturists' Relief Act. A. I. R. 1942 Mad. 133=54 M.L.W. 461=1941 M.W.N. 922= (1941) 2 M.L.J. 698=201 Ind. Cas. 15.

——S. 19—Payment and appropriation — S. 19, Proviso, if affects Crown prerogative—Power of Provincial Legislature to make law affecting Crown's prerogative—Judgment-debtor appealing to Privy Council and depositing security for costs of respondent under O. 45, R. 7, C. P. Code (Act 5 of 1908)—Appeal dismissed—Judgment-debtor's liability for costs discharged under S. 19, Proviso—Decree-holder, if can claim payment out of security.

In dealing with Privy Council decrees, royal prerogative cannot be said to be affected by the Proviso to S. 19. The prerogative has no concern with the curtailment or modification of the rights of parties by a local law although such rights may have been ascertained and defined by an order of His Majesty-in-Conucil.

It is a well-established principle that within the limits of subject and area assigned to a Legislature by the Imperial Parliament, its powers to make laws are as supreme and plenary as those of Parliament itself.

Even if S. 19, Proviso affects any prerogative, it is within the competence of the Legislatures in India to make laws derogating from other prerogative rights except, of course, in so far as such prerogatives may be comprised in matters specially accepted.

The judgment-debtor appealed to the Privy Council and deposited under O. 45, R. 7, C. P. Code, security for costs of the respondent decree-holder. The appeal was dismissed and the costs were awarded to the decree-holder. On the application of the judgment-debtor, his liability for costs was found to have been discharged under S. 19, Proviso:

Held, that the decree-holder could not claim any payments for costs out of the deposit which must be returned to the judgment-debtor. A.I.R. 1941 Mad. 817=I.L.R. (1942) Mad. 606=(1941) 2 M. L.J. 125=54 M.L.W. 107=1941 M.W.N. 741= 200 Ind. Cas. 520.

——S. 19—Payment and appropriation.

Mortgage-decree for principal of Rs. 7,500 with Rs. 3,648 as interest and Rs. 1,515 as taxed costs passed in 1935—In October 1935, Rs. 8,500 and in August, 1936, Rs. 500 paid towards decree—As to Rs. 8,500 creditor appropriating Rs. 500 towards principal and Rs. 3,500 towards interest in April, 1937—No evidence as to appropriation of later payment of Rs. 500 by judgment-debtor in his favour—Appropriation of later sum of Rs. 500, held must be presumed to be towards interest and hence to that extent interest was not available for cancellation on October 1, 1937—Creditor's appropriation as to Rs. 8,500 held, must stand and under S. 19, proviso, amount appropriated towards principal and amount appropriated towards interest should contribute rateably in making up amount required for re-appropriation towards costs. A. I. R. 1941 Mad. 697=53 M.L.W. 721=1941 M.W.N. 625=(1941) 1 M.L.J. 833=199 Ind. Cas. 449.

——S. 19—Payment and appropriation — Payments by debtor adjusted towards debt—Debtor not showing that they had been adjusted in reduction of principal.

Where the payments made by the debtor have been adjusted towards the debt they must have been adjusted in reduction of either interest or principal. Where the debtor is not in a position to show that they have been adjusted in reduction of the principal, it follows that to the extent of these payments he cannot show that there was, on October 1, 1937, interest outstanding. A.I.R. 1941 Mad. 403=53 M.L.W. 24=(1941) 1 M.L.J. 9=1941 M.W.N. 326.

6. Persons entitled.

——Ss. 19 and 20—Persons entitled — Mortgage deree against joint family — Subsequently born member of the family, whether can apply under S. 20.

A member of a Hindu joint family petitioned the Court under S. 20, Madras Agriculturists' Relief Act and the lower Court dismissed the application on the ground that the petitioner not having been born when the mortgage decree in question was passed, he could not maintain an application under S. 20 of the Act. In revision.

Held, that S. 20 is ancillary to S. 19 of the Act and that being so the expression "on application" should be construed as meaning "on an application by a person entitled to the benefits of S. 19". Therefore the petitioner's application was maintainable. 61 L.W. 631=1948 M.W.N. 538 =A.I.R. 1949 Mad. 142=(1948) 2 M.L.J. 164.

——S. 19—Persons entitled—Application under O. 21, R. 90, C. P. Code—Application dismissed and sale confirmed—Subsequent application under S. 19, Madras Agriculturists' Relief Act—Application dismissed — Appeal against both orders—Held, application under S. 19 lies during pendency of

appeal against order confirming execution sale—Sale confirmed in appeal—Result of confirmation was that judgment-debtor lost title to property on date of sale, i.e., before commencement of Agriculturists' Relief Act — Judgment-debtor was not land-holder when he applied—He was entitled to relief under S. 19.

On 6th July, 1935, in execution of a decree a sale was held of certain *inam* village. An application under O. 21, R. 90, C. P. Code, was preferred by the judgment-debtor to set aside the sale. The application was dismissed on 6th March, 1943 and the sale was confirmed on 18th March, 1943. The judgment-debtor filed an application under S. 19, Madras Agriculturists' Relief Act, to scale down the decree. On 22nd March, 1943 the trial Court, without deciding whether judgment-debtor was agriculturist dismissed this application on the ground that no decree subsisted. The judgment-debtor appealed against both the orders of dismissal:

Held, that the validity of the sale to the decree-holder was still in question and until the question was finally decided by the order of the Appellate Court the sale could not be said to have become absolute. The appeal must, therefore, be regarded as a continuation of the proceedings in the lower Court to set aside the sale and the application under S. 19 would lie during the pendency of the appeal provided the applicant was agriculturist:

Held further, that the sale being a good sale, should be confirmed. The confirmation of the sale necessarily resulted in the conclusion that the title of the judgment-debtor to the estate was deemed to have been lost with effect from the date of sale *i.e.*, 6th July, 1935. Thus the judgment-debtor not being a land-hoder of the village at the commencement of the Madras Agriculturists' Relief Act was not disqualified from the status of agriculturists by reason of Proviso D of S. 3 (ii) and could succeed. A.I.R. 1946 Mad. 337=1946 Mad. W.N. 195=(1946) 1 Mad. L.J. 17.

——Ss. 19 and 20—Person entitled—Decree against joint family—Junior member, if can apply for stay—Effect—Such application presented — Manager's application under S. 19 beyond sixty days after stay, if barred.

It is no doubt true that a junior member of a Hindu joint family cannot act so as to bind the family as a whole by the consequences of his act. But S. 19 of the Act expressly empowers in the case of a debt due by a joint Hindu family, any member of the family whether or not he is the judgment-debtor to apply for relief under that section and as the relief of stay under S. 20 is only ancillary to the application for the relief obtainable under S. 19, it must follow that any member of a joint Hindu family in the case of a family debt must also have the power to apply for stay under S. 20. The consequence, therefore, of junior member's obtaining the stay order under S. 20 is to make the period of limitation provided in S. 20 applicable to the application under S. 19 made by the *karnavan* or the manager of the family beyond sixty days of the stay order. 1945 M.W.N. 754=(1945) 2 M.L.J. 535=58 L.W. 632=A.I.R. 1946 Mad. 158.

——S. 19—Persons entitled—Partition between X and his uncle — Uncle subsequently assessed to income-tax as manager—X, held entitled to relief under Act.

One *X* became divided from his uncle as a result of a partition suit decreed on 30th March, 1936. In ignorance of this division, the Income-tax Officer assessed the uncle to income-tax as manager of a joint family for 1936-37:

Held, that the assessment of the uncle was valid with reference to S. 25-A (3), Income-tax Act, and having regard to S. 14 (1) of that Act, the assessment could not be regarded as the assessment of *X's* share of the income Hence *X* was not disentitled to the benefits of the Madras Act IV of 1938. A.I.R. 1943 Mad. 469=56 M.L.W. 132 (1)=(1943) 1 M.L.J. 211=1943 M.W.N. 705=210 Ind. Cas. 395.

——S. 19—Persons entitled — Property already bound by mortgage-decree—Subsequent mortgagee of property, if can apply under S. 19.

In the absence of any definition of the term "judgment-debtor" in Act IV of 1938, the term can be understood as including a person whose liability is "a debt" as defined by the Act when the debt in question was a judgment-debt. A person who acquires an interest in the property already bound by a mortgage-decree by reason of a mortgage of that property in his favour becomes thereby liable to discharge the debt decreed and must, therefore be deemed to be a judgment-debtor entitled to apply under S. 19 if he is an agriculturist. A.I.R. 1943 Mad. 134=55 M.L.W. 812=1942 M.W.N. 736=(1943) 1 M.L.J. 137=207 Ind. Cas. 438.

——Ss. 19, 9—Persons entitled — Agriculturist surety, if entitled to benefit of procedure under S. 19, with reference to date on which his liability was incurred.

Since the surety is, for the purposes of execution in the position of a judgment-debtor there is no reason why he should not be given the benefit of the procedure laid down in S. 19, Madras Agriculturists' Relief Act for agriculturist judgment-debtors to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act having regard to the date on which the liability of the surety himself was incurred. 54 M.L.W. 699=A.I.R. 1942 Mad. 149=(1941) 2 M.L.J. 1010=1942 M.W.N. 61=201 Ind. Cas. 79.

——S. 19—Persons entitled—Decree-holder given leave to bid and set-off but sale not confirmed—Application under S. 19, if can be filed.

Where, in execution of a decree, a sale is held and the decree-holder with leave of the Court to bid and set-off, purchases the property, the decree cannot be regarded as satisfied until the sale has been confirmed. Consequently, before confirmation of the sale, an application by the judgment-debtor under S. 19, Madras Agriculturists' Relief Act, lies as the decree is subsisting. 54 M.L.W. 503=A.I.R. 1942 Mad. 119=1941 M.W.N. 941=(1941) 2 M.L.J. 682=201 Ind. Cas. 229.

——Ss. 19, 10, 2 (ii)—Persons entitled—Vendee of hypotheca impleaded in mortgage suit—If judgment-debtor—If can apply under S. 19 to scale down decree.

A person impleaded as the vendee of the hypotheca in a mortgage suit is a judgment-debtor within the meaning of the Madras Agriculturists' Relief Act and can apply under S. 19 to scale down the decree. The liability to the decree-holder is not the same as the liability to the mortgagor in respect of which

the vendor's lien subsists. Consequently, an application under S. 19 by the vendee of the hypotheca who is impleaded in a mortgage suit, cannot be rejected on the ground that the liability which is sought to be scaled down is one in respect of which there is a charge under S. 55 (4) (*b*) of the T. P. Act and therefore, by S. 10 (2) (*ii*) of Madras Act IV of 1938, the debt cannot be scaled down. A.I.R. 1941 Mad. 889=54 M.L.W. 240=1941 M.W.N. 804=199 Ind. Cas. 617.

——Ss. 19, 20—Persons entitled—Decree against firm—One member agriculturist — Whether can apply under Ss. 19 and 20.

A debt incurred by a partnership is really a debt incurred by the partners for which each of them is liable. Where this is recognised by the decree which makes the petitioner and his partners personally liable, the petitioner is a judgment-debtor with a liability and if he is an agriculturist, he is entitled to apply under Ss. 19 and 20, Madras Agriculturists' Relief Act. A.I.R. 1941 Mad. 611=53 M. L. W. 497=(1941) 1 M.L.J. 609=1941 M.W.N. 570=199 Ind. Cas. 436.

——S. 19—Persons entitled — Term 'judgment-debtor', scope and extent—Liability of purchaser of property subject to mortgage is debt within meaning of Act, hence, he is entitled to apply under S. 19.

The term "judgment-debtor" in S. 19 includes a person whose liability is a 'debt' as defined by the Act, more especially as that definition includes a judgment-debt. Hence, "judgment-debtors" must be taken to include those claiming through or under him. The liability of a purchaser of property subject to a mortgage being a debt within the meaning of the Act, the purchaser is entitled to apply under S. 19 for scaling down the debt due under the mortgage decree. A.I.R. 1941 Mad. 158=(1940) 2 M.L.J. 887=52 M.L.W. 819=(1940) M.W.N. 1247.

——Ss. 19, 3 (ii)—Persons entitled—Puisne mortgagee impleaded in suit by prior mortgagee—If 'debtor' entitled to benefits of Act.

A puisne mortgagee impleaded by the prior mortgagee in his suit, can be deemed to be a "debtor" entitled to the benefits of the act as he is the person liable to pay the amount of the debt due to the prior mortgagee. A.I.R. 1941 Mad. 113=I.L.R. (1941) Mad. 53=52 M.L.W. 481=(1940) 2 M.L.J. 513 =1940 M.W.N. 1010=159 Ind. Cas. 697.

——S. 19—Persons entitled.

The Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act IV of 1938 to scale down the decree which is being attacked at the instance of the plaintiff. (1940) M. W.N. 936=A.I.R. 1941 Mad. 76=(1940) 2 M.L. J. 416=52 M.L.W. 385.

——S. 19—Persons entitled—Mortgagor and purchaser of hypotheca both agiculturists—Purchaser can claim to have debt scaled down.

Where both the mortgagor and the purchaser of hypotheca are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage debt for which he became liable is itself a renewal of an earlier debt in favour of the same creditor. A.I.R. 1941 Mad. 62=52 M.L.W. 607 =(1940) 2 M.L.J. 685=(1940) M.W.N. 1081.

——S. 19—Persons entited — Word 'judgment-debtor', if includes his assignee.

The word "judgment-debtor" in S. 19, Madras Agriculturists' Relief Act does not include the assignee of a judgment-debtor. Hence the purchaser of the equity of redemption from the judgment-debtor is not entitled to the benefit of S. 19. A.I.R. 1940 Mad. 907=(1940) 2 M.L.J. 317=(1940) M.W.N. 82=191 Ind. Cas. 744.

——Ss. 19, 20—Persons entitled—Every member of joint family if can file petition under Ss. 19 and 20 in succession.

It is a concession to joint family that any member entitled to relief may apply to stay and scaling down. The concession is not that every member of the family, in succession may obtain 60 days' stay. Obviously, the joint family is bound by any order passed on the application of any member, or by any default committed by any member. A.I.R. 1939 Mad. 500=(1939) M.W.N. 441=49 L.W. 620= (1939) 1 M.L.J. 888=I.L.R. (1939) Mad. 530= 183 Ind. Cas. 865.

7. Power and duty of Court.

——S. 19—Power and duty of Court—Application of other provisions of the Act.

No doubt S. 19 in terms gives to any judgment-debtor the right to apply: But when the Court comes to deal with that application, it is required to apply the provisions of the Act to the decree and this process brings into force the provisions of Ss. 7, 8 and 9 of the Act. (1945) 1 M.L.J. 384=58 L.W. 246=1945 M.W.N. 383=A.I.R. 1945 Mad. 385.

——S. 19—Power and duty of Court—Proceedings under — Court, if can see whethe decree to be scaled down is barred by limitation.

In a proceeding under S. 19, the Court is bound to go into the question whether the decree sought to be scaled down is barred by limitation or not. It is not open to the Court to scale down the decree at the instance of the decree-holder reserving the plea of limitation raised by the judgment-debtor for disposal "in appropriate proceedings." A.I.R. 1943 Mad. 657=56 L.W. 413 (2)=1943 M.W.N. 524=(1943) 2 M.L.J. 135=210 Ind. Cas. 448.

——Ss. 19, 20—Power and duty of Court—Execution sale after Act—Decree-holder bidding with leave to set-off. Before confirmation of sale, judgment-debtor applying under Ss. 19 and 20—Further proceedings stayed:

Held, (*i*) that as the sale was not confirmed, the set-off, though permitted, could not be said to have been completed:

(*ii*) that when the execution proceedings were stayed and the petition under S. 19 was filed at a time when there was a subsisting decrree debt, the Court was obliged to apply the procedure laid down in S. 19 and scale down that decree. A.I.R. 1943 Mad. 25=(1942) 2 M.L.J. 484=205 Ind. Cas. 631.

——Ss. 19, 8—Power and duty of Court—Suit by agricuturist mortgagor for redemption — Preliminary decree passed—Application for saling down —Purchasers of portion of mortgaged property,

non-agriculturists — Full satisfaction of decree, if can be entered.

A preliminary decree for redemption was passed in favour of the mortgagors. It was found that they were agriculturists and that the amount already paid to the decree-holder was more than twice the principal sum payable by the mortgagors under the mortgage, in their application for scaling down the decree. Some of the judgment-debtors who were purchasers of portions of the hypotheca were non-agriculturists and it was, therefore, contended that the Court ought not to enter full satisfaction of the decree even as against them as they were not entitled to the benefits of the Act:

Held, that the decree-holders who were agriculturists brought the suit as mortgagors to redeem the mortgage impleading purchasers of portions of the hypotheca as co-plaintiffs and redemption had been decreed on payment of a certain sum which must now be deemed to have been paid. Redemption of the mortgage as a whole, therefore, could not be denied to them. The Court below had found that the purchasers held the money reserved with them for payment to the mortgagee as 'mere custodians' for the mortgagors and it might be that the decrees-holders would be entitled to recover any portion of the purchase-money which as a result of the scaling down of the decree, the purchasers would not have to pay the mortgagee. In such circumstances, the Court, by entering satisfaction of the decree as a whole under S. 19 read with S. 8 would only be allowing to the agriculturist mortgagors the full benefits of the Act and not necessarily benefiting the non-agriculturist, purchasers of portions of the hypotheca. A.I.R. 1941 Mad. 557=53 L.W. 490 =(1941) 1 M.L.J. 547=1941 M.W.N. 386=200 Ind. Cas. 245.

——Ss. 19 and 11—Power and duty of Court—Compromise providing that a certain gross sum should be payable in full satisfaction of suit claim and costs without allocating any part of that sum specifically to costs of suits—Ss. 11 and 19 cannot be invoked by creditor—Court has no power to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment when the judgment-debtor applies for scaling down the decree debt under S. 19 of the Act. (1940) 2 M.L.J. 476=52 L.W. 403=(1940) M.W.N. 945=A.I.R. 1940 Mad. 925.

8. Procedure.

——Ss. 19, 6, 7, 8—Procedure—Judgment delivered by High Court on appeal — Practice of remitting subsequently filed application for scaling down debt to lower Court for enquiry and report and drawing decree in accordance with that report—Validity.

Where, subsequent to delivery of judgment by the High Court on appeal, an application for scaling down the debt is filed, the practice of remitting such application to the lower Court for enquiry and report and drawing the decree in accordance with such report is contrary to law in view of the provisions of C. P. Code (S. 33,O . 20). Once a judgment has been delivered, the consequest decree must be drawn up in accordance with the terms of the judgment and no Subordinate Court has power to pass an order which will affect the decree. The Judges obviously have no power to make any order which affects the judgment which they have delivered unless passed on an application for review. A.I.R. 1941 Mad. 929=(1941) 2 M.L.J. 855=54 L.W. 627=1941 M.W.N. 1052=I.L.R. (1942) Mad. 346=198 Ind. Cas. 117 (F.B.).

——Ss. 19 and 20—Procedure — Application by judgment-debtor for stay or scaling down debt—Other agriculturist co-judgment-debtors need not join in aforesaid application—They can move separately under S. 19 or S. 20. A.I.R. 1941 Mad. 556=53 L.W. 158=(1941) 1 M.L.J. 218=1941 M.W.N. 204 (1).

——Ss. 19, 11—Procedure—Scaling down.

There is nothing in the Act which excludes from the scaling down operation interest on costs. There is nothing in S. 19 which is inconsistent with the view that the application therein provided for, was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of S. 11. When there is a decree for costs which forms part of a decree being scaled down under S. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9 of the Act. A.I.R. 1941 Mad. 52=(1940) 2 M.L.J. 707=53 M.L.W. 638=(1940) M.W.N. 1128 =194 Ind. Cas. 36.

9. Scaling down.

——S. 19—Scaling down — Second appeal from mortgage decree pending at commencement of Act—Petition for relief filed in High Court during pendency of appeal but no reference to it in judgment in second appeal—Subsequent order remanding petition to trial Court — Trial Court scaling down debt—After delivery of judgment Court in second appeal has no power to remand petition for disposal to trial Court and consequently trial Court has no power to scale down debt.

During the pendency of a second appeal from a mortgage decree, pending at the time of the commencement of Act (IV of 1938), the mortgagor filed a petition to the High Court for relief under the Act. There was no reference in the judgment or the decree passed in second appeal, to the petition under the Madras Act (IV of 1938). By a subsequent order the petition was remanded to the trial Court for disposal according to law and the trial Court holding the view that because the High Court had remanded the petition for disposal it had power to modify the decree passed in scond appeal, scaled down the debt:

Held, that the High Court had no power, after it had delivered judgment in the second appeal, to modify that judgment by conferring upon one of the parties a relief under the Act which was not obtained at the proper time. Hence the order of the High Court remanding the petition to the trial Court for disposal would not give to the trial Court any power which it did not already possess to modify the decree in second appeal. The decree in second appeal being final any finding by the trial Court regarding the relief which might have been obtained had the proper procedure been taken would not affect that decree and the trial Court had, therefore, no power to modify that decree and to scale down the debt. A.I.R. 1946 Mad. 258=(1946) 1 Mad. L.J. 5=59 Mad. L.W. 14=1946 M.

——S. 19—Scaling down—Mode of.

In scaling down the decree debt, the amounts mentioned in the deposit receipts should not be taken as the principal but the process should be carried further back and the amount properly payable to the decree-holder should be ascertained after applying the appropriate provisions of the Act. (1945) 1 M.L.J. 391=I.L.R. (1945) Mad. 742=1945 M.W.N. 268=58 L.W. 193=A.I.R. 1945 Mad. 342.

——Ss. 19 and 15—Scaling down—Decree passed for contractual rent which alone could be claimed when Court dealt with matter—Amendment of S. 3 (2) (d), Madras Estates Land Act by Act 18 of 1936, if can change charater of rent or relations of parties—Scaling down—Mode of.

The amendment of S. 3 (2) (*d*), Madras Estates Land Act, by Act 18 of 1936 which enlarged the scope of the definition of 'estate' in S. 3 (2) (*d*) cannot govern completed judicial proceedings and divest vested rights. Where the decree had already been passed (on March 18, 1936), for an ordinary contractual rent (rent of damages for use and occupation of land) which alone could be claimed at the time when the Court dealt with the matter, the amendment of 1936 to the Madras Estates Land Act will not change the character of that rent or the relations of the parties as they stood at the time of the previous adjudication, by treating the decree-holder as a land-holder of an estate under the Estates Land Act, and the rent decreed in the previous suit as rent due to him as such land-holder, even though he did not sue as a land-holder of an estate and got his decree on the basis of an ordinary contract. The decree, therefore, can be scaled down only as a decree for a debt and not as a decree for rent. A.I.R. 1942 Mad. 746=1942 M.W.N. 472=55 L.W. 558=(1942) 2 M.L.J. 359=204 Ind. Cas. 367.

——S. 19—Scaling down — Sole judgment-debtor agriculturist—Scaling down of decree, extent of.

When the sole judgment-debtor on the record is an agriculturist, the scaling down of the decree need not be restricted so as not to affect any portion of the property covered by the decree which has come into the hands of a non-agriculturist after the suit. 53 L.W. 162=A.I.R. 1941 Mad. 497=1941 M.W.N. 284=(1941) 1 M.L.J. 223=200 Ind. Cas. 388.

——S. 19—Scaling down — Decree of Appellate Court, if can be scaled down by trial Court.

The trial Court has power under S. 9 to scale down a decree passed by the Appellate Court. A.I.R. 1941 Mad. 113=I.L.R. (1941) Mad. 53=52 L.W. 481=(1940) 2 M.L.J. 513=1940 M.W.N. 1010=195 Ind. Cas. 697.

——Ss. 19, 8, Expl. 10 (2) (ii), 4 (f)—Scaling down—Explanation to S. 8 contemplates renewal of debt by same debtor—Parties to first and subsequent debt, if must be identical—Purchaser of mortgagor's equity of redemption executing pro-note in mortgagee's favour to satisfy mortgage—Note, whether renewal of pre-existing liability — Scaling down.

Explanation to S. 8 contemplates the renewal of a debt or its inclusion in fresh document by the same debtor. But it does not necessarily follow that the parties to the first debt and second debt must be absolutely identical. Where the purchaser of the mortgagor's equity of redemption executes a pro-note to discharge the mortgage debt, the pro-note must be deemed to be a renewal of the pre-existing liability and the debt under the note can, therefore, be scaled down under S. 19. The liability sought to be scaled down in such a case is not a liability in respect of which a charge is provided under S. 55 (4), T. P. Act and hence S. 10 (2) (ii) is no bar to scaling down the debt S. 4 (*f*) as no application to such a case. A.I.R. 1941 Mad. 59=(1940) 2 M.L.J. 651=(1940) M.W.N. 1042=52 L.W. 582=196 Ind. Cas. 276.

——S. 19—Scaling down — Decree debt due by joint family—Any member can apply for scaling down—Mortgage debt due by joint family—Scaling down, whether ought to be only with reference to agricultural lands included in mortgage.

Where the decree debt sought to be scaled down is a debt due by the joint family, any member of the family can apply to have the decree debt scaled down according to the provisions of the Act. In such cases, it is the debt of the family as a whole that has to be scaled down provided, of course, the joint family is proved to be an agriculturist within the meaning of the Act. There is nothing in the Act to suggest that the benefit of scaling down in such cases is to be restricted to the member of the family who makes the application.

The view that the scaling down of a mortgage debt due by an agriculturist joint Hindu family ought to be only with reference to the agricultural lands which happen to be included in the mortgage but not with reference to the other properties like houses etc., comprised in the mortgage, is erroneous as the entire scheme of the act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt. A.I.R. 1940 Mad. 435=(1940) 1 M.L.J. 300=51 L.W. 269=(1940) M.W.N. 283=192 Ind. Cas. 62.

——S. 19-A (4), (a) and (b) and (8)—Order under—Appealability—Ex parte proceedings—Refusal to set aside—Appeal—Maintainability—C. P. Code, O. 9, R. 13 and O. 43, R. 1 (d).

Where the Judge found that the debtors were not agriculturists entitled to the benefits of Madras Act (4 of 1938) but without dismissing the petition on that ground he went on to say that the creditor was entitled to whatever amount was payable under the mortgage:

Held, that the order should be deemed to be one under S. 19-A (4) (*b*) of the Act and that it was not appealable. Although S. 19-A (8) of Madras Act (IV of 1938) may make the provisions of O. 9, R. 13 of the C. P. Code, applicable to proceedings under the Act, it cannot attract the right of appeal conferred under O. 43, R. (1) (b) of the C. P. Code. Hence an order refusing to set aside the *ex parte* proceedings is not appealable. 225 Ind. Cas. 332=1946 M.W.N. 66=59 L.W. 36=A.I.R. 1946 Mad. 264=(1946) 1 M.L.J. 54.

——S. 19-A—Scaling down, proceedings for—Procedure—Necessary parties.

By reason of the new section 19-A, enacted by the Amending Act of 1943, proceedings for scaling down until then held under the rules must now be deemed to be held under the Act itself, and it is necessary that all parties who would be necessary parties in a suit, be impleaded in those proceedings seeing that there is now a right to get a decree on the basis of the declaration on payment of the neces-

sary Court-fee. It is now necessary to implead all those persons who would have been necessary parties to a suit on the mortgage. (1944) 2 M. L.J. 329=57 M.L.W. 563=1944 M. W. N. 740 =A.I.R. 1945 Mad. 116.

——Ss. 19-A and 25-A—Scope and operation — Order declaring amount due as sealed down—Suit by mortgagee to enforce mortgage after the amending Act—Suit whether maintainable in view of provisions of S. 19-A of amending Act—Subsequent alienee's non-joinder whether fatal to suit.

The appellant applied in 1940, under the rules framed by the Madras Agriculturists' Relief Act for a declaration of the amount due by him under a mortgage claiming to be an agriculturist entitled to the benefits of the Act The debt was scaled down and the amount payable by appellant was determined. Subsequently the Act (XV of 1943) was passed amending the Madras Agriculturists' Relief Act by inserting new Ss. 19-A and 25-A. On the question whether a suit to enforce a mortgage after the amending Act came into force was maintainable, in view of sub-S. (9) of S. 19-A.

Held, that there was nothing in the new provisions preventing the respondent from suing to enforce his mortgage. The right of suing to enforce a mortgage which the respondent undoubtedly had when the amending Act was passed could not have been extinguished without express words. The non-joinder of a subsequent alienee will not be fatal to the suit the result being that the decree will not bind him. 59 L.W. 147=1946 M.W.N. 152=A.I.R. 1946 Mad. 335=(1946) 1 M.L.J. 136.

——S. 20.

Synopsis.

1. Appeal.
2. Applicability.
3. Fresh application.
4. Interpretation.
5. Limitation and starting point.
6. Parties.
7. Powers and duty of Court.
8. Revision.
9. Miscellaneous.

1. Appeal.

——S. 20—Order dismissing application on ground that judgment-debtor is not agriculturist—Appeal —C. P. Code, Ss. 47 and 96.

An order dismissing an application to stay execution proceedings under S. 20 of the Madras Agriculturists' Relief Act on the ground that the judgment-debtor is not an agriculturist, relates to the execution, discharge or satisfaction of a decree within the meaning of S. 47, C. P. Code, and an appeal therefore lies under S. 96, C. P. Code. 74 I.A. 264=I.L.R. (1948) Mad. 505=1948 M.W.N. 15 =A.I.R. 1948 P.C. 12=50 Bom.L.R. 18=61 L. W. 52=52 C.W.N. 275=(1948) 1 M.L.J. 41 (P. C.).

——S. 20—Appeal.

There is no right of appeal from the dismissal of an application under S. 20. 1942 M.W.N. 141= A.I.R. 1942 Mad. 418=55 L.W. 157=(1942) 1 M.L.J. 314=201 Ind. Cas. 721.

——S. 20—Appeal.

There is no appeal from order under S. 20. 54 L.W. 283=A.I.R. 1941 Mad. 831=(1941) 2 M. L.J. 497=200 Ind. Cas. 257.

——S. 20—Appeal—Court holding applicant under S. 20 not entitled to benefit under Act—Order, if appealable under S. 47, C. P. Code.

The Court to which an application is made under S. 20, must decide whether the person making the application is a person entitled to the benefits of the Act or not. But the inquiry contemplated by S. 20 is an inquiry of a summary kind. The only question which arises under S. 20 is a question between the executing Court and the applicant and not a question between the parties to the decree. Consequently, the order dismissing an application under S. 20 is not an appealable order under S. 47, C. P. Code. A.I.R. 1939 Mad. 942=(1939) M.W.N. 910=50 L.W. 411=(1939) 2 M.L.J. 495=186 Ind. Cas. 424.

2. Applicability.

——Ss. 20, 21—Sale by Official Receiver—S. 20, if applies.

S. 20 has no application to sales by Official Reveivers and cannot be invoked in favour of a person who is not a judgment-debtor seeking to stay the execution of a decree. A.I.R. 1942 Mad. 254=54 M.L.W. 513=1941 M.W.N. 947=(1941) 2 M.L. J. 698=200 Ind. Cas. 784.

——S. 20—Applicability — Sale in execution of money-decree, confirmed—Execution does not terminate until property is delivered to purchaser—S. 20, if can be applied to stay delivery proceedings.

The terms of S. 20, are wide enough to cover a case, where, after the confirmation of sale in execution of a simple money-decree an application for the delivery of the property is pending. If the property purchased by the decree-holder in execution of his money decree has not been delivered to him, then execution is not at an end and S. 20 can, therefore, be applied to stay a delivery proceeding. A. I.R. 1940 Mad. 825=(1940) M.W.N. 760 (1)= 52 M.L.W. 244=(1940) 2 M.L.J. 234=191 Ind. Cas. 359.

——S. 20—Applicability.

Where, in a suit by first mortgagee, the puisne mortgagee is given merely the privilege of freeing his own security and preserving his possession, he is not a debtor. He cannot, therefore, apply under S. 20 of the Act. A.I.R. 1940 Mad. 61=50 M.L.W. 150=(1939) 2 M.L.J. 225=1939 M.W.N. 736.

3. Fresh application.

——Ss. 20, 19—Dismissal for default of an application under S. 20 does not bar application under S. 19. 53 L. W. 227=(1941) 1 M. L. J. 296= 1941 M.W.N. 270=A.I.R. 1941 Mad. 433.

——S. 20—Fresh application—Father not following up his stay application with application under S. 19 but dying before expiry of sixty days—His son, if can file fresh application.

Where a father did not follow up his stay application under S. 20 with an application under S. 19, but died just before the expiry of the sixty days' time allowed under S. 20, his son, who is impleaded as his legal representative, cannot file a fresh application

under S. 20. A.I.R. 1941 Mad. 100=52 L.W. 431 (1)=(1940) 2 M.L.J. 466=(1940) M.W.N. 951=194 Ind. Cas. 134.

4. Interpretation.

——S. 20, Proviso—Word 'rejected' includes dismissal for default of appearance—It is not used in restricted sense as in Civil P. C. (1908), O. 7, R. 11.

The word 'rejected' in the proviso to S. 20, Madras Agriculturists' Relief Act, signifies rejected on any ground whatever including default of appearance of the petitioner. It is not used in the restricted sense in which it is under in O. 7, R. 11, Civil P. C., namely, rejected owing to some formal defect in the application. A.I.R. 1946 Mad. 78=58 Mad.L.W. 531=1945 Mad.W.N. 709=(1945) 2 Mad. L. J. 374=223 Ind. Cas. 407.

——Ss. 20, 19—Interpretation—Explanation of expression "Court which passed the decree" in S. 20, whether applies to S. 19.

Sections 19 and 20, should be read together and the explanation of the expression "Court which passed the decree" in S. 20 equally applies to S. 19. A.I.R. (1939) Mad. 483=I.L.R. (1939) Mad. 520=(1939) M.W.N. 164=49 L.W. 303=(1939) 1 M.L.J. 329=183 Ind. Cas. 596.

5. Limitation and starting point of.

——S. 20—Limitation.

There is nothing in S. 20 to warrant the distinction between an execution proceeding taken in a Court which passed the decree and a similar proceeding taken in a Court other than the one which passed the decree. In both cases, applications for stay can be made under S. 20 and if a stay is ordered, then the proviso to the section is attracted so as to make it incumbent upon the judgment-debtor to file an application for relief under S. 19 within sixty days of the stay order. 1945 M.W.N. 754=58 L.W. 632=A.I.R. 1946 Mad. 153=(1945) 2 M.L.J. 535.

——S. 20—Limitation—Computation of period of sixty days—Starting point.

The order contemplated in tht proviso to S. 20 is the order of stay pending the disposal of an application under S. 19 passed on the application under S. 29. Limitation for a proceeding under S. 19, therefore, cannot run from the date of the *interim* stay order but from the date the order is made absolute under S. 20.

Per *Wadsworth, J.*—The procedure of granting an *ad interim* stay followed by an absolute order is not contemplated by the Act; *interim* order is not an order under Act and limitation cannot run from such order. I.L.R. (1945) Mad. 188=(1944) 1 M.L.J. 427=57 L.W. 334=1944 M.W.N. 410=A. I. R. 1944 Mad. 455.

——S. 20—Limitation under—Applicability.

The time limit prescribed in S. 20 which in terms applies only to applications for relief under S. 19 does not apply to applications for relief under S. 15 in respect of decrees for rent. A.I.R. 1943 Mad. 321=(1943) 1 M.L.J. 45=1943 M.W.N. 43 (1)=56 L.W. 137 (1)=212 Ind. Cas. 214.

——Ss. 20, 19—Limitation, starting point—Interim stay followed by absolute order is not contemplated.

The procedure of the executing Court in granting an *ad interim* stay followed by an absolute order is not contemplated by S. 20 of Act IV of 1938 and that when once a stay has been granted, limitation for an application under S. 19 will begin to run. A.I.R. 1943 Mad. 245=(1942) 2 M.L.J. 735=55 L. W. 844 (1)=1942 M.W.N. 789=207 Ind. Cas. 274.

——S. 20—Limitation and starting point of—The period of limitation prescribed in S. 20 begins to run with the grant of a stay. A.I.R. 1941 Mad. 433=1941 M.W.N. 270=(1941) 1 M.L.J. 296=53 L.W. 227.

——S. 20—Limitation—Expiry on holiday—Proviso—Interpretation — Period of 60 days expiring when Court is closed — Application under S. 19 made on day the Court re-opens, whether in time.

Per *Leach, C. J.*—The Proviso to S. 20, Mad. Agri. Relief Act, fixes the period of limitation for an application by an agriculturist judgment-debtor when a decret is being executed against him. It is a special provision inserted in the Act to meet the case where an agriculturist against whom a decree has been passed has not taken the steps contemplated by S. 19 and he finds that the decree-holder is taking active steps against him. Hence, if the period of 60 days contemplated by S. 20 expires when the Court is closed, an application for scaling down the debt under S. 19 made on the first day when the Court reopens would be deemed to have been filed in time.

Per *Patanjali Sastri, J.*—Even if the period of 60 days referred to in S. 20, Mad. Agri. Relief Act be not strictly regarded as a period of limitation for an application under S. 19, the result would be the same, For, apart from S. 20, there is no time limit for such an application. It is clear from S. 7 that the debtor is entitled to the benefit of the scaling down of his debt in accordance with the Act so long as the debt is outstanding and enforceable. His right to apply under S. 19 must, therefore, be taken to accrue *de die in diem.* His application would thus be a proceeding to which the Limitation Act does not apply and therefore, the provisions of S. 11, Madras General Clauses Act, would be applicable. A.I.R. 1939 Mad. 613=I.L.R. (1939) Mad. 886=(1939) M. W.N. 521=49 L.W. 762=(1939) 2 M.L.J. 308=186 Ind. Cas. 379.

6. Parties.

——S. 20—Parties.

Where the applicant under S. 20 had been adjudicated insolvent prior to the mortgage suit against him, (in connection with which the application is made), it is desirable that both the insolvent and the Official Receiver are made parties. If. however, the Official Receiver is not made a party, the proceedings are not void. (1944) 1 M.L.J. 427=57 L.W. 334=1944 M.W.N. 410=I.L.R. (1945) Mad. 188=A.I.R. 1944 Mad. 455.

——Ss. 20, 19—Parties—Application by judgment-debtor for stay or scaling down debt—Other agriculturists co-judgment-debtors need not join in the aforesaid application—They can move separately under S. 19 or S. 20. (1941) 1 M.L.J. 218=53 L.W. 158=1941 M.W.N. 204=A.I.R. 1941 Mad. 556.

7. Powers and duty of Court.

——S. 20—Powers and duty of Court.

Where a stay application is filed under S. 20 before the orders have been passed on such applications, it is not within the competence of the executing Court to proceed with the applications for adjust-

ment which are essentially process in execution. 57 L.W. 71=1944 M.W.N. 110=(1944) 1 M.L.J. 136=A.I.R. 1944 Mad. 255.

——**Ss. 20, 19—Powers and duty of Court—Debtor's conduct obstructive — Court, whether bound to grant stay—Conditions for stay, if can be imposed.**

Section 20 does not allow the Court a discretion to refuse a stay in a case in which the conduct of the debtor has been obstructive, nor does it contain any provisions for imposing conditions for the grant of stay. Section 23 contains no time limit, within which the setting aside of the sale has to be followed by an application under S. 19. There is nothing in the Act to prevent a debtor from waiting to the last possible minute and then filing a stay application just at the time when the second sale is being held. The selling Court is obliged to stay the second sale on being satisfied that the debtor was an agriculturist. The holding of the sale in disobedience to the provisions of S. 20 constitutes a material irregularity. A. I.R. 1942 Mad. 731=55 M.L.W. 721=(1942) 2 M.L.J. 585=1942 M.W.N. 664=204 Ind. Cas. 147.

——**S. 20—Proviso—Powers and duty of Court—Applicability and interpretation—Execution of decree stayed under S. 20 — Application under S. 19 filed more than sixty days after stay and contested by decree-holder—Decree amended—Executing Court must execute decree as amended.**

The words "notwithstanding anything contained in this Act to the contrary" in S. 20, proviso, Madras Agri. Relief Act presumably have reference to the provisions of S. 7 which prohibit the execution of a decree against an agriculturist in so far as a decree is for an amount in excess of the sum as scaled down under Chap. II. They are not intended to refer to a case where the decree has in fact been amended before execution has actually been taken. The words "the decree shall be executed as it stands" in the proviso to S. 20 have reference to the frame of the decree at the time of the execution, having regard to any changes which it may have undergone in the trial Court, and not to the frame of the decree as it stood at the time of the stay order. Hence, where the application by the judgment-debtors under S. 19, filed more than sixty days after the stay of execution of decree under S. 20 was contested by the decree-holder and his objection to the amendment of the decree was overruled, it is no longer open to him to urge before the executing Court that the decree to be executed is the decree as it stood before the amendment. Even if the amendment was wrongly made, he is bound by it and the executing Court must execute the decree as amended. A.I.R. 1942 Mad. 757=55 L.W. 718 (2)=1942 M.W.N. 694=(1942) 2 M.L.J. 589=204 Ind. Cas. 517.

——**Ss. 20, 19—Powers and duty of Court—Application under S. 19—Notice under S. 20—Proceedings under O. 21, R. 90, must be stayed.**

Proceedings under O. 21, R. 90, Civil P. C., are proceedings in execution which must necessarily be stayed when an order under S. 20, Madras Act IV of 1938 has been passed, until the disposal of a pending application under S. 19. The fact that a sale held before October 1, 1937, cannot be set aside under Madras Act IV of 1938 does not justify the Court in going on with proceedings relating to such a sale, when all execution proceedings have been stayed. A.I.R. 1942 Mad. 727=1942 M.W.N. 550=55 M. L.W. 531=(1942) 2 M.L.J. 311=204 Ind. Cas. 256.

——**Ss. 20, 19—Powers and duty of Court—Application for stay of execution on ground that applicant is desirous of filing application under S. 19, when should be made—"Good faith", if condition.**

The Act does not compel the judgment-debtor to make an application to stay the execution on the ground that he is desirous of filing an application under S. 19 at an early stage and so he cannot be deemed to have waived his rights if he did not do so at an earlier stage. He can make his application at any stage and even though it be not made in good faith, the terms of S. 20 leaves no discretion to the Court to reject it. The right the petitioner has, to have the execution stayed pending the filing of an application under S. 19, he obtains at all times and under all circumstances. A.I.R. 1942 Mad. 398=1942 M.W.N. 185=(1942) 1 M.L.J. 335=55 L. W. 251=202 Ind. Cas. 67.

——**S. 20—Powers and duty of Court—Order under S. 20, if can be made conditional.**

Section 20 does not permit of a conditional order being made for, if the condition is not fulfilled, S. 20, still makes it primary to stay. So the making of a condition would be infructuous. A.I.R. 1942 Mad. 398=1942 M.W.N. 185=(1942) 1 M.L.J. 335=55 M.L.W. 251=202 Ind. Cas. 67.

8. Revision.

——**S. 20—Lower Court's order neither perverse nor embodying irregularity relating to jurisdiction — Revision.**

Where, on an application under S. 20, the lower Court has come to a conclusion which cannot be described as perverse and certainly embodies no irregularity relating to jurisdiction, the High Court will not interfere in revision as its powers of interference are confined solely to powers under S. 115, Civil P. C. A.I.R. 1941 Mad. 831=54 L.W. 283=(1942) 2 M.L.J. 497=200 Ind. Cas. 257.

9. Miscellaneous.

——**S. 20—Decree passed against father in respect of family liability must be deemed to be decree against son.**

Where a decree has been passed against the father in respect of a family liability, that is to say, a liability enforceable against the family property, the decree must be deemed in law to be a decree passed against the son also. The subsequent insolvency of the father does not affect in any way and make the decree anytheless a decree passed against the son. A.I.R. 1940 Mad. 95=50 L.W. 636=(1939) M. W.N. 1077=(1939 2 M.L.J. 745.

——**Ss. 20, 19—Miscellaneous—Application to scale down decree debt and amend decree accordingly, if lies to Court of first instance.**

Where the decree-holder, after the dismissal of an appeal against the mortgage decree, takes out execution and the proceedings are got stayed, by the judgment-debtor by an application under S. 20, an application by him under S. 19 praying to scale down the decree debt and amend the decree accordingly lies in the Court of first instance and that Court has jurisdiction to deal with the application. A.I.R. 1939 Mad. 483=(1939) M.W.N. 164=49 L.W.

303=(1939) 1 M.L.J. 329=I.L.R. (1939) Mad. 520=183 Ind. Cas. 596.

——Ss. 20 and 19—Miscellaneous—Operation of.

A stay under S. 20 operates until the Court which passed the decree had passed orders on the application to be made under S. 19. The dismissal of the application under S. 19 automatically vacates the stay under S. 20. (1945) 1 M.L.J. 480=58 L. W. 216=A.I.R. 1945 Mad. 304.

——S. 20—Miscellaneous—Proceedings under —Nature of.

Proceedings taken under S. 20 are not independent proceedings, but only ancillary to the proceedings in execution. A.I.R. 1943 Mad. 617=(1943) 2 M.L.J. 31=214 Ind. Cas. 283.

——S. 20—Miscellaneous—Plea not taken in final decree proceedings.

Mortgage suit—Preliminary decree before Act—Final decree after Act—Failure to take plea in final decree proceedings is no bar to such plea being taken subsequently. 1942 M. W. N. 141=55 L.W. 157=(1942) 1 M.L.J. 314=A.I.R. 1942 Mad. 418=201 Ind. Cas. 721.

——S. 21—Applicability—Insolvent — Adjudication in 1930—Absolute discharge in 1932—Estate in the hands of Official Receiver—Divident declared—Disbursement made—Insolvent asking to stay disbursement and claiming benefits under Madras Agriculturists' Relief Act, IV of 1938—Held, petition seeking revival of liability after absolute discharge cannot be allowed.

The petitioner was adjudged an insolvent in 1930. In 1932 he obtained an absolute discharge. The property vested in the Official Receiver for rateable satisfaction of proved debts. One dividend was declared in 1944 and was paid. The second dividend was pending disbursement. Petitioner moved the Insolvency Court to stop disbursement and claimed benefits under S. 21, Madras Agriculturists' Relief Act.

Held, that these debts were no longer, by reason of the discharge the debts of the insolvent. They were the debts of the estate vested in the Official Receiver. Hence S. 21 of Act IV of 1938 was not applicable. (1946) 2 M.L.J. 209=A.I.R. 1947 Mad. 92.

——S. 21—Applicability—Same debt payable by two persons—One becoming insolvent—S. 21, applicability of, to claim of non-insolvent-debtor.

Where a debt is payable to two persons one of whom is adjudged insolvent, S. 21 of Mad. Act IV of 1938 does not apply when the claim of the debtor who is not an insolvent is being considered. Hence, when the mortgage debt is payable by the mortgagors and a puisne mortgagee and the mortgagor becomes insolvent, the puisne mortgagee is not precluded by S. 21 from claiming the benefits of the Act. 1941 M.W.N. 191 (1)=A.I.R. 1941 Mad. 491=53 L. W. 229=(1941) 1 M.L.J. 304=201 Ind. Cas. 316.

——S. 21—Applicability — Conditions—Applicant to come under S. 21, must be insolvent at date of application.

S. 21, is not intended to impose a disqualification upon all persons who have at any time in the past been adjudicated insolvents if dividends have been declared out of their assets, nor is it intended to give the benefits of the Act to all persons who, at any time in the past, have been made insolvents when owning agricultural land, if no dividends have been declared out of their assets. The intention clearly is to provide for pending insolvencies and to lay it down that when a dividend had been paid in such an insolvency, the Act would not apply, but that if there had been no dividend, the Act would apply and the debts payable in insolvency would be liable to be scaled down if the insolvent was a person who but for his insolvency would have been an agriculturist. The words "has been adjudicated" cannot be interpreted as referring only to the state of affairs as on the commencement of the Act in order to come under S. 21, it is necessary that the applicant should be an insolvent at the time of his application. A.I.R. 1942 Mad. 523=1942 M.W.N. 279=(1942) 1 M.L.J. 491=55 L.W. 242=202 Ind. Cas. 298.

——S. 21—Insolvency—Effect of.

When, at the commencement of the Act, there was an agriculturists' family consisting of two brothers, one of whom was an insolvent on the date of the commencement of the Act and the other was an agriculturist, the insolvent brother and his sons cannot be deemed to be agriculturists, and the sons of the agriculturist brother should be deemed to be agriculturists. A.I.R. 1944 Mad. 497=1944 M.W.N. 593=(1944) 2 M.L.J. 112.

——S. 21—Interpretation—Words "has been adjudicated," meaning of.

There is no reason to interpret the words "has been adjudicated" in S. 21, Mad. Agri. Relief Act as having reference to a past completed act with no reference to present conditions. The ordinary meaning of the phrase in ordinary English would be "has been adjudicated and continues in the state resulting from his adjudication" and this is the meaning of the phrase in S. 21. A.I.R. 1942 Mad. 523=1942 M.W.N. 279=55 M.L.W. 242=(1947) 1 M.L.J. 491=202 Ind. Cas. 298.

——Ss. 21 and 19—Official Receiver—Powers of —Judgment-debtor becoming insolvent—The word 'judgment-debtor' in S. 19 being sufficiently wide to cover an Official Receiver, in whom the estate of the judgment-debtor is vested, the Official Receiver can apply under S. 19 to scale down decree against judgment-debtor—He can also file an appeal against the order passed under S. 19. 57 L.W. 34=1944 M.W.N. 118=A.I.R. 1944 Mad. 256=(1944) 1 M.L.J. 38=220 Ind. Cas. 117.

——S. 21—Parties—Insolvent and Official Receiver, if should be made parties.

Both the Official Receiver and the insolvent should be made parties to any application under S. 21. A. I.R. 1942 Mad. 254=(1941) 2 M.L.J. 698=54 L. W. 513=1941 M..W.N. 947=200 Ind. Cas. 784.

——S. 21—Party—Application under, by insolvent agriculturist—Official Receiver should be impleaded as party.

S. 21 contemplates an application by the person who would have been an agriculturist but for his adjudication. But it is proper that to such an application, the Official Receiver in whom the estate vests should be impleaded as a party. A.I.R. 1941 Mad. 487=53 M.L.W. 105 (2)=1941 M.W.N. 271=(1941) 1 M.L.J. 197=199 Ind. Cas. 854.

——Ss. 21, 20—Application by insolvent—Sale by Official Receiver, who refused to join in the application.

Held, that the petition filed by the insolvent before the Insolvency Court to scale down all the debts, without impleading the Official Receiver could not be

maintained. Moreover, the application to the Official Receiver under S. 20, praying for the stay of sale was clearly incompetent and though the sale was held by the Official Receiver with the knowledge that the insolvent had made a move in the matter of an application under S. 21, it could not be said that the Official Receiver acted illegally or irregularly in going on with the sale notwithstanding that knowledge. A.I.R. 1942 Mad. 254=54 L.W. 513=1941 M..W.N. 947=(1941) 2 M.L.J. 698=200 Ind. Cas. 784.

——Ss. 21, 20—Debts due by insolvent—Scaling down—Procedure—Debts not covered by decree or suits in other Courts—Application under S. 21 to Insolvency Court—Maintainability.

Though S. 21 lays down no procedure for scaling down debts due by the insolvent, the procedure should, as far as may be, be analogous to that prescribed for the reduction of other debts. It is apparent, therefore, that, if there is a debt embodied in a decree, the Court which passed the decree would have to be moved under S. 19 to reduce the decree and the Court which executes the decree must be moved under S. 20 to stay execution of the decree in so far as the debts of the insolvent are covered by the decrees of a Court. It is within the power of the Insolvency Court to entertain an application under S. 21 for the scaling down of those debts not covered by the decrees or suits in other Courts, and with reference to those debts, the Insolvency Court is empowered to apply the principles of the Act and direct the Official Receiver to revise or frame the schedule in accordance with the result and to give directions to the Official Receiver regarding the staying of realisation of assets where such realisation is legally to be effected by the scaling down process. But it certainly does not follow from the mere fact that an insolvent's estate may claim the benefit of S. 21 that all administration of the estate must stop until there has been an adjudication on the claims nor does it necessarily follow because there is a sale being held subject to mortgages and the insolvent's estate may have a right to get those mortgage-debts scaled down, that the sale must necessarily await the scaling down process. A.I.R. 1942 Mad. 254=54 L.W. 513=1942 M.W.N. 947=(1941) 2 M.L.J. 698=200 Ind. Cas. 784.

——Ss. 21, 20—Official Receiver about to sell insolvent's property subject to mortgages—Mortgages liable to be scaled down under Act—Application to direct Receiver to suspend sale till completion of scaling down process—Sale by Receiver in disobedience of direction—Setting aside—Provincial Insolvency Act (V of 1920), S. 68.

Where the Official Receiver is about to sell properties subject to mortgages which mortgages were liable to be scaled down, an application can be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed; and, if the Official Receiver holds the sale in disobedience to such directions, that, presumably, can be a ground under S. 68, Prov. Insol. Act for setting aside the sale. It would not be a case of the insolvent beng aggrieved by the mere sale of the properties, but the insolvent being aggrieved by the act of the Official Receiver disregarding the directions of the Court obtained at the instance of the insolvent who is seeking the benefit of a special statutory procedure. A.I.R. 1942 Mad. 254=54 L.W. 513=1941 M.W.N. 947=(1941) 2 M.L.J. 698=200 Ind. Cas. 784.

——S. 21—Scope of—Insolvency of father, if prevents son from applying under S. 21.

The insolvency of the father does not prevent the son from applying for the benefits of Act IV of 1938 by reason of S. 21. S. 21 only bars an application by the insolvent and not one by some other non-insolvent person liable for the same debt. I.L.R. (1941) Mad. 496=1941 M.W.N. 95=53 M.L.W. 69=(1941) 1 M.L.J. 467=201 Ind. Cas. 267.

——S. 21—Object and scope of—Debts of insolvent due by another—Right of latter for scaling down.

The object of S. 21 is to prevent the double scaling down of the debt of an individual. If that debt has been subjected to the scaling down process of the insolvency law and dividends have been paid on the basis of that scaling down, it should not be subject to the fresh scaling down at the instance of the same person who had already got the benefit of one process of reduction. But there is no reason to refuse these advantages to an entirely new person who had no benefit of the insolvency law and who is an agriculturist otherwise entitled to get his debts scaled down. There is nothing in the section nor its object that the exclusion of the debts of the insolvent should be extended to the same debts when due by another person who is not an insolvent.

Where, therefore, a mortgagor became insolvent and dividend was declared before the commencement of the Act, the purchasers of the part of the hypotheca who are agriculturists are not precluded from having the benefits of the Act. (1940) 2 M.L.J. 291 =(1940) M.W.N. 831=52 M.L.W. 301=A.I.R. 1940 Mad. 808.

——S. 21—Exclusion enacted in S. 21—Scope and construction.

The exclusion of an insolvent enacted in S. 21, must be limited only to the insolvent and the debts payable by him, and even if the same debt is payable by another, say, a Hindu son, who is liable to pay his father's debt, the son cannot be regarded as being virtually excluded by S. 21. Hence, even if a debt is one payable by the father and he is an insolvent in whose insolvency a dividend has been declared long ago, that cannot mean that his son who is in possession of the family property is not entitled to claim the benefits of the Act, simply because his father cannot do so by reason of S. 21 of the Act. A.I.R. 1940 Mad. 95=50 M.L.W. 636=(1939) M.W.N. 1077=(1939) 2 M.L.J. 745.

——S. 23.

Synopsis.

1. Appeal.
2. Applicability.
3. Interpretation and scope.
4. Power of Court.

1. Appeal.

——Ss. 23 and 25-A—Application under S. 23 to set aside sale on the ground that applicant was an agriculturist entitled to the benefits of the Act—Dismissal for default on vakil reporting "no instructions"—If can be regarded as an order refusing to set aside the sale and appealed against under S. 25-A—C. P. Code, S. 141 and O. 9, Rr. 8 and 9.

By virtue of S. 141 of the C. P. Code, the procedure under O. 9 is attracted to the trial of petitions under the main provisions of Madras Act 4 of 1938.

An order dismissing an application under S. 23 of Madras Act 4 of 1938 to set aside a sale on the ground that the applicant was an agriculturist entitled to the benefits of the Act, on the vakil reporting "no instruction," cannot be regarded as one on the merits refusing to set aside the sale and appealed against under S. 25-A of the Act. The order is not a decision either to grant or to refuse the prayer in the petition but is an order of a procedural nature under O. 9, R. 8 of the C. P. Code, giving rise to the remedy of an application for restoration and a special right of appeal conferred under O. 43, R. 1 of the Code in case such an application is dismissed. 60 L.W. 219=1947 M.W.N. 207=A.I.R. 1947 Mad. 377=(1947) 1 M.L.J. 228.

——S. 23—Order under—Appeal.

An order allowing an application under S. 23, Mad. Agri. Relief Act is not appealable but the appeal may be treated as a revision. A.I.R. 1942 Mad. 296=(1941) 2 M.L.J. 298=54 M.L.W. 184=1941 M.W.N. 975=200 Ind. Cas. 861.

——S. 23—Appeal — Order under, if appealable.

An order under S. 23 is not appealable as it does not relate to the execution, discharge or satisfaction of the decree under S. 47, Civil P. C. A.I.R. 1941 Mad. 73=(1941) 2 M.L.J. 709=52 M.L.W. 646 =(1940) M.W.N. 1121.

——S. 23—Order under S. 23, if appealable.

An order under S. 23, Madras Agri. Relief Act is not appealable as it does not relate to the execution, discharge or satisfaction of the decree under S. 47, Civil P. C. A.I.R. 1939 Mad. 796=(1939) M.W.N. 735 (2)=50 M.L.W. 201=(1939) 2 M.L.J. 398.

2. Applicability.

——S. 23—Applicability.

Section 23 applies to sales under any decree of Court and, therefore, to sales under the Estates Land Act. A.I.R. 1942 Mad. 741=1942 M.W.N. 632=(1942) 2 M.L.J. 450=206 Ind. Cas. 359.

——S. 23—Applicability—Ss. 23, 7, 19—S. 23, does not apply to decree fully satisfied before March 22, 1938, in view of Ss. 7 and 19.

In view of the provisions of S. 7, any debts incurred after the commencement of the Act cannot come under the general provisions though they may be covered by S. 13. Nor can any debts which have ceased to be payable when the Act came into force be affected in any way by any provision of the Act.

Hence, in view of S. 7 and S. 19, which contemplate decrees which are not yet satisfied, S. 23 cannot be construed to apply to a decree which has already been fully satisfied before the Act came into force and in respect of which no debt subsists on March 22, 1938. A.I.R. 1942 Mad. 323=1942 M.W.N. 137=55 M.L.W. 170 (2)=(1942) 1 M.L.J. 341=205 Ind. Cas. 234.

——Ss. 23, 7, 19—Applicability—Property attached in execution of money-decree—Property sold in disregard of attachment—Purchaser, if can be said to be liable for decree debt—If judgment-debtor—Whether can apply under S. 23.

When property has been attached in execution of money-decree and is sold in disregard of that attachment, having regard to the terms of S. 64, Civil P. C., the transfer is void against claims enforceable under the attachment so that the transferee can be ignored by the decree-holder and the attachment can be worked out by proceedings in execution against the transferor as still being the owner of the property for the purpose of the execution of his decree. The attachment creates no charge and there is, therefore, no property liable to pay the decree in so far as the property which passed to the transferee pending the attachment is concerned. Hence the transferee cannot be said to be liable to pay the decree debt and is not a jdgment-debtor. He cannot, therefore, apply under S. 23, Mad. Agri. Relief Act even if he is an agriculturist. A.I.R. 1942 Mad. 323=1942 M.W.N. 137=55 M.L.W. 170 (2)=(1942) 1 M.L.J. 341=205 Ind. Cas. 234.

——S. 23—Applicability—Applicability to sales held between October 1, 1937, and March 22, 1938—Sales held after Act.

Section 23, Mad. Agri. Relief Act was drafted with reference to the point of time at which the Act came into force and, therefore, the section only relates to sales held between October 1, 1937 and March 22, 1938, and has no application to sales held after the Act came into force. A.I.R. 1942 Mad. 278=54 M.L.W. 228=(1942) 2 M.L.J. 309=1941 M.W.N. 971=200 Ind. Cas. 765.

——S. 23—Applicability and scope.

Decree-holder purchasing property at sale in execution of his decree—Sale set aside under S. 23—Decree amended—Decree-holder seeking execution by re-sale of property—Claim by judgment-debtor that he was entitled to profits earned by decree-holder between date of his obtaining possession as purchaser and date of cancellation of sale:

Held, that the claim for profits not being a claim arising in execution of the decree, but a claim based on the statutory assumption under S. 23 that the sale in execution had not taken place at all, could not be put forward as an objection to execution and could be agitated only in a separate proceeding. A.I.R. 1942 Mad. 271=(1941) 2 M.L.J. 1060=1942 M.W.N. 27=55 M.L.W. 33 (2)=200 Ind. Cas. 876.

——Ss. 23, 8, 19—Applicability and scope—Sale in execution of decree set aside under S. 23—Purchaser is entitled to profits of land between date of his obtaining possession and re-delivery of land on cancellation of sale.

Where a sale held in execution of a decree is set aside at the instance of an agriculturist under S. 23, Mad. Agri. Relief Act, the purchaser, whether he is a stranger or the decree-holder himself is entitled to the profits of the land between the date of his obtaining possession and the date of re-delivery of possession on the cancellation of sale under S. 23. A.I.R. 1942 Mad. 271=(1941) 2 M.L.J. 1060=55 M.L.W. 33 (2)=1942 M.W.N. 27=200 Ind. Cas. 876.

——Ss. 23, 19—Applicability—Decree of foreign Court—Execution in British India—Judgment-debtor, if can get benefit under Act.

Section 23, Mad. Agri. Relief Act is available only to an agriculturist entitled to the benefits of the Act with reference to the particular matter and not generally. Where a decree-holder holding a decree of a foreign Court executes it in British India by sale of the property of the judgment-debtor, the latter cannot get the sale set aside under S. 23. If he gets the sale set

aside, he cannot apply for any benefit under the Act unless he can get the decree amended under S. 19. That cannot be done as the procedure under S. 19 can only be applied by the Court which passed the decree, *i.e.*, in this case by the foreign Court to which this Act has no application. Hence, in such a case, the judgment-debtor is not an agriculturist entitled to the benefits of the Act. A.I.R. 1942 Mad. 204 =54 M.L.W. 422=1941 M.W.N. 879 (1)=(1941) 2 M.L.J. 580=200 Ind. Cas. 848.

——S. 23—Applicability—Agriculturist parting with his interest in property long before the sale—Property sold belonging to non-agriculturist—S. 23 does not apply.

Where the property sold belongs solely to the non-agriculturist, S. 23 has no application. The section does not cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. A.I.R. 1942 Mad. 102=54 M.L.W. 561 (1)=(1941) M.W.N. 879 (2)=(1941) 2 M.L.J. 557=201 Ind. Cas. 400.

——Ss. 23, 15, 8, 9—Applicability—S. 23, applicability of, to decree for arrears of rent under Madras Estates Land Act (I of 1908)—Sale in execution of rent-decree—Until sale proceeds are paid to land-holder, mere sale does not wipe off arrears.

S. 23, Mad. Agri. Relief Act embraces all decrees and so it applies also to sales in execution of decrees for rent under the Mad. Estates Land Act. No doubt the procedure for scaling down is different from the procedure for scaling down an ordinary debt in that it is conditional on a deposit by the person liable to pay. But the fact that the extent to which the decree will have to be scaled down may not be capable of being determined at the time when the sale is to be set aside is not a reason for refusing to apply S. 23 if, in terms, that section applies.

The mere holding of the sale will not wipe off the arrears of rent. Those arrears will remain outstanding until the proceeds of the sale are paid to the land-holder. Hence, where a sale has been held and the purchase price is in deposit with the Collector, it cannot be said that there is no 'rent' outstanding. A.I.R. 1941 Mad. 500=(1941) 1 M.L.J. 156=53 M.L.W. 86=1941 M.W.N. 96=199 Ind. Cas. 591.

——S. 23—Applicability—Decree satisfied—Judgment-debtor cannot apply.

The person applying under S. 23 must be a judgment-debtor at the time he makes the application. The Act does not provide that any judgment-debtor may apply. Consequently, when satisfaction of the decree has been entered up and the decree itself has been wiped out, the judgment-debtor cannot apply under S. 23. A.I.R. 1941 Mad. 402=53 M.L.W. 57=(1941) 1 M.L.J. 106=1941 M.W.N. 89.

——S. 23—Applicability—Subsequent alienee of part of hypotheca, if can apply under S. 23.

The liability of the subsequent alience of part of the hypotheca to discharge the mortgage is a 'debt' liable to be scaled down under the provisions of the Act. He is, therefore, entitled to apply under S. 23. 52 M.L.W. 680=A.I.R. 1940 Mad. 944=(1940) 2 M.L.J. 749=(1940) M.W.N. 1148=192 Ind. Cas. 107.

3. Interpretation and scope.

——S. 23—Interpretation and scope—"Entitled to benefits of Act" in S. 23, meaning of.

The words "entitled to the benefit of this Act" in S. 23 mean that the agriculturist must be entitled to the benefits of the Act with reference to the particular debt and not merly generally. A.I.R. 1942 Mad. 323=1942 M.W.N. 137=55 M.L.W. 170 (2)=(1942) 1 M.L.J. 341=205 Ind. Cas. 234.

——S. 23—Interpretation and scope—Properties sold in execution of mortgage decree—Mortgagor selling equity of redemption pending mortgage suit, cannot be said to have interest in property within S. 23.

Where a mortgagor sells the equity of redemption pending the suit on the mortgage and the properties are sold in execution of the mortgage decree, the mortgagor cannot be said to possess an interest in the property sufficient to satisfy Cl. (1) of S. 23. The most that the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage deed with an endorsement of discharge and the delivery of the title deeds of the land which he would then have to hold as a trustee for his vendee.

The clause "where, in execution of any decree any immovable property in which an agriculturist had an interest has been sold," contemplates the existence of an interst owned by an agriculturist at the time of the sale. A.I.R. 1942 Mad. 296=(1941) 2 M.L.J. 298=54 M.L.W. 184=1941 M.W.N. 975=200 Ind. Cas.. 861.

——S. 23, Proviso and S. 19—Interpretation and scope—Words "other persons interested in such sale" in S. 23, Proviso extent of—Notice.

The words "other persons interested in such sale" in S. 23, proviso, do not contemplate all persons who were parties to the suit, but only refer to all persons interested in upholding the sale. Judgment-debtors desiring to have the sale set aside are not persons interested in upholding the sale and hence no notice to them is necessary.

Though S. 19 does not expressly require a notice to a non-agriculturist judgment-debtor still, in a case where the result of the application under S. 19 is to increase his burden, it is desirable that he should have notice. A.I.R. 1941 Mad. 205=52 M.L.W. 836=(1940) 2 M.L.J. 943=(1940) M.W.N. 1257.

——Ss. 23 and 7—Interpretation and scope—S. 23 is extension of S. 7—Remedy under S. 23.

S. 23 permits an agriculturist to attack a sale held in execution of a decree during the period when the Act was under consideration. It is really an extension of S. 7. The words "that the applicant is an agriculturist entitled to the benefits of this Act" in S. 23 contemplate a state of affairs in which the applicant has a saleable interest in agricultural land at the time when he makes his application and not at the time of the sale previously held. Hence the remedy under S. 23 is not open to a person who is not an agriculturist at the time when he makes the application. A.I.R. 1941 Mad. 205=52 M.L.W. 836=(1940) 2 M.L.J. 943=(1940) M.W.N. 1257.

——S. 23—Clause 'Notwithstanding that the sale has been confirmed'—Interpretation.

The clause "Notwithstanding that the sale has been confirmed" in no way affects the main provisions of S. 23 and cannot be used to introduce any new proviso. A.I.R. 1941 Mad. 73=(1940) 2 M.L.J. 709=52 M.L.W. 646=(1940) M.W.N. 1121.

4. Power of Court.

——S. 23—Power of Court—Court cannot re-open sale held before 1st October, 1937.

S. 23 empowers the Court to re-open sales held under a decree on or after 1st October, 1937, even where the sales have been confirmed. But a sale held before 1st October, 1937, cannot be re-opened. There is no provision in the Act which empowers the Court to re-open such sales. A.I.R. 1941 Mad. 37=(1940) 2 M.L.J. 340=52 M.L.W. 387=(1940) M.W.N. 894.

——S. 23—Power of Court—Rent-decree—Judgment-debtor's mortgagee applying under S. 23 and impleading one of judgment-debtors as counter-petitioner—Objection as to mortgagee's competency to apply—Court allowing transposition of judgment-debtor, as petitioner when application by such judgment-debtor would have been time-barred—O. 1, R. 10, C. P. Code, held did not apply—Court held had no jurisdiction to order transposition. A.I.R. 1942 Mad. 798=(1942) 2 M.L.J. 412=1942 M.W.N. 558=55 M.L.W. 577=206 Ind. Cas. 252.

——S. 24—Sale set aside—Decree re-opened—Auction-purchaser, if entitled to get back his money from decree-holder — Decree-holder, if can execute new decree arrived at after scaling down—Judgment-debtor, if entitled to re-delivery of his property—Purchaser, if can retain possession till amount is refunded.

When the sale is set aside under Mad. Agri. Relief Act, the decree is reopened which may result either in the complete satisfaction of the decree after it has been scaled down or in the passing of what is in effect a fresh decree for different amount. The auction-purchaser will get back his money from the decree-holder who has to return the same. The sale is deemed not to have taken place at all and the decree-holder is entitled to execute the new decree. The judgment-debtor is consequently entitled to re-delivery and possession of the property sold and the auction-purchaser has no right to retain possession pending refund to him of the purchase-money, his remedy being to apply for refund under S. 24 and have it paid by the decree-holder. A.I.R. 1943 Mad. 274=(1943) 1 M.L.J. 34=56 M.L.W. 206=1943 M.W.N. 65=209 Ind. Cas. 328.

——S. 24—Auction-purchaser continuing possession even after sale is set aside—His liability for mesne profits.

Continued possession of the land by the auction-purchaser after his sale has been set aside under the Act is wrongful possession and the judgment-debtor who is entitled to the land can claim mesne profits from the auction-purchaser from the date of the setting aside of the sale. A.I.R. 1943 Mad. 274=(1943) 1 M.L.J. 34=56 M.L.W. 206=1943 M.W.N. 65=209 Ind. Cas. 328.

——S. 25-A—Filing of appeal under out of time—Application to excuse delay under S. 5, Limitation Act—S. 29 of Limitation Act, if excludes the application of S. 5. *See* LIMITATION ACT, Ss. 5 AND 29 (2). (1949) 1 M.L.J. 271.

——S. 27—Local Board's certificate—Validity.

There is nothing in S. 27 to warrant the view that a certificate given by a Local Board is conclusive of the facts which it states. The other side can adduce evidence to the effect that the certificate is not true. 52 M.L.W. 430=A.I.R. 1941 Mad. 73=(1940) 2 M.L.J. 468 (1)=(1940) M.W.N. 948.

——S. 28—Rules under, R. 1-A—Failure to pay full rent owing to mistaken comprehension of law—Extension of time.

It is extremely doubtful if R. 1-A authorises an extension of time owing to the failure of agriculturists to pay the full rent by reason of a mistaken comprehension of the law as to what was the rent. A.I.R. 1941 Mad. 303=52 M.L.W. 737=(1940) M.W.N. 1177=(1940) 2 M.L.J. 820.

——S. 28—Rules under, R. 2—Court refusing to adjudicate on amount of debt which according to applicant was unenforceable—Revision.

Where the Court has refused under the Act to adjudicate upon the amount of the debt which, according to the applicant, was unenforceable on the ground of limitation, the Court cannot be said to have acted without jurisdiction in so refusing or to have improperly declined to exercise a jurisdiction which it had, so as to justify High Court's interference in revision. A.I.R. 1943 Mad. 7=55 M.L.W. 693 (1)=(1942) 2 M.L.J. 551=1942 M.W.N. 696=205 Ind. Cas. 396.

——S. 28, R. 2—Debtor seeking declaration of amount of his debt must concede existence of debt—He cannot plead that no debt is due on grounds outside Act.

Under R. 2 of the rules framed under G. O. No. 2634, Development, dated October 27, 1939 a debtor cannot ask the Court for a declaration of the amount of his debt, under the rules unless he concedes that there is a debt upon which the provisions of Act IV of 1938 can operate. He cannot, in the same breath, say that no debt is due from him at all whether on grounds of limitation or other grounds outside the scope of Act IV of 1938. A.I.R. 1943 Mad. 7=55 M.L.W. 693 (1)=(1942) 2 M.L.J. 551=1942 M.W.N. 696=205 Ind. Cas. 396.

——S. 28, R. 2—Intra vires.

Rule 2 of the Mad. Agri. Relief Act is not *ultra vires*—It does not offend against the provisions of O. 2, R. 2 or O. 34, Civil P. C., or S. 42, Specific Relief Act. A.I.R. 1942 Mad. 362=1942 M.W.N. 151=I.L.R. (1942) Mad. 647=55 M.L.W. 136=(1942) 1 M.L.J. 303=205 Ind. Cas. 97.

——S. 28—Rules under, R. 6 (1).

Suit by major *inamdar* against minor *inamdar* for recovery of water charges—Rule 6 (1) does not apply. (1940) 1 M.L.J. 369=51 M.L.W. 322=(1940) M.W.N. 300=A.I.R. 1940 Mad. 422.

——S. 28—Rules under, R. 7—R. 7, if ultra vires.

The use of the word 'owner' in the last sentence of proviso (*c*) to S. 3 (*ii*), Mad. Agri. Relief Act shows that the legislature intended to disqualify from a claim to be an agriculturists only a person from whom tax had been demanded by virtue of ownership. Rule 7 of the Rules framed under S. 28, makes it clear that the term 'assessed to property tax' in S. 3 (*ii*), proviso (*c*) will not cover the case of a person in whose name an assessment has been made, when he was not in fact the owner of the property during the relevant period. There is, therefore, nothing repugnant to the apparent intention of proviso (*c*) in this rule: nor can it be said that this rule gives to the proviso, a meaning which is not its probable meaning. It is within the powers of the Local Government to make a rule which merely removes an ambiguity in a clause of the statute. The rule is, therefore, not beyond the powers of the Provincial Government.

A.I.R. 1941 Mad. 704=I L.R. (1941) Mad. 840= 53 M.L.W. 518=(1941) 1 M.L.J. 605=1941 M. W.N. 400=198 Ind. Cas. 843.

——S. 28—Rules under, R. 8—Term "Court" includes Appellate Court.

The term 'Court' in R. 8 includes the Appellate Court having jurisdiction under the rules and not merely the Court of first instance.. Hence when R. 8 speaks of an application pending in the Court, it covers not merely an application pending in the Court of first instance but also an application pending in appeal before the Appellate Court. A.I.R. 1944 Mad. 206=1943 M.W.N. 832=57 M.L.W. 16 (1)= (1944) 1 M.L.J. 27=1944 M.W.N. 373=216 Ind. Cas. 294.

——S. 28, R. 8—Whether ultra vires.

To read either into sub-S. (1) or into Cl. (*c*) of sub-S. (2) of S. 28, Mad. Agri. Relief Act, a power for the Provincial Government to constitute an appellate tribunal would be to read something which is not there. Therefore, R. 8 of the rules framed under S. 28 is *ultra vires* the power of the Provincial Government. 53 M.L.W. 79=(1941) 1 M.L.J. 164=A.I.R. 1941 Mad. 235=1941 M. W.N. 131=I.L.R. (1941) Mad. 261=198 Ind. Cas. 760 (.F.B.).

——S. 28—R. 8, if retrospective.

There is nothing in the Mad. Agri. Relief Act, or in the rules, that retrospective effect should be given to the amended rules. The amendments to the rules are not of a declaratory nature. Rule 8 makes an entirely new provision. This being the case, it cannot have retrospective effect in the absence of a provision to that effect. A.I.R. 1940 Mad. 417= (1940) 1 M.L.J. 317=(1940) M.W.N. 301=51 M. L.W. 447=192 Ind. Cas. 896.

——S. 28—Rules under, R. 9—Rules 9 and 7—Appeal under R. 9—S. 13, Madras Civil Courts Act applies.

The words "as if it were a decree in an original suit" in R. 9 are wide enough to attract all the procedure relating to appeals, including the provisions governing the appellate jurisdiction of Courts contained in S. 13, Mad. Civil Courts Act. In applying S. 13, Madras Civil Courts Act to appeals allowed by R. 9, the application made under the rules should be deemed to be a suit and the Court in which the appeal is to be filed should be determined according to the valuation of the subject-matter.

A debtor applied to the Sub-Judge under the rules made under the Madras Agri. Relief Act for a declaration that a sum of Rs. 3,914-11-0 only was due from him under a mortgage executed by him in favour of the creditor for Rs. 10,000. The debt was scaled down to a sum of Rs. 5,814-11-2:

Held, that as the value of the reduction claimed by the debtor exceeds Rs. 5,000, an appeal lay direct to the High Court under S. 13, Mad. Civil Courts Act. A.I.R. 1944 Mad. 31=56 M.L.W. 514= (1943) 2 M.L.J. 352=1943 M.W.N. 637=I.L.R. (1944) Mad. 378=216 Ind. Cas. 77.

——S. 28, R. 9—Debt declared immune from reduction—No appeal lies—R. 9 is not ultra vires.

A decision that the debt was immune from reduction under Mad. Agri. Relief Act is not a decision declaring the amount of the debt and hence no appeal lies against such a decision although R. 9, is not *ultra vires*. A.I.R. 1943 Mad. 213=1942 M. W.N. 751=(1942) 2 M.L.J. 806=208 Ind. Cas. 113.

——S. 28, R. 9—Rule, if properly framed.

It is incorrect to say that a right of appeal is a right which can never be conferred by a rule unless there is an express power in the statute to make rules for that purpose. Rule 9 of the rules framed under S. 28, Mad. Agri. Relief Act is one which is a reasonable and convenient qualification of the procedure prescribed; it does not offend against any principle of law; it is not inconsistent with anything in the Act itself and it is properly framed for carrying into effect the purposes of the Act and removing difficulties in giving effect to its provisions. A.I.R. 1942 Mad. 466=1942 M.W.N. 230=55 M.L.W. 186= (1942) 1 M.L.J. 390=I.L.R. (1942) Mad. 654= 206 Ind. Cas. 568.

——S. 28, Rr. 9 and 2—Invalidity of R. 9, if can render whole body of rules invalid.

Assuming R. 9 framed under S. 28, Mad. Agri. Relief Act to be invalid, the invalidity of that rule would not carry the consequence that the whole of the body of rules framed under S. 28 (1) and (2) (*b*) and (*c*) would have to be deemed invalid. The provision for a right of appeal is quite separate from the provisions giving the machinery for the ascertainment of the amount of the debt by the Court of first instance. It is not a case in which the rule alleged to be invalid is so inextricably mixed with the rest of the rules that a declaration of its invalidity would necessarily destroy the whole fabric of the rules. Even taking away the right of appeal there remains a complete and effective procedure for the rapid and inexpensive determination of the effect of the Act upon a particular debt and even without an appeal the procedure would be subject to the control of the High Court in revision just as the procedure under Ss. 19 and 20 of the Act is also subject only to control in revision. A.I.R. 1941 Mad. 362=I.L.R. (1942) Mad. 647=1942 M.W.N. 151=55 M.L.W. 136=(1942) 1 M.L.J. 303=205 Ind. Cas. 97.

——S. 28, R. 9—Appeal under.

Appeal under R. 9 of rules under Mad. Agri. Relief Act falls under Art. 11, Sch. II, Court Fees Act. A.I.R. 1941 Mad. 639=I.L.R. (1941) Mad. 935=(1941) 1 M.L.J. 721=53 L.W. 637=1941 M. W.N. 564=198 Ind. Cas. 322.

MADRAS AND SOUTHERN MAHARATTA RAILWAY CO., RULES, R. 7.

A dismissal of a servant based on a criminal conviction arrived at by the Court cannot be said to be wrongful and no departmental enquiry is necessary under R. 7. A.I.R. 1940 Mad. 269=50 M.L.W. 833=(1939) 2 M.L.J. 911=(1940) M.W.N. 74= 190 Ind. Cas. 164.

MADRAS BOARD OF REVENUE ACT (I OF 1894), S. 2—Power to decide—Madras Estates Land Act (1908), Ss. 171 and 172—Powers of a member under the Acts.

A single member of the Board of Revenue has power to decide questions under Ss. 171 and 172, Madras Estates Land Act, if the Board has declared that the questions may be disposed of by him. 97 Ind. Cas. 921=24 M.L.W. 416=A.I.R. 1926 Mad. 1047=51 M.L.J. 500 (F.B.).

MADRAS BOARD OF REVENUE REGULATION (I OF 1803), S. 5—Revenue Board—Powers.

The general powers of superintendence under R. 5, Madras Board of Revenue Regulation do not autho-

rise the Board of Revenue to arrogate to itself a power of interference in revision or in second appeal from a statutory order, when machinery of the statute itself confers no such powers and contemplates the utilisation of another remedy which is accessible to the person aggrieved, more especially in a case in which the consequences of any error are purely personal to the rival claimants. A.I.R. 1939 Mad. 648=49 M.L.W. 773=(1939) 2 M.L.J. 6=189 Ind. Cas. 280.

——**S. 5—Revenue Board—Power to revise orders relating to dismissal or punishment of village officers—Suit to declare order of dismissal passed by Board ultra vires—Maintainability of.**

A *karnam* was dismissed by a Divisional Officer. On appeal, the District Collector modified the punishment to one of suspension for one year. A second appeal was preferred and the Board of Revenue restored the order of suspension. The *karnam* filed a suit for a declaration that the order of the Board was *ultra vires*:

Held, (*i*) that the Board had no power to entertain a second appeal, nor to interfere in revision and its order was, therefore, ***ultra vires***.

Section 5 of Regulation I of 1803 gives to the Revenue Board no punitive powers over village officers but such power is given to it by S. 33 of the same Regulation which empowers it to "punish neglect in the Subordinate Officers of Revenue according to the powers vested in them for that purpose." 56 M. 749=(1933) M.W.N. 611=38 M.L.W. 155=65 M.L.J. 186=A.I.R. 1933 Mad. 618=144 Ind. Cas. 400.

MADRAS BOARD OF REVENUE STANDING ORDERS. See also MADRAS REVENUE BOARDS STANDING ORDERS.

——**S. 17—Restoration of order—Interference by Civil Court.**

The Board's revisional powers are conditional on the Board of Revenue being satisfied that the decision was passed owing to the misrepresentation, or fraud or other causes. (32 M. 300, Dist.). Where the Board merely directed that a grant which had been made at one stage of the Darkhast proceedings by a competent authority should be restored, it is not open to a Civil Court to enquire into the merits of the case and to pronounce that the decision of the Board was wrong. 76 Ind. Cas. 789=18 M.L.W. 523=A.I.R. 1924 Mad. 326.

——**O. 19—Cancellation of patta.**

Cancellation of tree patta under O. 19 (1) has effect of surrender of Government's right and pattahdar gets absolute rights to trees. 31 M.L.W. 312 =A.I.R. 1930 Mad. 560=58 M.L.J. 437.

——**O. 52—Unenfranchised inam lands—If inalienable.**

Unenfranchised inam lands granted not for the performance of future services either public or private, but as a pure matter of favour for the maintenance of the donee and his heirs are not incapable of alienation. The prohibition of alienation mentioned in the standing order was merely intended to indicate that the Government had the right of resumption in consequence of the prohibited alienation though it would not exercise that right if the alienees agreed to enfranchisement and to pay the ordinary rent or to pay a quit rent without the option of refusal. 62 Ind. Cas. 625=44 Mad. 632=13 M. L.W. 383=1921 M.W.N. 204=A.I.R. 1921 Mad. 292=40 M.L.J. 344.

MADRAS BORSTAL SCHOOLS ACT (V OF 1896)—Procedure.

An adolescent cannot be sent to a Borstal School unless he is proved to be of criminal habits, tendencies or associations. 1931 M.W.N. 401.

——**Procedure.**

Before any adolescent can be borstalised, it is necessary to have a finding of criminal habits or association with persons of criminal character. 1931 M. W.N. 265.

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 2—Applicability—Act does not apply to adolescent girls.

In view of Bye-law (General) Department Notification No. 64, dated Janu| 26, 1927, published in p. 210 of Part I, of the *Fort St. Geo. Gaz.*, dated Feb. 1, 1927, adolescent girls cannot be sent to a Borstal School. A.I.R. 1942 Mad. 674=55 M.L.W. 457 (2)=(1942) 2 M.L.J. 132=1942 M.W.N. 442=43 Cr.L.J. 924=I.L.R. (1942) Mad. 963=203 Ind. Cas. 177.

——**Ss. 2, 8—Criminal P. C., S. 123—Order to give security for one year—Failure—Detention in Borstal Scool for two years—Legality of.**

A person under the age of 20 years who has been bound over to be of good behaviour for a period of one year and who fails to give security may be ordered to be kept in a Borstal School for a period of two years even though if he had been committed to prison, he could have been detained in prison only for one yar. (1934) M.W.N. 486=A.I.R. 1934 Mad. 457=40 M.L.W. 63=35 Cr.L.J. 1153=67 M.L.J. 300=57 M. 928=150 Ind. Cas. 796.

——**Ss. 2, 8—Aplicability of Act—Conditions.**

The provisions of the Madras Borstal Schools Act, 1926, can be applied to the case of an offender only if the Court is satisfied that the offender is addicted to criminal habits or tendencies or associates with persons of bad character and that he is likely to benefit by detention in a Borstal Institution. The mere fact that the offender is an adolescent is not a sufficient ground for applying the Act. 34 M.L. W. 45=(1931) M.W.N. 772=61 M.L.J. 222=32 Cr.L.J. 1044=54 M. 764=A.I.R. 1931 Mad. 771=133 Ind. Cas. 776.

——**S. 7—Adolescent offender, if can be acquitted under S. 7 (2).**

The powers conferred by S. 7 (2), Madras Borstal Schools Act, are neither appellate nor revisional, and the order permissible under S. 7 (2) is only such as can be passed upon a convicted person. S. 7 (2) does not empower a joint Magistrate to acquit an adolecent offender. A.I.R. 1941 Mad. 61=(1940) 2 M.L.J. 418=(1940) M.W.N. 944=52 M.L.W. 492 (2)=I.L.R. (1940) Mad. 869=42 Cr. L.J. 269=192 Ind. Cas. 289.

——**S. 8—"Criminal tendencies"—Meaning of.**

The word 'criminal tendencies' occurring in S. 8 of the Madras Borstal Schools Act should not be given a narrow interpretation. The section should be interpreted to mean that whenever an adolescent was convicted of an offence ordinarily he should be given the advantage of being put in the Borstal School so that by long association and training he would came out after the termination of the stay as a useful citizen of the country.

Per *Mack, J.*—A criminal tendency does not manifest itself only in acts involving dishonesty such as

theft or cheating. A person who, owing to lack of self-control or as a result of his environment, is unable to control himself and commits an offence of either grievous hurt or homicide by using a deadly weapon without regard to consequences exhibits a criminal tendency just as much as a person who steals. I.L.R. (1949) Mad. 840=61 L.W. 842=1949 M.W.N. 14=3 A.I. Cr. D. 224=A.I.R. 1949 Mad. 460=50 Cr.L.J. 656=(1948) 2 M.L.J. 630.

——S. 8—Scope of—Criminal tendencies and propensities—Indications.

All adolescents with criminal tendencies will clearly be covered by S. 8 of the Madras Borstal Schools Act. (1938) 2 M.L.J. 630, foll.

The very fact that an accused aged about sixteen is found to have inflicted severe injuries to a deceased for a very petty reason and to have thrown the dead body into a well would show pronounced criminal tendencies and propensities in him. It would be inequitable to send adolescents with records of thefts, cheatings and criminal tendencies of that type alone to the Borstal institution and to send adolescents with different criminal tendencies as above, to the ordinary jail, with the far greater hardships involved and the lesser facilities for reformation and of settlement in life by reaching a useful occupation. 62 L.W. 198=1949 M.W.N. 186=A.I.R. 1949 Mad. 648=50 Cr.L.J. 896=(1949) 1 M.L.J. 282.

——S. 8—Sentence.

Under S. 8, Borstal Schools Act, a sentence of less than two years' detention cannot be imposed and Act makes no provision for sentences to be served consecutively. (1944) 2 M.L.J. 226=57 M.L.W. 516 (1)=A.I.R. 1944 Mad. 573=1944 M.W.N. 688=46 Cr.L.J. 252=216 Ind. Cas. 314.

——S. 8—Sentence.

Minimum period of detention under S. 8 for failure to furnish security is two years. (1940) 1940 M.W.N. 388.

——S. 8—Sentence of detention must take effect at once—Sentence for lesser period than two years.

The Madras Borstal Schools Act does not contain a provision corresponding to S. 397, Cr. P. Code, and so a sentence of detention in a Borstal School must take effect at once and cannot be postponed to have effect from the date of subsequent release of the accused after the expiry of a term of sentence awarded previously. Similarly no sentence for detention for a lesser period than two years can be passed. A.I.R. 1938 Mad. 653=47 M.L.W. 636=(1938) 1 M.L.J. 761=(1938) M.W.N. 535=39 Cr.L.J. 906=177 Ind. Cas. 554.

——S. 8—Sentence under—S. 397, Cr. P. Code, if can be applied to.

S. 397, Cr. P. Code, is not applicable to sentences of detention under S. 8, Mad. Borstal Schools Act, and direction that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal, A.I.R. 1938 Mad. 613=47 M.L.W. 473=(1938) M.W.N. 352=39 Cr.L.J. 795=176 Ind. Cas. 768.

——S. 8—Detention—Object of.

The object of detention in a Borstal School being to reform the offender, and as the Magistrate has got sufficient discretion to detain an offender for such period as the law permits, there is no reason why one sentence of detention imposed upon the offender should be ordered to run after the expiry of another sentence imposed upon the same offender. The direction that the sentence of detention in one case should take effect after the expiry of the sentence of detention in the other case is not in consonance with law. A.I.R. 1938 Mad. 567=47 M.L.W. 321=(1938) M.W.N. 387=39 Cr.L.J. 839=176 Ind. Cas. 763.

——S. 8—Criminal tendencies, what are.

Where a boy aged 18 years commits pickpocketting in an open shandy during broad daylight amidst a crowd of persons in a distant village from home and when placed on trial, pleads that the Police has concocted the case by placing stolen property in his hand while he was going on the way, it must be said that he has criminal tendencies attracting the application of S. 8, Madras Borstal Schools Act. (1937) 1937 M.W.N. 639.

——S. 10-A—Applicability—Murder by youth of seventeen years—Righteous indignation against his younger brother, cause of murder.

In a case where rightous indignation in a youth of 17 years caused emotion to develop beyond control so as to lead him to stab his younger brother to death for his commission of petty thefts.

Held, that it was a fit case to which S. 10-A of the Madras Borstal Schools Act could be applied as the accused was psychologically somewhat abnormal and was not a hardened criminal so as to merit a sentence of transportation for life. I.L.R. (1949) Mad. 354=A.I.R. 1949 Mad. 109 (1)=50 Cr.L.J. 115=61 L.W. 484=1948 M.W.N. 521=(1948) 2 M.L.J. 115.

——S. 10-A—Recommendation for special treatment—Justifying circumstances.

Where in a case in which the accused, an young man of 19, was convicted of the murder of his mother, though there had been no sudden provocation but long and sustained provocation which resulted in a complete break down of control and the accused had been the victim of an abnormal and unnatural environment bereft of maternal affection,

Held, that it was not a fit case in which he should serve a long term of life imprisonment in an ordinary jail. The mitigating circumstances were sufficiently cogent to justify a recommendation to Governmemnt to give the accused special treatment under S. 10-A of the Madras Borstal Schools Act, and in exercise of their prerogative under S. 401, Cr. P. Code, to remit a portion of his ordinary punishment. 61 L.W. 777=1948 M.W.N. 749=A.I.R. 1949 Mad. 223=50 Cr.L.J. 240=(1948) 2 M.L.J. 452.

——Ss. 20, 8—Sentence—Sentences of detention in Borstal School, if can be ordered to run consecutively.

The sentence of detention in Borstal School cannot be regarded as equivalent for all purposes to sentences of imprisonment, though for purposes of appeal and revision they are to be deemed as sentences of imprisonment according to S. 20, Borstal Schools Act. The object of detention in a Borstal School being to reform the offender, and as the Magistrate has got sufficient discretion to detain an offender for such period as the law permits, there is no reason why one sentence of detention imposed upon an offender should be ordered to ran after the expiry of another sentence imposed upon the same offender. The direction that the sentence of detention in one case should take effect after the expiry of another sentence of detention in the other case is not in consonance with law. A.I.R. 1938 Mad. 567=(1938) M.W.N. 387=47 M.L.W. 321=39 Cr.L.J. 839=176 Ind. Cas. 763.

MADRAS BOUNDAY-MARKS ACT (XXVIII OF 1860).

——Ss. 2 and 25—Fixing of boundaries—Survey Officer can fix boundary between Zamindari village and Dharmasanam village if he thinks it necessary to prevent disputes.

A Survey Officer acting under Act (28 of 1860) has jurisdiction to fix the boundaries between a Dharmasanam village and a Zamindari village and the only pre-requisite for the exercise of jurisdiction is that the officer should be of opinion that such demarcation is necessary, for the prevention of disputes, etc. The fact that the funds for the survey of the Zemindari are furnished from the coffers of the Zemindari will not reduce the authority of an Officer, who is empowered by Government to act under the Act, to the level of a private surveyor employed by the Zamindarini. 62 Ind. Cas. 87=13 M.L.W. 172=A.I.R. 1921 Mad. 107.

——S. 25—No proof of survey—Barring of private rights.

In the absence of any proof that the procedure prescribed by the Boundary Marks Act was followed, a survey made by the Government would not bar private rights under S. 25 of the said Act. (1905) 15 M.L.J. 147=28 Mad. 257.

MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (15 OF 1946).

——Appellate authority under—If and when can set aside its own ex parte appellate order.

Where the appellate authority (the Chief Judge of the Court of Small Causes, Madras) has found before he allowed an appeal under the Madras Buildings (Lease and Rent Control) Act that there has been a proper service of notice of appeal on the respondent as required by the rules made under the Act, he has no jurisdiction thereafter to set aside his order on the appeal on the ground that the respondent was not aware of the appeal. The provisions of the Code of Civil Procedure have not been made applicable to proceedings under the Madras Buildings Control Act and therefore the appellate authority has no jurisdiction to set aside an *ex parte* order on the ground that the respondent was prevented by any sufficient cause from appearing at the hearing.

Accordingly the order of the appellate authority setting aside the *ex parte* order on the appeal must be quashed by a writ of *certiorari*. 60 L.W. 739=A.I.R. 1948 Mad. 235=1947 M.W.N. 691=(1947) 2 M.L.J. 482.

——Death of applicant for eviction before hearing—Application by his legal representative praying that he may be brought on record and the respondent evicted—Maintainability—Provisions of the C. P. Code not applicable to proceedings under the Act.

A landlord who filed a petition before the House Rent Controller for the eviction of his tenant on the grounds that he *bona fide* wanted the premises for his own use and that the tenant committed default in paying the rent died before the application could be heard. His son filed an affidavit repeating the material allegations and praying that he may be brought on record as the legal representative of the petitioner and that the tenant may be evicted. The Rent Controller ordered eviction, but on appeal, the Chief Judge of the Court of Small Causes held, that when the father of the petitioner died, the only course open to the latter as the legal representative was to file a separate application before the Rent Controller and that the original application could not be proceeded with. In an application for the issue of a writ of *certiorari* to quash that order,

Held: the provisions of the Code of Civil Procedure do not apply to proceedings under the Rent Control Act. Though the question whether it would be competent for the legal representative to be brought on record as such in an application before the Rent Controller in every case need not be decided, in the circumstances of the case, as the affidavit of the petitioner contains all the material particulars required to be mentioned in an application praying for eviction it would be the height of technicality to disregard it and insist uon a formal petition for the same purpose. 61 L.W. 267=1948 M.W.N. 264=A.I.R. 1949 Mad. 53=(1948) 1 M.L.J. 276.

——Order for eviction on default in payment of rent—Payment of rent subsequent to—If creates fresh tenancy—Transfer of Property Act, S. 116—Applicability and scope.

The payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there should be a new tenancy.

The Transfer of Property Act can have no application to a state of affairs governed by the Rent Control Act. When section 116 of the Transfer of Property Act speaks of the determination of the lease it must have reference to a determination of a lease such as is contemplated in S. 111 of that Act which sets out the various methods by which a lease may be determined.

The Rent Control Act does not concern itself with the termination of the leases. It gives the tenant (as defined in that Act) a right to continue in possession as long as he pays his rent regularly. If the rent is not paid regularly then whether the lease has been determined or not, the landlord has a right to evict the tenant. I.L.R. (1950) Mad. 844=A.I.R. 1950 Mad. 746=63 L.W. 67 (2)=1950 M.W.N. 90=(1950) 1 M.L.J. 72.

——Portions of building let separately—Landlord can file an application for obtaining possession of entire house for his occupation.

Though the definition of a building in the Madras Buildings (Lease and Rent Control) Act includes a portion of the building, it does not mean that the owner of a house, portions of which have been let separately, cannot file an application for obtaining possession of the entire house as a building. What is sufficient for the landlord is not the real question, but whether he requires the entire building *bona fide* for *his* occupation. 1949 M.W.N. 830=A. I. R. 1950 Mad. 366=(1949) 2 M.L.J. 784.

——Residential purpose — Test.

In determining whether a premises is residential or non-residential, the main or primary purpose for which it is let out or taken or used must be considered. Hence a premises must be deemed to be taken and used for 'residential purpose' though a portion of the premises may be used for making appalams when people are not sleeping there and used for sleeping purposes when appalams are not made there. 1949 M.W.N. 43=A.I.R. 1949 Mad. 785=(1949) 1 M.L.J. 74.

——Rule making Court of Small Causes the authority to hear appeals—Validity—Revision

to High Court against orders of Judge of Small Causes Court—Competency.

The rule making the Small Causes Court itself the 'authority' to hear appeals against the orders of the House Rent Controller, instead of the Chief Judge of the Small Causes Court as formerly is not *ultra vires,* since a Court can certainly be an 'authority' though 'every authority' need not be a Court.

If a statute or rule names a 'Court' as an 'authority' the usual appeals and revisions lying to the High Court from that Court will lie.

As a Judge of the Small Causes Court does not act as *persona designata* but as a Judge of the Small Causes Court and as part of the Small Causes Court a revision will lie against orders passed by him. 1949 M.W.N. 43=A.I.R. 1949 Mad. 785=(1949) 1 M.L.J. 74 [overruled in (1949) 1 M.L.J. 528].

——and T. P. Act (IV of 1882), S. 116—Tenant directed to give possession—Execution petition for eviction filed by landlord after due date—Payment of rent already due by tenant—No new tenancy created.

The appellant was directed by the House Rent Controller under the provisions of Madras Act XV of 1946 to give possession of the house in which he lived to his landlord, the respondent and on his failing to do so on the due date, the respondent filed on the next day an execution petition for the eviction of the appellant, and proceeded with it in spite of the payment by the appellant of rent in respect of the two previous months. It was pleaded in bar of execution that a new tenancy had been created by such payment.

Held, negativing such a contention, that it was not a case of a tenant holding over under S. 116 of the T. P. Act, but of a person wrongfully remaining in possession beyond the date on which he had been directed to give possession. 1947 M.W.N. 625 =60 L.W. 277 (1)=A.I.R. 1947 Mad. 436=(1947) 1 M.L.J. 354.

——S. 3—Collector of Madras intimating on receipt of notice of vacancy from the landlord that building is required for Government—Act not judicial but administrative and cannot be quashed by writ of certiorari.

Under S. 3 of the Madras Buildings (Lease and Rent Control) Act, 1946, on receipt of notice of vacancy the Government has to decide whether the building is required for any of the purposes specified in sub-S. (2) of S. 3 and then to intimate the landlord that they do require the building for such purposes. Such an act of the Government or the officer of Government empowered by them in this behalf can in no sense be described as judicial or *quasi*-judicial. The intimation of their decision is done in a purely administrative capacity. From the fact that an action of Government or a public officer may have the effect of prejudicing the rights of private parties, it does not follow that such act is necessarily of a judicial nature. The fact that the Collector, who was the officer empowered by the Government in this behalf, clothes his intimation in the form of an order does not make it subject to the jurisdiction of the High Court as if it were an order of a judicial or *quasi*-judicial tribunal. The person affected is not entitled to the issue of a writ of *certiorari* to quash such order. 1948 M.W.N. 248=A.I.R. 1949 Mad. 56=61 L.W. 277=(1948) 1 M.L.J. 266.

——S. 3 (2) and S. 16—Disobedience of order of Collector under S. 3 (2)—Offence—Penal Code (XLV of 1860), S. 188—Applicability.

A landlord disobeying the order of the Collector under S. 3 (2) of the Madras Buildings (Lease and Rent Control) Act (allotting the house for locating a police station) is liable to conviction under S. 188, I. P. Code. The I. P. Code will apply wherever its application is not expressly or by necessary implication excluded, and where the requirements prescribed under the I. P. Code for the offence charged are satisfied. It cannot be said that because S. 16 of the Act has provided penalties for breaches of S. 3 (1) and has provided no penalty for breaches under S. 3 (2) no punishment should be inflicted for disobedience of an order under S. 3 (2) of the Act. Where there is no specific punishment provided, the general law of the land under the Penal Code comes into operation if the requirements under any section thereof are satisfied.

The Collector has got under S. 3 (2) by necessary implication, the power to require the building for governmental purpose or for the use of any public institution under Government control or by any officer of the Government.

This being a case of orders made by the Collector, as a public functionary and for public purposes, and all the conditions under S. 188, I. P. Code, having been satisfied, the Collector had ample jurisdiction to lay the complaint under S. 188, I. P. Code. 1950 M.W.N. 142=A.I.R. 1950 Mad. 599=51 Cr.L.J. 1518=(1950) 1 M.L.J. 201.

——S. 3 (2)—Liability to notify in case of exchange of buildings—Rent—Meaning — If refers to fair rent.

An exchange of buildings by two persons inevitably involves the vacancies of both buildings, and the owner is bound to notify the vacancy to the Controller. The mere naming of such a double vacancy and double occupation as an exchange cannot alter the facts.

"Rent" under section 3 (2) means actual rent paid or payable and not fair rent when none has been fixed. 1950 M.W.N. 222 (1)=A.I.R. 1950 Mad. 432=51 Cr.L.J. 1015=(1950) 1 M.L.J. 110.

——S. 4—Fixing of fair rent—Date from which it takes effect—Scope of jurisdiction of Rent Controller and appellate authority in such a matter.

The jurisdiction of the Rent Controller or the appellate authority being only to declare the fair rent pertaining to a building, the landlord could claim the fair rent on the basis of that order from a date to which he is entitled under the Act, *i.e.,* the date of the filing of the application for fixing of fair rent. (1950) 1 M.L.J. 551, rel. on.

Where the landlord applied to the Rent Controller on 20th March, 1947, for fixing of fair rent and on the Rent Controller fixing the fair rent the landlord claimed that it should take effect from the date of the coming into force of the Act, *i.e.,* on 1st October, 1946.

Held: That the order of the Rent Controller takes effect from the date on which the application was presented. Consequently the landlord will be entitled to an enhanced rent from the date of the application. (1950) 2 M.L.J. 810=A.I.R. 1951 Mad. 493.

——Ss. 4 and 6—Fixation of fair rent—Fair rent fixed in excess of rent which was being paid prior to such fixation — Date from which landlord is entitled to the fair rent.

Where the fair rent fixed under S. 4 of the Mad

ras Buildings (Lease and Rent Control) Act is in excess of the rent which was being paid before such fixation, the landlord cannot claim the difference from any date anterior to the date of the filing of the application under S. 4. There is no provision corresponding to S. 6 (*c*) which provides for refund or other adjustment of any sum paid by the tenant in excess of the fair rent. The omission to make such a provision might have been deliberate having regard to the avowed policy of the Act to safeguard the rights of tenants. Apart from any speculation as to the policy, it is clear that no retrospective operation can be given to the order fixing the fair rent unless such operation is expressly provided in the Act or should be necessarily implied. 62 L.W. 750 =1949 M.W.N. 682=A.I.R. 1950 Mad. 185=(1949) 2 M.L.J. 555.

——S. 4—Landlord's application for fixing fair rent—Maintainability—Right to receive fair rent which is in excess of contractual rent—Relevant date.

The Act confers certain rights and privileges on landlords as well as tenants, though the latter benefited to a greater extent than the former. S. 4 of the Act is a deliberate departure from the corresponding provisions of S. 3 of the previous Control Order and expressly includes the landlord as a person entitled to apply to have a fair rent fixed. There is nothing in S. 4 to confine its application to contractual rents payable under subsisting lease. The words of S. 4 are plain and have only one meaning, *viz.*, that a landlord as well as a tenant could apply under the section.

Where the fair rent fixed under the section is in excess of the rent which was being paid before such date, the landlord cannot claim the difference from any date anterior to the date of filing the application. I.L.R. 1951 Mad. 330=63 L.W. 860=1950 M.W.N. 460=(1950) 2 M.L.J. 317.

——Ss. 4 and 6—Scope of jurisdiction of Rent Controller and appellate authority in application under S. 4—Appellate authority if can declare fair rent not to have retrospective operation—Amount of fair rent — Interference in certiorari proceedings.

On an application under S. 4 of the Madras Buildings (Lease and Rent Control) Act, the only jurisdiction which the appellate authority and the Rent Controller have is to fix the fair rent. What rights accrue to the landlord and the tenant is not within their province to decide on such an application. Hence an appellate authority cannot declare that the fair rent fixed shall not have retrospective operation. There is no justification for such restriction. S. 6 (*c*) of the Act in plain terms declares that any sums paid in excess of the fair rent even before the commencement of the Act in respect of the use of the building after the commencement of the Act shall be repaid to the tenant.

Though an appellate authority be wrong as to the amount of fair rent fixed that would not be a ground for interfering with it in *certiorari* proceedings. **53 L.W. 397=1950 M.W.N. 428=A.I.R. 1950 Mad. 555=(1947) 1 M.L.J. 551.**

——Ss. 6 (c) and 7 (2)—Adjustment of advance with landlord towards arrears—When could be pleaded.

Where a tenant who committed default in payment of rent relied on the fact that the landlord had with him two months advance of rent which he could adjust towards default and accumulation of arrears under S. 6 (*c*) of the Madras Buildings (Lease and Rent Control) Act.

Held: That to invoke the provisions of sub-S. (*c*) of S. 6 the tenant should have exercised the option and called upon the landlord to make the adjustment and the mere fact that the landlord had with him an advance rent does not mean that the tenant has not committed default within the meaning of S. 7 (2) of the Act. 63 L.W. 1176=(1950) 2 M.L.J. 579=A.I.R. 1951 Mad. 343.

——S. 7—Appeal from order under—Error apparent on the face of proceedings—Issue of writ of certiorari to quash.

A creditor who rejects a tender on other grounds must be deemed to have waived the objection as to the form of tender. A creditor who denies the tender is not entitled to question its sufficiency or validity.

Where the Chief Judge, Court of Small Causes, Madras, on appeal from an order of the Rent Controller under S. 7 of the Madras Buildings (Lease and Rent Control) Act XV of 1946, has found that the landlord refused to receive a registered cover containing a cheque for rent accrued and due for the month as well as for future months but decided that the tender was invalid as the cheque included also an amount of rent for future months which the landlord was not bound to accept and since the landlord did not accept the cheque (in which case only he would have been under an obligation to treat the advance payment as a loan in his hands available for appropriation towards rent as and when it accrued due) there was no valid tender and therefore the landlord was entitled to an order for eviction, there is an error apparent on the face of the proceedings which must be quashed by the issue of a *writ of certiorari*.

Had the landlord received the letter by which the cheque was tendered, it would have been open to him to consider the matter in all the aspects and to have intimated to the tenant in proper time his choice so as to enable the tenant to comply with his conditions. Having failed to do so, he cannot question the validity or form of the tender.

Grounds on which a *writ of certiorari* can be issued reviewed.

Errors apparent on the face of the proceedings are always treated as errors of jurisdiction for the purpose of quashing by issue of a *writ of certiorari*. If from the evidence set out or the facts found the conclusion does not follow in law it is open to the superior Court to interfere with the order and quash it by issuing a *writ of certiorari* as the error is patent on the face of the record.

The question of tender is not one relating to a collateral matter which has to be established before the House Rent Controller is called upon to enter into an enquiry in the application for eviction. It is one of the grounds which constitute the merits of the application. Accordingly the propriety of findings on question of fact arrived at by the appellate authority cannot be canvassed in the proceedings to quash by writ.

The fact that after the order of the appellate authority, time was granted by consent of parties for vacating the premises does not constitute an election by the tenant so as to preclude him from questioning the eviction order in the proceedings for quashing it. I.L.R. (1949) Mad. 657=A.I.R. 1949 Mad. 535 =1949 M.W.N. 329=(1948) 2 M.L.J. 559.

——Ss. 7 and 12—Eviction application for default in payment of rent—Termination of tenancy by due notice under S. 111 (h), Transfer

of Property Act (4 of 1882)—Necessity—Sub-tenant not party to application for eviction—If bound by eviction order—Order of special tribunals—Jurisdiction of civil Courts to question—Exclusion of jurisdiction by the Act—Effect—Question of jurisdiction—If can be raised for first time in the civil Court.

On a default in payment of rent a landlord filed an application before the Rent Controller under S. 7 of Madras Act 15 of 1946, praying for ejectment of the tenant but without issuing a notice terminating the tenancy as required by S. 111, Cl. (*h*) of the Transfer of Property Act. The Rent Controller made an order for eviction and an appeal by the tenant to the Chief Judge of the Presidency Court of Small Causes was dismissed. In a suit by the tenant for a declaration that the order for eviction was invalid, without jurisdiction, and unenforceable and for a permanent injunction restraining the landlord from enforcing the order,

Held, the object of Madras Act 15 of 1946 is to prevent unreasonable eviction and not to confer any new rights of eviction on the landlord. The right of the landlord to immediate possession is limited by the provisions of S. 7 of the Act. But by enacting that section the Legislature has not expressly or by implication repealed the provisions of the Transfer of Property Act so far as it related to the tenants governed by the Rent Control Act. The section only provides that no eviction shall lie except on the grounds specified in the section. Accordingly, unless and until a tenancy or lease is determined according to the provisions of the Transfer of Property Act, a landlord is not entitled to obtain an order for eviction or possession.

The order of the Rent Controller and that of the Chief Judge of the Presidency Court of Small Causes in appeal were made without jurisdiction and are liable to be set aside by the civil Court. Even though the jurisdiction of the civil Court is excluded by the Act, the civil Court has jurisdiction to set aside the order of the Rent Controller who exceeded the powers conferred on him under S. 7 of the Act by ordering eviction when the landlord had not fulfilled the necessary condition of giving notice.

The fact that the tenant did not question the jurisdiction of the Rent Controller in the application filed by the landlord or in the appeal filed before the Chief Judge of the Presidency Court of Small Causes, will not preclude him from questioning the same in the civil Court. Parties cannot confer jurisdiction on tribunals if otherwise they had not got such jurisdiction.

If a landlord had acquired a right to evict his tenant after giving a valid notice to quit, a person claiming to be a sub-tenant cannot claim higher rights than the tenant and is liable to be evicted. Even if he was not made a party to the proceedings before the Controller he would be bound by an order passed against the tenant obtained without any fraud or collusion.

(In the present case the sub-tenancy alleged was found against.) 61 L.W. 661=1948 M.W.N. 711 =A.I.R. 1949 Mad. 387=(1948) 2 M.L.J. 391 [Reversed in (1949) 1 M.L.J. 412.]

——Ss. 7 and 12 (4)—Eviction application under S. 7 for non-payment of rent—Determination of tenancy by notice to quit as required by S. 111 (h) of the Transfer of Property Act, 4 of 1882—Necessity—Question whether notice was necessary—Jurisdiction of Rent Controller and appellate authority to decide—Separate suit by defeated party questioning the decision—Barred by S. 12 (4) of Madras Act 15 of 1946.

S. 111 (*h*) of the Transfer of Property Act has no place in the scheme of procedure laid down in S. 7 of Madras Act 15 of 1946 and a notice to quit is not necessary before filing an application for eviction under S. 7 of Madras Act 15 of 1946. Even if such notice was necessary it would be merely one of the issues to be decided by the Rent Controller and would not in any way affect his jurisdiction to entertain the application for eviction. If the Rent Controller did not decide that question properly, the matter would have to be raised in appeal to the Court of Small Causes and would give the High Court no jurisdiction to entertain a suit by the defeated party; for such a suit would be barred by S. 12 (4) of Madras Act 15 of 1946. (1948) 2 M.L.J. 391, reversed. 62 L.W. 226=1949 M.W.N. 188=A.I.R. 1949 Mad. 780=(1949) 1 M.L.J. 412.

——S. 7—Scope—Decree for ejectment—Act coming into force later—Effect—Eviction of tenant—Liability of tenant to pay rent.

S. 7 of the Madras Act 15 of 1946, makes provision for the remaining in possession of a tenant, unless he has done something which would disentitle him to do so. The various acts which would disentitle him are set out in S. 7 (2), S. 7 (1) shows that the Act applies to tenants against whom a decree for eviction has been passed as well as to other tenants. The fact that the landlord obtained the decree for ejectment long before the Act came into force will not entitle him to eject the tenant and the latter being in the position of a tenant is liable to pay rent to the landlord so long as he remained in possession. 1948 M.W.N. 777=61 L.W. 795=A.I.R. 1949 Mad. 196=(1948) 2 M.L.J. 421.

——S. 7 (1) and (2)—Right to evict during period of tenancy.

The opening words of S. 7 (1) of the Madras Buildings (Lease and Rent Control) Act makes it clear that even during the continuance of the tenancy a tenant may be evicted. It follows that provided any of the conditions laid down in S. 7 (2) of the Act is satisfied the landlord will be entitled to an order evicting the tenant even if the period of the lease had not expired. 63 L.W. 834=(1950) 2 M.L.J. 489.

——S. 7 (2)—Conditions of, satisfied—Controller, if has any discretion to reject application.

There is nothing in the provisions of S. 7 (2) of the Madras Buildings (Lease and Rent Control) Act which enables the Controller to reject the application of the landlord even when he is satisfied that one or more of the conditions laid down in the clause have been fulfilled. No doubt the tenant is to be given a reasonable opportunity of showing cause against the application, but that can only be on grounds open to him in law. 61 L.W. 486=1948 M.W.N. 499=A.I.R. 1949 Mad. 139=(1948) 2 M.L.J. 82.

——S. 7 (2)—Scope—Controller's order for possession—Liability for payment of rent as rent till delivery of possession.

When the Controller has made an order directing the tenant to put the landlord in possession of the leased premises on a particular date, the tenant is bound to pay the rent as rent for the period, before that date, subject of course to the contingency of surrendering possession before that date. Failure to

pay the rent for that period would make him a defaulter. 61 L.W. 486=1948 M.W.N. 499=A.I.R. 1949 Mad. 139=(1948) 2 M.L.J. 82.

——S. 7 (2) (i)—Applicability—Registered lease after commencement of Act—Provisions as to default and eviction—Lease if governed by the Act.

A lease of a Cinema Theatre with furniture, fittings, talkie equipment, machinery, etc., was entered into by a registered agreement after the commencement of Madras Act 15 of 1946 and the lease contained *inter alia* provisions as to the due date for payment of rent, hire, etc., and for re-entry in case of default in their payment.

In an application for eviction under S. 7 (2) (*i*) of the Act for default in payment of a month's rent on the due date.

Held: The provisions of Madras Act 15 of 1946 would not apply to the lease in question. The parties must be presumed to have known of the provisions of the Act and contracted out of the terms of the Act. The landlord must by the agreement be deemed to have waived the right to evict conferred by the Act. No ground of public policy compelled the Court to hold that it was not open to the lessor to abridge his right to evict his lessees. Further the Act is not applicable as the lease is not one of a mere building and furniture only. Accordingly an eviction cannot be ordered under the Act. 62 L.W. 860=1949 M.W.N. 773=A.I.R. 1950 Mad. 284=(1949) 2 M.L.J. 694.

——S. 7 (2) (i)—Default in payment of rent—Right to evict—Tenant not making tender of monthly rent after refusal of rent tendered for one month—Effect—S. 12 (4)—Order of appellate authority—Not subject of revisional jurisdiction of the Court—Proper remedy.

It cannot be said that, merely because the rent due for one month has been improperly refused when tendered, the rent for succeeding months is neither due nor payable. Under S. 7 (2) of Madras Act 15 of 1946 the duty is cast on the tenant to make a payment or tender for every month, if he desires to take advantage of the provision of the Act. Unless there is an unequivocal intimation by the landlord that he would not accept any payment or tender for subsequent months, in the absence of payment or tender for each month the tenant must be considered to be a defaulter.

The order of the Court of Small Causes as an appellate authority cannot be the subject-matter of a revision to the High Court. (1949) 1 M.L.J. 74, overruled. No other remedy being available, an application for a writ of *certiorari* is competent. 62 L.W. 307=1949 M.W.N. 274=A.I.R. 1949 Mad. 788=(1949) 1 M.L.J. 528.

——S. 7 (2) (ii) (a)—Scope—Sub-letting before sale of property—If entitles purchaser to evict—Sub-letting of portion which was before the commencement of Act sub-let to some other sub-tenant—If ceases to be a sub-letting. entitling the landlord to evict.

A subsequent purchaser from the landlord can take advantage of the action of the tenant (in sub-letting without the consent in writing of the then landlord, the vendor) before his purchase and evict the tenant.

Even if there was sub-letting prior to the commencement of the Act and there was a mere change in the sub-tenants it cannot be said that it is not sub-letting after the commencement of the Act. It is a sub-letting after the commencement of the Act entitling the landlord to evict. 1950 M.W.N. 373=63 L.W. 610=A.I.R. 1950 Mad. 711=(1950) 1 M.L.J. 655.

——S. 7 (2) (ii) (a)—Sub-letting—Original tenancy in favour of three persons who were partners in a firm—Dissolution of firm—One partiner allowed to wind up affairs and subsequently use premises for his sole business—If amounts to transfer or sub-letting of premises.

Where the original tenancy was in favour of three persons who were partners in a firm, and after its dissolution one of the partners is allowed to wind up the affairs of the partnership and thereafter is allowed to use the premises for his sole business, such act of the two partners other than the one carrying on the business cannot amount to a transfer or sub-letting of the premises to that partner by the others. Hence, where the appellate tribunal under the Madras Buildings (Lease and Rent Control) Act, holds under such circumstances that the landlord is entitled to eviction on the ground that there is a subletting, the order is vitiated by an error of law apparent on the face of the record and has to be quashed. 1949 M.W.N. 814=A.I.R. 1950 Mad. 25=62 L.W. 653=(1949) 2 M.L.J. 423.

——S. 7 (2) (ii) (a)—Sub-letting—Written consent—Necessity—Date of such consent.

If there is a transfer or sub-letting after the commencement of the Madras Buildings (Lease and Rent Control) Act, the tenant can be saved only by a written consent of the landlord from the consequences, namely, eviction.

Obiter:—*Prima facie* a written consent given before the commencement of the Act, if it was subsisting at the time of any sub-letting after the Act might be sufficient to plead successfully to the landlord's application for eviction on the ground of such sub-letting. 1949 M.W.N. 816=A.I.R. 1950 Mad. 139=62 L.W. 814=(1949) 2 M.L.J. 597.

——S. 7 (3) (a)—Occupying—Meaning of—Landlord living in rented house with one wife, while a house of his is occupied by another wife—Right to eject tenant in another house.

A person must be deemed to be occupying a residential building at the time of an application for eviction under S. 7 (3) (*a*) of the Madras Buildings (Lease and Rent Control) Act, if any of the members of his family including dependants reside in the building with his permission and on his account, though physically he himself might not be residing therein. The test is whether if he desires he cannot at any time go to reside in it.

A landlord seeking eviction of a tenant from a house under S. 7 (3) (*a*) of the Act owned two other houses and one of them was vacant while in the other his second wife resided with her parents and others. The landlord himself was residing in a rented house with his first wife. He used to go and stay with his second wife sometimes and sometime both wives stayed together. At the time of the application, he was staying in the rented house with his first wife who had quarrelled with the second wife.

Held: In the circumstances, the landlord must be held to be occupying a residential house of his own in the city. There is nothing which compelled the Court to hold that a much married man can keep each of his wives in a separate building of his and seek another building for his own residence. 1950 M.W.N. 387=A.I.R. 1950 Mad. 556=63 L.W. 410=(1950) 1 M.L.J. 552.

——S. 7 (3) (a) (ii)—Owner of non-residential building in occupation of residential building in which he was carrying on his business—Right to get possession of his own non-residential building for carrying on his own business.

The fact that a landlord is in occupation of a residential building in which he is carrying on his business is not sufficient to prevent him from obtaining possession under S. 7 (3) (*a*) (ii) of the Madras Buildings (Lease and Rent Control) Act, of a non-residential building of his own for carrying on his own business. It is wrong to think that if an owner of a non-residential building is able to carry on his business at any place—it did not matter where—he would not be entitled to recover possession of his non-residential building to carry on his own business.

The essential condition laid down in that section which must be satisfied before a landlord can be denied his right to get back possession of his own building is that he was occupying for the purpose of a business which he is carrying on in a non-residential building which is his own or to the possession of which he is entitled. 1949 M.W.N. 698=A.I.R. 1950 Mad. 56=(1949) 2 M.L.J. 138.

——Ss. 7 (5) and 12 (i) (b)—Vexatious and false petition to evict—Dismissal—Compensatory costs—If can be recovered by separate suit.

The word "landlord" in S. 7 (5) of Madras Act 15 of 1946, obviously means landlord or any one claiming to be a landlord making an application. Similarly the words "a tenant" can only mean "a tenant or any one alleged to be a tenant".

S. 7 (5) of Act 15 of 1946 reproduced the principle of S. 35-A of the Code of Civil Procedure in rent control proceedings . . . If a petition was false and vexatious, compensatory costs can be granted. But there is no legal principle on which such relief can be given to the party who was dragged unnecessarily into the proceedings by way of a separate suit for damages. 1949 M.W.N. 580=A.I.R. 1950 Mad. 61=(1949) 2 M.L.J. 295.

——Ss. 9 and 12—Eviction ordered and executed—Reversal by Subordinate Court—Restitution—Legality.

In an application for eviction of a tenant on the ground of arrears of rent, the landlord got an order for eviction and actually got possession of the building in execution. On appeal to the sub-Judge the appellate authority of the place, the order was reversed. After five days the tenant applied to the sub-Judge himself for restitution and re-delivery, which were ordered and actually effected. On appeal.

Held: (1) An application for restitution is an application for execution. 40 Mad. 789; 33 M.L.J. 413 and (1937) 2 M.L.J. 108, foll.

(2) Once execution proceedings under Madras Act 15 of 1946, are placed in the hands of ordinary Courts, the provisions of C. P. Code, relating to the subject would apply *mutatis mutandis* and so far as the machinery set up by that Act and provisions thereof permit.

(3) It is a basic rule that Courts will not permit a suitor to suffer by reason of a wrong order it has made, and that, when once the error is discovered, it will as far as possible put him in the position which he would have occupied if the wrong order had not been made. The right to restitution is not derived from S. 144, C. P. Code. That section only prescribes the method of enforcing the right. I.L.R. (1940) 1 Cal. 486, appl.

(4) No separate suit for restitution could lie in view of S. 144, C. P. Code.

(5) In the circumstances, the order passed by the Subordinate Judge is the only order that could have been made. 62 L.W. 876=1949 M.W.N. 770=(1949) 2 M.L.J. 699.

——Ss. 9 and 18—Order of eviction passed in revision by Provincial Government under House Rent Control Order, 1945—Cannot be executed pursuant to S. 9 of the Act—S. 18, if applies—Notice to party affected—Necessity.

Proceedings commenced and taken on appeal and revision by a landlord for the eviction of his tenant under the Madras House Rent Control Order, 1945, terminated in favour of the landlord by an order of the Provincial Government, dated 30th September, 1946, by which the previous dismissal of the landlord's application to the Rent Controller and appeal to the Collector were set aside and the tenant was directed to put the landlord in possession. This order was passed without notice to the tenant. The landlord applied for execution of this order to the Principal City Civil Judge under S. 9 of the Madras Buildings (Lease and Rent Control) Act which came into force on 1st October, 1946.

Held, (*i*) since S. 9 enables execution to issue by the Principal City Civil Judge only in respect of orders made under the specified sections of the Act, the order which the landlord obtained against the tenant under the House Rent Control Order, 1945, was not one which is subject to execution pursuant to S. 9.

(*ii*) The proceedings following on the order of the Government of the 30th September, 1946, were not proceedings which could be deemed to have been commenced or to be continued subject to the provisions of the Act under S. 18 of the Act and is not one which can be treated as continuing in force.

(*iii*) The action of the Provincial Government in purported exercise of its powers given by the Control Order under Cl. 8 (2-A), in setting aside the dismissal of the landlord's application without notice to the tenant was without warrant or justification and was a denial of the ordinary principles of elementary justice. 61 L.W. 250=A.I.R. 1948 Mad. 394=1948 M.W.N. 255=(1948) 1 M.L.J. 256.

——S. 9—Petition for execution of order of eviction made under S. 7—Objection that notice terminating tenancy was not given and so order was without jurisdiction—Not sustainable.

If before the Rent Controller the tenant failed to raise the objection that the tenancy was not determined by proper notice under the Transfer of Property Act (assuming that that is the correct legal position) he is thereafter precluded from raising the objection in execution of the order of eviction. The order was not on the face of it without jurisdiction and the tenant cannot resist execution by canvassing the correctness of the order passed by the Controller on grounds not raised before him.

The Rent Controller has jurisdiction to order eviction even in cases where the tenancy was not determined as required by S. 111 of the Transfer of Property Act as S. 7 of the Rent Control Act deals with tenancies that were determined as well as those that had not been determined. There is no conflict between S. 7 of the Rent Control Act and S. 111 of the Transfer of Property Act. (1949) 1 M.L.

J. 412, relied on. 1949 M.W.N. 215=A.I.R. 1949 Mad. 784=(1949) 1 M.L.J. 417.

——Ss. 10 and 12 (4)—Dismissal for default of application for eviction—If a bar to a second application for eviction—Desirability of making rules similar to O. 9, Rr. 8, 9 and 13, C. P. Code, under the Act.

The dismissal for default of an application by a landlord before the Rent Controller does not bar a second application for eviction. The words "finally decided" in S. 10 of the Madras Buildings (Lease and Rent Control) Act clearly imply that the prior application should have been decided on the merits. Without an adjudication on the merits an issue cannot be said to have been finally decided so as to bar a second application for the same relief. In the absence of a provision similar to the provision of O. 9, R., 9, C. P. Code, it cannot be said that there is a general and universal rule of procedure, according to which once a suit or a petition is dismissed for default of appearance of the plaintiff or the petitioner, a subsequent suit or petition shall not be entertained claiming the same relief and based on the same cause of action. 62 Cal. 15, rel. on.

[Desirability of making rules corresponding to O. 9, Rr. 8, 9 and 13 of the C. P. Code under Madras Act 15 of 1946, pointed out.] 62 L.W. 826 =1949 M.W.N. 709=(1949) 2 M.L.J. 594.

——S. 10—Finally decided—Meaning—Application withdrawn—Subsequent application, if barred.

The words "finally decided" in S. 10 of the Act clearly implies that the prior application should have been decided on the merits. Where the application for eviction was withdrawn with leave to file a fresh application on the view of the then state of law that notice terminating tenancy was necessary, it cannot be said that the petition is "finally disposed" so as to bar a fresh application for eviction. 1949 M.W.N. 816=A.I.R. 1950 Mad. 139=62 L.W. 814=(1949) 2 M.L.J. 597.

——S. 12—Right of appeal—Evicted tenant obtaining time from landlord to comply with order of eviction—If amount to abandonment of right to appeal against eviction order.

Merely because a tenant against whom an order for eviction has been obtained prays for and obtains from his landlord time to comply with the order of eviction passed against him, it cannot be said that he had elected to treat the order of eviction passed by the Rent Controller as final or that he had abandoned his right of appeal under S. 12 of the Madras Buildings (Lease and Rent Control) Act.

An order for eviction of a tenant was passed on 30th March, 1948, and when the landlord took out execution proceedings to execute the order and went with the bailiff to take delivery of the premises on 22nd April, 1948, the tenant passed a letter to the landlord in the following terms: "As you have brought a warrant of possession against me. . . . I request you time for to-day and I assure you that I will give complete possession of the said-place by to-night. The tenant however did not give possession but filed an appeal and obtained an order for stay of delivery on 24th April, 1948. On a question whether the appeal was maintainable in view of the above letter.

Held, that *prima facie* there was nothing in the letter expressly waiving the rights of appeal, a right which the tenant was entitled to under S. 12 of the Act and that there was no implied undertaking not to file an appeal which could be gathered from the language of the letter and as such the appeal was maintainable. 62 L.W. 191=1949 M.W.N. 135=A.I.R. 1949 Mad. 872=(1949) 1 M.L.J. 280.

——S. 12 (1)—Appellate authority appointed by Government notification—If persona designata or Court—Application for transfer of appeal before that authority—Maintainability—C. P. Code 5 of 1908, S. 24.

From the language of S. 12 of Madras Act (15 of 1946) it seems clear that the District and Subordinate Judges mentioned by the notification to hear objections against orders passed by the Rent Controller are appointed *persona designata* and not as Courts. Hence an application under S. 24, C. P. Code, for transfer of an appeal before such appellate authority would not be maintainable. I.L.R. (1948) Mad. 43=60 L.W. 199=1947 M.W.N. 200=A.I.R. 1947 Mad. 400=(1947) 1 M.L.J. 207.

——S. 12 (1) (a)—Appellate authority appointed to entertain appeals against orders of the Rent Controller—Persona designata and not Court—Revision against his orders not competent.

The language of S. 12, Madras Buildings (Lease and Rent Control) Act, 1946, makes it clear that a District Judge or a Subordinate Judge notified as an appellate authority for the purpose of the Act is appointed as a *persona designata* and not as a Court. He is not a Court subordinate to the High Court. Hence no revision could be entertained by the High Court under S. 115, C. P. Code, against an order passed on appeal by such an appellate authority. 61 L.W. 364=A.I.R. 1948 Mad. 439=1948 M.W.N. 379=(1948) 1 M.L.J. 314.

——S. 12 (1) and (4)—Subordinate Judge appointed as appellate authority is a persona designata and not a Court—Revision against his order—Competency.

The Subordinate Judge was appointed *persona designata* as the appellate authority and was not a Court subordinate to the High Court and as such his order will not be open to revision by the High Court under S. 115, C. P. Code. (1947) 1 M.L.J. 207 and (1948) 1 M.L.J. 314, fol. 1949 M.W.N. 261=A.I.R. 1949 Mad. 787=62 L.W. 245=(1949) 1 M.L.J. 419.

——S. 12 (1) (a)—Power of Government to constitute appellate authorities—Scope—Notification of 1st March, 1948, substituting the "Court of Small Causes" for the "Chief Judge of the Court of Small Causes"—Validity—Power of Chief Judge of the Court of Small Causes to transfer appeal to another Judge of the Court—Government of India Act (1935), S. 100 and Sch. VII, List II, item 2—Delegation of power of legislation—Limits—Delegation of power of appointing authority involving extension of Courts' jurisdiction which can be done only by Legislature—Implied delegation of legislative power also.

It cannot be said that the notification of 1st March, 1948, substituting the "Court of Small Causes" for the "Chief Judge of the Court of Small Causes" as the appellate authority under S. 12 of the Madras Buildings (Lease and Rent Control) Act is invalid as enlarging the jurisdiction of the Court of Small Causes otherwise than by appropriate legislation or as taking away existing rights of appeal. There is

no doubt an extension of the jurisdiction of the Court of Small Causes by that notification. But the Provincial Legislature is perfectly competent to make this extension of jurisdiction by virtue of the power conferred on it by S. 100 of the Government of India Act read with item 2 of List II in Sch. VII to it. That this power of legislation could be delegated by the Legislature to the executive authority, that is the Provincial Government is also clear from the decision in (1945) 1 M.L.J. 76: L.R. 72 I.A. 57: 8 F.L.J. 1 (P.C.). It cannot be said that under S. 12 (1) (*a*) of Madras Act 15 of 1946 what was delegated was only a power of appointment but not a power of legislation. Though that provision contemplates appointment of an appellate authority, if it necessarily involves the exercise of legislative power because it may involve the extension of the jurisdiction of a Court, then impliedly the power of appointment must include such legislative power as is necessary for the purpose.

It cannot be said that all the Judges of the Court of Small Causes must hear and decide appeals under the Act. Appeals under the notification under S. 12 of Madras Act 15 of 1946 would also be included in the business of the Court (under S. 10 of the Presidency Small Cause Court's Act), and the Chief Judge may make such arrangements as he thinks fit for the distribution of the business of the Court among the Judges thereof. Accordingly where an appeal against the order of the Rent Controller is transferred by the Chief Judge of the Court of Small Causes to the Third Judge, the Third Judge has jurisdiction to dispose of the appeal.

Quaere.—How far S. 12 (4) of Madras Act 15 of 1946 would affect the power of revision possessed by the High Court.

The Court of Small Causes, Madras, was constituted an appellate authority as a Court and it cannot be said that in the notification of the Government "the Court of Small Causes" meant "the three Judges of the Court of Small Causes". The right of appeal as it existed before the notification has not been taken away or interfered with by the notification in question. Only the Chief Judge of the Court of Small Causes ceased to exist as an appellate authority. I.L.R. (1950) Mad. 28=1949 M.W.N. 211 =62 L.W. 285=A.I.R. 1949 Mad. 776=(1949) 1 M.L.J. 471.

——S. 12 (3)—Appeal against Rent Controller's Order—Appellant and his advocate absent —No reason shown to set aside the Controller's Order—No ground to interfere by way of certiorari.

When in an appeal against an order of the Rent Controller neither the appellant nor his advocate appears to show how the Rent Controller erred and it is not shown that the decision of the Rent Controller was in any way erroneous the appellate authority has no other course but to dismiss the appeal. The dismissal under the circumstances is nevertheless a decision of the appeal. There is no ground for interference by way of a writ of *certiorari*. 1950 M.W.N. 216=A.I.R. 1950 Mad. 443=(1950) 1 M.L.J. 336.

——S. 18 (1)—Construction—"Subject to the provisions of the Act"—"So far as may be."

The words "subject to the provisions of the Act" occurring in S. 18 (1) of the Madras Buildings (Lease and Rent Control) Act of 1946 cannot mean that an order validly obtained under the provisions of the Madras House Rent Control Order, 1945, could be attacked retrospectively in proceedings taken to execute such an order. It is only the further continuance of the proceedings pending on the date of the commencement of the Act that the provisions of the Act would govern. Nor is there anything in the words "so far as may be" to prevent valid execution proceedings from being continued.

Hence, where there is a valid execution application to execute an order of eviction pending before the City Civil Judge when the Madras Buildings (Lease and Rent Control) Act, 1946 came into force, it could be continued after the Act came into force. A.I.R. 1949 Mad. 201 and 204=1948 M.W.N. 588 and 591=(1948) 2 M.L.J. 174.

MADRAS CANALS AND PUBLIC FERRIES ACT (2 OF 1890).

——Construction.

Madras Canals and Public Ferries Act gives the Government powers very seriously to restrict the liberty of people and these powers must be strictly construed. 117 Ind. Cas. 728=28 M.L.W. 699= 1 Mad.Cr.C. 269=30 Cr.L.J. 827=A.I.R. 1929 Mad. 50=56 M.L.J. 277.

——S. 8—Validity of notification.

Government Notification declaring ferry extending over both banks of a river for twelve miles—Notification mentioning five places as limits of ferry—Such notification is not *ultra vires* and Government must be presumed to declare five different ferries and not to prevent up and down navigation. 28 M.L.W. 699=1 Mad.Cr.C. 269=117 Ind. Cas. 728=30 Cr. L.J. 827=A.I.R. 1929 Mad. 50=56 M.L.J. 277.

——S. 19—Ferry contractor's servant—Levy of toll—Presumption.

The fact that the ferry contractor's servant levied excessive toll does not give rise to a presumption of the contractor's guilty connivance. (1912) M.W.N. 69=13 Cr.L.J. 124=13 Ind. Cas. 780.

MADRAS CHILDREN ACT (4 OF 1920).

——S. 4—Powers of Second Class Magistrates.

A Second Class Magistrate is not precluded from hearing a case of a youthful offender—S. 4, Madras Children Act merely provides that special powers conferred upon Courts shall be exercised by Special Courts alone. 1932 M.W.N. 1076.

——S. 5 (2)—One of several accused 'child'—Magistrate not empowered to proceed under Act—Procedure—Cr. P. Code, S. 349.

When more accused than one are being tried and one of them happens to be a child within the meaning of the Madras Children Act and the Magistrate considers that, since he himself is not empowered to proceed against him under the Children Act, the Magistrate must proceed under sub-S. (1) of S. 349, Cr. P. Code and forward all the accused to the superior Magistrate and cannot himself convict any of them. 1945 M.W.N. 182=58 L.W. 96=(1945) 1 M.L.J. 241=I.L.R. (1945) Mad. 594.

——S. 22—Point of time material in considering whether offender is 'young persons' in time of conviction.

The point of time that is material in considering whether an offender is a 'young person,' or not within the meaning of S. 3, Madras Children Act, is the time at which the sentence is to be pronounced and not the time when the offence was committed. A.I.R. 1941 Mad. 358=42 Cr.L.J. 311=(1941) 1 M.L.J. 34=52 M.L.W. 949=(1941) M.W.N. 58=I.L.R. (1941) Mad. 428=192 Ind. Cas. 579.

——Ss. 24 and 27—Retention by order of Local Government—Period—Conviction of person under 16 for murder—Period of detention that may be ordered by Local Government is not subject to any limitation. 1936 M.W.N. 1136 (2).

——S. 24—Accused below the age of 16.

Accused below 16 years should not be sent to the Borstal School but to a senior certified school for detention under S. 24 of the Madras Children Act, 1920. 1935 M.W.N. 1232.

——S. 26—Son sentenced to pay fine for offence—Father directed to pay fine under S. 26 (1)—Order, held improper—Proper order.

A young person was convicted under S. 326, I. P. Code, and sentenced to pay a certain fine. His father was directed to pay the fine under S. 25 (1), Madras Children Act without giving him opportunity of showing that he did not neglect to exercise due care on his son. Nor did it appear from the report of the probation officer that the offence was due to any neglect of the father:

Held, that the order under S. 26 (1) must be set aside and that the proper course was to commit the son to the custody of his father on his executing a bond to be responsible for the good behaviour of the son. A.I.R. 1941 Mad. 429=53 M.L.W. 154=(1941) 1 M.L.J. 219=1941 M.W.N. 369=42 Cr.L.J. 516=194 Ind. Cas. 98.

——Ss. 27 and 22—Serious offence by a child of 15—Procedure.

In a case where a child of 15 years has committed a serious offence, and in the opinion of the Sessions Judge no punishment under the provisions of Madras Children Act is sufficient, he should order under S. 27 of Madras Children Act that the accused be detained in jail and report the case for orders of the Local Government. 1935 M.W.N. 10.

——S. 37—Computation of 16 years—Material time.

Under S. 37, Madras Children Act, the time material for purposes of computing the 16 years mentioned therein is the time when the prisoner is before it. 1937 M.W.N. 555.

——S. 37—Declaration of age—Due enquiry, necessity of—Burden of proof—Practice.

S. 37 of the Madras Children Act requires that a due enquiry into age shall be made and it is most desirable that a declaration of age under S. 37 should not be made except on adequate and proper evidence.

The burden of proof in such a matter is on the accused and though in any case of doubt the Judge should give him the benefit of the doubt, the doubt must be real.

(The tendency among Judges and Magistrates to be content with a perfunctuory enquiry and to find that an accused is a young person on inadequate evidence condemned.) 34 M.L.W. 896=(1931) M.W.N. 1192=33 Cr.L.J. 192=A.I.R. 1932 Mad. 213=135 Ind. Cas. 622.

——S. 39—Consideration of previous conviction.

S. 39, Mad. Children Act, does not prohibit the taking into consideration the previous conviction under S. 75, I. P. Code. A.I.R. 1942 Mad. 674=55 M.L.W. 457 (2)=(1942) 2 M.L.J. 132=1942 M.W.N. 443=43 Cr.L.J. 924=I.L.R. (1942) Mad. 963=203 Ind. Cas. 177.

MADRAS CIVIL COURTS ACT (3 OF 1873).

——S. 16—Mahomedan Law—Gift. *See* MAHOMEDAN LAW. 11 M.L.J. 227=24 M. 513.

——S. 16—Suit to have an attached property declared subject to a mortgage—Mortgage amount or decree amount.

A suit to set aside an order in claim proceedings by declaring that an attached property is subject to the mortgage of the plaintiff as against the mortgagor and the attaching creditor to the extent of Rs. 16,000 is cognizable by a Subordinate Court and not a Munsif's Court even though the amount of the decree in respect of which the attachment was made was below Rs. 2,000. 19 M.L.J. 236=5 M.L.T. 70=2 Ind. Cas. 522.

——S. 17, Cl. (2)—Where a District Judge settled issues in a suit instituted in his Court, but on the High Court subsequently transferring it to the Sub-Court the Sub-Judge decided the case and an appeal was preferred to the District Court, and the successor in office of the Judge who settled the issues heard the appeal:

Held, that the Judge was competent to hear the appeal and S. 17, Cl. 2 would not apply. (1902) 26 M. 595.

MADRAS CITY CIVIL COURTS ACT (7 OF 1892).

——S. 3—Scope of.

S. 3, Madras City Civil Courts Act, merely sets forth the purpose for which the Madras City Civil Court was to be established and cannot be read to mean that the Madras City Civil Court, after its establishment, would not be competent to try and dispose of suits that were transferred to it. A.I.R. 1933 Mad. 745=(1938) 2 M.L.J. 249=(1938) M.W.N. 565=48 M.L.W. 74=178 Ind. Cas. 287.

——S. 3—Suit for infringement of copyright—Madras City Civil Court, if has jurisdiction to try—Copyright Act (3 of 1914), S. 13.

The Madras City Civil Court has no jurisdiction to entertain and try a suit for infringement of copyright. S. 3, Madras City Civil Courts Act, which constituted the Court does not avoid the effect of a specific provision like S. 13, Copyright Act. S. 3, Madras City Civil Courts Act, gives general jurisdiction to the City Civil Courts, but the Copyright Act, which deals with the special subject-matter of copyright clearly restricts jurisdiction to hear a suit or proceeding relating to copyright to the High Court and the District Court. A.I.R. 1937 Mad. 94=173 Ind. Cas. 452 (2).

——S. 3—Ejectment suit—In City Civil Court—If Presidency Small Cause Courts Act, S. 41 is a bar.

A suit to eject a tenant is not cognizable by the Small Cause Court and therefore S. 3 of the City Civil Courts Act does not prohibit its being filed before the City Civil Court. 68 Ind. Cas. 983=16 M.L.W. 137=1922 M.W.N. 462=32 M.L.T. 288=A.I.R. 1922 Mad. 445=43 M.L.J. 288.

——S. 3—Suits relating to office—Valuation.

A suit for a declaration relating to an office and not to property is incapable of valuation and is not excepted from the provisions of S. 3 of the Act. 1 L.W. 396=24 Ind. Cas. 316.

——S. 5—Scope of.

S. 5, Madras City Civil Courts Act, is only intended to give authority to the Judges of the City Civil Court to try small cause suits when they are transferred by the Chief Justice with a direction to that effect and a person appointed Judge of the City Civil Court cannot, by virtue of his office, be a Judge of Small Causes. 50 M.L.W. 133=A.I.R. 1939 Mad. 610=(1939) 1 M.L.J. 776=(1939) M.W.N. 582=184 Ind. Cas. 516.

——S. 5 (1)—Suit transferred to City Civil Court, if can be tried by it—If can try small cause suit transferred to it.

Section 5 (1) of the Act gives the Judge of the City Civil Court power to try and dispose of any suit cognizable by the Small Cause Court. The City Civil Judge is competent to try and dispose of the small cause suit if it is transferred to him. A.I.R. 1938 Mad. 745=48 M.L.W. 74=(1938) M.W.N. 565=(1938) 2 M.L.J. 249=178 Ind. Cas. 287.

——S. 5 (2)—Powers of High Court to transfer case—Limits of.

Though under S. 24 of the Civil Procedure Code, the Chief Justice has jurisdiction to transfer matters other than suits to a subordinate Court, *e.g.*, the City Civil Court, he can only transfer them to a Court which has jurisdiction to try them. The jurisdiction to try a summary application in ejectment is one exclusively vested in the Small Cause Court and the Chief Justice has no power to transfer it to the City Civil Court. 98 Ind. Cas. 371=25 M.L.W. 115=38 M.L.T. 35=A.I.R. 1927 Mad. 321.

——S. 5 (2)—Transfer of suit—C. P. Code, S. 24.

S. 24, C. P. Code does not authorise the transfer of a suit from the file of the Small Cause Court to that of the City Civil Court. This can be done by the Chief Justice of the High Court under S. 5 (2) of the City Civil Courts Act. 32 M.L.J. 258=(1917) M.W.N. 288=38 Ind. Cas. 367.

——S. 8—Defendant outside jurisdiction—Application for leave to sue, whether can be made after filing of suit—'Law', meaning of.

The Madras City Civil Court is not governed in all matters of procedure by the rules applicable to the High Court on its original side. The word 'law' in S. 8 of the Madras City Civil Court Act refers to substantive law and not details of procedure.

Where one of the defendants lives outside the jurisdiction of the City Civil Court, leave to sue need not necessarily be applied for before the suit is filed. Leave may be granted even on an application made after the filing of the plaint. (1935) M.W.N. 126=68 M.L.J. 205=41 M.L.W. 223=A.I.R. 1935 Mad. 219=58 M. 511=156 Ind. Cas. 527.

——S. 14—Suit transferred to High Court—Court-fee.

Under S. 14, Madras City Civil Courts Act, when suit filed in Madras City Civil Court is transferred to High Court, court-fees payable are those in force in the High Court as a Court of ordinary civil jurisdiction. 60 M.L.J. 435=33 M.L.W. 318=A.I.R. 1931 Mad. 457=132 Ind. Cas. 647.

——S. 16 (2) and G. O. No. Mis. 4175 (Home), dated 11th November, 1948—Suits in which the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 pending in the High Court on the date of the G. O., increasing the pecuniary limits of the jurisdiction of the City Civil Court—If can be transferred to the City Civil Court under S. 16 (2).

On the question whether consequent on the increase in the pecuniary limits of the jurisdiction of the City Civil Court by the G. O. No. Mis. 4175 (Home), dated 11th November, 1948, suits wherein the value of the subject-matter is between Rs. 5,000 and Rs. 10,000 and pending in the High Court on the date of the said notification could be validly transferred to the City Civil Court.

Held:—A transfer could not be made under S. 16 (2) of the Madras City Civil Court Act unless the suit to be transferred is within the jurisdiction of the City Civil Court. At the time the pending suits were instituted in the High Court the City Civil Court had no jurisdiction to receive, try and dispose of them. That Court was given the jurisdiction to try such suits only on and from 1st day of December, 1948. This indicates that suits and proceedings, which had already been instituted prior to 1st December, 1948 and which had arisen already, could not be tried by the City Civil Court. It is therefore not possible to hold that these pending suits are within the jurisdiction of the City Civil Court within the meaning of S. 16 (2) of the Act and hence they cannot be transferred for trial to the City Civil Court. I.L.R. (1950) Mad. 448=62 I.W. 290=A.I.R. 1949 Mad. 751=(1949) 1 M.L.J. 503.

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